

THEORETICAL AND HISTORICAL SECTION

EU Framework Decision and the Czech Legal Order

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This contribution deals with the relationship of the framework decisions accepted in the Third Pillar and of the international pacts regulating identical subjects and binding the member states from the point of view of the consequences for the Czech legal order.

1. THE SUBJECT MATTER

In connection with accepting framework decisions and their coming into effect, as the EU-law acts very similar to community regulations, a significant problem arose with regard to their relation to the multi-lateral international conventions that had been negotiated before outside of the EU framework and that have the same subject of legislation. In practice, these are mainly conventions from the penal law area, especially the procedural area, where the framework decisions bring different legislation into the relationships between EU states. The framework decision is looked upon as a tool substituting for the clauses of these conventions, which, however, remain to be valid and therefore binding for the member states. The problem lies in the character of framework decisions that are not acts of community law, and therefore the principle of pre-

ference does not apply automatically. Member states are thus put in a situation of being bound by two regulations of different content at the same time, while both of these regulations (the framework decision as well as the international convention) claim preferential application.

The above-stated problem is further complicated by the fact that the framework decision does not have an immediate effect; it cannot be applied as such by the domestic authorities and must thus be implemented into the domestic law by national legislature (laws). At the same time, the domestic regulation embodied in the constitution holds, i.e. that an international convention is to have preference over domestic legislations, including the legislation that originated as an implementation of the EU framework decision.

The question is therefore the following: how can both of these principles be combined, i.e., seen through the EU-eyes, how to respect the framework decision without at the same time making the member state violate the obligations following from a multi-lateral international convention?

From the above-said it is apparent that the given problem has two dimensions: the international legislation viewpoint (the relation between the framework

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decision and the international convention) and the domestic viewpoint (the relation between the domestic legislation accepted on the basis of the framework decision and the international convention). Both of these aspects shall now be judged.

2. THE INTERNATIONAL LAW LEVEL

The EU framework decisions present a particular legal regulation of the relevant issues with the applicability exclusively in the EU member states. They are considered to be a necessary and more perfect regulation that is demanded for the functioning of the European „area of freedom, security, and law“. They contain regulations that significantly surpass the framework of the regulation agreed upon on the universal or, more often, regional European level in the international conventions whose parties are also non-EU members.

On the part of EU, this is a special particular adjustment derogating the more general bindings contained in the international conventions (this can be clearly read in several statements of the legal section of the Council of EU). The question remains, however, whether the EU framework decision, from the point of view of international law, is qualified to derogate clauses of international conventions, by which its members are bound, albeit this derogation is limited only to the relations between the member states, while it cannot be to the detriment of the bindings of the international conventions in which EU members and non-EU members, are the parties of the particular contact in question.

The problem does not come up in such situations where the international convention itself explicitly offers a solution of such conflict, i.e. supposes and allows for the existence of a particular adjustment. This is e.g. the case of the Article 28 of the European convention on extradition, which supposes different adjustment among some parties of the convention and only requires a formal notification of the depository. It is obvious that such particular adjustment must not influence the position of the remaining parties of the convention.

The situation is more complicated without the explicitly stated possibility of such particular adjustment. The Legal section of the Council admits that this is a problem in the international law. There is no doubt that the framework decisions as well as the acts of the Third Pillar are acts whose basis lies in the international law, and not the community law. In the argumentation, they therefore draw attention to Article 41 of the Viennese Agreement on the convention law that admits the signing of an agreement between some parties of the multi-lateral convention, an agreement that, between those parties, adjusts some issues differently and thus derogates the clauses of the

original convention. This is the **change of the original convention**, namely *inter partes*, in this case. The conditions stated in Article 41 of the Agreement are undoubtedly fulfilled: the original convention does not prohibit such *inter partes* change, the rights of the other parties of the convention are not offended, and the change is not incompatible with the subject and purpose of the original convention.

Such argumentation is inadequate in two serious ways. First, it primarily draws upon the fact that the framework decision has to be *regarded as an international convention*, and second, it is based on the *change of the original convention* (i.e. on the discharge of international law obligations), and not on the change of the scope of its *implementation* (while preserving the original obligations, which are not performed).

As for the first question: It is obvious that the framework decision is not an international convention, although it has some of its elements. It is accepted univocally, i.e. by a consensus of the participants (the member states). It is therefore binding for a member state if and only if the state has expressed its consent. It presents an adjustment unified in a certain way and valid for the members, in which respect it is similar to an international convention. It is thus the consenting declaration of will, forming the basis of international law obligations for the participants. The regime of the framework decision is of the international law kind, as the whole of the EU Third Pillar.

