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EDITORIAL

BREXIT REFERENDUM: BEGINNING OF THE END OR JUST A TURNING POINT?

The basic facts are well known by now. On 23 June 2016 the voters, by a slim majority, decided that the United Kingdom (UK) should leave the European Union. This has been a major earthquake with political and economic aftershocks going beyond the white cliffs of Dover. They are destined to continue for months, if not years. For the first time in history of the European Communities/the European Union a Member State has decided to ask for a divorce. This, in itself, is a serious blow to the European integration project and, as some may argue, it may be the beginning of the end. It may well be a major turning point, a wake-up call for the EU, its political elites and millions of EU citizens. It may lead to stagnation and slow demise of the EU, it may well lead to consolidation or even deeper integration. While predicting the future should be left to fortune-tellers, the academic community will use a lot of ink to analyze, among other things, the political, legal and economic implications of the Brexit vote. European Papers will hopefully serve as one of the platforms for this debate. This short editorial is by no means an attempt to analyze the Brexit referendum in great depth. It merely aims to give some food for thought.

Referenda are frequently perceived as epitomes of democracy. In a perfect world, well informed voters representing the entire society take key decisions affecting the future of their local communities or countries. Their decisions on what to vote for are based on a thorough consideration of real arguments and facts that are objectively presented and argued. Alas, such a perfect world does not exist and in many cases democratic credentials of such plebiscites are questionable. The Brexit referendum, rather sadly, belongs to that category. To begin with, the franchise was controversial from the start. While, with the exception of municipal and European Parliament elections, the franchise is a matter of domestic, not EU law, it should guarantee a proper representation. Allegedly this was not the case on 23 June 2016. Millions of EU citizens whose rights are at stake (and potentially in danger) have not been allowed to cast a ballot. Firstly, the UK citizens who have resided abroad, including those living in the EU Member States, for over 15 years were not allowed to vote. On the one hand, one could defend this decision by arguing that their links with the United Kingdom have been loosened, if not severed all together. On the other hand, they have been deprived of their voting rights because they have exercised their fundamental right as EU citizens, that is the right to move and reside freely in any other Member State than the country of origin. Secondly, the EU citizens residing in the United Kingdom have been divided into

two groups. The privileged group, that is nationals of Ireland, Malta and Cyprus were included in the franchise while nationals of other Member States did not have the right to vote. The franchise also included Commonwealth citizens. While such a distinction may be historically justified it does give a bitter aftertaste as dividing between the *better* and *lesser* EU citizens. Then comes the voting age. One could, of course, dispute whether it should have been lowered to 16 years of age, as it was with the Scottish independence referendum in 2014. This, however, is not as challengeable as the first two crucial points about the franchise. Finally, one could also debate the merits of the decision to leave the results of the referendum to simple majority without any additional requirements to comply with. There was neither minimum turnout threshold to meet, nor a double majority requiring all constituent parts of the United Kingdom to agree on EU exit. This, as explained below, may turn the United Kingdom into the United Kingdom with another Scottish referendum looming on the horizon.

The second important point is the quality of the pre-referendum debate as well as levels of awareness and understanding of EU matters among the voters. Unfortunately, the picture is depressingly bleak. The political elites on both sides of the battle line have shelved one of the most fundamental virtues of public debate, that is the duty of honesty. The Vote Leave campaign was built on fantasies, plain lies and misrepresentations. Above all, it gave an impression that EU membership was all about immigration, whether free movement of workers or immigration from third countries (which is largely UK's competence). The message was clear: the migrants were to blame for all misery the UK citizens encounter on daily basis. The Vote Remain focused on scaring the public and failed to demonstrate the benefits of European integration. The latter is hardly surprising, bearing in mind that many of the Conservatives supporting the EU membership, including the former Prime Minister David Cameron, spent years building a negative image of the European Union. A sudden affection for European integration would have looked anything but credible. Sadly, calls for a reasonable and merit-based discussion made by the academic community were largely ignored¹ and in some cases our fellow colleagues, who were engaged in the debate, were exposed to cyber bullying and open threats.² Last but not least, biased and manipulative media played their role, too. The question is if the voters themselves took a rational decision based on individual analysis of pros and cons, or, rather, they followed emotions based on prejudices and assumptions but not real facts. This we will never know and one might, rightly so, give the voters the benefit of the doubt. At the same time, some reactions to results of the referendum send worrying signals. Numerous voters opted for Brexit not believing it would actually materialize, some

¹ See *Over 250 senior academics criticise deliberate campaign misinformation in EU Referendum*, in *The Constitution Unit News*, 14 June 2016, www.ucl.ac.uk.

² See P. YEUNG, *Brexit campaign was 'criminally irresponsible'*, in *Independent*, 2 July 2016, www.independent.co.uk.

openly admitted complete ignorance about the EU and consequences of Vote Leave, while others – in the midst of post-referendum chaos – had a recourse to a well established internet search engine to find out what the European Union actually was. Already on 24 June the discussion started whether the United Kingdom should have another referendum and a petition in this respect was signed by over four million people. Very importantly, this was more of a grassroots initiative than yet another political gamble. If all the above was not shocking enough, it has quickly turned out that neither Vote Leave, nor the Government had an actual plan for Brexit. Furthermore, the leading Brexiteers have had no desire to design one and decided to abandon the ship. All of this gives a picture of a failed attempt for a genuine democratic exercise and makes the Brexit referendum look like mere political chutzpah. It also shows the reality of contemporary politics where mediocre political elites are not only acting primarily in their own personal interest but also fail to see the big picture. The scene is full of visionaries of the worst sort, while genuine statesmen are in big demand but nowhere to be seen. One thing is certain, though. The voters who cast their votes have made their point clear and the United Kingdom, whether accidentally or not, is heading for a EU divorce. This was confirmed by the UK's new Prime Minister Theresa May.

What does it mean for the United Kingdom and for the European Union? As far as the first is concerned it is definitely in the period of self imposed uncertainty, which has already translated into an economic and political crisis. It may also lead to a disintegration of the country. The results of the referendum clearly demonstrate deep divisions in the society and dangers brought by poor civic education combined with irresponsible populism. As far as the first is concerned, the United Kingdom is not united anymore. Both, Scotland and Northern Ireland voted for staying in the European Union. This has already given impetus to a second independence referendum in the first, and, potentially a referendum on unification with Ireland, in the latter. One should also not forget about London, which overwhelmingly voted for remain. So far the idea that London itself could be an independent country is treated as a fantasy, however, one should not forget that with its population London could end up being one of the midsize Member States with a very high GDP. In the short term much more worrying signs are not such tectonic shifts on the British Isles but growing nationalism and xenophobia. Obviously, both have been rumbling for a long time but the dramatically increased levels of hate crime in the weeks following the referendum are alarming. In the coming years the United Kingdom will therefore have to face not only difficult negotiations of the terms of divorce, future relations with the EU and with the outside World but also a major existential challenge. The kindergarten politics that the Conservative and Labour Party have been engaged since 23 June 2016 demonstrate that the political elites seem to be in denial when it comes to severity of the predicament that the United Kingdom is in. All of these factors are likely to be a very fertile ground for academic analysis. No doubt, they will keep political scientists, economists and lawyers very busy in the coming years.

For the European Union the current situation is yet another crisis to handle. As Donald Tusk, the President of the European Council, metaphorically said quoting Nietzsche, what will not kill us will make us stronger. The early days after the referendum have shown that the European Union is getting itself ready to face this challenge, notwithstanding the usual doses of political bickering and differences between the Member States. Judging by some political pronouncements, the EU political elites are aware that Brexit may be the beginning of the end or, at best, a turning point. One should now hope for the political statements declaring unity to be turned into actions. Brexit will be, no doubt, a political exercise. However, when the time comes, it is going to be, as any other divorce, a game played by the lawyers. This game has already started as the Brexit vote forced many to take a serious first look at Art. 50 TEU and it became abundantly clear that it was not the finest hour of the Treaty drafters. Art. 50 TEU may not be a loose cannon but, without any doubt, adds to the post-referendum blues.

The first question that emerged, almost as soon as the results of the referendum were announced, was whether Art. 50 TUE is the only way to depart the European Union. A prevalent opinion, confirmed by the EU itself, was that it is the only way out from the European Union. Then came the question of who exactly triggers the withdrawal procedure. Art. 50, para. 1, TEU provides that any Member State may decide to withdraw "in accordance with its constitutional requirements". It was quickly settled that from the point of view of EU law, it is the departing country that has the initiative. *Au contraire*, the divorce proceedings may not be formally triggered by the European Union itself. With that settled the discussion moves to the actual act itself. Is the referendum a notification *per se*, or perhaps a statement of the UK's Prime Minister to the European Council would do? In fact, one can draw here from the accession process which is triggered by a diplomatic letter. There is no reason why this should not be the case with the EU withdrawal. This very issue seems to be far more problematic from the UK's constitutional perspective. The legal community is clearly divided if the power to trigger Art. 50 TEU belongs solely to the government or whether it requires a parliamentary approval. The latter in itself is likely to be a challenge as a majority of Members of Parliament do not support the idea of EU withdrawal, furthermore, the referendum from a purely legal point of view was merely a consultative exercise.³

Another key question is how much time does the United Kingdom have to actually commence the withdrawal proceedings. With a rapid replacement of the Prime Minister, both leading political parties in disarray, no credible alternative to EU membership or a negotiation position developed the UK seems to be playing for time. David Cameron in his resignation speech left to the problem to be handled by his successor, which Theresa May had no choice but to inherit on her first day at 10 Downing Street. The European Union, though not exactly in unison, has asked the United Kingdom to proceed

³ See a number of interesting posts currently available at ukconstitutionallaw.org.

with the notification at the earliest convenience. There is no doubt that at this stage of withdrawal procedure it all hangs on the decision of the United Kingdom (whether involving its Parliament or not). However, as soon as the divorce notice is filed the centre of gravity will largely move to the EU's side. This game will change the dynamics into one against 27. Political and legal fireworks are guaranteed. A bulletproof plan as to substance and timing of Brexit negotiations is badly needed. Art. 50 TEU provides only that the withdrawal agreement is concluded between the EU and a departing country. It shall cover the terms of exit, taking account of the framework for future relations. In the aftermath of the referendum three options are being discussed: one comprehensive agreement covering the divorce and future relations, two separate agreements negotiated together or in sequence. The best option, that is an agreement covering the divorce and post-Brexit relations, would be a guarantor of legal certainty. At the other end of the spectrum is the last option, which provides for the least amount of certainty but it is clearly a preferred solution for the European Union.⁴ If it were to be implemented there would be a potentially long period of disintegration between the EU and the UK that would only at a later stage lead back to some, for now uncertain, levels of integration. For the UK the Brexit exercise will be much more than this. Unless it opts for the European Economic Area as an alternative to EU membership, it will also have to leave the EEA. Even if it opts for the EEA the jump over the fence from the EU to European Free Trade Association (EFTA) side would not be easy and could involve a formal pullout from the EEA first, followed by accession to EFTA and re-accession to the EEA. Furthermore, whether it opts for EEA or not, it will also lose all trade agreements with third countries it is currently bound by as an EU Member State. If this were not enough, the Whitehall, together with the devolved authorities, will also have to engage in the screening of the UK legal orders with the view of replacing directly applicable EU regulations with domestic law. All of this will keep politicians and lawyers busy but one thing is certain. The European Union and particularly the United Kingdom are heading for a very turbulent period. The early signs are, however, that the ups and downs of Brexit may wake up the European *Demos*, even in the United Kingdom. In the weeks following the referendum something unthinkable before 23 June happened: thousands of people wrapped in EU flags took to the streets of London to protest against Brexit. This was not an episode of blind love. Many of us share the view that the EU is not perfect, that it needs to reform to become closer to EU citizens to win over their minds and hearts. Let's hope these voices will be heard and echoed in political actions. Perhaps, it is not the beginning of the end, but just a turning point in the history of European integration.

A.L.

⁴ European Council, *Informal meeting at 27 - Brussels, 29 June 2016 - Statement*, www.consilium.europa.eu.



OVERVIEWS

NATIONAL IDENTITY AND EUROPEAN INTEGRATION: THE UNBEARABLE LIGHTNESS OF LEGAL TRADITION

TABLE OF CONTENTS: I. Introduction. – II. Legal Traditions and Fundamental Rights. – III. Legal Traditions and National Identity. – IV. Transgression and Response. – V. Legal Traditions ad Authority. – VI. Conclusion.

I. In an article introducing the concept of legal tradition, Patrick Glenn explicitly discusses the notion against the background of law and legal sources moving beyond the nation state. As this phenomenon unfolds, he defends the view that “we appear to need some other large organizing concept [...] providing normative support both for the law of the state [...] and law beyond the state”.¹ Distinguishing the notion of tradition from that of custom, he observes that “[t]radition derives from the Latin *traditio*, to pass over or on, originally indispensable as a means of proof of transfer or property”.² What is understood by the modern notion of tradition? Tradition refers to a specific kind of information: “information that meets the test of what T.S. Eliot called ‘pastness’, an imprecise period of time that converts raw data into something qualitatively different”.³ Importantly, the notion of pastness “implies obligation – not ‘binding’ obligation but persuasive obligation”.⁴ Hence, we think of tradition as representing normative information, and legal traditions as a specific subgenre of this notion.

It seems apt to look at the present state of the European Union, a polity beyond the nation state, through the conceptual glasses of legal traditions. Framed in these terms, the key question is which role to assign to national legal traditions in the EU. What immediately comes to mind is the famous introduction of a reference to the constitutional traditions of the Member States by the CJEU in its case law on fundamental rights. This case law and more specifically the reasoning of the CJEU will be central to the next section of this article.

II. The notion of legal traditions found its way in the vocabulary of EU law not as a theoretical concept coined by an academic but as a notion invoked by the CJEU in what is

¹ H. PATRICK GLENN, *A Concept of Legal Tradition*, in *Queen's Law Journal*, 2008-2009, p. 427 *et seq.*

² *Ivi*, p. 430.

³ *Ivi*, p. 432.

⁴ *Ivi*, p. 436.

generally seen as a crucial line in its case law: the cases on fundamental rights. In the 1970s, the CJEU held that the institutions of the EC were all bound by fundamental rights.⁵ It is in these cases that the notion of legal traditions enters the scene of (then) EC law. The first of these judgments was in the case of *Internationale Handelsgesellschaft*.⁶ In this case, the German judge was asked to leave out of consideration a measure of EC law, since it was in conflict with fundamental rights enshrined in the German constitution. In this famous judgment, the CJEU recognized fundamental rights as part and parcel of the principles of EC law.⁷ Furthermore, the Court held that, in the absence of an EC charter of fundamental rights, it could find inspiration for these rights in “the constitutional traditions common to the Member States”, a phrase that we can now find in Art. 6, para. 3, TEU.⁸

If we take a closer look at the reasoning of the CJEU, we can see that it takes several steps in order to reach this conclusion. The Court, confronted with a case in which the uniformity and efficacy of EC law was at stake, held that such a case could only be decided by taking the perspective of EC law. Then, referring to the *nature* of EC law, as stemming from an independent source, it proceeds to argue that national law cannot set aside EC rules without putting at risk the legal basis of the whole Community. This, importantly, even holds for the highest national rules, those found in the constitutions of the Member States. In other words, taking up the situation of the Community as an independent, and thus autonomous, legal order, the CJEU was able to take the next step by taking its cue from “the constitutional traditions common to the Member States”, yet preserving *for itself* the ultimate decision what these traditions would mean in the case at hand. The danger of this approach is evident, as Craig and de Búrca noted in their comment on this case: “If the ECJ’s interpretation of the requirements of these principles differs significantly from the interpretation of the Member States which also guarantee their protection, the legitimacy of the Court’s adjudication is likely to be called into question”.⁹

Perhaps also for this very reason, the CJEU continued its search for other sources to tap. Some years later, it found another spring that could help feed the general principles of EC law. In the case of *Nold*, the Court argued that “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the frame-

⁵ As they were decided before the existence of the EU, in this section I will speak of EC (law).

⁶ Court of Justice, judgment of 17 December 1970, case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

⁷ See also Court of Justice, judgment of 12 November 1969, case 29/69, *Stauder v. City of Ulm*.

⁸ “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

⁹ P. CRAIG, G. DE BÚRCA, *EU Law: Text, Cases and Materials*, Oxford: Oxford University Press, 2008, p. 383.

work of Community law [...]”.¹⁰ Notice that the CJEU holds that it should respect the constitutional traditions common to the Member States. The new element in this case is obviously the reference to international treaties signed by the Member States. Just as national constitutions, these may form guidelines for the Court when asked to decide a case concerning fundamental rights. In 1979, the CJEU further elaborated on this approach when it had to take a decision in the case of *Hauer*.¹¹ In a conflict concerning the right to property, the Court clarified its earlier case law, while bringing into the limelight the fundamental issue underlying its case law on human rights. The CJEU starts by reiterating its judgment in the case of *Handelsgesellschaft*. However, it chooses sharper wording to emphasize the risk posed by national courts reviewing EC measures by their own (national) fundamental rights standard. This would damage the “substantive unity and efficacy of EC law” and “destruct the unity” of the market, while putting at risk the “cohesion” of the Community. After referring to the case of *Nold*, the Court returns to these risks for Community law and includes an explicit reference to the European Convention on Human Rights (ECHR).¹² The principles of EC law thus include those fundamental rights that are to be found in the ECHR, and the constitutional traditions common to the Member States.¹³

There is, however, something strange happening here. For, from which perspective are those constitutional traditions to be seen as constituting a “common” heritage, a source shared by the Member States that can subsequently be used by the CJEU as an inspiration for the EC general principles? Surely, only from a particular vantage point do the traditions of the Member States appear as “common”. The CJEU, confronted with a threat to the unity and efficacy of EC law, the unity of the market and the cohesion of the Community, is put in the specific situation of recognizing human rights as a part of the general principles of EC law. It, moreover, does this in a very specific way. While emphasizing the autonomy and independence of these EC principles, at the very same time, the CJEU takes its bearing from the rights found in international agreements, and the constitutional traditions common to the Member States. In other words, while constituting fundamental rights as an integral part of EC legal principles, the CJEU lets itself be guided by what the Member States already hold in common.

And yet, there is more. The answer to the question posed at the beginning of the previous paragraph brings to light a circularity in the reasoning of the Court. Indeed,

¹⁰ Court of Justice, judgment of 14 May 1974, case 4/73, *Nold v. Commission*, para. 13.

¹¹ Court of Justice, judgment of 13 December 1979, case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, paras 14-15.

¹² See also Court of Justice, judgment of 18 June 1991, case 260/89, *ERT*, para. 41 and Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, paras 283-285, where the CJEU calls respect for fundamental rights one of the “constitutional principles of the EC Treaty”.

¹³ See now Art. 6, para. 2, TEU.

only from the perspective of the CJEU, situated in a field where general principles of EC law are called upon in order to avert possible dangers to the integration process, do the constitutional traditions of the Member States appear as “common”. However, why then should the CJEU be the sole judge authorized to set aside EC law contradicting fundamental rights? What threats do national courts pose to the unity and cohesion of EC law, if they assess the compatibility of EC measures from “*common traditions*”? In what sense do national courts menace the unity of the market with “*special criteria* for assessment stemming from the legislation or constitutional law of a *particular* Member State”, if fundamental rights are exactly a part of traditions the Member States have *in common*? Here then is the circularity in the reasoning of the Court: the commonness of constitutional traditions is only to be found by the CJEU, if it presupposes a commonness of traditions. The Court’s reasoning is like the act of a magician pulling from its hat a rabbit that it has first put there itself.

III. The topic of national legal traditions in the EU has gained new momentum with the entry into force of the Lisbon Treaty and the new place the concept of national identity has in it. The national identity of a Member State is protected by Art. 4, para. 2, TEU, the so-called identity clause. This provision offers the perfect starting point to investigate the continuing importance of national legal traditions in the EU. Hence, in this section I will make an overview of this case law, trying to find out what role the identity clause plays in the EU and what this tells us about the fate of national legal traditions.

A discussion of the identity clause should begin with the European Convention, more precisely with the Final report of Working Group V on complementary competencies. This group of competences concerns those “national policy areas of significance for the identity of the Member States”.¹⁴ By a better allocation of competences, the Group aims to show the Union’s respect for certain core responsibilities of the Member States. This follows from the fundamental principle, the identity clause, then to be found in Art. 6, para. 3, TEU. Hence, the Group’s “purpose would be to provide added transparency of what constitutes essential elements of national identity, which the EU must respect in the exercise of its competence”.¹⁵ Indeed, by a clarification of the notion of national identity one could both safeguard the role of the Member States in the Treaty and grant them a certain amount of flexibility, without this provision being a general derogation clause.¹⁶ Ultimately, Working Group V arrives at the following recommendation: “The provisions contained in TEU Article 6(3) that the Union respects the national identity of the Member States should be made more transparent by clarifying

¹⁴ European Convention, Final Report of Working Group V of 4 November 2002, CONV 375/1/02 REV 1, p. 1.

¹⁵ *Ivi*, p. 10.

¹⁶ *Ivi*, p. 11.

that the essential elements of the national identity include, among others, fundamental structures and essential functions of the Member States notably their political and constitutional structure, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organisation of armed forces".¹⁷

Looking at the discussion on the identity clause, the first thing that attracts attention is that most commentators submit that national identity should be understood as national *constitutional* identity and that this notion refers to certain aspects of the national constitutions of the Member States which remain unaffected by EU law. This would make the identity clause an answer to the case law of several national constitutional courts.¹⁸ In this case law, constitutional courts have questioned the higher rank of EU law *vis-à-vis* national constitutions.¹⁹ They see the EU as an ordinary international organization and the Member States as Masters of the Treaties.²⁰ Accordingly, they maintain that EU law has no primacy over national constitutions and that they, the national constitutional courts, are the guardians of these constitutions. Yet, this claim contradicts a key doctrine of EU law. According to well-established case law of the CJEU, the EU forms its own, autonomous legal order claiming authority independent of its Member States.²¹ One of the principal consequences of this autonomy is the primacy of EU law, meaning that EU law has precedence over all law of the Member States, even national constitutions.²²

¹⁷ *Ivi*, p. 12.

¹⁸ T. KONSTADINIDES, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, in *Cambridge Yearbook of European Legal Studies*, 2011, p. 195 *et seq.*; A. VON BOGDANDY, S. SCHILL, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, in *Common Market Law Review*, 2011, p. 1417 *et seq.*; L. BESSELINK, *National and Constitutional Identity Before and After Lisbon*, in *Utrecht Law Review*, 2010, p. 36 *et seq.*

¹⁹ J.H. REESTMAN, *The Franco-German Constitutional Divide: Reflections on National and Constitutional Identity*, in *European Constitutional Law Review*, 2009, p. 374 *et seq.*; W. SADURSKI, 'Solange, Chapter 3': *Constitutional Courts in Central Europe – Democracy – European Union*, in *European Law Journal*, 2008, p. 1 *et seq.*; M. CLAES, *The European Constitution and the Role of National Constitutional Courts*, in A. ALBI, J. ZILLER (eds), *The European Constitution and National Constitutions. Ratification and Beyond*, The Hague: Kluwer Law International, 2007, p. 235 *et seq.*; M. CLAES, *The National Courts' Mandate in the European Constitution*, Oxford: Hart Publishing, 2006; A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds), *The European Court and the National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context*, Oxford: Hart Publishing, 1998.

²⁰ P. KIRCHHOF, *The Legal Structure of the European Union as Union of States*, in A. VON BOGDANDY, J. BAST (eds), *Principles of European Constitutional Law*, Oxford: Hart Publishing, 2005, p. 765 *et seq.*

²¹ See, among others: Court of Justice, judgment of 9 March 1978, case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*; *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*; Court of Justice, judgment of 15 July 1964, case 6/64, *Flaminio Costa v. E.N.E.L.*

²² See, among many others: B. DE WITTE, *Direct Effect, Primacy, and the Nature of the Legal Order*, in P. CRAIG, G. DE BÚRCA (eds), *The Evolution of EU law*, Oxford: Oxford University Press, 2011, p. 323 *et seq.*; M. AVBELJ, *Supremacy or Primacy of EU Law – (Why) Does it Matter?*, in *European Law Journal*, 2011, p. 744 *et seq.*

What interests me here is first and foremost the reasoning of the CJEU in the cases on the identity clause. While this case law does not solve the authority problem sketched above, it does show in what way the CJEU deals with national legal traditions in the EU on a day to day basis. At this moment, it is mostly Advocates General who have referred to the identity clause in their Opinions. An important number of these cases was concerned with language. For instance, Advocate General Maduro argued as follows in his Opinion in *Spain v. Eurojust*: "Respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States, as is apparent from Article 6(3) EU and Article 149 EC".²³

In his Opinion in the case of *Michaniki*, Maduro even puts the respect for national identity at the very heart of European integration: "It is true that the European Union is obliged to respect the constitutional identity of the Member States. That obligation has existed from the outset. It indeed forms part of the very essence of the European project initiated at the beginning of the 1950s, which consists of following the path of integration whilst maintaining the political existence of the States".²⁴

Discussing some case law, Maduro identified several functions a reference to national identity might fulfil. First of all, a Member State may invoke national identity as a ground for derogation from the applications of the fundamental freedoms. In this respect, he called to mind that the preservation of national identity "is a legitimate aim respected by the Community legal order".²⁵ Secondly, national identity may be relied upon by a Member State in order "to develop, within certain limits, its own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom of movement".²⁶ This would entail a broad discretion for the Member States to develop its own standards. Thirdly, a Member State may also rely on national identity "to justify its assessment of constitutional measures which must supplement Community legislation in order to ensure observance, on its territory, of the principles and rules laid down by or underlying that legislation".²⁷ Yet, Maduro also stresses that the preservation of national identity does not constitute the absolute right for a Member State to diverge from EU law. Indeed, national constitutional law and the European legal order should mutually take into account each other's requirements. Moreover, derogations from a fundamental freedom should be proportionate and are subject to judicial review.

M. KUMM, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, in *European Law Journal*, 2005, p. 262 *et seq.*

²³ Opinion of AG Poiares Maduro delivered on 16 December 2004, case C-160/03, *Kingdom of Spain v. Eurojust*, para. 24.

²⁴ Opinion of AG Poiares Maduro delivered on 8 October 2008, case C-213/07, *Michaniki AE v. Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, para. 31.

²⁵ *Ivi*, para. 35 (referring to Court of Justice, judgment of 2 July 1996, case C-473/93, *Commission v. Luxembourg*).

²⁶ *Ivi*, para. 32.

²⁷ *Ivi*, para. 33.

In its judgment in the case of *Sayn-Wittgenstein*, the CJEU itself stated that the Austrian Law on the abolition of nobility had constitutional status and was meant to foster equal treatment. As such, it could “be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognized under European Union law”.²⁸ The justification of the Austrian government was read by the CJEU as one of public policy. The Court stressed that this notion should be interpreted strictly, only to be allowed as a legitimate interest when “there is a genuine and sufficiently serious threat to a fundamental interest of society”.²⁹ While Member States have a margin of discretion here, any measure should always pass the proportionality test. In this case, the CJEU deemed the restriction not disproportionate.³⁰

In the case of *Runevic*, the Lithuanian government argued for the protection of the Lithuanian language as “a constitutional asset which preserves the nation’s identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities”.³¹

Answering to this plea, the CJEU stressed that the protection of the national language falls under the identity clause.³² However, it reiterated its well-known case law concerning restrictions on one of the fundamental freedoms: these measures can be justified “by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures”.³³ It remains, however, the responsibility of the national court to strike a fair balance between the interests involved in the case at hand.³⁴

In the case of *O’Brien*, the CJEU rejected the Latvian Government’s claim that “the application of European Union law to the judiciary has the result that the national identities of the Member States are not respected, contrary to Article 4(2) TEU”.³⁵ In his Opinion in the case of *Las*, Advocate General Jääskinen reiterated the bond between national identity and language. He makes the following distinction in this regard: “The concept of ‘national identity’ therefore concerns the choices made as to the languages

²⁸ Court of Justice, judgment of 22 December 2010, case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, para. 83.

²⁹ *Ivi*, para. 86.

³⁰ *Ivi*, para. 93.

³¹ Court of Justice, judgment of 12 May 2011, case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*, para. 84.

³² *Ivi*, para. 86.

³³ *Ivi*, para. 88.

³⁴ *Ivi*, para. 91.

³⁵ Court of Justice, judgment of 1 March 2012, case C-393/10, *Dermod Patrick O’Brien v. Ministry of Justice, formerly Department for Constitutional Affairs*, para. 49. The legislation discussed was Directive 97/81/EC of the Council of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC and the Framework Agreement on part-time work.

used at national or regional level, whereas the concept of 'linguistic diversity' relates to the multilingualism existing at EU level".³⁶ In his Opinion in the case of *Melloni*, Advocate General Bot argued that in this particular case the identity clause played no part, since the national identity of Spain was not affected.³⁷ Yet, Bot stresses that "the taking into account of the distinctive features of the national legal orders is part of the principles which must guide the construction of an area of freedom, security and justice".³⁸ The joint approach taken by the Member States with regard to the execution of judgments rendered *in absentia* is "compatible with the diversity of the legal traditions and systems of the Member States".³⁹

IV. What to make of the cases discussed in the last two sections? I submit that what we witness here is a specific kind of reasoning of the CJEU and its Advocates General which may be characterized through the double strategy of transgression and response. It is easiest to start with the latter demand. The reasoning of the CJEU is *responsive* in the sense that it explicitly tries to tie in with national constitutional traditions. Not only is the CJEU handing over something, it also acknowledges that what it is handing over finds its origin in another source than EU law, namely in the constitutions of the Member States. The CJEU is thus responsive because it answers the call of someone else. Yet, this is only one half of the story. The CJEU does not simply respond to a question, or rather, responding it, the Court (or its Advocates General, for that matter) exhausts the question and adds a new element. Indeed, the Court *transgresses* the boundaries of EU law as they were known until then. Before the cases discussed in section 3, it was – to say the least – unclear whether or not the EU was actually bound by fundamental rights. After this case law, the EU is not only bound by rights enshrined in national legal traditions but also by those to be found in the ECHR. The CJEU thus goes beyond the *status quo* as represented in the established interpretation of positive law. The Court does not only interpret national legal traditions, it also adds to them. Something similar may be said about the cases and Opinions on the identity clause. While a reference to national legal traditions is made, these traditions are immediately encapsulated in the context of EU law.

Why would this be paradoxical? This becomes clear when we take into account that transgression and response are two sides of one and the same coin.⁴⁰ This must be understood in the following sense. The CJEU can only be responsive by transgressing: only

³⁶ Opinion of AG Jääskinen delivered on 12 July 2012, case C-202/11, *Anton Las v. PSA Antwerp NV*, para. 59.

³⁷ Opinion of AG Bot delivered on 2 October 2012, case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, para. 140.

³⁸ *Ivi*, para. 143.

³⁹ *Ivi*, para. 145.

⁴⁰ For an extensive analysis of this paradox in the case law of the CJEU, see: L. CORRIAS, *The Passivity of Law: Competence and Constitution in the European Court of Justice*, New York: Springer, 2011.

by going beyond a given tradition, the Court can be faithful to it. For a tradition to remain living it needs to be invigorated with new life time and again. The transgression of the CJEU does exactly that: by going further than the established interpretation, the Court breathes new life in a national legal tradition. Yet, the transgression should always remain responsive: as a judge the CJEU is bound by the sources handed over to it. It may only successfully transform them as long as its interpretation remains recognizable as a reinterpretation of what was already there. In other words, no tradition is handed over by acts of pure creation. Hence, there is only transgression through response, only response through transgression. The CJEU, while handing over national legal traditions, founds a tradition of its own, the European legal tradition. This seems to be the paradox of legal traditions in the EU.

V. What to make of this paradox? In order to analyze what is at stake here, in this section I will look into the theoretical foundations of the concept of a legal tradition. A good starting point for a theoretical inquiry into the concept of legal tradition is the question, explicitly posed by Glenn, how traditions operate over time. He distinguishes three stages. The first moment is called the initial capture of information.⁴¹ With this initial capture, a tradition is born. The second moment is one of use or application: "This means there has developed, as the process goes on, a *living* tradition, as opposed to a simple deposit of information that may have become lost, or buried over with sand, or burned, or eaten by moths".⁴² Finally, the third and, according to Glenn, most interesting feature is the excavation of tradition: "revival is always possible, and the concept is vitally important for those struggling to retain identity and entitlement in a hostile world".⁴³

Using the concept of legal tradition, Glenn argues, has huge advantages in terms of inclusiveness. It allows us to understand non-state law as law.⁴⁴ Furthermore, legal traditions are also inclusive of state law: the concept of legal tradition is "not only compatible with state law; it is the only possible justification for it".⁴⁵ There is, moreover, another feature of legal traditions that makes them extremely interesting in the context of the EU. Different from the notion of law, the concept of legal tradition has a highly reconciliatory ability: "If law conceived as system yields facts, silence and conflict, law conceived as tradition (as normative information) must yield normative claims, discussion and dialogue, as well as the possibility of reconciliation".⁴⁶ In one phrase which sounds like heaven on earth for any adherer of (constitutional) pluralism, Glenn tells us that

⁴¹ H. PATRICK GLENN, *A Concept Legal Tradition*, cit., p. 432.

⁴² *Ibidem*.

⁴³ *Ivi*, p. 434.

⁴⁴ *Ivi*, p. 438.

⁴⁵ *Ivi*, p. 440.

⁴⁶ *Ivi*, p. 442.

"[t]he concept of a legal tradition allows for normative engagement, as opposed to hierarchical dominance".⁴⁷

In order to grasp what is theoretically at play in a discussion of national legal traditions in the EU, I propose to make a distinction between two types of authority associated with legal traditions. I discern the authority *of* legal traditions from the authority *over* legal traditions. The former type designates the authority we usually associate with traditions. In other words, the authority of legal traditions points to the fact that legal traditions are authoritative. One can only call something a legal *tradition* if it actually counts as authoritative in a certain legal order. The other form of authority, the authority over legal traditions, points to the power to create, call into being or initiate a legal tradition, or to change it. I take it that all legal traditions we recognize today were once founded or indeed invented. The notion of an invented tradition points to a moment of invention, or in the vocabulary of Glenn: a moment of capture. Now, the authority over legal traditions is used to grasp this power to invent.

It is important to notice that the relationship between both types of authority is of a paradoxical nature. On the one hand, there is an obvious primacy of the authority over legal traditions *vis-à-vis* the authority of legal traditions. As the authority over legal traditions is the power to found or change a legal tradition, it *precedes* the authoritative character of a tradition in time. Yet, this is only half of the story. The act of founding a tradition does not take place *ex nihilo*. Like any act of initiation, inventing a tradition is done by seizing the initiative. Not only must a *beginning* be made, a beginning must also be *made*. As Hans Lindahl rightly argues, making a beginning in law is always done through acts representing an interested collective: "Whoever seizes the initiative to found a polity must claim to legislate in the name of a collective, attributing her/his act to a group. In this sense, initiatives are never simply *ex nihilo*. Attribution always involves both a *representational* claim, the evocation of a collective ground of acts of setting legal boundaries, and a representational *claim*, the evocation of a collective ground that can be contested, validated or rejected".⁴⁸

This claim needs to be taken up by others in order to be successful. But at the moment that it is made, such a claim can only *anticipate* the authority of the legal tradition initiated. In other words, and this is the full paradox, while the authority of legal traditions refers to the authority over legal traditions, the authority over legal traditions in its turn refers to the authority of a legal tradition.

We can now return to Glenn's claim that the great advantage of legal traditions is that they allow normative engagement, instead of hierarchical dominance. How to assess this claim in the light of what we have written on authority? Glenn seems to think

⁴⁷ *Ivi*, p. 443.

⁴⁸ H. LINDAHL, *Law's 'Uncanniness': A Phenomenology of Legal Decisions*, in *Netherlands Journal of Legal Philosophy*, 2008, p. 141 *et seq.*

of a (legal) tradition as something authoritative of itself. In this way, he is unable to grasp the two different forms of authority involved in legal traditions. Yet, as we have argued, the authority to found a tradition is never simply part of the tradition founded. In other words, the authority over legal traditions can never be reduced to the authority of legal traditions. As a consequence, the concept of legal traditions is valuable as far as it goes. Yet, it cannot be used to bypass the question of authority. This means that this question, and thus the question of sovereignty in the sense of the ultimate authority in a legal order, remains to be answered.

VI. In this article, I have analyzed the language of legal traditions in the context of the EU. While the notion of legal tradition was introduced by the CJEU in its case law on fundamental rights, the concept recently returned in the cases of the Court and the Opinions of the Advocates General on the so-called identity clause. In these cases, the CJEU and the Advocates General time and again argued in a paradoxical way, both responding to the traditions of the Member States and transgressing them in order to build a European legal tradition. This paradoxical way of reasoning can be understood through the categories of the authority *of* legal traditions and the authority *over* legal traditions. More than 20 years after it was first posed, Bruno de Witte's question at the end of his article *Sovereignty and European Integration: The Weight of Legal Tradition* remains all too true: "How should one order the complex web of legal relationships in Europe today without the help of the principle of sovereignty determining where final authority, in the case of conflict, lies?".⁴⁹ The concept of a legal tradition is necessary in the EU to mitigate between EU level and Member States. But with the 'eternal return' of this notion, the question of authority and sovereignty in the EU does not fail to return either. It is this latter question which remains at the very center of any discussion on the boundaries, competences and identity of the European Union – especially in times of Brexit and Disintegration.

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⁴⁹ B. DE WITTE, *Sovereignty and European Integration: The Weight of Legal Tradition*, in *Maastricht Journal of European & Comparative Law*, 1995, p. 173.

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OVERVIEWS

OPENNESS TOWARDS EUROPEAN LAW AND COOPERATION WITH THE COURT OF JUSTICE REVISITED: THE *BUNDESVERFASSUNGSGERICHT* JUDGMENT OF 21 JUNE 2016 ON THE OMT PROGRAMME

TABLE OF CONTENTS: I. Introduction. – II. The evolving relationship between the German Federal Constitutional Court and the CJEU under the *ultra vires* review. – III. The FCC criticism of the CJEU's legal reasoning. – IV. The legal effects of the CJEU's preliminary rulings.

I. The intensity, and the very conditions, of the *ultra vires* review of EU acts by the German Federal Constitutional Court (FCC) have greatly changed along the course of its case law. The FCC has swung from a cooperative approach, which has featured the first phase of the case law, to a less friendly model, only recently adopted, in the face of the Euro crisis, with its first 2014 OMT decision. Whilst under the first approach, the FCC was inclined to fully respect the CJEU's role as a "guardian" of the legality of the system established by the founding Treaties, and reserved for itself the nominal role of external reviewing of EU acts, under the second model, its function as an external reviewer has acquired a more peremptory tone.

Against this backdrop the judgment of 21 June 2016 of the FCC in the *OMT* case has to be assessed.¹ It is the latest decision in a judicial saga on the question of whether the policy decision of the European Central Bank (ECB) of 6 September 2012, launching the Eurosystem's Outright Monetary Transactions in the secondary sovereign bond markets (OMT) programme, manifestly exceeded the monetary mandate of the ECB and/or was incompatible with the prohibition of monetary financing public deficits in the Euro Area set forth by Art. 123, para. 1, TFEU. With its judgment of 21 June 2016 the FCC rejected constitutional complaints and an application for *Organstreit* proceedings challenging the OMT programme of the ECB and seeking to enforce the duty of the German *Bundestag* and Federal Government to refrain from implementing this programme.²

¹ German Federal Constitutional Court, judgment of 21 June 2016, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13.

² As the FCC clarified in its previous jurisprudence, these duties are derived from the responsibility of the German national authorities with respect to European integration. In case of manifest and structurally significant transgressions of powers by European Union organs, they are to not only refrain from any participation and implementation, but to actively pursue the goal to reach compliance with the integration programme. German Federal Constitutional Court, order of 14 January 2014, 2 BvR 2728/13, para. 49.

As an analytical summary is provided for in a press release available on the FCC's website,³ it is sufficient to recall here the following fundamental aspects of the judgment. After declaring the complaints and the *Organstreit* proceedings partially inadmissible to the extent that they *directly* challenged acts of the ECB, the Second Senate of the FCC held that complaints and proceedings directed against the behaviour of German authorities were unfounded.

The Senate based its decision on the CJEU's *Gauweiler* preliminary ruling of 16 June 2015,⁴ which held, as a response to the FCC referral of 2014, that the ECB's programme is covered by the powers of the ECB, as defined by primary law, and does not infringe the principle of proportionality nor Art. 123, para. 1, TFEU. According to the Senate, if interpreted in accordance with the conditions formulated by the CJEU in *Gauweiler*, the OMT programme does not manifestly exceed the competence attributed to the ECB and does not present major constitutional threats to the German *Bundestag*'s right to decide on the budget.

Yet, far from being a submissive agreement with the CJEU ruling, this judgment is the reaffirmation of the latest, less cooperative, approach of the FCC towards the CJEU in the *ultra vires* review procedure. In this regard, two aspects of the judgment deserve attention and will thereby be examined here. First, although the FCC finds that the *Gauweiler* judgment is "acceptable", it rigorously criticizes the legal reasoning followed by the CJEU therein. This first aspect will be analyzed in section III. Secondly, the FCC attributes broad legal effects to *Gauweiler*, but, in so doing, it strengthens its prerogatives towards the CJEU. This apparent paradox will be clarified in section IV. However, a preliminary account of the oscillations in the FCC case law concerning the relationship with the CJEU will be concisely given (section II).

II. For anyone who has followed the saga of "warnings" fired by the FCC at the CJEU since *Solange II*, the solution found in this judgment was, in its essence, foreseeable. It is a very well established strategy of the FCC to reaffirm its ultimate jurisdiction to review whether acts of institutions, as interpreted by the CJEU, remain within the limits of their competences, and at the same time to hold that the solution found by the CJEU constitutes an acceptable reading of the founding Treaties. This strategy serves the purpose of balancing the FCC mandate to protect the fundamental rights of the Basic Law with the principle of openness towards European law, which is also constitutionally protected. This particularly applies to the *ultra vires* review, which, since *Lisbon*, is "only exercised in a manner which is open towards European law".⁵

³ Bundesverfassungsgericht.de.

⁴ Court of Justice, judgment of 16 June 2015, case C-62/14, *Gauweiler*.

⁵ German Federal Constitutional Court, judgment of 30 June 2009, 2 BvE 2/08, para. 240. See also German Federal Constitutional Court, order of 6 July 2010, 2 BvR 2661/06, para. 58 (*Honeywell*).

Furthermore, in the *OMT* case, a “yes..., but” shaped judgment⁶ seemed likely to be delivered considering the particular risks for the euro that were at issue. Christian Joerges, for example, considered “as unlikely as ever that Karlsruhe will shoulder the responsibility for the destruction of the common currency” and predicted “what we can hence expect is the search for some face-saving compromise formula”.⁷

However, under a “yes..., but” strategy a number of different solutions can be conceived. Furthermore, the *ultra vires* review has been developing through the FCC case law and the principles of relationship with the CJEU designed by the FCC have not been steady over time. After introducing this review in *Maastricht*,⁸ with no clarification on its scope and on the mechanisms to be followed, the FCC recognized in *Lisbon*⁹ that, according to the principle of openness towards European law, it would consider *ultra vires* complaints “only if it is manifest that acts of the European bodies and institutions have taken place outside the transferred competences”. Moreover, “prior to the acceptance of an *ultra vires* act on the part of the European bodies and institutions, the CJEU is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Art. 267 TFEU”. Then, in *Honeywell*,¹⁰ the FCC appeared to conceive its role in an even more cooperative way. First, it construed the notion of “acts manifestly in violation of competences” as encompassing not only acts which obviously transgress the boundaries of conferred competences, but also “highly significant in the structure of competences between the Member State and the Union with regard to the principle of conferral”. To make its friendly intentions clear, the FCC sought to clarify this principle, by borrowing from the CJEU the concept of “sufficiently qualified” violations. Secondly, the FCC expressly attributed ample scope for manoeuvre to the CJEU in refining the EU law “by means of methodically bound case-law”. In other words, *Lisbon* and *Honeywell* show a clear trend towards a restrictive interpretation of the FCC powers under the *ultra vires* review and the establishment of a cooperative paradigm in its relationship with the CJEU.¹¹

The 2014 FCC reference for a preliminary ruling to the CJEU in *OMT* represented a shift in this line of development. Indeed, the Karlsruhe referral was accompanied by a

⁶ See P. LINDSETH, *Meanwhile, in Germany... The OMT Ruling on the German Constitutional Court*, 23 June 2016, eutopialaw.com.

⁷ C. JOERGES, *A Disintegration of European Studies?*, in *European Papers*, 2016, www.europeanpapers.eu, p. 8 et seq., pp. 9-10.

⁸ German Federal Constitutional Court, judgment of 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92.

⁹ German Federal Constitutional Court, judgment of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09.

¹⁰ German Federal Constitutional Court, order of 6 July 2010, cit.

¹¹ See M. PAYANDEH, *Constitutional Review of EU Law After Honeywell: Contextualising the Relationship Between the German Constitutional Court and the EU Court of Justice*, in *Common Market Law Review*, 2011, p. 9 et seq.

careful reading of the TFEU under which the OMT decision was expressly considered as incompatible with EU primary law (in particular with a number of rules of the TFEU of the European System of Central Banks Statute regulating the mandate of the ECB, and with the prohibition on monetary financing of the budget enshrined in Art. 123, para. 2, TFEU). It is true that the FCC left open the possibility for the CJEU of an alternative interpretation of the OMT programme in conformity with the Treaties. But, in so doing, the FCC specified a number of conditions for this interpretation to be acceptable under the German Constitution. In particular, the OMT decision could not undermine the conditionality of assistance programmes and it would only be of a supportive nature with regard to the economic policies of the Union.

Legal scholarship has promptly highlighted this turn in the Court's strategy. M. Goldmann, for example, argued that the FCC "understands the cooperative relationship as a one-way street or at least as an asymmetrical relationship".¹² According to M. Everson, "the FCC deferred to the CJEU, but did so by posing a question to the European Court, which contained its own preemptive answer: should the CJEU not accord with the limitations to the reach of the OMT Decision proposed by the FCC [...] the constitutional justices will assert their own sovereign competence to judge upon the compatibility of European law with the German Constitution".¹³

III. In its judgment of 21 June 2016 the FCC confirmed its recent turn in judicial policy. The first reason justifying such a reading of the judgment can be seen in the FCC's assumption of a role of external control over the CJEU's legal reasoning. The Senate considered the CJEU's findings merely acceptable and harshly criticized "the manner of judicial specification of the Treaty evidenced in the judgment of 16 June 2015".

It is true that already in *Honeywell* the FCC did not miss the opportunity to affirm that a CJEU statement "was reasoned with two arguments whose interrelationship remains unclear".¹⁴ However, in the 2016 *OMT* judgment criticism is conceived on a grand scale. It is a constellation of arguments covering concerns both on the CJEU's overall legal reasoning and on the fact-finding process followed by the CJEU.

As far as the CJEU's legal reasoning is concerned, the objections of the Senate focused mainly on two factors. First, it was affirmed that teleological interpretation, taking into account the objectives of the OMT programme as indicated by the ECB and the

¹² M. GOLDMANN, *Friend or Foe? The General Federal Constitutional Court's Request for a Preliminary Ruling on the ECB's OMT Program*, in *SIDIBlog*, 19 February 2014, www.sidiblog.org.

¹³ M. EVERSON, *An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgericht*, in *European Law Review*, 2015, p. 474 et seq., p. 475. However, for a completely different view, under which the FCC 2014 OMT decision is seen as the "surrender of the German Constitutional proviso" see G. BECK, *The Court of Justice, the Bundesverfassungsgericht and Legal Reasoning during the Euro Crisis: The Rule of Law as a Fair-Weather Phenomenon*, in *European Public Law*, 2014, p. 539 et seq.

¹⁴ German Federal Constitutional Court, order of 6 July 2010, cit., para. 69.

means employed to achieve those objectives, bore excessively on the CJEU's ruling.¹⁵ Secondly, the Senate maintained that, as the independence granted to the ECB leads to a noticeable reduction of democratic legitimacy of its action, a restrictive interpretation of the ECB's mandate was needed. Yet the CJEU failed to adopt this restrictive approach.¹⁶

However, the FCC's objections also concern "the way the facts of the case were established". The Senate here refers to "the underlying factual assumptions" of the assertion that the OMT programme pursues a monetary policy objective. According to the Senate, the CJEU accepted this assertion "without questioning or at least discussing and individually reviewing the soundness" of those underlying factual assumptions.¹⁷

In brief, by submitting the legal reasoning of the CJEU to close scrutiny, the FCC reaffirms its residual right to ultimately review EU law and the CJEU's decisions under the *ultra vires* procedure. This part of the judgment is worthy of attention also because it seems to be more an exercise in doctrinal review than the "mere" work of a judge (albeit a constitutional one). Furthermore, one can also quite clearly distinguish the legal theories influencing this FCC's scholarly-shaped criticism, which seems to be developed under a theoretical framework made up mainly of elements drawn from legal realism.¹⁸

One could say that, by expressing these "realist" concerns, the FCC served the cause of developing the doctrinal and – although to a lesser extent – also the public debate on legality and legitimacy of ECB decisions aiming at saving the Euro.¹⁹ Yet it must be highlighted that these concerns introduce in the debate not only doubts on the respect by the ECB of the principle of conferral, but also more general doubts on the credibility of the CJEU as a Court guaranteeing the principle of legal certainty. This holds all the more if one focuses on the "fact uncertainty" side of the FCC's concerns, i.e. on the objections expressed by the FCC on the way the facts of the case were established. Indeed, as the history of American legal realism tells us, skepticism about facts has been often ex-

¹⁵ German Federal Constitutional Court, judgment of 21 June 2016, cit., paras 183-186.

¹⁶ *Ivi*, paras 187-189.

¹⁷ *Ivi*, para. 182. The underlying question is the scope of the discretion that the ECB has to be allowed. According to the CJEU this has to be broad "since the ESCB is required, when it prepares and implements an open market operations programme of the kind announced in the press release, to make choices of a technical nature and to undertake forecasts and complex assessments". Thus, according to the CJEU, the judicial review of the underlying facts on which the ECB decision was based, and particularly the analysis of the economic situation of the Euro Area, is limited to assessing if it is vitiated by a manifest error of assessment" (*Gauweiler*, cit., paras 68, 74).

¹⁸ However, because of the interrelatedness of the judgment under review and the OMT order of 14 January 2014, the judgment is partly dependent on economic theory. For a discussion of the 2014 OMT order as a decision "burrowing deeply into economic theory" and the consideration of "the dependence of the FCC upon a grammar of economics" see M. EVERSON, *An Exercise in Legal Honesty*, cit., p. 475.

¹⁹ For a discussion of the deliberative values of judicial review see C.F. ZURN, *Deliberative Democracy and the Institutions of Judicial Review*, Cambridge: Cambridge University Press, 2007.

pressed by scholars who sought to disclose the “mythological” nature of the principle of legal certainty.²⁰

IV. The second mechanism whereby the FCC reinterprets to its own advantage the principles of “openness towards EU law” and “cooperation with the CJEU” under the *ultra vires* review is more insidious because it is concealed under an apparent policy of deference towards the CJEU. Indeed, the effect of strengthening the FCC’s prerogatives is pursued by attaching broader consequences to the *Gauweiler* judgment than those granted to preliminary rulings under EU law.

The FCC enhances the differentiation made by the CJEU between the “policy decision” of 6 September 2012 on the one hand and “the implementation of the programme” on the other. Admittedly, on 6 September 2012, the ECB approved the main parameters of OMT, but the implementation of the announced program was possible only after the adoption of further legal acts, as was acknowledged in *Gauweiler*. The FCC exploitation of the difference made by the CJEU between the ECB’s policy decision and the implementation of the programme leads to the affirmation of the “automatic” *ultra vires* character of any future ECB implementing measure that will not abide by a number of conditions of validity that the FCC draws from *Gauweiler*.

This automatic process unfolds along a three-step argument.

First, according to the FCC the CJEU did not merely come to the conclusion that the ECB decision should not be declared invalid, but “with a view to the proportionality of the OMT programme and the fulfilment of the obligations to state reasons, it specifies additional compelling restrictions that apply to any implementation of the OMT programme and exceed the framework conditions indicated in the policy decisions”.²¹

Secondly, the FCC states that it must be assumed that the Court of Justice considers the conditions it specified to be legally binding (*rechtsverbindliche Kriterien*) and that the violation of those conditions by the ECB entails a lack of competence (*Kompetenzverstoß*). The CJEU thereby considers – the FCC continues – that the implementing acts of the OMT program “must fulfill further conditions in order for the purchase program not to violate Union law”.²²

Thirdly, the FCC concludes that “the OMT programme constitutes an *ultra vires* act if the framework conditions defined by the CJEU are not met”. Any violation of these conditions will entail for the German authorities a number of consequences that the FCC

²⁰ J. FRANCK, *Courts on Trial*, Princeton: Princeton University Press, 1949. See, for a recent discussion, in EU legal doctrine, of fact uncertainty as a “great source of judicial discretion besides rule and conceptual uncertainty”, G. BECK, *The Legal Reasoning of the Court of Justice of the EU*, Oxford: Hart Publishing, 2012, p. 49.

²¹ German Federal Constitutional Court, judgment of 21 June 2016, cit., para. 191.

²² *Ivi*, para. 192.

had already enumerated, in its 2014 OMT decision, as descending from an *ultra vires* act.²³ On the one side, an act of this kind creates a duty not to act of the German *Bundesbank*, which may only participate in the programme implementation if and to the extent to which the preconditions defined by the CJEU are met”.²⁴ On the other side, the Federal Government and the *Bundestag* will be under a duty to monitor closely any implementation of the OMT programme. This compulsory monitoring shall determine not only whether the abovementioned conditions are met, but also “whether there is a specific threat to the federal budget – deriving from the volume and the risk structure of the purchased bonds”.²⁵

Two objections can be made to this part of the FCC’s reasoning. One relates to its first two steps. The FCC’s acknowledgment that *Gauweiler* can have broad legal effects (broader than those normally attached to preliminary rulings of the CJEU acknowledging the validity of EU acts) is not convincing. The FCC seems to consider the *Gauweiler* decision more as an interpretative decision of a Constitutional Court than as a declaration of validity under Art. 264 TFEU. However, preliminary rulings on the validity of an act of the European Union have to be clearly distinguished from preliminary rulings on the interpretation of European law. In particular, in the prevailing view among scholars, two consequences flow from the finding of invalidity of a EU act in preliminary rulings. The CJEU ruling is binding for the national judge who referred to the Court and every other national judge has “sufficient reason to regard that act as void for the purposes of a judgment which it has to give”.²⁶ This, however, does not preclude other national judges from referring to the CJEU other issues concerning the validity of the same act. Albeit rarely, the Court has sometimes pointed out that the finding of invalidity of a EU act imposes to the European institutions the duty to adopt “such measures as might be appropriate”,²⁷ thus establishing a sort of parallelism between the action for annulment and the proceedings for preliminary rulings on the validity of EU acts. In no case, however, a preliminary ruling finding that a certain EU act is valid has been meant to impose to the European institutions a duty to do act. This appears to be perfectly logic since, in order to comply with the ruling, the institution would be required to have regard not to the operative part of it, but to the grounds which underlie the declaration of validity and may be seen as constituting its essential basis. Whereas the CJEU attaches binding effects to the specific “essential” reasons which led to a declaration of invalidity of an EU

²³ German Federal Constitutional Court, order of 14 January 2014, cit., para. 44 *et seq.*

²⁴ German Federal Constitutional Court, judgment of 21 June 2016, cit., para. 205.

²⁵ *Ivi*, para. 208 *et seq.*

²⁶ Court of Justice, judgment of 13 May 1981, case 66/80, *International Chemical Corporation*, para. 13.

²⁷ Court of Justice, judgment of 19 October 1977, cases 124/76 and 20/77, *Moulin et Huileries de Pont-à-Mousson*, para. 28.

act, under Art. 264 TFEU,²⁸ it would be unreasonable to assume that the same principle also determines the effects of declarations of validity delivered under the preliminary ruling proceedings.²⁹ By so doing, the FCC not only seems to assume that the CJEU preliminary rulings do have *erga omnes* effect, but also that this *erga omnes* effect extends to decisions which found that a certain EU act is valid and determines a duty for the European Institution to act in accordance with the parts of the judgment which determine the conditions under which that act has been considered to be valid.

The second point concerns the third step in the FCC's reasoning, summarized above. One could safely assume that the *OMT* judgment can be considered as continuing the recent trend embarked on by the FCC in revising the relationship between the CJEU, on the one side, and German authorities (not only the judiciary) on the other, to the detriment of the first one. Admittedly, the broadening of the *erga omnes* effect of preliminary rulings in *Gauweiler* may prove an illusory strengthening of the CJEU prerogatives. In particular, this will occur if – as it seems from a first reading of the *OMT* judgment – the German national authorities regard themselves as having the legitimate right to ascertain the violation of the criteria provided by the CJEU, and consequently the *ultra vires* character of the implementing act, on their own, that is without giving the CJEU the opportunity to review the implementing act in question. Moreover, respect for these criteria is ultimately guaranteed by the FCC, which would have the power to determine – under the *ultra vires* review – whether the duties of the German authorities are duly fulfilled with regards to the process of implementation of the ruling of the CJEU. It is difficult to accept the FCC argument that this solution flows from the judgment rendered in *Gauweiler*. It is true that the CJEU affirmed that “in accordance with the principle of conferral of powers set out in Art. 5, para. 2 TEU, the ESCB must act within the limits of the powers conferred upon it by primary law and it cannot therefore validly *adopt and implement* a programme which is outside the area assigned to monetary policy by primary law”.³⁰ Yet nothing in the judgment can be interpreted as empowering the national courts to survey the conduct of the ECB with regard to its compliance with the ruling of the CJEU.

Moreover, the solution found by the Senate seems to challenge the principle of the CJEU's exclusive competence of declaring invalidity of EU acts, a competence that FCC Court had hitherto scrupulously acknowledged. This observation prompts the question whether the FCC intended to attach broad *erga omnes* effects to preliminary rulings in general or only to *Gauweiler*. In the first scenario the 2016 *OMT* judgment seriously en-

²⁸ See, for example, Court of Justice, judgment of 12 November 1998, case C-415/96, *Spain v. Commission*, para. 31.

²⁹ However, “essential” reasons may guide the national judges in determining the meaning and the scope of declarations of invalidity under Art. 267 TFEU, to the extent that they shed light on the operative part of CJEU judgments.

