

STŘET MEZINÁRODNÍCH ZÁVAZKŮ ČLENSKÝCH STÁTŮ ES A POVINNOST LOAJALITY

CONFLICT OF INTERNATIONAL OBLIGATIONS OF MEMBER STATES OF EC AND THE OBLIGATION OF LOYALTY

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Abstrakt

Tento příspěvek se zabývá otázkou konfliktu závazků členských států Evropského společenství plynoucích z komunitárního práva na jedné straně a mezinárodních smluv a úmluv, jejichž stranou členské státy jsou, na straně druhé. Příspěvek se snaží najít odpověď na otázku zda komunitární právo v případě takového konfliktu převládá nad právem mezinárodním či naopak. Problém je zkoumán na rozhodnutích Evropského soudního dvora (ESD) týkajících se střetu mezinárodních závazků členských států Společenství a jejich povinnosti loajality.

Klíčová slova

Evropské společenství – členské státy – povinnost loajality – mezinárodní závazky – mezinárodní právo

Abstract

This paper is trying to examine the problem of a conflict of obligations of member states of the European Community stemming from Community law on one hand and obligations stemming from other international agreements and treaties it is a party to on the other. The most difficult question to answer here is the one “does Community law prevail international law or vice-versa?” Some major decisions of the European Court of Justice (ECJ) regarding the conflict of international obligations of the member states and their duty of sincere cooperation are presented to give the rough idea of the attitude of the ECJ to the conflict of these two member states’ duties.

Key words

European Community – member states – duty of sincere co-operation – international obligations – international law

Introduction

The very specific position of the law of the European Communities together with the principle of primacy of Community law over national law of the member states stated by the European Court of Justice (ECJ) in various judgements and the member states' duty of sincere co-operation as set in article 10 of the Treaty establishing the European Community (TEC) create a dilemma for the member states as to which obligations to fulfil and which to breach. When trying to answer the question whether the member states of the European Community¹ (not speaking about the European Union) should prefer to fulfil their obligations towards the European Community to the ones stemming from various (sometimes bilateral) international agreements and treaties, one must first consider the position of the European Community in the current international system. It has always been very difficult to classify this entity – the Community is not entirely an international organisation, political system or a federal state. Therefore, it might seem almost impossible to define the role of Community law in international law. The major questions here are whether there exists any system of primacy between Community and public international law. The European Court of Justice defined Community law as new a legal order of international law² already forty years ago; but this does not really help us understand the position of Community law within or along public international law. If we consider Community law as a part of international law, this leads us to the conclusion that the European Community shall observe principles and rules of public international law and that it is de facto subordinated to international law, i. e. there exists a primacy of (public) international law over Community law as it exists over national law. The question whether the member states of the European Community shall respect more their obligations from international law or Community law (especially the duty of sincere co-operation) could be than quite easily answered – international law and its obligations would prevail. On the other hand, if we consider Community law as an independent legal order – as the ECJ had put it - we must necessarily come to the observation that Community law stands

¹ In this paper we are going to deal exclusively with the European Community (ex European Economic Community) and the Treaty Establishing the European Community.

² Case 26/62 Van Gend en Loos.

apart from any other legal orders, national or international. The member states would then have to respect primarily their Community obligations while trying to fulfil their international obligations at the same time. We will see that the ECJ tends – quite unsurprisingly – to the second interpretation of Community law position in international law. This paper argues that the question of conflict of obligations has not been sufficiently answered yet.

International obligations of the member states in Community law

Community law naturally does not ignore the existence of international law and consequent obligations stemming from it. The Treaty Establishing the European Community (TEC) deals with the relation of the European Community to international system in Part Six. For our purposes, article 307 is of the greatest importance as it envisages international obligations of the member states. It states: *(1) The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. (2) To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. (3) In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.*

The text of the provision includes a wide set of problems. At first, it might seem that especially the first paragraph of article 307 TEC defines quite clearly inviolability of member states' obligations which stem from treaties concluded with third states. However, it is necessary to read it together with paragraph No. 2 which actually refers to the duty of sincere co-operation of the member states as set in article 10 TEC.³ First of all, we can see at the first sight that the inviolability concerns only international treaties or agreements concluded by one

³ Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

or more member states of the Community and third states. This is naturally logical because treaties concluded between member states must be in accordance with member states' obligations under Community law. What is missing in the provision of the first paragraph of article 307 are the international organisations. We can easily imagine an international treaty concluded between a member state of the Community on one hand and an international organisation on the other hand. What happens if such a treaty gets into a conflict with the member state's Community law obligations? Another problem occurs when a member state of the Community adopts a national rule upon an international agreement concluded before its accession to the Community and such rule – after the accession to the Community – appears contradictory to Community rules. Normally, a national regulation contradictory to Community law would not apply, but in a case when the national regulation has been adopted upon an international agreement or treaty (which actually means a conflict between Community and international law) we cannot stop ourselves asking whether any of the systems of law (international and Community) shall prevail.

