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EDITORIAL

DISINTEGRATION THROUGH LAW?

This is certainly not the most propitious time to publish a Journal “on Law and Integration”. The *Zeitgeist* is captured by the European Council in its recent meeting of 18 and 19 February, where it stated that the reference to an “ever closer Europe”, a formula which resounds in every founding instrument from Rome to Lisbon, has no interpretative effect; the only possible effect that it could be reasonably deemed to produce.

It is disintegration, not integration, that seems to be the dominant motive behind the contemporary events in Europe; it is the *panacea* offered to soothe the fears raised by the multiple crises which hold the present state of Europe in a tight grip; it is the invisible thread keeping together the anxieties which underlie the scholarly discussions about its future.

It is not our task to determine the multifarious factors, of a social, political or cultural nature, which led to the current state of things. But the analysis of law as a possible disintegration factor would clearly be part of our brief.

A classical and, to my knowledge, unprecedented example comes from the recent EU-Turkey Statement of 18 March 2016 on the large influx of migrants and asylum seekers in Greece. This Statement has been harshly criticised in the press and in specialised blogs for its dubious consistency with international and European refugee law and with the imperatives of public morality.

There is, however, a further reason to be critical, less evident but equally or even more insidious, concerning the nature of the Statement and the procedure followed for its adoption.

In spite of its elusive title, the Statement appears to be an international agreement. As is well known, the law of treaties does not give a special decisive meaning to the designation of an instrument to determine its legal nature. Rather, the legal nature of an international instrument is to be determined on the basis of its contents and of the intent of its parties (see, along these lines, International Court of Justice, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, judgment on jurisdiction and admissibility of 1 July 1994, paras 23-30; the International Court of Justice (ICJ) applied customary law as codified by Art. 2, para. 1, lett. c), of the 1969 Vienna Convention on the Law of Treaties).

With regard to its content, there is little doubt that the Statement is not a mere declaration of principles, but rather a full-fledged normative scheme, spelling out specific conduct for the parties. In the case referred to above, which in many aspects is similar to the case at hand, the ICJ ruled:

“the Minutes are not a simple record of a meeting [...] they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement”.

With regard to the intent, the phraseology used in the Statement clearly indicates that the parties intended its provisions to be binding in their reciprocal relations: “The EU and Turkey today decided to end the irregular migration from Turkey to the EU. In order to achieve this goal, they agreed on the following additional action points [...]”. This sentence indicates that the parties “decided” on the purpose of the Statement and “agreed” on the means to be used to attain it. Moreover, in the subsequent practice of the European Institutions, the Statement is commonly referred to as an agreement and its provisions are referred to as “agreed” by the parties (see, for example, the press release MEMO/16/1221 of the European Commission, *Implementing the EU-Turkey agreement*, 4 April 2016).

But, if the Statement is an international agreement, who are the parties to it? While the answer is quite obvious for Turkey; it is far less obvious for its European counterpart.

According to the terms of the Statement, it is “concluded” by the European Union. However, the procedure of Art. 218 of the Treaty on the Functioning of the European Union (TFUE), which forms the basis for the conclusion of international agreements by the European Union, was not used. The Statement has been negotiated by the President of the European Council and, apparently, concluded in the course of a joint meeting between the European Council and the Turkish counterpart. The Commission had some role in the preparatory work of the Statement, and a little role, if any, in the negotiations, whereas the European Parliament had no role at all. Even if the Statement were related exclusively to the Common Foreign and Security Policy (CFSP), which appears to be highly questionable, Parliament should nonetheless have been immediately and fully informed at all the stages of the procedure (Art. 218, para. 10, TFEU; see also Court of Justice, judgment of 20 June 2014, case C-258/11, *European Parliament v. Council*, para. 54). In no case, under the founding Treaties, can an agreement be concluded by the European Council.

It is also complicated to assume that the Statement has been concluded by the Member States acting within the European Council. The subject of the Statement falls clearly within the exclusive competence of the EU. A number of its provisions may affect

common EU rules or alter their scope or still prejudice the further development of EU legislation, under the *ERTA* doctrine and its progeny (see, Court of Justice, opinion of 7 February 2006, 1/03, para. 126 and judgment of 4 September 2014, case C-114/12, *Commission v. Council*, para. 90 *et seq.*). To mention the most obvious example, the Statement determines that Turkey is to be considered as a first asylum country or third safe country under the Directive procedures (Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection). Moreover, the Statement intends to have effect in an area already covered by the readmission agreement between the EU and Turkey of 16 December 2013. Following an understanding with Turkey, the agreement should be provisionally applied from 1 June 2016 (see Communication COM(2016) 166 final from the Commission to the European Parliament, the European Council and the Council, *Next operational steps in EU-Turkey cooperation in the field of migration*).

Thus, neither the European Council, acting on behalf of the EU, nor the Member States, acting on their own behalf, did have the authority, under EU law, to conclude the Statement and to assume the rights and obligations contained therein.

As a consequence, the legality of the Statement can only be based on a superior source of authority. But does this source exist within the European legal order? The only possibility which remains to be explored is that the Statement relies on the unanimous consent of the Member States, which, allegedly, could overcome the legal hurdles imposed by EU law. It would be international law, in this perspective, which provides for the overarching source of authority within the EU legal order.

Beyond mere legalism, there is thus a great deal at stake. According to its classical foundations, EU law is based on the principle of autonomy, according to which the Member States cannot, neither individually nor collectively, act beyond and above the founding Treaties, to affect their procedures or to alter their scope.

In *Defrenne*, the Court of Justice famously clarified that, in light of the principle of autonomy, agreements concluded among the Member States that aimed to derogate from a rule of the (then) Treaty on the European Community, are “ineffective” within the European legal order (Court of Justice, judgment of 8 April 1976, case 43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, paras 58-59). This is quite obvious in a Constitutional legal order in which law is produced by a *numerus clausus* of sources and the powers of the public authorities are legitimated through a *numerus clausus* of procedures.

In all its aspects, the EU-Turkey Statement is going in the opposite direction and seems to be exploiting the potentialities offered by international law as an alternative decision-making procedure within the EU legal system. This is not a completely unexplored road. The *Brexit* agreement, adopted by the Member States, acting within the European Council on 18 and 19 February 2016, and mentioned at the outset of this edi-

torial, equally seems to subvert the very mission of the founding Treaties: to create an ever closer Union. Even with respect to this precedent, however, the EU-Turkey Statement seems to go one step further as it represents a visible example of the creeping modifications of the EU legal and political system, which almost inadvertently happens with the abdicant consent of the other political EU Institutions.

This road has a symbolic cost which can hardly be overestimated. For decades, law has discharged a key role in the process of European integration. It has often heralded the way through which social conduct was to proceed. Now, law, and more specifically the normative instruments offered by international law seem to be used by the Member States to pursue their objectives over and above the Constitutional framework established by the Treaties.

This use of international instruments has the effect of disregarding the European institutional balance upon which the *acquis européen* has developed and which, with all its limits, constitutes the legacy of the first phase of the European integration. It may shift the centre of gravity to the Member States, the *unmoved movers* of the European legal universe. It may subdue the institutional pluralism, which has represented the hallmark of the political experience of the European integration, and create, instead, an institutional desert, where the political power is concentrated in the hand of the States acting through the European Council. It may mark the return to a Europe of sovereign States and the definite disappearance of the notion of a European public interest, of which we are in desperate need.

E. C.



OVERVIEWS

A DISINTEGRATION OF EUROPEAN STUDIES?

TABLE OF CONTENTS: I. "More Europe" – a better Europe? The state of the Union after the *Gauweiler* Judgment. – II. The road to the crisis and the ambivalences of unconventional rescue operations. – III. Necessity knows no laws: entrapment in a state of emergency?

I. The European integration project is in troubled waters. All branches of European studies document its difficulties, explore the reasons and discuss the potential to cure its failings. Diagnoses, of course, differ widely both across and beyond the Eurozone and the European Union, and, unsurprisingly, these debates are not immune to distorted perceptions and wrongful ascriptions. The title of this comment points to a schism which is not new, but which seems to be deepening. The schism mirrors the discrepancies in the various disciplines concerned with the integration process. Jürgen Habermas has pointed to them in one of his earlier essays on constitutionalism.¹ Legal scholars and political scientists, he explained, each tend to approach law according to their respective disciplinary logic, which cannot be communicated across the disciplinary borders. Lawyers focus on normative issues and the art of legal reasoning. Social scientists tend to perceive law – if they see it at all – from external perspectives. They do not engage in the business of a *lege artis* application of rules, but explore their impact on society, their effectiveness, or they analyse its processes of implementation. They thus tend to avoid the prescriptive dimension of law; normative issues, as dealt with by lawyers, are an *aliud* to truly scientific operations. This constellation corresponds precisely. The present state of the Union offers ample evidence for the cogency of Habermas' observation. Suffice it here to point to the work of two of my colleagues and friends from the Hertie School of Governance in Berlin. The integration project is now reaching into core state functions, observes Markus Jachtenfuchs in an article co-authored with my former Bremen colleague Phillip Genschel.² So perceived, the crisis has triggered a move to "more Europe" and further deepening of the integration project. Within economics, by

¹ J. HABERMAS, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, in *Political Theory*, 2001, p. 766 *et seq.* (the original German version was published in 1994).

² M. JACHTENFUCHS, P. GENSCHEL, *Conflict-minimizing Integration: How the EU Achieves Massive Integration Despite Massive Protest*, in D. CHALMERS, M. JACHTENFUCHS, C. JOERGES (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity*, Cambridge: Cambridge University Press, 2016, p. 166 *et seq.*

now the leading discipline in European studies, the focus is on functional necessities and crisis management. “The first victim of the crisis is democracy”, writes my renowned colleague Henrik Enderlein.³ This is an observation, which does not affect his work on the economic problems of the crisis and the search for their solution.⁴ We lawyers should be concerned about such legal and normative complacency.⁵

But we cannot and should not expect our neighbouring disciplines to deliver some *lege artis* analyses of the transformation of Europe’s constitutional constellation caused by the financial crisis, let alone the elaboration of a new institutional architecture, which would deserve recognition. What we should be deeply concerned about, however, is an intrusion of normative complacency into our own realms, the spheres of law, and a takeover there of purely instrumental and functionalist categories, which damages the law’s integrity. It is this latter concern, which will be addressed in the following deliberation. They are by no means comprehensive in their scope but will instead focus on one single case, albeit one of extraordinary, and by the same token exemplary, importance, namely, the *Gauweiler* judgment of the Court of Justice of the European Union (CJEU),⁶ handed down as a response to “the first reference ever” by Germany’s Federal Constitutional Court (BVerfG).⁷ The two courts are engaged in a litigation whose end is not in clear sight. On 16 February 2016, the BVerfG re-opened the proceedings on the response that it received from Luxembourg. The first session lasted eight hours.⁸ Prior to this return to the Outright Monetary Transactions agenda (OMT), Herr Gauweiler had filed a new constitutional complaint, this time directed against the European Central Bank’s (ECB) quantitative easing which has complemented its former OMT programme.⁹

Thanks to the re-opening of the OMT-litigation in Karlsruhe, we know at least that the CJEU did not have the last word. But the Luxembourg Court may well have had the final say; it is as unlikely as ever that Karlsruhe will shoulder the responsibility for the destruction of the common currency. What we can hence expect is the search for some

³ H. ENDERLEIN, *Das erste Opfer der Krise ist die Demokratie (The First Victim of the Crisis is Democracy): Wirtschaftspolitik und ihre Legitimation in der Finanzmarktkrise 2008-2013*, in *Politische Vierteljahresschrift*, 2013, p. 714 *et seq.*

⁴ See, e.g., H. ENDERLEIN, *Economic and Monetary Union as a Showcase of Exploratory Governance: Why There Are No Simple Answers to the Future of the Euro-area*, in HERTIE-SCHOOL OF GOVERNANCE (ed.), *The Governance Report 2015*, Oxford: Oxford University Press, 2015, p. 25 *et seq.*

⁵ See, even if a long while ago, C. JOERGES, *Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration*, in *European Law Journal*, 1996, p. 105 *et seq.*

⁶ Court of Justice (Grand Chamber), judgment of 16 June 2015, case C-62/14, *Gauweiler et al. v. Deutscher Bundestag*.

⁷ Bundesverfassungsgericht, judgment of 14 January 2014, no. BvR 2728/13, paras 1-105.

⁸ *Ivi*, paras 1-105.

⁹ The brief (176 pages) is available at www.jura.uni-freiburg.de.

face-saving compromise formula.¹⁰ Such an outcome is conceivable, even likely, but would this be a happy ending? With its *Gauweiler* judgment, the highest court of the Union gave its legal blessing to a deep and problematical transformation of Europe's economic governance. This is the consummation of a process, which occurred step-by-step through what the European University Institute (EUI) in Florence has somewhat oxymorically called Europe's "crisis law".¹¹ This *law* had already met with highest judicial approval in the previous *Pringle* judgment.¹² But it had not yet been so transparently clear that the Court supports the establishment of a technocratic regime with unlimited discretionary powers and without credible accountability. This is certainly a highly critical characterisation. But this critique does not suggest that legally valid alternatives were available. The deeper dilemma and tragedy of the present state of the judicial responses to Europe's crisis management is the overburdening of the judiciary with its assessment. To cite from the introduction to a collection of essays by Karl Polanyi, which deal with the great financial crisis of 1929 and the Great Depression: "Today, it is easy enough to see past mistakes. But it is much less easy to undo their consequences".¹³ Seventy-nine years later, we seem to be entrapped in the same kind of constellation. We have to take stock of what happened after 2008 and try to understand the situation in which we find ourselves.

II. To go back to the introductory observation and thesis: what we can observe is a strengthening of European powers. We have learned to understand any move towards more Europe as a signal of progress. This used to be an assumption, which all the disciplines engaged in the study of the integration process shared. But the kind of transformation to which we are now exposed has been generated by a crisis of enormous dimensions whose end is not in sight. This crisis confronts us with dilemmas rather than praiseworthy accomplishments. As a lawyer, I would substantiate: this crisis attests to nothing less and nothing better than the inability of European politics to remain faithful to the commitment to the project of a democratic mode of European governance, to the respect of human and social rights, and to a law-mediated legitimacy of the integration project. This is a discomfiting reading of the state of the Union. In a nutshell, it is, by now, widely held that the separation of monetary policy from fiscal and economic policy, which the Treaty on European Union (Maastricht Treaty) established, constituted a design failure of the Economic and Monetary Union (EMU). The move to a common

¹⁰ A prominent suggestion: the BVerfG should accept the result reached by the CJEU but reject its reasoning; see L.P. FELD, C. FUEST, J. HAUCAP, H. SCHWEITZER, V. WIELAND, B.U. WIGGER, *Das entgrenzte Mandat der EZB. Das OMT-Urteil des EuGH und seine Folgen*, Berlin: Stiftung Marktwirtschaft, 2015, p. 37.

¹¹ See www.eurocrisislaw.eui.eu.

¹² Court of Justice, judgment of 27 November 2012, case C-370/12, *Thomas Pringle v. Gouvernement of Ireland, Ireland and The Attorney General*.

¹³ K. POLANYI, *Europe To-Day*, London: Workers' Educational Trade Union Committee, 1937.

currency should have been accompanied by the establishment of political union, we read over and over again.¹⁴ This is anything but a consolidating message, however. The defence of national powers in the realms of fiscal and monetary policy by the Member States cannot really be called irresponsible. “The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated”. What Alexander Hamilton had stated in no. 78 of the Federalist Papers back in 1788 defines an essential feature of a constitutional democracy.

The Europeanisation of democratic rule as a pre-condition of Monetary Union was utterly inconceivable back in 1993. What the Maastricht Treaty has, instead, brought about is an irresolvable *diagonal* conflict constellation. To explain this briefly: the socio-economic conditions, political orientations and cultural legacies of the Member States were – and still are – not uniform. The implications of this diversity are threefold: for one, the differences between the fiscal and economic policies both within and beyond the Eurozone rest upon good *democratic* reasons. It follows that the single monetary policy, which the ECB has to deliver cannot fit *anyone*. And it was hence neither surprising nor *wrong* that the Union was empowered only with a competence to co-ordinate national policies, and the Stability and Growth Pact (SGP) of 1997 was not cast in hard rules. Monetary policy cannot claim supremacy with respect to fiscal and economic policy.

These problems could be kept latent for a short while. But conflicts were bound to break out when, in the course of the financial crisis, American rating agencies and *the markets* became aware of Europe’s socio-economic diversity, and then adjusted their grading of national economies and their credit conditions accordingly. The spread between the interest rates of Eurozone members widened steadily, and became unsustainable until a break-up of the common currency seemed imminent in 2012. At this point, Mario Draghi stepped in with his legendary announcement of 26 July in London: “Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough”.¹⁵ The markets calmed down. The “stability of the Eurozone as a whole” was sustained.

Not to everybody’s liking, we have to add. Ever since the controversy over the ratification of the Maastricht Treaty, constitutional complaints have been filed with the *Bundesverfassungsgericht* against any further Treaty amendment, often by the ever same complainants. Herr Gauweiler, member of the *Bundestag* for the Christian Social Union (CSU) is the most prominent among them. This time, he was supported by the parliamentary group DIE LINKE and another 11,692 complainants. This looks and this was

¹⁴ See the prominent explanation of the former President of the Bundesbank Helmut Schlesinger during the course of the original challenge to EMU made before the BVerfG, no. 2 BvR 2134/92 and 2159/92, BVerfGE 89, 155. English translation: *Manfred Brunner and Others v. The European Union Treaty*, in *Common Market Law Reports*, 1994, para. 92.

¹⁵ M. DRAGHI, *Verbatim Remarks, President of the European Central Bank at the Global Investment Conference in London*, 26 July 2012, www.ecb.europa.eu.

quite spectacular. But nobody could, and hardly anybody did, expect that the German Court would, let alone should, strive for the destruction of what Mario Draghi had accomplished. Can we close our files? “Lieb’ Vaterland magst ruhig sein, Fest steht und treu die Wacht am Rhein!”. The emotional and nationalist *Lied* from 1840 conveys the message that the German Fatherland needs not to worry about its arch-enemy because it is so strongly guarded by its watchposts on the Rhine. Draghi’s strong statement protected the Euro at least for the time being. But how about the guardian of Europe’s constitutionalism? The unconventional financial rescue operation came at the price of a major collateral damage.

III. Draghi’s intervention was a measure that did not accept – but instead corrected – the operation of the financial markets. It revealed that we cannot place our trust in the disciplining functions which the stability philosophy of the EMU had expected the markets to exercise. The action announced by the ECB and Draghi was not foreseen within the EMU framework, neither legally nor conceptually. This is not in itself unusual and problematical. What is so discomfiting is the lack of a political infrastructure and an institutional framework in which democratic political contestation could have legitimated the correction or improvement of what had been ratified. Mario Draghi could not – and did not – invoke such a mandate. This is why he transformed the conundrum of legal *lacunae*, political failure and malfunctioning of the common currency into an epistemic challenge, which required sophisticated expertise, rather than political deliberation and legal changes. The kind of challenge which he defined was instead accessible and manageable only by the ECB. What else could he have done in view of the desperate situation in 2012? A considerable interdisciplinary body of scholarship refers to the notions of emergency and state of exception in their characterisation of the financial crisis.¹⁶ Conceding that he responded to an apparent emergency, we still have to ask whether the CJEU really had no choice other than to legalise Draghi’s move into unconventional modes of monetary politics? To cite Alexander Hamilton again: “The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution” while “the Executive not only dispenses the honors, but holds the sword of the community”. Can we accept and *normalise* the fusion of both branches within the ECB? In the OMT case, the alliance between the *sword* and the *least dangerous branch* may have been economically successful. We cannot be too sure about the social effects

¹⁶ Following the lead of former constitutional judge E.W. BÖCKENFÖRDE, *Kennt die europäische Not kein Gebot? Die Webfehler der EU und die Notwendigkeit einer neuen politischen Entscheidung* (Does Necessity Not Know Rules?, Design Flaws of the EU and the Necessity of a New Political Decision), in *Neue Züricher Zeitung*, 21 June 2010; C. JOERGES, *Law and Politics in Europe’s Crisis: On the History of the Impact of an Unfortunate Configuration*, in *Constellations*, 2014, p. 249 *et seq.*; most recently, C. KREUDER-SONNEN, *Beyond Integration Theory: The (Anti-)constitutional Dimension of European Crisis Governance*, in *Journal of Common Market Studies*, 2016, forthcoming.

and the long-term impact of unconventional monetary policy measures. Be that as it may: this alliance was not a holy one. Its replacement of the rule of law by assumed economic necessity and political expediency threatens the integrity of law. Two judges of the Second Senate of the *Bundesverfassungsgericht* (Gertrude Lübbe-Wolff and Michael Gerhardt) had delivered two Dissenting Opinions in which they pleaded that the complaints brought against the OMT programme be rejected as inadmissible. Did they do a better service to the law? Not even this is certain. Judicial self-restraint could become a cure only if the judiciary both intended to *and* were able to help to initiate responsible political deliberation about a re-construction of Europe's legitimacy. For the time being, we have to conclude, sadly, that Europe is without a guardian of its constitutionalism.

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ARTICLES

THE PASSION AND THE SPIRIT: ALBERT CAMUS AS MORAL POLITICIAN

JAN KLABBERS*

TABLE OF CONTENTS: I. Introduction. – II. A manifesto. – III. On Camus. – IV. Camus and the virtues. – V. A smouldering continent. – V.1. Financial crisis. – V.2. Refugee flows. – V.3. Russia and Crimea. – V.4. Referenda, governance, responsibility. – VI. To conclude.

ABSTRACT: This essays addresses the curious circumstance that for all their visibility on blogs, twitter and the 'op-ed' pages of newspapers, public intellectuals offer remarkably little ethical guidance regarding current events and crises. These intellectuals may offer their expertise (explanations, predictions), but do not provide much ethical inspiration, almost as if 'right' and 'wrong' have become meaningless categories. Things were different a few generations ago, when the likes of Albert Camus would search their souls in order to figure out how to live. This essay portrays Camus as private citizen and public moralist, and briefly discusses current political events in a mindset inspired by Camus.

KEYWORDS: Albert Camus – virtue ethics – political crisis – Europe – public intellectuals.

"... for us Europe is a home of the spirit where for the last twenty centuries the most amazing adventure of the human spirit has been going on".¹

I. INTRODUCTION

Europe is, if not on fire, at least smouldering. The last couple of years alone have seen the continent confronted with the unabashed annexation of the Crimea; the shooting down, accidental or otherwise, of civilian aircraft; a financial crisis and a country on the brink of bankruptcy; and an influx of refugees seen as threatening in its own right, and which threatens to bring down the European Union (EU) and threatens to turn Europe

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¹ A. CAMUS, *Letters to a German Friend*, reproduced in A. CAMUS, *Resistance, Rebellion, and Death*, New York: Vintage, 1995 (1961), p. 22.

into a bleak state of medievalism, with small bits of territory surrounded by walls and fences and policed around the clock.

This should be more than enough, one would think, to spur philosophers, sociologists and economists, and others who are intellectually engaged into writing about what is going on, about the meaning of events, advocating for possible solutions, and generally discussing the moral side of things.² And yet, the noise coming from intellectual circles has been a deafening silence as far as the ethics of political action goes. What has happened? The continent seems to have resigned itself to a weird *laissez faire* attitude, with few public intellectuals occasionally raising a moralist voice.³

There might be various reasons for this state of affairs. One is, no doubt, that scholarship has generally come to be more technical and detailed, also in the social sciences and humanities, shunning grand theory for being able to say something sensible about something small. Much scholarship is of the sort that a United States (US) Chief Justice once famously complained about, discussing “the influence of Kant on evidentiary approaches in 19th century Bulgaria”, but without much impact on society or societal questions at large. Social sciences are losing themselves in methodological debates, while philosophy is dominated by an analytical approach. Even writers and journalists seem to have fallen for the glories of specialization, and opt for diagnosis rather than prescription. Michel Houellebecq, for instance, continues to have a keen eye for the *Zeitgeist* (bleak as his outlook may be), recording the alienation of individuals and the atomization of society, but seems highly reluctant to offer anything in response.

The point is not so much that public commentary has gone missing: there is plenty commentary in the newspapers and blogs. The point is however, that this commentary tends to come in two versions, neither of which is eventually very inspirational, quite possibly because the overarching idea of meaningful and comprehensive political divisions, and meaningful political debate about right and wrong and taking care of the common world, has been all but given up.⁴ On the one hand, there are those who inform on the basis of their expert knowledge. Policy proposals are supported or dismissed with the help of disciplinary insights, and the well-chosen historical example serves either to endorse or to critique. On the other hand, there are the voices of the professionally opinionated, so to speak: the *op-ed* pages and blogs are filled with pieces written by people representing a political party or representing a particular interest group or civil society organization, professionally engaged in trying to influence public debate. Those pieces tend to be bland and utterly predictable: the environmental activist is not going to write that the threat of climate change is exaggerated; the business

² This is all the more surprising given the popularity of the concept of *legitimacy* in academic circles – and surely, legitimacy cannot entirely be isolated from ethics and morality.

³ The observation is far from novel. See e.g. F. FUREDI, *Where Have All The Intellectuals Gone?*, London: Continuum, 2006.

⁴ See, e.g., Z. BAUMANN, *In Search of Politics*, Cambridge: Polity, 1999.

leaders' spokesman (and yes, he will usually be a he) is not going to warn against climate change.

Hence, the one thing often left without discussion is the ethical side of things. It is all well and good to discuss the sources of the financial crisis, its economic effects, *et cetera*, but few offer some kind of ethical guidance. Should Greece be bailed out yet again, and with it all the bankers who have behaved irresponsibly in contributing to the crisis? Should Hungary get away with building a fence to keep refugees out, and is it right to make distinctions between refugees based on their religion or other group affiliations? The experts can tell us, perhaps, what is happening, what has gone wrong, and what the likely effects of specific forms of political action will be. But those experts cannot tell us whether (and why) political action is justifiable or not; for this, what is needed is ethical guidance. That such guidance is generally appreciated cannot be better illustrated than by reference to the current Pope, Pope Francis who, in marked contrast to his recent predecessors, is widely heralded by believers and non-believers alike, precisely because he provides guidance on such vexing issues as climate change.⁵

Things were not always thus. During the stormy and violent twentieth century, several intellectuals stood up and provided ethical guidance, and whether one agreed with the likes of Hannah Arendt or Albert Camus or not, their words would often strike a chord. The remainder of this essay is an attempt to come to terms with Camus,⁶ who raised his public voice about a number of issues, ranging from big issues such as the German occupation of Europe or the Algerian struggle for decolonization, to smaller, more personal things such as the wrongful imprisonment of those politically active in Algeria, or the death penalty imposed on a fascist French writer. Before delving more deeply into Camus, however, it might be useful to have a closer look at one recent initiative by a group of (largely) international law academics to influence political decision-making in Europe concerning the influx of refugees, in order to suggest both that expert knowledge can be invoked, and that invoking it nonetheless is bound to result in somewhat anodyne protest.

II. A MANIFESTO

The refugee influx of 2015, and the responses of the EU and its Member States thereto, provoked at least one professional group into action. Close to 700 international lawyers signed an open letter, published on 22 September 2015 to a number of addressees. The

⁵ See POPE FRANCIS, *Encyclical on Climate Change and Inequality: On Care for Our Common Home*, New York: Melville House, 2015.

⁶ I have elsewhere written about Arendt: see J. KLABBERS, *Possible Islands of Predictability: The Legal Thought of Hannah Arendt*, in *Leiden Journal of International Law*, 2007, p. 1 *et seq.*, and J. KLABBERS, *Hannah Arendt and the Languages of Global Governance*, in M. GOLDONI, C. MCCORKINDALE (eds), *Hannah Arendt and the Law*, Oxford: Hart, 2012, p. 229 *et seq.*

international lawyers had gathered for the annual conference of the European Society of International Law, in Oslo, the week before, and some of the most well-known refugee lawyers and human rights lawyers had taken the initiative, it seems, to do something. The result is the Open Letter, a fairly brief document which, in the form of a legal instrument (a resolution) urges its addressees to do a number of things and, likewise, refrain from some other things.⁷

As an academic international lawyer, I am a member of the European Society, and had I been present at the Oslo conference and had I been asked to sign, I would most likely have done so, albeit perhaps not without some hesitation. I would have signed, in all likelihood, based on the conviction that sometimes it is necessary to take a stand, even if one does not fully agree with the stand being taken. But I would have preferred to sign a different letter, one that would have spoken the language of moral outrage rather than the ambivalent language of the law. As it is, the Open Letter is strategically positioned to address a meeting of EU policy makers, and somehow it shows.

The most remarkable aspect of the letter, upon closer scrutiny, is precisely that it is cast in legal language. There is a clear element of critique of policy, but the critique is cast in almost exclusively legal terms. The authors express their horror at the continuing human rights violations, and remind the addressees of their obligations under international human rights law as well as international refugee law. These addressees are reminded of obligations under specific treaties, but also under customary international law and EU law. In short, the document is cast, for the better part, in terms of rights and obligations, expressive of the hope that if the addressees will live up to their obligations, the world will be a better place. It does not so much provide a remedy for the crisis or a diagnosis of what causes the crisis, or even whether the action taken is ethically justifiable, but calls upon its addressees to respect their legal obligations.

At the same time, it expresses hopes that some of the existing law will be changed. The letter notes that departures of current policies (based on law) might be useful: it suggests the suspension of sanctions on carriers; it proposes the issuing of humanitarian visas, in a departure from regular visa requirements and it urges a suspension of what are referred to as “Dublin returns” as well as a replacement of the “Dublin system”. It is here, arguably, where the Open Letter is most easily identifiable as a technocratic document: few ordinary citizens will have an inkling as to what *Dublin* stands for in the jargon of refugee and asylum lawyers; indeed, apart from a number of specialists, few international lawyers will have more than a rudimentary idea as to what *Dublin* refers to.⁸

⁷ The letter can be found at www.ohrh.law.ox.ac.uk. A brief introduction is provided by one of its initiators, Basak Cali, at www.opiniojuris.org. An update suggested that the number of signatories had risen to some 900, at www.opiniojuris.org.

⁸ In general terms it refers to the system whereby refugees who have not been accepted in one of the EU Member States have no possibility of applying elsewhere in the EU. The system was created in

The technocratic nature of the letter is also apparent in its listing of addressees. It is addressed, as one would perhaps expect, at the “peoples of Europe”, but not just at them. In fact, the title is rather long and unwieldy: “Open Letter to the peoples of Europe, the European Union, EU Member States and their representatives on the Justice and Home Affairs Council”. These addressees are, no doubt, highly surprised to find themselves addressed in the same letter. In particular the throwing together of the European peoples and the politicians representing the EU’s Member States at a meeting is, to say the least, a source of ambivalence.

Hence, the letter is ambivalent on several counts. It is ambivalent in addressing both the European peoples and Europe’s policy-makers, and it is ambivalent in urging respect for the law as well as changes of the law. Most of its criticism is couched in legal terms, but sometimes there is a more general note to be heard: the odd reference to human dignity, or the “horror” expressed at human rights violations. Here, the term “horror” (however justified in itself) is strikingly out of place with the otherwise legalistic tone. And why still this curious reference to the “peoples” (plural) of Europe?

Much of the ambivalence could have been avoided by adopting a different tone. Drafting the Open Letter as a legal brief invites rebuttal on legal grounds, and as any international lawyer should know these days, all legal arguments contain their own rebuttals.⁹ By contrast, the language of morality is more difficult to rebut: who in their right mind could argue that the treatment of refugees in several parts of Europe could be called *decent*? Who could seriously argue that the distinction made by some governments between Christians and others, with a view of barring those others, amounts to a decent distinction, especially in view of the circumstance that the entire heritage of Christianity is based on acceptance of travelling others? This is what is celebrated, not entirely free from hypocrisy perhaps, every year at Christmas time: the happy circumstance that an innkeeper in Bethlehem was ready to offer a stable to weary travellers so that a pregnant woman could give birth in peace.

There are, to be sure, occasions when the technocratic vocabulary will be useful; in discussions with specialists, it no doubt helps to be able to speak the specialist language. There are also, no doubt, occasions where the specialist, technical vocabulary is less helpful, for instance when trying to mobilize a political movement. Either way, while not expected to be entirely successful perhaps, the Open Letter represents an attempt by a large group of international lawyers to place their disciplinary knowledge in the cause of a greater good, and that alone deserves respect.

1991, and has been subject to criticism ever since. It is based on the premise that the EU forms, for purposes of refugee law, a single entity.

⁹ See M. KOSKENNIEMI, *From Apology to Utopia: The Structure of International Legal Argument*, Helsinki: Finnish Lawyers’ Publishing Company, 1989.

Moreover, some of Europe's political leadership demonstrate that there is a need to be reminded of legal obligations and the like. In what must rank as one of the most un-presidential speeches ever by a sitting president, the normally somewhat bland Finnish president Sauli Niinistö suggested, in February 2016, that the refugee crisis placed Europe before a stark choice: either to honour international obligations (human rights law, refugee law), or to honour European values (these remained unidentified – probably for the good reason that they are difficult to distinguish from those international obligations). He left little doubt about where his sympathies lie, and not surprisingly the speech, all but calling for the expulsion of all foreigners and preventing all others from ever entering Europe, was welcomed by Finland's extreme right.¹⁰

III. ON CAMUS

Immanuel Kant, as is well known, drew a distinction between the moral politician, and the political moralist.¹¹ The political moralist, he suggested, makes principles subservient to ends, and can thus always find another justification for behaving in any particular manner. The moral politician, by contrast, would be someone engaged in political activity but guided by some kind of respect for others, treating people as ends rather than means. The moral politician is one who integrates moral concerns in his politics, while the political moralist is one who bends ethical notions so as to serve political ends.

In these terms, Camus, while not a professional politician, was clearly a moral politician. The bare outline of his biography is well-known.¹² Born in 1913 in French Algeria, he grew up without a father: his father died on the battlefield of World War I when Camus was still an infant. The household in which Camus grew up comprised an uncle, a dominant grandmother, and a silent mother (she was almost totally deaf and mute), and was decidedly lower class. Young Camus was a bright schoolboy, and caught the eye of his teachers, first Louis Germain and later also Jean Grenier. These sparked in him an interest in literature, theatre and philosophy: the worlds of ideas and ideals. At the age of 17, Camus suffered a first bout of tuberculosis, a disease that would continue to plague him. He died in a car crash in 1960, having made a name for himself during

¹⁰ The speech marked the opening of the 2016 sessions of parliament, and is available at www.presidentti.fi (the English version is available at: <http://presidentti.fi/public/default.aspx?contentid=341376&nodeid=44810&contentlan=2&culture=en-US>). And here's a little flavour: discussing migration law, president Niinistö notes that "in practice this means that anyone who knows how to pronounce the word 'asylum' can enter Europe and Finland; in essence, use of the word grants a kind of subjective right to cross the border. Without any good grounds whatsoever, an arrival is entitled to an evaluation lasting years and can then, if not qualifying for asylum, avoid enforcement of the subsequent decision and remain where he or she arrived under false pretences".

¹¹ He did so in I. KANT, *Zum ewigen Frieden*, Stuttgart: Reclam Verlag, 1984 (1795), p. 38.

¹² Several biographies have been written, including P. MCCARTHY, *Camus*, New York: Random House, 1982, and O. TODD, *Albert Camus: A Life*, B. Ivry (translator), London: Vintage, 1998.

the Second World War as editor of the resistance newspaper *Combat* and as the author of three novels (*The Stranger*, *The Plague*, *The Fall*),¹³ numerous essays, some theatre plays, and some philosophical works. He was awarded the Nobel Literature Prize at the rather young age of 43, in 1957.

For much of his life, Camus shunned formal political affiliations. He never joined any political party, with the exception of a brief membership of the Algerian Communist Party when still in his early twenties. Even this was a far from straightforward move: he was reported strongly under the influence of a friend¹⁴ and of his mentor Grenier, who apparently advised him to join the party.¹⁵ The ambivalence is clearly spelled out in a letter to Grenier, dated 21 August 1935: "Though I have objections to Communism, it seems to me that it would be better to live with them". Communism had its excesses, but these were not inherent in the doctrine, he suggested. "Also, Communism sometimes differs from the communists". What he was looking for, tellingly, was for communism to provide him with some sort of spiritual meaning, "a foundation, an asceticism that will prepare the ground for more spiritual concerns". Even so, Camus was not about to sacrifice his independence: "I will always refuse to put a volume of *Das Kapital* between life and mankind".¹⁶ He ended the letter by stating his "strong desire to help reduce the sum of unhappiness and bitterness that is poisoning mankind", and promised to "stay lucid and never to surrender blindly".¹⁷ He was expelled from the party not long after joining it, for refusing to toe the line after the party had softened its anti-colonialism position.¹⁸

Camus' reputation rests, it seems, predominantly on two things. On the one hand, there are the novels and the essays. He is not generally considered a brilliant philosopher or great playwright, but the novels and at least some of the essays have stood the test of time. Second, he is often seen as embodying a desirable model for ethical behaviour.¹⁹ To some extent, this manifested itself in his writings, but it also showed in the actions (and inactions) taken during his lifetime. Students of his life and work keep re-

¹³ A fourth, *The First Man*, was only published long after his death.

¹⁴ See P. MCCARTHY, *Camus*, cit., p. 38.

¹⁵ McCarthy asserts, all too neatly perhaps, that Grenier wanted to study what being a member would do to someone like Camus, and explains Camus' willingness to go along largely on psychological grounds. *Ivi*, p. 75.

¹⁶ The sentence is echoed in the famous (and often misunderstood) statement he made at the occasion of receiving the Nobel Prize more than two decades later, when noting that if forced to choose between justice and his mother, he would choose the latter.

¹⁷ See A. CAMUS, J. GRENIER, *Correspondence, 1932-1960*, J. Rigaud (translator), Lincoln: University of Nebraska Press, 2003 (1981), letter 11, p. 10 *et seq.*

¹⁸ See E. HAWES, *Camus: A Romance*, New York: Grove Press, 2009, p. 32.

¹⁹ It has been suggested that there may be a link between the two: his sincerity and honesty may have "prevented him from becoming a successful dramatist". See H. POPKIN, *Camus as Dramatist*, in G. BRÉE (ed.), *Camus: A Collection of Critical Essays*, Englewood Cliffs NJ: Prentice-Hall, 1962, p. 170 *et seq.*

sorting to terms such as honesty, integrity, and similar words. While his ethical stance as apparent from his fiction is sometimes subjected to analysis,²⁰ little systematic attention has been devoted to his political action. Such attention as there is tends to be devoted to particular events: his opposition to the execution of fascist writer Robert Brasillach; his falling out with Sartre; his silence during the later years of Algeria's independence struggle, or even his famous quip about choosing his mother over justice. One may speculate in which ethical tradition he could best be placed, but it seems undeniable that he had a lot of sympathy for the Aristotelian virtue ethics tradition. Be that as it may, it is more interesting to systematically discuss his political action, with a view to finding out what it is he can still teach us, more than half a century after his untimely death.

IV. CAMUS AND THE VIRTUES

If Camus was a virtue ethicist, then he was also living proof that the doctrine of the unity of the virtues is less than compelling. According to this doctrine, formulated already by Aristotle, a person can only be considered virtuous if he or she is virtuous in all aspects of life.²¹ Camus was no saint, by any standard, and had a well-deserved reputation for womanizing. This alone renders him unfit, according to some, to be a role model: there is a strong urge in observers to proclaim the unity of private and public life.²² Someone who inflicts emotional pain in his private life, so the thought goes, cannot speak with much moral authority about public issues either. And that Camus inflicted pain in his private life seems clear: his second wife²³ Francine saw a number of mistresses pass by, some of them in relationships spanning long periods of time, and may have contemplated committing suicide as a result.²⁴

Beyond this, though, Camus is often heralded as a virtuous person, and time and again he advocated the virtues while declining to accept grand theories. He was fond of ancient Greece, feeling "closer to the values of the classical world than to those of Chris-

²⁰ See in particular D. SPRINTZEN, *Camus: A Critical Examination*, Philadelphia: Temple University Press, 1988; more briefly also several of the contributions to an excellent collection published not long after his death, most explicitly so S. DOUBROVSKY, *The Ethics of Albert Camus*, in G. BRÉE (ed.), *Camus: A Collection of Critical Essays*, cit., p. 71 *et seq.* A more recent example is T. JUDT, *On The Plague*, reproduced in T. JUDT, *When the Facts Change: Essays 1995-2010*, London: Vintage, 2015, p. 171 *et seq.*

²¹ See ARISTOTLE, *Ethics*, J. Thomson (translator), London: Penguin, 1976.

²² For a lucid discussion, see F. SCHAUER, *Can Public Figures Have Private Lives?*, in *Social Philosophy and Policy*, 2000, p. 293 *et seq.*

²³ As a young man, Camus had briefly been married to a young heroin addict. His discovery that she had cheated on him in return for drugs brought the marriage to an end, although it is reported that they remained close for a long period thereafter.

²⁴ One should be careful drawing inferences of this nature though: there is no direct evidence to back up this claim; merely circumstantial evidence. See, e.g. E. HAWES, *Camus: A Romance*, cit.

tianity”²⁵ and confessed to a “nostalgia for the lost Greek virtues”.²⁶ He would extoll the virtues of frankness and justice in a brief attempt to conceptualize solidarity,²⁷ and much of his journalistic writings is infused with a strong sense of empathy.²⁸ He is depicted as a “man of courage and integrity”.²⁹

Two episodes in particular stand out, and suggest that his ethics was virtue inspired rather than deontological or consequentialist.³⁰ First, there is the issue of the death penalty for Robert Brasillach, a fascist French writer. Brasillach was truly an anti-semite, who would urge the Nazis not to forget about the children when sending Jews to their death: their children should not be allowed to survive. He edited a fascist newspaper during much of the Second World War, and was prosecuted for treason after France had been liberated, while World War Two was still ongoing. He was found guilty and sentenced to death.³¹ At some point, a petition was circulated so as to commute the death sentence into life imprisonment, but many refused to sign, including many who found themselves, with Camus, on the political left. Camus, however, did sign on behalf of the notorious Nazi, and in doing so displayed a capacity to look beyond party political lines and to set aside personal feelings of antipathy.³²

Perhaps this opposition to the death penalty owed something to one of the stories circulating in Camus’ family when he was growing up, and which he recounted at the

²⁵ See *Encounter with Albert Camus*, reproduced in A. CAMUS, *Lyrical and Critical Essays*, E. Kennedy (translator), New York: Vintage, 1970, p. 357.

²⁶ See S. BENYON JOHN, *Image and Symbol in the Work of Albert Camus*, in G. BRÉE (ed.), *Camus: A Collection of Critical Essays*, cit., p. 133.

²⁷ See *No, I am not an existentialist...*, in A. CAMUS, *Lyrical and Critical Essays*, cit., p. 346.

²⁸ See, e.g., A. CAMUS, *Algerian Chronicles*, A. Goldhammer (translator), Cambridge MA: Harvard University Press, 2013.

²⁹ See S. LEYS, *In the Light of Simone Weil*, in S. WEIL, *On the Abolition of All Political Parties*, S. Leys (translator), New York Review of Books, 2013, p. 67.

³⁰ For Camus, as Doubrovsky once observed, ethics was inescapably personal: “No formula, no effort of discursive thought can absolve us from recreating experience ourselves within ourselves”. See S. DOUBROVSKY, *The Ethics of Albert Camus*, cit., p. 84.

³¹ The story is very well told in A. KAPLAN, *The Collaborator: The Trial and Execution of Robert Brasillach*, Chicago: University of Chicago Press, 2000.

