

The Court of Justice of the European Union and protection of private parties: the possibilities for Ukrainian business*

The goal of this article is to research the main legal mechanisms for protection of rights of private parties in the Court of Justice of the European Union. To show such possibilities for Ukrainian private parties in the context of the entering into force of Association Agreement between the EU and Ukraine.

The *European Union*, in contrast to classic international organizations, which mainly regulate relations between states, focused on participation of its citizens as an immediate subjects of the *European law*. This puts the *Union* at new level – the organization with a unique legal mechanism which is not similar to any of the existing legal orders. Back in 1963 in *Van Gend en Loos* judgement the *Court of the European Economic Community* said:

"The Community constitutes a new international order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals".¹

This judgement became fundamental to the successive practice of the *Court of Justice of the European Union* (the CJEU) and determined the vector of formation of a special model of effective protection of the rights of individuals within the EU.

Private parties (individuals and legal entities) began frequently use the EU law in order to protect their legitimate interests. This happens at the national levels and at the level of the *Union*. Absolutely, national courts of the EU Member States are those elements which help to implement the EU law, because supranational law are given in their hands and in this way it has become an integral part of the legal order of all Member States of the *Union*. However, at the same time with the national courts, a major role belongs to the CJEU,² which in process of realization of its jurisdiction affects the formation of the integrational legal order and contributes to effective achievement of the objectives of the EU.

Concerning *Ukraine*, unfortunately private parties are not sufficiently informed about the possibilities of legal protection within the EU, and in fact the position of Ukrainian business on *European* markets depends not only on strict compliance with the EU rules, but also on the ability to protect effectively their rights in the case of violations. It happens also because of lack of practical and doctrinal researches in *Ukraine* in such field in comparison with huge numbers of complex elaborations of *European* scientists.

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1 Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1964] ECR 1.

2 When we are using the term "the CJEU" we are talking about general name of the whole judicial system of the EU.

Such questions were developed mostly by *Western-European* scientists: A. Arnulf, P. Craig, G. de Burca, J. Shaw and others. *Ukrainian* scientists and scientists from other post-soviet countries touched this topic only in the context of studying of general issues of the EU law.³ That's why one of the purposes of this article is to explain possibilities and some legal remedies for protection of private parties' interests in the EU.

It should be noted that today the *European Union* is the largest economic partner of *Ukraine* especially after changing of political situation connected with annexation of *Crimea* and aggravation of relations with the *Russian Federation*. For example, in 2014 and 2015 the largest volume of *Ukrainian* trade was carried out with the EU (approximately 35 %). In addition, because of enlargement of the *European Union*, *Ukraine* became its geographical neighbour, and this consequently affected on mutual relations. The increasing penetration of *Ukrainian* business in the area of the EU marked the foundation of such a model of relationship which can be called as "*sectoral integration*" or "*Europeanization of Ukrainian business*". At the legislative level it has since 1993 when *Ukraine* determined its foreign policy as oriented on membership in the EU.⁴ This is logical due to the belonging of *Ukraine* to the *European* civilization and its efforts to strengthen the democratic nature of the political system, legal order, national legislation and the legal status of individuals.

Later a common legal basis for *European* integration was formed. Usually such a basis is created by international agreements between the *European Union* and third countries – *Partnership and Cooperation Agreements* and *Association Agreements*. *Ukraine*, for example, in 1994, signed with the *European Communities* and their Member States the *Partnership and Cooperation Agreement (PCA)*, which entered into force in March 1998. One of the main objectives of the *Agreement* was to promote and develop trade, investment and economic relations, as well as laying the foundation for mutually beneficial economic cooperation. And this provision of the *PCA* has been of decisive importance for the further construction of mutually beneficial economic dialogue.

Radically new stage of the EU-*Ukraine* relations has begun after the signing in 2013 of the *Association Agreement*, which fully entered into force on 1 January 2016. From this point the *Association Agreement* became an integral part of the national law of *Ukraine* in compliance with Part 1, Art. 9 of the *Constitution of Ukraine* and has primacy over ordinary norms of *Ukrainian* legislation (Part 2, Art. 19 of the Law of *Ukraine* "*On international treaties of Ukraine*"). The *Association Agreement* deepens the connection between the EU and *Ukraine* in all spheres, including economical.

