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# Loyalty to the EU and the Duty to Revise Pre-Accession International Agreements

## 1. Introduction

One must but refrain from considering simple the legal solutions that form the basis of the European Union (hereinafter 'EU') and its interrelations with the Member States and third countries. Application of these rules constitutes a complicated balancing exercise between contradicting yet equally valid interests. One source of such complications is the need to take the binding nature of existing international agreements into account at the time of accession of any state. One seeks to avoid situations wherein the signing of an act of accession to the EU for a new Member State would lead to a breach of international agreements ratified by that state on an earlier date. In extreme cases, such a risk could lead to a state refusing EU accession in order to respect its prior international commitments. According to the Court of Justice of the European Union (hereinafter 'CJEU'):<sup>1</sup>

[T]he purpose of that provision is to lay down, in accordance with the principles of international law, that the application of the Treaty does not affect the duty of the member state concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder.

Advocate General (hereinafter 'AG') Kokott states: 'In other words, membership of the European Union does not impose an obligation on Member States to act, vis-à-vis third countries, in breach of international agreements previously entered into.'<sup>2</sup> Thus, the treaty framework must cater for this need for flexibility even if at some cost to the uniformity of application of the EU *acquis*. At the same time, a Member State could not be given *carte blanche* to continue operating on the basis of different rules forever. This would constitute disproportionate interference with *une certaine idée de l'Europe*.

This article is an attempt to analyse the role and implications of Article 351 (formerly Art. 307 EC and prior to that Art. 234 EC) of the Treaty on the Functioning of the EU (hereinafter 'TFEU'), also known as the 'conflict clause', which has been tailored to deal with these dichotomies.<sup>3</sup> According to the CJEU, '[t]he

<sup>1</sup> Case C-812/79, *Attorney General v. Burgoa*, para. 8. – ECR 1980, p. 2787.

<sup>2</sup> Opinion of AG Kokott in C-366/10, *Air Transport Association of America and Others*, para. 56. – ECR not yet published

<sup>3</sup> Treaty on the Functioning of the European Union. – OJ C 326, 26.10.2012.

purpose of this provision is to make it clear, in accordance with the principles of international law, that application of the EC Treaty does not affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder<sup>\*4</sup>.

The importance of said article is underscored by the case law, which states that if the conditions for its application have been satisfied, it can allow derogation even from primary law.<sup>\*5</sup> In fact, the Court expressly admits that it ‘implicitly permits obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations’<sup>\*6</sup>.

In an equally pompous manner, the Court has laid down an unequivocal limitation to its effect, stating that ‘Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights’<sup>\*7</sup>.

While arising from clear logic in response to a necessary evil, academic research and case law demonstrate that the scope and application of the article are far from clear. The present paper is an attempt to analyse the rights and obligations arising by way of the conflict clause and to identify its key elements and the methodology of its application. In order to do so, we address the controversies arising from the above-mentioned provisions.

This paper examines the scope of Article 351 (1) of the TFEU by elaborating on the determination of the conclusion date of international agreements, the effects of later amendments to international agreements, the need to take potential collision into account, and the need to guarantee the effective application of EU law. The exclusion of international agreements concluded between Member States is discussed, and the balance in favour of protection of third countries in interpretation of the exception is stressed. The division of competencies between the CJEU and the national courts in interpretation of international agreements is analysed. Finally, the obligations arising out of paragraph 2 of Article 351 of the TFEU for the Member States, including the obligations to renegotiate or terminate existing international agreements, are analysed.

## 2. The scope and consequences of Article 351

According to the TFEU’s Article 351:

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 the Treaties.

To the extent that such agreements are not compatible with the Treaties, 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.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union 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 first clause enables the Member States to respect their international-law obligations *vis-à-vis* third countries even if the duties are in conflict with EU law. The second paragraph imposes an active duty to deal with the controversies both upon the acceding state and, where appropriate, on other Member States. The third provision **precludes** the application of the first clause to ‘most favoured nation’ clauses.

<sup>4</sup> See, for instance, T-315/01, *Kadi v. Council and Commission*, para. 186. – ECR 2005, p. II-3649; Case C-324/93, *Evans Medical and Macfarlan Smith*, para. 27. – ECR 1995, p. I-563; Case 10/61, *Commission v. Italy*. – ECR 1962, p. 1; Case C-158/91, *Levy*. – ECR 1993, p. I-4287; Case C-124/95, *Centro-Com*, para. 56. – ECR 1997, p. I-81.

<sup>5</sup> See Case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, para. 301. – ECR 2008, p. I-6351; Case C-124/95, *Centro-Com*, paras 56–61.

<sup>6</sup> Case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, para. 302.

<sup>7</sup> *Ibid.*, para. 304.

At first glance, the criteria for an international agreement falling within the scope of Article 351 of the TFEU appear to be clear. Firstly, the agreement must have been concluded before the relevant state's accession to the EU; secondly, it must be between a Member State and a third country; and, finally, it must give rise to international rights and obligations.