³⁰ *Gauweiler*, cit., para. 41, italic added.

croaches upon the competences of the CJEU, as established in the Treaty, because national authorities could assess the *ultra vires* character of any EU implementing measures as long as the CJEU has ruled on the validity of the EU implemented act, in the context of preliminary ruling proceedings.

In the second scenario the 2016 *OMT* judgment is as an exceptional response to exceptional developments in EU law. The ultimate justification of these developments and, in particular, the crisis-led actions of the ECB is preventing the euro from collapsing. But the independence of the ECB generates tensions between its action and the principle of democracy (and other principles governing the EU legal system) and in the FCC's eyes, the CJEU's blessing bestowed on the dynamism shown by the ECB fails to answer this democratic problem. These considerations could weigh in assessing the authority of *OMT* for the future case law. One could be led to believe that this judgment does not establish a general principle of relationship with the CJEU, but a unique solution applicable to the specific circumstances of the case.

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ARTICLES

THE UNCONFINED POWER OF EUROPEAN UNION LAW

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TABLE OF CONTENTS: I. Introduction. – II. The three puzzles of EU contestation. – III. The three dimensions of EU legal power. – III.1. EU law's excessive responsabilisation of its subjects. – III.2. The obscure and destabilising features of what the European Union does. – III.3. EU law's alienating depiction of life. – IV. Unconfined EU legal power? – IV.1. The confines of the Treaties. – IV.2. The casual disregard for EU legal power by the Court of Justice. – IV.3. The impoverished vocabulary of national constitutional courts. – V. The incidence, dynamics and significance of EU legal conflicts. – V.1. The incidence of conflicts: expert and non expert worlds. – V.2. The dynamics of contestation: the dislocation of the familiar and authoritarian overreach. – VI. Conclusion.

ABSTRACT: Certain features condition when most EU law comes into being. EU laws must compete with other laws for authority. They form part of legal regimes which are partial in scope and can cut across national legal regimes. They justify themselves by reference to a vision of political community which values what individuals do together more than simply their living together. These features act as a source of conflict in two ways. They, first, endow EU law with certain qualities which act as a source of stress. These include over-responsibilisation, destabilisation and functionalism. Secondly, the concern to secure authority by legislating better to realise certain shared activities leads to expertise heavily influencing both the content and incidence of EU law and to a disregard of those activities which link daily life experiences to wider processes of identity formation. The failure to address these features is central to the malaise and antipathy currently confronting the European Union.

KEYWORDS: power of EU law – conflicts and EU law – public opinion – culture and EU law – expertise and EU law – solidarity.

I. INTRODUCTION

EU law has never been so challenged. There has been the referendum vote in the United Kingdom. Hungary will be holding a referendum on whether to accept the mandato-

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ry relocation of asylum seekers.¹ France has stated that if the EU fails to amend Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (Posted Workers Directive) it will simply disobey it.² Italy is threatening to ignore EU laws on bank bail-outs.³ Formal sanctions procedures against Spain and Portugal for running excessive deficits are being withdrawn because of 'political sensitivities'.⁴ If much of this defiance is against measures seen by national leaders as politically costly, permission is taken for it because of a wider environment in which, since 2006, positive visions of the EU have fallen by about one third and negative ones increased by over one half.⁵ If some believe this to have been provoked by the crises of the last few years, others see the continual intrusions of the EU into the minutiae of everyday lives as the cause. Future strategies reflect this uncertain diagnosis.⁶ One view is that the EU should tinker less and prioritise large-scale projects.⁷ Another is that it should intervene to make citizens' lives tangibly better.⁸ These views make assumptions about the malaise upon which assertions about what should be done are built. For no regard is had to how its subjects experience EU power. This is in large part because none engage with the dominant instrument for the expression of that power, EU law, whose institutionalisation and communication of that power is central to its experience.

Three structures central to the development of EU law have been pivotal to this experience. EU law needs, first, to offer better solutions than other arenas. Having to rely on its subjects to realise these, this leads to its imposing intensive and extensive responsibilities on them. Secondly, its partial scope and reliance on domestic laws and institutional machinery for its application and enforcement lead both to a sense of ob-

¹ Hungary to Have October Referendum on EU Migrant Plan, in *BBC News, Europe*, 5 July 2016, www.bbc.com. Opinion polls show a strong opposition to the measures in Hungary. On the measures see Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece; European Commission Proposal for a Regulation establishing a Union Resettlement Framework and Amending Regulation 516/2014, COM (2016) 468.

² EurActiv.com with Reuters, *France Threatens to Stop Applying EU Law on Posted Workers*, in *EurActiv.com, News*, 4 July 2016, www.euractiv.com. This has pushed a Commission rethink, www.ft.com.

³ T. DURDEN, "We Won't Be Lectured" – Italy's Renzi To Defy Brussels Over Banking Bailout, in *Zero Hedge*, 3 July 2016, www.zerohedge.com.

⁴ Brussels Drops Fines Against Spain and Portugal for Fiscal Breaches, in *Financial Times*, 27 July 2016, www.ft.com.

⁵ European Commission, *Public Opinion in the European Union: Autumn 2015*, in *Standard Eurobarometer 84*, 2015, p. 6.

⁶ EU Has Interfered Too Much in People's Lives, Juncker Says Ahead of Brexit Vote, in *Reuters, World*, 19 April 2016, www.reuters.com; J.M. FERRY, *En Europe, "une souveraineté partagée plutôt que le fédéralisme"*, in *Le Monde*, 27 June 2016, www.lemonde.fr.

⁷ J. BARROSO, *We Are Determined to Make EU Laws More Business-friendly*, in *Telegraph*, 24 October 2013, www.telegraph.co.uk.

⁸ German Government Statement on Brexit, *Our Historical Responsibility for the EU*, 28 June 2016, www.bundeskanzlerin.de.

scurity about what it does and instability insofar as it cuts across and unsettles domestic regimes. Finally, EU law sees well-being and enrichment as secured exclusively through participation in shared or common activities. It neglects other visions of community which see well-being and self-realised secured through mere co-presence. This focus on worth being tied to what one does, rather than who one is, generates a very alienating vision marked by a limited moral vocabulary and a tendency towards functionalism and utilitarianism.

This EU legal power is unconfined because neither the EU nor domestic judiciaries have addressed these qualities of EU law. This lack of constraint results in these qualities shaping many of the conflicts about the exercise of EU power. EU legislative intervention has centred on responding to technological or economic developments as these provide the greatest opportunity to further its claims to legislate better than others and the greatest threats to these claims. This results in a central cleavage in the EU being between experts and non-experts as the former are granted a privileged place in EU law in setting out what better law-making involves here. This worldview, when institutionalised into EU law and combined with the latter's opaque and destabilising features, has a propensity to generate conflict where it destabilises identities which link daily activities, roles and status to wider notions of social or national boundary setting. For, quite simply, it takes no account of these. These acquire an edge in an EU context that they would not otherwise, partly because EU law's foreign-ness accentuates the link between the daily activity and ideas of national identity and partly because, it will be argued, EU law's alienating qualities result in its disrupting the relationship with the past and the climates of personal tolerance created by these identities in a particularly aggressive way. This leads to equally unconfined domestic responses where the idea of Europe is now strongly associated with an unpleasant cultural politics in which a collective freedom, in which the smallest activities are tied to wider notions of society and the nation, is to be defended from a EU which is the enemy of that freedom.

The iconography of these conflicts adds another layer to how EU law is experienced. In addition to the general experiences of over-responsibilisation, disorientation and alienation, EU law become associated with a labile continuum in which treasured identities can become too easily suffused within a reactionary cultural politics and polarisation between those who value the insights of expertise and those who treasure more those of cognition. If opportunist politicians bear some responsibility for exploiting this mix, the unconfined nature of EU legal power and the EU's failure to create suitable institutional arenas for its contestation have provided the context and trigger for this contamination of public life across Europe.

II. THE THREE PUZZLES OF EU CONTESTATION

A plausible explanation for the crisis of authority facing the EU is over-reach. The President of the European Council, Donald Tusk, alluded to this in a speech on 1 June 2016,

when he stated that “forcing lyrical and in fact naïve Euro-enthusiastic visions of total integration [...] is not a suitable answer to our problems”.⁹ If he was referring to future overreach, for some the EU passed this point a while ago. It now governs core State policies many of which are the bread and butter of national elections. Its lack of authority to do this creates a double whammy of decline in support for it, which, in turn limits its capacity to take effective policy measures.¹⁰ There is, to be sure, much in this argument but it does not fit with the two negative associations most commonly held by citizens about the EU. These are that it has no clear message (held by 78 per cent of citizens) and that it involves too much bureaucracy (shared by 71 per cent of citizens). The EU is more widely associated with these than austerity, for example (held by 61 per cent).¹¹ These qualities attach to all EU activities rather than simply those where it strayed into fields that it arguably should not have. Scratch further and three puzzles emerge about the contestation which takes place surrounding the EU.

The first goes to the incidence of this contestation. It is unpredictable as to where it takes place. It takes place, of course, in politically salient fields such as migration, bioethics or budgetary politics. However, it is equally likely that contestation takes place around seemingly arcane or technical matters. In the second half of 2014, for example, there was considerable political debate in the United Kingdom about EU law extending compulsory motor insurance to vehicles used on private land,¹² EU legislative proposals on oven and kitchen gloves,¹³ and the Commission considering phasing out of halogen

⁹ Speech by President Donald Tusk at the European Business Summit of 1 June 2016, in European Council Press Release 307/16 of 1 June 2016, www.consilium.europa.eu.

¹⁰ For examples of this thesis see G. MAJONE, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?*, Cambridge: Cambridge University Press, 2014, Chs 4 and 5; P. GENSCHER, M. JACHTENFUCHS, *More Integration, Less Federation: the European Integration of Core State Powers*, in *Journal of European Public Policy*, 2016, p. 42 *et seq.*

¹¹ These shares are relatively consistent. These particular figures are taken from European Commission, *Public Opinion in the European Union: Spring 2015*, in *Standard Eurobarometer 83*, 2015, p. 118.

¹² Court of Justice, judgment of 4 September 2014, case C-162/13, *Damijan Vnuk*. A source close to the British Transport Minister stated “[...] this is exactly the sort of bureaucratic EU meddling that drives people mad. We’re determined to fight it off. It simply isn’t necessary and could hit Brits in their pockets”. See B. CARLIN, *Now Brussels Threatens to Slap Car Insurance on Your Lawnmower*, in *Daily Mail*, 2 August 2014, www.dailymail.co.uk. For other press coverage see N. COLLINS, C. HOPE, *Gardeners with Sit-on Lawnmowers Face Buying Motor Insurance*, in *Telegraph*, 3 August 2014, www.telegraph.co.uk; J. NORTON, *Insure Your Lawnmower*, in *Daily Mail*, 25 February 2015, www.dailymail.co.uk; *Lawnmowers and Buggies need Insurance rules EU*, in *The Times*, 25 February 2015, www.thetimes.co.uk; *Now ‘Ridiculous’ EU Calls for ALL Vehicles to Be Insured Even Lawnmowers and Golf Buggies*, in *Daily Express*, 25 February 2015.

¹³ European Commission Proposal for a Regulation on Personal Protective Equipment, COM (2014) 186. The British Business Minister stated that “this EU power grab for our kitchen sinks is completely bonkers”. See P. DOMINICZAK, *Price of Oven Glows and Marigolds to Rise Because of ‘Bonkers’ EU*, in *The Telegraph*, 23 November 2014, www.telegraph.co.uk. Press reaction included J. PALMER, *Eurocrats to Regulate our Marigolds? We Have to Combat these EU Fantasies*, in *The Guardian*, 24 November 2014, www.theguardian.com; T. GOODENOUGH, *Bonkers’ EU Could Cause Marigolds and Oven Glove Price Hike*, in *The*

bulbs.¹⁴ All this cannot be put down to the exceptional salaciousness of the British press. Similar reporting is present in a number of EU States, notably the Netherlands,¹⁵ Czech Republic, Austria, Denmark, Ireland and Sweden.¹⁶ Nor can be it put down some peculiarly British thin skin about Brussels intrusion. The belief that the EU encroaches excessively on life style regulation is reportedly also held by the German government.¹⁷ Just as mysterious, however, is when contestation does not occur. A judgment in November 2014 that overtime pay was to be included in the calculation of holiday pay made almost as big news. Its financial implications were more significant than the other EU controversies mentioned.¹⁸ It was also based on an extensive interpretation of the Working Time Directive, the EU instrument which has been most often questioned.¹⁹ However, for all this heat, its EU dimension was simply neither debated nor contested.

The second goes to the drivers of this contestation. A rich seam of literature has suggested three drivers are dominant in shaping public opinion about the EU.²⁰ One goes to whether individuals or States benefitted materially from what the EU does.²¹

Sun, 25 November 2014, www.thesun.co.uk; T. COHEN, *Price of Marigolds Set to Soar... Because of 'Bonkers' EU Rules to Make Them 'Washing-up Proof'*, in *Daily Mail*, 23 November 2014, www.dailymail.co.uk.

¹⁴ It was required to review to this end Commission Regulation (EC) 244/2009 of 18 March 2009 implementing Directive 2005/32/EC of the European Parliament and of the Council with regard to ecodesign requirements for non-directional household lamps, Preamble, alinea 21 and Art. 7. J. DELINGPOLE, *Why the EU's Plan to Ban Halogen Light Bulbs Should Make You Blow a Fuse*, in *Daily Mail*, 2 March 2015; L. WINCHESTER, *Now EU Targets Halogen Bulbs: Brussels Could Ban Light Used by Millions by Next Year*, in *Daily Express*, 2 March 2015, www.express.co.uk; N. BARTLETT, *EU Could Ban Halogen Bulbs as Early as Next Year as Part of Energy-saving Drive*, in *Daily Mirror*, 2 March 2015, www.mirror.co.uk. For a contrary account, A. NESLEN, *LED Lighting Surge Dimmed by Halogen Lamp Reprieve in Brussels*, in *The Guardian*, 25 November 2014, www.theguardian.com.

¹⁵ Brusselse bezoimucht (Brussels meddling) is a favorite phrase of the Dutch press. For an example see *Brussel, Handen af van de e-sigaret*, in *De Dagelijkse Standaard*, 27 September 2013, www.dagelijksestandaard.nl.

¹⁶ C. DE VREESE, *A Spiral of Euroscepticism: The Media's Fault?*, in *Acta Politica*, 2007, p. 271.

¹⁷ N. WATT, *Angela Merkel Ready to Offer Britain Limited EU Opt-outs*, in *The Guardian*, 25 February 2014, www.theguardian.com.

¹⁸ Employment Appeal Tribunal, judgment of 4 November 2014, *Bear Scotland v. Fulton*. A task force has been established to examine the implications, R. NEATE, *Coalition Seeks to Limit Impact of Holiday Back-pay Ruling*, in *The Guardian*, 4 November 2014, www.theguardian.com. The EEF was reported as estimating that it would put 3 per cent on manufacturers' payroll costs, K. HOPE, *Holiday Pay Ruling: Who is Affected?*, in *BBC News*, 4 November 2014, www.bbc.co.uk.

¹⁹ The relevant provision was Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Art. 7. There was also a CJEU judgment covering this situation which the EAT largely followed, see Court of Justice, judgment of 22 May 2014, case C-539/12, *Lock*.

²⁰ An excellent survey is provided in S. HOBOLT, C. DE VRIES, *Public Support and European Integration*, in *Annual Review of Political Science*, 2016, p. 413.

²¹ M. GABEL, *Public Support for European Integration. An Empirical Test of Five Theories*, in *Journal of Politics*, 1998, p. 333; J. TUCKER, A. PACEK, A. BERINSKY, *Transitional Winners and Losers: Attitudes Toward EU Membership in Post-communist Countries*, in *American Journal of Political Science*, 2002, p. 557.

Another goes to whether the EU reinforces or destabilises individual and collective identities: be it national narratives,²² relationships to the wider world,²³ and or individuals' own relationships with more individualistic and less trusting dispositions tending to be less sympathetic to European integration.²⁴ The final narrative argues that public opinion is shaped by how questions were framed by domestic political elites and the cues provided to the wider citizenry as to whether EU policies and laws are beneficial or not.²⁵ The balance between these will vary and different authors emphasise one more than the other. However, nobody suggests public opinion at a general level is significantly driven by anything else. However, none of these drivers appear particularly determinative when we consider the examples of contestation earlier. To be sure, some may have been driven by a British minister faced with the threat of defeat who then tipped the media, but many did not involve this. This was certainly not the case in *Vnuk*, for example, where the ministerial response was made in reaction to British press uproar. Furthermore, in all instances, these very plausible general explanations seem to fade away into the background when we look at the texture and detail of any dispute.

The third puzzle goes to the significance of this contestation, both in terms of what it signifies and whether it matters. Does a law on halogen lamps imply a law on halogen lamps whether its designation is that of a national statute or an EU Directive? It is very difficult to argue this as when citizens argue about a proposed EU measure on this, they are also discussing the wider relations, symbols and associations represented by it. If that were not the case, citizens would not focus on the provenance on an EU measure. Yet what is represented by this EU association and does it matter? Politicians clearly think it matters. As when they choose to take on the Union's "bossiness",²⁶ its excessive

²² J. DIEZ MEDRANO, *Framing Europe: Attitudes to European Integration in Germany, Spain, and the United Kingdom*, Princeton, Oxford: Princeton University Press, 2003, Chs 3 and 9; A. MENÉNDEZ ALARCÓN, *The Cultural Realm of European Integration: Social Representations in France, Spain, and the United Kingdom*, Westport, Conn: Praeger Publishers, 2004; C. KENTMEN, *Determinants of Support for EU Membership in Turkey: Islamic Attachments, Utilitarian Considerations and National Identity*, in *European Union Politics*, 2008, p. 487.

²³ S. CAREY, *Undivided Loyalties. Is National Identity an Obstacle to European Integration?*, in *European Union Politics*, 2002, p. 387; A. LUEDTKE, *European Integration, Public Opinion and Immigration Policy: Testing the Impact of National Identity*, in *European Union Politics*, 2005, p. 83.

²⁴ S. DUCHESNE, A.-P. FROGNIER, *National and European Identifications: A Dual Relationship*, in *Comparative European Politics*, 2008, p. 143; E. HARTEVELD, T. VAN DER MEER, C. DE VRIES, *In Europe We Trust? Exploring Three Logics of Trust in the European Union*, in *European Union Politics*, 2013, p. 542.

²⁵ L. HOOGHE, G. MARKS, *Calculation, Community and Cues. Public Opinion on European Integration*, in *European Union Politics*, 2005, p. 419; M. STEENBERGEN, E. EDWARDS, C. DE VRIES, *Who's Cueing Whom?*, in *European Union Politics*, 2007, p. 13; S. HOBOLT, J. WITTROCK, *The Second-order Election Model Revisited*, in *Electoral Studies*, 2011, p. 29.

²⁶ P. WALKER, *David Cameron: Beating Heart of Britain Wants Less EU Interference*, in *The Guardian*, 14 January 2013, www.theguardian.com.

intrusion in domestic affairs,²⁷ its “life style regulation”²⁸ or its burdensomeness,²⁹ they see, however, something politically significant which affects the lives of their citizens which they wish to address. Academics have (unsurprisingly) associated the EU with a number of phenomena. Some, for example, associate it with the realisation of a European ideal which combats atavistic national behaviour;³⁰ develops citizen sensibilities;³¹ protects excluded and marginalised interests³² or provokes a re-imagination of our political horizons.³³ Another interesting association is with the rise of post-material politics in which there is a move away from protection of material interests to advocacy of non-material concerns, such as ecology, development, the internet, or consumerism.³⁴ Such a world is dominated by a politics of risk and regulation whereby actors have to anticipate the negative effects of the actions of others with a division between those who create risks and those anxious about bearing the consequences of these risks and about their status and security within a disorienting world.³⁵

None of these associations correspond with how EU citizens experience the significance of EU law. If they did, one would expect EU law to be identified with a clear *ethos* or belief-system which would be at the heart of any contestation. However, as mentioned earlier, obscurity about what the EU is about is the second most widely held association after bureaucratic intrusion.³⁶ This absence is furthermore keenly felt relative to the domestic political or legal space. Citizens, thus, are often de-anchored when confronted by EU measures or institutions and, thus, look for substitutes to inform their

²⁷ These were the comments of the Dutch Prime Minister, Mark de Rutte, in an interview on 18 May 2014, see nieuwsuur.nl.

²⁸ N. WATT, *Angela Merkel Ready to Offer Britain Limited EU Opt-outs*, cit.

²⁹ J. KATAINEN, L. ENRICO, *Die EU-Rechtsetzung Vereinfachen*, in *Frankfurter Allgemeine Zeitung*, 18 October 2013.

³⁰ J. WEILER, *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999, especially pp. 332-348.

³¹ A. SOMEK, *Europe: Political, Not Cosmopolitan*, in *European Law Journal*, 2014, p. 142.

³² M. POIARES MADURO, *We, the Court: The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing, 1998, pp. 166-174; C. JOERGES, *Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form*, in *LEQS Working Paper* 28, 2010.

³³ J. KRISTEVA, *Europhilia, Europhoria*, in *Constellations*, 1998, pp. 321, 327; J. KRISTEVA, *The Crisis of the European Subject*, New York: Other Press, 2000, Ch. 3; R. GASCHÉ, *Europe, or the Infinite Task: A Study of a Philosophical Concept*, Stanford: Stanford University Press, 2009, p. 342.

³⁴ R. INGLEHART, *The Silent Revolution Changing Values and Political Styles Among Western Publics*, Princeton: Princeton University Press, 1977; R. INGLEHART, S. FLANAGAN, *Value Change in Industrial Societies*, in *American Political Science Review*, 1987, p. 1289.

³⁵ On this theme within a Europeanised context see U. BECK, C. CRONIN, *The European Crisis in the Context of Cosmopolitization*, in *New Literary History*, 2012, p. 641; U. BECK, D. LEVY, *Cosmopolitization: Re-imagining Collectivity in World Risk Society*, in *Theory, Culture and Society*, 2013, p. 3.

³⁶ European Commission, *Public Opinion in the European Union: Spring 2015*, cit.

views: be these narratives provided by domestic decision-makers³⁷ or national equivalents.³⁸ This obscured *ethos* is startling as ideology permeates the EU political institutions. Decision-makers have been found to vote predominantly along left wing/right wing lines in EU institutions³⁹ and citizens vote for representatives within these institutions along the same lines.⁴⁰

III. THE THREE DIMENSIONS OF EU LEGAL POWER

Research, such as the above, on EU public opinion has ensured that EU studies are not simply about bureaucracy and institutional interplay. It locates the law and institutional settlement of the EU against a more detailed wider environment than any other research. In so doing, it relativizes the power and authority of EU law and institutions by providing some measure of how their subjects view them. This is all path-breaking. It tells only half the story, however, as it does not gauge how EU law's subjects experience its power. This is in large part because EU law is simply an instrument to realise EU policies with few independent qualities of its own. Subjects' views of EU's policies and EU law are thus treated synonymously.

EU law cannot, however, be reduced in this way. It has been deployed as the central vehicle through which EU power has been traditionally realised because it has certain qualities of its own that are seen as more valuable than other alternatives. Traditional accounts would, therefore, point to these as law's power to stabilise expectations, command authority, institutionalise certain values, resolve differences, and communicate collective decisions to all parts of society. However, to do all these things, EU law must have a certain capacity, a particular power. For this essay, the qualities of this power are of particular interest. It enables the EU to do things in a particular way – otherwise EU law would not be used – but it can also have qualities which are both objects of contestation in their own right, and, equally importantly, go to how EU policies are experienced.

There are three dimensions to EU law's power.⁴¹

³⁷ L. HOOGHE, G. MARKS, *Calculation, Community and Cues*, cit.; M. STEENBERGEN, E. EDWARDS, C. DE VRIES, *Who's Cueing Whom?*, cit.; S. HOBOLT, J. WITTROCK, *The Second-order Election Model Revisited*, cit.

³⁸ M. ELLENBAAS *et al.*, *The Impact of Information Acquisition on EU Performance Judgments*, in *European Journal of Political Research*, 2012, p. 728.

³⁹ S. HIX, A. NOURY, G. ROLAND, *Dimensions of Politics in the European Parliament*, in *American Journal of Political Science*, 2006, p. 494; S. HAGEMANN, B. HOYLAND, *Parties in the Council?*, in *Journal of European Public Policy*, 2008, p. 1205.

⁴⁰ In both domestic elections (for who will represent them in the Council) and European Parliament elections, voters vote for national political parties overwhelmingly aligned along this axis.

⁴¹ On this more generally, see G. GOEHLER, *Constitution and Use of Power*, in H. GOVERDE *et al.* (eds), *Power in Contemporary Politics: Theories, Practices, Globalizations*, London: Sage, 2000.

III.1. EU LAW'S EXCESSIVE RESPONSIBILISATION OF ITS SUBJECTS

When EU law, first, exercises a *power over* its subjects, a pervasive characteristic of this dimension is excessive responsabilisation. This derives from EU law competing with other legal orders, be they international or national, and other systems of governance (i.e. standardisation processes) for regulatory authority. Within the EU legal system, this is exemplified by the subsidiarity principle which prohibits the EU from legislating in most fields of competence unless it can be shown that the goals can be better realised by Union action.⁴² Powerful market forces are also at work alongside this. If the EU legislature cannot demonstrate to constituencies who might otherwise clamour for EU law that it cannot provide an optimal regulatory measure, these will turn to substitutes. Indeed, this is what has happened with EU legislative activity declining by over half since 2010, hemmed in by national parliaments demanding more be done nationally, on the one hand, and transnational business turning increasingly to private international and European standardisation processes on the other.⁴³ With few other resources, the EU has to secure these “better activities” – be these a better environment, a stronger single market, more gender equality – through making legal demands on its subjects. It must get them to do more and do better. This is secured largely through imposing additional, more intensive responsibilities upon those actors – be these employers, suppliers, developers, consumers – who are seen as having the greatest capacity to make the activities regulated by it flourish.⁴⁴

One sees the tensions provoked by this responsabilisation at every level. At the micro-level, the furore about halogen bulbs could not, therefore, be traced back to cost but to a sense that it was imposing significant new responsibilities on householders. Likewise, the fuss about *Vnuk* case was not that it threatened the British elite lawnmower or golf buggy industries but rather because it carried a responsibility to be insured onto private late. A similar pattern is present at the meso-level. In a survey of arguably the three most significant legislative proposals in 2008 – health care, carbon capture and storage – I found that all intensified and extended the responsibilities required of operators.⁴⁵ At the macro-level, the REFIT programme, which aims to examine the regulatory impact of EU law throughout its lifecycle, is nothing else than an administrative response to the excesses of this refrain of responsabilisation.⁴⁶

⁴² Art. 5, para. 3, TEU.

⁴³ D. CHALMERS, M. CHAVES, *EU Law-making and the State of European Democratic Agency*, in S. HOBOLT, O. CRAMME (eds), *Democratic Politics in a European Union under Stress*, Oxford: Oxford University Press, 2014.

⁴⁴ D. CHALMERS, S. TROTTER, *Fundamental Rights and Legal Wrongs: The Two Sides of the Same EU Coin*, in *European Law Journal*, 2016, pp. 9 e 14.

⁴⁵ D. CHALMERS, *Gauging the Cumbersomeness of EU Law*, in *Current Legal Problems*, 2009, p. 405.

⁴⁶ Communication COM (2012) 746 final of 12 December 2012 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU Regulatory Fitness*. More detail on the programme can be found at the platform, ec.europa.eu.

III.2. THE OBSCURE AND DESTABILISING FEATURES OF WHAT THE EUROPEAN UNION DOES

The second dimension to EU legal power is that EU law allows activities to be realised. Most saliently, the TFEU sets out a series of policies in Arts 3-4 TFEU which are to be realised largely through EU law. However, it happens more prevalently wherever an Action Programme or Plan is established which sets out a justification for series of laws, relates them to each other, ties their operation and scope to realisation of a series of objectives, and coordinates them with national law.

The characteristics of this dimension to EU legal power are its obscurity and destabilising qualities. If one looks at the examples earlier, there is weak identification at best with the policy goals served by the EU legislation, whether for good or for bad. There is little discussion of consumer, climate change or pedestrian safety issues, even as unreasonable demands. Instead, these EU laws are framed as presenting unwelcome demands with weakly specified motivations. The only exception to this is, of course, the dispute about holiday pay. In that instance, the British legislation was aligned with EU legislation with debate focusing along classic lines about the rights of poorly paid versus the increase in employer cost.

Its obscurity stems, in part, from EU law conferring few direct obligations or rights on private actors. Treaties and regulations, which formally are able to impose such obligations, rarely do.⁴⁷ Directives cannot as they are not capable of horizontal direct effect. Most private obligations are mediated by national law which is interpreted in the light of EU law. Alongside this, the deployment of EU law to realise EU policies means it is usually only deployed when it is an effective policy instrument. Justiciable rights granted to private parties are, from a policy-makers' perspective, rarely such an instrument as they may be used for unintended ends by unanticipated beneficiaries and be granted a meaning by courts which was not envisaged. The consequence is that very few individual rights are granted in the proportion to the scale of EU law. Research found, for example, that in the five year period between 2007 and 2011, one judgment during the whole of that period was given by the Court of Justice for about every 25 pieces of legislation.⁴⁸

⁴⁷ Directly effective Treaty provisions include those on competition, equal pay for work for equal value, and, arguably in some couched form, free movement of persons. Extending horizontal direct effect to the latter has been controversial, H. SCHEPPEL, *Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law*, in *European Law Journal*, 2012, p. 177. It is difficult to find many examples in the case law of Regulations have horizontal direct effect, albeit that some clearly do, e.g. Regulation (EC) 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Arts 14-20.

⁴⁸ Insofar as many of the judgments concerned the same legal instrument, the actual proportions were, in fact, even higher, D. CHALMERS, L. BARROSO, *What Van Gend en Loos Stands For*, in *International Journal of Constitutional Law*, 2014, pp. 105, 124.

This obscurity and instability derives also from how EU law relates to the national legal system. The pioneering literature on diagonal conflicts illustrated that, in many instances, it was not a case of an EU law replacing a national law with an identical scope. Instead, conflicts emerged from a combination of the partiality of the EU legal order so that it would rarely fully govern a dispute and from its pursuing goals which cut across those of the national law.⁴⁹ This criss-crossing feature generates destabilising effects for each legal order which ripple out beyond the dispute. For, in each case, the law will contribute to the coherence and operation of a wider regime, be it national or EU. Its removal can lead, therefore, to incoherence and weak policy effectiveness across the regime.

III.3. EU LAW'S ALIENATING DEPICTION OF LIFE

The third dimension to EU legal power is that it sets out a picture which makes sense of social practice(s) and human association(s). EU law has a power here which transcends the relations it governs and has an identity of its own. When talk is of the single market, economic and monetary union or area of freedom, security and justice, an image is represented not simply of a series of relations but of a series of common projects. This image has the qualities of the imaginary of Charles Taylor:

"[...] incorporates a sense of the normal expectations that we have of each other; the kind of common understanding which enables us to carry out the collective practices which make up our social life. This incorporates some sense of how we all fit together in carrying out the common practice. This understanding is both factual and 'normative'; that is, we have a sense of how things usually go, but this is interwoven with an idea of how they ought to go [...] this understanding supposes, if it is to make sense, a wider grasp of our whole predicament, how we stand to each other, how we got to where we are, how we relate to other groups, etc." ⁵⁰

The imaginary set out by EU law has profoundly alienating qualities because it sets out a vision of human association based exclusively around shared or common activities. Well-being and meaning are derived in EU law from what citizens *do* together. Many find this too arid a view of common life, leading too easily to functionalism in which value is located in what makes the activities better or utilitarianism in which value is located in the activities bringing the greatest benefit to the greatest number. Modern community is often represented as also comprising another form of association, one based on the shared and collective co-presence of its members. They come together

⁴⁹ C. SCHMID, *Diagonal Competence Conflicts Between European Competition Law and National Regulation: A Conflict of Laws Reconstruction of the Dispute on Book Price-fixing*, in *European Review of Private Law*, 2000, p. 155; R. KRÄMER, *The Notion of Diagonal Conflicts as a Key Concept of European Conflicts Law*, in C. JOERGES, T. RALLI (eds), *After Globalisation New Patterns of Conflict and their Sociological and Legal Re-constructions (ARENA Report no. 4/11, RECON Report no. 15)*, Oslo: University of Oslo, 2011.

⁵⁰ C. TAYLOR, *Modern Social Imaginaries*, Durham: Duke University Press, 2003, p. 123.

simply because they *are*.⁵¹ This absence shapes EU legal visions of property and fundamental rights. The individual or property only exists within EU law for their contribution to the collective activities established or regulated by EU law. Intellectual property rights are, therefore, to be established only in the context and establishment of the functioning of the single market.⁵² Beyond this, EU law is not to prejudice national systems of property ownership.⁵³ In like vein, EU fundamental rights law only governs EU and national Institutions when these are acting in fields governed by other EU law.⁵⁴ There is also no EU legal vision of collective being as a social form, a notion of society. There is, thus, no independent EU norm of either justice or solidarity which acts as a basis for commitment between EU citizens irrespective of their activities or any sense of mutual dependence. Although the Union claims to be founded on the principles of representative democracy,⁵⁵ EU law struggles to set out on whose behalf the Union acts or, more symbolically, what vision of life it represents. The vision of EU law is, consequently, a functional and utilitarian one. It is also an arid one as a lexicon which forms important parts of national legal kaleidoscopes is only thinly present. If occasionally mentioned in EU legal provisions and judgment, there is no wider representation of what concepts such as autonomy, freedom, justice, equality, society or heritage mean beyond the case or application in hand.

EU law also misses out on the interaction between these two forms of association and co-presence. Yet this interaction is seen as fundamental and productive by thinkers of both left and right that it has to be seen as the building block of political community.⁵⁶ Elements can be found, therefore, in the distinction between *societas* and *universitas* made by Oakeshott,⁵⁷ purposeful living and external rationality by Husserl,⁵⁸ life-

⁵¹ This presence does not have to be physical. It can be granted to past and future members of the community as well as those living outside the territory. All must share some defining tie which does not go to what they do, however.

⁵² Art. 118 TFEU

⁵³ Art. 345 TFEU.

⁵⁴ On the level of connection for this see, recently, Court of Justice, judgment of 10 July 2014, case C-198/13, *Julian Hernández*.

⁵⁵ Art. 10, para. 1, TEU.

⁵⁶ Their respective origins can be traced to the political associations which emerged in the Middle Ages. The *societas* reflects the first and the *universitas* and *communis utilitas* the latter. On the former see O. VON GIERKE, *Natural Law and the Theory of Society 1500-1800*, Boston: Lawbook Exchange, 1950, transl. E. Barker, pp. 44-79 and on the latter see W. BLOCKMANS, P. HOPPENBROUWERS, *Introduction to Medieval Europe 300-1500*, London, New York: Routledge, 2014, pp. 312-314; H. HÖPFL, *Jesuit Political Thought: The Society of Jesus and the State, c.1540-1630*, Cambridge: Cambridge University Press, 2004, p. 282 *et seq.*

⁵⁷ M. OAKESHOTT, *The Vocabulary of a Modern European State*, Exeter: Imprint, 2008, p. 245.

⁵⁸ E. HUSSERL, *The Vienna Lecture: Philosophy and the Crisis of European Humanity*, in E. HUSSERL (ed.), *Crisis of European Sciences and Transcendental Phenomenology*, Chicago: Northwestern University, 1970, transl. D. Carr.

world and system by Habermas,⁵⁹ or the distinction between the drives of singularity and transformation in Kristeva.⁶⁰ This interaction, however, forms the backdrop to decisions about when law is deployed, namely whether a single market law would contribute to a vision of shared human life that we like, and how it is interpreted. The absent interaction leads to a heavy instrumentalisation of those laws most strongly associated with protecting human dignity. Mention has already been made that individual rights granted by EU law are few and selective as they are generally only granted when this would be an effective way of realising a particular policy.⁶¹ A study by myself and Sarah Trotter found a parallel dynamic with regard to fundamental rights. The majority of EU fundamental rights cases involved fundamental rights being used as a guide to EU legislation. However, they rarely acted as a powerful independent guide or source of review. Instead, they and the legislation were attributed a wider objective of sustaining the European political economy and interpreted in the light of this. This weakened the normative force of these rights, provided often odd interpretations of them, and resulted in their often providing only rhetorical justification for EU legislation.⁶²

IV. UNCONFINED EU LEGAL POWER?

IV.1. THE CONFINES OF THE TREATIES

These qualities of excessive responsabilisation, opacity, destabilisation and alienation are inevitable as they stem, respectively, from EU law having to compete for authority, its partial scope which cuts across national regimes, and its being an association based around shared activities. Furthermore, the more it competes, seeks to secure the coherence of its laws or the effectiveness of its policies, the more it will exacerbate these qualities as the latter are by-products of the former. They sit aside and are a corollary to EU law's more positive qualities. They are unconfined in that they cannot be addressed by the conferred power doctrine as they are endemic to all EU law. The question is, therefore, not whether they can be prevented but rather whether their effects can be softened or checks and balances can be found.

Interestingly, the Treaty provides a number of institutions and values which EU law must *respect* and which could provide such checks. These include human rights,⁶³ cultural and linguistic diversity,⁶⁴ the principles of the UN Charter,⁶⁵ national identities,⁶⁶

⁵⁹ J. HABERMAS, *Outline of a Theory of Communicative Action: The Critique of Functionalist Reason*, Cambridge: Polity, 1987, pp. 119-197.

⁶⁰ J. KRISTEVA, *The Crisis of the European Subject*, cit., Ch. 3.

⁶¹ D. CHALMERS, L. BARROSO, *What Van Gend en Loos Stands For*, cit.

⁶² D. CHALMERS, S. TROTTER, *Fundamental Rights and Legal Wrongs*, cit., p. 9.

⁶³ Art. 2 TEU; Art. 67, para. 1, TEU.

⁶⁴ Art. 3, para. 3, TEU; Art. 167, para. 1, TFEU.

⁶⁵ Art. 3, para. 5, TEU; Art. 21 TEU.

agricultural laws on religious rites, traditions and regional heritage,⁶⁷ the status of churches, religious, philosophical and confessional organisations,⁶⁸ and national responsibilities for the definition, organisation and delivery of public health care.⁶⁹ Alongside these, national security⁷⁰ and property rights⁷¹ at least on the face of the Treaty seem to be ring-fenced off from EU law curbs. Finally, the Treaties makes clear EU citizenship is additional to (and one would infer of a second order to) national citizenship.⁷²

Respect, as the philosopher Stephen Darwall notes, involves not merely recognising the presence of phenomena but also valuing them on their own terms rather than because they serve some ulterior objective.⁷³ It touches at something deeper, therefore, than simply secure the formal status of all the above, but also goes to valuing what they represent. If these phenomena are to confine and soften EU legal power, therefore, protection must be offered not merely to their formal features but also to the broaden visions that they represent.

In this, they seem to cluster around four images. First, there are human rights. Respect must be accorded to the particular legal institution or text insofar it formally protects individual autonomy. The resonance of human rights also lies in their representing deeper, possibly more inchoate moral values which are never fully subsumed in the text. And these must also be respected.⁷⁴ Secondly, there are those headings which go to individual and collective security. If this comprises formal protection from physical threats,⁷⁵ security also represents an environment which protects status, self-esteem and vulnerability. It safeguards routines, traditions, and beliefs which provide common fabrics of meaning which, in turn, allow people to locate themselves and generate narratives about their lives.⁷⁶ Thirdly, there are structures which contribute significantly to ascribed collective identities. These identities are those possessed by individuals regardless of what they do or any capacity they enjoy. They can be identities based on faith, nation-

⁶⁶ Art. 4, para. 2, TEU.

⁶⁷ Art. 13 TFEU.

⁶⁸ Art. 17 TFEU.

⁶⁹ Art. 168, para. 7, TFEU.

⁷⁰ Art. 4, para. 2, TEU; Art. 346 TFEU.

⁷¹ Art. 345 TFEU.

⁷² Art. 20 TFEU.

⁷³ S. DARWALL, *Two Kinds of Respect*, in *Ethics*, 1977, p. 36; S. DARWALL, *The Second Person Standpoint: Morality, Respect, and Accountability*, Cambridge: Harvard University Press, 2006, pp. 120-137.

⁷⁴ This duality is famously noted in J. HABERMAS, *Kant's Idea of Perpetual Peace: At Two Hundred Years*, in C. CRONIN, P. DE GREIFF (eds), *The Inclusion of the Other: Studies in Political Theory*, Cambridge: MIT Press, 1998, pp. 165 and 189-191.

⁷⁵ On how security is never just about former safety but goes to question of affect and collective identity-formation see I. LOADER, N. WALKER, *Civilising Security*, Cambridge: Cambridge University Press, 2007, pp. 146-66.

⁷⁶ Famously on this, see C. GEERTZ, *The Interpretation of Cultures*, New York: Basic Books, 1973, p. 145.

ality, ethnicity or place. Formal markers of such identities go to questions of *what we are* and focus on common external traits which allow members to identify one another. The formal qualities rarely go to what these identities mean for members. Membership also goes to questions of *who we are* and a search for authenticity⁷⁷ with a series of symbols and narratives serving to help the individual locate herself within the community and to relate to members and non-members of that community. Fourthly, there is citizenship.⁷⁸ Formally, it endows individuals with sufficient civic, economic, political and social entitlements that they can be considered free and equal members of a political community. Citizenship possesses a representative duality that other identities do not. It involves, on the one hand, a right to represent the community. It is, thus, conceived of as a practice, be it political or social, whereby individuals through exercise of their entitlements articulate a particular vision of freedom and equality. On the other hand, citizenship has a symbolic dimension. In this, it represents both a sense of belonging to a political community and an emotional tie to other members of that community.

IV.2. THE CASUAL DISREGARD FOR EU LEGAL POWER BY THE COURT OF JUSTICE

A case can be made that EU law not merely respects but also contributes to a richer realisation of these phenomena. The EU has thus its own policies and law on fundamental rights, collective security and EU citizenship. There is also an impressive literature on how development of a European identity can enlarge national identities.⁷⁹ This is all very well but there is no respect of somebody or something if the beholder claims of a monopoly of authoritative voice over what or who it is. It is only to be what EU law conceives it as or within the limits conceived for it by EU law.

This has happened by virtue of these phenomena being subject to the rigours of the proportionality principle when they cross EU law.⁸⁰ This principle requires the domestic measure to be taken in good faith, be suitable to realising legitimate goals, necessary for realising these, consistent and no more restrictive than is necessary. This principles seeks to confine these phenomena, limit their operation and make their invo-

⁷⁷ C. GUIGNON, *On Being Authentic*, London, New York: Routledge, 2004, p. 146 *et seq.*; J. CHRISTMAN, *The Politics of Persons*, Oxford: Oxford University Press, 2011, p. 4.

⁷⁸ These, as well as relevant literature, are set out D. LEYDET, *Citizenship*, in *The Stanford Encyclopedia of Philosophy*, Spring, 2014, plato.stanford.edu.

⁷⁹ J. WEILER, *To be a European Citizen—Eros and Civilization*, in *Journal of European Public Policy*, 1997, p. 495; J. KRISTEVA, *The Crisis of the European Subject*, cit., Ch. 3; U. BECK, E. GRANDE, *Cosmopolitan Europe*, Oxford: Polity, 2007, pp. 6–9 and 225–240; R. GASCHÉ, *Europe, or the Infinite Task: A Study of a Philosophical Concept*, Palo Alto: Stanford University Press, 2009, p. 342.

⁸⁰ The challenges of the principle are noted in E. CLOOT, *National Identity in EU Law*, Oxford: Oxford University Press, 2015. She proposes, instead, that if certain processes or values fall into certain categories, they would not be subject to proportionality review, *ivi*, pp. 210–214. The scope of this protection is limited having to be in the national constitution or an equivalent document.

cation as minimally disruptive to EU law as possible.⁸¹ The Court has, therefore, indicated that the Treaty provisions allowing national security measures to be taken must be interpreted strictly⁸² and be narrowly construed.⁸³ There should be no presumption that reasons provided by national authorities that security is compromised are either valid or show that it is so compromised.⁸⁴ A similar tone permeates interpretation of the EU law provisions on national identity. National restrictions on what names may be used have been successfully protected largely because they were seen as proportionate ways to protect the official languages of Member States⁸⁵ or to combat historical excesses of the aristocracy.⁸⁶ Wider invocations of national and constitutional identities have, however, been dismissed by the Court with little reasons given.⁸⁷ Perhaps the strongest example was with regard to national citizenship in the judgment of *Rottmann*.⁸⁸ The Court noted that the grant and loss of nationality was a matter for national law but then stated it had to have due regard for EU law. Insofar as it might deprive an individual of their EU citizenship rights, the Court held that it would only be lawful if the removal of citizenship was for a legitimate interest and proportionate. The very cornerstone of citizenship, the terms under which individuals held it and the tie it expressed between individual and community, were, therefore, to be constrained by EU law. It is very difficult to see how EU citizenship can be derivative of national citizenship if it can shape the latter's terms in this way.⁸⁹

⁸¹ F. DE WITTE, *Sex, Drugs & EU law: The Recognition of Ethical and Moral Diversity in Europe*, in *Common Market Law Review*, 2015, pp. 1545 and 1566-1570.

⁸² Court of Justice, judgment of 15 December 2009, case C-284/05, *European Commission v. Finland* [GC], para. 46.

⁸³ Court of Justice, judgment of 4 September 2014, case C-474/12, *Schiebel Aircraft*, para. 33.

⁸⁴ Court of Justice, judgment of 4 June 2013, case C-300/11, *ZZ* [GC], para. 61.

⁸⁵ Court of Justice, judgment of 12 May 2011, case C-391/09, *Runevič-Vardyn and Wardyn*.

⁸⁶ Court of Justice, judgment of 22 December 2010, case C-208/09, *Sayn-Wittgenstein*; Court of Justice, judgment of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*.

⁸⁷ Court of Justice, judgment of 24 May 2011, case C-51/08, *European Commission v. Luxembourg* [GC]; Court of Justice, judgment of 1 March 2012, case C-393/10, *O'Brien*, para. 49; Court of Justice, judgment of 16 April 2013, case C-202/11, *Las* [GC], paras 30-33; Court of Justice, judgment of 17 July 2014, joined cases C-58/13 and C-59/19, *Torresi* [GC], paras 56, 57. A defence based on constitutional identity was most dismissively addressed in Opinion of AG Villalón delivered on 14 January 2015, case C-62/14, *Gauweiler and others* [GC], para. 59 where he stated that "[...] it seems to me an all but impossible task to preserve this Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as 'constitutional identity'".

⁸⁸ Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann* [GC].

⁸⁹ With regard to fundamental rights the proportionality principle was famously invoked in Court of Justice, judgment of 18 December 2007, case C-341/05, *Laval un Partneri* [GC], to hold that an exercise of the right to collective action unlawfully infringed free provision of services. This was a rare instance, however. The majority of EU fundamental rights cases involve interpretation of EU legislation where the right

IV.3. THE IMPOVERISHED VOCABULARY OF NATIONAL CONSTITUTIONAL COURTS

The consequence is that it has fallen to national constitutional courts to protect constitutional rights, collective identity, security and citizenship from the constraints of EU law. As early as 1973, the Italian Constitutional Court stated that EU law must not transgress on “civil, ethico-social, or political relations”.⁹⁰ Identity review, whereby a national court reserves the right to disapply EU law because it violates a national democratic or constitutional identity, forms part of the constitutional law of at least 12 Member States.⁹¹ Whilst national courts have said less about national security, the 28 Heads of State and Government emphasised in February 2016 that national security was the sole responsibility of each Member State and was not, therefore, to be seen as a derogation under EU law which should be interpreted strictly.⁹² Judicial antagonism has been most marked on national citizenship. There has been opposition to EU law restrictions on when States can remove citizenship from their own nationals;⁹³ to replacement of national constitutional rights by EU fundamental rights⁹⁴ in large part because the former are seen as central to the substance of national citizenship; and to encroachment by EU law on political and social rights identified with national citizenship. On political rights, national courts have objected to EU legal interference over who can vote,⁹⁵ the internal deliberation of legislatures⁹⁶ and to significant displacement of national representative institutions by EU law.⁹⁷ They have also been keen to protect that compact sometimes

and legislation are brought together through being interpreted in the light of a wider narrative of sustaining the European political economy, D. CHALMERS, S. TROTTER, *Fundamental Rights and Legal Wrongs*, cit.

⁹⁰ Italian Constitutional Court, judgment of 27 December 1973, no. 183, para. 21. Similar language was used in German Federal Constitutional Court, judgment of 30 June 2009, 2 BvE 2/08, para. 249.

⁹¹ On the list see German Federal Constitutional Court, order of 14 January 2014, 2 BvR 2728/13, para. 30.

⁹² Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within The European Union, in Annex 1 of European Council Conclusions of 19 February 2016, Section C, para. 5.

⁹³ United Kingdom Supreme Court, judgment of 25 March 2015, *Pham v. Secretary of State for the Home Department*, paras 85-90.

⁹⁴ Latvian Constitutional Court, judgment of 7 April 2009, case 2008-35-01, *Ratification of the Lisbon Treaty*; Hungarian Constitutional Court, judgment of 25 May 2004, decision 17/04, regarding Agricultural Surpluses; Polish Constitutional Court, judgment of 11 May 2005, no. K 18/04, *Polish Accession to the European Union*; Czech Constitutional Court, judgment of 3 March 2008, Pl ÚS 50/04, *Sugar Quotas III*; German Federal Constitutional Court, judgment of 24 April 2013, 1 BvR 1215/07.

⁹⁵ English and Welsh Court of Appeal, judgment of 20 May 2016, case C1/2016/1796, EWCA Civ-469, *Shindler and Anr v. Chancellor of the Duchy of Lancaster and Anr*.

⁹⁶ United Kingdom Supreme Court, judgment of 22 January 2014, *R v. The Secretary of State for Transport ex parte HS2 Action Alliance Limited*.

⁹⁷ German Federal Constitutional Court, judgment of 18 March 2014, 2 BvR 1390/12; Latvian Constitutional Court, judgment of 7 April 2009, no. 2008-35-01, *Re Ratification of the Lisbon Treaty*, para. 207. In similar vein see Supreme Court of Estonia, judgment of 12 July 2012, case 3-4-1-6-12, *ESM Treaty*, paras 131 *et seq*.

seen as distinguishing the political authority of liberal democracies, namely that the State's power to punish citizens derives its legitimacy from their being able to contribute to the making of the laws which do this.⁹⁸ On social rights, national courts have been concerned about EU intervention, be it directly through EU law or more indirectly through processes such as the European Stability Mechanism, on health care,⁹⁹ pensions;¹⁰⁰ and social policy and social justice more generally.¹⁰¹

These courts are, however, institutionally poorly equipped to protect against destabilising encroachment by EU law. Little EU law is litigated with the consequence that the protections offered by the judiciary only serve to protect that part of it. Even there, the issues before them may be framed in slanted ways or framed too narrowly by the dispute in hand. The formal nature of their reasoning will rarely engage, furthermore, with what these phenomena of human rights, citizenship, collective identity and security represent. The national case law on citizenship focuses on protecting the legal entitlements associated with it but not on how EU law destabilises its other dimensions, namely political engagement and citizens' sense of belonging. Yet research has shown that EU integration has affected domestic political engagement significantly. As it is impossible for national citizens to vote out the government of the EU, discontent is, instead, directed at national governments who are seen as proxies for the EU.¹⁰² This has contributed to the electoral emergence of populist parties who not only express anger at the operation of domestic institutions but do so within the context of challenging European integration.¹⁰³ In parallel to this, if there is little evidence that European integra-

⁹⁸ Polish Constitutional Tribunal, judgment of 27 April 2005, no. P 1/05, *Re Enforcement of a European Arrest Warrant*; Czech Constitutional Court, judgment of 3 May 2006, no. Pl. ÚS 66/04, *Re Constitutionality of Framework Decision on the European Arrest Warrant*; Supreme Court of Cyprus, judgment of 7 November 2005, *Attorney General of the Republic of Cyprus v. Konstantinou*; Athenian Court of Appeal, judgment of 10 May 2007, no. 25, *Re Enforcement of a European Arrest Warrant against Tzoannos*.

⁹⁹ Italian State Council, judgment of 8 August 2005, case 4207/05, *Admenta et al. v. Federfarma et al.*; Greek Council of State, judgment of 4 June 2014, 8 Cte 1906/2014, *Olom EYDAP*.

¹⁰⁰ Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions*; Portuguese Constitutional Tribunal, judgment of 22 April 2013, no. 187/2013, *State Budget 2012*; Portuguese Constitutional Tribunal, judgment of 18 December 2013, no. 862/13, *State Pensions*; Portuguese Constitutional Tribunal, judgment of 30 May 2014, no. 413/2014, *State Budget 2014*.

¹⁰¹ Polish Constitutional Tribunal, judgment of 24 November 2010, K 32/09, *Lisbon Treaty*.

¹⁰² S. HOBOLT, J. TILLEY, *Blaming Europe? Responsibility Without Accountability in the European Union*, Oxford: Oxford University Press, 2014, Conclusion; M. ARESA, B. CEKAB, H. KRIESI, *Diffuse Support for the European Union: Spillover Effects of the Politicization of the European Integration Process at the Domestic Level*, in *Journal of European Public Policy*, 2016 (early view).

¹⁰³ These exist across the left/right spectrum. They include UKIP in the United Kingdom, AfD in Germany, Front Nationale in France, Podemos in Spain, the Five Star Movement in Italy, Syriza in Greece, the True Finns in Finland and Liberty and Hope in Poland.

tion changes citizens' trust in one another,¹⁰⁴ there is evidence that it is perceived as forming part of a kaleidoscope of remorseless, large scale phenomena – such as globalisation, mass migration or the economy – which unsettle individuals' sense of self.¹⁰⁵

This interplay has had significant effects, however, for how these issues of identity, security etc., are represented. The Court of Justice refers to them as no more than concepts. They are generic notions with domestic invocations doing no more than providing particular examples of these concepts. The problem with this construction is that it presents only half a picture. As an abstract model, it cannot identify how identity, security etc., are experienced, practiced, perceived or symbolised.¹⁰⁶ In the absence of this, it has fallen, once again, on national judiciaries to set out what these phenomena represent. The context of the task asked of them by EU law has above all shaped their representations. It has led them to establish a domestic calculus of value which provides a basis for more valued laws to be protected from EU law and less valued ones to be overridden by it. The protection of human rights, collective identities, citizenship and security has, thus, become submerged within a wider judicial language of defending national sovereignty. It has been most explicitly couched in these terms by the French Constitutional Council who has talked of protecting "conditions essential for the exercise of national sovereignty"¹⁰⁷ and the Hungarian Constitutional Court who has stated that it will protect that "State's independence, her rule of law character and her sovereignty".¹⁰⁸ However, other courts have talked in similar terms about protecting the "essence"¹⁰⁹ or "identity"¹¹⁰ of the State.

What is the content of this sovereignty which is deployed to supply this calculus of values? National courts have resorted to received notions inherited from the Middle Ages, namely that of the body politic, to determine upon which side of the line different laws fall. This image casts political communities in the image of a sacred and eternal human body. Laws perceived as expressing this image strongly are to be protected. Like

¹⁰⁴ B. WESTLE, T.-M. KLEINER, *Trust towards other People: Co-nationals, Europeans, People Outside Europe*, in B. WESTLE, P. SEGATTI (eds), *European Identity in the Context of National Identity: Questions of Identity in Sixteen European Countries in the Wake of the Financial Crisis*, Oxford: Oxford University Press, 2016.

¹⁰⁵ J. WHITE, *Political Allegiance after European Integration*, Basingstoke: Palgrave, 2011, Ch. 6.

¹⁰⁶ This point has been well established and famously made in the philosophical literature, T. NAGEL, *What Is It Like To Be a Bat?*, in *Philosophical Review*, 1974, p. 435.

¹⁰⁷ French Constitutional Council, decision of 19 June 1970, no. 70-39 DC, *Own Resources Decision*; French Constitutional Council, decision of 9 August 2012, no. 2012/653 DC, *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, para. 16.

¹⁰⁸ Hungarian Constitutional Court, decision of 14 July 2010, no. 143/10, *Lisbon Treaty*.

¹⁰⁹ Czech Constitutional Court, judgment of 8 March 2006, no. Pl. ÚS 50/04, *Re Czech Sugar Quotas*, para. 109.

¹¹⁰ Polish Constitutional Tribunal, judgment of 24 November 2010, K. 32.09, *Lisbon Treaty*, para. 2.1. Similar language has been used in Spain, Spanish Constitutional Court, judgment of 13 December 2004, declaration 1/2004, *Constitutional Treaty*, ground 2; Spanish Constitutional Court, judgment of 13 February 2014, decision 26/2014, *Melloni*, ground 3.

the human body, the body politic represents society or the political community as a single, indivisible whole. Laws expressing this unitary vision, be these criminal, fiscal or social laws, have been protected. Equally, the body politic has an image of the body as something hallowed and eternal. Courts have moved to protect laws seen as expressing hallowed or eternal qualities: examples include nationality, citizenship, religious and fundamental rights laws as well as laws protecting the national territory.¹¹¹

This image of the body politic has a very tainted legacy in Europe. It can put in play three egregious dynamics. The first is that visioning a political community as a human body can slide very quickly into a racist politics. Biological metaphors and justifications become central to membership of the community and to aspirations of members of that community. Secondly, the body politic justifies extraordinary administrative centralisation. It accords the highest value to meeting the needs of the imaginary whole allowing central administrations to claim not only that they are uniquely placed to meet these needs but also to determine what these needs are. Thirdly, and finally, the body politic excludes diversity and debate. For views conveying internal tensions, contradictions or conflicts go against the unitary qualities of its vision.

V. THE INCIDENCE, DYNAMICS AND SIGNIFICANCE OF EU LEGAL CONFLICTS

It is time to relate these unconfined qualities of EU legal power back to the incidence, dynamics and significance of EU legal conflicts and to show how they contribute to these.

V.1. THE INCIDENCE OF CONFLICTS: EXPERT AND NON EXPERT WORLDS

The need to perform better than other regulatory or legislative arenas pushes the EU not merely to responsabilise its subjects but also to seek better solutions and that means technological solutions which are safer, more regulatory effective, more ecological and more competitive than those offered by these other arenas. Technological expertise, and keeping abreast of it, is central to this competitive effort. It is present in many norms which EU laws must incorporate.¹¹² It justifies the institutional design of EU governance, with both comitology and European standardisation procedures em-

¹¹¹ D. CHALMERS, *European Restatements of Sovereignty*, in R. RAWLINGS *et al.* (eds), *Sovereignty and the Law*, Oxford: Oxford University Press, 2013, p. 186.

