HIGHLIGHT

The Court of Justice Finally Rules on the Analogical Application of Art. 351 TFEU: End of the Story?

Luca Pantaleo*

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As is well-known, art. 351 TFUE is a so-called conflict clause within the meaning of art. 30(2) of the Vienna Convention of the Law of Treaties. Conflict rules are common practice in international treaty law. In short, they have the primary purpose of governing the relationships between different treaties concluded at different times. The basic idea behind these rules is to *prevent* normative conflicts: "by adopting clauses of this kind, the problem is solved from the start".[1] Under the all-encompassing concept of conflict clause, there are, however, different varieties of it. It is not possible to provide a detailed account of all different types of conflict clauses in the limited space available here. Suffice it to say that art. 351(1) TFEU is strictly speaking a *subordination clause*, that is, a treaty provision granting precedence to one or more treaties concluded before the treaty in which it is included. In the case at hand, the agreements safeguarded are those concluded by the Member States before 1 January 1958 (or before accession for non-founding Member States). In EU law parlance, these agreements are commonly referred to as prior agreements, as opposed to successive (or posterior) agreements, which are those concluded after the deadline set out in art. 351 TFEU. Successive agreements are subject to the rule of primacy.

There is, however, one major qualification. Art. 351(2) TFEU mandates the Member States to "take all appropriate measures to eliminate the incompatibilities" between the agreements safeguarded by art. 351(1) TFEU and the EU Treaties, in what may appear an ostensible contradiction. On the one hand, art. 351(1) TFEU grants precedence to earlier treaties. On the other hand, art. 351(2) requires the Member States to remove the

* Assistant Professor in EU Law, University of Cagliari, luca.pantaleo@unica.it.

[1] See B Conforti, 'Consistency Among Treaty Obligations' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford 2011) 190.

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incompatibilities. The Court of Justice has dealt with art. 351 TFEU extensively, interpreting away most of the doubts arising from there.[2] The meaning of the two paragraphs have been reconciled, and it is now safe to affirm that art. 351(1) TFEU provides temporary protection to allow the Member States not to incur international responsibility while the ultimate goal established by art. 351(2) TFEU (that is, the removal of all incompatibilities) is achieved in a sustainable (for the Member State involved) and lawful (from an international law perspective) manner.[3]

Most issues have indeed been clarified by the Court. One issue, however, has remained unclear until very recently, namely the possibility of applying art. 351 TFEU by analogy to agreements concluded by the Member States after the deadline set out therein, yet before the granting of a new competence to the Union. The idea of an analogical application of art. 351 TFEU first came up in an early case that was not related to the granting of a new competence to the EU. Rather, it had to do with an agreement concluded before the *exercise* of a competence that had already been granted to the Union when the agreement in question was concluded. This was the situation the Court of Justice was confronted with in the now classic *Arbelaiz-Emazabel* ruling. In short, the case concerned fishing rights granted under a French-Spanish agreement concluded in 1971. That is, after the deadline contemplated by art. 351 TFEU, yet before the (then) Community effectively exercised its competence on fisheries. One of the arguments submitted by the defendant in the main proceedings was based precisely on the analogical application of art. 351 TFEU. As AG Capotorti put it, the basic idea was that "on matters over which the Community did not start to exercise its powers for some time after the entry into force of the Treaty, the institutions' obligation not to obstruct observance of the commitments entered into by one or more Member States towards one or more non-Member States should extend also to the commitments entered into before such powers were

[2] As a result, the scholarship dealing with art. 351 TFEU is quite abundant. To name but the writings that have most heavily influenced the present author, see E Roucounas, 'Engagements parallèles et contradictoires' (1987) Recueil des cours; International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682 par. 283 ss.; P Eeckhout and J Klabbers, 'Moribund on the Fourth of July? The Court of Justice on Prior Agreements of the Member States' (2001) ELR 187; J Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press 2010); P Manzini, 'The Priority of Pre-existing Treaties of EC Member States within the Framework of International Law' (2001) EJIL 781; S Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* (Memorie del Dipartimento di giurisprudenza dell'Università di Torino 2018), especially at 115 ff.

