

The European Union – From Reciprocity to Loyalty

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The international agreement, the treaty, has borrowed many of its legal traits from the area of private contract law. It was, after all, from the beginning a contract between sovereign princes. The treaty establishes mutual, reciprocal obligations between parties. A serious treaty violation by one of the parties entitles the other party to suspend the treaty or even to annul it,¹ and the possibility to relinquish the treaty by reference to "clausula rebus sic stantibus"² is closely related to the principle of contractual conditions.

The contractual relation indicates that the parties, at least in a formal legal sense, are seen as equal. In order to enter into the treaty they must fulfil the criteria for international legal subjectivity, and a state must, aside from people and territory, also be able to point to its highest level of state authority as possessing independence. Through the treaty, the state can however transfer authority to such a degree that its international legal subjectivity can be questioned. The Bey of Tunisia and the King of Morocco entered into successive agreements with France that finally led to the drawing up of treaties that gave Tunisia and Morocco protectorate standing (Bardo 1881 and Fez 1912). The states did not cease to exist through these treaties, but they relinquished their external and certain of their internal competency. The latter could be carried out by the states by delegation from France.³

However, after the end of the Second World War and the dissolution of colonialism, the sovereignty of the states, and especially their equality, has been emphasized by international law. True, the countries restrict their independent authority through international law obligations, but these affect all of the involved states to the same degree, and do not lead to one nation losing its independence to the advantage of another. Furthermore, equality between states is an international law principle that is represented in the Art. 2(1) of the UN charter, which refers to the sovereign equality of all the members.

¹ The Vienna Convention on the Law of Treaties, 1969, Art. 60.

² Ibid Art. 62.

³ Marcel Merle, *La Vie Internationale*, Paris, 1963.

Besides, sovereignty is no longer the prince but the people, and changes in a state's position demands constitutional consideration and most often a referendum or political elections in connection with constitutional changes. Reciprocity, mutuality is therefore a central concept in international law, constituting the foundation of obligations between states. It is on a mutual basis that states have created organizations such as the UN, GATT, NATO, and also the European Community, the European Union and the European Convention on Human Rights.

While a federation is not founded on the international law principle of reciprocity, but rather on a federal constitution which determines the authority of the states within the federation, the foundation for the European Union (EU) is a treaty. However, The member states of the EU, inspired by the EU-Court, have admitted that the European Community constitutes a new legal order, which does not only imply mutual obligations but also includes principles of solidarity, loyalty and democracy. Therefore, participation of the member states in the confederation of states, the European Union, carries with it fewer restrictions of sovereignty than in a federal state but more than within a traditional international organization.

The European Union as a Confederation

Historically, an association of states, a confederation, has been attempted a number of times as stages on the road to becoming a federal state: The United States of America between 1778 and 1787, Switzerland between 1818 and 1848, and Germany between 1815 and 1871. Just as the federal state, the confederation is founded on the principle of the division of authority, but the confederation is founded on a treaty, and it is the individual member states that decide the position of this treaty in their national hierarchy of norms. Member states in a confederacy are not subordinate to a federal constitution, and an "actus contrarius" results therefore as a violation of a constitutional-like treaty.

The European Union, founded on a treaty, shows unmistakable characteristics of a confederation. It is founded on a division of authority regarding all important areas. Cooperation within EU areas is administered by common institutions, and the union's highest organ, the European Council, is a purely quasi-state creation, which can be compared to the historical confederacy's Diet. The EU has authority within the social and economic sphere which surpasses historical predecessors, but it does not exhibit unity within the foreign policy and defense areas. It is true that the member states in a confederation, as opposed to the member states of a federation, have kept their international legal sovereignty, but contrary to the EU, historical predecessors built on a defense alliance. Naturally, section V in the treaty of the European Union (EUT) can be seen as such; however it acknowledges at the same time that organizations with a partially different structure, such as NATO and WEU, can be of greater cooperative importance than the EU for certain member states within this central area. These weaknesses are, however, compensated for in two ways. The EU itself possesses active and passive diplomatic representative rights, and since the EUT incorporates a citizenship of the union for the citizens of its member states,

and since every member state shall give diplomatic protection to all EU-citizens, the EU stands out as a diplomatic entity.

An even more important confederate trait is that the EUT includes an obligation to federal loyalty, which applies to all of the EU:s sphere of activities. It is somewhat vaguely expressed in the EU:s initial regulation Art. A, but is more clearly formulated in Art. J 1(4), regarding the foreign and security policy areas, and which applies to the Community area through Art. G EGT.