¹¹² There are a number of examples. Single market legislation must take account of any new scientific development, Art. 114, para. 3, TFEU, environmental legislation of available scientific data, Art. 191, para. 3, TFEU; whether a product is safe enough to marketed will be assessed in light of the state and technology, Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, Art. 3, para. 3, let. e; and standards in the field of electronic communication must be removed if they impede technological development, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, Art. 17, para. 5.

powered because of their perceived adaptiveness to such developments. Finally, it exists in the politics of legislative agenda-setting, appearing to be the driving force behind the largest number of proposals made by the Commission.¹¹³

Technological developments involve, however, experts telling the public that understandings of the world have changed and that they have to change their behaviour accordingly resulting in the establishment of an “expert/lay” divide.¹¹⁴ This divide arises from expertise attributing meaning to patterns, events or things which are invisible to non-experts.¹¹⁵ Expert-led narratives, furthermore, are not simply disempowering for non-experts but provide accounts which suggest a different way of looking at the world from non-experts. Adapting behaviour and incurring costs to meet their claims involves non-experts vesting significant trust in expertise, therefore, when there may be reasons not to. This trust may be in particular short supply where its purveyor, as is the case with the EU, is seen as either unaccountable or as using it for its own ends.

The incidence of many conflicts in EU law, thus, mirrors those circumstances where this “expert/lay” divide is most likely to lead to contestation.

The first is where expertise is used to justify an underlying activity which challenges prior beliefs of non-experts¹¹⁶ or which they believe to be immoral.¹¹⁷ Examples within the EU include the authorisation of genetically modified organisms or carbon capture and storage, vouching for industrial farming, or formulating measures taken to restore national public finances. In such instances, expertise may be being deployed to establish the safety of certain processes or products or, in the case of public finances, to restore their equilibrium. However, the problem is too narrowly framed. It does not address wider questions which significant members of the public may think significant: be it broader ethical or religious questions about tampering with Nature, the emotional relationship between many humans and their food, or the distributive consequences and hardship provoked by austerity. This meme is present not only in these grand narratives but also at the micro-level. The reaction provoked by *Vnuk* case, with its re-

¹¹³ Figures are rather out-dated but during the *Future of Europe* Convention, the Commission suggested that 35 per cent of its proposals were a result of this with only 17 per cent being response to national government requests and only five per cent at its own behest. See House of Lords, European Union Committee, report of session 2007–08 of 24 July 2008, *Initiation of EU Legislation*, p. 15. There is little reason to believe that this will have changed much.

¹¹⁴ There is an enormous literature on this. A good starting point is H. MARGOLIS, *Dealing with Risk: Why the Public and the Experts Disagree on Environmental Issues*, Chicago: University of Chicago Press, 1997.

¹¹⁵ K. ERICSSON, N. CHARNES, *Expert Performance: Its Structure and Acquisition*, in *American Psychologist*, 1994, p. 725. Ericsson and his collaborators furthermore found it took thousands of hours of inculcation in this expertise before these phenomena became tractable in those terms to the observer. K. ERICSSON *et al.*, *The Role of Deliberate Practice in the Acquisition of Expert Performance*, in *Psychological Review*, 1993, p. 363.

¹¹⁶ P. KRAFT, M. LODGE, C. TABER, *Why People “Don’t Trust the Evidence” Motivated Reasoning and Scientific Beliefs*, in *Annals of the American Academy of Political and Social Science*, 2015, p. 121.

¹¹⁷ D. KAHAN, *Cultural Cognition of Scientific Consensus*, in *Journal of Risk Research*, 2011, p. 147.

quirements that vehicles be insured on private land, arose, if one reads the press coverage, above all from the sense of being taxed for use of one's own private land: an idea which generated some resentment.

The second is where the motivation behind the law is unclear to non-experts. Most citizens neither have the resources nor incentives to invest significant time in engaging with political decisions or laws. They, therefore, look for cues to help them decide if a particular technology or law fits with their worldview.¹¹⁸ If these cues are insufficiently determinate, which can be the case either where the risk is poorly communicated or where it is so diffuse that it can appear obscure, there is likely to be contestation.¹¹⁹ The EU suffers from both of these. The rationales behind some of its measures are either not reported or distorted by the press. At the same time, by virtue of its scale, it tackles a number of phenomena of epic proportions, such as climate change or systemic risk in the financial sector, where the relationship between individual measures (e.g. that between banning halogen lamps and climate change targets) and realisation of the overall goal is often remote.¹²⁰

The third is where EU law provokes anxiety. A large part of the divide derives from non-experts' views being shaped by the experience of risk whilst experts are concerned with the analysis of risk.¹²¹ Public opinion is, thus, biased in its perception of risk towards protecting the status quo as risk is not experienced as out of the ordinary in the day-to-day.¹²² Non-experts also attach greater weight to the distributive consequences of risks or risks leading to events which inspire dread effects.¹²³ This tension is most accentuated, and a politics of anxiety arises if a measure provokes a destabilising tension between a valued status, relations and/or place, on the one hand, and the fear of a wider threatening, precarious environment which can destroy the value in the former, on the other. This politics is most likely, therefore, where EU law intrudes in a secure place, such as the home; touches on intimate relations, such as the family; or destabilises beliefs about ex-

¹¹⁸ M. FINUCANE *et al.*, *The Affect Heuristic in Judgment of Risks and Benefits*, in *Journal of Behavioral Decision Making*, 2000, p. 1.

¹¹⁹ Sunstein talks, therefore, of the availability heuristic whereby non-experts assess risks on the basis of how it is easy for them to identify examples of where these have gone bad. If risks can only be described abstractly, they tend to be under-estimated. C. SUNSTEIN, *Laws of Fear: Beyond the Precautionary Principle*, Cambridge: Cambridge University Press, 2005, pp. 35-36.

¹²⁰ Research has, therefore, found psychic numbing whereby non-experts do not respond in the same way as experts to large scale risks (i.e. they minimise them), such as climate change, automobile deaths or financial catastrophe, N. DIECKMANN *et al.*, *At Home on the Range? Lay Interpretations of Numerical Uncertainty Ranges*, in *Risk Analysis*, 2015, p. 1281.

¹²¹ P. SLOVIC *et al.*, *Risk as Analysis and Risk as Feelings: Some Thoughts about Affect, Reason, Risk, and Rationality*, in *Risk Analysis*, 2004, p. 311.

¹²² T. BOLSEN, J. DRUCKMAN, F. LOMAX COOK, *How Frames Can Undermine Support for Scientific Adaptations: Politicization and the Status-Quo Bias*, in *Public Opinion Quarterly*, 2014, p. 1.

¹²³ R. KASPERSON *et al.*, *The Social Amplification of Risk: A Conceptual Framework*, in *Risk Analysis*, 1988, p. 177; C. SUNSTEIN, *Terrorism and Probability Neglect*, in *Journal of Risk and Uncertainty*, 2003, p. 121.

isting entitlements.¹²⁴ Talk about the intrusiveness of EU law invariably touches to a stronger or lesser degree on this anxiety as this notion of intrusion expresses the idea of something extraneous in a familiar space which is tarnishing that space.¹²⁵

There is a fourth situation which is provoked less by technology but rather by EU laws generating unanticipated developments with sharp and sudden redistributive economic consequences. These consequences are distinguishable from those of much EU law by virtue of their not being foreseen. The conflicts described are, therefore, rare, but the migration of EU citizens since 2004, the sovereign debt crisis and the refugee crisis of 2014 and 2015 are all examples. In such circumstances, the EU legislative need to perform better generates such strong externalities that a strong Union response is demanded. The EU is, thus, held to blame as much for this response as for its contribution to the initial situation: be this the measures which contributed to austerity in many EU States, the break-down of the Schengen and Dublin systems in the wake of the refugee crisis or unflinching interpretations of free movement in light of the scale and nature of EU migration. In this, the EU responds in an analogous manner to its response to technological developments. It emphasises the collective benefits to the Union as whole and puts, in fact, new forms of expertise or expert-based procedures to rectify any problems. Scant attention is paid to the distributive or disruptive effects of the policy, its effect on settled routines or beliefs, or on individual or collective securities. The possibility for similar cleavages, therefore, emerges: those of change versus anxiety; collective gains versus distributive consequences; those of pan Union versus local scales of action; and judgments based on the analysis of reality versus those based on its experience.

The Union's response to the sovereign debt crisis was, thus, to introduce a whole new administrative apparatus to secure (in the EU's eyes) better national economic and fiscal performance. Procedures were brought in to assess not just budget deficits but economic performance more generally and fiscal performance across the cycle. States were to reform their administrations to secure more reliable statistics, independent fiscal councils to measure better their fiscal performance, and to introduce fiscal rules to identify budgetary targets and review for all parts of government.¹²⁶ There was nothing on the effects on job insecurity, wages, the quality of public services, hardship or levels of inequality or hardship within EU societies. Equally, the Commission has been quick to praise the net fiscal effects of EU mobility of persons, its contribution to EU GDP, tackling

¹²⁴ Examples of the latter include a State's own nationals expressing discontent over EU citizens having access to preferred social housing or (for their children) to preferred schools.

¹²⁵ The imagery of the press coverage about EU proposals for kitchen gloves focussed, therefore, on EU law as something which was in and meddling with the kitchen sink. The kitchen sink is, of course, the place from where food waste has to be removed.

¹²⁶ D. CHALMERS, *Crisis Reconfiguration of the European Constitutional State*, in D. CHALMERS, M. JACHTENFUCHS, C. JOERGES (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity*, Cambridge: Cambridge University Press, 2016, pp. 266 and 272-275.

skills shortages and the high number of mobile EU citizens in employment.¹²⁷ However, neither pressures on housing, school places or wage rates are addressed in the host society nor questions of skills shortages and depopulation in the State of nationality nor how labour mobility has changed communities, towns and regions across the Union.¹²⁸

V.2. THE DYNAMICS OF CONTESTATION: THE DISLOCATION OF THE FAMILIAR AND AUTHORITARIAN OVERREACH

It is still unclear what endows these social conflicts with such intensity and salience that they become a source of political or legal contestation within an EU legal context when this would be unlikely if the matter was governed solely by domestic regulation. The answer lies in these disputes being framed as EU disputes rather than disputes above gloves etc. The gloves, insurance, light bulbs are all seen as yet another example of EU interference. Each dispute is only made sense of through resort to a broader narrative about EU legal intrusion or disruption. This narrative provides these conflicts with a common EU hallmark and is central to their transformation into political and legal conflicts.

This narrative has two threads which emerge out the destabilising and opaque qualities of EU law. If contestation only occurs when something of value is destabilised, a curiosity is that most of these activities are humdrum. Few would place the art of dishwashing as their central political concern! The significance attributed to them can only be because they represent something else of value. The first thread goes to this. However, in much of the contestation described above, the destabilisation was anticipated rather than present. Contestation could only occur because there was already some prior association about what EU does and how this threatens this object of value. To be sure, EU law's obscurity facilitates this as it allows many things to be projected on-to EU law independently of actual veracity, but the second thread goes to how EU law's enables it to be perceived as a threat to certain activities but not to others.

A threat to civil identities.

To be valuable, the contested activities must generate a series of attachments about which there is a fear of loss. A feature of these activities is their everyday nature. Such activities are not associated with generating primordial identities, based on race or ethnicity, nor are they associated with those identities which create a relationship with the sublime, such as religious identities or those based around human rights. Correspond-

¹²⁷ Communication COM (2013) 837 final of 25 November 2013 from the Commission on Free Movement of EU Citizens and Their Families: Five Actions to Make a Difference, paras 1-4.

¹²⁸ A similar style of governing is emerging in response to the refugee crisis. There will be increased capacity and technology deployed to secure the Union's external frontier, administrative reform and increased capacity to speed up the processing of requests for international protection, and measures to prevent movements of asylum seekers within the EU, Communication COM (2016) 197 final of 6 April 2016 from the Commission on a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe.

ingly, there is little popular opposition to the EU law, or the EU more generally, because of either its foreign-ness or its simple presence,¹²⁹ and no evidence of any opposition to it, beyond a few academics and public intellectuals, because it is seen as amoral.

Attachments are instead “constructed on the basis of familiarity with implicit and explicit rules of conduct, traditions, and social routines that define and demarcate the boundary of the collectivity”.¹³⁰ These civil identities root personal and collective narratives in the daily activities of ordinary life: be these (in the examples of earlier) driving, cooking or turning the light on in one’s own home. They also relate these activities to wider boundary setting of “them” and “us” so that these activities become general markers of nationhood or cultural identity. They also allow individuals to move between perceptions of scale by linking the grand meta-narratives of nationhood and society and the micro-level of the everyday.¹³¹

The power of these identities lies, in part, in the relationship they draw with the past.¹³² They grant it a place in the present. Daily activities are passed down through families, schools, workplaces and act as a continual reminder of people’s close relations. They also constitute reminders of personal narratives contributing both to a sense of personal stability and a life story. Alongside this, they sacralise the past. Insofar as these routines, places, traditions are taken for granted, they cease to be questioned and become something which makes us who we are.¹³³ Finally, they allow change to be evolutionary rather than dramatic or revolutionary. New activities emerge as modifications to existing activities where the bulk of what is being done appears unchanged and where the new merges over time into the established.

Their power also lies in their having authoritative qualities which are neither political, legal nor economic in nature, and which serve as counterpoints to overreach by any of the latter. This authority may stem from the activities at the heart of this identity being associated with some authority figure or significant event, or from the activities “frequent anonymous appearance in the past”.¹³⁴ However, this authority requires no

¹²⁹ Very little of the opposition to the EU has thus been the EU *per se* or to the idea of Europeaness. It is rather because of what the European Union does, even if opposition takes the form of blaming the EU as an institution rather than just contesting the particular policy. P. TAGGART, A. SZCZERBIAK, *Introduction: Opposing Europe? The Politics of Euroscepticism in Europe*, in A. SZCZERBIAK, P. TAGGART (eds), *Opposing Europe? The Comparative Party Politics of Euroscepticism*, Oxford: Oxford University Press, 2008, pp. 1 and 7–10.

¹³⁰ S. EISENSTADT, *The Construction of Collective Identities: Some Analytical and Comparative Indications*, in *European Journal of Social Theory*, 1998, pp. 229 and 232.

¹³¹ P. SEGATTI, B. WESTLE, *An Exploration of Europeans’ Identities*, in B. WESTLE, P. SEGATTI (eds), *European Identity in the Context of National Identity: Questions of Identity in Sixteen European Countries in the Wake of the Financial Crisis*, Oxford: Oxford University Press, 2016, pp. 1 and 12.

¹³² This paragraph owes its argument to E. SHILS, *Tradition*, in *Comparative Studies in Society and History*, 1971, p. 122.

¹³³ This sacralisation can in turn generate animosity when we dislike where we are.

¹³⁴ E. SHILS, *Tradition*, cit., p. 130.

institution or person to exercise authority over individuals and tell them what to do, e.g. how to cook, light the house or drive on one's own property. As a consequence, the norms and codes surrounding these activities are laden with ambiguity and leeway. This gives individuals considerable autonomy. This autonomy is, moreover, not de-anchored but firmly embedded in the familiar and the individual's own sense of character and personal narrative. How one cooks, drives etc. goes both to a sense of who one is and one's own sense of manners. The autonomy is one to make comfortable choices and often not make choices at all but simply observe routines unreflectively.

The press reportage of kitchen gloves, banned gloves and motor car insurance acquires resonance and generates a demand from readers in part because it references back to what is treasured in civil identities, their sense of experience, narrative and relationship with the past, and partly because it suggests their precariousness, something of which citizens will be aware in a time of technological and economic change. It is exemplified well in a story run by the *Frankfurter Allgemeine* in October 2013, on EU plans to put maximum wattage limits on electrical appliances for ecological reasons with some limits being placed in 2014 and others in 2017. It observed the possible implications of this for vacuum cleaning.

"Housewives and husbands will have to retrain. Up to now, people knew that any reasonably reliable dust sucker was analogous to the horsepower of the car, the higher the wattage, the higher the suction power. Now, will everyone who picks up the 'green A' [the mark for the new ecologically friendly vacuum cleaners] be forced in future to go three to four times under the breakfast table to ensure that every crumb is picked up?"¹³⁵

However, conflicts about civil identities are present not just at the micro-level when individual EU laws encroach on a particular dimension of them. They are also present in more general contestation about EU law.

This is nowhere more evident than that in that most contested of fields, free movement of EU citizens. If mobility can have significant and unpredictable redistributive effects,¹³⁶ economic explanations for its contestation hold limited sway. Fears of labour market competition exercise only weak effects whilst concerns about public finances exercise a stronger but still very uneven influence. Two cultural arguments have, by contrast, a more powerful hold.¹³⁷ One goes to how migration is perceived to destabilise existing hierarchies, status, patterns of activity and traditions within citizens' daily lives. The other goes to how migration might affect the nation or economy as a whole. These argu-

¹³⁵ H. KAFSACK, *EU verbietet energiehungrige Staubsauger*, in *FAZ*, 24 October 2013, www.faz.net.

¹³⁶ R. DANCYGIER, S. WALTER, *Globalization, Labor Market Risks and Class Cleavages*, in P. BERAMENDI et al. (eds), *The Politics of Advanced Capitalism*, Cambridge: Cambridge University Press, 2015.

¹³⁷ This may well be because there are, on the whole not huge. On effects of EU migration on wages in the United Kingdom see S. NICKELL, J. SALAHEEN, *The Impact of Immigration on Occupational Wages: Evidence from Britain*, in *Bank of England Staff Working Paper 574*, London, 2015.

ments, of course, represent the two dimensions of civil identity where grand ideas of “them” and “us” are linked to the habitual and the local.¹³⁸ Narratives of intrusion, dislocation of the familiar past and an erosion of local inhabitants’ own sense of authenticity have a hold here just as much they do over motor vehicle insurance and kitchen gloves. They come to form part of a continuum of threat. If these identities can carry racist and snobbish idealisations as to how the nation, economy and the habitual ought to be, key is the proximity of this destabilisation to the citizen’s own sense of status and routine. Whilst hostility to migration is greatest amongst low-skill nationals of a State, it is also the case that there can be hostility towards high skill EU migrants by a State’s own high skill nationals. This appears most pronounced where the former are perceived as threatening elite traditions, opportunities or sense of cultural superior within their own society.¹³⁹

This civil identity also contributes to explaining why some citizens believe in the EU. If it is a truism that those benefitting from mobility are more likely to support the EU,¹⁴⁰ there is the paradox that increased mobility has coincided with declining support for the Union. More nuanced accounts have observed, therefore, that mobility per se is unlikely to generate support, particularly if it is occasional, fleeting or unpredictable. Mobility generates a EU civil identity when it feeds a citizen’s sense of status, routine and sense of the familiar.¹⁴¹ This can be where her own movement between States fosters this, but it can also be when movement to her local environment, as is the case with large metropolises, generates a sense of status about this environment and her place within that environment, and comes to be seen as part of the fabric of that environment.

The ahistorical authoritarianism of EU Law.

If the previous subsection explains the value of what is being threatened by EU law, there is still the question of why EU law is seen as both a particular threat to these identities and a perennial one. It is not simply that it encroaches on activities which go to making up these identities. It confounds and challenges those two elements which make holders value them, their relationship with the past and their authoritative ambiguity.

EU law has strong ahistorical qualities in the sense that no powerful human narrative accompanies it.¹⁴² National laws can rely on national histories with their myths, tales of

¹³⁸ J. HEINMUELLER, M. HISCOX, *Attitudes toward Highly Skilled and Low-skilled Immigration: Evidence from a Survey Experiment*, in *American Political Science Review*, 2010, pp. 61 and 79-80; M. HELBLING, H.-P. KRIESI, *Why Citizens Prefer High-over Low-skilled Immigrants. Labor Market Competition, Welfare State, and Deservingness*, in *European Sociological Review*, 2014, p. 595.

¹³⁹ M. HELBLING, *Why Swiss-Germans Dislike Germans: Opposition to Culturally Similar and Highly Skilled Immigrants*, in *European Societies*, 2011, p. 5.

¹⁴⁰ N. FLIGSTEIN, A. POLYAKOVA, W. SANDHOLTZ, *European Integration, Nationalism and European Identity*, in *Journal of Common Market Studies*, 2012, p. 106.

¹⁴¹ T. KUHN, *Experiencing European Integration: Transnational Lives and European Identity*, Oxford: Oxford University Press, 2015, pp. 127-143.

¹⁴² Gasché argues that Europe must have a distinctive identity which has both a referential dimension in that it must refer back to independent phenomena which provide a heritage for it, and a figurative

passage and tales of sacrifice. They create a sacred past and daily activities can be tied back to this by those who want. There is simply no parallel EU history. The history of the EU is an institutional and legal one. One cannot point to an accompanying cultural, social or economic history. EU law acquires dislocating qualities as a result. It sits at odds with the familiarity, tradition and routine of the activities which it is regulating. It is not simply that it causes disruption and cost, but it also generates unfamiliarity and an absence of fit.¹⁴³

EU law also robs the codes governing these activities of their ambiguity. Legislation setting out the safety of oven gloves, the balance of risks of driving on private land or the degree of ecological quality which must be exercised within a home prescribes, in all cases, the standard of conduct which must be observed. Such legislation is ideological in the sense in that it claims a monopoly of authority over what should be done and then a single way over how it should be done.¹⁴⁴ It negates the authoritative qualities of this civil identity as it has scant regard for conflicting beliefs, practices or things of value which might be disturbed or displaced. It also appears relatively unlimited. It intrudes into areas of familiarity, security and personal autonomy. As a consequence, EU law becomes associated with legalisation and politicisation. Legalisation happens because it subjects citizens to formal commands where they presumed ambiguity. To be sure, many of these activities were not law-free zones, but these laws had, in many cases, simply become part of the habits of daily lives so that the lamps or gloves used were not analysed in terms of the standards used. Politicisation occurs because these EU laws force citizens to decide whether they are for or against them with the consequence that political contestability now takes place over arenas thought to be relatively politics free.

EU law's relationship to these identities also explains why certain EU legal conflicts do not occur. The dispute about holiday pay rates, it will be remembered, generated significant debate but was not framed as an EU law conflict. It did not regulate an activity that was either unregulated or where the prior domestic regulation had taken for granted qualities. Holiday pay has been legally protected for some time. There was no discussion, consequently, of EU law intruding on workplace relations or unduly legalising or politicising them. In addition, EU law did not resolve this question authoritatively so there was only one answer. Employers moaned but they were well aware that costs

dimension which bestows it a distinctive identity that is more than a sum of its parts. The EU has neither in a resonant way. R. GASCHÉ, *Europe, or the Infinite Task: A Study of a Philosophical Concept*, Stanford: Stanford University Press, 2009, pp. 1-18.

¹⁴³ A powerful example is the requirement of good faith in the Unfair Contract Terms Directive which so that there is a significant imbalance in the contract can allow the consumer to cancel the contract. This concept, Teubner has observed, originated in German contract law and relied for its interpretation on close producer relations and powerful organised labour. These did not exist in some other States so it came across as something of an abstract and confusing concept. G. TEUBNER, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences*, in *Modern Law Review*, 1998, p. 11.

¹⁴⁴ On this vision of ideology see S. TURNER, *The Significance of Shils*, in *Sociological Theory*, 1999, p. 125.

could be adjusted through changing overtime rates or limiting pay increases. There were ways, therefore, of counteracting the judgment.

V.3. THE SIGNIFICANCE OF EU LEGAL CONFLICTS: A EUROPEAN CULTURAL POLITICS OF NATIONALISM

Uncomfortable as they may be for EU institutions, these conflicts could be extremely positive. They may open a space for democratic contestation of things that would otherwise be suppressed. Contestation could lead to new types of collective actors emerging, the development of EU law and to patterns of dominance entrenched or ignored by EU law being addressed.¹⁴⁵ Yet this does not happen in an institutionally structured manner because the primacy of EU law entails that it cannot be formally challenged other than through reform in Brussels: an impossible threshold for most parties. There is a more significant problem. This goes to the terms of this contestation.

EU law conflicts are set out along three axes which reinforce one another.

The first is that between EU law and the civil identity focused around daily routines, statuses, and activities. EU law transgresses on these sufficiently to touch off anxieties about who I am and who we are amongst those practising these routines etc.

The second is that between European and national. EU law frames the threat to these civil identities as a EU one, and, in the eyes of many, as a European one because the strong association that many hold between the EU and the idea of Europe. This reinforces the processes of boundary formation played by such identities. These identities become framed as being part of a wider national identity with conflicts now described as that of a national identity (or identities) being threatened by a European one. The expert/non expert or authoritarianism/ambiguity divides now become those between Europe and the nation State. A popular theme in the British referendum debate concerned the possible EU restrictions on high-wattage electrical appliances, which, it was believed, had been postponed so as not to affect the result. The reportage came across as a parody of paranoia about foreign threat and resistance.¹⁴⁶ The *Daily Telegraph*, therefore, headlined the “EU to launch kettle and toaster crackdown after Brexit vote”;¹⁴⁷ the *Daily Mirror* “Why new EU rules could ban your toaster and kettle by au-

¹⁴⁵ On this more generally G. SIMMEL, *Conflict and the Web of Group Affiliations*, New York: Free Press, 1969, transl. R. Bendix, pp. 17-28.

¹⁴⁶ For a more considered discussion see L. O'BRIEN, *First They Came for the Vacuum Cleaners: Will It Be Kettles Next?*, in *Full Fact*, 21 June 2016, fullfact.org.

¹⁴⁷ M. HOLEHOUSE, *EU to Launch Kettle and Toaster Crackdown After Brexit Vote*, in *The Telegraph*, 11 May 2016, www.telegraph.co.uk.

turn";¹⁴⁸ and the *Daily Mail* "Brexit threat saves our super-fast kettles: Brussels shelves ban on powerful appliances after British negotiators warn it could sway referendum".¹⁴⁹

The third is that between EU law and a vision of collective freedom. It was pointed out earlier that the development of EU law relies on a vision of well-being which derives from participation in shared or common activities. This sets in train in a narrative in which local identities are characterised as opposing forms of association. These identities are set out, therefore, not as political communities whose value lies in a productive interaction between associations based on shared activities and associations based on co-presence. Instead, their predominant value lies in constituting a shared and common way of being. This is to be insulated off from the vision presented by EU law rather than interact with it. To be sure, therefore, putting on a kettle, cooking, driving may all be activities, and often these will be done with others, but the value ascribed to these is not the activity itself but because it represents a perceived state: be this a way of life, personal autonomy or a state of collective freedom.

This vision of community is present at every level of debate. At the micro-level, the idea is invariably one of the EU interfering with a prevailing state of freedom. This was present in the *Frankfurter Allgemeine* quote cited early on proposed wattage limits for vacuum cleaners. One can find it in many newspaper reports. The *Daily Mail* began a report in 2014 on the impending *Vnuk* judgment which was to extend compulsory insurance for vehicles in the following way: "There are few things Britons take greater pride in than a well-trimmed swathe of lustrous lawn. But caring for your treasured turf could be about to become much more expensive – thanks to a ruling from (you guessed it) Europe".¹⁵⁰

At the meso-level, it has led to a particular vision of national community. Polyakova and Fligstein have, therefore, argued that the significant growth in the number of EU citizens who saw themselves in exclusively national terms during the financial crisis irrespective of context or the type of debate in which they were engaged occurred most strongly in those States where the EU was seen most dramatically an engine of change and instability.¹⁵¹ Citizens did not trust national institutions more strongly in those States, however. The debate was therefore not about which institution or law could do a better job. It fell back, instead on the image of the nation as a prior State.

The political morality of this singular narrative of co-presence has an equally impoverished and distorted vocabulary to that of a political community based exclusively

¹⁴⁸ R. SAYID, *Why New EU Rules Could Ban Your Toaster and Kettle by Autumn*, in *Mirror*, 11 May 2016, www.mirror.co.uk.

¹⁴⁹ T. COHEN, *Brexit Threat Saves Our Super-fast Kettles: Brussels Shelves Ban on Powerful Appliances After British Negotiators Warn It Could Sway Referendum*, in *Daily Mail*, 27 February 2016, www.dailymail.co.uk.

¹⁵⁰ B. CARLIN, *Now Brussels Threatens to Slap Car Insurance on Your Lawnmower: Move Could Cost Gardeners at Least £100 a Year*, in *Daily Mail*, 2 August 2014.

¹⁵¹ A. POLYAKOVA, N. FLIGSTEIN, *Is European Integration Causing Europe to Become More Nationalist? Evidence from the 2007–9 Financial Crisis*, in *Journal of European Public Policy*, 2016, p. 60.

around shared activities. It sets out a representation of what people should feel because of the enactment or application of particular EU laws. In reality, some may be bothered by EU laws, others unfazed or others simply untouched. A good example was the *Vnuk* judgment. Very few citizens in the EU own golf buggies or lawnmowers which could be driven, the two central vehicles touched by the new insurance requirements. Almost everybody was untouched by it.

A lexicon of common sense is provided as to what citizens should feel about EU law and its effects on their lives.

It is a common *sense* in that it does not appeal to their reason, reflection or cognition but rather to their feelings and senses. Tendentious language such as “bonkers” or “barmy” is used to describe the qualities of EU laws. Imagery, be it of kitchen tables, housewives or perfect lawns, is used in the place of analysis. This serves as a colourful antidote to the functionalism and instrumentalism of EU law but carries its own dangers. Such language can mask the authenticity of what is taking place, and whether feelings are actually being disoriented or displaced. It also sacralises these activities and identities. They become immune from judgment as they acquire a value in themselves independently of what they actually do. Traditions, rituals, roles are perpetuated by such language irrespective of the abuse and damage that they may do.

It also sets out a *common* sense in two ways. It does this, first, by expressing not merely a collective judgment about EU law but also a shared template as to how to respond. In this, it sets out an aesthetic for how citizens are to react to EU law. They are to judge it bonkers, barmy, interfering or intrusive. A quality of judgment is provided which it would be considered deviant to depart from.¹⁵² In the British referendum, therefore, experts were frequently attacked as biased,¹⁵³ suffering from group-think¹⁵⁴ or in the pay of Brussels.¹⁵⁵ For that to be suggested, irrespective of the expertise offered in support of the expert’s argument, a characterisation had to be made that an argument supporting or even agnostic about EU law departed so far from common sense that it put into question the expert’s judgment.¹⁵⁶ Secondly, and even more problematically, in

¹⁵² This idea of a shared sensibility which is to inform judgment which is then to inform reason is not new. It can be traced back to the origins of the Enlightenment, J. HESS, *Reconstituting the Body Politic: Enlightenment, Public Culture and the Invention of Aesthetic Autonomy*, Detroit: Wayne State University Press, 1999, pp. 155-180.

¹⁵³ P. INMAN, *Bank of England Governor Rejects Accusations of Bias Over EU Referendum*, in *The Guardian*, 24 May 2016, www.theguardian.com.

¹⁵⁴ R. BOOTLE, *Economic Arguments about Brexit Have Succumbed to Group-Think*, in *Telegraph*, 5 June 2016, www.telegraph.co.uk.

¹⁵⁵ D. MATTHEWS, *EU-funded Professors Deny Claims of Bias from Brexit Campaigners*, 31 May 2016, www.timeshighereducation.com.

¹⁵⁶ An example was the reaction to the research showing the positive fiscal effects of EU migration, C. DUSTMANN, T. FRATTINI, *The Fiscal Effects of Immigration to the UK*, in *Economic Journal*, 2014, p. 563. The piece has appeared in a peer-reviewed journal ranked 19 for Economics in the world. However, that did

many instances it is argued in some limited instances that a common sensibility is being attacked. An EU law requiring insurance of golf buggies is not just bothersome for owners of these but is rather an attack on national freedom more generally. The domestic law or activity is seen as an inextricable part of a collective freedom in which an attack on the former is equally an attack on the latter.

An extreme example is to be found in a particularly repugnant piece entitled "Europe destroying the foundations of our way of life". The *Daily Express* newspaper, after admitting that a Hungarian dance troupe were worthy winners of a British show *Britain's Got Talent*, stated:

"The Hungarian troupe were able to compete on British television for precisely the same reason that we have lost control of immigration, criminal justice and welfare under our subjugation to Brussels and Strasbourg.

The European system that demands the participation by Attraction in Britain's Got Talent is also the system that prevents the deportation of Islamic extremist Abu Qatada or insists that we dish out benefits to jobless Romanians.

One Hungarian dance troupe might seem utterly insignificant but in truth the entire demography of our country has been transformed by EU's determination to smash our border controls".¹⁵⁷

It is also expressed in more pervasive ways. EU health and safety proposals for hairdressers were criticised in a 2012 *Sun* newspaper article not just for restricting the way hairdressers want to express and market themselves, but also for the strangulation of thousands businesses and the imposition of regulatory costs of 80 billion GBP per annum, notwithstanding that top estimates of the costs were three million GBP per annum and there was nothing on what clothes should be worn.¹⁵⁸ A relatively restricted proposal was, thus, presented as a devastating a national economy and culture.

VI. CONCLUSION

The picture presented by EU legal power is, thus, an ugly one. The dominant imaginary for the EU is one of over-responsibilisation, disorientation and alienation. The reportage of conflicts about EU law adds further sensations. Citizens are forced to make binary choices between the world of *Wissenschaft* and the world of *Kenntnis*, the world as it is

not stop the relevant (Euro-sceptic) minister Iain Duncan Smith describing its approach as "silly" because "you don't account for the fact that often in many communities they literally change the schooling because so many people arrive not speaking English. You have then got problems you know with local services, transport all that kind of stuff". See R. MASON, *Immigration Is Changing Character of UK Schools, Claims Iain Duncan Smith*, in *The Guardian*, 17 November 2014, www.theguardian.com.

¹⁵⁷ L. MCKINSTRY, *Europe Destroying the Foundations of Our Way of Life*, in *Express*, 10 June 2013, www.express.co.uk.

¹⁵⁸ T. NEWTON DUNN, *Hair Hitlers*, in *The Sun*, 9 April 2012, www.thesun.co.uk.

conceived and intellectualised for them and the world as it is perceived by them and with which they are acquainted. They are required to engage, unnecessarily, with the question of whether valued daily routines, activities and roles are just that or whether holding on to them is a sign of defensiveness and intolerance to be exploited by those who want a return to a world of aggressive nationalist politics. The surprise is not the level of opposition to the EU but rather the level of support for it.

This is what happens when the language of constitutionalism and checks and balances is dedicated to a process of European system building rather than to structuring legal and institutional power. It is all the more unnecessary because a plausible case can be made for most of the EU's policies.¹⁵⁹ At the heart of these difficulties, it is suggested, is a lack of thought about both the quality of the relationships established by EU law and the quality of the relationships dislocated by EU law. There is no quick institutional solution. These qualities are endemic to EU law as no institution has a monopoly over the resolution of EU legal conflicts, no expectation can be made that it can be resolved by any single institution.

The best aspiration is that EU law can begin to embody an *ethos* which values these relationships appropriately. Such an *ethos* would involve a new European law of attachments. At its heart, this law would be characterised by an *ethos* in which pre-eminent value is granted to solidarities generated by EU law, on the one hand, and the attachments of daily life, on the other, with mutual respect for the dominant norm governing their interaction. Such a law would be a complicated affair as it would have to discern between those relationships which contribute to or enlarge our sense of Self and false impostors, such as market dependencies, and it would also have to address what to do when these relationships conflict. Such a debate would still, however, be a more honest and grounded debate than the current ones about what the EU should do next. Setting out its parameters is beyond the scope of this piece, however, and awaits another day!

¹⁵⁹ On two controversial issues, there is thus strong citizen support. Over two thirds of EU citizens want a common European immigration policy and support for a free trade agreement with the United States is over fifty per cent higher than opposition to it, European Commission, *Public Opinion in the European Union: Autumn 2015*, cit., pp. 29 and 31.



ARTICLES

LEX IMPERFECTA: LAW AND INTEGRATION IN EUROPEAN FOREIGN AND SECURITY POLICY

RAMSES A. WESSEL *

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ABSTRACT: This article aims to overcome the traditional image of the European Union's foreign and security policy by revealing an integrationist undercurrent that is boosted by both internal and external developments. It argues that both internal and external drivers have caused a consolidation of EU foreign policy, as well as a *constitutionalisation* underlining that CFSP is part of the Union's legal order. The aim is to note shifts and developments on the basis of new legal provisions (or new interpretations of provisions). It is argued that the treaty provisions as well as the case law of the Court point to an on-going integration and that even in the area of foreign policy EU nation-states have developed into Member States. At the same time, CFSP law remains *lex imperfecta*, as many logical next steps – for instance related to the role of Courts or the enforcements of CFSP norms – have not (yet) been taken.

KEYWORDS: Common Foreign and Security Policy – European integration – Court of Justice of the European Union – EU external relations – constitutionalisation – EU legal order.

I. INTRODUCTION

The European Union (EU)'s presentation of its foreign and security policy has been ambivalent from the outset. The ambiguity follows from the fact that Member States continue to see (or at least present)¹ the Common Foreign and Security Policy (CFSP) as a

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¹ Although primarily made for domestic consumption, the following representation of CFSP by the UK Foreign Secretary while explaining the result of the 2007 Lisbon negotiations to Parliament is striking: “[c]ommon foreign and security policy [CFSP] remains intergovernmental and in a separate treaty. Importantly [...] the European Court of Justice's jurisdiction over substantive CFSP policy is clearly and expressly excluded. As agreed at Maastricht, the ECJ will continue to monitor the boundary between CFSP and other EU external action, such as development assistance. But the Lisbon treaty considerably im-

policy area that has not developed beyond the intergovernmental European Political Cooperation of the 1970s and 1980s, while neglecting an integrationist undercurrent that is boosted by both internal and external developments. While this view is certainly no longer supported (if it ever was)² by the current treaty provisions, the question is whether – ironically – the continued intergovernmental representation of CFSP did in fact not serve as a vehicle for further integration in that field. Indeed, a less visible integration perhaps – as CFSP is much less used as a legal basis for policy making than other external relations provisions – but nevertheless one that has changed the position of CFSP in the EU and hence the commitments of the Member States, the role of the institutions and the way the EU is perceived by other States in relation to its role in global governance.³

Yet, it is difficult to change the image of CFSP. It has been argued that there is a “tradition of otherness”⁴ which continues to keep alive the notion that CFSP is a policy of the joint Member States rather than of the Union (admittedly, the term *Common Foreign and Security Policy* may support that notion, although the argument is never made in relation to the other *common* policies within the EU). This contribution aims to highlight the consolidation of EU foreign policy – as well its *constitutionalisation* as part of the Union's legal order – and will do so from both an internal and an external perspective.⁵ *Internally*, subsequent treaty modifications as well as institutional adaptations have led to a further *normalisation* of CFSP in the Brussels policy-making machinery, while at the same time revealing a “movement towards member statehood”,⁶ challenging the sovereignty of EU Member States in the area of foreign policy. *Externally*, the need for a clear-

proves the existing position by making it clear that CFSP cannot be affected by other EU policies. It ring-fences CFSP as a distinct, equal area of action”; Secretary of State for Foreign and Commonwealth Affairs David Miliband, HC Debs 20 February 2008, col 378. Similar views were reported to have been shared by the France's Prime Minister François Fillon and the Spanish Foreign Minister Miguel Moratinos; “Debate on the European External Action Service, European Parliament”, European Parliament CRE 07/07/2010-12, 7 July 2010, www.europarl.europa.eu. See more extensively: P.J. CARDWELL, *On ‘Ring-Fencing’ the Common Foreign and Security Policy in the Legal Order of the European Union*, in *Northern Ireland Legal Quarterly*, 2015, pp. 443-463.

² R.A. WESSEL, *The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation*, in *European Constitutional Law Review*, 2009, pp. 117-142; M.E. SMITH, *Europe's Foreign and Security Policy: The Institutionalization of Cooperation*, Cambridge: Cambridge University Press, 2004.

³ See more extensively on the external perception of the EU: C. ECKES, R.A. WESSEL, *The European Union: An International Perspective*, in T. TRIDIMAS, R. SCHÜTZE (eds), *The Oxford Principles of European Union Law. Volume 1: The European Union Legal Order*, Oxford: Oxford University Press, 2016 (forthcoming).

⁴ P.J. CARDWELL, *On ‘Ring-Fencing’ the Common Foreign and Security Policy*, cit., p. 445.

⁵ Parts of the argumentation used in this contribution was developed over the years in earlier publications. See the references throughout this Chapter and more particularly: B. VAN VOOREN, R.A. WESSEL, *EU External Relations Law: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2014.

⁶ C.J. BICKERTON, *European Integration: From Nation-States to Member States*, Oxford: Oxford University Press, 2012, (Chapter 5: From Nation States to Member States in European Union Foreign Policy) p. 151.

er EU foreign policy stance flowed from the increasingly undeniable external dimension of successful internal policies. Yet, both the internal and the external dimensions are sides of the same coin; they are intertwined and basically reveal the Union's coming of age as a polity with the ambition to validate the external potential of its internal development. As we will see this also complicates seeing the governance of CFSP as a template for other forms of international cooperation.

From the outset (the 1992 Maastricht Treaty) much has been written on the position of CFSP in the Union and its legal nature.⁷ The current contribution has no intention of repeating these analyses. Rather, it purports to take a fresh look at the current Treaty provisions. In fact, taking these provisions at face value (rather than dwelling on informal interpretations that may serve certain political goals) may allow for a clearer view of the result of the negotiations and the texts Member States agreed on. Too many analyses reveal a poor or selective reading of the Treaty texts and seem to be affected by the "tradition of otherness" which prevents seeing CFSP in a new light and in the context of a European Union that is redefining its contribution to global governance.⁸

Looking at a policy area from an integrationist perspective is largely left to political scientists and international relations scholars.⁹ Indeed, those disciplines have extensively analysed EU foreign policy from different theoretical perspectives, including European-integration theory (EIT).¹⁰ While earlier studies followed the classic works on the internal aspects of integration, the development of the external dimension (through CFSP as well as other external relations policies) triggered new integration analyses.¹¹ In general, research in political science and European Studies concluded on a "move beyond intergovernmentalism" in CFSP.¹² Yet – and that seems to be a hallmark of IR and politi-

⁷ See for an overview for instance R.A. WESSEL, *The Dynamics of the European Union Legal Order*, cit.

⁸ Cf. D. KOCHENOV, F. AMTENBRINK (eds), *The European Union's Shaping of the International Legal Order*, Cambridge: Cambridge University Press, 2014; B. VAN VOOREN, S. BLOCKMANS, J. WOUTERS (eds), *The Legal Dimension of Global Governance, What Role for the EU?*, Oxford: Oxford University Press, 2013.

⁹ Yet, "integration through law" has of course been part of the debates. Key publications include: M. CAPPELLETTI, M. SECCOMBE, J.H. WEILER (eds), *Integration Through Law: Europe and the American Federal Experience*, Berlin, New York: de Gruyter, 1985; S. WEATHERILL, *Law and Integration in the European Union*, Oxford: Oxford University Press, 1995; D. AUGENSTEIN (ed.), *'Integration through Law' Revisited: The Making of the European Polity*, Farnham, UK: Burlington; USA: Ashgate, 2012.

¹⁰ An overview can be found in J. BERGMANN, A. NIEMANN, *Theories of European Integration*, in K.E. JØRGENSEN, Å.K. AARSTAD, E. DRIESKENS, K. LAATIKAINEN, B. TONRA (eds), *The SAGE Handbook of European Foreign Policy, Vol. 1 and 2*, London: Sage, 2015, pp.166-182.

¹¹ See for instance the analyses by R. GINSBERG, *Conceptualizing the European as an International Actor: Narrowing the Theoretical Capability-Expectations Gap*, in *Journal of Common Market Studies*, 1999, p. 432; B. TONRA, T. CHRISTIANSEN, *The Study of EU Foreign Policy: Between International Relations and European Studies*, in B. TONRA, T. CHRISTIANSEN (eds), *Rethinking European Union Foreign Policy*, Manchester: Manchester University Press, 2004, pp. 1-9.

¹² P.M. NORHEIM-MARTINSEN, *Beyond Intergovernmentalism: European Security and Defence Policy and the Governance Approach*, in *Journal of Common Market Studies*, 2010, pp. 1351-1365; H. SJURSEN, *Not So Intergovernmental After All? On Democracy and Integration in European Foreign and Security Policy*, in *Journal of*

cal science studies – the application of different theories results in different outcomes (or: whatever the outcome, there is always a theory to explain it). Thus, while a neo-functional approach may be able to explain the development of CFSP and the further integration into the EU's legal-political framework, intergovernmentalism will be able to let us know why this is in fact not the case since in the end European integration is determined by States' interests.¹³

Nevertheless, it has been argued that "EIT is capable of providing the answer to the question why European foreign-policy cooperation has developed in a specific historic way and not in another [...]. Secondly [...] EIT contributes to our understanding of which actors drive integration processes in the foreign policy domain and through which channels and mechanisms [...]. Third, EIT [...] also has the potential to explain European foreign-policy non-decisions and inaction".¹⁴

For legal scholars the extensive debates in IR, European studies and political science may be relevant in the sense that they show us where to look when we wish to study European integration. And, in a way, the same theoretical approaches are at the background of our choices to focus on the role of the Commission or the European Parliament, or on the voting procedures in the Council when defining the nature of, for instance, CFSP. Yet, as also the present contribution will testify, *legal* integration has a somewhat different focus. In particular in relation to EU foreign policy, our aim is to note shifts and developments on the basis of new legal provisions (or new interpretations of provisions). We compare competences and confront actors with the legal choices they made. We look for (in)consistencies and try to make sense of paradoxical provisions. In doing so, we indeed have an internal as well as an external perspective: internally, more integration would mean that CFSP has become more similar to other (more

European Public Policy, 2011, pp. 1078–1095; A. JUNCOS, K. POMORSKA, *Invisible and Unaccountable? National Representatives and Council Officials in EU Foreign Policy*, in *Journal of European Public Policy*, 2011, p. 1096. And, true to their character, these academic disciplines came up with new ways to describe the new modes of cooperation, using terms like "transgovernmentalism" (S. HOFFMANN, *CSDP: Approaching Transgovernmentalism?*, in X. KUROWSKA, F. BREUER (eds), *Explaining the EU's Common Security and Defence Policy: Theory in Action*, London: Palgrave MacMillan, 2011) or "supranational intergovernmentalism" (J. HOWORTH, *Decision-making in Security and Defense Policy: Towards Supranational Inter-governmentalism?*, in *Cooperation and Conflict*, pp. 433–453). Yet, also note the term "progressive supranationalism" coined by (then) Director of the Council's legal service R. GOSALBO-BONO, *Some Reflections of the CFSP Legal Order*, in *Common Market Law Review*, 2006, pp. 337–394.

¹³ J. BERGMANN, A. NIEMANN, *Theories of European Integration*, cit., point to the importance of a quite a number of different theories in relation to European foreign policy: federalism, neofunctionalism, intergovernmentalism, the governance approach, policy-network analysis, new institutionalism and social constructivism. In addition, a special role is often devoted to the theory of "Europeanization", also in relation to European foreign policy. "Europeanization" focuses on the impact of the European integration process on Member States. See for instance B. TONRA, *Europeanization*, in K.E. JØRGENSEN et al., *The SAGE Handbook*, cit., pp. 184–196.

¹⁴ *Ivi*, p. 176.

supranational) policies (section III below); externally, integration would be triggered by the simple need for the Union to act in a more unified and coherent fashion (section IV). First of all, however, we will reassess the position of CFSP within the EU on the basis of the current Treaty provisions (section II).

II. THE CURRENT POSITION OF CFSP IN THE EU TREATIES

II.1. THE PURPOSE OF CFSP

As indicated above, in many discussions on the nature of CFSP Treaty provisions are frequently ignored. So, let's see what we are dealing with. The first reference to CFSP can be found in the Preamble to the TEU, where the signatories State to be "resolved to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of Article 42, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world". Three key elements are already evidenced by this statement: 1) the signatory States not only aim at implementing CFSP, they also intend to work on the further development of a common defence (policy); 2) all of this is meant to promote peace, security and progress, both in Europe and in the rest of the world; 3) the European identity and its independence will be reinforced through the implementation of CFSP and the further development of a common defence policy. The latter is particularly important for the narrative of the present contribution: CFSP is important to reinforce the European identity.

At the same time CFSP is a *foreign* policy and its main objectives relate not to the EU itself but to the rest of the world, while stimulated by the EU's own integration. Art. 5, para. 3, TEU phrases this as follows:

"In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".

And Art. 21, para. 1, TEU even more extensively provides:

"The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations”.

Specific references to CFSP are absent. Indeed, the 2009 Lisbon Treaty consolidated the Union’s external relations objectives and CFSP is just one of the means to attain these objectives. The requirement of consistency in Art. 21, para. 3, TEU is meant to prevent a fragmentation of the Union’s external action (see below).

Zooming in on the objectives (Art. 21, para. 2, TEU) reveals their extraordinarily broad scope. Aside from perhaps issuing a declaration of war, there is very little that does not fall within the purview of these objectives:

“The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- (a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
- (g) assist populations, countries and regions confronting natural or man-made disasters; and
- (h) promote an international system based on stronger multilateral cooperation and good global governance”.

Arts 3, para. 5 and 21 TEU give a double response to the question as to what kind of international actor the EU is, and how it relates to the international order. On the one hand, there is the substantive answer. These provisions in the TEU impose substantive requirements on EU international relations by stating that there are certain fundamental objectives which shall guide its internal and external policies.¹⁵ On the other hand, these provisions also impose a strong methodological imperative upon EU international

¹⁵ See also J. LARIK, *Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality*, in B. VAN VOOREN, S. BLOCKMANS, J. WOUTERS, *The Legal Dimension of Global Governance*, cit., pp. 7-22.

action: it must pursue its action through a multilateral approach based on the rule of law. Yet, no clear link is made between these objectives and the means to attain them; but CFSP is clearly needed to make this work.

II.2. CONSISTENCY BETWEEN CFSP AND OTHER EXTERNAL RELATIONS POLICIES

Art. 21 TEU is the first provision in Title V that was invented to integrate (but also still partly separate) the EU external relations. The title is named “General provisions on the Union’s external action and specific provisions on the Common Foreign and Security Policy”. One could argue that the first Chapter (called “General Provisions of the Union’s External Action”) is indeed general in the sense that it aims to regulate EU external relations in general, whereas Ch. 2 entails “Specific Provisions on the Common Foreign and Security Policy”. Yet, Art. 21, para. 3, TEU establishes a legal connection between the different parts. Indeed, it imposes a binding obligation of coherence in EU external relations, illustrating that coherence is not merely an academic notion but a tangible legal principle of EU primary law. It provides that “[...] the Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect”.

Indeed, para. 3 of Art. 21 TEU can be considered the *lex generalis* coherence obligation in EU external relations. Thus, what this paragraph does is connect the list of policy objectives in Art. 21, para. 2 to each other, and to the functioning of pertinent legal principles, by imposing a legally binding obligation of coherence between all EU internal and external policies which must pursue them. Specifically through the case-law of the Court of Justice the obligation of loyalty has become directly connected to the objective of “ensur[ing] the coherence and consistency of the action and its [the Union’s] international representation”.¹⁶

The TEU contains four other provisions which pertain to coherence in its material and institutional dimensions. All in their own way, these provisions strengthen the relationship (or in fact, the integration) between CFSP and other external relations policies.¹⁷

Art. 13, para. 1, TEU imposes coherence as one of the over-arching purposes for the activities of the EU institutions: “[t]he Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions”. The explicit reference to the Member States can

¹⁶ Court of Justice, judgment of 2 June 2005, case C-266/03, *Commission v. Luxembourg*, para. 60, and Court of Justice, judgment of 5 November 2002, case C-476/98, *Commission v. Germany*, para. 66.

¹⁷ This analysis of the provisions on coherence and consistency is partly based on Chapter 1 of B. VAN VOOREN, R.A. WESSEL, *EU External Relations Law*, cit.

be read as meaning that it concerns not merely coherence between policies and action of the Union itself (horizontal), but also between that of the Union and its Member States (vertical).

Art. 16, para. 6, TEU imposes on the General Affairs Council an obligation of substantive policy coherence between the work of the different Councils, and a specific obligation for the Foreign Affairs Council since it “shall elaborate the Union’s external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union’s action is consistent”.

Art. 18, para. 4, TEU imposes a specific coherence obligation on the EU High Representative (HR) with a strong institutional dimension, as it relates to the connection between the work of the HR and that of the Commission: “[t]he High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union’s external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action [...]”.

Art. 26, para. 2, TEU contains an obligation of substantive policy coherence specifically for the EU’s Common Foreign and Security Policy: “[t]he Council and the High Representative of the Union for Foreign Affairs and Security Policy shall ensure the unity, consistency and effectiveness of action by the Union”.

Furthermore, in the TFEU, we find coherence obligations that do not relate to the institutions as such, but are predominantly substantive in the nature of their requirement.

Art. 7 TFEU is found in Title II of that treaty, under the heading “provisions having general application” and states that “[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers”. Because this article is of general application and not specific to EU external relations, it must be read as requiring substantive, positive coherence between EU internal policies and EU external policies.

Part five of the TFEU concerns “external action by the Union”. Art. 205 TFEU is the first and general provision of that Title and reads that “the Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union”. This Article is a cross-reference to Arts 21 and 22 TEU and has a triple consequence. First, any of the external competences listed in Part Five of the TFEU (common commercial policy, development policy, and so on) must be conducted in line with the coherence obligation of Art. 21, para. 3, TEU. Second, any of these competences must all pursue the objectives listed in Art. 21, para. 2, TEU. Third, where Art. 22, para. 1, TEU states that “the European Council shall identify the strategic interests and objectives of the Union”, Art. 205 TFEU is yet another confirmation that this EU institution is given the principal role in ensuring over-arching coherence across all EU external policies.

In three competence-specific articles we also find obligations to maintain coherence. In Art. 208, para. 1, TFEU concerning development policy there is an obligation that it pursue “the principles and objectives of the Union’s external action” (e.g. an obligation of horizontal coherence with Arts 3, para. 5, TEU and 21, para. 2, TEU), and a vertical obligation of coherence stating that “the Union’s development cooperation policy and that of the Member States complement and reinforce each other”. In Art. 212 TFEU concerning economic, financial and technical cooperation with third countries we find similar obligations: one of horizontal coherence but this time with EU development policy, and one of vertical coherence with Member States’ respective policies. Finally Art. 214 TFEU concerning humanitarian aid, is formulated in similar terms: a general reference to the EU’s principles and objectives in external relations, and the need for EU measures and those of Member States to “complement and reinforce each other”. This is thus a reciprocal obligation of substantive, positive, policy coherence.

All in all, by simply reading the Treaties one can only conclude that everything is geared towards an integration of the overall external relations regime, of which CFSP forms an integral part.

II.3. LEGAL BASIS AND COMPETENCE

However, this conclusion brings us to the question of the attention that is also paid by treaty provisions to separating CFSP from all other Union policies. The fact that CFSP (including CSDP) is the only policy area that is not regulated by the TFEU but by the TEU may be interpreted differently. The TFEU is usually considered to be the operational treaty, whereas the TEU may be seen as the constitutional foundation, providing the legal-constitutional framework for the EU’s actions. Perhaps ironically, this would allude to a *higher or more important* status of CFSP norms as they seem to form part of the constitutional set-up of the Union. At the same time we know that it owes this special position to fears by certain Member States that aligning CFSP with some former Community policies could make an end to what they perceive as the “intergovernmental” nature of CFSP.¹⁸

Indeed, the textbook classification of CFSP as “intergovernmental” often conceals the fact that CFSP decisions are taken by the Union – following strict rules and procedures – and not by the Member States. Art. 2, para. 4, TFEU clearly refers to CFSP as an

¹⁸ The intergovernmental nature is often related to Declarations 13 and 14 annexed to the Treaties, which indicate that CFSP does not affect “the responsibilities of the Member States, as they currently exist for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organizations” and that it “will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organizations [...]”. Yet, a close reading of these Declarations reveals that they mainly state the obvious and repeat rules that are also reflected in the general principle of conferral.

EU competence: “[t]he Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy”.

CFSP is not the sum of national foreign policy issues; CFSP is primarily an EU policy. And, in the words of Keukeleire and Delreux:

“it is questionable whether EU foreign policy must automatically – and on all levels – be seen as a substitute or as a transposition of individual Member States’ foreign policies to the European level. The specificity and added value of an EU foreign policy can be precisely that it emphasizes different issues, tackling different sorts of problems, pursuing different objectives through alternative methods, and ultimately assuming a form and content that differs from the foreign policy of its individual members”.¹⁹

Yet, the legal basis to be used by the Union to adopt CFSP Decisions is to be found in the “Specific Provisions on the Common Foreign and Security Policy” (Ch. 2 of Title V TEU). The intention does not seem to be to set CFSP aside from other policies; the term “specific provisions” is rather to be read in relation to the “general provisions” on external relations (Ch. 1 of Title V TEU). In fact, also as far as external relations are concerned, the TEU and TFEU are clearly linked. Part V of the TFEU (bearing the very general title “The Union’s External Action”) starts with a reference in Art. 205 to Title V of the TEU: “[t]he Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union”.

So, Union action *pursuant to this Part* of the TFEU (which includes the Common Commercial Policy, Development Cooperation, Economic, Financial and Technical Cooperation with Third States, Humanitarian Aid, Restrictive Measures, International Agreements, the Union’s Relations with International Organisations and Third Countries and Union Delegations, as well as the Solidarity Clause) *shall be conducted in accordance with* the general provisions on external action in the TEU. This seems to indicate a subordination of this TFEU Part to general TEU provisions on external action. At least it reveals the intention of the Treaty legislator to consolidate the different provisions on external action, despite the positioning of CFSP in the TEU. At the same time it underlines that CFSP may be the only policy area that is placed in the TEU, but that the general provisions on EU external relations are also put there. Title V of the TEU is therefore presented as the basis for EU external relations, including CFSP.²⁰

¹⁹ S. KEUKELEIRE, T. DELREUX, *The Foreign Policy of the European Union*, Basingstoke: Palgrave Macmillan, 2014, pp. 18-19.

²⁰ All of this is again confirmed by Art. 24, para. 2, TEU: “[w]ithin the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy [...]” (emphasis added).

Another link is made by the general competence of the Union “to define and implement” CFSP, which is laid down in the TFEU (Art. 2, para. 4) and the more concrete legal bases that can indeed be found in the “specific provisions” in the TEU. And despite their specificity, action of the Union on the basis of the CFSP provisions is also to be “conducted in accordance with” the general principles (Art. 23 TEU). Unfortunately, the distinction between CFSP and other external action is not made clear by the Treaties. “The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence” (Art. 24, para. 1, TEU). Considering that the TFEU mentions many other areas where the EU has external competences, one will have to conclude that “foreign policy” is everything that is not covered by other competences. That this is easier said than done will become clear in the next section.

