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Payment of Canal Dues by Carriers Carrying Out International Overseas Transportation – a Case of Legal Discrimination

Asygnowanie opłat kanałowych przez przewoźników prowadzących międzynarodowy transport morski – zagadnienie dyskryminacji prawnej

ABSTRACT

The article is of a scientific nature and its main goal is to determine whether there is discrimination in the regulatory provisions regarding the payment of canal dues by international overseas carriers. The methodological basis of the research is the use of the comparative approach (comparison of various concepts and provisions regarding the payment of canal dues) and the empirical analysis (study of court practice). The method of the discrimination test is of decisive importance for this paper. The most important conclusions on the discriminatory nature of the regulatory provisions regarding the payment of canal dues by international carriers were formulated due to the use of the discrimination test. It has been proven that the changes in the legislation, which introduced the canal dues for Ukrainian carriers that carry out international overseas transportation, are not discriminatory. It was argued that the discrimination test of the disputed subject and the arguments of its participants should be applied in the process of resolving the dispute regarding the discrimination of legal norms.

Keywords: discrimination; international trade; international law; canal dues; judicial protection

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INTRODUCTION

In international trade, the balance of goods and international market participants (buyers and sellers) plays an important role. However, under the conditions of the worsening food crisis in the countries of Africa and Asia, carriers play an equally important role in the supply market of goods, especially food. International trade is an activity that involves the exchange of goods and services across national borders. International trade is strongly influenced by the harmonization of political, legal, social, and cultural rights owned by respective countries. As it is known, record-high food prices have triggered a global crisis that will drive millions more into extreme poverty, magnifying hunger and malnutrition, while threatening to erase hard-won gains in development. The war in Ukraine, supply chain disruptions, and the continued economic fallout of the COVID-19 pandemic are reversing years of development gains and pushing food prices to all-time highs. Following the start of the war in Ukraine, trade-related policies imposed by countries have surged. The global food crisis has been partially made worse by the growing number of food trade restrictions put in place by countries with a goal thef increasing domestic supply and reducing prices. As of August 11, at least 23 countries have implemented 33 food export bans, and at least seven have implemented 11 export-limiting measures.[1]

Wheat and corn account for almost 30% of all calories or simply all food (in various forms) in the world. Ukraine and Russia together export about 30% of wheat and about 18% of corn in the world. Wheat is the key commodity for global food security. Ukraine alone exports about 10% of wheat and about 16% of corn in the world.

Middle East and North Africa (Egypt, Yemen, Israel, Indonesia, Bangladesh, Ethiopia, Libya, Lebanon, Tunisia, Morocco, Pakistan, Saudi Arabia, and Turkey) are the main buyers of wheat and corn, and the problem of food security is very acute for these countries (overall more than 400 million people globally depend from grain supplies from Ukraine only).[2]

Under these conditions, great hope is placed on sea carriers of various countries, including Ukrainian ones, who carry out the transportation of grain and other food products from Ukraine to the countries of Asia and Africa, risking their lives, ships, and goods, because of the threats of war.

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[1] World Bank, *Food Security Update*, 15.8.2022, https://www.worldbank.org/en/topic/agriculture/brief/food-security-update (access: 6.10.2022).

[2] Kyiv School of Economics, *Russian Invasion in Ukraine Could Threaten Global Food Security and Starve Hundreds of Millions Globally*, 4.3.2022, https://kse.ua/ua/about-the-school/news/russian-invasion-in-ukraine-could-threaten-global-food-security-and-starve-hundreds-of-millions-globally (access: 6.10.2022).

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Obviously, the exporting country should provide favorable conditions for the activities of water transportation companies through its state policy, in particular, its legislation and delegated legislation of state bodies.

However, one of the problems encountered by vessels in international overseas transportation is the introduction of additional dues for sailing through the Danube – Black Sea Canal at the bar part of the Novostambulske (Bystre) mouth, the Bug-Dnipro-Lyman Canal, the Kherson Sea Canal, the Kerch–Yenikale Canal. In particular, canal dues that had not been charged before began to be levied from shipowners, whose ships sail under the Ukrainian flag and carry out transportation to foreign ports. Obviously, this led to an increase in transportation prices and, accordingly, in the cost of goods.

At the same time, not all carriers and ship owners agree with such innovations. They consider these new requirements for canal dues payment introduced by the Ministry of Infrastructure of Ukraine (hereinafter: the Ministry of Infrastructure) to be illegal on the grounds of discrimination. On this basis and because of the reluctance to pay the canal dues, a legal conflict arose in this trade area. Carriers are trying to resolve this in national courts primarily due to their economic interest. At the same time, carriers are trying to defend their canceled privilege in different ways in local administrative courts. Some of them apply to the court with personal demands to declare the canal dues levied from them illegal; others demand to cancel the order of the state body, which introduced a new obligation to pay such dues.

On the one hand, the aggravation of this conflict is facilitated by the entry into force of the decision of the local administrative court, in which the court declared illegal and invalid the Order of the Ministry of Infrastructure from the moment of adoption, which introduced the above obligation (as well as canceled the privilege) regarding the payment of the canal dues.[3] On the other hand, it is also facilitated by the disagreement of the Ministry of Infrastructure with such a court decision and the loss of the expected revenues of the state in connection with the non-payment of the canal dues by the relevant vessels.

This legal conflict arose in Ukraine and formally went beyond the borders of this state due to the need for the development of international trade relations. Therefore, an in-depth analysis of legislation and court practice with the aim of resolving the conflict and improving the mechanism of legal regulation of international transportation. It will also help to regulate the payment of canal dues by vessels engaged in international overseas transportation.