³² It is these same characteristics which saw him fall out with Jean-Paul Sartre (who idolized the USSR) and Arthur Koestler (who was politically much more in tune with Camus but, rumour has it, was not a terribly nice person). P. MCCARTHY, *Camus*, cit., p. 218, suggests that Koestler wanted to be “the sole bulwark against Stalin”. At least once they engaged in fisticuffs, brought about either because Camus tried to broker peace between Koestler and Sartre, or simply for no reason whatsoever. For these different interpretations, see respectively D. CESARINI, *Arthur Koestler: The Homeless Mind*, London: Vintage, 1999, p. 300 *et seq.*, citing Simone de Beauvoir it seems, and C. SEYMOUR-JONES, *A Dangerous Liaison*, London: Arrow Books, 2008, p. 357. Todd claims that Camus and Koestler’s girlfriend at the time, Maimaine (later briefly married to Koestler) had an affair, which may or may not have influenced the friendship between Camus and Koestler. See O. TODD, *Albert Camus: A Life*, cit., p. 231 *et seq.*

start of an important essay.³³ Camus' father had once witnessed a public execution in Algeria, and had come home intensely quiet before he started to vomit. Camus was too young to remember this (as his father died when he was still an infant), but the story must have had some impact. Even so, it would be fully in character for him to oppose the death penalty on less mundanely psychological grounds.³⁴ Doubrovsky once made the point with great insight: "Camus never denied that in exceptional cases, the use of violence might be a weapon, but he always refused to accept that it might become a policy".³⁵

The second episode is his oft-derided silence concerning Algeria's independence struggle. Here, obviously, he was in a difficult position. He had been born and bred in Algeria, as a poor working class boy, and could only sympathize with the poor and dispossessed striving for independence. The reporting he did as a young journalist from the Algerian countryside about poverty and malnutrition speaks volumes: it oozes empathy with the local starving population.³⁶ And yet, he was also a child of French settlers: he was not an Arab in Algeria, but a Frenchman, and his loyalties were forever divided. In the end, he favoured a solution along federalist lines, but became especially well-known for, at some point, refusing to speak out. Between January 1956 and June 1958, he declined to comment on Algeria, and this prolonged silence rapidly became a byword for cowardice.³⁷ He was even chided for not signing a petition to call on Algerian war draftees to engage in subordination, despite the somewhat awkward circumstance that when the petition was circulated among French intellectuals, he had already been dead for nine months.³⁸

Camus himself explained his prolonged silence as a matter of moderation: he was well aware that whatever he would say would result in further unrest, and thus the only sensible course to follow was to remain silent. His position was so uncomfortable precisely because his being torn between two worlds, and it was clear that neither of his two worlds would listen to anything he would have to say. Instead of engaging in public

³³ A. CAMUS, *Reflections on the Guillotine*, in A. CAMUS, *Resistance, Rebellion, and Death*, cit., p. 173 *et seq.*

³⁴ He mentioned Brasillach by name in the essay, suggesting that his execution prevented him from being judged by society later. See *ivi*, p. 228. Note however that he briefly endorsed the execution of Pierre Pucheu, interior minister in Vichy France and as such responsible for sending many political opponents to their graves. He later came to regret this. The episode is discussed in R. ZARETSKY, *Albert Camus: Elements of a Life*, Ithaca NY: Cornell University Press, 2010, p. 66 *et seq.*

³⁵ See S. DOUBROVSKY, *The Ethics of Albert Camus*, cit., p. 82.

³⁶ These reports, as well as some later ones, have been collected in A. CAMUS, *Algerian Chronicles*, cit.

³⁷ See A. Kaplan's introduction to A. CAMUS, *Algerian Chronicles*, cit., p. 5. Bronner remarks pithily, and in italics, that Camus' silence (his "vacillations") "actually hindered bringing the conflict to a close". This may be too much honour, although Bronner is probably closer to the mark when noting, this time without italics, that "the great moralist could not make a concrete political decision". See S.E. BRONNER, *Camus: Portrait of a Moralist*, Chicago: University of Chicago Press, 2009, pp. 116 and 117, respectively.

³⁸ A. Kaplan's introduction to A. CAMUS, *Algerian Chronicles*, cit., p. 5.

action, he went underground, writing letters on behalf of political prisoners on both sides of the divide to the French authorities, and using his fame in order to get some of them released.³⁹

V. A SMOULDERING CONTINENT

What Camus would have made of the current crises facing Europe will have to remain speculative – he is not around to tell us. Moreover, there would be a little irony in trying to emulate his thinking, if only because he demonstrates the Arendtian virtue of “thinking without banisters”. Nonetheless, it might be possible to try and adopt positions based on inspiration from the Camusian role model. The following will briefly discuss three current themes in European politics (the financial crisis, the refugee flow,⁴⁰ and Russia’s annexation of the Crimea), and will delve into a more general phenomenon: the organization of referenda by our political leaders.

V.1. FINANCIAL CRISIS

Much of the financial crisis in Greece and other parts of southern Europe is caused by unmitigated lending. Individuals have borrowed more from banks than they could afford (and Europe’s banks have thus been too liberal in approving loans), while governments, under the influence of neo-liberal economic thought, have decided not to raise taxes in order to take care of the national debt, but rather to borrow on international capital markets. In such a setting, one cannot solely blame the Greeks for the Greek crisis: all of Europe is implicated, and north-western European financial institutions have made handsome profits in keeping money circulating. Moreover, if the Greek economy goes belly up, then the European economy at large is in trouble as well. Hence, two suggestions present themselves. First, if nothing else, it is enlightened self-interest that dictates that Greece should be supported. Second, those EU Member States who claim that the Greeks have brought it all on themselves and should be cut loose, are guilty of hypocrisy: Greece could only become a financial mess because this was to the benefit of others. One cannot just reap the benefits of predatory capitalism and then run away when the consequences come knocking.

³⁹ Two of these are reproduced in A. CAMUS, *Algerian Chronicles*, cit., p. 209 *et seq.*

⁴⁰ I am desperately trying to avoid the biased term *crisis*, which suggests a huge problem that requires fixing. More neutral terms are hard to find though – and that is a point of more general validity: the language we use often contains elements of evaluation. See, e.g., F.V. KRATOCHWIL, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge: Cambridge University Press, 1989.

V.2. REFUGEE FLOWS

It is difficult to see how persons could respond in a humanitarian crisis other than by providing a welcome. Civilized and not so civilized peoples have long accepted the idea that sending people back to places of persecution is not a good idea, as the central place of the prohibition of *non-refoulement* in the 1951 Refugee Convention testifies. By the same token, it is difficult to see how virtues such as empathy and justice could possibly be reconciled with the building of fences and walls to keep people out, or with selecting those considered welcome on the basis of their religious or political convictions – such makes a mockery of every humanitarian impulse known to man.

That is not to say that there might not be good reasons to be selective. Some might experience more urgent fears of persecution than others (and the Refugee Convention, it should be remembered, was only meant to assist those who were persecuted in their native lands⁴¹). And of course, the western States do have something to lose: whatever remains of their welfare States is threatened by the influx of large numbers of foreigners, and that is a concern that should not lightly be dismissed. On the other hand, those large numbers still pale in comparison to what other States are asked to absorb.

In addition, there is a highly plausible link between such things as poverty, violence, and refugee flows. Surely, what western governments have *saved* over the last years in cutting development aid is what they now have to fork out in support of the refugees, so perhaps it would have been wiser not to diminish aid and support. Even more stupid are decisions cutting support to organizations that stand a decent chance of success in mediating in violent conflicts in troubled places, precisely the places where many of the refugees hail from. Hacking away at the funding for an entity such as CMI in Finland,⁴² highly active and sometimes successful in conflict resolution in places such as Afghanistan, can only be counterproductive.

What makes things even worse is the idea of letting the refugees pay for their shelter by impounding their valuables: watches, mobile phones, etc. Denmark – of all places – recently passed a law to authorize the seizing of cash and valuables,⁴³ an activity more usually associated with those engaged in illegal human trafficking. The one positive note to discern here is, on a charitable interpretation and through rose-tinted specta-

⁴¹ This was in itself a rather instrumental use of the concept: it was meant to assist above all those who were fleeing Stalin's terror, and thus a useful tool of Cold War politics. International refugee law was never meant to assist those leaving their homelands for other reasons, be it economics or even the mere incidence of war. See briefly J. KLABBERS, *International Law*, Cambridge: Cambridge University Press, 2013, p. 120 *et seq.*

⁴² CMI stands for Crisis Management Initiative, and was set up by former President of Finland and Nobel Peace Prize laureate Martti Ahtisaari, who is also active, together with Kofi Annan and others, as one of the Elders. On the latter, see A. COOPER, *Diplomatic Afterlives*, Cambridge: Polity, 2014.

⁴³ See D. CROUCH, P. KINGSLEY, *Danish Parliament Approves Plan to Seize Assets from Refugees*, in *The Guardian*, 26 January 2016, www.theguardian.com.

cles, that the Danish law suggests that effectively asylum can be bought; combined with other discernible trends, such as selling nationalities,⁴⁴ this might somehow – and quite unintentionally, no doubt – spell the beginning of a borderless world, where those who can afford it are allowed to move freely. This may not immediately help those without sufficient means, but might spell the beginning of the end of the absurd situation where all goods and services and movable production factors can move freely across the globe, except people.⁴⁵

V.3. RUSSIA AND CRIMEA

The ironist in Camus (and he had a considerable capacity to appreciate irony) would no doubt be intrigued by Russia's annexation of the Crimea. It is clear, to most non-Russian observers, that Russia, in sponsoring the Crimean struggle to secede from Ukraine, was not behaving in highly commendable fashion. Such things should be – and often are, at least to some extent – governed by international law, but as the invisible college of international lawyers has implicitly confirmed by not addressing the legality (*vel non*) of Russia's behavior in great detail, that international law has fairly little it can specifically say on the matter.⁴⁶

The irony then, Camus might have thought if he had been sufficiently familiar with the intricacies of international law, is that international lawyers have shot themselves in their collective feet when inventing, since the 1950s, the idea that some agreements between States can be considered binding, but not as a matter of international law.⁴⁷ If plausible, this is most likely the fate of the Budapest Memorandum, an agreement concluded in 1994 between the US, UK and Russia concerning Ukraine. In a nutshell, the Memorandum sees to it that in exchange for giving up its inherited nuclear arsenal, the then-existing borders of Ukraine shall be inviolable. Clearly, annexation Crimea is difficult to reconcile with the terms of the Memorandum, but it does not count as a violation of international law unless the Agreement is considered to give rise to legally binding rights and obligations – and it is this that the *theory* of non-legally binding agreements aims to prevent. It does so for reasons relating foremost to domestic political considerations: typically, treaties need some kind of domestic approval (in democracies

⁴⁴ See A.A. ABRAHAMIAN, *The Cosmopolites: The Coming of the Global Citizen*, New York: Columbia Global Reports, 2015.

⁴⁵ For excellent discussion, see C. DAUVERGNE, *Making People Illegal: What Globalization Means for Migration and Law*, Cambridge: Cambridge University Press, 2008.

⁴⁶ Much of the discussion has focused on such things as the effects of referenda in putative cases of self-determination, but the legality (*vel non*) of Russia's behaviour has largely been left unaddressed.

⁴⁷ Classic expositions include J.E.S. FAWCETT, *The Legal Character of International Agreements*, in *British Yearbook of International Law*, 1953, p. 381 *et seq.*, and A. AUST, *Modern Treaty Law and Practice*, Cambridge: Cambridge University Press, 2007. For a critique, see J. KLABBERS, *The Concept of Treaty in International Law*, The Hague: Kluwer, 1996.

often by a parliament), whereas no such requirement is said to exist if the agreement is merely 'politically' binding, or 'morally' binding – whatever those terms may mean.⁴⁸ Curiously perhaps for adherents of the *theory*, the putative non-legally binding nature of the Memorandum has not stopped western governments from suggesting Russia violated it in 2014; but somehow it has managed to escape discussions amongst international lawyers.⁴⁹

V.4. REFERENDA, GOVERNANCE, RESPONSIBILITY

At first sight, it seems wonderful to allow direct citizen participation in deciding on all sorts of issues. The Greeks held a referendum on whether or not to accept the austerity package proposed by the International Monetary Fund. The people of Scotland, in 2014, were asked whether they wished to remain part of the United Kingdom (UK). In the Netherlands, a referendum has been pushed on the question whether the EU should conclude an association agreement with Ukraine, after a first attempt to do so was botched and resulted directly in the annexation of the Crimea. And UK Prime Minister David Cameron has announced repeatedly that he wants the British people to pronounce of the future of British EU membership.

At first sight, it appears that the age of direct democracy has finally dawned: what could be better than to have the people itself decide on issues which directly affect the people? The enthusiasm with which elected politicians embrace these referenda should, nonetheless, give pause. More often than not, such referenda are not (or not only) intended to give the people a voice; instead, they are meant to absolve elected officials for difficult, perhaps unpalatable, decisions. Cameron must know that leaving the EU is a suicidal option for the UK; hence, he has no desire that a government under his leadership take that decision. What better way out then than to arrange a referendum? If the UK voters would indeed come to leave the EU after a referendum, it would make Cameron look good. After all, in that case he bears no responsibility for the ill-fated decision, and can even claim some political credit for having given the people the chance to speak their mind. And if they vote to stay inside the EU, then so much the better. The honest thing to do, for Cameron, would be to either decide that the UK will stop talking about Brexit, or to actually leave the EU and accept the concomitant responsibility. This is what politicians are elected for: to take difficult decisions on our behalf. And if we do not like their decisions, we can vote them out of office the next time around. As a decision-making device this comes with drawbacks, but at least it gives the people some-

⁴⁸ And what these terms mean has remained hopelessly unclear despite a good six decades worth of writings to endorse the idea.

⁴⁹ The one (and somewhat inconclusive) exception I am aware of is T.D. GRANT, *The Budapest Memorandum of 5 December 1994: Political Engagement or Legal Obligation?*, in *Polish Yearbook of International Law*, 2014, p. 89 *et seq.*

thing of a say, and makes clear that political responsibility cannot be avoided. Wishing to occupy the seats of government but abdicating responsibility for difficult decisions is political cowardice.⁵⁰

VI. TO CONCLUDE

Hannah Arendt's writings provide current generations with some of the intellectual tools and a vocabulary to make sense of current developments: her "banality of evil"⁵¹ notion alone is capable of informing the study of bureaucracy, although it may often be considered too loaded to actually do so.⁵² With Camus, by contrast, it is less his writings and conceptualizations which are exemplary but rather the active (and sometimes passive, or perhaps passive-aggressive) stands he took which may serve to inspire. His inspirational legacy continues,⁵³ in however strange a form perhaps: Martin could recently structure an entire book around the discord between Sartre and Camus concerning (mostly) the Soviet Union, and could do so under a seemingly somewhat frivolous title: the boxer and the goalkeeper.⁵⁴

This in turn creates a somewhat strange dichotomy: it is Camus the man whose public stands serve as exemplary, whereas private citizen Camus is sometimes considered less than fully equipped to serve as a role model. On the other hand, as Coady suggests, not too much should be made of the doctrine of the unity of the virtues, despite Aristotle's insistence. Often enough, we have no access to what people do privately, and all we have to go on is what can be observed in public. Moreover, what people do privately, so Coady continues, is "not always the most relevant to the judicious political treatment of important social questions such as unjust wars, gross social inequality, poverty, and access to health care".⁵⁵

⁵⁰ Judt has perceptively suggested that Camus' ethics was an ethics of responsibility rather than of principles or convictions. See T. JUDT, *The Burden of Responsibility: Blum, Camus, Aron, and the French Twentieth Century*, Chicago: University of Chicago Press, 1998, p. 124.

⁵¹ The classic reference here is H. ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil*, London: Penguin, 1965.

⁵² The Arendtian notion of "natality" (related to but distinct from fresh start or new beginning) has been fruitfully applied to human rights law by D. WHITEHALL, *Hannah Arendt and the Turn to Life in International Law*, Melbourne: University of Melbourne, 2013, www.minerva-access.unimelb.edu.au.

⁵³ Tellingly perhaps, the great historian Tony Judt reportedly had a picture of Camus on his desk: see the *Introduction* by his widow Jennifer Homans to T. JUDT, *When the Facts Change: Essays 1995-2010*, cit., p. 10.

⁵⁴ No prizes for guessing here: given his bad health, Camus could only be the goalkeeper. See A. MARTIN, *The Boxer and the Goalkeeper: Sartre vs Camus*, London: Simon & Schuster, 2012. The book, incidentally, is rather more serious than its title suggests. Perhaps curiously, one of the leading Sartre biographies pays very little attention to his relationship with Camus: see A. COHEN-SOLAL, *Sartre: A Life*, London: Minerva, 1991 (1985).

⁵⁵ See C.A.J. COADY, *Messy Morality: The Challenge of Politics*, Oxford: Oxford University Press, 2008, p. 33 *et seq.*

The important thing about Camus then is his solid moral intuition about matters of public interest. In his day, he stood up against violence, including legally sanctioned violence symbolized by the death penalty, and in favour of decency, reasonableness, and even-handedness. The issues may have changed, but the attitude itself would seem to be worth emulating, if only to provide a counterweight to the almighty force exercised by economic considerations on matters that would be better discussed in terms not solely informed by profitability, markets and efficiency.⁵⁶

⁵⁶ See also M.J. SANDEL, *What Money Can't Buy: The Moral Limits of Markets*, London: Allen Lane, 2012. Camus himself suggested, in a striking turn of phrase, that a society organized around money would be an "artificial society"; see A. CAMUS, *Create Dangerously*, in A. CAMUS, *Resistance, Rebellion, and Death*, cit., p. 249 *et seq.*, p. 253.



ARTICLES

THE LIMPING LEGITIMACY OF EU LAWMAKING: A BARRIER TO INTEGRATION

CAROL HARLOW*

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ABSTRACT: This paper uses the concepts of output and input legitimacy to examine the formal law-making processes of the European Union. It argues that the traditional distinction between laws, which are legitimated through the democratic concept of representativeness, and subordinate legislation, which is normally justified in terms of output values of efficiency and effectiveness, need to be modified in the European Union. The paper argues that the need for democratic input values requires all formal lawmaking processes to make space for popular access to the policy- and rule-making processes.

KEYWORDS: lawmaking – legitimacy – democracy – output values – input values – citizen access.

I. INTRODUCTION

The subject of this paper is the formal lawmaking processes of the European Union (EU), a central element in European integration. Lawmaking is an attribute of sovereignty, and statehood without plenary lawmaking powers is unimaginable. It follows that the legitimacy of EU lawmaking matters to both sides of the integration argument. For inter-governmentalists, lawmaking legitimacy rests and must always rest with sovereign national legislatures from which the legitimacy of lawmaking at Union level derives; for integrationists, a plenary lawmaking authority is essential for integration and it must be demonstrably legitimate.

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In the early days of the Communities, the inter-governmental view prevailed. The authority of the Community institutions to make formal rules was assumed to be delegated by the Member States, where lawmaking legitimacy was situated. But as the Community began to acquire new competences and rapidly expanded its areas of activity, the need was felt for speedier and more efficient methods of rulemaking. Further delegation of the lawmaking power was permitted. And when the Treaty on European Union (Maastricht Treaty) added freedom, security and justice to the European portfolio, the special and unorthodox rulemaking processes provoked concern about the growth of executive power and secrecy. Yet alongside, a radical integrationist campaign was calling for stronger lawmaking powers, culminating in an attempt during the Convention on the Constitution to install a more orthodox hierarchy of EU laws. These demands were only partially met by the Lisbon Treaty.

Arguments over legitimacy have not gone away; rather they have increased under the strain of economic crisis and an increasingly authoritarian style of governance in the Eurozone. As with the area of freedom, security and justice, rulemaking in the embattled Eurozone has escalated into lawmaking, and powers transferred from the Union to a sub-group of Member States have been further downloaded to a trio of powerful agencies. Mark Dawson draws attention in this context to the contrast between lawmaking that observes the spirit of traditional constitutional concepts such as the rule of law, representative democracy, institutional balance and separation of powers (the classic Community method) and the lawmaking methods to which the EU resorts when it wants to get things done:

"Just as, under prior models of economic governance, the 'soft' nature of recommendations was seen as necessitating a limited parliamentary role, [here] the EP carries no formal powers to co-adopt recommendations for EU governance. The political legitimacy of new economic governance in this sense relies heavily on the 'output' of its norms (financial and macroeconomic stability), not on their connection to general political processes".¹

These are the very tactics that have over the years done so much to de-legitimize EU rulemaking.

This is a context in which the legitimacy of the EU lawmaking process demands serious consideration and this paper aims to provide a framework for such discussion. Section one sets out the parameters of the debate by briefly considering the relationship of lawmaking with legitimacy in terms of "input" and "output" legitimacy. "Input le-

¹ M. DAWSON, *The Legal and Political Structure of "Post-Crisis" Economic Governance*, in *Journal of Common Market Studies*, 2013, p. 976 *et seq.*, p. 983. See also S. PIATTONI, *Is the EU a Representative Democracy? The Normative Debate and the Impact of the Euro-Crisis*, in F. FABBRINI, E. HIRSCH BALLIN, H. SOMSEN (eds), *What Form of Government for the European Union and the Eurozone?*, Oxford: Hart Publishing, 2015.

gitimacy" refers to techniques of legitimation that relate to the wider input functions of government, namely interest representation and articulation, political aggregation and communication;² "output values" on the other hand relate to efficiency and effectiveness. This usage reflects Fritz Scharpf's famous distinction between input legitimacy as "trust in institutional arrangements that are thought to ensure that governing processes are generally responsive to the manifest preferences of the governed", and output legitimacy, which depends on the belief that policies "will generally represent effective solutions to common problems of the governed".³ In the context of lawmaking, effectiveness relates to traditional benefits such as speed and successful implementation but can extend more widely to cover the prerequisites of "Better Regulation". Section two first situates the debate at Union level and moves on to outline steps taken to strengthen the output legitimacy of EU lawmaking through the buying in of scientific and technical expertise and the use of tools and techniques of "Better Regulation". Section three turns to input values, considering the claims of direct democracy to input legitimacy and focusing on steps taken by the institutions to build up civil society as a basis for input legitimacy in EU lawmaking.

II. AN HISTORICAL LEGACY

There are good constitutional reasons for the close links between lawmaking and legitimacy. The rule of law, a fundamental principle of modern constitutionalism, is premised on law and lawmaking. The rule of law requires that law is certain and should take the shape of general and formal "rules", designed to prevent arbitrariness and structure discretion.⁴ Lawmaking is especially central to the formal *Rechtsstaat* ideal, characterized by a written constitution in which government is closely regulated by law. The *Rechtsstaat* is a State that frames its activities with rules, which should be "general, abstract and permanent, non-contradictory, possible, intelligible, certain, public, and not retroactive; and the authority to issue commands in the name of the State must be grounded in a legal rule".⁵ In this essentially positivist view of the State, the constitution establishes a hierarchy of legal norms in which "rules, legally produced, recognized or ratified by the appropriate legislative organs of the [...] are the primary source of the law or superior legal norm".⁶ A State that does not meet these criteria "is not a formal

² D. EASTON, *An Approach to the Analysis of Political Systems*, in *World Politics*, 1957, p. 383 *et seq.*

³ F. SCHARPF, *Problem-solving Effectiveness and Democratic Accountability in the EU*, in *Working Papers*, Cologne: Max Planck Institut für Gesellschaftsforschung (MPIFG), 3 January 2003, p. 4 *et seq.*, www.mpifg.de.

⁴ D. GODEFRIDI, *Critique de l'Utopie Libertarienne*, in *Journal des économistes et des études humaines*, 2003, p. 85 *et seq.*, citing F. HAYEK, *The Constitution of Liberty*, London: Routledge and Kegan Paul, 1960, p. 206; L. FULLER, *The Morality of Law*, New Haven: Yale University Press, 1969, p. 10.

⁵ D. GODEFRIDI, *Critique de l'Utopie Libertarienne*, cit., p. 85 *et seq.*

⁶ *Ibid.*

*Rechtsstaat*⁷ and its legitimacy as a rule of law state would be seriously in issue.

In the various democratic systems of government that characterize the Member States of the European Union, the authority of the established lawmaker to make laws and the place of those laws at the top of the lawmaking hierarchy normally depends on a twofold legitimacy. The first, which stems from the fact that law is made by the authorized lawmaker according to an authorized procedure, can be described as a form of process legitimacy; this is the primary concern of lawyers. Secondly, and at a more abstract level, the lawmaker in a modern democracy should be representative.

It is important to bear in mind that representation in legal and constitutional theory is typically a thin form of legitimacy, in which legitimacy is equated with legality and “representative” may mean nothing more than “duly elected”.⁸ We should take notice too that representation is not the only form of input legitimacy; indeed, in recent years it has come to be questioned on the ground that representative institutions are not in practice sufficiently representative. Other more direct forms of input legitimacy have been gaining favour and the term has been extended to embrace ideas such as “direct”, “participatory” and “responsive” democracy, terminology that reflects a more direct popular input into policymaking. The movement for direct citizen input has given rise to an alternative set of input values by which to measure legitimacy and we need to bear in mind that the two forms of input legitimacy (representative and direct) may sometimes conflict.

Lawmaking in a rule of law state is not necessarily the sole prerogative of a legislature. Indeed, the hallmark of the constitutional *Rechtsstaat* is, according to Michael Stolleis, “the assigning of administrative activity to predictable legal forms”.⁹ Most modern European constitutions are, however, infused by separation of powers theory, which in its dominant triadic form allocates three main functions of government to three separate institutions: legislature, executive and judiciary.¹⁰ This division is not essential. In some governmental systems the executive may possess inherent legislative power, which may simply be carried over (as in England) from an earlier constitutional settlement. In the French model of separation of powers, where the division has always been different, an inherent power of formal executive rulemaking sufficient for the execution

⁷ F. VAN DUN, *Political Liberalism and the Formal Rechtsstaat*, 2004, www.rothbard.be.

⁸ Discussed further in C. HARLOW, *The Concepts and Methods of Reasoning of the New Public Law: A New Legislation?*, in *European Review of Public Law*, 2011, p. 1 *et seq.* And see C. LORD, P. MAGNETTE, *E Pluribus Unum? Creative Disagreement about Legitimacy in the EU*, in *Journal of Common Market Studies*, 2004, p. 183 *et seq.*

⁹ M. STOLLEIS, *A History of Public Law in Germany, 1914-45*, T. Dunlap (translator), Oxford: Oxford University Press, 2004, p. 9 *et seq.*

¹⁰ See generally, M. VILE, *Constitutionalism and Separation of Powers*, Indianapolis: Liberty Fund, 1998. Arguably, today there are more than three governmental functions.

of its core functions exists.¹¹ This is reflected in Arts 37 and 38 of the contemporary French Constitution, which explicitly provides for two forms of lawmaking: decrees enacted by the executive carry the same normative value as legislation, providing them with an intrinsic constitutional legitimacy. This does not exclude, however, specific delegations of regulatory power to the French executive by the legislature.¹²

Separation of powers theory as understood in other governance systems does not of course preclude the executive from lawmaking; it simply renders its legitimacy questionable. Systems where executive legislation – a term that refers throughout this paper to lawmaking by formal process – lacks inherent legitimacy must turn to other legitimating devices. A convenient answer lies in the concept of delegation. Both lawyers and political scientists refer to executive legislation as “delegated”, although they arrive at their conclusion by slightly different routes. Lawyers tend to focus on the concept of “vires” according to which subordinate legislation must not exceed the powers delegated in the governing statute. This conveniently allows courts to function as accountability machinery by deciding when a rulemaking body has outstripped its statutory powers (the *ultra vires* principle). Political scientists tend to rely on principal/agent theory,¹³ a doctrine that views the executive agent as functioning within the parameters of the delegation specified by a lawmaker-principal. In both analyses, however, the lawmaker sets the parameters of executive legislation, though in principal/agent theory, the electorate rather than the lawmaker is the ultimate principal. This difference becomes significant in the context of the EU.

Initially, when questions started to be asked about the legitimacy as opposed to the legality of executive legislation,¹⁴ the justifications were expedient and pragmatic: speed and pressure on parliamentary time together with the need for trivial detail in procedural rules. Flexibility was an added advantage; systems and practices that did not work out could more easily be changed (though today this is explanation more commonly used to justify “soft law” and “soft governance”). Later, delegated legislation was more often justified in terms of technicality and expertise. Thus, the legitimacy of executive legislation lay in delegation theory, but this in turn needed justification in terms of out-

¹¹ M. TROPER, *La séparation des pouvoirs et l'histoire constitutionnelle française*, Paris: Librairie générale de droit et de jurisprudence (LGDJ), 1980.

¹² See generally P. BRUNET, *Les normes législatives et administratives*, and P. GONOD, *L'administration et l'élaboration des normes*, both in P. GONOD, F. MELLERAY, P. YOLKA, *Traité de droit administratif*, vol. 1, Paris: Dalloz, 2011. See also L. FAVOREU, *Le domaine de la loi et du règlement*, Paris: Economica, 1981.

¹³ See for a helpful literature survey, M. POLLACK, *Learning from the Americanists (Again): Theory and Method in the Study of Delegation*, in *West European Politics*, 2002, p. 200 *et seq.*

¹⁴ See, e.g., the discussion in the inter-war (Donoughmore) Committee on Ministers' Powers, Cmnd 4050 (1932), set up in England to “consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law”.

put values of expertise and effectiveness. Thus, like legislation, subordinate legislation came to possess a dual basis for legitimacy: delegation and output values.

There are, however, cogent reasons why delegation is defective as an explanatory force for executive lawmaking. The fact that the legal framework can be wide and general (modern lawmakers often resort to “outline” or “framework” legislation) adds to the potential for “mission creep”. It is hard also to apply the *ultra vires* principle to very widely drafted legislative provisions or to distinguish between “policy” (supposedly reserved for the lawmaker) and “implementation”, which permits delegation. The most technical of issues, such as the siting of a nuclear power station or cultivation of genetically modified crops, can conceal a policy decision on which the general public may have decided views.¹⁵ More important, delegation theory provides no answer for the almost infinite capacity of the agent to overrun the boundaries set by the principal and usurp the latter’s powers (mission creep).

Thus far the argument has proceeded inside the constraining corset of a functional separation of powers framework. This, amongst other deficiencies, entirely overlooks the modern tendency to delegate powers to autonomous and semi-autonomous bodies outside the executive and central administration. It is fair to describe the late twentieth century as the age of regulation and the agency. Agencies have proliferated, many possessing substantial regulatory powers in the generic sense of authority to promulgate “an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules”.¹⁶ In this sense the term “regulation” is wide enough to cover both regulation in the formal technical sense of executive legislation and informal rulemaking in the sense of “soft law” or informal rules, standards or principles (with which this paper does not attempt to deal). Technically, agencies exercise delegated powers bestowed by a specific legislative grant; a more value-laden source of legitimacy lies, however, in their independence and autonomy. This produces the paradox that agency legitimacy is founded on a principal/agent relationship that cannot in practice be fully realized, since interference with agency autonomy undercuts its legitimacy. The resultant problems of oversight, control and accountability happily fall outside the ambit of this paper.¹⁷

Briefly to summarize, the argument so far presented suggests that legitimation for the lawmaking process is of two main kinds: process legitimacy, based on a recognized procedure administered by the lawmaker established by tradition or the constitution; and legitimacy based on the character of the lawmaker as representative, here de-

¹⁵ See M. SHAPIRO, *The Problems of Independent Agencies in the United States and European Union*, in *Journal of European Public Policy*, 1997, p. 276 *et seq.*

¹⁶ R. BALDWIN, C. SCOTT, C. HOOD (eds), *A Reader on Regulation*, Oxford: Oxford University Press, 1998, p. 3.

¹⁷ But see M. BUSUIOC, *European Agencies, Law and Practices of Accountability*, Oxford: Oxford University Press, 2013.

scribed as a strong form of input legitimacy. Executive legislation, on the other hand, is generally legitimated by the principle of delegation. Justification for delegation of this symbolic power of lawmaking is often expressed in terms of output values of efficiency, expertise and technicality, and effectiveness.

Recently, however, these positions have started to merge. We have seen attempts to move the legislative process towards a position of “evidence-based” lawmaking, which forms part of the “Better Regulation” movement. This global ideology of the late twentieth century reflects a profound belief in scientific method, acceptance of “government by experts” and “a heavy reliance on regulatory tools”.¹⁸ Grounded in output legitimacy, the supposedly scientific techniques of “Better Regulation”, such as consultation, impact assessment and post-legislative evaluation, have taken hold and may be beginning to possess a “process legitimacy” of their own. In contrast, in delegated lawmaking – traditionally legitimated in terms of output values – demands for greater access to and participation in the process of non-legislative lawmaking show input legitimacy as weighing increasingly heavy in the legitimation scales. In section four, it will be suggested that output values are being eroded as a benchmark of legitimacy. This may come to undermine the rationale of executive legislation.

III. LAWMAKING IN THE EUROPEAN UNION: A DELEGATED FUNCTION?

Initially, lawmaking in the Communities was loosely based on the two-tier, constitutional model of legitimacy outlined above. Early analysis of the new regime portrayed it in terms of delegation and principal/agent theory with the Member States as principals and the Community institutions as agents.¹⁹ An alternative analysis posited the Community as a regulatory agency in which the European Commission (the Commission) was the implementer of regulatory policies;²⁰ here again rulemaking power was treated as delegated. This analysis was supported by the measure of autonomy and independence reflected in the treaty provision that Commission members were “in the general interest of the Community (to be) completely independent in the performance of their duties” (Art. 213 of the Treaty establishing the European Community). Both analyses

¹⁸ For an introduction to the enormous subject of better regulation, see C. HARLOW, R. RAWLINGS, *Law and Administration*, Cambridge: Cambridge University Press, 2009, p. 251 *et seq.*; and for Europe, C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, Oxford: Hart Publishing, 2014, p. 55 *et seq.* See also R. HAYTHORNTHWAITE, *Better Regulation in Europe*, in S. WEATHERILL (ed.), *Better Regulation*, London: Bloomsbury, 2007.

¹⁹ See A. STONE SWEET, M. THATCHER (eds), *Special Issue: Theory and Practice of Delegation to Non-majoritarian Institutions*, in *West European Politics*, 2002, p. 1 *et seq.* Compare for a lawyer's analysis, K. LENAERTS, *Regulating the Regulatory Process: “Delegation of Powers” in the EC*, in *European Law Review*, 1993, p. 23.

²⁰ G. MAJONE (ed.), *Regulating Europe*, London: Macmillan, 1996; G. MAJONE, *The Regulatory State and its Legitimacy Problems*, in *West European Politics*, 1999, p. 1 *et seq.*

imply a single delegated lawmaking process and there is no mention of secondary delegations of power to make subordinate law. Input legitimacy was strictly limited. The Assembly was not directly elected. Participation and consultation were based on a largely corporatist model, conducted through the Economic and Social Committee (hereafter, the ECSC) and the “social partners” (management and labour), again unelected and assumed to be representative. Input legitimacy was not a priority for the Council of the European Union (the Council), which adhered to the closed procedures of diplomatic treaty-making.

III.1. SUB-DELEGATION

In its famous (or infamous) *Meroni* decision,²¹ the Court of Justice (CJEU or Court) severely limited the Union’s power to delegate, ruling that delegation can never exceed the limits of the powers granted by the Treaty to the delegator, while powers (such as rulemaking) that involve “a wide margin of discretion” can never be delegated because they bring about an “actual transfer of responsibility”. Implicit in *Meroni* is an application of the familiar administrative law maxim that a delegate cannot delegate (*delegatus non potest delegare*). Acknowledging the need for a measure of delegation in the light of the work entailed in implementing the Single Market, however, the Court subsequently authorized “implementing regulations” allowing the Council to delegate rulemaking powers to the Commission provided always that it set out in a law “the basic elements of the matter to be dealt with” and authorized the “mode of proceeding”.²² The Court went on to authorize the “so-called management committee procedure, a mechanism which allows the Council to give the Commission an appreciably wide power of implementation whilst reserving where necessary its own right to intervene”.²³ The roots of this ruling in output values is indicated in the further statements that “the transition to the system established by this regulation must be effected as smoothly as possible” and that, as transitional measures may prove necessary at the end of each marketing year, “provision must therefore be made for the possibility of adopting appropriate measures”.²⁴

The Court has never recognized any *inherent* power in the EU and its institutions to make delegated legislation despite pressure from the Council to do so. It has consistently ruled that both rulemaking and decision-making procedures are creatures of the Treaties and are “not at the disposal of the Member States or of the institutions them-

²¹ Court of Justice, judgment of 13 June 1958, case 9/56, *Meroni v. High Authority*.

²² Court of Justice, judgment of 17 December 1970, case 25/70, *Einfuhr-und Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt & Co.*

²³ Court of Justice, judgment of 30 October 1975, case 23/75, *Rey Soda v. Cassa Conguaglio Zucchero*, paras 12 and 13.

²⁴ *Ivi*, para. 19.

selves”;²⁵ to rule otherwise would “undermine the principle of institutional balance”, a variant on the separation of powers doctrine, which the Court has installed as a fundamental principle of Community constitutional law.²⁶ Delegated as opposed to implementing power to make regulations had therefore to await action by the treaty-makers in Arts 290 and 291 of the Treaty on the Functioning of the European Union (TFEU). Again despite pressure, the Court has consistently refused to overrule the *Meroni* principle, though it has on occasion allowed it to be side-stepped. When the United Kingdom attacked excessive executive discretion in the European Securities and Markets Authority, the CJEU came under pressure to relax the *Meroni* doctrine. The Court side-stepped the issue, declining to overrule the earlier decision but finding that agency regulation of “short selling” was in the instant case sufficiently delineated to be lawful.²⁷ This decision in practice permitted a substantial delegation of discretionary power to an agency, justified perhaps in terms of expertise, perhaps in terms of expediency. Where it leaves the delegation issue in the context of agency rulemaking remains for the time being an open question.²⁸

The Court’s equivocal stance is judicious, however. In the European Union, multiple forms of delegation (using this term loosely) are possible. Member States delegate rulemaking powers to the European Union; the Council delegates to the Commission; it has even tried (unsuccessfully) to delegate to itself.²⁹ Council and Parliament delegate to the Commission, to agencies and committees, which may be given limited rulemaking powers. These very different situations require a differential approach.

III.2. THE TOOLS OF OUTPUT LEGITIMACY: “BETTER REGULATION”

The Commission’s managerial *ethos* emerged in response to the demise of the Santer Commission, charged with incompetence and maladministration. This led the Commission to experiment with the methods of New Public Management (NPM). The “Better Regulation” project, which aimed to improve the quality of legislation in the interests of

²⁵ Court of Justice, judgment of 6 May 2008, case C-133/06, *Parliament v. Council*.

²⁶ *Ibid.* See also K. LENAERTS, *Some Reflections on the Separation of Powers in the European Community*, in *Common Market Law Review*, 1991, p. 11 *et seq.*; K. LENAERTS, A. VERHOEVEN, *Institutional Balance as a Guarantee for Democracy in EU Governance*, in C. JOERGES, R. DEHOUSSE (eds), *Good Governance in Europe’s Integrated Market*, Oxford: Oxford University Press, 2002.

²⁷ Court of Justice, judgment of 22 January 2014, case C-270/12, *UK v. Council and Parliament*, paras 27 and 55.

²⁸ P. NICOLAIDES, N. PREZIOSI, *Discretion and Accountability: The ESMA Judgment and the Meroni Doctrine*, in *Bruges European Economic Research (BEER) Papers no. 30*, Bruges: College of Europe, 2014, www.coleurope.eu; M. BUSUIOC, *Rulemaking by the European Financial Supervisory Authorities: Walking a Tight Rope*, in *European Law Journal*, 2013, p. 111 *et seq.*

²⁹ *Parliament v. Council*, cit., noted by P. CRAIG, *Case C-133/06, European Parliament v. Council (Delegation of legislative power)*, judgment of the Grand Chamber of 6 May 2008, in *Common Market Law Review*, 2009, p. 1265 *et seq.*

business, was formally a response to the need expressed at the Edinburgh, Gothenburg and Laeken European Councils to simplify and improve the Community regulatory environment. It is, however, inextricably linked with NPM. As indicated earlier, both reflect a love of the scientific method, both signify acceptance of “government by experts” and both signal a heavy reliance on regulatory tools. Commission policy-making today is replete with managerial jargon: road-maps, performance indicators, impact assessment, pre and post-legislative evaluation and consultation have all taken hold. At the lawmaking stage too, attempts have been made to move the legislative process towards a position of “evidence-based lawmaking”.

The Commission puts much weight on pre-legislative impact assessment (IA) and consultation targeted directly on legislative proposals; increasingly these procedures are being rolled out across the board.³⁰ IA is designed to assist the legislator “by systematically collecting and analysing information on planned interventions and estimating their likely impact”.³¹ Linked inextricably with consultation, IA is an inherent part of a series of processes and procedures that lock up together in a coherent package nominally aimed at legislative simplification (though inclined to produce the reverse).³² Theoretically, consultation also represents output values: it is a tool for information-gathering and learning exercise for the policy-maker, designed to enhance the effectiveness of policy-making. But of all the tools used by the rule-maker in designing rules, consultation is the most ambivalent; we shall return to its use as perhaps the most effective device for interest-representation and citizen participation in rulemaking. It is sufficient here to say that, whether or not they really contribute to effectiveness or merely add unnecessary stages to the lawmaking process, these new (supposedly) scientific techniques of better regulation grounded in output values are here to stay.

III.3. EXPERTISE AND OUTPUT LEGITIMACY

Output values of efficiency and effectiveness were invoked to justify the use of implementing regulation in organizing the common agricultural policy and, around the time of the Single European Act, the single market, areas in which implementing powers were first established and management committees began their life.³³ Today, however, Commission-made rules in the EU deal with a wide range of scientific and technical mat-

³⁰ Communication COM(2015) 216 of the European Commission on the Proposal for an Interinstitutional Agreement on Better Regulation, 19 May 2015. And see A. ALEMANN, A. MEUWSE, *Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in “New Comitology”*, in *European Law Journal*, 2013, p. 76 *et seq.*

³¹ European Court of Auditors Special Report No 3, *Impact assessments in the EU institutions: do they support decision-making?*, 2010, p. 6.

³² A. ALEMANN, *The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission's Wall or the Way Forward?*, in *European Law Journal*, 2009, p. 382 *et seq.*

³³ E. Vos, *The Rise of Committees*, in *European Law Journal*, 1997, p. 210 *et seq.*

ters such as trade standards, the proscription of food additives or toxic chemicals, the technicalities of complex global trade systems or global telecommunications networks; and so on. These areas of risk regulation and technological subject-matter are precisely the type of rulemaking where delegation is validly justified in terms of the output value of expertise. The role of the parliamentarian, largely conceived in terms of representation, was seen to lie in considering broad lines of policy presented by the executive and stamping these with the approval of society, a function for which generalist skills are both sufficient and essential. As suggested earlier, this may often be a misconception. But in scientific or technical regulation, it may be argued, expertise and rationality take precedence over democratic input – hence the approved twentieth-century model of subordinate lawmaking involving delegation of technical matters to scientific experts or regulators.

Scientific expertise can be supplied to lawmakers in various ways: technical advisers, committees, representatives from industry and the private sector, agencies – the EU has used them all. Information-gathering agencies date back to the 1970s when they had no rulemaking powers.³⁴ In the 1990s, further agencies were introduced and the Commission attempted structural rationalization;³⁵ agencies were to operate with a degree of independence but a proper respect for principal/agent relations.³⁶ A clear framework must be established by the legislature; the regulation creating each agency must set out the limits of their activities and powers, their responsibilities and requirements for openness. Agencies could have powers to take individual decisions in the application of regulatory measures but not rulemaking powers. In short, there was executive but no regulatory delegation. No matter. The true value of agencies was their ability to draw on highly technical sectorial know-how and filter it through to the Commission. In the current phase of agencification when there is increasing use of agencies, however, they have begun to acquire some rulemaking and regulatory powers. In defiance of *Meroni*,³⁷ EU agencies are starting to look more like the regulatory agencies found elsewhere in national governance systems.

Standard-setting by private bodies is a further way to introduce technological know-how. It represents a widespread practice of what can best be described as pseudo-

³⁴ See A. KREHER (ed.), *The EC Agencies Between Community Institutions and Constituents: Autonomy, Control and Accountability*, Florence: European University Institute, 1997.

³⁵ See Communication COM(2001) 428 of the Commission, *White Paper on European Governance*, 25 July 2001, p. 24; Communication COM(2002) 718 of the Commission on the operating framework for the European regulatory agencies, 11 December 2002; Communication COM(2008) 135 of the Commission, *The European Agencies: The Way Forward*, 11 March 2008.

³⁶ D. CURTIN, *Delegation to EU Non-majoritarian Agencies and Emerging Practices of Public Accountability*, in D. GERADIN, R. MUNOZ, N. PETIT (eds), *Regulation Through Agencies in the EU: A New Paradigm for European Governance*, Cheltenham: Edward Elgar, 2005.

³⁷ S. GRILLER, A. ORATOR, *Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine*, in *European Law Review*, 2010, p. 3 *et seq.*

delegation, in which standards are set by industry, or industry is simply left to design its own codes of practice, which are then taken into the public sphere. The EU cooperates, for example, with the global standard-setting body on food safety, which produces the *codex alimentarius*. The European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC) and European emissions trading scheme (ETS) are semi-public EU bodies authorized to set standards in highly technical areas. These can then be adopted – in practice rubber-stamped – by the EU lawmakers. There are no overall standards of representativeness for rulemaking by these disparate bodies, though in practice they often work openly and arrange their own consultation procedures.

