

Loyalty in the European Union. A review (*)

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I. Introduction(+)

[1] The accession of up to twelve East-European States to the European Union in the next decade is likely to change the possibilities for substantive consensus within the Union for the worse. Yet, the consensus on the means to pursue the objectives of the Union has thus far made European integration successful. Insofar as the feasibility of substantial consent between the Member States diminishes, the need to have rules and principles regulating the conflict between the relevant actors increases. These rules and principles must facilitate the creation of solutions to the new challenges that face the Union. Thus, it is essential for the Union's future that the law of the European Union offers both such rules and principles. One of the most outstanding principles which could perform this important task is the principle of *loyalty* as developed by the European Court of Justice (ECJ) based on Article 10 EC Treaty.

II. Synopsis

[2] In the later expanded, printed version of his inaugural speech before the Faculty of Law at the University of Bielefeld, Professor *Armin Hatje* makes a highly interesting attempt to conceptualise this fundamental principle. (1) According to *Hatje*, the most important area in which the principle of loyalty displays its full impact is the securing of the unity of the European legal order. This unity is challenged by the autonomy of the actors of European integration. The political and legal conflicts between the relevant actors arising out of the tension created by the need for unity - and thus the need for co-operation - and the need to respect the actor's respective autonomy require mechanisms for the resolution of these disputes. *Hatje* argues that the principle of loyalty provides for adequate responses to these challenges.

[3] *Hatje* presumes that the law of the European Union is intertwined with, but separate from, the law of the European Community. Therefore, he distinguishes between Community loyalty and Union loyalty. The principles developed in one legal order may be employed with respect to the other, but only under the constraints arising from the differences between these orders. Thus, *Hatje* concludes, a conception of Union loyalty must take into account the intergovernmental character of the law of the *European Union* as contrasted to the supranational nature of the law of the *European Community*. (2)

[4] *Hatje* does not - as might be assumed - locate the source for the validity of the principle of loyalty in both the Union and the Community legal orders in Article 10 EC, but in a general principle of *bona fides*. Like several other provisions in EU law, Article 10 EC is but a special expression of good faith. According to *Hatje*, loyalty is thereby accessory to the legal relationship constituted by membership in the EU. Therefore, loyalty is a reciprocal principle which binds not only the Member States with respect to the Union and the other Members, but also the Union with respect to the Member States. (3) As concerns the faithful co-operation between organs (*Organtreue*), *Hatje* however asserts that the institutions of the EU are not internally bound by this principle. In other words, he asserts that it does not bind them with respect to each other, as their relation is not determined by the rights and obligations stemming from the relationship of membership.

[5] Central to *Hatje*'s conception is the thesis that loyalty serves the creation of unity, which is characterised by the general institutional autonomy of both the Member States and the EU on the one hand and the duty of co-operation in order to implement the objectives of the EU on the other. The mediation of conflicts on the political and legal levels thus becomes one of the most important tasks of the principle of loyalty. (4) Starting from this background, *Hatje* describes the respective contents of the principle of loyalty when employed in order to secure autonomy, to guarantee sufficient co-operation, and to mediate the conflicts between the actors.

[6] Mutually ensuring each other's autonomy obliges the involved actors to take the competencies of the other actors into account, both institutionally and materially. The institutional aspect serves the efficiency of the respective institution, whereas the material aspect guarantees the effectiveness of EU law with respect to unilateral national action.

[7] Co-operation between the actors is secured by institutional, material and procedural obligations to participate, which are derived from the principle of loyalty. Institutional co-operation requires the Member States to participate in the process of political decision-making and to implement European law. Material co-operation serves the effectiveness of EU law by observing its direct effect and supremacy. The principles which govern the applicability of national law in the case of national implementation of EU law - namely, effectiveness and equivalence - and state liability for breaches of EU law are also aspects of the material obligation to co-operate. The procedural co-operation

requires mutual consultation and an exchange of information between the actors.

[8] In *Hatje*'s conception, loyalty also solves conflicts between the relevant actors by mediating the settlement of disputes. Judicial loyalty requires the respective judiciary to respect the jurisdiction of the other. Political loyalty works against an abuse of rights by and within (5) the political organs. Another duty stemming from the mediating function of loyalty is the reasonable application of the sanctioning powers in case of manifest breaches of the fundamental constitutional principles under Article 6 *et seq.* EU. In this case, all actors are obliged by loyalty to consult and inform each other and to promote a constructive dialogue.

[9] After this description of the obligations of the actors, *Hatje* outlines the consequences of an infringement of the principle of loyalty. In addition to the possible infringement procedure under Article 226 *et seq.* EC or judicial review according to Article 230 EC, the act concerned must be interpreted in light of the principle of loyalty by both national and European organs. Moreover, an infringement of loyalty can lead to liability for damages, similar to the doctrine of "state liability" as developed by the ECJ in its *Francoovich* and *Brasserrie* decisions (6) as well as to the "non-contractual liability" of the EC under Article 288 (2) EC. However, only the EU or a Member State can claim these damages since the individual is not entitled to loyal co-operation.

[10] In his closing chapter, *Hatje* shows how the principle of loyalty developed in this sense may be deployed to find adequate solutions for the problems faced by the EU in the future. Firstly, the possibility of closer co-operation as foreseen by Articles 43 *et seq.* EU and Article 11 EC threatens to cause a further fragmentation of European law. To secure the unity of the European legal order, loyalty serves as the basis of mutual duties both for the Member States that have and for those that have not joined the flexible integration. Second, according to *Hatje*, the Member States are also bound by loyalty when negotiating the enlargement of the EU. Thus, they are obliged to guarantee the functionality of the Union's institutions. However, *Hatje* does not deduce a general principle of development in the interest of the realisation of the objectives of the EU from the principle of loyalty.