Many works of scientists and practitioners are devoted to the study of issues in this field. In particular, B. De Borger and D. De Bruyne have studied the implications of vertical integration in logistics and transport operations for welfare-optimal

[3] Judgment of the District Administrative Court of the City of Kyiv of 23 July 2020, C-640/3513/20, https://reyestr.court.gov.ua/Review/90942282 (access: 6.10.2022).

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port access charges and hinterland congestion tolls. They showed that, first, vertical integration of terminal operators and transport firms does not affect the optimal congestion toll rule for the hinterland, but it does imply higher optimal port access charges. Second, the government not only has the incentive to promote competition between downstream firms, but it may also be beneficial to approve of vertical mergers in the logistic chain. Third, the government's failure to respond to changes in the industry market structure may have large welfare effects. Fourth, both under separation and integration, optimal port fees may imply subsidies if downstream firms enjoy a high degree of market power.[4]

The subject of M. Rum's research are administrative processes related to loading and unloading cost in terms of a ship's arrival and departure to seaports, typically attributed to elevated levels of cost of labor, handling cost, dwelling time, and port fee, which required to complete the related administrative tasks.[5]

The study by A. Mjelde et al. investigates conditions under which differentiating port fees based on vessels' environmental performance could be an additional driver for cruise-ship owners to invest in green technologies. Their case study on liquefied natural gas (LNG) as fuel for a cruise ship shows that port-based incentives could help reduce emissions to the air and drive uptake of green technologies. Consequently, significantly reduced ship emissions in ports will bring social benefits through reduced risks of loss of life, health, and well-being.[6]

The article of A. Gao and A. Song introduces in detail the research significance of the maritime cost management structure, and specifically investigates the ocean shipping company's transportation cost budget analysis and calculation method. Through the study of the ocean shipping cost budget and dynamic targets, the source of actual value, the five major items of ocean shipping cost (namely, terminal cargo fee, station cargo fee, transit fee, port fee, and canal fee) are specifically defined, and the planning cost occurs. The process analysis chart and corresponding formation of a mathematical analysis model is necessary to establish a cost management evaluation index system for liner transportation enterprises. From the enterprise's strategic point of view, the cost control methods at multiple levels are discussed, and the concept of improving linear transportation cost control is proposed.[7]

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[4] B. De Borger, D. De Bruyne, *Port Activities, Hinterland Congestion, and Optimal Government Policies: The Role of Vertical Integration in Logistic Operations*, "Journal of Transport Economics and Policy" 2011, vol. 45(2), pp. 247–275.

[5] M. Rum, *Cost Efficiency of Sea Freight and Lowering Cost of Consumption Goods*, "IOP Conference Series: Earth and Environmental Science" 2018, vol. 156(1), pp. 1–11.

[6] A. Mjelde, Ø. Endresen, E. Bjørshol, C.W. Gierløff, E. Husby, J. Solheim, N. Mjøs, M.S. Eide, *Differentiating on Port Fees to Accelerate the Green Maritime Transition*, "Marine Pollution Bulletin" 2019, vol. 149.

[7] F. Gao, A. Song, *Fund Management Method of Ocean Shipping Enterprises Based on Cost Control Theory*, "Journal of Coastal Research" 2020, no. 110 (Special Issue), pp. 291–294.

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In the study of D. Widijowati, a number of principles have been formulated and enforced to prevent and resolve disputes arising from international trade, one of which is the principle of non-discrimination. The existence of principle of non-discrimination often cannot be implemented in practice, because it runs contrary to the policies of each country which is to protect its own interests. The results of the assessment conducted revealed that the principle of non-discrimination in international trade cannot be applied directly. Although there is a variety of policies whether committed either by the government or society, which indirectly consider the principle of non-discrimination internationally, the principle of non-discrimination can only be applied if it can support and protect the interests of concerned parties.[8]

R. Baldwin, S. Evenett, and P. Low have examined the ways in which regional trading agreements have become vehicles for reducing discrimination in international trade and the political economy dynamics underlying these developments. They have also elaborated on and explored the merits of potential World Trade Organization initiatives that could channel the evident momentum behind reciprocal, preferential trade negotiations toward reinforcing the principle of non-discrimination in international commercial relations.[9]

However, these and many other research works do not solve the problem identified in this paper, but separately reveal only some of its aspects. In this regard, the purpose of this study is to determine whether there is discrimination in the regulatory provisions regarding the payment of canal dues by international overseas carriers.

RESEARCH METHODS

The methodological basis of the research includes positivism, which involves focusing attention on the study of the provisions of legal acts, including law enforcement bodies; a comparative approach, which contributed to the comparison of different concepts and provisions regarding the payment of the canal dues; empirical analysis, which consisted in the study of court practice. The decisive role in the work is played by the method of the discrimination test, with the help of which the most important conclusions about the discriminatory nature of the regulatory provisions regarding the payment of the canal dues by international carriers were formulated. The work has studied the development (changes) of delegated legislation in the temporal dimension as well as established their impact on international overseas carriers.

[8] D. Widijowati, *Implementation of Non-Discrimination in Respect to Determine the Appropriate Policy for Dealing with International Trade*, "UUM Journal of Legal Studies" 2018, vol. 9, pp. 153–174.

[9] R. Baldwin, S. Evenett, P. Low, *Beyond Tariffs: Multilateralizing Non-Tariff RTA Commitments*, [in:] *Multilateralizing Regionalism*, eds. R. Baldwin, P. Low, Cambridge 2009, pp. 79–141.

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International legal acts, national legislation of Ukraine, delegated legislation, as well as empirical sources (decisions of the European Court of Human Rights [ECtHR] and national courts of Ukraine) became the subject of the research. At the same time, the decisions of the local court and the Court of Appeal, when deciding the issue of the discriminatory nature of the act of the Ministry of Infrastructure, formed the basis of this scientific study.

