Are the rules of European Union public policy a reality?

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Abstract

Over the years there have been a lot of debates at academic and doctrinal level regarding the EU rules of public policy. Are these rules to be found in the Treaties or in secondary legislation? Which EU legal rules shall be considered as being rules of public policy? Which EU values are they protecting? These are some of the questions that the present study tries to answer starting with the definition of EU public policy rules and analyzing then its content and its role within EU legal system.

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JEL Classification: K23, K33

1. Preliminary considerations

The most important argument used by the legislator in order to protect the most important values of a given country is the "public policy and morals".

The concept of "public policy" is very controversial and complex. Over the yeas have been a lot of debates at the academic and doctrinal level regarding the concept of "public policy". Many of these debates are also focused on the concept of "public policy" at the EU level, since there is no textual support in the Communities Treaties or EU secondary legislation.

Usually, the authors underline the general directions, principles or values, which are protected by the concept of "public policy". But, where can we find these directions, principles or values? Are they listed and named as such?

No, the concept of "public policy" appears to be a flexible and controversial notion, which is used as a defensive tool that protects the most basic fundamentals of justice and morality of a given state.

Since, these basic principles change with the time, the contemporary content of the "public policy" concept also changes in order to reflect the state's values and beliefs evolution. Apart from its relativeness in time, the "public policy" concept is also relative in space, because it protects only those fundamentals of the society that are adversely affected.

Moreover, it was underlined that the "public policy" concept appears in different forms and various contexts. It has different meanings depending on circumstances in which it is invoked. In different areas of law, procedural or

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substantive, it may refer to different things. Its content may also differ at different procedural stages. As a motivation of specific legal rules, the "public policy" concept has many faces not only at the level of a single national legal system but also between countries and internationally. The vagueness of its content gives plenty of room to the courts to interpret it.

2. Are the rules of EU public policy a reality?

The difficulty to determine the content of the "public policy" concept comes from the fact that all the legal rules have a protective role. From this perspective, the determination of the content of "public policy" concept involves a reverse analysis. It means that, firstly, we need to establish if the infringement of a specific legal rule jeopardizes the "public policy" of a given state and then we conclude that the respective rule has a "public policy" character. Usually, only the infringement of mandatory rules is considered to jeopardize the "public policy", but not any simply infringement will violate it.

To conclude, it is admitted that, in order to identify the rules that form the core of the "public policy" concept we should consider the given state's legal system as a whole, with all its political, economic, social and moral features. In other words, as the most powerful exception, the "public policy" concept "comprises the fundamental principles of law and morality, constituting the core of the social and legal order of a given state"[2].

If we extrapolate this assertion at the EU level, it appears that, as a new legal order, the EU has its own "public policy" rules apart from those of the member states. But, in its well-known judgment in the Van Gend end Loos case[3], the CJEC[4] ruled univocally about the genuine relationship between the national and the Community legal systems:

"The Community constitutes a new legal order of international law…the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of 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".

Moreover, this new legal order created through the establishing Treaties has become, according to CJEC[5], through the immediate enforcement of the Treaties, an integral part of the national legal systems of the Member States:

"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

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[2] Natalia Shelkoplyas, *The application of EC law in arbitration proceedings*, Europa Law Publishing, Groningen, 2003, pag.124

[3] Case 26/62, Van Gend end Loos v. Administratie der Belastingen (1963)

[4] CJEC – Court of Justice of European Communities

[5] See case 6/62 Costa v. ENEL (1964) and case 26/62 (1963) mentioned above

By creating a Community of unlimited duration, having….its own personality, its own legal capacity of representation on the international plane…..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".

It means that the EU legal system instantly infuses into the legal system of each Member State and no prior or subsequent approval or transformation is required. In the EU legal system there are included not only the Treaties provisions but, also, the acts adopted by the EU institutions within their competences. These acts became directly applicable and produce direct effect on the territories of Member States from the moment they enter into force.

In accordance with the subject of this study, does it mean that the EU "public policy" rules maintain their status at national level? Do the national "public policy" rules change their status at EU level?

Yes and no, as it was underlined by the doctrine[6] "*the simple recognition of the fact that EU law acquires the same status as a national law would not reveal the genuine relationship between these two legal systems*". Indeed, if the "genuine" character of this relationship is not observed, it can be foreseen that the EU rules may be subject of modifications or even replaced by a national rules of a higher legal force. Furthermore, as the CJEC ruled[7], the entire application of EU law can generate discrimination between Member States, which jeopardizes the principle of equality stipulated by the Treaties, and their objectives.

