ПУБЛІЧНЕ ПРАВО

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DESHKO Liudmyla,
Doctor of Law, associate professor, Head of the Department of International Public Law
of the Kyiv National University of Trade and Economics

THE PRINCIPLE OF «DE MINIMIS NON CURAT PRAETOR» IN INTERNATIONAL LAW

The new condition, introduced by the European Court of Human Rights, is considered, according to which the Court uses the principle of «de minimis non curat praetor». The content of the criteria for assessing the availability or absence of significant harm, inflicted on individuals and legal entities, who apply to the European Court of Human Rights, has been examined.

Keywords: Human Rights, European Court of Human Rights, European Commission on Human Rights, de minimis, de minimis non curat praetor.

Дешко Л. Принцип «de minimis non curat praetor» в международном праве. *Рассмотрено новое условие, введенное Европейским Судом по правам человека, в соответствии с которым Суд при рассмотрении дел не занимается мелочами (de minimis non curat praetor). Исследовано содержательное наполнение критериев оценки наличия или отсутствия существенного вреда, нанесенного физическим и юридическим лицам, которые обращаются в Европейский суд по правам человека.*

Ключевые слова: права человека, Европейский суд по правам человека, Европейская Комиссия по правам человека, *de minimis, de minimis non curat praetor*.

Background. The principle «de minimis non curat praetor» has been known since the times of ancient Rome. However, by 01.06.2010, the concept of «de minimis» was formally absent in texts of international documents, although it was systematically mentioned in special opinions of the members of the European Commission on Human Rights, for example, «Eyoum-Priso vs. France», «HFK-F. vs. Germany», «Lechesne vs. France», judges of the European Court of Human Rights, let's say, «Dudgeon vs. U.K.», «O'Halloran and Francis vs. U.K.», «Micallef vs. Malta» as well as in

objections submitted to the European Court of Human Rights by the respondent states, for example, in «Koumoutsea and others vs. Greece» [1]. The practice of the European Court of Human Rights (hereinafter – the Court) shows that since 1972 the Court itself has been veiled in applying this principle, for example, in the case of «X. vs. U.K.» of 05.11.1981 [2].

The increasing need for international courts, in particular the need for the European Court of Human Rights and the Committee of Ministers of the European Council to enable international courts to continue to play their leading role in protecting human rights raised the issue of the need and expediency of changing the international legal mechanism of access to the courts. As a matter of urgency, the European Court of Human Rights has faced this issue considering the steady increase in number of applications filed with the Court [3]. On 13.05.2004, the member states of the European Council signed Protocol № 14 to the Convention, which entered into force on 01.06.2010 [4]. In accordance with the amendments made to it by the Convention [5], the Court declares inadmissible any individual application filed under Article 34 if it considers that the applicant has not suffered material damage. On 26–27 of April 2011 the High-Level Conference of the States-members of the European Council noting with concern the continued increase in number of applications filed with the Court, called on the Court to give full effect to the new admissibility of cases in accordance with the principle that the Court does not deal with trifles (de minimis non curat praetor) [6].

«Substantial damage» is a complex abstract concept. From the case the Court formulates the legal position (s) on the interpretation of this convention. At the same time, the very use by the Court of the principle of «de minimis non curat praetor» and the list and content of the de minimis criteria as a new condition for the admissibility of an individual statement by the European Court of Human Rights is causing heated debate among judges, governments of the member States of the European Council, lawyers and experts.

This article is a continuation of the discussion initiated by the author for the first time in the legal science of the debate on the principle of «de minimis non curat praetor» and on the list and content of the criteria for assessing the existence or absence of material damage suffered by the applicant before the European Court of Human Rights [7].

Analysis of recent researches and publications. The introduction of a new condition for the admissibility of an application to the Court, «the existence of material damage to which the applicant suffered» deepened former discourses of the scientists of the constitutionalists and the individualists with respect to the principle of «de minimis non curat praetor» (researchers: J. Gerards, L. Glas [8], D. Gudyuma [9], N. Sevostyanova [10], N. Vogiatzis [11] and others), and also gave impetus to the intensification of the discussions of scientists about the role of this new condition in the international legal mechanism of access to the Court, as well as on the general criteria for

assessing (measuring) its availability or absence (researchers: D. Shelton [12], B. Raine, E. Wicks, C. Ovey [13] and others).

The **aim** of the article is to determine the role and place of the principle of «de minimis non curat praetor» in international law.