A general description of the reason for the emergence of a legal conflict as a condition for choosing the methodology of this study is as follows.

The emergence of the conflict is due to the adoption of delegated legislation – the Order of the Ministry of Infrastructure of Ukraine "On the Approval of Amendments to Some Normative Legal Acts of the Ministry of Infrastructure of Ukraine" of 25 June 2019[10] – the norm (namely, subparagraph 2 of paragraph 1) of which became the reason for the generation of two opposing legal positions. On the one hand, international carriers (in particular, vessels that sail under the state flag of Ukraine and carry out international transportation) believe that this regulatory act was adopted in violation of the provisions of the Constitution of Ukraine and the laws of Ukraine, and it also violated the following principles (eligibility criteria): reasonableness, prudence, equality before the law and prevention of unfair discrimination; proportionality on the part of the subject of power (maintaining a balance between adverse consequences for the rights, freedoms, and interests of economic entities carrying out international overseas transportation by vessels under the Ukrainian flag). On the other hand, the Ministry of Infrastructure insists that this order was adopted within the limits of its powers provided for by the Constitution of Ukraine and the laws of Ukraine, and the statement of the opponents about the non-compliance of the contested act with the Economic Code of Ukraine of 16 January 2003,[11] the Laws of Ukraine "On Transport" and "On Protection of Economic Competition" is false and groundless, since upon registration of the contested legal act,[12] the Ministry of Justice of Ukraine carried out a legal examination for compliance with the current legislation.

It should be noted that an attempt to resolve this conflict was the legal position of the courts of the first and second (appellate) instances,[13] according to which the courts recognized that Order No. 459 (in the disputed part) creates for the

[10] No. 459, https://zakon.rada.gov.ua/laws/show/z0827-19#Text (access: 6.10.2022).

[11] No. 436-IV, https://zakon.rada.gov.ua/laws/show/436-15#Text (access: 6.10.2022), hereinafter: the Economic Code.

[12] Resolution of the Cabinet of Ministers of Ukraine "On the Approval of the Regulation on State Registration of Normative Legal Acts of Ministries and Other Executive Authorities" of 28 December 1992, No. 731, https://zakon.rada.gov.ua/laws/show/731-92-%D0%BF#Text (access: 6.10.2022).

[13] Judgment of the District Administrative Court of the City of Kyiv of 23 July 2020, C-640/3513/20; judgment of the Sixth Appellate Administrative Court of 19 April 2021, C-640/3513/20. https://reestr.court.gov.ua/Review/96418647(access: 6.10.2022).

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above-mentioned group of carriers as subjects of foreign economic activity (FEA) unequal conditions for carrying out such activities.

The inequality is explained by the following reasons:

- it does not contribute to the protection of the economic interests of Ukraine and the interests of FEA subjects in the field of overseas transportation,
- it does not encourage competition,
- it violates the principles of legal equality and non-discrimination, as well as the rule of law,
- it does not encourage the export of goods, as it sets additional dues for international transportation,
- it violates the principle of stability of setting taxes and dues (mandatory payments), which is a violation of the provisions of Article 380 (1) of the Economic Code, Article 385 (1) of the Economic Code, and Article 2 of the Law of Ukraine "On Foreign Economic Activity" of 16 April 1991,[14]
- it does not contribute to the strengthening of economic and trade relations with other countries, in particular, EU countries, as it creates an additional tariff burden for vessels under the Ukrainian flag that is engaged in international maritime traffic, which, in turn, increases the cost of transportation and makes Ukrainian goods (products) less competitive on the international market,
- it does not correspond to the Maritime Doctrine of Ukraine, approved by the Cabinet of Ministers of Ukraine in Resolution No. 1307,[15] since the act being appealed contradicts the national interests of Ukraine at sea, since creating discriminatory conditions in carrying out international overseas transportation for Ukrainian ship owners, the state does not contribute to the strengthening of Ukraine's position among the leading maritime states, the development of Ukrainian merchant shipping, as well as the creation and development of national shipping companies and the national merchant fleet,
- it does not create conditions for the revival of a competitive Ukrainian merchant fleet, in particular by providing legislative support to Ukrainian shipping companies,
- it does not contribute to the creation of economic incentives for the registration of vessels under the Ukrainian flag,
- it has a negative impact on the development of port activities as well as on the strengthening of economic and trade relations with other countries,

[14] No. 959-XII, https://zakon.rada.gov.ua/laws/show/959-12#Text (access: 6.10.2022).

[15] Resolution of the Cabinet of Ministers of Ukraine "On the Approval of the Maritime Doctrine of Ukraine for the Period Up to 2035" of 7 October 2009 No. 1307, https://zakon.rada.gov.ua/laws/show/1307-2009-%D0%BF#Text (access: 6.10.2022).

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– it does not ensure the creation of equal conditions for the provision of transport services.

Although the relevant court decision entered into force and canceled the disputed norm, the conflict remains unresolved, as the Ministry of Infrastructure holds firm in its position, and there are still several main legal ways to further defend the interests of the state, including consideration of the dispute in the Supreme Court.

Thus, the issue of discrimination of legal provisions in the field of payment of canal dues by Ukrainian vessels engaged in international transportation became the ideological basis of this work and served as the basis for the research methodology.

RESEARCH AND RESULTS

1. Legal bases for ensuring guarantees of non-discrimination in trade relations

The problem of discrimination is not new in science and practice, which is due to the variety of its characteristics and manifestations, including international relations, international law, and maritime law. However, individual subjective, non-professional use of national legislation quite often raises doubts about the fairness of the lawmaker and the provisions of the legislation, which sometimes leads to violations of the relevant provisions, as well as to public legal disputes.