The concept of "public policy" at EU level emerges from the case law of the CJEC in the context of preliminary ruling procedure provided by art. 177 EEC/art.234 TEC/ art. 267 TFEU.

From this abundant jurisprudence, the authors[8] have concluded that there should be considered as rules of public policy at EU level the principle of cooperation, proportionality, legal certainty, protection of human rights, non-discrimination and protection of consumer. There are also included the provisions referring to the Community freedoms, such as the principle of equal pay for equal work and competition rules of art.81/82 TEC (art.101/102 TFEU) and other economic freedoms that "cannot be compromised under any conditions".

Another opinion proposed to divide the EU "public policy" into two parts: one, so-called economic public policy and the other meta-economic public policy. The first one will protect the EU rules on competition and monetary union, while the second, will guarantee the social peace. The latter one, at its turn shall include basically the principles enumerated by art.2 TEU (Lisbon consolidated version) referring to the liberty, democracy, respect of human rights, fundamental freedoms and rule of law as well as those concerning the political measures in the area of

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[6] Dr. Natalia Shelkoplyas, the application of EC law in arbitration proceedings, Europa Law Publishing, Groningen, 2003, pag.29 and the bibliography mentioned therein.

[7] See case 6/64 mentioned above: *"the executive force of Community law cannot vary from one state to another…..without jeopardizing the attainment of the objectives of the Treaty"*

[8] Ibid, p.175, 176 and the bibliography mentioned therein.

freedom, security and Justice and judicial cooperation in criminal matters stipulated by the Third Part, Title V, Chapter 4, art.82 from TFEU (ex art.31TEU).

It means that, as such, the content of "public policy" rules at EU level is seen very broadly. It includes rules (as those related to competition), principles (as those enumerated by art.2 TEU) and measures (as those referring to internal security and judicial cooperation).

The central point of these articles appears to be the word "common". It expresses the idea that these values and principles are not new, genuine, for EU because they are already stipulates as such by the constitutional provisions of the Member States and through the agreement of sovereign states they become "common" values and principles for all of them. In other words, the most fundamental values and principles on which the "public policy" rules at EU level are based are those common to the Member States. From this perspective, it appears that the "public policy" concept at national level, for a given state of EU, is enriched with those values and principles that are common for all the Member States.

At the same time, the content of "public policy" concept is not usually precise[9]; on the contrary, it is formulated in a very general way and refers to the most fundamental values and principles without enumerating them. Why should it be otherwise at EU level?

3. Conclusions

As it was seen, CJEU avoided in its rulings[10] any use of the term "EU public policy" and usually relies on national concepts. It has also identified with this concept, matters that are of a certain public concern at EU level such as the competition rules. But, these rules and the exceptions provided by them are, in fact, limiting the exercise of the fundamental freedoms provided by the Treaties. In other words, through its rulings, the CJEU has enlarged the concept of "EU public policy" with the economic policy rules without establishing certain standards that any mandatory rules have to comply with in order to qualify as rules of "public policy".

To conclude, we agree with those authors, which consider that the concept of "public policy" shall include only those "block of values that form the top of the pyramid of social values which cannot be compromise under any conditions".

Extrapolating this idea, we can neither deny the existence of EU public policy nor enlarge its content!

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[9] See Cătălin-Silviu Săraru in Ioan Alexandru (coord.), Cătălin-Silviu Săraru , Alina-Livia Nicu a.o., *Drept administrativ European*, Lumina Lex, Bucharest, 2005, p. 149.

[10] See e.g. the case 126/97 (1999) Eco-Swiss and case 38/98 (2000) Renault

Bibliography

1. Natalia Shelkoplyas, *The application of EC law in arbitration proceedings*, Europa Law Publishing, Groningen, 2003
2. Paul Craig, Grainne de Burca, *EU Law – Text, cases and materials*, 3rd Ed, Oxford University Press, 2003
3. Cătălin-Silviu Săraru in Ioan Alexandru (coord.), Cătălin-Silviu Săraru , Alina-Livia Nicu a.o., *Drept administrativ European*, Lumina Lex, Bucharest, 2005.
4. Treaty regarding the EU (Lisbon - consolidated version)
5. Treaty on the Functioning of EU (Lisbon – consolidated version)