

BALTISCH-DEUTSCHES HOCHSCHULKONTOR
Prof. Dr. Thomas Schmitz

Spring Semester 2010

PRACTICAL CASE-SOLVING IN EUROPEAN LAW

Case 3

(facts of the case)

A-land, B-land and C-land are successor states of the Soviet Union. C-land is a member state of the European Union. A-land is one of the world's leading oil suppliers.

One day, tensions between A-land and B-land led to an armed conflict during which A-land occupied parts of B-land in violation of public international law. The European Union discussed possible sanctions against A-land in a lengthy process. Since C-land urged to impose sanctions, A-land put pressure on it. It closed the borders, refused to repay immense overdue loans, despoiled companies from C-land of their real estate in A-land and stopped to fulfil any contract with C-land. In particular, it did not deliver any oil anymore. This caused a severe energy crisis in C-land, which resulted in rigorous limitations of traffic and heating in the winter. A-land also threatened that it might deal with C-land as it had dealt with B-land and started extensive military manoeuvres near the border and off the coast of C-land.

During the last years, EU member state D-land had intensified its relations with A-land, which had become one of the biggest customers of its industries. Now it planned to build a high capacity oil pipeline between both countries, which should provide for an easy energy supply and would be erected at the bottom of the sea, avoiding to pass the territory of any other state. In October 2009, the governments signed a "friendship and cooperation agreement" about this project and other projects of close cooperation. In vain, C-land demanded of D-land to cancel the signing of the agreement. It argued that in the given situation, all EU member states were legally obliged to act in loyalty and solidarity. The government of D-land objected that the EU was not a federal state but an international organisation based on public international law and that there was no legal norm obliging a member state to take on substantial economic disadvantages in order to do another member state a favour - in particular as long as the Union had not imposed any sanctions. In 2010, however, the prime minister is not sure if this was correct and wants to get an independent opinion.

You are a promising young expert of European Union law and have just begun an exciting internship at the state chancellery of D-land. When you are presented to the prime minister, he asks you if in the given situation, the signing of the agreement represented a violation of European Union law and what could be the legal consequences. What will be your (correct...) answer?

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(discussion of the case)

SUBJECTS: Mutual loyalty within the Union ["Unionstreue"]; the legal nature of the European Union ["Staatenverbund", supranational union, state without sovereignty?]; legal actions between member states; reference to the previous and prevailing law after the reform of Lisbon.

OUTLINE OF THE CASE SOLUTION:

My (correct) answer will clarify at first if in the given situation the signing of the "friendship and cooperation agreement" with A-land represented a violation of European Union law (A.). Then it will explain the various possible legal consequences (B.)

A. The signing of the agreement with A-land as violation of European Union law

The signing of the agreement in October 2009 represented a violation of European Union law if it contravened any norm of primary or secondary law (at that time Community law or other Union law). There might be such norms, which, in the given situation, obliged D-land to refrain from the signing in order to show loyalty or solidarity with its fellow member state. C-land was in a difficult situation, since A-land put enormous pressure on it, combining numerous legal and illegal measures: closing the borders, refusing to repay immense overdue loans, despoiling companies from C-land of their real estate, stopping to fulfil any contracts and threatening with a military intervention. Under these circumstances, the conclusion of a friendship or cooperation agreement by another member state could be understood as indifference of this state (or even of the European Union as a whole) and encourage A-land to continue its menacing behaviour. It might also not have been helpful to solve the severe energy crisis in C-land, which had emerged because A-land did not deliver any oil anymore. Since the European Union is an organisation of integration, which unites the member states and their peoples in "an ever closer union" (art. 1 sub-sect. 2 EU Treaty), its law might have required D-land to postpone the project until the international crisis of those days was solved.