Providing a legal assessment regarding the presence of discrimination, which is manifested in different legal regimes for the collection of canal dues, namely, regarding the exemption from payment of the canal dues, we proceed with the following.

According to Article 5 of the Economic Code of Ukraine the "constitutional foundations of the legal economic order in Ukraine are, in particular, recognition of all subjects of property rights as equal before the law, economic pluralism, state protection of competition in entrepreneurial activity, prevention of abuse of a monopoly position on the market, unlawful restriction of competition and unfair competition, the definition of competition rules and norms of antimonopoly regulation exclusively by law".

According to Article 6 of the Economic Code, among other things, the general principles of economic management in Ukraine include the limitation of state regulation of economic processes in connection with the need to ensure the social orientation of the economy, and fair competition in entrepreneurship.

As follows from the provisions of the Economic Code, state authorities and local self-government bodies that regulate relations in the economic sphere are prohibited from adopting acts or taking actions that determine the privileged position of economic entities of one or another form of ownership, or put certain

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categories of economic entities in an unequal position or otherwise violate the rules of competition. In case of violation of this requirement, the state authorities, whose powers include control and supervision of compliance with antimonopoly and competition legislation, as well as economic entities may challenge such acts in the manner established by law.[16]

In the economic sphere, including the sphere of trade and transportation, the law defines such manifestations of discrimination of economic entities by authorities as "the prohibition of the creation of new enterprises or other organizational forms of business in any sphere of economic activity, as well as the establishment of restrictions on the implementation of certain types of economic activity or the production of certain types of goods in order to limit competition; forcing economic entities to prioritize contracts, selling goods to certain consumers, or joining business organizations and other associations; making decisions about the centralized distribution of goods, which leads to a monopoly position in the market; establishing a ban on the sale of goods from one region of Ukraine to another; providing individual entrepreneurs with tax and other benefits that put them in a privileged position compared to other economic entities, which leads to the monopolization of the market of a certain product; restriction of the rights of economic entities regarding the purchase and sale of goods; establishment of prohibitions or restrictions regarding individual economic entities or groups of entrepreneurs".[17]

The principle of non-discrimination is recognized as a universal (general) principle that applies to all current legislation of Ukraine. It should be considered as a principle that has an "open" nature and is subject to application in cases of restrictions on the recognition, implementation, or use of any rights and freedoms in any form if such restrictions are based on discriminatory grounds (certain characteristics).

The principle of equality (or equality as the basis of the legislation of Ukraine), which is enshrined in numerous laws or delegated legislations, should be interpreted as a requirement of equal treatment in the same cases and unequal treatment in different situations, and a prohibition of discrimination. In case of non-compliance with these requirements, the corresponding situation acts as discrimination, as it is a violation of the principle of equality due to the presence of a certain characteristic of a person (belonging to a certain protected group). Such a recommendation is confirmed by international and European standards in the field of prohibition and countermeasures against discrimination, which is recognized by Ukraine and requires their observance, protection, and promotion of implementation by the state.

The standards (principles, recommendations, rules, criteria) recognized by the progressive international community in the field of justice are contained in various

[16] Article 25 (2) of the Economic Code.
[17] Article 31 (1) of the Economic Code.

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legal documents of different levels, namely global or European ones. They can be both obligatory and optional for Ukraine. In accordance with Article 9 of the Constitution of Ukraine, acts of the United Nations, in particular, the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention), are part of national Ukrainian legislation and are subject to obligatory exercising.[18]

The Convention and the practice of the ECtHR play a leading role in the mechanism of effective countermeasures against discrimination in relation to fundamental rights and freedoms. The Convention was signed by Ukraine on 9 November 1995, ratified on 17 July 1997, and entered into force on 11 September 1997. It does not literally establish the principle of equality of human rights, but ensures equality precisely due to the prohibition of discrimination in its Article 14 "Prohibition of Discrimination", which provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".[19] This provision contains a number of features that determine the scope and nature of the state's obligations to combat discrimination under the European Convention on Human Rights (ECHR), which should also be taken into account when applying it at the national level – it does not create an additional right, but complements the already guaranteed ECHR rights, does not have an independent character.

An important step on the way to establish the independent nature of the principle of discrimination was the adoption of Protocol No. 12 to the Convention, which was opened for signing on 4 November 2000, and ratified by Ukraine by the Law No. 3435-IV of 9 February 2006. Article 1 of Protocol No. 12 provides for a general prohibition of discrimination: "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1".

Protocol No. 12 prohibits discrimination in the "exercise of any right provided for by law" and therefore has a wider scope than Article 14 of the Convention, which is extended only to the rights specified in the ECHR.

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[18] *European and International Standards in the Field of Justice*, ed. Yu. Zemlytska, Kyiv 2015, p. 10.

[19] See Law of Ukraine "On Ratified of Convention on the Protection of Human Rights and Fundamental Freedoms (with Protocols) (European Convention on Human Rights)" of 17 July 1997, No. 475/97-VR, https://zakon.rada.gov.ua/laws/show/995_004#Text (access: 6.10.2022).

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Therefore, the application of Article 14 of the Convention is possible only in a certain situation related to the rights guaranteed by Articles 2–13 of the Convention. At the same time, violation of the right itself is not required; Protocol No. 12 concerns the prohibition of discrimination in the exercise of any right provided for by national legislation, which significantly expands its scope.