[3] I have maintained the inherently provisional nature of the legal safeguards provided by art. 351(1) TFEU in L Pantaleo, 'Member States Prior Agreements and Newly EU Attributed Competence: What Lesson from Foreign Investment' (2014) EFAR 307, especially at 314; along the same lines see E Cannizzaro, 'Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case' (2009) Yearbook of European Law 596; JW Van Rossem, 'Interaction between EU Law and International Law in the Light of Intertanko and Kadi: the Dilemma of Norms binding the Member States but not the Community' (2009) Netherlands Yearbook of International Law.

exercised".[4] The argument was firmly rejected by the Advocate General based on a literal interpretation of the provision.[5] The Court did not even bother: it remained silent on this issue, yet the silence, in this case, was an apparent lack of endorsement of the defendant's argument.

The question, however, came up again several years later under different circumstances. As is well-known, the Treaty of Lisbon granted a new (exclusive) competence to the Union in the field of foreign investment. Before Lisbon, the Member States had concluded several bilateral investment treaties (BITs) with third countries based on what, at the time of their conclusion, was an exclusive competence of the Member States. Overnight, the Lisbon Treaty had potentially turned these BITs into violations of the new exclusive competence acquired by the Union, unless such BITs could be considered, by analogy, prior agreements safeguarded by art. 351 TFEU. The question gave rise to a heated debate in the scholarship. On the one hand, some authors argued in favour of the analogical application of the provision in question.[6] Others, like AG Capotorti did in *Arbelaiz-Emazabel*, emphasized that the wording of art. 351 TFEU could not allow a departure from the deadline therein codified.[7]

The solution to the BITs conundrum was found in Regulation 1219/2012 (the Regulation), which grandfathered Member States' BITs by allowing them to maintain in force the agreements notified under the procedure established by it. Formally speaking, the Regulation amounted to an authorisation granted under art. 2(1) TFEU. However, it was openly modelled on and inspired by art. 351 TFEU.[8] This circumstance could be clearly inferred from the very wording of the Regulation[9] as well as from the official position of the Council, which unambiguously held that "[i]n accordance with Article 351 of the Treaty on the Functioning of the European Union, bilateral investment agreements concluded by Member States should continue to afford protection and legal security to investors".[10]

Then along it came *Generalstaatsanwaltschaft München v HF*. In this ruling, an extradition treaty (hereinafter: the extradition treaty) concluded between Germany and the

[4] Case 181/80 *Arbelaiz-Emazabel* ECLI:EU:C:1981:192, opinion of AG Capotorti, para. 4.

[5] "[T]hat view manifestly conflicts with the wording of the first paragraph of Article [351]" *ibid*.

[6] See, for example, JP Terhechte, 'Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties' in M Bungenberg, J Griebel and S Hindelang (eds), *International Investment Law and EU Law – European Yearbook of International Economic Law* (Springer 2011) 79; L Pantaleo, 'Member States Prior Agreements and Newly EU Attributed Competence: What Lesson from Foreign Investment' cit. 312 ff; S Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* cit. 309 ff.

[7] See, in particular, A Dimopoulos, *EU Foreign Investment Law* (Oxford 2011) 306.

[8] See the considerations made by A De Luca, 'The EU Regulation Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries: the Destiny of Member States BITs' (2012) Diritti Comparati diritticomparati.it.

[9] For example, art. 2 of the Regulation is reminiscent of art. 351(1) TFEU, while Recital 12 includes a reference to art. 351(2) TFEU.

[10] See Council of the European Union, *Conclusions on a Comprehensive European International Investment Policy* consilium.europea.eu 9.

United States in 1978 was at stake. Without going into too much detail, it is sufficient to say that its provisions conflicted with the *ne bis in idem* principle as enshrined in art. 54 of the Convention implementing the Schengen Agreement of 14 June 1985 (which, as is well-known, was incorporated into EU law by the Treaty of Amsterdam) as well as in art. 50 of the Charter of Fundamental Rights.[11] If one considered the extradition treaty a successive agreement under art. 351 TFEU, there was no doubt that the referring court should have applied the rule of primacy. The German court, however, wondered whether art. 351 TFEU "should not be interpreted broadly as also referring to agreements concluded by a Member State after 1 January 1958 or the date of its accession, *but before the date on which the European Union became competent* in the field covered by those agreements".[12] The Union's competence in question - namely, in essence, the former third pillar - was initially granted to the Union by the Maastricht Treaty in 1993 and later expanded by the Amsterdam Treaty in 1999. That is, well after the conclusion of the extradition treaty. In short, the German court explicitly asked the Court of Justice a question that was never expressly put to it. The opportunity to clarify an issue that remained unclear for a long time suddenly materialised. And the Court of Justice, sitting in a Grand Chamber, duly seized it.