Reciprocity in Trade Agreements

The economic provisions of the EEC, such as those regarding the customs union and free movement of goods within the inner market, are some of the cornerstones of the European Union. For this reason, the reciprocity concept of general commercial treaties is also of importance to the European Union. The intention that the parties, reciprocally, shall maintain a balance between economic pros and cons is central. The parties allow market admission and refrain from applying any of its most important trade instruments, so long as this does not lead to unwarranted economic disadvantages for any party. A party can thus reinstate trade barriers, either because a party fails to uphold the agreement or in case other factors create an unreasonable trade balance (Article 15).

Hence, purely economic criteria are of importance in order to establish reciprocity, but agreements of this type also include as a rule the important clause regarding national treatment. This clause is at the same time quite possibly the most important material provision in the agreement, and a criterion that simplifies the control of the parties reciprocally acknowledging each other's market admission. The clear implication of the clause is the reason that it is directly applicable in the EEC, and that is why it has also often appeared in GATT:s quasi-judicial panels. In cases of violations of this clause, or of any other clear rule of law, the panels establish if there exists a "prima facie" violation. They also abstain, for economic reasons, from verifying if the reciprocity was also broken in economic terms. The EU Commission and Court restrict themselves, as well, to establishing treaty violations. Advanced trade and economic agreements presuppose that the parties attain economic reciprocity by respecting the rules of the agreements.

The Principle of Solidarity in Treaties to Protect Individual Rights

Treaty obligations for the protection of human rights must necessarily be of a different nature than applying the reciprocity principle of trade agreements and national treatment. National treatment would, for example, have been a dubious guarantee in Pol Pot's Cambodia. The treaties have a broader meaning than merely assuring that foreigners are treated according to international standards. Their purpose is also to protect the country's own citizens from acts of cruelty by the country's authorities.

Traditional interstate retaliation against a state that breaks such treaties do not fulfill their intended purpose. They would have the opposite effect, since they would affect individuals rather than authorities. Art. 60 (5) of The 1969 Vienna

Convention includes therefore a prohibition against suspension or revocation of rules regarding the protection of the human person which are included in treaties of a humanitarian nature.

This is why the European Convention on Human Rights has supplemented the reciprocity principle with a solidarity principle. The Convention is meant to function as a European "super constitution" that guarantees everyone, regardless of nationality, its inclusive rights. Therefore, it not only entails an inter-state obligation but, above all, it obligates the state in relation to the individual.

The objective nature of the obligations entails, first, that the member states have the right to express themselves and supervise each other's internal political/legal situation and to charge every member state for treaty violations, including those aimed at another member state's own citizens. Secondly, the Convention confers legal standing to individuals. They shall have the opportunity to raise claims, based on the Conventions rights, in front of their national courts and authorities, and they have the right, according to article 25, to lodge complaints individually before the Commission on Human Rights.

The European Convention on Human Rights, including its solidarity principle, is included as an integral part of the European Union. The Treaty presupposes that the member states are bound to it, and the Union itself is obligated to respect its rights according to Art. F, EUT.

The Community Method

The three treaties that constitute the CECA, EEC and Euratom have three different methods for cooperation. Within the general economic area, the member states shall only coordinate their policies. Possible agreements are embraced by the reciprocity principle that characterizes international treaties of an economic nature.

The second method applies to the realization of ECT:s most important purpose, the creation of a common market with free movement of goods, persons, services and capital, which, according to the treaty shall for the most part be realized through directives. These are similar to treaties in that they shall be implemented by national laws. The legal situation concerning the common market is however characterized by objectivity rather than reciprocity. True, the EEC corresponds to the idea of other advanced trade treaties that reciprocity shall be reached through strict adherence to legal rules, but the EEC separates itself from these through its Court, through the Commission's role as "public prosecutor", and by allowing any member state to summon any other member state to the Court for any violation (Art. 170 EGF). Furthermore, individuals and legal entities are legal subjects according to EEC-law.

The maintenance of the common market presupposes, in itself, that the Council promulgate new directives to adapt the EEC-rules to the developmental demands. However, what can be regarded as the third and original community method consists of the EEC creating a real administration in an area. This is accomplished by having the Council, or more often the Commission, promulgate regulations of a general character or decisions directed to individuals. The treaties anticipated that this would occur as regards, for example, the coal and

steel industry, the competition and agricultural policies, and the same method is anticipated for the monetary union. In other words, this method does not limit itself to reciprocity or objectivity but presupposes that the member states relinquish their decision-making competence in an area in favour of common institutions, which issue rules that carry with them rights and obligations for the member state's own citizens. The expressed will of the member states to bestow on the EEC a decision-making competency is reflected in the fact that their constitutions are equipped with provisions allowing the transfer of decision-making competency. EECT introduced an additional legal novelty concerning international cooperation, namely a prejudicial pleading. This direct contact between the national court systems and the EEC Court was established in order to reach a uniform interpretation and application of EEC law, i.e., to assure that an effective judicial examination of reciprocity be reached and secondly that the individual rights deriving from community law be safeguarded by the national courts.