From the wording of the provision, it seems that Article 351 (1) of the TFEU simply gives priority to earlier treaties that meet the criteria. Not surprisingly, the court has opted for a narrow interpretation of the article and, accordingly, has curbed its use. In *Kadi*<sup>8</sup>, it limited the scope of the conflict clause by adding a fourth criterion: for a prior international agreement to prevail, the fundamental principles of the EU must be respected.

## 2.1. The conclusion date of an agreement

The question of whether an international agreement can be considered concluded prior to a Member State's accession is more complicated than simply looking at the dates. First of all, the concept of conclusion is ambiguous. Secondly, the date of execution of an international agreement might be equivocal in certain situations.

### 2.1.1. Implementation of the term 'to conclude'

Where a linguist might consider 'to conclude a treaty' to mean to sign it, a lawyer will immediately consider whether the act of its ratification may have an influence. In *Commission v. Italy*, the court had to deal with the General Agreement on Tariffs and Trade (hereinafter 'GATT') agreement, which Italy had signed on 23 May 1956 and ratified after 1 January 1958—i.e., after the entry into force of the EEC Treaty.<sup>9</sup> Italy argued that Article 234 of the EEC Treaty (Art. 351 of the TFEU) is applicable because 'Article 234 of the EEC Treaty applies to agreements concluded before this date, and not to conventions ratified before it'. Interestingly enough, the court did not take this opportunity to clarify the significance of ratification for the purposes of Article 351 of the TFEU and, instead, focused on the fact that the EEC Treaty had stripped Italy of its right to apply tariffs to other Member States even if this was foreseen by the GATT regime. A similar approach can be deduced from *Commission v. Belgium*.<sup>10</sup> After Belgium stated that the treaty with Zaire had been 'concluded before the date of entry into force of Regulation No. 4055/86 and had been applied *de facto* from its signature' and 'in view of the fact that the formalities required by Belgian legislation for the entry into force of the Agreement had been completed', the Commission reconsidered its legal position and accepted that the treaty could be regarded as an 'existing agreement'. Once again, the significance of ratification was not addressed by the court.

Thus, in fact, the question of whether or not an international agreement has to be ratified in order for it to benefit from the provisions of Article 351 of the TFEU remains unanswered. There are compelling arguments in favour of concluding that ratification should be a condition precedent. The same is argued by Manzini, who refers to the fact that Article 30 of the Vienna Convention always refers to treaties to which states are parties and concludes that, therefore, the treaties must be in force among them.<sup>11</sup> A state is only party to an agreement that has been ratified. Manzini further justifies this conclusion by referring to the wording of paragraph 1 of Article 351 of the TFEU, which uses the phrase 'rights and obligations arising from agreements', and he states that neither rights nor obligations arise from international agreements that have not been ratified.

<sup>8</sup> Joined Cases C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission* (p. I-6351) and Case C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (ECR 2005, p. II-3649).

<sup>9</sup> See Case 10/61, *Commission v. Italy*, p. 7.

<sup>10</sup> See Case C-170/98, *Commission v. Belgium*, paras 18–21. – ECR 1999, p. I-5493.

<sup>11</sup> P. Manzini. The priority of pre-existing treaties of EC member states within the framework of international law. – *European Journal of International Law* 2001 (12)/4, p. 786.

### 2.1.2. The effect of later amendments to the international agreement

As referred to above, the *raison d'être* of Article 351 of the TFEU has been to enable states to accede to the EU without having to breach their existing international obligations. Therefore, it is only reasonable that when international agreements are revised upon mutual agreement, there cannot be any justification for continued application of the exception. When a Member State is no longer *de facto* bound by its earlier commitments, the EU can rightfully expect the deviations from EU law to have been eliminated in the process.

In the *Open Skies*<sup>\*12</sup> litigation, this was further elaborated on by the CJEU, with respect to cases wherein some Member States had renegotiated earlier international agreements with the United States. As an example we refer to the case against Denmark, wherein the court ruled on the effects of amendments made in 1995 to a 1944 agreement. According to the Court:

It must be pointed out, moreover, that the amendments made in 1995 provide proof of a renegotiation of the 1944 Agreement in its entirety. It follows that, while some provisions of the agreement were not formally modified by the amendments made in 1995 or were subject only to marginal changes in drafting, the commitments arising from those provisions were none the less confirmed during the renegotiation. In such a case, the Member States are prevented not only from contracting new international commitments but also from maintaining such commitments in force if they infringe Community law.<sup>\*13</sup>

The new quality of the international relationship itself provides proof of a renegotiation of the pre-existing treaty. Therefore, the scope of protection of Article 351 (1) of the TFEU does not even cover the provisions that remain identical to those in the original version of the international agreement if, in fact, the quality of the international relationship is changed.<sup>\*14</sup> Accordingly, if a Member State substantially modifies a pre-existing international agreement, that Member State forfeits the opportunity to rely on Article 351 (1). Rosas concludes from the *Open Skies* case law that amendments concluded subsequently fall under the protection of Article 351 of the TFEU only if they constitute 'implementation of an obligation already concluded before the Member State became an EU member'<sup>\*15</sup>. The state's inability to rely on Article 351 (1) of the TFEU is relevant mostly for the purposes of potential infringement proceedings. Whether or not the international agreement, if capable of direct application, may still be relevant for individuals is subject to case-by-case evaluation.