The European Court of Justice gave answers to above raised questions in judgement *Levy*⁴ which concerned a criminal proceeding against a French citizen, Mr. Levy, who was accused of breaching a French law dealing with prohibition of night work of women which had been adopted upon a convention concluded within the International Labour Organisation (ILO). Mr. Levy, on the other hand, claimed that the French provision was contrary to the Community directive on the implementation of the principle of equal treatment for men and women. The criminal court in Metz raised a preliminary question regarding the French implementation of the ILO convention, to which France is a party, being in a possible conflict with Community legislation. The ECJ ruled that *the national court in under an obligation to ensure that [...] Directive 76/207 is fully complied with by refraining from applying any conflicting provision of national legislation, unless the application of such a provision is necessary in order to ensure performance by the Member State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the EEC Treaty*. We can see that the judgement of the ECJ is not really helpful as to give us an idea of a criterion for distinguishing obligations of international treaties that should be fulfilled while preserving the Community rules and the duty of sincere co-operation from the ones that should be cancelled or simply not applied. The Court actually re-cites the

⁴ Judgement of the European Court of Justice of 2. 8. 1993 (C 158/91 *Ministère Public and Direction du Travail et de l'Employ v. Jean-Clause Levy*).

provision of article 307 TEC – the international agreement concerned must have been concluded before the Treaty came into force⁵. At the same time – again – the agreement must have been concluded with a third, i. e. non-member state. The Court emphasizes the principle of preservation of assumed rights of third parties and general rules of public international law respecting the sovereignty and equality of national states while at the same time reminding the member states their duty to fully obey and respect Community law.

The Court took the same view in judgement T. Port.⁶ When judging the role of article 234 of the Treaty (now article 307) it stated that *the purpose of the first paragraph of the Treaty is to make clear, in accordance with the principle of international law, that application of the Treaty does not affect the commitment of the Member State concerned to respect the rights of third countries under an earlier agreement and to comply with its obligations thereunder. Thus, for a Community provision to be deprived of effect as a result of an international agreement, two conditions must be fulfilled: the agreement must have been concluded before the entry into force of the Treaty and the third country must derive from it rights which it can require the Member State concerned to respect.* Unlike in the above mentioned judgement, the Court referred here to international law which could indicate us that the Community is aware of the not clearly defined role of Community law in the international system and that it is likely to respect obligations stemming from public international law. However, the Court does not provide us with any clue to set how far the member states can go when trying to fulfil both their international and Community obligations.

The Court expressed even a clearer view of the position of the Community towards member states' international obligations which had been implemented in their national law in case Deserbais.⁷ Here, a French citizen was accused of breaching French legislation adopted upon an international convention and Codex Alimentarius drawn up together by the Food and Agriculture Organisation (FAO) and the World Health Organisation (WHO) to which Community is not a party. The question here was – among others – whether a national legislation based on an international agreement to which only some member states of the Community are parties and which is in conflict with a Community measure shall be applied when observing the international obligations of the member state concerned. The Court held

⁵ This goes naturally for founding member states. For other member states the time of their accession to the Community is important.

⁶ Judgement of 10. 3. 1998 (C 364-365/95).

⁷ Judgement of the European Court of Justice of 22. 9. 1988 (C 286/86 *Ministere Public v. Deserbais*).

that rights of the third states stemming from international agreements with member states and having been concluded before the coming into force of the Treaty must be preserved, but – as in the current case no rights of third states or parties were involved - *a Member State cannot rely on the provisions of a pre-existing convention of that kind in order to justify restrictions on the marketing of products coming from another Member State where the marketing thereof is lawful by virtue of the free movement of goods provided for by the Treaty.* The judgement refers to the famous case Cassis de Dijon which is not subject to our examination. What is important for us is the general message of the Court – only third parties can rely on rights granted to them in international agreements concluded with the member states prior coming into force of the TEC or the accession of the member state concerned to the Community. The Court confirmed again the rule that the member states cannot rely on their national legislation (even if this was adopted on the basis of an international agreement) that constitutes an obstacle to proper realisation of Community goals as set in the Treaty.

A little less strict approach of the ECJ towards member states' duty to fulfil their obligations from the TEC (or more generally, from Community law) can be found in judgement Burgoa⁸. In this case, a Spain fisherman –Mr. Burgoa - was accused of breaching Irish law by not respecting Irish fishery limits and using nets prohibited by those limits. Mr. Burgoa, on the other hand, defended himself that he acted in compliance with the London Fisheries Convention⁹ to which both Ireland and Spain were parties and that the rights guaranteed by the Convention were preserved for him also by Community law. On grounds of the dispute the Circuit Court of the County of Cork raised preliminary questions to the ECJ whether *article 234 of the Treaty of Rome (now article 307 TEC) or any other rule of Community law does maintain or uphold rights of the beneficiaries of treaties to which article 234 of the Treaty of Rome applies, which national courts must uphold* and whether the London Fisheries Convention is a treaty to which article 234 of the Treaty of Rome applies. Quite unsurprisingly, in the answer of the second question the court held that *article 234 (now 307) is of general scope and applies to any international agreement, irrespective of subject-matter, which is capable of affecting the application of the Treaty.*¹⁰ This conclusion shall not surprise us as it only reflects the long-term tendency of the ECJ to interpret provisions of Community law in favour of the Community. However, the statement of the Court opens another question

⁸ Judgement of the European Court of Justice of 14. 10. 1980 (C 812/79).