There are apparently no norms of secondary law or other binding acts, which might have been violated.¹ Given that the European Union had not yet imposed any sanctions on A-land, there were not yet any common positions or joint actions adopted within the framework of the Common Foreign and Security Policy (see for that time art. 12 EU Treaty) or any urgent measures taken on the basis of art. 301 EC Treaty². There were also no general rules of secondary law about standards of solidarity in case of tensions between member states and third countries. However, solidarity is an important aspect of European integration and there might be norms of primary law, which did not allow the signing of such an agreement in the given situation.

¹ Note: Since it is obvious that there is no relevant norm of secondary law, it is not necessary to dedicate an own section to this issue. It is more elegant to deal with it shortly within the introduction and then to concentrate on the examination of a possible violation of primary law.

² Now (after the Treaty of Lisbon has come into force) art. 215 FEU Treaty.

I. Violation of explicit norms in the EU Treaty or EC Treaty

The signing of the agreement did not represent a violation of explicit norms in the Treaties, because at that time there were no Treaty clauses that were sufficiently precise, specific and definite to allow to deduce a concrete loyalty or solidarity obligation in a situation of conflict between a member state and a third country. The EU Treaty stressed on several occasions that the relationship between the member states shall be based on solidarity. However, it did not contain a relevant explicit norm. There was no clause like the new art. 32 EU Treaty (brought by the Treaty of Lisbon), which, unlike the former art. 16, obliges the member states explicitly to "show mutual solidarity" in their international activities. The preamble stressed the desire of the member states "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions" - but a preamble consideration is not a legal norm. According to art. 1 sub-sect. 3 EU Treaty, it was the task of the European Union "to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples" - but this was about the tasks of the Union, not about the obligations of the member states. According to art. 11(2) sub-sect. 1 EU Treaty, within the framework of the Common Foreign and Security Policy, the member states had to "support the Union's external and security policy ... in a spirit of loyalty and mutual solidarity" - but this was not relevant in the given case, because there was not yet any policy of the Union how to deal with the conflict. For the same reason, art. 23(2), which obliged member states abstaining in a vote on the Common Foreign and Security Policy to refrain in a spirit of mutual solidarity from any action likely to conflict with or impede Union action was not relevant. All these clauses implied that there was a general legal obligation of mutual loyalty and solidarity within the Union, but did neither establish such a general obligation themselves neither concretize it with regard to the given type of situation. Unlike the EU Treaty, the EC Treaty did postulate a general loyalty obligation of the member states. Art. 10³ required them to take all appropriate measures to ensure their obligations, to facilitate the achievement of the Community's tasks and to abstain from any measure, which could jeopardise the attainment of the objectives of the Treaty. However, all these aspects of a positive and negative Community loyalty ["Gemeinschaftstreue"] were only relevant for matters, which fell under the EC Treaty, and were limited to the relation between the member states and the Community. Art. 10 EC Treaty did not answer the question if a member state must generally show respect of the interests of other member states in foreign affairs.

II. Violation of general principles of Union law

The signing of the "friendship and cooperation agreement" might however be incompatible with unwritten primary law. Loyalty and solidarity might be essential concepts in the process of integration, which the member states considered as self-evident when drafting the Treaties. In this case, the obligation to act in loyalty and solidarity will follow from a general principle of Union law. Such principles are broadly recognized in the jurisprudence of the European Court of Justice, in particular with regard to the practical effectiveness ["effet utile"] of Union law, fundamental rights and the rule of law.

1) The existence of a principle of mutual loyalty within the Union

Whether there is a principle of loyalty or solidarity in the European Union depends on its legal nature and the resulting basic understanding of the Union as organisation of integration. In federal states, a principle of federal loyalty ["Bundestreue"⁴] is generally recognized.⁵ The term is used as a generic term, which usually stands for *duties of loyalty* (to act in good faith) and *duties of solidarity*. Federal loyalty governs the relationship between the federation and the states and among the states in aspects that are not expressly regulated in the federal constitution. It is an essential and characteristic element of any federal legal order. Therefore, the concept can be transferred to other forms of organisation, which are based on the fundamental idea of federalism.⁶ Hence there is the obligation to show loyalty and solidarity in a confederation (a classical

³ See now art. 4(3) EU Treaty, which postulates a "principle of sincere cooperation".

