THE CONTROL EXERCISED BY THE COURT OF JUSTICE IN LUXEMBOURG ON INTERNATIONAL AGREEMENTS TO WHICH THE EUROPEAN UNION IS A PARTY

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Abstract:

The European Union as subject of international law can conclude external agreements, under a procedure which is the object of art. 218 of the Treaty on the Functioning of the European Union (TFEU). Regarding the legal force of such agreements, the Court of Justice of the European Union ruled that they were part of the EU legal order. In addition, pursuant to provisions of art. 216 para. (2) TFEU, these agreements „link Union institutions and their Member States". However, it should be noted that the competence of the Court of Justice in Luxembourg reflects also its ability to rule, at the request of a Member State, the European Parliament, the Council or the Commission on the compatibility of an international agreement with constitutive treaties, whether prior to the entry into force of an international agreement or later. Considering this aspect, in the contents of our study, we shall highlight, by using the specialized doctrine and case law in the field, the role that the Court of Justice of EU has in the field of control over international agreements. This analysis will consider the control aimed at formal validity (compliance with the procedure of adoption), on the one hand, and the control on the substance (compliance of the agreement with EU primary law).

Keywords: *European Union, international agreement, Court of Justice of the EU, „constitutional" review, a posteriori control.*

1. General aspects

Through this study, we propose an analysis of CJEU competences on the control of international agreements[1] to which the EU is a party. To achieve this goal, we shall conduct a thorough study of the French, English and Romanian doctrines, an important place being reserved to historical jurisprudence, but also to recent jurisprudence of the Court of Justice of the European Union. In this research, we shall resort to a range of research methods, specifically: the logical method, the comparative method, the historical method and the quantitative methods. Thus, in analyzing the CJEU jurisdiction in international agreements to which the EU is a party, we shall use, in particular the historical method, but also the logical method in the approach to capture structural and dynamic aspects from historical and evolutionary perspective. In deciphering considerations and grounds of regulations and goals pursued by the solutions proposed by the court in Luxembourg, we shall use, predominantly, the logical method for

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[1] For details regarding international agreements to which the EU is a party, see **Augustin Fuerea**, *Manualul Uniunii Europene,* ediția a V-a, Fifth edition, revised and enlarged after the Treaty of Lisbon (2007/2009), Universul Juridic Publishing House, Bucharest, 2011, p. 173-175.

capturing their theoretical and practical implications, and synthesizing research results in conclusions drawn and presented at the end of the analysis.

We shall start from the fact that the proposed research is a current approach, given the realities Romania is currently facing and which have very profound and various consequences on the Romanian society after 2007, which is increasingly and firmly anchored in the context of universal and regional international society of the stage. EU legal order (i.e., including international agreements to which the EU is a party) is of particular importance for the evolution of the organization, for which, we believe that efforts are needed to acknowledge peculiarities that it involves, their understanding and learning in order to adopt and implement them, including by specialists in our country[2].

2. Constitutional review

The European Union, as subject of international law can conclude external agreements under the procedure laid down in art. 218 TFEU. According to the Court, once published in the Official Journal of the European Union, the agreements to which the EU is a party „are part of the Community legal order"[3]. In addition, pursuant to provisions of art. 216 para. (2) TFEU, these agreements "link Union institutions and their Member States". However, as stated in the legal doctrine[4], this binding effect resulting from art. 216 para. (2) „must be, however, relativized" and this because, in the jurisdiction of the Court of Justice in Luxembourg, it is found also its ability to rule, at the request of a Member State, the European Parliament, the Council or the Commission on the compatibility of an international agreement with constitutive treaties, whether prior to the entry into force of an international agreement or later. Given the Court's judgment in *Kadi* Case[5] where the Court referred to the „constitutional principles of the Treaty"[6], in doctrine, such control was described as a „constitutional review"[7].

