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Dear Presidents,

Fellow Judges,

Distinguished Experts and Scholars,

Dear Ladies and Gentlemen,

Thank you for the honour of addressing this esteemed gathering at the VI International Scientific and Practical Conference on "Administrative Justice in Ukraine: Issues of Theory and Practice. Social Rights. Wartime Challenges." As Vice-President of the Supreme Administrative Court of the Slovak Republic, I am delighted to contribute to the discussion, particularly in the context of the essential nucleus of EU social rights and its enforcement.

The devastating conflict in Ukraine has had far-reaching consequences, caused immense human suffering, and challenged the very fabric of society. In times of war, the protection and preservation of social rights become even more crucial, as they play a vital role in securing the well-being and dignity of individuals affected by the conflict. It is hard to even imagine all the difficulties that the Ukrainian government has with ensuring people's social rights during the war. However, it is worth making every effort, including attracting international support, to safeguard social rights, including the right to work, education and health care. I take participation in this event as an opportunity to learn, especially from Ukrainian colleagues, how to manage this extreme situation.

In its modern history, Slovakia has no experience in ensuring social rights during war, so my contribution is also an outline of the current European perspective, which awaits Ukraine in the shortest possible time, as we all wish.

Social rights tend to be described as rights that require state intervention rather than state abstention (as opposed to the fundamental rights and freedoms of the first generation), in order to provide primarily for the individual's material well-being. The Charter of Fundamental Rights of the EU, that was rendered binding with the Treaty on the Functioning of the European Union on December 1st, 2009, enshrines traditional civil rights as well as social and economic rights in statutory form. The purpose of the Charter was not to create new rights, nor to extend the scope of existing rights. The aim was to add visibility to the existing rights in EU law, which derived from the rights embedded in the constitutional traditions common to the Member States.

Compared to the first generation of human rights, such as the right to life, equality before the law, freedom of speech and others, the specific form and conditions for the exercise of second-generation of rights, mainly right to employment, education, healthcare and social security and assistance, are subject to a considerably broader degree of discretion by the legislator, depending mainly on the economic situation of the State or current economic, social or cultural policies. This is particularly so because these rights are demanding in terms of public finances.

This is then fundamentally reflected in the content and scope of these rights. The statutory legislation establishes the content and scope of an individual's social rights and guarantees their exercise. The European Court of Human Rights has stated in this regard that "it considers natural that the margin of appreciation left to the legislator in the implementation of social and economic policy should be sufficiently wide, and the Court will therefore respect the legislator's conception of what constitutes the public interest, unless its judgment is manifestly lacking in a reasonable basis." It should therefore be noted that the margin of appreciation given to the legislature in enacting laws regulating

social rights cannot be understood in absolute terms. Although these fundamental rights by their very nature call for legislation by the State (which will give effect to their content), the State must not, however, interfere with the very essence of these rights or affect other rights enshrined in the Member States constitutions and the Convention for the Protection of Human Rights and Fundamental Freedoms.

The essential nucleus of social rights can be understood either as the essence of that particular social right, but also as a set of rights, which can include those rights that are protected in the Member States of the European Union.

What falls within the essence or nucleus of any given right is a difficult task. The two main methods according to jurisprudence are:

I. linking the nucleus of the right to the dignity of the individual and

II. determining the nucleus on the basis of social consensus.

Pursuant to the first of them, the nucleus is that part of the right which, if violated, also substantially violates the dignity of the individual. For example, a low material hardship allowance that is insufficient to cover the basic necessities of life is a violation of a person's dignity. In terms of the second method, the nucleus is formed by social consensus (obviously excluding extreme views) and represents a certain minimum of this-or-that right. The interpretive significance of human dignity for the determination of the minimum standard of individual fundamental rights is also emphasised for instance by the German Constitutional Court and constitutional courts of the other EU Member States.

In almost all EU countries there is an intangible core of social rights, which cannot be sacrificed due to the limited financial resources. This core is identified in many countries by their constitution, in some of them by case law. Where legal provisions restrict or otherwise affect social rights, the task of balancing between social rights and budgetary needs lies usually with constitutional courts, when it is called upon to assess the constitutionality of the provisions in question. In the case of interference with social rights, the less stringent test of proportionality is usually applied. For the legislator, this entails an increase in the room for manoeuvre in regulating the institutes by which he grants economic, social, and cultural rights their concrete content.

The Constitutional Court of the Slovak Republic standardly applies (see e.g., PL. ÚS 12/2014) in the interpretation and application of social rights a rationality test consisting of 4 steps leading to a conclusion on the constitutionality or unconstitutionality of a law that implements constitutionally guaranteed social rights:

1. defining the purpose and essence of the social right, i.e., certain essential content,
2. an assessment of whether the law affects the very existence of the social right or its actual implementation (essential content). If it does not affect the essential content of the social right, further
3. an assessment of whether the statutory provision pursues a legitimate aim; that is to say, whether it is not an arbitrary and fundamental lowering of the overall standard of fundamental rights, and finally
4. consideration of whether the legal means used to achieve it is reasonable (rational), even if not necessarily the best, most appropriate, most effective, or wisest.

Only if it is found that the law, by its content, interferes with the very essential content of a fundamental right should a proportionality test be applied, which would assess, inter alia, whether the interference with the essential right is justified by the sheer exceptionality of the actual situation which would justify such interference.

On the other hand, if the limitations arise from specific acts or measures, it will be the competent court to decide the individual case.