⁴ In German, the principle is also called "Grundsatz des bundesfreundlichen Verhaltens".

⁵ See *Bauer*, Die Bundestreue, 1992, with further references; *Unruh*, in: *Europarecht* 2002, 41 (47 ff.); *Sachs*, in: *Sachs* (editor), *Grundgesetz. Kommentar*, 3rd edition 2003, art. 20 no. 68 ff. with further references; *Piero*, in: *Jarass/Piero* (editors), *Grundgesetz für die Bundesrepublik Deutschland*, 10th edition 2009, art. 20 no. 20 ff. with further references; *Lebitsch-Buchsteiner*, Zur Rücksichtnahmepflicht im Bundesstaat - im Interesse der Länder oder Pflicht zur Bundestreue, 2001.

⁶ Cf. *Unruh*, *Europarecht* 2002, 47.

association of states, which is not a federal state) but not in a conventional international organisation (which does not unite the member states and their citizens to a new political community but is confined to limited special tasks). It is not decisive if an organisation is based on public international law but if it has a federal or non-federal character.

In respect of the European organisation of integration there is no doubt that it is based on the idea of federalism. During the first decades of integration, when it had few tasks and competences, it was qualified as a mere specialised organisation ["Zweckverband"]⁷ or, helplessly, as an "organisation sui generis"⁸. During the nineties, it became evident that this was inadequate, given its growing functions, powers and importance. In 1993, the German Bundesverfassungsgericht (Federal Constitutional Court) used the term "Staatenverbund" ["compound of states"] to explain its legal nature.⁹ This term aims to illustrate that the Union is a non-state entity based on, dependent on and dominated by the will of the still sovereign member states but more developed than a confederation ["Staatenbund"] and approaching the model of a federal state ["Bundesstaat"]. Others, in particular VON BOGDANDY¹⁰ and SCHMITZ¹¹, proposed to qualify it as a "supranational union".¹² Von Bogdandy emphasized the emergence of an autonomous legal order, which superposes but does not replace national law, and of a polycentric political system, in which an autonomous non-state centre complements the states. Schmitz stressed that the Union's purpose is integration, that it performs its *integrative function* primarily by the comprehensive exercise of *supranational public power*, that it is conceptually open for *tasks of every kind* and that it tends to evolve continuously (this *dynamic quality* distinguishes it both from traditional kinds of international organisation and from the state). The supranational union is a *new form of organisation*, situated in the triangle between international organisation, confederation and federal state. It combines the characteristics of a confederation and an international organisation and is close to - but is not - a federal state. DAUPS even considers it as a state, but as a state of a new category, a "state without national sovereignty".¹³

The concepts of "Staatenverbund", "supranational union" and "state without sovereignty" differ considerably, with consequences for the understanding of the role of the member states, the role of the courts and democracy in the European Union. There are, however, no significant consequences with regard to the question of loyalty and solidarity because all theories describe the Union as an advanced federal governing entity. It is generally admitted that the Union has left far behind the stadium of a conventional international or supranational organisation, such as the UN, OECD, WTO, Council of Europe or NATO. In this state-like organisation, loyalty and solidarity must govern the relations between the entities in a way comparable to that in a federal state. This is reflected in a general principle of mutual loyalty within the Union ["Unionstreue"].¹⁴

Just like federal loyalty in the federal state, mutual loyalty within the Union amounts to *duties of loyalty* in the narrow sense of the word (duties to act in good faith) *and duties of solidarity*. It governs the relationship between the Union and the member states (in both directions) and among the member states. It may oblige them to act or to refrain from a certain action in a certain situation. Some aspects are concretized in the Treaties; after the reform of Lisbon, this applies to more aspects than before.¹⁵ In 2009, some aspects were concretized in the Treaty articles mentioned above (cf. A.I., see in particular art. 10 EC Treaty). Another important aspect was

⁷ H. P. Ipsen, *Europäisches Gemeinschaftsrecht*, 1972, p. 196 ff., called the European Communities "Zweckverbände funktioneller Integration".