The CJEU has also tackled the issue of subsequent amendments to earlier treaties in the context of the 1992 collapse of the Federal Republic of Yugoslavia<sup>\*16</sup> and the abolishment of the Czech and Slovak Federative Republic, in 1993.<sup>\*17</sup> The CJEU confirmed that it might be possible for such agreements to fall under the protection of Article 351 of the TFEU should the competent court establish that the parties intended to follow the principle of the continuity of treaties.<sup>\*18</sup>

## 2.2. Collision (potentially) arising after accession to the EU

If read to the letter, Article 351 of the TFEU applies only to pre-Union international agreements that already are in conflict with EU law. The article may, however, have significance in cases wherein a contradiction arises later (e.g., through a shift in competencies) or infringes on the EU's possibilities of exercising its competencies.

<sup>12</sup> See Case C-471/98, *Commission v. Belgium* (ECR 2002, p. I-9681) and the decisions against Denmark in Case C-467/98 (ECR 2002, p. I-9519), Sweden in Case C-468/98 (ECR 2002, p. I-9575), Finland in Case C-469/98 (ECR 2002, p. I-9627), Luxembourg in Case C-472/98 (ECR 2002, p. I-9741), Austria in Case C-475/98 (ECR 2002, p. I-9797), and the Federal Republic of Germany in Case C-476/98 (ECR 2002, p. I-9855).

<sup>13</sup> C-467/98, *Commission v. Denmark*, para. 39.

<sup>14</sup> *Ibid.*, paras 33–34.

<sup>15</sup> See A. Rosas. The status in EU law of international agreements concluded by EU member states. – *Fordham International Law Journal* 2010–2011, p. 1322.

<sup>16</sup> See Case C-84/98, *Commission v. Portugal*. – ECR 2000, p. I-5215.

<sup>17</sup> See Case C-216/01, *Budějovický Budvar*. – ECR 2003, p. 2787.

<sup>18</sup> *Ibid.*, paras 152–165.

### 2.2.1. Collision created via modification or exercise of competencies

Contradiction between an international agreement and EU law may, while absent *ex ante*, arise *ex post*. This could occur mainly because of a shift in competencies between Member States and the EU. As witnessed by the *Open Skies* litigation, discussed above, the competencies of the EU change with time, especially with respect to shared competencies, and a Member State's competence to conclude treaties with third countries may disappear as soon as the EU has exercised its corresponding competencies. Therefore, it was only natural that the Member States sought to rely on Article 351 of the TFEU also in cases wherein their international agreements were concluded after EU accession.<sup>\*19</sup> In *Cornelis Kramer and Others*<sup>\*20</sup> and *Procureur General v. José Arbelaiz-Emazabel*<sup>\*21</sup>, the CJEU indicated that Article 351 of the TFEU is not applicable in cases in which the international agreement in question has been concluded by the Member State since its accession to the EU, even if the agreement was concluded at a time when the EU had no competence in the field in question.

### 2.2.2. Collision related to unexercised EU competencies

If taken literally, the phrase 'incompatibilities established' limits the application of Article 351 of the TFEU to existing contradictions between the international agreement and EU law. However, the CJEU has indicated in recent cases to do with bilateral investment treaties, *Commission v. Sweden*, *Commission v. Austria*, and *Commission v. Finland*, that obligations stemming from Article 351 (2) of the TFEU are also relevant *vis-à-vis* future contradictions.<sup>\*22</sup>

The Kingdom of Sweden and the Republic of Austria had concluded various bilateral investment treaties with third countries before acceding to the EU under which each party took on an obligation to guarantee the investors of the other party the free transfer, in freely convertible currency, of payments connected with an investment.<sup>\*23</sup> The Commission considered that this might infringe on the competencies of the Council to restrict, in certain specific circumstances, movement of capital and payments between the Member States and third countries. Such a need might arise in the future, for example, to give effect to a resolution of the Security Council of the United Nations Organisation.<sup>\*24</sup> The agreements concluded by Sweden and Austria contained no provisions referring to such a possibility for the EU to act or allowing the Member State concerned to exercise its rights and to fulfil its obligations as a member of the EU, and also there was no international-law mechanism that would have made this possible. Therefore, the court rightfully concluded that the Member States had breached their obligations under the second paragraph of Article 351 of the TFEU by failing to take appropriate steps to eliminate incompatibilities.

This line of reasoning seems in line with the general duty of loyalty arising from Article 4, paragraph 3 of the Treaty on European Union (hereinafter, 'TEU'), which imposes a general duty of active support to the pursuit of the goals of the EU and of abstinence from any activity that might be detrimental to the reaching of such goals. De Baere concludes that the duty of co-operation can lead to a duty of abstention even if the competence at issue is neither *a priori* exclusive nor exclusive.<sup>\*25</sup> In principle, a Member State must, in the exercise of its international rights and obligations, always remember to make a reservation permitting the EU to become active in the relevant field in future. This also has an effect on the pre-existing international agreements through the duty of the Member State arising out of the second paragraph of Article 351 of the TFEU to take all appropriate steps to eliminate the incompatibilities created.