Materials and methods. The normative basis of the study is international treaties, law-making decisions of the European Court of Human Rights. The empirical basis of the study is the materials of the court practice, official statistics on the subject. The methodological basis of the research was the general methods of scientific knowledge as well as those used in legal science: methods of analysis and synthesis, formal-logical, comparative legal, statistical, etc. The statistical method was used to generalize the practice of the European Court of Human Rights.

Results. In accordance with the amendments made to the Convention for the Protection of Human Rights and Fundamental Freedoms by the Protocol № 14 of 13.05.2004 the Court declares inadmissible any individual application filed under Article 34 if it considers that the applicant has not suffered material damage, if only the respect for human rights guaranteed by the Convention and the thereto protocols does not require the consideration of the application on the merits. The introduction of this new condition for the admissibility of an individual statement by the European Court of Human Rights was the result of a compromise between constitutionalists and individualists [14].

According to the position of the constitutionalists, which was not only the bulk of the judges of the Court, but the majority of the members of the Committee of Ministers of the Council of Europe as well, the Court must has special powers to reject cases that do not overlook important issues under the Convention. Constitutionalists are opposed by supporters of so-called individual justice or «individualists». They consider «substantial harm» and the principle of «de minimis non curat praetor» a barrier to filing complaints to the Court by individuals or legal entities, and underlines that the legality of the European Court of Human Rights for individuals is at the heart of judicial protection [15]. Nikos Vogiatzis argues that «the admissibility criterion: undermines direct access to justice at the international level; affects the right of individual petition to the Strasbourg Court; constitutes a misunderstanding of the subsidiarity principle within the Convention machinery» [11]. Janneke Y. Gerards', Lize R. Glas' scientific researches explores two approaches to the notion of access to justice both generally and for the Convention system specifically. The main argument of the researches is to show the value of taking a substantive approach to access to justice in the Convention system [8]. N. Sevostyanova in the dissertation entitled «Appeal to the European Court of Human Rights as the realization of the right to access to justice» warns that «... in the presence of unconditional positive decisions, it is necessary to recognize that there is a probability of lowering the level of access to the ECHR ... so that the concept of «substantial harm» is a very abstract category. Due to the lack of normative

specification, this could be the reason for the rejection of a large number of individual statements, which in essence are violations of the Convention and need to be considered by the Court» [10].

At the same time there was no decrease in the level of access to the European Court of Human Rights because of their rejection on the criterion of absence of «significant harm».

So, after enacting of the Protocol № 14 to the Convention on 01.06.2010, the Court applied this criterion in 9 decisions on admissibility on 31.03.2011. In two judgment decisions on the merits the Court rejected the objection of inadmissibility by the respondent State, which was based on the criterion of *de minimis* [16]. According to the statistics of the European Court of Human Rights in 2016, 53.500 new applications were filed with the Court. Compared to 2015 (40.550 applications), the overall increase is 32 %. 27.300 of them were identified as the subject to a single judge sitting and likely to be declared inadmissible (a decrease of 1 % relative to 2015). 26.200 applications were identified as likely to be considered by chambers or committees (an increase of 100 %) [17]. In 2017 63,350 applications were allocated to a judicial formation, an overall increase of 19% compared with 2016 (53,400). 49,400 of these were identified as Single-Judge cases likely to be declared inadmissible (an increase of 36 % in relation to 2016). Single judge applications continue to be processed as soon as they are identified as qualifying for such a procedure. 13,950 applications were identified as probable Chamber or Committee cases (a decrease of 18 %). 85,951 applications were disposed of judicially, an increase of 123 % in relation to 2016 (38,506). The number of cases disposed of exceeded those allocated by more than 22,500. As a result, the stock of allocated applications pending before the Court decreased over the year, by 29 % from 79,750 to 56,250. As at 31.12.2017 the number of applications pending at this pre-judicial stage stood at 12,600, a decrease of 9 % in relation to the same date the previous year (13,800). The number of applications disposed of administratively in 2017 was 22,650, a decrease of 8 %. 61 % of these files were disposed of for failure to comply with the requirements of Rule 47 of the Rules of Court (contents of an individual application). In 2017 70,356 applications were declared inadmissible or struck out of the list of cases by a Single Judge, a Committee, a Chamber or a Grand Chamber, a 92 % increase compared with 2016 (36,579). The Single-Judge formation decided 66,156 applications in 2017, an increase of 113 % compared with 2016 (30,996). In 2017, 2,282 applications were struck out by a Chamber or a Committee, in a decision, following a friendly settlement or a unilateral declaration, a decrease of 40 % (3,772 in 2016). Friendly settlements (1,528) decreased by 24 % (2,006 in 2016) and unilateral declarations decreased by 57 % (754 compared to 1,766 in 2016). The remainder of the applications were declared inadmissible by a Grand Chamber, Chamber or a Committee or struck out by these formations on other grounds [18].