⁸ See the references at Schmitz, *Integration in der Supranationalen Union*, 2001, p. 72.

⁹ BVerfGE 89, 155 (188) = *Entscheidungen des Bundesverfassungsgerichts* (decisions of the Federal Constitutional Court, official reports), volume 89, beginning of the quoted decision at page 155, see in particular page 188.

¹⁰ Von Bogdandy, in: von Bogdandy (editor), *Die europäische Option*, 1993, p. 97 (119 f.); von Bogdandy, in: von Danwitz/Heintzen/Jaestedt/Korioth/Reinhardt (editors), *Auf dem Wege zu einer europäischen Staatlichkeit*, 1993, p. 9 (13 ff.); von Bogdandy, in: *Integration 1993*, p. 210 ff.; von Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform*, 1999.

¹¹ Schmitz, *Integration in der Supranationalen Union*, 2001; see the English summary at http://lehrstuhl.jura.uni-goettingen.de/tschmitz/SupranUnion/SupranUnion_en.htm.

¹² For other terms used to describe or qualify the European Union see Schmitz (note 11), p. 70 ff.

¹³ Daups, *L'Union européenne. Un Etat sans souveraineté nationale*, 2006, p. 20 ff.

¹⁴ See *Unruh*, in: *Europarecht 2002*, 41; *Hatje*, *Loyalität als Rechtsprinzip in der Europäischen Union*, 2001; Schmitz (note 11), p. 235, 484, 485; *Zuleeg*, in: *Neue Juristische Wochenschrift 2000*, 2846 ff.

¹⁵ See the note following the outline of the case solution.

addressed in art. 6(3) EU Treaty¹⁶, which obliged the Union to respect the national identity of its member states.

2) The violation of the principle of mutual loyalty within the Union

After establishing that there *is* a legal principle of mutual loyalty within the Union, it must be examined if this principle was violated by the signing of the "friendship and cooperation agreement" with A-land in the given situation. This is the case if such a policy was incompatible with the duties of loyalty (a) or with the duties of solidarity (b) of D-land as EU member state.

a) Violation of duties of loyalty

The duties of loyalty require that the member states conduct all their policies, even those unconnected to the Union's competences and objectives, in good faith. They always have to be considerate of the Union and of the fellow member states. They must refrain from activities which fall into their competences and are not submitted to any Union law but may cause significant damage or harm to the Union or another member state. A closer look on the agreement signed in October 2009 reveals, however, that this was not the case: The agreement concerned exclusively the relationship between D-land and A-land. It was not directed against any other state and did not postulate any obligations that might cause the partners to disregard or neglect their legal obligations towards others. In particular, the planned building of an oil pipeline between D-land and A-land did not invite A-land not to fulfil its delivery obligations towards C-land. The agreement neither supported the menacing policies of A-land vis-à-vis C-land¹⁷ - it just did not stop them. Therefore, the signing of the "friendship and cooperation agreement" with A-land did not violate any duties of loyalty.

b) Violation of duties of solidarity

The signing might have violated, however, D-land's duties of solidarity. In a state-like federal organisation of integration, the member states are not only required not to harm each other but must also support each other in *crises*. This is one of the essential reasons why such an organisation exists. Firstly, they must help a threatened or struggling member state to preserve or regain its real political independence. Secondly, they are to a certain extent responsible for the well-being of its citizens. This is evident in the European Union, given that the citizens of the member states are united by the institution of the citizenship of the Union (art. 17 et seq. EC Treaty respectively art. 20 et seq. FEU Treaty) to a new, supra-national geo-regional human community. In the case under consideration, the measures taken by A-land against C-land were seriously threatening the free exercise of an independent political will of the member state's institutions. Furthermore, they had caused a severe energy crisis, which resulted in rigorous limitations of traffic and heating in the winter. Such serious effects on the daily life of citizens of the Union cannot be accepted, neither by the Union neither by the other member states. So they were all required to pursue a policy that backs up and supports the distressed state and contributes to solve the crisis. This included positive actions as well as to exercise restraint if the refrain from a certain activity might be useful.

