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THE COMMUNITY PRINCIPLE OF PROPORTIONALITY IN PENAL MATTER

Abstract

Since 1st of January 2007, the date of Romania's adhesion to the European Union, a new matter has raised in judicial thinking, that of the penal implications of the European integration.

One of these implications regards the community principle of proportionality according to which in the matter of economical-financial offence, the applied sanctions must be proportional to the committed deed, not to impede the free movement of goods and persons.

Key words: *community law, principle of proportionality, economic offences, customs offences, sanctions, free movement of goods, free movement of persons, measure equivalent to a quantitative restriction.*

1. Recently, in our doctrine, there has been the opinion that the community law represents a real direct issue of criminal law – substantial or procedural – on the basis of priority principle, without being necessary the adoption of national norm [12]. In this context, an important community principle with implications in penal matter is being analyzed by us : the principle of proportionality.

The Court of Justice of the European Community (C.J.E.C.), made an appeal for many times to the application of proportional sanctions in the economic matter.

This principle has been explained in the community instance, as follows: "In general, criminal legislation and rules of criminal procedures are problems for which the member states are responsible [15]. However, according to a constant jurisprudence of the Court, the community law imposes certain limits regarding measures of control that the law allows to the member states regarding free movement of goods and persons. Administrative or repressive measures must not exceed the necessary, and the control procedures must not be

elaborated in such manner that restricts the freedom asked by the treaty and must not be accompanied by disproportionate sanctions comparing to the gravity of offence so that they become impediments for using that freedom. [4] "

To estimate if a provision of community law is in connection with the principle of proportionality, it is necessary to state, first of all, if the means it uses for reaching its objective correspond to the importance of the objective and, secondly, if they are necessary for the aimed result [5].

According to dispositions of the Treaty Establishing the European Community (T.E.E.C.), the goods from a third country, after paying the customs taxes, are free to move in a member-state of the Community, being assimilated by the goods even from one of the member states.

It was a case about the import in France of such goods for which the customs taxes had been paid by another member state of the Community, when, the Correctional Tribunal from Lille, finding out that the import is based on misrepresentations of origin of goods, sentenced some Belgian traders to prison for 1 month and three months with postponement, and respectively with a fine equivalent to the value of the imported goods, meant to replace seizure of goods that could not be sequestered, as well as payment of a supplementary fine equal to the double value of the imported goods.

According to Art. 234 from the Treaty Establishing the European Community, the amended version, the Customs Court of Appeal asked the European Court of Justice two questions, especially about interpretation of provisions from the treaty that eliminate restrictions to free movement, within the Community, of the goods from a third country, being in free pratique in one of the member states.

The Court criticized the way in which The Correctional Tribunal severely sanctioned the committing of customs offence, showing that exigency of an indication from the origin country in the customs statement, in the member state of import, for the products of free-pratique and whose community status is accepted by a certificate of community movement, does not represent a measure equivalent to a quantitative restriction, under the condition that these goods depend on the measures of commercial policy taken by this state, according to the Treaty. However, such an exigency represents a measure equivalent to a

quantitative restriction when it is requested to the importer to declare as it concerns the origin, other things that he knows or he can rationally know, or if omission or inexactness of this statement is so severely sanctioned, as the French instance did, and equivalent to a punishment disproportional with the nature of offence that has an administrative pure character. All administrative or restrictive measures that exceed the framework of what is necessary, in the member state of import, for obtaining some complete and accurate information reasonably about movement of goods that depend on the particular measures of commercial policy, must be considered as measures equivalent to a quantitative restriction forbidden by the Treaty [6].

Such arguments have been repeated by the Court [7], that led to establishment of a constant jurisprudence in the sense of forcing the national instances to give priority to the disposition from the community legislation and to bring modifications in the judicial specification of the facts or to minimize the applied punitive sanctions [1; 2].