Thus, art. 218 TFEU provides that „a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice on the compatibility of an envisaged agreement with provisions of the Treaties. In the case of a negative opinion of the Court, the agreement shall enter into force only if it is amended or if Treaties are revised. In other words, in practice, a negative opinion given

[2] See **Elena Emilia Ștefan**, *Reflections on the principle of independence of justice,* CKS-*eBook* 2013, p. 671 (http://cks.univnt.ro/ cks_2013.html).

[3] ECJ Judgment, 30 April 1974 *R. & V.Haegean v./Belgian State*, 181/73, pt. 5 (http://www.ier.ro/sites/default /files/traduceri/61973 JO181.pdf)

[4] **Quentin Lejeune**, *L'application des accords internationaux dans l'Union européenne: entre défiance et confiance à l'égard du droit international,* p. 9 (http://www.lepetitjuriste.fr/wp-content/uploads/2014/04/IHEI-L_application-des-accords-internationaux-dans-l_Union-europe%C2%B4enne-9677695_1.pdf?aa0226).

[5] ECJ Judgment, 3 September, 2008, *Kadi*, Joined Cases C-402/05 P and C-415/05 P, (http://curia.europa.eu/juris/document/document.jsf?text=&docid=67611&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=223391), the expression repeated in the ECJ judgment, 18 July 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, pt. 5

(http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5cd74ae9dd6b746869ad9c018185ba940.e34KaxiLc3qMb40Rch0SaxuOchj0?text=&docid=139745&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=221729).

[6] Pt. 285, *Kadi, cited above*.

[7] **Robert Kovar**, *La compétence consultative de la Cour de justice et la procédure de conclusion des accords internationaux par la Communauté Economique européenne*, Mélanges Reuter. Le droit international: unité et diversité, 1981, pp. 357-377-quoted by Quentin Lejeune, *cited above*.

by the Court leads to the impossibility of ratification of the agreement or to its ratification, but only after the revision of Treaties. In both cases, however, this would lead to a blockage in the European Union, at least for a certain time, if we also consider the fact that the revision procedure involves, in certain stages, the unanimity vote. However, regulating the capacity of the Court to give an opinion prior to ratification of the agreement, is a way to overcome another blockage that may arise, namely that that would result, as the Court[8] observed since 1975, from the "legal challenge of the issue of compatibility with the Treaty, of international agreements that commit" the Union.

The issuance of a negative opinion results, naturally, in the impossibility of entry into force of the Agreement which was the subject of that opinion. The case law of the Court in Luxembourg is constant regarding the issuance of negative opinions when it finds the establishment, by agreement, of a court system, different from that regulated at EU level.

Thus, in Opinion 1/76[9], the Court concluded that the *Draft Agreement establishing a European Fund for retention of inland waterway vessels* is not compatible with the Treaty. The draft established a judicial system that assigned certain competences to a body (background Court), which by its composition, was different from the Court of Justice established by the Treaty. The Court had to decide, in the field of the European Fund, on actions brought against Fund bodies or against states, and on actions undertaken for failure of obligations brought against the States on which the Statute would have had binding status (and not against the Community, at the time, as it was). However, the Court would have been competent to rule on prejudicial actions of which it would be informed by national courts, under certain conditions. With respect to these actions, it was mentioned the fact that they could have as object not only the validity and interpretation of acts adopted by bodies of the Fund, but equally, the interpretation of the Agreement and the Statute. Regarding this last point, the Court stated, since 1974[10], that an agreement concluded by the Community with a third country is, in respect of the Community, an act adopted by one of the Community institutions, and under the provisions of Community Treaties, the Court within the Community legal order is competent to decide preliminary rulings on the interpretation of an international agreement"[11]. Under these conditions, there would be the issue whether provisions on jurisdiction of the Fund Court are consistent with those of the Treaty relating to the jurisdiction of the Court. According to the Court, „the establishment of a judicial system such as that provided by the statute, which on the whole ensures effective legal protection of individuals, cannot elude imperatives arising from participation of a third State. The need to establish actions and proceedings which will ensure equally for all individuals, compliance with law in the activities of the Fund, can justify (...) the establishment of the Tribunal. Although, initially, the Court approved the concern to

[8] ECJ Opinion, November 11, 1975, 1/75 (http://www.ier.ro/sites/default/files/traduceri/61975V0001.pdf)

[9] ECJ Opinion, 26 April 1977 (http://www.ier.ro/sites/default/files/traduceri/61976V0001.pdf). For details, see **Mihaela Augustina Dumitraşcu**, *Dreptul Uniunii Europene şi specificitatea acestuia,* Universul Juridic Publishing House, Bucharest, 2011, p. 50.