Under the given circumstances, D-land could have motivated A-land to stop putting pressure on C-land by cancelling (postponing) the signing of the "friendship and cooperation agreement" until the crisis of those days was settled. It could at least have strengthened the motivation of A-land to do so. Thereby it could have made an important contribution to the solving of the crisis. Its duties of solidarity required making use of this option. Strictly speaking, *not the signing of the agreement violated these duties but the failure to use the chance to assist the distressed member state by cancelling it.*

So the signing was incompatible with the principle of mutual loyalty within the Union, which is a general principle of Union law.

Conclusion: In the given situation, the signing of the "friendship and cooperation agreement" did represent a violation of European Union law.

¹⁶ See now the more detailed regulation in the new art. 4(2) EU Treaty.

¹⁷ Note: This would have been the case if D-land agreed to deliver goods to A-land, which might be instrumentalized to put pressure on C-land or to resist counter-pressure exercised by C-land, as for example weapons, equipment that could be used for a naval blockade or goods that compensated for missing goods previously imported from C-land.

B. Possible legal consequences of the signing of the agreement

Given that the signing of the agreement violated a general principle of Union law, various possible legal consequences come under consideration:

I. Action of C-land against D-land for failure to fulfil obligations (art. 259 FEU Treaty¹⁸)

C-land could possibly take legal action against D-land before the European Court of Justice. In this case, the Court would find that D-land has violated the Treaties. According to art. 259 FEU Treaty, after preliminary proceedings before the Commission (see art. 259 sub-sect. 2 - 4), member states can bring actions against other member states for failure to fulfil Treaty obligations. The applicant would have to be convinced that the defendant has failed to fulfil an obligation, but this would be the case. C-land would also have the necessary legitimate interest to take legal action, because it would be interested to prevent future violations of the principle of mutual loyalty or possibly to claim compensation for damages.

However, an action for failure to fulfil obligations might be excluded because it would concern an obligation in the field of the Common Foreign and Security Policy. In this field, the European Court of Justice does not have jurisdiction (except for some very special questions, see now art. 275 sub-sect. 2 FEU Treaty). This holds true for the old law as for the prevailing law.

Concerning the old law, art. 227 EC Treaty only allowed actions for failure of "an obligation under *this Treaty*". The principle of mutual loyalty is a general principle of law, which was applicable in Community law and other Union law. It is relevant for all policies of the member states in all fields, even if there is no connection to the European Union. Hence, if there had been no EU Treaty, there would have been no reason to doubt that the obligation to refrain from the signing of the "friendship and cooperation agreement" with A-land in the given situation was an obligation under the EC Treaty. Yet, there was an EU Treaty, and rules about the foreign policy of the member states were part of it (see art. 11 et seq.¹⁹). Therefore, this obligation, which concerned a matter of foreign policy, had to be regarded as an *obligation under the EU Treaty, not under the EC Treaty*. In respect of these obligations, there were special rules: According to art. 46 EU Treaty, the provisions of the EC Treaty concerning the powers of the Court of Justice were to be applied only to certain provisions of the EU Treaty, those on the Common Foreign and Security Policy not included. So even if the Union had adopted a common position or a joint action, which expressly prohibited concluding cooperation agreements with A-land, the violation of this obligation could not have been brought before the European Court of Justice. The same must apply to the violation of a corresponding unwritten obligation resulting from a general principle of law. From this followed an alarming deficit of legal protection in the European Union. This was, however, the will of the member states as the "masters of the Treaties".