On the other hand, there is no similarity from the point of view of the form here. The framework decision is accepted not as an agreement of the member states, but as an act of the Council of the EU, i.e. of an international body. (It is not the act of an international organisation, for EU is not such an organisation.) This act is subordinated to the EU law, which in the Third Pillar holds the features of international law, but with significant modifications. The Council of the EU as a body, not the member states, is responsible for this act. The European Court of Justice may annul the framework decision, in contrast to an international convention, if a reason for its invalidity is given. Another difference lies in the way this act is accepted. The consent of the member state is given by voting in the Council of the EU on the level of the ministers and it represents the final consent of the member state. There is no further domestic consent given, nor ratification, although the change of the domestic legislature follows from it.

Is thus the framework decision an act of an international body or an organisation? It seems to be so, but then it is not a source of the international law, to which it should be subordinated. International law does not allow, without further specification, the obligations of the states by a unilateral act of an international body or an organisation, unless these states had transferred the relevant competences on such a body or organisa-

tion (which is true only in the case of the European Community, the only one having supra-state features). Obligatory unilateral acts of international organisations (outside the European Community) are very scarce and exceptional in practice. Such acts are of a rather technical kind and usually contain rules that belong to subordinate legislation in the domestic law (e.g. the regulation of aircraft operation of the International Organisation for Civil Aviation). There are no known cases (outside the EC) of „imposing“ rules on the level of laws to the member states by a unilateral act of an international body or an organisation.

If we want to perform a qualification of the framework decision, i.e. subordinate it under a certain known notion of the international law, we cannot do otherwise than state that it is a *sui generis* act with some features of an international convention and at the same time with some features of a unilateral act of an international body. Such qualification is, however, only of academic value and it is irrelevant for practice,

Let us therefore return to the Viennese agreement on the convention law that works only with the notion of an „international convention“. It seems that a more feasible way to reach a useful conclusion will, instead of the qualification of the notion of framework decision, rather be the interpretation of the notion of international convention (agreement), used in the Viennese agreement. Does the Vienna agreement in the Articles 30 and 39–41 refer really only to the international convention as a formal source of the international law that constitutes international legal obligations to the states?

Nowadays the situation is totally different from the 1960s, when this agreement originated. At that time, the states overtook the obligations towards each other solely on the basis of international conventions (if we disregard the international custom and the law of the European Communities, having a totally different nature). At that time, nobody could have foreseen that some states will in future be joined in a very specific and mainly innovatory entity, which the contemporary European Union presents, an entity that will, on the basis of international law, accept laws binding for the member states in a special way different from the classic international conventions. It is only the process, and not the result that is different: the act of this entity presents an internationally unified legal regulation that has been accepted by the expression of will of the participating states on the basis of international law. The aim is the same as with the international convention – the creating of a unified legal regulation binding for the participating states. It is only the process that is different – there are no complicated negotiations and especially the long approving procedure (domestic approval and ratification), albeit at the expense of the democratic aspect of the process (actual exclusion of the national parliaments that are presented with the *fait accompli*).

The linguistic interpretation of the stated clauses of the Viennese agreement will lead us to the conclusion that the Agreement only concerns the international conventions as the classic source of the international law. The linguistic interpretation, however, is not the only interpretation of an international convention. The Viennese Agreement itself contains the rules for the international conventions' interpretation and in its Article 31, par. 1 it puts the linguistic, systematic, and teleological interpretation on the same level. If we opt for the teleological interpretation, we will arrive at the conclusion that the notion of „international convention“ has to be interpreted in an extensive way. The purpose of the international convention is the creation of a unified set of rules, or the settling of a certain relation between the states, on the basis of their **identical expression of will**. If this purpose is reached in a different way, then it is only the form that is different, but the essence, i.e. the purpose, remains the same. It is decisive that these unified rules are accepted by a **consensus of the participants and on the basis of international law**, that is e.g. on the basis of an international convention.

From the above-said we can arrive at the conclusion that the notion of „international convention“ used in Articles 30 and 39–41 of the Viennese Agreement can be interpreted from the point of view of their purpose in the extensive way, i.e. to include also other international legal instruments for accepting the unified legal regulation between states. Then this clause can be related also to the EU framework decisions, which present such a legal instrument.

In connection with this we can argue that the purpose of framework decisions is not changing of the obligations of the member states, but influencing the content of their domestic legal regulations. This is true, however, the obligation to accept or change domestic regulations is given through international law, which means that the international obligations of the member states are affected in any way – the new domestic regulation is explicitly an outcome of those.