Furthermore, Article 35 (3) (b) of the Convention contains the following clause: the respect for human rights guaranteed by the Convention and the protocols thereto requires an examination of the merits, even if the applicant has not suffered material damage. As it has been already noted, this is precisely a compromise between the positions of the constitutionalists and the idealists. As you see, the condition of the admissibility of an individual statement – «significant harm» – is not absolute. If the applicant has not suffered material damage, but respect for human rights requires substantive consideration, the Court cannot declare individual application as inadmissible [7].

The foregoing suggests that the introduction of a condition for the admissibility of cases in accordance with the principle that the Court does not deal with trifles (de minimis non curat praetor) does not restrict applicants' right of access to the European Court of Human Rights, as well as it does not restrict the right to individual treatment. These rights are the cornerstone of the convention system, although the convention has a subsidiary nature. The purpose of introducing a new eligibility criterion for individual applications was solely to ensure the effectiveness of the conventional mechanism in the short, medium and long term [7].

As it has been already noted, at the moment p. «b» clause 3 of Art. 35 of the Convention contains two reservations: 1) The European Court of Human Rights cannot declare inadmissible any individual application if respect for human rights requires the consideration of an application in substance; 2) no case can be rejected on the ground of a new admissibility condition if the national court has not considered it properly.

The hypothesis of the first reservation is an indication of the fact that the Court undertakes to declare any individual application admissible. Thus, in the case «Korolev vs. Russia» the European Court of Human Rights, even assuming that the applicant did not suffer material damage, notes referring to the report of the Commission in the case of «Thayerer vs. The United Kingdom» of 14.12.1976 [19], that further consideration of the case is necessary if it concerns general issues affecting the observance of the Convention.

The analysis of these decisions as well as the judgments of the European Court of Human Rights in the case of «Finger vs. Bulgaria» of 10.05.2011 [20], suggests that such a circumstance as respect for human rights provided for in the Convention for the Protection of Human Rights and Fundamental Freedoms and thereto protocols, even if there is an assumption that the applicant did not suffer material damage, requires the admissibility of such an individual statement by the Court since it raised issues on general character with regard to the observance of the rules of the Convention: 1) the need to clarify the obligations of States in accordance with the Convention; 2) to force the respondent State to resolve a structural problem affecting the interests of other persons in the same position as the applicant.

In the «Ћiviж vs. Serbia» judgment decision of 13.09.2011 [21] the Court noted that even assuming that the applicant had not suffered material damage, the matter concerns issues of public interest and needs to be

considered due to inconsistencies in the judicial practice of the regional Belgrade Court regarding the right to fair wages and equal pay for equal work, that is the right to increase equal payments for all police officers belonging to the same category (§ 36–42) [22].

Consequently, even assuming that the applicant did not suffer material damage, the European Court of Human Rights declares a suitable individual application because in the case: 1) issues on the public interest are raised; 2) issues on the non-conformity of national court practice with the requirements of the Convention are raised; 3) the question raised as to the existence of a structural problem affecting the interests of other persons in the same position as the applicant and which State respondent would have to solve.

This is in fact, attention is drawn not so much to the subject of violation (pecuniary damage), but to its general object (violation of law, encroachment on social relations) [23; 24].

Thus, the European Court of Human Rights, even assuming that the applicant did not suffer material injury, cannot declare inadmissible any of individual claims that raise the question of the application of the Law, the interpretation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and National Law. In this regard that concerns the issue of the interpretation of domestic law; the role of the European Court of Human Rights is to ensure effects of such an interpretation compatible with the Convention. The problem of interpretation of domestic legislation should be decided by the national authorities [25].

The analysis of practice of the European Court of Human Rights regarding the application of paragraph «b» clause 3 of Art. 35 suggests that respect for human rights does not require the Court to consider the application if: 1) the relevant national legislation and practice has been changed, and similar issues have already been resolved in other cases which the Court has considered; 2) if the relevant law has abolished and the complaint has only a historical character; 3) if the Court or the Council of Ministers has already considered this issue as a complex problem [26].

