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The dual nature of the Common Aviation Area: Public international law and European law correlation

This article considers the essence of the Common Aviation Area (hereinafter referred to as the CAA) as it is from the perspective of analysis of the dual nature of the CAA agreements between the EU Member States and neighbor countries.

Using a dogmatic and formal-logical method, on the one hand it should be proved that, the form of CAA agreements meets all the features of international agreements as a source of international law, in particular, aviation law, since this type of agreement expresses a form of legal establishment, consolidation and expression of prescriptions (rules, norms). Since the transnational essence of aviation cannot be delineated only by national level rules, the majority of aviation law consists of international norms, and therefore, international law is a legal system that regulates relations between countries, international organizations and individuals [1]. Therefore, such a type of agreement as CAA between the EU and other neighboring countries is a source of international law, the features of which will be described in more detail below. On the other hand, the purpose and internal tasks of the CAA agreements determine the gradual progressive incorporation in national legislation of the requirements and standards of the European Union acts listed in these treaties. Such incorporation of rules, regulations and predominance over national legislation is inherent in European law, the subjects of which are the member states of the European Union. The countries, which are other parties of the concluded CAA agreements are not members of the European Union, so a logical and simple question arises: what is the legal nature of the CAA and its agreements?

In order to answer this question, we start with the analysis of such type of agreement as a source of international law within the framework of interpretations of the 1969 Vienna Convention on the Law of Treaties (the Vienna Convention), the provisions of which will be presented and analysed in this section. The Vienna Convention in its Article 2(1) defines a treaty as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation [2].

The International Law Commission (ILC) said:

In addition to a ‘treaty,’ ‘convention,’ and ‘protocol,’ one not infrequently finds titles such as ‘declaration,’ ‘charter,’ ‘covenant’, ‘pact,’ ‘act,’ ‘statute,’ ‘agreement,' 'concordat,' whilst names like ‘declaration,’ ‘agreement,’ and *‘modus vivendi’* may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names such as ‘agreement,’ ‘exchange of notes,’ exchange of letters, ‘memorandum of agreement,’ or ‘agreed minute’, may be more common than others there is no exclusive or systematic use of nomenclature for particular types of transaction [3]. Treaties in the

sphere of liberalization of aviation services to create CAA between EU Member States and neighboring countries (ECAA Agreement, Euro- Mediterranean aviation agreements and CAA Agreements within the Eastern Partnership with 6 Eastern neighbors) have been concluded in the form of 'agreements'. The Vienna Convention also does not require that a treaty be in any particular form or include any particular elements, so that if a dispute arises as to the status of a document, an objective test with applicable requirements are used to determine the issue taking into account its real conditions and specific circumstances under which it was made. Such test with requirements, applicable towards concluded CAA international agreements as a source of Public international law could be follows: parties of agreements; authority to conclude them; expression of consent to be bound and entry into force; the scope of legal obligation (the principle *pacta sund servanda (*[Latin: pacts must be respected]. Agreements are to be kept; treaties should be observed) [4]) and responsibility under the international law.

a). Parties

States and international organizations remain the dominant international actors in the creation, interpretation and implementation or observance of international law, in particular, the creation of sources of international public law in the form of concluding treaties [5]. Treaties may be concluded between States, States and international organizations, and between international organizations. The multilateral Agreement on the establishment of a European Common Aviation Area (the ECAA Agreement) was concluded between the EU, and group of countries, connected by conditional geographical area – Western Balkans**.** However, Euro-Mediterranean aviation agreements were concluded separately between EU Member States and each neighbor country from Mediterranean region, which includes Kingdom of Morocco, Jordan, Israel, and Tunisia. Agreements within the Eastern Partnership also were concluded with each of the six neighbors individually.

b) Authority to conclude treaties

Articles 7 and 8 of the Vienna Convention deal with the authority of Parties' representatives, which crucial for the validity of treaties. Hence, the most important issue is the authority, the owner of which is authorized to approve and certify the text of the contract and to express the state's consent to its binding by the contract. The general rule expressed in the Vienna Convention (art. 7 p. 1(a) and (b)) [2] is that a person is deemed to be a representative of the State for the purpose of expressing the consent of the State to be bound by this provision if he provides the appropriate full authority or it follows from the practice of the States concerned or from other circumstances that they intended to regard the person as a representative of the State for such purposes and to waive the authority. Since a creation and enlargement of the CAA is directly connected to international aviation policy, access to states' air transport infrastructures and to the air transportation market, it is natural that authorized representatives of the countries-parties of the CAA Agreements were the ministers of transport and infrastructure of the signatory countries. However, the legal effect of signature of a treaty depends upon whether or not it is subject to ratification, acceptance, or approval.