[10] ECJ Judgment, 30 April 1974, *Haegemann*, 181/73, pt. 18 (http://www.ier.ro/sites/default/files/traduceri/61973J0181.pdf).

[11] Id.

organize, within the Fund, a legal protection adapted to difficulties of the situation, the Court was obliged to have some reservations about the compatibility of the "Fund Tribunal" structure with the Treaty"[12].

The Court had the same position in 1991, when it issued another negative opinion[13], this time on *the Draft Agreement between the Community, on the one hand, and the European Free Trade Association (EFTA), on the other hand, on the creation of the European Economic Area (EEA),* draft which provided, inter alia, a review mechanism on the interpretation of the Agreement, representing, otherwise the action brought by the Commission before the Court. In fact, the judicial system that was meant to be established, aimed at three objectives, namely: 1. settlement of disputes between Contracting Parties; 2. settlement of internal conflicts within EFTA and 3. strengthening the legal homogeneity within the EEA. These powers would „be exercised by a Court of the European Economic Area (EEA Court), which would be independent, but would be integrated from functional perspective, in the Court of Justice, and by an independent Court of First Instance of an EEA, operating, though, by the EEA Court or by the Court itself"[14]. According to the draft, provisions of the Agreement were to be interpreted in accordance with the jurisprudence of the Court of Justice, prior to signing the agreement. In addition, „in the application or interpretation of provisions of that Agreement or of provisions of the ECSC and EEC Treaties, as amended or supplemented, or of acts adopted pursuant to those treaties, the Court of Justice, the EEA Court, the Court of First Instance of EC, the Court of First Instance of the EEA and Courts of EFTA States will take due account of the principles arising from decisions ruled by other Courts or Tribunals, so as to ensure an interpretation of the Agreement as uniform as possible[15]. In this context, the main issue which the Court had to solve was to examine whether „the judicial system envisaged is likely to undermine the autonomy of the Community legal order in pursuit of its specific objectives"[16]. Once the problem defined, the Court grounded its reasoning on the particularity of the Community legal order that is based on „a community of law"[17] and concluded that „the jurisdiction conferred upon the EEA Court under the agreement may affect the division of powers defined by the Treaties and thus, the autonomy of the Community legal system which is enforced by the Court of Justice (...). This exclusive jurisdiction of the Court of Justice is confirmed[18], including by the Treaty," whereby Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement, other than those provided for therein"[19]. „Therefore, the assignment of this competence to EEA Court is incompatible with Community law"[20]. The result of this negative opinion was, naturally, the following: the

[12] Pt. 21 of Opinion 1/76.

[13] Opinion ECJ, 14 December 1991, 1/91 (http://www.ier.ro/sites/default/files/traduceri/61991V0001.pdf).

[14] http://www.ier.ro/sites/default/files/traduceri/61991V0001.pdf on the jurisdiction of the EEA Court, see also section 5-12 of the Opinion.

[15] Pt. 8 and 9 of the Opinion.

[16] Pt. 30 of the Opinion.

[17] **Quentin Lejeune**, *op.cit.*, p. 10.

[18] Pt. 35 of the Opinion.

[19] Id.

[20] Pt. 36 of the Opinion.

Agreement was revised and the new draft agreement was the subject of another opinion[21] of the Court, this time of a favorable one.