In this context, transnational business requires legal remedies and guarantees of its activity. In general, there is a decades-folding mechanism of private international law,

3 See: Энтин М.Л. Суд Европейских Сообществ: правовые формы обеспечения западноевропейской интеграции. – М.: Междунар. отношения, 1987. – 175 с.; Европейское право. Право Европейского Союза и правовое обеспечение защиты прав человека: Учебник для вузов / Рук. авт. кол. и отв. ред. Л.М. Энтин. – 2-е изд., пересм. и доп. – М.: Норма, 2005. – 960 с.; Капустин А.Я. Европейский Союз: интеграция и право. – М.: Изд-во РУДН, 2000. – 436 с.; Хорольський Р.Б. Правові засоби вирішення міжнародних спорів у рамках Європейського Союзу: Дис. ... канд. юрид. наук. – X, 2001. – 204 с.

4 Resolution of the Verkhovna Rada of *Ukraine* on July 2, 1993 "On the main directions of domestic and foreign policy of *Ukraine*".

which is used by businessmen. It is based on the application of national laws and remedies of the EU Member States. However, in context of *Europeanization* of *Ukrainian* business, the question arises about protection from actions of the *European* institutions because a lot of economical spheres are under exclusive competence of the EU and that's why only the EU issues normative acts in such spheres. Such mechanisms, including legal ones, can give to *Ukrainian* natural or legal persons the protection of their interests within the legal order of the EU. This is particularly important with respect of settlement of disputes between third countries (and their private parties) and the EU.

As in the *Union* there is no separate judicial mechanism for resolving disputes between the EU and third countries (and their private parties), to which *Ukraine* and *Ukrainian* business are belong, they have to use common judicial mechanisms. These mechanisms provide *Ukrainian* private parties several ways of protection of their rights.

The first way – it is a direct action for annulment of acts of the EU institutions before the courts of the EU. Art. 263 of the Treaty on functioning of the *European Union* (the TFEU) provides an opportunity to initiate legal proceedings for the revision of the legality of legislative acts, acts of the *Council*, the *Commission* and the *European Central Bank*, other than recommendations and opinions, and of acts of the *European Parliament*, the *European Council*, bodies, offices and agencies of the EU intended to produce legal effects vis-à-vis third parties.

The grounds for such action for annulment may include: lack of competence of the institution to take the contested act, the violation of an essential procedural requirement, infringement of the Treaties or other EU laws or an abuse of power by institutions.

Article 263 of the TFEU can be used by three groups of applicants: 1. by a Member State, the *European Parliament*, the *Council* or the *Commission*; 2. by the *Court of Auditors*, by the *European Central Bank* and by the *Committee of the Regions*; 3. by private parties. If the first group of applicants may bring proceeding to the CJEU in order to protect any interests, the second – for the purpose of protecting their prerogatives, the third group of applicants must show to the *General Court* (namely, it has jurisdiction to deal with cases initiated by private parties) that the contested act affects their rights. In this regard, the third group of applicants usually called as "non-privileged".⁵ It also includes private parties from the third countries, ie, potentially *Ukrainian* businessmen who are operating in the territory of the EU. Under this procedure they have the same rights as private parties from the EU Member States.

Annulment of the EU acts by private parties is one of the most complex and controversial issues both in doctrine and in practice. They are non-privileged applicants, as they can bring proceeding to the *General Court* only "against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures", as defined in Part 4 Art. 263 of the TFEU. There is no any problem if the act is addressed to *Ukrainian* private party or the group of persons, but if the *Ukrainian* private party wants to bring proceeding for annulment of act which is addressed to another person, then he must prove not only the grounds for proceeding but the existence of two conditions: that the contested act affects him directly and individually. These conditions

5 Arnulf A. The European Union and its Court of Justice. – Oxford, New York: Oxford University Press, 1999. – P. 40.

characterize the so-called "qualified link" between the act and individual and the *General Court* jurisdiction *ratione personae*, ie the existence of jurisdiction over the person who initiates proceeding. Practice shows that the CJEU give a restrictive interpretation of Art. 263 of the TFEU concerning this group of applicants (i.e. trying to decrease the probable circle of private applicants). This can be explained by the legal traditions of *Western Europe*, according to which it is very difficult to individuals to challenge national legislation.

The direct effect of the act to private party means the causal connection between the action of the act and its effect on the applicant. The key issue here is the existence of intermediate link between the act and the applicant to which act is not addressed. This link may be the Member State to whom the act is addressed, and be more precise – an obligation of the Member State to implement such an act. If such a link exists, and instantly act does not change the position of an individual applicant, the act has no direct effect on the applicant. We are talking about situations where the act excludes the direct impact because it vested appropriate discretionary powers to the Member States.⁶ In such circumstances, it is possible to challenge only Member State act of implementation and only at the national level. If the EU act comes into effect automatically and does not depend on the will and actions of a Member State, its direct effect qualifies as available.