The term "discrimination" was also used by the Constitutional Court of Ukraine in the process of making decisions. Their analysis gives grounds for asserting that the approach, which is used by the Constitutional Court of Ukraine in its decisions is similar to the ECtHR: "(…) the purpose of establishing certain differences (requirements) in legal status shall be substantial, and the differences (requirements) pursuing such a purpose shall correspond to the constitutional provisions, be objectively justified, reasonable and fair. Otherwise, the establishment of restrictions would mean discrimination".[20]

According to the definition of Article 1 (1) (2) of the Law of Ukraine "On the Principles of Preventing and Countering Discrimination in Ukraine" of 6 September 2012,[21] discrimination is "a situation in which a person and/or a group of persons based on their race, skin color, political, religious and other beliefs, gender, age, disability, ethnic and social origin, citizenship, family and property status, place of residence, language or other characteristics that were, are and may be valid or assumed, is subject to restrictions in recognition, implementation or the use of rights and freedoms in any form established by this Law, except when a such restriction has a legitimate, objectively justified goal with appropriate and necessary methods for its achievement".

It should be added that Law No. 5207-VI distinguishes between direct and indirect discrimination. Direct discrimination is a situation in which a person and/or a group of persons, based on their certain characteristics, are treated less favorably than another person and/or a group of persons in a similar situation, except when such treatment has a legitimate, objectively justified goal with appropriate and necessary methods for its achievement.

It is known that Ukrainian courts are obliged to apply the practice of the ECtHR as a source of law when considering cases.[22]

In its decisions, the ECtHR formed characteristics of direct discrimination. In its practice, the ECtHR established that for the purposes of Article 14 of the Convention (that is, regarding the issue of discrimination), there should be a differ-

[20] Judgment of the Constitutional Court of Ukraine of 7 July 2004, C-14-rp/2004, https://zakon.rada.gov.ua/laws/show/v014p710-04#Text (access: 6.10.2022), subparagraph 7 of item 4.1 of the motivational part.

[21] No. 5207-VI, https://zakon.rada.gov.ua/laws/show/5207-17#Text (access: 6.10.2022).

[22] Article 17 (1) of the Law of Ukraine "On the Execution of Decisions and Application of the Practice of the European Court of Human Rights" of 23 February 2006, No. 3477-IV, https://zakon.rada.gov.ua/laws/show/3477-15#Text (access: 6.10.2022).

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ence in the treatment of persons in a relatively similar situation: "(b) 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate goal or if there is no reasonable relationship between the means employed and the aim sought to be realised".[23] "A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment".[24]

Thus, direct discrimination is associated with a difference in treatment of persons who are in the same situation, when exercising one or another right, when such a difference does not pursue a legitimate purpose and does not ensure reasonable proportionality of the measures taken and the purpose set.

Indirect discrimination is a situation in which, as a result of the implementation or application of formally neutral legal norms, evaluation criteria, rules, requirements, or practices for a person and/or a group of persons, due to their certain characteristics, there are less favorable conditions or a situation compared to other persons and/or groups of persons, except for cases when their implementation or application has a legitimate, objectively justified goal with appropriate and necessary methods for its achievement which are.[25]

In the theory of international law, indirect discrimination is usually defined as a situation where two persons in different situations are treated equally, and this leads to a particularly unfavorable situation for one of them. This type of discrimination is permissible when the criterion or provision is objectively justified by a legitimate goal, and the means to achieve it are appropriate and necessary (the so-called "rational basis test" in American law, the proportionality test in European law), which has received the greatest development in the German legal doctrine and in the judicial practice of the Federal Constitutional Court of Germany; in a broad sense that is the principle of legal rationality.[26]

The ECtHR's "classic" approach to the issue of indirect discrimination is set out in the Court's decision in the case *Thlimmenos v. Greece* of 6 April 2000: "The

[23] Judgment of the ECtHR of 13 November 2007 in case *D.H. and others v. The Czech Republic*, application no. 57325/00, paragraph 60.

[24] Judgment of the ECtHR of 12 April 2006 in case *Stec and others v. The United Kingdom*, applications nos. 65731/01 and 65900/01, paragraph 51.

[25] Article 1 (1) of the Law of Ukraine No. 5207-VI.

[26] K. Trykhlib, *Zasada niedyskryminacji w prawie europejskim*, "Przegląd Prawa Konstytucyjnego" 2020, vol. 54(2), p. 294.

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Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification (…). However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".[27]

Therefore, the Law of Ukraine "On the Principles of Prevention and Counteraction of Discrimination in Ukraine" contains an official definition of "indirect discrimination", which today fully complies with European standards, which makes it necessary to interpret this concept using the appropriate practice of the ECtHR when considering this category of cases.

In this case, discrimination is associated with the same treatment of persons who are in a different situation, in the exercise of this or that right or freedom, when such equal treatment does not pursue a legitimate goal and does not ensure reasonable proportionality of the measures taken and the goal set.

The expanded interpretation of Article 14 of the Convention indicates the recognition of the Convention's obligation of states to treat differently persons in different situations.

Regardless of which definition of discrimination is taken as a basis, in both cases, it involves the category of "reasonableness", which, first of all, means that the court, based on the circumstances of the case, assesses whether this or that measure was proportionate to the legitimate goal pursued.

Protection from discrimination is subject to both natural persons, namely citizens of the country (the decision of the ECtHR in the case *Inze v. Austria* of 28 October 1987, application no. 8695/79) or foreigners (the decision in the case *Abdulaziz, Cabales and Balkandali v. the United Kingdom* of 28 May 1985, application no. 9214/80[28]), as well as groups of natural persons (decision in the case *Ireland v. the United Kingdom* of 18 January 1978, application no. 5310/71) or legal entities (decision of the ECtHR in the case *Lithgow and others v. the United Kingdom* of 8 July 1986, application no. 9006/80).[29]

The standard of the principle of non-discrimination (or the so-called "discrimination test") has been consistently developed by the ECtHR since its first cases

[27] Judgment of the ECtHR of 6 April 2000 in case *Thlimmenos v. Greece*, application no. 34369/97, paragraph 44.

[28] Judgment of the ECtHR of 28 May 1985 in case *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, applications nos. 9214/80, 9473/81, 9474/81.

