European Parliament

DIRECTORATE GENERAL FOR
RESEARCH AND DOCUMENTATION

421/77

CONVENTIONS UNDER ART. 220

OF THE EEC-TREATY

June 1977

CONVENTIONS UNDER ART. 22o[x] OF THE EEC-TREATY

Normally a state can itself decide whether it wants to enter into negotiations with another state in order to make an agreement with the other state. It, of course, also applies to the member states of the EEC. It is, however, in Article 22o in the EEC Treaty (In the following will only be referred to the Articles in that treaty) found necessary to oblige the member states to enter into negotiations about certain matters and in certain situations.

It is worth mentioning that Article 22o was made only 14 days before the signing of the EEC Treaty. The Article had not been discussed during the preceding negotiations about the Treaty.

Article 22o is a way to harmonize those differences in the national legislation, which are considered an obstacle to the real functioning of the EEC. The aim of the Article is to secure (the rights of) the nationals of the member states. But the Article only applies in situations not covered by other Articles in the Treaty. It

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x) "Member states shall, so far as necessary, enter into (is) negotiations with each other with a view to securing for the benefit of their nationals;

- the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals;
- the abolition of double taxation within the Community;
- the mutual recognition of companies or firms within the meaning of the second paragraph of Article 58, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies of firms governed by the laws of different countries;
- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards".

follows from the words "so far as necessary" in Article 22o. In some situations it will be doubtful whether an article in the Treaty can be applied or Article 22o is the most relevant. But as long as the EEC has nothing to cover that specific topic, Article 22o can be applied by the member states.

Article 22o does not force all the member states to participate in the negotiations, but if the four freedoms in the EEC Treaty (right of establishment, free movement of labour, services and capital) can be fully effective and ensure equality of competitive conditions all member states have to participate.

According to the words in Article 22o there is only an obligation to enter into negotiations. This negotiation is, however, assumed to result in conventions. This result follows from Article 3, paragraph 2 in the Act of Accession, which deals with the three new member states (Ireland, Denmark and Great Britain and Northern Ireland) and their relation to the three European Communities and their reciprocal relations.[1]

Before dealing with the different subjects in Article 22o it is worth mentioning that the member states outside the scope of Article 22o and the Treaty have entered into negotiations e.g. about uniform rules for conflict of laws, European trade marks rights and European patent rights.

For the sake of clarity the four different topics in Article 22o will be discussed in the order mentioned in the Article.

a) National treatment as for the protection of persons and the enjoyment of rights

This topic is presumably a supplement to the obligation to extend national treatment imposed by other articles of the Treaty such as the four freedoms (mentioned above) to citizens of the other member states.

Until now it has not been considered necessary to enter into negotiations about the topic, presumably because the equality of status already is considered secured in all the member states. Another explanation of the lack of negotiation

may be, that as long as it is not decided to what extent the right to national treatment can be secured by other articles in the Treaty, the scope of Article 220 cannot easily be determined.

b) Abolition of double taxation

The second topic to be negotiated concerns elimination of double taxation within the EEC.

The phrase "double taxation" is not generally defined, but it seems accepted to talk of double taxation when a person because of taxation in more than one state is subject to heavier taxes than he would have been had he been taxed in one state only.

The member states have worked on a cenvention for the elimination of the double taxation among the member states. The work has, however, been interrupted since 1967, because priority has been given to harmonize the national tax laws on the basis of Article 100. The work on the harmonization of tax laws may give identical conditions for taxation among the member states. Yet application of Article 220 is useful in order to get a common interpretation of the different basic notions to be given by the European Court (The member states have to agree to give the Court this right to interpret) By existence of an international agreement the different national fiscal authorities will also have better possibility to cooperate and prevent tax evasion.

At the moment a number of bilateral agreements for the elimination of double taxation are in existance among the member states. Nearly the whole EEC is covered by those agreements.

c) Mutual recognition of companies and firms

The third subparagraph of Article 220 deals with three different subjects, for which seperate conventions have either been signed or are under consideration. No convention has, however, entered into force yet.

The first subject is the mutual recognition of companies as defined in the second paragraph of Article 58. When companie are made in accordance with the legislation in one of the member states and have their official office within the Community, they are considered equal with the physical persons living in the Community. The different rules concerning right of establishment and the free movement of services seem to presuppose that the companies concerned are ~~recognized~~ recognized in all the member states. According to Article 220 the question about recognition does not seem to be answered by Article 58, because this Article implies that a convention will be made between the member states.

For some member states recognition of foreign companies has never been a problem. When a company is made in accordance with the law of the country concerned other countries automatically recognize the personality of that company (this is for instance the situation in Denmark). In other countries recognition of companies requires that special formalities are fulfilled, and if such a recognition is not granted, the company is considered as non-existing.

The work on a convention started in 1962, and on February 29, 1968 the convention was signed by the governments, but it has not entered into force yet.