The removal of the second «b» clause 3 of Art. 35 of the Convention warning clause will not become a barrier to access to the Court, in accordance with the Protocol № 15 to the Convention, which was opened for signature on 24.06.2013. D. Gudyma states: «... it appears that in the light of its (Court) reform, aimed at «unloading cases of «ballast» and also taking into account the principles of subsidiarity and freedom of judgment, which will be enshrined in the preamble to the Convention, procedural irregularities in the consideration of cases before national courts may not be decisive for the fact that in the event of the inevitability of the damage sustained to the applicant, the latter's application was dealt with in substance by the Court». According to the scholar's thought, some states (where Ukraine can be included) in which the judicial system significantly impedes the violation of procedural rules – especially when the courts are overly busy affairs – may consider that according to the Protocol № 15 they receive a «carte blanche»

for such violations in «non-essential» affairs [24]. However, as D. Gudyma rightly emphasizes, it is unlikely to consider that it would be justified in such cases, where there is no place for fair trial [27, p. 21].

Taking into account the foregoing, it seems appropriate to emphasize that the proper administration of justice is a key principle of Article 6 of the Convention [28]. The right to a fair trial, in particular, for the proper administration of justice, extends onto all individuals (§ 53 of the judgment decision of the European Court of Human Rights in «Ramanauskas vs. Lithuania» dated 05.02.2008 [29]). Guaranteeing the right to a fair administration of justice is one of the legal foundations of a democratic society; ignoring this right cannot justify the pursued objective (§ 25 of the judgment of the European Court of Human Rights in the case of «Delkur vs. Belgium» of 17.01.1970). Inappropriate administration of justice is a violation of clause 1 of Art. 6 of the Convention (judgment decision of the European Court of Human Rights in «Van de Gourk vs. The Netherlands» of 19.04.1994, «Bendersky vs. Ukraine» dated 15.11.2007).

In addition, in its decisions the European Court of Human Rights has repeatedly stated that according to the practice that reflects the principle of the proper administration of justice; judicial decisions must adequately cover the motives on which they are based [30]. The criteria for observing the court's obligation to substantiate its decisions are: 1) the court accepted the evidence of the party (parties) having the following features which are specific, expedient, appropriate; in case of refusal of the court to accept the evidence suggested by the party (parties) in the court decision detailed and convincing reasons for such refusal are given; 2) the way in which the evidence was accepted as fair; 3) the way in which the evidence was evaluated as fair; 4) the consequences of the assessment of evidence and the application of legal norms are made in accordance with international treaties; 5) the procedure for the adoption of procedural decision as fair [31].

The Convention does not guarantee the protection of theoretical and illusory rights, but it guarantees the protection of the rights of specific and effective ones (judgment decision of the European Court of Human Rights in «Artico vs. Italy» dated 13.05.1980).

Thus, the principle of respect for human rights is the violation of the principle of the proper administration of justice. The European Court of Human Rights, even assuming that the applicant has not suffered material injury, cannot declare inadmissible any of individual application filed under Article 34 of the Convention if the respect for human rights guaranteed by the Convention and the thereto protocols require consideration of the application essence.

Conclusion. The conclusion given by the author in the article has been substantiated «Application of legal entities to the European Court of Human Rights: a significant disadvantage as the condition of admissibility»: The court granted full effect to the new admissibility of cases in accordance with the principle that the Court does not deal with trifles («de minimis non

curat praetor»). Although «substantial harm» is a complex abstract concept, the Court, however, has developed objective criteria for its application through the gradual development of precedent practice.

The purpose of introducing a new eligibility criterion for individual applications was solely to ensure the effectiveness of the conventional mechanism in the short, medium and long term. At present day the Court's general approach to the understanding of material harm is based on the idea that the violation of law regardless of the extent to which such a violation of a legal position has materialized should reach the minimum degree of gravity for consideration by the international court.

It has been established that the foregoing suggests that the introduction of a condition for the admissibility of cases in accordance with the principle that the Court does not deal with trifles (de minimis non curat praetor) does not restrict applicants' right of access to the European Court of Human Rights, as well as it does not restrict the right to individual treatment. These rights are the cornerstone of the convention system, although the convention system has a subsidiary nature.

It has been established that the European Court of Human Rights, even assuming that the applicant has not suffered material injury, cannot declare inadmissible any of individual claim that raises the question: the application of the Law, the interpretation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, National law.

It has been established that respect for human rights, even if there is a presumption that the applicant did not suffer material damage, requires the admissibility of such an individual statement by the Court, since it raised issues of general character with respect to the observance of the Convention: 1) the need to clarify the obligations of States in accordance with The Convention; 2) to force the respondent State to resolve a structural problem affecting the interests of other persons in the same position as the applicant.

The following conditions have been identified in the presence of which respect for human rights does not require consideration of the application by the Court: 1) the relevant national law and the practice of its application have been changed, and similar issues have already been solved in other cases that were considered by the Court; 2) the relevant law was abolished and the complaint had only a historical character; 3) The Court or the Council of Ministers have already considered this issue as a complex issue.