In 2011, the Court maintained its position on the establishment of a parallel judicial mechanism, even if, it was about the establishment of a specialized court. Opinion 1/09 had as object the compatibility examination of the *Draft agreement on the European and Community Patents Court with European Union law*. Under the agreement, the European and Community Patent Court would be an institution outside the institutional and judicial Union, having legal personality under international law. Competences of the Tribunal would be, some of them exclusive „in relation to a number of actions brought by individuals in the field of patents, particularly actions for infringement or potential infringement on patent, revocation actions and specific actions for damages. In this regard, Member States' courts are deprived of these competences and keep, therefore, only tasks that do not fall within the exclusive competence of the European and Community Patents Court"[22]. The Court, in the exercise of its functions, had to interpret and apply EU law[23]. The Court's reasoning has as starting point reiterating „the fundamental elements of the legal and judicial system of the Union, as established by the founding Treaties and developed by the Court"[24], namely: 1. unlike ordinary international treaties, the founding treaties of the Union established a new legal order, completed with its own institutions, for which the States have limited their sovereign rights in areas increasingly more extensive and the subjects of which comprise not only Member States, but also their nationals and 2. the essential characteristics of the Union legal order thus constituted, are in particular, its primacy over the law of Member States and the direct effect of a whole series of provisions applicable to Member States and their citizens. The Court held that, „unlike other international jurisdictions on which the Court has ruled until present time, the European and Community Patents Court has the task to interpret and apply not only the international agreement provided, but also law provisions of the Union. In addition, the Court found that by creating this jurisdiction, courts should be deprived of the possibility or, where appropriate, of the obligation to refer to the Court for preliminary reference in the patent field, given that the draft agreement provides a mechanism of preliminary references which reserves only to the European and Community Patents Court, the possibility of reference, depriving national courts of this possibility"[25]. Given that a Member State is bound to fix the damage caused to individuals by breaches of EU law which it is responsible of, and that, if a breach of EU law is committed by a national court, the Court may be referred to in order to find a violation of obligations by the Member State concerned, the Court noted that a decision of the European and Community Patents Court that would violate EU law, could not be the subject of proceedings for infringement and could not draw any

[21] ECJ Opinion, April 10, 1992, 1/92 (http://www.ier.ro/sites/default/files/traduceri/61992V0001.pdf).

[22] Press release no. 17/11, 8 March 2011 (http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/cp110017ro.pdf).

[23] About the existence of constant law, see **Elena Anghel**, *Constant aspects of law*, în proceedings-ul CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011, pag. 594.

[24] Pt. 64 of the Opinion.

[25] Press release no. 17/11, *cited above*.

patrimonial liability of one or more Member States. Therefore, the Court held that „by the fact that it assigns exclusive jurisdiction to settle a number of actions brought by individuals in the Community patent field and to interpret and apply EU law in this area in favor of an international court which is outside the institutional and judicial framework of the Union, the envisaged agreement would deprive the courts of Member States, of powers concerning the interpretation and application of EU law[26]„. The Court, therefore, concluded that the envisaged agreement, through which a European and Community Patents Court would be settled, is not compatible with EU law.

As a conclusion, we can say that proceedings of the opinion issued by the Court, before the entry into force of the Agreement to which the EU is a party, help to ensure integrity and compliance with EU treaties. As mentioned above, the opinion of the Court may intervene also after the entry into force of international agreements to which the EU is a party.

3. A posteriori control

Regarding the control exercised by the Court after the entry into force of an agreement to which the EU participates, control exercised through the action for annulment, in the specialized literature, several arguments were outlined to support the theory according to which this type of control is purely theoretic, in practice being impossible to accomplish. Thus, it is argued that the existence of a procedure of *a priori* opinion precludes the possibility of the Court to review the compatibility of the agreement with EU law, *a posteriori*[27]. On the other hand, the Court's declaration of incompatibility of an agreement entered into force with European Union law, leads to international liability of the European Union, and this because the Union cannot rely internationally on the judgment in annulment delivered by the Court because, according to Vienna Convention on Treaties (1969) and the Convention on the Law of Treaties concluded by states and international organizations (1986), a State or an international organization cannot exempt from liability by invoking its own internal rules. And last but not least, according to TFEU, only acts of the Union's institutions[28] may be subject to an action for annulment[29].