Concerning individual effect, in *Plaumann* judgement there was set a criterion by which it could be established and so the right to bring a proceeding could exist. In *Plaumann* case the individual brought an action against the decision addressed to the EU Member States and the *Court* held:

"Persons other than those to whom act is addressed can claim that it applies to them individually only on condition that the decision affects them or because of certain inherent characteristics, or the circumstances by which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the persons addressed".⁷

Apparently, under the criterion of *Plaumann* applicant must be a member of the relevant group of people, whose number of members is constant and determined at the time of adoption of the contested act and during its validity. In this respect, very important is *Toepfer v Commission* judgement, in which there was recognized an individual effect on the applicant of the *Commission* decision on imports of grain because it applied only to importers who have passed licensing in a fixed time and, consequently, their list was clearly defined.⁸ *Craig P.* and *de Burca G.* called such situation as "*the criterion of a closed group*",⁹ since it became impossible to join this group because of the period for registration was expired.

One more example is *Piraiiki-Patraiki* case in which *Greece* textile factory – cotton exporter to *France* – challenged the *Commission* decision, which allowed *France* to

6 Case 222/83, *Municipality of Differdange v Commission* [1984] ECR 2889.

7 Case 222/8325/62, *Plaumann v Commission* [1963] ECR 95.

8 Joined cases 106, 107/63, *Toepfer v Commission* [1965] ECR 405.

9 *Craig P., de Burca G.* EU Law. Text, Cases and Materials. Third Edition. – Oxford: Oxford University Press, 2003. – P. 495.

impose import restrictions. Factory prove to the ECJ that imposed import restrictions have a direct effect on its operations and concluded contracts for export of cotton can not be executed. The ECJ recognized the right of the factory to challenge this *Commission* Decision addressed to *France*.¹⁰

As to the hierarchy between two requirements for proof of *locus standi* (direct and individual concern) the individual concern has the vital role. At first the CJEU verifies the existence of individual effect of an act on private applicant because it is the most difficult to prove. And if that existence is proved, it is not necessary to prove its direct effect.

It seems very interesting possibility of challenging by private parties such acts of general application, as regulations. For a long time, there was thought that the challenging of acts of general application by individuals is not possible,¹¹ because they could bring proceeding for annulment only concerning administrative acts, ie those which are addressed to private applicant. But the ECJ fixed the possibility of challenging regulations which are acts of general application. The *Court* confirmed the ability of regulations to be both an act of general application for one group of people and an act of individual effect for another limited group of people. This means that those who challenged regulations must prove not only the existence of individual and direct effect but that the contested act or its certain provisions are actually a decision concerning them because of certain circumstances which distinguish them from others persons, on which the act affects.¹²

The ECJ emphasized in the case *Confederation Nationale* the legal distinction between decision and regulation. The *Court* noted that to determine in ambiguous situation where is the existence of decision or regulation, it is necessary to find out whether an administrative act individually concerns private party.¹³ In addition, the criterion for differentiation should be found in general application of act or vice versa. General application of act means not only the extent of its spread geographically, but its non-personified application to objective situation. But again, this non-personified application should be limited by several entities and this makes possible to challenge regulation by individuals. Only after a person proves that the act in the form of regulation is in fact a decision for him, he should prove two conditions which are necessary for existence of *locus standi*, namely direct and personal effect of this act. Only by proving the existence of three, not two standard conditions that are put forward for all other acts, the applicant will have the right to challenge regulations.

Professor of *Liverpool University Neuwahl N.* holds a different view: if a person has proved that a regulation is a decision that affects the person or addressed to it, the person is not obliged to prove a direct and personal effect of this act.¹⁴ In our opinion, if the

10 Case 11/82, *Piraiki-Patraiki v Commission* // European Court Reports. – 1985. – P. 207.

11 *Harding C.* The Private Interest in Challenging Community Action // European Law Review. – 1980. – Vol. 5. – P. 354.

12 Case T-60/96, *Merck & Co. Inc., NV Organon and Glaxo Wellcome plc v Commission* [1997] ECR II-849.

13 Joined cases 16/62 та 17/62, *Confédération nationale des producteurs de fruits et légumes and others v Council of the European Economic Community* [1962] ECR 471.

