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On legal situations and the interpretation of European Union law

Introduction

European Union (EU or Union) law is a source of rights, entitlements, authorisations, permissions, duties and obligations for all kinds of subjects, including institutions of the European Union, its Member States and last, but undoubtedly not least, individuals, legal persons and other entities in the Member States[1]. It is otherwise commonly proposed and arguably indisputable that EU law has a direct legal effect also as regards this latter class. Since it's not a trivial question to explore how EU law actually does this, the primary purpose of this paper is to analyse how, at the rudimentary level of legal provisions and rules, it is at all possible to assert that any individual has an obligation or duty, authorisation or permission; or enjoys a right, benefit or entitlement, that is, in one way or other, rooted in Union law. Since arriving at any such result presupposes a certain concept of legal interpretation and application of some kind of interpretation methodology, the second purpose of this paper is to analyse and demonstrate how, by applying certain primary notions of *legal situation*[2] and *legal rule*[3] (in their forms developed or accepted by the Poznań school of legal theory), as well

[1] In what follows, the term "individuals" is used to refer to all such national subjects in the Member States.

[2] On primary and secondary legal situations, see Z. Ziembiński, *Logiczne podstawy prawoznawstwa*, Warszawa 1966, p. 89; S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa*, Poznań 2001, p. 100 et seq.

[3] Z. Ziembiński, *Przepis prawny a norma prawna*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1960, rok XXII, z. 1, p. 105 et seq.

as certain basic ideas of Maciej Zieliński's derivative concept of legal interpretation along with its methodological framework[4], it might be possible to clarify and even offer solutions to some puzzling problems that EU law, its interpretation and application in the Member States has revealed. In what follows and within the limits this publication offers, the focus is on selected areas, recognizing that there is room to expand and refine both the scope of this analysis and its conclusions. A familiarity with the foregoing notions is presupposed, as well as the general ideas of the derivative concept of legal interpretation. In particular, these considerations are based upon a distinction, in all respects crucial for that concept, between a legal **provision** and a legal **rule**[5]. Finally, legal interpretation is considered an intentional act consisting of certain structured actions aimed at answering the following fundamental question: What legal rules are expressed by legal provisions? Since anyone's legal situation is asserted by virtue of the legal rules that define it, it follows that legal interpretation is a necessary step to define any legal situation of any subject.

1. On deontology, legal situations and interpretation

On account of the philosophy of language and social ontology, it appears plausible to conclude that EU law is an immediate source of deontic powers[6] and a source of information on deontic status of a wide variety of persons or entities on the one hand, and binding upon a similarly broad class of persons and entities on the other. What EU law also

[4] The derivative concept of legal interpretation was anticipated by Z. Ziembiński, and developed by M. Zieliński but named by F. Studnicki and T. Gizbert-Studnicki. Cf. F. Studnicki, *Wprowadzenie do informatyki prawniczej*, Warszawa 1978, p. 41; T. Gizbert-Studnicki, *Wieloznaczność leksykalna w interpretacji prawniczej*, Kraków 1978, p. 6–8. In its most current shape the concept is set out in: M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2012.

[5] As opposed to legal provisions (understood as a grammatical portion of text included in legal acts), legal rules are defined as expressions that, in principle, in a general and abstract manner and in sufficiently clear and unambiguous terms order or prohibit addressees of type-*S* to behave in a manner type-*D* in circumstances type-*C*. As such, legal rules have a certain form or structure composed of those three elements and a deontic operator: *shall* – for expressing orders to do something or *shall not* – for expressing prohibition.

[6] On the concept of deontic powers, *v.* J.R. Searle, *Making the social world. The structure of human civilization*, Oxford 2011, passim.

does – or rather what legal community collectively believe it to do – is to immediately define the deontic status of individuals at the national level. The above philosophical account is, no doubt, a good starting point, yet no legal analysis may be satisfied here. For an account must also be given of the facts that: lawyers work primarily with legal texts; are mainly concerned with legal rules and finally, the indispensable tools in their professional repertoire are supplied by the accepted normative concept of legal interpretation, along with the methodology it provides. So, what shall one say about this as legal theorist? Granted that the founding Treaties and legal acts of the EU[7] are composed in a specific manner and their normative part consists of legal provisions grouped into larger text structures, such as titles, chapters, sections, articles, and so on[8], often written in an ostensibly descriptive manner, all the same they perform a specific communication and institutional function which is far from reflecting on how the world is[9]. EU acts perform and, what appears even more important, are collectively recognized to perform a normative function of ordering various subjects to do (not to do) something[10]. Therefore, in terms of legal theory, they define the legal situations of those subjects. It follows that at a rudimentary level for legal theory, EU acts communicate orders or prohibitions (legal rules) that in a certain way relate to individuals at the national level, for ultimately, every legal situation is reducible to a legal rule or set of such rules that define it.

Thus a proposition that EU law has an immediate or direct legal effect on individuals in the Member States or at the national level may be understood in a seemingly trivial manner as a statement that, in one way or other, Union law defines the legal situations of those subjects. It may also be asserted that it is by virtue of Union law alone or Union law jointly with national laws of the Member States that those individuals are obligated to do (not to do) something or that others

[7] For simplicity and clarity, in what follows those acts are jointly referred to as *EU acts*.