In all these situations, there are of course controls. The EU legislator may refuse to approve standards. Delegations may be rescinded. Courts can impose limits on public bodies through judicial review and the *ultra vires* doctrine.³⁸ The CJEU has intervened decisively to defend the interests of stakeholders by promoting due process rights to access information and make representations to the rule-maker; these rights are, however, characteristically individual and individuated.³⁹ Where risk assessment or the validity of scientific evidence is in issue, the Court measures the administrative process against standards of rationality, defined in terms of reason-giving and independent analysis. The case law holds, for example, that the Commission must consult and take note of the best scientific evidence available⁴⁰ and the Court will verify that this has been done.⁴¹ Expertise is the core requirement in cases of risk assessment. There is little talk of citizen input or democracy.

III.4. LAWMAKING BY COMMITTEE

Committees represent the traditional answer to problems of expertise, coming into use in very early days. Advisory committees were, as their name suggests, purely consultative, although, under comitology procedure, the Commission was required to take “the utmost account” of committee opinions. Management committees had, as already indicated, been validated by the CJEU in *Köster*, where the Court easily accepted that the Council need do no more than “establish the basic elements” of its policies and was not

³⁸ See M. SHAPIRO, *The Giving Reasons Requirement*, in M. SHAPIRO, A. STONE SWEET, *On Law, Political and Judicialization*, Oxford: Oxford University Press, 2002.

³⁹ F. BIGNAMI, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, in *Harvard International Law Journal*, 1999, p. 451 *et seq.*; and, F. BIGNAMI, *Three Generations of Participation Rights before the European Commission*, in *Law and Contemporary Problems*, 2004, p. 61 *et seq.* See C. ANDERSON, *Contrasting Models of EU Administration in Judicial Review of Risk Regulation*, in *Common Market Law Review*, 2014, p. 1 *et seq.*

⁴⁰ Tribunal, judgment of 11 September 2002, case T-13/99, *Pfizer Animal Health SA v. Council of the European Union*.

⁴¹ Tribunal, judgment of 11 July 2007, case T-229/04, *Sweden v. Commission*.

required by the Treaties to do otherwise. Management committee machinery enabled the Council “without distorting the Community structure and the institutional balance” to “delegate” to the Commission “an implementing power of appreciable scope, subject to its power to take the decision itself if necessary”.⁴²

Afraid of the implications, the Council moved to regulate comitology procedure with a series of Decisions providing for different degrees of control.⁴³ Comitology committees were not representative of output values; they were agents of Council control with specified veto powers. To a limited extent they were representative of the Council⁴⁴ but this did not mean that they were agents of democracy; indeed, there was much concern over input values, notably over the lack of transparency in the committees, which published only minimal agendas and skeletal minutes.⁴⁵

As the hydra-headed comitology evolved over the years, however, different institutional attitudes became discernible. The Council viewed comitology from the perspective of international relations practice, which many of its advisers would have experienced. Theoretically, Council/comitology represented a principal/agent partnership in which committees acted as a means of controlling the Commission in the context of a broadly negotiatory lawmaking process.⁴⁶ For the Commission, the importance of comitology lay in expertise: the committees were either composed of experts who gave essential technical advice, or of national public servants who advised on difficulties that might arise in the process of implementation. Advisory committees, which had no veto powers, were naturally preferable to management and regulatory committees, with the complex procedures required by the comitology decisions. The European Parliament (EP) professed to be the guardian of input values. It was jealous of the comitology, treating it as a non-representative rival to representative lawmaking in a governmental structure where the elected Parliament was neither the sole nor even the primary lawmaker. Thus the comitology became a battlefield on which the EP gradually gained

⁴² *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster, Berodt & Co*, cit., paras 6 and 9.

⁴³ The comitology was regulated by three Council decisions laying down the procedures for the exercise of implementing powers conferred on the Commission, respectively Council Decision 87/373/EEC laying down the procedures for the exercise of implementing powers conferred on the Commission, Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, and Council Decision 2006/512/EC amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission.

⁴⁴ For further details, see E. Vos, *50 Years of European Integration, 45 Years of Comitology*, in *Maas-tricht University Faculty of Law Working Papers*, Maastricht: University of Maastricht, 18 February 2009, www.ssrn.com.

⁴⁵ G. BRANDSMA, *Backstage Europe, Comitology, Accountability, and Democracy in the European Union*, Utrecht: University Press, 2010; G. BRANDSMA, D. CURTIN, A. MEIJER, *How Transparent are EU “Comitology” Committees in Practice?*, in *European Law Journal*, 2008, p. 819 *et seq.*; M. BUSUIOC, *European Agencies, Law and Practices of Accountability*, cit.

⁴⁶ See further F. BERGSTRÖM, *Comitology: Delegation of Powers in the European Union and the Committee System*, Oxford: Oxford University Press, 2005.

ground.⁴⁷ Undoubtedly unwelcome to the Commission, the resultant dose of input values added to the complexity of the various procedures and fuelled Commission antipathy to the whole process.

III.5. THE LISBON REFORMS

The reforms of executive legislation introduced by the Lisbon Treaty moved delegated legislation towards a more traditional pattern. Art. 290 TFEU bestows on the Commission a true power to make delegated legislation closely based on principal/agent theory. Following a somewhat old-fashioned format, the Article provides that delegation must be by a “legislative act” for the purpose of supplementing or amending “non-essential elements” of the legislative act. The objectives, content, scope and duration of the delegation of power must be explicitly defined. Significantly, control is shared between the Council and EP as joint principals, each of which may be empowered by the governing legislation to revoke the delegation; alternatively, the governing legislation can provide for the delegated act to come into force only if no objection has been expressed by either the EP or the Council within a given period.

Art. 291 TFEU retains the category of implementing regulation but within closely defined parameters. It empowers the EU legislator to confer implementing powers on the Commission where “uniform conditions for implementing legally binding Union acts are needed” but – in a novel provision – transfers the general powers of implementation and control to the Member States, subject to the important proviso that the EU legislator “shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers”. A post-Lisbon Regulation became necessary to re-organize the comitology.⁴⁸ This rolled up management and regulatory committees into a new “examination procedure” and introduced a new appeal committee to decide in cases where the committee vetoed a Commission draft. No doubt the Commission hopes to restrict this relatively cumbersome procedure to important policy areas (agriculture, fisheries, environment, health, trade and taxation are singled out) and rely instead on the simpler advisory procedure, where the Commission needs only to “take the utmost account” of the committee’s opinion, adopted by simple majority of those voting. It is too early to say how these provisions will play out in practice, though we can say that they add nothing to input legitimacy. They are not intended to. This is, after all, delegated legislation.

⁴⁷ See K.St.C. BRADLEY, *The European Parliament and Comitology: On the Road to Nowhere?*, in *European Law Journal*, 1997, p. 230 *et seq.*; and K.St.C. BRADLEY, *Delegated Legislation and Parliamentary Supervision in the European Community*, in A. EPINEY *et al.* (eds), *Challenging Boundaries*, Baden-Baden: Nomos, 2007.

⁴⁸ Regulation (EU) No 182/2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, p. 13.

IV. PUSHING FOR DEMOCRATIC INPUT

There are several reasons why, in the modern world, delegation might no longer suffice as a ground for the legitimation of executive lawmaking. In general, the power is greatly over-used by modern governments, bringing the realization that law is no longer made or sufficiently supervised by legislatures. Power and authority is being leached from Parliaments to the profit of government and administrators. In the EU, the trend has been accentuated by the constant addition of new competences and new areas of activity demanding Union-level regulation, while general failure on the part of Union institutions to respect the crucial subsidiarity principle – according to which power should be exercised at the lowest possible level – has further accentuated the feeling of stealthy integration. A surreptitious transfer is taking place, draining power and authority from Member States and from their Parliaments.⁴⁹ Indeed, the integrative nature of Union lawmaking seems to be reducing national lawmakers from principals to agents obliged to implement texts promulgated by the EU lawmaker. If, as Neil Walker claims,⁵⁰ the legitimacy of a delegate depends on the continuing control of the principal and clarity of the mandate, then the Union lawmaking process is now doubly defective. The clarity of the mandate is threatened by the “expansionary dynamic of the Union” and the Union lawmaking process is remote. Legitimacy founded on delegation is “ever less plausible in a supranational polity attenuated from national control, with an ever broader and deeper policy agenda”.⁵¹ Moreover, legitimacy in the EU depends heavily on output values, as Scharpf⁵² and Majone⁵³ realized.

At a stage when the output of the Community legislator was (or was thought to be) a rather “technical-regulatory expert type of legislation”, delegation and output values sufficed for its legitimation. Later, when the “expansionary dynamic of the Union” brought greater political saliency and visibility, the democratic legitimacy of regulation came into question. And concern for the democratic character of the EU was undoubtedly heightened by the tendency of those in power to circumvent the regular lawmaking processes, as with the justice and home affairs (JHA) at Maastricht and more recently in the Eurozone. “With every revision of the founding treaties”, András Jakab contends, “non-political arguments for legitimacy were weakened”.⁵⁴ Again, output legiti-

⁴⁹ G. BERMANN, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, in *Columbia Law Review*, 1994, p. 331.

⁵⁰ N. WALKER, *Justice In and Out of the European Union*, in D. KOCHOR, G. DE BÚRCA, A. WILLIAMS (eds), *Europe's Justice Deficit?*, Oxford and Portland Oregon: Hart Publishing, 2015, p. 251 *et seq.*

⁵¹ *Ibid.*

⁵² F. SCHARPF, *Governing in Europe. Effective and Democratic?*, Oxford: Oxford University Press, 1999.

⁵³ G. MAJONE, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?*, Cambridge: Cambridge University Press, 2014.

⁵⁴ A. JAKAB, *Full Parliamentarisation of the EU without Changing the Treaties: Why We Should Aim for It and How Easily It Can be Achieved*, in *Jean Monnet Working Paper*, 2012, p. 55.

macy, rooted in expertise, efficiency and effectiveness, is peculiarly vulnerable to crisis, as we saw in Greece and Italy when austerity measures were announced and in the collapse of solidarity amongst the Schengen partners during the present immigrant crisis. In contrast, Jakab argues, democratic governance induces loyalty. By giving members of a community a voice in what is happening, it promotes ownership and solidarity. In the EU where the basis of lawmaking legitimacy lay in delegation and the ultimate principals, the Member State electorates, were remote from the final lawmaking process and hope of further integration clearly depended on the ability of the Union to make space in the regulatory process for its citizens.

IV.1. LAWMAKING AND REPRESENTATION

1979, when the European Parliament emerged as a directly elected parliamentary body, marked a significant step in the direction of input legitimacy for EU law. The claim could be made – though not necessarily accepted – that the EU lawmaker was now “representative” with one indirectly elected chamber, the Council of Ministers, whose members were at least notionally accountable at national level and a directly elected Parliament. This might be enough to satisfy lawyers, who are normally satisfied by a thin notion of representation but even for lawyers the European Parliament still lacked an important constituent for legitimacy: it was not the plenary lawmaker. In several areas its role was – and still is – reduced to consultation; and it had no jurisdiction at all in the new “Third Pillar” added at Maastricht, raising the question whether the common positions, decisions and framework decisions made by the Council in terms of Art. 34 of the Treaty on European Union (TEU) could be deemed to amount to lawmaking in the proper sense of the term or was merely a form of soft law. Political scientists homed in on the alleged “democratic deficit”, variously analysed as due to the absence of an elected government, the failure of the young EP to establish itself at the centre of the European political system, and persistent apathy at European elections.⁵⁵ Alongside, as already noted, representative democracy had come under attack from the variant values of direct and participatory democracy.⁵⁶

A crucial opportunity for plenary legislative authority was lost with the failure of the Constitutional Treaty (CT), which would have provided specifically that the Constitution and “law adopted by the Union’s Institutions in exercising competences conferred on it” should have primacy over the law of the Member States. This would have given the CT

⁵⁵ See, e.g., S. ANDERSEN, K. ELIASSEN (eds), *The European Union: How Democratic Is It?*, London: Sage, 1996; A. FOLLESDAL, S. HIX, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, in *Journal of Common Market Studies*, 2006, p. 533 *et seq.*; S. HIX, B. HØYLAND, *Empowerment of the European Parliament*, in *Annual Review of Political Science*, 2013, p. 171 *et seq.*

⁵⁶ A debate initiated in the EU by J. COHEN, C. SABEL, *Directly Deliberative Polyarchy*, in *European Law Journal*, 1997, p. 313 *et seq.*, but see now B. KOHLER-KOCH, B. RITTBERGER (eds), *Debating the Democratic Legitimacy of the European Union*, Lanham: Rowman & Littlefield, 2007.

very much the look of a federal constitution with a dual legislative system and might have settled the delegation question once and for all. The CT would also have settled the hierarchy of norms by changing the nomenclature of “regulation” and “directive” to EU “laws” and “framework laws” (Art. 10 TEU). However, the proposals did not survive in the Lisbon Treaty.

The notion of delegation persists in Art. 5, para. 2, TEU with the concepts of conferral, defined to mean that the Union should act only “within the limits of the competences conferred upon it by the Member States” and of subsidiarity, which allows the EU to act “only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States”. Crucially, the Lisbon Treaty strengthened the position of the European Parliament, which was now an equal partner in what was now termed the “ordinary” EU lawmaking procedure (Art. 289 TFEU). For the first time, a directly representative body was virtually an equal partner in lawmaking.

IV.2. TRANSPARENCY AS A TIN-OPENER

Procedurally, however, things were rather different. Input legitimacy was not a priority for the Council, which continued to adhere to the closed procedures of diplomatic treaty-making. In a series of important cases brought by proponents of open government, however, the Court of Justice pushed for greater transparency in the lawmaking process. Its progressive judgments were based on the Preamble to Regulation 1049/2001, the current EU access to information legislation,⁵⁷ which states in recital 6 that “wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers”. In addition, recital 2 of the Preamble asserts:

“Openness enables citizens to participate more fully in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizens in a democratic system. Openness contributes to strengthening the principles of democracy [...]”.

Whether these provisions should be read as an affirmation of input values or rather treat openness and accountability as a source of output legitimacy is not entirely clear. From an input perspective, however, *Sweden and Turco*⁵⁸ was a breakthrough case. Turco had asked for access to an opinion from the Council’s Legal Service concerning the potential validity of a proposal for a Council Directive laying down minimum standards for the reception of applicants for asylum in Member States. The Council denied

⁵⁷ Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission Documents.

⁵⁸ Court of Justice, judgment of 1 July 2008, joined cases C-39/05 and C-52/05, *Sweden and Turco v. Council*.

access, standing on a mandatory exception to disclosure in Art. 4, para. 2, of Regulation No 1049/2001 for “court proceedings and legal advice” unless an “an overriding public interest in disclosure” could be shown. The Council argued for output legitimacy. The advice of its legal service deserved “particular protection” because it was an important instrument enabling the Council to be sure of the compatibility of its acts with Community law and enabled it “to move forward the discussion of the legal aspects at issue”; further, disclosure could create uncertainty regarding the legality of legislative acts adopted, “thus jeopardizing the legal certainty and stability of the Community legal order”. On the point of overriding public interest, the Council argued that the general interest of increasing transparency and openness of the decision-making process could not stand on its own as a justification for release as this would make it virtually impossible for the institutions to claim privilege for advice on legal questions arising in debate on legislative initiatives.

The Court rejected all these arguments, basing its reasoning on the Preamble:

“Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights”.⁵⁹

Prioritizing input values, the Court advised the Council that it was not secrecy but openness that would contribute to:

“conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole”.⁶⁰

To ram the message home, the Court reminded the Council of its obligation under Art. 207, para. 3, of the Treaty establishing the European Community (EC) “to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases”.

It was not long, however, before the General Court had to return to the subject in a case involving attempts by Access Info, a campaign group, to find out which Member States were opposing reform of the contested Regulation No 1049/2001 in the Council.⁶¹ The Council presented its long-standing view of the EU legislative procedure as es-

⁵⁹ *Ivi*, para. 46.

⁶⁰ *Ivi*, para. 59.

⁶¹ Tribunal, judgment of 22 March 2011, case T-233/09, *Access Info Europe v. Council*, confirmed in Court of Justice, judgment of 17 October 2013, case C-280/11 P, *Council v. Access Info Europe*.

entially a diplomatic process, arguing that disclosure would inhibit delegates room for *manœuvre* during preliminary discussions:

"If written contributions were made fully accessible to the public in an ongoing legislative procedure, this would lead positions of the delegations to become entrenched, since those delegations would lose some of their ability to modify their positions in the course of discussions and to justify before their public a compromise solution, which may differ from their initial position, seriously affecting the chances of finding a compromise".⁶²

It was the turn of the General Court to speak up for democratic legitimacy:

"If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. The identification of the Member State delegations which submit proposals at the stage of the initial discussions does not appear liable to prevent those delegations from being able to take those discussions into consideration so as to present new proposals if their initial proposals no longer reflect their positions. By its nature, a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently".⁶³

There could hardly be a clearer statement of input values.

Perhaps we should not dismiss Council arguments for "space to negotiate" too readily, however. We should not underrate the potential for a genuine mismatch between input and output values in a transnational governance system where policy-making depends on the agreement or at least acquiescence of 28 sovereign States. Thus Emily O'Reilly, the recently appointed European Ombudsman (EO), walked on to slippery ground when she opened an Own-Initiative Investigation (OI) into the so-called "trialogue" procedure.⁶⁴ Trialogue is a stage in co-decision procedure whereby around twenty representatives of the Council and Parliament meet in committee under the watchful eye of the Commission to broker agreement on a legislative text prior to second reading in the Parliament. This highly secretive process not only excludes the wider public from participation but also limits input from representatives since, as Tony Bunyan once put it, parliamentarians "are not allowed to change a 'dot or comma' of the 'compromise' position agreed in triologue meetings".⁶⁵ Yet triologue is widely used in

⁶² *Access Info Europe v. Council*, cit., para. 43.

⁶³ *Ivi*, para. 69.

⁶⁴ European Ombudsman, Own-initiative inquiry OI/8/2015/FOR concerning transparency of trialogues, 26 May 2015.

⁶⁵ T. BUNYAN, *European Parliament: Abolish 1st [and 2nd] Reading Secret Deals: Bring Back Democracy "Warts and All"*, in *Statewatch News Online*, September 2009, www.statewatch.org. See also J. GARMAN,

politically controversial and sensitive areas: *Statewatch* has recorded, for example, that all eight of the controversial immigration and asylum measures passed in 2006 were negotiated and agreed in secret trialogue meetings.⁶⁶

Reflecting on trialogue in a press interview, Emily O'Reilly put her finger on the potential for conflict between input and output values. Trialogue was efficient: "They get the work done. One doesn't want to be responsible for suggesting a mechanism that would lengthen the process". On the other hand, the procedure was hardly transparent: "There are no minutes that come out afterwards. It's never quite clear when the meetings are on or how the decision making is carried out".⁶⁷ In the central section of a law-making process, little or no attention is paid to input values.⁶⁸

IV.3. CITIZEN INPUT AND PARTICIPATION

Earlier, lawmaking authority was depicted as underpinned in nation States by a twofold legitimacy of process and representation. We noted too that representative legitimacy had come under attack in recent years from the variant values of direct and participatory democracy. This debate over the nature and forms of democracy has tended to flourish in systems of transnational governance where representative institutions are young or weak, of which the European Union is one.⁶⁹ Commission interest in citizen participation was first expressed in the White Paper on European Governance (WPEG).⁷⁰ Interest was partly pragmatic; there was an imperative need to reform the Commission in the fallout from the devastating parliamentary investigation of 1999.⁷¹ Partly, however, the Commission was anxious over the negative attitude of the European public sparked by the Danish No vote in the Maastricht referendum. To put this in academic terms, there was a perceived need after Maastricht to construct a European *demos* as a basis for integration.⁷²

L. HILDITCH, *Behind the Scenes: an Examination of the Importance of Informal Processes at Work in Conciliation*, in *Journal of European Public Policy*, 1998, p. 271 *et seq.*

⁶⁶ T. BUNYAN, *Secret Trialogues and the Democratic Deficit*, in *Statewatch Journal* (vol. 16), 5-6 September 2007, www.statewatch.org.

⁶⁷ Euractiv, *Secretive "Trialogue" Talks to Agree EU Law Face Investigation*, 21 April 2015, www.euractiv.com.

⁶⁸ There is now an inter-institutional agreement brokered by the Commission under negotiation: see Communication COM(2015) 216, *Proposal for an Interinstitutional Agreement on Better Regulation*, 19 May 2015.

⁶⁹ See footnote 57 above.

⁷⁰ Communication COM(2001) 428, *cit.*, p. 1.

⁷¹ Committee of Independent Experts, *Second Report on Reform of the Commission*, Brussels, 1999.

⁷² A debate closely associated with the work of Joseph Weiler: see J. WEILER, *To Be a European Citizen: Eros and Civilisation*, in *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999, ch. 10; and, J. WEILER, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision?*, in *European Law Journal*, 1995, p. 219 *et seq.*

The Commission response was to plan a “Citizen’s Europe” to be constructed under its paternal eye. But as Beate Kohler-Koch has observed in her penetrating scrutiny of Commission relationships with civil society, input values were neither the Commission’s priority nor its first thought.⁷³ The primary motive of those who drafted the White Paper on European Governance was to promote “a reasoned discourse between experts and laypeople to support the effectiveness and legitimacy of policy-making”. In this passage, redolent of output values, “civil society engagement became linked to a more down-to-earth approach looking for ‘better regulation’ and more efficient consultation”.⁷⁴

The many techniques employed today by the Commission actively to involve citizens – consultation exercises, online debates, citizen consensus conferences, the “Your Voice in Europe” website, and so on – are aimed overtly at “the expression of an informed citizen’s perspective”. Yet arguably, from the perspective of input legitimacy, the Commission has taken a seriously wrong turning by focusing too much on *organised* society;⁷⁵ the ECSC, which it supports as a bridge with European civil society and the civil society organizations (CSOs) that claim to represent civil society.⁷⁶ Its insistence on the “representativeness” of bodies with which it has relationships also has a distinctly undemocratic ring.⁷⁷ In a vibrant political community, interest representation does not demand representativeness unless a body claims to speak for its members or a particular section of the community. The public space is open to anyone and everyone to express their views and communicate them to policy-makers; such relationships are unregulated and informal and increasingly conducted on both sides through email, tweet and twitter. The Commission Transparency Register in contrast, has a forbidding and bureaucratic character;⁷⁸ it is a tool for interest representation and lobbyists rather

⁷³ B. KOHLER-KOCH, *Civil Society and EU democracy: “Astroturf” Representation*, in *Journal of European Public Policy*, 2010, p. 100 *et seq.*

⁷⁴ *Ibid.*, citing L. LEBELLIS, J. PATERSON, *Developing New Modes of Governance*, in *Forward Studies Unit Working Paper*, Luxembourg: European Commission, 2000, p. 27 *et seq.*

⁷⁵ See Communication COM(2002) 277 of the Commission, *General Principles and Minimum Standards for Consulting Non-institutional Interested Parties*, 5 June 2002; Communication COM(2002) 704 of the Commission, *Towards a Reinforced Culture of Consultation and Dialogue-General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, 11 December 2002; Communication COM(2008) 323 of the Commission, *European Transparency Initiative: A Framework for Relations with Interest Representatives by the Commission (Register and Code of Conduct)*, 27 May 2008. The Register is available on the Commission website.

⁷⁶ This argument is taken further in C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, cit.

⁷⁷ N. PEREZ-SOLÓRZANO BORRAGAN, S. SMISMANS, *Representativeness: A Tool to Structure Interest Intermediation in the European Union?*, in *Journal of Common Market Studies*, 2012, p. 403 *et seq.*

⁷⁸ See D. OBRADOVIC, J. ALONSO VIZCARINO, *Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations*, in *Common Market Law Review*, 2006, p. 1049 *et seq.*

than for citizen participation.⁷⁹ Moreover, the Commission sets higher standards for civil society than it observes in its own relationships. Research confirms a distinct bias in both the Commission and its partner, the ECSC, towards relationships with business and market-related organizations. Interest-representation is, to reiterate, an input value and possible source of input legitimacy; it is, however, a narrow form of input and a pale shadow of democracy.⁸⁰

The strongest move towards entrenching input values in EU lawmaking comes with Art. 11 TEU inserted at Lisbon. This is a robust expression of input values, which places a wide general obligation on the institutions to “maintain an open, transparent and regular dialogue with representative associations and civil society”; to give “citizens and representative associations” an opportunity to exchange views publicly; and to “carry out broad consultations with parties concerned” in all policy areas. The word “broad” here may be significant. By generating a new input function for consultation and dialogue, the Lisbon Treaty seems to promise something more than the carefully controlled consultation that was the Commission norm.

Citizen participation can serve two main purposes: to encourage active citizen participation in the policymaking process represents an effort to “reinvigorate European democracy”,⁸¹ an objective for which Art. 11 seems to be designed. For EU policymakers and institutions on the other hand, it represents “a listening exercise”. Which of these two objectives does the Commission prioritise? Many protestations of commitment to input legitimacy have been made by the EU institutions and enshrined in the Treaties. In response, the Commission has made rather bureaucratic attempts to create space for European civil society. But it is hard to see relationships that are so rigorously corseted by the Commission either as truly democratic or as adding, or being likely to add, legitimacy to the EU lawmaking process. Indeed, the outcome of the many reforms may be rather to undercut output legitimacy by removing the claims of executive legislation to speed and effectiveness than to substantiate the claims of direct democracy to increase input legitimacy.

The same bureaucratic propensities mark the “Citizens’ Initiative” procedure introduced by Art. 11, para. 4, TEU. This purports to create a specific space for individual citizens to participate in lawmaking – a clear expression of input values. The process is, however, cumbersome; it requires not less than one million signatures from citizens who are nationals of a significant number of Member States and who come together to

⁷⁹ B. KOHLER-KOCH, B. FINKE, *The Institutional Shaping of EU-Society Relations: A Contribution to Democracy via Participation?*, in *Journal of Civil Society*, 2007, p. 35 *et seq.*

⁸⁰ *Ibid.* See also S. SMISMANS, *An Economic and Social Committee for the Citizen, or a Citizen for the Economic and Social Committee?*, in *European Public Law*, 1999, p. 557 *et seq.*

⁸¹ C. MARXSEN, *Participatory Democracy in Europe*, in F. FABRINI, E. HIRSCH BALLIN, H. SOMSEN (eds), *What Form of Governance for the European Union and the Eurozone*, Oxford: Hart Publishing, 2015, p. 156 *et seq.*

"invite" the Commission to take action by submitting an "appropriate proposal" on a matter that falls within EU competence. In practice, this is an opportunity likely to be available mainly for interest representation and used by trade unions, which organized the first successful European citizens' initiative (ECI) against the privatization of water authorities, or well-entrenched pressure and protest groups, like the organizers of "One of Us", petitioning against the use of human embryos in research or "stop Vivisection".⁸² Of the handful of initiatives so far submitted, 11 are currently listed as obsolete or withdrawn, while the organizers of the three initiatives that have so far crawled through the complex procedural hoops are all in receipt of a bureaucratic communication explaining at great length why the Commission believes no further legislative action is necessary or appropriate.⁸³

V. TOWARDS LEGITIMATION?

All the Member States of the European Union are democracies and have confirmed, in the words of the TEU, "their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law". Some of the democracies are old-established and unwilling lightly to surrender their cultural inheritance; others have recent experience of authoritarian government and, equally, are unwilling to see it reintroduced. An open and democratic lawmaking process stands as a core value at the heart of democracy. This is implicit in the increasing significance attached in contemporary society to the principles of transparency, participation and accountability, fundamental values of contemporary democracy. The significance of these values has been recognized many times by the Treaty-makers: in the Preamble to the TEU, where they appear several times; in Declaration 17 attached to the TEU at Maastricht, which states that "Transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration"; in the provisions of Art. 11 TEU, which are set out above. At a lower level in the hierarchy, the Commission was thinking along the right lines when it committed itself in the WPEG "to work in a more open manner", to "actively communicate about what the EU does and the decisions it takes" and to "use language that is accessible and understandable for the general public".⁸⁴ This, the drafters noted, "is of particular importance in order to improve the confidence in complex institutions". As this paper has attempt-

⁸² See for a critical evaluation, M. DOUGAN, *What Are We to Make of the Citizens' Initiative?*, in *Common Market Law Review*, 2011, p. 1807 *et seq.*

⁸³ Respectively Communication COM(2014) 355 of the Commission on the European Citizens' Initiative "One of us", 28 May 2014; Communication C(2015) 3773 of the Commission on the European Citizens' Initiative "Stop Vivisection", 3 June 2015; Communication COM(2014) 177 of the Commission on the European Citizens' Initiative "Water and sanitation are a human right! Water is a public good, not a commodity!", 19 March 2014. Initiatives are all registered on the Commission Website under Citizens' Initiative.

⁸⁴ Communication COM(2001) 428, cit., p. 10.

ed to show, this desideratum has not yet been attained.

Measured against the benchmark of the two-stage model that – broadly speaking – represents our constitutional legacy, the EU lawmaking processes score badly. For inter-governmentalists, the deficiencies provide a strong argument against integration – a strong argument indeed for a general claw-back of power by the Member States, where lawmaking legitimacy is seen to lie. Integrationists by way of contrast are faced with a possibly insoluble dilemma. At every level of Union lawmaking, greater input legitimacy is essential if the EU is to flourish as a democratic polity. The changes that this entails, however, must not be allowed too greatly to undercut the output legitimacy necessary for the EU's important regulatory functions.

In the field of executive legislation, some improvements can be made relatively easily. More space can be made for public participation in policy-making with procedural underpinning. The objective of those who have worked on the Research Network on EU Administrative Law project (ReNEUAL) to prepare a code of administrative lawmaking procedure is to ensure “a higher degree of legitimacy of rulemaking activities, in accordance with Art. 11, para. 1, TEU”. The focus throughout is on input values: transparency as a pathway to public debate and deliberation and enhanced opportunities for expression. It is certainly the group's hope that by setting in place a set of participatory procedures, public participation will be fostered as well as underpinned. The group may also believe that the introduction of protective procedures will generate a degree of “process legitimacy”, based on the citizen's expectation of good governance and the right to good administration protected by Art. 41 of the Charter of Fundamental Rights of the European Union. Procedural rectitude will operate, in other words, to reinforce the legitimacy of executive lawmaking.⁸⁵

But would this necessarily be the outcome? The ReNEUAL team has elaborated a five-volume set of model rules for EU administrative procedure, Volume II of which covers formal rulemaking procedures. These would apply to all non-legislative government acts of general application by all EU institutions and other bodies, offices and agencies.⁸⁶ But experience of the Citizens' Initiative reminds us that process legitimacy is easily undercut by a slide into bureaucratic proceduralism. The outcome is not only damage to input legitimacy through disappointed expectations⁸⁷ but also to output legitimacy through delay and inefficiency. If citizen input is to become more than “Astroturf Representation”,⁸⁸ it is a change of heart and genuine commitment to input values

⁸⁵ See V. SCHMIDT, *Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput*, in *Political Studies*, 2013, p. 2 *et seq.*

⁸⁶ ReNEUAL, *Administrative Rulemaking*, Book 2, p. 41, www.reneual.eu.

⁸⁷ On which see S. ARNSTEIN, *A Ladder of Citizen Participation*, in *Journal of the American Institute of Planners*, 1969, p. 136 *et seq.*

⁸⁸ B. KOHLER-KOCH, *Civil Society and EU democracy: “Astroturf” Representation*, in *Journal of European Public Policy*, 2010, p. 100 *et seq.*

that is necessary on the part of the Commission rather than further proceduralisation.

This is in any event merely to tinker at the edges of the EU legitimacy problem. The real need is to install a true sense of representative legitimacy at Union level. Here again there is room for tinkering at the edges; further space could, for example, be made for regional representation through the Committee of the Regions. A more fundamental remedy would be to buy in legitimacy from national parliaments. Experiments are already under way to strengthen the hand of national parliaments with the so-called “yellow” and “orange card” procedures introduced by the Lisbon Treaty, which (briefly) afford reinforcement for the under-valued subsidiarity principle by providing for Reasoned Opinions from national Parliaments or their chambers that can force the Commission to “review” a draft proposal. This is of course a stop order rather than a policy-making facility or even a veto and the procedures would retain their essentially negative character even if they were converted into a delaying power requiring the Commission to reconsider its proposal, which would resemble the Art. 290 TFEU procedure in respect of delegated legislation.

More positive would be a new “green card” procedure, recommended in an initiative from Member State Parliaments. This would enable Member State Parliaments to make proposals to the Commission, thereby influencing the direction of EU policy.⁸⁹ The first green card from 16 national Parliaments concerned food waste. It received a fairly typical response from the Commission, thanking the Parliaments for their interest and promising to pay particular attention to their suggestions when preparing its action plan, while at the same time declining to show them the content of the package of broader proposals that it was preparing.⁹⁰ Such a power could of course be strengthened and converted to a “triggering” mechanism by placing the Commission under a “loyal duty” to respond by bringing forward a proposal for legislation (though this might require Treaty change). These procedures, which would at least put national Parliaments on an even footing with the organizers of a Citizens’ Initiative, are likely to be too cumbersome to be useful as they involve the cooperation of up to 30 elephantine bodies. They are moreover peripheral and, if they were not, would be dangerous. To drag national Parliaments into EU policymaking may look like a positive gain for integration; it is to the contrary a dangerous incursion into the autonomy of national constitutions. It is a step that is far more likely to destabilize relationships between national govern-

⁸⁹ See British House of Lords, EU Committee HL 151, *The role of National Parliaments in the European Union*, 2014; Dutch Tweede Kamer, *Democratic Legitimacy in the EU and the Role of National Parliaments*, November 2013; Danish Folketing, European Affairs Committee, *Twenty-Three Recommendations to Strengthen the Role of National Parliaments in a Changing European Governance*, January 2014.

⁹⁰ See British House of Lords, EU Committee, *Food Waste: a Proposal by National Parliaments to the European Commission*, 22 July 2015, www.parliament.uk; and Commission C(2015) 7982 final, Commission Response to the Green Card, 17 November 2015.

ments and legislatures and weaken national accountability arrangements than greatly to enhance the input legitimacy of Union legislation.

It is clear then that the EU in general, and more specifically its lawmaking process, faces something of a legitimacy crisis. Legitimacy from delegation based on output values is fading. This may be because EU policies are less successful. It may be because, in line with a general trend in contemporary popular democracy, input values weigh increasingly highly in the legitimacy scales. Most likely, it is because of the EU's ever-deepening policy agenda: from the trade and technology of the Single Market regulator the EU has assumed responsibility for primary economic regulation and taken on the human rights remit of a national government. In a speech to the EP, the EO, Emily O'Reilly, remarked that "the demands now being made by citizens, demands made ever louder, more direct and more pervasive, by the megaphone of social and other kinds of interactive new media, makes the creation of more transparent and accountable structures and processes an everyday business imperative".⁹¹ At every level of government, in every modality of governance, every type of public authority from governments and legislatures to agencies and administrators will need to learn how to respond.

There is no room any longer for legitimacy based on a purely formal process of delegation or for the notional input that the European Commission has been promoting. Where this leaves us is uncertain. At the end of the day, it has to be admitted that legitimacy lies in the eye of the beholder, who may be a politician, judge, administrator or merely a baffled ordinary citizen who takes an interest in EU affairs. It is hard to define legitimacy, to distinguish its ingredients or decide where it is located. Significantly in the context of this paper, the views of a staunch integrationist on these matters are likely to differ sharply from those of an inter-governmentalist and more sharply still from those of a wholehearted Eurosceptic. Like democracy itself, legitimacy largely depends, on what Jakab calls "its capability to induce loyalty".⁹² And loyalty seems increasingly to depend on the ability of the prevailing governance system to respond by giving a voice to that loyalty. Unfortunately for integration, these are uncertain qualities that are not easily bought.

⁹¹ European Ombudsman, Joint Hearing with the European Parliament, *Towards a High Degree of Accountability, Transparency & Integrity in the EU Institutions*, 26 March 2015.

⁹² A. JAKAB, *Full Parliamentarisation of the EU without Changing the Treaties*, cit.



ARTICLES

DECENTRALISED INTEGRATION? FUNDAMENTAL RIGHTS PROTECTION IN THE EU COMMON FOREIGN AND SECURITY POLICY

CHRISTOPHE HILLION*

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ABSTRACT: This paper examines how fundamental rights are protected in the specific context of the EU Common Foreign and Security Policy, against the backdrop of the European Court of Justice's Opinion 2/13 on the EU accession to the ECHR. As any area of EU law, the CFSP must be implemented in compliance with EU fundamental rights. The jurisdiction of the European Court of Justice plays a critical if limited part in ensuring such compliance, which Member States' judiciaries complement, acting as "guardians of (the) legal order and the judicial system of the (EU)". Such a mixed judicial control over the CFSP derives from the Court's established case law, as well as from the Treaty of Lisbon, and the deeper integration of the CFSP in the EU legal order that it envisages.

KEYWORDS: European Union – foreign and security policy – fundamental rights – Court of Justice – national courts – preliminary reference – European integration.

I. INTRODUCTION

In its Opinion 2/13,¹ the European Court of Justice (CJEU) found that "the agreement envisaged [for the European Union (EU) to accede to the European Convention of Human Rights (ECHR)] fail[ed] to have regard to the specific characteristics of EU law with re-

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¹ Court of Justice, opinion of 18 December 2014, opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*.

gard to the judicial review of acts, actions or omissions on the part of the EU in [Common Foreign and Security Policy (CFSP)] matters”.² In particular, the Court considered that the agreement disregarded the specific (i.e. limited) jurisdiction it exercises in the CFSP area by granting the European Court of Human Rights power to review certain acts which it itself (i.e. the CJEU) cannot review,³ adding that “jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU”.⁴

Undeniably, the limited jurisdiction of the Court of Justice in CFSP matters is a specific feature of EU law. But is it so significant as to warrant protection from the Court?⁵ In her preliminary View, Advocate General (AG) Kokott did not find it decisive, on the contrary:

“with regard to the CFSP [...] the proposed accession of the EU to the ECHR can be completed without the creation of new competences for the Court of Justice of the EU, since, in matters relating to the CFSP, effective legal protection for individuals is afforded partly by the Courts of the EU (Article 275(2) TFEU) and partly by national courts and tribunals (Article 19(1), second sentence, TEU and Article 274 TFEU)”.⁶

This paper argues that the CFSP is indeed not as distinctive as suggested in Opinion 2/13. In particular, the general EU obligation to respect fundamental rights is fully applicable to the CFSP context (section one), and the Court of Justice has power, albeit limited, to enforce such an obligation (section two), which it *shares* with Member States’ courts *qua* EU courts (section three).

This specific mixed judicial control derives from the established case law of the Court and the Treaty of Lisbon. It epitomises the balance between the increasing integration of the CFSP into the EU constitutional order,⁷ and the recurrent role that Mem-

² *Ivi*, para. 257.

³ *Ivi*, para. 255.

⁴ *Ivi*, para. 256.

⁵ According to Art. 1 of Protocol (No 8) relating to Art. 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms: “The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention) provided for in Art. 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: (a) the specific arrangements for the Union’s possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate”.

⁶ View of Advocate General Kokott delivered on 13 June 2014, and preceding CJEU opinion 2/13, cit., para. 103.

⁷ Further on this, see C. HILLION, *Cohérence et action extérieure de l’Union*, in E. NEFRAMI (dir.), *Objectifs et compétences de l’Union européenne*, Bruxelles: Bruylant, 2012, p. 229 *et seq.*

ber States, including their judiciaries, play in this process. To be sure, this role challenges the Court's allegation that EU accession to the ECHR "would effectively entrust the judicial review of [CFSP] acts, actions or omissions on the part of the EU *exclusively* to a non-EU body"⁸ (emphasis added).

II. MANDATORY RESPECT FOR EU FUNDAMENTAL RIGHTS IN CFSP

II.1. CFSP AS DISTINCT FRAMEWORK EMBEDDED IN THE EU LEGAL ORDER

The specific characteristics of the EU CFSP are briefly evoked in Art. 24, para. 1, of the Treaty on European Union (TEU). The provision refers to its particular "rules and procedures", and to the distinct nature of acts adopted in its context, in the sense that adoption of legislative acts is excluded in the CFSP.

In the same vein, Art. 40, para. 2, TEU, which establishes the legal mandate for preserving the integrity of the CFSP, requires the protection of the *application of the procedures and the extent of the powers of the institutions* as set out in the specific CFSP chapter of the TEU.⁹ The integrity of the CFSP is thus to be preserved from the "implementation of the [EU] policies listed in [...] Arts [3 to 6 TFEU]", i.e. not from other provisions of the Treaties. The combined reading of Arts 21, para. 1, and 23, TEU makes clear that the CFSP is, as any other EU external policy, guided by the principles which have inspired the Union's own creation, development and enlargement, and particularly respect for human rights.

In short, the specificity of the CFSP, as envisaged and protected under EU primary law, is essentially of a procedural and institutional nature. Neither Art. 24, para. 1, TEU nor Art. 40, para. 2, TEU shields the CFSP from the application of *principles* governing the EU external action in particular, and of those underpinning the EU legal order in general. The various principles contained in the Common Provisions of the TEU, where the CFSP chapter is located, are therefore applicable to the CFSP. That is particularly so with regard to the obligation to respect fundamental rights.

⁸ Opinion 2/13, cit., para. 255.

⁹ According to Art. 40 TEU: "The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Arts 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter".

II.2. HORIZONTAL OBLIGATION TO RESPECT FUNDAMENTAL RIGHTS IN THE EU

That fundamental rights ought to be respected also in the context of the CFSP equally flows from the post-Lisbon primary law of the EU. Art. 6, para. 1, TEU, included in the Common Provisions, foresees that the “*Union* recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties” (emphasis added). It is thus the Union, as a whole, that is bound by the Charter as part of EU primary law, regardless of whether it acts in the framework of the Treaty on the Functioning of the European (TFEU) or that of the CFSP.

In addition, Art. 5, para. 1, of the Charter makes clear that its provisions are addressed to the “*institutions*, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the *Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof* in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties” (emphasis added). The Charter therefore binds all EU institutions and Member States, irrespective of whether they operate in the context of CFSP or outside it.

The early post-Lisbon case law of the Court of Justice further supports this view. Building on what it had already established in its famous *Kadi I* ruling,¹⁰ the Court held in its *Smart Sanctions* judgment¹¹ that:

“the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, *on all the institutions and bodies of the Union*. [...] [T]he duty to respect fundamental rights bears also on Union measures giving effect to resolutions of the Security”.¹²

The distinction between CFSP and non-CFSP (implementing) measures is therefore of no relevance when it comes to EU institutions’ obligation to respect the fundamental rights enshrined in the Charter.

¹⁰ Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*.

¹¹ Court of Justice, judgment of 19 July 2012, case C-130/10, *European Parliament v. Council (Smart Sanctions)*, paras 83-84.

¹² Emphasis added. The Court referred to its judgment in *Kadi and Al Barakaat International Foundation v. Council and Commission*, cit., notably paras 285, 299 and 326.

II.3. MAINSTREAMING FUNDAMENTAL RIGHTS IN CFSP DECISION-MAKING

Indeed, fundamental rights have been mainstreamed into the EU decision-making process, including in the CFSP area.¹³ Required by the Charter, this phenomenon also corresponds to the general ambition of the EU to promote its values, enshrined in Art. 2 TEU and which include the protection of human rights.¹⁴ Thus according to Art. 3, para. 1, TEU: “The Union’s aim is to promote peace, its values and the well-being of its peoples”, while following Art. 13, para. 1, TEU, “[it] shall have an institutional framework which shall aim to promote its values”.

As an *aim* of the Union and of its institutional framework, the promotion of human rights triggers the general obligation of sincere cooperation, binding Member States¹⁵ and institutions¹⁶ alike. In particular, they must assist the Union in fulfilling its tasks, and pursue its objectives, including that of protecting and promoting fundamental rights.

In sum, the CFSP specificity has no impact on the EU’s obligation to respect fundamental rights. As in any other EU policy field, both Member States and EU institutions are bound to respect and promote them when developing and implementing the CFSP. It is rather at the level of enforcement that the specific character of the CFSP has significance, albeit relative, as discussed in the next section.