⁹ London Fisheries Convention of 9. 3. 1964, UN Treaty Series 581, No. 8432.

¹⁰ Paragraph 6 of grounds of the judgement in case Bugoa.

and that is the one of Community powers. We cannot stop asking how provision of article 307 TEC can apply to any international agreement without regard to its subject-matter when at the same time the Community is obliged to act within its powers conferred upon it by the member state (as set in article 5 TEC and provisions of the Protocols on the application of the principles of subsidiarity and proportionality). What if the subject-matter of such international treaty or agreement does not fall within the scope of Community powers? When we stick to the judgement, we must necessarily come to the conclusion that the Community is actually omnipotent and the member states are obliged to put all their international agreements into conformity with Community law. The idea is naturally ridiculous. On the other hand, if we get into a field where the competence is shared between the Community and the member states and while relying upon provision of article 10 TEC we must agree with the ECJ that once the Community has acted in the field of shared competences, the member states are obliged to act in compliance with Community regulation, i. e. also to adjust not only their national legislation but also their international agreements.

In the answer to the first question (concerning the maintenance and uphold of rights of the beneficiaries of the Treaty) the Court held that *article 234 of the Treaty must be interpreted as meaning that the application of the Treaty does not affect either the duty to observe the rights of non-member countries under an agreement concluded with a member state prior to the entry into force of the Treaty or, as the case may be, the accession of a member state, or the observance of by that member state of its obligations under the agreement and that, consequently, the institutions of the Community are bound not to impede the performance of those obligations by the member state concerned.* We might conclude from this part of the judgement that the rights of third parties stemming from international agreements concluded before the accession of a member state into the Community or before coming into force of the Treaty are preserved in every case. Being very optimistic, we could come to a conclusion that in cases such as *Burgoa*, the Community is obliged to refrain from any action that could prevent the member state concerned from fulfilling its international obligations different from the Community ones. However, while grounding its judgement, the Court held that *that duty of Community institutions [not to impede the performance of the obligations of the member states which stem from a prior agreement] is directed only to permitting the member state concerned to perform its obligations under the prior agreement and does not bind the*

*Community as regards the non-member country in question.*¹¹ This approach of the ECJ shows us quite well where – in the Court's point of view – lies the line of Community benevolence. The Community agrees not to interfere to fulfilment of member states' prior international obligations but at the same it is not going to grant any rights to the third (non-member) state being the other party to the international agreement concerned. This approach is logical because after all the Community is not a party to the agreement concerned. We could term the judgement *Burgoa* as crucial as for the first time it admitted the obligation of the Community to respect rights of the third parties based on international agreements other than Community treaties and regulations.

Final observation

We have seen that the member states can never be really sure that they are not going to be accused of breaching Community law when trying to implement their prior international obligations. The European Court of Justice is showing a tendency in its judgements to acknowledge the existence of international obligations of member states but is also not extremely willing to go further than necessary when allowing the member states to implement their obligations from international agreements towards third states. It seems quite probable that the duty of sincere co-operation is still going to play an important role for the member states even on the field of their international obligations.

Literature

[1] Azoulai, L.: *The Acquis of the European Union and International Organisations*, European Law Journal, 2005, Volume 11, No. 2, pp. 196 – 231.

[2] Denza, E.: *Two legal orders: divergent or convergent*, International and Comparative Law Quarterly, 1999, Volume 48, pp. 257 – 284.

[3] Vedder, Ch.: *A Survey on Principal Decisions of the European Court of Justice Pertaining to International Law*, European Journal of International Law, 1990, Volume 365, No. 1, pp. 365 – 377.

[4] Judgement of the European Court of Justice of 2. 8. 1993 (C 158/91 *Ministere Public and Direction du Travail et de l'Employ v. Jean-Clause Levy*).

¹¹ Part 9 of the grounds of the judgement *Burgoa*.

[5] Judgement of the European Court of Justice of 22. 9. 1988 (C 286/86 *Ministere Public v. Deserbais*)

[6] Judgement of the European Court of Justice of 10. 3. 1998 (C 364-365/95 *T. Port GmbH & Co. v. Hauptzollamt Hamburg-Jonas*)

[7] Judgement of the European Court of Justice of 14. 10. 1980 (C 812/79 *Attorney General v. Juan Burgoa*)

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