[8] On the structure of legal acts of the EU see *Manual of precedents for acts established within the Council of the European Union*, General Secretariat of the Council of the European Union, English revision 19 April 2011, p. 3 et seq.

[9] However, to a certain extent, they may be used as a source of such information. Cf. R. Sarkowicz, *Poziomowa interpretacja tekstu prawnego*, Kraków 1995, passim.

[10] Recognition of that normative function of legal acts is referred to by the derivative concept of interpretation as a presupposition of their normativity. Cf. M. Zieliński, op. cit., p. 102–107. It seems more plausible to me, though, to talk about ascription of a normative function to legal texts rather than presupposition of normativity.

have an obligation to do (not to do) something in relation to them. Since from the point of view of rudimentary legal theory, any legal situation is defined by or derived from a legal rule (a consistent set of such rules), the author claims and further attempts to substantiate that, as a matter of fact, certain EU acts or their specific provisions express legal rules (elements of rules) that in various ways determine different types of legal situations of individuals in the Member States. On account of the derivative concept of legal interpretation, it may otherwise be said that there is a normative structure and content that underlies, is associated with or assigned to any EU act which differs, often substantially so, from its *prima facie* perception. This structure and associated content is revealed through legal interpretation performed within a framework of principles, rules and guidelines of interpretation[11]. Its result may be articulated in the form of a directive and thus becomes intersubjectively expressible, while its correctness is intersubjectively verifiable.

2. On primary legal situations and interpretation of underlying provisions

2.1. From European Union legal acts to legal rules

Legal situations are typically classified into primary and secondary legal situations on the one hand and simple and complex situations, on the other[12]. Since complex situations are ultimately reducible to a set of primary or secondary situations, this paper focuses on these two rudimentary categories. Now, to say that EU law determines, in an immediate manner, the **primary** legal situation of any individual implies that it is possible to generate deontic sentences asserting that by virtue of Union law, certain types of behaviours are, for certain types of individuals (addressees), in certain types of circumstances mandatory, prohibited or indifferent[13]. EU law is deemed to define a legal situation of **obligation** in those instances, where it immediately orders (commands or prohibits) a behaviour. Yet not every provision of Union law that is intended to induce an individual to do (or not to do) something

[11] For details of that framework see M. Zieliński, op. cit., p. 314 et seq.
[12] S. Wronkowska, Z. Ziembiński, op. cit., p. 100 et seq.
[13] Ibidem, p. 100–102.

is directly provided in the form of a legal rule that would moreover be sufficiently clear as regards its addressee, normative obligation and the circumstances in which it actualizes. Thus it becomes a matter of legal interpretation, as it is understood by the derivative concept, to establish all those normative components (syntactic elements) as well as their content and last but not least, express the result so achieved (interpretation in the apragmatic sense) in the form of a directive. In many respects, interpretation of EU acts poses the exact same problems as those typically encountered under national law. Nonetheless, there arise issues that are specific to EU law or the national normative environment within which or along with which it is being interpreted. Some of those questions may be clarified and possibly even resolved by applying the concepts offered by the derivative concept of interpretation and its methodology framework.

2.2. Cross-distribution of rules in legal provisions

For one part, an inherent challenge accompanying interpretation of EU provisions is that they are not always sufficiently clear as to whose primary legal situation is actually being defined and in what circumstances the obligation actualizes. Certain aspects of this issue have, in fact, been the subject of continuous debate dating back to the early stages of the European Economic Community (EEC). Since identifying the addressees of legal rules and their obligations is a primary concern for any lawyer, it is worth taking a closer look at how certain provisions of Union law may be transformed into the form of a directive: indicating clearly what obligations are being imposed, under what conditions and lastly, upon whom. In this regard, it should be noticed that many, perhaps most, EU provisions are semiotically incomplete in that they do not include all of the syntactic and semantic elements that a "fully-fledged" legal rule is supposed to possess. Those elements are usually distributed in different parts of legal acts. This, in turn, necessitates a search for the missing components as part of interpretation. The derivative concept explains that phenomenon by its notion of the syntactic (normative and logical) and content distribution of legal rules in different legal provisions[14]. It points to this puzzling feature of legal texts (including EU acts), whereby

[14] M. Zieliński, op. cit., p. 108 et seq.

various elements of the same legal rule, both in terms of its form (syntax) and propositional content (sense), are contained in various legal provisions. In other words, the elements of a legal rule – whether considered from a purely formal or semantic point of view – are fragmented in different parts of the same or even multiple legal acts. Nonetheless, during interpretation all those fragments must be considered as a whole. On account of the derivative concept, it is always (and rightly so) the framework provision that is a starting point for any act of interpretation[15]. Framework provisions contain at minimum the element of *behaviour* accompanied by a deontic operator (shall/shall not) and, as a result, seem best placed to serve as a building block for the entire normative structure. For this reason, normative incompleteness of interpreted provisions may only concern the element of *addressee*, *circumstances* or both these components. Provisions that contribute any missing elements to the framework provisions – whether normative or logical – play a syntactically completing role (completing provisions)[16], while those that modify its actual content – a modifying role (modifying provisions)[17]. For these reasons, interpretation of any EU act should commence with the identification of a framework provision, followed by the insertion of any missing syntactic elements or elements modifying its sense based on other relevant legal provisions. It may prove a relatively easy task to locate any missing parts of a legal rule in the same or any related EU act. What is to be said, however, about those cases, where a EU provision, imposing obligations upon individuals or in relation to them, lacks a key element that simply cannot be supplemented by means of any other EU act? Certainly, the problem may not be left unsolved and it frequently transpires that in the quest for the right answer one may need to refer to national law. Prime examples of such syntactically incomplete EU provisions may be encountered in the procedural or private international laws that do not or only rarely set out any addressee for the legal rules they encode[18]. Those addressees are typically defined