Even if the three new member states according to Article 3, paragraph 2 in the Act of Accession are obliged to accede the convention, the negotiation concerning their accession cannot start before all the original six member states have ratified the convention, and the Netherlands have not done so yet.

Additional to the convention a protocol, signed by the original member states on June 3, 1971, gives the Court of Justice jurisdiction to resolve questions of interpretation of the Convention. The procedure for this interpretation is very similar to the "preliminary ruling" procedure in Article 177. This Protocol is neither ratified by all the original member states (the Netherlands and Italy have not ratified). Also this Protocol has to be acceded by the new member states.

Article 1 in the convention enumerates the conditions, which have to be fulfilled before a company can be recognized according to the convention. When a company is made in accordanc with the law of one of the member states, and it has its statutory seat in the EEC, it must be recognized by the other member states.

The legal consequences of the recognition are that the company gets its legal personality in accordance with the company law, under which it is made.

c2) Retention of legal personality if transfer of seat to another country

Under the law of the member states the transfer of the rea seat of a company from one country to another results in loss of the corporate personality. Until now no work has been started to solve that problem. As long as the problems about tax has not been solved, no country will be interested in transferring the seat of the company. But the convention on recognition of companies will probably make the work on a convention easier.

c3) Mergers between companies

In order to give companies of different nationalities a possibility to merge across the national borders, work on a convention concerning international mergers of companies was started in 1964. The final draft conventinn was submitted to the Council from the Commission on June 29, 1973, but the convention has not been signed yet.

In February 1974 the work on the convention was started again with the new member states in order to facilitiate their accession to the convention.

The convention presupposes the implementation of the third directive concerning harmonization of the national laws about mergers of companies.

The convention does not deal with the problem about workers representation in the companies. Without due regard to that proble international mergers could according to the convention take place in order to avoid strong rules about participation of the workers.

Also the accession of the new member states may give some reason to change some articles in the convention. It is therefore doubtful whether the convention will be signed in the near future.

d1) Reciprocal recognition and enforcement of judgments

The last topic in Article 220 deals with simplification of formalities governing recognition and enforcement of judgments. Already in 1959 the EEC-Commission proposed the six member states to try to find a solution on the question of reciprocal recognition and enforcement of judges. In this field the rules varied in the member states, even if some bilateral agreements were made. If an harmonization did not take place, it would be difficult to secure the rights of the nationals in the different member states. Through an harmonization an equal treatment of the enforcement of judgments would be possible.

On September 27, 1968, the convention and the additional protocol were signed by the foreign ministers of the member states On June 3, 1971, a supplemental Protocol giving the Court of Justice jurisdiction to interpret the convention was signed. The procedure for such an interpretation is similar to that for a preliminary reference under Article 177.

From February 1, 1973, the convention has been in force, and the Protocol has been in force since September 1, 1975, when it was duly ratified by the original six members. At the moment the new member states discuss their accession to the convention.

The convention applies in matters where private and commercia law is involved and only in economic and social affairs (the scope of the EEC-Treaty). Without discussing the content of the convention in details it is noted, that the convention must be applied also on the courts' own motion (all courts and tribunals are included), and that the domicil of the defendant normally is decisive for the jurisdiction of the court.

After the entry into force of the protocol for the Court of Justice several cases have come before the Court asking for interpretation of the different articles in the convention.

On October 1976 the 3 first judgments were given by the Court.

Two cases dealt with the interpretation of Article 5 (1) "the place of performance of the obligation in question".(The court held that it was for the national court for which the proceedings were brought to decide whether the place of performance was within the court's territorial jurisdiction). In the second case the meaning of "obligation" in Article 5(1) and "branch, agency or other establishment" in Article 5(5) were discussed. The third case dealt with the meaning of "civil and commercial matters" in Article 1.

d2) Recognition and enforcement of arbitration awards

No work has been done to recognize and enforce arbitration awards between the member states. It is also not very necessary to do anything about it for the moment because of the existence of many international agreements in that field.

d3) Convention on bankruptcy

In 197o an expert group made a draft to a convention on judicial decisions given in bankruptcy proceedings. The draft is made with reference to Article 22o and is a supplement to the abovediscussed convention on enforcement of judgments, which explicitly excludes judgments in this field.

The aim with the convention is to get uniform rules on bankruptcy within the EEC, so that the competent national court has competence within the whole EEC.

In 1972 the draft convention was amended. When the new member states acceeded the EEC, the convention was not signed by the original member states. Now all 9 member states are negotiating and have not yet signed the convention.

An outline of the implementation of Art. 22o

	no negotiations	negotiations started	final draft convention	convention signed	convention in force
a)	x				
b)		x			
c1)				x[x)]	
c2)	x				
c3)			x		
d1)					x[xx)]
d2)	x				
d3)		x			

x) Only signed by the original member states. Negotiations with the new member states have not started yet.

xx) The convention has been in force since 1st February 1973 for the original member states, and the additional Protocol has been in force since 1st September 1975. The new member states discuss their accession to the convention.

L I T E R A T U R E

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