c) Expression of consent to be bound and entry into force

Treaties are voluntary in the sense that no state can be bound by a treaty

without having given its consentto be bound by one of the methods recognised as effective in international law for this purpose (e.g. signature, ratification, accession). The Vienna Convention while recognizing treaties as a source of law, accepts free consent, good faith and the *pacta sunt servanda* as universally recognized elements of a treaty (Preamble) [2]. Article 11 of the Vienna Convention provides that the consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means agreed upon. 'Ratification,' 'acceptance,' 'approval' and 'accession' [6] generally mean the same thing, i.e., that in each case the international act so named indicates that the state performing such act is establishing on the international plane its consent to be bound by a treaty [4]. The general conception concerning the entry into force is mainly equal in all CAA Agreements, which is following: the Agreement shall be subject to ratification or approval by the signatories in accordance with their own procedures. Instruments of ratification or approval shall be deposited with the General Secretariat of the Council of the EU (depository), which shall notify all other signatories as well as the ICAO thereof. This Agreement shall enter into force on the first day of the second month following the date of deposit of the instruments of ratification or approval by the European Community and the EC Member States and at least one Associated Party. For each signatory which ratifies or approves this agreement after such date, it shall enter into force on the first day of the second month following the deposit by such signatory of its instrument of ratification or approval [7]. For Ukraine it took 4 months to ratify the CAA Agreement [8], which was signed on October 12, 2021. Just 7 days before the beginning of large-scaled invasion to the territory of Ukraine on February 17, 2022 the Verkhovna Rada of Ukraine ratified the CAA Agreement by Law of Ukraine No. 2067-IX [9]. The mentioned 'own procedure' by which the CAA agreement is a subject to ratification or approval is generally determined by the constitutional law of each sovereign state - Party of the treaty. Thus, according to Article 9 of the Constitution of Ukraine [10] current international treaties, the binding consent of which was given by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The conclusion of international agreements, which contradict the Constitution of Ukraine, is possible only after making appropriate changes to the Constitution of Ukraine.

d) Pacta sunt servanda

A state demonstrates its adherence to a treaty by means of the *pacta sunt servanda*, whereby Article 26 of the Vienna Convention reflects the fact that every treaty in force is binding upon the parties and must be performed by them in good faith. The validity of a treaty or of the consent of a state to be bound by a treaty may be impeached only through the application of the Vienna Convention [2, Art. 26].

States or international organizations which are parties to such treaties have to apply the treaties they have signed and therefore have to interpret them. Although the conclusion of a treaty is generally governed by international customary law in accordance with accepted rules and practices of a constitutional law of the signatory states, the application of treaties is governed by principles of international law. If, however application or performance of a requirement in an international treaty poses problems to a state, the constitutional law of that state would be applied by courts of that state to settle the problem stipulated in Article 27 of the Vienna Convention

requires states not to invoke provisions of their internal laws as justification for failure to comply with the provisions of a treaty, states are free to choose the means of implementation according to their traditions and political organization. The overriding rule is that treaties are juristic acts and have to be performed [2, Art. 26].

It has been argued that a treaty is better understood as a source of *obligation,* and that the only rule of *law* in the matter is the basic principle that treaties must be observed [11, p. 56]. If it is axiomatic that a party to a treaty is committed to what has been agreed in the treaty, it is equaly axiomatic that a State which is not a party to a treaty is under no such obligation [11]. The principle *res inter alios acta nec nocet nec prodest (*A thing done between some does not harm or benefit others) [4] is as valid as *pacta sunt servanda* and can in fact be considered as a consequence of that principle. Moreover, the Vienna Convention (Article 34) stipulates, that a treaty does not create either obligations or rights for a third State without its consent [2, Art. 34].

e) Governed by International law

Art. 27 of the Vienna Convention stipulates that the dictates of national law cannot be invoked as a reason for failure to perform a treaty obligation and this preserves the objective validity of international law as a *system of law* distinct from the local laws of each state [2, Art. 27]. Consequently, failure to perform a treaty obligation involves international responsibility [2, p. 47] even if the act in breach is consistent with, or even required by, national law. At this stage of our analysis of the nature of CAA and its treaties, we approached the points of contact between their features, which lie in the plane of public international law and law of international treaties, with their features in the field of European law.

First of all, being covered by the rules of international law, CAA agreements are part of the system of European aviation law regarding the liberalization of aviation services, because they constitute special provision of a single market in aviation services. Secondly, the fulfillment of the CAA Agreements conditions is guaranteed not only by means of purely international law approaches, but is also strengthened by the political and economic efforts of neighboring states to integrate into the EU by adapting European law to their national systems. The parties of CAA Agreements are EU Member States from one side and neighboring countries from the other side, including candidate countries, as well as third countries, which have not yet obtain a chance to get EU membership, however, have this purpose for the future. Hence, the CAA may be considered as a bright example of so-called 'sectoral integration without membership', which gives third countries the opportunity to consolidate in the domestic EU market and spread the 'sectoral Acquis' of the EU beyond its borders. Such sectoral cooperation provides legislation adaptation of neighboring country by means of voluntary implementation of the 'sectoral Acquis' EU in accordance with the terms and conditions of signed CAA agreements. The formation of the CAA, based on European and international law, occurs through the 'Europeanization' of third, neighboring, countries. Even though such Europeanization occurs within only one area - aviation, but undoubtedly it has an impact on other sectors up to the gradual provision of access to the neighboring countries of the EU internal market and, as a consequence, the adaptation of the EU sectoral Acquis. Cooperation and accession towards the European CAA gives the third countries a unique opportunity of EU 'sectoral Acquis' transposition into their legal systems, which implies the gradual

integration of the aviation sector of neighboring countries into the EU aviation area, by means of contracts obligations fulfillment.

Conclusions. Therefore, having analyzed the essence of the CAA and its treaties, it should be emphasized on its dual nature, since they are regulated by international public law norms and principles, which regulates rules on parties of agreements, authority to conclude them, expression of consent to be bound and entry into force, the scope of legal obligation (the principle *pacta sund servanda*) and responsibility. However, on the other hand, according to their internal content, such agreements obey the principles of European law, in particular the principle of the priority over national law and provide adaptation of their national legislative acts to EC legislation in the sphere of aviation transport.

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