[15] Ibidem, p. 188–201.

[16] Ibidem, p. 188 et seq.

[17] Ibidem, p. 215–225.

[18] E.g. the missing addressees for the rules encoded in Rome I regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177, 4 VII 2008, p. 6–16) should be completed based on the Polish Code of Civil Procedure (unified text J.L. 2014, item 101, as amended) and the Law on structure and organisation of common courts (unified text J.L. 2015, item 133).

by the institutional and procedural laws of the Member States. This particular type of distribution (whether syntactic or content-related) can be referred to as *cross-distribution*. Although founded on the notion designed by the derivative concept, it underscores the fact that the elements of rules are distributed amongst legal acts enacted by institutionally independent legislators. Nevertheless, thanks to the derivative concept, there is no need to explain this phenomenon from scratch and develop new methodologies to deal with those hard cases. Instead, it is possible to rely on the conceptualisations and methodology already designed by that concept. Needless to say, a correct identification of the missing components of such cross-distributed rules may prove particularly difficult.

2.3. Plurality of European Union legal provisions

Another important and common reason why EU law may not always be clear as regards the addressees of legal rules it encodes is because the very same legal provision may be intended to define primary legal situations of entirely different categories of subjects. What is striking is that the members of those classes belong to entirely different normative ontologies or legal orders. Despite the doctrine of direct effect[19], it continues to be puzzling that the very same provision contained, as an example, in the founding Treaty may impose obligations and thus define the primary legal situations of both Member States in their state capacity (as understood by public international law) and various individuals at the country level. The concept of direct effect appears to provide an important yet partial explanation to that puzzle. Failing to account for the striking difference between the literal sentence-meaning and the normative or pragmatic sense of those provisions, the doctrine of direct effect seems to leave out certain crucial aspects, offering no formal analysis of the phenomenon in question.

Consider the following provision[20]:

[19] This is widely known and as such does not need to be explained here. Readers may find a comprehensive yet concise summary in: T.C. Hartley, *The foundations of European Union Law*, Oxford 2010, p. 209 et seq.

[20] Art. 157 TFEU, ex. Art. 119 EEC.

(1) Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

Its literal meaning is clear and precise in that this provision defines a primary legal situation (obligation) of the Member States. From a theoretical point of view, it expresses a program rule that binds its addressee as to the result (objective), while leaving it to the Member States to define and undertake the necessary measures to achieve it. It seems that the normative structure underlying such provisions may be expressed by the following form:

(2) Member State *MS* shall take measures *M* necessary to achieve objective *O* by time *T* at the latest[21].

Therefore, interpretation of those provisions should account for the above structure. It is important to notice that behaviours ordered by program rules (which are contained not only in the founding Treaties, but also directives) consist of two distinct, yet functionally correlated components (*M*+*O*): taking the necessary measures (*M*) and the actual objective that the same target to achieve (*O*). In principle, the content of *M* may be reconstructed based on Art. 4 para. 3 Treaty on European Union (TEU) and Art. 291 para. 1 Treaty on the Functioning of the European Union (TFEU) that express instrumental rules obligating the Member States to carry out all actions that are necessary to ensure fulfilment of their obligations and achievement of EU objectives (including implementation of EU acts), as well as refrain from any actions that would make the same impossible. As far as directives are concerned, the content of *M* is specifically set forth in the final provisions concerned with the implementation of directives and typically consists of bringing into force the laws, regulations and administrative provisions[22].

Regardless of its clear and unambiguous meaning, the provision in example 2 is attributed yet another deontic power: the power to define

[21] In what follows, the letters *MS*, *M*, O, and *T* are used *respectively* for: "Member State;" "measures;" "objective of the program rule;" and "time".

[22] Cf. *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation* (JPG), p. 43, http://eur-lex.europa.eu/content/pdf/techleg/joint-practical-guide-2013-en.pdf (accessed: 15 V 2015).

the primary legal situations of **individuals**[23]. In other words, it is deemed to impose obligations upon the addressees that are not even remotely mentioned in its literal content. As a matter of fact, this puzzle is part of a much bigger question: How is it possible that certain categories of EU provisions that *prima facie* bind the Member States may also bind a variety of other persons or entities at the national level? To an extent not yet accounted for by the doctrine of direct effect, the derivative concept appears to offer a possible answer by providing the conceptualisation and apparatus necessary to explain their underlying structure. Above all, such provisions are considered by the derivative concept as **plural**[24]. The notion of plurality assumes that certain legal provisions express more than one legal rule or, in the majority of cases, elements of more than one legal rule. In other words, different legal rules (their elements) are, as the derivative concept explains, condensed in the very same text[25].