[29] Judgment of the ECtHR of 24 June 1986 in case *Lithgow and others v. The United Kingdom*, application no. 9006/80.

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dealing with the prohibition of discrimination. "For the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (…). As in relation to the means for giving effect to the right of property, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations permit a different treatment in law (…)".[30]

2. Legal prerequisites for the emergence of a dispute about discrimination

Considering the problem of discrimination of the norms that became the subject of the conflict, it should be noted that the manner for the collection of port dues and the rates of port dues in Ukraine is established by the Procedure for the Collection and Rates of Port Dues (hereinafter: the Procedure), approved by the Order of the Ministry of Infrastructure of Ukraine "On Port Dues" of 27 May 2013.[31]

In accordance with subparagraph 2 of item 3.5 of section III of the Procedure, which was valid until 25 June 2019, "vessels that, according to the measurement certificate, have a draft of no more than 4 meters with a full load, sail under the state flag of Ukraine on inland waterways within the territory of Ukraine and are assigned to vessels of inland or mixed navigation, according to the classification certificate issued by the classification society, are exempted from paying the canal dues".

However, on 25 June 2019, the Ministry of Infrastructure issued Order No. 459, in accordance with subparagraph 2 of item 1 of which, subparagraph 2 of item 3.5 of section III of the Procedure is set out in the following (new) version: "Vessels that, according to the measurement certificate, have a draft of no more than 4 meters with a full load, are engaged in cabotage and are assigned to vessels of inland or mixed navigation, according to the classification certificate issued by the classification society, are exempted from paying the canal dues".

There have been some changes, the results of which, compared to the previous version, are presented in Table 1.

[30] Judgment of the ECtHR of 21 February 1986 in case *James and others v. The United Kingdom*, application no. 8793/79, paragraph 72.

[31] No. 316, https://zakon.rada.gov.ua/laws/show/z0930-13#Text (access: 6.10.2022).

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Table 1. Comparative table of paragraph 2 of item 3.5 of section III of the Procedure (current and repealed)

No.	Subparagraph 2 of item 3.5 of section III of the Procedure (valid until 25 June 2019)	Subparagraph 2 of item 3.5 of section III of the Procedure (valid after 25 June 2019)
Vessels		
1	according to the measurement certificate, have a draft of no more than 4 meters with a full load	according to the measurement certificate, have a draft of no more than 4 meters with a full load
2	sail under the state flag of Ukraine	are engaged in cabotage: sail under the state flag of Ukraine sail under the foreign flag carry out transportation between ports of Ukraine
3	sail on inland waterways within the territory of Ukraine	
4	are assigned to vessels of inland or mixed navigation according to the classification certificate	are assigned to vessels of inland or mixed navigation according to the classification certificate

Source: own elaboration.

The comparative analysis has shown that, on the one hand, only vessels that meet all of the above characteristics at the same time are/were exempted from paying the canal dues; on the other hand, there are changes in the approach of the Ministry of Infrastructure in determining the characteristics of the beneficiary and the characteristics differ.

Currently, one of the new conditions for a vessel to receive the specified benefit is to carry out cabotage.

In accordance with Article 132 of the Merchant Shipping Code of Ukraine of 23 May 1995,[32] cabotage transportation is transportation between ports of Ukraine that is carried out by vessels sailing under the state flag of Ukraine, as well as by vessels sailing under a foreign flag (except for ships sailing under the flag of the aggressor state and ships whose owner or shipowner or participants [shareholders, members] or ultimate beneficiaries of owners or shipowners are citizens of a state recognized by Ukraine as an aggressor state or an occupying state, legal entities registered on the territory of the state recognized by Ukraine as an aggressor state or an occupying state, natural persons and legal entities against whom special economic and other restrictive measures [sanctions] have been applied in accordance with the Law of Ukraine "On Sanctions").

According to Article 133 of the Merchant Shipping Code, under the contract of carriage by sea, the carrier or the charterer shall undertake to transport the cargo entrusted to him by the consignor from the port of departure to the port of destination, and hand it over to the person authorized to receive the cargo (consignee),

[32] No. 176/95-VR, https://zakon.rada.gov.ua/laws/show/176/95-%D0%B2%D1%80#Text (access: 6.10.2022), hereinafter: the Merchant Shipping Code.

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and the consignor or charterer undertakes to pay established fee (freight) for the transportation.

Therefore, the main feature for determining the type of transportation is the port of departure and the port of destination, which are defined in the contract of carriage by sea and the transport document.[33]

As it followed from subparagraph 2 of item 3.5 of section III of the Procedure (valid until 25 June 2019), one of the conditions for a vessel to receive a benefit was navigation on inland waterways within the territory of Ukraine.

Canals are navigable inland waterways of general use located within the territory of Ukraine. Therefore, navigation on inland waterways within the territory of Ukraine means the actual movement of a vessel on a navigable inland waterway without any reference to the port of departure or destination. This proves that it is necessary to distinguish between the concepts of "cabotage transportation" and "navigation on inland waterways within the territory of Ukraine".[34]

Thus, it can be concluded that, on the one hand, the lawmaker has expanded the list of economic entities that are exempted from paying the canal dues (by including vessels sailing under a foreign flag), on the other hand, the approach to the establishment of a benefit has been changed (the basis for establishing a benefit is the relation of the vessel to the port of departure or destination and not the actual movement of the vessel through a navigable inland waterway).

Therefore, vessels that are registered under the state flag of Ukraine and recorded in the State Ship Register of Ukraine, and carrying out transportation on the Dnipro River and the Danube River with access to the coastal areas of the seas or between the river ports of Ukraine and the ports of other states in foreign trade are not exempted from paying the canal dues (according to the new version of subparagraph 2 of item 3.5 of section III of the Procedure).