It is well known that CFSP is formed on the basis of “specific rules and procedures” (Art. 24, para. 1, TEU). The exclusion of the use of the “legislative acts”²¹ (Art. 23, para. 1, TEU; and thereby the use of the legislative procedure which is the regular decision-making procedure for other Union policies) is often mentioned as a main reason for setting CFSP apart. At the same time it is difficult to maintain that the inapplicability of the legislative procedure implies that CFSP acts are not binding on Member States. In the *H*-case, AG Wahl recently put it like this:

“[...] it has to be acknowledged that, in the field of the CFSP, the Union has the power to adopt acts that are legally binding not only on its institutions, but also on the Member States. The wording of Articles 24(3) (13) and 31(1) (14) TEU is particularly informative in that regard. On the other hand, the Union is not meant, in the field of the CFSP, to adopt acts that lay down general abstract rules creating rights and obligations for individuals. That explains why, in essence, the CFSP has been conceived, since its creation with the Treaty of Maastricht, as a set of rules which I would define as *lex imperfecta* [...]”.²²

At the same time, the institutional distinctions remain clear: unanimity rather than Qualified majority voting (QMV) as the default voting rule,²³ the “specific role of the Eu-

²¹ See R.A. WESSEL, *Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?*, in *European Foreign Affairs Review*, 2015, pp. 123-145.

²² Opinion of AG Wahl delivered on 7 April 2016, case C-55/14, *H v. Council of the European Union and European Commission*, paras 37-38.

²³ Unanimity continues to form the basis for CFSP decisions, “except where the Treaties provide otherwise” (Art. 24, para. 1, TEU). In that respect it is interesting to point to the fact that apart from the previously existing possibilities for QMV under CFSP, it is now possible for the Council to adopt measures on this basis following a proposal submitted by the High Representative (Art. 31, para. 2, TEU). Such proposals should, however, follow a specific request by the European Council, in which, of course, Member States can foreclose the use of QMV. In addition, QMV may be used for setting up, financing and administering a start-up fund to ensure rapid access to appropriations in the Union budget for urgent financing

ropean Parliament and of the Commission” and the fact that “the Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty [decision on the legal basis] and to review the legality of certain decisions as provided for by the second paragraph of Article 275 [restrictive measures against natural or legal persons]” (see further below).

Yet, many policy areas have their own rules and exceptions. The fact that CFSP – to accommodate the strong political preferences of certain Member States – was placed in another Treaty is clearly compensated by the many links and cross-references between the Treaties. And, despite their public presentation of CFSP as an intergovernmental form of cooperation, the Member States drafted the Treaties as to allow for a far-reaching integration foreign policy into the Union’s external relations regime; thereby allowing for a further integration dynamic on the basis of the Union’s external action.

III. INTERNAL PRESSURES TOWARDS INTEGRATION

This integration dynamic is first of all caused by internal developments triggered by the treaty provisions. Thus, the consolidation of EU external policies was not only accompanied but also boosted by a revised role for the Institutions. At the same time the Court of Justice seems to push for a further alignment of CFSP and other policies.

III.1. A NEW INSTITUTIONAL SET-UP

Perhaps the most visible body representing the Union’s ambitions to consolidate its external relations is the European External Action Service (EEAS). Much has been written on the status and position of this new body.²⁴ The EEAS, mentioned only in Art. 27, para. 3, TEU, was formally established by a Council Decision in 2010, and was officially launched in January 2011.²⁵ Its set-up is ambiguous. In a way, the EEAS can be seen as a

of CFSP initiatives (Art. 41, para. 3, TEU). This start-up fund may be used for crisis management initiatives as well, which would potentially speed up the financing process of operations. In addition, QMV may be extended to new areas on the basis of a decision by the European Council (Art. 31, para. 3, TEU).

²⁴ See for instance B. VAN VOOREN, *A Legal Institutional Perspective on the European External Action Service*, in *Common Market Law Review*, 2011, pp. 500-501; as well as G. DE BAERE, R.A. WESSEL, *EU Law and the EEAS: Of Complex Competences and Constitutional Consequences*, in J. BÁTORA, D. SPENCE (eds), *The European External Action Service: European Diplomacy Post-Westphalia*, Basingstoke: Palgrave MacMillan, 2015, pp. 175-193. A thorough legal analysis was done by S. BLOCKMANS, M. CREMONA, D. CURTIN, G. DE BAERE, S. DUKE, C. ECKES, C. HILLION, B. VAN VOOREN, R. WESSEL, J. WOUTERS, in S. BLOCKMANS, C. HILLION (eds), *EEAS 2.0: A Legal Commentary on Council Decision 2010/427/EU Establishing the Organisation and Functioning of the European External Action Service*, Brussels: CEPS; Stockholm: Sieps; Florence: EUI, 2013; and by the same authors in S. BLOCKMANS, C. HILLION (eds), *European External Action Service 2.0: Recommendations for the 2013 EEAS Review*, Brussels: CEPS; Stockholm: Sieps; Florence: EUI, 2013.

²⁵ Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service.

continuation of a process that defined the former European Political Cooperation and the establishment of the early CFSP: a decades-old struggle of the Union seeking to project a strong, coherent voice on the international scene; counterbalanced by the Member States' wish to retain control over various aspects of international relations. At the same time the EEAS was created to overcome this fragmentation. The idea is to bring together policy preparation and implementation on external relations into one new body, under the auspices of the High Representative for CFSP. In terms of policy fields covered by the new EEAS, the current structure remains a typical EU-type compromise. It is *not* an EU institution, which significantly constrains its power to legally influence EU external decision-making. Furthermore, the EU external action service has no say whatsoever in the Common Commercial Policy, where the Commission remains very firmly in the driver's seat. Development policy is more opaque, where both the EEAS and the Commission have been given a role in the policy-making process. Similarly, in the domain of EU external energy policy, the EEAS has "some kind" of role to play, but disagreement persists as to its exact relationship with the European Commission.

The preamble of the Council Decision reaffirms that coherence remains the final objective of setting up the EEAS, and does this by copying and pasting the text of Art. 21, para. 3, second subparagraph, TEU (see above). In all practical terms the EEAS may be seen as the EU's Foreign Ministry, which does not at all deny that other *Ministries* (the Commission's DGs) may engage in their own external relations. Art. 2 of the EEAS Decision indicates that CFSP may be its core business, but also hits at a more general role in EU external relations:

"1. The EEAS shall support the High Representative in fulfilling his/her mandates as outlined, notably, in Articles 18 and 27 TEU:

- in fulfilling his/her mandate to conduct the Common Foreign and Security Policy ('CFSP') of the European Union, including the Common Security and Defence Policy ('CSDP'), to contribute by his/her proposals to the development of that policy, which he/she shall carry out as mandated by the Council and to ensure the consistency of the Union's external action,
- in his/her capacity as President of the Foreign Affairs Council, without prejudice to the normal tasks of the General Secretariat of the Council,
- in his/her capacity as Vice-President of the Commission for fulfilling within the Commission the responsibilities incumbent on it in external relations, and in coordinating other aspects of the Union's external action, without prejudice to the normal tasks of the services of the Commission.

2. The EEAS shall assist the President of the European Council, the President of the Commission, and the Commission in the exercise of their respective functions in the area of external relations".

Deep disagreement existed throughout the negotiation process on the EEAS' position in the EU institutional set-up. On the one hand, there was Member State agreement that "the EEAS should be a service of a *sui generis* nature separate from the Com-

mission and the Council Secretariat",²⁶ while Parliament's opinion was that it should be connected to the Commission. The final result laid down in Art. 1, para. 2 reveals that Parliament has lost out in the final compromise. Art. 1 of the EEAS Decision provides that the EEAS is "functionally autonomous" and "separate" from the Council Secretariat and Commission. Given the negotiation history to the EEAS ("equidistance"), these notions should be interpreted as meaning that in supporting the High Representative, the EU diplomatic service does not take instructions from the Council or the Commission. Its instructions come from the *office of the High Representative*,²⁷ who is in her turn accountable to the EU institutions proper – notably also the Parliament. The EEAS is certainly part of a "command structure" which runs vertically via the High Representative, then through to the Council and up to the European Council, with a strand of accountability connecting it to Parliament. However, the EEAS is horizontally not an institutional participant in the EU's institutional balance, or part of an Institution itself.²⁸

An interesting institutional integrationist development took place with the creation of the "Union Delegations". On the basis of Art. 221, para. 1, TFEU "Union delegations in third countries and at international organisations shall represent the Union". In the absence of any further description in the Treaties, their mandate is based on Art. 5 of the EEAS Decision and turns them into an integral part of the EEAS,²⁹ with the Head of Delegation (clearly an EU official appointed by the High Representative), who receives instructions from the High Representative and the Commission) exercising "authority over all staff in the Delegation, whatever their status, and for all its activities", including the staff members seconded by Member States. Yet, the EEAS is often presented as a CFSP body, whereas Art. 221 TFEU indicates that Delegations represent the Union as a whole.³⁰ At the same time the link with the High Representative for Foreign And Security Policy is clear. Art. 221, para. 2, TFEU states that "Union delegations shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Securi-

²⁶ Presidency Report DOC 14930/09 of October 2009, para. 16.

²⁷ Heads of the EU delegations can also receive instructions from the Commission "in areas where they exercise powers conferred upon it by the Treaties". Otherwise the Delegations only receive instructions from the High Representative (Council Decision 2010/427/EU, Art. 5, para. 3).

²⁸ See more extensively B. VAN VOOREN, *A Legal Institutional Perspective*, cit.; and G. DE BAERE, R.A. WESSEL, *EU Law and the EEAS*, cit.

²⁹ Yet, see General Court, judgment of 13 December 2012, case T-395/11, *Elti v. EU Delegation to Montenegro*, where it argued that "the legal status of the Union Delegations is characterised by a two-fold organic and functional dependence with respect to the EEAS and the Commission". In a similar case on the former Commission Delegations, the General Court came to the same conclusion: General Court, order of 30 June 2011, case T-264/09, *Technoprocess v. Commission and EU Delegation to Morocco*, para. 70. While different interpretations are possible, at least the Court underlined that in order for the Delegations to represent the Union as a whole, they need to work both for the EEAS and the Commission.

³⁰ See also Art. 5, para. 7, of the Council Decision 2010/427/EU, indicating that Delegation "shall have the capacity to respond to the needs of other institutions of the Union, in particular the European Parliament".

ty Policy. They shall act in close cooperation with Member States' diplomatic and consular missions". The HR/VP in turn combines her function with the one of vice-President of the Commission and Chairperson of the Foreign Affairs Council (Art. 18 TEU). This is referred to as "triple-hatting", and is again hoped to support attaining coherence in EU external relations (Art. 21, para. 3, TEU).

Significantly, a study commissioned by the European Parliament found that most stakeholders now agree that the *sui generis* positioning of the EEAS was a mistake: the Commission perceives the construction of the EEAS as a loss of power that ought to be regained or protected, while Member States believe the priorities set out by the EEAS often compete with their own national priorities.³¹ The hybrid position of the EEAS, and in particular the position of the HR/VP, was put on the agenda again at the start of the new Juncker Commission in November 2014. Juncker preferred to have the new High Representative, Federica Mogherini, as a fully operational Vice President. "Mogherini's symbolic decision to install her office in the Berlaymont building, the appointment of Stefano Manservigi, an experienced hand at the Commission, as her *Chef de Cabinet*, and the recruitment of half of her cabinet from Commission staff, have served her well in striving to attain that goal".³² Yet, it is questionable whether this is the best solution. While it will still be possible for Mogherini to use her EEAS office for her HR functions, her closest staff will be in the Berlaymont Building and it will remain difficult to clearly separate the issues, possibly triggering Member States that are particularly sensitive on the issue of Commission involvement in CFSP to open a new battle front. Thus, while a closer entanglement between EEAS and other external policies is to be welcomed from a consistency perspective, time will tell whether this somewhat bold move did not come too soon. In any case, recent studies reveal that the role of the Commission in relation to foreign policy is often underestimated.

This is nevertheless one of the best examples of the internal dynamics pushing towards a further "normalisation" of CFSP. While the Commission undeniably retained control over (important) parts of the EU's external relations, the HR/VP does function as a bridge-builder as she is forced to align the different external policies.³³ At the same time, since the entry into force of the Treaty of Lisbon, a new interinstitutional agreement between the European Parliament and the Commission foresees the involvement

³¹ J. WOUTERS *et al.*, *The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities*, Brussels: European Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department, 2013, p. 93 *et seq.*

³² S. BLOCKMANS, F.S. MONTESANO, *Mogherini's First 100 Days: Not the Quiet Diplomat*, in *CEPS Commentary*, 12 February 2015.

³³ See for a recent evaluation of the function post-Lisbon N. HERWIG, *The High Representative of the Union: The Quest for Leadership in EU Foreign Policy*, in J. BÁTORA, D. SPENCE (eds), *The European External Action Service*, cit., pp. 87-104.

of the former by the latter in the CFSP:³⁴ “[w]ithin its competences, the Commission shall take measures to better involve Parliament in such a way as to take Parliament’s views into account as far as possible in the area of the Common Foreign and Security Policy”.³⁵ *Within its competences*. Yet, the traditional view is that these competences are extremely limited in relation to CFSP. Again, however, this picture needs to be nuanced. The limited formal competences of the Commission in the CFSP area have not led to the Commission being completely passive in this field. From the outset, the Commission has been represented at all levels in the CFSP structures. Within the negotiating process in the Council, the Commission is a full negotiating partner as in any working party or Committee (including the PSC). The President of the Commission attends European Council and other *ad hoc* meetings. The Commission is in fact the *29th Member State* at the table; it safeguards the *acquis communautaire* and ensures the consistency of the action of the Union other than CFSP. In the implementation of CFSP Decisions the Commission’s role is however formally non-existent as delegation of executive competences from the Council to the Commission is prevented by the fact that CFSP acts are no legislative acts (Art. 29 TFEU). Nevertheless, practice from the outset showed an involvement of the Commission in the implementation of CFSP Decisions, not in the least because other measures were in some cases essential for an effective implementation of CFSP policy decisions. Recent studies even reveal a considerable influence of the Commission on one of the most sensitive dimensions of CFSP, the security and defence policy and the military missions.³⁶ Regardless of these competences and practices of the Commission under CFSP, it is not difficult to conclude that this institution is nowhere near the pivotal position it occupies in the other areas of the Union. Although it is not formally excluded by Art. 17 TEU, the Commission lacks its classic function as a watchdog under CFSP. The absence of an exclusive right of initiative also denies the Commission another indispensable role it has in other areas.

III.2. LEGAL BASES

Perhaps the best example of a necessary combination of CFSP and other EU-rules is formed by the regulation of restrictive measures. In fact, legislative decisions taken by the Union in this area depend on a prior CFSP decision. Art. 215, para. 1, TFEU provides:

“Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union [the provisions on CFSP], provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries,

³⁴ P.J. CARDWELL, *On ‘Ring-Fencing’ the Common Foreign and Security Policy*, cit., p. 459.

³⁵ Framework Agreement on Relations between the European Parliament and the European Commission, 2010, Art. 10.

³⁶ M. RIDDERVOLD, *(Not) in the Hands of the Member States: How the European Commission Influences EU Security and Defence Policies*, in *Journal of Common Market Studies*, 2015, pp. 1-7.

the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof”.

Para. 2 adds that this procedure is also to be followed whenever a CFSP decision provides for restrictive measures against natural or legal persons and groups or non-State entities.

While other CFSP decisions do not automatically affect the creation of Union legislative acts, it remains clear that they form part of the Union's legal order and that all decisions related to a certain external policy are to be interpreted taking their content into account and irrespective of their place in the Treaties (see also the rules on consistency referred to above). Apart from the example of restrictive measures, which present a CFSP decisions as the foundation for subsequent action, no automatic hierarchy exists. Art. 40 TEU simply provides:

“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 Articles 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”.

In other words: in adopting CFSP decisions the Council should be aware of the external policies in the TFEU, and *vice versa*. Despite its *balanced* approach, Art. 40 implies that foreign policy measures are excluded once they would interfere with exclusive powers of the Union, for instance in the area of Common Commercial Policy. This may seriously limit the freedom of the Member States in the area of restrictive measures (*supra*) or the export of “dual goods” (commodities which can also have a military application).³⁷ The current text of Art. 40 TEU forces the Court to take a different view on the relationship between CFSP and other areas of external action. No longer should an automatic preference be given to a non-CFSP legal basis whenever this is possible. One could argue that Art. 40 is merely a confirmation of the principle of consistency, now

³⁷ Council Regulation (EC) 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology; in the meantime replaced by Council Regulation (EC) 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items. Exception was only made for certain services considered not to come under the CCP competence. For these services (again) a CFSP measure was adopted: Council Joint Action 2000/401/CFSP of 22 June 2000 concerning the control of technical assistance related to certain military end-uses.

that it does no longer establish a hierarchy between CFSP and other policies.³⁸ At the same time, the fact that Art. 40 does not really add anything to the treaty regime may be interpreted as confirming a separate status of CFSP, which again underlines what has been termed the “integration-delimitation paradox” which from the outset has characterised the position of CFSP in the Treaties.³⁹

Despite the fact that a combination of CFSP and other external policies legal basis’ is difficult because of the diverging decision-making procedures and instruments,⁴⁰ an integrationist pull can again come from the Union’s unified external objectives. Indeed, as recently argued by Merket on the basis of a study on the relationship between development and security policy, “[o]bjectives of conflict prevention, crisis management, reconciliation and post-conflict reconstruction cannot be assigned to one or the other EU competence, forging an indissoluble link between development cooperation and the CFSP”.⁴¹ Yet, obviously it would have been easier when CFSP and other policies could be combined in single legal instruments.

III.3 INTEGRATIONIST CASE LAW?

Yet, while the consistency requirement hints at a combination of legal bases, the different CFSP procedures and instruments preclude that. In fact, the combination of the different CFSP procedures/instruments and the requirement of consistency seems to form a key challenge for the Court of Justice.⁴² The role of the Court in relation to CFSP has been subject to legal analysis over the years,⁴³ yet the impact of the changes by the Lis-

³⁸ Pre-Lisbon Art. 47 TEU contained the clear rule that “nothing in the TEU shall affect the EC Treaty”. See also Court of Justice, judgment of 20 May 2008, case C-91/05, *Commission v. Council* (Small Arms/ECOWAS). See further: C. HILLION, R.A. WESSEL, *Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?*, in *Common Market Law Review*, 2009, pp. 551-586.

³⁹ H. MERKET, *The European Union and the Security-Development Nexus: Bridging the Legal Divide*, Belgium: PhD-thesis, defended at the University of Ghent, 2015; see on this issue in particular Ch. 2.

⁴⁰ See for instance Court of Justice, judgment of 8 July 1999, joined cases C-164/97 and C-165/97, *Parliament v. Council*, para. 14, in which the Court held that no combination of legal bases is possible “where the procedures laid down for each legal basis are incompatible with each other”.

⁴¹ H. MERKET, *The European Union and the Security-Development Nexus*, cit., Ch. 3.

⁴² Arguments in this section are further developed in R.A. WESSEL, *Resisting Legal Facts*, cit.

⁴³ S. GRILLER, *The Court of Justice and the Common Foreign and Security Policy*, in A. ROSAS, E. LEVITS, Y. BOT (eds), *Court of Justice of the European Union - Cour de Justice de l'Union Européenne, The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, The Hague: T.M.C. Asser Press, 2013, pp. 675-692; G. DE BAERE, P. KOUTRAKOS, *The Interactions between the Legislature and the Judiciary in EU External Relations*, in P. SYRPIS (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge: Cambridge University Press, 2012, pp. 243-273; L. SALTINYTE, *Jurisdiction of the European Court of Justice over Issues Related to the Common Foreign and Security Policy under the Lisbon Treaty*, in *Jurisprudence*, 2010, p. 119 et seq.; A. HINAREJOS, *Judicial Control in the European Union - Reforming Jurisdiction in the Inter-governmental Pillars*, Oxford: Oxford University Press, 2009.

bon Treaty has only partly been recognized in literature. A clear exception is Hillion, who convincingly argued that the view that the Court is not competent at all in the area of CFSP can no longer be upheld.⁴⁴ He sees three areas in which the Lisbon treaty has created a competence for the Court in relation to CFSP:

“First, it has made it possible for the Court, albeit within limits, to exercise judicial control with regard to certain CFSP acts, thus abolishing the policy’s conventional immunity from judicial supervision. Second, it has recalibrated the Court’s role in patrolling the borders between EU (external) competences based on the TFEU and the CFSP, turning it into the guarantor of the latter’s integrity. Third, the Treaty has generalized the Court’s capacity to enforce the principles underpinning the Union’s legal order”.

This role of the Court should not come unexpected, given the intertwinement of CFSP and other external Union policies – in particular through the principle of consistency referred to above. This would also explain the major change initiated by the Lisbon Treaty: no longer is the Court’s role explicitly excluded in relation to CFSP; rather the general rule seems to be that the Court is competent unless its role is excluded in a specific situation.⁴⁵

This leads to a role for the Court in relation to CFSP in different situations.⁴⁶ First of all, as we have seen, restrictive measures taken on the basis of CFSP acts against natural or legal persons, fall under the scrutiny of the Court (Art. 24, para.1, TEU, Arts 275 and 263 TFEU). Secondly, there is the situation under Art. 40 TEU, calling for a balanced choice for either a CFSP or another legal basis of decisions (e.g., trade or development cooperation). In the 2012 case *European Parliament v. Council* the Court was given a first chance to develop an approach towards the function of Art. 40.⁴⁷ Being confronted with the question of the appropriate legal basis for “restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban”,⁴⁸ the Court held that Art. 215 TFEU (following a previous CFSP decisions) rather than Art. 75 TFEU (in the Area of Freedom, Security and Justice – AFSJ) was the correct choice, despite the limited role of the European Parliament in relation to the CFSP Art. 215 procedure. The context of peace and security proved to be decisive for the

⁴⁴ C. HILLION, *A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy*, in M. CREMONA, A. THIES, *The European Court of Justice and External Relations Law*, Oxford: Hart Publishing, 2014, pp. 47-70. See also C. HILLION, *Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy*, in *European Papers*, 2016, www.europeanpapers.eu, pp. 55-66.

⁴⁵ A. HINAREJOS, *Judicial Control in the European Union*, cit., p. 150.

⁴⁶ See more extensively and for many case law references C. HILLION, *A Powerless Court?*, cit.

⁴⁷ Court of Justice, judgment of 19 July 2012, case C-130/10, *Parliament v. Council*.

⁴⁸ Council Regulation (EU) 1286/2009 of 22 December 2009 amending Regulation (EC) 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban.

Court's conclusion. The Court did not shy away from referring to CFSP provisions as well and seemed to focus on the distinction between internal policies and external action.⁴⁹

These legal basis questions are relevant for the point the present contribution aims to make. As recently argued by AG Kokott in a similar case "[a]t first sight this might all seem a question of technical detail which certainly does not hold the same excitement as many literary treatments of the subject of piracy. Nevertheless, the problem at issue here has considerable political and even constitutional implications because it is necessary to define more sharply the limits of the common foreign and security policy and to delimit it from other European Union policies".⁵⁰ This became clear also when the Court had a chance to revisit the issue in the so-called *Mauritius* case.⁵¹ Here the Court chose context over content and argued that the EU-Mauritius Agreement, concluded in the framework of operation Atalanta, was rightfully based within CFSP.⁵² Yet, this does not limit's the application of procedural EU rules and principles. In the words of Peers:

"the Court's ruling means that any CFSP measure can be litigated before it, as long as the legal arguments relate to a procedural rule falling outside the scope of the CFSP provisions of the Treaty (Title V of the TEU). For instance, it arguably means that the Court would have the power to rule on the compatibility of proposed CFSP treaties with EU law, since that jurisdiction is conferred by Article 218 TFEU and not expressly ruled out by Article 275. But such disputes might often include arguments about the substance of the measure concerned (for instance, whether it would breach the EU's human rights obligations), and it could be awkward to distinguish between procedural and substantive issues in practice".⁵³

Thirdly, international agreements in the area of CFSP are concluded on the basis of the general EU provisions in this regard (Art. 218 TFEU), despite some specific procedural rules, and no exception is made in relation to legality control by the Court.⁵⁴ It has

⁴⁹ Cf. C. HILLION, *A Powerless Court?*, cit., who also notes that this "is one of, if not the first time that the all-encompassing character of the CFSP is evoked in the case law".

⁵⁰ Opinion of AG Kokott delivered on 28 October 2015, case C-263/14, *European Parliament v. Council*, para. 4.

⁵¹ Court of Justice, judgment of 24 June 2014, case C-658/11, *European Parliament v. Council (Mauritius Agreement)*. See C. MATERA, R.A. WESSEL, *Context or Content? A CFSP or AFSJ Legal Basis for EU International Agreements – Case C-658/11, European Parliament v. Council (Mauritius Agreement)*, in *Revista de Derecho Comunitario Europeo*, 2014, pp. 1047–1064.

⁵² A similar conclusion was drawn in Opinion of AG Kokott, *European Parliament v. Council (Tanzania case)*, cit.

⁵³ S. PEERS, *The CJEU Ensures Basic Democratic and Judicial Accountability of the EU's Foreign Policy*, in *EU Law Analysis*, 24 June 2014, eulawanalysis.blogspot.nl.

⁵⁴ T. TRIDIMAS, *The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?*, in T. TRIDIMAS, P. NEBBIA (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order. Vol. 1: Constitutional and Public Law. External Relations*, Oxford: Hart Publishing, 2004, p. 128; G. DE BAERE, *Constitutional Principles of EU External Relations*, Oxford: Oxford University Press, 2008, p. 190.

further been noted – and in a way conformed by the *Mauritius* case – that Art. 218, para. 11 does not seem to exclude EU agreements that relate “exclusively or principally” to the CFSP from the Court’s scrutiny.⁵⁵ In the end, all international agreements (whether not, wholly or partly) CFSP agreements, are agreements for which the Union as such is internationally formally responsible. It would therefore be difficult to maintain the view that the Court could not scrutinize CFSP international agreements or CFSP parts in agreements. In any case, the Art. 40 TEU situations could by itself already cause a need for the Court to assess international agreements in their entirety. In case C-658/11 on the EU-Mauritius Agreement (and more recently confirmed by AG Kokott in the similar case C-263/14), the Court underlined its jurisdiction in relation to CFSP-related agreements where the EP’s right to be informed is concerned. All cases can be seen as underlining that CFSP is part and parcel of the Union’s constitutional set-up.

Fourthly, where the Court in the *Mauritius* case argued that the simple fact that there is a CFSP relation does not deprive Parliament from its constitutional prerogatives, in another recent case it had already argued that a CFSP link could not form a reason to deny an individual the right to bring a case. Without being able to go to the heart of the matter, in *H v. Council and Commission* – a case brought by a staff member of the EU Police Mission in Bosnia and Herzegovina (EUPM) – the President of the General Court held that:

“[...] it should be ensured that [the] institutions do not evade any review by the Courts of the European Union in respect of purely administrative decisions which are taken in relation to staff management within the EUPM, which would be clearly separable from the ‘political’ measures taken as part of the CFSP. Where such a decision adversely affects the person to whom it is addressed and significantly alters that person’s legal position, it cannot be acceptable in a European Union based on the rule of law that such a decision escape any judicial review [...]”.⁵⁶

Overall, the Lisbon Treaty thus seems to have strengthened the Court’s role as a Constitutional Court, allowing it to enforce the fundamental EU principles across the board.⁵⁷ The Treaties do not provide reasons to exclude CFSP from this holistic ap-

⁵⁵ C. HILLION, *A Powerless Court?*, cit.; as well as P. EECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, p. 498.

⁵⁶ Order of the President of 22 July 2010, case T-271/10 R, *H. v. Council and Commission*, para. 25. Similarly – at least as argued by AG Jääskinen in his Opinion delivered on 21 May 2015, case C-439/13 P, *Elitaliana SpA v. Eulex Kosovo* – the EU Courts should be able to hear individuals on budgetary issues, even if a particular decision was taken by an entity established under CFSP.

⁵⁷ Cf. D.M. CURTIN, I.F. DEKKER, *The European Union from Maastricht to Lisbon: Institutional and Legal Unity Out of the Shadows*, in P. CRAIG, G. DE BÚRCA (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, p. 170. This is not to say that the Court did not have this role prior to the Lisbon Treaty; see for instance D.M. CURTIN, R.A. WESSEL, *Rechtseenheid van de Europese Unie? De rol van het Hof van Justitie als constitutionele rechter*, in *SEW Tijdschrift voor Europees en economisch recht*, 2008, pp. 371–378; as well as

proach, simply because it finds its basis in another treaty. The obvious question is whether Art. 24, para. 1, TEU does not simply provide an exhaustive list of the powers of the Court in relation to CFSP? After all, the text of that provision is quite clear: “[t]he Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union”.

Taking into account our analysis above, the answer seems to be that it remains difficult to see a role for the Court in pure CFSP situations, in which the context of other EU external relations is absent. The most obvious lack of judicial control is apparent when competences and decision-making procedures *within* the CFSP legal order are at stake. This means, for instance, that neither the Commission, nor the European Parliament can commence a procedure before the Court in cases where the Council has ignored their rights and competences in CFSP decision-making procedures in a situation where CFSP as a legal basis is not disputed. This brings about a situation in which the interpretation and implementation of the CFSP provisions (including the procedures to be followed) is left entirely to the Council (or perhaps worse: to individual Member States). Remembering their preference for *intergovernmental* cooperation where CFSP is concerned, it may be understandable that Member States at the time of the negotiations had the strong desire to prevent a body of *CFSP law* coming into being by way of judicial activism on the part of the European Court of Justice, but it is less understandable that they were also reluctant to allow for judicial control of the *procedural* arrangements they explicitly agreed upon (although it is acknowledged that it may be difficult to unlink procedures and content).

Yet, recent and pending cases shed more light on the Court’s jurisdiction and the interpretation of the *carving out* provisions in the Treaties. In his recent Opinion in the *Rosneft* case,⁵⁸ AG Wathelet does exactly what the present article proposes to do more: carefully analyse the text of the relevant Treaty provisions. The case concerns EU measures targeted at certain Russian undertakings including Rosneft Oil Company, which specialises in the exploration and production of oil and gas. Rosneft challenged the validity of certain measures adopted by the UK authorities to implement the Council Decision and accompanying Regulation. The High Court of England and Wales referred a number of questions to the Court of Justice. As we know, restrictive measures are based on a combination of Arts 24 TEU (CFSP) and 275 TFEU. The AG concludes that the

D.M. CURTIN, R.H. VAN OOIK, *Een Hof van Justitie van de Europese Unie?*, in *SEW Tijdschrift voor Europees en economisch Recht*, 1999, pp. 24-38.

⁵⁸ Opinion of AG Wathelet delivered on 31 May 2016, case C-72/15, *Rosneft Oil Company OJSC v. Her Majesty’s Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*.

Court has jurisdiction to give a ruling and review the legality of a decision adopted under the CFSP:

"I would also point out that there is a difference in wording between the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU.

43. According to the last sentence of the second subparagraph of Article 24(1) TEU, 'the Court of Justice of the European Union shall not have jurisdiction with respect to *these provisions*', (17) whereas the first paragraph of Article 275 TFEU provides that 'the Court of Justice of the European Union 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*'.

44. The use in the first paragraph of Article 275 TFEU of the words 'provisions relating to the [CFSP]' might create the false impression that the European Union Courts have no jurisdiction in relation to any provisions of the FEU Treaty that, while not falling within the scope of the CFSP, may relate to it".

In other words, a "relation" with CFSP does not automatically grant jurisdictional immunity to an EU act. As clarified by the AG:

"52. I would point out that the reason for the limitation of the Court's jurisdiction in CFSP matters brought about by the 'carve-out' provision is that CFSP acts are, in principle, solely intended to translate decisions of a purely political nature connected with implementation of the CFSP, in relation to which it is difficult to reconcile judicial review with the separation of powers. [...]

65. I therefore consider that the 'claw-back' provision in the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU enables the European Union Courts to review the compliance with Article 40 TEU of all CFSP acts (either in an action for annulment or in preliminary ruling proceedings) as well as to review the legality of CFSP decisions adopted by the Council in accordance with Chapter 2 of Title V of the EU Treaty which provide for restrictive measures against natural or legal persons (again, either in an action for annulment or in preliminary ruling proceedings)".

Yet, important also in this case is the relation with Art. 275 TFEU. This link between CFSP and other policies, however, is not a rare one. Given the dynamics of the Lisbon approach to consolidating the EU's external relations, it will be increasingly difficult to deny a link with other policies, allowing the Court to take CFSP-dimensions along in its assessment of those policies. Arguments can be found why the current Treaty regimes also allows for an extended role for domestic courts in relations to CFSP. Recently this question was addressed briefly by AG Kokott in her View on Opinion 2/13 (the accession of the EU to the European Convention on Human Rights). She somewhat cryptically argued:

"[T]he very wide interpretation of the jurisdiction of the Courts of the EU which it proposes is just not necessary for the purpose of ensuring effective legal protection for individuals in the CFSP. This is because the – entirely accurate – assertion that neither the Member States nor the EU institutions can avoid a review of the question whether the

measures adopted by them are in conformity with the Treaties as the basic constitutional charter does not necessarily always have to lead to the conclusion that the Courts of the EU have jurisdiction”.⁵⁹

The reason is that “national courts or tribunals have, and will retain, jurisdiction”.⁶⁰ A similar and even more extensive reference to domestic courts was made by AG Wahl in the *H* case.⁶¹ In fact, according to the AG, when the CJEU does not have jurisdiction it is for the national courts “to examine the lawfulness of the contested decisions and rule on the related claim for damages” (para. 89). In doing so, they may have to ask preliminary questions:

“90. [...] it cannot be excluded that the competent national courts may have doubts as to the extent of their review of the contested decisions as well as on the possible consequences of that review.

91. Should that be the case, I would remind those courts that they are at liberty – and they may sometimes be obliged – to submit a request for a preliminary ruling to the Court under Article 267 TFEU. In that connection, the Court may still be able to assist those courts in deciding the case before them, while remaining within the boundaries established by Articles 24(1) TEU and 275 TFEU. It occurs to me that such requests for a preliminary ruling ought to be welcomed [...]”.

Indeed, an acceptance of a role of domestic courts (which is, by the way, fully in line with Art. 19 TFEU as well as Art. 47 of the Charter of Fundamental Rights of the European Union (EU Charter); and the Courts earlier view in Opinion 1/09)⁶² almost automatically leads to the need for preliminary references. As we have seen, in the AG’s Opinion in the above-mentioned *Rosneft* case it was also held that a relation with CFSP does not automatically change the rules on preliminary rulings for domestic courts:

“66. The contrary view, expressed by Advocate General Kokott in her View in Opinion 2/13 [...] according to which ‘the Treaties [...] specifically do not provide for the Court of Justice to have *any* jurisdiction to give preliminary rulings in relation to the CFSP’, would, in my opinion, be difficult to reconcile with Article 23 TEU, which provides that ‘the Union’s action on the international scene [...] shall be guided by the principles [...] laid down in Chapter 1’, which include the rule of law and the universality and indivisibility of human rights and fundamental freedoms, which unquestionably include the right of access to a court and effective legal protection”.

⁵⁹ Opinion of AG Kokott delivered on 13 June 2014, Opinion 2/13, para. 95. For an academic appraisal see, *inter alia*, A. LAZOWSKI, R.A. WESSEL, *When Caveats turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, in *German Law Journal*, 2015, pp. 179–212.

⁶⁰ *Ivi*, para. 96.

⁶¹ Opinion of AG Wahl, *H v. Council of the European Union and European Commission*, cit.

⁶² Opinion of the Court (Full Court) of 8 March 2011, Opinion 1/09, *European Patent Court*.

Yet, what about the other two notions that are often said to differentiate CFSP norms from other EU norms: primacy and direct effect.⁶³ The question of primacy and direct effect of CFSP norms is far from new. Earlier, it has been contended that these principles cannot be said to be completely alien to the CFSP legal order.⁶⁴ At the same time Declaration No. 17 on primacy explicitly refers to both the TFEU and the TEU: “[...] in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law”. Obviously, one could argue that there is not so much case law in the area of CFSP; yet this could also be seen as a reference to the *Segi* case in which the Court had already claimed the Union-wide application of primacy.⁶⁵

Indeed, both the legal nature and the normative content of CFSP decisions may form an obligation for Member States to allow for direct effect and primacy in their national legal order in specific cases. This would also be in line with the general demand laid down in Art. 19, para. 1, TEU that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. Once individuals are confronted with rights or obligations on the basis of CFSP decisions that are “sufficiently clear and unconditional” it may become difficult for national courts to simply ignore an important EU decision simply because its status has not been regulated in as much detail as some other EU instruments. Effective legal protection includes the protection of fundamental rights,⁶⁶ which (as underlined by Art. 6, para. 3, TEU) “shall constitute general principles of the Union’s law”.

All in all, while enforcement of CFSP decisions as such remains difficult,⁶⁷ the case law of the Court reveals that the “special position” of CFSP should not affect general principles of EU law, that there may be good reasons to opt for CFSP rather than for any other external policy and that individuals have a right to effective protection. Admittedly, apart from perhaps the restrictive measures, not many CFSP decisions have a sub-

⁶³ According to the first principle a Court would need to set aside a national rule in case of a conflict with an EU norm; on the basis of the second principle EU norms can in principle be invoked in domestic proceedings.

⁶⁴ R. GOSALBO-BONO, *Some Reflections of the CFSP Legal Order*, cit.

⁶⁵ In a similar vein: Court of Justice, judgment of 16 June 2005, case C-105/03, *Pupino* [GC].

⁶⁶ Including the right to access to justice. See also C. ECKES, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford: Oxford University Press, 2009.

⁶⁷ Cf. Opinion of AG Wahl, *H v. Council of the European Union and European Commission*, cit., para. 39: “no judicial procedure for enforcement and penalties in case of breaches is expressly provided for in the Treaties. Accordingly, there is hardly any way to ensure compliance with those rules by recalcitrant Member States or by non-conforming EU institutions”.

stantive impact on the EU's legal order or on the position of individuals.⁶⁸ Yet, the foreseen extended role of the Union in global governance may change this.

IV. EXTERNAL PRESSURES TOWARDS INTEGRATION

Integration in European foreign policy is not only triggered by an internal institutional dynamic, but increasingly also by external reactions to the EU's global ambitions and its more visible posture in the international arena. The wish of the Union to *play along* calls for an adaptation of the Union to the rules and customs of international law. This is indeed a two-way street: while we have seen that the Union aims to contribute to global governance, it also has to find its place in a legal order that has states as its primary subjects.

At the same time, the internal debates (partly described above) have to a large extent resulted in navel-gazing. The outside world is less interested in internal (horizontal as well as vertical) competence battles. This has led the Union to develop its so-called *comprehensive approach*, which as observed by Merket "indicates a tendency to move away from pre-determined off-the-shelf solutions or politically correct but vague calls for coherence. This is replaced by a gradual systematisation of mechanisms that stimulate continuous interaction between all relevant stakeholders in order to arrive at made-to-measure comprehensive approaches continuously adapted to the specific needs of any given situation".⁶⁹ The question then is to which extent outside pressures help the EU in integrating and consolidating its external relation regime.

It is not to be expected that the international legal order will be adapted to allow the European Union to fully play its role as a global actor.⁷⁰ In fact, the Union's demands – often related to its complex internal division of competences – may increasingly annoy third States for whom it may remain unclear with whom they are actually dealing.⁷¹ The current Treaty regime therefore aims to streamline the Union's external representation.

⁶⁸ See also P.J. CARDWELL, *On 'Ring-Fencing' the Common Foreign and Security Policy*, cit., p. 461: "[t]he reasoning set out above leads to a conclusion that the practice of the CFSP, beyond sanctions, remains declaratory in nature. 'Declaratory' is a criticism that has been levelled at the CFSP since its creation, and whilst declarations may have some foreign policy impact, it is curious that these are the hallmark of the policy, instead of the instruments which have been specifically created for its use. The extent to which non-CFSP measures are used already suggests that actions and policies toward third countries or issues are there but not badged as such under the CFSP".

⁶⁹ H. MERKET, *The European Union and the Security-Development Nexus*, cit., Conclusions of Ch. 6.

⁷⁰ See more extensively on this: R.A. WESSEL, *Flipping the Question: The Reception of EU Law in the International Legal Order*, in *Oxford Yearbook of European Law*, 2016 (forthcoming).

⁷¹ A recent example is the Draft Agreement on the Accession of the EU to the European Convention on Human Rights, which contains many complex innovations to allow the Union to participate in what was set-up as a system for states only. See on the various aspects for instance the special issue of the *German Law Journal*, 2015, no. 1, www.germanlawjournal.com.

While this is also clear driven by internal developments, the external pressure is obvious as well.⁷²

Traditionally, diplomatic relations are established between States and the legal framework is strongly State-oriented. As an international organization enjoying international legal personality the EU is allowed to enter into legal relations with States and other international organizations. At the same time, its external competences are limited by the principle of conferral (Art. 5 TEU), and in many cases the EU is far from exclusively competent and shares its powers with the Member States. Indeed, the TEU mandates that “essential state functions”⁷³ of the Member States are to be respected by the Union and it is in diplomatic relations in particular that one may come across these State functions.⁷⁴ Yet, the Treaties reveals the EU’s new diplomatic ambitions, in particular through the establishment of the EEAS, which has been called “the first structure of a common European diplomacy”.⁷⁵ In the report of December 2011 evaluating the first year of the new Diplomatic Service, its foundation is viewed as an historic opportunity to rise above “internal debates pertaining to institutional and constitutional reform”, and instead to focus on “delivering new substance to the EU’s external action”.⁷⁶ When the EEAS is to deliver this “new diplomatic substance”, the Treaties obviously provide binding guidance on the method and substance of EU action in the world. But at the same time, everything will have to fit into the existing international legal framework.

International representation is a core element of international (diplomatic) law. The first indent of Art. 3, para. 1, VCDR lists as a task of Embassies: “[r]epresent the sending state in the receiving state”.⁷⁷ Several EU Treaty articles provide a solid basis for the Union to establish a formal and substantive presence as a single, fully matured diplomatic

⁷² See on this topic also: J. WOUTERS, S. DUQUET, *Unus inter plures? The EEAS, the Vienna Convention and International Diplomatic Practice*, in J. BÁTORA, D. SPENCE (eds), *The European External Action Service*, cit. See earlier R.A. WESSEL, *Can the European Union Replace its Member States in International Affairs? An International Law Perspective*, in I. GOVAERE, E. LANNON, P. VAN ELSUWEGE, S. ADAM (eds), *The European Union in the World: Essays in Honour of Marc Maresceau*, Leiden, Boston: Martinus Nijhoff Publishers, 2013, pp. 129-147; as well as R.A. WESSEL, B. VAN VOOREN, *The EEAS’ Diplomatic Dreams and the Reality of International and European Law*, in *Journal of European Public Policy*, 2013, pp. 1350-1367.

⁷³ Cf. Art. 4, para. 2, TEU.

⁷⁴ The EEAS Decision acknowledges this in Art. 5, para. 9: “[t]he Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States”. See also B. VAN VOOREN, *A Legal-Institutional Perspective on the European External Actions Service*, in *Common Market Law Review*, 2011, pp. 475-502, who points out that due to consistency obligations this should be read as a general obligation to cooperate between the EEAS and the national diplomatic services (p. 497).

⁷⁵ Report of the EU CARE project, *Consular and Diplomatic Protection: Legal Framework in the EU Member States*, December 2010, www.careproject.eu, p. 31.

⁷⁶ EEAS, *Report by the High Representative to the European Parliament, the Council and the Commission*, 22 December 2011, p. 2. See also S. BLOCKMANS, *The European External Action Service One Year On: First Signs of Strengths and Weaknesses*, in *CLEER Working Paper*, 2012.

⁷⁷ Art. 3, let. a), VCDR.

actor represented in third countries and international organisations.⁷⁸ As regards the physical presence through its delegations, EU activities are based on Art. 221, para. 1, TFEU: “Union Delegations in third countries and at international organisations shall represent the Union”. The ambition flowing from this new provision in the TFEU should be quite clear: the Union no longer wishes to have an international presence through delegations of only one of its institutions (e.g. Commission delegations), or through the diplomats of the Member State holding the rotating Presidency.⁷⁹ The purpose of this new Treaty provision was to have “less Europeans and more EU”,⁸⁰ e.g. a single diplomatic presence for the Union speaking on behalf of a single legal entity active globally.

The transformation from Commission delegations into Embassies proper was not purely formal, but was in some cases accompanied by added powers to at least some of those representations abroad. While all 139 Commission delegations⁸¹ were transformed into EU Delegations mere weeks after the entry into force of the Lisbon Treaty, 54 were immediately transformed into “EU embassies” in all but name.⁸² This meant that these *super-missions* were not merely given the new name, but also new powers in the form of an authorization to speak for the entire Union (subject to approval from Brussels); and the role to co-ordinate the work of the Member States’ bilateral missions. Prominent exclusions among those 54 delegations were those to international bodies, of which there are eight: New York (UN), Geneva (UN and WTO), Vienna (IAEA, UNODC, UNIDO, OSCE), Strasbourg (Council of Europe), Addis Abeba (AU), Paris (UNESCO and OECD) and Rome (FAO, WFP, IFAD, Holy Sea, and Order of Malta). The Union still has to work out how to handle EU representation in multilateral forums under Lisbon.⁸³ However, it is certainly the EU’s ambition to “progressively” expand these powers to other EU delegations as well.⁸⁴

⁷⁸ Arts 220 and 221 TFEU, Arts 3, para. 5 and 21, para. 1, TEU.

⁷⁹ But see the EEAS document “EU Diplomatic Representation in third countries – First half of 2012”, Council of the European Union, doc. 18975/1/11, REV 1 of 11 January 2012, which reveals that in some countries the EU is still represented by a Member State.

⁸⁰ A. MISSIROLI, *The New EU Foreign Policy System After Lisbon: A Work in Progress*, in *European Foreign Affairs Review*, 2010, pp. 427–452.

⁸¹ See www.eeas.europa.eu.

⁸² A. RETTMAN, *EU Commission ‘Embassies’ Granted New Powers*, in *EUObserver*, 21 January 2010. Yet, see the many differences between Union Delegations and national embassies: P. KERRES, R.A. WESSEL, *Apples and Oranges? Comparing European Union Delegations to National Embassies*, in *CLEER Papers*, 2015.

⁸³ *Ibid.* Similarly, A. RETTMAN, *Ashton Designates Six New ‘Strategic Partners’*, quoting an EU official on the importance of the EEAS for the role of Mrs. Ashton in external representation: “Lady Ashton has de facto 136 ambassadors at her disposal”, 16 September 2010.

⁸⁴ See for example: EEAS 11808/2/11 REV 2, *EU diplomatic representation in third countries – second half of 2011*, Brussels, 25 November 2011, and EEAS 18975/11, *EU diplomatic representation in third countries – first half of 2012*, Brussels, 22 December 2011. These documents always start with two paragraphs quoting Art. 221 TFEU and an excerpt from the Swedish Presidency report on the EEAS of 23 October 2009, which set out the Member States’ view on the scope of the EEAS in relation to the HR mandate. On

So far, the representation by the Union delegations largely followed the pre-Lisbon practice which was developed on the basis of the experience with the Commission delegations. Representation by the Union did not replace representation by the Member States. Indeed, as Art. 5, para. 9, of the EEAS Decision provides: “[t]he Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States”. Yet, on-going budget cuts may trigger Member States to close some of their own representations and to rely more on the new “EU Embassies”. This may be unthinkable for most of the larger Member states at this moment, and the current EEAS legal regime does not yet include this option. Obviously, any transfer of powers will depend on the consent of the Member States, as they may have good reasons to continue a bilateral representation. After all, essential elements of a relationship between a Member State and a third State may not be covered by the EU’s competences or a special relationship may exist between an EU State and a third country, either due to historical ties and/or geographic location.⁸⁵ Nevertheless, one medium-sized Member State already openly discussed the possible benefits of a transfer of certain consular tasks and the collection of information to Union delegations.⁸⁶

The development of the external representation through the High Representative, but above all by establishing “Union Delegations”, was certainly also triggered by the demands and customs of the international diplomatic system. The arrangements concluded with third States reveal that the Union has adopted the rules of the game and has in fact *contracted-in* to the rules of international diplomatic law.

V. CONCLUSION

The European Union’s foreign and security policy represents a clear paradox. Set-up as a largely intergovernmental network, the aim of most Member States was to limit integration in the area. Yet, both internal and external factors put the intergovernmental nature into perspective and the Union’s legal order as well as the global system pulled CFSP closer to other policy areas. Ironically, this seems to have happened while the perception of *otherness* was not affected; or perhaps *because* this perception was not affected. In a way it is surprising how limited the effects of Treaty changes and internal and external developments have been on the perception of the nature of CFSP. Most

that basis these reports continue by stating that the “responsibility of representation and coordination on behalf of the EU has been performed by a number of Union delegations as of 1 January 2010, or later”, and insofar as they have not taken over such functions, pre-Lisbon arrangements and the role of the Presidency continue to apply.

⁸⁵ C. CUSENS, *The EEAS vs. the National Embassies of EU Member States?*, in P. QUINN (ed.), *Making European Diplomacy Work: Can the EEAS Deliver?*, in *EU Diplomacy Papers 8/2011*, Bruges, Natolin: College of Europe, 2011, p. 12.

⁸⁶ See the report by the Netherlands Ministry for Foreign Affairs, “Nota modernisering Nederlandse diplomatie” of 8 April 2011, pp. 10 and 18, www.rijksoverheid.nl.

probably, the same amount of integration could not have been reached when the issues would have been laid out on the table.

Despite the fact that one stream in literature has always pointed to the clear links between CFSP and other Union policies, legal scholarship is traditionally slow in picking up on real life developments. As we have seen, other academic disciplines (such as political science and European Studies) have been more clear on the integrationist tendencies in CFSP. Yet, these days many more lawyers would agree with Cardwell that “the perspective of the CFSP as being intergovernmental is not only out-dated but misleading because it stresses that the Member States are the only significant actors in it and that anything which concerns the world beyond the borders of the EU must take place within CFSP”.⁸⁷ At the same time, while political scientists may more easily take things as they come, lawyers struggle with inconsistencies and paradoxes. As indicated by Merket, for instance, “one of the main post-Lisbon challenges for EU external action will therefore be to solve this integration-delimitation paradox. In other words, how to reconcile the remaining plea for delimitation of the CFSP, with the equally strong call for coherence, integration and comprehensiveness”.⁸⁸

The present contribution aimed to show that this is not a challenge we should fear, and that the development of CFSP is as much connected to internal integrationist tendencies as to external demands to the new kid on the (State-centred) block.

⁸⁷ P.J. CARDWELL, *On 'Ring-Fencing' the Common Foreign and Security Policy*, cit., p. 456.

⁸⁸ H. MERKET, *The European Union and the Security-Development Nexus*, cit., Ch.1.



ARTICLES

NEW PERSPECTIVES ON EU-IMF RELATIONS: A STEP TO STRENGTHEN THE EMU EXTERNAL GOVERNANCE

MANUEL LOPEZ-ESCUDERO*

TABLE OF CONTENTS: I. Introduction. – II. Pragmatic arrangements in the EMU external governance. – II.1. The legal and political obstacles against the external projection of the Euro area. – II.2. The pragmatic arrangements: The EU in the IMF. – III. The impact of the 2010 IMF reform implementation on the EU. – III.1. The EU representation in a renovated IMF Executive Board. – III.2. New quota assignments and the EU. – IV. A single EU chair in the IMF? The 2015 Commission Proposal and the way forward. – IV.1. The EU membership possibilities at the IMF. – IV.2. Improvement of the coordination of the EU Member States on IMF issues. – IV.3. Euro area unified representation. – V. Conclusion.

ABSTRACT: After many years of inactivity, the time has come to activate the external side of the EMU and surpass the time of pragmatic arrangements applied until now to the EU-IMF relationship. The economic crisis and the subsequent sovereign debt crisis in Europe have forced more transfers of competences from the EU countries to the EU institutions in the economic policy field, and this new dynamic in the European integration process provides a strong rationale for the EU and Euro area to reassess the external representation of the EU on EMU issues, including the participation in international institutions and fora and, in particular, in the IMF. Moreover, the implementation of the 2010 IMF reform after the US congressional approval will eliminate legal obstacles to a consolidation of the EU Member States' constituencies in the IMF. To develop Art. 138 TFEU, the European Commission presented a proposal to enhance the Euro area representation in the IMF in October 2015. After a reshuffling of the current IMF constituencies with Euro area Member States, the proposal advocates EU mixed representation in the IMF (EU and their Member States) with a single chair for the Euro area in the IMF Executive Board from 2025.

KEYWORDS: EU external action – external representation of EMU – EU-IMF relationship – 2010 IMF reform – EU single chair in the IMF – Art. 138 TFEU.

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I. INTRODUCTION

The Maastricht Treaty and then the Lisbon Treaty thoroughly regulate the internal aspects of the Economic and Monetary Union (EMU). In contrast, external representation was extremely complex, and its regulation was very limited in the Maastricht Treaty (Art. 111 of the Treaty establishing the European Community – TEC) and the Treaty of Lisbon maintains this line with minor modifications in Arts 138 and 219 TFEU.

As a result of the Great Recession and the subsequent European debt crisis, the EU has reformed the internal economic governance of the EMU. Since 2010, European Union institutions have adopted many new EU secondary law rules and even intergovernmental treaties outside EU law to reinforce the internal governance of the economic leg of the EMU. These new measures are the strengthening of the EU mechanism to coordinate the national economic policies and the tightening of sanctions in case Member States breach EU disciplines, the introduction of crisis resolution mechanisms to assist Member States in crisis, and the transfer of responsibilities in banking supervision to the EU institutions in order to achieve a banking union.¹ In addition, the Euro area has a single monetary and exchange rate policy.

The improvements that have been achieved on further internal integration of the Euro area need to be projected externally and they should induce a change in the external EMU governance and open the opportunity for a centralized representation of the Euro area.² It would be logical to equilibrate the internal and the external sides of the EMU in order to allow the Euro area to play a more active role in international financial institutions and to shape effectively its future role in the global financial architecture.

¹ On the reforms in the European economic governance after the crisis, see generally F. ALLEMAND, F. MARTUCCI, *La nouvelle gouvernance économique européenne*, in *Cahiers de droit européen*, 2012, pp. 1-100; P. CHITI, J. TEIXEIRA, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, in *Common Market Law Review*, 2013, p. 683; O. CLERC, *La gouvernance économique de l'Union européenne. Recherches sur l'intégration par la différenciation*, Brussels: Bruylant, 2012; A. HINAREJOS, *Fiscal Federalism in the European Union: Evolution and Future Choices for EMU*, in *Common Market Law Review*, 2013, p. 621; D. HODSON, *Governing the Euro Area in Good Times & Bad*, Oxford: Oxford University Press, 2011; J.P. KEPPELNE, *Institutional Report*, in U. NEERGAARD, D. JACQUESON, O. DANIELSEN (eds), *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU. XXVI FIDE Congress in Copenhagen, 2014*, Copenhagen: DJØF Publishing, 2014, p.179; R. LASTRA, J.V. LOUIS, *European Economic and Monetary Union: History, Trends, and Prospects*, in *Yearbook of European Law*, 2013, pp. 4-5; K. LENAERTS, *EMU and the EU's Constitutional Framework*, in *European Law Review*, 2014, p. 753; M. LÓPEZ-ESCUDEO, *La nueva gobernanza económica de la Unión Europea: ¿una auténtica unión económica en formación?*, in *Revista de Derecho Comunitario Europeo*, 2015, p. 361; F. MARTUCCI, *L'ordre économique et monétaire de l'Union européenne*, Brussels: Bruylant, 2016.

² D. SCHWARZER, F. STEINBERG, D. VALIANTE, *Towards A Common External Representation for the Eurozone?*, Madrid: Real Instituto Elcano, March 2013, p. 5; R. CHEMAIN, *L'UE dans le système monétaire international*, in M. BENLOLO-CARABOT, U. CANDAS, D. CUJO, *Union européenne et droit international*, Paris: Pédone, 2013, p. 503.

The external governance of the Euro area cannot continue to be the *failed* or the *forgotten* component of the EMU. The price to pay for this weakness is too high: the Euro area does not have an influence or a leadership role in monetary and financial international relations commensurate to its economic weight and the position of the Euro as the second international currency after the US dollar.³

More than 15 years after the implementation of the EMU, we have only pragmatic arrangements to allow a scarce Euro area participation in the international financial organizations and fora. This regrettable situation could evolve in the coming months due to two elements: the entry into force of the 2010 IMF reform and the process of completing the EMU. As the Five Presidents' report of June 2015 underlines, in the way of the completion of EMU perhaps the most difficult challenge will be the strength of its external governance.⁴ The first step to reach this objective was the publication by Commission in October 2015 of a Communication designing a road map for a more consistent external representation of the Euro area⁵ and a Proposal for a Council Decision in order to unify progressively the Euro area representation in the International Monetary Fund (IMF).⁶

Another event that opens new possibilities for the EU and Euro area to improve their representation at the IMF is the approval of the 2010 IMF reform by US legislature on December 2015. After five years of US veto, this reform will entry into force and it contains relevant legal changes of the IMF Articles of Agreements that will facilitate the consolidation of EU representation at the IMF.

Our aim is to analyse the legal questions raised by this necessary reinforcement of the external economic governance of the Euro area. Our study will focus on the EU-IMF relationship because the IMF is the most relevant and powerful international financial organization and the EU participation in it is an essential part of the EMU external relations, and a litmus test for the actions of the member.

³ R. SMITS, *International Representation of Europe in the Area of Economic and Monetary Union: Legal Issues and Practice in the First Ten Years of the Euro*, in *Euredia, European Banking and Financial Law Journal*, 2009, pp. 297-333. On the international role of the euro, see generally I. ANGELONI, A. BENASSY-QUÉRÉ, D. CARTON, Z. DARVAS, E. PHEDESTRAIS, J. PISANI-FERRY, *Global Currencies for Tomorrow: A European Perspective*, Brussels: Bruegel, 2011; D. COHEN, *The Future of Global Currency. The Euro Versus the Dollar*, New York: IIE, 2011; ECB, *International Role of the Euro*, Frankfurt: European Central Bank, 2013; M. LOPEZ-ESCUDERO, *El Euro en el Sistema Monetario Internacional*, Madrid: Tecnos, 2005; J. PISANI-FERRY, A. POSEN (eds), *The Euro at 10: The Next Global Currency?*, Brussels: Bruegel, 2009.