The plurality of certain legal provisions may be immediately evident, whereas without an in-depth analysis it may be escaping us in other instances. Last but not least, one might be confronted with a hard case of **plurality by definition**[26]. The latter covers all cases where the plural nature of a provision may not be discovered by a mere linguistic analysis of its syntax and content, but requires substantial legal knowledge. This is precisely the case as regards Art. 157 TFEU in example 1. It is deemed to impose obligations and thus define primary legal situations of: (i) Members States (EU level) – which follows immediately from its sentence-meaning and is reflected by the formal structure in example 2; (ii) individuals (national level) – which doesn't follow from the actual text at all, but results from the extra-linguistic rules developed by the doctrine and case law (see example 3 below). As a result, this particular provision in Art. 157 TFEU may be further described as plural in view of its addressee. The derivative concept appears to provide the methodology framework detailing how, in general terms, such plural provisions ought to be dealt with. Above all, they should be separated into distinct normative structures and thereafter the interpretation of each and

[23] Cf. Judgment of the European Court of Justice of 8 IV 1976, *Defrenne v Sabena*, C-43/75, ECR 1976, p. 455.

[24] M. Zieliński, op. cit., p. 135 et seq.

[25] Ibidem, p. 134 et seq.

[26] Ibidem, p. 137.

every one of them should be carried out separately[27]. As regards EU law specifically, this procedure reveals an interesting pattern as far as the element of *behaviour* is concerned enabling the formulation of a specific interpretation rule. While the Member States are obligated to do what is reflected by the structure type *M+O*, typical of program rules, it is certainly no longer the case as far as obligations of any individuals are concerned. They are bound to do what is symbolized by *O*. Therefore, interpretation of such plural provisions should yield two legal rules: one rule reflected in example (2) and yet another rule reflected by the following simplified structure:

(3) Addressee *S* shall do *DO* in circumstances *C*[28].

As clarified under ECJ case law, in order for any EU provision to be plural and generate normative structures type 3, it must meet the conditions as set out under the *Van Gend* test[29]. Based on the analysis carried out from the point of view of the derivative concept, the *Van Gend* test ultimately appears reducible to the following set of requirements: (i) it is possible to identify the element of *addressee* in clear and precise terms based on the provision under interpretation or its context; (ii) *DO* denotes or is reducible to a clear and precise behaviour of addressees; (iii) it is possible to identify the circumstances in which the obligation denoted by *DO* actualizes; (iv) that obligation is not dependent on any further actions as mandated by Union law to be performed by either the Member States or the EU itself. Consequently, the structure type 3 excludes the following scenario *a limine*, and any provisions that lead to that scenario may not be considered as producing a direct effect: "If Member State *MS* or the EU takes the measures *M*, then addressee *S* shall do *DO* in circumstances *C*".

As regards the addressees of the rule type 3, it must be possible to identify them based on the content or context of the provision in

[27] Ibidem, p. 325 et seq.

[28] In what follows, the letters, *S*, *D*, *DO*, and *C* are used *respectively* for: "addressee who is a national of a MS;" "ordered behaviour/act/action;" "ordered behaviour/act/action corresponding to the objective of the program rule;" and "circumstances". As a side remark, the obligations of individuals may, in certain cases, be phrased as prohibitions (*e.g.* prohibition of discrimination).

[29] Judgment of the European Court of Justice of 5 II 1963, *Van Gend* & *Loos*, C-26/62, ECR 1963, p. 1.

question. Frequently, this will be decided on the basis of the actual content of *DO*, such as in example 1, where the result to be achieved may easily be attributed to employers. Consequently, the actual legal rule could be expressed in the following terms:

(4) Each employer shall apply the principle of equal pay for male and female workers for equal work or work of equal value.

The assignment of obligations upon different categories of addressees is also dependent on the type of act which contains the provisions under interpretation. In general, the Founding treaties, international agreements and regulations[30] may define primary situations of any person or entity, including the Member States, EU institutions, but also both private and public persons or other entities at the national level. The same conclusion extends to certain categories of decisions whose scope of application is abstract and general[31]. The situation is radically different, though, as regards directives and, yet again, certain types of decisions which, from the point of view of individuals, resemble directives. It is important to notice that directives, by definition, enact or should enact program rules. They set out results (objectives), leaving it to the national authorities to select the form and methods necessary to achieve them. Directives are addressed to the Member States and, as such, may not define primary legal situations of any person or entity at the national level. It is common knowledge that this general principle has a major exception, which includes the *state* (most broadly understood), regardless of whether it is: (i) acting in the capacity of the State Treasury or through its "emanations;" or (ii) exercising public authority. As for directives, structures type 3 hold solely as long as the addressees fall under this broad category of the *state*.