<sup>19</sup> See Joined Cases 3,4 and 6/76, *Cornelis Kramer and Others*. – ECR 1976, p. 1303; Case C-181/80, *Procureur General v. José Arbelaiz-Emazabel*. – ECR 1981, p. 2968.

<sup>20</sup> See Joined Cases 3,4 and 6/76, *Cornelis Kramer and Others*, p. 1279.

<sup>21</sup> See Case C-181/80, *Procureur General v. José Arbelaiz-Emazabel*, p. 2961.

<sup>22</sup> Case C-249/06, *Commission v. Sweden*. – ECR 2009, p. I-1335; Case C-205/06, *Commission v. Austria*. – ECR 2009, p. I-1301; Case C-118/07, *Commission v. Finland*. – ECR 2009, p. I-10889.

<sup>23</sup> See Case C-249/06, *Commission v. Sweden*, para. 25; Case C-205/06, *Commission v. Austria*, para. 3.

<sup>24</sup> See Case C-249/06, *Commission v. Sweden*, para. 32.

<sup>25</sup> G. De Baere. 'O, where is faith? O, where is loyalty?' Some thoughts on the duty of loyal co-operation and the Union's external environmental competences in the light of the PFOS case. – ELRev 2011 (36)/3, pp. 405–419.

### 2.3. The exclusion of intra-EU agreements

Though not clearly arising from wording, the case law leads to the conclusion that application of Article 351 of the TFEU is limited to agreements that have been concluded between Member States and third countries. As a rule of thumb, the conflict clause does not affect intra-EU relations.<sup>\*26</sup> This principle was already stressed by the CJEU in 1962, when the court blocked Italy's attempt to invoke the GATT tariff regime for other Member States.<sup>\*27</sup> The court recognised the exception in favour of third countries. In relation to other Member States, however, the Court stated that '[i]n matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between member states before its entry into force'<sup>\*28</sup>. The Court went on to reiterate that 'the manner in which member states proceed to reduce customs duties amongst themselves cannot be criticized by third countries since this abolition of customs duties [...] does not interfere with the rights held by third countries under agreements still in force'<sup>\*29</sup>.

Lambert argues that such derogation is acceptable only where it would not make the prior treaty ineffective.<sup>\*30</sup> This statement is supported by the *Burgoa* decision, in which the Court clarified that Article 351 of the TFEU cannot adversely alter the nature of the rights that may flow from such prior agreements.<sup>\*31</sup>

Such differentiation can be justified in situations wherein the protection granted by EU law to an individual or a party to the international agreement is inferior to that to which it is entitled under a prior international agreement within the meaning of Article 351 of the TFEU. In the case of a private party, the provisions of the relevant agreement should be capable of directly creating rights of individuals. In such cases, it would be difficult to justify the derivation to the detriment of the individual. In many cases, such controversies could be overcome with consistent interpretation of relevant EU provisions and principles.

### 2.4. Differentiation between rights and obligations

The literal interpretation of paragraph 1 of the conflict clause implies that both rights and obligations arising from the international agreements would be fully exempted. An interpretation stemming from the purpose of the provision, however, prevails. In fact, the court distinguishes expressly between the two. The term 'rights' is limited to the rights of third countries, and 'obligations' refers to the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement.<sup>\*32</sup> Thus, once again, a balance in favour of protecting the interests of third countries and at the same time not going beyond what is necessary when limiting the effect of the EU *acquis* has been struck.

The Court explained the restriction in *Commission v. Italy*: '[B]y assuming a new obligation which is incompatible with rights held under a prior treaty a State *ipso facto* gives up the exercise of these rights to the extent necessary for the performance of its new obligations.'<sup>\*33</sup> This approach has been confirmed and further developed in *Evans*, wherein the CJEU stressed that 'when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Community law, the Member State must refrain from adopting such a measure'<sup>\*34</sup>. Accordingly, in most cases, the conflict clause applies only to the obligations of the Member States.

Furthermore, in order for Article 351 (1) of the TFEU to apply, 'it is necessary to examine whether the agreement imposes on the Member State concerned obligations whose performance may still be required by the non-member country which is party to it'<sup>\*35</sup>. Accordingly, one must also determine whether the third

<sup>26</sup> See Case C-473/93, *Commission v. Luxembourg*, para. 40 of the Judgment document and the case law cited therein. – ECR 1996, p. 3207.

<sup>27</sup> Case 10/61, *Commission v. Italy*, p. 10.

<sup>28</sup> *Ibid.*, section II B.

<sup>29</sup> *Ibid.*

<sup>30</sup> See H. Lambert. The EU Asylum Qualification Directive, its impact on the jurisprudence of the United Kingdom and international law. – *International & Comparative Law Quarterly* 2006, p. 185.