14 *Neuwahl N.* Article 173 Paragraph 4 EC: Past, Present and Possible Future // European Law Review. – 1996. – Vol. 21. – P. 22.

person proves that a decision is addressed to it, then the existence of a direct and personal effect is not necessary, but if the recipient of act is still not clearly stated, such demonstration is necessary.

It is clear that in practice such a process of proof regarding regulations is quite difficult. Moreover, the EU institutions can protect their acts, taking them in the form of regulations. This special position of regulations would allow institutions even to violate the fundamental rights of individuals without the possibility of its protection. But the ECJ in its judgment in the case *Alusuisse Italia SpA v Council and Commission* said: "... objective of that provision (Art. 263 of the TFEU) is in particular to prevent the community institutions, merely by choosing the form of a regulation, from being able to exclude an application by an individual against a decision of direct and individual concern to him and thus to make clear that the choice of form may not alter the nature of a measure".¹⁵ Apparently the CJEU examines not only the name of act but also its nature, terminology, subjects and its legal effect.

Some other position the CJEU has regarding cases concerning such important areas of *European* economic integration as competition, anti-dumping rules and rules on countervailing duties. Activity of private parties in these areas often is governed by the *Council* regulations and as auxiliary sources – by the *Commission* regulation. As the annulment proceeding of regulations is very complex, the need to protect the participants of above sectors of the European economy through the procedure of Art. 263 of the TFEU led the CJEU to soften the requirements on proof of *locus standi*. The liberalization of the CJEU in the field of competition, anti-dumping and countervailing duties could be explained by their specificity. In these areas the most active are private parties (producers and traders), and changes in legal regulations often affect the position of all participants in these relations and that's why their activities require an effective remedy against illegal decisions of the *Council* and *Commission*.

Concerning challenging by private parties of directives, which are acts addressed to the Member States, almost similar approach is used as to regulations. A directive may be a decision,¹⁶ but of course this is rather an exception.

As already noted, the CJEU gives a restrictive interpretation of Art. 263 of the TFEU concerning private applicants. As the practice of the CJEU has a significant impact not only on the rights and obligations of the parties in the cases, but on legal order of the EU and integration in general, such restrictive practice has been criticized not only by scientists,¹⁷ but also by national authorities.¹⁸ Many academic lawyers argue such criticism by the fact that the person's right to effective judicial protection is restricted and

15 Case 307/81, *Alusuisse Italia SpA v Council and Commission* [1982] ECR 3463.

16 Case T-135/96, *UEAPME v. Council* [1998] ECR II-2335, Joined cases 172, 175-177/98, *Salamander AG and Others v Parliament & Council* [2000] ECR II-2487.

17 *Ward A. Judicial Review and the Rights of Private Parties in EC Law*. – Oxford: Oxford University Press, 2000. – P. 213-220; *Arnulf A. 1952-2002: Plus Ça Change // European Law Review*. – 2002. – Vol. 27, No. 5. – P. 510; *Usher J.A. Direct and Individual Concern – An Effective Remedy or a Conventional Solution // European Law Review*. – 2003. – Vol. 28, No. 5. – P. 584; *Koch C. Locus Standi on Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individuals' Right to an Effective Remedy // European Law Review*. – 2005. – Vol. 30, No. 4. – P. 511-516.

18 *Jacobs F. G. EU Charter of Fundamental Rights Are New Judicial Remedies Needed? // Human Rights & UK Practice*. – 2003. – Vol. 4, Is. 1. – P. 243-264.

is not fully guaranteed. As noted by Professor *Kovar R.*, in some cases this leads to a denial of justice.¹⁹ This situation contradicts to the common constitutional values on which *Charter of Fundamental Rights of the EU* and Articles 6 and 13 of the *European Convention on Human Rights* are based.

It should be noted, however, that the CJEU is steadfast in its position on the restriction of private applicants under the procedure of Art. 263 of the TFEU and in the judgement in the case *Unión de Pequeños Agricultores* underlined that the effective judicial protection is guaranteed not only by separate Art. 263 of the TFEU, but by set of articles, namely indirect way of preliminary ruling procedure through the national courts (Art. 267 of the TFEU) and by invoking before the CJEU the inapplicability of illegal act (Art. 277 of the TFEU).²⁰ The CJEU imposes the basic obligation to protect the rights of individuals on the Member States and their courts in accordance with the principle of cooperation. In this context, the Court obliged the Member States to promote the full protection by establishing in national legal systems complex legal remedies and procedures that guarantee the right to effective judicial protection. This means that national courts should interpret and apply national procedural law in such a way that individuals have the opportunity to challenge actions of national authorities, based on the *Union's* acts of general application. The courts must permit the applicants to refer to the illegality of an act of the *Union* at proving the illegality of actions of the government or national regulations. The CJEU makes it clear that the weakness of the current system of challenging of the EU acts could not be changed by its case law, and such changes can be made only by amendments of the *Treaty*.