Reciprocity, Solidarity, Loyalty

The European Union confederation fulfils the requirement of a division of authority in accordance to federal principles. It is fully established with regard to those areas that are under the EEC Treaty. However, since the confederate construction also allows for a less ambitious division of authority according to international law methodology, it is also acknowledged regarding foreign, defence, justice and home affairs. Within the EEC areas, EU:s institutions can exercise these authorities independent of the member states. This is possible since legal security is ensured. As regards the judicial control over the EEC:s legal acts, the EEC includes a complete procedural system with legal tools that offer no less protection for the legal subjects than those of member states.

The EU:s legal order therefore lays the foundation for more than mutual rights between the treaty parties. The Court found early that the EEC is a new type of legal order, something that has been accepted by the high courts of the member states. This legal order's first characteristic is that it is directly applicable:

”the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only to Member States but also their nationals. Independently of the legislation of the Member States, Community Law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”⁴

Because this new legal order not only creates reciprocal rights and obligations but also obligations for the states in relation to individuals, the Court has found, as has the Commission for Human Rights regarding the European Rights Convention, that the legal order of the EEC embraces a solidarity principle:

⁴ *Affaire 26/62 Van Gend en Loos Rec.* 1963, 1.

”In permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules...

For a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discriminations at the expense of their nationals, and above all of the nationals of the State itself which places itself outside the Community rules...

This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the community legal order.”⁵

Already in 1964, when the Court decided the question regarding EEC law primacy over national law, the Court disclosed quite bluntly that it considered the solidarity principle to have a deeper meaning for the Community’s legal order. In reality the solidarity principle is supplemented by the loyalty principle. The Court could not base precedence of community law on general international law, as international law acknowledges state responsibility, but not preference, for *actus contrarius*. Nor could the Court assert preference, on the basis that national law were subordinated to EEC law, because of the simple fact that the EECT is not a federal constitution. Therefore, the Court’s first argument was that the EEC legal order creates a real separation of powers that limit the authority of the member states. Because the Community has:

”... real power, stemming from a limitation of sovereignty or a transfer of powers from the States to the Community. The Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The transfer by the States from their domestic legal systems to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.”⁶

The Court’s second argument complemented these motives. It referred to the loyalty principle in Art. 5(2). In this legal case, it occurred in an almost haphazard manner since it used, in the same phrase, international law terms such as naming reciprocity and the discrimination that would follow if the member states were to apply different national laws.

In later case law, the Court has given the loyalty principle in Art. 5 a clearer definition.⁷ This has occurred in cases concerning precedence. In order to give greater effectiveness to precedence, the Court cannot, as a federal constitutional court, rescind conflicting national laws, but in practice it has attempted to create a similar pre-emptory effect. It has pointed out that, as a consequence of the

⁵ *Affaire 39/72 Commission contre Italie* Rec. 1973, 115; *128/78 Commission contre Royaume Uni* Rec. 1979, 429.

⁶ *Affaire 6/64 Costa contre ENEL* Rec. 1964, 1141.

⁷ For comments and literature references see Pär Hallström, *Medlemsstaternas verkställande av EG-rätten*, *Juridisk Tidskrift* 1992-93 p. 69 ff.

characteristic of ECC law to be integrated in the member states legal systems and to give rights to individuals that they can base themselves on in front of their courts, ECC law shall have precedence over earlier and later national statutes. Art. 5 implies an obligation for national courts to apply EEC law and set aside conflicting national laws. It also obligates governments and parliaments not to adopt conflicting national legislation.⁸

In other cases the Court has defined what the obligation entails for state bodies and authorities in terms of concrete measures. The Community's legal order and division of authority can, in certain cases, mean that the member states shall abstain from promulgating their own laws or enter into international treaties. However, in other cases it can entail that the member states complement EEC rules with their own rules in order to ensure that the Community's policies attain their intended result. The Court has established that the loyalty principle also includes the Union's obligation to support the member nations and the mutual obligation of the member states to cooperate.⁹

The traditional reciprocity principle as well as the solidarity and loyalty principles are, therefore, among the cornerstones of the EU legal system, and they are complexly intertwined. Mutual benefits and disadvantages shall be reached by having the states uniformly comply with EU law. The solidarity principle can be found in two versions. On the one hand, individual rights shall be guaranteed and can be raised, by all the member states and by the EU's institutions, without nationality concerns. On the other hand, the treaty includes rules regarding economic aid that is distributed by the EU institutions and shall be so in appliance of the principle. The loyalty principle has a completely different quality than the *bona fide* principle of international law. The loyalty principle, too, has two sides. Article 5 EGF is tied to the obligation of state authorities and EU institutions to allow the EEC legal order to reach its full potential. The loyalty obligation in Art. A and J.1(4) EUF has, on the other hand, an intergovernmental political content that is as yet unproven.