⁴ Five Presidents' Report on Completing Europe's Economic and Monetary Union, 22 June 2015, ec.europa.eu.

⁵ Communication COM/2015/0602 final of 21 October 2015 from the Commission to the European Parliament, the Council and the ECB on a roadmap for moving towards a more consistent external representation of the euro area in international fora.

⁶ Commission proposal for a Council Decision laying down measures in view of progressively establishing unified representation of the euro area in the International Monetary Fund, COM(2015) 603 final.

First, I intend to explain the minimalist approach applied to IMF-EU relations since the introduction of the single currency in 1999 and the pragmatic solutions put into practice to take into account the Euro reality. Second, I will review the consequences for EU-IMF relations of the implementation of the 2010 IMF reform, which comes into force after US Congressional approval in December 2015. Third, I will analyse the Decision Proposal introduced by the European Commission in October 2015 in order to achieve a unified Euro area representation in the IMF by 2015. Finally, I will present some conclusions for developing better EU-IMF relations, useful also for better international economic and financial governance.

II. PRAGMATIC ARRANGEMENTS IN THE EMU EXTERNAL GOVERNANCE

The original EU primary law included only one article as the express legal basis for the external governance of EMU. This was Art. 111 TEC, which after the Lisbon Treaty became Arts 138 and 219 TFEU.⁷ The last article regulates the EU competences to conclude international treaties on EMU matters and the single exchange rate policy of the Euro area, which are elements of the EMU external relations not envisaged in our study. Art. 111, para. 4, was the rule on EU participation in international financial organisation, but it was always neutralised by the EU Member States.

In effect, the Commission submitted in 1998 a modest proposal for a Council decision on external representation⁸ calling for the Council, along with the Commission and the European Central Bank (ECB), to represent the Community at the international level in the context of the EMU. The Council could not agree on this proposal and, instead, it submitted a report to the Vienna European Council, which adopted it, considering that a pragmatic approach would be the most successful in minimizing the adaptation of the international rules and practices.⁹ There were too many legal and political obstacles to resolve and the wait- and- see tactic dominated this area of EU external action.

⁷ See J.V. LOUIS, *The International Projection of the Euro and the International Monetary System*, in M. TELÒ (ed.), *The European Union and Global Governance*, London: Routledge, 2009, p. 74.

⁸ Commission proposal for a Council Decision on the Representation and Position Taking of the Community at International Level in the context of Economic and Monetary Union, COM(1998) 637 final.

⁹ European Council Conclusions of 11-12 December 1998. See the comments from S. CAFARO, *The Missing Voice of the Euro. Legal, Technical and Political Obstacles to the External Representation of the Euro Area*, in *Il Diritto dell'Unione europea*, 2011, pp. 901-902; B. STEINKI, *Competencies of the European Community on International Monetary Fund Matters: an Overview of the Key Legal Issues*, in *IMF, Current Developments in Monetary and Financial Law*, Washington: IMF, 2003, p. 120.

II.1. THE LEGAL AND POLITICAL OBSTACLES AGAINST THE EXTERNAL PROJECTION OF THE EURO AREA

The external relations of the EMU were and continue to be a field full of legal and political obstacles. Some of these barriers have their origin in the EMU legal framework and in the EU Member States' attitudes towards the international financial institutions, especially the IMF, and others come from the international financial law and the institutional dynamics of the international financial organisations and fora.

If we look at the EU law, it has also generated some barriers against the developments of the EMU external relations. The most relevant are: the asymmetrical character of the EMU, the dichotomy between the EU and the Euro area, and the reluctance of some EU Member States and their bureaucracies to lose privileged positions at the IMF and other financial institutions, in particular some Euro area members holding the chair or the alternate executive director position of their constituencies.¹⁰

The EMU has been characterized by a specific combination of monetary transfer of competences from the Member States to the EU institutions, the ECB, and the weak economic coordination of national economic policies at the EU level. The asymmetry between the *M* of EMU and the *E* is one of the dominant features of EMU and it determines much of the EMU's external relations.¹¹ Taking into account the logic of Arts 3, para. 2 and 216, para. 1, TFEU and the CJEU case-law on EU external competences,¹² I

¹⁰ This argument was mentioned by European Commission, *EMU@10: The Evolution of Economic Governance in EMU*, in *Economic Papers* no. 328, 2008, p. 46. See the strong criticism of the former Executive Board member of the ECB L. BINI SMAGHI, *Powerless Europe: Why is the Euro Area Still a Political Dwarf?*, in *International Finance*, 2006, p. 16 "The real obstacle to stronger [Euro area] representation does not reside in the aversion of its citizens but rather in its national institutions and policy makers' reluctance to leave their seats at the table. [...] Unless national representatives are particularly gifted in understanding the little power that they have in their current role, they will tend to use all possible arguments to oppose a single Euro area representation. The ultimate argument is 'the political conditions are not yet ripe', which means in plain words 'I don't like it'."

¹¹ ECB, *The External Representation of the EU and EMU*, in *ECB Monthly Bulletin*, May 2011, pp. 96-97; M. DUTZLER, *EMU and the Representation of the Community in International Organizations*, in S. GRILLER, M. WEIDEL (eds), *External Economic Relations and Foreign Policy in the European Union*, Wien: Beck, 2002, p. 449; M. HERRMANN, *Monetary Sovereignty of the Euro and External Relations of the Euro Area: Competences, Procedures and Practices*, in *European Foreign Affairs Review*, 2002, p. 1; M. LÓPEZ- ESCUDERO, *La politique de taux de change de l'euro vis-à-vis des monnaies de pays tiers*, in *Mélanges en hommage à Jean-Victor Louis*, Vol II, Brussels: Bruylant 2003, pp. 282-300; J.V. LOUIS, *Les relations extérieures de l'union économique et monétaire*, in E. CANNIZZARO (ed.), *The European Union as an Actor in International Relations*, The Hague: Kluwer, 2002, p. 77; C. ZILIOLI, M. SELMAYER, *The External Relations of the Euro Area: Legal Aspects*, in *Common Market Law Review*, 1996, p. 273.

¹² Court of Justice, judgment of 31 March 1971, case 22/70, *Commission v. Council ('ERTA')*; opinion 1/76 of 26 April 1977; opinion 1/94 of 15 November 1994; judgment of 14 April 2005, case C-519/03, *Commission v. Luxembourg*; judgment of 14 July 2005, case C-433/03, *Commission v. Germany*; opinion 1/03 of 7 February 2006; judgment of 24 April 2007, case C-523/04, *Commission v. Netherlands*; opinion 1/13 of 14 October 2014. About this doctrine see among others P. EECKHOUT, *EU External Relations Law*, Oxford:

consider an exclusive EU external competence in monetary and exchange rates matters to be logical. Because the EU has an exclusive internal competence on monetary and exchange rate policy, the EU alone must be responsible for the external representation of that competence. In contrast, the EU is not able to exercise an exclusive external competence on economic matters due to the persistent internal competences of EU Member States on economic policy. It is an area of coordination or shared competence, and a mixed representation at the IMF (Member States and EU) and other organisations and fora would seem to be a consistent way for the EU to proceed.¹³

The dichotomy between the EU and the Euro area also seems an inconvenience for the EU relationship with the international financial institutions, especially the IMF. Nowadays, only 19 EU Member States make up the Euro area and nine Member States have not yet made the leap to the common currency. The EU cannot expect to substitute the EU members outside the Euro area in international organizations and forums like the IMF, because these countries maintain their monetary sovereignty.¹⁴

If we turn now to the international financial law, there are two main barriers to the EU participation in the complex network of international organisations and fora competent in financial affairs. The first one is the country-based character of these institutions and the second one is the institutional complexity of some organ of these organisations such as the IMF Executive Board.

The international financial architecture is built by states and the principle of one country, one money is at the centre of all the international financial institutions and forum. The Euro and the Euro area are aliens in this international financial system composed by the G-20, the Financial Stability Board (FSB) and many standard setting bodies, the Bank of International Settlements (BIS), the Organisation for Economic Cooperation

Oxford University Press, 2011; P. ECKHOUT, *Exclusive External Competences: Constructing the EU as an International Actor*, in European Court of Justice, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Berlin: Springer Verlag, 2013, pp. 613-626; R. GOSALBO BONO, *The Organization of the External Relations of the European Union in the Treaty of Lisbon*, in P. KOUTRAKOS (ed.), *The European Union's External Relations a Year After Lisbon*, CLEER Working Paper 2011/3; C. HILLION, P. KOUTRAKOS (eds), *Mixed Agreements Revisited*, Oxford: Hart Publishing, 2011; G. DE BAERE, P. KOUTRAKOS, *The Interactions Between the Legislature and the Judiciary in EU External Relations*, in T. SYRPIS (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge: Cambridge University Press, 2012.

¹³ For a different view, see J.V. LOUIS, *L'Union européenne et sa monnaie*, in *Commentaire J. Mégret*, Brussels: Bruylant, 2009, p. 162; and S. CAFARO, *Il governo delle organizzazioni di Bretton Woods. Analisi critica, processi di revisione in atto e proposte di riforma*, Torino: Giapichelli, 2012, p. 162.

¹⁴ In that sense, Art. 139 TFEU excludes the application of the following provisions of the Treaties to the Member States with a derogation: (g) monetary agreements and other measures relating to exchange-rate policy (Art. 219); [...] (i) decisions establishing common positions on issues of particular relevance for economic and monetary union within the competent international financial institutions and conferences (Art. 138, para. 1); (j) measures to ensure unified representation within the international financial institutions and conferences (Art. 138, para. 2).

and Development (OECD), and the IMF. The EU participation in this system needs to erode its intergovernmental nature.

In addition, some key organs of these international financial institutions has a complex institutional structure, as is the case of the IMF Executive Board that consists of 24 executive directors (EDs)¹⁵ but there is no EU, Euro area, or EU Member States constituency. The EU Member States' representation is spread among many executive directors. While Germany, the United Kingdom, and France each appoint one Executive Director and an alternate, all other EU Member States participate in the election of seven different executive directors and form mixed constituencies, together with other non-EU Member States. The EU countries are overrepresented in the IMF Executive Board with one-third of EDs and the high voting share (more than 30 per cent), but the influence of the Europeans on IMF policy is more limited than the US, which has, however, a quota about half the size of the EU's aggregate quota.¹⁶

II.2. THE PRAGMATIC ARRANGEMENTS: THE EU IN THE IMF

Due to these obstacles, the EU has applied a pragmatic approach in order to participate in the international financial and monetary system¹⁷ and, in particular, in the IMF.¹⁸ The most relevant pragmatic arrangements agreed by the EU and the IMF are the following:

¹⁵ See IMF Executive Directors and Voting Power, www.imf.org.

¹⁶ The clearest way to explain this contradiction is to use power index analysis, which political scientists use to measure the power of an institution's member by taking into account not only its voting share but also its real possibilities to influence the final outcome of the voting process. Applying the Banzhaf Index, the Coleman's Power Index, and the Shapley and Shubik Index, some economists have analysed the voting power of the EU and the Eurozone in the IMF. These analyses show that the US has more real voting power in the current IMF decision-making process than its voting share would suggest. See M. GIOVANNINI *et al.*, *External Representation of the Euro Area*, IP/A/ECON/FWC/2010_19, May 2012, p. 45; M. LEECH, S. LEECH, *Power Versus Weight in IMF Governance: the Possible Beneficial Implications of a United European Bloc Vote*, in A. BIURA (ed.), *Reforming the Governance of the IMF and the World Bank*, London: Anthem Press, 2005; P. BRANDER, H. GRECH, I. PATERSON, *Unifying EU Representation at the IMF Executive Board A Voting and Veto Power Analysis*, Vienna: Institute for Advanced Studies, 2009.

¹⁷ I focus in the EU-IMF relations, but the EU participation in other international institutions and fora conforming the international financial and monetary system is also very complex. See L. QUAGLIA, *The European Union and Global Financial Regulation*, Oxford: Oxford University Press, 2014; F. AMTENBRINK, N. BLOKKER, S. VAN DEN BOGAERT, M. CUYVERS, M. HEINE, C. HILLION, M. KANTOROWICZ, A. LENK, L. REPASI, *The European Union's Role in International Economic Fora. Paper 1: The G20*, 2015; J. WOUTERS, J. ODERMATT, *International Banking Standards, Private Law and the European Union*, in M. CREMONA, H.W. MICHLITZ, *The External Dimension of EU Private Law*, Oxford: Hart, 2014, p. 290; C. OHLER, *Back in Balance? The EU and the Challenges of International Financial Regulation*, in D. KOCHENOV, F. AMTENBRINK (eds), *The European Union's Shaping of the International Legal Order*, Cambridge: Cambridge University Press, 2014; ECONOPOLIS, *The European Union's Role in International Economic Fora. Paper 2: The FSB*, 2015; M. LOPEZ-ESCUDERO, *EU Banking Union and International Financial Law*, in L. HINOJOSA MARTÍNEZ, J.M. BENEYTO PÉREZ, *European Banking Union. The New Regime*, Deventer: Kluwer, 2015, pp. 181-198.

a) Restricted presence of the EU institutions in the IMF organs.

Even though all the EU countries participate in the IMF, the EU itself is not an IMF member because it is a strictly intergovernmental organisation only composed by sovereign States. Nevertheless, since 1999 the IMF granted ECB the observer status by a decision of the Board of Governors.¹⁹ The ECB sends a representative to meetings of the Executive Board which deal with Euro area policies in the context of the Art. IV consultations, Fund surveillance under Art. IV over the policies of individual Euro area members, the role of the Euro in the international monetary system, the World Economic Outlook, global financial stability reports, and world economic and market developments. The observer status means that the ECB representative at Executive Board meetings will be able to address the Board with the permission of the Chairman on matters within the responsibility of the ECB and may circulate written statements in advance of Board meetings to which the ECB has been invited.

The EU also has observer status in the International Monetary and Financial Committee (IMFC), a consultative IMF organ created in 1999. The President of the ECB and the European Commissioner for Economic and Financial Affairs, Taxation and Customs attend the twice a year meetings as observers in the context of the IMF's Spring and Annual Meetings. Both EU representatives are allowed to make statements at these meetings, commenting on economic developments related to the Euro area. The EU Council rotating presidency also makes a statement.

Finally, it is interesting to note that, for the IMF's first multilateral consultation on the topic of global imbalances in 2006, the Euro area as an entity (rather than individual Member States) was invited to participate together with China, Japan, Saudi Arabia, and the United States.²⁰

b) Incorporation of the Euro in the composition of the SDR basket.

The Special Drawing Right (SDR) is the unit of account for the IMF. Before the appearance of the Euro, the SDR basket was composed of the US dollar, the pound sterling, the Japanese yen, the French franc, and the deutsche mark. The IMF took into account the Euro and changed the composition of the SDR basket by three Board of Gov-

¹⁸ About the origin of this approach, see A. BROOME, *The Politics of IMF-EU Cooperation: Institutional Challenge from the Maastricht Treaty to the Launch of the Euro*, in *Journal of European Public Policy*, 2013, pp. 1-15.

¹⁹ IMF Decision 12925-(03/1) of 27 December 2002, as amended by Decision 13414-(05/01) of 23 December 2004, 13612-(05/108) of 22 December 2005, and 14517-(10/1) of 5 January 2010 on Selected decisions and selected documents of the International Monetary Fund, updated as of 31 December 2013.

²⁰ IMF Staff, *The Multilateral Consultation on Global Imbalances*, in *IMF Issues Brief*, July 2003. As a result, the IMF introduced in 2011 the first *consolidated spill-over report*, which assesses interconnections in the global economy and in particular potential spill-overs from the five most "systemic" economies. See ECB, *IMF Surveillance of the Euro Area and its Member Countries*, in *ECB Economic Bulletin no. 4*, 2015, p. 80.

ernors' decisions on September 1998.²¹ Taking effect on January 1, 1999, these decisions replaced references in the SDR basket to the Deutsche mark and the French franc with references to the Euro as the currency of Germany and France, respectively. In addition, the currency amounts of the Deutsche mark and the French franc in the SDR valuation basket have been automatically replaced by the Euro as the currency of Germany and France.²²

c) IMF surveillance of Euro area policies under Art. IV consultations.

Under Art. IV, Section 3, of the IMF Articles of Agreement the Fund oversees the international monetary system in order to ensure its effective operation and oversees the compliance of each member with its obligations. This is the legal basis for the surveillance activity of the IMF over the national economies of all member countries and over the world economy.²³ To take into account the EMU impact, the Executive Board adopted decisions in 1998 and 2002²⁴ to extend IMF surveillance to the Euro area, maintaining at the same time the individual supervision of the Euro area countries.²⁵

The new Decision on Bilateral and Multilateral Surveillance regulates the application of surveillance procedure to the currency unions and has thus completed the specific decisions on the Euro area. Its para. 8 says that members of currency unions remain subject to all of their obligations under Art. IV, Section 1, and, accordingly, each member is accountable for those policies that are conducted by union-level institutions on its behalf. In its surveillance over the policies of members of a currency union, the Fund will assess whether relevant policies implemented at the level of the currency union (including exchange rate and monetary policies) and at the level of members are promoting the balance of payments and domestic stability of the union and will advise on policy adjustments necessary for this purpose. Because exchange rate policies in a currency

²¹ IMF Decision 11801-(98/101) G/S, Decision 11802-(98/101) G/S and Decision 11803-(98/101), G/S, of 21 September 1998. See IMF, *Selected Decisions and Selected Documents of the International Monetary Fund*, updated as of 31 December 2013.

²² In November 2015, the IMF Executive Board decided that, effective 1 October 2016, the Chinese renminbi will be included in the SDR basket as a fifth currency, along with the US dollar, euro, Japanese yen and pound sterling. See IMF, *Review of the Special Drawing Right (SDR) Currency Basket*, IMF Factsheet, 30 November 2015.

²³ IMF, *Modernizing the Legal Framework for Surveillance - An Integrated Surveillance Decision*, 26 June 2012, www.imf.org.

²⁴ IMF Decision 11846-(98/125) of 9 December 1998 on modalities for conducting surveillance over the monetary and exchange rate policies of the members of the euro area, as set out in SM/98/257 (11/25/98), effective of 11 December 1998; IMF Decision 12899-(02/119) of 4 December 2002 on modalities for surveillance over Euro area policies in context of Art. IV consultations with member countries, as amended by Decision 14062-(08/15) of 12 February 2008. See IMF, *Selected Decisions and Selected Documents of the International Monetary Fund*, updated as of 31 December 2013, www.imf.org.

²⁵ In 2015, all the documents related to the IV consultation on Euro area are published in the same document IMF, *Euro Area Policies: 2015 Article IV Consultation Press Release; Staff Report; and Statement by the Executive Director*, in IMF Country Report 15/204, 10 July 2015, www.imf.org.

union are implemented at the level of the union, the principles for the guidance of members' exchange rate policies and the associated indicators set out in para. 21 of this Decision only apply at the level of the currency union. In my opinion, it is another relevant precedent for an EU membership at the IMF, taking into account the currency and not the home country of that currency.²⁶

The Euro area was also considered directly by the IMF in the Financial Sector Assessment Programme (FSAP). In April 2010 the IMF's Executive Board agreed to consider making stability assessments under the FSAP a mandatory part of bilateral surveillance. In September 2010 this agreement took concrete shape when the IMF made it mandatory for 25 jurisdictions with systemically important financial sectors to undergo financial stability assessments under the FSAP every five years. The Euro area is one of these jurisdictions with a systemically important financial sector, and the first EU-wide FSAP was concluded in March 2013.²⁷

d) IMF financial assistance for EU Member States.

The 2008 Great Recession precipitated a European sovereign debt crisis, and some EU members needed economic assistance from abroad to address their economic problems. EU Member States outside and inside the Euro area required financial assistance, and in this context the IMF and the EU have cooperated closely to assist those EU countries with balance of payments problems, the EU today surprisingly being the biggest user of IMF resources.

Art. V, Section 3 of the IMF Articles of Agreement allows the IMF to finance Member States with balance of payments problems. From the IMF law perspective, EU Member States have access to Fund facilities in the same way that all IMF members do, and being part of a currency union is irrelevant. The EU primary law does not preclude an EU Member State from requesting the use of IMF resources, but some requirements must be fulfilled which differ from those laid down for Euro area members. The EU Member States outside the Euro area which face difficulties can be helped by the EU using the medium-term financial assistance facility, for which the legal basis is Art. 143 TFEU developed by Regulation (EC) 332/2002 of the Council of the 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments. Art. 143, para. 2, let. a), TFEU enables the EU Member State to request aid from "any other international organization to which such a member may have recourse."

²⁶ A deep and critical study of the IMF surveillance practice in the euro area has revealed that the Eurozone surveillance and the surveillance of individual euro countries by the Fund were not integrated. See J. PISANI-FERRY, A. SAPIR, G. WOLFF, *An Evaluation of IMF Surveillance of the Euro Area*, Brussels: Bruegel Blueprint 14, 2011. See also Task Force on IMF Issues of the international relations committee of the European system of Central banks, *IMF Surveillance in Europe*, in ECB, *Occasional Paper Series no. 158*, 30 January 2015, and ECB, *IMF Surveillance of the Euro Area and its Member Countries*, cit., pp. 78-85.

²⁷ IMF, *European Union: Financial System Stability Assessment*, in *IMF Country Report no. 13/75*, March 2013.

The use of the EU's medium-term financial assistance facility was combined with IMF loans to help Hungary and Latvia in 2008 and Romania in 2009, 2011 and 2013.²⁸

The legal framework for Euro area countries under EU laws was different, and the assistance of the IMF to these states was more complicated. In spite of Art. 125 TFEU, which prohibits EU Member States from assuming the commitments of other EU Member States (the no bail-out clause), the EU Council in May 2010 used Art. 122, para. 2, as the legal basis for establishing an assistance mechanism for Euro area states in crisis and built the European Stabilization Mechanism with two legs. The EU leg was the European Financial Stabilization Mechanism (EFSM), established by Regulation (EU) 407/2010 of the Council of the 11 May 2010 on establishing a European financial stabilization mechanism, and reproducing for the Euro area countries the medium-term financial assistance facility for countries outside the Euro. The intergovernmental leg was the European Financial Stability Facility (EFSF), created outside EU law by Euro area Member States on a temporary basis until June 2013. In December 2010, the European Council decided to enact a permanent crisis resolution mechanism, and it was adopted as a simplified reform of the TFEU by the Decision 2011/199/EU of the European Council of the 25 March 2011.²⁹ The Treaty Establishing the European Stability Mechanism (ESM) was signed in Brussels on February 2, 2012. The ESM was inaugurated on October 8, 2012 and is operational, using the staff and building of the EFSF, which has substituted for the ESM. The ESM is an intergovernmental organization under public international law and a permanent crisis resolution mechanism for the countries of the Euro area.

These Euro area resolution mechanisms have been activated in the context of the EU sovereign debt crisis, and in many cases, the IMF has supported the Euro area countries: Greece in 2010 and 2012, Ireland in 2010, Portugal in 2011 and, Cyprus in 2013.³⁰ On December 3, 2012 the Spanish government formally requested the disbursement of close to 39.5 billion euros funds. The IMF did not agree to provide any loan to Spain, but it did agree to monitor European financial assistance for Spain's bank recapitalization program under technical assistance, which ended in January 2014. Ireland and Portugal concluded their programmes in December 2013 and June 2014, respectively, and they then entered into Post-Programme Monitoring. On August 2015, the European Commission signed a Memorandum of Understanding (MoU) with Greece following approval by the European Stability Mechanism Board of Governors for further stability support accompanied by a third economic adjustment programme. This paves the way for mobilising up to 86 billion euros in financial assistance to Greece over three years

²⁸ All the information is on the EU website at ec.europa.eu.

²⁹ European Council Decision 2011/199/EU of 25 March 2011 amending Art. 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro. The validity of this decision and the ESM Treaty was confirmed by the CJEU in the famous full Court judgment of 27 November 2012, case C-370/12, *Pringle*.

³⁰ All the information is on the EU website at ec.europa.eu.

(2015-2018).³¹ The IMF did not agree at the moment to lend more money to Greece but the IMF has confirmed that it has assisted in preparing the programme and it continues to support the process.

From an economic and political perspective, the IMF's involvement in the assistance to EU countries during the sovereign debt crisis was colossal.³² Even though the EU is not member of the IMF, the EU countries have been assisted by the Fund, which has collaborated extensively with the European Commission and ECB in the application of the Euro area programme countries.³³ The EU institutions had little experience in the surveillance of economic programmes, and they needed the IMF's expertise, which has more than 60 years of experience lending money and encouraging reforms to help countries with balance-of-payments problems or in financial crisis. This enhanced collaboration has become known as the Troika and its roles and activities generate some critics.³⁴

e) Coordination of the EU Member States at the IMF: the SCIMF and the EURIMF.

EU leaders have called for enhanced cooperation on economic and financial matters related to the IMF since the Vienna Council in 1998. Following this, EU Member States set up a multi-layered structure of coordination, composed of two bodies that allow for a certain level of coordination among EU Member States at the IMF: the EURIMF and the SCIMF.³⁵

The SCIMF is a sub-committee on IMF matters and related issues, linked to the Economic and Financial Committee (EFC).³⁶ The SCIMF comprises one representative of each Country's finance ministry and central bank plus two from the DG Ecfm of the European Commission and two from the ECB. The SCIMF meets eight to ten times a year

³¹ See the information on the EU web site at ec.europa.eu.

³² IMF, *The IMF and Europe*, in *Factsheet*, 10 April 2015. See, M. KOOPS, T. TOLKSDORF, *The European Union's Role in International Economic Fora. Paper 4: The IMF*, 2015, pp. 52-58.

³³ See W. BERGTHALER, *The Relationship between International Monetary Fund Law and European Union Law: Influence, Impact, Effect, and Interaction*, in R.A. WESSEL, S. BLOCKMANS (eds), *Between Autonomy and Dependence*, Berlin: Springer Verlag, 2012, pp. 183-186; and for a deep analysis of the IMF assistance to the EU countries, see J. PISANI-FERRY, A. SAPIR, G. WOLFF, *EU-IMF Assistance to Euro-area Countries: an Early Assessment*, Brussels: Bruegel Blueprint, 2013.

³⁴ See the European Parliament Resolution 2013/2277(INI) of 13 March 2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, europarl.europa.eu.

³⁵ J. AUBRECHTOVÁ, W. COUSSENS, G. PINEAU, *How to Reconcile EU Integration with the Governance of the International Monetary Fund*, in *Banking Journal* no. 18, 2010, pp. 7-8; J. KOOPS, D. TOLKSDORF, *The European Union's Role in International Economic Fora*, cit., pp. 46-48.

³⁶ The EFC also meets in a Euro area configuration, the so called Eurogroup Working Group (EWG), in which only the Euro area Member States, the Commission and the ECB are represented. In this configuration, the Committee prepares the work of the Eurogroup and usually meets once a month ahead of Eurogroup meetings. The Eurogroup Working Group members elect a President for a period of four years, which may be extended by a further two years. It is full-time role, in line with the agreement by the heads of state or government of the Euro area of 26 October 2011, and is based in Brussels in the General Secretariat of the Council of the EU. See, Eurozone Portal, eurozone.europa.eu.

in Brussels, depending on its chairman, and is a consensus-based body (although simple majority voting is the legal rule). Due to its intergovernmental nature, SCIMF is dominated by a culture of diplomacy and compromise building.³⁷ The President of SCIMF is chosen by consensus from amongst high-ranking officials belonging to the EFC.

The SCIMF drafts the text of the EU Council President's speech at the spring and autumn meetings of the IMFC, which is usually broad enough to be consensual. Another task of the SCIMF is to prepare the Art. IV review of the Eurozone, and, on an *ad-hoc* basis, the SCIMF may draft common policy papers known as "common understandings" about key subjects of IMF activity.

The second body, the EURIMF, is an informal body based in Washington, D.C., composed of representatives of EU Member States at the IMF and a representative from both the EU Delegation in Washington, D.C., and from the ECB representatives of the EU Member States in the IMF. Interestingly, the presidency of this group is chosen for two years, and therefore does not always reflect the EU presidency, which rotates more frequently. The EURIMF so-called permanent President is in charge of presenting the views of the EU and the Euro area to the IMF Executive Board in the form of written statements.³⁸

The EURIMF meets once to three times a week in Washington, and its activities consist primarily of day-to-day coordination and informal exchange of views and information on Member States' positions, especially on IMF economic surveillance activities. For the Euro area Art. IV discussions in the IMF Executive Board, the Euro area speaks with one voice and issues a written statement, which includes a distinct section on monetary policy prepared by the ECB. Apart from these Art. IV review exercises, EURIMF discusses almost all important political or economic topics that are on the agenda of the IMF Executive Board.³⁹

The EU Member States' coordination has evolved in recent years through EURIMF and SCIMF activities. However, there are limits to the ability of the EU members to forge common positions.

³⁷ EUODAD, *European Coordination at the World Bank and International Monetary Fund: A Question of Harmony?*, January 2006, www.euodad.org, p. 11

³⁸ D. HODSON, *The Paradox of EMU's External Representation: The Case of the G20 and the IMF*, in *EUSA Twelfth Biennial International Conference*, Massachusetts-Boston, 2011, p. 13.

³⁹ The most common and formalized coordination method is the EU Presidency *grey* mechanism. The EU presidency prepares a European grey to be discussed at EURIMF before the Board meeting. The strongest form of coordination is the so-called common written statement (also known as grey), which precludes other EU chairs from issuing separate written statements. The EURIMF is a deliberative body dedicated simply to exchanging views and opinions with a high degree of frankness and openness without taking binding decisions. The European executive directors are linked to their capitals. See ECB, *The External Representation of the EU and EMU*, in *ECB Monthly Bulletin no. 5*, 2015, p. 92.

III. THE IMPACT OF THE 2010 IMF REFORM IMPLEMENTATION ON THE EU

After a limited IMF reform in 2008, which became effective on 3 March 2011, a more ambitious IMF reform package was agreed to by the G-20 leaders in Seoul in November 2010. It was implemented by the Board of Governors of the IMF, which approved a package of relevant reforms of the Fund's quotas and governance on 15 December 2010, completing the 14th General Review of Quotas.⁴⁰

The package of IMF governance reforms should have been put in place by November 2012, in time for the biennial election of executive directors at that time. This deadline was not met, because the United States had not given its approval due to the Republican reluctance in the Congress. This country with 16.75 per cent of the vote in the IMF has a veto power because the entry into force of the 2010 reform requires 85 per cent of member countries' votes of the IMF, according to the IMF Articles of Agreements. Because of other countries' pressures, as well as US academics and officials⁴¹ and the IMF staff, the Obama administration has obtained Congress approval to ratify the reform on 18 December 2015.⁴²

The 2010 reform fixed an unprecedented 100 per cent increase in total quotas and a reallocation of quota and voting shares in the IMF to better reflect the changing relative weights of the IMF's member countries in the global economy. The reform also restructures the composition of the IMF's Executive Board, paving the way for an increase in the representation of emerging markets and developing economies (EMDCs) in the

⁴⁰ IMF Resolution 66-2 of 15 December 2010 on Fourteenth General Review of Quotas and Reform of the Executive Board, in IMF, *Selected Decisions and Selected Documents of the IMF, Thirty-Sixth Issue*, updated as of 31 December 2011, p. 9. The content of the 2010 reform is well explained in IMF, *IMF Quota and Governance Reform: Elements of an Agreement*, 2010. For a general overview, See S. HAGAN, *Reforming the IMF*, in M. GIOVANNOLI, D. DEVOS (eds), *International Monetary and Financial Law. The Global Crisis*, Oxford: Oxford University Press, 2010, pp. 40–68; W. BERGTHALER, G. BOSSU, *Recent Legal Developments in the International Monetary Fund*, in *European Yearbook of International Economic Law*, 2010, p. 391.

⁴¹ T. TRUMAN, *IMF Governance Reform, Better Late than Never*, in *Real Time Economic Issues Watch*, Washington, DC.: Peterson Institute for International Economics, 16 December 2015; R. M. NELSON, M. A. WEISS, *IMF Reforms: Issues for Congress*, Congressional Research Service, 9 April 2015; R. HENNING, *U.S. Interests and the International Monetary Fund*, in *Policy Brief no. 9-12*, Washington, DC.: Peterson Institute for International Economics; G. LAVELLE, *Legislating International Organization: the US Congress, the IMF and the World Bank*, Oxford: Oxford University Press, 2011.

⁴² In order for the proposed amendment on reform of the Executive Board to enter into force, acceptance by three-fifths of the Fund's 188 members (or 113 members) being 85 percent of the Fund's total voting power is required. As of 21 January 2016, 149 members having 94.04 per cent of total voting power had accepted the amendment. For the quota increases under the 14th General Review of Quotas to become effective, the entry into force of the proposed amendment to reform the Executive Board is required, as well as the consent to the quota increase by members having not less than 70 per cent of total quotas. As of 21 January 2016, 170 members having 97.667 percent of total quota had consented. See IMF, *Acceptances of the Proposed Amendment of the Articles of Agreement on Reform of the Executive Board and Consents to 2010 Quota Increase*, 22 January 2016, www.imf.org.

day-to-day decision-making at the IMF. There will be two fewer Board members from advanced European countries, and all Executive Directors will be elected rather than appointed, as some are now.

This reform is relevant for the EU position in the IMF in two ways. First, it introduces some legal changes in the composition and functioning of the Executive Board that would facilitate the joint EU/Euro area representation. The subsequent modifications in IMF quotas will erode the EU's relative position. Second, it marks a clear tendency to reduce the EU Member States' quotas in the IMF and the rise of the EMDCs linked to the increase in the influence of the emerging countries in the global economy.

III.1. THE EU REPRESENTATION IN A RENOVATED IMF EXECUTIVE BOARD

Some legal conditions of the current legal framework constrain joint EU representation at the IMF Executive Board. First, members having the five largest quotas (currently the US, Japan, Germany, the United Kingdom, and France) have the right but also the obligation to appoint an executive director to the Executive Board.⁴³ Accordingly, Germany, the UK, and France do not participate in the biannual regular elections of executive directors and thus no other EU member could join a German, British, or French chair. It would thus be impossible for all of the EU or Euro area members to form a single constituency and elect a single executive director. Second, the rules under which executive directors are elected biannually prescribe that, in order to achieve an equitable distribution of voting power among executive directors, there is an upper limit of nine per cent of voting power imposed on the constitution of any constituency. Consequently, EU Member States (currently representing together about 30.8 per cent of the IMF's total voting power), minus the UK, Germany, and France, who together represent about 14.4 per cent of the IMF's total voting power, represent about 16.4 per cent of the total voting power of which the Euro area accounts for 12.2 per cent and thus both groups would exceed the current upper limit of nine per cent. Finally, the formation of constituencies is voluntary, and no IMF member can be compelled to be part of a constituency.

The 2010 IMF reform introduces relevant changes in these legal conditions to improve the governance of the IMF,⁴⁴ and some of them would facilitate the consolidation of the European representation on the Executive Board. In particular, four aspects must be emphasized: (i) the elimination of the category of appointed directors at the IMF Executive Board thereby enabling European consolidation on the Board (i.e., members with the five largest voting powers would no longer appoint one executive director each) which would mean that all of the Executive Board will be elected; (ii) the election rules contained in Schedule E of the Articles of Agreements will be deleted, and, going

⁴³ Art. XII, Section 3 of the IMF's Articles.

⁴⁴ W. BERGTHALER, *The Relationship between International Monetary Fund Law and European Union Law: Influence*, cit., p. 179.

forward, the IMF Board of Governors will set the upper and lower limits for the regular election of executive directors for each biannual election (i.e., making a Euro area chair pooling more than 9 per cent of the votes possible); (iii) under Art. XII, Section 3, let. e), of the IMF's Articles together with Board of Governors Resolution 66-2, executive directors representing seven or more members in a constituency may appoint a second Alternate following the 2012 regular elections of executive directors (i.e., a Euro area chair would be an executive director as well as two Euro area alternate executive directors, which would be an interesting way to distribute the responsibilities between Euro area countries); (iv) the commitment to 24 executive directors at the IMF Executive Board would remain in place for the time being;⁴⁵ and (iv) the IMF Board of Governors noted the commitment to reduce "advanced European country representation" at the IMF Executive Board by two executive directors leading to a greater integration and consolidation of European representation.⁴⁶

The first step towards Board realignment was taken in November 2012 by the Benelux countries. The Netherlands and its constituency partners, Belgium and Luxembourg, decided to create a new constituency as of first November 2012.⁴⁷ The constituency comprises⁴⁸ seven states, or a full quarter of all EU members (three Euro area countries), alongside a number of (potential) EU candidate countries and close European neighbours (15 members). This new constituency is represented by the fifth largest chair, and it is the largest multi-country constituency on the Executive Board in terms of quota (6.57 per cent of votes). Belgium and the Netherlands designate the Executive Director for this group on a rotating basis. Currently, the Executive Director is Dutch; the Alternate Executive Director is Belgian. Except for Luxembourg and Montenegro, most of the countries in the new constituency will be adversely affected by the 2010 IMF re-

⁴⁵ Art. XII, Section 3, let. b) of the IMF's Articles (currently, and as proposed to be amended by Board of Governors Resolution 66-2) sets the number of Executive Directors at 20, which may be increased or decreased by the Board of Governors with a majority of 85 per cent of the total voting power, for the purposes of each regular election of Executive Directors.

⁴⁶ This political agreement was adopted at the G-20 Ministerial Meeting in Gyeongju, Korea in 2010. See IMF, *G-20 Ministers Agree "Historic" Reforms in IMF Governance*, in *News Release*, 23 October 2010, www.imf.org. It was argued that the overrepresentation of the EU on the Executive Board was denying emerging countries the opportunity to play a bigger role in the IMF, which was seen as vital for the Fund's effectiveness and legitimacy (see, K. GNATH, *The Reform of the IMF: Europe's Short-Term Arithmetic and Long-Term Choices*, in *AICGS Transatlantic Perspectives*, 2010, p. 4; T. TRUMAN, *The Congress Should Support IMF Governance Reform to Help Stabilize the World Economy*, in *Peterson Institute for International Economics Policy Brief PB*, July 2013, p. 4).

⁴⁷ Netherlands Central Bank, *IMF Governance Reform: Open Economies Have a Place at the Table*, in *DN BULLETIN*, October 2012.

⁴⁸ The chair is composed by Belgium, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Georgia, Israel, Luxembourg, former Yugoslav Republic of Macedonia, Moldova, Montenegro, The Netherlands, Romania, and Ukraine.

form and will lose quota and voting shares (almost 22 per cent). Therefore, this realignment is particularly advantageous for these medium and small European countries.

The eight countries left-over from the old Belgian chair have constituted a new Central and Eastern European IMF Constituency.⁴⁹ The Constituency Agreement was signed in Vienna on July 11, 2012,⁵⁰ and includes five EU Member States and three Euro area countries. As a result of the Constituency Agreement, the current executive director is from Austria and the alternate executive directors rotate between Turkey, the Czech Republic, and Hungary. The first alternate executive director will be from Austria in 2014-2022 and the second Alternate Director will rotate between Turkey, Czech Republic, and Hungary. Through this complex rotation scheme, one seat on the IMF's Executive Board will be redistributed from the advanced European countries to the emerging market countries.

This first realignment is a step towards the consolidation of EU representation on the IMF, but it could also be understood as a movement against the more crucial realignments instigated by bigger European countries to implement the Gyeongju compromise.⁵¹ I am not sure that this first realignment follows the Art. 138 TFUE mandate.

III.2. NEW QUOTAS ASSIGNMENTS AND THE EU

Each member Country of the IMF is assigned a quota, based broadly on its relative position in the world economy, and this quota determines a member's maximum financial commitment to the IMF and its voting power. The distribution of IMF quotas is the key to explaining the balance of power in the IMF, and the formula to calculate quotas has always been a highly controversial matter. The current quotas and voting shares of the EU Member States are based on the application of the 2008 quota formula that is a weighted average of GDP (weight of 50 per cent), openness (30 per cent), economic variability (15 per cent), and international reserves (five per cent). For this purpose, GDP is measured through a blend of GDP, based on market exchange rates (weight of 60 per cent), and on purchasing power parity (PPP) (40 per cent). The formula also includes a *compression factor* that reduces the dispersion in calculated quota shares across members.⁵² The EU Member States together have approximately 31.9 per cent of the quota shares and 30.9 per cent of the voting shares, which is more than the US (17.7 per cent and 16.7 per cent respectively), which is the single biggest shareholder in the IMF.

⁴⁹ The members of this chair are Austria, Belarus, Czech Republic, Hungary, Kosovo, Slovak Republic, Slovenia and Turkey.

⁵⁰ See www.friedlnews.com.

⁵¹ See the critics by J.V. LOUIS, *Monetary Union and the Law: Some Comments*, in T. COTTIER, R. LASTRA, C. TIETJE, S. SATRANGO (eds), *The Rule of Law in Monetary Affairs*, Cambridge: Cambridge University Press, 2015, p. 120.

⁵² The documentation about the IMF studies on quota formula can be found in IMF, *IMF Quota and Governance Publications*, 9 October 2012.

The Executive Board uses the 2008 quota formula as a base for calculating the new quotas, but using many highly technical and complex corrections to attain the agreed-upon results. The 2010 package of reforms doubled the overall IMF quotas to about 755 billion dollars and shifted voting power to dynamic emerging market economies. In fact, the 14th General Review of Quotas will: (i) double quotas from approximately SDR 238.5 billion to approximately SDR 477 billion, (about 715 billion dollars at current exchange rates); (ii) shift more than six per cent of quota shares from over-represented to under-represented member countries, a quota shift made possible mainly by reducing the shares of a number of advanced economies and oil-producing countries; (iii) shift more than six per cent of quota shares to dynamic EMDCs; (iv) preserve the quota and voting share of the poorest member countries, and (v) significantly realign quota shares. As a result of these modifications, the 10 Fund members with the largest voting shares will consist of the United States, Japan, the so-called BRICs (Brazil, China, India, the Russian Federation), and the four largest European countries (France, Germany, Italy, the United Kingdom).⁵³

The 2010 quota reform will only reduce the EU quotas by 1.616 per cent. There will be some EU Member States that will sacrifice a significant voting share (Belgium, 43 per cent; Netherlands, 18 per cent; and Bulgaria 37 per cent); the biggest states (Germany, France, United Kingdom, and Italy) lose between five per cent and seven per cent. Most of the Central and Eastern states will increase their voting shares by five per cent to 17 per cent), and Spain, Ireland, and Luxembourg will capture significant additional voting shares. Clearly, the 2008 quota formula was fruitful for the EU States, and the adjustments applied in 2010 do not modify those results. The EU decline in the world economy in favour of emerging economies is insufficiently reflected in the IMF quota and voting shares.

Although the 2010 quota reform was pending and it will be implemented after the US ratification, it is a transitory modification, because the Resolution 66-2 required the Executive Board to complete a comprehensive review of the formula. It has discussed the new formula without success and has decided that consensus on a new quota formula will best be done in the context of the 15th Review rather than on a stand-alone basis.⁵⁴

In any case, the negotiation of a new quota formula will be a challenge for the EU Member States, and their quotas and voting shares in the IMF will be reduced in line

⁵³ All the calculations by IMF Staff are available in IMF, *Quota and Governance Reform Elements of an Agreement*, 2010. See also M. MORENO, *Metamorfosis del FMI*, Madrid: Tecnos, 2011, pp. 174-196; New Rules For Global Governments, *Impact of 2010 IMF Quota Reform: Winners, Losers and Realignments*, 24 July 2012, www.new-rules.org.

⁵⁴ See IMF, *Executive Board Reports on the Quota Formula Review*, in *Press Release no. 13/30*, 30 January 2013; IMF, *IMF Executive Board Discusses Quota Formula Review—October 2012*, 9 October 2012; IMF, *Quota Formula—Data Update and Further Considerations*, in *IMF Policy Paper*, July 2014.

with the decrease in their relative weights in the world economy.⁵⁵ This is a good argument for going to a single EU or Euro area chair at the IMF and thus compensating for the loss of individual quotas by unifying the national quotas.

IV. A SINGLE EURO AREA CHAIR IN THE IMF FOR 2025? THE 2015 COMMISSION PROPOSAL AND THE WAY FORWARD

The strengthening of the internal economic governance during the Great Recession, the impact of the 2010 IMF reform and the decreasing EU weight in the world economy have influenced the opinion and positions of the EU institutions related to the EU-IMF relations. In spite of the academic literature,⁵⁶ what voiced the inadequacy of the EU position in the IMF and proposed several approaches to a more unified EU representation or even a single chair for the EU at the IMF, the EU institutions have remained silent since 1998, apparently comfortable with the pragmatic approach that was chosen for EU-IMF relations.

The Great Recession contributed to a louder call from the European authorities for a unified external representation of the Euro area. The Eurogroup President, Jean-Claude Juncker,⁵⁷ was quite clear, as was the Commissioner Almunia.⁵⁸ The European Parliament also pressed for such action, the Feio Report re-launched the debate and more recently, on October 25, 2011 a non-legislative resolution on Global Economic Governance was adopted by the European Parliament, the Hökmark Report, recalling "that, under Art. 138 of the Lisbon Treaty, the Euro area is supposed to introduce unified external representation; [the Parliament] urges the Commission to put forward a legislative proposal to that effect".⁵⁹

⁵⁵ Un update analysis is available in R. MOHAN, M. KAPUR, *Emerging Powers and Global Governance: Whither the IMF?*, in *IMF Working Paper* 15/219, 2015.

⁵⁶ A. AHEARNE, B. EICHENGREEN, *External Monetary and Financial Policy: a Review and a Proposal*, in A. SAPIR (ed.), *Fragmented Power: Europe and the Global Economy*, Brussels: Bruegel, 2007, p. 142; S. CAFARO, *Il governo delle organizzazioni di Bretton Woods. Analisi critica, processi di revisione in atto e proposte di riforma*, cit., pp. 141-177; J.V. LOUIS, *L'Union Européenne et sa monnaie*, cit., paras 418-424; L. BINI SMAGHI, *A Single EU Seat in the IMF?*, in *Journal of Common Market Studies*, 2004, p. 229; M. LÓPEZ-ESCUDERO, *Crisis y reforma del Fondo Monetario Internacional*, in *Revista Española de Derecho Internacional*, 2007, p. 435; DE LAROSIÈRE et al., *Report of the High-Level Group on Financial Supervisions in the EU*, 2009, para. 256.

⁵⁷ Mr. Juncker said "It is absurd for those 15 countries not to agree to have a single representation at the IMF. It makes us look absolutely ridiculous. We are regarded as buffoons on the international scene", declaration of the Eurogroup President Mr. Junckers in April 2008, euobserver.com.

⁵⁸ Speech by J. ALMUNIA, *Laying the Foundations of a European Foreign Economic Policy*, 6 April 2009, europa.eu. He clearly stated that "The Commission has long called for a consolidation of European representation on the boards of the IFIs. In the case of the IMF, the argument for a single consolidated Euro-area chair is quite obvious".

⁵⁹ European Parliament, Committee on Economic and Monetary Affairs, Rapporteur: Diogo Feio, Report A7-0282/2010 of 11 October 2010 with recommendations to the Commission on improving the economic governance and stability framework of the Union, in particular in the euro area; European Parlia-

New expectations have been opened by the European Commission with the 2012 Communication about the development of the EMU,⁶⁰ which included a serious commitment to activate Art. 138 TFEU. The European Commission wanted to take into account the progress achieved in the internal economic governance in response to the crisis to strengthen and consolidate its external representation based on the current Treaties (Art. 17 TEU and Art. 138 TFEU). The focus was on EU representation in the IMF, and no reference was made to the EU's participation in other international economic organizations and fora. The pragmatic approach was deemed unsatisfactory, and the Commission will propose a two-stage process to enhance the Euro area representation in the IMF. In a first stage, the Commission will design a rearrangement of the country constituencies in the IMF so as to re-group countries into Eurozone constituencies which could also include future Euro area Member States. In parallel, observer status at the IMF Executive Board should be sought for the Euro area. At a second stage, a single seat in the IMF bodies is planned with a few specifications. Finally, the Barroso Commission did not make any proposition to activate this compromise.

The Juncker Commission announced in its 2015 work programme that it intended to address the external representation of the Euro area in the framework of deepening the EMU. The Five Presidents' Report of June 2015 on completing EMU indicates "as EMU evolves towards Economic, Financial and Fiscal Union, its external representation should be increasingly unified".⁶¹ This Report criticizes that EU and the Euro area are still not represented as one in the international financial institutions and this fragmented voice means the EU is punching below its political and economic weight as each Euro area Member State speaks individually, in particular in the case of the IMF. Consequently, the Five Presidents' Report proposes in the first stage of the completion on EMU to "take steps towards a consolidated external representation of the euro area".

Taking into account Art. 138 TFEU and the Five Presidents' Report mandates, the European Commission published in October 2015 a Communication⁶² and a Proposal for a Council Decision in order to unify progressively the Euro area representation in the IMF.⁶³ According to Art. 138, para. 3, TFUE, it is the Council which, acting on a proposal of the Commission and after consulting the ECB, will decide on the Euro area's

ment, Committee on Economic and Monetary Affairs, Rapporteur: Gunnar Hökmark, Report A7-0323/2011 of 25 October 2011 on Global Economic Governance, European Parliament.

⁶⁰ Communication COM(2012) 777 final/2 of 28 November 2012 from the Commission on blueprint for a deep and genuine economic and monetary union. Launching a European debate.

⁶¹ Five Presidents' Report of 22 June 2015, *Completing Europe's Economic and Monetary Union*, p. 17, ec.europa.eu.

⁶² Communication COM(2015)/0602.

⁶³ Proposal for a Council Decision, COM(2015) 603 final.

participation and representation in international financial institutions and conferences based on a qualified majority of the Member States which have adopted the Euro.⁶⁴

The Commission Proposal is spineless and unambitious in the sense that it does not encourage EU membership in the IMF. However, it suggests moving to a unified representation for the Euro area in the IMF since 2025 with the President of the Eurogroup as the representative, applying a gradual approach involving intermediate transitional steps for representation in the IMFC and the IMF Executive Board. Such transitional steps would involve granting observer rights to the Euro area represented by a representative of a Euro area Member State already a member of the Board, in association with the Commission and the ECB. Furthermore, the coordination process for establishing common positions should be strengthened in order to have systematic common statements on all IMF policy, country and surveillance issues that are of relevance to the Euro area. I consider that the content and strategy established by this Proposal could be understood by analysing the following issues: the EU membership possibilities at the IMF, the improvement of the coordination of the EU Member States on IMF issues and the Euro area single chair options.

IV.1. THE EU MEMBERSHIP POSSIBILITIES AT THE IMF

Art. 2 clearly says that the 2015 Commission Proposal lays down provisions for the progressive establishment of a unified representation as well as common positions of the Euro area within IMF until the Euro area will have obtained full membership of the IMF. Consequently, the Proposal takes into account the current IMF membership without prejudice to the possibility of full membership of the Euro area at a later stage. The objective pursued by this Proposal is a unified representation with a single seat for the Euro area within all organs of the IMF, while allowing Euro area Member States to maintain their current shareholder status in the Fund. The Commission should undertake work to achieve this objective but not to obtain full membership in the IMF.

In my opinion, it is not an ambitious approach; the Proposal accepts that the external representation of the Euro area will depend on the future status of the Euro area in the IMF that member countries of the IMF would be willing to grant. In spite of this certainty, I consider that the EU could apply a more proactive approach and try to eliminate the obstacles to become a full IMF member, which is the best way to be represented in this international organisation.

As now constituted, the IMF is strictly a country-based organization due to the formalistic interpretation of the word *countries* included in Art. II, Section 2, of the IMF's Articles of Agreement. Nevertheless, some scholars have proposed a more open and up-

⁶⁴ The 2015 Commission Proposal withdraws the 1998 Proposal for a Council decision on the representation of the Community at international level in the context of EMU, which was not adopted and became obsolete since the launch of the euro and the entry into force of the Lisbon Treaty.

dated interpretation of this word that would allow the inclusion of states and international organizations that benefit from an attribution of states' powers in the monetary and exchange rate fields. In the case of the EU/Euro area, the responsibility for monetary and exchange rate matters, an essential characteristic of statehood and a condition for compliance with the obligations resulting from membership of the IMF, no longer lies with the Member States; it is in the hands of the EU institutions. In addition, the EU/Euro area has increasing powers on banking supervision and resolution in the framework of the EU banking union and the strengthening of the EU economic governance during the crisis has increased the EU competences in this area. Under these circumstances, the EU has arguably already assumed the characteristics of a country for the purposes of the Articles of Agreement.⁶⁵

The modification of the BIS statute to open up membership in the BIS to the ECB⁶⁶ is a relevant precedent to support this broad interpretation of the word country in Art. II, Section 2 of the IMF's Articles of Agreement. However, a less controversial way to open IMF membership to international organizations with competence in monetary matters is to introduce a specific clause in Art. II to open the IMF to monetary unions with specific conditions.⁶⁷ Arts XI and XII of the Agreement Establishing the World Trade Organization could be a model, and I think that the new Section 3 in Art. II of the IMF's Articles of Agreement could be "Membership shall be open to international organizations with full competences in monetary matters at such times and in accordance with such terms as may be prescribed by the Board of Governors".⁶⁸ The membership of the

⁶⁵ E. DENTERS, *Representation of the EEC in the IMF*, in M. GIOVANOLI (ed.), *International Monetary Law. Issues for the New Millenium*, Oxford: Oxford University Press, 2000, pp. 221-224; E. DENTERS, *The IMF*, in J. WOUTERS (ed.), *International Encyclopaedia of Laws: Intergovernmental Organizations*, Deventer: Kluwer, 2010, para. 23; R. SMITS, *The European Central Bank: Institutional Aspects*, The Hague: Kluwer Law, 1997, p. 443; J. WOUTERS, S. VAN KERCHOVEN, T. RAMOPOULOS, *The EU and the Euro Area in International Economic Governance: the Case of the IMF*, in D. KOCHENOV, F. AMTENBRINK (eds), *The European's Union Shaping of the International Legal Order*, Cambridge: Cambridge University Press, 2013, pp. 321-326.

⁶⁶ Art. 56 of the Statutes of the Bank for International Settlements of 20 January 1930, text as amended on 27 June 2005, www.bis.org.

⁶⁷ In fact, it is an inclusion of a Regional Economic Integration Organization (REIO) clause in the Articles of Agreements. AREIO clause is commonly defined in UN protocols and conventions as "an organization constituted by sovereign states of a given region to which its Member States have transferred competence in respect of matters governed by [...] convention or its protocols and [which] has been duly authorised, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it [the instruments concerned]". See for instance Arts 4.1, 4.2, 4.3 and 4.5, 21 and 22 of the Kyoto Protocol. Art. II of the FAO Constitution was specifically modified to allow for the accession of "regional economic organizations". On the qualification of the EU as an international (integration) organization also C. ECKES, R. WESSEL, *The European Union: An International Perspective*, in T. TRIDIMAS, R. SCHÜTZE (eds), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order*, Oxford: Oxford University Press, 2014.

⁶⁸ In that sense, see R. HENNING, *Regional Arrangements and the IMF*, Seminar of the Institute for International Economics on IMF Reform, Washington, 2005.

EU in the IMF raises the question of whether there should be a new quota to the EU that simply amasses the current EU member quotas or whether a new quota excluding the intercommunity trade and subsequently its effect on a member's role in the IMF's governance.

The modification of the IMF Articles of Agreement is *conditio sine qua non* to open the IMF to the EU membership and it requires an 85 per cent majority of the votes of the IMF members. The interest of the emergent countries in EU unification in the IMF, supported by the US opens up possibilities for this step. However, a strong political will in the EU countries is required to encourage this relevant IMF reform, and nowadays that does not exist.

In any case, the EU is a regional organization with legal personality (Art. 47 TFEU), and it will be the EU that joins the IMF. The Euro area has no international legal personality as an international organization and thus could not be an IMF member⁶⁹ even it was possible to organize two EU constituencies in the IMF, one for the Euro area countries and the other for the EU countries outside it with less intervention by EU institutions. It is clear, however, that a strong coordination between these two EU constituencies could be desirable and easy to establish.

The model to follow in the IMF for EU membership should be the joint participation of the EU Member States and the EU (mixity). The substitution of a single EU representation and a single EU chair for EU countries is neither legally founded, nor politically workable, because the EU could not substitute for the EU countries outside the Euro area, which continue to have their own currencies and national economic and monetary policies. On the other hand, the IMF has competences related to the surveillance of economic and fiscal policies, and even the Euro area Member States continue to keep competences in this field.

In my opinion, the IMF's Articles of Agreement do not fulfil the CJEU conditions, and the functional succession doctrine applied to the GATT is excluded in this case, because the matters covered by IMF activity are partially shared competences in EU law. Moreover, the other IMF members did not accept the EU institutions in substitution for EU countries in the Fund.⁷⁰ Consequently, an EU membership in the IMF could be a mixed

⁶⁹ See the reasoning in that sense of J. WOUTERS, S. VAN KERCHOVEN, T. RAMOPOULOS, *The EU and the Euro Area in International Economic Governance*, cit., pp. 317-319.

⁷⁰ This functional succession doctrine has been constructed by the CJEU in, among others, judgment of 12 December 1972, joined cases 21/72 e 24/72, *International Fruit Company NV et al. v. Produktschap voor Groenten en Fruit*; judgment of 3 June 2008, case C-308/06, *Intertanko et al. v. Secretary of State for Transport*, para. 48; judgment of 21 December 2011, case C-366/10, *Air Transport Association of America and Others*, paras 61-63. The CJEU recognized that multilateral agreements to which the EU is not a party may be binding upon the EU, provided that five conditions are satisfied: (i) All EU member states are parties to the multilateral agreement; (ii) member states intend to continue to be bound by such multilateral agreement as evidenced by their statements or in provisions of the TFEU; (iii) the multilateral agreement has been entered into prior to 1 January 1958 or before the accession of the country to the EU; (iv) the

representation and will not affect the IMF membership of the EU countries. This conclusion⁷¹ is in line with the EU membership in other international organizations such as the WTO, the Food and Agriculture Organisation, or the European Bank for Reconstruction and Development.⁷²

IV.2. IMPROVEMENT OF THE COORDINATION OF THE EU MEMBER STATES ON IMF ISSUES

The current EU coordination mechanism on IMF issues is based as I explained before on the work of two committees, the Brussels-based SCIMF and the Washington-based EURIMF. The performance of this mechanism is limited at the moment. In particular, the SCIMF has demonstrated little ability to steer the EURIMF due to a number of deficiencies. First, the SCIMF is hindered by its composition, which includes too many officials, some of whom are too junior to speak with authority on sensitive policy issues. Second, the SCIMF meets on a monthly basis, whereas the EURIMF meets as many as three times per week when there are urgent matters to discuss. Third, the SCIMF devotes most of its attention to horizontal policy issues such as the development of common

matter of the multilateral agreement has later been fully and exclusively assumed by the EU; and (v) the other contracting parties to the multilateral agreement have recognized such a shift in competence from the member states to the EU. The only international agreement that the CJEU considers as fulfilling these conditions was the GATT. However, the Court recently considered these conditions were missing in the Chicago Convention on Civil Aviation and the MARPOL Convention on marine pollution. On this cases, see P.J. KUIJPER, *It Shall Contribute to the Strict Observance and Development of International Law*, in ECJ, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Berlin: Springer Verlag, 2013, pp. 593-594; A. ROSAS, *The Status in EU Law of International Agreements Concluded by the Member States*, in *Fordham International Law*, 2011, pp. 1304-1345; R. WESSEL, *Reconsidering the Relationship between International and EU law: Towards a Content-based Approach*, in E. CANNIZZARO, P. PALCHETTI, R. WESSEL (eds), *International Law as Law of the European Union*, The Hague: Martinus Nijhoff, 2011, pp. 7-33.