In our opinion, it is not possible to impose obligation to guarantee the right to effective judicial protection only on the Member States because legal order of the EU is much more complex. The EU institutions, including the CJEU, are also under such obligations. Therefore, the *Court's* position fully corresponds to the standards of legal protection. As it was noted by *Schermers H. G.* and *Waelbroeck D. F.*, judicial protection of individuals in the EU is now weaker than in the Member States. This means that the more Member States of the *Union* delegate their sovereign power, the less guaranteed become judicial protection. Combined with the lack of detailed parliamentary control over *Union* acts, difficulties in ensuring of judicial review of such acts do not give the institutions the possibility to stay within the traditional system of check and balances, which characterizes democratic states.²¹

In this respect, there is noteworthy expression of *Arnulf A.*, who notes that the *European Communities* was created by elites, so little can be found in Treaties for individuals. The main role was assigned to the *Commission* and the *Council* which interact little with society, and their acts was protected from full control of individuals.²² But with time the *Communities* and the *Union* were changed and now citizens of the EU are unwilling to give control in the hands of elites – transparency and democratization became the

19 *Kovar R.* // *Journal de Droit International.* – 1966. – Vol. 93. – P. 710.

20 Case 50/00, *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677; Case 263/02 P (Sixth Chamber), *Commission of the European Communities v Jégo – Quére et Cie SA* [2005].

21 *Schermers H. G., Waelbroeck D. F.* *Judicial Protection in the European Union.* 6th ed. – The Hague /London /New York: Kluwer, 2001. – P. 451.

22 *Arnulf A.* 1952-2002: Plus Ça Change // *European Law Review.* – 2002. – Vol. 27, No. 5. – P. 509-510.

main principles of functioning of the EU. So the reality in the future will push appropriate changes in the procedure of challenging *Union* acts by private parties in order to make integrational order more efficiently functioning.

But despite the complexity of the use of described mechanism, it is quite effective. Unfortunately, the cases of participation of *Ukrainian* businesses in the EU litigation are incident but they became more frequently and this proves the possibility of such participation.²³

One of the first cases with *Ukrainian* party was when the *Court of the First Instance* (the CFI) accepted a joint application of the Polish steel producer and *Industrial Union of Donbass (Ukraine)*, which is a shareholder in the *Polish* company. The application concerned the annulment of the *Commission* Decision, which recognized the aid which was paid to the Polish steel producer, as incompatible with the common market and orders the to recover it. Under the Decision the aid shall be repaid in full. The applicants, in turn, demand to annul the Decision, since it is contrary, in their view, to the EU law. Although CFI dismissed the actions, but *Ukrainian* applicant could prove their individual concern in Decision which is addressed to another person.²⁴

One of the recent example of the involvement of *Ukrainian* parties in European proceedings can be recent Judgement of the *General Court* in Case *Andriy Portnov v Council*, which sets aside the freeze on the funds of *Andriy Portnov*, one-time adviser to the former *Ukrainian President Viktor Yanukovich*.²⁵

In response to the *Ukrainian* crisis which began in late 2013, the *Council* decided, on 5 March 2014, to freeze the funds and economic resources of persons who had been identified as responsible for the misappropriation of *Ukrainian State* funds and/or for human rights violations in *Ukraine*. *Mr Andriy Portnov*, who was described by the *Council* as a “former Adviser to the President of Ukraine (Viktor Yanukovich)”, was included, for the period from 6 March 2014 to 5 March 2015, on the list of persons whose funds were frozen. The reasons given for his listing were as follows:

“Person subject to criminal proceedings in Ukraine to investigate crimes in connection with the embezzlement of Ukrainian State funds and their illegal transfer outside Ukraine”.

Mr Portnov brought an action before the *General Court* seeking cancellation of that listing. The *Court* finds that the *Council* identified *Mr Portnov* as responsible for the misappropriation of *Ukrainian State* funds solely on the basis of a letter of 3 March 2014 from the *Public Prosecutor’s Office of Ukraine*, which stated that the investigation into, amongst others, *Mr Portnov* had

“made it possible to establish misappropriation of sizeable amounts of State funds and the subsequent illegal transfer of those funds outside Ukraine”.