Thus we already get to the *second question*, and that is whether the framework decision really changes or just suspends the international obligations of the existing multilateral conventions. The framework decision asks the member states to proceed in certain issues differently than the international convention asks them to. The international convention, however, still exists and is valid. It cannot be otherwise, since the convention has also other parties, non-EU members. If, hypothetically, the framework decision is annulled and as a result of that also the domestic regulations accepted on its basis are annulled, the member states would undoubtedly automatically return, in their mutual relations, to the original international convention. This means that the framework decision does not present a change of the convention, but that it only

excludes its applicability in the relations between EU members.

For the relation between the framework decision and the convention it is therefore not Article 41, but Article 30 of the Viennese Agreement that is decisive. Article 30 in its par. 4 states that in the relationship between the states that are parties of both conventions (i.e. in our case, of the original convention and the later framework decision) that the later convention, i.e. the framework decision, is decisive (unless the previous convention is compatible with the later one). This clause thus constitutes the priority of the framework decision over the original international convention, which remains valid. To support this conclusion, we might also mention the diction of Article 28 of the European convention on extradition, which speaks of „parties of the conventions that between themselves apply a unified regulation“ that thus „exclude the applicability of the Agreement between themselves“.

The influence on the international obligations is the following: if the international convention is still valid, but its applicability between EU member states is excluded by the framework decision, it is not the original convention, but the later framework decision that constitutes the international obligation between these states. Not respecting the original convention between member states is thus not seen as violation of international law. Such violation would on the other hand be not respecting the framework decision.

In relationship to other parties of the original convention (i.e. non-EU members), it is always the original convention that is decisive. The framework decision cannot influence their rights and obligations, which is acknowledged and accepted.

3. DOMESTIC (CONSTITUTIONAL) LEVEL

The framework decision is an act that is accepted univocally by the Council of EU with the purpose to bring the domestic legal regulations closer in the area of the applicability of the EU Third Pillar (especially of the penal law). It thus creates a harmonised, or in some aspects actually unified, legal regulation in all member states. As well as the EC directives, the framework decision must be implemented into domestic law usually through legislative measures, while its direct effect is eliminated. The framework decision thus can never be called upon in relation to an individual.

Problems might appear in the relation of the law accepted in this way and a previous international convention. In the previous text, we came to the conclusion that from the international law point of view, the more recent framework decision is to be preferred to the previous international convention, without affect-

ing its validity. This is important from the point of view of the examination of the relationship between the implementing legislature and the framework decision and the previous international convention. According to Article 10 of the Constitution, the clauses of this convention are to be preferred to the domestic regulation, albeit of a more recent date.

This constitutes a discrepancy that ought to be solved. If we claim that from the international point of view, the framework decision is to be preferred to the international convention, from the domestic point of view, it would then be logical if the implementation legislation were preferred to the convention. However, Article 10 of the Constitution states the opposite – the priority of the convention.

This question has a quite concrete practical dimension. For individuals, it may sometimes be more advantageous to be subject to the international convention rather than to the legislation coming from the framework decision, which would determine a stricter regime for them. They would thus call upon the use of the international convention on the basis of Article 10 of the Constitution. By the interpretation of this clause, we have to determine whether it really applies also to the conventions whose implementation has been, in the sense of Article 30 of the Viennese Agreement on the law of conventions, in the particular case substituted by the implementation of the framework decision.

Article 10 of the Constitution applies to those international conventions by which the Czech Republic is bound. This notion means that the Czech Republic is subordinated to the clauses of the convention and is obliged to fulfil the obligations following from it. „Being bound“ by the convention is, however, not the same as validity. The state does not always and in all situations have to be bound by the valid convention. The state does not have the obligation to fulfil the obligation stated in the valid international convention, whose applicability has for the particular case towards the particular state been eliminated according to the international law. That is exactly the case of Article 30 of the Viennese Agreement – the convention is valid for the state, but in some relationships, it is not applicable. In this sense the state is not bound by it, i.e. is not obliged to implement it with regard to another particular regulation.

We thus arrive to the final conclusion. We cannot call upon the priority of the international convention, whose implementation between the parties has been validly eliminated on the basis of international law. The implementation legislation to the framework decision will thus be applied even when a non-implemented international convention regulating the same matter exists.

CONCLUDING SUMMARY

The framework decisions, although they are not international conventions, present particular regulation of certain questions among the EU members, which had prior to that been regulated by a multi-lateral convention. Such a particular regulation cannot be conceived as substituting the conventional regulation in the sense of full substitution for the original convention by a new instrument. The previous convention remains to be valid, but it will not be used be-

tween the EU members, where the framework decision is to be preferred. The obligations to non-EU members who are the parties of the convention remained unaffected.

The conclusion stated can be applied both in the international and domestic levels, i.e. the international convention not being applied between EU members is not, according to the constitution, to be preferred to the implementation legislature to the framework decision.