In such a situation, according to many carriers, there was an unjustified impairment of the rights of vessels registered under the state flag of Ukraine and carrying out transportation through the internal canals of Ukraine for the transportation of goods to foreign ports (international overseas transportation) by canceling their privilege in paying the canal dues, and therefore, comparing their position with other Ukrainian vessels that carry out transportation only in internal waters (between the ports of Ukraine), discrimination takes place.

As K. Trykhlib reasonably argues in her work, in order to qualify a certain activity as discrimination, it seems legitimate to establish, firstly, whether there is differentiation as such, and, secondly, whether this differentiation can be rationally

[33] Judgment of the Higher Administrative Court of Ukraine of 9 March 2017, C-826/23214/15, https://reyestr.court.gov.ua/Review/65348871 (access: 6.10.2022).

[34] *Ibidem.*

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justified.[35] Thus, we can distinguish three levels of judicial control: strict control, under which differentiation is justified only when it is necessary to promote the public interest; the so-called rational basis test, when the differentiation must be rationally related to a legitimate purpose; and the test of indirect control, which is applied to discriminations that do not require stricter control but require more detailed testing compared to the rational basis test.

Based on the approaches of the ECtHR, consideration of court cases and disputes related to discrimination should involve a consistent resolution of the following issues (taking the "discrimination test"):[36]

1. Is there a difference in behavior?

Discrimination is based on a difference in attitude towards an individual (group of individuals) or in treating him. Accordingly, the earliest feature of direct discrimination is evidence of unfavorable attitude or treatment. Unfavorable treatment is important for establishing the fact of discrimination, if it is unfavorable for one person compared to another person in a similar situation. It is necessary to find a "sample for comparison" (comparator), that is, a person who is essentially in similar conditions to the person who complains of discrimination, that is, to conduct a "comparability test" in the submitted complaint. The main difference between them should be "protected characteristics" (personal characteristics). The list of "protected characteristics" is not exhaustive, but only indicative. This conclusion confirms the presence of the phrase "or on other grounds" in the "anti-discrimination provisions".

Therefore, the presence of a difference in the behavior compared to other persons who are in an analogical or similar situation ("comparability test"). This element requires proof that:

- the treatment of the applicant is significantly different and less favorable than the treatment of others,
- the basis for discrimination is a personal characteristic, quality, or status of the applicant (protected characteristic), which belongs to the prohibited grounds of discrimination (gender, age, race, language, religion, etc.),
- others, with whom the applicant compares himself, are in a similar situation.

2. Does the difference in treatment have an objective and reasonable justification? Does the difference in behavior pursue a lawful (legitimate) goal? Are the measures used proportionate to achieving this legitimate goal?

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[35] K. Trykhlib, *op. cit.*, p. 295.

[36] G. Khristova, *Issues of Prohibition and Counters of Discrimination*, [in:] *Methodological Recommendations for Lawyers*, Strasbourg 2015, https://rm.coe.int/16803040d8 (access: 6.10.2022), p. 24; judgment of the ECtHR of 28 November 1984 in case *Rasmussen v. Denmark*, application no. 8777/79.

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Such a distinction is not justified. The principle of equality is violated if there is no "reasonable and objective" justification of the distinction ("justification test"). The presence of such a justification should be assessed in view of the goals and impact of the measure under consideration, taking into account the principles that prevail in democratic societies, first of all, and the principle of proportionality ("proportionality test").

3. Does the difference in behavior go beyond the state's discretion?

Within this test, for the purposes of our study, it is considered necessary, first of all, to define a comparator.

Based on the analysis of the provisions of the legislation, business entities that carry out transportation by ships, which in particular correspond to such common features as: a) according to the measurement, the certificate has a draft of no more than 4 meters with a full load; b) are referred according to the classification certificate issued by the classification society to inland or mixed navigation vessels, should be divided into the following main classification groups:

1) economic entities with vessels sailing under the state flag of Ukraine on inland waterways within the territory of Ukraine (carrying out transportation between ports of Ukraine – cabotage transportation),
2) economic entities with ships sailing under a foreign flag on inland waterways within the territory of Ukraine (carrying out transportation between ports of Ukraine – cabotage transportation),
3) economic entities with vessels sailing under the state flag of Ukraine on internal and external waterways (carrying out transportation between ports of Ukraine and foreign ports – international transportation),
4) economic entities with vessels sailing under a foreign flag on internal and external waterways (carrying out transportation between ports of Ukraine and foreign ports – international transportation).

A comparison of the entities of the given list of groups according to the legal regime of economic activity, in particular according to the legislation on foreign economic activity, gives reasons to group them into two higher-level groups, namely (at the same time, such groups include vessels that sail under the state flag of Ukraine, as well as vessels sailing under a foreign flag):

1) economic entities with vessels sailing on inland waterways within the territory of Ukraine (carrying out transportation between ports of Ukraine – cabotage transportation) – entities of inland waterway transportation,
2) economic entities with vessels sailing on internal and external waterways (carrying out transportation between ports of Ukraine and foreign ports – international transportation) – entities of foreign economic activity.

Such a division is obvious, taking into account the requirements of the Economic Code and the Law of Ukraine No. 959-XII. Accordingly, for subjects of these two groups, the state establishes special mechanisms of legal regulation of

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their activities, taking into account, in particular, the requirements of international legislation, international treaties, etc.