III. DEROGATORY ENFORCEMENT OF EU FUNDAMENTAL RIGHTS IN CFSP

III.1. LIMITED ECJ JURISDICTION IN CFSP: AN EXCEPTION TO THE RULE

The EU Treaties endow the Court of Justice with a *limited* jurisdiction in the context of the CFSP. Thus, Art. 24, para. 1, TEU foresees that the CJEU “shall not have jurisdiction with respect to [the] provisions [on the common foreign and security policy], with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review

¹³ See in this regard the Joint Communication COM (2011) 886 of the European Commission to the European Parliament and the Council, *Human rights and Democracy at the Heart of EU external Action: Towards a more effective approach*.

¹⁴ Art. 2 TEU stipulates that: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

¹⁵ Art. 4, para. 3, TEU provides: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives”.

¹⁶ According to Art. 13, para. 2, TEU: “Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. *The institutions shall practice mutual sincere cooperation*” (emphasis added).

the legality of certain decisions as provided for by the second paragraph of Art. 275 TFEU". Art. 275 TFEU articulates the principle of limited jurisdiction in the following way:

"The [CJEU] shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union".

The Court of Justice has interpreted these specific jurisdictional arrangements as *exception* to the principle of general jurisdiction established by Art. 19 TEU. Thus in the first *Anti-piracy (Mauritius)* case,¹⁷ the Court opined that:

"the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a *derogation from the rule of the general jurisdiction* which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, and they must, therefore, be *interpreted narrowly*".¹⁸

III.2. BROAD EXERCISE OF LIMITED ECJ JURISDICTION

The Court's jurisdiction in CFSP matters, including the power to control compliance of certain CFSP acts with fundamental rights, cannot therefore be understood restrictively. This may have, at least, four applications.

First, the notion of "restrictive measures", referred to in Art. 275, para. 2, TFEU, could be interpreted broadly so as to encompass, for example, *detention* in the context of a Common Security and Defence Policy (CSDP) mission,¹⁹ thus beyond the well-established individual sanctions, such as the one adopted to fight international terrorism.

Secondly, the case could be made for the Court to exercise jurisdiction also in relation to international agreements concluded by the EU in the area of CFSP. After all, CFSP agreements are negotiated and concluded in the context of the general procedure set out in Art. 218 TFEU, over which the Court has unfettered jurisdiction. Indeed, in the *Mauritius* case mentioned above, the Court found that the right of the European Parliament to be informed on negotiations of EU external agreements, stipulated in Art. 218, para. 10, TFEU, concerned all EU external agreements including those concluded in

¹⁷ Court of Justice, judgment of 24 June 2014, case C-658/11, *European Parliament v. Council (Mauritius)*.

¹⁸ *Ivi*, para. 70. Emphasis added.

¹⁹ For instance on the basis of Joint Action 2008/851/CFSP of the Council on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, 10 November 2008.

the area of CFSP. Based on this approach, the Court's *a priori* control envisaged in Art. 218, para. 11, TFEU could also concern CFSP agreements, so as to ensure the latter's compatibility with EU fundamental rights.

Thirdly, the reference in Art. 275, para. 2, TFEU to the "conditions laid down in the fourth paragraph of Article 263" TFEU should not be understood as excluding all other courses of action of the complete system of judicial remedies.²⁰ For instance, challenging the legality of CFSP acts by reference to EU fundamental rights should also be possible indirectly, by allowing recourse to the preliminary ruling procedure,²¹ thereby involving Member States' courts.

Fourthly, the restrictions of Art. 275, para. 2, TFEU should not be understood as precluding the judicial enforcement of EU non-CFSP rules if and when applied to a CFSP situation. For instance, the Court has jurisdiction in the context of a CFSP operation if the case concerns the application of EU public procurement rules.²²

In sum, the Court of Justice has general jurisdiction to ensure that fundamental rights are respected in the EU legal order, and the derogatory judicial regime applying to the CFSP should consequently be understood restrictively. Although many CFSP measures are thus subject to the Court's control, there remains, as pointed out in Opinion 2/13, some CFSP acts, actions or omissions which still fall outside its jurisdiction. As the next section argues, this does not mean that there is no EU judicial control over those acts.

IV. COMPLEMENTARY NATIONAL ENFORCEMENT OF EU FUNDAMENTAL RIGHTS IN CFSP

IV.1. MEMBER STATES' COURTS AS EU COURTS

Member States' systems of remedies are integrated in the EU judicial system. Thus, Art. 19 TEU foresees that:

²⁰ For illustration of a broad exercise of limited Court's jurisdiction: see Court of Justice, judgment of 27 February 2007, case C-355/04 P, *Segi et al. v. Council*, and Court of Justice, judgment of 20 May 2008, case C-91/05, *Commission v. Council (Ecowas)*.

²¹ Clarification has been requested in the pending case C-72/15, *Rosneft*: the High Court of Justice (England & Wales), Queen's Bench Division (Divisional Court) has asked the Court of Justice whether, having regard in particular to Arts 19, para. 1, 24, and 40 TEU, Art. 47 of the Charter and Art. 275, para. 2, TFEU, the CJEU has jurisdiction to give a preliminary ruling under Art. 267 TFEU on the validity of various provisions of Decision 2014/512/CFSP of the Council concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, as amended by Decision 2014/659/CFSP of the Council and Decision 2014/872/CFSP of the Council. The case is still pending: see S.O. JOHANSEN, *EU Sanctions Against Non-EU Countries: the CJEU Will Soon Address Some Key Legal Issues*, in *EU Law Analysis*, 26 February 2016, www.eulawanalysis.blogspot.it.

²² See in this regard, Court of Justice, judgment of 12 November 2015, case C-439/13 P, *Elitaliana v. Eulex Kosovo*.

“The [CJEU] shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”.

The Court of Justice has further spelled out the role that Member States’ courts play in ensuring that in the interpretation and application of the Treaties, the law is observed. Hence, in its Opinion on the *Unified Patent Court*,²³ the Court held that:

“66. As is evident from Article 19(1) TEU, the guardians of [the] legal order and the judicial system of the European Union are the Court of Justice *and the courts and tribunals of the Member States*. [...]

68. It should also be observed that the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for European Union law (see, to that effect, Case C-298/96 *Oelmühle and Schmidt Söhne* [1998] ECR I-4767, paragraph 23). Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, *it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law*. [...]

69. The national court, in collaboration with the Court of Justice, fulfils *a duty entrusted to them both* of ensuring that in the interpretation and application of the Treaties the law is observed”.²⁴

Based on this general statement, it is arguable that national courts and tribunals, as “guardians of [the] legal order and the judicial system of the European Union”, may be called upon to enforce EU fundamental rights in the context of the CFSP, including in situations where the Court of Justice does not have jurisdiction. Nothing in the Treaties suggests that the restrictions applicable to Court of Justice’s powers, based on Arts 24, para. 1, TEU and 275 TFEU, concern in any way the jurisdiction of Member States’ courts. On the contrary, Art. 274 TFEU stipulates that: “Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States”.

In the context of Opinion 2/13, AG Kokott added that “this follows from the principle of conferral, according to which competences not conferred upon the EU in the Treaties remain with the Member States”.²⁵ Arguably, the restricted jurisdiction of the Court of

²³ Court of Justice, opinion of 8 March 2011, opinion 1/09, *Creation of a European and Community Patents Court*.

²⁴ Emphasis added.

²⁵ See View of Advocate General Kokott, cit., esp. para. 96.

Justice prompts an increased involvement of Member States' judiciaries precisely to offset the Court's inability to ensure that the law is observed in the interpretation and application of the some aspects of the CFSP. Art. 19 TEU points to this complementary role, inspired by the Court's case law,²⁶ when requiring Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law", to avoid "a lacuna [...] in the legal protection system",²⁷ and thus to fulfil the requirement of Art. 47 of the EU Charter of Fundamental Rights.²⁸ Given that the Court of Justice itself cannot provide legal protection, the notion of *sufficiency* entails that it is entirely up to the Member States to provide effective remedies.

AG Kokott extensively discussed the role of national judiciaries in her View.²⁹ The Court, by contrast, did not. In mentioning that accession "would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU *exclusively* to a non-EU body" (emphasis added),³⁰ it suggested instead, albeit obliquely, that Member States' courts are not able to review the legality of CFSP acts, even those that fall outside its jurisdiction. For the Court of Justice, its exclusion from certain aspects of the CFSP sphere is seemingly tantamount to an exclusion of the whole EU judicial system including Member States' courts as EU courts despite the express provision of Art. 274 TFEU, the unequivocal language of Opinion 1/09, and the obligations enshrined in Art. 19 TEU.

IV.2. PRACTICAL IMPLICATIONS OF MEMBER STATES' COURTS INVOLVEMENT IN REVIEWING CFSP

Allowing Member States' courts to review the legality of certain EU acts would undoubtedly complicate the functioning of the EU legal order. This is a well-known concern for the Court of Justice that was forcefully expressed in its *Foto Frost* judgment,³¹ in which it concluded that:

²⁶ See e.g. Court of Justice, judgment of 3 October 2013, case C-583/11, *Inuit Tapiriit Kanatami et al. v. Parliament and Council*; Court of Justice, judgment of 5 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*.

²⁷ View of Advocate General Kokott, cit., para. 85.

²⁸ Art. 47 of the Charter stipulates that: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

²⁹ View of Advocate General Kokott, cit., esp. paras 96-103.

³⁰ See Opinion 2/13, cit., para. 255. It reiterated that point in the following para.

³¹ Court of Justice, judgment of 22 October 1987, case 314/85, *Foto Frost v. Hauptzollamt Lübeck-Ost*. For a recent reiteration of the doctrine it contains, see e.g. Court of Justice, judgment of 6 October 2015, case C-362/14, *Maximilian Schrems v. Data Protection Commissioner*, para. 61 *et seq.*

"15. [...] those courts do not have the power to declare acts of the Community institutions invalid. As the Court emphasized in the judgment of 13 May 1981 in Case 66/80 *International Chemical Corporation v Amministrazione delle Finanze* [1981] ECR 1191, the main purpose of the powers accorded to the Court by Article [267 TFEU] is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. *Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the community legal order and detract from the fundamental requirement of legal certainty.*

16. The same conclusion is dictated by *consideration of the necessary coherence of the system of judicial protection established by the Treaty*. In that regard it must be observed that requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the Community institutions. As the Court pointed out in its judgment of 23 April 1986 in Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339), 'in Articles [263] and [277], on the one hand, and in Article [267], on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'.

17. Since Article [263] gives the court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice". (emphases added)

The invalidation of CFSP acts by Member States' courts would have implications comparable to those evoked in *Foto-Frost* as regards the unity of the EU legal order and legal certainty. This could indeed explain the Court's implicit position on Member States' courts in Opinion 2/13. That said, how could the *Foto-Frost* solution operate in a situation where the Court of Justice has *no* jurisdiction? How can it guarantee the unity of the EU legal order, and particularly the uniformity of application of CFSP rules, if the Court cannot review those rules in the first place? Shouldn't "the necessary coherence of the system of judicial protection established by the Treaty" require that, if the Court does not have the exclusive jurisdiction to declare void certain CFSP acts, the power to declare such acts invalid cannot be reserved to it? AG Kokott seems to think so:

"in the context of the CFSP, the Court of Justice cannot claim its otherwise recognised monopoly on reviews of the legality of the activities of EU institutions, bodies, offices and agencies. The settled case-law of the Court, stemming from the judgment in *Foto-Frost*, cannot, therefore, in my view, be applied to the CFSP. Unlike in supranational areas of EU law, there is no general principle in the CFSP that only the Courts of the EU may review acts of the EU institutions as to their legality".³²

³² View of Advocate General Kokott, cit., para. 100.

Admittedly, the *Foto-Frost* approach could still apply to certain CFSP-related situations. Member States' courts would thus be precluded from invalidating CFSP acts that fall under the Court of Justice's jurisdiction, at least if the preliminary ruling procedure was allowed in such situations. But for CFSP-related cases falling outside the scope of Art. 275, para. 2, TFEU, Member States' courts could not be prevented from exercising what remains their judicial power. To be sure, they can always invalidate the national measure implementing the CFSP act on the grounds that it violates fundamental rights.³³ In this context, EU principles and rules, including the Charter of Fundamental Rights are of relevance given that the Member State would be acting within the scope of EU law within the meaning of Art. 51, para. 1, of the Charter. But, beyond the national implementation measures, Member States' courts, *qua* EU courts, are arguably able to control the validity of CFSP acts as such.

Indeed, the Court of Justice may assist the national judge's review of a CFSP act, or its national implementation, through the preliminary ruling procedure. In particular, it may provide interpretation of any EU law provisions, such as a provision of the Charter, which would be relevant for deciding on the case at hand. After all, the limits enshrined in Art. 275, para. 2, TFEU cannot entail restrictions on the Court's jurisdiction in relation to other (i.e. non-CFSP) domains of EU law without potentially breaching the rule of Art. 40, para. 1, TEU,³⁴ while negating the *exceptional* nature of the judicial arrangements of Art. 275 TFEU, and their consequent narrow interpretation.³⁵

In sum, there are grounds to support Member State courts' involvement, as EU courts, in exercising complementary judicial control over the CFSP, where and as long as the Court of Justice is not allowed to exercise it itself. That this approach involves complications for the functioning of the legal order cannot in itself disqualify the only judicial protection against CFSP acts that is available under EU law as it stands. The contrary would amount to a denial of legal protection which would be equally problematic for the EU legal order, based as it is on the rule of law.³⁶

Indeed, the implications of a decentralised judicial control might be less damaging than a judicial review by national courts limited to the domestic implementation measures. While in the latter case, national courts would be adjudicating by reference to national and EU law, in the former situation, they would review the legality of the

³³ The High Administrative Court of Nordrhein Westfalen was asked to rule on the alleged responsibility of Germany for the transfer of suspected Somali pirates to Kenya, carried out in the framework of the EUNAVFOR Atalanta mission (Oberverwaltungsgericht NRW, 4 A 2948/11, 18 September 2014).

³⁴ See note 9 above.

³⁵ As mentioned above, the Court of Justice considered at para. 70 of its *Mauritius* judgment, cit., that "the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, and *they must, therefore, be interpreted narrowly*" (emphasis added).

³⁶ See Art. 2 TEU, and recently e.g. *Maximilian Schrems*, cit., para. 60.

CFSP measure on the basis of EU law only, including the Charter. In other words, the shared power of national courts in exercising judicial review of CFSP acts may contribute to securing the primacy of EU norms, including the Charter, in situations where the Court cannot ascertain it itself.³⁷

V. CONCLUDING REMARKS

As with any other area of EU law, the development of the CFSP is subject to the obligation to respect EU fundamental rights. What distinguishes it from other EU policy spheres essentially lies in its procedural and institutional arrangements in the form *inter alia* of the circumscribed jurisdiction of the European Court of Justice. Although limited, the Court's jurisdiction nevertheless plays a significant part in ensuring that fundamental rights are respected in the context of CFSP, particularly since such judicial limitation has been interpreted as an exception to the general jurisdiction rule, and as such understood restrictively. Moreover, Member States' judiciaries are fully part of the EU judicial system, acting as "guardians of (the) legal order and the judicial system of the (EU)" alongside the Court of Justice, particularly where the latter cannot intervene.

This specific joined involvement of EU and national courts in ensuring that fundamental rights are respected in the CFSP challenges the Court's allegation in Opinion 2/13 that accession to the ECHR "would effectively entrust the judicial review of [certain CFSP] acts, actions or omissions on the part of the EU exclusively to a non-EU body". It points to an inconsistency in the Court's articulation of the EU judicial architecture, and a failure to draw out the implications of the Lisbon Treaty, in terms of further integration of the CFSP in the EU legal order.

Admittedly, thorny questions remain to be addressed for such a decentralised EU judicial protection of fundamental rights in CFSP to operate and effectively, having in mind the legitimate concerns voiced by the Court of Justice in *Foto-Frost*. Leaving aside the question of whether national courts would readily embrace such a EU role, the effects of their decisions invalidating CFSP acts would have to be meticulously spelled out. Where there is a will...

³⁷ In this respect, see Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni v. Ministero Fiscale*.



ARTICLES

SECESSIONS FROM EU MEMBER STATES: THE IMPERATIVE OF UNION'S NEUTRALITY

DIMITRY KOCHENOV* AND MARTIJN VAN DEN BRINK**

TABLE OF CONTENTS: I. Introduction. – II. A word about the artificiality of secessions' exceptionalism. – III. The principle of democracy and its limits. – IV. Secessions and the *ethos* of European integration. – V. How to approach a seceded territory. – VI. Conclusion.

ABSTRACT: We argue that EU law and the *ethos* of European integration, premised on inclusiveness and the taming of the State requires the Union to remain neutral in the context of the permutations of statehood at the national level leading to the emergence of the new State entities in Europe. We show that the matter of permutations of statehood is not new or exceptional, unlike what is sometimes claimed, and demonstrate that the EU is not to blame for facilitating the viability of newly-emerging States in Europe, since this is one of the natural bi-products of the very nature of the Union. In this context intervening into national constitutional secession politics and making threats to prevent the newly-emerging States from joining the EU would not only be an *ultra vires* action for the EU to take. It will also be both counter-productive and deprived of any purpose, which leads us to conclude that EU law should be deployed as inventively as will be necessary to ensure continued membership in the EU of the entities seceding from the current Member States.

KEYWORDS: secessions – EU integration – EU membership – accession – *ethos* EU.

I. INTRODUCTION

This article argues that there are no legal grounds for the European Union (EU) to take sides in the context of the internal processes within the Member States potentially leading to their territorial reconfiguration and even eventual secessions of their parts, re-

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sulting in the articulation of new statehood on the European continent.¹ When confronted with the demands of either the Member States' governments or the secessionist regions to support their cause, EU's neutral position (presuming that the process of the territorial reframing of statehood is taking place in a non-violent fashion and in full conformity with the law)² is crucial for the success of democracy and the rule of law in the context of the strict observance of the principle of good neighbourly relations in Europe.³ Importantly, such neutrality necessarily implies assisting both parties (while acting strictly within the sphere of competences of the Union, of course) to come as close as possible to the attainment of the Union objectives of peace, prosperity and democratic development embodied in the values, which the EU together with its Member States draws upon.⁴ It goes without saying that such assistance can take a variety of different forms, ranging from possible necessary accommodation of the special needs of a particular region in the process of devolution (which has traditionally been the case with the EU's Overseas, for instance,⁵ where such accommodation is elevated to the

¹ For analyses of the legal mechanics of secessions under international law, see, e.g., C. WALTER, A. VON UNGERN-STERNBERG, K. ABUSHOV (eds), *Self-Determination and Secession in International Law*, Oxford: Oxford University Press, 2014; A. TANCREDI, *La secessione nel diritto internazionale*, Padova: CEDAM, 2001. See also: Supreme Court of Canada, *Reference re Secession of Quebec*, opinion of 20 August 1998, paras 103-104. For a thoughtful analysis of this case see: S. CHOUDRY, R. HOWSE, *Constitutional Theory and the Quebec Secession Reference*, in *Canadian Journal of Law and Jurisprudence*, 2000, p. 143 *et seq.* For an overview of the thorny issues surrounding secessions in the EU context, see, e.g., S. DOUGLAS-SCOTT, *How Easily Could an Independent Scotland Join the EU?*, in *University of Oxford Legal Research Paper Series*, 2014; C. CLOSA (ed.), *Troubled Membership: Dealing with Secession from a Member State and Withdrawal from the EU*, in *EUI Working Paper*, 2014/91; D. KENEALY, S. MACLENNAN, *Sincere Cooperation, Respect for Democracy and EU Citizenship: Sufficient to Guarantee Scotland's Future in the European Union?*, in *European Law Journal*, 2014, p. 591 *et seq.*; N. MACCORMICK, *Is there a Constitutional Path to Scottish Independence?*, in *Parliamentary Affairs*, 2000, p. 721 *et seq.*; D. EDWARD, *EU Law and the Separation of Member States*, in *Fordham International Law Journal*, 2013, p. 1151 *et seq.*; N. WALKER, *Beyond Secession? Law in the Framing of the National Polity*, in *University of Edinburgh Europa Working Paper*, 2014/11.

² Such as was the process of the Scottish secessionist referendum, for instance. The Edinburgh agreement, signed by the Scottish and United Kingdom (UK) government, on the referendum concerning Scottish independence provides proof of this. The text of the Agreement is available at www.gov.scot. See also: M. KEATING, *Scotland and the EU: Comment by MICHAEL KEATING*, in *Verfassungsblog*, 9 September 2014, www.verfassungsblog.de.

³ On the latter, see E. BASHESKA, *The Good Neighbourliness Principle in EU Law*, PhD Thesis 2014; see also E. BASHESKA, *The Position of the Good Neighbourliness Principle in International and EU Law*, in D. KOCHENOV, E. BASHESKA (eds), *Good Neighbourliness in the European Legal Context*, Leiden-Boston: Brill-Nijhoff, 2015.

⁴ As reflected in Art. 2 of the Treaty on European Union (TEU), among other instruments. On the legal nature of this provision, see, C. HILLION, *Overseeing the Rule of Law in the EU: Legal Mandate and Means*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

⁵ Importantly, such accommodation in the context of the Overseas happens both *vis-à-vis* the regions within the ambit of the *acquis* (so-called Outermost Regions) and the territories under the sovereignty of the Member States where the principle of the application of the *acquis* in full does not apply (so-

rank of a principle of law)⁶ to providing newly-minted polities with full wholehearted assistance in joining the Union, should they so desire.⁷

Taking sides in the national secession/territorial rearrangement debates by preventing and/or fostering (either directly or indirectly) particular outcomes in the context of the national constitutional rearrangements, is simply not among EU's constitutional prerogatives: intervening into the resolution of these issues, thus shaping the Member States with no regard to their internal constitutional process, is not merely *ultra vires* action: it amounts to tyranny. Evidently, neutrality is, bearing in mind the political salience of secessions, a matter of perspective, which will be perceived differently by the opponents and advocates of separation. To claim, however, that it would be "extremely difficult if not impossible"⁸ for a seceded territory to join the EU clearly violates the imperatives of neutrality. Taking into account the palpable impact of the EU's reactions on voting behavior in secession referendums,⁹ the EU should shy away from getting involved in the national debate, but, instead, let it run its due course and respect the democratic process' outcome.

As is clear by now, this article embodies a principled disagreement with the dominant position on the issue of secessions, espoused, *inter alia*, by Joseph Weiler,¹⁰ but

called Associated Countries and Territories). For an overview, see, e.g., D. KOCHENOV, *The Application of EU Law in the EU's Overseas Regions, Countries, and Territories after the Entry into Force of the Treaty of Lisbon*, in *Michigan State International Law Review*, 2012, p. 669 *et seq.* (and the literature cited therein).

⁶ The principle of accommodation is enshrined in the Treaties through Arts 52, para. 2, TEU, 349, 355 TFEU. See also K. MÜLLER, 'Concentric Circles' of the Periphery of the European Union, in *Australian Journal of Politics & History*, 2002, p. 322 *et seq.* Dock dues are, among numerous others, a great example of such accommodations: M. SLOTBOOM, *L'application du Traité CE au commerce intraétatique? Le cas de l'octroi de mer*, in *Cahiers de Droit Européen*, 1996, p. 9 *et seq.* See also P. PUISOCHET, *Aux confins de la Communauté européenne: les régions ultrapériphériques*, in G.C. RODRÍGUEZ IGLESIAS *et al.* (eds), *Mélanges en hommage à Fernand Schockweiler*, Baden-Baden: Nomos, 1999, p. 491 *et seq.*, pp. 504–506. For a good summary of the development of the *octroi de mer* case-law of the Court of Justice (CJEU) see also Court of Justice, judgment of 7 November 1996, case C-126/94, *Société Cadi Surgelés, Société Sofrigu, Société Sofroi and Société Sofriber v. Ministre des Finances and Directeur général des douanes*. See also judgment of 12 February 1992, case C-260/90, *Leplat*. On the derogations more generally, see, e.g. D. KOCHENOV, *De praktische toepassing van Artikel 299 als grondgebied voor derogaties*, in H.E. BRÖRING *et al.* (eds), *Schurende rechtsordes: Over juridische implicaties van de UPG-status voor de eilandgebieden van de Nederlandse Antillen en Aruba*, Groningen: Europa Law Publishing, 2008.

⁷ For a lucid analysis of the rules on joining the EU, see, S. DOUGLAS-SCOTT, *How Easily Could an Independent Scotland Join the EU?*, cit., p. 6.

⁸ These were Barroso's much criticised comments on the Scottish secession debate, available at news.bbc.co.uk. For a critique: N. WALKER, *Hijacking the Debate*, in *Blog of the UK Constitutional Law Association*, 18 February 2014, www.ukconstitutionallaw.org.

⁹ N. WALKER, *Beyond Secession? Law in the Framing of the National Polity*, cit., footnote 13 and accompanying text.

¹⁰ J.H.H. WEILER, *Scotland and the EU: A Comment by JOSEPH H.H. WEILER*, in *Verfassungsblog*, 10 September 2014, www.verfassungsblog.de. His view on Catalonia is very similar. J.H.H. WEILER, *Catalonian*

also finding support with the EU institutions,¹¹ that the EU should prevent secessionist claims at the national level from succeeding through an effective politics of blocking the processes of successfully-formed new States' inclusion into the Union, thereby making secessions unattractive and guaranteeing a stable number of Member States through what we see as an indirect coercive intervention with the constitutional politics at the national level. The demands that the Union stay out of the heated political battles around such thorny issues seem to be most justified. The goal of the article is to explain, clarify and defend this position.

We proceed in four steps. Firstly, we draw on a number of historical examples in Europe and elsewhere to demonstrate beyond any doubt how common the mutations of statehood are, secessions included. Indeed, (much) more than half of what used to be the founding Member States' territory has left their sovereignty since the creation of the European Communities.¹² Moreover, a significant number of the Member States of

Independence and the European Union, in *Blog of the European Journal of International Law*, 20 December 2012, www.ejiltalk.org.

¹¹ Barroso's comments on the Scottish secession debate, cit. Later, Juncker, Barroso's successor, toned down those claims: www.scotsman.com. However, Juncker, then still in his capacity as leader of the European People's Party (EPP), has made similar remarks as Barroso with respect to the independence movement in Catalonia, saying that "[t]hose who believe that Europe would accept an independent Catalonia, are fundamentally wrong". For the interview in Spanish see *Juncker: "Una Cataluña independiente no sería aceptada en Europa"*, in *abc.es*, 28 April 2014, www.abc.es. The Commission letters recently sent in response Santiago Fisas' (Member of the European Parliament of the Popular Party) question, asking whether the Commission would recognise an independent Catalan State created by a declaration that would not respect the Spanish constitution also demonstrates the EU's ambivalence in this situation. While the English version states that "[i]t is not for the Commission to express a position on questions of internal organisation related to the constitutional arrangements of a particular Member State", the Spanish version adds another nine sentences, which, when translated, read as follows: "The Commission recalls in this context that, in accordance with the provisions of Article 4, paragraph 2, TEU, the Union must respect the 'national identities [of Member States], inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the state'. A Member State's territory is determined only by national constitutional law, and not by the decision of an automatic parliament contrary to the constitution of that state". The letters are available at www.euobserver.com 24 September 2015, "*Juncker's answer on Catalonia grew in translation*". The Catalan situation is different, of course, from the Scottish due to the unconstitutionality of the Catalanian independence claims: R. RINCÓN, *El Constitucional anula la declaración soberanista por unanimidad*, in *El País*, 2 December 2015, www.politica.elpais.com.

¹² Besides of course Algeria which was fully incorporated into the French Republic at the inception of the Communities and the Netherlands East Indies and New Guinea, the Member States possessed a variety of territories around the world and it was not the intention of the Communities to let these territories go. Indeed, their incorporation into the internal market in the mid - to long-term future was a crucial condition for the French participation in the European integration project: D. CUSTOS, *Implications of the European Integration for the Overseas*, in D. KOCHENOV (ed.), *EU Law of the Overseas*, Alphen aan den Rijn: Kluwer Law International, 2011, p. 91 *et seq.* Following Ziller's helpful compilation, the Member States' territories then included: the Belgian territories of Congo and Rwanda-Burundi, Italian protectorate of

the EU are direct products of recent permutations of statehood, some of them gaining statehood with the clear support of the Union.¹³ The same applies to some candidate countries.¹⁴ To say that secessions are somewhat extraordinary would thus be a serious and unhelpful misrepresentation of reality. They are a day-to-day part of the life of the international community¹⁵ (Section I). Having thus set the ground for the discussion and dismissed the false exceptionalism of secessions, the article moves on by explaining the importance of the principle of democracy as a foundational value for the EU, as well as its limits. It is suggested that those, who believe the EU should not embrace seceded territories do not take the principle of democracy sufficiently seriously (Section III). If a seceded State desires to join the EU, the need to accommodate the people's will is not premised only upon the EU's foundational values, but also follows from the EU's historic *ethos* of openness to new members¹⁶ (Section IV). What is required, therefore, in the case of legally and constitutionally sound secessions is that the EU employ all the legal and political tools at its disposal to prevent a (temporary) termination of the enjoyment of rights stemming from the seceding territory's membership of the EU as part of the Member State it is about to leave, would the people of the newly emerged State express the will to remain part of the EU. In full agreement with Sionaidh Douglas-Scott's crisp argument,¹⁷ we believe that a large number of legal-political tools at the disposal of the Union, coupled with good will of all the actors involved makes it legally possible to en-

Somalia, to the Netherlands New Guinea, and to the French equatorial Africa (Côte-d'Ivoire, Dahomey, Guinea, Mauritania, Niger, Senegal, Sudan, and Upper Volta), French East Africa (Moyen-Congo (the future Central African Empire beloved by Giscard d'Estaing), Gabon, Oubangui-Chari and Chad), protectorates Togo and Cameroon, Comoros Islands (Mayotte, separated from them is now an outermost region of the EU), Madagascar, Côte Française des Somalis. Following the UK accession, the list of the associated countries and territories became much longer, including (besides the countries and territories still on the list) Bahamas, Brunei, Caribbean Colonies and Associated States (Antigua, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, St. Vincent and Anguilla, British Honduras), Gilbert and Ellis Islands, Line Islands, the Anglo-French Condominium of the New Hebrides, Solomon Islands, and Seychelles. J. ZILLER, *L'Union européenne et l'outre-mer*, in *Pouvoirs*, 2005, p. 145 *et seq.*, pp. 146-147.

¹³ Which is attested, for instance, by the work of the Badinter Commission: F. HOFFMEISTER, *The Contribution of EU Practice to International Law*, in M. CREMONA (ed.), *Developments in EU External Relations Law*, Oxford: Oxford University Press, 2008, p. 37 *et seq.*

¹⁴ In one example, it was due to the EU's efforts that a deal laying down the rules concerning the rules of the Montenegrin independence referendum was brokered between the pro- and anti-independence movements. Following EU recommendations, it was decided that for independence to be gained, a 55 per cent majority was required. For a detailed analysis of the negotiations see: K. FRIIS, *The Referendum in Montenegro: The EU's Postmodern Diplomacy*, in *European Foreign Affairs Review*, 2007, p. 67.

¹⁵ A. TANCREDI, *La secessione nel diritto internazionale*, cit.

¹⁶ For a seminal early treatment, see P. SOLDATOS, G. VANDERSANDEN, *L'admission dans la CEE – Essai 'interprétation juridique'*, in *Cahiers de Droit Européen*, 1968, p. 674 *et seq.*; D. KOCHENOV, *EU Enlargement and the Failure of Conditionality*, Alphen aan den Rijn: Kluwer Law International, 2008, chapter 1 (and the literature cited therein).

¹⁷ S. DOUGLAS-SCOTT, *How Easily Could an Independent Scotland Join the EU?*, cit.

sure that no such termination comes about and all the efforts are taken to ensure continuity (Section V). The conclusion is simple: secessions are ordinary events in international life, which are up to the polities themselves to manage. EU's interventions into this process (no matter whether these are active, or passive in nature) should thus necessarily be frowned upon as uncalled for from the point of view of the principle of democracy as well as the *ethos* of the Union, its value-laden nature considered and, importantly, would lack any legal basis.

II. A WORD ABOUT THE ARTIFICIALITY OF SECESSIONS' EXCEPTIONALISM

Secession from a Member State of the European Union is nothing new. History knows plentiful examples of what has at times erroneously been portrayed as a novel problem. One should only recall the origins of the EU as a Eurafrican Union¹⁸ and look at the contemporary maps: from Vanuatu to Congo, from Somalia and Suriname, European sovereignty has receded, bringing with it exclusion from the internal market¹⁹ and the European Convention of Human Rights.²⁰ Hailing "the development of the African continent" as the "essential task" of Europe,²¹ the Schuman Declaration (Europe's mischievous messianic document)²² clearly belongs to a different era, when decolonization was perceived as an impossibility and European nations' power over the Overseas domin-

¹⁸ P. HANSEN, S. JONSSON, *Building Eurafrica: Reviving Colonialism through European Integration, 1920-60*, in K. NICOLAIDIS, B. SEBE, G. MAAS (eds), *Echoes of Empire: Identity, Memory, and Colonial Legacies*, London: I.B. Tauris, 2015; P. HANSEN, S. JONSSON, *Eurafrica: The Untold History of European Integration and Colonialism*, London: Bloomsbury Academic, 2014; P. HANSEN, S. JONSSON, *Bringing Africa as a "Dowry to Europe": European Integration and the Eurafrican Project*, in *Interventions*, 2011, p. 443 *et seq.*; P. HANSEN, S. JONSSON, *Imperial Origins of European Integration and the Case of Eurafrica: A Reply to Gary Marks' 'Europe and Its Empires'*, in *Journal of Common Market Studies*, 2012, p. 1028 *et seq.*; D. CUSTOS, *Implications of the European Integration for the Overseas*, cit.

¹⁹ All the Cotonou agreements notwithstanding. K. ARTS, *ACP-EU Relations in a New Era: The Cotonou Agreement*, in *Common Market Law Review*, 2003, p. 95 *et seq.*; S. BARTELT, *ACP-EU Development Cooperation at a Crossroads? One Year after the Second Revision of the Cotonou Agreement*, in *European Foreign Affairs Review*, 2012, p. 1 *et seq.*

²⁰ A. HALLO DE WOLF, *The Application of Human Rights Treaties in Overseas Countries and Territories*, in D. KOCHENOV (ed.), *EU Law of the Overseas*, cit. See, however, European Court of Human Rights, judgment of 28 April 2009, no. 11890/05, *Bijelić v. Montenegro and Serbia*, where the Court found that the Convention might be deemed as continuously in force, thereby applying to a seceded entity: an approach unknown in the times of decolonisation.

²¹ The relevant paragraph of the Declaration of 9 May 1950 reads as follows: "With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent". Full text is available at www.robert-schuman.eu.

²² J.H.H. WEILER, *Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay*, in J. DICKSON, P. ELEFTHERIADIS (eds), *Philosophical Foundations of European Union Law*, Oxford: Oxford University Press, 2012, p. 137 *et seq.*

ions was presumed eternal, destined to last.²³ The sovereign territories of the majority of the founding Member States of the Union have shrunk in the most radical fashion.²⁴ The same applies to numerous Member States to have joined later:²⁵ British colonial law was denigrated from one of the key areas of law into the relative obscurity of a mere panopticum of exotic topics.²⁶ The territorial shrinking in question did not only happen due to the elevation to statehood of the colonial possessions²⁷ – these were, in many respects, separate legal entities²⁸ with their own law and nationality²⁹ – but also, at least in one important example, through splitting the Member States proper: Algeria *was* France.³⁰ Besides, some territories were said to have “left the EU”,³¹ while at the same time formally remaining part of a Member State. While some actually never “joined”,³² others constantly fluctuated (or at least appeared to be fluctuating)³³ be-

²³ P. HANSEN, S. JONSSON, *Building Eurafrica: Reviving Colonialism through European Integration, 1920-60*, cit.; P. HANSEN, S. JONSSON, *Eurafrica: The Untold History of European Integration and Colonialism*, cit.; P. HANSEN, S. JONSSON, *Bringing Africa as a “Dowry to Europe”: European Integration and the Eurafrican Project*, cit.; P. HANSEN, S. JONSSON, *Imperial Origins of European Integration and the Case of Eurafrica: A Reply to Gary Marks’ ‘Europe and Its Empires’*, cit.

²⁴ Germany, of course, is the most radical counter-example: Treaty on the Establishment of German Unity of 31 August 1990, Art. 1; M. BOTHE, *The German Experience to Meet the Challenges of Reunification*, in A.E. KELLERMAN *et al.* (eds), *EU Enlargement: The Constitutional Impact at EU and National Level*, The Hague: Asser Press, 2011, p. 435 *et seq.*; E. GRABITZ, *L’unité allemande et l’intégration européenne*, in *Cahiers de Droit Européen*, 1991, p. 3 *et seq.*; J.-P. JACQUÉ, *L’unification de l’Allemagne et la Communauté européenne*, in *Revue générale de droit international public*, 1990, p. 997 *et seq.*

²⁵ For the Europe-wide take, see, D. KOCHENOV (ed.), *EU Law of the Overseas*, cit.; R. ADLER-NISSEN, U. PRAM GAD (eds), *European Integration and Postcolonial Sovereignty Games: The EU Overseas Countries and Territories*, London: Routledge, 2013.

²⁶ I. HENDRY, S. DICKINSON, *British Overseas Territories Law*, Oxford: Hart Publishing, 2011.

²⁷ Thus, for the first time in history, making statehood the dominant form of the legal-political organisation of the world: P. KJÆR, *Constitutionalism in the Global Realm: A Sociological Approach*, London: Routledge, 2014.

²⁸ See, e.g. the classic treatise on British colonial law by Sir Kenneth Roberts-Wray, outlining these complexities with great clarity: K. ROBERTS-WRAY, *Commonwealth and Colonial Law*, London: Stevens and Stevens, 1966.

²⁹ For an example from the Dutch East Indies law, see, e.g. B. DE HART, *De verwerpelijste van alle gemengde huwelijken. De Gemengde Huwelijken Regeling Nederlands-Indië 1898 en de Rijkswet op het Nederlandschap 1892 vergeleken*, in *Jaarboek voor Vrouwengeschiedenis*, 2001, p. 60 *et seq.*

³⁰ Algeria was fully incorporated first following the formation of the Second Republic (1848). G. PERVILLÉ, *La politique algérienne de la France, de 1830 à 1962*, in *Le Genre humain*, 1997, p. 27 *et seq.*

³¹ Treaty amending, with regard to Greenland, the Treaties establishing the European Communities of 13 March 1984 (The Greenland Treaty); F. WEISS, *Greenland’s Withdrawal from the European Communities*, in *European Law Review*, 1985, p. 173 *et seq.* “Leaving” is not a correct characterisation of this treaty’s key legal effect: Greenland simply changed its status under the Treaties, becoming an Overseas Country or Territory in the sense of Annex II, which means that a lot of EU law applied there.

³² Such examples include, *inter alia*, Macao, Hong Kong (B. HOOK, M. SANTOS NEVES, *The Role of Hong Kong and Macau in China’s Relations with Europe*, in *The China Quarterly*, 2002, p. 108 *et seq.*), Faroe Islands (Art. 355, para. 5, lett. a), TFEU), Suriname (which decided not to join the Communities when the

tween *in* and *out*.³⁴ Some opted to stay in, the decolonization drive notwithstanding.³⁵ The place of global-territorial ambitions and failed imperial narratives in the evolution of the European Union (marked by total scholarly silence for decades) is finally studied in a serious fashion.³⁶

Turning to Europe *proper* (now conceived of geographically, not through its “mission civilisatrice”, as half-hearted, as it was Quichotean), a simple glance at the statehood of the current Member States suffices to make a basic point: mutations of statehood (in different forms that they may take)³⁷ are responsible for the creation / consolidation of a number of the Member States of the EU, from the decolonization context spurring Malta and Cyprus into existence to the regaining of statehood by the Baltic

Netherlands Antilles asked to be included as Overseas Countries or Territories, UK Sovereign Base Areas in Cyprus (SBAs) (Art. 355, para. 5, lett. b), TFEU); S. LAUHLÉ-SHAËLOU, *The Principle of Territorial Exclusion in the EU: SBAs in Cyprus – A Special Case of Sui Generis Territories in the EU*, in D. KOCHENOV (ed.), *EU Law of the Overseas*, cit., p. 153 *et seq.* Some did join at a later stage compared with the ratification of the Treaties by their “mother country”. The examples include the former Netherlands Antilles (Convention to amend the Treaty setting up the European Economic Community with the object of making the special system of Association defined in Part Four of that Treaty applicable to the Netherlands Antilles of 13 November 1962) and Canary Islands (See, Regulation (EEC) No 1911/1991 of the Council on the application of the provisions of Community law to the Canary Islands).

³³ Saint-Pierre-et-Miquelon is the best example: France claimed to have changed the status of the territory unilaterally on a number of occasion. It is not entirely clear whether such unilateral change (which was entirely in line with the Treaty text at the time) actually resulted in a difference in treatment vis-à-vis the Communities. The Commission claimed it did: Written Question No 400/76 by Mr. Lagorce to the Commission concerning the situation of the islands Saint-Pierre-and-Miquelon, para. 1.

³⁴ For a detailed analysis of the case of Saint-Pierre-et-Miquelon, see, D. KOCHENOV, *The Application of EU Law in the EU's Overseas Regions, Countries, and Territories after the Entry into Force of the Treaty of Lisbon*, cit., note 321.

³⁵ Mayotte, breaking away from the Comores is a great example, as is Aruba, which was being pushed out of the Kingdom by the Dutch government, but managed to remain part of the Kingdom of the Netherlands. See, on Mayotte, H. BÉRINGER, *Départementalisation de Mayotte: Un changement de régime statutaire aux enjeux internationaux*, in *Revue Juridique et Politique*, 2010, p. 176 *et seq.*; H. BÉRINGER, *La question de Mayotte devant le Parlement français*, in O. GOHIN P. MAURICE (eds), Paris: L.G.D.J., 1996, p. 199 *et seq.* On Aruba, see, D. KOCHENOV, *Le droit européen et le fédéralisme néerlandais: Une dynamique en évolution progressive*, in J.-Y. FABERON, V. FAYAUD, J.-M. REGNAULT (eds), *Destins des collectivités politique d'Océanie*, Marseille: Presses Universitaires d'Aix-Marseille, 2012.

³⁶ K. NICOLAIDIS, B. SEBE, G. MAAS (eds), *Echoes of Empire: Identity, Memory, and Colonial Legacies*, London: I.B. Tauris, 2015. The EU, for some, is an Empire too, and the arguments supporting this claim are worthy of a serious consideration: J. ZIELONKA, *Europe as Empire: The Nature of the Enlarged European Union*, Oxford: Oxford University Press, 2007.

³⁷ These could amount to the denunciation of pre-existing founding treaties forming union states; the emergence of dual statehood under pressure from the winning powers in the post-war context; restoration of independence lost at a certain point in the past, and so forth. What is relevant for us here is the general dynamic nature of statehood's mutation and (re)emergence, which is certainly observable in the contemporary context.

States,³⁸ the split between the Czech and the Slovak Republics,³⁹ and the articulation of Slovenia and Croatia, as well as the united Germany, following the incorporation of the German Democratic Republic (DDR) and Berlin (West) into the Federal Republic,⁴⁰ and France, with Algeria leaving.⁴¹ Some of these sovereignties are fictitious: Cyprus does not control a good half of its territory, with one of the most important borders in Europe being branded a "green line";⁴² Algeria was only excluded from the Treaties with the Maastricht revision – many years (and many chances to adjust the text to reality) following independence in 1962. Crucially, the EU, as well as its individual Member States, played an important role in bringing about such mutations of statehood not only with regard to the entities which came to be Member States,⁴³ but also other countries, including loose protectorates that the EU has created.⁴⁴

All in all, thus, two important lessons from the above emerge. Firstly, mutations of statehood are not exceptional. To present them as rare would be a mistake, in the "historical time" at least. A large number of Member States spent the longest share of their "life" (especially in their contemporary borders and humbler, post-imperial emanations) as Members of the EU, boasting little (sometimes virtually none) of recent history of

³⁸ For a meticulous analysis, see P. VAN ELSUWEGE, *From Soviet Republics to EU Member States*, Leiden-Boston: Brill-Nijhoff, 2008. See also: I. ZIEMELE, *State Continuity and Nationality: The Baltic States and Russia – Past, Present and Future as Defined by International Law*, Leiden-Boston: Brill-Nijhoff, 2005; A. DIMITROVS, V. POLESHCHUK, *Kontinuitet kak osnova gosudarstvennosti i ètnopolitiki v Latvii i Èstonii*, in V. POLESHCHUK, V. STEPANOV (eds), *Ètnopolitika stran Baltii*, Moscow: Nauka, 2013.