However, in practice, the situation is different. There are opinions in the specialized literature[30] that support the argument that the Court cannot exercise *a posteriori* control on agreements to which the EU is a party as long as a regulated procedure of *a priori* opinion „distorts the content of the Treaty because if it was not asked, the Court would see failed the power to rule *a posteriori*"[31]. At the same time, it was discussed, including the fact that the

[26] Id.

[27] **Quentin Lejeune**, *op.cit.*, p. 12.

[28] Art. 288 TFEU: To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions (...).

[29] Art. 263 para. (1) TFEU: the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, the Commission and the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and the European Council intended to produce legal effects to third parties. It also controls the legality of acts of bodies, offices or agencies intended to produce legal effects to third parties (...).

[30] **Eugène Schaeffer**, *Monisme avec primauté de l'ordre juridique communautaire sur le droit international*, Annuaire de droit maritime et aérospatial, 1er janvier 1993 n ° 12, pp. 565-589.

[31] **Quentin Lejeune**, *op.cit.*, p. 12.

Luxembourg Court did not distinguish between „act" and „agreement" as it ruled since 1971: „the action for annulment must (...) be open regarding all provisions adopted by the institutions, irrespectively of their nature or form, which are intended to have legal effect"[32]. According to the Court, „to determine whether the contested measures are acts within the meaning of Article 173[33], it is necessary (...) to examine their substance. According to the jurisprudence of the Court, acts or decisions which may be the subject of an action for annulment (...) are those measures which produce binding legal effects likely to affect the interests of the applicant by modifying in a specific manner, its legal status"[34]. On the other hand, „the form in which acts or decisions are made is, in principle, irrelevant regarding the possibility of attacking them, by an action for annulment"[35]. Furthermore, in Opinion 1/75[36], the Court stated explicitly on the *a posteriori* control, as follows: „since the question whether the conclusion of a particular agreement falls or not within the competence of the Community and if, as appropriate, these powers were exercised in accordance with the Treaty, being in principle susceptible of being submitted to the Court of Justice, directly under Article 169[37] or Article 173[38] of the Treaty or by the proceedings for preliminary ruling, it must be, therefore, admitted that the Court may receive the preliminary procedure of Article 228[39]„. In Opinion 1/91, the Court considers that such a control is justified by the existence of a „legal order that must be protected"[40]: „The EEC Treaty, although concluded as an international agreement, constitutes the constitutional charter of a community of law"[41]. Regarding this last point, we recall the observation of the General Advocate Maduro P., from his Conclusions presented on 16 January 2008 in *Kadi* Case, „although the Court takes great care to respect Community obligations under international law, it seeks, first of all, to preserve the constitutional framework created by the Treaty. It would be wrong to conclude that, since the Community is bound by a rule of international law, Community Courts must bow to that rule and apply it unconditionally in the Community legal order"[42].

Therefore, the practice does not preclude the possibility of the Court of Justice in Luxembourg to achieve a „constitutional review"[43] on international agreements to which the Union is a party. It should be noted that even at EU level, there is a difference between acts authorizing the conclusion of agreements and enforcement provisions of the agreement. Moreover, the Court itself distinguishes between „act authorizing the signing of the agreement"

[32] ECJ Judgment, 31 March 1971, *the Commission of the European Communities v./Council of the European Communities – "European Agreement on Road Transport"*, 22/70, pt. 42.

[33] The current 288 TFEU.

[34] ECJ Judgment, November 11, 1981, *International Business Machines Corporation v./Commission of the European Communities,* 60/81 pt. 9 (http://www.ier.ro/sites/default/files/traduceri/61981J0060.pdf).

[35] Id.

[36] *Cited above*.

[37] The current art. 260 TFEU.

[38] The current art. 263 TFEU.

[39] The current art. 218 TFEU.

[40] **Quentin Lejeune**, *op.cit*., p. 12.

[41] Pt. 21 of Opinion 1/91.

[42] Pt. 24 of the Conclusions (http://curia.europa.eu/juris/celex.jsf?celex=62005CC0415&lang1=ro&type=TXT&ancre=).