23 For example Case T-249/06, *Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT) v Council* [2009] ECR II-00383.

24 Case 273/06, *ISD Polska and Industrial Union of Donbass v Commission* // Official Journal. – 2006. – Serie C. – № 294. – P. 57-58.

25 Case T-290/14, *Andriy Portnov v Council* // Official Journal. – 2015. – Serie C. – № 429. – P. 21–22.

The *Court* considers that that letter fails to provide any details concerning either the facts alleged against *Mr Portnov* or his responsibility in that regard and a person cannot be considered responsible for the misappropriation of funds merely because he is the subject of a preliminary investigation. Of course this case has some political marking but it shows that *European* courts are impartial and their decisions are not based on political vector. A lot of similar cases with *Ukrainian* applicants, related *Ukrainian* destabilization are waiting for judgments (*Arbuzov v Council*, *Azarov v Council*, *Klymenko v Council*, *Klyuyev v Council*, *Pshonka v Council*, *Yanukovich v Council*).

So *Ukrainian* private parties must understand that it is possible to use described remedies. By the way, inside the EU the level of activity of individuals concerning application of Art. 263 of the TFEU is quite different, depending on their nationality. Often the procedure of challenging the EU acts is used by private parties from Germany, France, the Netherlands and the UK. The most frequently they contest acts concerning competition law, ie of the sector, where the participation of private interest is very high. Thus, the mechanism of control partially given into the hands of private individuals.

Ukrainian individuals should adopt an active experience in the protection of their rights as of European market participants from other countries which also are not members of the EU. An example could be *China*, which initiates annulment procedure against the EU acts especially in the sphere of anti-dumping measures for many times, and the CJEU recognized it right to be an applicant.

Returning to the additional opportunity to protect the interests of private parties, we should mention the possibility to intervene in cases already initiated in the CJEU. Paragraph 2 of Art. 40 of the Statute of the CJEU gives the right to individuals (and third countries) to intervene the litigation if they established an interest in the result of a case submitted to the *Court*. That is, if the *Ukrainian* private person could not challenge the act of the EU, and similar case was initiated by another person, he can use such an opportunity to intervene. *Ukrainian* individuals can influence the process, making statements and showing their legal position. Thus, in *Chris International v Commission*, in which the *Commission* decision concerning the protection of the *British* banana market was challenged, there was recognized the right of the *Dominican Republic* to intervene. Although the decision was addressed to the *British Government*, the *Dominican Republic* as a third country has managed to prove a direct and personal effect of act on its position as the major exporter of bananas.²⁶

Also it should be noted about quite original for *Ukrainian* legal system way of challenging of acts of the *European Union* – the use of preliminary ruling procedure (Art. 267 of the TFEU). The essence of the preliminary ruling procedure is that the national courts of the Member States may request the CJEU to give a ruling concerning the interpretation of the *Treaties* or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the *Union*.

Individuals may indirectly protect their rights using this procedure by initiating proceedings before the national courts, which, in turn, may apply to the CJEU. Classical example is the case when in 1980 Italian court asked the ECJ about the compatibility of the *French* wine import tax with the *Community law*. As it became known later the

26 Joined cases 91/82, 200/82, *Chris International Foods Ltd v Commission* // European Court Reports. – 1983. – P. 417.

parties have agreed to submit fictitious dispute before the Italian court because they were sure in inconsistency of the *French* tax with the EU law. On this fictitious dispute wine dealer *Foglia* asked wine importer *Novello* to pay the corresponding *French* tax. They appealed to the *Italian* court on the grounds that it was more willing to send preliminary request to the ECJ than the *French* courts. But the ECJ dismissed the claim because of fictitious of the case.²⁷ But this example has confirmed the readiness of private parties to use *European* remedies and their belief in the efficiency of *European* legal protection.