Competence de la Competence, Fundamental Rights, Democracy

The European Union has transferred the EEC's principle regarding attributed competence to the whole EU's spectrum of interests and, furthermore, the EUT has complemented it with the subsidiary principle. Every member state and its parliament wants to be able to anticipate and approve that a given area be included in the quasi federal EC legal system. An expansion of this can only occur with a treaty revision (Art. N) that guarantees the national parliament the power to decide. Competence de la competence does not exist. In federations, however, constitutional changes (Amendments) are decided by the federal institutions. Special decision procedures give, however, a decisive role to the Senate or federal congress, representing the individual states.

The principle of attributed powers of competencies has been problematic in application, since the EEC treaty is unclearly formulated and builds on the

⁸ *Affaire 213/89 Factorame* Rec. 1990,2473; 826/79 *Mireco* Rec. 1980,2559; 811/79 *Ariete* Rec. 1980,2545; 106/77 *Simmenthal* Rec. 1979,629.

⁹ *Pär Hallström*, art. cit.

concept that the institutions, founded in generally formulated articles, shall adopt measures aimed at reaching the EEC:s goals. EUT tries to limit EEC competence in areas outside the internal market by deciding that supplemental actions that do not encroach on the competence of the member states or the minimum directive, shall be applied if possible. At the same time the EUT contains an article F with indefinite content as well as new rules regarding the economic and monetary union, the application of which may have difficult and unclear consequences for the division of competence.¹⁰

In spite of their lacking competence competency, the EEC institutions have expanded the EEC:s competencies in a manner that could not have been foreseen from the start. The political institutions have promulgated binding legal acts on the basis of Art. 100 and 235 in areas outside of what is normally associated with the common market. This has above all been the case with the Court, which has expanded the EEC legal obligations with its case law (i.e., *stare decisis*).

The Court has, for example, developed the doctrine regarding the nature of EEC law, its direct effect and preference etc.; through its case law it has developed the doctrine regarding parallel internal and external competency, which has expanded the EEC:s exclusive competency to conclude treaties with a third country; with its article 30 doctrine, it has given the EEC widespread competence within the commercial policy area; it has incorporated fundamental rights into the EEC legal system and, furthermore, it has introduced a right to third party tort liability, according to administrative law procedure, for individuals who suffer economic damages as a result of the wrongful application of EEC law by a member state.¹¹ Finally the Court has given substance to the loyalty obligation in Art. 5, and has thereby bound the member states not only to fulfill the treaty and the legal acts that the political institutions promulgate, but also to fulfill those conclusions and rights that the Court has formulated through its own case law.

The EEC has only been able to develop its qualities under the requirement that two conditions be followed. The member states would not have relinquished their competency if the EEC had not adhered as well as they did to fundamental rights, and the EEC must enjoy democratic legitimacy. Since these aspects have been given a legal content at a EU level, and citizens are granted rights, they also contribute in removing the EEC legal order from international law.

The transfer of competence to the EEC does not include the protection of fundamental rights, but the EEC institutions acting independently would not have been able to exert competency in the EEC areas, if the EEC legal acts had been nullified by the courts of the member states for violating human rights. Therefore, the Court introduced the fundamental rights as a legal source of EEC law of the highest caliber.¹² It has even explained that these rights have a direct effect and can be cited by individuals in a dispute regarding the execution of

¹⁰ The legal effect of the article has been removed by the German constitutional court, 2 BvR 2134/92; 2 BvR 2159/92 p. 58.

¹¹ *Affaire 6/90 et 9/90 Francovich* Rec. 1991.

¹² *Affaire 11/70 Internationale Handelsgesellschaft* Rec. 1970, 1135; Observe that the EEC competence regarding economic rights in the common market can come into contact with constitutional rules ex. *Affaire 159/90* Rec. 1991.

EEC law by the national authorities. The obligation of the EU to respect fundamental rights is now incorporated in Art. F.