It is still under debate, how to give a proper account of legal provisions with Member States as their addressees at the EU level that somehow "change" to have a different "actual addressee" at the national level. In particular where the directive in question has not been implemented on time. Various solutions have been put forward, but none of them

[30] Under their legal definition regulations are acts that have general application, are binding in their entirety and directly applicable in the Member States (Art. 288 TFEU)

[31] This paper is not concerned with the decisions understood as individual instances of the application of the law.

yields a sufficient or entirely plausible explanation[32]. First, the idea of the "actual" addressee may not suffice, as it simply leaves out a significant portion of deontology: Member States always remain the addressees of directives. Advocating a "change" in the element of *addressee* doesn't appear plausible, either, for it is difficult (if not impossible) to explain what this "change" actually is, let alone account for its "mechanics". The author of this paper argues that a possible solution to one aspect of this puzzle has already been presented above and is based on the notion of the plurality of legal provisions as conceptualised under the derivative concept of interpretation. It seems more convenient and closer to linguistic intuition to assume that certain provisions of directives, by intent and *ab initio* (with no need for any "change"), express the elements of more than one legal rule. From the content point of view, they actually communicate much more than their literal sentence-meaning appears to express *prima vista*. On this account, the provisions in question contain the elements of: (i) a legal rule addressed to the Member States (rule R_1); and (ii) yet another rule addressed to a specific category of national subjects acting on behalf of the state or considered to be its emanation at the national level (rule R_2). As demonstrated above, this problem is not limited to the element of *addressee* alone. It also impacts that of *behaviour* and possibly the accompanying deontic operator (shall/shall not). Under rule R_2 (no longer a program rule), its addressees are ordered to perform a specific type of act or action or otherwise behave in a clearly identified way, without which no EU provision could produce any direct effect.

The solution to the remaining part of this puzzle concerns the element of *circumstances*. It follows from the very nature of the Treaties and regulations that the obligations they impose, except as otherwise stated, do not require any further action on the part of either the Member States or the EU. They are unconditional and directly applicable. The same does not hold true for directives and "directive-like" decisions which, by definition, require implementation in the national legal order. Their direct applicability is associated with a Member State's default in the implementation. Hence, the structure of rule R_2 in this analysis could be formalised as follows:

[32] For more on this topic and possible solutions see S. Prechal, *Directives in EC law*, Oxford 2005, p. 55 et seq.; B. Kurcz, *Komentarz do art. 288 Traktatu o funkcjonowaniu Unii Europejskiej*, in: *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz*, t. 3, red. A. Wróbel, Warszawa 2012.

(5) If a Member State *MS* fails to implement directive *DR* by time *T* at the latest or fails to do so correctly, then addressee *S* shall do *DO* in circumstances *C*.

These considerations lead to a more general conclusion that the directly applicable provisions of directives have, in fact, an entirely different normative structure reflected in example 5, to those contained in the Treaties or regulations and expressed in example 3. As part of interpretation, those seemingly subtle differences must be brought into full view and, as demonstrated in this analysis, the derivative concept of interpretation provides both an excellent conceptual apparatus to articulate these issues and the methodology to deal with them.

3. On secondary and complex legal situations and interpretation

3.1. Secondary legal situations in general

EU law defines the deontic status of individuals in yet another way: by defining their **secondary** legal situations. A secondary situation of an individual under a legal rule (beneficiary, authorised subject) derives from a primary legal situation of yet another subject as the addressee of that same rule[33]. Thus one and the same rule imposes an obligation upon its addressee, which is simultaneously correlated with a deontic power attributed to its beneficiary (authorised subject). Although secondary legal situations or deontic powers associated with them are typically labelled as "rights," this category is neither uniform nor structurally identical. On the classical theoretical account, secondary situations may be classified into two major categories of entitlement and authorisation (competence)[34]. There is also the question of sanctions that appear to be complex legal situations, whose propositional content always involves a negative impact on a subject. In that specific sense they are a convert of entitlement. Due to its complexity, this category shall be discussed separately.

[33] S. Wronkowska, Z. Ziembiński, op. cit., p. 100.

[34] Based on the criterion of an actualized "right," one ought to discriminate substantive claims as a class of actualized entitlements from procedural claims as a class of procedural rights to bring an action before the national courts, tribunals or other authorities of the Member States to protect a substantive right.

The lack of understanding and discrimination between different categories of legal situations and the underlying rules may, and often does lead, to confusion. It is further aggravated by the convoluted way EU acts can be expressing legal rules. As a matter of fact, the first landmark cases before the ECJ, such as *Van Gend* or *Costa*[35], concerned the very question if the Treaties and regulations encode the legal rules that define only the primary legal situations of the Member States and institutions of the EU, or if they also express the secondary legal situations of individuals (their entitlements, authorisations or possibly both).

3.2. Entitlements of individuals under European Union law

Secondary legal situations of entitlement arise for individuals firstly, because EU law directly imposes obligations on certain subjects that are, in one way or other, favourable to those individuals as their beneficiaries, and secondly, because the entitlement to that benefit is recognised under both the EU and national legal orders. Thus the normative structure of the rules expressing entitlement may be reflected as follows:

(6) Addressee *S* shall do *D* for the benefit of beneficiary *B* in circumstances *C*.