The Court started off by recalling its settled case law on the need to interpret exceptional rules in a restrictive manner.[13] The Court emphasized that the need to adhere to such case law was all the more important in relation to a rule like art. 351 TFEU that "allows derogation not from a specific principle but from the application of any provisions of the Treaties".[14] Here, the Luxembourg court seemed to suggest that the more far-reaching is the exception, the stricter has to be its interpretation. This was confirmed, the Court continued, by the existence of an "obligation of the Member States under the second paragraph of Article 351 TFEU to take all appropriate steps to eliminate existing incompatibilities between an agreement and the Treaties".[15] It should be recalled that art. 351(2) TFEU only applies to the extent that art. 351(1) TFEU also applies. Therefore, at this point of the Court's reasoning, the reader was inclined to believe that the Court deemed art. 351 TFEU applicable to the extradition treaty. Yet, it considered that the provision in question, albeit applicable in principle, had to be interpreted strictly, meaning that the obligation under 351(2) TFEU was to prevail over the safeguard accorded by art. 351(1) TFEU. So far, the Court's reasoning seemed fairly logical, and the proponents of the analogical application of art. 351

[11] On these matters, see the thoughtful considerations made by S Montaldo, 'Op-Ed: Three Revolutions in a Row: *Ne Bis in Idem*, Extradition Agreements and the Temporal Scope of Article 351(1) TFEU: *Generalstaatsanwaltschaft München v HF* (C-435/22 PPU)' (17 November 2022) EU Law Live eulawlive.com.

[12] See case C-435/22 PPU *Generalstaatsanwaltschaft München v HF* ECLI:EU:C:2022:852 para. 118 (emphasis added).

[13] *Ibid.*, para. 120.

[14] *Ibid.*, para. 121.

[15] *Ibid.*, para. 122.

TFEU were convinced that their views were about to be confirmed by the Court. The Court, after all, appeared to be saying that an analogical application was theoretically possible, yet it was not admissible in the circumstances. It bears noting that this was exactly the position taken by AG Collins in his opinion. The Advocate General stated that art. 351 TFEU was applicable by analogy. However, based on the *Kadi* case law, he concluded that a departure from a foundational principle of the Union's legal order (namely, the *ne bis in idem*) could not be permitted in the case at hand.[16]

However, the Court of Justice suddenly changed course. In the following statement, the Court returned to the textual interpretation of the provision's wording, but with a twist. The Court did not merely emphasise that the deadline codified by art. 351 TFEU predates the conclusion of the extradition treaty. It did so by adding a reference to the Treaty framers' intention. More specifically, the Court pointed out that the Treaty of Amsterdam changed the wording of art. 351 TFEU. The Court recalled that art. 351 TFEU's predecessor, namely art. 234 TEC, "used the phrase 'before the entry into force of this Treaty'".[17] The new formulation, without changing the substantive meaning of the provision, for the Court was a clear indication that the Member States intended to rule out the analogical application of art. 351 TFEU. In the Court's own words, the Member States,

> "[a]lthough they were already aware, when concluding those Treaties, that the competences of the European Union may evolve significantly over time, including in fields which were the subject of agreements concluded with third countries, the Member States did not provide for the possibility of taking into account, for the purposes of the first paragraph of Article 351 TFEU, the date on which the European Union became competent in a given area".[18]

The logical conclusion that followed this statement was that art. 351 TFEU "must be interpreted as applying only to agreements concluded before 1 January 1958 or, in the case of acceding States, before the date of their accession",[19] and that the provision in question "is not applicable to the Germany-USA Extradition Treaty".[20]

In light of these findings, the discussion revolving around the analogical application of art. 351 TFEU seems to have been settled for good. Based on *Generalstaatsanwaltschaft München v HF*, it would be difficult for anyone to argue that the provision in question can be analogically extended to the granting of a new competence to the Union. Unless, of course, the Treaty framers decided to expressly address the matter in the next Reform

[16] Case C-435/22 PPU *Generalstaatsanwaltschaft München v HF* ECLI:EU:C:2022:775, opinion of AG Collins, paras 72-77, commented by S Montaldo, 'Op-Ed: No One Means No One: *Ne Bis in Idem* and Extradition Agreements (Advocate General Collins' Opinion in *Generalstaatsanwaltschaft München v HF*)' (28 October 2022) EU Law Live eulawlive.com.