<sup>31</sup> See Case C-812/79, *Attorney General v. Burgoa*, para. 10.

<sup>32</sup> Case 10/61, *Commission v. Italy*, section II B and Case C-812/79, *Attorney General v. Burgoa*, para. 8.

<sup>33</sup> Case 10/61, *Commission v. Italy*, p. 10.

<sup>34</sup> Case C-324/93, *R. v. Secretary of State for the Home Department, ex parte Evans Medical Ltd*, para. 32. – ECR 1995, p. I-563.

<sup>35</sup> See Case C-216/01, *Budějovický Budvar*, para. 146.

country could, in fact, demand performance of the agreement. If the right is contingent, the Member State should also analyse the circumstances triggering the condition. If the state is actually at liberty to exercise discretion, it will inevitably be bound in its decision by the duty of loyalty toward the EU.

The court has not extended the effects of Article 351 of the TFEU to introduce active obligations to the EU institutions *vis-à-vis* third countries. Instead, it confirmed that the article only imposes a duty on the part of EU institutions not to impede the performance of those obligations of Member States that stem from a prior agreement conferring rights on third countries.<sup>\*36</sup>

For determination of whether an international agreement imposes an obligation on a Member State, it must be settled that the duty of the Member State is clearly in contradiction with EU law and that interpretation of the international obligation as consistent with EU law is impossible. However, it is not clear whether the last word about the possibility of consistent interpretation rests with the Member State or, instead, with the CJEU.

## 2.5. The limits of the courts' competence to interpret international agreements

Article 19 of the TEU does not attribute to the CJEU the competence to interpret national law or international treaties. Nevertheless, the court has on several occasions implied the possibility of consistent interpretation. The duty of consistent interpretation is derived from the principle of loyalty, which is today stated in paragraph 3 of Article 4 of the TEU. The principle has been strengthened over time in various ways, with the Court declaring it to be 'inherent in the system of the Treaty' and an aspect of the requirement of full effectiveness of EU law.<sup>\*37</sup> The obligation of consistent interpretation means that the courts of the Member States should interpret their national law 'in the light of the wording and purpose' of EU law.<sup>\*38</sup> This requires Member States to take all appropriate measures to ensure fulfilment of the obligations arising from the EU treaties. In relation to interpretation of international agreements, the Court has used very express wording—for example, stating this in *Budvar*:<sup>\*39</sup>

It follows that the national court must ascertain whether a possible incompatibility between the Treaty and the bilateral convention can be avoided by interpreting that convention, to the extent possible and in compliance with international law, in such a way that it is consistent with Community law.

Thus the obligation for the national court to seek the guidance of EU law in its decision on the meaning and effect of an international agreement is obvious. Whether or not, within the division of competencies between the CJEU and national courts, the latter remain the final arbiters over international agreements (or national law, for that matter) is debatable in practice. Often the Court refers to the national court as competent to analyse whether consistent interpretation is possible.<sup>\*40</sup> In *Pupino*, the CJEU decided that the ultimate decision on whether or not an interpretation consistent with EU law is possible lay with the national court.<sup>\*41</sup> By the same token, it pointed out that, in the opinion of the Advocate General, 'it is not obvious that an interpretation of national law in conformity with the framework decision is impossible'<sup>\*42</sup>. Even if consistent interpretation of national law is impossible, the Member States have a duty of minimising inconsistency by all means available.<sup>\*43</sup>

It seems that a two-tier system is created, which, in fact, enables the CJEU to have a say in most matters. Where Article 19 of the TEU excludes the court's competence, the court is still able to exercise review over whether or not discretionary decisions on the national level (including interpretations related to application

<sup>36</sup> See Case C-812/79, *Attorney General v. Burgoa*, para. 9.

<sup>37</sup> Case C-160/01, *Mau*, para. 34. – ECR 2003, p. I-4791; Joined Cases C-397-403/01, *Pfeiffer*, para. 114. – ECR 2004, p. I-79.

<sup>38</sup> The origin of this obligation lies in Case 14/83, *Von Colson and Kamann*, para. 26. – ECR 1984, p. 1891.

<sup>39</sup> Case C-216/01, *Budějovický Budvar*, para. 169.

<sup>40</sup> See, for example, Case C-365/98, *Brinkmann Tabakfabriken*, para. 41. – ECR 2000, p. I-4619; Case C-177/88, *Dekker v. Stichting*. – ECR 1990, p. I-3941; Case C-300/95, *Commission v. United Kingdom*. – ECR 1997, p. I-2649.

<sup>41</sup> Case C-105/03, *Pupino*, para. 48. – ECR 2005, p. I-5285.

<sup>42</sup> *Ibid.*

<sup>43</sup> Case C-216/01, *Budějovický Budvar*, paras 169–173.

of the international agreement) have been handled in the manner most favourable to the interests of the EU. This inevitably involves interpretation and application of EU law, in relation to which questions of the substance and interpretation of international law are likely to arise. Whether or not in these circumstances one can argue that the limitation of competencies under paragraph 3 of Article 19 of the TEU provides the *effet utile* remains subject to debate.