Based on the provisions of Article 2 of the Law No. 959-XII (which defines the principles of legal equality and non-discrimination, which consists in the equality before the law of all subjects of foreign economic activity, regardless of the forms of ownership, including the state, in the implementation of foreign economic activity; prohibition any actions of the state, other than those provided for by this Law, the result of which is the restriction of rights and discrimination of subjects of foreign economic activity, as well as foreign subjects of economic activity based on forms of ownership, location and other characteristics; the inadmissibility of restrictive activity on the part of any which of its subjects, except for the cases provided for by this Law; the prohibition of the application of delegated legislation and acts of management of local bodies, which in any way create for subjects of foreign economic activity conditions less favorable than those established by the laws of Ukraine), and Article 385 of the Economic Code (regarding the principles of taxation of subjects of foreign economic activity, in particular, equality of subjects of foreign economic activity when setting tax rates), the approach of the Ministry of Infrastructure when adopting Order No. 459 of 25 June 2019, in particular subparagraph 2 of paragraph 1, which is set out in the new edition, appears to be quite logically consistent and justified subparagraph 2 of item 3.5 of section III of the Procedure, approved by Order No. 316 of 27 May 2013.

In this way, the Ministry of Infrastructure based on the demarcation of the main purpose and legal nature of transportation (delivery of goods to a foreign port or from a foreign port to a Ukrainian port – international transportation) and establishing the same conditions for the payment of cannel dues for similar vessels on comparative grounds (economic entities), eliminated the discrimination based on residency that existed until 13 August 2019. At the same time, the new version actually added to the number of beneficiaries, that should pay such dues, vessels sailing under a foreign flag on inland waterways within the territory of Ukraine (carrying out transportation between ports of Ukraine that is cabotage transportation), which, according to the prescriptions of the previous edition, paid such dues; at the same time, vessels sailing under the state flag of Ukraine on internal and external waterways (carrying out transportation between ports of Ukraine and foreign ports – international transportation) were excluded from the number of beneficiaries of canal dues, being equated with foreign vessels that carry out international transportation and that paid canal dues and before the new edition of the specified norm.

Therefore, when verifying the fact of violation of the entrepreneurial rights of the party to the dispute on the basis of discrimination, a "comparison sample" (comparator) should identify business entities with ships sailing under a foreign flag on internal and external waterways (carrying out transportation between ports of Ukraine and foreign ports that is international transportation).

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Thus, it seems erroneous to compare the initiator of the dispute on the basis of residency with vessels sailing under the state flag of Ukraine on inland waterways within the territory of Ukraine (carrying out transportation between ports of Ukraine that is cabotage transportation), since the latter, unlike the initiator of the dispute, have another legal status in the field of transportation, with their characteristic restrictions on the implementation of their activities, in particular: territorial, circle of service customers, restrictions on the type of cargo, type and value of contracts (non-international, currency restrictions, etc.).

DISCUSSION AND CONCLUSIONS

The introduction of a new approach by the lawmaker to the establishment of benefits for the payment of canal dues corresponds to the goal of developing the domestic market of transport services by waterways, stimulating the attraction of foreign investors, capital and carriers, creating a competitive environment as an alternative to other types of transport (road, rail, air). At the same time, the international exploitation (through international transportation) of the inland waterways of Ukraine at the stage of restoration and development of the inland waterway transportation market is an objectively necessary public need, in particular in the form of dues for the purpose of financing the development of water transport infrastructure according to international standards (that means, the standards which are expected and wanted by carriers and customers of foreign countries and Ukraine).

The conducted analysis gives grounds to conclude that the subject of the legal conflict under the research, namely the provisions of subparagraph 2 of paragraph 1 of the Order No. 459 of 25 June 2019, which regulate the establishment of benefits for the payment of channel dues to vessels under the Ukrainian flag engaged in international sea transportation, cannot be considered discriminatory.

The results of the study prove that the process of resolving the dispute regarding the discrimination of legal norms should involve a discrimination test of the disputed subject and the arguments of its participants. Such a test is usually not taken into account by the courts or the conflicting parties. This gives reason to question the correctness of the legal positions and decisions of the courts of the first and appellate instances in resolving the dispute regarding the discriminatory nature of the norms on the collection of canal dues from Ukrainian vessels engaged in international transportation and indicates the appropriateness of their revision (with subsequent cancellation) with subsequent restoration of the canceled norms of the Order No. 459 of 25 June 2019.

This study has both practical and theoretical significance. It can serve as scientifically based material for the development and improvement of regulatory acts in the field of trade, in particular at the stage of conducting an examination of norms

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for discrimination; for the further resolution of the legal conflict regarding the payment of the canal dues by vessels that carry out international transportation; as well as for conducting further scientific research in the field of international trade.

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ABSTRAKT

Artykuł ma charakter badawczy, a jego celem jest określenie występowania zjawiska dyskryminacji w przepisach prawnych dotyczących uiszczania opłat kanałowych przez morskich przewoźników międzynarodowych. Podstawę metodologiczną badań stanowi zastosowanie podejścia porównawczego (porównanie różnych koncepcji i regulacji dotyczących rozliczania opłat kanałowych) oraz analizy empirycznej (badanie praktyki sądowej). Decydujące znaczenie dla opracowania ma metoda testu dyskryminacji. Najważniejsze wnioski na temat dyskryminacyjnego charakteru przepisów prawnych dotyczących uiszczania opłat kanałowych przez przewoźników międzynarodowych zostały sformułowane dzięki przeprowadzeniu testu dyskryminacji. Dowiedziono, że zmiany w prawie, które wprowadziły opłaty kanałowe dla przewoźników ukraińskich prowadzących międzynarodowy transport morski, nie mają charakteru dyskryminacyjnego. Podniesiono, że test dyskryminacji użyty w stosunku do danej kwestii spornej oraz argumentację uczestników można wykorzystywać w procesie rozstrzygania sporów na tle dyskryminacyjnych regulacji prawnych.

Słowa kluczowe: dyskryminacja; handel międzynarodowy; prawo międzynarodowe; opłaty kanałowe; ochrona sądowa