[17] *Ibid.*, para. 123.

[18] *Ibid.*, para. 125.

[19] *Ibid.*, para. 126.

[20] *Ibid.*, para. 127.

Treaty. Considering the strong views of the Council on the matter, it is not an entirely unrealistic scenario. Yet, it is a *de lege ferenda* one, which is for policymakers to explore further. One last point, however, seems worth to be made.

In essence, the Court concluded that the analogical application of art. 351 TFEU must be ruled out based on the textual interpretation of the provision. In order to reach such a conclusion, the considerations made by the Court in paras 120-122 are essentially superfluous. If those considerations were not there, the legal implications of the judgment would remain unchanged. This begs the question of why the Court has engaged in such (not strictly necessary) preliminary reasoning. In my view, there are two possible explanations, which are interconnected with each other.

First, the Court might have wanted to avoid dismissing the referring court's argument with a cursory reference to the literal interpretation of art. 351 TFEU, for doing so would not have done justice, so to speak, to the complexities of the issues at stake. The Court might have been well aware that a quick rejection of the thesis proffered by the German court (which enjoyed widespread support not only in the scholarship but also at the highest institutional level) based exclusively on the provision's wording would not have been positively received. The Court's lengthy explanation (better: lengthier than necessary) might therefore be a concession to the doctrinal intricacies and the political stakes behind the debate surrounding art. 351 TFEU. Second, one should not forget that the Court of Justice does not allow internal disagreement to be made public, for example, through separate or dissenting opinions of individual members. This is a vexed question that has long been debated and on which it is only possible to make speculative arguments given the lack of public information on the Court's decision making. However, it is reasonable to assume that dissent among the judges can most likely lead to two possible outcomes. When a compromise is within reach, dissenting judges will (wittingly or unwittingly) turn their disagreement into a watering down exercise aimed at making a ruling more ambiguous. When a compromise simply cannot be reached, decisions must be made by the majority.[21] It is reasonable to assume that the Court's tortuous reasoning might reflect the discussion that may have taken place behind closed doors. Reaching a compromise between the individual members of the bench may have been particularly challenging in this case. The careful and partly ambiguous reasoning of the Court may therefore reflect these difficulties. It appears reasonable to believe that some statements made by the Luxembourg Court can most likely be explained as concessions to the dissenting judges

[21] It has been argued, for example, that Opinion 2/13 was a majority decision made by the members of the Court of Justice that were more openly hostile to the Accession Agreement. See the thoughtful considerations made by SO Johansen, 'Opinion 2/13: A Bag of Coal from the CJEU' (10 January 2015) PluriCourts Blog jus.uio.no. See also the analysis made by H Rasmussen and LN Rasmussen, 'Comment on Katalin Kelemen—Activist EU Court "Feeds" on the Existing Ban on Dissenting Opinions: Lifting the Ban is Likely to Improve the Quality of EU Judgments' (2013) German Law Journal 1373, according to whom the lack of transparency of the Court's decision making results in more ideological, "activist" rulings.

leaning towards the Advocate General's position. Even though AG Collins was never mentioned in this part of the judgment, the reference to the *Kadi* case law (on which the Advocate General had built its argument) right before saying that art. 351(1) TFEU was not applicable *rationae temporis* can hardly be explained otherwise.[22] One might object that the final result is not so ambiguous. That is certainly true. However, it is hard to deny that the Court has chosen a meandering path rather than a straightforward one (that is, one based on a plain textual interpretation of art. 351 TFEU).

Be that as it may, art. 351 TFEU remains a formidably interesting legal provision. Every time one thinks that it has fallen into desuetude, something unexpected comes up and revives the debate revolving around it. *Generalstaatsanwaltschaft München v HF* may be the last episode of the saga unless a new *coup de théâtre* occurs. The next Reform Treaty, if it ever comes to light, may offer an excellent opportunity.

[22] The *Kadi* ruling is mentioned in *Generalstaatsanwaltschaft München v HF* cit. para. 119.