Such opportunity was used by *Russian* football player *Igor Simutenkov*. He was hired by the *Spanish* club “*Deportivo Tenerife*” and in order to play in national competitions for the *Spanish* club he had to obtain a license of the *Royal Spanish Football Federation*. However, the rules of the *Federation* state that citizens of non-EU countries can not obtain the same licenses as citizens of the *Union*, and that number of such players is limited in the national competitions. The *Federation* refused *Simutenkov* in the obtaining a license provided for the EU citizens. *Simutenkov* challenged the *Federation* refusal in the *Central Administrative Court* and later in the *Supreme Court of Spain*, referring to the violation of Art. 23 of the *Agreement on Partnership and Cooperation* between the EU and the *Russian Federation* on non-discrimination of *Russian* workers in the EU. The *Supreme Court of Spain* decided to address preliminary request to the ECJ concerning interpretation of Art. 23 of the *Agreement on Partnership and Cooperation*, in order to determine whether the refusal was legitimate. In its judgement, the ECJ has recognized Art. 23 of the *Agreement* as norm of direct application and pointed out that the failure to obtain the relevant license was illegal.²⁸ Thus, *Simutenkov* defended his right to work on equal terms with the EU citizens. By the same principle, the *Ukrainian* business structures can defend their interests in the national courts of the Member States to which they are, for example, export products or carry out their activities and believe that they are unlawfully discriminated. They should ask the national courts to make a request to the CJEU concerning legitimacy of the EU act or its correct interpretation. But it should be noted that the *obligation* to make such request to the CJEU is imposed only on the national courts of last instance, the courts of other instances have only such a *right*.

As can be seen from the above-mentioned examples, the *Ukrainian* individuals have real opportunity to defend their legitimate interests in the CJEU. It largely depends on their activity and understanding of practice of such a proceeding. Especially right now when more and more opportunities for *Ukrainian* business are opening in connection with deep cooperation of the EU and *Ukraine* under the *Association Agreement*, which contains norms of direct application and provides appropriate access to the EU internal market. The direct application of norms means that they directly provide rights for individuals which could be protected in legal systems and by national courts. In connection with the introduction of a free trade zone, *Ukraine* has an expanded access to the EU internal market and the direct effect of such norms will enable the *Ukrainian* business to defend their legitimate interests and to refer in courts to a wide range of standards, which the *Association Agreement* grants to them.

27 Case 104/79, *Foglia v Novello* [1980] ECR 745.

28 Case 265/03, *Igor Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol* // European Court Reports. – 2005. – P. I-2579.

In the near future we should expect activation of *Ukrainian* business in the CJEU, because under new Agreement Ukraine has undertaken legal obligations of convergence of regulatory standards, which are in the majority now impede the development of *Ukrainian* business and its access to the European level.

In any way the protection of the rights of individuals, as *Western-European* scholars say (for example *Kilpatrick C.*) – is a triumph of human rights over the objectives and principles of the policy. An effective mechanism for such protection, including sufficiently broad jurisdiction of the CJEU, confirm that the *European Union* has a unique integration legal system and legal order, which improve the protection of the rights of individuals also by the courts, and that, in turn, leads to the strengthening of the whole *Union*.

It should be noted that one of the components of the model of protection of rights of individuals in the EU is a dialogue between the CJEU and national courts of the Member States. This model depends on how these courts are adapted to each other. In order to give the EU law in hand of individuals the CJEU provides effective judicial protection, improves the efficiency of its judgements and of course develops judicial cooperation. All these processes can be realized within the case law of the CJEU.

In its early years the ECJ has established the division of the ways which can be used by judicial authorities of the EU and which by national courts. Aspects of substantive EU law was solved by courts of the Communities and the aspects of its implementation and procedural aspects were the responsibility of national legal systems and national courts. This led to the procedural autonomy of national courts. That's why it was complicated for individuals to assert the rights granted to them by the EU law before national courts or to receive compensation for the violation of such rights. Subsequently it was determined that the rights granted by the EU law, can not be secondary to the rights granted by national legal systems.²⁹

Gradually, there was a retreat from such a division. In several judgments the ECJ replaced procedural autonomy of national courts by its own right to control the means of implementation of the EU law. The first harbinger of this was in *Simmenthal* case, in which the ECJ required not to apply the *Italian* legislation which, although not made the right provided by the EU regulations practically impossible to implement, but at the same time laid their effective protection. The ECJ has ordered the *Italian Constitutional Court* to set aside national laws that are incompatible with the EU law.³⁰

The next firm step on development of efficiency of the judicial protection of the rights granted by the EU law, was *Factortame* judgement, which obliged the *British House of Lords* to grant the interim injunction against the *Crown* to protect the rights, although the *House of Lords* didn't have such a powers under national law.³¹ In *Emmott* case the ECJ ruled that until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot

29 Case 33/76, *Rewe v. Landwirtschaftskammer für das Saarland*, [1976] ECR 1989, esp. para. 5; Case 45/76, *Comet v. Productschap voor Siergewassen*, [1976] ECR 2043, paras. 12-16.

30 Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, [1978] ECR 629.