³⁹ For an overview of the legal implications of the dissolution of Czechoslovakia, see, M. PALOUS, *Questions of Czech Citizenship*, in A. LIEBICH, D. WARNER, J. DRAGOVIC (eds), *Citizenship East and West*, London: Routledge, 1995, p. 141 *et seq.* For the general assessment of secessions in the context of the East-European eruption of state-making, see, C.R. SUNSTEIN, *Constitutionalism and Secession*, in *University of Chicago Law Review*, 1991, p. 633 *et seq.*

⁴⁰ R.W. PIOTROWICZ, *The Status of Germany in International Law: Deutschland über Deutschland?*, in *International and Comparative Law Quarterly*, 1989, p. 609 *et seq.*

⁴¹ P. LAFFONT, *Histoire de la France en Algérie*, Paris: Plon, 1979.

⁴² S.L. SHAELOU, *Market Freedoms, Fundamental Rights, and the European Public Order: Views from Cyprus*, in *Yearbook of European Law*, 2011, p. 298 *et seq.*; N. SKOUTARIS, *The status of Northern Cyprus under EU law: a comparative approach to the territorial suspension of the acquis*, in D. KOCHENOV (ed.), *EU Law of the Overseas*, cit., p. 401 *et seq.*

⁴³ F. HOFFMEISTER, *The Contribution of EU Practice to International Law*, cit.

⁴⁴ On the role of the EU in Kosovo see: W. KOETH, *State Building without a State: The EU's Dilemma in Defining Its Relations with Kosovo*, in *European Foreign Affairs Review*, 2010, p. 227 *et seq.*; S. ROZÉE, *Order-Maintenance in Kosovo: The EU as an Increasingly Comprehensive Police Actor?*, in *European Foreign Affairs Review*, 2015, p. 97 *et seq.*; S. ECONOMIDES, J. KER-LINDSAY, *Forging EU Policy Unity from Diversity: The 'Unique Case' of the Kosovo Status Talks*, in *European Foreign Affairs Review*, 2010, p. 495 *et seq.* For Bosnia see: A. VOH BOSTIC, *The Role of the European Union's Expert Assistance in the Process of Peace-Building: The Case of Bosnia and Herzegovina*, in *European Foreign Affairs Review*, 2010, p. 209 *et seq.*; M.A. VACHUDOVA, *The Thieves of Bosnia: The Complicated Legacy of the Dayton Peace Accords*, in *Foreign Affairs*, 24 February 2014, www.foreignaffairs.com.

statehood without, the EU unquestionably emerging as an essential part of what they are as sovereign States.⁴⁵

Besides the “normality” of secessions and territorial fluctuations as testified by their commonality and omnipresence, secondly, history teaches us also the lesson of flexibility of the legal arrangements in many of these cases. This flexibility definitely includes EU law and international law: from citizenship rules,⁴⁶ to adaptations to the unique circumstances of each particular case: the Badinter commission, just as the adaptations of the pre-accession regime to accept divided Cyprus, in ephemeral control of the island,⁴⁷ are the cases in point. These lessons should be taken into account in full while interpreting the limits of the Treaties in dealing with secessions and accessions.

Now the potential permutations of statehood (secessions in particular) are coming much closer to “home”, to the “centre”, leaving behind the confines of the colonial and Eastern European periphery, often disregarded by EU legal scholars as insignificant.⁴⁸ So does the scholarly debate.⁴⁹ It would be most naïf to believe that due to the “No” camp’s victory in the last year’s Scottish referendum,⁵⁰ the question of the future relationship with the EU of an independent Scotland has disappeared from the agenda for now. The jinni is out of the bottle. Consequently, precisely how the EU should approach secessionist movements’ calls for devolution and independence is a question that is as important as ever. It is abundantly clear that the issue is definitely staying on the agenda. A number of Member States still see movements that strive for secession. Catalonia in particular springs to mind, also Flanders, possibly the Basque country, but the Scottish referendum outcome also has not silenced those advocating Scottish independence; its call for independence might very well resurge, particularly so should the major-

⁴⁵ For an illuminating analysis of the place of statehood in the international legal landscape, which is frequently misunderstood, see P.F. KJÆR, *Constitutionalism in the Global Realm: A Sociological Approach*, cit.

⁴⁶ EU law honours the Member States’ determinations, for instance, of nationality for the purposes of EU law, which implies that non-nationals of the Member States could be considered EU citizens and vice versa, some nationals could be considered non-EU citizens. The German and the UK approaches to citizenship are particular cases in point, both tolerated by EU law: Court of Justice, judgment of 20 February 2001, case C-192/99, *The Queen v. Secretary of State for the Home Department ex parte Manjit Kaur*, para. 27. For a detailed analysis of this particular issue, see, e.g., D. KOCHENOV, A. DIMITROVS, *EU Citizenship for the Latvian ‘Non-Citizens’: A Concrete Proposal*, in *Houston Journal of International Law*, 2016, p. 101 *et seq.*

⁴⁷ E. BASHESKA, D. KOCHENOV, *Thanking the Greeks: The Crisis of the Rule of Law in EU Enlargement Regulation*, in *Southeastern Europe*, 2015, p. 392 *et seq.*

⁴⁸ D. KUKOVEC, *Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo*, in D. KOCHENOV, G. DE BÜRCA, A. WILLIAMS (eds), *Europe’s Justice Deficit?*, Oxford: Hart Publishing, 2015, p. 319 *et seq.*

⁴⁹ See for a wide range of arguments the by S. Douglas-Scott initiated discussion on the *Verfassungsblog*: S. DOUGLAS-SCOTT, *Scotland and the EU: Eleventh hour thoughts on a contested subject*, in *Verfassungsblog*, 17 September 2014, www.verfassungsblog.de.

⁵⁰ Of the 84.6 per cent of the eligible voters, 55.3 per cent voted in favour of the Union against 44.7 per cent in favour of independence. For an analysis, see, e.g. T. MULLEN, *The Scottish Independence Referendum*, in *Journal of Law and Society*, 2014, p. 627 *et seq.*

ity of the UK population decide to vote in favor of leaving the EU in the in-out referendum promised by the Tories.⁵¹ Also plentiful other regions in Romania, Slovakia, France, Italy, Greece and elsewhere come to mind. Some Member States are noted for playing with ethnonationalism of the kin-minorities across borders,⁵² thus contributing to the richness of the palette of challenges we are speaking about.

Crucially, however, the EU's own experience of State-creation through secessions in the Balkans and a welcoming attitude to newly-emerging States in the East of Europe seems to be entirely ignored by the on-going scholarly debate, leaving room to hypocrisy accusations, no doubt. While the EU (albeit quasi-unofficially) condones Kosovo statehood⁵³ and strongly ethno-nationalist experiments elsewhere,⁵⁴ EU officials proclaim that for Scots and Catalans, when independent, there might be no future within the EU. The debate about Western European secessions is thus entirely disconnected from the facts observable in practice.⁵⁵ This perspective, devoid of historical outlook is highly problematic, to say the least.

Even though no secession and secessionist movement is the same, making it difficult to draw comparisons between Scotland, Catalonia, Kosovo and the many other examples, the question what position the EU should adopt in the secessionist context is highly relevant. The argument developed here is that as long as secessions are legally and constitutionally sound the EU should not take sides in independence debates: blackmailing the secessionist regions into remaining parts of larger States is not the way forward, antithetical to the EU's values of democracy and the Rule of Law. Inspired by those values, the EU should adopt a neutral stance on the independence referenda, respect the will of the people eligible to vote, and recognize secessions that happened in accordance with the EU's constitutional principles, just as it has consistently done in the past in the cases of many of its Member States, helping to come up with such secessionist rules itself (which is a no small matter) thus fundamentally advancing, in the words of Frank Hoffmeister, the

⁵¹ On this and the UK referendum more generally: S. DOUGLAS-SCOTT, *A UK Exit from the EU: The End of the United Kingdom or a New Constitutional Dawn?*, in *Oxford Legal Studies Research Paper*, 2015/25; M. KEATING, *The European Dimension to Scottish Constitutional Change*, in *The Political Quarterly*, 2015, p. 208 *et seq.*; Editorial Comments, *Union Membership in Times of Crisis*, in *Common Market Law Review*, 2014, p. 1 *et seq.*; N. FORWOOD, *Chinese Curses, Lawyers' Dreams, Political Nightmares and New Dawns: Interesting Times for the UK's Relationship with the EU*, in *Cambridge Yearbook of European Legal Studies*, 2012, p. 83 *et seq.*

⁵² E.g. J.-M. ARAIZA, *Good Neighbourliness as the Limit of Extra-territorial Citizenship: The Case of Hungary and Slovakia*, in D. KOCHENOV, E. BASHESKA (eds), *Good Neighbourliness in the European Legal Context*, cit., p. 114 *et seq.*

⁵³ Communication COM(2009) 5343 of the Commission, *Kosovo Fulfilling its European Perspective*. At the moment Kosovo is designated as a potential membership candidate. Available at www.ec.europa.eu.

⁵⁴ On the systemic ethnic discrimination in Latvia and Estonia, see, e.g. D. KOCHENOV, V. POLESCHCHUK, A. DIMITROVS, *Do Professional Linguistic Requirements Discriminate? A Legal Analysis: Estonia and Latvia in the Spotlight*, in *European Yearbook of Minority Issues*, 2013, p. 137 *et seq.*

⁵⁵ J.H.H. WEILER, *Scotland and the EU: a Comment by JOSEPH H.H. WEILER*, cit.

development of international law on the matter.⁵⁶ This being said, criticism of grotesque mockery of allowing the people to speak out in order to cover-up military aggression should obviously be frowned upon and publically condemned.⁵⁷

Would the people of the newly emerged State express the will to remain part of the EU, moreover, the EU should aspire to employ all the available political and legal tools to ensure the continuation of EU membership and protect those citizens and companies that benefit from the internal market and important EU rights in other spheres from a temporary disapplication of the *acquis*. The EU's historic ethos of inclusion,⁵⁸ integration and reaching out to the other would be betrayed would the EU frustrate the accession of States that acquired independence through secession. Moreover, it will clearly amount to a reversal of a very consistent practice to date: even Kosovo (not a State yet, as far as the EU is concerned)⁵⁹ is offered "a clear European perspective",⁶⁰ this, notwithstanding the fact, of course, that the Treaty does not provide for a possibility of the accession to the Union of any entities, which are not "European States".⁶¹ The EU *can* be very flexible (including with its own law) when it so wants. Not only famously absurd politics of veto-wielding,⁶² but also the Union's in-built aspirational idealism should help finding the proper legal solutions to do the right thing. The EU should thus try to accommodate the will of the people of the newly emerged State, thereby also protecting them against an unnecessary loss of their rights stemming from the EU legal order. Once again, we fully realize that in putting forth such claims, we contradict an important trend in European legal scholarship on the matter, which remained astonishingly incoherent, oblivious of precedent and context-driven throughout the whole run-up to the Scottish independence referendum.

⁵⁶ F. HOFFMEISTER, *The Contribution of EU Practice to International Law*, cit.

⁵⁷ C. WALTER, *Postscript: Self-Determination, Secession, and the Crimean Crisis 2014*, in C. WALTER, A. VON UNGERN-STERMBERG, K. ABUSHOV (eds), *Self-Determination and Secession in International Law*, Oxford: Oxford University Press, 2014, p. 293 *et seq.*; J.A. GREEN, *Editorial Comment. The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited*, in *Journal on the Use of Force and International Law*, 2014, p. 3 *et seq.*; E. MILANO, *The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question*, in *Questions of International Law*, 2014, p. 35 *et seq.*; A. TANCREDI, *The Russian Annexation of the Crimea: Questions Relating to the Use of Force*, in *Questions of International Law*, 2014, p. 5 *et seq.*

⁵⁸ P. SOLDATOS, G. VANDERSANDEN, *L'admission dans la CEE – Essai 'interprétation juridique'*, cit.

⁵⁹ Of all EU Member States, Spain, Romania, Greece, Cyprus, and Slovakia have not recognised Kosovo. As a consequence, the EU, when referring to Kosovo, includes a footnote specifying that "this designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence". See, for example, the Kosovo status on the European Commission – Enlargement Policy webpage, ec.europa.eu/enlargement.

⁶⁰ See sources cited in footnote 53.

⁶¹ The language of Art. 49 TEU is quite clear, notwithstanding certain scholarly disagreements on this issue, as summarized, e.g. in D. KOCHENOV, *EU Enlargement and the Failure of Conditionality*, cit.

⁶² For an array of examples, see, E. BASHESKA, D. KOCHENOV, *Thanking the Greeks: The Crisis of the Rule of Law in EU Enlargement Regulation*, cit.

III. THE PRINCIPLE OF DEMOCRACY AND ITS LIMITS

In one of the most thought-provoking contributions to the secessionist debate, Joseph Weiler has argued that the EU should not embrace those regions that one day may require statehood through secession from an EU Member State. He appears to believe the secessionist movements to be guided by a “seriously misdirected social and economic egoism, cultural and national hubris and the naked ambition of local politicians”;⁶³ a “go it alone mentality”⁶⁴ that is diametrically opposed to the normative foundations of the European Union, which is based on forward looking, reconciliatory, and inclusionary ethics. Considering that “Europe should not seem as a Nirvana for that form of irredentist Euro-tribalism which contradicts the deep values and needs of the Union”,⁶⁵ the EU must wish territories that want to secede “a Bon Voyage in their separatist destiny”.⁶⁶

Problematically, Weiler’s argument ignores the principle of self-determination and thereby one of the core values upon which the EU is founded, namely democracy. The Treaty on European Union contains numerous provisions stressing the importance of democracy. Not only is the EU, according to Art. 2 TEU, founded upon the values of respect for democracy, its functioning is based on principles of representative democracy (Art. 10 TEU), and also in its external action the EU has promised to respect and promote democratic deliberation (Art. 21 TEU). If we accept that the issue of secession must be approached from an EU legal perspective, rather than traditional international law,⁶⁷ the principle of democracy ought to be among the main principles guiding the EU as well as the Member States when determining their position with respect to seceding territories.

That democratic considerations should be central to the position the EU should take on secession is not difficult to grasp. The EU would simply disregard the values upon which it is founded and which it has promised to uphold and promote would it not take seriously the peoples’ exercise of self-determination.⁶⁸ Agreeing with Daniel Kenealy, the EU “would border on the schizophrenic” would it not allow a territory that has democratically opted for secession to become a Member State of the EU.⁶⁹ The position advocated by Weiler arguably does not take sufficiently seriously the democratic aspiration of self-

⁶³ J.H.H. WEILER, *Scotland and the EU: a Comment by JOSEPH H.H. WEILER*, cit.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ For a compelling argument to this see: S. DOUGLAS-SCOTT, *How Easily Could an Independent Scotland Join the EU*, cit., p. 10.

⁶⁸ See also, D. EDWARD, *EU Law and the Separation of Member States*, cit., p. 1154.

⁶⁹ D. KENEALY, *How Do You Solve a Problem like Scotland? A Proposal Regarding ‘Internal Enlargement’*, in *Journal of European Integration*, 2014, p. 585 et seq.

determination of some of the people in Europe.⁷⁰ Respect for the democratic will of the people of the seceding territory would require the EU to respect the outcome of the exercise of a democratic right and not to punish those exercising that right. Of course, secession does not need to happen via democratic means, but it would be difficult to imagine a Member State territory seceding by the use of force at the moment.

We must agree with Carlos Closa that the principle of democracy “must be understood in the light of the principles of respect for human rights, the rule of law and constitutionalism”,⁷¹ some of the other values which the EU is supposed to respect. We should expect the EU, therefore, to take into account the other values laid down in Art. 2 TEU as well when deciding whether a newly formed State formerly part of a Member State is eligible for EU membership; a secession reflecting the will of the majority but following from or resulting in the breaches of the EU’s foundational values should not result in legitimate membership claims.⁷² The implication of the latter is of course the diminished likelihood of such a secession, given that seceding from a Member State only to stay out of the Union does not seem to correspond to the programme of *any* of the credible secessionist movements in the EU at the moment. We will return to this important connection later on in this analysis.

Of particular acuteness among the principles and values to the secession process ought to comply with is the rule of law, if only because more recent rounds of enlargement have raised concerns about the protection of the rule of law within the EU.⁷³ With respect to secession, adherence to the rule of law requires that secessions happen in accordance with national constitutional requirements (presuming the latter are reasonable, of course, as opposed to the arrangements that ban any secessions talk outright

⁷⁰ For this argument see also: N. WALKER, *Scotland and the EU: Comment by NEIL WALKER*, cit.

⁷¹ C. CLOSA, *Scotland and the EU: Comment by CARLOS CLOSA*, in *Verfassungsblog*, 12 September 2014, www.verfassungsblog.de.

⁷² When combined, these criteria are similar to the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, adopted by the EC in 1991 and put into practice by the Badinter Commission, in which the EU expressed the intention to recognise new States which “have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations”. This requires those new States, in addition to the principle of democracy, also to respect the rule of law, human rights, and minority rights. For an analysis see: R. RICH, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, in *European Journal of International Law*, 1993, p. 36 *et seq.*

⁷³ C. CLOSA, D. KOCHENOV, J.H.H. WEILER, *Reinforcing rule of law oversight in the European Union*, in *EU Working Papers*, 2014/25; J.-W. MÜLLER, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, in *European Law Journal*, 2015, p. 141 *et seq.* EU’s own obvious problems both with democracy and with the Rule of Law are outside the scope of this paper. On the former see, especially, J.H.H. WEILER, *Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, cit. On the latter, D. KOCHENOV, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, in *Yearbook of European Law*, 2015.

without giving the constitutional rearrangement any possibility whatsoever)⁷⁴. The rule of law is probably the main criterion by which it is possible to distinguish between the different secessionist movements, forming a continuum of acceptability, as it were. Comparisons between Scotland, Catalonia and Kosovo are as telling in this respect, as they are legally difficult: comparisons know clear limits.⁷⁵ The reasons for this are clear: while the Scottish referendum was democratically approved by both the British as well as Scottish parliament and took place fully in accordance with British constitutional requirements,⁷⁶ the same cannot be said of the Catalanian developments even notwithstanding the fact that the rigidity of the stance adopted by the Spanish government can be subject of legitimate criticism.⁷⁷ Kosovo is a seemingly different matter: while international law on self-determination is oftentimes guided by a victimhood ethos: demonstrable suffering being the best tool to amplify the claim,⁷⁸ the very fact that even among the Member States of the EU some failed to recognize its statehood, speaks for itself.

⁷⁴ In this we agree with Vicky Jackson's argument that silence about the issue of secessions is preferable to either black-letter regulation in a Constitution, or an outright prohibition. Flexibility is definitely one of the keys to stability: V. JACKSON, *Secession, Transnational Precedents and Constitutional Silences*, paper presented at the I-CON 5 conference, New York, 2015. See also, in the same vein, C.R. SUNSTEIN, *Constitutionalism and Secession*, cit.

⁷⁵ S. ROY, *Privileging (Some Forms of) Interdisciplinarity and Interpretation: Methods in Comparative Law*, in *International Journal of Constitutional Law*, 2014, p. 786 *et seq.* The comparison between Scotland and Kosovo was drawn by Barroso on the Andrew Marr show. For the transcript, see the reference at note 8.

⁷⁶ S. DOUGLAS-SCOTT, *How Easily Could an Independent Scotland Join the EU?*, cit., p. 21; M. KEATING, *Scotland and the EU: Comment by MICHAEL KEATING*, cit.

⁷⁷ See Spanish Constitutional Court, judgment no. 42/2014 of 25 March 2014; V. FERRERES COMELLA, *The Spanish Constitutional Court Confronts Catalonia's 'Right to Decide'*, in *European Constitutional Law Review*, 2015, p. 571 *et seq.* The US Judiciary took a similar view in Supreme Court of the United States of America, *Texas v. White*, judgment of 12 April 1869; see also *Kohlhaas v. Alaska*, judgment of 17 November 2006. For a radically different approach, see the Quebec secession case. Despite the absence of Constitutional provisions allowing for secession, the Canadian Supreme Court decided that the federal government would be under an obligation to negotiate with Quebec would a clear majority of the Quebecois favour secession. Choudry and Howse see this step as one that "promotes democracy" and one which tries "restoring the legitimacy of the Canadian Constitution". S. CHOUDRY, R. HOWSE, *Constitutional Theory and the Quebec Secession Reference*, cit., pp. 163-165.

⁷⁸ On the remedial nature of statehood claims see: A.E. BUCHANAN, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford: Oxford University Press, 2004, p. 335; J. VIDMAR, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice*, Oxford: Hart Publishing, 2013, pp. 159-169; M. WELLER, *Contested Statehood: Kosovo's Struggle for Independence*, Oxford: Oxford University Press, 2008, pp. 272-274. In its advisory Opinion on Kosovo, the ICJ considered that it was not necessary to resolve the questions concerning remedial secession. International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, advisory opinion of 22 July 2010, para. 83. Victimhood seems to be acquiring a new meaning in law outside of the secessions context, subject to serious criticism: A. SAJÓ, *Victimhood and Vulnerability as Sources of Justice*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe's Justice Deficit?*, Oxford: Hart Publishing 2015.

Adherence to the principles of democracy as well as the rule of law require that the EU recognize constitutionally sound secessions reflecting the will of the majority of the people of the seceding territory enjoying the right to vote under the law of the respective Member State – which would have been the case for Scotland would the majority have voted differently. The EU should not blackmail the people of the territory deciding on secession into remaining part of the Member State.⁷⁹ Adopting an agnostic position with regard to possible secessions would be a more acceptable stance, as Neil Walker equally concluded.⁸⁰ We would push this argument further still; simply waiting through the secession process is not enough. Should a territory acquire statehood on the basis of a democratic mandate and desires to remain part of the European integration process, the EU must approach the seceded State in a manner harmonious to its ethos, to which we will turn next, thereby also bearing in mind the interest of its own as well as the seceded States citizens, companies, and all others affected.

It goes without saying that for independent States to be able to accede to the EU, evidently more is required than their secession to be compliant with principles of democratic representation and the rule of law.⁸¹ In addition to respecting all of the EU's foundational values in Art. 2 TEU, those States would have to comply with the other Copenhagen criteria and possible further pre-accession demands.⁸² In the context of secessions good neighbourly relations will definitely play an important role (particularly in conducting relations with the State the new entity is splitting from), to name just one example.⁸³ At the Copenhagen criteria baseline, the newly-emerging State will have to demonstrate its "capacity to cope with competitive pressures and market forces within the Union" and be able "to take on the obligations of membership including adherence to the aims of political, economic and monetary union" therefore.

It cannot be taken for granted of course that new States automatically fulfil all these criteria. Even newly independent States that have been part of the EU for many years as parts of other Member States would still have to adopt new laws and transpose secondary legislation in order to be fully compliant with the requirements imposed by EU

⁷⁹ Graham Avery has expressed his discontent about the EU being used as a "weapon of mass dis-suasion". Quoted in: S. DOUGLAS-SCOTT, *How Easily Could an Independent Scotland Join the EU?*, cit., p. 9.

⁸⁰ N. WALKER, *Beyond Secession? Law in the Framing of the National Polity*, cit., and N. WALKER, *Hijacking the Debate*, cit.

⁸¹ On the detailed legal analysis of EU enlargement law, see C. HILLION, *Enlargement of the European Union: A Legal Analysis*, in A. ARNULL, D. WINCOTT (eds), *Accountability and Legitimacy in the European Union*, Oxford: Oxford University Press, 2002, p. 401 *et seq.*; D. KOCHENOV, *EU Enlargement and the Failure of Conditionality*, cit., chapters 1 and 2.

⁸² C. HILLION, *The Copenhagen Criteria and Their Progeny*, in C. HILLION (ed.), *EU Enlargement: A Legal Approach*, Oxford: Hart Publishing, 2004, p. 19 *et seq.*

⁸³ P. VAN ELSUWEGE, *Good Neighbourliness as a Condition for Accession to the European Union: Finding the Balance between Law and Politics*, in D. KOCHENOV, E. BASHESKA (eds), *Good Neighbourliness in the European Legal Context*, cit.; E. BASHESKA, *The Good Neighbourliness Principle in EU Law*, cit.

law, to say nothing of the need to build up all the necessary organs and structures of statehood.⁸⁴ While much can be achieved by upgrading the municipal structures in place, a lot of work will still be required before a former province, however self-governing, becomes a truly operational State entity. This being said, and in complete agreement with Sionaidh Douglas-Scott, none of these are insurmountable obstacles. Considering the States, with respect, of a (much) more difficult pedigree that became full-fledged members of the Union throughout its history without solving deeply-rooted fundamental problems eroding the core of their statehood,⁸⁵ territories that secede from Member States that have been part of the EU for many years, enjoying stable institutions as well as a good economic and human rights track-record are highly unlikely to experience systemic difficulties in the course of transformation into States or fall short on EU pre-accession criteria. In the case of Scotland at least, the possible hurdles could not only be overcome, but would also be minimal.⁸⁶

IV. SECESSIONS AND THE *ETHOS* OF EUROPEAN INTEGRATION

Joseph Weiler's objections to allowing States that acquired independence through secession to join the EU are of a different kind. He agrees, in the case of Scotland at least, that there are no legal impediments for them to join would they become independent and that the adjustments necessary are of a technical nature and not too difficult to overcome.⁸⁷ His objections seem to be chiefly political, not legal, and are twofold. First of all, he fears that secession of one territory will create a domino effect among other regions pushing for secession, particularly if accession to the EU is almost automatic. More importantly, however, the secessionist movements within the Member States act in a manner fundamentally opposing the *ethos* of European integration, as Weiler sees it. It is this "Euro-tribalism", in the words of Weiler, which we should not support.⁸⁸ Perhaps one can wonder to what extent the motivations for secession should truly matter and if not the EU should be primordially concerned with the nature and character of the new State and the way the secession process was conducted. However, even if the secessionist movement's attitudes are to be taken into account, which is not unreasonable, Weiler's view of those movements is disputable.

⁸⁴ This point was accurately made by B. DE WITTE, *Scotland and the EU: Comment by BRUNO DE WITTE*, in *Verfassungsblog*, 10 September 2014, www.verfassungsblog.de.

⁸⁵ E.g. A. VON BOGDANDY, P. SONNEVEND (eds), *Constitutional Crisis in the European Constitutional Area*, Oxford: Hart Publishing, 2015; M.A. VACHUDOVA, *Why Improve EU Oversight of Rule of Law? The Two-Headed Problem of Defending Liberal Democracy and Fighting Corruption*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing the Rule of Law Oversight in the European Union*, cit.

⁸⁶ S. DOUGLAS-SCOTT, *Scotland and the EU: Eleventh hour thoughts on a contested subject*, in *Verfassungsblog*, 17 September 2014, www.verfassungsblog.de.

⁸⁷ J.H.H. WEILER, *Scotland and the EU: a Comment by JOSEPH H.H. WEILER*, cit.

⁸⁸ *Ibid.*

The EU, on this view, is premised on an ethos of forgiveness and reaching out to the other, incompatible with selfish nationalism and thus should not embrace the products of the secessionist movements that are construed upon an entirely outdated as well as demoralizing nationalist and utilitarian attitude, or at least so goes the argument.⁸⁹ Such rendering of the Union and of secessionist movements, once drained of some emotions, is deeply questionable. Even for those who are sure that the Scots who voted *Yes* are as tribalist and backward-looking as charged, it should be quite clear that the accusation does not solve the outstanding problem: how to build relations with the newly-emerging States which secede from existing EU Member States in the Europe of the 21st century.

But actually: are those voting in favor of secession truly the “Euro-tribalists” Joseph Weiler holds them for? Do they truly represent ideas that disqualify them from the membership of a Union that reaches out to the Croatians, the Irish, the Serbs and the Kosovars (among innumerable others)? And if it is the *ethos* of forgiveness and integration, as well as a forward-looking perspective that has historically characterized the EU, what should the EU’s attitude towards a secession that has come about through democratic deliberation and that respects the other of the EU’s core values be: dismissive and exclusionary or open-minded and welcoming?

One should, first of all, question Weiler’s interpretation of the kind of nationalism at stake in many of the regions that desire independence. It is far from evident that those regions are “reverting to an early 20th Century post World War I mentality”.⁹⁰ A more accurate interpretation of the matter has been provided by Will Kymlicka, whose analysis is worth quoting in full: “the assumption that minority cultural nationalisms are a defensive and xenophobic reaction to modernity is often overstated. [...] here are many cases of minority nationalisms around the world today which are not all that different from French and American revolutionary nationalism, in the sense that they too are forward-looking political movements for the creation of a society of free and equal citizens. They seek to create a democratic society, defined and united by a common language and sense of history. I think this is what most Québécois nationalists seek, as well as most Catalan, Scottish, and Flemish nationalists. They are not trying to avoid modernity; they are precisely trying to create a modern democratic society”.⁹¹

Regardless of whether we agree with or (mis)understand the aspirations and motivations of those seeking secessions, we must be careful not to dismiss every instance of minority nationalism as belonging to the kind of mindset that is concerned with “national purità” and resulted in “ethnic cleansing”.⁹² But even if one sees secession as a

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ W. KYMLICKA, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*, Oxford: Oxford University Press, 2001, pp. 245-246.

⁹² J.H.H. WEILER, *Scotland and the EU: a Comment by JOSEPH H.H. WEILER*, cit.

historical mistake, representing an outdated nationalistic perspective that runs counter to what the EU has aspired to achieve, the epitome of forgiveness would be the one that accepts the new State despite the people's *mistaken* decision to secede. What could be more in line with the EU's historical *ethos* (grand colonization projects aside) than the EU and in particular the Member State from which the territory has seceded to say: despite our disagreements about what should have happened, despite our past and present tensions and conflicts, we welcome you to the European family and recognize you as an independent Member State with which we share a common destiny? Wishing seceding States "a Bon Voyage in their separatist destiny" rests upon a profoundly disputable reading of the European *ethos*.⁹³

It might be "ironic if the prospect of Membership in the Union ended up providing an incentive for the ethos of political integration",⁹⁴ Weiler writes, but it would be no less ironic if the EU, which is the reply to absolute sovereignty ideologies, the *tamer* of States and the promotor of liberal, inclusive and tolerant nationhood,⁹⁵ would exclude those who share the most profound European values, pushing them to the fringes of European society, and forcing them to be the sovereign entities the EU has always aspired to overcome. Contrary to what Weiler assumes, there is no indication at all that those who support secession do not share the *ethos* of European integration. To the opposite, those who strive for secession might very well be more supportive of the European project – and what this project stands for – than some of the current Member States. Moreover, the population of territories with secessionist movements, such as Scotland, seem more inclusive and respectful towards the other than some of the Member States that joined the EU in recent years, which at times have a highly dubious track-record concerning the protection of minorities, the rule of law and human rights.⁹⁶ Ironically, the EU itself is guilty as charged of bringing minority protection on the ideological altar of the internal market,⁹⁷ as well as promoting quite a one-sided vision of progress,⁹⁸ where depoliticisation is frequently presented as an achievement⁹⁹

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ W. KYMLICKA, *Liberal Nationalism and Cosmopolitan Justice*, in S. BENHABIB, *Another Cosmopolitanism*, Oxford: Oxford University Press, 2006, p. 128; N. MACCORMICK, *Beyond the Sovereign State*, in *Modern Law Review*, 1993, p. 1 *et seq.*

⁹⁶ On problematic standards of minority protection in some Member States see: W. KYMLICKA, *National Minorities in Postcommunist Europe: The Role of International Norms and European Integration*, in Z. BARANY, R.G. MOSER (eds), *Ethnic Politics after Communism*, Ithaca: Cornell University Press, 2005; G.N. TOGGENBURG (ed.), *Minority Protection in the Enlarged European Union: The Way Forward*, Budapest: Open Society Institute, 2004.

⁹⁷ D. KOCHENOV, *The European Union's Troublesome Minority Protection: A Bird's-Eye View*, in J. BOULDEN, W. KYMLICKA (eds), *International Approaches to Governing Ethnic Diversity*, Oxford: Oxford University Press, 2015, p. 79 *et seq.*

⁹⁸ G. PEEBLES, 'A Very Eden of the Innate Rights of Man? A Marxist Look at the European Union Treaties and Case Law', in *Law and Social Inquiry*, 1998, p. 581 *et seq.*; M. BARTL, *Internal Market Rationality*,

and the technicalities, like “autonomy” trump values, such as the protection of human rights or the rule of law,¹⁰⁰ which the EU is powerless to enforce in the Member States deviating from the proclaimed ideals.¹⁰¹ Upon such a (radical) reading, (potential) Member States with a more questionable reputation, with all respect, will definitely be more at home *in Europe* than the Scots. Yet, the EU should be too good even to ask the Scots what they want after their betrayal of the UK, Joseph Weiler is telling us.

There is no denying of the fact of course that the secessionist regions’ interest in membership of the EU is to a great degree driven by utilitarian considerations.¹⁰² In this sense there can be no dispute about the fact that secessions become a much more attractive option due to the presence of the EU. Indeed, as Eric Hobsbawm explained in detail, the EU added the viability component missing from the small States secessionist claims throughout the history of development of nationalism.¹⁰³ In this sense we see a reversal in the vector of nationalism in which the presence of the EU definitely plays a role, even if this role is not necessarily decisive. While classical nationalism of the 19th century aspired for *unification*, this is not any more the case partly due to the fact that the structure of global economy, coupled with the rise of regional organisations, like the EU, make much smaller States viable projects, which can be effectively sustained through time. So the internal market, EU citizenship, and the principle of non-discrimination allow the seceded States, would they be allowed to join the EU, to enjoy many of the benefits of scale they could enjoy would they have remained part of another Member State. Simultaneously, the structures making smaller States viable also limit the *sovereignty* of such States, imposing serious limitations on the political agendas which they can actually pursue. It is widely assumed (and might be correct)¹⁰⁴ that it is much more difficult to fail as a State, both economically and in terms of democratic and Rule of Law-backsliding, once in the EU. Indeed, this was arguably one of the main arguments for joining the Union for the States from behind the iron curtain: a safety-valve

Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political, in *European Law Journal*, 2015, p. 572 *et seq.* See, also, for a broader account, P. AGHA, *The Empire of Principle*, in J. PRIBÁŇ (ed.), *The Self-Constitution of Europe*, Farnham: Ashgate, 2015; A. WILLIAMS, *Taking Values Seriously: Towards a Philosophy of EU Law*, in *Oxford Journal of Legal Studies*, 2009, p. 549.

⁹⁹ A.J. MENÉNDEZ, *Whose Justice? Which Europe?*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe’s Justice Deficit?*, cit., p. 137.

¹⁰⁰ P. ECKHOUT, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?*, in *Fordham International Law Journal*, 2015, p. 955.

¹⁰¹ D. KOCHENOV, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, cit.

¹⁰² SNP, in Scotland, switched from an anti-European to a pro-European party, fully realising Europe’s potential for the (new) small States. Cf.: J. SHAW, *Scotland: 40 Years of EU Membership*, in *Journal of Contemporary European Research*, 2012, p. 547.

¹⁰³ E. HOBBSAWM, *Some Reflections on ‘The Break-up of Britain’*, in *New Left Review*, 1977, p. 105 *et seq.*

¹⁰⁴ But see, for a more sophisticated perspective, A.J. MENÉNDEZ, *The Existential Crisis of the European Union*, in *German Law Journal*, 2013, p. 453 *et seq.*

against themselves¹⁰⁵ and the question is open whether Scotland or Catalonia (unlike, say, Hungary or Poland) will actually need to see such a safety-valve to guarantee their democracy and development in action. In any event, blaming the EU for making secessions from the Member States premised upon joining the Union easier would be an absurd move: it is engrained in the EU's very nature to challenge the sovereigntist *status quo* (let us not forget that the EU's strong point and its main deficiency, the humiliation of the State, is its main constitutional tactic).¹⁰⁶ Simultaneously also empowering those seeking secession and, afterwards, accession, seems to be a natural by-product of what the Union is about. It would be unfair also to exclude newly emerging States from EU membership for their utilitarian motives, for the simple reason that it is difficult to understand how that differentiates those regions from current Member States and, even trickier perhaps, why exactly joining the EU should not be a utilitarian choice. One would be tempted to share Weiler's concern for the "what's in it for us"¹⁰⁷ mentality that currently plagues the EU, but it is difficult to understand how being as good/bad as the current Member States is a criterion by which we can exclude seceded States seeking accession. Instead, a seceding State's eligibility for EU membership should be examined according to the same criteria we used for other enlargements.

Most importantly, utilitarianism alone cannot fully account for secessionist movements, if only because secession might be entirely unwise from a utilitarian perspective. Many of those favoring secession must surely also be regarded as having different and deeply held convictions about the collective future of their nation. One may dismiss these feelings of nationalism as merely imagined as they certainly are,¹⁰⁸ but that does not change the profound social reality within many Member States.¹⁰⁹ And while the EU's historic *ethos* has been to tame feelings of nationalism, it is undisputable that it was not designed to fully overcome national sentiments, thereby destroying the Member States, let alone to recreate problematic *quasi*-nationalisms at the supranational level.¹¹⁰ This is perfectly demonstrated by EU citizenship's derivative nature, *inter alia*, which Weiler also stresses in his contribution.¹¹¹ If the people of a current Member State's territory secede following a constitutionally legitimated expression of collective autonomy but meanwhile unequivocally indicate, through a request for EU member-

¹⁰⁵ W. SADURSKI, *Constitutionalism and the Enlargement of Europe*, Oxford: Oxford University Press, 2012.

¹⁰⁶ G. DAVIES, *The Humiliation of the State as a Constitutional Tactic*, in F. AMTENBRINK, P.A.J. VAN DEN BERG (eds), *The Constitutional Integrity of the European Union*, The Hague: Asser Press, 2010, p. 147.

¹⁰⁷ J.H.H. WEILER, *Scotland and the EU: a Comment by JOSEPH H.H. WEILER*, cit.

¹⁰⁸ B. ANDERSON, *Imagined Communities*, London-New York: Verso, 1991.

¹⁰⁹ D. MILLER, *On Nationality*, Oxford: Oxford University Press, 2000.

¹¹⁰ Pace Habermas: J. LACROIX, *Does Europe Need Common Values? Habermas vs Habermas*, in *European Journal of Political Theory*, 2008, p. 141 *et seq.* See also D. KOSTAKOPOULOU, *The Future Governance of Citizenship*, Cambridge: Cambridge University Press, 2008, Chapter 3.

¹¹¹ J.H.H. WEILER, *Scotland and the EU: a Comment by JOSEPH H.H. WEILER*, cit.

ship, that they want to tame their feelings of nationalism, the EU would betray its *ethos* as well as its foundational values would it frustrate or reject such a request.

Instead of blackmailing secessionist regions into remaining part of their State, the EU should adopt a more neutral approach, therefore, which respects the exercise and outcome of the democratic process of collective self-determination. This requires the EU to distance itself from the national debate and respect and endorse the outcome of the vote on secession. Would the majority of the people of a region prefer independence, the EU must approach the seceded territory with an open mind, finding the best solution for all parties involved.

V. HOW TO APPROACH A SECEDED TERRITORY

Truly respecting the democratic right of the people of the seceded State to determine their collective future also requires acknowledging that the seceded territory should be free to decide what kind of relationship to the EU it prefers. To claim that newly-independent States formerly forming part of a Member States of the EU and thus being subjected to the EU legal order should also embrace the EU in the future because their citizens cannot lose their EU citizenship rights is not only problematic from a legal point of view,¹¹² particularly given the derivative nature of EU citizenship, but also violates democratic principles. It should be up for the people of the newly-formed State to decide whether they want to apply for EU membership, or whether they prefer a different kind of relationship with the EU.¹¹³ Would the people of the seceding State be allowed to retain the citizenship of their previous State, which is clearly a preferred solution,¹¹⁴ this might not be an issue at all. Where this is not the case, however, the consequence of the decision not to apply for EU membership will be the loss of the status as EU citizen upon the date of secession.¹¹⁵ It is difficult to see how individuals who are negatively affected by this could prevent this from happening would the majority of their people decide to leave the EU.

¹¹² P. ATHANASSIOU, S. LAULHÉ SHAELOU, *EU Accession from Within? – An Introduction*, in *Yearbook of European Law*, 2014, p. 1 *et seq.* See also D. KENEALY, S. MACLENNAN, *Sincere Cooperation, Respect for Democracy and EU Citizenship: Sufficient to Guarantee Scotland's Future in the European Union?*, cit.

¹¹³ On the role that EU citizenship should (and can) play in the context of secessions, see, P. ATHANASSIOU, S. LAULHÉ SHAELOU, *EU Citizenship and Its Relevance for EU Exit and Secession*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, cit.

¹¹⁴ In the case of Scotland, it has been suggested for example that it could have been possible for the Scottish people to retain their British citizenship. S. DOUGLAS-SCOTT, *Scotland and the EU: Eleventh hour thoughts on a contested subject*, cit.

¹¹⁵ Unless some alternative status of belonging would be granted to the citizens of the seceding territory by their former motherland, which would be connected with EU citizenship, which is an obvious possibility in EU law. For a similar possibility applied to the Latvian citizenship context, plagued by ethnic discrimination, which could be remedied through EU law, see D. KOCHENOV, A. DIMITROVS, *EU Citizenship for the Latvian "Non-Citizens": A Concrete Proposal*, cit.

We can all see though that a decision of a newly-formed State that used to be part of an EU Member State not to apply for EU membership is not a really attractive one. This would be the kind of tribalism we should deplore. Furthermore, it would severely undermine the interests of the companies established in the seceding State, as well as the workers, students, as well as other EU citizens residing there. Of course, also the citizens of the seceding State residing within an EU Member State would pay the price of their State not becoming an EU Member State. This being said, the problem is largely ephemeral, of course, since, presuming there is minimal good will, an agreement between the EU and the Member States and the newly-independent State can be negotiated with an aim to minimize the negative effects of secession for EU citizens in the seceding State.

Preventing any negative consequences of secession from emerging is of course the EU's responsibility as well. Rather than slamming the door to EU membership in the face of the seceded State, the EU must be open and constructive. Of course, to repeat what was said throughout this article, this requires that the decision to secede was legally and constitutionally sound, was taken through democratic means, and that the State fulfils the other membership criteria. If this is the case, the EU and the Member States should be open to the applicant State, not only because it should want to protect the acquired rights of business and citizens, but also because the EU's historic *ethos* of inclusion, integration, and accepting the other warrants an open and welcoming approach towards States that acquired independence through secession. Even more, the EU should be ready to tame its own Member States unwilling to engage in constructive dialogue (a negative example of such State is constantly provided by the Greek behavior in its neighbourhood which is far from constructive and has totally undermined)¹¹⁶ *inter alia*, the EU's and the UN's attempts to solve the Cyprus issue¹¹⁷ as well as to stabilize the situation in Macedonia,¹¹⁸ which is a constant target of the illegal pressure by Greece.¹¹⁹ It is not unlikely that some of the Member States will be ready to misbehave in a similar way, making the EU as well as their peers and the newly-independent State to pay a high price. A strong presumption concerning the nature of such behavior as

¹¹⁶ E. BASHESKA, D. KOCHENOV, *Thanking the Greeks: The Crisis of the Rule of Law in EU Enlargement Regulation*, cit.

¹¹⁷ F. HOFFMEISTER, *The Contribution of EU Practice to International Law*, cit.

¹¹⁸ E. BASHESKA, *(Mis-)application of the Good Neighbourliness Principle in International and EU Law: The Case of the Republic of Macedonia*, in D. KOCHENOV, E. BASHESKA (eds), *Good Neighbourliness in the European Legal Context*, cit.

¹¹⁹ International Court of Justice, *Application of the Interim Accord of 13 September 1995*, judgment of 5 December 2011. For an analysis see: F. FONTANELLI, E. BJORGE, *International Court of Justice, Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece) Judgment of 5 December 2011*, in *International and Comparative Law Quarterly*, 2013, p. 775 *et seq.*; F. MESSINEO, *Maps of Ephemeral Empires: The ICJ and the Macedonian Names Dispute*, in *Cambridge Journal of International and Comparative Law*, 2013, p. 169 *et seq.*

breaching the duty of loyalty, should be adopted by the Commission, taking all the necessary steps to ensure that Greek-style tradition of ignoring international law and undermining dialogue does not serve as an example of solving outstanding issues in Europe involving the territories which have already been within the scope of EU law.