III. Critique

[11] *Hatje* convincingly conceptualises the principle of loyalty by assigning the respective contents of loyalty to its three different functions, that is, the guarantee of both autonomy and co-operation as well as the mediation of conflicts. In contrast to much other work dealing with the obligation to loyal co-operation, in his study, *Hatje* does not try to describe extensively every concrete content of loyalty. His conception is aimed at finding a general but sufficiently precise formula of loyalty which facilitates an application of this principle in concrete cases, thereby making its application and effects more foreseeable.

[12] *Hatje* does not convincingly show, however, that his distinction between a loyalty principle at work within the Union and the Community has any qualitative consequences for the content or the application of the principle. Still, if one were to take the separation of the EU and EC seriously, one would face considerable difficulties in extending the scope of the principle from one legal order to the other. *Hatje* tries to solve these problems by using analogies. The problems with this approach become apparent in the - eventually fruitless - attempt to draw clear boundaries between Union and Community loyalty. Moreover, *Hatje* does not succeed in demonstrating that there actually are possible contradictions between a Union and a Community loyalty. In the end, it has to be concluded not only that the thesis of the unity of EU and EC is theoretically more convincing than that of a separation, but also that it is much easier to handle.(6) Thus it is appropriate to use the term *Union loyalty* to include loyalty both in the EU and the EC.

[13] *Hatje*'s assertion that the faithful co-operation between the Community's (and the Union's) institutions is not an aspect of the general principle of loyalty is certainly in line with an otherwise often presented interpretation. Nevertheless, the reason for this - the dependency on the legal relationship of membership in the EU/EC - is not enough to simply disregard the Declaration on Article 10 EC to the *Treaty of Nice*. Only in a footnote does *Hatje* mention this declaration which states that "the principle of sincere co-operation which derives from Article 10 [...] also governs relations between the Community institutions themselves". The ECJ also seems to construe loyalty between the institutions in light of Article 10 EC.(8) Thus, it must be concluded that Article 10 EC is an expression of a principle which also applies as between the organs. Therefore, if *Hatje* sees Article 10 EC as an expression of the *general principle* of loyalty, the same principle has to be the *source of the obligation* of the organs to faithfully co-operate. Hence, the principle of loyalty is *also* applicable in the relations between the *Union and the Member States* (and amongst the Members) as well as in relations between the *EU/EC institutions themselves*, the only difference being that Article 10 EC is not directly applicable in conflicts arising between the institutions.

[14] *Hatje*'s description of the principles of effectiveness and equivalence applied in case of national implementation of European law is, in the end, not entirely adequate. Although he correctly describes the content of these principles, he does not see the small, albeit important change in the jurisprudence of the ECJ concerning the exact terminology. Formerly, the ECJ restricted the scope of the principle of equivalence to a mere prohibition on discrimination.(9) In its

more recent jurisprudence The ECJ has held that the principle of equivalence requires that national rules governing the safeguarding of Community rights and obligations must not be "less favourable than those governing similar domestic actions".(10) Thus, the principle of equivalence now serves to entitle the individual who relies on Community law to claim an actual "equivalence" in handling his or her case instead of a mere negative exclusion of discrimination. This change in terminology could be understood as being a counterpart to the ECJ's jurisprudence regarding the free movement of goods. Here, the ECJ transformed the anti-discrimination clause into a prohibition on the *hindrance* of the free movement of goods.(11)

[15] In conclusion, it has to be pointed out that *Hatje's* study is a well researched and argued work. His observations of the sanctions against Austria and the role of the principle of loyalty in cases of closer co-operation between some Member States are particularly convincing. In addition, *Hatje's* proposals for the solution of the tension between the ECJ and the national constitutional courts are very notable, as are his remarks concerning a possible liability of the Member States in the case of infringements of the loyalty principle. His assertion that the Member States are also bound by this principle when negotiating the enlargement of the EU is very pointed and politically sensitive. However, *Hatje* convincingly shows that the principle of loyalty is the fundamental principle which serves to secure the unity of the European legal order, whether when faced with the smaller, everyday problems or with the constitutional challenges posed by enlarging the European Union.

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(1) *Armin Hatje*, *Loyalität als Rechtsprinzip in der Europäischen Union*, Nomos: Baden-Baden 2001.

(2) In the following paragraphs, I use the terms EC and EU interchangeably if the context does not require the distinction. *Hatje* consistently differentiates between them throughout his text.

(3) The same, of course, applies to the Community.

(4) The literal translation of the term *Hatje* uses (German: Moderation) is "moderation". However, the content of this function of the loyalty principle as *Hatje* sees it, is more adequately described by the term "mediation".

(5) Thus, the French "empty chair politics" is an infringement of the principle of loyalty.

(6) ECJ, joined cases C-6 & 9/90, *Francovich et al. v. Italy*, [1991] ECR I-5357; ECJ, case C-46/93, *Brasserie de Pêcheur v. Germany*, [1996] ECR I-1029.

(7) cf. *Armin von Bogdandy*, *The case for unity: The European Union as a single organization with a single legal system*, CMLRev 36 (1999), pp. 887 et seq.

(8) ECJ, case 204/86, *Greece v. Council*, [1988] ECR 5323, para. 16; ECJ, case C-65/93, *Parliament v. Council*, [1995] ECR I-643, para. 23.

(9) ECJ, joined cases 205 to 215/82, *Deutsche Milchkontor et al. v. Germany*, [1983] ECR 2633, para. 19.

(10) ECJ, case C-231/96, *Edilizia Industriale Siderurgica (Edis) v. Ministero delle Finanze*, [1998] ECR I-4951, para. 34.

(11) ECJ, case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165, para. 37.