After the reform of Lisbon, the basis in the Treaties has changed but the result is the same. Art. 259 FEU Treaty now allows actions for failure to fulfil an obligation "under *the Treaties*", including the EU Treaty. However, according to art. 275 sub-sect. 1 FEU Treaty, the Court shall not have jurisdiction with respect to the provisions relating to the Common Foreign and Security Policy (except for special cases under art. 275 sub-sect. 2 irrelevant in the given case). As far as the principle of mutual loyalty in the Union concerns activities in the field of foreign policy, a teleological interpretation of art. 275 sub-sect. 1 FEU Treaty reveals that these questions fall under that restriction of jurisdiction. By the way, after the reform of Lisbon, the provisions on the Common Foreign and Security Policy, to which art. 275 sub-sect. 1 refers, expressly oblige the member states to "show mutual solidarity" (art. 32(1) sub-sect. 1 phrase 4) and to "work together to enhance and develop their mutual solidarity" in this field (cf. art. 24(3) sub-sect. 2 EU Treaty²⁰), thereby excluding this obligation from the jurisdiction of the Court. So, the alarming deficit of legal protection in the European Union continues. This is, however, the will of the member states as the "masters of the Treaties" who are responsible for the reform of Lisbon.

So the signing of the agreement could not and cannot have an action of C-land against D-land as legal consequence.

¹⁸ Formerly art. 227 EC Treaty.

¹⁹ See now art. 23 et seq. EU Treaty.

²⁰ Concerning these provisions, see the note following the outline of the solution.

II. Action of the Commission against D-land for failure to fulfil obligations (art. 258 FEU Treaty²¹)

For the same reason, there is no risk that the Commission could take legal action against D-land according to art. 258 FEU Treaty. It could not even start the preliminary proceedings provided for in art. 258, since these proceedings must be related to a possible following action before the Court of Justice and therefore also are excluded by the old art. 46 EU Treaty respectively art. 275(1) FEU Treaty.

III. Reprisals of C-land against D-land

C-land could possibly take reprisals against D-land. Such measures are common among states in cases of violations of public international law. For example, C-land could temporarily stop any trade with D-land, suspend the economic fundamental freedoms of citizens from D-land living in C-land or not apply the rules of the Schengen *acquis* on citizens travelling from or to D-land. However, within the European Union, reprisals are generally inadmissible. The member states are confined to make use of the legal remedies at the European Court of Justice provided by art. 19 EU Treaty, 251 et seq. FEU Treaty²² - even if, like in the case under consideration, there are none. C-land is, however, free to exercise political pressure on D-land in the institutions of the European Union and in the European public.

IV. Liability of D-land for damages occurring in C-land

Finally, it has to be examined if D-land could be liable for damages that might occur if A-land continued to put pressure on C-land after the conclusion of the agreement with D-land. It is a general principle of law following from the commitment to the rule of law and from the necessity to ensure the practical effectiveness ["*effet utile*"] of the law that the member states are liable for damages caused by violations of European Union law. There is a comprehensive jurisprudence of the European Court of Justice about state liability pursuant to Community law (now: Union law). It started with the basic decisions *Francovich* (1991)²³ and *Brasserie du Pêcheur/Factortame* (1996)²⁴ and has ever after been expanded, developed and consolidated.²⁵

It is, however, uncertain if - and under which possible modifications - the principle of state liability might also apply to violations of unwritten principles of law in the field of foreign policy by activities, which as such do not contravene Union law but, under special circumstances, are inappropriate with regard to solidarity in the Union. The European Court of Justice has developed its jurisprudence on state liability within the field of *Community law* (the "first pillar") and with regard to the non-implementation or incorrect implementation²⁶ of directives, the violation of directly applicable provisions of the EC Treaty (now the FEU Treaty) and the violation of Community law by administrative practice²⁷ and judgements of supreme courts²⁸. It is questionable if these constellations are comparable. Besides, the legal institution of state liability aims to enforce the individual rights of the citizens. Therefore, it might not be suitable to regulate problems between the states.