31 Case C-213/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd and others*, [1990] ECR I-2433.

begin to run before that time.³² *Francovich* judgement opened a new era in the EU law evolution – it created new remedy of the EU influence on all national legal systems – state liability for the improper implementation of the EU law.³³

Cases involving gender issues show in the most indicative way the effectiveness of the EU remedies in protection of rights of individuals. One of the first such cases were *Von Colson* and *Harz*. In these cases, before the ECJ, the question was raised concerning conformity with the EU law of the provisions of the *German Civil Code* about damages for sexual discrimination in employment.

Under these provisions of the *Civil Code of Germany* the compensation for damages was meager. The practice of the EU about compensation shows that it is considered sufficient if national law does not make it very difficult to obtain or if such compensation is not lower than the compensation for the damage caused in any other sphere. *Von Colson* judgement requires compensation should "guarantee real and effective judicial protection".³⁴

This judgement to some extent deprived the *German* courts autonomy in determining the amount of compensation. The ECJ also added that Member States should in future ensure that victims of discrimination have necessary remedies for protection. It requires Member States to ensure access to justice and guarantees for employment to victims of discrimination, adequate compensation and the imposition of penalties on responsible parties.

The precedent laid in *Von Colson*, has become a model, which was repeatedly used by the CJEU in cases about discrimination. A special feature of this Judgement is that it was the first time the domestic courts were deprived of the autonomy in determining ways compensation and range of remedies in their national systems.

The next step of the ECJ in improving of the judicial protection was that he identified some of the main provisions of the *Directive 76/207* (on equal treatment at work) as directly applicable. Thus, the *Court* fixed that the provisions of this *Directive* do not require the adoption of additional national acts for their implementation in order to become valid in the domestic legal system of a Member State.³⁵

Considered a large role the CJEU played in developing of such important issues, we should refer to the practice of national courts and consider how their practice has changed after the CJEU innovations.

In *Marshall* case the ECJ decided that *Directive 76/207* on the equal position on the work require not the payment of adequate compensation but full payment plus a percentage for discriminatory dismissal.³⁶ This has created an unprecedented boom in the UK. Firstly, it was canceled a maximum limit on compensation for damage caused by discrimination. Secondly, there was a need to do the same in regard to all forms of discrimination, and that was done. As a result, the British government paid more than

32 Case C-208/90, *Emmott v. Minister of Social Welfare*, [1991] ECR I-4269.

33 Case C-6 and 9/90, *Francovich and Bonifaci v Italy*, [1991] ECR I-5357.

34 Case 14/83, *Von Colson and Kammann v. Land Nordrhein-Westfalen*, [1984] ECR 1891.

35 See: *Глотова С.В.* Прямая применимость (эффект) директив Европейских Сообществ во внутреннем праве государств-членов ЕС // Московский журнал международного права. – 1999. – № 3, июль-сентябрь. – С. 175-188.

36 Case 152/84, *Marshall v Southampton Area Health Authority* // European Court Reports. – 1986. – P. 723.

50 million Pounds compensation. Third, the *English Act on equal payment for women and men work* have been amended to change the terms for compensation.

As can be seen, the activism of the CJEU shows a constant strengthening of the protection of the rights of individuals and the effectiveness of powers of all elements of the judicial system of the EU. This aspect represents an essential factor of *European* integration. This is an *acquis communautaire*. As some lawyers expressed, *European* integration is possible while the involvement of national legal systems in the gravitational field of the *acquis communautaire*, making the *acquis* as the main object of attraction of national legislation. *European* authors call the *acquis communautaire* as "one of the shrines of the EU". It is also natural that the *European* attitude to the law as one of the fundamental basics of modern European civilization, and in the legal sense the *acquis* is identified with the whole legal system of the EU.³⁷ And therefore the role of the CJEU has phenomenological importance for the implementation of this principle, as its practice affects the development of the institutional system of the EU and the formation of the four fundamental freedoms and later development of national legal systems of the Member States. Thus there is constitutionalization of the EU legal system and of fundamental rights and freedoms of citizens. That is why the entry into force of the *European Union Charter of Fundamental Rights* became an important step in the approval of status of private persons in the EU. It should be noted that the *Preamble* to the *Charter* recognized the decision the CJEU as one of the important sources of human rights. That is one of the proofs of fruitful work of the CJEU on human rights and protection of rights of private parties.

37 Друзенко Г. Що приховано за словами? Адаптація законодавства України до законодавства Європейського Союзу чи прийняття *acquis communautaire*? / Юридична газета. 21 квітня 2004. – № 8(20). – С. 4.