⁷¹ Louis rejects this interpretation because he said that “the economic perspective in the Fund is limited by the main objective of monetary and financial stability that, in turn, has to contribute to growth and jobs. On the other hand, the joint participation of the EU and its Member States raises problems due to IMF is a very specific financial institution based on quotas that are intended to express, by the use of objective data, the relative ranking of any country in the world economy. Nothing similar is to be found in other international institutions” (J.V. LOUIS, *The International Projection*, cit., p. 80).

⁷² See among others F. HOFFMEISTER, *Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies*, in *Common Market Law Review*, 2007, pp. 41-68; R. WESSEL, *The Legal Framework for the Participation of the European Union in International Institutions*, in *Journal of European Integration*, 2011, pp. 621-635; J. WOUTERS, J. ODERMATT, T. RAMOPOULOS, *The EU in the World of International Organizations: Diplomatic Aspirations, Legal Hurdles and Political Realities*, in M. SMITH, S. KEUKELEIRE, S. VANHOONACKER (eds), *The Diplomatic System of the European Union: Evolution, Change and Challenges*, London: Routledge, 2015; R. WESSELS, S. BLOCKMANS, *The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union*, in P. EECKHOUT, M. LOPEZ-ESCUDEO (eds), *The European Union's External Action in Times of Crisis*, Oxford: Hart Publishing, 2016 (forthcoming).

views on exchange rate policy and the international economic situation, whereas the EURIMF spends most of its time trying to reach a common view on country-specific issues in the context of IMF Art. IV consultations.

The Commission Proposal envisages strengthening this EU coordination on IMF issues until the establishment of a Euro area single chair. Arts 6 to 9 references some transitional arrangements in order for the Euro area to present a more coherent position within the IMF, in particular in the Executive Board, and the IMFC.

First, Art. 9 recalls the Council's ability, according to Art. 138, para. 1, TFEU to adopt a common position on IMF issues and imposes ("shall") on the Euro area Member States the obligation, within the Council, the Eurogroup, the EFC and/or the EWG, as appropriate, to closely coordinate and agree on common positions on all matters of Euro area relevance for the IMF Executive Board and Board of Governors meetings and shall use common statements on those issues.

This obligation can only be put in practice by improving the functioning of the two committees in charge of this coordination, the Brussels-based SCIMF and the Washington-based EURIMF. Perhaps it will be possible to create a Euro area SCIMF, linked to the EWG, and maintain the current SCIMF dependence on the European Financial Committee, similarly to the way the relations between the Eurogroup and the Ecofin Council are organized. The SCIMF function might be reformed using as a model the EU Trade Committee (previously known as the Art. 133 committee), which closely monitors the Commission's involvement in international trade talks through weekly meetings at the level of deputies and monthly meetings at the level of full members. In addition, the reverse majority procedure now accepted within the new EU economic governance framework could be applied in the decision-making process of the SCIMF.

It is interesting to note that Art. 218, para. 9, could be useful to strength the EU coordination in the IMF as clarified by the CJEU in a recent case which relates to decisions taken by the International Organization for Wine and Vine (IOV), of which the EU is not a member, but several of its Member States are. On 19 June 2012, the Council by qualified majority with Germany voting against adopted a decision establishing an EU position to be adopted in the OIV⁷³ on the basis of Arts 43 and 218, para. 9, TFEU. Germany (itself a member of the OIV) brought an action for annulment against that decision challenging Art. 218, para. 9, TFEU as the correct legal basis for the adoption of the decision arguing that Art. 218, para. 9, TFEU concerns only the adoption of the positions of the Union in bodies set up by international agreements of which the Union is a member. In its judgment of 7 October 2014 the Court reached a different conclusion. It argues that there is nothing in the wording of Art. 218, para. 9, TFEU to prevent the European Union

⁷³ Council Document 11436 on establishing the position to be adopted on behalf of the European Union with regard to certain resolutions to be voted in the framework of the International Organisation for Vine and Wine (OIV).

from adopting a decision establishing a position to be adopted on its behalf in a body set up by an international agreement to which it is not a party.⁷⁴

However, there are complex limits to the ability of the EU members to forge common positions; some EU countries have difficulties or have no possibility of respecting the agreed position when they are in mixed constituencies where the majority is against the EU common position.

The second transitional arrangement is the extension to the Euro area as a whole of the ECB observer status in the IMF Executive Board. Art. 6, para. 1, of the Proposition entrusts the Eurogroup, the Commission, and the ECB to negotiate jointly to secure with the IMF the status of observer for the Euro area within the IMF Executive Board. This negotiation must be conducted taking into account conditions as set out in para. 2:

- the Euro area shall be represented in the Executive Board by the representative of a Euro area Member State already a member of the Board. That is the formalization of the current practice of having one of the current Executive Directors of the Euro area Member States, the EURIMF President, also representing the interests of the Euro area.

- The representative shall be designated for two and a half years in accordance with the procedure provided for in Art. 2 of Protocol no. 14 on the Eurogroup annexed to the Treaties.

- The Commission and the ECB shall also be able to attend meetings and intervene, as appropriate.

- An observer office shall be established within the IMF in order to support the exercise of the euro area's observer rights (Art. 6, para. 3).

- The status of observer in the Executive Board for the Euro area as a whole would allow covering the full range of Euro area matters, which include today most of the IMF activities.

The third transitional arrangement is related to the Euro area status in the IMFC. Art. 7 of the Proposal put by the Eurogroup, the Commission, and the ECB in charge to secure with the IMF a right for the Euro area to address the IMFC. The EU wants to maintain the current situation in which the Commission and ECB are already observers in the IMFC and to entrust to the President of the Eurogroup the Euro area representation in its Spring and Annual Meetings and the right to make a statement for the Euro area instead of the EU Council rotating presidency.

The last transitional arrangement concerns the reshuffling of the EU constituencies in order to create a Euro area single chair at the IMF Executive Board.

⁷⁴ Court of Justice, judgment of 7 October 2014, case C-399/12, *Germany v. Council*. "Where an area of law falls within a competence of the European Union, such as the one mentioned in the preceding paragraph, the fact that the European Union did not take part in the international agreement in question does not prevent it from exercising that competence by establishing, through its institutions, a position to be adopted on its behalf in the body set up by that agreement, in particular through the Member States which are party to that agreement acting jointly in its interest" (para. 52).

IV.3. EURO AREA UNIFIED REPRESENTATION

The Commission Proposal envisages a unified representation of the Euro area within the IMF by 2025 at the latest and paves the way to the reshuffle of the current IMF constituencies into a single or some chairs composed only by Euro area countries. This reshuffle is the most controversial question to resolve in order to reach this unification.

In fact, the Commission thinks about a gradual rearrangement of the IMF constituencies in the transitional period and a single chair at the end of the process. Art. 8 of the Proposition forced the Euro area countries to regroup to establish one or several constituencies composed only of Euro area Member States and lays down the obligation to fully coordinate and agree in advance within the Council, the Eurogroup, the EFC and/or the EWG, as appropriate, all questions related to constituency arrangements of the IMF involving Euro area countries. In addition, the positions taken in relation to these constituency arrangements or changes thereto shall be consistent with the objectives of increasing coherence of the representation of the Euro area and achieving its unified representation within the IMF.

The entry into force of the 2010 IMF reform after US approval will facilitate the reshuffling of the EU constituencies on the IMF Executive Board. With the move to an all-elected Executive Board, it would become legally possible for executive directors who were formerly appointed by single-seat countries such as France and Germany (the United Kingdom is outside the Euro area) to be elected by other Member States and to represent them in the future. Also, the limit of 9 per cent of the quotas on countries merging into a constituency will go out, and it will be possible for big Euro area countries to come together and with other medium-size and small Euro area countries.

As I pointed out before, a first reshuffling was decided for some EU countries in November 2012. A new Benelux constituency and a Central and Eastern European constituency have been created, in order to accomplish the commitment to reduce “advanced European country representation” at the IMF Executive Board by two Executive Directors, a move included in the 2010 IMF reform. This reshuffling affects Euro area countries alongside a number of (potential) EU candidate countries, close European neighbours and even Asian countries. The constitution of these two new constituencies is not in line with the Commission Proposal and this reshuffling could be understood as a way for medium and small countries of the Euro area to perpetuate their power in the IMF.

It is possible to speculate about potential new constituencies, taking into account the rationale to create constituencies in the IMF.⁷⁵ The Commission Proposal envisages

⁷⁵ For Woods and Lombardi an effective constituency has four features: Maximization of voting powers, a shared agenda, unity within the constituency beyond shared interests, and lobbying capacity and technical support. Applying these features to the creation of constituencies by EU countries, the panorama is discouraging. In spite of the fact that EU countries share a similar agenda, have shared interests in IMF matters, and have lobbying capacity and technical means to build new IMF constituencies, they will

in the transitional period to establish one or several constituencies composed of only Euro area Member States. In my opinion, it is a bad strategy and the reshuffling will be more difficult. I think that it will be easier and more desirable in this transitional period to include all the EU countries and even to attract European candidates for future accession to the EU (Balkan states, Iceland) and other European countries like Norway, Switzerland, Ukraine, Moldova, Belarus or Turkey.

Using this broader approach, we can spread the reshuffling in several steps. The easiest reshuffle would be for Spain to leave its current Central American constituency and join the Italian constituency with an agreement between these two states to rotate the posts of executive director and alternate. Poland could migrate to the Central and Eastern European constituency and Ireland could leave the Canadian constituency and join either the Nordic/Baltic or the Benelux constituencies. It is also possible to envision a Mediterranean chair that could encompass France, Italy, Spain, Portugal, Greece, Malta, and Cyprus; a British/Nordic/Baltic chair which would add the United Kingdom and Ireland to the current Nordic/Baltic constituency; a German-Benelux constituency that would encompass Germany, the Benelux countries, and Austria; and a Central and Eastern European constituency comprised of Poland, Hungary, Czech Republic, Slovakia, Slovenia, Romania, Croatia, and Bulgaria.

The end of the process should be a unified representation with a single seat for the Euro area within all organs of the IMF. Art. 3 would specify the meaning of this unified representation which shall be based on the following principles:

- in the Board of Governors, presentation of the views of the Euro area by the President of the Eurogroup;
- in the IMFC, representation of the Euro area by the President of the Eurogroup;
- in the IMF Executive Board, direct representation of the Euro area by the Executive Director of a Euro area constituency, following the establishment of one or several constituencies composed only of Euro area Member States;
- election of the Executive Director, as referred to above, upon proposal of the President of the Eurogroup and in accordance with the procedure provided for in Art. 2 of Protocol no. 14 on the Eurogroup, annexed to the Treaties.

It is unclear if the Commission envisages a single chair or several constituencies for the Euro area countries. Clearly, a single chair is the highest degree of unification and the last steps of the unification process, headed by an Executive Director elected upon proposal of the President of the Eurogroup and in accordance with the procedure provided for in Art. 2 of Protocol no. 14 on the Eurogroup, annexed to the Treaties. However, it could be interesting to open the door to several Euro area chairs if the reordering

not maximize the voting power of each EU country in the IMF (N. WOODS, D. LOMBARDI, *Uneven Patterns of Governance: How Developing Countries Are Represented in the IMF*, in *Review of International Political Economy*, 2006, pp. 480-515).

process of the IMF Executive Board advises it, due to the implications of the other EU Member States and many third countries. In this case, a strong coordination is needed and a single Executive Director could speak for the Euro area chairs.

In my opinion, the best end of the reunification process should be to regroup all Euro area countries in a single constituency, to create another chair with EU countries outside the Euro led by United Kingdom (if this country remain in the EU in spite of the Brexit referendum) and to encourage the creation of another constituency with the other European countries led by Switzerland. The coordination between the three chairs should be intense and an agreement could be established to facilitate the flow of States from one to another (when a European country adheres to the EU, it will join the EU countries outside the euro constituency and, if a EU Member States accede to the Euro it will pass to the Euro area chair).

This approach is also interesting to maintain a greater cooperation of the Euro area with non-Euro area Member States in the IMF. It is important to note that many IMF activities are related to matters covered by the EU rules applied to all EU countries as is the case for internal markets rules on financial services, capital markets union, some banking union elements and, EMU rules on coordination of economic policies. We cannot forget that EU Member States outside the Euro are compelled by the obligation to represents EU interest in an international organisation in which the EU is not a member (IMF) as the CJEU recalls in the OIV case.

If we have a Euro area single chair, the common position of the Euro area countries in IMF activities is necessary.⁷⁶ Nevertheless, Art. 4 of the Proposal establishes that all positions to be taken, orally or through written statements, within IMF organs shall be fully coordinated in advance within the Council, the Eurogroup, the EFC and/or the Euro Working Group (EWG), as appropriate. To put this obligation in place and speak with a single voice this Art. 4 also foresees the creation of a dedicated support structure within the IMF in order to support all actors engaged in the unified representation of the Euro area. In my opinion, it will be necessary to rearrange the EURIMF Committee and to create an EU Permanent Mission to the IMF following the model applied to the EU representation in the WTO.

A remarkable characteristic of the Proposal is the prominent role of the Eurogroup in the Euro area representation at the IMF. The Eurogroup President is in charge of the presentation of the views of the Euro area to the Board of Governors, as well as to represent it in the IMFC meetings. The Eurogroup will also manage the process of rearranging the current constituencies in order to achieve a single Euro area chair. This pre-eminence of the Eurogroup is in line with its increasing *de facto* powers in the EMU internal governance. However, this is an exception in the EU external relations in which the European

⁷⁶ The Council always has the power to adopt a common position on IMF activities pursuant to Art. 138, para. 1, TFEU.

Commission has the dominant position, except the Common Foreign and Security Policy (CFSP) domains in which the High Representative leads the EU representation.

To counterbalance the Eurogroup pre-eminence it may be adequate for the European Commission to manage the Euro area support structure, the technical infrastructure required to cook the Euro area common position on IMF activities under the political supervision of the Eurogroup.

V. CONCLUSIONS

After many years of inactivity and *ad hoc* pragmatic arrangements, the time is coming to rearrange the external side of the EMU. The economic crisis and the subsequent sovereign debt crisis in Europe have forced more transfers of competences from the EU countries to the EU institutions in the economic policy field, and these changes must be reflected in the EMU's external relations, including the EU participation in the international organisations and fora working in the international financial and monetary system, in particular the IMF.

The distribution of power in the global economy is changing, and the EU share in it is expected to decline in the coming years and decades. The EU Member States' power in the international institution must also decline in a similar way. The best measure to counterbalance this tendency is that EU or at least the Euro area has a joint representation and speaks with one voice. To this end and to develop Art. 138, para. 2, TFEU, the European Commission has introduced a Decision Proposal in October 2015 to enhance the Euro area representation in the IMF in a two-stage process. The final objective is to have a single Euro area chair in the IMF Executive Board for 2015 leading by and Executive Director that will be nominated using the Eurogroup Protocol procedure. During the transitional period, the Eurogroup and the Council will promote and supervise the reshuffling of the current IMF chairs including Euro area countries to Euro-only constituencies. It is a difficult diplomatic challenge for the EU, because it will also affect EU Member States outside the Euro and, others close European and even Asian countries. Hopefully, the US Congress approves in December 2015 the 2010 IMF reform the implementation of which will eliminate legal obstacles to a consolidation of the EU Member State constituencies in the IMF.

An encouraging precedent to this reshuffling is that all Euro area Member States which are currently participating in the Asian Infrastructure Investment Bank have agreed in January 2016 to form a single Euro area constituency in this Bank.⁷⁷

⁷⁷ See the Eurogroup President Jeroen Dijsselbloem information about this decision in www.consilium.europa.eu.

The Decision Proposal assigns a prominent role to the Eurogroup to control and supervise this reshuffling process and to represent Euro area at the IMF. The Eurogroup President will be in charge of the presentation of the views of the Euro area to the Board of Governors, as well as to represent it in the IMFC meetings. This pre-eminence of the Eurogroup is in line with its increasing *de facto* powers in the EMU internal governance but need to be counterbalance with the European Commission powers and the European Parliament controls.

The Decision Proposal is not ambitious and proposes a single Euro area chair at the IMF Executive Board but without forcing a legal EU mixed representation in the IMF. In my opinion, the EU member countries must continue to be IMF members and the EU must also become an IMF member, after changing the IMF's Articles of Agreement or using a broad interpretation of Art. II, Section 2. The EU representation at the IMF Executive Board could be structured into two constituencies, one including the Euro area countries and controlled by EU representatives and the other including the remaining EU countries outside the Euro.

The challenge to articulate a single voice of the Euro area at the IMF is a test for the external action of the EU in the coming years. In the IMF, the current dispersion of European representation is not only suboptimal from an effectiveness and efficiency perspective when trying to pursue EU interests, but it is also increasingly at odds with the expectations of the international partners. The EU's position in the new financial world governance will dependent on the ability to develop a single voice of the Euro area at the IMF and subsequently in the remaining international financial organisation and fora.



ARTICLES

LEGAL AND ACCOUNTABILITY ISSUES ARISING FROM THE ECB'S CONDITIONALITY

ANNAMARIA VITERBO*

TABLE OF CONTENTS: I. Introduction. – II. The ECB's conditionality in context. – III. Conditionality applied to collateral eligibility for Eurosystem credit operations. – IV. Conditionality applied to the provision of Emergency Liquidity Assistance. – V. Conditionality applied to the Securities Markets Programme. – VI. Conditionality applied to the transfer of SMP profits to Greece. – VII. The shift to explicit conditionality in the Outright Monetary Transactions and the Public Sector Purchase programmes. – VIII. Conclusions.

ABSTRACT: The aim of this research is to clarify the legal framework under which the ECB applies its conditionality policy, by making a distinction between *implicit* and *explicit* conditionality. In the first years of the sovereign debt crisis, the ECB resorted to an *implicit* form of conditionality, driving Euro area Member States towards acceptance of an economic adjustment programme or the adoption of significant economic, fiscal and structural reforms. Implicit conditionality has been applied in the context of the ECB's collateral policy, to the provision of Emergency Liquidity Assistance (ELA), to the purchase of sovereign bonds under the Securities Markets Programme (SMP), as well as to the transfer of profits deriving from these purchases (the so-called SMP profits). Eventually, the ECB decided to shift to *explicit* conditionality. Under the Outright Monetary Transactions programme (OMT) and the Public Sector Purchase Programme (PSPP), sovereign bonds purchases became subject to compliance with the EU/IMF strict and effective conditionality. The temporary framework for collateral eligibility was modified following the same approach. While the shift to explicit conditionality has to be welcomed, it does not lessen concerns about the ECB's democratic accountability and its *interference* in domestic reform processes. Some regards the ECB's conditionality as a true political action departing from the standards of neutrality and independence that central banks should meet. This paper describes the set of policy instruments through which conditionality has been applied, with a view to assess the legitimacy of the ECB's actions.

KEYWORDS: ECB – conditionality – collateral – SMP – ELA – OMT – PSPP.

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I. INTRODUCTION

In 2012, at the peak of the European sovereign debt crisis, the President of the European Central Bank (ECB) Mario Draghi pledged that: “Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough”.¹

This paper aims at analysing the meaning of the ECB’s commitment to do “whatever it takes” (probably the three most effective words in the history of central banking), focussing in particular on the evolution of the ECB’s conditionality policy and its tools.

During the crisis, *assistance* to countries in distress was often provided by the ECB on the condition that EU/IMF financial assistance was requested or comprehensive structural reforms adopted.

The depth of the ECB’s interference in the domestic policy-making of weak Euro area members was justified in terms of *raison d’euro*: the need to safeguard the EMU and its stability – perceived as a supreme good – made extreme measures not only necessary, but almost inevitable.

Although technocratic in nature, the ECB exerted its power not only to protect the integrity of its monetary policy, but also to achieve clearly political goals.

Even if it has to be acknowledged that central banks inevitably inhabit a *world of policy*, where the law plays a rather limited role,² the issue deserves careful consideration, especially for the legal and democratic accountability concerns it raises.

II. THE ECB’S CONDITIONALITY IN CONTEXT

Since the 1970s, a substantial body of literature has developed on the subject of conditionality. Political science and legal studies have focussed on conditionality applied by States (the USA in particular) or international organizations (the European Union, the IMF and the World Bank) to influence the behaviour of other countries through various incentive instruments.

Initially, conditionality was mainly applied in the fields of trade and development cooperation and by international financial institutions when providing their financial assistance. Over the years, due to its effectiveness, the scope of conditionality expanded to other external policy sectors like international investments, foreign affairs and security, environment and energy. Moreover, it was used to achieve a broader set of objectives including human rights protection, democracy, good governance, and the introduction of labour and environmental standards.

¹ Speech by M. DRAGHI, *President of the European Central Bank at the Global Investment Conference in London*, 26 July 2012, www.ecb.europa.eu.

² R.M. LASTRA, *International Financial and Monetary Law*, Oxford: Oxford University Press, 2016, para. 2.01.

Academics have sought to identify the many types of conditionality instruments and incentive mechanisms, which were classified in: negative and positive, *ex ante* and *ex post* conditionality.³

Negative conditionality was first defined by Stokke while studying the development policy of the USA during the post-Cold War period as “the use of pressure, by the donor government, in terms of threatening to terminate aid, or actually terminating or reducing it, if conditions are not met by the recipient”.⁴ Negative conditionality was later associated with the use of sanctions in a number of policy areas.

Positive conditionality, instead, can be described as a mechanism to induce in the addressee a *voluntary* behaviour that fulfils a set of conditions, in return for benefits or *rewards* (in terms of aid, preferential treatment or access).

When conditionality is applied *ex ante*, conditions are used as a leverage and have to be fulfilled by the addressee before the promised benefits can be enjoyed.

On the contrary, *ex post* conditionality applies to on-going institutionalised relationships, and the recipient has to stay compliant with pre-set conditions in order to continue receiving the benefits which would otherwise be reduced, suspended or cancelled.

The EU conditionality policy has been studied extensively especially in the field of the external relations. In this context, the EU has always been treated as a single actor, taking into account only the final outcome and ignoring the different views expressed by its institutions or the inter-institutional debate.

More recently, scholars have turned their attention to the austerity measures to which the provision of EU/IMF financial assistance is conditioned. Thus, the focus has shifted from EU outward conditionality, concerning third States, to EU internal conditionality, applied to its members.

With this research, we wish to contribute to the debate by analysing the conditionality policy of the ECB, one of the EU institutions which is also a member of the so-called Troika together with the European Commission and the IMF.

Notably, for the first time, a central bank used its monetary policy powers as instruments of conditionality.

³ As a reference, also for a detailed bibliography, see S. KOCH, *A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union, in World Development*, 2015, pp. 97-108. According to the Author (at pp. 101-102), the traditional types of conditionality form a matrix and can be combined in four different configurations: *ex-ante/positive*, *ex-post/positive*, *ex-ante/negative* and *ex-post/negative* conditionality, the former and the latter being the most frequently used. *Ex-ante/positive* conditionality refers to the fact that a set of pre-defined conditions has to be met by the addressee before benefits can be granted. *Ex-post/negative* conditionality applies in pre-established relationships and makes the continuous access to benefits dependent on the recipient's level of performance; in this case, benefits are terminated, suspended or withdrawn should the recipient no longer implement pre-set conditions.

⁴ O. STOKKE, *Aid and Political Conditionality*, London: Frank Cass, 1995, p. 12.

We contend that the ECB's conditionality policy presents many distinctive features. It is directed to Euro area members and thus it is aimed internally. It pursues institution-specific goals, even if for the benefit of the whole Euro area and it shows the ECB's strong commitment to preserve the euro. Furthermore, alongside the *traditional* negative/positive and *ex ante/ex post* instruments, the ECB applied its incentive mechanisms in an *implicit* and *explicit* way.

Implicit conditionality entails a tacit understanding of benefits and sanctions, outside the confines of written law, and it is based on a clear power asymmetry.

According to Stefano Sacchi,

"Although instances of conditionality are usually embodied in formalized agreements, and their terms – including the sanctions for non-compliance – explicitly specified through detailed covenants, [...] this is not necessary for conditionality to be operational and effective in influencing a party's behaviour. Conditionality can be based on an implicit understanding between the two parties involved that a particular behaviour is expected in order for the good to be made available, even in the absence of detailed covenants".⁵

While it is widespread in the realm of international relations, recourse to *implicit* conditionality is rather uncommon for a supranational institution. In fact, conditionality is usually applied by international organizations in the exercise of their conferred powers and its terms are *explicitly* established in binding legal provisions.

At the beginning of the sovereign debt crisis, the ECB applied this form of conditionality in the context of its collateral policy, the Emergency Liquidity Assistance (ELA) and the Securities Markets Programme (SMP).

In these instances, the Central Bank made (large) use of its discretionary monetary powers, formally pursuing risk-mitigating objectives, in order to safeguard the EMU and its stability. However, well beyond that, the ECB's conditionality contributed to drive Euro area crisis countries to adopt urgent and crucial reforms or even to seek EU/IMF financial assistance.

Unlike in the case of conditionality attached to EU/IMF lending, which has clear legal bases⁶ and is defined in Memoranda of Understanding and EU Council Decisions (and,

⁵ S. SACCHI, *Conditionality by Other Means: EU Involvement in Italy's Structural Reforms in the Sovereign Debt Crisis*, in *Comparative European Politics*, 2015, pp. 77-92, at p. 78.

⁶ The legal bases for conditionality attached to the Euro Area intergovernmental loans to Greece (the so-called Greek Loan Facility) are to be found in TFEU Arts 126 and 136. In the case of the European Financial Stabilisation Mechanism (EFSM), conditionality is based on Art. 3 of Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism. In 2011, a third paragraph was added to TFEU Art. 136 through the European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro adding; according to the new para. 3 of Art. 136 TFEU: "The granting of any required financial assistance under the mechanism will be made subject to strict conditionality". Accordingly, Art. 13 of the European Stability Mechanism (ESM) establishes

in the case of the IMF, in Letters of Intent and Stand-By Arrangements), no legal document formalises the scope of the ECB's implicit conditionality.

Instead, pressure on governments in distress was exerted by the ECB through press releases and letters which were supposed to remain confidential. Market mechanisms further contributed to make the ECB's interventions effective.

Eventually, the ECB decided to shift to *explicit* conditionality.

Under the Outright Monetary Transactions programme (OMT), announced in September 2012 but never implemented, sovereign bonds purchases were subject to the "strict and effective conditionality" attached to a European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. The 2014 review of the temporary framework on collateral eligibility established that debt instruments issued by countries under an EU/IMF macro-economic adjustment programme could be accepted as collateral as long as they complied with the attached conditionality. More recently, under the Public Sector Purchase Programme (PSPP), the purchase of bonds issued by Euro area countries receiving EU/IMF financial assistance was conditioned to a positive outcome of the programme review.

In doing so, the ECB demonstrated its ability to respond to context. One might argue that, being the reform of the EU economic governance under the close scrutiny of the European Court of Justice (and of the German Federal Constitutional Court),⁷ the ECB adapted its policy to the evolving legal situation.

Explicit conditionality strengthens legal certainty and predictability. Providing it with a clear legal basis in ECB legal acts, conditionality becomes applicable to Euro area members according to standard criteria, thus reducing discretionality and avoiding selectivity. The whole process is made more transparent and open to judicial review.

The shift to explicit conditionality has therefore to be welcomed, even if it does not lessen concerns about the ECB's democratic accountability and its *interference* in domestic reform processes.⁸ Moreover, it does not address the several controversial is-

the procedure to define the conditions attached to financial assistance. See also Art. 2 of the European Financial Stability Facility (EFSF) Framework Agreement.

⁷ Reference is made to the claims that led to German Federal Constitutional Court, judgment of the 12 September 2012, BvR 1390/12 *et al.*, on the ESM and on the so-called Fiscal Compact, to the Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*, and to the Court of Justice, judgment of 16 June 2015, case C-62/14, *Gauweiler et al. v. Deutscher Bundestag* adopted following a preliminary ruling request from the German Federal Constitutional Court, Order of the Second Senate of 14 January 2014, BvR 2728/13 *et al.*

⁸ On the ECB's democratic accountability see in particular G. CLAEYS, M. HALLERBERG, O. TSCHAKASSIN, *European Central Bank Accountability: How the Monetary Dialogue could Evolve*, in *Bruegel Policy Contribution*, March 2014; F. SCHARPF, *Monetary Union, Fiscal Crisis and the Disabling of Democratic accountability*, in A. SCHÄFER, W. STREECK, *Politics in the Age of Austerity*, Cambridge: Cambridge University Press, 2013, p. 108 *et seq.*; F. AMTENBRINK, *The Democratic Accountability of Central Banks: A Comparative Study*, Oxford: Oxford University Press, 1999.

sues arising from the ECB's participation in the Troika and from the content of the EU/IMF adjustment programmes.⁹

The following paragraphs will analyse the scope of the ECB's conditionality, describing the set of policy instruments through which it has been applied and with a view to assess the legitimacy of the ECB's actions.

III. CONDITIONALITY APPLIED TO COLLATERAL ELIGIBILITY FOR EUROSISTEM CREDIT OPERATIONS

Since the onset of the financial crisis, central banks have been at the forefront of efforts to prevent economic collapse, providing liquidity to the financial system and to solvent individual banks experiencing funding difficulties.

As the crisis unfolded, the ECB engaged in "non-standard" (or unconventional) monetary policy measures, which deviate from traditional monetary policy operations and are of a temporary nature.

One of the ECB's non-standard measures was aimed at improving banks' funding and liquidity conditions.¹⁰ To this end, the collateral framework was changed to broaden the list of eligible assets against which counterparties may obtain liquidity in central bank refinancing operations.

Besides, it has to be noted that the ECB Governing Council – which includes the members of the Executive Board and the central bank governors of euro area Member States – decides on a *one member, one vote* basis, but a voting rights rotation system has been in place since January 2015. According to Art. 10, para. 2, of the ESCB Statute, until the total number of Governors exceeded 18, Executive Board members hold permanent voting rights; instead, euro area countries are assigned to two groups, which exercise their voting rights with different frequencies, according to their capital share in the ECB and the size of GDP and the financial sector. To determine group membership, a ranking was established. Governors from the first five countries – currently, Germany, France, Italy, Spain and the Netherlands – share four voting rights. All others (14 since Lithuania joined on 1 January 2015) share 11 voting rights. The Governors take turns using the rights on a monthly rotation. As a result, Governors from the five largest euro area economies may vote 80 per cent of times, with participation of other Governors significantly lower (see S. LEVASSEUR, *Rotation of Voting on the ECB Governing Council: More than Symbolic?*, in *ofce le blog. The Collective Blog of the French Economic Observatory*, 15 January 2015, www.ofce.sciences-po.fr). In response to criticism raised by the European Parliament, the ECB underlined that decisions are traditionally adopted by consensus (see European Parliament Legislative resolution P5_TA(2003)0094 of 13 March 2003 on the recommendation of the ECB for a proposal for a Council decision on an amendment to Art. 10.2 of the ESCB Statute. The minutes of the Governing Council monetary policy meetings, that the ECB started to publish only in January 2015, do not include details of discussions.

⁹ While monetary policy decisions (such as decisions on collateral, ELA ceilings, SMPs, OMTs and the PSPP) falls within the mandate of the Governing Council, participation in the Troika is managed directly by the Executive Board.

¹⁰ The ECB's standard monetary policy tools are: open market and credit operations, standing facilities and minimum reserves requirements for credit institutions.

According to Art. 18, para. 1, of the ESCB Statute,¹¹ the ECB and Euro area national central banks (NCBs) can operate in financial markets and provide credit to counterparties only against *adequate collateral*.

The assumption is that central banks should only lend against high quality collateral. Collateral requirements are conceived to mitigate credit risk, ensure equal treatment of counterparties and enhance operational efficiency and transparency. Haircuts are applied to the market value of the collateral being pledged.

Criteria to determine assets adequacy, as well as entities that may act as counterparties in credit operations, are established by two sets of provisions: the ECB General and Temporary Frameworks.

The General Framework consists of decisions and guidelines¹² adopted by the ECB Governing Council and it establishes the monetary policy tools, operations, instruments and procedures of the Eurosystem. Its cornerstone is ECB Guideline 2015/510,¹³ which in its Part Four defines uniform eligibility criteria for assets that may be employed as collateral in Eurosystem credit operations, differentiating by type of asset type and its risk.¹⁴

The Temporary Framework complements, amends or overrules the General Framework. It allows the ECB to adopt additional derogatory measures that may become necessary under exceptional circumstances and are applicable until further notice. The two frameworks co-exist and the requirements of one framework do not override the other unless otherwise specified. This provides the ECB with sufficient flexibility to respond to market conditions and regulatory developments.

During the financial crisis, the ECB broadened the range of acceptable collateral through the Temporary Framework, thus allowing departures from the general eligibil-

¹¹ Protocol no. 4 on the Statute of the European System of Central Banks and of the ECB (the ESCB Statute), p. 230.

¹² The ECB Guidelines are binding legal acts addressed to the euro area NCBs only. They are not intended to directly or individually affect the rights of counterparties. "They are the tools with which the ECB can ensure the integration of the NCBs into the System and concern the power of the ECB to ensure compliance by the NCBs with decisions taken centrally" (R. SMITS, *The European Central Bank: Institutional Aspects*, The Hague: Kluwer Law, 1997, p. 104). See also S. ANTONIAZZI, *La Banca centrale europea tra politica monetaria e vigilanza*, Torino: Giappichelli, 2013, p. 114; A. MALATESTA, *La Banca centrale europea*, Milano: Giuffrè, 2003, p. 135 *et seq.*

¹³ Guideline (EU) 2015/510 of the ECB of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60), p. 3, as lastly revised and amended (see *ECB Monetary Policy instruments, General Framework*, www.ecb.europa.eu).

¹⁴ One of the eligibility criteria consists in meeting the high credit quality requirements specified in the Eurosystem credit assessment framework (ECAf). On the basis of the General Framework, the ECB publishes on its website a *single list* of collateral, specifying on a daily basis which assets may be used in liquidity-providing operations.

ity criteria. This was necessary to avoid a credit crunch and to guarantee the availability of sufficient bank liquidity in countries struck by the crisis.¹⁵

Notably, debt instruments issued or guaranteed by Euro area members in distress were either accepted through a waiver to the general criteria or rejected, depending on the ECB's risk assessment. In spite of their downgrading by credit rating agencies, sovereign bonds of these countries were considered eligible as collateral, provided that they complied with EU/IMF adjustment programmes. Greater haircuts compensated the consequent increase in risk.

Decisions on collateral eligibility were taken by the ECB in the exercise of its power to limit risks for the Eurosystem.¹⁶ In fact, according to ECB Guideline 2015/510, the Governing Council has the right to determine whether an issue, issuer, debtor or guarantor fulfils the Eurosystem credit quality requirements relying on any information it deems relevant for ensuring adequate risk protection (Art. 59, para. 6). Moreover, even assets eligible for ordinary Eurosystem credit operations may be subject to specific risk control measures (Arts 127 and 128).

Compliance with EU/IMF conditionality was therefore monitored by the ECB to assess the adequacy as collateral of sovereign bonds issued by crisis countries. As a matter of fact, the ECB formally exercised its risk management discretionary powers. However, by making collateral eligibility subject to the implementation of EU/IMF adjustment programmes, the ECB almost acted as an enforcer of the Troika's conditionality.

This stance was applied to Greece, Ireland, Portugal and Cyprus.

a) On 6th May 2010, following the worsening of the Greek crisis and fearing contagion to other countries, the Eurogroup Member States¹⁷ announced they were ready to provide financial assistance to Greece together with the IMF.¹⁸

On the same day, the ECB decided to continue accepting Greek sovereign debt debentures as collateral even though their rating had been written down to junk bond levels. To this end, for Greek sovereign bonds only, the ECB exceptionally and tempo-

¹⁵ Guideline 2014/528/EU of the ECB of 9 July 2014 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline ECB/2007/9 (ECB/2014/31), p. 28, as amended.

¹⁶ See ECB, *The Financial Risk Management of the Eurosystem's Monetary Policy Operations*, July 2015, www.ecb.europa.eu.

¹⁷ See *Statement by the Eurogroup on providing stability support to Greece*, 2 May 2010, www.consilium.europa.eu, as well as *Statement of the Heads of State or Government of the Euro Area*, 7 May 2010, www.consilium.europa.eu.

¹⁸ On 2nd May 2010, the Eurogroup agreed to provide 80 billion euros through the so-called Greek Loan Facility, a pool of bilateral loans to be managed and disbursed to Greece by the European Commission along a three-year period. The IMF adopted a Stand-by Arrangement under the Emergency Financing Mechanism to lend Greece 30 billion euros (equivalent to 3200 per cent of the country's quota). See IMF, *Greece: Request for Stand-By Arrangement*, in *Country Report n. 10/111*, May 2010.

rarily suspended the Eurosystem minimum requirements for credit quality thresholds (ECB Decision 2010/268/EU).¹⁹

The fourth recital of the ECB Decision 2010/268/EU stated the grounds on which the waiver was granted:

"The Governing Council has assessed the fact that the Greek Government has approved an economic and financial adjustment programme which it has negotiated with the European Commission, the ECB and the International Monetary Fund, as well as the strong commitment of the Greek Government to fully implement such programme. The Governing Council has also assessed, from a Eurosystem credit risk management perspective, the effects of such a programme on the securities issued by the Greek Government. The Governing Council considers the programme to be appropriate, so that, from a credit risk management perspective, the marketable debt instruments issued by the Greek Government or guaranteed by the Greek Government retain a quality standard sufficient for their continued eligibility as collateral for Eurosystem monetary policy operations, irrespective of any external credit assessment".²⁰

At the same time, the ECB announced that it would monitor the implementation of the economic and financial reform programme behind the adoption of the ECB Decision 2010/268/EU.

This Decision remained in force until the end of February 2012, when Greece began its sovereign debt restructuring by launching a 200 billion euros exchange offer on its bonds.²¹ The so-called Private Sector Involvement (PSI) brought further distress to the country and, on 27th February 2012, Fitch, Moody's and Standard & Poor's awarded Greece a "selective default" rating. In this new context, the ECB considered the PSI impairing the adequacy of Greek sovereign bonds as collateral and therefore repealed its previous decision,²² only to reintroduce it shortly after, but with further conditionality

¹⁹ Decision ECB/2010/3 of the European Central Bank of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government, p. 102, no longer in force.

²⁰ *Ibidem*.

²¹ The exchange offer did not include Greek sovereign debt instruments held by the ECB, NCBs and the EIB in their portfolios. See J. ZETTELMEYER, C. TREBESCH, M. GULATI, *The Greek Debt Restructuring: An Autopsy*, in *Peterson Institute for International Economics Working Paper*, WP 13-8, August 2013, p. 10; J. BLACK, *Euro Central Banks Said to Swap Greek Investment-Portfolio Bonds*, in *Bloomberg*, 21 February 2012, www.bloomberg.com. See also A. VITERBO, *I meccanismi per la risoluzione delle crisi del debito sovrano: alla ricerca di un difficile bilanciamento tra interessi pubblici e privati*, in *Diritti umani e diritto internazionale*, 2014, pp. 351-370; A. VITERBO, *Supranational Creditors: A Threat to the Equal Status of Bondholders?*, in *Capital Markets Law Journal*, 2015, pp. 193-211.

²² Decision 2012/133/EU of the European Central Bank of 27 February 2012 repealing Decision ECB/2010/3 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government (ECB/2012/2), p. 36, no longer in force.

attached (ECB Decision 2012/153/EU).²³ A few days later, the Euro area Ministers of Finance approved the Second economic adjustment programme for Greece.²⁴

It is worth mentioning that a group of more than 200 Italian bondholders of Greek securities requested the annulment of ECB Decision 2012/153/EU before the CJEU. The applicants claimed that the additional conditionality required for the acceptance of Greek bonds as collateral breached the principles of equal treatment and proportionality. The CJEU however dismissed the case declaring it inadmissible because the applicants were not directly concerned by the ECB Decision 2012/153/EU.²⁵

The same group of applicants brought an action before the CJEU for the damage they had allegedly suffered from the adoption of ECB Decision 2012/153/EU and from other measures related to the Greek sovereign debt restructuring, arguing that the ECB had infringed their legitimate expectations, the principle of legal certainty and the principle of equal treatment of private creditors.²⁶ The CJEU ruled however that the ECB was not responsible for losses borne by private investors in the context of the Greek restructuring.

During 2012, the ECB intervened many other times to urge Greece to implement austerity measures. In July, following the general elections, the ECB suspended the acceptance of Greek securities as collateral until the completion of the first review of the second economic adjustment programme.²⁷ Commentators considered this decision as a way of stepping up pressure on the new government to confirm adherence to the

²³ The waiver was made conditional upon “the provision by the Hellenic Republic to NCBs of a collateral enhancement in form of a buy-back scheme” (Art. 1, para. 1, of the Decision ECB/2012/3 of the European Central Bank of 5 March 2012 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic in the context of the Hellenic Republic’s debt exchange offer, p. 19, no longer in force). See also the Statements by the Heads of State or Government of the euro area and EU institutions, Brussels, of 21 July 2011 and 26 October 2011. On the credit enhancement see A. SÁINZ DE VICUÑA, *Legal Perspectives on Sovereign Default*, in BIS, *Sovereign Risk: A World Without Risk Free Assets?*, BIS Papers No. 72, July 2013, p. 117.

²⁴ Euro area members and the IMF committed the undisbursed amounts of the first programme plus an additional 130 billion euros for the years 2012–2014.

²⁵ See Tribunal, order of 25 June 2014, case T-224/12, *Alessandro Accorinti et al. v. ECB*. It is worth mentioning that, unlike ordinary decisions for which the ECB identifies the addressee of the act, decisions on collateral are atypical. In fact, although not specifying the addressee, they have an impact on the domestic law system of euro area members: NCBs are authorised to accept or reject as collateral debt instruments issued or fully guaranteed by a country in distress, waiving ordinary credit requirements.

²⁶ See Tribunal, judgment of 7 October 2015, case T-79/13, *Alessandro Accorinti et al. v. ECB*. See N. PIGEON, *La Banque centrale européenne n’est pas responsable des pertes subies par les créanciers privés de la Grèce dans le cadre du plan de restructuration de la dette publique grecque* (Commentaire de Tribunal, arrêt du 7 octobre 2015, affaire T-79/13, Accorinti et al. c. BCE), in *European Papers*, 2016, www.europeanpapers.eu, pp. 231–243.

²⁷ See Decision ECB/2012/14 of the European Central Bank of 18 July 2012 repealing Decision ECB/2012/3 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic in the context of the Hellenic Republic’s debt exchange offer, p. 26.

commitments previously undertaken with the EU/IMF.²⁸ A waiver to the general eligibility requirements was reinstated once the Eurogroup expressed its positive opinion on the reform programme implemented until then by the country.²⁹

More recently, following the January 2015 legislative elections and announcements by the new Prime Minister Alexis Tsipras that his government intended to renegotiate the reform programme agreed with the Troika, the ECB once again discontinued acceptance of Greek securities as collateral.³⁰ The ECB press release of 4th February 2015 explained that: "The Governing Council decision is based on the fact that it is currently not possible to assume a successful conclusion of the programme review and is in line with existing Eurosystem rules".³¹ Since Greece was no longer compliant with the programme, the temporary suspension of ordinary credit quality thresholds could not be maintained. As a result of the decision – adopted a few days before a crucial Eurogroup meeting – the spread soared,³² most Greek banks suffered severe capitalisation losses and their customers rushed to retrieve their money from bank accounts.

"If the ECB had let the politicians discuss first, and the Eurogroup had concluded that Greece is no longer under a programme, then the necessary conditions for the waiver on Greek government bonds would have disappeared. The waiver would have anyway needed to be cancelled, with the difference that the trigger in that case would have been a political decision from the Eurogroup rather than from the ECB. The ECB's pre-emptive move formally protects the central bank's independence, but it also forces the political game of next week, well beyond the limit of a central bank's remit".³³

On 18th February 2015, the Athens government requested a six-month extension of the adjustment programme. The Eurogroup and the EFSF agreed to four months but, in spite of exhausting negotiations, it was impossible to successfully conclude the last re-

²⁸ S. SUONINEN, M. JONES, *ECB Turns Screw on Greece, Stops Accepting Collateral*, in *Reuters*, 20 July 2012.

²⁹ See in particular the fourth and fifth recital of the Decision ECB/2012/32 of the European Central Bank of 19 December 2012 on temporary measures relating to the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic, p. 74, no longer in force.

³⁰ See in particular the fifth recital of the Decision ECB/2015/6 of the European Central Bank of 10 February 2015 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic, p. 29: "On the basis of the information available, the Governing Council has made an assessment, according to which it is not currently possible to assume a successful conclusion of the review of the European Union/International Monetary Fund programme for the Hellenic Republic. Consequently, the Hellenic Republic is no longer deemed to be in compliance with the conditionality of the programme".

³¹ ECB Press Release, *Eligibility of Greek Bonds Used as Collateral in Eurosystem Monetary Policy Operations*, 4 February 2015, www.ecb.europa.eu.

³² J. Cox, *Greek Stocks and Bonds Sink After ECB Debt Decision*, in *The Wall Street Journal*, 5 February 2015, www.wsj.com.

³³ S. MERLER, *ECB Collateral Damages on Greece*, in *Bruegel Blog*, 5 February 2015, www.bruegel.org. See also P. KRUGMAN, *A Dance with Draghi*, in *The New York Times*, 5 February 2015, krugman.blogs.nytimes.com and *Greece and the ECB: The Enforcer. How the European Central Bank can dictate terms to the Greek government*, in *The Economist*, 4 February 2015.

view of the programme before its expiry on 30th June 2015.³⁴ To avoid bank runs and a collapse of the Greek banking system, the government was forced to introduce capital controls, limiting transfers outside the country and cash withdrawals. Only on the 14th of August, a political agreement was finally reached on a third economic adjustment programme.³⁵

Nonetheless, the ECB's negative decision on the adequacy of Greek debt securities as collateral remained in force for more than a year.³⁶ The waiver was reintroduced only after the adoption of all prior actions requested under the Memorandum of Understanding and the successful conclusion of the first review of the third adjustment programme.³⁷

b) A similar approach was adopted with Ireland (in 2010 and 2011) and with Portugal (in 2011), suspending the eligibility of their debt instruments for Eurosystem monetary policy operations, only to accept them again after the introduction of "appropriate" adjustment programmes "agreed" with the Troika.

Notably, in his letter dated 15th October 2010, the ECB President Jean-Claude Trichet reminded the Irish Minister for Finance Brian Lenihan that:

"The Eurosystem may limit, exclude or suspend counterparties' access to monetary policy instruments on the grounds of prudence and may reject or limit the use of assets in the Eurosystem credit operations by specific counterparties. The Governing Council indeed carefully monitors the Eurosystem credit granted to the banking system, in the Irish as well as in all other cases, and in particular the size of Eurosystem exposures to individual banks, the financial soundness of these banks, and the collateral they provide to the Eurosystem. The assessment by the Governing Council of the appropriateness of its exposures to Irish banks depends very much on progress in economic policy adjustment, enhancing financial sector capital and bank restructuring".³⁸

Eventually, the ECB Governing Council considered that both the Irish and Portuguese debt instruments met sufficient quality standards as collateral, irrespective of any external credit assessment, since "the Government [had] approved and [was] in the process of implementing an economic and financial adjustment programme, which it

³⁴ Eurogroup, *Statement on Greece*, 20 February 2015; EFSF Press Release, *EFSS Board of Directors extends the Master Financial Facility Agreement (MFFA) for Greece until 30 June 2015*, 27 February 2015.

³⁵ A new Memorandum of Understanding was signed on 19 August 2015 after the ESM Board of Governors approved the Third economic adjustment programme for up to 86 billion euros for the period 2015-2018.

³⁶ During this period, the Hellenic banking system was kept afloat by the Emergency Liquidity Assistance provided by the Bank of Greece (see *infra* para. 3).

³⁷ See Decision ECB/2016/18 of the European Central Bank of 22 June 2016 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic and repealing Decision, p. 14 and ECB Press Release, *ECB Reinstates Waiver Affecting the Eligibility of Greek Bonds Used as Collateral in Eurosystem Monetary Policy Operations*, 22 June 2016.

³⁸ The so-called Irish letters are published on the ECB website (see *infra*, para. 3).

[had] negotiated with the European Commission, the ECB and the International Monetary Fund, and which [had] committed to fully implement".³⁹

c) In the case of Cyprus, after the March 2013 banking crisis and the partial bail-in of uninsured deposits, the country launched a one billion euros offer to exchange domestic-law bonds held by residents with new bonds having the same coupon rate but longer maturity. During the debt management exercise, Cypriot bonds were no longer accepted as collateral. Their eligibility was restored only after completion of the exercise and confirmation that Cyprus was complying with the conditionality of the economic and financial adjustment programme.⁴⁰

Eventually, in March 2013, to simplify the collateral framework, the ECB Governing Council withdrew its many decisions on assets issued or guaranteed by individual programme countries⁴¹ and adopted a Guideline addressed to all Euro area members.⁴²

The new Guideline contained temporary measures on collateral eligibility and marked a shift to explicit conditionality. It established the following general principle: debt instruments offered as collateral by Euro area members in distress are exempted from general credit quality requirements whenever the issuing or guaranteeing country is implementing a EU/IMF programme. However, it is within the powers of the ECB Governing Council to decide whether the Member State "comply with the conditionality of the financial support and/or the macroeconomic programme" and to revoke the waiver.⁴³

The ECB Guideline currently in force maintains the same approach.⁴⁴

³⁹ See the fourth recital of the following two ECB Decisions: Decision ECB/2011/4 of the European Central Bank of 31 March 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Irish Government, p. 33, no longer in force; and Decision ECB/2011/10 of the European Central Bank of 7 July 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Portuguese Government, p. 31, no longer in force.

⁴⁰ See Decision ECB/2013/13 of the European Central Bank of 2 May 2013 on temporary measures relating to the eligibility of marketable debt instruments issued or fully guaranteed by the Republic of Cyprus, p. 26; Decision ECB/2013/21 of 28 June 2013 repealing Decision ECB/2013/13 on temporary measures relating to the eligibility of marketable debt instruments issued or fully guaranteed by the Republic of Cyprus, no longer in force.

⁴¹ In March 2013, the ECB decisions concerning the eligibility of marketable debt instruments issued or guaranteed by Greece, Ireland and Portugal were repealed by the Decision ECB/2013/5 of the European Central Bank of 20 March 2013.

⁴² Guideline 2013/170/EU of the ECB of 20 March 2013 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline ECB/2007/9 (recast) (ECB/2013/4), p. 23, no longer in force.

⁴³ *Ivi*, Art. 7.

⁴⁴ See Art. 8, para. 2, of ECB Guideline 2014/528/EU, *cit.*, p. 28, as amended.

IV. CONDITIONALITY APPLIED TO THE PROVISION OF EMERGENCY LIQUIDITY ASSISTANCE

During the crisis, Emergency Liquidity Assistance (ELA) proved to be of critical importance for the operation of the banking system in crisis countries and was granted in many occasions.⁴⁵ In the case of Ireland, Cyprus and Greece, however, the provision of ELA was implicitly conditioned by the ECB to the acceptance of a EU/IMF programme of economic adjustment.

Since 1999, Euro area credit institutions facing temporary liquidity problems can receive ELA from their NCB, in addition or in place of the assistance provided by the Eurosystem.⁴⁶ In other words, ELA might be granted by NCBs even to banks which are unable to access ordinary Eurosystem refinancing operations, provided that they are otherwise solvent. All risks and costs are only borne by the NCB concerned.

Compared to ordinary monetary policy operations, ELA is provided against lower-quality collateral, with larger haircuts usually applied.⁴⁷ NCBs can autonomously design their own ELA framework, including eligibility criteria for collateral and the applicable risk control measures.

In fact, ELA falls within national competence and the legal basis for its disbursement is found in domestic law. Nevertheless, according to Art. 14, para. 4, of the ESBC Statute, the ECB Governing Council may restrict the performance of NCBs national functions, and consequently also of ELA operations, whenever they are deemed to interfere with the Eurosystem goals and tasks.⁴⁸

⁴⁵ Only in September 2015, the ECB authorized NCBs to disclose ELA figures, "in cases where they deem that such communication is necessary". See ECB Press Release, *Communication on Emergency Liquidity Assistance*, 16 September 2015, www.ecb.europa.eu.

⁴⁶ W. BUITER, *ELA: An Emperor Without Clothes*, in *Global Economics View*, 21 January 2011, www.willembuiter.com. See also K. WHELAN, *The ECB's Collateral Policy and Its Future as Lender of Last Resort*, November 2014, www.polcms.europarl.europa.eu.

⁴⁷ ELA may amount to State aid if it is not "fully secured by collateral to which appropriate haircuts are applied, in function of its quality and market value" (European Commission, *Communication on the application from 1 August 2013 of State aid rules to support measures in favour of banks in the context of the financial crisis*, 2013/C 216/01, 30 July 2013).

⁴⁸ See ECB, *The financial risk management of the Eurosystem's monetary policy operations*, cit., p. 34: "Interference with the objectives and tasks of the ESCB could, for instance, result from the following: (i) a threat to the singleness of monetary policy, (ii) a threat to the implementation of monetary policy, for example by making the steering of short-term rates more difficult, (iii) a threat to the financial independence of the NCB, for instance if ELA was not provided against sufficient collateral to safeguard such independence, (iv) an obvious concern about a possible breach of the monetary financing prohibition, or (v) provision of ELA at overly generous conditions, which, in turn, could increase the risk of moral hazard on the side of financial institutions or responsible authorities".

To this end, NCBs have to duly inform the ECB, which may object to the granting of ELA.⁴⁹ Restrictions are approved by the ECB Governing Council by a majority of two thirds of the votes cast.

Upon request of the NCB, the ECB Governing Council may even set a ceiling, refraining from vetoing ELA operations below a given threshold.

To avoid moral hazard, ELA cannot be provided to insolvent financial institutions. In fact, the purpose of ELA is to address banks' short-term liquidity problems and not to provide solvency support to credit institutions.

It has to be said though that "the distinction between [solvent but illiquid and insolvent institutions] is particularly difficult to make in periods of financial distress, which is exactly when central banks may have to use this tool. Consequently, careful judgment is necessary in providing emergency liquidity assistance".⁵⁰

When setting ELA ceilings and monitoring NCBs activities in the general interest of the Eurosystem, the ECB certainly applies a "careful judgement". However, for Ireland, Cyprus and Greece, this power was also exerted to drive the countries to seek the Troika's financial assistance.⁵¹ These cases in fact clearly epitomise the impact that a threat to veto ELA above a certain threshold may have on a country.

a) Irish banks, holding low rating assets unsuitable for direct ECB liquidity purposes, desperately needed ELA.⁵² In March 2009, the Central Bank of Ireland provided ELA for 11.5 billion euros to Anglo Irish Bank, which had been nationalized the previous January, for collateral that could not be pledged in ordinary monetary policy operations. At the end of 2010, Anglo Irish Bank owed 28.1 billion euros in ELA.⁵³ Overall, the Eurosys-

⁴⁹ In October 2013, for the first time, the ECB disclosed the ELA Procedures available at www.ecb.europa.eu. Below two billion euros, ELA may be granted by the relevant NCB without clearance by the ECB Governing Council (non-objection procedure). In practice, however, all ELA requests are communicated before disbursement. Timely information should be provided on the reasons for the ELA request, its beneficiaries, volume and duration, as well as on pledged collateral, its valuation and haircuts applied.

⁵⁰ Remarks by T. PADOA-SCHIOPPA, Member of the ECB Executive Board, Jakarta, 7 July 2003, www.ecb.europa.eu. In 2014, also the European Parliament expressed the view that the solvency concept employed by the ECB in the context of ELA is "lacking in transparency and predictability" (European Parliament Resolution P7_TA(2014)0239 of 13 March 2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, paras 26 and 94).

⁵¹ See T. BEUKERS, *The New ECB and Its Relationship with The Eurozone Member States: Between Central Bank Independence and Central Bank Intervention*, in *Common Market Law Review*, 2013, pp. 1579-1620, at 1593 *et seq.*

⁵² G.B. WOLFF, *Eurosystem Collateral Policy and Framework: Was It Unduly Changed?*, in *Bruegel Policy Contribution*, November 2014, p. 7.

⁵³ See K. WHELAN, *Briefing Paper on the IBRC, ELA and Promissory Notes*, 15 February 2012, prepared for the Oireachtas Joint Committee on Finance, Public Expenditure and Reform, p. 3. See also W. BUITER, *ELA: An Emperor without Clothes?*, in *CITI Global Economics View*, 21 January 2011; B. EICHENGREEN, *The Irish Crisis and the EU from a Distance*, in IMF, *Ireland: Lessons from Its Recovery from the Bank-Sovereign Loop*, 2015, p. 109.

tem was providing approximately 140 billion euros to Irish banks, around 85 per cent of the country's GDP.⁵⁴ Ireland was on the verge of a banking crisis, but EU/IMF financial assistance had not been requested yet.

On 15th October 2010, Jean-Claude Trichet, at the time President of the ECB, wrote to the Irish Minister of Finance demanding the timely adoption of a reform programme in the absence of which the ECB would suspend ELA support. The exchange was supposed to remain strictly confidential, but eventually the so-called Irish letters were published on the ECB's website following receipt of six requests under the public access regime.⁵⁵

In his letter, Trichet reminded that ELA was closely monitored by the Governing Council to prevent interference with the objectives and tasks of the Eurosystem. And "Therefore, if ELA is provided in significant amounts, the Governing Council will assess whether there is a need to impose specific conditions in order to protect the integrity of our monetary policy".⁵⁶ In addition, to ensure compliance with the monetary financing prohibition set forth in Art. 123 TFEU, it was essential to ensure that recipient institutions continued to be solvent.