Furthermore, the preconditions of state liability would not be fulfilled: According to the jurisprudence of the European Court of Justice, the member states are only liable in case of a *sufficiently serious breach*. The decisive test for finding that a breach of law is sufficiently serious is whether the member state "manifestly and gravely disregarded the limits on its discretion".²⁹ However, given that the Court has not yet elucidated the principle of mutual loyalty within the Union and that in the case under consideration the planned agreement as such would not cause any harm, there is no reason to consider the disregard shown by D-land as "manifest" or "grave". Finally, even if A-land should continue to put pressure on C-land after the conclusion of the agreement with D-land and

²¹ Formerly art. 226 EC Treaty.

²² Formerly art. 220 et seq. EC Treaty.

²³ ECJ, joint cases C-6/90 and 9/90, *Francovich*.

²⁴ ECJ, joint cases C-46/93 and 48/93, *Brasserie du Pêcheur/Factortame*.

²⁵ See the presentations of *Craig/de Búrca*, *EU Law. Text, cases and materials*, 4th edition 2008, p. 328 ff., and *Wea-therill*, *Cases & Materials on EU Law*, 8th edition 2007, p. 161 ff.

²⁶ ECJ, case C-392/93, *British Telecommunication*.

²⁷ ECJ, case C-5/94, *Hedley Lomas*.

²⁸ ECJ, case C-224/01, *Köbler*.

²⁹ See ECJ, joint cases C-6/90 and 9/90, Summary 4 and no. 55 ff.

even if C-land should suffer damages from that, it is doubtful if there would be any damage presenting the necessary *direct causal link*.

So there is no risk that D-land could be liable for any damages.

Conclusion: It is not obvious that there could be any legal consequences after D-land has signed the agreement. C-land is confined to exercise political pressure on D-land in the institutions of the Union and in the public.

Answer to the question: My (correct) answer will be that in the given situation, the signing of the agreement was incompatible with the principle of mutual loyalty within the Union and therefore represented a violation of European Union law but that - with regard to the old art. 46 EU Treaty respectively to art. 275(1) FEU Treaty - there will be no legal consequences.

NOTE:

The political events reported in the facts of the case occurred in October 2009. Therefore, the modifications of the primary law of the European Union by the Treaty of Lisbon, which entered into force in December 2009, are not relevant. The case solution has to refer to the old version of the EU Treaty and to the EC Treaty (instead of the FEU Treaty), even if your meeting with the prime minister in the state chancellery of D-land happened in 2010. However, concerning possible legal actions against D-land after the entering into force of the Lisbon Treaty, the new law is relevant and the case solution has to refer to the new numbering (art. 259 and 260 FEU Treaty instead of art. 226 and 227 EC Treaty). Concerning the restriction of the jurisdiction of the Court of Justice in the field of the Common Foreign and Security Policy under the old art. 46 EU Treaty and now under art. 275(1) FEU Treaty, it is not *prima facie* clear if the new or the old norm has to be applied in the given case. However, since the result is the same, this question does not need to be discussed.

After the reform of Lisbon, the substance of the legal obligation to loyalty and solidarity is essentially the same as it was before. The Founding Treaties still do not contain a comprehensive general clause on loyalty and solidarity in the Union. However, they emphasize this commitment more often and more clearly with regard to more aspects. Several clauses have been modified or introduced, which deal with individual aspects. They are *lex specialis*. If they are relevant, there is no way to have recourse to the (unwritten) general principle of mutual loyalty within the Union standing behind them. See in particular the new art. 4(3) EU Treaty (principle of sincere cooperation), which replaces art. 10 EC Treaty, and the new solidarity clause in art. 222 FEU Treaty (concerning solidarity in cases of terrorist attacks and natural or man-made disaster). See also the new provisions on the Common Foreign and Security Policy, in particular the new *art. 42(7) EU Treaty*, which obliges all member states to aid and assistance by all means (!), if a member state is the victim of armed aggression on its territory. In a future case similar to the given case, *art. 24 and 32 EU Treaty* would be relevant. According to art. 24(2), the Union shall conduct, define and implement a Common Foreign and Security Policy, which is based on the development of mutual political solidarity among the member states. According to art. 24(3), the member states shall support it in a spirit of loyalty and mutual solidarity and shall also *work together to enhance and develop their mutual political solidarity*. According to art. 32 sub-sect. 1 phrase 4 EU Treaty, in all matters of foreign and security policy, the "*member states shall show mutual solidarity*". Under circumstances similar to those of the given case, this would not allow D-land to sign a "friendship and cooperation agreement" with a non-member state that is threatening and imposing severe sanctions on a EU member state.