Subsequently, the French legislator and national instances followed these indications of moderation for applying the punitive sanctions in customs and economic offences, certainly of those under community right. Thus, for example, for the import of goods on the grounds of a misinterpretation of origin, the instances decided to that there must be applied a fine according to Art. 410 from the Customs Code. This rule is not valid for the illicit traffic of drugs, matter in which the French Court of Cassation motivates that even C.J.E.C. decided that there must be applied sanctions proper to the severe danger that such facts represent [3]. In his turn, the French legislator replaced the fixed punishment with fines by punishments relatively determined (Law from 21st of December 1977), and subsequently (Law from 8th of July 1987) limited the fine to the quantum of twice the value of the imported goods, in case of contraband of import or export without statement of origin. In the same way, by another law, it was emphasized that the intensification of the sanctions in these domains must be reported to the reduced gravity of the committed infringements (Law from 20th of September 1986).

In our penal law there are legal criteria – general and special – that the instance court must obey considering individualization of the punishment (Art.

72 – Penal Code); among these it is also included the degree of social real danger of committed offence or the real gravity of the committed offence [13]. Nevertheless, we dare to say that for applying the punitive sanctions, in customs and economic offences, certainly those that belong to the domain of application of community right, the instance courts must also take into consideration the community principle of proportionality. In the same way, the Romanian legislator must precede to an assessment of penal legislation to remove the possible legislative impediments ahead of exercising the free movement of goods and persons in the community space.

2. We must mention that at the jurisprudence level, the national judge has the obligation to verify if an internal penal norm is against a provision of community legislation; in case he finds that it is incompatible with a community norm, he is obliged not to enforce it. If the judge does not see this incompatibility, the C.J.E.C. shall take action [14].

Regarding the last affirmation, it is to be considered a short review of the institution "preliminary decision".

Art. 234 from the Treaty Establishing the European Community (TEEC) shows the following:

"C.J.E.C." is forced to decide by preliminary title:

a) towards interpretation of the treaty;
b) towards validity and interpretation of the documents adopted by the institutions of the Community and Central European Bank (C.E.B.)
c) towards interpretation of the rules of bodies created by an Act of the Council, if the rules mention this [paragraph [1]].

When this matter is questioned before the instance of a member state, this instance, when it considers that for stating it is necessary a decision upon this matter, it can ask the C.J.E.C. to decide [paragraph [2]].

When this matter is questioned in a pendinte cause before the national instance whose decisions cannot subject to a way of action in internal law, this instance is forced to go to law C.J.E.C. [paragraph [3]].

From these normative dispositions, two important aspects result:

Firstly, interpretation of the community law cannot be left for the judges from the member states. On the whole territory of European Union (E.U.) this interpretation must be equal, considering the diversity of national judicial systems that may lead to unequal interpretations; it is considered that exigency of equality for applying the community law is inherent in the proper existence of E.U. for insurance of an equal interpretation, the treaties invested in C.J.E.C an independent and mandatory position of interpretation of community law, and put at disposal of the national judges a procedure, that one of preliminary decision, for reaching this objective.

Secondly, to the community instances it has been given the exclusive competence to verify legality of documents of community institutions; the national judge needs a decision from C.J.E.C. regarding the possible aspects of illegality.

3. Regarding the "preliminary rulings", we are able to show that the sending for a preliminary rulings have two features: a facultative one and a mandatory one.

The *facultative* sending comes when the national judge does not find a solution in the last instance. He appreciates discretionarily if a decision of C.J.E.C. is necessary to help him judging the cause he is given.

The sending is *mandatory* when a national instance judges a cause in the last instance. In this condition, the place of an instance in the jurisdictional system of a state is irrelevant, as far as its decisions are irrevocable, and undisputed internally [10].

Some national judges tried elusion of the rule from Art. 234 paragraph 3, Treaty Establishing the European Community (regarding mandatory sending), appealing to the theory of "acte clair" from the French administrative law, according to which the national instances do not need to ask to the C.J.E.C. for interpretation of a matter of community law, if it is clear enough.

Regarding this theory, it has been questioned if it is also applicable in the community law. The Doctrine emphasized that regarding Art. 234 paragraph 2 from Treaty Establishing the European Community (regarding facultative sending) there are no problems, because the national judge is free to decide if a

matter of community law is clear enough. But, regarding Art. 234 paragraph 2 from Treaty Establishing the European Community, the national instances are forced to solicit a preliminary ruling when a matter of interpretation of the community law is raised before them [11].