Last but not least, Trichet warned that the "large provision of liquidity by the Eurosystem and the Central Bank of Ireland to entities such as Anglo Irish Bank should not be taken for granted as a long-term solution. [...] the Governing Council cannot commit to maintaining the size of its funding to these institutions on a permanent basis"⁵⁷ and concluded that in any decisions concerning liquidity provision to the Irish banking system, the ECB would "take into account appropriate progress in the areas of fiscal consolidation, structural reforms and financial sector restructuring".⁵⁸

In his reply, the Minister of Finance, Brian Lenihan, assured that the Irish government was prepared to adopt any measure to achieve budget sustainability within a four years economic strategy.⁵⁹

On 16th November 2010, although considered still inadequate, the Eurogroup welcomed the reform programme.⁶⁰

⁵⁴ See M. DRAGHI, *Letter to Mr. Matt Carthy, Member of the European Parliament*, Frankfurt: European Central Bank, 17 February 2015, which added that "This represented around one-quarter of the ECB's total lending at the time – an unprecedented level of exposure to any country, not least in the light of the fact that Ireland's share in the capital of the ECB was about 1%".

⁵⁵ On 6th November 2014, the ECB published on its website the letters exchanged at the end of 2010 between the former ECB President J.-C. Trichet and the Irish Finance Minister B. Lenihan (including a dedicated Q&A). See www.ecb.europa.eu.

⁵⁶ Letter of the ECB President Jean-Claude Trichet to the Irish Minister for Finance Brian Lenihan dated 15 October 2010, published on the ECB's website.

⁵⁷ *Ibidem*.

⁵⁸ *Ibidem*.

⁵⁹ Reply letter of the Irish Minister for Finance Brian Lenihan dated 4 November 2010, published on the ECB's website.

In a new letter, the ECB's President made it clear that:

"It is the position of the Governing Council that it is only if we receive in writing a commitment from the Irish Government vis-à-vis the Eurosystem on the four following points that we can authorise further provision of ELA to Irish financial institutions: 1) The Irish government shall send a request for financial support to the Eurogroup; 2) The request shall include the commitment to undertake decisive actions in the areas of fiscal consolidation structural reforms and financial sector restructuring, in agreement with the European Commission, the IMF and the ECB; 3) The plan for the restructuring of the Irish financial sector shall include the provision of the necessary capital to those Irish banks needing it and will be funded by the financial resources provided at the European and international level to the Irish government as well as by financial means currently available to the Irish government, including existing cash reserves of the Irish government; 4) The repayment of the funds provided in the form of ELA shall be fully guaranteed by the Irish Government, which would ensure the payment of immediate compensation to the Central Bank of Ireland in the event of missed payments on the side of the recipient institutions".⁶¹

As a result, on 21st November 2010, the Irish government submitted a formal request for EU/IMF financial assistance, in practice declaring that it was prepared to adopt the measures requested by the ECB.⁶²

On the same day, the Minister Lenihan replied to Trichet stating that:

"I would like to inform you that the Irish Government has decided today to seek access to external support from the European and international support mechanisms. This grave and serious decision has been taken in the light of [recent developments] and informed by your recent communications, and the advice you have conveyed to me personally and courteously in recent days. [...] I hope that this will provide some reassurance to the Governing Council and that you will be able to reiterate in a public way the continuing practical support of the ECB for the liquidity position of the Irish banks, to help reassure the market on this crucial point".⁶³

A few days later, the ECB Governing Council approved the disbursement of ELA by the Central Bank of Ireland.

⁶⁰ Eurogroup, *Statement on Ireland*, 16 November 2010, www.consilium.europa.eu.

⁶¹ Letter of the ECB President Jean-Claude Trichet, to the Irish Minister for Finance Brian Lenihan dated 19 November 2010 on the large provision of liquidity by the Eurosystem and the Central Bank of Ireland to Irish banks and the need for Ireland to agree to an adjustment programme, published on the ECB's website.

⁶² See *Statement by the Eurogroup and ECOFIN Ministers*, 21 November 2010, as well as *Statement by the Eurogroup and ECOFIN Ministers*, 28 November 2010, www.consilium.europa.eu.

⁶³ Reply letter of the Irish Minister for Finance Brian Lenihan dated 21 November 2010, published on the ECB's website.

b) The ECB conditioned ELA also in the case of the Cyprus crisis. In March 2013, as the Cypriot Parliament had rejected a number of conditions contained in the EU/IMF rescue programme, the ECB Governing Council announced it would soon stop ELA to Cypriot banks: “[further] ELA could only be considered if an EU/IMF programme is in place that would ensure the solvency of the concerned banks”.⁶⁴ However, to guarantee solvency, banks had to be recapitalised and to do so Cyprus needed financial assistance. As a consequence, Cyprus accepted all the conditions imposed by the Troika⁶⁵ and the ECB did not veto an increase in emergency liquidity assistance but continued to “monitor the situation closely”.⁶⁶

c) For what concerns the Hellenic Republic, in 2015, during the hectic negotiations between the newly elected Greek government and the Troika on a four-month extension of the second adjustment programme, the ECB agreed on a number of increases in ELA support.⁶⁷ At the time, Greek banks heavily relied on ELA. Amid massive deposit outflows and a deterioration in the quality of their assets, banks were operating under very tight liquidity conditions. The banks-sovereign nexus added further risk to financial stability in the country.

When, on 27th June 2015 – after five Eurogroup meetings in just ten days –, Prime Minister Alexis Tsipras submitted the implementation of austerity measures to a referendum, negotiations came suddenly to a halt. The following day, the ECB rejected a request by the Bank of Greece to increase ELA from 89 to 95 billion euros, while adjusting haircuts on collateral.⁶⁸ The ECB’s decision to cap ELA was followed by the imposition of a bank holiday and capital controls to stop withdrawals of savings.⁶⁹

The agreement on the third adjustment programme was finally reached in August 2015. Initially, ELA was maintained at pre-existing levels,⁷⁰ to be then gradually reduced as a consequence of improved liquidity conditions in the Greek banking sector and the stabilization of private deposit flows.⁷¹

⁶⁴ ECB Press Release, *Governing Council decision on Emergency Liquidity Assistance requested by the Central Bank of Cyprus*, 21 March 2013, www.ecb.europa.eu.

⁶⁵ Eurogroup, *Statement on Cyprus*, 25 March 2013, www.consilium.europa.eu.

⁶⁶ ECB Press Release, *ECB’s Reaction to the Agreement on the Cypriot Macroeconomic Adjustment Programme*, 25 March 2013, www.ecb.europa.eu.

⁶⁷ BBC News, *ECB Offers Greek Banks Extra €3.3bn Emergency Cash*, 19 February 2015, www.bbc.com.

⁶⁸ See ECB Press Release, *ELA to Greek Banks Maintained*, 28 June 2015; G. GEORGIPOULOS, J. O’DONNELL, *ECB Rejects Bumper Greek Plea but Existing Support to Stay*, 29 June 2015, www.reuters.com.

⁶⁹ See President of the Hellenic Republic, *Act of Cabinet Having the Effect of Law: Bank Holiday of Short Duration (unofficial translation)*, Act No. 65, 28 June 2015, www.bankofgreece.gr.

⁷⁰ See ECB Press Releases, *ELA to Greek Banks Maintained*, 6 July 2015.

⁷¹ The further reduction of the ELA ceiling for Greek banks at 61 billion euros decided on 22 June 2016 also reflects the fact that the ECB Governing Council reintroduced the waiver on the eligibility as collateral of Greek debt instruments. See ECB Press Release, *ECB Reinstates Waiver Affecting the Eligibility of Greek Bonds Used as Collateral in Eurosystem Monetary Policy Operations*, 22 June 2016 and Bank of Greece Press Release, *ELA Ceiling for Greek Banks*, 23 June 2016.

It is worth noting that an annulment procedure has been brought before the CJEU to challenge two ECB's decisions adopted in 2015 to keep the ceiling on ELA support unchanged despite the requests made by the Bank of Greece.⁷² The applicant claims to be directly and individually concerned, arguing that the ECB acted *ultra vires*, taking into account political considerations in spite of its independence duties and breaching Art. 14, para. 4, of the ESCB Statute, since an increase in ELA would not interfere with the ESCB's objectives or tasks. The case is still pending at the time of writing.

V. CONDITIONALITY APPLIED TO THE SECURITIES MARKETS PROGRAMME

In May 2010, the ECB Governing Council adopted a Decision introducing the Securities Markets Programme (SMP) with the aim of restoring an appropriate monetary policy transmission and safeguard price stability.⁷³ To this end, the ECB and NCBs were to purchase on the secondary market eligible debt instruments issued by central governments or public entities of the Euro area.

Purchases of sovereign bonds were to be decided by the Governing Council without being explicitly subject to any form of conditionality. However, the fourth recital of the SMP Decision pointed out that "The Governing Council has taken note of the statement of the Euro area Member State governments that they 'will take all measures needed to meet their fiscal targets this year and the years ahead in line with excessive deficit procedures' and the precise additional commitments taken by some Euro area Member State governments to accelerate fiscal consolidation and ensure the sustainability of their public finances".⁷⁴ Moreover, SMP purchases were used to put up pressure on some countries, contributing to their swift adoption of "appropriate" policies and reforms.

Initially, the SMP was only used to purchase sovereign bonds issued by Greece, Ireland and Portugal. However, after being dormant for a few months, the programme was reactivated in summer 2011 to include also Italy and Spain.⁷⁵

The situation had in fact rapidly worsened, with Italian and Spanish spreads soaring to 370 points and market operators starting to believe a request for financial assistance was imminent.

Of no avail was the solemn declaration made on 21st July 2011 by the Euro area Heads of State or Government in an attempt to reassure markets that they would "hon-

⁷² ECB's Decisions of 28 June and 6 July 2015 (see *supra*). See Court of Justice, case T-368/15, *Alcimos Consulting SMPC v. ECB*, pending. See also www.alcimos.com.

⁷³ Decision ECB/2010/5 of the European Central Bank of 14 May 2010 establishing a securities markets programme, p. 8.

⁷⁴ *Ibidem*.

⁷⁵ Purchases under the SMP were made between the 10th May 2010 and 25th March 2011 and between 4th August 2011 and the end of February 2012.

our fully their own individual sovereign signature and all their commitments to sustainable fiscal conditions and structural reforms".⁷⁶

Therefore, on 4th August 2011, amid serious financial turbulence, the ECB Governing Council decided to resort to the SMP buying programme again. However, the first purchases – made while Trichet's press conference was still in progress – disappointed markets since they were limited to Irish and Portuguese sovereign bonds.⁷⁷

The following day, Trichet wrote to the governments of Italy and Spain.⁷⁸ While no mention to the SMP was made, the timing of the letters was clearly deliberate.⁷⁹

In the letter addressed to the Italian government, it was underlined that the measures to achieve a balanced budget by 2014 and debt sustainability were deemed insufficient. The ECB was venturing into an unexplored territory, dictating detailed measures to be timely adopted through decree-laws to be followed by Parliamentary ratification in a tight schedule, with the ECB's implicit conditionality reaching new levels.

The following excerpt clearly shows the depth of reforms warmly requested to the Italian government:

"At the current juncture, we consider the following measures as essential: [...] a) A comprehensive, far-reaching and credible reform strategy, including the full liberalisation of local public services and of professional services is needed. This should apply particularly to the provision of local services through large scale privatizations. b) There is also a need to further reform the collective wage bargaining system allowing firm-level agreements to tailor wages and working conditions to firms' specific needs and increasing their relevance with respect to other layers of negotiations. [...]. c) A thorough review of the rules regulating the hiring and dismissal of employees should be adopted in conjunction with the establishment of an unemployment insurance system and a set of active labour market policies capable of easing the reallocation of resources towards the more competitive firms and sectors".⁸⁰

Mario Monti, who would soon become the new Prime Minister of Italy, commented that important domestic policy decisions were being taken by a "market-oriented su-

⁷⁶ See *Statement by the Heads of State or Government of the Euro Area and EU Institutions, Brussels*, 21 July 2011, para. 7, www.consilium.europa.eu.

⁷⁷ See Jean-Claude Trichet, President of the ECB and Vitor Constancio, Vice-President of the ECB, *Introductory Statement to Press Conference with Q&A*, 4 August 2011, www.ecb.europa.eu, during which J.-C. Trichet declared "I would not be surprised if, before the end of this press conference, you would see something in the market".

⁷⁸ The confidential letter from Jean-Claude Trichet to the Italian Prime Minister Silvio Berlusconi dated 5 August 2011 was leaked to the press and published by *Il Corriere* on 29 September 2011 (www.corriere.it). The letter from Jean-Claude Trichet to the Spanish Prime Minister José Luis Rodríguez Zapatero dated 5 August 2011 is published in J. ZAPATERO, *El Dilema: 600 días de vértigo*, Barcelona: Planeta, 2013, p. 405.

⁷⁹ See T. BEUKERS, *The New ECB and Its Relationship with The Eurozone Member States*, cit., p. 1600.

⁸⁰ From: *Il Corriere*, cit.

pranational technical government" and compared the ECB to a "*podestà forestiero*", an authoritarian figure appointed by the central government that, during the fascist regime, was introduced to replace elected mayors.⁸¹

Similarly, urgent measures were dictated by the ECB in a letter to the Spanish Government. The country was requested to reform its labour legislation, improve public finance sustainability, restructure and recapitalise the banking sector. The letter concluded that: "Overall, we trust that the Spanish government is aware of its very high responsibility for the smooth functioning of the Euro area at the current juncture and will decisively undertake all necessary measures to regain market confidence in the sustainability of its policies again".⁸²

The day after, the governments of both countries promptly replied that they were prepared to undertake the reform actions indicated by the ECB.⁸³ Subsequently, Trichet released a communiqué welcoming the new course of Italy and Spain, announcing that "on the basis of the above assessments, the ECB will actively implement its Securities Markets Programme".⁸⁴ Sizeable sovereign bonds purchases began the following week, with securities acquired under the SMP increasing by 22 billion euros, to reach 96 billion euros in total.⁸⁵ Spread rapidly dropped almost to pre-crisis levels, making a default or a financial assistance request only a remote possibility.⁸⁶

Even Trichet later admitted the extraordinary character of his letters, but he denied their conditional nature: "The letters were of an extraordinary nature. They listed the economic, fiscal and structural measures the ECB thought Rome and Madrid had to take if they wanted to regain the confidence of investors. [...] There were no negotiations between the ECB and the two governments; no promise, no quid pro quo conditions under which the ECB would act. The governments were, of course, free to do whatever they deemed appropriate".⁸⁷

VI. CONDITIONALITY APPLIED TO THE TRANSFER OF SMP PROFITS TO GREECE

At this point of our analysis, a digression concerning the so-called SMP profits is required.

⁸¹ M. MONTI, *Il podestà forestiero*, in *Il Corriere*, 7 August 2011.

⁸² From: J. ZAPATERO, *El Dilema*, cit., p. 405.

⁸³ See in particular S. SACCHI, *Conditionality by Other Means*, cit., p. 81 *et seq.*

⁸⁴ See *Statement by the President of the ECB*, 7 August 2011, www.ecb.europa.eu.

⁸⁵ Source: www.ecb.europa.eu.

⁸⁶ Eventually, in June 2012, Spain requested financial assistance to the European Stability Mechanism for the recapitalisation of its financial institutions.

⁸⁷ Source: asia.nikkei.com. See also the transcript of the ECB Press Conference of 8 September 2011 and of 6 October 2011, with Trichet affirming that the letters were to be regarded as messages and the ECB was not dictating or imposing anything.

The ECB is going to earn huge profits from SMP operations, not only for the differential between ECB's funding and the bonds interest rate, but above all because the bonds were bought at a discount to par.⁸⁸ Furthermore, these bonds yield considerable interest and are usually held until maturity.⁸⁹

At the beginning of 2013, when the ECB Governing Council finally disclosed details on SMP holdings, the Eurosystem had securities in portfolio nominally worth 218 billion euros, of which 33.9 billion in Greek bonds.⁹⁰

A first group of Greek sovereign bonds had already reached maturity by August 2012. Greece had to repay the ECB three billion euros just few months after the sovereign debt restructuring and while still struggling with austerity measures. This was only a small fraction of Greek bonds being held by the ECB and NCBs.⁹¹ In practice, part of the money provided by Euro area members (and the IMF) to Greece had to be used to pay back the ECB in a rather circular way.

Following a storm of criticism,⁹² the ECB committed to return any profits on its Greek bond holdings to its shareholders, in proportion to their capital subscription (i.e. both to euro and non-Euro area NCBs, with the latter receiving a smaller percentage).⁹³ In turns, Euro area Member States undertook to transfer to the Bank of Greece "an amount equivalent to the income on the SMP portfolio accruing to their NCBs".⁹⁴ These

⁸⁸ "Through its covered bond and securities market programmes, the ECB acquired €276bn in assets between 2009 and 2012, when it was superseded by OMTs. This includes substantial peripheral sovereign debt – more than 50 per cent of outstanding Greek debt and a quarter of Portuguese debt – as well as commercial paper. As these assets will typically be held to maturity, coupon is the main source of gains rather than capital appreciation. Assuming no further defaults, these programmes should generate a net gain of around €70bn–€80bn, including €9bn on the Greek debt" (A. UTERMANN, *Bailouts Can Turn a Profit for Central Banks*, in *Financial Times*, 22 July 2013, www.ft.com).

⁸⁹ On the basis of the ECB's Annual Accounts, the net interest income arising from securities purchased under the SMP amounted to 1,108 million euros for FY 2012, 962 million euros for FY 2013, 728 million euros for FY 2014.

⁹⁰ Besides, just days before the country's general election, it was revealed that Italy was by far the greatest beneficiary of the SMP, with the Eurosystem holding Italian debt securities for a nominal amount of 102.8 billion euros. See ECB Press Release, *Details on securities holdings acquired under the Securities Market Programme*, 21 February 2013, www.ecb.europa.eu. For early estimates, see IMF, *Euro Area Policies: 2012 Article IV Consultation - Selected Issues Paper*, in *IMF Country Report No. 12/182*, July 2012, p. 47; Morgan Stanley, *Trading After the PSI*, 8 March 2012.

⁹¹ Between 2015 and 2037, it was estimated that 20 billion euros of Greek bonds held by the ECB will reach maturity. See C. FORELLE, P. MINCZESKI, E. BENTLEY, *Greece's Debt Due: What Greece Owes When*, in *Wall Street Journal*, 19 February 2015, graphics.wsj.com.

⁹² See for instance D. KEOHANE, *A €5bn Greek Bond Imminently Falling Due? Did We Mention We Have Deckchairs by This Abyss?*, in *Financial Times*, 9 November 2012, ftalphaville.ft.com.

⁹³ On the transfer of the Bank of Greece's SMP income to the Greek State, see the ECB Opinion of 20 February 2013, CON/2013/15.

⁹⁴ See Eurogroup, *Statement on Greece*, 27 November 2012, www.eurozone.europa.eu. See also ECB *Monthly Bulletin*, December 2012, p. 44. Euro Area Member States receiving financial assistance by the EFSF/ESM were exempted from participation in the scheme.

transfers would be conducted in a phased manner and “conditional upon a strong implementation by the country of the agreed reform measures in the programme period as well as in the post-programme surveillance period”.⁹⁵

SMP profits were transferred on a segregated account with the Bank of Greece that had to be used exclusively for public debt servicing, subject to prior detailed reporting to the EFSF/ESM.⁹⁶ The account was established by Law 4063/2012⁹⁷ to meet one of the second economic adjustment programme requirements.⁹⁸ Greece had to ensure priority to debt servicing payments and adopt specific measures to this end.

Accordingly, Art. 4, para. 5, of Law 4063/2012 (as amended)⁹⁹ sets forth that the service of public debt is a “special goal of public nature” and that it has priority over any other expense. “These provisions prove that Greece now has departed from the [...] position adopted by the Greek government in 1938, when it used the doctrine of state of necessity to justify its choice of giving preference to meeting its internal vital needs (administration, defence, public health, etc.) over paying its debt to its foreign creditors”.¹⁰⁰ More radical views questioned this form of conditionality claiming that Greece was moving towards “a creditors’ constitution” with the Troika “interfering directly in the constitutional set-up of a sovereign State, to impose a duty to pay creditors to take precedence over all other human and citizen concerns, needs and rights”.¹⁰¹

⁹⁵ *Ibidem*. In parallel, Member States committed to transfer to Greece any future income accruing to their national central bank’s holdings of Greek government bonds until 2020. The amounts of the so-called ANFA payments (Agreement on Net Financial Assets) to be transferred each year, as well as the deadline for payment, are established and agreed in the context of the Eurogroup. In principle, they are not conditional on the implementation of MoU measures.

⁹⁶ Disbursements of EFSF’s loans, as well as the Hellenic Republic’s contributions to debt servicing, including all revenues from the privatization of State assets and at least 30 per cent of windfall revenues are deposited in the segregated account at the Bank of Greece.

⁹⁷ Law 4063/2012 of 30 March 2012 (ΦΕΚ Α’ 71/30-3-2012). The bill also authorized the ratification of the ESM and the Fiscal Compact as well as the amendment of Art. 136 TFEU. In Greece, for the implementation of Euro-crisis law recourse was usually made to ordinary legislation, which does not require a qualified majority vote. In some cases, objections of unconstitutionality were raised.

⁹⁸ Pursuant to para. 2.5.6.1 of the Memorandum of Understanding on Specific Economic Policy Conditionality, Greece was required to adopt measures to safeguard debt servicing and monitor cash flows, avoid diversion of official financing and secure a timely debt servicing. See *Statement by the Eurogroup*, 21 February 2012 and European Commission, *The Second Economic Adjustment Programme for Greece*, in *Occasional Papers* 94, March 2012, p. 165. See also European Commission, *The Second Economic Adjustment Programme for Greece: First Review*, in *Occasional Papers* 123, December 2012, p. 203.

⁹⁹ Para. 5 of Art. 4 of Law 4063/2012 was amended by Art. 2 of the Presidential legislative act of 18 July 2015 (ΦΕΚ Α 84/18-7-2015).

¹⁰⁰ D.V. SKIADAS, *Tackling Greece’s Financial Crisis: A Legal-Institutional Viewpoint*, in K.A. LAVDAS, S.N. LITSAS, D.V. SKIADAS, *Stateness and Sovereign Debt: Greece in the European Conundrum*, Lexington Books, 2013, pp. 83-173, p. 160.

¹⁰¹ J. SMITH, *Greece: Towards a Creditors’ Constitution?*, in *Socialist Lawyer*, July 2012, p. 14.

In July 2013, the Eurogroup approved a two billion euros transfer to the segregated account and mandated the ESM to make the disbursement in two instalments.¹⁰² The ESM was involved to avoid claims of breach of Arts 123 and 125 TFEU.¹⁰³ It is unclear though whether these transfers fall within the competence of the mechanism.

SMP profits came to the forefront again in February 2015, during the frantic negotiations to prolong the second adjustment programme. The Greek Finance Minister Yanis Varoufakis requested bridge financing to meet the obligations towards the IMF and the ECB, falling due in the following months.¹⁰⁴ "We ask the Eurogroup to disburse to Greece the outstanding 1.9 billion euros SMP bond-related Eurosystem income, in accordance with its previous commitments. We are, in fact, open to the idea that the ECB transfers these funds directly to the IMF in lieu of Greece outstanding repayments".¹⁰⁵

The Eurogroup decided, however, that "Only approval of the conclusion of the review of the extended arrangement by the institutions [...] will allow for any disbursement of the outstanding tranche of the current EFSF programme and the transfer of the 2014 SMP profits. Both are [...] subject to approval by the Eurogroup".¹⁰⁶

On 30th June 2015, at the expiry of the programme, Greece was formally declared in arrears with the IMF as it was unable to repay 1.5 billion euros.¹⁰⁷

Only on 17th July 2015, with banks still closed and swift legislative steps taken to rebuild trust, the Council decided to grant Greece short-term financial assistance to allow it to honour its debt obligations until agreement on a new ESM programme was reached.¹⁰⁸

To safeguard non-Euro area members from possible losses deriving from the EFSM bridge financing, the Eurogroup decided to deposit, this time on an ECB account, the SMP profits accrued in 2014.¹⁰⁹ If not needed, allocations would be returned to Euro area members. To our knowledge, since then, no other transfer has been made.

¹⁰² Eurogroup, *Statement on Greece*, 8 July 2013, www.eurozone.europa.eu. See also EFSF Press Release of 31 July 2013 and EFSF Press Release of 17 December 2013, both available at www.efsf.europa.eu.

¹⁰³ See *Pringle*, cit., paras 125-126: "Art. 123 is addressed specifically to the ECB and the central banks of the Member States. The grant of financial assistance by one Member State or by a group of Member States to another Member State is therefore not covered by that prohibition. [...] even if the Member States are acting via the ESM, the Member States are not derogating from the prohibition laid down in Art. 123 TFEU, since that article is not addressed to them". On Art. 125 TFEU, see *Thomas Pringle*, cit., paras 136-139.

¹⁰⁴ Between February and June 2015, Greece was to reimburse 5.2 billion euros to the IMF and in July/August, it was to repay 6.7 billion euros to the ECB as holder of SMP Greek bonds.

¹⁰⁵ See Y. VAROUFAKIS, *Talk in the 11th February 2015 Eurogroup Meeting*, www.tovima.gr.

¹⁰⁶ See Eurogroup, *Statement on Greece*, 20 February 2015, www.consilium.europa.eu.

¹⁰⁷ See IMF Press Release, *Statement by the IMF on Greece*, 30 June 2015, www.imf.org. Arrears with the IMF were cleared on 20 July 2015.

¹⁰⁸ See Eurosummit, *Statement*, 12 July 2015 and Eurogroup, *Statement on Greece*, 17 July 2015.

¹⁰⁹ Eurogroup, *Statement on Greece*, 17 July 2015.

While the Troika describes the remittance of SMP profits as “additional financing sources”,¹¹⁰ these transfers do not have to be reimbursed. Notably, they were discussed at first under the heading Official Sector Involvement.¹¹¹ Incidentally, it has to be noted that SMP profits were only transferred to Greece, while they are being retained in the case of Ireland, Italy, Portugal and Spain.

VII. THE SHIFT TO EXPLICIT CONDITIONALITY IN THE OUTRIGHT MONETARY TRANSACTIONS AND THE PUBLIC SECTOR PURCHASE PROGRAMMES

In August 2012, the ECB announced the new Outright Monetary Transactions programme (OMT), under which the application of conditionality was finally made explicit. The programme concerns only government bonds issued by Euro area members receiving financial assistance from the EFSF or the ESM and are subject to full compliance with the attached “strict and effective conditionality”.¹¹²

The ECB explained the need for explicit conditionality stating that without domestic policy reforms parallel to sovereign bonds purchases, its monetary policy would not be effective. In the words of the ECB's President Mario Draghi: “we should not forget why countries have found themselves in a bad equilibrium to start with. And this is because of policy mistakes. [...] If the central bank were to intervene without any actions on the part of governments, without any conditionality, the intervention would not be effective and the Bank would lose its independence”.¹¹³

According to the CJEU, the introduction of explicit conditionality in the OMT programme is legitimate,¹¹⁴ since it guarantees that OMT purchases, as monetary policy

¹¹⁰ See, for instance, European Commission, *The Second Economic Adjustment Programme for Greece: Third Review*, in *Directorate-General for Economic and Financial Affairs, Occasional Papers 159*, July 2013, p. 49, ec.europa.eu.

¹¹¹ See European Commission, *The Second Economic Adjustment Programme for Greece*, cit., p. 27.

¹¹² The ECB decision establishing the Outright Monetary Transactions programme has not been published yet. The technical features of the OMT are described in the ECB Press Release, *Technical Features of Outright Monetary Transactions*, 6 September 2012, www.ecb.europa.eu. See also: ECB, *Monthly Bulletin*, September 2012, pp. 7-11 and ECB, *Monthly Bulletin*, October 2012, pp. 7-9. On the atypical nature of the OMT, see the Opinion of AG Cruz Villalón delivered on 14 January 2015, case C-62/14, *Gauweiler et al. v. Deutscher Bundestag*, paras 82-91.

¹¹³ M. DRAGHI, ECB Press conference, 6 September 2012, available at ec.europa.eu. See also T. BEUKERS, *The New ECB and Its Relationship with The Eurozone Member States*, cit., p. 1607: “The ECB's intervention in order to restore the proper functioning of the monetary policy transmission mechanism may have the effect of buying a Member State time, but the intervention itself cannot solve the underlying structural problems. The ECB is only willing to buy this time, if the Member State is willing to deal with the problems that have caused the malfunctioning of the mechanism. Conditionality should thus guarantee that the exceptional ECB intervention is temporary”.

¹¹⁴ Cfr. *Pringle*, cit., and *Gauweiler*, cit. On the *Pringle* case see: S. ADAM, F.J. MENA PARRAS, *The European Stability Mechanism through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle*, in *European Law Review*, 2013, p. 848 et seq.; G. BECK, *The Legal Reasoning of the Court of Justice and the Euro*

measures, “would not work against the effectiveness of the economic policies followed by the member States”.¹¹⁵

The ECB relies on explicit conditionality to ensure that the implementation of its monetary policy measures will prevent Member States from departing from the adjustment programmes they have subscribed. In addition, by making OMT purchases conditional, an incentive is provided to improve a State’s financial and budgetary situation.¹¹⁶

Crisis – The Flexibility of the Court’s Cumulative Approach in the Pringle Case, in *Maastricht Journal of European and Comparative Law*, 2013, p. 635 et seq.; V. BORGER, *The ESM and the European Court’s Predicament in Pringle*, in *German Law Journal*, 2013, p. 113 et seq.; P. CRAIG, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 3 et seq.; P. CRAIG, *Pringle and the Nature of Legal Reasoning*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 205 et seq.; B. DE WITTE, T. BEUKERS, *The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle*, in *Common Market Law Review*, 2013, p. 805 et seq.; L.M. HINOJOSA MARTÍNEZ, *La Compatibilidad Del Mecanismo Europeo De Estabilidad Con El Derecho Europeo: Jurisprudencia Para Tiempos De Crisis*, in D.J. LIÑÁN (ed.), *Las Crisis Políticas y Económicas: Nuevos Escenarios Internacionales*, Madrid: Tecnos, 2014, pp. 212-240; O. PORCHIA, *Il ruolo della Corte di giustizia dell’Unione europea nella governance economica europea*, in *Diritto dell’Unione europea*, 2012, p. 593 et seq.; D. THYM, M. WENDEL, *Préserver le respect du droit dans la crise; la Cour de justice, le MES et le mythe du déclin de la Communauté de droit (arrêt Pringle)*, in *Cahiers de droit européen*, 2012, p. 733 et seq.

On the *Gauweiler* case see, in particular, the two special issues of the *German Law Journal*, n. 2/2014 and n. 3/2015 and the special issue of the *Maastricht Journal of European and Comparative Law*, n. 1/2016. See also: F. BASSAN, *Le operazioni non convenzionali della BCE al vaglio della Corte costituzionale tedesca*, in *Rivista di diritto internazionale*, 2014, p. 361 et seq.; T. BEUKERS, *The Bundesverfassungsgericht Preliminary Reference on the OMT Programme: In the ECB We Do Not Trust. What About You?*, in *German Law Journal*, 2014, 343 et seq.; S. CAFARO, *Della legittimità del programma OMT della BCE, per ora... ovvero: le conclusioni dell’avvocato generale Cruz Villalón nel caso Gauweiler et alii c. Deutscher Bundestag*, in *SIDIBlog*, 18 January 2015, www.sidi-isil.org; S. CAFARO, *L’azione della BCE nella crisi dell’area dell’euro alla luce del diritto dell’Unione europea*, in G. ADINOLFI, M. VELLANO (a cura di), *La crisi del debito sovrano degli Stati dell’area dell’euro. Profili giuridici*, Torino: Giappichelli, 2013, pp. 49-68; M. GOLDMANN, *Friend or Foe? The German Federal Constitutional Court’s Request for a Preliminary Ruling on the ECB’s OMT Program*, in *SIDIBlog*, 19 February 2014, www.sidiblog.org; M. GOLDMANN, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, in *German Law Journal*, 2014, p. 265 et seq.; M. IOANNIDIS, *How Strict is “Strict Conditionality”? The New Eurozone Agreement on Greece*, in *SIDIBlog*, 13 March 2015, www.sidi-isil.org; A. MIGLIO, *Il primo rinvio pregiudiziale del Tribunale costituzionale federale tedesco: dialogo o conflitto?*, in *Osservatorio AIC*, September 2014, www.osservatorioaic.it; T. PETCH, *The Compatibility of Outright Monetary Transactions with EU Law*, in *Law and Financial Markets Review*, 2013, p. 13 et seq.; A. VITERBO, *Oh My ...OMT! Some Thoughts About the German Constitutional Court’s Decision to Refer the Outright Monetary Transactions Programme to the Court of Justice of the European Union*, in *SIDIBlog*, 13 February 2014, www.sidi-isil.org; M. WENDEL, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court’s OMT Reference*, in *European Constitutional Law Review*, 2014, p. 263 et seq.

¹¹⁵ *Gauweiler*, cit., para. 60; see also *ivi*, paras 104 and 120. A similar reasoning can be applied to the PSPP.

¹¹⁶ C. ZILIOI, *The ECB’s Powers and Institutional Role in the Financial Crisis: A Confirmation from the Court of Justice of the European Union*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 171-184, at 174.

Besides, even if necessary, compliance with an EFSF/ESM programme does not automatically guarantee purchases. In fact, the ECB Governing Council has full discretion over the start, continuation or suspension of OMTs.¹¹⁷

Explicit conditionality also features in the Public Sector Purchase Programme (PSPP), introduced by the ECB in May 2015.¹¹⁸

The PSPP is part of the so-called 'quantitative easing' and includes the possibility to purchase debt securities issued by any Euro area member, irrespective of its financial assistance status. Actually, the PSPP rationale differs from that of the OMTs: while the OMT programme aims at safeguarding an appropriate monetary policy transmission and the singleness of the euro monetary policy, the PSPP aims at facilitating credit provision, stimulating economic activities and contributing to keep inflation rates close to 2 per cent in the whole Euro area. OMTs therefore can be selectively (and proportionately) applied where necessary. On the contrary, PSPP purchases target the whole Euro area.

To mitigate potential financial risks, several cumulative safeguards were included in the PSPP. Purchases are in fact restricted to debt securities complying with collateral eligibility rules (as recently reformed)¹¹⁹ and limits apply to the maximum amount of debt securities that the Eurosystem may hold.¹²⁰ Furthermore, purchases of public sector assets issued by countries receiving EU/IMF financial assistance are subject to compliance with programme conditionality: "In the event of a review of an ongoing financial assistance programme, eligibility for PSPP purchases shall be suspended and shall resume only in the event of a positive outcome of the review".¹²¹

A "positive outcome of a review" entails the approval of a further disbursement under the financial assistance programme by the ESM Board of Directors and, in case of IMF co-financing, approval by the Fund's Executive Board as well.¹²²

However, even after the conclusion of a review, purchases of central government bonds under the PSPP can be carried out – prudentially – only for a period of two months (unless there are exceptional circumstances justifying a suspension or a con-

¹¹⁷ ECB Press Release, *Technical features of Outright Monetary Transactions*, cit.

¹¹⁸ Decision ECB/2015/10 of the EBC of 4 March 2015 on a secondary markets public sector asset purchase programme. A complaint against the PSPP programme was filed in front of Germany's Federal Constitutional Court soon after; the brief is available in German language at www.jura.uni-freiburg.de.

¹¹⁹ The new temporary framework for collateral contains an explicit reference to EU/IMF conditionality. See *supra*, at the end of para. 1.

¹²⁰ The issue limit refers to the maximum share of a single PSPP-eligible security that the Eurosystem may hold. The issuer limit refers to the maximum share of an issuer's outstanding securities that the ECB may buy. The issuer limit of 33 per cent is a means to safeguard market functioning and price formation as well as to mitigate the risk of the ECB becoming a dominant creditor of Euro Area governments. The issuer limit includes/takes into account also bonds purchased under the SMP programme.

¹²¹ Art. 3, para. 2, let. d), of the PSPP Decision.

¹²² Art. 2 of the PSPP Decision.

tinuation of purchases).¹²³ It is in the ECB Governing Council's discretionary powers to determine whether such circumstances exist.

In the context of the PSPP, therefore, explicit conditionality serves the purpose of ensuring that purchases are proportionate to the monetary policy aims pursued by the programme and that the related financial risks are reduced through adequate risk management measures.

It is revealing that, as a result of the risk-limitation measures put in place, no purchases of Greek sovereign bonds were undertaken under the PSPP up to the time of writing.¹²⁴

VIII. CONCLUSIONS

During the crisis, to safeguard the EMU and its stability, the ECB deployed all its monetary policy instruments, prompting Member States to adopt urgent and crucial reforms (sometimes even driving them to seek EU/IMF financial assistance) or pushing programme countries to comply with the Troika's conditionality.

As the survival of the EMU was the ECB's ultimate goal, it can be argued that its actions were justified, even if many issues are being raised not only from a purely legal perspective.

To assess whether the ECB acted within the scope of its mandate, although close to the edge, an analysis of ECB's policy instruments was performed, keeping implicit and explicit conditionality separate.

Decisions on collateral eligibility were taken by the ECB in the exercise of its power to limit the assumption of risks for the Eurosystem. As such, the ECB Governing Council considered compliance with EU/IMF conditionality relevant to assess the adequacy as collateral of sovereign bonds issued by Euro area countries in distress. However, even if collateral decisions can be considered a legitimate exercise of discretionary power, it may be argued that the latter was stretched to the point of becoming a true political action.

A similar reasoning applies in the case of ELA. The ECB Governing Council may prudentially establish ceilings on ELA whenever the assistance is deemed to interfere with the objectives and tasks of the Eurosystem. However, confidential letters, threatening caps on ELA unless financial assistance is requested and structural reforms are implemented, seem to depart from the institutional role of a central bank.

¹²³ Art. 4, para. 2, of the PSPP Decision.

¹²⁴ In June 2016, the ECB Governing Council declared that it will examine the possibility of future purchases of Greek government bonds under the PSPP "taking into account the progress made in the analysis and reinforcement of Greece's debt sustainability, as well as other risk management considerations" (see ECB Press Release, *ECB Reinstates Waiver Affecting the Eligibility of Greek Bonds Used as Collateral in Eurosystem Monetary Policy Operations*, 22 June 2016).

For what concerns the SMP, although no reference to conditionality was contained in the relevant legal framework, sovereign bond purchases were conditioned to the timely adoption of economic, fiscal and structural reforms by the country issuing the bonds. In this context, therefore, one might regard the use of confidential letters to put pressure on the governments of Italy and Spain as an alarming signal.

In the light of the above, the introduction of explicit conditionality in the decisions introducing the OMT and PSPP programme can be considered a turning point. Compliance with programme conditionality became one of the eligibility requirements for the purchases of sovereign bonds issued by crisis countries. The new approach contributed to enhance legal certainty and predictability.

Notably, in the *Gauweiler* decision, the European Court of Justice found the inclusion of explicit conditionality in the OMT programme legitimate.¹²⁵

Nevertheless, many pointed out that the CJEU showed a high degree of deference towards the ECB, leaving enormous discretion to the European monetary authority. Remarkably, despite the different view expressed by Advocate General Cruz Villalón, the CJEU refrained from scrutinizing the ECB's activity within the Troika.¹²⁶

The issue deserves careful consideration: on the European political arena, the ECB plays a *dual role*, at the same time acting as a member of the group of institutions negotiating financial adjustment packages and as an enforcer of conditionality.¹²⁷

On the one side, it has been argued that the ECB only provides advice and expertise, in line with the tasks conferred upon it by the EU Treaties and the ESCB Statute.¹²⁸

¹²⁵ See *Gauweiler*, cit., para. 60.

¹²⁶ See Opinion of AG Cruz Villalón, *Gauweiler*, cit., para. 145: "Unilaterally making the purchase of government bonds subject to compliance with conditions when those conditions have been set by a third party is not the same as doing so when the 'third party' is not really a third party. In those circumstances, the purchase of debt securities subject to conditions may become another instrument for enforcing the conditions of the financial assistance programmes. The mere fact that the purchase may be perceived in that way — as an instrument which serves macroeconomic conditionality — may be sufficient in its impact to detract from or even distort the monetary policy objectives that the OMT programme pursues".

¹²⁷ On the ECB's role within the Troika see D. SARMIENTO, *The advocate General's Opinion and the Judgement in the Gauweiler Case*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 40-54, at 52-53; T. TRIDIMAS, N. XANTHOULIS, *A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 17-39, at 34. See also the European Parliament Resolution P7_TA(2014)0239 of 13 March 2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, in particular para. 54. The European Parliament pointed to the potential conflict of interest between the role of the ECB within the Troika as "technical advisor" and as 'enforcer of conditionality' exerting pressure on programme countries through purchases of their sovereign bonds.

Benoît Coeuré, Member of the ECB Executive Board, underlined that under the difficult circumstances that led to the establishment of the Troika, the ECB's particular expertise and Euro Area focus were compelling reasons for requesting its participation in the Troika. See B. COEURÉ, *Introductory Remarks: Exchange of Views of Benoît Coeuré with ECON on Troika Matters*, 13 February 2014, www.ecb.europa.eu.

Support to this point of view can be found in the relevant legal framework.

Art. 13 of the ESM Treaty entrusts the European Commission, “in liaison with” the ECB, with the task of negotiating a Memorandum of Understanding (MoU). The MoU is signed by the Commission “on behalf of the ESM” and “subject to approval by the ESM Board of Governors” (that is the Finance Ministers of the Euro area). It follows that the MoU solely originates from and commits the ESM.¹²⁹ Art. 2, para. 1, let. a), of the EFSF Framework Agreement (a private law instrument) and Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the Euro area experiencing or threatened with serious difficulties with respect to their financial stability contain similar provisions.¹³⁰

However, even if formally it does not participate in the decision-making concerning adjustment programmes, “the ECB has been very much part of the decision-shaping process”.¹³¹

On the other side, the ECB’s conditionality is regarded by some as a true political action departing from the standards of neutrality and independence that central banks should meet.

Beyond this, it was argued that, with the *Gauweiler* decision, the CJEU supported “the establishment of a technocratic regime with unlimited discretionary powers and without credible accountability”.¹³²

It is the contention of this paper that, to address these concerns, the ECB should limit itself to provide technical assistance and advice, avoiding any involvement in the design and monitoring of future adjustment programmes. Only in this way we would

¹²⁸ See C. ZILIOLI, *The ECB’s Powers and Institutional Role in the Financial Crisis: A Confirmation from the Court of Justice of the European Union*, cit., p. 177 et seq., as well as ECB, *Replies to the questionnaire of the European Parliament supporting the own initiative report evaluating the structure, the role and operations of the ‘troika’ (Commission, ECB and the IMF) actions in euro area programme countries*, www.europarl.europa.eu.

¹²⁹ The CJEU expressed this position in *Thomas Pringle*, cit., para. 161 et seq. See also Tribunal, order of 10 November 2014, case T-289/13, *Ledra Advertising Ltd v. European Commission and ECB*, as well as Opinion of AG Wahl delivered on 21 April 2016, joined cases C-8/15 P, C-9/15 P and C-10/15 P, *Ledra Advertising Ltd et al. v. European Commission and ECB*, para. 50 et seq.

¹³⁰ The same applies under the European Financial Stability Mechanism, through which the EU provides financial assistance also to non-euro area members. Pursuant to Art. 3, para. 3, of Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, general economic policy conditions are defined by the Commission “in consultation with the ECB”.

¹³¹ D. GROS, *Countries under Adjustment Programmes: What Role for the ECB?*, in *CEPS Special Report no. 124*, December 2015.

¹³² C. JOERGES, *A Disintegration of European Studies?*, in *European Papers*, 2016, www.europeanpapers.eu, p. 9. See also C. JOERGES, *Pereat Iustitia, Fiat Mundus: What is Left of the European Economic Constitution after the Gauweiler Litigation?*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 99-118.

reach a balance between the ECB's democratic accountability and its technocratic expertise, while ensuring the Euro area financial stability.



ON THE AGENDA: THE REFUGEE CRISIS AND EUROPEAN INTEGRATION

MINIMALIST REFLECTIONS ON EUROPE, REFUGEES AND LAW

THOMAS SPIJKERBOER*

TABLE OF CONTENTS: I. *Stilo antico*. – II. Perfect storm. – III. Tunnel. – IV. NATO. – V. Weakness. – VI. Deal. – VII. Women and children.

ABSTRACT: It is hard to understand the current developments in European refugee law without the benefit of hindsight. This paper refrains from trying to make a comprehensive analysis, and investigates fragments small enough to allow for analysis. We will look at the political and legal processes which turned the influx of a small number of people into the European Union (EU) into a crisis; at tunnel vision of European policy makers; at the legal aspects of the EU's and NATO's intervention in the Aegean Sea; and at the processes resulting in the acceptance of mass deaths as a daily routine.

KEYWORDS: refugees – Syrians – EU-Turkey Agreement – border deaths – jurisdiction – Art. 216 TFEU.

I. *STILO ANTICO*

At an academic conference on European asylum law at the Université Libre de Bruxelles in February 2016, for a day and a half we discussed law. The meaning of the term solidarity in Art. 80 TFEU, the interpretation of Arts 26 and 26*bis* of the Schengen Borders Code – the discussions were clearly responding to the current situation in Europe. But for one reason or another, we apparently felt we had to remain faithful technicians, and that this was not the time or the place to ask bigger questions about Europe, refugees and law. Only a few days later, European police forces were shooting at refugees simultaneously in two places on the continent.¹ People were being shot at (with tear gas grenades, for the time being) not because of misdemeanour, but because they were on a particular location – for being there. During the conference, several speakers compared

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¹ E. SMITH, M. TRAN, *Teargas Fired As Refugees Try to Breach Greek-Macedonian Border*, 29 February 2016, www.theguardian.com (Idomeni); A. CHRISAFIS, P. WALKER, B. QUINN, *Calais 'Jungle' Camp: Clashes As Authorities Demolish Homes*, 1° March 2016, www.theguardian.com (Calais).

themselves to the proverbial orchestra on the Titanic. During a private conversation we wondered about parallels to the members of the Central Committee of the East German Communist Party on, let's say, 5 November 1989.

The Italian musician Francesco Rognoni published his *Selva de' varii passaggi* in Milan in 1620.² The book (music scores with a little bit of text) is a treatise on vocal and violin technique, and consists of hundreds of examples of how a very simple melody can be ornamented into insane complexity. This book is one of the latest in a genre that came into existence during the simultaneous vernacularization of printing and the rising importance of music as an indicator of social prestige. Earlier examples are Sylvestro Gannassi's *Fontegara* (Venice, 1535), Diego Ortiz's *Trattado de glosas* (Rome, 1553), Giovanni Bassano's *Ricercate, passage et cadentie* (Venice, 1585), and Antonio Brunelli's *Varii exercitii* (Florence, 1614). Rognoni's book is one of the most extended in its genre, and one of the most complicated to play. What Rognoni did was to codify a practice. The practice consisted of playing tunes that everyone knew, and that other musicians and composers had worked with before, but to embellish them and thereby dazzle the audience. A very similar practice today exists in jazz.

Rognoni codified a practice that was dead. Composers and audiences with a better feeling for the pulse of the times had moved on. Claudio Monteverdi and his contemporaries were creating a new style and doing more exciting stuff – the first sonata had been published in Milan in 1610 (Gian Paolo Cima's *Sei sonate*), and composers like Dario Castello, Tarquinio Merula and Giovanni Battista Fontana were developing this new genre into a vehicle for instrumentalists to display their virtuosity. Rognoni was a conservative who – at least in his published books – did not adopt these novelties, but insisted on the correct application of rules for making music that were becoming something of the past. The length of his treatise, and the level of complication he creates, can easily be interpreted as signs of the fanaticism of someone who is losing the battle and knows it. He was codifying a practice that was a living general practice half a century earlier, but now would be gone unless it were laid down in writing.

The idea that there was a shift was shared at the time – innovative composers made distinctions between the *stilo antico* and their own *stilo moderno* and the *prima pratica* versus the *seconda pratica*. However, contrary to emphasising the rupture (as I did above), one may also emphasise the continuities. The new composers still used the ornaments of their predecessors in their written compositions, as Johann Sebastian Bach did a century later. And many claim that the modern composers presumed that musicians knew and mastered the techniques described by Rognoni and his predecessors. They did not want to abolish them but took them for granted. They were con-

² F. ROGNONI, *Selva de' varii passage secondo l'uso modern, per cantare e suonare con ogni sorte de stromenti, divisa in due parti*, Milano, 1620. A facsimile was published in Sala Bolognese: Arnaldo Forni Editore, 2012; a transcription was published in Albese con Cassano: Musedita, 2014.

scious of a change, which they wanted and were proud of (as is clear from the self-designations *stilo moderno* and *seconda pratica*), but that does not imply they necessarily wanted to put an end to what had been general practice before.

The refugee 'crisis' (about the inverted commas more will follow) in Europe seems to signify that something is coming to an end. State representatives openly say they are fed up with the obligations following from international and European refugee law. The core of the unanimous Grand Chamber judgment of the European Court of Human Rights in *Hirsi Jamaa v. Italy* (*Hirsi Jamaa*)³ on the prohibition of collective expulsion and the exercise of jurisdiction outside the territory is considered obsolete⁴ – to the extent it is noted at all. In the agreement between the EU and Turkey,⁵ the tension between refugee and human rights law on the one hand, and what States have actually agreed to do on the other, has become so intense and explicit that a breaking point may have been reached.

The increasing obesity of refugee law is similar to Rognoni's length and complexity. The handbooks are becoming thicker and thicker; doctrine is becoming more and more refined and learned; there are ever more journals and peer reviewed articles; domestic and European legislation and case law is increasingly complex; the interaction between international, European and domestic law is Byzantine. One may interpret this as a sign that the field is being codified to the last detail because it is dead, because it is not actual State practice any more. In that perspective, the people insisting on the proper application of international and European refugee law are *stilo antico*, while the State representatives concluding hard to classify agreements (called *memorandum of understanding*, or merely *statement*)⁶ are the infinitely cooler *stilo moderno* guys building the future. They bewilder the traditionalists ("is this a treaty? does it need to be ratified?" – more on this below) and elicit conservative responses ("but you could have achieved the same through a treaty, and ratification has never hurt anyone"). But they (we) are the Rognoni's of our era. A time will come in the future when people will discover the beauty in what we are trying to do (traditionalists like Ortiz, Bassano and Rognoni are stars in the present day ancient music scene). For now, however, we are standing on the side while the action is elsewhere. But an alternative interpretation would hold that the

³ European Court of Human Rights, judgment of 23 February 2012, no. 27765/09, *Hirsi Jamaa et al. v. Italy*.

⁴ For example, Hathaway has labelled the Court's systematic and broadly supported case law as ill conceived, in M. STEINBEIS, *Three Legal Requirements for the EU-Turkey Deal: An Interview with JAMES HATHAWAY*, 9 March 2016, verfassungsblog.de. Hailbronner goes further and states that the Court's case law "largely ignores the wording and purpose of" Art. 4 Protocol 4 ECHR, in K. HAILBRONNER, *Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway*, 11 March 2016, verfassungsblog.de.

⁵ Press releases and statements, *EU-Turkey statement*, 18 March 2016, www.consilium.europa.eu.

⁶ On the question whether the EU-Turkey Statement of 18 March is a treaty in the sense of Art. 2 of the Vienna Convention on the Law of Treaties, and of Art. 216 TFEU see below, section VI.

enormous amount of activity in refugee law in which we engage is a sign of the importance and liveliness of the field.

It is hard to understand the current developments in European refugee law without the benefit of hindsight. Are we living through a rupture? Will the EU-Turkey deal signal the end of the prohibition of collective expulsion as we have known it, the end of the prohibition of indirect refoulement? Does the deployment of NATO in the Aegean Sea in order to stop boat people mean that refugees will from now on be met by the military instead of by international law? Or do the references to human rights and refugee law in the relevant documents embody the resilience of international law, and will the continuities outweigh the differences? One may decide for one of these perspectives. In this essay, I will refrain from such a decision. We are right in the middle of chaotic and complex developments, which make it impossible to fully diagnose the situation. Therefore, the effort will be to collect fragments which are small enough to be able to examine them, and to withstand the seduction to claim to be sure of what the bigger picture looks like.

II. PERFECT STORM

A perfect storm⁷ is a disastrous event which happens because a number of problems occur simultaneously. The interaction of different elements reinforces these problems and makes them into a 'crisis'. Europe's migration 'crisis' is such a perfect storm. Here are the elements.

a) A major refugee crisis: since 2011, a conflict has broken out in Syria which has resulted in the forced movement of half of the Syrian population, most of them (some 7.5 million) inside Syria,⁸ and some 4.8 million to territories outside Syria.⁹ Over one million Syrians are registered as refugees in Lebanon; 630.000 in Jordan; 2.7 million in Turkey; 118.000 in Egypt; and 246.000 in Iraq.¹⁰ Compared to the number of inhabitants of these countries (Lebanon 5.8 million inhabitants,¹¹ Jordan 8 million inhabitants,¹² Turkey 77.6 million inhabitants,¹³ Egypt 82.5 million inhabitants,¹⁴ Iraq 32.5 million inhabitants)¹⁵ the percentage of registered Syrian refugees is as high as 20 per cent for Lebanon (and estimated at 30 per cent if non-registered refugees are included). Much can be

⁷ This passage is based on an earlier article published as T. SPIJKERBOER, *Europe's Refugee Crisis: A Perfect Storm*, 10 February 2016, www.law.ox.ac.uk.

⁸ Cf. UNHCR, *Where We Work: Middle East and North Africa*, www.unhcr.org.

⁹ Cf. Syria Regional Refugee Response – Inter-agency Information Sharing Portal, *Regional Overview*, www.data.unhcr.org.

¹⁰ *Ibid.*

¹¹ Cf. *Demographics of Lebanon*, en.wikipedia.org.

¹² Cf. *Demographics of Jordan*, en.wikipedia.org.

¹³ Cf. *Demographics of Turkey*, en.wikipedia.org.

¹⁴ Cf. *Demographics of Egypt*, en.wikipedia.org.

¹⁵ Cf. *Demographics of Iraq*, en.wikipedia.org.

said to relativize these estimates, but they dwarf the estimated 1.3 million asylum seekers in Europe in 2015,¹⁶ constituting 0.26 per cent of the EU's 508 million inhabitants.¹⁷

b) Willingness to use migration as geopolitical instrument:¹⁸ Russia may have an interest in destabilization of the EU. The massive displacement during the offensive to recapture Aleppo in February 2016 can plausibly be interpreted as a side-effect welcome to Russian foreign policy. That Turkey is prepared to use migration flows as a political instrument is evident. During a meeting last fall, Turkish president Erdoğan said to Juncker: "We can open the doors to Greece and Bulgaria any time and we can put the refugees on buses".¹⁹ Erdoğan has explicitly confirmed the authenticity of the minutes which contain these statements, and publicly added: "In the past we have stopped people at the gates of Europe; in Edirne we stopped their buses. This happens once or twice, and then we'll open the gates and wish them a safe journey, that's what I said".²⁰

c) Serious under-funding: programmes for hosting Syrian refugees in the region are badly under-funded. The United Nations Office for the Coordination of Humanitarian Assistance reported that for 2015, 56 per cent of the required funding had been received.²¹ The World Food Programme reports that critical funding shortages forced the organization to reduce the level of assistance, with most refugees now living on 50 cents a day.²² The EU has recently agreed on how to fund the three billion of Euros promised to Turkey, but when actual payments will be made remains to be seen.²³ In addition, Turkey is not the country where the humanitarian disaster is worst.

d) Minimal resettlement: resettlement of Syrian refugees in other parts of the world – crucial in order to enable especially Lebanon to host Syrian refugees – is not occurring on a scale of any significance. Since the beginning of the conflict, only 162.151 Syrian refugees have been resettled elsewhere in the world – four per cent of the four million Syrian refugees outside Syria, and merely two per cent of all Syrian refugees.²⁴

¹⁶ Cf. Eurostat, *Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded)*, 18 March 2016, appsso.eurostat.ec.europa.eu.

¹⁷ Cf. *Demographics of the European Union*, en.wikipedia.org.

¹⁸ I am grateful to Martijn Pluim of ICMPD for this observation, which he made in response to an earlier version of this text.

¹⁹ P. FOSTER, *Turkey's Erdogan 'Taunted EU Leaders' Over Migrant Deal*, 8 February 2016, www.telegraph.co.uk.

²⁰ *Minutes Revealing Refugee Talks with EU Leaders Provide 'Absolution,' Says Erdoğan*, 11 February 2016, www.hurriyetdailynews.com. An EU spokesperson declined to comment, cf. J. MORTIMER, *Did EU Meddle with Turkish Elections?*, 18 February 2016, www.al-monitor.com. I am grateful to Orçun Ulusoy for these sources.

²¹ Cf. *Total Funding to the Syrian Crisis 2015*, fts.unocha.org.

²² Cf. *Syria Emergency*, www.wfp.org.

²³ *Ibid.*

²⁴ *Ibid.*

e) Prohibition of travel:²⁵ States have prohibited Syrians to travel, thus making it impossible for them to leave Syria or the overburdened refugee camps in the region. Responding to European pressure, countries which did not require visa from Syrians in 2011 have introduced them. Crucially, Lebanon and Jordan now require Syrians to have a visa.²⁶ Enforcement of these visa requirements is ensured by obliging airlines to check travel documents before departure, under threat of significant fines. The external borders of the EU have been militarized, and the EU is intensifying its criminal law approach to irregular migration. UN Security Council, Resolution 2240 of October 2015, UN Doc. S/RES/2240 (2015), considers irregular migration to be a threat to international security and empowers the EU to take military action.

f) Intended ripple effect: by prohibiting refugees from entering the EU and encouraging neighbouring countries to prohibit refugees entering their countries, the European Union has intentionally made it illegal and therefore very difficult for many Syrian refugees to leave their own country in order to seek the protection they need and to which they are entitled. In January, it was reported that 16.000 Syrian refugees are stranded in the desert because Jordan blocks entry.²⁷ In February, Turkey closed its border for the estimated 70.000 refugees fleeing Aleppo.²⁸

g) Common European Asylum System fails: the European Union has a set of directives and regulations which together are called the Common European Asylum System (CEAS). The aim of the CEAS is to harmonize asylum law in the EU. However, in any respect the standards vary dramatically from State to State. The quality of asylum procedures ranges from near perfect to non-existent. In some countries refugees have to live on the streets for years, whereas in others they get shelter. Some countries recognize almost no one as a refugee, while in other countries two thirds of all asylum seekers get asylum.²⁹ And in some countries refugees are maltreated by authorities on a large scale, while in others that happens only incidentally. European asylum law has little in common, and there is no system to it. As a consequence, refugees have very high stakes in being in countries like Germany and Sweden, and not in countries such as Greece.