There are two legal routes through which seceding States formerly belonging to an EU Member State can be welcomed to the EU. The first and at first sight most obvious is the normal Treaty accession procedure in Art. 49 TEU.¹²⁰ During the discussions in the lead-up to the Scottish referendum on independence a second option was suggested: namely, Art. 48 TEU, which allows for internal enlargement and immediate membership of the seceding State through the revision of the Treaties. The latter was put forward as an option because the use of Art. 48 TEU would allow for a “seamless transition”,¹²¹ allowing the seceding State to become an EU member on the date of secession thereby preventing the seceding State to have to leave the EU before being able to join again. The Art. 49 TEU accession route would force the seceding State to temporarily leave. After the accession Treaty has been signed by the independent State, it must, after all, still be ratified by all Member States.¹²²

To ensure the uninterrupted continuity of rights and obligations within the context of the internal market and the area of freedom security and justice, the Art. 48, TEU route clearly appears to be the preferable option. It would allow for internal enlargement and thus prevent that a territory has to leave the EU, even for a very brief period. To dismiss the possibility of the Art. 48 TEU procedure out of hand and suggest that a seceding territory can only apply upon independence, as done by former Commission President Barroso,¹²³ is unhelpful and smells of particularly cautious and traditional legal advice, which is all too handy to ensure that the Union subtly takes sides in the secession debate by taking the position of the government opposing secession.

Instead, it would clearly be preferable to examine the different options available with an open mind. In all likelihood we would be required then to acknowledge that both routes provide us with political and practical difficulties. Both Treaty amendment and accession require the uniform consent of all Member States. Considering the number of Member States with internal struggles for secession, it is far from certain that all Member States will ratify the revision or accession Treaty without further ado. Whereas Art. 48 TEU might allow for a seamless transition, it is thus certainly not guaranteed that

¹²⁰ For an analysis, see, M. CHAMON, G. VAN DER LOO, *The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?*, in *European Law Journal*, 2014, p. 613 *et seq.*

¹²¹ The term seamless transition was used by the Scottish government to describe internal enlargement process through the use of Article 48 TEU. See the document by the Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland*, in *Scottish Government White Paper*, 2013, p. 220.

¹²² B. DE WITTE, *Scotland and the EU: Comment by BRUNO DE WITTE*, cit.

¹²³ Barroso's comments, cit.

it will create “a smooth transition”.¹²⁴ Additionally, the initiation of the Treaty revision procedure might be used by other Member States as a pretext to try to renegotiate their own membership within the EU. Without the willingness of the Member States to act in a prudential manner, ensuring that secession does not result in a temporal gap of legal protection for citizens, companies, and others benefitting from the internal market, Art. 48 TEU might very well become a more lengthy process than Art. 49 TEU.¹²⁵

While Art. 48 TEU seems the preferable procedure, depending on the political context the Treaty revision procedure might still not guarantee uninterrupted membership for the seceding territory. During the ongoing process of negotiations, those who risk losing the rights acquired during the EU membership of the seceding territory should be protected against the unduly and temporary termination of rights during the transitional period of non-membership. Even if the negotiations for full membership turn out to last longer, no one should aim at concocting a temporary legal limbo during which important rights are suddenly temporarily terminated. Even in the case of legal or political disagreement about accession, there can be no moral excuse for such a situation to happen (unless one feels like punishing the Euro-tribalists, of course). In case a period of non-membership is inevitable, measures will have to be adopted for this period to protect those with acquired rights, as Christophe Hillion and Nick Barber have rightly suggested.¹²⁶ The preferable option, however, still remains uninterrupted membership.

VI. CONCLUSION

While the surge of independence movements within several of the EU's Member States raises a set of intricate political and legal questions, the impression that these movements represent something unseen before must be rejected. Mutations of statehood, through secession or by other means, are of all times. This time, however, those pushing for independence are not the people outside the geographical boundaries of Europe, they are European citizens at the heart of the continent. Coming closer to home, the legal and political issues raised by those developments need to be responded to adequately by the EU.

¹²⁴ B. DE WITTE, *Scotland and the EU: Comment by BRUNO DE WITTE*, cit. See also: J. MURKENS, *Scotland and the EU: Comment by JO MURKENS*, in *Verfassungsblog*, 8 September 2014, www.verfassungsblog.de.

¹²⁵ These were the remarks made by Kenneth Armstrong in his evidence to the House of Commons on the Scottish independence referendum. For the transcript see The House of Commons Oral Evidence Taken Before the Scottish Affairs Committee, *The Referendum on Separation for Scotland*, 15 January 2014, www.publications.parliament.uk. See also: J. MURKENS, *Scotland and the EU: Comment by JO MURKENS*, cit.

¹²⁶ C. HILLION, *Scotland and the EU: Comment by CHRISTOPHE HILLION*, in *Verfassungsblog*, 15 September 2014, www.verfassungsblog.de. N. BARBER, *After the Vote*, in *Blog of the UK Constitutional Law Association*, 14 January 2014, www.ukconstitutionallaw.org.

The position adopted by several of the EU officials, unfortunately, suffers from some blatant shortcomings. Rather than adhering to the principle of democracy, which would have warranted a more agnostic stance with respect to possible secessions exercised through legally sound democratic means, the EU has taken a more interventionist perspective warning those territories that their future as members of the European family is far from certain would they opt for independence, thereby making secession a less attractive option. This view, espoused by Weiler as well, though in an even more extreme fashion, would not only leave ample room for hypocrisy accusations, bearing in mind the States of more dubious pedigree that have been allowed to join or are on the waiting list, but also opposes the values upon which the EU is founded. Adherence to the principles of democracy as well as the rule of law require the EU to recognize legally and constitutionally sound and democratically legitimated secessions, provided that the other membership criteria are fulfilled of course.

Not only would any other decision run counter to the EU's foundational values, banning the seceded territory from the European family would also betray the ethos of European integration. This ethos, which rests upon inclusion, integration, and the embrace of the other, is not served by removing or frustrating the prospect of EU membership; rather, and contra to what Weiler assumes, embracing those who share core European values, despite past and present disagreements, thereby taming the nationalist sentiments within those territories, is the position that is premised upon a firm belief in the EU's historic ethos.

Respecting the democratic right of the people of the seceded State equally requires that the seceded territory is left free to determine what sort of relationship to the EU it prefers. The EU ought to adopt an open and welcoming approach, should the seceded State opt for EU membership. The EU should use all means to prevent that the accession process is frustrated. Such an approach also requires the EU to try to prevent the loss of rights of those presently covered by EU law. Whether through the Art. 48 TEU route or by temporarily protecting those with acquired rights by other means until the seceded territory becomes an official EU Member State, the road to membership should be as smooth as possible. Rather than punishing the people of a seceded territory for the exercise of their democratic right to self-determination, a European Union that pretends to take seriously its foundational values and historic ethos should be expected to welcome those States to the European family.



ON THE AGENDA: THE REFUGEE CRISIS AND EUROPEAN INTEGRATION[□]

A GLOBAL SOLUTION TO A GLOBAL REFUGEE CRISIS

JAMES C. HATHAWAY*

TABLE OF CONTENTS: I. The Refugee Convention's commitment to self-sufficiency. – II. The ground reality of dependency. – III. Diagnosing the problem. – IV. The challenge. – V. A five-point plan. – V.1. Reform must address the circumstances of all States, not just the powerful few. – V.2. Plan for, rather than simply react to, refugee movements. – V.3. Embrace common but differentiated State responsibility. – V.4. Shift away from national, and towards international, administration of refugee protection. – V.5. Access to protection, and to a solution.

ABSTRACT: The author argues that the time is right to change the way that refugee law is implemented. Specifically, Hathaway advocates a shift towards a managed and collectivized approach to the implementation of refugee protection obligations. He contends that while the obligations under the Convention remain sound, the mechanisms for implementing those obligations are flawed in ways that too often lead States to act against their own values and interests, and which produce needless suffering amongst refugees. The author concludes with a five-point plan to revitalize the Refugee Convention.

KEYWORDS: Refugee Convention – asylum – immigration – common but differentiated responsibility – UNHCR.

I. THE REFUGEE CONVENTION'S COMMITMENT TO SELF-SUFFICIENCY

The United Nations Convention relating to the Status of Refugees (Refugee Convention) is increasingly marginal to the way in which refugee protection happens around the world. I believe that this is a bad thing – both for refugees, and for States.

[□] Starting with its very first issue, *European Papers* intends to keep the on-going, epochal refugee crisis “On the Agenda”. The two contributions published in this issue are meant to open a debate which will be followed up in the upcoming issues.

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In introducing the draft of the Refugee Convention some 65 years ago, the UN's first Secretary General explained that "[t]his phase [...] will be characterized by the fact that the refugees will lead an independent life in the countries which have given them shelter. With the exception of the 'hard core' cases, the refugees will no longer be maintained by an international organization as they are at present. They will be integrated in the economic system of the countries of asylum and will themselves provide for their own needs and for those of their families".

II. THE GROUND REALITY OF DEPENDENCY

Yet today, and despite the fact that 148 countries have signed onto the Refugee Convention, the reality is quite the opposite. Most refugees today *are not* allowed to live independent lives. Most refugees *are* maintained by an international organization. And most refugees are emphatically *not* allowed to provide for their own needs.

In order to be able to contribute to meeting their own needs, the most obvious need of refugees is to enjoy freedom of movement. Yet one in four refugees in the world is effectively imprisoned, and at least as many are often subject to serious restrictions on their mobility. In an especially cruel irony, United Nations refugee agency, the United Nations High Commissioner for Refugees (UNHCR), runs more refugee camps than anyone else. Not only is this response unlawful, it is absurdly counter-productive. Refugees become burdens on their hosts and the international community, and are debilitated in ways that often make it difficult for them ever to return home, integrate locally, or resettle. The risk of violence in refugee camps is also endemic – with women and children especially vulnerable to the anger that too often arises from being caged up.

III. DIAGNOSING THE PROBLEM

What went wrong?

One thing that is not wrong is the Refugee Convention itself. Its definition ("a well-founded fear of being persecuted" for discriminatory reasons) has proved wonderfully flexible, identifying new groups of fundamentally disfranchised persons unable to benefit from human rights protection in their own countries.

At least as important, its catalogue of refugee-specific rights remains as valuable today as ever. The underlying theory of the Refugee Convention is emphatically *not* the creation of dependency by hand-outs. It guarantees the social and economic rights that refugees need to be able to get back on their feet after being forced away from their own national community (e.g., to access education, to seek work, and to start businesses).

It was patently obvious to the States that drafted the refugee treaty that refugees could not begin to look after themselves, much less to contribute to the well-being of their host communities, if they were caged up. For this reason, as soon as a refugee has

submitted herself to the jurisdiction of the host country, satisfied authorities of her identity, and addressed any security-related concerns, the Refugee Convention requires that she be afforded not only freedom of movement, but the right to choose her place of residence – a right that continues until and unless the substance of her refugee claim is negatively determined. Respecting this legal guarantee of refugee mobility can dramatically change the policy outcomes of admitting refugees; indeed, a recent study shows that those countries that *do* facilitate refugee freedom of movement are often economically *advantaged* by the presence of refugees.¹

Why, then, do States not routinely liberate the productive potential of refugees?

Part of the reason is that setting up refugee camps is an easy *one size fits all* answer that can be quickly and efficiently rolled out by both the UNHCR and many of its many humanitarian partners. When there is a political imperative to act, the establishment of camps is a concrete and visible sign of engagement. Indeed, even as the regional States receiving the overwhelming majority of Syrian refugees were largely ignored by the rest of the world, international donors stepped forward to finance the building and operation of refugee camps.²

Most fundamentally, though, the detention of refugees is a strategy that appeals to States that would prefer to avoid their international duty to protect refugees. While not willing to accept the political cost of formally renouncing the treaty, States with the economic and practical wherewithal have for many years sought to ensure that refugees never arrive at their jurisdiction, at which point duties inhere. The strategy of deterrence has, however, come under increasingly successful challenge, including before the European Court of Human Rights.³ Poorer States, as well as those with especially porous borders, have of course rarely been able to deter refugee arrivals at all. For States in either situation, restricting the mobility of refugees by detention or similar practices (often accompanied by other harsh treatment post-arrival) is seen as a second-best means for a State to *send a signal* that they are not open to the arrival of refugees.

But why are States so often unwilling to receive refugees?

Safety and security are of course frequently invoked. While such concerns can be real, there is, however, no empirical evidence that refugees present a greater threat of crime or violence than do the many other non-citizens routinely crossing borders, or indeed those already resident in the State, including citizens. In any event, the Refugee Convention takes a very hard line on such cases, *requiring* the exclusion from refugee status of any person reasonably suspected of being a criminal, and allowing States to

¹ A. BETTS, L. BLOOM, J. KAPLAN, N. OMATA, *Refugee Economies Rethinking Popular Assumptions*, in *Humanitarian Innovation Project*, 20 June 2014, www.rsc.ox.ac.uk.

² R.F. SWEIS, *Despite Good Intentions: Vacancies in Refugee Camp in Jordan for Syrians*, in *The New York Times*, 15 March 2015, www.nytimes.com.

³ T. GAMMELTOFT-HANSEN, J.C. HATHAWAY, *Non-Refoulement in a World of Cooperative Deterrence*, in *Columbia Journal of Translational Law*, 2015, p. 235 *et seq.*

send away those shown to pose a threat to their safety or security, even back to the country of persecution, if there is no other option.

The real concern is instead that most governments believe that refugees who arrive at their borders impose unconditional and indefinite obligations on them, and on them alone. The idea that the arrival of refugees can effectively subvert a State's sovereign authority over immigration is understandably unsettling to even powerful States. For States of the less developed world, which receive more than 80 per cent of the world's refugees, the challenge can be acute. They are supported by no more than the (often grossly inadequate and inevitably fluctuating) charity of wealthier countries, and rarely benefit from meaningful support to lessen the human responsibility of protection. Of the roughly 14 million refugees in the world last year, only about 100,000 were resettled, with just two countries, the United States and Canada, providing the lion's share of this woefully inadequate contribution.

IV. THE CHALLENGE

The challenge, then, is to ensure that refugees can access meaningful protection in a way that both addresses the legitimate concerns of States and which harnesses the refugees' own ability to contribute to the viability of the protection regime.

The irony is that the Refugee Convention itself suggests the way forward. The rights regime established by Arts 2-34 rejects a charity-based model in favour of refugee empowerment. The Refugee Convention is also massively attentive to the safety and security concerns of States: not only are fugitives from justice mandatorily excluded from refugee status, but those shown to be risks to national security are subject to legally sanctioned *refoulement*. The Refugee Convention's cessation clause moreover makes clear that States are not required permanently to admit refugees, but need only protect them for the duration of the risk in their home country. And perhaps most important, the refugee regime was never intended to operate in the atomized and uncoordinated way that has characterized most of its nearly 65-year history. To the contrary, the Preamble to the Refugee Convention expressly recognizes that "the grant of asylum may place unduly heavy burdens on certain countries" such that real global protection "cannot therefore be achieved without international co-operation".

This is not just another tired call for States to live up to what they have signed onto. It is rather a plea for us fundamentally to change *the way that refugee law is implemented*. The obligations are right, but the mechanisms for implementing those obligations are flawed in ways that too often lead States to act against their own values and interests – and which produce needless suffering amongst refugees.

V. A FIVE-POINT PLAN

How should we proceed?

A team of lawyers, social scientists, non-governmental activists, and governmental and intergovernmental officials, drawn from all parts of the world, worked for five years to conceive the model for a new approach to *implementing* the Refugee Convention. We reached consensus on a number of core principles.⁴

V.1. REFORM MUST ADDRESS THE CIRCUMSTANCES OF ALL STATES, NOT JUST THE POWERFUL FEW

Most refugee reform efforts in recent years have been designed and controlled by powerful States: e.g., Australia and the EU. There has been no effort to share out fairly in a binding way the much greater burdens and responsibilities of the less developed world, even at the level of financial contributions or guaranteed resettlement opportunities. This condemns poorer States and the 80 per cent of refugees who live in them to mercurial and normally inadequate support, leading often to failure to respect refugee rights. It is also decidedly short-sighted in that the absence of meaningful protection options nearer to home is a significant driver of efforts to find extra-regional asylum, often playing into the strategies of smugglers and traffickers.

V.2. PLAN FOR, RATHER THAN SIMPLY REACT TO, REFUGEE MOVEMENTS

There is absolutely no need for the refugee system to be captive of a seemingly continuous process of responding in an episodic way to multiple crises, with the inevitable loss of life that a reactive and uncoordinated response entails. The protection system should instead shift to a managed model, with the UNHCR able to act decisively by calling on pre-determined burden (financial) sharing and responsibility (human) sharing quotas. Such factors as prior contributions to refugee protection, per capita GDP, and arable land provide sensible starting points for the allocation of shares of the financial and human dimensions of protection. But, as the recent abortive effort to come up with such shares *ex post* by the EU makes clear, the insurance-based logic of standing allocations can only be accomplished in advance of any particular refugee movement.

V.3. EMBRACE COMMON BUT DIFFERENTIATED STATE RESPONSIBILITY

There should be no necessary connection between the place where a refugee arrives and the State in which protection for duration of risk will occur. Under present norms, and most emphatically under the *country of first arrival* norm enshrined in the Regulation (EU) No 604/2013, the so-called Dublin Regulation, a refugee will nearly always be

⁴ J.C. HATHAWAY (ed.), *Reconceiving International Refugee Law*, The Hague: Kluwer Law International, 1997; J.C. HATHAWAY, R.A. NEVE, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, in *Harvard Human Rights Journal*, 1997, p. 115 *et seq.*

allowed to stay in her State of arrival.⁵ It thus makes sense for refugees to travel often far from home (and, in the EU context, to disguise any presence in a State other than the preferred destination) before claiming protection as a means of maximizing economic or social outcomes. If in contrast the country of arrival were no more than the place in which a simplified status assessment (see below) and assignment of protective responsibility occurred, the perverse incentive to decide where to seek recognition of refugee status for reasons unrelated to protection needs would come to an abrupt end. In addition, a system of shared State responsibility for refugees would enable us to harness the ability and willingness of different States to assist in different ways. The core of the renewed protection regime should be common but differentiated responsibility, meaning that beyond the common duty to provide first asylum pending an assignment of protective responsibility, States could assume a range of protection roles within their responsibility-sharing quota (protection for duration of risk; exceptional immediate permanent integration; residual resettlement), though all States would be required to make contributions to both (financial) burden-sharing and (human) responsibility-sharing, with no trade-offs between the two.

V.4. SHIFT AWAY FROM NATIONAL, AND TOWARDS INTERNATIONAL, ADMINISTRATION OF REFUGEE PROTECTION

We advocate a revitalized UNHCR to administer quotas, with authority to allocate funds and refugees based on respect for legal norms; and encouragement of a shift to common international refugee status determination system and group *prima facie* assessment to reduce processing costs, thereby freeing up funds for real and dependable support to front-line receiving countries, including start-up funds for economic development that links refugees to their host communities, and which facilitate their eventual return home. Our economists suggest that reallocation of the funds now spent on the many often very elaborate domestic asylum systems would more than suffice to fund this system. And since as described below positive refugee status recognition would have no domestic immigration consequence for the State in which status assessment occurs, this savings could be realized without engaging sovereignty concerns.

V.5. ACCESS TO PROTECTION, AND TO A SOLUTION

The refugee system relies on migration as the means to protection: while managed entry is sometimes viable, international law prohibits barriers that impede refugees from *voting with their feet* in order to access the protection system wherever they are able,

⁵ Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

with no penalty for unlawful entry or presence. But it must be clearly understood that arrival does not entitle a refugee immediately to access permanent immigration. While some cases, e.g. unaccompanied minors and the severely traumatized, will require speedy permanent integration in some State, most refugees should instead benefit from protection for the duration of risk (with full access to refugee rights guaranteed) in order to promote the continual renewal of asylum capacity. Some refugees will ultimately choose and be able to go home. For others, a new commitment to creative development assistance linking refugees to host communities will increase the prospects for local integration. And for those still at risk and without access to either of these solutions at five-seven years after arrival, residual resettlement will be guaranteed, enabling them to remake their lives, in stark contrast to the present norm of often indefinite uncertainty.

If we are serious about avoiding continuing humanitarian tragedy (not just in Europe, but throughout the world) then the present atomized and haphazard approach to refugee protection must end. The moment has come *not* to renegotiate the Refugee Convention, but rather at long last to *operationalize* that treaty in a way that works dependably, and fairly.



ON THE AGENDA: THE REFUGEE CRISIS AND EUROPEAN INTEGRATION

REFUGEES, THE EUROPEAN UNION AND THE 'DUBLIN SYSTEM'. THE REASONS FOR A CRISIS

BRUNO NASCIMBENE*

TABLE OF CONTENTS: I. The current scenario. Dublin and Schengen in crisis? – II. The initiatives of the European institutions. A censurable delay. The need for solidarity between Member States. – III. The first derogation of the “Dublin system”. The controversial mechanism of replacement and the institutionalisation of exceptions. – IV. The criticality and inadequacy of the current system. The prospects for reform. What rights for the migrant? – V. Some final considerations.

ABSTRACT: The huge surge in migration into the European Union, particularly over the last two years, has revealed the inadequacy of the current legal framework. The Dublin III Regulation, which establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, now appears outdated. The initiatives devised by the European Commission to alleviate the burdens on the countries most exposed, activating for the first time the emergency mechanism under Art. 78, para. 3, TFEU, have proven to be largely ineffective and have faced stiff opposition from various Member States on both political and legal grounds. The resettlement programme introduced to ensure safe and legal access into the European Union has also failed to achieve the desired results. The debate has now turned to how to overcome the limitations of the current system. The European Agenda on Migration presented in May 2015 proposed the establishment of a single asylum decision process, to guarantee equal treatment of asylum seekers throughout Europe, and a mechanism for mutual recognition of positive asylum decisions. The European Commission now seems set to develop a relocation mechanism based on a distribution key. The new system must nonetheless ensure a fairer sharing of responsibility while guaranteeing effective solidarity between Member States and respect for the fundamental rights of people.

KEYWORDS: international protection – Dublin Regulation – re-location – resettlement – solidarity – fundamental rights.

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I. THE CURRENT SCENARIO. DUBLIN AND SCHENGEN IN CRISIS?

In recent years the increase in forced migration on a global scale, caused by wars, violence and persecution, has reached the highest levels yet recorded. And it is expected to increase in the coming years. This is concerning the legal expert, the politician, those responsible for governing as well as civil society seriously.¹ In addition to the ordinary flows of migrants seeking employment opportunities and better living conditions, a growing number of people, coming particularly from Syria, Iraq and Afghanistan, are seeking protection in Europe,² risking their lives in the process. It has been almost a daily occurrence to witness a tragedy of deaths at sea; and in public opinion, as well as in political circles, a censurable indifference appears to be growing.

In 2015, over one million of people fled their home countries³ and most illegally crossed the European Union borders, compared to approximately 280,000 in 2014.⁴ Italy and Greece were most exposed to the flows, via the central-eastern Mediterranean route, with growing tension in the Western Balkans.⁵

The situation thus created, worsened by recent terrorist attacks, has given new impetus to the debate on the effectiveness of border controls, on the suitability and relevance of the Dublin system, on burden-sharing in light of the principle of solidarity and on the need to identify mechanisms for distributing asylum seekers, as well as on safe and legal avenues. The reaction of many European States, for reasons related to public order and national security, has been to restore internal border controls to prevent migrants from entering, questioning their commitment to the Schengen *acquis*.⁶ Are

¹ Forced migrants numbered 59.5 million at the end of 2014 compared with 51.2 million a year earlier and 37.5 million a decade earlier. United Nations Refugee Agency (UNHCR), *World at war, UNHCR Global Trends, Forced Displacement in 2014*, 2015, www.unhcr.org.

² News Release of Eurostat, *Record number of over 1.2 million first-time asylum seekers registered in 2015*, 4 March 2016, www.ec.europa.eu/eurostat.

³ Annual risk analysis 2015 of Frontex, April 2015, available online at frontex.europa.eu. For updated figures see the information published on the Frontex website: www.frontex.europa.eu. According to the EU agency for the management of border operational cooperation, throughout 2015, there were 1.83 million illegal border crossings detected at the EU's external borders compared to the previous year's record of 283,500, see: News of Frontex, *Greece and Italy Continued to Face Unprecedented Number of Migrants in December*, 22 January 2016, www.frontex.europa.eu.

⁴ The UNHCR figures (available at www.unhcr.org) show that some 1,000,573 people had reached Europe across the Mediterranean, mainly to Greece and Italy, in 2015. The UNHCR also indicates that 84 per cent of those arriving in Europe came from the world's top 10 refugee producing countries.

⁵ See Frontex, *Western Balkan Route*, available at frontex.europa.eu.

⁶ The proliferation of national plans B is evidence of the failure of the European Plan A (D. THYM, *Towards a Plan B: The Rejection of Refugees at the Border*, in *EU Migration Law Blog*, 28 January 2016, eumigrationlawblog.eu). The suspension of the Schengen commitments was decided, albeit temporarily, by Sweden, Norway, Denmark, Germany, Austria, Belgium, Slovenia specifically to cope with the flow of migrants. The updated list is published by the Commission at www.ec.europa.eu.

Schengen and Dublin in crisis, then? And what are the prospects, in particular, for the Dublin system?

II. THE INITIATIVES OF THE EUROPEAN INSTITUTIONS. A CENSURABLE DELAY. THE NEED FOR SOLIDARITY BETWEEN MEMBER STATES

In March 2015, the "new" European Commission which took office in autumn 2014 launched a debate on the future European agenda on immigration.⁷ The communication presented in May proposed measures to be implemented immediately,⁸ aimed at addressing the crisis situation in the Mediterranean and identified actions to be developed in future years to improve the management of migration as a whole. This was followed by several initiatives in the subsequent months, including a) the definition of a new framework for coordination and cooperation with the countries of the Western Balkans; b) the establishment of a partnership with Turkey;⁹ c) a proposal for a new European border and coast guard;¹⁰ d) the launch of a numerous infringement procedures to ensure the coherence of the Common European Asylum System;¹¹ and e) the strengthening of the framework on the return of irregular migrants.¹² Nevertheless the effectiveness of such measures appears questionable.

⁷ A. DI PASCALE, *La futura agenda europea per l'immigrazione: alla ricerca di soluzioni per la gestione dei flussi migratori nel Mediterraneo*, in *Eurojus.it*, 9 April 2016, www.eurojus.it.

⁸ Communication COM(2015) 240 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, *A European Agenda On Migration*. The implementation of the measures adopted on that basis is constantly monitored and updated. See Legislative documents of the European Commission Migration and Home Affairs, ec.europa.eu. S. CARRERA, D. GROS, E. GUILD, *What Priorities for the New European Agenda on Migration?*, in *Centre for European Policy Studies*, 22 April 2015, p. 1 *et seq.*

⁹ On 18 March, following on from the European Union (EU)-Turkey Joint Action Plan activated on 29 November 2015 and the 7 March EU-Turkey statement, the European Union and Turkey reached an agreement providing for the re-admission of migrants who have crossed irregularly into the EU borders from Turkey. See www.consilium.europa.eu. See also Communication COM(2016) 166 final from the Commission to the European Parliament, the European Council and the Council, *Next operational steps in EU-Turkey cooperation in the field of migration*. See the remarks by S. PEERS, *The Final EU/Turkey Refugee Deal: a Legal Assessment*, in *EU Law Analysis*, 18 March 2016, www.eulawanalysis.blogspot.it.

¹⁰ Proposal for a Regulation COM(2015) 671 final of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC. See the remarks by S. PEERS, *The Reform of Frontex: Saving Schengen at Refugees' Expense?*, in *EU Law Analysis*, 16 December 2015, www.eulawanalysis.blogspot.it.

¹¹ Annex 8 to the Communication COM(2016) 85 final from the Commission to the European Parliament and the Council on the state of play of implementation of the priority actions under the European Agenda on Migration, *Implementation of EU Law State of Play*.

¹² Recommendation C(2015) 6250 final of the Commission establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks; Communication COM(2015) 453 final from the Commission to the European Parliament and to the Council, *EU Action*

The most significant aspect of the framework of an asylum policy that has its cornerstone in the Dublin system lies in the provision of a mechanism that, for the first time, has implemented Art. 78, para.3, of the Treaty on the Functioning of the European Union (TFEU). The aim is to support Member States most exposed to the flow of migrants,¹³ in implementation of the principles of solidarity and fair burden-sharing¹⁴ which must guide policies on asylum and immigration (art. 80 TFEU):¹⁵ a principle that cannot simply be stated but must actually be implemented. It was also recommended to establish a European mechanism of resettlement, aimed at allowing for the arrival in the European Union, directly from third countries, of people in need of international protection.

The relocation mechanism therefore represented an initial important derogation of the Dublin Regulation. A regulation intended at preventing both the phenomenon of so-called refugees in orbit, establishing with certainty that at least one State is responsible for examining asylum applications, and so-called asylum shopping, preventing the simultaneous submission of a number of applications in different countries. By virtue of the current rules, essentially based upon the attribution of responsibility for the reception and examination of applications at the first country of arrival (in the absence of

Plan on return, proposal for a Regulation COM(2015) 668 final of the European Parliament and of the Council on a European travel document for the return of illegally staying third-country nationals.

¹³ A measure specifically intended to deal with temporary situations of mass influx of displaced persons had actually been adopted in 2001 (Directive 2001/55/EC of the Council on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof). The so-called "temporary protection directive" sets up a procedure of exceptional character to provide, in cases of mass influx, or imminent mass influx, of displaced persons from third countries who cannot return to their country of origin, immediate and temporary protection, also for the purpose of burden sharing between Member States. It was, however, never used, although it was invoked in relation to the events of the so-called "Arab Spring" in 2011. The legal basis of this instrument is found in Art. 63, para. 2, lett. a) and b), of the Treaty establishing the European Community (TEC). Moreover, in the Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (so-called "Dublin Regulation III") an early warning and crisis management mechanism was added, intended amongst other things to deal with special situations of pressure on the asylum system of a Member State. None of these instruments is apparently deemed adequate to deal with the current situation.

¹⁴ See C. FAVILLI, *L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'emergenza» immigrazione*, in *Quaderni Costituzionali*, 2015, p. 785 *et seq.*

¹⁵ The TFEU does not contain any indication of how this provision should be enacted. See: A. ADINOLFI, *La politica dell'immigrazione dell'Unione europea dopo il Trattato di Lisbona*, in *Rassegna di Diritto pubblico europeo*, 2011, p. 11 *et seq.* For an analysis of the initiatives taken so far to implement the principle of solidarity in the field of asylum, see G. MORGESE, *Solidarietà e ripartizione degli oneri in materia di asilo nell'Unione europea*, in G. CAGGIANO (a cura di), *I percorsi giuridici per l'integrazione*, Torino: Giappichelli, 2014, p. 366 *et seq.*

special criteria), the result has been strong disparity between Member States.¹⁶ In 2014, five Member States (Germany, Italy, Sweden, Hungary and Austria) dealt with 72 per cent of all asylum applications submitted in the EU. The Dublin system, designed in 1990, clearly appears to be outdated and inadequate.

The system also appears to be questionable from the perspective of protection of the fundamental rights of applicants for international protection. A mechanism that imposes, on the foreigner, a country of destination needs in the first place a uniform application of the Common European Asylum System.¹⁷ Conversely, there are strong discrepancies between the Member States, in some cases so serious as to be censured by the European Court of Human Rights and the Court of Justice of the European Union (CJEU). Particularly important is the suspension, by the Member States, of transfers to Greece, in 2011, following a ruling of the Strasbourg Court and another ruling of the EU Court,¹⁸ in which systematic deficiencies in the Greek asylum system were identified.

¹⁶ Regulation No 604/2013 replaced Regulation (EC) No 343/2003 which had "communitarised" the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990. The Dublin Regulation III is the fundamental act of the "Dublin system", i.e. the system for identifying the country responsible for examining the application for international protection, together with Regulation (EU) No 603/2013 of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 (which replaced previous Regulation (EC) No 2725/2000). In the absence of special criteria (which aim to protect above all minors and the family unit, as well as any previous link with another Member State), it is noted that the Member State in which the asylum seeker entered the European Union for the first time becomes responsible for examining the asylum application; more particularly, where it is established that that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection (Art. 13, para.1). The asylum application must be examined by a single Member State, but this is subject to the right of a Member State to examine an application lodged by a citizen of a third country, even if that examination is not its responsibility based upon the criteria established in the regulation. In that case, that Member State becomes the State responsible in accordance with the regulation and accepts the obligations related to that responsibility. By virtue of that system, the Member State responsible for examining the application is also that responsible for any protection granted.

¹⁷ The Common European Asylum System consists of four specific directives (on the reception conditions of applicants for international protection, on temporary protection, on the recognition and status of international protection and on the procedures for obtaining that recognition) in addition to the Dublin and Eurodac regulations. That system was implemented in two phases, with a gradual harmonisation process. It is supplemented, in addition, by some provisions on family reunification contained in the specific directive and the directive extending the right to obtain the EU long term residence permit to holders of international protection.

¹⁸ European Court of Human Rights (Grand Chamber), judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*; and Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department*. Albeit in a more limited manner, the reception conditions offered by Italy were also condemned denounced. See, in particular, European Court of Human Rights (Grand Chamber), judgment of 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland*,

Transfers to Greece could resume in 2016 if the measures indicated by the Commission are effectively implemented.¹⁹

III. THE FIRST DEROGATION OF THE “DUBLIN SYSTEM”. THE CONTROVERSIAL MECHANISM OF REPLACEMENT AND THE INSTITUTIONALISATION OF EXCEPTIONS

In its May communication, the Commission identified a series of emergency measures to help frontline Member States to deal with migrant arrivals, establishing a new approach based upon “crisis points” or *hotspots*. This provides that the European Asylum Support Office (EASO), Frontex and the European Police Office (Europol) will work on the ground with those Member States to swiftly identify, register and fingerprint incoming migrants. It also announced the submission of a legislative proposal to activate the emergency scheme under Art. 78, para. 3, TFEU on the basis of a distribution key.

Two decisions establishing temporary measures in the area of international protection for the benefit of Italy and Greece, deemed to be the countries most exposed to inflow of migrants and asylum seekers, were approved in September 2015, with opposition from some Member States.²⁰ It was an initial derogation, albeit temporary, of Dublin Regulation III, and in particular Art. 13, para. 1, according to which the two countries would otherwise have been responsible for examining the applications for international protection in accordance with the criteria set out in Chapter III of that Regulation, as well as the procedural phases, including the time limits, set out in Arts 21, 22 and 29 of that Regulation.²¹ So, compared to the ordinary criteria of responsibility, that mechanism provides for the transfer to other Member States (which will become responsible

which indirectly ascertains the severe inadequacy of the reception conditions offered by Italy, with specific reference to the protection of the family and children.

¹⁹ Recommendation C(2016) 871 of the Commission addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013.

²⁰ In relation to the difficulties in adopting the two decisions and the division between Member States, see H. LABAYLE, *Angela Merkel au Parlement européen, des paroles aux actes?*, in *Espace de liberté, sécurité et justice*, 12 October 2015, www.gdr-elsj.eu. Some Eastern European countries (Hungary, Slovakia, Romania and the Czech Republic) objected to the emergency mechanism, even though the benefits would have been extended to Hungary and so the second decision was adopted by majority. In addition, Slovakia and Hungary filed two actions for annulment of the Decision (EU) 2015/1601 of the Council establishing provisional measures in the area of international protection for the benefit of Italy and Greece (Court of Justice, application of 15 January 2016, case C-643/15, *Slovakia v. Council*; and application of 15 January 2016, case C-647/15, *Hungary v. Council*). In addition to procedural matters, the two actions dispute the violation of some general principles of the legal system of the European Union, particularly that of proportionality.

²¹ Decision (EU) 2015/1523 of the Council establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Decision 2015/1601.

for examining the applications) of 160,000 persons²² in clear need of international protection²³ who reached Italy and Greece between 15 August 2015 and 16 September 2017. The distribution is carried out on the basis of criteria relating to the reception and absorption capacity of each Member State.²⁴ In confirmation of the commitment of the European Union to find solutions aimed at greater burden-sharing between all the Member States, in September 2015 a proposal for a regulation was also submitted which establishes a mechanism of permanent relocation in the presence of certain conditions.²⁵

As the two decisions established temporary measures of "exceptional nature", applicable to Greece and Italy by virtue of their exposure to significant migratory pressure and the deficiencies identified in their respective systems of asylum,²⁶ the two countries were asked to identify solutions to obviate the criticalities identified, submitting to that

²² Approximately 40,000 from Italy and 66,000 from Greece should be relocated. The remaining 54,000 were originally destined for Hungary which rejected this possibility, however, objecting to the European Union's relocation plan and voting against the decision adopted by the Justice and Home Affairs Council dated 22 September 2015. The final text therefore allocates the remaining 54,000 to a relocation to be defined at a later stage, in an amount proportional to the tables annexed to the Decision 2015/1601 or on the basis of other criteria, in light of the constant monitoring activity of flows that the Commission will perform in accordance with the Decision. See Art. 1, para. 2, Decision 2015/1601.

²³ Relocation only applies in respect of an applicant belonging to a nationality for which the proportion of decisions granting international protection among decisions taken at first instance on applications for international protection as referred to in Chapter III of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection is, according to the latest available updated quarterly Union-wide average Eurostat data, 75 per cent or higher. See Art. 3 of both decisions. According to Eurostat data for the third quarter of 2015, nationals of eight countries would be eligible for relocation: Central African Republic (85 per cent recognition rate), Eritrea (87 per cent), Iraq (88 per cent), Yemen (88 per cent), Syria (98 per cent), Bahrain (100 per cent), Swaziland (100 per cent), and Trinidad and Tobago (100 per cent).

²⁴ Relocation is based on defined criteria: GDP, population, unemployment rate and past number of asylum seekers and resettled refugees. Applying these criteria Cyprus is due to receive the lowest percentage of transferred asylum seekers and Germany the highest.

²⁵ See the proposal for a Regulation COM(2015) 450 final of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person. The proposal differs from the two decisions as it has the same legal basis as Regulation No 604/2013, i.e. Art. 78, para. 2, lett. e), TFEU. The crisis relocation mechanism provided involves permanent derogations (to be activated in certain crisis situations to the benefit of specific Member States), particularly of the principle set out in Art. 3, para. 1, of Regulation No 604/2013. The proposal establishes, in clearly specified crisis circumstances, the mandatory use of a distribution key for determining the responsibility for examining applications.

²⁶ See, in that regard, the considerations expressed in the explanatory memorandum.

end a roadmap,²⁷ under penalty of suspension of the decisions. The Commission does not exclude that similar measures may be applied to other Member States, where the conditions arise.

In addition to relocation, the proposal provides for an increase in support given by other Member States to Italy and to Greece, by sending national experts,²⁸ under the coordination of EASO and the other agencies involved. The aim is to assist Italy and Greece, in particular in the screening and initial phases of dealing with the applications, as well as in the relocation procedure (particularly in providing information and specific assistance to the persons involved and in the practical implementation of the transfers). The response of the Member States has, to date, been insufficient²⁹ and the initiatives of the European Institutions have proven to be largely ineffective.

Member States are not entitled to reject the transferred persons (for whom they receive a lump sum of 6,000 Euro per person), except for reasons of national security or public order, to be ascertained following individual assessment. However, under the second decision of 22 September it was permitted to notify the Commission and the Council (within three months from the entry into force of the decision) of the temporary incapacity to participate in the relocation process, for up to 30 per cent of the assigned applicants, for duly justified reasons compatible with the fundamental values of the European Union in accordance with Art. 2 of the Treaty on European Union (TEU).³⁰ National requirements play a significant role, and the mechanism at stake does not place into discussion one of the cornerstones of the current system, i.e. the lack of choice of the migrant in relation to the State that will examine the application. The decisions do

²⁷ The roadmap prepared by the Italian Ministry of the Interior is available here: www.asylumineurope.org.

²⁸ Art. 7 Decision 2015/1601.

²⁹ Communication COM(2015) 510 final from the Commission to the European Parliament, the European Council and the Council, *Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration*, pp. 3-4, and Annex to the Communication COM(2016) 165 final from the Commission to the European Parliament, the European Council and the Council, *First report on relocation and resettlement*, p. 11.

³⁰ Art. 4, para. 5, Decision 2015/1601. Sweden and Austria have made use of this option. See proposal for a Council Decision COM(2015) 677 final of the Commission establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Council Decision (EU) 2015/1523 and Article 9 of Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. The proposal is currently in the Civil Liberties Committee in the European Parliament. On 10 February 2016, the Commission presented another proposal to suspend for one year the relocation of 30 per cent of applicants allocated to Austria in view of assisting Austria in better coping with an emergency situation characterised by a sudden inflow of nationals of third countries in its territory, proposal for a Council Implementing Decision COM(2016) 80 final of the Commission on the temporary suspension of the relocation of 30 per cent of applicants allocated to Austria under Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

not provide that the beneficiaries of the programme be consulted or that they may object to the destination, although they leave to the national authorities some margin in assessing personal situations. In selecting the Member State of relocation, account must be taken, in particular, of the qualifications and specific characteristics of the relevant applicants, such as their language skills and other individual indications based upon demonstrated family, cultural or social links that could facilitate their integration into the Member State of relocation. For particularly vulnerable applicants, the ability of the Member State of relocation to ensure adequate support must be taken into consideration. These profiles are emphasised in the second decision, with the emerging concern that the protection of fundamental rights may be compromised. The decision emphasises that the integration of asylum seekers in clear need of international protection into the host society is the cornerstone of the correct functioning of the Common European Asylum System. The importance of migrants’ personal characteristics is confirmed by the fact that the decisions, albeit recalling respect of the principle of non-discrimination, allow the Member State of relocation to indicate its preferences. States have not applied this provision appropriately. A faculty aimed at promoting integration has been used as a tool for refusing the reception of potential beneficiaries.

IV. THE CRITICALITY AND INADEQUACY OF THE CURRENT SYSTEM. THE PROSPECTS FOR REFORM. WHAT RIGHTS FOR THE MIGRANT?

The debate of the last period³¹ and the recent discussion concerning the criticalities of the Dublin system allows for some comments and proposals to be made in light of the proposal put forward by the Commission.³² In March 2016, the Commission published the first report on the implementation of the mechanisms of relocation and resettlement.³³

The Dublin system has a number of critical aspects. These include: a) excessive burdens for only some Member States on the border or those States favoured by applicants – where they are able, in any case, to reach by evading fingerprinting; b) limited implementation (approximately 30 per cent in 2008-2012) of transfers where a Member State different from where the application was lodged is found to be responsible; c) absence of equal treatment for migrants due to differences identifiable with reference to the reception rates of applications, reception conditions and the possibilities of subse-

³¹ Communication COM(2016) 197 final from the Commission to the European Parliament and the Council, *Towards a return of the Common European asylum system and enhancing legal avenues to Europe*.

³² See in particular E. GUILD, C. COSTELLO, M. GARLICK, V. MORENO-LAX, S. CARRERA, *Enhancing the Common European Asylum System and Alternatives to Dublin Study for the Committee on Civil Liberties, Justice and Home Affairs*, 2015, www.europarl.europa.eu.

³³ Communication COM(2016) 165 final from the Commission to the European Parliament, the European Council and the Council, *First report on relocation and resettlement*.

quent integration, which in some cases also translate into serious violations of human rights; d) imposition on the migrant of a final decision without considering individual specific aspects.

The Commission, in its Agenda of May 2015, put forward some innovative changes that would allow for mobility within the European Union for the beneficiaries of international protection and greater uniformity in the implementation of the Common European Asylum System. It suggested a reflection both on the introduction of a possible mechanism for the reciprocal recognition of positive decisions on asylum,³⁴ and on the establishment of a single decision-making process, in order to ensure equality of treatment of asylum seekers across the whole European Union. The mutual recognition of positive decisions is not currently covered by Union legislation, but has been proposed in various guidance documents, particularly recently.³⁵ As to the second aspect, it is clear that there is a need to strengthen the coherence of the system. The gaps are confirmed by the infringement proceedings launched by the Commission in recent times, but a more incisive role could be played by EASO in supporting the Member States and guaranteeing more uniform conditions in the examination of applications, also with a view to strengthening mutual trust. It has also been suggested to create an EU Migration, Asylum and Protection Agency, instructed to perform the centralised examination of applications for international protection.³⁶ This solution would appear a success, outside the Union system, in realising the condition or harmonisation that is missing today. The question that arises today concerns the rights that the Union should grant to the migrant. The impossibility for the migrant to express any preference for his destination is an aspect worthy of serious consideration. The resistance of asylum seekers to be fingerprinted highlights the need to consider preference requests, particularly where these are based upon concrete motivations such as family and personal connections or employment opportunities. Preferences could be taken into consideration when lodging the application, but also at a later stage, allowing for movement after recognition of the status, now possible only for beneficiaries of international protection who have ob-

³⁴ C. FAVILLI, *Reciproca fiducia, mutuo riconoscimento e libertà di circolazione di rifugiati e richiedenti protezione internazionale nell'Unione europea*, in *Rivista di diritto internazionale*, 2015, p. 701 *et seq.*

³⁵ See in particular the programme of the Italian Presidency of the Council of the European Union, *Europe, A Fresh Start: Programme of the Italian Presidency of the European Union*, 1 July – 31 December 2014, available at www.italia2014.eu; Communication COM(2014) 154 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Open and Secure Europe: making it happen*.