It has been approved that withdrawal of the second warning clause «b» 3 of Art. 35 of the Convention in accordance with the Protocol № 15 to the Convention does not imply the violation of principles of fairness within the consideration of the applicant's case on the national level in the circumstances, in which the damage sustained by the applicant is not material, would not be covered by the principle of respect for human rights.

It has been substantiated that the principle of respect for human rights covers the violation of the principle of the proper administration of justice. The European Court of Human Rights, even assuming that the

applicant has not suffered material injury, cannot declare inadmissible any of individual application filed under the Article 34 of the Convention if the respect for human rights guaranteed by the Convention and the thereto protocols require consideration of the application essentially.

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Дешко Л. Принцип «de minimis non curat praetor» в міжнародному праві.

Постановка проблеми. *До 1 червня 2010 року поняття «de minimis» формально було відсутнє в текстах міжнародних документів з прав людини, хоча систематично згадувалось в особливих думках членів Європейської Комісії з прав людини, суддів Європейського суду з прав людини, запереченнях, що були надані Європейському суду з прав людини державами-відповідачами. Практика Європейського суду з прав людини свідчить, що з 1972 р. і сам Суд завуальовано застосовував принцип «de minimis non curat praetor». Дедалі більша завантаженість міжнародних судових установ, особливо Європейського суду з прав людини та Комітету Міністрів Ради Європи, потреба забезпечити міжнародним судам можливість і далі відігравати свою провідну роль у захисті прав людини загострили питання про необхідність та доцільність зміни міжнародно-правового механізму доступу до судів.*

Аналіз останніх досліджень і публікацій. *Запровадження нової умови прийнятності заяви до Суду – «наявність суттєвої шкоди, якої зазнав заявник», поглибило старі дискурси науковців – конституціоналістів та індивідуалістів –*

щодо принципу «de minimis non curat praetor», а також стало поштовхом для активізації дискусій науковців щодо ролі цієї нової умови в міжнародно-правовому механізмі доступу до Суду, а також загальних критеріїв оцінки (виміру) її наявності чи відсутності.

***Мета** статті – визначити роль та місце принципу «de minimis non curat praetor» у міжнародному праві.*

***Матеріали та методи.** Нормативну базу дослідження становлять міжнародні договори, правотворчі рішення Європейського суду з прав людини. Емпіричною базою дослідження є матеріали судової практики, офіційні статистичні дані з досліджуваної проблематики. Методологічною основою проведеного дослідження стали загальнонаукові та спеціально юридичні методи пізнання.*

***Результати досліджень.** Критерій «суттєва шкода» заснований на ідеї, що порушення права, незалежно від того, наскільки істотним було таке порушення з правової позиції, має досягти мінімального ступеня тяжкості, щоб бути розглянутим міжнародним судом. Додатково аргументовано, що право на індивідуальне звернення до Європейського суду з прав людини є наріжним каменем конвенційної системи. З'ясовано, що Європейський суд з прав людини, навіть припускаючи, що заявник не зазнав суттєвої шкоди, не може оголосити неприйнятною будь-яку індивідуальну заяву, яка порушує питання: застосування права, тлумачення норм Конвенції про захист прав людини і основоположних свобод, національного права.*

***Висновки.** Судом надано повну дію новій умові прийнятності справ відповідно до принципу, згідно з яким Суд не займається дрібницями (de minimis non curat praetor). Вона не обмежує право заявників на доступ до Європейського суду з прав людини, не обмежує право на індивідуальне звернення до нього. Ці права є основою конвенційної системи, хоча конвенційний механізм і має субсидіарний характер. Мета запровадження нового критерію прийнятності індивідуальних заяв полягає виключно в забезпеченні ефективності конвенційного механізму у коротко-, середньо- і довгостроковій перспективах. Хоча «суттєва шкода» є складним абстрактним поняттям, тим не менш Суд виробив об'єктивні критерії для його застосування за допомогою поступового розвитку прецедентної практики. Перелік і змістовне наповнення критеріїв оцінки наявності або відсутності суттєвої шкоди, якої зазнав заявник до Європейського суду з прав людини, є різним для фізичних і юридичних осіб – суб'єктів підприємництва. Оскільки Конвенція – живий інструмент, який повинен тлумачитися з огляду на умови сьогодення. Перелік критеріїв оцінки (виміру) наявності або відсутності суттєвої шкоди та їх зміст не можуть бути раз і назавжди встановленими. Вони змінюються залежно від реалій життя.*

Ключові слова: права людини, Європейський суд з прав людини, Європейська Комісія з прав людини, *de minimis*, *de minimis non curat praetor*.