Entitlements involve deontic powers vested in their beneficiaries authorising them to **demand** the benefit from the addressee, as long as that benefit is inherent or otherwise immediately follows from the obligations imposed. Hence, entitlements are linked with authorisations (as described in more detail below) inuring to the benefit of beneficiaries empowering them to seek enforcement of that benefit before the courts of the Member States[36]. At the same time, this authorisation also defines the primary legal situation of the courts, which are obligated to recognise the case brought before them and adjudicate. Thus complex

[35] Judgment of the European Court of Justice of 15 VII 1964, *Costa v. E.N.E.L.*, C-6/64, ECR 1964, p. 585.

[36] Cf. Judgment of the European Court of Justice of 5 II 1963, *Van Gend & Loos*, C-26/62, ECR 1963, p. 1: *"It follows from the foregoing considerations that* […] *article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect".*

legal situations arise[37]. From a structural perspective they are defined by a set of functionally correlated legal rules, whose syntactic and semantic elements are, in fact, cross-distributed, as EU law provides very few procedural provisions. As a result, the procedural rules protecting individual rights granted under Union law are primarily reconstructed based on national laws. Yet their components always include an element of entitlement stemming from EU law.

A special category of EU entitlements inuring to the benefit of individuals includes freedoms from state interference. In the context of Union law, such freedoms are defined by the legal rules addressed to the national authorities and are typically encountered in the area of the internal market and its fundamental freedoms. Beneficiaries of those rules are free to act in a certain way, e.g. by selling goods from one Member State to another without having to pay any customs duties (Art. 28 para. 1 TFEU). The structure of those rules may be outlined as follows:

(7) Member State *MS* shall not do anything that may prevent or interfere with beneficiary *B* doing *D* in circumstances *C*.

It seems that one of the key interpretation challenges relating to EU law consists in the correct determination of whether a given normative obligation has any beneficiary associated with it and who that beneficiary is. In principle, any clear and unconditional prohibition imposed upon the Member States, which can technically be transformed into a beneficiary-type normative structure as set out in example 7, with an identifiable beneficiary, should be deemed to define a legal situation of freedom. Nonetheless, the subtleties related to directives and directive-type decisions (before their implementation deadline) must be noted. Obviously, the situation differs if the benefit is attempted to be sought against any private person, for no obligation may arise under directives for any private individuals. Entitlements may be expressed in a form substantially similar to examples 6 and 7, yet they may also be articulated from the point of view of the beneficiary, who "may," "can" or "is entitled to something". Interpretation challenges concerning those legal provisions are different, as the focus shifts in precisely the opposite direction. Instead of searching for a beneficiary, one is searching for the addressee bound to provide the benefit.

[37] S. Wronkowska, Z. Ziembiński, op. cit., p. 106 et seq.

3.3. Individual competence (authorisation) under European Union law

Secondary legal situations may also arise for individuals in those cases where EU law directly authorises them, as competent subjects, to perform an institutional act, whereby an obligation either actualises or is **created** for an addressee[38]. While all rules of competence ascribe deontic powers to authorised subjects, so that they are empowered to bind others through their own acts, authorisations in the latter form are simultaneously correlated with a special ontological power.

Authorisations are defined by the rules of competence (authorisation rules)[39] and, in a simplified form, their syntax may be outlined as follows:

(8) Addressee *S* shall do *D* if an authorised subject *A* performs an institutional act *C*.

The structure of authorisation underscores the fact that the acts performed by authorised subjects fall under the element of *circumstances* in which an obligation is either created or triggered. In EU acts, the rules of competence are typically formulated from the point of view of those empowered to create obligations binding upon others or even themselves simply by performing an institutional act. Thus a formal transformation of those expressions into the structure of a directive may appear difficult and in a sense counter-intuitive. This may be justified by psychology and a typical way of thinking about law perceived not only as a source of obligations, but equally or even more importantly as granting and safeguarding one's rights. It appears to be taken for granted that there is always someone against whom one's rights may be enforced. In a certain sense it shouldn't matter whether someone's obligation is syntactically expressed from the point of view of an authorised subject (a beneficiary in the case of entitlement) or an addressee actually bound by the correlated obligation. Those structures should, paraphrasing the principle of identity, be mutually substitutable *salva intentione legislatoris*. Yet for purposes of legal interpretation, it may be

[38] Ibidem, p. 104.

[39] For the rules of competence in the Polish literature see Z. Ziembiński, *Kompetencja i norma kompetencyjna*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1969, rok XXXI, z. 4, p. 23 et seq.

argued that the transformation into the normative structure, as set out in example 8, is required or at least recommended in order to identify, beyond any reasonable doubt, the subjects bound to react to an institutional act. One may be surprised how very often such identification is not as straightforward as one would hope.

Consider the following provision in the UCC[40]: "*The customs authorities may carry out any customs controls they deem necessary*". This provision encodes a legal rule that, on the one hand, defines the secondary legal situation of customs authorities (competence), while simultaneously creating a primary legal situation for someone who is "endowed" with a "privilege" to bear through the customs control. It is neither clear who it is nor in which circumstances such control may be carried out, but it may be suggested that no-one would question the importance of addressing those questions.

3.4. Complex legal situations

The focus shall now be turned to the question of complex legal situations. By necessity, this account will be limited to certain aspects of that issue and shall focus on how selected types of those situations may be expressed by EU provisions and what their interpretation entails.