In the case of international obligations, the specific nature of international commitments must be taken into account and consistent interpretation with EU law must not lead to infringement of international law. The boundaries for interpretation of international treaties are codified in Article 31 of the Vienna Convention on the Law of Treaties, according to which '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Accordingly, consistent interpretation of international agreements and EU law is possible only if the object and purpose of the treaty so allows. AG Tizziani also stresses this position, in his opinion on the *Budějovický* case. He emphasised that consistent interpretation in the context of international law presupposes that the provisions of the treaty in question are ambiguous and lend themselves to being interpreted in such a way.<sup>\*44</sup> Recently, the Court affirmed this approach in the context of Article 351 of the TFEU, stating that a good-faith interpretation must prevail.<sup>\*45</sup> This should serve as a limitation to how much flexibility in interpretation of international agreements can be expected from a national judge.

## 2.6. The requirement of respect for fundamental rights and other foundations of the EU legal order

The last prerequisite for bringing an international agreement within the scope of Article 351 (1) of the TFEU was introduced in *Kadi*.<sup>\*46</sup> The Court expressed the opinion that a Member State is only allowed to rely on Article 351 (1) if the foundations of the EU legal order, such as fundamental rights, are respected. One may argue that Article 351 (1) gives no indication of this further precondition. The sound-minded counter-argument is made by AG Maduro, stating: 'Measures which are incompatible with the observance of human rights [...] are not acceptable in the Community.'<sup>\*47</sup>

The Court stressed that even Article 351 of the TFEU 'may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights'<sup>\*48</sup>. The CJEU found that fundamental rights violated in the case of *Kadi* were the right to be heard, the right to effective judicial review<sup>\*49</sup>, and the right to property.<sup>\*50</sup> The fact that financial resources of people and entities listed by the resolutions had to be frozen automatically, without any consideration or possibility of objection, constituted determinative circumstance for establishment of infringement of fundamental rights. In this sense, *Kadi* is very significant, since one could argue that the EU introduced unilateral limitations to the effect of an international agreement that had already been concluded.

## 2.7. The relationship between paragraphs 1 and 3

The CJEU has not elaborated on paragraph 3 of Article 351, and it has seldom been the subject of academic research, which raises doubts about the significance of the paragraph today. However, legal scholars who have analysed the clause interpret it as a limitation to paragraph 1.<sup>\*51</sup>

Occasionally, agreements contain clauses that oblige contractors to extend privileges offered to third states to the other parties to the treaty. These provisions are known as 'most favoured nation clauses' or

<sup>44</sup> Opinion of Advocate General Tizziani in Case C-216/01, *Budějovický Budvar*, para. 148. – ECR 2003, p. 2787.

<sup>45</sup> Case C-118/07, *Commission v. Finland*, para. 39. – ECR 2009, p. I-10889.

<sup>46</sup> Case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, para. 302.

<sup>47</sup> Opinion of Advocate General Poiares Maduro in Case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, para. 31. – ECR 2008, p. I-6351.

<sup>48</sup> Case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, para. 304.

<sup>49</sup> *Ibid.*, paras 304, 333.

<sup>50</sup> *Ibid.*, paras 304, 335.

<sup>51</sup> P. Manzini (see Note 11), p. 782.



‘the principle of non-discrimination’. However, the advantages granted and shared among the Member States ‘are not separable and are based on an integrated institutional and economic scheme’.<sup>52</sup> The third paragraph of the conflict clause is aimed at limiting the possibility of extending benefits of the EU to non-member states through bilateral treaties of Member States. Thus, the section restricts the application of the TFEU’s Article 351 (1).

### 3. The obligation to eliminate incompatibilities

In the absence of clear collision between an international agreement and EU law, the Member State is normally unable to appeal to Article 351 (1) of the TFEU. In such cases, the Member State concerned is obliged to take a course that enables avoidance of derogation from EU law.<sup>53</sup> However, in the case of real collisions between a Member State’s international obligations and EU law, Article 351 (2) of the TFEU becomes relevant and the state is expected to take all appropriate steps to eliminate the incompatibilities. In practical terms, the obligation of taking these appropriate steps entails an obligation for Member States to renegotiate their agreements. In cases of extreme incompatibility with EU law, this may lead to the need to terminate the agreement in accordance with the Vienna Convention of 1969 on the law of treaties.<sup>54</sup>

The duty of Member States to render mutual assistance when dealing with such conflicts has been clarified somewhat by the Court in *Commission v. Sweden*, *Commission v. Austria*, and *Commission v. Finland*, wherein several Member States were in similar breach. The Court stated that, in accordance with Article 351 (2) of the TFEU, the Member States must assist each other to eliminate the incompatibilities. According to the judgement, it is for the Commission to take steps to co-ordinate and facilitate such mutual assistance and adoption of a common attitude.<sup>55</sup>

#### 3.1. The steps Member States must take under Article 351 (2) of the TFEU

The CJEU has clearly indicated that it is the Member States’ duty to guarantee the compatibility of their international treaties with EU law. In addition, the CJEU has indicated two possible manners of action for Member States wishing to respect their obligations under the treaty.