Allow me to delve deeper into these perspectives and address the rights which could belong to the essential nucleus of the European Union's social rights.

The essential nucleus as a set of rights and individual rights

Article 151 of the Treaty on the Functioning of the European Union provides that the Union and the Member States, while respecting fundamental social rights as set out in the European Social Charter signed by the Member States of the Council of Europe in the 1961, shall aim to promote the employment of workers, to improve living and working conditions so as to achieve harmonisation while maintaining attainment, adequate social protection, social dialogue, dialogue between the social partners, the development of human resources with a view to permanently high levels of employment, and the fight against exclusion from the labour market.

The Treaty on the Functioning of the European Union contains provisions setting out the Union's competences as regards, inter alia, the free movement of workers (Articles 45 to 48), the right of establishment (Articles 49 to 55), social policy (Articles 151 to 161), the promotion of social dialogue (Article 154), including agreements concluded and implemented at Union level (Article 155), equal pay for men and women (Article 157), and contributing to the development of quality education and training (Articles 165 and 166), Union action complementing national policies and promoting cooperation in the field of health (Article 168), economic, social and territorial cohesion (Articles 174 to 178), proposing and monitoring the implementation of the broad economic policy guidelines (Article 121), proposing and reviewing the implementation of the guidelines for employment policies (Article 148) and, more generally, as regards approximation of law (Articles 114 to 117).

In the above-mentioned European Social Charter, the Council of Europe gives the Contracting Parties the option of making only certain rights binding, but the Contracting Parties must adopt at least 6 of the 9 articles that can be considered as the nucleus of the European Social Charter. These are the right to work, the right to organise, the right to collective bargaining, the right of children and adolescents to protection, the right to social security, the right to social and medical assistance, the right of the family to social, legal and economic protection, the right of migrant workers and their families to protection and assistance, and the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on grounds of sex.

In view of the above, the right to work and related rights can be included in the essential nucleus of social rights as a set of rights, which, according to the report of the ACA-EUROPE organization (European association composed of the Court of Justice of the European Union as well as the Councils of State and the Supreme administrative jurisdictions of each of the Members of the European Union), is also protected by the constitution in 85% of the Member States of the European Union. Furthermore, it is the right to social security, which is protected by the constitution in 81% of the Member States of the European Union. Then there is the right to healthcare, which is protected by the constitution of 93% of the Member States of the European Union.

The subject of social rights may be either a natural person or a citizen, or some may also belong to legal persons. As far as the rights belonging to citizens are concerned, in the case of the Member States of the European Union, these do not relate only to citizens of a particular Member State, but, with reference to several decisions of the Court of Justice of the European Union, can be referred to as citizenship of the Union. Thus, in the territory of each Member State, a citizen of another Member State should have the same social rights as a citizen of his or her home State.

In most countries, non-EU citizens can access social rights in some domains, while for example in France, Germany, Spain or also in Slovakia, non-EU citizens can benefit in all areas of social rights.

Enforceability of social rights

The enshrinement of social rights in international treaties, in the constitutions of the individual Member States of the European Union, and in laws would be meaningless if there were no procedural guarantees for the exercise of these rights. It is for the judiciary to ensure compliance with the obligations in the area of citizens' social rights. The protection of fundamental rights (and freedoms) and legally protected interests is primarily entrusted to the competent authorities in the context of administrative proceedings, with subsequent judicial protection in the administrative justice system, which is exercised by the administrative courts, mainly after the exhaustion of remedies in administrative proceedings. Constitutional courts then supplement the system of enforcement of social rights.

The jurisdiction over disputes relating to social rights in the EU Member States usually belongs to administrative courts, in some countries it is combination of administrative courts, ordinary courts or special social or insurance courts. For example, disputes relating to labour protection or social security matters in many cases belongs to ordinary courts, however, in case of public employment jurisdiction falls under administrative courts.

The types of remedies that administrative courts can order for the protection of social rights include the annulment of administrative measures and judgements against the administration. In most countries measures that can be annulled include both organizational measures and specific recognition of social benefits. Administrative courts have often the power to order the administration to pay compensation in a form of unlawfully denied benefits, or its equivalent. However, Slovak administrative courts have the power to annul decision of the public administration if it is deemed to be unlawful, while compensation for any damage resulting from them can only be claimed at a civil court.

For the sake of completeness, mention may also be made of the possibility of referring the matter to the European Commission, which may, under Article 258 of the Treaty on the Functioning of the European Union, initiate infringement proceedings against a Member State and refer the matter to the Court of Justice of the European Union.

Summarising the foregoing, it can be reiterated in conclusion that the margin of discretion afforded to the legislator when adopting laws regulating social rights cannot be understood in absolute terms and that the legislator must respect the essential nucleus of social rights, nor can it adopt legislation which would render social rights merely illusory or interfere with their essence.

We could state that the essential nucleus of social rights is protected transversally homogenous despite the diversity of regulatory and jurisprudential options in the EU Member States. Social rights could by certainly placed among the fundamental rights that contribute to defining a modern notion of European citizenship which will one day also be a citizenship of the people of Ukraine.

Thank you for your attention and please allow me to extend my heartfelt appreciation to the organizers of this conference for providing us with this valuable opportunity to exchange perspectives and collaborate. Let us carry forward the insights gained here today and continue our efforts to ensure a more just and inclusive society for all.

Marián Trenčan

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