It is commonplace for the same legal provision to define a primary legal situation of certain addressees and simultaneously determine their secondary situation of competence. A typical example includes those provisions obligating the authorities to perform an institutional act. Consider the following provision[41]:

> The customs authorities shall release the guarantee immediately when the customs debt or liability for other charges is extinguished or can no longer arise.

It defines at least three legal situations: (i) the primary situation of customs authorities by obligating them to release the guarantee; (ii) the secondary situation of the very same authorities authorising them to perform the act of releasing the guarantee; and lastly, (iii) the secondary situation of the subject who issued the guarantee in

[40] Cf. Art. 44 para. 1 of the Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, O.J. L 269 of 10 X 2013, p. 1–101, hereinafter "UCC".

[41] Cf. Art. 98 para. 1 of the UCC.

the first place (as the beneficiary of the obligation imposed on the authorities). On account of the derivative concept of interpretation, this provision is plural by intent, as it expresses the elements of at least two legal rules:

(a) Rule *RO* imposing an obligation upon the customs authorities as its addressee *S*, in the form outlined in example 6, that has a beneficiary (*B*) associated with that obligation.
(b) Competence rule *RC*, in the form outlined in example 8, which has the same subject as both its addressee *S* and authorised subject *A*.

As a matter of fact, similar yet even more complex legal situations arise under the provisions encoding sanctioning rules (their elements). Under competence rule *RC*, the addressee *S* (person subjected to the sanction) is always distinct from the authorised subject *A* empowered to apply the sanction. In addition, the normative obligation in rule *RO* is of a different kind because, by definition, the prescribed behaviour is expected to bring about certain negative consequences for the person subjected to the sanction. For one part, such rules impose an obligation upon the authorities to apply the sanction against the person subjected to it and at the same time they empower the authorities to do so. Furthermore, sanctioning rules create obligations binding upon persons subjected to the sanction, which may consist in tolerating certain acts of the authorities considered as a nuisance or requiring them to do something unpleasant, such as pay a fine or penalty. Since only rarely does EU law stipulate any sanctions, leaving it rather to the Member States to do so, sanctioning rules provide an excellent example of the cross-distribution of rules in legal provisions enacted by institutionally different legislators[42]. As such, sanctioning rules provide a useful demonstration of the syntactical complexities that legal interpretation in today's multi-level legal environment entails.

It follows from this legislative practice that the structure of a typical rule which sanctions a violation of EU law consists primarily of the elements enacted under national laws, save for the element of *circumstances* that includes a reference to the sanctioned rule:

[42] A typical example of how sanctions are dealt with under EU law may be found in Art. 42 para. 1 of the UCC: "Each Member State shall provide for penalties for failure to comply with the customs legislation. Such penalties shall be effective, proportionate and dissuasive".

(3) If addressee *S* violates sanctioned rule of EU law *RU* and the competent authority *A* imposes sanction *D* upon addressee *S*, then addressee *S* shall do *D*.

It is important to notice that the element of *circumstances* consist of a *iunctim* of two components: (i) violation of the sanctioned rule by its addressee who is also the addressee of the sanctioning rule; and (ii) imposition of the sanction upon that addressee by the competent authorities. Examples of sanctioning rules illustrated in example 9 may be encountered in the FCC[43], which abounds in blanket rules. Interpretation of those provisions requires the incomplete element of *circumstances* to be completed based on the provisions enacted by EU law.

3.5. Interpretation of complex legal provisions

Interpretation of EU provisions that define complex legal situations should commence with their separation into distinct normative structures, accompanied by the proper articulation of behaviours ordered by each rule. On many occasions this exercise is nontrivial and may require an in-depth understanding of both the legislative practice and rules of interpretation accepted by the legal community. The guiding principles on how to perform those syntactical operations constitute a key element of the derivative concept of interpretation. Those principles appear adequate and apply to the same or an even higher degree to interpretation of Union law, considering its genuine complexities and syntactic and semantic relations with national laws. The derivative concept may be applied successfully here and arguably developed further, taking into account EU legislative practice. For example, positive commands (imposing obligations) are typically expressed by the modal verb *shall*[44], while prohibitions take the negative form of "may"[45]. Nonetheless, there are many different and not evident ways in which EU provisions express prohibitions, such as in the below example[46]:

[43] Law of 10 IX 1999 – Fiscal Criminal Code (J.L. 2013, item 186), hereinafter "FCC".

[44] For more information see European Commission Directorate-General for Translation, English Style Guide, *A handbook for authors and translators in the European Commission*, August 2011, p. 42, last updated on April 2015, hereinafter "ESG".

[45] Ibidem.

[46] Cf. Art. 7 para. 2 of Council Regulation (EC) No 1346/2000 of 29 V 2000 on insolvency proceedings (OJ L 160, 30 VI 2000, p. 1, as amended).

> The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale […].

Here, the prohibition is expressed indirectly by stating that something shall not constitute grounds for something else. This simply means that the addressee (a contracting party) shall not terminate or rescind an asset sale contract after delivery of the asset on the grounds that the insolvency proceedings have been opened against the seller. Those non-evident ways of expressing obligations or prohibitions in EU law could form the basis for developing new principles of interpretation.