³⁶ G. GOODWIN-GILL, *Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action*, 11 May 2015, www.jmcmigrants.eu; S. CARRERA, D. GROS, E. GUILD, *What Priorities for the New European Agenda on Migration*, cit.

tained the status of long-term residents (i.e. after five years of uninterrupted legal residence in the first reception country).³⁷

The revision of the Dublin Regulation appears, however, to focus particularly on defining suitable methods to guarantee fairer burden-sharing between the Member States, through a permanent allocation formula,³⁸ substantially developing, or better defining, the emergency mechanism implemented in recent months. Hence, no *revolutionary* modification. The permanent codification of the system of derogation adopted more recently incited, however, imaginable resistance by those Member States that, more than the others, are subject to migratory burdens and pressure. Nor can the fact be overlooked that the European Commissioner himself, Mr. Avramopoulos, has admitted that the mechanisms adopted up to now have not provided the expected results.³⁹ Until March 2016 only a thousand people had been transferred from Italy and Greece. The Member States made available only roughly 7,000 places, with some Member States not having given any availability (Austria, Croatia, Hungary, Slovakia and Slovenia).⁴⁰ Although there has been a slight increase since February, the results are inadequate compared to the aim of transferring 160,000 people in two years. One can clearly understand the perplexities and criticisms of initiatives that have expressed a mere hope, from the very moment they were proposed and publicised. Yet it should be ensured that member accept responsibility. To this effect the multiplication of infringement procedures could help to pursue common objectives, and thus to avoid a) the incorrect use of the right to indicate preferences by the Member States; b) the excessively lengthy response timescales; c) the unjustified rejections of applications; d) the lack of adequate information to migrants who, consequently, do not collaborate in the procedures. Reports on the implementation of the mechanism in Italy show a clear criticism not only of the screening methods for access to the procedure (summary interviews, conducted soon after disembarkation when the people are still traumatised and without providing adequate information on the mechanism of relocation), but also highlight the lack of a legal qualification and definition of the hotspots and the pre-selection methods of people based upon their presumed belonging to a nationality. This is against the guarantees and principles established by the "procedures directive", Directive 2013/32 whereby anyone may have a personal history that justifies international protection and

³⁷ Directive 2011/51/EU of the European Parliament and of the Council amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection Text with EEA relevance.

³⁸ S. PEERS, *The Dublin Regulation: Is the End Nigh? Where Should Unaccompanied Children Apply for Asylum?*, in *EU Law Analysis*, 21 January 2016, www.eulawanalysis.blogspot.it.

³⁹ European Commission, *Remarks by Commissioner Avramopoulos to the LIBE Committee at the European Parliament*, Press Release (SPEECH/16/76), 14 January 2014.

⁴⁰ See weekly updates published by the European Commission, available at ec.europa.eu.

should be entitled to a correct individual assessment, while collective expulsions under simplified procedures are prohibited.⁴¹

Another aspect of concern, also with regard to the protection of fundamental rights, relates to the possibility of using force to acquire fingerprints, where the migrant objects. The European Commission invited the necessary changes to be made to national legislation,⁴² but some perplexity – ethical over legal – remains.

The new mechanism makes the costs of management and reception of migrants the responsibility of the most exposed Member States, albeit with financial help from the European Union and support staff sent by the other Member States and agencies of the Union. The responsibility for the hotspots lacks equal sharing of costs and efforts: “To provide for a hotspot approach that reflects solidarity, the EU should establish European hotspots where the provisions of the Reception directive are applied as minimum standards”.⁴³

The planning of a distribution of asylum seekers between the Member States, in application of the principle of solidarity, requires a definition of the criteria of allocation that takes account of the actual reception capacity of the different Member States, with an update and periodic revision of the same in light of the gradual evolution. The migrant must be allowed to indicate a preference, in the presence of a substantial connection between the asylum seeker and the Member State, favouring the existence of family relationships, reasons of opportunity or professional requirements that are objectively verifiable. The legal entry channels must be used better or be more accessible, also introducing humanitarian visas, expanding the possible beneficiaries of family reunification, introducing forms of sponsorship by non-governmental organisations, private companies or associations to allow for the entry of people worthy of protection who could be guaranteed reception in the territory.⁴⁴

⁴¹ See European Court of Human Rights, judgment of 1 September 2015, no. 16483/12, *Khlaifia and Others v. Italy*; the case was referred to the Grand Chamber in February 2016. See A.R. GIL, *Collective expulsions in times of migratory crisis: Comments on the Khlaifia case of the ECHR*, in *EU Migration Law Blog*, 11 February 2016, available at: www.eumigrationlawblog.eu.

⁴² Staff working document SWD(2015) 150 final of the Commission on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints, 27 May 2015. Communication COM(2015) 679 final from the Commission to the European Parliament and the Council, *Progress Report on the Implementation of the hotspots in Italy*, p. 4.

⁴³ See in these terms E. BROUWER, C. RIJKEN, R. SEVERIJNS, *Sharing responsibility: A Proposal for a European Asylum System Based on Solidarity*, in *EU Immigration and Asylum Law and Policy*, 17 February 2016, www.eumigrationlawblog.eu.

⁴⁴ M. DI FILIPPO, *From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures*, in *European Area of Freedom Security & Justice*, 6 February 2016, www.free-group.eu.

V. SOME FINAL CONSIDERATIONS

The announced, now necessary, revision of the Dublin system⁴⁵ presents elements that cannot be easily solved. The current system no longer appears to be adequate and requires overall rethinking, not only by proposing methods of distribution that avoid excessive burdens for some States – and therefore ensuring greater burden-sharing – but also taking into consideration fundamental rights.

The distribution mechanism implemented in recent months should only be viewed as an experiment. It should be useful for improving the procedures and filling the gaps in respect of fundamental rights. In particular, the means of appeal and the modalities of assessment of the citizenship of the asylum seeker, the stance to be taken with migrants who do not collaborate – with unaccompanied minors, and with vulnerable groups – and the duration of acceptance and transfer procedures need to be carefully considered.

It is therefore to be hoped that the response will not simply be a sterile re-proposition of a mechanism of distribution that has shown to be inadequate and ineffective. Excessive burdens cannot be combated by sending the migrants to Turkey.

The conclusions of the European Council of 17-18 March appear to be a compromise addressing all the problems posed by Turkey. An adequate solution ought not to be limited to the closure of the borders or to the transfer to third countries. The Union certainly cannot deem the problem to be solved by way of a sort of “subcontracting” of low profile⁴⁶ both in legal and political terms.

⁴⁵ E. GUILD, C. COSTELLO, M. GARLICK, V. MORENO-LAX, *The 2015 Refugee Crisis in the European Union*, in *Centre for European Policy Studies Policy Brief*, September 2015. A proposal of a new Dublin regulation is due to be submitted by the Commission.

⁴⁶ See H. LABAYLE, P. DE BRUYCKER, *La Marche turque: quand l'Union sous-traite le respect de ses valeurs à un État tiers*, in *EU Immigration and Asylum Law and Policy*, 9 March 2016, eumigrationlawblog.eu.



THE DISTRIBUTION OF POWERS BETWEEN EU INSTITUTIONS FOR CONDUCTING EXTERNAL AFFAIRS THROUGH NON-BINDING INSTRUMENTS

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ABSTRACT: The increasing tendency of the EU to resort to non-binding agreements in its external action raises the sensitive and still unclear question of the distribution of powers between EU institutions when adopting them. In light of the post-Lisbon provisions of primary law in the field of external action, this *Insight* attempts to clarify how to interpret Arts 16 and 17 TEU when demarcating the scope both of the external representation of the Union in the hands of the Commission, and that of the decision-making power of the Council, as regards the adoption by the Union of non-binding instruments. The Opinion of Advocate General Sharpston delivered in case C-660/13 serves as the guiding thread of this analysis. In this Opinion, it is suggested that the Court of Justice annul the Commission's decision to authorise the signature of an addendum to the EU-Switzerland Memorandum of Understanding on a Swiss financial contribution to the new Member States of the EU, due to the breach of the principle of distribution of powers between institutions, enshrined in Art. 13, para. 2, TEU, insofar that the Commission signed this political agreement without the Council's prior authorisation.

KEYWORDS: non-binding agreements – external representation of the Union – distribution of powers between EU institutions – principle of institutional balance – Art. 218 TFEU – Arts 16 and 17 TEU.

I. INTRODUCTION

Recourse to non-binding instruments in governing the relations of the European Union (EU) with the rest of the world is increasingly common. Action plans, agendas, memoranda of understanding, and joint declarations proliferate in the distinct fields of the EU external action. This can be observed, for instance, in the adoption of mobility partnerships and common agendas on migration and mobility in the external dimension of EU

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immigration policy;¹ in action plans and association agendas, typical of the European Neighbourhood Policy;² or in the diverse arrangements and memoranda used in the development of the external dimension of policies such as, amongst others, environment or energy.³

Emulating similar State practice, this increasing EU tendency to resort to non-legally binding agreements as a means of regulating cooperation with third States may respond to different reasons, such as the need to increase the efficiency of external action, to allow greater smoothness in negotiation and conclusion of the instrument, or to enhance the margin of discretion of the signatories in the fulfilment of commitments. In addition, non-binding agreements may be more suitable to the political sensitivity of the subject of the agreement or to its changing nature. In the case of the EU, it could further be argued that the signing of political instruments may forestall the complications inherent to the conclusion of mixed agreements.

However, the use of non-binding rather than legally-binding agreements by the EU can potentially be problematic, or at least controversial, with regard to the lack of legal certainty of international commitments, or the difficulties for enforcing individual rights. From an institutional perspective also, the issue of who within the EU has the power to adopt agreements with no binding force is far from clear. Given that Art. 218 of the Treaty on the Functioning of the European Union (TFEU) is applicable only to the conclusion of international binding agreements, the question requires clarification. This is particularly true in the light of the post-Lisbon provisions for primary law governing the allocation of powers between EU institutions in the field of external relations, which continue to be a source of considerable judicial activism in Luxembourg.⁴ The Court of Justice (ECJ) has not encountered any cases related to the specific question of the power to conclude non-binding agreements with third parties since its well-known 2004 judgment in *France v. Commission*.⁵ On that occasion, the Court acknowledged that it was down to the Council to conclude international agreements, and that the non-binding

¹ E.g. Joint Declaration 10055/3/14 establishing a Mobility Partnership between the Hashemite Kingdom of Jordan and the European Union and its participating Member States, 9 September 2014, or the Joint Declaration on a Common Agenda on Migration and Mobility between the Federal Republic of Nigeria and the European Union and its Member States, 12 March 2015.

² E.g. the EU-Georgia Action Plan of 2006 and the Association Agenda of 2014 replacing it, eeas.europa.eu.

³ E.g. the Joint Declaration between the European Union and the Republic of India on a Clean Energy and Climate Partnership, 30 March 2016, and other instruments available at europa.eu/rapid, or the Memorandum of Understanding on Strategic Partnership on Energy between the European Union and the Arab Republic of Egypt, 2 December 2008, eeas.europa.eu/egypt/index_en.htm.

⁴ For recent case-law, see, for instance, Court of Justice, judgment of 16 July 2015, case C-425/13, *Commission v. Council*; Court of Justice, judgment of 28 April 2015, case C-28/12, *Commission v. Council*; Court of Justice, judgment of 24 June 2014, case C-658/11, *European Parliament v. Council*.

⁵ Court of Justice, judgment of 23 March 2004, case C-233/02, *France v. Commission*.

character of the instrument signed by the Commission with the United States (US) was not sufficient to confer on the Commission the power to adopt it.⁶ It did not however, clearly settle the demarcation of concluding powers between the latter and the Council.

Recently, the enlarged interpretation given by the Commission to Art. 17, para. 1, of the Treaty on the European Union (TEU), conferring on it the external representation of the EU, along with the increasing tendency of this Institution to sign non-legally binding instruments with third parties on behalf of the EU,⁷ have created grounds for the ECJ to clarify further the applicable rules. In particular, case C-660/13, in which Advocate General (AG) Sharpston delivered her Opinion on 26 November 2015,⁸ deals with an action for annulment which was submitted by the Council before the Court of Justice against the Commission's Decision of 3 October 2013 on the signature of an addendum to the Memorandum of Understanding of 27 February 2006, regarding a Swiss financial contribution to the new Member States of the EU (MoU 2006).⁹ This addendum, aimed at taking into account the Croatian accession to the EU,¹⁰ contains non-legally binding commitments between the EU and Switzerland. In spite of the Council and Member States' objections, the 2013 addendum was signed on 7 November 2013 by the Commission on the basis of the contested decision without the previous authorisation of the Council, the latter simply having authorised the Commission to negotiate it.¹¹

This *Insight* will try thereby to shed some light on the distribution of powers between EU institutions for the adoption of international non-binding agreements on behalf of the EU, taking as a corollary the principle of institutional balance as reflected in Art. 13, para. 2, TEU. To this end, the Opinion of AG Sharpston delivered in case C-660/13 will be a guiding thread for analysis. We will firstly examine the question of admissibility, particularly whether decisions authorising the signature of non-binding agreements are supposed to deploy legal effects in the sense of Art. 263 TFEU. Secondly, we will attempt to clarify the delimitation of external powers between the Council and the Commission as

⁶ *France v. Commission*, case C-233/02, cit., para. 40.

⁷ Confirmed in the Council position 12498/13 on the arrangements to be followed for the conclusion by the EU of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organisations, 18 July 2013. See also the position 5707/13 of its Legal Service, 1 February 2013.

⁸ Opinion of Advocate General Sharpston delivered on 26 November 2015, case C-660/13, *Council v. Commission*.

⁹ Decision C(2013) 6355 of the Commission on the signature of the Addendum to the Memorandum of Understanding on a Swiss financial contribution. The MoU of 2006 served as a compromise in exchange for the Swiss access to the enlarged internal market within the framework of the negotiations between the EU and Switzerland on the second series of bilateral agreements known as "Bilaterals II", which were signed in 2004.

¹⁰ A first addendum to the MoU was signed, by the Presidency of the Council and the Commission, in 2008 in order to adapt the Swiss financial contribution to the accession of Bulgaria and Romania to the EU.

¹¹ The authorisation to negotiate it was adopted in the form of conclusions of the Council and the Member States meeting within the Council.

deduced from Arts 16 and 17 TEU, thus demarcating the boundaries between international representation and decision-making in external affairs.

II. DECISIONS AUTHORISING THE SIGNATURE OF NON-BINDING AGREEMENTS AS ACTS “INTENDED TO PRODUCE LEGAL EFFECTS”

Actions seeking to annul decisions authorising the signature of non-binding agreements on behalf of the EU face one initial difficulty, i.e. how to tackle the very nature of this kind of decisions, and consequently the agreements themselves. This constitutes a substantial requirement, since it would help to determine whether to apply Art. 218 TFEU, but also a procedural demand, as acts with no legal effect cannot be reviewed by the ECJ under Art. 263 TFEU. In *France v. Commission*, the Court did not take a stance on the admissibility of the annulment action against the Commission's decision to sign with the United States the “Guidelines on Regulatory Cooperation and Transparency”, since it decided to dismiss the action on the substance of the case. The manner in which the Court proceeded seems questionable, and all the more so when it can reasonably be argued that the fact that an agreement is not intended to be binding under international law does not exclude the possibility that signature decisions may produce legal effects. This is especially so if we take into account that the effects of the agreement under international law are different from the effects of the contested decision under EU law.¹²

When a decision authorises the conclusion of a legally binding agreement, the act, adopted according to the procedure described in Art. 218 TFEU, clearly produces legal effects by expressing the Union's consent to be bound by that agreement in international law and will therefore be subject to annulment under Art. 263 TFEU. However, the operation of identifying whether we are effectively before a treaty or an act of international soft law is not always self-evident. For the ECJ, the intention of the parties “must in principle be the decisive criterion”,¹³ although relevance must also be given to other complementary evidence such as the actual terms and content of the instrument, its official publication, and the subsequent conduct of the parties, among other indicators.¹⁴ In this case, as AG Sharpston explains, the 2013 addendum was not an international agreement, but rather a “concurrence of wills” in the form of guidelines, using non-mandatory terminology and clearly reflecting a lack of intent by the parties to be bound by international law.¹⁵

¹² Opinion of Advocate General Sharpston, case C-660/13, cit., para. 69.

¹³ *France v. Commission*, case C-233/02, cit., para. 42.

¹⁴ See the outstanding work of A. REMIRO BROTONS, *De los tratados a los acuerdos no normativos*, in *La celebración de tratados internacionales por España: problemas actuales*, Madrid: Ministerio de Asuntos Exteriores, 1990.

¹⁵ Opinion of Advocate General Sharpston, case C-660/13, cit., para. 67.

If we start by considering the possible effects on international law, it is acknowledged that the Union is bound by the international consequences of the conclusion of an agreement even if this is by itself non-binding.¹⁶ International soft law is indeed apt to produce legal effects in the international legal order, on the basis of the principle of good faith, and it will generate, at the least, expectations between the parties with regard to the compliance with those political agreements.¹⁷ In this case, it cannot be underestimated that the 2006 MoU, and also its addenda, served as a compromise underlying the conclusion of the sectoral agreements between the EU and Switzerland. The addenda was also intended to specify the conditions for the signature of implementing treaties between Member States and the third country.

With regard to EU law, and in spite of the non-binding character of a given agreement, the decision to authorise its conclusion and the agreement itself - the Commission's decision and the 2013 addendum in this case - may have legal effects on EU institutions and Member States alike. The need to ensure the unity of the Union's external representation and the principle of sincere cooperation between the Union and Member States, and specifically among EU institutions, is valid even in relation to political agreements with third States. It leads to obligations on the part of EU institutions and Member States to cooperate with the end of achieving the Union's goals and to abstain from jeopardising such action.¹⁸ In addition, the impingement by the Commission on the scope of the foreign relations powers assigned to the Council is, by itself, a legal effect - the usurpation of powers of an Institution - which, as AG Sharpston concludes in this case, may render an action for annulment admissible under Art. 263 TFUE.¹⁹

III. CLARIFYING THE RESPECTIVE SCOPE OF ARTS 16 AND 17 TEU

Going on to the substantive question of the respective powers of EU institutions to conclude non-binding agreements, a first controversial feature of the Commission's decision authorising the signature of the 2013 addendum between the EU and Switzerland refers to its legal basis, Art. 17 TEU. AG Sharpston very accurately points out that the principle of the distribution of powers between EU institutions would have been infringed by the Commission if Art. 17 TEU had not conferred on the latter a power to approve and authorise the signature of the addendum. However, even were the Court to consider that this principle was not violated, the contested decision could still be a

¹⁶ *Ivi*, para. 69.

¹⁷ See P. DAILLIER, M. FORTEAU, A. PELLET, *Droit international public*, Paris: LGDJ, 2009, p. 30. For a critical approach, A. MAZUELOS BELLIDO, *Soft law: ¿mucho ruido y pocas nueces?*, in *Revista Electrónica de Estudios Internacionales*, 2004, p. 23 *et seq.*

¹⁸ Opinion of Advocate General Sharpston, case C-660/13, cit., para. 71.

¹⁹ *Ivi*, para. 62.

wrongful act for lacking an appropriate legal basis.²⁰ Indeed, decisions to conclude international agreements on behalf of the Union need to combine a procedural basis with a substantive legal basis related to the material competence of the EU.²¹

Although the question of which material competences the EU is exercising when concluding an agreement precedes that regarding the allocation of powers between EU institutions,²² the truth is that, whichever material competence the Union exercises, the core question which the ECJ must clarify remains that of whether the Commission is empowered, under EU Treaties, to exercise any sort of decision-making power in external relations, since the substantive legal basis should be consistent with the general distribution of powers deduced from Arts 16 and 17 TEU.

In this regard, it clearly emerges from ECJ case law that the adoption of legally-binding international commitments by the Union requires that it respect the procedure foreseen in Art. 218 TFEU,²³ which mirrors the usual distribution of powers between EU institutions for the exercise of internal competences, as the Commission has the power both to recommend the opening of negotiations,²⁴ and to negotiate agreements.²⁵ Meanwhile, the Council is entrusted with authorising the opening of these negotiations, adopting negotiating directives, and deciding on the signature, conclusion – with the previous approval or consent of the Parliament – and provisional application of the agreement. In particular, the Court had confirmed in its judgment of 1994, in *France v. Commission*, that the Commission is not bestowed with the power to conclude international treaties, but that this prerogative pertains to the Council.²⁶

As far as international non-binding agreements are concerned, the fact that Art. 218 TFEU is not applicable does not mean that the distribution of powers between EU insti-

²⁰ *Ivi*, paras 74-75.

²¹ See, for instance, Opinion of Advocate General Kokott delivered on 26 March 2009, case C-103/07, *Commission v. Council*, para. 47.

²² Opinion of Advocate General Sharpston, case C-660/13, cit., paras 75-76. The Commission had presented a proposal for a Council decision on the conclusion of the MoU 2006, which was based on former Art. 159 EC related to economic, social and territorial cohesion (now Art. 175 TFEU).

²³ Court of Justice, judgment of 9 August 1994, case C-327/91, *France v. Commission*, para. 41; *France v. Commission*, case C-233/02, cit., para. 45.

²⁴ As far as non-Common Foreign and Security Policy (CFSP) issues are concerned, since Art. 218, para. 3, TFEU grants the right of initiative in CFSP matters to the High Representative.

²⁵ Although Art. 218, para. 3, TFEU no longer specifies who must be the negotiator of EU international agreements, it is generally understood that the Commission will be the negotiator for non-CFSP agreements precisely in accordance with the general distribution of powers between EU institutions and, specifically, with the conferral on the Commission of the Union's external representation, a task that includes the function of negotiation. See P. ECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, p. 196, and also M. GATTI, P. MANZINI, *External representation of the European Union in the Conclusion of International Agreements*, in *Common Market Law Review*, 2012, p. 1708.

²⁶ *France v. Commission*, case C-327/91, cit., paras 33-37.

tutions and the principle of institutional balance should not be respected;²⁷ this principle requires that each institution must exercise its powers with due regard for the powers of the other institutions.²⁸ Although in its judgment of 2004 in *France v. Commission* the Commission's adoption of the "Guidelines on Regulatory Cooperation and Transparency" with the US was accepted, the Court acknowledged that the non-binding character of the instrument was not in itself sufficient to confer a power of conclusion on the Commission.²⁹ It appears that only the special circumstances of the case allowed the Court to agree to the adoption of the Guidelines by the Commission, the judgment having emphasized that constant contact had been maintained between the Commission, the Council, and the Committee on Trade Policy during the negotiations of the instrument.³⁰ However, a degree of uncertainty remained, which, together with the Lisbon reform on the provisions governing the inter-institutional distribution of powers in the field of external relations, mean there is a need to further clarify the rules for the adoption of non-binding agreements. Another kind of agreement would be administrative arrangements, which can be subscribed to by any EU institution, body or agency with similar authorities within third States, by virtue of the principle of administrative autonomy enshrined in Art. 335 TFEU.³¹ This allows, for instance, the Commission to bind itself – not the EU – vis-à-vis the administration of a given third country.³²

Thus focusing on non-binding agreements, Art. 16, para. 1, TEU entrusts the Council, with the task of policy-making, especially the Foreign Affairs Council as regards EU external action,³³ while Art. 17, para. 1, TEU empowers the Commission to hold the external representation of the Union, except for the CFSP where external representation is attributed to the President of the European Council and to the HR/VP.³⁴ The explicit attrib-

²⁷ *France v. Commission*, case C-233/02, cit., para. 40.

²⁸ Court of Justice, judgment of 14 April 2015, case C-409/13, *Council v. Commission*, para. 64.

²⁹ Recall how AG Tesouro and AG Alber considered that the possibility of identifying in the Commission a general executive power with functions similar to States' governments, including the power to conclude international agreements, would be contrary to the principle of institutional balance. Opinion of Advocate General Tesouro delivered on 16 December 1993, case C-327/91, *France v. Commission*, paras 33-34; Opinion of Advocate General Alber delivered on 25 September 2003, case C-233/02, *France v. Commission*, para. 66.

³⁰ See P.J. KUIJPER, *The Case Law of the Court of Justice of the EU and the Allocation of External Relations Powers. Whither the Traditional Role of the Executive in EU Foreign Relations?*, in M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law. Constitutional Challenges*, Oxford: Hart Publishing, 2014, pp. 109-110.

³¹ See Opinion of Advocate General Tesouro, cit., para. 22, in which these arrangements are qualified as concerted practices between authorities that lack the power to bind the State, not being governed by international law.

³² And thus possibly explaining the non-annulment of the Commission-US Guidelines in *France v. Commission*, C-233/02, cit.

³³ Art. 16, para. 6, TEU.

³⁴ Art. 15, para. 6, TEU.

ution of this power, operated by the Lisbon Treaty, to the Commission has broadly speaking clarified and simplified the question of the external representation of the Union, by eliminating the distorting power retained by the rotating Presidency of the Council. The external representation of the EU is anchored on a criterion of material delimitation between CFSP and non-CFSP issues rather than on a delimitation based on the level of the representatives involved, though this is only applicable when demarcating the respective functions of the President of the European Council – at the level of Heads of State and Government – and the High R. Vice P. – at ministerial level – for CFSP issues.³⁵

While the clarifications in primary law regarding the external representation of the Union may not be fully satisfactory, they have generated a change of strategy within the Commission. In previous cases, this institution has attempted to claim a power to conclude international agreements on the basis of the terms included in former Art. 300 of the Treaty Establishing the European Community (EC),³⁶ but following the Lisbon reform, the Commission has tried to stretch the scope of application of Art. 17 TEU as far as possible; a tendency perceivable in very distinct fields such as environment³⁷ or migration. Indeed, at the launch of a dialogue on migration issues between the EU and Russia, the controversies between the Commission and the Member States were related not only to the leading role the Commission was seeking in the conduction of the dialogue with the Russian authorities,³⁸ but also to the fact that the Commission intended to sign the terms of reference of this dialogue - thus claiming the power of decision-making in external affairs with regard to an instrument of a clear political nature. The case under discussion here seems to be part of a similar strategy, albeit with some nuances, since the Commission offers the view that its competence to sign the 2013 ad-

³⁵ On recent controversies regarding the division of responsibilities for the Union's external representation between the Commission and the European Council in the field of migration, see P. GARCÍA ANDRADE, *Who is in charge? The External Representation of the EU on Dialogues on Immigration and Asylum with Third Countries*, in *OMNIA Blog*, 13 January 2016, eumigrationlawblog.eu.

³⁶ Recall that Art. 300, para. 2, EC conferred on the Council the power to sign and conclude international agreements "subject to the powers vested in the Commission in this field", a provision interpreted not as a general power granted to the Commission but only in specific cases, such as agreements on the recognition of Community laissez-passers or the conclusion of arrangements to ensure the maintenance of appropriate relations with other international organisations. See Opinion of Advocate General Tesouro, cit., and Opinion of Advocate General Alber, cit., para. 66.

³⁷ E.g. the controversial negotiations of a legally-binding instrument on mercury within UNEP and the position SEC (2010) 1145 of the Commission, 30 September 2010, point 4, *in fine*.

³⁸ This dissension also requires to clarify that Art. 17 TEU entrusts the Commission with the external representation of the Union, not that of the Union and its Member States. Member States may decide how to be represented in fields of their exclusive power or concurrent competences still not exercised by the EU, having the option to be represented by themselves, by the rotating Presidency of the Council or even by the Commission in order to comply with the requirement of unity in the international representation of the EU. In this regard and on the controversies on this migration dialogue, see P. GARCÍA ANDRADE, *La acción exterior de la Unión Europea en materia migratoria: un problema de reparto de competencias*, Valencia: Tirant lo Blanch, 2015, p. 501 *et seq.*

dendum is based on the fact that the political instrument reflects an existing Union position, and therefore that its signature is an act of external representation on a political position already fixed by the Council.³⁹

As a consequence, demarcating the respective roles of the Commission and the Council requires further interpretation of the exact scope of Arts 16 and 17 TEU, taking into account that Art. 218 TFEU reflects the general distribution of powers under those provisions. In this regard, as AG Sharpston reminds us, Union policies are formulated by the European Council – which sets out the strategic objectives of the EU in external relations⁴⁰ – and the Council; in particular the Foreign Affairs Council, which is in charge of elaborating and defining the Union's external action on the basis of those guidelines. Consequently, without the prior intervention of the Council, the Commission – in charge merely of adopting the measures to give effect to the policy defined by the Council – cannot know which Union policy to represent externally.⁴¹ What is more, once the Council has decided, at the start of negotiations with a third State, to pursue a given objective on the international plane, the representation power of the Commission does not end with the policy-making power of the Council, which will have the final say on whether or not the Union should engage in the agreement resulting from the negotiations and thus deciding on its signature.⁴²

The external representation granted to the Commission by Art. 17 TEU does not therefore encompass a decision-making power in any of the subsequent stages following the negotiations.⁴³ AG Sharpston even indicates that “the mere fact that the content of the agreement reached corresponds to the negotiating mandate given by the Council does not mean that the Commission can disregard the Council's powers under Article 16, para. 1, TEU to decide whether or not to become party to an agreement such as the 2013 addendum”.⁴⁴ Once the negotiations are over, it is for the Council, on the basis of Art. 16 TEU, to verify the content and form of the agreement and to decide on the need for the Union to become party to it. This applies to binding and non-binding agreements alike, as Art. 218 TFEU does nothing more than specify the principles enshrined in Arts 16 and 17 TEU. Nonetheless, it is important to note in this case that, as the Opinion highlights, the 2013 addendum did not even correspond to the content of the negotiating directives

³⁹ Opinion of Advocate General Sharpston, case C-660/13, cit., para. 94.

⁴⁰ Art. 22, para. 1, TEU.

⁴¹ Opinion of Advocate General Sharpston, case C-660/13, cit., paras 104-106.

⁴² *Ivi*, paras 112-113.

⁴³ As stated in M. GATTI, P. MANZINI, *External Representation of the European Union in the Conclusion of International Agreements*, cit., p. 1733, Union representation in the conclusion of non-binding instruments is not distant from the procedure of Art. 218 TFEU, although the negotiator's margin of manoeuvre is considerably wider.

⁴⁴ Opinion of Advocate General Sharpston, case C-660/13, cit., para. 113. See a slightly different view in T. RAMOPOULOS, J. WOUTERS, *Charting the Legal Landscape of EU External Relations Post-Lisbon*, Working Paper no 156, KU Leuven, March 2015, p. 14, ghum.kuleuven.be/ggs/publications.

given by the Council, which shows how political choices were actually made by the Commission.⁴⁵ This course of action entails – even more clearly – an infringement of Art. 13, para. 2, TEU, since the Commission exceeded its powers as granted by Art. 17 TEU and encroached upon the powers conferred upon the Council by Art. 16 TEU. For these reasons, AG Sharpston recommends that the Court uphold the first plea of the Council based on the principle of distribution of powers of Art. 13, para. 2, TEU.⁴⁶

If endorsed by the Court, this would be a different response to the one given in the International Tribunal for the Law of the Sea (ITLOS) case, in which both AG Sharpston and the Court endorsed the Commission's position. In that case, the interpretation that can be deduced from the tandem made up of Arts 16 and 17 TEU stays the same, but its application to the subject of the case differs. Submissions to be made by the EU in international judicial proceedings, such as those made before the ITLOS in the case in issue, rather correspond to the power of representation of the Commission and are not deemed to infringe Art. 16 TEU. The intention of the statements to be submitted before ITLOS, in this case at least, was not to formulate policy-making choices,⁴⁷ which would have been previously made by the Council within the framework of United Nations Convention on the Law of the Sea.⁴⁸

IV. CONCLUDING REMARKS

In her Opinion in case C-660/13, AG Sharpston makes it clear that it is for the Council to decide on the signature of a non-binding international agreement with a third State, and that its decision-making power in external relations not only includes the authorisation to open negotiations in order to achieve a Union objective, but also to take the decision about whether the Union should become party to the instrument resulting from those negotiations. The AG also underlines that the external representation of the Union conferred on the Commission does not allow it to disregard the decision-making

⁴⁵ Opinion of Advocate General Sharpston, case C-660/13, cit., para. 114.

⁴⁶ *Ivi*, para. 117. A second plea of the Council in this case relates to an infringement of the principle of sincere cooperation of Art. 13, para. 2, TEU, since the Commission would have rendered ineffective the Council's efforts to correct the situation created by the Commission and affected the unity in the external representation of the Union. In AG Sharpston's view, this plea should not be upheld, since the lack of good faith and active cooperation shown by the Commission before the adoption of the contested decision does not vitiate the decision in itself. Otherwise, the Council's argument against the Commission's conduct after adopting the decision could only be the basis for an action for failure to act under Art. 265 TFEU.

⁴⁷ Opinion of Advocate General Sharpston delivered on 16 July 2015, case C-73/14, *Council v. Commission*, para 85 *et seq.*; Court of Justice, judgment of 6 October 2015, case C-73/14, *Council v. Commission*, paras 71-75. The Court has mostly followed the AG Opinion. For an in-depth comment, see S.R. SÁNCHEZ-TABERNERO, *Swimming in a Sea of Courts: The EU's Representation Before International Tribunals*, in *European Papers – European Forum, Insight* (forthcoming), www.europeanpapers.eu.

⁴⁸ Opinion of Advocate General Sharpston, case C-73/14, paras 86-89.

power of the Council even when the content of the agreement reached corresponds to the negotiating mandate.

It is now up to the Court to have its say on the scope of the respective tasks granted to the Commission and the Council in the development of the EU external action, a clarification which is particularly needed with regard to the rather contentious conclusion of non-legally binding instruments on behalf of the EU. This is all the more so when soft law is increasingly a feature of the external action of the Union. The existing options appear to lie either in supporting the extensive reading made by the Commission of the external representation function granted by Art. 17 TEU, or in endorsing a stricter interpretation of that power, reserving policy-making options for the Council according to Art. 16 TEU. What is evident is that the recourse to non-binding instruments does not exempt from respecting the principles of distribution of powers and institutional balance enshrined in the Treaties. In this respect, attention should also be paid to the role of the European Parliament. The right to information and the power of consultation or approval vested in it by Art. 218 TFEU would only be applicable to truly international treaties, although as regards non-binding agreements, neither should the European Parliament's function of political control as stated in Art. 14, para. 1, TEU be overlooked.

The challenge to be faced by the forthcoming judgment lies in any case in whether or not it can put an end to the excessive interinstitutional controversies which affect both the external image of the EU and the coherence, unity and efficiency of its international actions. As they have been for decades, EU external relations continue to be the perfect battlefield for supranationalism and intergovernmentalism, although the current struggles, and the negative perceptions they spread over the wider world, are perhaps particularly detrimental in the tumultuous times the project of European integration is living through.



PUBLIC PROCUREMENT, SOCIAL POLICY AND MINIMUM WAGE REGULATION FOR POSTED WORKERS: TOWARDS A MORE BALANCED SOCIO-ECONOMIC INTEGRATION PROCESS?

CLEMENS KAUPA*

ABSTRACT: Income inequality increased significantly over the past decades. The liberalization and outsourcing of public services, in conjunction with increased pressure on public budgets, has played a considerable role in this development: in procuring services they previously had provided themselves, public authorities fostered price competition among private operators vying for public contracts, which in turn exacerbated the pressure on wages. In response, some public authorities conceived of strategies aimed at neutralizing the downward pressure on wages they effected. Among the measures developed in this context is the establishment of a wage floor via public procurement that contractors and their sub-contractors have to comply with. In principle, European procurement law allows public authorities to set special performance conditions that exceed general regulatory standards. This is also the case in the social area. However, attempts to implement wage floors via public procurement have been repeatedly challenged on the basis of Directive 96/71 (Posted Workers Directive) and Art. 56 TFEU, as the decisions *Rüffert* (Court of Justice, judgment of 3 April 2008, case C-346/06), *Bundesdruckerei* (Court of Justice, judgment of 18 September 2014, case C-549/13) and, most recently, *RegioPost* (Court of Justice, judgment of 17 November 2015, case C-115/04) attest. The present text analyzes the decision *RegioPost* and sketches the extent to which public procurement can be employed to pursue social policy objectives. It will be shown that *RegioPost* confirmed the right of public authorities to pursue social objectives via procurement law, which also includes the setting of a procurement wage (even if it exceeds general wage levels), provided that it conforms to the formal requirements of Directive 96/71. The decision clarifies and partly overturns the controversial judgment *Rüffert*, and – despite its perhaps somewhat technical nature – may contribute to an integration process that is more balanced in socio-economic terms.

KEYWORDS: public procurement – posted workers – freedom to provide services – social policy.

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I. INTRODUCTION: PURSUING MULTIPLE POLICY OBJECTIVES VIA PUBLIC PROCUREMENT

When public authorities procure goods, works or services, they do not necessarily want to base their decision on the lowest price alone. Other considerations may be of relevance for them as well: they may want to employ public procurement as a tool to foster innovation, wish to act as role models in social or environmental concerns, or to otherwise pursue regulatory objectives by nudging contractors, but without creating additional rules for the private sector as a whole.¹ As procurement accounts for a significant amount of the Union's overall economic activity, it constitutes a potentially powerful tool of governance.²

European law enables public authorities to pursue a broad spectrum of regulatory objectives by means of public procurement. While both the old and the new Procurement Directives, Directives 2004/18 and 2014/24,³ aim at fostering market integration and preventing discrimination between domestic and non-domestic contractors, they also recognize that procurement as an instrument of governance can serve multiple objectives. This becomes very clear in the preamble of Directive 2014/24, which emphasizes the role of public procurement in the Europe 2020 strategy, and discusses extensively how it can be mobilized for example to foster innovation, or in support of SMEs. According to Directive 2014/24, award criteria may comprise "quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions";⁴ while these criteria shall be "linked to the subject-matter of the public contract", these factors do not have to "form part of their material substance".⁵ Social objectives may be pursued by setting contract performance conditions. Art. 70 of Directive 2014/24 holds in that regard that "contracting authorities may lay down special conditions relating to the performance of a contract", which "may include economic, innovation-related, environmental, social or employment-related considerations". The scope of social performance conditions that can be pursued under this provision is broad, as the Directive's preamble indicates. Art. 70 of Directive 2014/24 conforms mostly to Art. 26 of Directive 2004/18, which is the subject of the *RegioPost* decision, and which we will discuss below.

¹ Along these lines the new Procurement Directive calls on public authorities to "spur innovation", including "eco-innovation and social innovation". Recital 47 of Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC.

² See *ivi*, recital 2.

³ The old Procurement Directive (Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts) has been replaced by Directive 2014/24, and must be implemented by April 2016.

⁴ Art. 67, para. 2, lett. a), of Directive 2014/24.

⁵ *ivi*, Art. 67, para. 3.

However, not all such performance conditions are uncontroversial. In particular, conditions requiring contractors and subcontractors to respect a certain wage floor have faced legal challenges, as illustrated by the decisions *Rüffert*,⁶ *Bundesdruckerei*⁷ and, most recently, *RegioPost*.⁸ There are a number of reasons why public authorities may wish to prescribe a certain minimum wage level via procurement. If the required wage floor corresponds to the legal minimum wage or a relevant collective agreement, the reason may lie in the desire to ensure compliance, which is an issue the Procurement Directives address.⁹ However, public authorities may also want to prescribe a procurement wage that exceeds the general wage level: the nationally mandated minimum wage – if one exists – may be very low in general, or it may be too low for certain regions with high living costs. The relevant public authority may not have the competence to alter the national minimum wage or may not deem it appropriate to enforce it against all operators alike, but may nonetheless wish to pay a living wage in its area of responsibility.¹⁰ In more general terms, it can be argued that prescribing a minimum wage via public procurement relates to the desire to limit competition based on wages below a certain bottom level, or at least to prevent that public procurement exacerbates such dynamic. The insinuation that competition based on wage differences would be the main form of competition the internal market aims to foster is incorrect.¹¹ In fact, excluding a certain form of wage competition that is considered socially undesirable may stimulate competition in other aspects, such as innovation, quality or efficiency.

II. CROSS-BORDER PROVISION OF SERVICES AND THE POSTED WORKERS DIRECTIVE

The European market encompasses regions with different productivity levels and living costs. As a general principle, the terms and conditions of employment applicable at the location where a work is executed should be respected.¹² However, such principle

⁶ Court of Justice, judgment of 3 April 2008, case C-346/06, *Dirk Rüffert v. Land Niedersachsen*.

⁷ Court of Justice, judgment of 18 September 2014, case C-549/13, *Bundesdruckerei GmbH v. Stadt Dortmund*.

⁸ Court of Justice, judgment of 17 November 2015, case C-115/04, *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*.

⁹ Art. 18, para. 2, and preamble, para. 37, of Directive 2014/24.

¹⁰ See T. SCHULTEN, M. PAWICKI, *Tariftreueregelungen in Deutschland: Ein aktueller Überblick*, in *WSI Mitteilungen*, 2008, p. 189.

¹¹ See e.g. the comments made by the referring court cited in *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, cit., para. 33.

¹² See the reference to the Convention 80/934/ECC on the law applicable to contractual obligations (Rome Convention) in Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services (Posted Workers Directive), preamble, recitals 7-10; see also the discussion of the older case law in the Opinion of Advocate General Wahl deliv-

leaves many concrete problems unsolved; among them is the cross-border provision of services.¹³ Directive 96/71 (Posted Workers Directive) constitutes a legislative compromise on this issue.¹⁴ According to its Art. 3, the host State has to set certain terms and conditions of employment for posted workers. These include areas such as maximum work periods, minimum rest periods and health, safety and hygiene standards at work, as well as the “minimum rates of pay”. Member States can fix terms and conditions of employment for posted workers in one of three ways. They can do so “by law, regulation or administrative provision” (variant 1). Alternatively, they can declare a collective agreement universally applicable (variant 2). For countries in which such system does not exist, Member States may base themselves on “generally applicable” collective agreements (variant 3). Because Directive 96/71 defines the conditions under which a host State can prescribe binding employment conditions for workers posted on their territory, it limits the margin of appreciation available to procuring authorities in defining social performance conditions, as we will discuss below.

Overview: How Member States can fix terms and conditions of employment for posted workers under Directive 96/71.

Variant 1	Art. 3, para. 1, first indent	“by law, regulation or administrative provision”
Variant 2	Art. 3, para. 1, second indent	by “collective agreements or arbitration awards which have been declared universally applicable”
Variant 3	Art. 3, para. 8	If such system does not exist, Member States may base themselves on “collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned; or “collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory”

ered on 18 September 2014, case C-396/13, *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*, para. 29.

¹³ See *ivi*, para. 26.

¹⁴ See *ivi*, paras 27-30.

III. GROWING INEQUALITY AND NATIONAL PROCUREMENT LAW

For the past decades, income inequality increased, and the development of wages and of productivity has been decoupled: while productivity increased, wages stagnated.¹⁵ Consequently, the labor share in the overall societal income fell, which essentially represents a re-distribution from labor to capital. While the causes of this process are likely multiple, the liberalization and outsourcing of public services, in conjunction with increased pressure on public budgets, has played a considerable role in this development.¹⁶ In procuring services they had previously provided themselves, public authorities fostered price competition among private operators vying for public contracts, which in turn exacerbated the pressure on wage levels. In response, some public authorities conceived of strategies aimed at neutralizing the downward pressure on wages they effected.¹⁷ Among the measures developed in this context is the prescription of a wage floor via public procurement that contractors and their sub-contractors have to comply with. An example are the so-called “Tariftreugesetze” enacted by various German states, which were the subject of the decisions *Rüffert*, *Bundesdruckerei*, and *RegioPost*.¹⁸ The first generation of these laws required contractors and sub-contractors to pay wages according to the collective agreement of the place where the service is provided. However, this model was rejected by the Court in *Rüffert*, which dealt with the *Landesvergabegesetz (LVergabeG)* of the German region *Niedersachsen*. It required contractors and subcontractors in the building sector to pay their employees according to a collective agreement that had not been declared universally applicable.¹⁹ The Court found the measure to be in conflict with Directive 96/71 because it did not conform to any of its three variants discussed above. Moreover, it was found to conflict with Art. 56 of the Treaty on the Functioning of the European Union (TFEU), for reasons we will discuss further below. The precise scope of the decision remained unclear, however, and created considerable uncertainty, as it appeared questionable whether procurement laws could legitimately prescribe a minimum wage at all. The decision *Rüffert* contributed to an ongoing reconstruction of German law;²⁰ most

¹⁵ European Commission, *Employment in Europe*, 2007, p. 237.