First of all, a Member State is expected to use diplomatic means to renegotiate the agreements and thereby render them compatible with EU law.<sup>56</sup> However, the CJEU has explained that even when the contracting party has expressed its readiness to adjust the prior international treaty, the state has not met its obligations if political events have made it impossible. The Court stressed that ‘the existence of a difficult political situation [...] cannot justify a continuing failure on the part of a Member State to fulfil its obligations under the Treaty’<sup>57</sup>.

If the Member State encounters difficulties that render adjustment of an agreement impossible, that agreement must be renounced.<sup>58</sup> Article 56 of the Vienna Convention on the Law of Treaties stipulates that a treaty that does not provide for renunciation is not subject to renunciation unless it is established either that the parties intended to admit the possibility of renunciation or that a right of renunciation may be implied by the nature of the treaty. The Vienna Convention also states that a party shall give not less than 12 months’ notice of its intention to renounce a treaty.

<sup>52</sup> H. Smit, P.E. Herzog. *The Law of the European Economic Community*. New York: LexisNexis Matthew Bender 1992, p. 6-296.30.

<sup>53</sup> See Case C-324/93, *R. v. Secretary of State for the Home Department, ex parte Evans Medical Ltd*, para. 32.

<sup>54</sup> J.P. Terhechte. Article 351 TFEU: The principle of loyalty and the future role of the Member States’ bilateral investment treaties. – *European Yearbook of International Economic Law*, 10.1.2010, p. 7.

<sup>55</sup> See Case C-249/06, *Commission v. Sweden*, paras 43–44; Case C-205/06, *Commission v. Austria*, paras 43–44; Case C-118/07, *Commission v. Finland*, paras 34–35.

<sup>56</sup> Case C-84/98, *Commission v. Portugal*, para. 38.

<sup>57</sup> Case C-170/98, *Commission v. Belgium*, paras 37, 42; Case C-84/98, *Commission v. Portugal*, para. 48.

<sup>58</sup> See Case C-84/98, *Commission v. Portugal*, para. 58; Case C-170/98, *Commission v. Belgium*, para. 15.

In CJEU case law, said court has demanded renunciation only if that possibility is provided for by the international agreement itself.<sup>\*59</sup> However, until a treaty has been renounced, the Member State concerned remains bound by it.

Where renunciation is not provided for in the treaty and not accepted by the third country that is a party to the agreement, the Member State in question may have to resort to unilateral withdrawal. Article 60 of the Vienna Convention specifies that unilateral suspension or termination of a treaty is regarded as material breach, which leads to international liability. Hence, the consequences of unilateral renunciation may prove difficult for the Member State. As the CJEU has not yet had the possibility of trying a case wherein the international agreement neither expressly nor implicitly provides for renunciation, it remains unclear whether renunciation is required in such circumstances. Nevertheless the CJEU has emphasised that the purpose of the conflict clause is to safeguard the rights of the third country and avoid breaches of international law.<sup>\*60</sup> Requiring renunciation when it would constitute material breach and lead to international liability would diverge from the purpose of the provision.

### 3.2. Proportionality of the steps taken

In *Commission v. Portugal*, the Portuguese government argued that Article 351 of the TFEU does not impose an obligation to achieve a specific result, in the sense of requiring a Member State to eliminate the incompatibility without regard for the legal consequences and political price.<sup>\*61</sup> In its statement, the Portuguese government clearly referred to the principle of proportionality. Even though all measures of the Union are governed by the principle of proportionality<sup>\*62</sup>, the case law of the CJEU has established that Member States cannot justify not taking all possible measures to eliminate conflicts between EU law and their international treaties by relying on this concept.

Article 351 of the TFEU incorporates the principle of proportionality and serves the purpose of balancing the foreign-policy interests of the Member States and the Union's interests. While Article 351 (2) defends Union goals, Article 351 (1) clearly safeguards the interests of the Member States. In addition, Article 351 allows the Member States to use appropriate means to render agreements compatible with EU law at their own discretion, which balances the powers of the Union and the Member States. Therefore, according to the Court, if Article 351 (2) of the TFEU becomes applicable, the interests of the Member States have already been protected.<sup>\*63</sup>

### 3.3. The conflict clause in accession treaties

The obligation to eliminate incompatibilities that is derived from the conflict clause is normally encompassed by the accession treaties. Either there is an express reference to the conflict clause or the obligation is stressed without reference to 351 (2) of the TFEU and the conflict clause is implied by accession to the *acquis*. In either case, the obligation to assure the compliance of Member States' pre-Union international obligations with EU law is required.

If the Union is informed about the existence of conflicting international obligations, concrete obligations related to certain subjects/fields or certain agreements that the relevant Member State(s) must deal with are introduced in the Act of Accession. The 2004 Act of Accession, for example, compelled Member States to withdraw from or phase out conflicting obligations associated with international fishery organisations and agreements to which the Community or other Member States are also parties and, in addition, obligations pertaining to free-trade agreements with third countries, with express reference being made to Central European Free Trade Agreement (hereinafter 'CEFTA').<sup>\*64</sup>

<sup>59</sup> Case C-84/98, *Commission v. Portugal*, para. 58; Case C-170/98, *Commission v. Belgium*, para. 15.