But even as far as "may" is concerned, one should be careful in attributing any meaning to it too quickly. For it is used in EU law for many purposes, such as expressing competence. Furthermore, it can be a mark for modifying provisions which stipulate exceptions either from the scope of application of a rule (if modification relates to the element of *addressee* or *circumstances*) or its scope of regulation (if modification applies to the element of *behaviour*). Modifications include: (i) positive permissions, where they exclude certain categories of objects or subjects from a prohibition; or (ii) negative permissions, where they permit certain subjects not to do something or not do something in relation to some objects[47].

Conclusions

In conclusion, several remarks may be made regarding the considerations presented in this paper. Secondary legal situations in relation to Union law may, in principle, arise for individuals pursuant to the legal rules that impose obligations and thus define the primary situations of: (i) the state and its emanations as set out in example 5 (vertical effect); (ii) institutions of the EU[48]; (iii) private individuals (horizontal effect); (iv) more than one of the foregoing categories of subjects. For the purposes of interpreting Union law, it is crucial to understand that, in principle, any sources of EU law, ranging from the Treaties, through international agreements and ending with secondary sources, may define the secondary legal situations of individuals. Thus as part of inter-

[47] Cf. ESG, p. 43.

[48] Cf. Art. 267 TFEU which defines a secondary legal situation of national courts and tribunals by virtue of a legal rule binding upon the ECJ.

pretation involving EU provisions, it is generally possible to reconstruct rules that have individuals as their beneficiaries or authorised subjects. The same applies to complex legal situations that consist of entitlements and authorisations, regardless of whether they are classified as individual rights or not. By contrast, not every act may be a source of primary legal situations for private individuals (e.g. directives and decisions resembling directives), and by the same token, no secondary situations will arise for any person or entity based on such acts if a benefit or obligation were to be requested from or enforced against private individuals. The same principle applies to any legal situation of sanction against individuals, for no sanctions may arise against them based on the provisions contained in directives (decisions resembling directives).

EU law defines various legal situations of different categories of subjects, including nationals in the Member States. The reason why it is at all possible for EU law to do this is because its provisions express legal rules (their elements) which designate such nationals as their addressees, beneficiaries, authorized or sanctioned subjects. Those rules are reconstructed during the interpretation of Union law. Both the apparatus and methodology framework designed under M. Zieliński's derivative concept of interpretation, as demonstrated in these considerations, may be directly and successfully applied to that end. As it transpires, this concept proves even more helpful in those cases where different syntactic and semantic elements of legal rules are distributed in the legal acts enacted by institutionally independent legislators (cross-distribution). Furthermore, the notion of the plurality of legal provisions developed under that concept provides an explanation and contributes to solving some puzzling questions that EU law has presented one with, including the problem of multiple and implied addressees of legal rules.

O SYTUACJACH PRAWNYCH I WYKŁADNI PRAWA UNII EUROPEJSKIEJ

Streszczenie

Prawo unijne stanowi źródło praw, uprawnień, kompetencji, obowiązków i zobowiązań różnych podmiotów: instytucji unijnych, państw członkowskich oraz podmiotów krajowych. Ponieważ eksplikacja, w jaki sposób prawo unijne to w istocie czyni, nie jest wcale sprawą trywialną, podstawowym celem artykułu jest ustalenie, na rudymentarnym poziomie przepisów i norm prawnych, jak to się dzieje, że podmiotom krajowym przysługiwać mogą prawa i obowiązki w jakiś sposób zakorzenione w prawie unijnym. Jako że udzielenie odpowiedzi na to pytanie zakłada

akceptację pewnej koncepcji wykładni prawa, drugim celem opracowania jest wykazanie, że derywacyjna koncepcja wykładni prawa prof. Macieja Zielińskiego umożliwia eksplikację, a nawet rozwiązanie niektórych problemów ujawniających się w ramach wykładni i stosowania prawa unijnego w państwach członkowskich. Przeprowadzona analiza normatywna wybranych przepisów wykazuje, że prawo unijne wyznacza w istocie pierwotne, pochodne i złożone sytuacje prawne podmiotów krajowych. Przepisy unijne wysłowiają bowiem normy (elementy norm), które czynią podmioty krajowe ich adresatami, beneficjentami lub podmiotami uprawnionymi. W artykule wykazano, że zarówno konceptualizacje, jak i metodologia koncepcji derywacyjnej mogą być z powodzeniem wykorzystane w procesie rekonstrukcji norm prawnych w ramach wykładni prawa unijnego. Koncepcja ta okazuje się przydatna zwłaszcza wówczas, gdy elementy syntaktyczne i semantyczne rekonstruowanej normy są rozczłonkowane krzyżowo między aktami prawnymi ustanowionymi przez instytucjonalnie różnych prawodawców. Okazuje się również, że wypracowane w koncepcji derywacyjnej pojęcie pluralności przepisów przyczynia się do rozwiązania interesujących problemów dotyczących prawa unijnego, jak problem wielości i założonych adresatów norm.

Słowa kluczowe: derywacyjna koncepcja wykładni – prawo Unii Europejskiej – wykładnia prawa UE – interpretacja prawa – sytuacje prawne