¹⁶ K. JAEHRLING, *Öffentliche Auftragsvergabe - eine neue Arena der industriellen Beziehungen? Konzeptionelle Überlegungen und erste empirische Befunde*, in *Industrielle Beziehungen*, 2015, p. 326.

¹⁷ This point was made in the legislative materials accompanying the procurement laws in Nordrhein-Westfalen and Schleswig-Holstein. Quoted in T. SCHULTEN, *Warum landespezifische Mindestlohnvorgaben im Vergabegesetz trotz allgemeinem Mindestlohn eine Zukunft haben könnten*, in *Euroforum*, 2014, p. 5.

¹⁸ For an updated overview over the various *Tariftreugesetze* see www.boeckler.de.

¹⁹ *Dirk Rüffert v. Land Niedersachsen*, cit., para. 6.

²⁰ See M. ROHRMANN, H.W. EISERLOH, *Update Tariftreue*, in *Arbeit und Arbeitsrecht*, 2014, p. 720; D. SEIKEL, N. ABSENGER, *Die Auswirkungen der EuGH-Rechtsprechung auf das Tarifvertragssystem in Deutschland*, in *Industrielle Beziehungen*, 2015, p. 51; E.K. SARTER, D. SACK, S. FUCHS, *Public Procurement as Social Policy? An Introduction to Social Criteria in Public Procurement in Germany*, in *Working Paper Series*

notably, Germany introduced a federal minimum wage in 2015.²¹ Other reforms included the adaptation of the regional *Tariftreuegesetz*: whereas the first generation of these laws had referred to existing collective agreements, the second generation referred to collective agreements declared universally applicable via regulation on the basis of the *Arbeitnehmer-Entsendegesetz* (AEntG), and otherwise prescribed a minimum wage themselves.²² These were in turn challenged in *Bundesdruckerei* and *RegioPost*. *Bundesdruckerei* dealt with the TVgG-NRW, a *Tariftreuegesetz* of the second generation. It required contractors to pay the wage prescribed by the collective agreements declared universally applicable via regulation on the basis of the AEntG, and otherwise prescribed a minimum wage of 8.62 Euro.²³ The case dealt with a tender for the service of digitalizing documents, which the Bundesdruckerei, a candidate for the tender, intended to perform exclusively in Poland. The contracting authority, the city of Dortmund, nonetheless required the contractor and subcontractor to pay their employees according to the TVgG-NRW, against which Bundesdruckerei appealed. Different to *Rüffert*, the Court found Directive 96/71 inapplicable in *Bundesdruckerei*, as the contractor would not have posted workers to Germany. As it prescribed a minimum wage higher than the one applicable in Poland, the Court found the measure to be an unjustifiable restriction of Art. 56 TFEU.

Overview: legal instruments for setting minimum wages in Germany discussed in *RegioPost*.

Federal minimum wage	Since 2015, the <i>Mindestlohngesetz</i> (MiLoG) prescribes a minimum wage of brutto 8.5 Euro for employees not covered by a higher wage. ²⁴ At the time of the facts in <i>RegioPost</i> (2013), the MiLoG was not yet in place.
Collective agreements declared universally applicable	The AEntG extends the scope of collective agreements to posted workers via regulation. The AEntG was already applicable in 2013; a regulation for setting a mandatory minimum wage for the postal sector according to the AEntG had been in place, but had been annulled by a court. Thus, at the time of the facts of the main proceedings, no such regulation was in place. ²⁵

"Comparative Governance": *Arbeitsgebiet Vergleichende Politikwissenschaft*, Bielefeld: Universität Bielefeld, 2014, p. 8 *et seq.*, www.uni-bielefeld.de.

²¹ Mindestlohngesetz (MiLoG) of 11 August 2014 (BGBl. I S. 1348).

²² E.K. SARTER, D. SACK, S. FUCHS, *Public Procurement as Social Policy? An Introduction to Social Criteria in Public Procurement in Germany*, cit., p. 13.

²³ *Bundesdruckerei GmbH v. Stadt Dortmund*, cit., para. 7.

²⁴ Art. 1, MiLoG.

²⁵ *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, cit., para. 10.

Procurement wage via regional procurement laws	Various German regions prescribe wage floors in their procurement laws, such as the LTTG that is the subject of the decision <i>RegioPost</i> .
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IV. THE DECISION *REGIOPOST*

In the German *Bundesland Rheinland-Pfalz*, the *Landestariftreuegesetz* (LTTG) lays down the minimum wage that a contractor has to pay its employees in performing public contracts. Its Art. 4 requires contractors to pay according to the relevant collective agreements that were declared universally applicable per regulation on the basis of the federal *Arbeitnehmer-Entsendegesetz* (AEntG). For contractors to which Art. 4 is not applicable, Art. 3 prescribes a minimum wage of 8.5 Euro (now 8.9 Euro). As the relevant regulation for the postal sector under AEntG had been annulled by a court at the time of the facts of the case, contractors and subcontractors were bound by the wage floor defined by Art. 3 LTTG. The municipality of *Landau in der Pfalz* had issued a call for tender for the provision of postal services. In accordance with the LTTG, the city required tenderers to submit declarations for themselves and their subcontractors that the minimum wage would be paid. The application of one tenderer, RegioPost, which did not comply with this requirement, was excluded from the tender. Against this decision RegioPost lodged a complaint. In the judgment, the Court of Justice had essentially to deal with the question whether contractors and their subcontractors can be required to pay a certain minimum wage to their employees. By requiring tenderers and their subcontractors to pay a minimum wage of 8.5 Euro, the procuring authority defines a performance condition according to Art. 26 of Directive 2004/18. Such conditions must conform to the procedural condition of transparency, as Art. 26 requires these conditions to be “indicated in the contract notice or in the specifications”. The Court found this condition to be fulfilled, as the minimum wage is laid down by law. Moreover, as performance conditions must be compatible with Union law, the Court subsequently scrutinized the measure’s conformity with Directive 96/71 as well as Art. 56 TFEU.

IV.1. THE NATIONAL MEASURE IN THE LIGHT OF DIRECTIVE 96/71

Directive 96/71 provides, as just discussed, three possibilities to prescribe minimum rates of pay. According to the Court, the LTTG conforms to the first variant, as it lays down a minimum rate of pay by law. The Court thereby clarifies that public authorities may lay down a minimum procurement wage if they conform to the formal requirements of Directive 96/71. In this regard, the Court makes two points of interest, which we will discuss in turn. First, the Court holds that “at the time of the facts in the main proceedings, the AEntG did not impose, nor did other national legislation impose, a

lower wage for the postal services sector”.²⁶ This statement, which relates to the question how the concept of “*minimum* rates of pay” should be interpreted, is ambiguous. It may invite misunderstandings, as it could be assumed that Directive 96/71 would allow Member States to only lay down one single minimum wage for all posted workers or for each sector, or even that the minimum rate of pay applicable to posted workers would have to conform to the lowest wage prescribed in a Member State. This, however, would be an incorrect interpretation of Directive 96/71 for the following reasons. Art. 3, para. 1, lett. c), of Directive 96/71 allows the host Member States to set “the minimum rates of pay”: the use of the plural²⁷ already indicates that Directive 96/71 does not limit the host Member States to set one general minimum wage.²⁸ Instead, Directive 96/71 allows Member States to apply multiple minimum rates of pay; as the Court speaks about a lower wage “for the postal services sector,” it implies at least the possibility of minimum rates of pay differentiated on the basis of the various economic sectors. However, there is no indication that the minimum rates of pay could not also be differentiated for the different professions, qualifications or regions. This point has recently been explicitly recognized by the Court in the decision *Sähköalojen Ammattiliitto* (2015).²⁹ Beyond that, the functional orientation of Directive 96/71 certainly does not support an overly restrictive reading of the concept. Art. 3 conceptualizes the host Member State as the guardian of the posted workers, and Art. 3, para. 7, of Directive 96/71 emphasizes that the provision “shall not prevent application of terms and conditions of employment which are more favourable to workers”.³⁰ Finally, the Preamble emphasizes that the “promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers”, and certainly does not mention anywhere that the objective of Directive 96/71

²⁶ *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, cit., para. 62.

²⁷ See e.g. the German and the Polish language version (“Mindestlohnsätze”, “minimalne stawki płacy”).

²⁸ Advocate General Mengozzi lays out extensively that Directive 96/71 cannot be understood to require the Member States to implement a federal minimum wage. Opinion of Advocate General Mengozzi delivered on 9 September 2015, *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, cit., para. 73.

²⁹ *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*, cit., paras 43-44; on this point see also G. NASSIBI, F. RÖDL, T. SCHULTEN, *Perspektiven vergabespezifischer Mindestlöhne nach dem Regio-Post-Urteil des EuGH*, in *WSI Mitteilungen*, 2016 (upcoming).

³⁰ The Court’s interpretation of Art. 3, para. 7, in *Dirk Rüffert v. Land Niedersachsen*, cit., paras 32-34, and in Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, paras 79-80, is incorrect, given its clear wording in the context of the Directive’s overall objective, as laid out in its Preamble. The correct interpretation of Art. 3 of Directive 96/71 is that Member States *shall* lay down minimum standards for posted workers (para. 1) and *can* lay down protective measures that go beyond this (para. 7). These rules are, however, subject to the proportionality requirement under Art. 56 TFEU. It can be assumed that standards laid down according to Directive 96/71 will conform with Art. 56 TFEU, unless there are indications that this is not the case.

would be to foster price competition on the basis of cross border wage differences.³¹ While the Court emphasized in decisions like *Rüffert* and *Laval* that Member States cannot require the “observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection”,³² such argument defines a procedural requirement, i.e., the adherence to the formal requirements laid down by Directive 96/71, and cannot possibly be read in substantive terms, as we will discuss below.³³ Consequently, Directive 96/71 must be understood as allowing Member States to apply differentiated minimum rates of pay, if they conform to its formal requirements.

Second, *RegioPost* clarifies and overturns *Rüffert* in one important aspect. It concerns what could be called the selective applicability of procurement law, i.e., the fact that procurement law, by its nature, does not apply to the general work force but only to employees working on public contracts. In *Rüffert*, this point had been brought up twice, once in regard to Directive 96/71, and once in regard to the proportionality test under Art. 56 TFEU, which we will discuss in the next section. In *RegioPost* the Court and especially Advocate General.

Advocate General Mengozzi clarified that this point is of relevance with regard to a very limited aspect of Directive 96/71 alone, namely the interpretation of its Art. 3, para. 8. As already discussed, Art. 3, para. 8, of Directive 96/71 allows Member States that do not have a system of declaring collective agreements universally applicable to prescribe minimum rates of pay to posted workers via a collective agreement if it is “generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned”. As procurement laws are not generally applicable in such sense, they are not covered by this provision. It is only in this regard that the selective applicability of procurement laws must be considered relevant. By contrast, a procurement law – as already discussed – may well conform to the first variant of setting minimum wages provided for by Directive 96/71.

IV.2. THE NATIONAL MEASURE IN THE LIGHT OF ART. 56 TFEU

The Court held in *RegioPost*, as it had already done in *Rüffert*, that the imposition of a minimum wage on contractors and subcontractors via procurement law constituted a restriction of the freedom to provide services if they are established in another Member State where lower minimum rates of pay apply.³⁴ Different to *Rüffert*, however, the

³¹ See in particular recitals 5, 9-10, 12-14, 17 of Directive 96/71.

³² *Dirk Rüffert v. Land Niedersachsen*, cit., para. 33; *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet et al.*, cit., para. 80.

³³ Advocate General Wahl is correct when he argues that “Member States retain substantial discretion in determining the material content of the rules referred to in Art. 3, para. 1 of Directive 96/71”. This discretion is subject to the proportionality requirement of Art. 56 TFEU, as we will discuss below. Opinion of Advocate General Wahl, cit., para. 66.

³⁴ *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, cit., para. 69.

Court found the measure at stake in *RegioPost* justifiable in the light of the regulatory objective of protecting workers. The Court's reasoning includes the same points it had already made in relation to Directive 96/71. But as Directive 96/71 and Art. 56 TFEU are different instruments, it is important to scrutinize these points anew in relation to the latter. Distinguishing between the two is important in particular in regard to the selective applicability argument. As discussed above, the Court in *Rüffert* had made the limited point that the selective applicability of procurement measures to public contracts alone conflicts with the requirement of Art. 3, para. 8, of Directive 96/71 – which establishes one of the three variants of setting a minimum wage – that the collective agreement in question would have to be “generally applicable”. However, the Court had then brought up the same argument again in the context of a proportionality analysis under Art. 56 TFEU: it was suggested, and repeated a few years later in *Bundesdruckerei*, that measures applying to employees in public contracts alone could not be justified on grounds of worker protection unless such differential treatment between employees working on private and on public contracts was justified.³⁵ By contrast, the Court rejected this line of reasoning in *RegioPost*, and thereby overturned *Rüffert* in an important aspect. A key argument brought forward by Advocate General Mengozzi, and accepted by the Court, concerns Art. 26 of Directive 2004/18, which – as we already discussed – grants the possibility to set special performance conditions, and explicitly mentions social and environmental considerations in that regard. This competence implies the setting of requirements that exceed the general regulatory standards.³⁶ If procurement conditions, which by their nature apply to public contracts alone would be unjustifiable, Art. 26 would lose its meaning. The Court thereby recognizes that public procurement can legitimately serve objectives of social policy, despite the fact that it does not establish rules that apply to everyone alike.

The second point the Court picked up again in the context of the proportionality analysis under Art. 56 TFEU relates to the interpretation of the concept of “*minimum rates of pay*”. The Court argued that the LTTG “confers a minimum social protection since, at the time of the facts in the main proceedings, the AEntG did not impose, nor did other national legislation impose, a lower minimum wage for the postal services sector”.³⁷ The statement is ambiguous also with regard to Art. 56 TFEU. It might be assumed that Member States, additionally to the formal restrictions Directive 96/71 defines for setting minimum rates of pay, would also be subject to the requirement that

³⁵ *Bundesdruckerei GmbH v. Stadt Dortmund*, cit., para. 32.

³⁶ According to the Advocate General Mengozzi, the Court has already recognized this in relation to special environmental considerations. Opinion of Advocate General Mengozzi, cit., para. 86; see also G. NASSIBI, F. RÖDL, T. SCHULTEN, *Perspektiven vergabespezifischer Mindestlöhne nach dem Regio-Post-Urteil des EuGH*, cit., discussing further case law supporting this point in regard to both environmental and social considerations.

³⁷ *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, cit., para. 76.

they could not prescribe a minimum wage that exceeds the “minimum social protection” in some substantive sense. We already discussed above that Directive 96/71 cannot be read in such way, and this is also of relevance for the interpretation of Art. 56 TFEU in that context. Directive 96/71 essentially constitutes a legislative compromise on the regulation of wages in the context of the cross-border provision of services, which holds that the minimum rates of pay applicable at the location where the service is executed can be prescribed.³⁸ This does not imply that a national measure that sets minimum rates in some form could not be scrutinized on the basis of Art. 56 TFEU at all, or could not be held to be disproportionate. However, the minimum rates of pay fixed in accordance with Directive 96/71 should generally be assumed to be in conformity with Art. 56 TFEU as well, unless there are indications that this is not the case. Moreover, such reading would lead to inconsistent results: in the *RegioPost* scenario, even an excessively high procurement wage would be considered justifiable as it was the lowest minimum wage on the books at that time. This, however, would quite obviously be in conflict with the claim that it confers not more than a “minimum social protection”. And third, as already discussed, the Court’s statement in *RegioPost* itself – which speaks of “a lower minimum wage for the postal services sector” – implies to the very least that differentiated, sector-specific minimum wages are considered possible. Given the Court’s clear finding in *Sähköalojen Ammattiliitto* that minimum rates structured on the basis of wage groups differentiated on the basis of “various criteria including the workers’ qualifications, training and experience and/or the nature of the work performed by them” conform with Directive 96/71, the Court’s statement in *RegioPost* must be read along the same lines.³⁹ Advocate General Wahl is certainly correct when he argues that in the case of “competing minima” (e.g. one set by legislation, the other by collective agreement of universal applicability) the “conflict would need to be decided in favour of the lowest of those ‘minima’”.⁴⁰ However, such situation will often be avoided in practice. For example, federal minimum law such as the MiLoG usually apply only to the extent that no other, more beneficial law is applicable, so that no situation of “competing minima” occurs.⁴¹ Consequently, it must be assumed that, despite the Court’s ambiguous formulation, Art. 56 TFEU allows Member States to prescribe differentiated minimum rates of pay, and does not require the imposition of one a rate of pay that is “minimum” in the absolute sense.

³⁸ See in this regard recitals 9-10 and 12-14 of Directive 96/71.

³⁹ *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*, cit., paras 43-44.

⁴⁰ Opinion of Advocate General Wahl, cit., para. 87.

⁴¹ Art. 1, para. 3, MiLoG.

V. CONCLUSION

In *RegioPost*, the Court revisited the decisions in *Rüffert* and *Bundesdruckerei*, and clarified or overturned them in important aspects. The preceding analysis allows us to sum up the key points of judgment as follows: first, public authorities may set procurement wages that exceed the general regulatory standard as performance conditions under Art. 26 of Directive 2004/18. Even though its Art. 70 is formulated slightly differently, this will clearly also be possible under Directive 2014/24. Second, insofar as posted workers are factually or potentially concerned, the procurement wage has to conform to the requirements of Directive 96/71. A procurement law such as the LTTG that sets a numerical minimum wage conforms to that requirement. Third, Directive 96/71 allows Member States to set differentiated minimum wages for posted workers, e.g. based on different regions, tasks or qualifications. Fourth, a minimum wage applied to posted workers constitutes, as the Court argues, a restriction of Art. 56 TFEU that must be justified, e.g. on the grounds of worker protection. However, it has been argued in this text that Directive 96/71 constitutes a legislative compromise, which presumes that the wage level applicable in the place where the service is executed can be applied to posted workers. Consequently, a national measure that conforms to the requirements of Directive 96/71 must generally be assumed to conform with Art. 56 TFEU as well, unless there are indications to the contrary. In such case, the procuring authority will have to provide rational support for why they procure for a specific wage, e.g., if they wish to set a procurement wage that exceeds the general standards; as discussed in the beginning, possible arguments could be found in the objective to pay a living wage.

All in all the decision *RegioPost* shows that public procurement can be employed as an instrument of social policy and in that sense has become a factor that is relevant for the process of European integration. In particular, the legality of establishing wage floors for public procurement aimed at neutralizing the downward pressure on wages that public authorities that public authorities exert through their procurement activity has been confirmed. By clarifying and partly overturning the controversial judgment *Rüffert*, *RegioPost* may contribute to an integration process that is more balanced in socio-economic terms.



SCHENGEN, DIFFERENTIATED INTEGRATION AND COOPERATION WITH THE ‘OUTS’

ALBERTO MIGLIO*

ABSTRACT: In case C-44/14, *Spain v. European Parliament and Council*, the Court of Justice of the European Union has had the opportunity to clarify the scope and effects of the British and Irish opt-out in the Schengen area. The Court held that a limited cooperation with those countries by means of international agreements in an area of the Schengen *acquis*, that does not apply, notoriously, to Ireland and the United Kingdom, does not infringe Art. 4 of the Schengen Protocol. By upholding the legality of such agreements, the judgment introduces some flexibility in dealing with opt-outs, while at the same time confirming that an unrestrained *à la carte* approach would not be tolerated.

KEYWORDS: differentiated integration – opting-out – Ireland and the United Kingdom – Schengen *acquis* – EUROSUR Regulation – cooperation through international agreements.

I. INTRODUCTION

In times where differentiation is increasingly seen as a necessary path to accommodate diverging views of European integration, a judgment delivered by the Grand Chamber of the Court of Justice of the European Union in September 2015¹ may provide some interesting clarifications as to the functioning of the opt-outs in the development of the Schengen *acquis*.²

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¹ Court of Justice, judgment of 8 September 2015, case C-44/14, *Kingdom of Spain v. European Parliament and Council of the European Union*. For a first comment, see A. MARLETTA, *Kingdom of Spain v. Council: another piece in the “Schengen puzzle”*, in *European Law Blog*, 15 March 2016, www.europeanlawblog.eu.

² The Schengen *acquis* originates from the Schengen Agreement originally concluded by five Member States with the aim of progressively abolishing internal border controls (Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 14 June 1985, www.eur-lex.europa.eu). Five years later the objectives of the Agreement were further developed by the Convention implementing the Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at

The judgment concerned the legality of arrangements establishing a limited form of cooperation between Member States that fully participate in the *acquis* and Member States that have a partial opt-out from it. The case arose from a challenge brought by Spain against a provision of the EUROSUR Regulation³ entitling Member States to conclude international agreements between themselves with a view to extending the applicability of certain rules of the Regulation No 1052/2013 to Ireland and the United Kingdom, to whom the Regulation does not apply. Indeed, neither Ireland nor the United Kingdom could participate in the adoption of the Regulation No 1052/2013, as they do not take part in the underlying portion of the Schengen *acquis*. Therefore, recourse to international agreements was the only way to allow for a partial extension of the relevant provisions.

In reviewing Regulation No 1052/2013 in the light of the Schengen Protocol,⁴ the Court held that such arrangements are not conflicting with primary law, as long as they do not constitute for Ireland and the United Kingdom a form of “taking part” in measures developing the *acquis* within the meaning of Art. 4 of the Protocol No 19.

The case is interesting for several reasons and may have implications that go beyond the area of Schengen-related measures. First, while confirming the need to ensure the coherence of the *acquis*, it adopts a more flexible approach compared to the pre-Lisbon case law. Secondly, it underscores the importance of effectiveness as a guiding principle in assessing the legality of the contested measure. Finally, it allows for some considerations on the use of international agreements between Member States at the service of European integration more generally.

After a brief overview of the rules of the Schengen Protocol on the participation of Ireland and the United Kingdom (II) this comment will analyse the key points of the judgment (III) and finally draw some concluding remarks (IV).

their common borders, 19 June 1990, www.eur-lex.europa.eu. The *acquis*, comprising the two conventions, the related agreements and the decisions adopted on their basis of the conventions, was later incorporated into European Union (EU) law by the Treaty of Amsterdam, which also established new legal bases for its development (on this process, see M. DEN BOER, L. CORRADO, *For the Record or Off the Record: Comments About the Incorporation of Schengen into the EU*, in *European Journal of Migration and Law*, 1999, p. 397 *et seq.*; D. THYM, *The Schengen Law: A Challenge for Legal Accountability in the European Union*, in *European Law Journal*, 2002, p. 218 *et seq.* For an overall reconstruction of the Schengen *acquis* see S. PEERS, *EU Justice and Home Affairs Law*, Oxford: Oxford University Press, 2012; S. PEERS, *The Future of the Schengen System*, in *SIEPS Report No. 6*, 2013, www.sieps.se.

³ Regulation (EU) No 1052/2013 of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR).

⁴ Protocol (No 19) integrating the Schengen *Acquis* into the Framework of the European Union. The Protocol is a modified version of the Schengen Protocol annexed to the Amsterdam Treaty. On the modifications introduced by the Lisbon Treaty see S. PEERS, *In a World of Their Own? Justice and Home Affairs Opt-Outs and the Treaty of Lisbon*, in *Cambridge Yearbook of European Legal Studies*, 2007-2008, p. 383 *et seq.*; E. FAHEY, *Swimming in a Sea of Law: Reflections on Water Borders, Irish (British) Euro Relations and Opting-Out and Opting-In After the Treaty of Lisbon*, in *Common Market Law Review*, 2010, p. 690 *et seq.*

II. THE SCHENGEN PROTOCOL AND THE POSITION OF IRELAND AND THE UNITED KINGDOM

The Schengen area represents a primary example of differentiated integration⁵ due to the special status granted to Ireland, the United Kingdom and, in different terms, Denmark.⁶

While Ireland and the United Kingdom are not, in principle, bound by the Schengen *acquis*,⁷ the Schengen Protocol introduces two mechanisms regulating, respectively, their participation in the application of the *acquis* (Art. 4)⁸ and in its implementation through the adoption of further measures (Art. 5).⁹

The judgment must be viewed against the background of previous cases where the Court clarified the relationship between these provisions. In two judgments rendered on 18 December 2007 on application of the United Kingdom which challenged the Council

⁵ On the notion and classification of forms of differentiated integration see F. TUYTSCHAEVER, *Differentiation in European Union Law*, Oxford: Hart Publishing, 1999; B. DE WITTE, D. HANF, E. VOS (eds), *The Many Faces of Differentiation in EU Law*, Antwerp, Oxford, New York: Intersentia, 2001; C. GUILLARD, *L'intégration différenciée dans l'Union européenne*, Bruxelles: Bruylant, 2007.

⁶ On the Schengen opt-out regime see S. PEERS, *In a World of Their Own? Justice and Home Affairs Opt-outs and the Treaty of Lisbon*, cit.; M. SION-TZIDKIYAHU, *Opt-Outs in the Lisbon Treaty: What Direction for Europe à la Carte?*, in *European Journal of Law Reform*, 2008, p. 497 *et seq.*; M. FLETCHER, *Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom's 'Ins' and 'Outs'*, in *European Constitutional Law Review*, 2009, p. 71 *et seq.*; E. FAHEY, *Swimming in a Sea of Law: Reflections on Water Borders, Irishi(-British)-Euro Relations and Opting-out and Opting-in after the Treaty of Lisbon*, cit.; J.J.E. SCHUTTE, *UK v. EU: A Continuous Test Match*, in *Fordham International Law Journal*, 2010-2011, p. 1346 *et seq.*; G. CORNELISSE, *What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area without Internal Borders*, in *Common Market Law Review*, 2014, p. 741 *et seq.*; P. MENGIOZZI, *La Corte di giustizia confrontata agli Stati membri opting out*, in *Il diritto dell'Unione europea*, 2015, p. 261 *et seq.*; S. MONTALDO, *L'integrazione differenziata e la cooperazione giudiziaria e di polizia in materia penale nell'UE: il caso degli opt-out di Regno Unito, Irlanda e Danimarca*, in *La legislazione penale*, 4 febbraio 2016.

⁷ See Art. 4 of the Schengen Protocol, in addition to Art. 2 in conjunction with Art. 1. Although the wording of Art. 1 indicates that the other Member States are entitled to "to establish closer cooperation among themselves in areas covered by provisions defined by the Council which constitute the Schengen *acquis*", it in fact introduces an opt-out in favour of the United Kingdom and Ireland.

⁸ Art. 4 provides that the Ireland and the United Kingdom "may at any time request to take part in some or all of the provisions of this *acquis*", subject to a unanimity decision by the Council. Application of the Schengen *acquis* was partially extended to the United Kingdom and Ireland pursuant to this procedure: see, respectively, Decision 2000/365/EC of the Council concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis* and Decision 2002/192/EC of the Council concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*.

⁹ Art. 5 of the Protocol makes participation of the 'outs' subject to less stringent requirements: they merely need to notify the President of the Council, within a reasonable period from the launch of the proposal, that they wish to take part in the adoption of the measure.

refusal to let it participate in Schengen-related measures,¹⁰ the Court found that participation of a Member State in the adoption of a measure developing the Schengen *acquis* is only admissible where that State has accepted the area of the *acquis* upon which the measure is based.¹¹ If a Member State could rely on Art. 5 of Protocol No 19 to participate in any measure developing the *acquis*, the procedure set out in Art. 4 would become meaningless, as the Council refusal could be easily circumvented by participating in the implementing measures.¹² This strict approach, which may seem at odds with the Court's traditional favour for European integration,¹³ was aimed to limit fragmentation and to provide an incentive for Ireland and the United Kingdom to join the whole of the Schengen *acquis*.

Finally, in a subsequent case the Court reiterated the strict approach to opt-out rules, adding that the other Member States are not required, where they intend to adopt provisions developing the Schengen *acquis*, to provide for special adaptation measures for opt-out countries.¹⁴

III. DISTINGUISHING “LIMITED COOPERATION” FROM A FULL “TAKING PART” IN THE SCHENGEN ACQUIS

While the pre-Lisbon cases concerned the scope of Art. 5 of Protocol No 19 in relation to Art. 4 of the Regulation, in case *Kingdom of Spain v. European Parliament and Council* the Court was confronted only with the interpretation of the latter.

The case arose from a challenge that Spain brought against a provision of the EUROSUR Regulation, a measure adopted in October 2013 in order to improve the management of the EU external borders.

Regulation No 1052/2013 establishes a European Border Surveillance System (EUROSUR) based on a network of national authorities responsible for border control. Their task is to collect and share, with the other Member States and with the European

¹⁰ Court of Justice, judgment of 18 December 2007, case C-77/05, *United Kingdom v. Council*; Court of Justice, judgment of 18 December 2007, case C-137/05, *United Kingdom v. Council*; Court of Justice, judgment of 26 October 2010, case C-482/08, *United Kingdom v. Council*.

¹¹ *United Kingdom v. Council*, case C-77/05, cit., para. 62. The judgment also established that the Schengen Protocol and the Protocol on participation of Ireland and the UK in the area of Freedom, Security and Justice (at that time, Justice and Home Affairs) are mutually exclusive (para. 73 *et seq.*). By construing the scope of application of the Schengen Protocol broadly, it correspondingly reduced the scope of the AFSJ Protocol.

¹² *United Kingdom v. Council*, case C-77/05, cit., para. 67.

¹³ See J.J. RIJPMAN, case annotation *Case C-77/05, United Kingdom v. Council, Judgment of the Grand Chamber of 18 December 2007*, not yet reported, and *Case C-137/05, United Kingdom v. Council, Judgment of the Grand Chamber of 18 December 2007*, not yet reported, in *Common Market Law Review*, 2008, p. 851; G. CORNELISSE, *What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area without Internal Borders*, cit., p. 769 *et seq.*

¹⁴ *United Kingdom v. Council*, case C-482/08, cit., para. 49.

agency FRONTEX, information gathered through border surveillance activities, in order to improve situational awareness and reaction capability at the external borders for the purpose combating cross-border crime and irregular migration and protecting the lives of migrants.

Since the Regulation No 1052/2013 establishes rules related to the crossing of external borders, it undoubtedly constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom and Ireland do not participate.¹⁵

Nevertheless, Art. 19 of the Regulation No 1052/2013 allows for cooperation with the United Kingdom and Ireland on the basis of international agreements to be concluded between those countries and neighbouring Member States.

Spain challenged the legality of this provision, alleging that it breached Art. 4 of the Schengen Protocol. It argued that the possible association of Ireland and the United Kingdom to the EUROSUR system by means of international agreements was a form of participation in the Schengen *acquis*. Accordingly, that would amount to a circumvention of Art. 4 of the Protocol No 19, which makes participation in the *acquis* by the Member States concerned subject to precise procedural requirements (namely, a unanimity Council decision).

At the outset, the Court recalled that Ireland and the United Kingdom are in a special situation in respect to the Schengen *acquis*, as they have not joined it in its entirety. In particular, those two Member States do not participate in the measures of the *acquis* concerning the crossing of the external borders.¹⁶

Therefore, they may “take part” in measures relating to that area, such as the EUROSUR Regulation, only by resorting to the procedure set forth in Art. 4 of the Protocol No 19. Recalling its previous case law, the Court pointed out that “the EU legislature cannot validly establish a procedure that differs from that provided for in Art. 4 of the Schengen Protocol, whether in the direction of strengthening or easing that procedure”.¹⁷ It follows logically from this statement that circumvention of Art. 4 of the Protocol No 19 is not permitted even by means of international agreements between Member States.¹⁸

This, however, was only the starting point of the analysis. The key question was to determine whether the cooperation established with Ireland and the United Kingdom by Art. 19 of the contested Regulation did in fact allow those Member States to “take part” in provisions of the Schengen *acquis*.

¹⁵ See recitals nos 20 and 21 of the Regulation.

¹⁶ *Spain v. European Parliament and Council*, cit., paras 29-33.

¹⁷ *Spain v. European Parliament and Council*, cit., para. 31.

¹⁸ *Spain v. European Parliament and Council*, cit., para. 32.

In rejecting this view, the Court largely followed the Opinion delivered by Advocate General Wahl, who had traced a distinction between actual participation in the *acquis* and more limited forms of cooperation.¹⁹

The difference does not rest on the nature of the arrangement that would permit cooperation with the *outs*. That is perfectly reasonable, as permitting Ireland and the United Kingdom to fully participate in the measure by concluding a separate international agreement would in fact amount to a circumvention of Art. 4 of the Protocol No 19. The Court clearly stated that this outcome would not be admissible.²⁰

Rather, the distinction appears to be based on two criteria.

The first is the difference in scope. The Court observed that the envisaged cooperation only covers part of the subject matter of the Regulation No 1052/2013 and excludes, significantly, any direct relation between the *out* Member States and FRONTEX and the application of provisions on operational coordination.²¹ The agreements set out in Art. 19 of the Regulation No 1052/2013 would thus not extend to the *outs* the entire content of the Regulation, only allowing for the exchange of some of the information gathered by the national coordination centres. Had the EU legislature provided for the full extension of the Regulation No 1052/2013 to the United Kingdom and Ireland, the Court would arguably have found the arrangement to be incompatible with primary law.

The second criterion relates to the legal effects of the envisaged agreements. In this respect, the Court held that the Schengen Protocol only concerns full participation of Ireland and the United Kingdom in EU measures developing the *acquis*. This conclusion was supported by the reading of the Preamble, which states that the Protocol No 19 is intended to allow those Member States to “accept” provisions of the Schengen *acquis*, thereby suggesting that the procedure set out in Art. 4 only refers to the “full acceptance” of provisions of the *acquis*, not to “limited cooperation mechanisms”.²²

Based on the wording of Art. 1 of the Protocol No 19, which expressly defines the development of the Schengen *acquis* by the participating Member States as a form of “closer cooperation”, the Court also drew an interesting comparison with the regime of enhanced cooperation set out in the Treaties. It recalled that pursuant to Art. 327 of the Treaty on the Functioning of the European Union (TFEU) the main feature of enhanced cooperation is the distinction between participating and non-participating Member

¹⁹ Opinion of Advocate General Wahl delivered on 13 May 2015, case C-44/14, *Kingdom of Spain v. European Parliament and Council of the European Union*, para. 26 *et seq.*

²⁰ *Spain v. European Parliament and Council*, cit., para. 32.

²¹ *Spain v. European Parliament and Council*, cit., para. 37 *et seq.* According to Art. 19 of the EUROSUR Regulation, bilateral or multilateral agreements with Ireland and the United Kingdom cannot establish relations between them and FRONTEX, nor grant Ireland and the United Kingdom access to the communication network and to all information the other Member States share with each other and with FRONTEX. Additionally, the agreements could not extend to Ireland or the United Kingdom the operational provisions of the Regulation.

²² *Spain v. European Parliament and Council*, cit., para. 46.

States. Whereas the former are bound by the acts adopted in the context of the enhanced cooperation, even where they have joined it at a later stage, the latter are not. Applying this scheme to the Schengen Protocol, the Court concluded that Art. 4 thereof "must [...] be read as having the objective of allowing Ireland and the United Kingdom to be placed, as regards certain provisions in force of the Schengen *acquis*, in a situation equivalent to that of the Member States participating in that *acquis*".²³ By contrast, it does not regulate the rights and obligations of Ireland and the United Kingdom where they decide to stay outside that enhanced cooperation.²⁴

The effects of agreements such as those envisaged by the contested provision are therefore quite different from full participation of Ireland and the United Kingdom in the adoption of the measure. Additionally, neighbouring Member States may provide for coordination with those Member States by concluding bilateral or multilateral agreements, but are not obliged to do so. In the same vein, since this form of coordination does not amount to participation of Ireland and the United Kingdom in the Schengen *acquis*, it cannot affect their position as regards both the *acquis* and the future adoption of further measures in this area.

Interestingly, the judgement strongly relies on the principle of effectiveness. In assessing the potential impact of cooperation by means of international law on the *effet utile* of Art. 4 of the Protocol No 19²⁵ the Court noted that the effectiveness of that provision would not be called into question, as Ireland and the United Kingdom would not obtain rights comparable to those of the Member States fully participating in the *acquis*. On the contrary, a restrictive interpretation of Art. 4, preventing coordination with non-participating Member States, could jeopardise the effectiveness of external borders control in neighbouring countries. Thus, if some fragmentation is inevitable, being the necessary consequence of the existence of opt-outs, at least the agreements set out in Art. 19 of the Regulation No 1052/2013 could reduce its negative impact.

IV. CONCLUDING REMARKS

The judgment is coherent with previous cases dealing with the situation where one or more Member States have opted out of certain European policies. The case law has constantly emphasised the need to preserve the consistency and the effectiveness of EU law by avoiding a *pick and choose* approach that would increase fragmentation,²⁶ an

²³ *Spain v. European Parliament and Council*, cit., para. 49.

²⁴ *Ibidem*.

²⁵ *Ivi*, para. 52 *et seq.*

²⁶ See S. MONTALDO, *L'integrazione differenziata e la cooperazione giudiziaria e di polizia in materia penale nell'UE: il caso degli opt-out di Regno Unito, Irlanda e Danimarca*, cit., p. 6. Some authors have criticized the Court's approach, arguing that, instead of stressing "the coherence of the Schengen *acquis* from the perspective of the Schengen Member States, [...] it could have focused instead on its substantive coherence", favouring a wider participation of the *outs* in Schengen-related measures (G. CORNELISSE,

approach the Court has also followed in determining the scope of opt-out rules in other areas.²⁷ In this respect, the judgment has – unsurprisingly – upheld the Court’s previous case law concerning the Schengen Protocol.

The pre-Lisbon cases, however, have often been criticised as excessively rigid. It was argued that by insisting on the coherence of the Schengen *acquis* and on the strict demarcation between the Schengen Protocol and the (then) Title IV Protocol (now Protocol No 21), the Court undermined the equally important objective of ensuring the widest possible participation in EU measures, leading in fact to yet more fragmentation.²⁸

Actually, the need to resort to international law arrangements to ensure some co-ordination with Ireland and the United Kingdom in the context of the EUROSUR Regulation is precisely a consequence of this approach. Since those Member States are not taking part in the underlying *acquis*, they could not just participate in the EUROSUR Regulation by invoking Art. 5 of Protocol No 19. Instead, they would have had to first “take part” in the underlying provisions of the Schengen *acquis*, a step that neither the United Kingdom nor Ireland are willing to take.²⁹ As a consequence, the only way to ensure some form of cooperation with Ireland and the United Kingdom within the framework of EUROSUR was to resort to *ad hoc* international agreements.

By admitting the legality of such agreements, in case *Spain v. European Parliament and Council*, the Court of Justice has followed a more pragmatic approach compared to the previous case law. This is particularly evident from the reading of paras 55-57 of the judgment, where, following a suggestion of the Advocate General,³⁰ it recognized that a certain degree of fragmentation is the inevitable by-product of any regime of differentiated integration, but Art. 19 of the EUROSUR Regulation may in fact “contribute to reducing that fragmentation”.³¹ This is so not only because it may enhance the effectiveness of border control rules, but also for a different reason: while expressly permitting the conclusion of international agreements between Member States, the Regulation also sets clear limits to the provisions whose application may be extended. By establishing a legal basis for such agreements in EU law provisions, Regulation No 1052/2013 excludes that such agreements are entirely left to the initiative of Member States and es-

What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area without Internal Borders, cit., p. 756).

²⁷ See Court of Justice, judgment of 26 September 2013, case C-431/11, *United Kingdom v. Council*; Court of Justice, judgment of 27 February 2014, case C-656/11, *United Kingdom v. Council*; Court of Justice, judgment of 18 December 2014, case C-81/13, *United Kingdom v. Council*.

²⁸ M. FLETCHER, *Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom's 'Ins' and 'Outs'*, cit., p. 87.

²⁹ The reasons for staying out of part of the Schengen *acquis* for these two Member States are, however, quite different: see E. FAHEY, *Swimming in a Sea of Law: Reflections on Water Borders, Irish(-British)-Euro Relations and Opting-out and Opting-in after the Treaty of Lisbon*, cit., p. 673 *et seq.*

³⁰ Opinion of Advocate General Wahl, cit., para. 52.

³¹ *Spain v. European Parliament and Council*, cit., para. 57.

establishes the proper framework for verifying that agreements concluded on the basis of Art. 19 respect the primacy of EU law.³²

This conclusion suggests a more general reflection on the value of international agreements as an instrument of differentiated integration. It is well-known that Member States may use international law to foster the aims of European integration.³³ The case of the EUROSUR Regulation is a classic example where recourse to such instrument offers clear advantages, namely an improvement in the efficiency of rules on control of the external borders that would not have been possible by applying the rules of the Schengen Protocol, all the more important at the height of a migration crisis that has placed the Schengen system under unprecedented strain.³⁴

International agreements between Member States, however, are often contested, as they are seen as more disruptive to the integrity of the EU legal order compared to other forms of differentiated integration that take place entirely within the framework of Union law and are regulated by the Treaties.³⁵

Yet, there are several types of international agreements between Member States that may be distinguished according to how they relate to existing EU law or to competences of the Union.³⁶ In this respect, agreements of the kind permitted by the EUROSUR Regulation appear well-coordinated with the European legal order. It is a clear advantage that their conclusion is explicitly foreseen by an act of EU secondary

³² On the constraints that the principle of primacy poses on agreements between Member States see B. DE WITTE, *Old-Fashioned Flexibility: International Agreements between Member States of the European Union*, in G. DE BÜRCA, J. SCOTT (eds), *Constitutional Change in the EU. From Uniformity to Flexibility*, Oxford: Hart, 2000, p. 45 *et seq.*

³³ See B. DE WITTE, *Old-Fashioned Flexibility: International Agreements between Member States of the European Union*, cit., p. 31 *et seq.*; B. DE WITTE, *Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements*, in B. DE WITTE, D. HANF, E. VOS (eds), *The Many Faces of Differentiation in EU Law*, cit., p. 231 *et seq.*; L.S. ROSSI, *Le convenzioni fra gli Stati membri dell'Unione europea*, Milano: Giuffrè, 2000.

³⁴ Recourse to international agreements in order to ensure cooperation with opt-out Member States in this area is likely to grow. It is no coincidence that after the judgment was delivered the Commission seized the opportunity to include a similar mechanism in its proposal for the establishment of a European Border and Coast Guard (Communication COM(2015) 671 final of the Commission, *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC*).

³⁵ See especially P. CRAIG, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance*, in *European Constitutional Law Review*, 2013, p. 263 *et seq.*; A. DIMOPOULOS, *The Use of International Law as a Tool for Enhancing Governance in the Eurozone and its Impact on EU Institutional Integrity*, in M. ADAMS, F. FABBRINI, P. LAROCHE (eds), *The Constitutionalization of Budgetary Constraints*, Oxford: Hart, 2014, p. 41 *et seq.*; P.J. KUIJPER, *International Law in the Case Law of the Court of Justice*, in *Legal Issues of Economic Integration*, 2013, p. 1 *et seq.*

³⁶ See the classification proposed by J. HEESSEN, *Interne Abkommen: Völkerrechtliche Verträge zwischen den Mitgliedstaaten der Europäischen Union*, Berlin-Heidelberg: Springer, 2015, p. 9 *et seq.*: the Author distinguishes six types of agreements according to their connection with EU law.

law, which lays down rules limiting its content and effects, without in any way conditioning or limiting the effectiveness of the Regulation No 1052/2013 among participating Member States. Moreover, this technique is easily amenable to judicial review, since the legality of the envisaged arrangements may be contested by challenging the Regulation No 1052/2013, as Spain did in the case at stake.

In conclusion, it may be argued that the judgment strikes a fair balance between the reality of differentiated integration and the need to ensure the coherence of the system. By distinguishing full participation in the Schengen *acquis* from more nuanced forms of cooperation, the Court could allow for a measure of flexibility in the application of opt-out rules without disavowing its pre-Lisbon case law, which strongly relies on the consistency of the Schengen *acquis*. By moving in the wake of the previous judgments, the Court also made clear that while a limited cooperation by means of international agreements may be permissible, it would not tolerate an unrestrained *à la carte* approach.



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