But, the national instances are not forced to send for a preliminary ruling in the following circumstances:

A. Causes judged in emergent procedure, because by waiting for the answer from C.J.E.C., there could be made a violation of the urgent character of the procedure. For this reason, C.J.E.C. stated the following: a) Brief and urgent character of a national procedure does not impede C.J.E.C. to consider it valid on the grounds of Art. 234 paragraph 2 from Treaty Establishing the European Community, if a national instance considers necessary an interpretation; b) Art. 234 paragraph 3 from Treaty establishing the European Community (T.E.C.) must be interpreted as a national instance is not forced to inform C.J.C.E. about a problem of interpretation or validity approved by this article, when the matter is raised in a temporary procedure (*einstweilige Verfugung*), in which the taken decision within this procedure cannot subject to a recourse, providing that any part to have the possibility to subsequently open a judgment on the merits, during which the matter of community law temporary treated in the brief procedure to be examined and submitted to sending according to Art. 234 paragraph 3 from Treaty establishing the European Community (T.E.C.) [8].

B. Causes when the matter of community law is nor relevant, meaning when the possible obtained answer from C.J.E.C. cannot affect the solution of interest.

C. When the raised matter is identical to one that was already subjected to a preliminary ruling of C.J.E.C. in the same manner or when the matter of law was solved by C.J.E.C. under its jurisprudence, irrespective of the nature of proceeding that led to that decision and not only to the sending for the preliminary rulings, as for example interpretation of C.J.E.C. on the occasion of fulfilling an action of the Commission against a member state, on the basis of Art. 226 from T.E.C.

D. When the correct applying of the community law imposes in such circumstance that does not allow any reasonable doubt [9].

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[7]C.J.E.C., Decision from 28th of March 1979, Procureur de la Republique against Michelangelo Rivoira et autres, cause C-179/78, in "Recueil …", 1979, p.01147 (the measure of applying punitive sanctions in case of a misrepresentation made on the accasion of an import that by itself cannot subject to a prohibition or restriction, even if these sanctions are provided by the national law that incriminates the misrepresentations made for forbidden imports).
[8]C.J.E.C., Decision from 24th of May 1944, Hoffman-La Roche AG against Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH, cause C-107/76, in "Recueil …", 1977, p.00957.
[9]C.J.E.C., Decision from 6th of October 1982, Srl CILFIT et Lanificio di Gavardo SpA against Ministere de la santé, cause C-283/81, in "Recueil …", 1982, p.03415.
[10]In the same sense, C.J.E.C. actioned in Decision from 15th of July 1964, Flaminio Costa against E.N.E.L., cause C-6/64, in "Recueil de jurisprudence", edition francaise, p.01141.
[11]In our act it is sustained that the community instance accepted the theory of "clear act", invoking Decision C.J.E.C., from 6th of October 1982, Srl CILFIT et Lanificio di Gavardo SpA against Ministere de la sante, cause C-283/81, in (O. Manolache, Community Law, 4th edition, Publishing House All Beck, Bucharest, 2003, p.684). However, in this decision, the community instance does not confirm the theory of "clear act", but, on contrary, it reminds the fundamental exigency of the

judicial community order regarding uniformity of interpretation and application of community law that imposes to the national instances, as well to C.J.E.C. itself.

[12]Gh. Ivan, Community Law as issue of penal law, in "Magazine of penal law", No.2/2008, p.93.

[13]Gh. Ivan, Individualization of punishment, Publishing House C.H. Beck, Bucharest, 2007, p.121-143.

[14]G. Stefani, G. levasseur, B. Bouloc, Droit penal general, Dalloz, Paris, 1977, p.98-103.

[15]We must not forget that it is about the position of the Court in 1981. Nowadays, it is stated an indirect penal European integration, by means of penal procedural norms it is taken action upon the substantial penal norms (see institution of the European warrant).