[43] **Quentin Lejeune**, *op.cit.,* p. 13.

and „act concerning its conclusion": „the act authorizing the signing of the international agreement and that stating its conclusion are two distinct legal acts involving completely distinct obligations for stakeholders and the second act is not in any way the confirmation of the first. Under these circumstances, the lack of action for annulment of the aforementioned first act does not constitute an obstacle to bringing such an action against the act of concluding the agreement envisaged, and it doesn't make inadmissible an opinion which raises the question of its compatibility with the Treaty"[44]. Therefore, the provisions on international agreements are likely to be cancelled. From the case law of the Court in the area, we stop at two cases that dealt with the conclusion of international agreements to which the EU is a party. The first case[45] refers to the signing by the European Commission, of an agreement with the United States, in the competition matter. The Court that was not requested an opinion before the entry into force of the Agreement, recognized its jurisdiction to control the act signed by the European Commission: „it is clear from the text of the agreement that it seeks to produce legal effects. Consequently, the act whereby the Commission sought to conclude the agreement must be the subject of an action for annulment"[46]. The Judgment of the Court was seeking the annulment of that act, because the Commission was not competent to sign the act as that power was conferred upon the Council.

In the second case[47], the Court declared partially void the act concerning the conclusion of the framework agreement on bananas (the Uruguay Round), for breach of the principle of non-discrimination.

If the two previous cases dealt with the review exercised *a posteriori* by the Court, over the acts authorizing the conclusion of an agreement, we shall still remember two actions that have focused on the *a posteriori* review exercised by the Court on acts of enforcement of an international agreement to which EU is a party, namely *the Hellenic Republic v./Council of the European Communities*[48] and *the Hellenic Republic v./Commission of the European Communities*[49]; in both cases, the Court submitted to control, the special aid granted to Turkey by the EEC Association -Turkey Agreement.

Through this type of control, the Court, with its judgment, may prevent the Union to apply in its legal order, the agreement that was the subject of annulment, which, internationally, means that the EU does not execute its obligations, following, however, to be held accountable, but as noted in the specialized literature, the Court may „be prudent"[50], resorting to general principles of

[44] ECJ Opinion, December 6, 2001, *the Cartagena Protocol*, 2/00, section 11 (http://www.ier.ro/sites/default/files/traduceri/62000V0 002.pdf).

[45] ECJ judgment, August 9, 1994, *the French Republic v./Commission of the European Communities*, C-327/91 (http://www.ier.ro/sites/ default/files/traduceri/61991J0327.pdf).

[46] Pt. 15 of the judgment ruled in C-327/91, *cited above*.

[47] ECJ Judgment, 10 March 1998, *Germany v./Council of the European Union*, C-122/95 (http://www.ier.ro/sites/default/files/ traduceri/61995J0122.pdf).

[48] ECJ Judgment, 27 September 1988, *the Hellenic Republic v./Council of the European Communities*, 204/86 (http://www.ier.ro/sites/ default/files/traduceri/61986J0204.pdf).

[49] Judgment of the ECJ, 14 November 1989, *the Hellenic Republic v./Commission of the European Communities*, 30/88 (cited by Quentin Lejeune, *op.cit.,* p. 14).

[50] **Joël Rideau**, *Ordre juridique de l'Union Sources écrites*, JurisClasseur Europe Traite, 30 novembre 2006, par. 403 (cited by Quentin Lejeune, *op.cit.*, p. 14).

international law, such as the principle of consistent interpretation[51].

4. Conclusions

We believe that the Court in Luxembourg, through the control that it can have on international agreements to which the EU is a party, behaves, in terms of international law, as a national constitutional Court, if we consider the opinion of the General Advocate P. Maduro expressed in the Opinion from *Kadi* Case[52], namely: „the ratio between international law and Community law is governed by the Community legal order itself, and international law can interact with this legal order only under the conditions set by the constitutional principles of the Community".

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[51] For details see, **Elena Emilia Ștefan**, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* Pro Universitaria Publishing House, Bucharest, 2013, p.318.

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