<sup>60</sup> Case C-84/98, *Commission v. Portugal*, para. 53.

<sup>61</sup> *Ibid.*, para. 30.

<sup>62</sup> Article 5 of the TEU.

<sup>63</sup> Case C-84/98, *Commission v. Portugal*, paras 37, 59.

<sup>64</sup> See the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. Act of Accession, Articles 6 (10), 6 (12). – OJ L 236, 23.9.2003.

As a general rule, the state(s) in question must eliminate incompatibilities before the accession to the EU or on the earliest date possible afterward.<sup>\*65</sup> Sometimes specific deadlines for Member States are set out by regulations. For example, Regulation 4055/68, on maritime transport, stipulated that cargo-sharing arrangements incorporated into existing bilateral agreements concluded by Member States with third countries shall be phased out or adjusted within six years from that regulation's entrance into force.<sup>\*66</sup>

### 3.4. The application of the conflict clause after accession

The situation is more complex when neither the Member State nor the EU is aware of an existing incompatibility between an international commitment of a Member State and EU law or if the Member State denies the existence of an incompatibility or of an obligation to act under terms of the Accession Treaty during the accession process.

In such cases, the Commission as the guardian of the treaties usually calls attention to the incompatibilities between a pre-Union international treaty and EU law by initiating an infringement-related procedure. The aim of this pre-litigation procedure is to point out the problem and to enable the Member State to conform voluntarily to the requirements of Article 351 (2) of the TFEU. If the Member State denies the existence of incompatibility or the obligation to act, the Commission often initiates litigation against the Member State.

It has been pointed out by legal scholars that an implicit result of the CJEU case law is that a Member State may rely on Article 351 (1) of the TFEU for a limited time, from identification of the incompatibility until the first opportunity to renounce the agreement, and if the Member State concerned has not taken any steps under Article 351 (2) to eliminate the incompatibilities, it may lose its right to appeal to Article 351 (1).<sup>\*67</sup>

In a case in point, with *Commission v. Austria* the CJEU examined whether the Republic of Austria had had an opportunity to withdraw from Convention No. 45 of the International Labour Organization, which imposed on that Member State an obligation incompatible with EU law. On the one hand, the CJEU identified that Austria had had a chance to renounce the relevant convention, but, on the other hand, the CJEU stressed that at the time when that possibility existed, the incompatibility was not sufficiently clearly established for the Member State to be bound by an obligation to renounce the convention.<sup>\*68</sup> Nevertheless, the mere fact that the CJEU has analysed the possibility of renouncing an international obligation does not establish that a Member State may lose its right to rely on Article 351 (1) of the TFEU.

If it does not fulfil its obligations under Article 351 (2) of the TFEU, a Member State must face the usual consequences of failing to comply with EU law. This may entail imposition of an obligation to act and/or to pay a penalty or make lump-sum payments but not to lose its rights under EU law such as that of appealing to Article 351 (1) of the TFEU. Since such limits are not established yet, one should refrain from extensive interpretation and follow the main idea of Article 351, which is that conflicting international obligations are maintained until they are renegotiated, phased out, or renounced by the Member State concerned.

## 4. Conclusions

With Article 351 of the TFEU, the EU has, on the one hand, made a commitment to respect international law, yet at the same time it enforces its position by obliging Member States to take all appropriate steps to eliminate incompatibilities with EU law. The CJEU has used this provision to emphasise the specific *sui generis* nature of the EU by stating that the international commitments of the Member States must be in concordance with human rights and the foundations of EU law.

The purpose of Article 351 (1) of the TFEU is to enable the Member States to respect their international commitments taken on prior to accession to the EU. Judged by its purpose and structure, the exception

<sup>65</sup> See, for example, the Treaty of Accession of the Republic of Bulgaria and Romania, Article 12. – OJ L 157, 21.6.2005.

<sup>66</sup> Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, Articles 3, 4. – OJ L 378, 31.12.1986.

<sup>67</sup> A. Rosas (see Note 15), paras 59–64.

<sup>68</sup> Case C-203/03, *Commission v. Austria*, paras 59–64. – ECR 2005, p. I 935.

is designed to be temporary and to promote gradual movement away from differences in external agreements of the Member States. This is well reflected in the case law of the CJEU, which often dismisses as unfounded any arguments as to difficulties of renegotiating. Any serious opportunity to revisit the text of the agreement with the third country is likely to lead to impossibility of future reliance on Article 351 (1). Indeed, even small modifications that bring with them a new quality of international relationship may be considered sufficient for this.

Article 351 of the TFEU is an intrinsic balancing trick that is designed to position the interests of the Union and the Member States in a certain proportion to each other. Even though the provisions are complicated and at times hard to comprehend, the article adeptly achieves its goal.