The principle of mutual loyalty and solidarity applies to all fields of politics and with regard to all possible problems and threats. It also found its expression in the massive financial support of the Republic Latvia by the European Union in 2009 in order to assure the survival of the member state during the present severe financial crisis. These examples illustrate that the basic idea of the European integration in a supranational union of states and citizens must not be confused with the mere utilitarian concept of an open market - even if the internal market does represent an important element of it.

FURTHER READING:

On the legal nature of the European Union: *Schmitz*, Integration in der Supranationalen Union, 2001; *von Bogdandy*, Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform, 1999; von Bogdandy, Skizzen einer Theorie der Gemeinschaftsverfassung, in: von Danwitz/Heintzen/Jaestedt/Koriouth/Reinhardt (editors), Auf dem Wege zu einer europäischen Staatlichkeit, 1993, p. 9 ff.; *Thalmaier*: Die zu-

künftige Gestalt der Europäischen Union, 2005; *Daups*, L'Union européenne. Un Etat sans souveraineté nationale, 2006.

On the principle of mutual loyalty within the Union: *Unruh*, Die Unionstreue. Anmerkungen zu einem Rechtsgrundsatz der Europäischen Union, *Europarecht* 2001, 41 ff.; *Schmitz*, Integration in der Supranationalen Union, 2001, p. 235 ff., 278, 484 f.; *Hatje*, Loyalität als Rechtsprinzip in der Europäischen Union, 2001; *Hofbeck*, Bundes- und Unionstreue und der Grundsatz der loyalen Zusammenarbeit, 2006. See also the comments on art. 10 in the commentaries on the EC Treaty.

More informations on this course at www.lanet.lv/~tschmit1. For any questions, suggestions and criticism please contact me via e-mail at tschmit1@gwdg.de.

A. The signing of the agreement with A-land as violation of European Union law

- introduction

I. Violation of explicit norms in the EU Treaty (Nice version) or EC Treaty

- preamble
- art. 1 sub-sect. 3 EU Treaty
- art. 11(2) sub-sect. 1 EU Treaty
- art. 23(2) EU Treaty
- art. 10 EC Treaty (Community loyalty)

II. Violation of general principles of Union law

1) The existence of a principle of mutual loyalty within the Union

- the European Union as an organisation of integration
- the European Union as an organisation based on the idea of federalism?
- **problem**: the legal nature of the European Union: "Staatenverbund", supranational union or "state without sovereignty"?
- duties of loyalty (→ good faith) and duties of solidarity

2) The violation of the principle of mutual loyalty within the Union

- a) Violation of duties of loyalty
- b) Violation of duties of solidarity
 - not the signing as such but the failure to assist C-land by cancelling it would violate these duties

- concluding sentences ...

B. Possible legal consequences of the signing of the agreement

I. Action of C-land against D-land for failure to fulfil obligations (art. 259 FEU Treaty)

- art. 46 EUV (Nice version) respectively art. 275(1) FEU Treaty

II. Action of the Commission against D-land for failure to fulfil obligations (art. 258 FEU Treaty)

III. Reprisals of C-land against D-land

IV. Liability of D-land for damages occurring in C-land

- **problem**: state liability outside Community law? Among member states?
- sufficiently serious breach, direct causal link?