Another obstacle for EU institutions in exercising, independently, their competency is the demand for a parliamentary democracy. The EU has, through Art. F, obligated itself to the democratic principle that is found in the European Rights Convention, but the question of how the EEC institutions can live up to this demand is hard to answer. It has been a critical issue since the majority rule in the Council began to be applied in 1985 and the national parliaments lost power since they got to see their governments outvoted. The member states tried to overcome this democratic deficit by expanding the power of the EU Parliament through the decision procedure. The Single Act of 1986 introduced the cooperation procedure (Art. 149, now Art. 189 C EUF), and the EUT implemented real joint decision making through veto powers in certain questions (EUF 189 b, 228). Through its case law the Court, too, has strengthened the Parliament's position.¹³ In a confederation such as the EU, where the member states still are seen as guarantors for the welfare of the citizens, the European Parliament enjoys formal but hardly full democratic and social legitimacy.¹⁴ A second road that the EUT points to in order to abridge the democratic deficit is an application of the subsidiary principle by giving preference to legal acts that do not encroach on the decision making authority of the national parliament, such as supplementary acts and minimum directives.

The Member States Control over the EU:s Competence and Doctrine of Vital State Interests

Important arguments can be made that the member states would have lost their independence within the EEC:s areas of competence and would have cut back their rights within EU:s other areas of interest. But a closer analysis gives a more complex picture. True, the Court has maintained that they have permanently transferred their competence, and that they are bound to obligations of solidarity and loyalty. The member states can not even implement protective measures without final approval by EU institutions. However, the EU is, in a legal sense, a confederation. It has incomplete means at its disposal to ensure economic solidarity, and the loyalty obligation does not extend further than the demand of the sociological legitimacy concept. The participation of the member states is therefore conditioned on both national constitutional grounds and on the international law principle regarding vital state interests.

The fact that the EU is founded on a treaty entails the member states themselves to decide the role of the EU and EEC laws in their own national normative hierarchies, and they can undertake a constitutional normative scrutiny to ensure that the EEC law does not encroach on standards of a constitutional dignity. Such scrutiny has been undertaken by the Italian, French and German constitutional courts. In the "solange case" the German

¹³ For example, *Affaire 138/79 Roquette* Rec. 1980, 3333; *70/88 Parlement contre Conseil* Rec. 1990.

¹⁴ Pär Hallström, *EG-domstolen och legitimitetsfrågan*, *Internationella Studier*, Nr 4, 1993, p. 60 f.

constitutional court declared that EEC law can not limit vital German constitutional standards.¹⁵ It is also ready to ensure that the EU respect the principle of attributed competency. The constitutional court made clear that eventual EU:s legal acts, containing obligations that to a considerable extent would exceed the competency that Germany by law has transferred to the EU, would be without legality in Germany.¹⁶ It has finally declared that the EU:s confederate character, which must respect member state identity, implies that the democratic principle to a major degree shall be taken care of on the member state plane. The constitutional court would be able to nullify the German membership law if the EU increased its power authority, with the result that the power competency of the parliaments of the German federation and the member states would be essentially limited.

If a member state were to promulgate an "actus contrus" as a result of those reasons that the German constitutional court pointed to, it would be able to defend its action by referring to the international law doctrine regarding vital state interests. Essentially, this has the same contents as that expressed in Art. 62 in the Vienna Convention from 1969 regarding treaty law, and means that a state can remove itself from or suspend a treaty if a fundamental change of circumstances drastically alters the scope of obligations according to the treaty.

The doctrine of vital state interests ought also be applicable on economic and social grounds. The EU:s competencies, and especially those that could be added to the EEC through the creation of a monetary union, can lead to economic and social consequences. While it is true that the solidarity principle obligates the EU to aid the member nations and the member states to aid each other, EU:s manifest shortcomings in regard to economic resources may make this obligation illusory. The doctrine has also been applied, albeit silently, to the economic area. The empty chair crisis of 1965 can be named as an example, as well as the renewed crisis in 1993, in the agricultural area, in connection with negotiations in GATT.

The principles of solidarity and loyalty must however be considered to be of importance to the application of the doctrine of vital state interests as well. The solidarity principle is often connected to rights for the individual and it is the nature of these rights that they are indivisible and must be maintained by the EU as well as by the member states. Such rights, as they are formulated on the EU level, ought almost to be seen as mini standards, from which deviations are not allowed. Finally, the loyalty principle is connected to the question of legitimacy. If the EU attains democratic and social legitimacy, respect for the loyalty principle, will be strengthened and departures from the EU Charta will be more difficult to defend.

¹⁵ *BverfGE* 37, p. 260 ff; *BverfGE* 73, p. 387.

¹⁶ 2 *BvR* 2134/92; 2 *BvR* 2159/92.