²⁵ This prohibition approach is not specific for Syrian refugees, cf. J.C. HATHAWAY, *A Global Solution to a Global Refugee Crisis*, in *European Papers*, 2016, www.europeanpapers.eu, p. 93 et seq.

²⁶ Cf. *Visa requirements for Syrian citizens*, en.m.wikipedia.org.

²⁷ Cf. World: Europe, www.ft.com.

²⁸ Cf. C. JOHNSTON, *EU Urges Turkey to Open Its Borders to Syrians Fleeing War-torn Aleppo*, 6 February 2016, www.theguardian.com.

²⁹ The European Commission mentions the case of Afghans; their recognition rate in Italy is almost 100 per cent, whereas in Bulgaria it is 5.88 per cent, in Communication COM(2016) 197 final 6 April 2016 from the Commission to the European Parliament and the Council, p. 5. For more systematic information see A. LEERKES, *How (Un)restrictive Are We? 'Adjusted' and 'Expected' Asylum Recognition Rates in Europe*, in *Wetenschappelijk Onderzoek – en Documentatiecentrum (WODC)*, 2015, www.wodc.nl.

h) Systematic underestimation: the Syrian conflict has been building up for a couple of years now, and refugees started to leave the country in significant numbers in 2012. The major under-funding and the lack of meaningful resettlement ensured that Syrian refugees would feel forced to try to reach Europe after a while. No fortune telling was required to predict that the combination of millions of refugees and them being neglected by the international community would lead to a movement towards Europe. Nevertheless, European authorities were taken by surprise when this happened in 2015. The lack of preparation – not enough reception facilities, insufficient immigration officers, etc. – created the idea that the numbers are more than the EU can handle. Similar to the underestimation of the number of new arrivals is the overestimation of the people who will return. European asylum policies systematically produce people whose asylum claim is rejected while it is evident that they will not return and cannot be deported (as in the Dutch policy based on the idea that people will voluntarily migrate to ... Mogadishu).³⁰

i) Exploitation of problems: by now, almost every European country has prominent politicians successfully profiteering from the problems that, obviously, accompany an influx of refugees. Mainstream parties mimic their xenophobic rhetoric, and thereby undermine support for sheltering refugees.

The number of refugees is small in relation to the population and wealth of the EU. Nevertheless, the wide spread perception is that Europe has a refugee crisis on its hands, which potentially threatens the European project as a whole. The situation could get out of hand because the nine elements listed above interlock. The refugees were ignored when they failed to access meaningful protection in the region. They were faced with the impossibility to seek safety in Europe by legal means. This has created a huge demand for the services of human smugglers. The prices (and consequently: profit margins) of smugglers went up, which attracted new suppliers of smuggling services. In the energetic cycle of supply and demand, prices have now gone down because there is so much supply, which attracts new migrants. This explains why Moroccans and Algerians now enter Europe via Turkey. The influx in 2015 constituted the first stress test for the CEAS – and it's plain to see how robust it is. The systemic failures were evident for years, but could be ignored as long as the number of asylum seekers was negligible. Now the number of refugees equals that of the 1990s, it's clear that far from having harmonized their asylum systems, European asylum policies still predominantly consists of passing the buck.

It is the interaction between the elements mentioned above that has created the perfect storm now raging over Europe. Can anything be done? It should be noted that the elements *c)* to *h)* are of Europe's own making. It's probably too late now to put in place a more robust system of reception in the region. The cycle of supply and demand

³⁰ T. SPIJKERBOER, *Rechtsherstel voor Somaliërs*, in *Nederland Juristenblad*, 2014, p. 1672 *et seq.*, p. 1674.

for smuggling services and the lack of trust of Syrian refugees in the international community cannot be changed soon. But other elements can be influenced in the short run. The market for smuggling can be disrupted by large scale resettlement, and by partially or entirely liberalizing travel for Syrian nationals, preferably together with the world's other wealthiest nations. People recognized as refugees in Europe could be given a version of the right of free movement in the EU, facilitating them to find employment or enjoy the support of their families or ethnic communities. And underestimating the number of asylum seekers is something that States simply can stop doing.

But it's quite unlikely that anything like this will happen. European policy makers are caught in tunnel vision (more below). They do notice that their policies fail to achieve the intended effect, but draw the conclusion that what is needed is intensification of basically the same policies. Trying to interrupt the perfect storm, however, would require a fundamental reconsideration of policies of the past 25 years – and this requires not just admitting that they have failed, but that they backfired. Therefore, policy makers try to ignore analyses such as the present one. They habitually state that they are a plea for open borders, and then ignore them.

It is more likely that European policy makers will go on fuelling the storm. Is it possible that the storm gets worse? Certainly. If Lebanon is not assisted immediately in shouldering the burden of the Syrian refugees – in addition to the Palestinians who have been there for over half a century! – it's quite possible that the civil war which ravaged the country between 1975 and 1990 will be reignited. This can lead to millions more refugees. And if European countries keep reinforcing their criminal approach to the travel of refugees and migrants, human smuggling is likely to be incorporated in the more organized drug trafficking business – a phenomenon that has occurred at the US-Mexico border and has attracted extremely well organized and ruthless entrepreneurs to the human smuggling business.

III. TUNNEL

In 2015, I was contacted to act as an expert for the European Commission, which was doing an impact assessment for a recast of the directives on smuggling and trafficking. There was one occasion in the fall where the experts actually met with the commission civil servants and the external consultants working on the project. Half of the experts were positive about the idea to intensify the criminal approach to these phenomena, while the other half (including me) was sceptical or outright negative about this idea. This scepticism was not what the commission representatives wanted to hear. They ignored interventions doubting the usefulness of further criminalization. Some of us got a bit annoyed; we sceptics became increasingly vocal. The clearest response we received was: "Aha, so you are against border control altogether," and "So you take an open border position". Apparently, any hesitation about the dominant paradigm (criminalisation of smuggling & trafficking is good, hence more criminalisation is better) was seen as

equal to being opposed as a matter of principle to State regulation of migration. On my way back to Amsterdam, this struck me as a bad case of tunnel vision. And maybe this is my own case of tunnel vision, but I began to notice it as one of the dominant characteristics of European migration policies.

For example:³¹ the European Commission presented a proposal for a European border policy on 15 December 2015. At the core of its proposal is the European Border and Coast Guard. The tools the European Border and Coast Guard would use are intensified versions of the tools of Member State border policies over the past 25 years: more controls, more technology, externalization through more cooperation with third countries, and internalization through more emphasis on forced return. The entire package consists of several documents jointly amounting to hundreds of pages. A first analysis leads to three observations.

To begin with, the Commission justifies its proposals by referring to the 'migration crisis' at the European borders. What the proposals fails to deal with is that this crisis is primarily a crisis of European asylum policy. The past few months and years have shown that what's formally called the Common European Asylum System is neither common, nor is it a system. EU Member States all have their own distinctive asylum procedures and their own way of examining asylum applications. In addition, the level of facilities in asylum reception systems varies wildly. As a consequence, migrants and refugees risk death while trying to cross internal borders (such as the one between Hungary and Austria) because they have good reasons not to want to end up in a Member State without a functioning asylum system.

The 1.3 million new asylum applications which the European Union faced in 2015 are a challenge for the asylum systems of European States. But if there would have been something worth calling a Common European Asylum System, this wouldn't have created a crisis. Less than 0.3 per cent of the population of the European Union was an asylum seeker – a number that pales in comparison to the challenges faced by Turkey, Jordan, and Lebanon.

Whereas the inability of the European Union to develop a functioning asylum system is at the root of what the European Commission calls the 'migration crisis,' little is being undertaken to address this (more below). The plans to redistribute a minimal number of asylum seekers – agreed on in September after bitter negotiations and subject to litigation in the Court of Justice – are implemented in miniscule numbers – are in fact not being implemented.

The second observation concerns the proposals which the Commission does make. What has been done in the past 25 years to combat irregular migration? Until 1990, European countries all had their own visa policies. From most countries in the world at

³¹ This passage is based on an earlier article published as T. SPIJKERBOER, T. LAST, *EU Border Plan is a Textbook Example of Tunnel Vision*, 16 December 2015, www.law.ox.ac.uk.

least one European country could be reached without an entry visa. Therefore, most people didn't need a smuggler. As part of Europeanization, this has changed. Today, all EU countries require visas from nationals of poor countries. In addition, Europe has forced transport companies to check passports and visas before travellers are allowed to board an airplane or ferry. The technical quality of documents has also improved considerably. As a consequence, it's much more difficult now to enter Europe by plane or ferry without being in possession of all required documents.

This policy ended temporary migration (including seasonal migration) from the Maghreb to Spain and Italy. Travel became so burdensome that those who had succeeded in entering Europe now remained there. Furthermore, the permanent intensification of these policy measures led to an ever increasing demand for human smuggling, by land or by sea. Europe responded by guarding its borders ever more strictly. Fences appeared along with infrared cameras, radar, and satellite systems, and negotiations with transit countries were started. In addition to the traditional coast guard and police, the navy was put to use, criminal sanctions were introduced, a separate EU agency was created (Frontex), and European border guard operations were carried out (with ancient Greek names such as Poseidon, Hera, Triton). The private security sector alone has an estimated annual turnover of seven billion of Euros of European border business.

These policies haven't had the intended effect of reducing or controlling migration. They have had the unintended effect of boosting the market for human smuggling. Basically, the policies have backfired. Yet policy makers don't tire of repeating that these policies have had no visible effect, and consequently... should be intensified. This is a textbook case of tunnel vision: policy has failed so what we need is more of the same policy.

A third observation concerns border deaths. Many have pointed out that the steady increase of unauthorised migration across the EU's external borders since 1990 (and thereby border deaths) coincides with the harmonization of European migration policies which, as part of harmonization, have become much stricter towards certain groups. There may well be a relationship between the two, as is shown by our research on border deaths.³²

The European Commission, in response to what are labelled as the 'tragedies' at sea which took place in recent months, years, and decades, now proposes to intensify current restrictive migration policies. But there is a considerable risk that, by making migration more difficult, EU policies may put more lives at risk. What has been changed in order to reduce or remove the unintended side-effects of European migration policies, most notably the increasing loss of lives?

The answers to such questions should be based on evidence about almost three decades of migration and border policies. But policy decisions are presently being driven by politics rather than facts. It's necessary for European policy-makers to begin a

³² Cf. T. LAST, T. SPIJKERBOER, *Analysis*, www.borderdeaths.org.

process of evidence-based policy-making in an area which affects the lives of countless people. However, in its proposals, the European Commission doesn't even begin to ask the question whether there may be a relation between the policies which it now proposes to intensify, and the increasing number of migrants dying at European borders.

Existing data sets, such as the Deaths at the Borders Database³³ and the lists compiled by UNITED Against Racism³⁴ and the Fortress Europe Blog³⁵ can be an important part of evidence-based policy-making, in combination with data on migration policies and the determinants of international migration (for example, research of the DEMIG project of the University of Oxford's International Migration Institute),³⁶ data on the volume of unauthorised migration (such as apprehension data), and data on smuggling (for example, research of the Migration and Border Management project of the Danish Institute of International Studies).³⁷

Such data can be collected and analysed in an observatory that tracks migrant deaths in Europe. Local authorities trying to identify the bodies of dead migrants, and families searching for their loved ones, as well as the many organisations and individuals trying to help, need an appropriate and mandated office to which they can turn. And evidence-based policies require accurate data to be collected and analysed using a holistic and longitudinal approach by an independent office which could properly evaluate the effects (intended and unintended) of past and current EU policy, to inform future policy decisions.

The observatory should operate at a European level because these needs could not be satisfactorily met at a regional or national level. First, migration routes in different regions and countries are related, so policies directed at preventing unauthorised, unwanted migration must take an encompassing European approach to stand a chance at success. Second, individual migrants' routes can change and their bodies may end up in places their families would not search, so to maximise the chances of identification, all available *ante-mortem* and *post-mortem* information needs to be centralised. Third, one responsible office is more likely to result in consistent procedures, data collection, and analysis. Fourth, discovery and exchange of best practices on recording deaths and on identification benefits from maximising the number of actors (and their localities) involved. Finally, direct cooperation between local authorities of different countries requires an alternative to the usual nationalised model. Such an observatory would preferably be hosted by the Council of Europe because of its larger geographical scope

³³ Cf. *Deaths at the Borders of Southern Europe*, 2015, www.borderdeaths.org.

³⁴ Cf. UNITED, *List of 22.394 Documented Deaths of Asylum Seekers, Refugees and Migrants Due to the Restrictive Policies of Fortress Europe*, 19 June 2015, www.unitedagainstracism.org.

³⁵ Cf. *Immigrants Dead at Frontiers of Europe*, fortresseurope.blogspot.nl.

³⁶ Cf. International Migration Institute, *Determinants of International Migration*, www.imi.ox.ac.uk.

³⁷ Cf. Danish Institute for International Studies, *Migration and Border Management*, www.diis.dk.

(consisting of 47 Member States as opposed to the EU's 28 Member States), and because it has extensive experience with the supervision of human rights practices.

The observatory (which has been outlined in more detail elsewhere)³⁸ could use a very similar methodology to that of the Deaths at the Borders Database to collect data from 1 January 2014 – the date on which the Database ends. The task would be made far easier by the fact that death registration in Spain, Italy, Malta, and Greece has now been digitalised and are accessible at the national (Spain, Greece, Malta) or regional (Italy) levels.

IV. NATO

On Thursday 11 February 2016, NATO³⁹ announced that its ships would immediately be deployed in the Aegean in order to combat irregular migration, in cooperation with the relevant authorities and with Frontex.⁴⁰ On 23 February, NATO Secretary-General Stoltenberg stated in the European Parliament: “When we rescue those people, what we agreed with Turkey at a ministerial level, we agreed that if those people came from Turkey then we can return them to Turkey”.⁴¹ Stoltenberg repeated this on 24 February.⁴² Is this compatible with international law?

Politico.eu reported the following on the NATO plans.⁴³ A group of five vessels (from Germany, Italy, Canada, Turkey and Greece) already were present in the Eastern Mediterranean. Denmark and the Netherlands are said to have promised vessels too.⁴⁴ Stoltenberg said that Turkey and Greece will not operate in each other's territorial waters, thereby addressing a political sensitivity. The mandate of the mission will not be to intercept or to return boats, but to engage in search and rescue (which however, as Stoltenberg made clear on 23 and 24 February, may consist of interception and return). Activities were to take place in Turkish territorial waters. The Guardian reported that the action was to start on 12 February.⁴⁵ Operational reports on NATO activity in the Aegean are lacking so far.

³⁸ T. SPIJKERBOER, *Policy Conclusions*, May 2015, www.borderdeaths.org.

³⁹ This passage is based on an earlier article published as T. SPIJKERBOER, *The NATO Pushbacks in the Aegean and International Law*, 2016, thomasspijkerboer.eu. I am grateful to Martin Scheinin for his feedback on the original version of the text.

⁴⁰ Cf. NATO Defence Ministers Agree on NATO Support to Assist With the Refugee and Migrant Crisis, 11 February 2016, statewatch.org.

⁴¹ Cf. A. RETTMAN, *Nato to Take Migrants Back to Turkey, If Rescued*, 23 February 2016, euobserver.com.

⁴² Cf. NATO Support to Assist with the Refugee and Migrant Crisis, 24 February 2016, www.youtube.com.

⁴³ Cf. F. EDER, *72 Hours to Launch NATO's Migrant Mission*, 11 February 2016, www.politico.eu.

⁴⁴ Cf. NAVO helpt bij indammen vluchtelingenstroom Egeïsche Zee, 11 February 2016, nos.nl.

⁴⁵ Cf. E. MACASKILL, E. GRAHAM-HARRISON, *Nato Launches Naval Patrols to Return Migrants to Turkey*, 11 February 2016, www.theguardian.com.

A number of questions is relevant in order to assess the legitimacy of this in light of international law: are NATO Member States exercising jurisdiction; are there international law objections; and are there ways to evade jurisdiction and international law obligations?

States are bound to international law when they exercise jurisdiction. If – for example – a German vessel picks up people while it is in Turkish territorial waters and brings them to the Turkish shore, is Germany exercising jurisdiction? This is not an irrelevant question. If such a German vessel exercises jurisdiction, Germany has a number of international law obligations, relating *inter alia* to asylum. The issue of jurisdiction has been the subject of a number of cases.

One of the first cases on the issue is a decision of the UN Human Rights Committee from the early 1980s. The case of *Burgos v. Uruguay* concerned a Uruguayan refugee who enjoyed asylum in Argentina.⁴⁶ After the military coup in Argentina, he was kidnapped by the Uruguayan secret service, detained in Argentina for two weeks, and transferred to Uruguay where he was tortured. The question arose whether Burgos was under Uruguayan jurisdiction during his initial arrest. The UN Human Rights Committee held that it would be unconscionable to interpret the International Covenant on Civil and Political Rights (ICCPR) in such a manner that a State would be allowed to perpetrate acts on the territory of another State which it would not be allowed to perpetrate on its own territory. The Human Rights Committee formulated a fundamental rule: what a State is prohibited from doing on its own territory, it is not allowed to do somewhere else.

A case of the Committee Against Torture displays more similarities with the NATO plan. The Marine I-case concerned a cargo vessel carrying 369 migrants, which in 2007 issued a rescue call in international waters.⁴⁷ A Spanish rescue vessel approached the Marine I and towed it to the Mauritanian coast. After a week and a half of negotiations, the Mauritanian authorities gave permission to tow the vessel into a Mauritanian harbour. The migrants were detained under supervision of Spanish personnel. In groups most of them were returned to their country of origin; a few received a humanitarian residence permit. The complaints concerned detention conditions and removal to the country of origin. One of the arguments brought forward on behalf of the Spanish authorities was that all this occurred outside Spanish territory. The Committee Against Torture held that a State exercises jurisdiction when it has, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control. The Committee ruled that Spain exercised jurisdiction from the moment it came to the rescue of the Marine I.

⁴⁶ Human Rights Committee (CCPR), views of 29 June 1981, communication no. 52/1979, *Sergio Euben Lopez Burgos v. Uruguay*.

⁴⁷ Committee against Torture (CAT), decision of 21 November 2008, communication no. 323/2007, *P.K. et al. v. Spain*.

The most directly applicable case is the 2012 *Hirsi Jamaa v. Italy* judgment, in which the Grand Chamber of the European Court of Human Rights passed judgment on the Italian pushbacks, which consisted of transferring migrants from vessels onto Italian navy vessels and returning to Libya without any procedure.⁴⁸ The Court held that a State exercises *de jure* jurisdiction over vessels flying its flag, and therefore the migrants were under Italian jurisdiction. It added that Italy could not evade the exercise of jurisdiction by arguing that its activities constitute a search and rescue action – just like NATO is doing at present.

The Court referred to another case, in which it held that French agents who took over a vessel (suspected of engaging in drugs trafficking) flying a Cambodian flag exercised *de facto* jurisdiction.⁴⁹ In conclusion, the Italian authorities had exercised jurisdiction during the pushbacks because the migrants were put on Italian vessels (*de jure* jurisdiction) and because the Italian navy had factual control over them (*de facto* jurisdiction).

Legal doctrine holds that the same applies to the 1951 Refugee Convention. It has to be noted that the US Supreme Court ruled that the Refugee Convention does not apply outside the territory of the United States.⁵⁰ However, this interpretation of the Supreme Court is highly contested, and has more to do with US constitutional law (in particular with the plenary powers doctrine) than with international law. The Supreme Court projected a piece of domestic constitutional law onto the international convention on refugees. It is not to be expected that European courts will change their position in order to adopt this American interpretation, although that cannot be strictly excluded either.

In sum: it is evident that, when they return migrants to the Turkish shore, NATO vessels exercise jurisdiction in the sense of the European Convention on Human Rights (ECHR), the ICCPR, and the Convention Against Torture (CAT) – even when the entire operation takes place within Turkish territorial waters. That this is evident is clear from the fact that the judgment of the Grand Chamber of the European Court of Human Rights was unanimous on all major points. This underlines that the Court's interpretation is not far-fetched or activist, but reflects a broad consensus. The Court did nothing else than restate the obvious and basic rule formulated in *Burgos v. Uruguay*: what a State is not permitted to do on its own territory, it cannot do somewhere else. This is a fundamental rule. If the US is not permitted to waterboard people, it is not permitted to do so on Guantanamo Bay either. If the Russian secret service is not allowed to poison an opponent with polonium, it is not allowed to do so in London.

It would be conceivable to use a construction which Spain is said to apply in its co-operation with some West-African countries. Imagine that on board of all participating

⁴⁸ *Hirsi Jamaa et al. v. Italy*, cit.

⁴⁹ European Court of Human Rights, judgment of 29 March 2010, no. 3394/03, *Medvedyev et al. v. France*.

⁵⁰ US Supreme Court, judgment of 2 March 1993, *Sale v. Haitian Ctrs. Council*.

NATO vessels a Turkish representative is posted who – even when s/he is taking a nap – is supposed to command the vessel. This would clearly be a mere construction to hide the jurisdiction the NATO State concerned is exercising under a formalist veil. But even for those who wish to go along with that, it would merely mean that the *de jure* jurisdiction of that NATO State would disappear. It would not do away with its *de facto* exercise of jurisdiction. The presence of a Turkish functionary could possibly mean that Turkey would exercise *de jure* jurisdiction in addition to the exercise of jurisdiction of the NATO State concerned. The fact is that it is hard to think of a clearer example of the exercise of jurisdiction that a State has over its own navy vessels.

Migrants who may want to ask for asylum can be returned to a third country, on the condition that the third country is safe; it has been established in an individual decision that the country is safe for this person as well; and the migrant has had the possibility to appeal this decision in a court of law.⁵¹ As has been explained elsewhere, it is highly questionable whether Turkey is to be considered as a safe third country.⁵² The last time the European Court of Human Rights concluded that Turkey violated the human rights of an asylum seeker dates from 15 December last year.⁵³ In addition to this, the NATO action excludes the possibility of individual decisions and appeal to courts. Therefore, the NATO action would be contrary to the prohibition of *refoulement*. The prohibition of *refoulement* contained in the ECHR, ICCPR and CAT is non-derogable.

What NATO plans to do is contrary to case law of the European Court of Human Rights (*Hirsi Jamaa v. Italy*), the CAT (*Marine I*) and the ICCPR (*Burgos v. Uruguay*). States may denounce (i.e. stop being a party to) most conventions (the ICCPR does not foresee denunciation),⁵⁴ but that is not an easy thing. EU law requires that its Member States are party to these conventions. Therefore, denouncing them would require amendment of EU treaties (as well as of all secondary legislation referring to the prohibition of *refoulement*).

An additional problem would be that the prohibition of *refoulement* which the NATO Member States would violate is part of international customary law, according to most authors. International customary law binds States even if they have not ratified any international treaty. So maybe it would not help to denounce all these conventions. On the other hand, one might argue that the idea that the prohibition of *refoulement* is customary law is based primarily in the fact that it has been incorporated into a number of treaties (in addition to the ones already referred to also in regional treaties in Africa

⁵¹ Extensively S. PEERS, E. ROMAN, *The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?*, 5 February 2016, eulawanalysis.blogspot.nl.

⁵² E. ROMAN, T. BAIRD, T. RADCLIFFE, *Analysis Why Turkey is Not a "Safe Country"*, 2016, www.statewatch.org.

⁵³ European Court of Human Rights, judgment of 15 December 2015, no. 74535/10, *S.A. v. Turkey*.

⁵⁴ Human Rights Committee (CCPR), *General Comment No. 26: Continuity of Obligations*, 8 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1.

and the Americas). So, if all NATO-States withdraw from these treaties, one might argue that customary law has changed.

The conclusion has to be that the NATO actions are in violation of international law; and that the relevant parts of international law are binding on NATO States because they exercise jurisdiction over migrants. Returning migrants to Turkey as envisioned violates the prohibition of *refoulement*, also when it happens in the form of search and rescue.

V. WEAKNESS

Elsewhere, it has been argued that the miserable achievement of the CEAS in the face of its first stress test (the foreseeable arrival of Syrian refugees) is caused by four structural weaknesses in the CEAS itself. These are, first, outcomes that are unfair towards both Member States and asylum seekers⁵⁵ as a result of which key players (being those Member States and asylum seekers) have legitimate interests in cheating. Secondly, both in empirical and in legal terms, too much is expected of what borders can achieve. Thirdly, the external element is based on the prohibition of refugee movement across borders, including the borders of their country of origin. This is morally illegitimate, legally problematic, and empirically unrealistic. Finally, the legal forms used in European asylum policy are complicated to the point of being obscure.⁵⁶

Does the EU-Turkey deal of 18 March 2016,⁵⁷ which for the time being is the culmination point of the European response to the Syrian refugee arrivals, begin to address these structural weaknesses? It does not change the distribution of asylum seekers among the Member States. Quite the contrary, it is based on the notion that Greece has to process all asylum applications of people arriving at its borders, ignoring that Greece has a disproportionate burden to share. True: the EU has suggested Greece will be assisted in doing this, but such promises remained empty in 2015. This way of trying to force Greece to apply the Dublin system, with patently unfair consequences for Greece, has aptly been called *troikaisation* elsewhere.⁵⁸ The EU-Turkey deal also does not address the significant disparities in the asylum systems of EU Member States. To give just one example: whereas under the EU-Turkey deal, Greece initially was to return only people who had not asked for asylum, UNHCR reported that the first group included 13 people who actually had asked for asylum, but whose asylum application Greece had

⁵⁵ Cf. B. NASCIMBENE, *Refugees, the European Union and the Dublin System. The Reasons for a Crisis*, in *European Papers*, 2016, www.europeanpapers.eu, p. 101 et seq.

⁵⁶ M. DEN HEIJER, J. RIJPMAN, T. SPIJKERBOER, *Coercion, Prohibition, and Great Expectations. The Continuing Failure of the Common European Asylum System*, in *Common Market Law Review*, 2016, pp. 607-642.

⁵⁷ Cf. Press releases and statements, *EU-Turkey statement*, 18 March 2016, cit.

⁵⁸ C. HELLER, L. PEZZANI, *Ebbing and Flowing. The EU's Shifting Practices of (Non-) Assistance and Bordering in a Time of Crisis*, Nearfuturesonline.org.

“forgotten” to process.⁵⁹ This should have come as no surprise, because return of asylum seekers to Greece would amount to a violation of Arts 3 and 13 of the ECHR on account of the sub-standard Greek asylum policy.⁶⁰ The second structural weakness (unrealistic expectations of the border) is even being reinforced. The core of the EU-Turkey deal is the notion that all “irregular migrants” (a term used despite the fact that a solid majority of them would be granted asylum if their asylum claims were to be processed in substance) are to be returned to Turkey. This is expected to reduce the number of boat arrivals in Greece to almost zero. This is both factually and legally unrealistic. Even if arrivals in Greece indeed drop, it is to be expected that arrivals will go up somewhere else, as this is the mechanism we have seen over the past 25 years. And although the EU-Turkey deal claims that returning everyone can be done without violating international law (including the prohibition of collective expulsion, the prohibition of *refoulement*, and the right to remain on the territory pending appeals against negative asylum decisions), the tension between the main objective of the deal (return everyone so as to stop all arrivals) and international law is extreme. The third structural weakness was prohibition of refugee movement. The EU has promised to resettle Syrian refugees from Turkey. However, it has capped this at 54,000 – which is a mere 1.9 per cent of the 2,749,140 Syrian refugees registered in Turkey,⁶¹ and merely 1.1 per cent of the 4,837,208 Syrian refugees registered in the region.⁶² This minimal form of resettlement (even if it works, which is doubtful) is humanitarian window dressing. The final weakness (the unclear legal form of cooperation) is exemplified, not repaired by the EU-Turkey deal – see the next chapter.

On 6 April 2016, the European Commission published a communication on reform of the CEAS and legal migration avenues to Europe.⁶³ At first sight, this seems a more promising approach. The document begins by identifying “significant structural weaknesses”: uneven responsibility sharing between Member States; problematic implementation of the Dublin regulation; systemic flaws in the asylum systems of Member States such as Greece; differing treatment of asylum seekers in procedures, reception conditions and percentage of asylum seekers granted protection.⁶⁴ This means that the first and fourth structural weakness identified above are recognised as such by the Commission. The unrealistic expectation of the border are not identified – note for example the

⁵⁹ Cf. P. KINGSLEY, *Greece May Have Deported Asylum Seekers by Mistake, Says UN*, 5 April 2016, www.theguardian.com.

⁶⁰ European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*.

⁶¹ Cf. Syria Regional Refugee Response, Inter-agency Information Sharing Portal, *Turkey*, data.unhcr.org.

⁶² Cf. Syria Regional Refugee Response, Inter-agency Information Sharing Portal, *Regional Overview*, cit.

⁶³ Communication COM(2016) 197, cit.

⁶⁴ *Ivi*, pp. 2-5.

repeated idea that Member States are responsible for protection of their part of the external border⁶⁵ which is assumed to imply that no migrants will arrive there instead of assuming it implies (as it does under the CEAS) that all asylum applications will be dealt with in accordance with international law. And the external element (prohibition) arguable is not within the scope of this communication. But what does the communication actually propose with the two structural weaknesses it does identify?

It suggests two rather minimal changes to the Dublin system. Both assume that, just like now, the Member State of first entry (think: Greece, Italy) will examine applications, and will return people not in need of international protection (for example because they come from a country of origin declared to be safe). This means that Greece and Italy will bear the brunt, just as they do now. However, the Commission suggests two ways of diminishing the unfairness a bit. The first is to add to the present Dublin system a corrective fairness mechanism, activated when a certain threshold is reached. This is a variation on the hotspot approach which has so miserably failed in 2015.⁶⁶ The second variety goes a bit further and replaces the present Dublin system by a distribution key for all applications which stand a reasonable chance. This goes a little way in addressing this structural weakness. For reducing the differing treatment of asylum seekers, the Commission suggests to replace the Qualification and Procedures Directives by Regulations, and to give European Asylum Support Office (EASO) a more prominent role. As has been argued elsewhere, it is the national application of these mechanisms (and not their legal status under EU law) that is problematic,⁶⁷ and therefore the effect of this will be minimal. For the longer run, the Commission suggests federalization of asylum decision making, which in fact would address part of the first structural weakness. In sum, the first structural weakness is identified in the communication, but the proposals the Commission tables barely begin to address it.

The fourth weakness (the unclear legal nature of the CEAS) is only addressed in the proposal to federalize asylum decision making in the long run. As has been argued elsewhere, piecemeal federalization will probably not only solve this weakness, but may even increase the chaos.⁶⁸

The EU-Turkey deal reinforces the four structural weaknesses which made the arrival of 1.3 million new asylum seekers in 2015 into a crisis. The Commission proposals of 6 April 2016 may signify a beginning awareness that fundamental aspects of European asylum policies have to be revised, but is not the beginning of that revision itself.

⁶⁵ *Ivi*, pp. 4, 7, 8.

⁶⁶ M. DEN HEIJER, J. RIJPMAN, T. SPIJKERBOER, *Coercion, Prohibition, and Great Expectations*, cit., pp. 627-630.

⁶⁷ *Ivi*, p. 610.

⁶⁸ *Ivi*, pp. 638-641.

VI. DEAL

On 18 March 2016, the EU and Turkey made a deal about the return of irregular migrants from Greece to Turkey.⁶⁹ On the basis of this deal, people were deported from Turkey to Greece as of 20 March 2016. The deal was laid down in a press release.⁷⁰ In the European Parliament, the question was raised whether this statement is to be considered as an agreement in the sense of Art. 216 TFEU.⁷¹ Apparently, the EU's procedure for negotiating and concluding treaties with third countries, laid down in Art. 218 TFEU, has not been followed. The European Parliament wants to know whether the Council nonetheless considers the Statement to be a treaty, and, if not, whether Turkey has been informed about the non-binding nature.

It is evident that legal counselors of the Commission and the Council have identified the problem. After the EU-Turkey statement, the Commission has proposed to amend the Council Decision of 22 September 2015.⁷² This seems to contradict the idea that no changes are needed in order to implement the 18 March deal in order to bring Syrians resettled from Turkey under the relocation quota.⁷³ If the EU has to amend existing legal instruments in order to implement the EU-Turkey Statement, that would be a strong indication that the Statement is a treaty obliging the EU to implement it. However, in preamble consideration four, the basis for the proposed amendment is given as the EU decision of 7 March:⁷⁴ "The EU Heads of State or Government agreed on 7 March to work on the basis of a series of principles for an agreement with Turkey, including to resettle, for every Syrian readmitted by Turkey from Greek islands, another Syrian from Turkey to the Member States, within the framework of the existing commitments". In this proposal, the Commission is navigating around the EU-Turkey Statement as the ground for amending the 22 September Council Decision, and instead uses another basis.

It could be argued that the statement is not a treaty in the meaning of the Vienna Convention on the Law of Treaties or an international agreement in the meaning of Art.

⁶⁹ This paragraph is based on M. DEN HEIJER, T. SPIJKERBOER, *Is the EU-Turkey Migration and Refugee Deal a Treaty?*, Eulawanalysis.blogspot.nl. See for a similar analysis E. CANNIZZARO, *Disintegration Through Law?*, in *European Papers*, 2016, www.europeanpapers.eu, p. 3 *et seq.*

⁷⁰ Cf. Press releases and statements, *EU-Turkey statement*, 18 March 2016, cit.

⁷¹ Cf. European Parliament, Parliamentary questions, 22 March 2016, www.europarl.europa.eu.

⁷² Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁷³ Council Decision (EU) 2016/0089 of 21 March 2016 amending Council Decision EU 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁷⁴ Cf. Press releases and statements, *Statement of the EU Heads of State or Government*, 07/03/2016, www.consilium.europa.eu.

216 TFEU, because the exchanges between the EU and Turkey were merely included in a statement. This is the view of Steve Peers⁷⁵ and Karolína Babická.⁷⁶

A further reason not to view the statement as a treaty is that it does not use terms as shall and should, which are normally used in international law to indicate obligations of result (shall) or obligations of effort (should). Instead, the more indistinct term 'will' is used. On the other hand, the Statement says that the EU and Turkey "have agreed on the following additional points". Art. 216 TFEU uses the term 'agreement' when referring to a treaty with third countries. If two parties agree to something, can the result be anything less than an "agreement"? Or is the meaning of the term agreement in Art. 216 TFEU different from its ordinary meaning?

If one would embrace the thought that the Statement of 18 March is not a treaty or agreement because it is designated as "Statement" and uses the term "will", it would follow that the EU could neglect the constitutional safeguards of Art. 218 TFEU by changing the form or terminology of a particular text. It would be rather odd if the European Parliament and the CJEU could be sidetracked by such clever ruses. It would mean that the applicability of constitutional safeguards depends entirely on choices regarding the design instead of content made by Commission or Council.

That the form is not decisive is confirmed in the case law of the International Court of Justice (ICJ). In *Aegean Sea*, the question was whether a joint *communiqué*, issued after a meeting between the Prime Ministers of Greece and Turkey, in which they agreed that a territorial dispute dividing the two countries should be resolved by the ICJ, constituted a treaty on the basis of which the ICJ had jurisdiction over the case. The Court held "that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement (cf. Arts 2, 3 and 11 of the Vienna Convention on the Law of Treaties). Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form – a communiqué – in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up".⁷⁷

The ICJ found that the terms of the *communiqué*, using terms as "decision" and "obligation" were indicative of the parties intending to bind themselves. However, it transpired from the context, namely previous and later negotiations and diplomatic ex-

⁷⁵ Cf. S. PEERS, *The Draft EU/Turkey Deal on Migration and Refugees: Is It Legal?*, 16 March 2016, eulawanalysis.blogspot.nl.

⁷⁶ Cf. K. BABICKÁ, *EU-Turkey Deal Seems to Be Schizophrenic*, 22 March 2016, www.migrationonline.cz.

⁷⁷ International Court of Justice, *Aegean Sea Continental Shelf* (Greece v. Turkey), judgment of 19 December 1978.

changes between the parties, that they had not yet undertaken an unconditional commitment to submit the continental shelf dispute to the Court.

In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the question was whether minutes of a meeting between two Foreign Ministers constituted a treaty. The ICJ held that the minutes included a reaffirmation of obligations previously entered into; undertook attempting to find a solution to the dispute during a period of six months; and addressed the circumstances under which the Court could be seized after May 1991. According to the ICJ, 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.⁷⁸

It follows that the question of whether a text is a treaty does not depend on form but on whether the parties consented to bind themselves. Whether there is such consent, depends on the terms used and the context in which the text was drawn up.

Both the text and context of the EU-Turkey Statement support the view that it is a treaty. The parties “decided” to end the irregular migration from Turkey to the EU, and, to that purpose, they “agreed” on a number of action points. These include a commitment on the part of Turkey to accept returned migrants and a commitment on the part of the EU to accept for resettlement one Syrian for every one Syrian returned to Turkey. Further, the Statement reaffirms the joint action plan of November 2015 and mentions that it is already being implemented. Indeed, several implementation reports have been drawn up since November 2015, from which it is clear that the previous action plan has been activated.⁷⁹

The only way to argue that the EU-Turkey statement is not an agreement in the sense of Art. 216 TFEU would be to argue that it merely reconfirms already existing obligations from previous agreements (such as the EU-Turkey and Greece-Turkey Readmission Agreements), as well as expressing the political intention to enter into new obligations (establishing a procedure for resettlement of Syrians from Turkey). If one focuses exclusively on the text of the statement and disregards the context, this is a position which can be made to look tenable. However, it would require disregard of two blatant aspects of the statement. First, the substantive part of the agreement opens with the decision to return all irregular migrants to Turkey. If one focuses merely on the text of this crucial sentence, this would imply violation of the prohibition of collective expul-

⁷⁸ International Court of Justice, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), judgment of 1 July 1994.

⁷⁹ Cf. European Commission, *Managing the Refugee Crisis. EU-Turkey Joint Action Plan: Implementation Report*, ec.europa.eu and Report from the Commission to the European Parliament and the Council, *EU-Turkey Joint Action Plan: Third Implementation Report*, COM(2016) 144 final of 4 March 2016 ec.europa.eu/dgs.

sion. Because application of this provision would constitute a violation of international law, by that very fact it is not merely a restatement of pre-existing obligations. It is true that this sentence is followed by qualifications about compatibility with international and European law and even the explicit statement that this does not constitute collective expulsion, but the internal tension (returning everyone *versus* compliance with international law) is so evident that the idea that the agreement contains a novel legal element is more convincing than the idea that it contains nothing new. Secondly, it is well known that the pre-existing legal readmission obligations (on the basis of the EU-Turkey and Greece-Turkey Readmission Agreements) were barely being applied.⁸⁰ Therefore, the fact that Turkey agreed that, as of 20 March 2016, all irregular migrants were to be accepted is a substantively novel element. Therefore, for two reasons the idea that the EU-Turkey Statement merely repeats pre-existing legal obligations is not convincing.

The EU-Turkey Statement now at issue is also being implemented. For example, the Greek parliament has passed a law allowing migrants arriving in the country to be returned to Turkey.⁸¹ On Monday 4 April 2016, Turkey accepted the first returned asylum seekers from Greece.⁸² All this indicates that the EU-Turkey Statement was meant to create mutual obligations to implement its terms. This indicates that it is a treaty.

There is no reason to assume that this reasoning does not apply to the EU (which is not a party to the Vienna Convention on the Law of Treaties). In interpreting agreements concluded between the EU and third countries, the CJEU consistently observes that even though the Vienna Convention does not bind either the Community or all its Member States, a series of provisions in that convention reflect the rules of customary international law which, as such, are binding upon the Community institutions and form part of the Community legal order.⁸³ Presumably, the definition of a treaty in Art. 2, para. 1, let. a) of the Vienna Convention on the Law of Treaties belongs to customary international law. The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which has not yet entered into force, uses the same definition and expands it to agreements concluded between international organizations or an international organization and a State.

Does the fact that the internal EU rules were possibly not followed mean that the Statement does not have legal effect? Probably not, as the Statement was agreed by the

⁸⁰ This is evident from Council Decision (EU) 2016/551 of 23 March 2016 establishing the position to be taken on behalf of the European Union within the Joint Readmission Committee on a Decision of the Joint Readmission Committee on implementing arrangements for the application of Articles 4 and 6 of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation from 1 June 2016. This makes clear it was not being applied (at least not systematically) before that date.

⁸¹ Cf. *Greece Passes Law Allowing Migrants' Return to Turkey*, 1° April 2016, www.bbc.com.

⁸² Cf. P. KINGSLEY, H. SMITH, *First Boats Returning Migrants and Refugees From Greece Arrive in Turkey*, 4 April 2016, www.theguardian.com.

⁸³ Court of Justice, judgment of 25 February 2010, case C-386/08, *Brita*, para. 42.

Members of the European Council, whom Turkey could have considered to have full powers to bind the EU. Art. 46 of the Vienna Convention on the Law of Treaties provides that a party may not “invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance”.

Para. 2 of that provision provides that a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith. In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the ICJ did not consider it relevant that Qatar had not followed the procedures required by its own Constitution for the conclusion of treaties: “Nor is there anything in the material before the Court which would justify deducing from any disregard by Qatar of its constitutional rules relating to the conclusion of treaties that it did not intend to conclude, and did not consider that it had concluded, an instrument of that kind; nor could any such intention, even if shown to exist, prevail over the actual terms of the instrument in question”.⁸⁴

We therefore conclude that the EU-Turkey Statement is a treaty with legal effects, despite its name and despite internal EU rules not having been observed.

That the Statement is a treaty implies not only that the EU and Turkey must uphold its terms; it also opens up a debate about its legal effects, including possible challenges against its legality in view of possible conflict with other rules and treaties, such as human rights. The fact that the Statement has already been concluded and is therefore no longer merely ‘envisaged’, means, however, that it is no longer possible to obtain an opinion of the CJEU “as to whether an agreement envisaged is compatible with the Treaties” (Art. 218, para. 11, TFEU). It is still possible for one of the EU institutions or a Member State to bring an action for annulment of the act of the European Council to conclude the agreement with Turkey. Such an action was successfully brought in *France v. Commission*, when the ECJ declared void the act whereby the Commission sought to conclude a competition agreement with the US, for reason of the Commission not being empowered to do so.⁸⁵ However, this left the Agreement with the US itself intact, which is in conformity with the rule of Art. 46 of the Vienna Convention on the Law of Treaties.

In view of the default position in international law that all treaties are equal, it further is difficult to argue that the Statement is void because of a possible conflict with human rights such as guaranteed in the ECHR or within the EU legal order, such as the right to asylum and the prohibitions of *non-refoulement* and collective expulsion (the EU Charter of Fundamental Rights). Only if the EU-Turkey Statement conflicts with *jus co-*

⁸⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, cit., para. 29.

⁸⁵ Court of justice, judgment of 9 August 1994, case C-327/91, *France v. Commission*.

gens, is it to be considered void and may Member States not give effect to it (Art. 53 of the Vienna Convention on the Law of Treaties).

It is however possible for individuals (such as those being returned from Greece to Turkey) to challenge the implementation of the EU-Turkey agreement before national courts, arguing that it conflicts with fundamental rights. This in turn, may lead to a referral to the CJEU or a complaint before the European Court of Human Rights. Is the agreement in violation of human rights? As has been argued elsewhere,⁸⁶ the agreement may raise issues under the prohibition of *refoulement* (is Turkey safe?), the right to liberty (is systematic detention in Greece allowed?) and the prohibition of collective expulsion (are the returnees able to challenge their return on individual basis, including before a court?). However, the Statement does not prescribe how, exactly, returns are to be effectuated and does not oblige Greece to systematically detain all asylum seekers who enter the country from Turkey. The Statement says that returns are to “take place in full accordance with EU and international law, thus excluding any kind of collective expulsion” and that “[a]ll migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement”. Further, migrants are to be “duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive”. It would seem therefore that the Statement itself does not directly violate international norms – it leaves the Member States sufficient freedom to implement the obligations in harmony with human rights. It follows that the Member States (Greece) must implement the agreement in harmony with human rights: “Where a number of apparently contradictory instruments are simultaneously applicable, they must be construed in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law”.⁸⁷ A similar line of reasoning is followed in the case law of the ECJ.⁸⁸

This brings us to two concluding observations. First, the devil of implementing the EU-Turkey deal is in the detail. Although its effectiveness in terms of stopping irregular migration by creating a deterrent effect may depend on returning *all* persons arriving in Greece *as quickly as possible*, fundamental rights may well halt returns in individual case or result in lengthy procedures. It is indeed the question whether the appropriate hu-

⁸⁶ Cf. United Nations High Commissioner for Refugees (UNHCR), *Legal Considerations On the Return of Asylum-Seekers and Refugees From Greece to Turkey As Part of the EU-Turkey Cooperation in Tackling the Migration Crisis Under the Safe Third Country and First Country of Asylum Concept*, 23 March 2016, www.refworld.org; H. LABAYLE, P. DE BRUYCKER, *The EU-Turkey Agreement on Migration and Asylum: False Pretences or a Fool's Bargain?*, 1° April 2016, eumigrationlawblog.eu.

⁸⁷ European Court of Human Rights, judgment of 12 September 2012, no. 10593/08, *Nada v. Switzerland*, para. 170.

⁸⁸ Court of Justice, judgment of 27 June 2006, case C-540/03, *Parliament v. Council*.

man rights framework is in place in Greece. Second, the European Parliament is right in asking critical questions about the Council not following the rules for concluding a treaty (also see earlier questions about the EU-Turkey deal of 29 November 2015).⁸⁹ Although one could take the view that time did not allow to await an Opinion of the CJEU, the agreement was not concluded with Turkey overnight and there was at least ample opportunity for European Parliament to deliver an opinion “within a time-limit which the Council may set depending on the urgency of the matter” as provided by Art. 218, para. 6, let. b), TFEU.

It is an affront to European democracy and the rule of law that such a controversial agreement, touching on fundamental human rights is concluded without properly allowing the European Parliament and, if approached, the CJEU, to play the constitutional role which they have been assigned by the Member States themselves in the TFEU.

VII. WOMENANDCHILDREN[□]

“As I write, highly civilized human beings are flying overhead, trying to kill me”. This is the memorable opening sentence of a long essay George Orwell wrote in London in 1941.⁹⁰ Three years of being bombarded later, he returned to the topic. Why would it be worse to kill civilians than soldiers? “Every time a German submarine goes to the bottom about fifty young men of fine physique and good nerves are suffocated”.⁹¹ “The other thing that needs dealing with is the parrot cry ‘killing women and children’. [...] Why is it worse to kill a woman than a man?”⁹² Orwell objected “to the hypocrisy of accepting force as an instrument while squealing against this or that individual weapon, or of denouncing war while wanting to preserve the kind of society that makes war inevitable”. (The last few words show Orwell to be a committed socialist, which for some reason is not what he is remembered for today).

Somewhere in his argument, Orwell makes a mistake. He ignores that warfare which makes more victims than is strictly necessary for military aims is worse than warfare that tries to minimise the number of victims. Less victims are less bad than more victims. He pretends not to notice that women and children often are non-combatants, hence cannot be killed for military reasons. He does not try to understand what his op-

⁸⁹ Cf. M. SCHAAKE, *Written Question About the Appendix Letter to the EU-Turkey Deal*, 12 January 2016, www.marietjeschaake.eu.

[□] The term is Cynthia Enloe's: C. ENLOE, *Margins, Silences and Bottom Rungs: How to Overcome the Underestimation of Power in the Study of International Relations*, in S. SMITH, K. BOOTH, M. ZALEWSKI (eds), *International Theory: Positivism and Beyond*, Cambridge: Cambridge University Press, 1996, p. 186 *et seq.*

⁹⁰ S. ORWELL, I. ANGUS (eds), *The Collected Essays, Journalism and Letters of George Orwell*, Vol. 2, Harmondsworth: Penguin, 1977, p. 74 *et seq.*, at p. 74.

⁹¹ S. ORWELL, I. ANGUS (eds), *The Collected Essays, Journalism and Letters of George Orwell*, Vol. 3, Harmondsworth: Penguin, 1971, p. 180.

⁹² *Ivi*, p. 214.

ponents want to argue, and instead goes after the exact words they use. The shocked response to his essays show that his opponents often also did not understand what they wanted to argue. Many people believed (and still believe) that women and children belong to a higher moral category and that them being victims is more tragic than victimisation of “young men of fine physique and good nerves”. Orwell had a sharp eye for hypocrisy, and an almost flawless style.

The picture of Aylan Kurdi, the Kurdish-Syrian toddler who drowned in the Aegean in September 2015, brought home to the world that children were dying on their way to Europe. If these children had been granted a visa (the Kurdi's had been trying to get to relatives in Canada) this would not have happened. But is Aylan's death worse than that of the four months old girl who drowned in the Adriatic on 13 October 1994?⁹³ And is the death of these children more tragic than that of the 27 year old Iraqi man who stepped on a Greek mine at the Turkish-Greek border on 15 September 1997? Or that of the Somali man in his early twenties who drowned between Morocco and Spain on 5 May 2011? The people who die at European borders predominantly are young men.

In the context of warfare, it does make sense to distinguish between avoidable and non-avoidable deaths (assuming that one accepts that the use of violence may be legitimate under certain circumstances). And because combatants are predominantly male adults, this implies that adult male deaths will be morally acceptable more often than those of women and children. The same is not true for border deaths. The use of force at European and other borders, which results in these deaths, is equally legitimate or illegitimate for men and women, for adults and children. The shock at the picture of Aylan Kurdi's body merely underscored that the death of less photogenic corpses has been accepted as a daily routine.

⁹³ The individual data are based on T. LAST, *Deaths at the Borders: Database for the Southern EU 2015*, retrieved from www.borderdeaths.org on 6 April 2016.



ON THE AGENDA: THE REFUGEE CRISIS AND EUROPEAN INTEGRATION

THE EUROPEAN BORDER AND COAST GUARD: A NEW MODEL BUILT ON AN OLD LOGIC

PHILIPPE DE BRUYCKER*

TABLE OF CONTENTS: I. Introduction. – II. A new model? Hierarchy within an intergovernmental network. – III. An old logic! Prioritising responsibility over solidarity. – IV. Conclusions.

ABSTRACT: Due to the refugee crisis, the Proposal made by the Commission in December 2015 to create a European Border and Coast Guard (EBCG) will soon become legislation adopted in record time with a large consensus. Wrongly considered as an ambitious solution, it is based on highly questionable principles. Firstly, it transforms the EBCG Agency into the Chief Executive Officer of the Member States authorities in charge of border controls. This is a welcome new model because of the current powerlessness of Frontex, but it does not guarantee the independence towards Member States of this new Agency that will remain intergovernmental. In reality, the Proposal does not create in the true sense an EBCG that will be nothing more than a legal fiction while its misleading title will keep going the confusion between the numerous concepts used in the European borders policy. Secondly, although the Commission pretends to share border controls between the EU and its Member States, the latter will remain responsible for their implementation which is in contradiction with the principle of solidarity, with the consequence that the funding of the European borders policy will remain an unsolved problem. Actually, the Proposal follows the old logic of a supposed principle of responsibility and gives it the priority over the necessary solidarity in violation of the Treaty and in contradiction with the new orientation given by the Commission to the asylum policy. The EBCG could be a short-term solution to the situation at the Greek borders, but it will not solve the structural problem of border controls in the EU that requires a centralised agency for which there is no legal basis in the Treaty.

KEYWORDS: border controls – European Agencies – Frontex – European Border Guard – responsibility – solidarity.

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I. INTRODUCTION

The crisis that the European Union faced in 2015 with the massive arrival of asylum seekers and migrants through the Western Balkans route is closely linked to the issue of controlling the external borders of the European Union. This is not the only issue related to the crisis: the unfair “Dublin” rules on allocating responsibility for asylum seekers are also an important factor, and the crisis can in no way be reduced to border controls despite efforts by some political leaders (particularly those in Central Europe) to do so. However, it is clear that borders are a key issue, as Greece’s loss of control over its external borders had repercussions on the entire Schengen Area. The security concerns linked to the recent terrorist attacks only increased the relevance of this issue.

One can therefore understand why on 15 December 2015 the Commission tabled a Proposal for a Regulation on the European Border and Coast Guard (EBCG) “in order to ensure a European integrated border management” by bringing it “to a qualitatively different level”, in particular by expanding substantially the competences of the Frontex Agency by transforming it into a EBCG Agency.¹ Having “identified the need to move to a shared management of external borders”, the Commission also intends “to render border management more effective and reliable by bringing it to a new level of responsibility and solidarity”.² Thus, the EBCG Proposal presented by the Commission seemed to be an ambitious one. This impression was reinforced by the political controversy that followed the Proposal, which centred on the possibility for the new Agency to substitute itself for Member States not controlling their own external borders. If Member States oppose it in the name of their sovereignty, could it be that it is not really a powerful new European tool?

On the basis of the idea that the EBCG is needed as soon as possible, the EU institutions are advancing through the legislative process at full speed in order to adopt the Proposal by the summer of 2016. As the legislature³ is in line with the Commission Proposal, this extremely tight calendar (seven months for the Council and the Parliament to adopt an important Proposal in co-decision!) will be respected, although one may won-

¹ 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, COM(2015) 671 final.

² See Proposal for a Regulation COM(2015) 671, cit. See also the Communication from the Commission to the European Parliament and the Council, *A European Border and Coast Guard and effective management of Europe’s external borders*, COM(2015)673 of 15 December 2015, which summarises the goals of the borders policy.

³ See Council Mandate of negotiations with the European Parliament of 8 April 2016, 7649/16 and European Parliament, Libe Committee, Rapporteur: Artis Pabriks, Draft Report of 23 March 2016 on the 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. The European Parliament approved the text in plenary on 6 July and the legislative procedure will end soon with the approval by the Council.

der if it will be possible to implement the new regulation by launching the EBCG Agency within a few months as intended.

However, the principles on which the Commission Proposal is based are questionable. Firstly, even if it represents an important change towards a new, but problematic, model of the new Agency's role in relation to the Member States, it maintains a level of confusion surrounding the different concepts related to border controls by wrongly claiming to create a European Border and Coast Guard. Secondly, it pretends to change the way responsibilities are shared between the EU and its Member States while it preserves the old logic of implementing border controls by emphasising a supposed principle of responsibility as superior to the principle of solidarity, in contravention of the Treaty.

II. A NEW MODEL? HIERARCHY WITHIN AN INTERGOVERNMENTAL NETWORK

The Frontex Agency was built by Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union as the core of a network made of the national authorities in charge of border controls. Despite the Commission Proposal's intention to considerably enlarge Frontex' competences, the biggest envisaged change concerns the nature of the Agency: if the Proposal is adopted without fundamental changes, the new European borders Agency will become the line manager or even the Chief Executive Officer (CEO)⁴ of Member States' authorities in charge of external border control. The goal of the Proposal is to prevent future crises and to remedy the insufficient power of the Agency over Member States. Frontex desperately needs Member States' cooperation, however, they do not always collaborate fully, and the Agency has neither the necessary information to act nor the power to force the Member States to do so.

In that sense, the EBCG Proposal is a crucial step in the evolution of the Agency. The Proposal gives it progressively more and more power over the Member States, as demonstrated by several provisions:

- the Agency will adopt a European "operational and technical strategy" with which the "national strategies" of Member States will have to be "*coherent*" (Art. 3);
- Member States shall "take Frontex risk analysis *into account* when planning their activities" (Art. 10, para. 6);
- Member States have a general obligation to provide timely and accurate information to the Agency (Art. 9);

⁴ Following the words of S. PEERS, *The Reform of Frontex: Saving Schengen at Refugee's Expense?*, 16 December 2015, eulawanalysis.blogspot.it.

- the Agency will deploy its own Liaison Officers to Member States. These officers will report regularly to the Executive Director of the Agency on the capacity of Member States to deal with the situation at their external borders (Art. 11, para. 3, let. e);

- the Agency shall evaluate Member States' "capacity" to control their section of the external borders by a "vulnerability assessment" (Art. 12); previously "capacity assessment" was a task that the Agency was authorized to undertake on the basis of Art. 4, second indent of the Frontex Regulation as amended in 2011, however, it was a possibility – not an obligation for the Agency – and it has not been implemented due to a lack of resources and resistance from Member States following the evaluation of the Agency's activities carried out in 2015 by Ramboll;⁵

- if this "vulnerability assessment" concludes that their capacity is insufficient, a sanction is foreseen: the Executive Director can take a "binding decision imposing corrective measures" on the Member State, and if this decision is not implemented, the Management board of the Agency and the European Commission may intervene (Art. 12);

- finally, the Proposal contains a provision which gives the Agency the power to substitute itself for a Member State in the case of failure to implement the corrective measures following a vulnerability assessment or in the case of "disproportionate migratory pressure at the external border, which risks putting in jeopardy the functioning of the Schengen Area". In such case, the Member State will be obliged to cooperate with the Agency, which will apply the measures identified by the Commission. This mechanism, foreseen by Art. 18 of the Proposal, became famous immediately after the presentation of the Commission Proposal, as several Member States expressed their opposition to what they considered a violation of their sovereignty. Following this political positioning, Member States in the Council do not currently oppose the substitution mechanism as such, but propose instead to give the power to act against a Member State to the Council rather than the Commission. It is not certain that such a change constitutes an adequate answer to the constitutional problem that has been raised. Some experts consider indeed that "The right to intervene under the Commission's Proposal raises serious concerns as regards Arts 4, para. 2, TEU and 72 TFEU".⁶ The same seems to be true for the Council amendment as what is at stake is not the horizontal division of powers between the EU institutions but the vertical distribution of competences between the EU and the Member States. The Treaty provisions indeed preserve the power of each Member State to act for the maintenance of law and order.

This change of model from a flat network to a kind of hierarchy also raises the problem of the institutional configuration of the Agency. One may wonder if it will bene-

⁵ External evaluation of the Agency under Art. 33 of the Frontex Regulation, 2015, frontex.europa.eu, p. 35.

⁶ J. RJPMA, *The Proposal for a European Border and Coast Guard: Evolution or Revolution in External Border Management*, Libe Committee of the European Parliament, 2016, www.europarl.europa.eu, p. 18.

fit from enough independence from the Member States to carry out authentic vulnerability assessments, in particular if the Executive Director is “completely (sic) independent” (Art. 67, para. 1, of the Proposal) to make the necessary recommendations, and if the management board is able to adopt the necessary decisions on this basis in order to eliminate the identified vulnerabilities. These questions are relevant, as Frontex is (and the EBCG will remain) an Agency of intergovernmental nature, where most of the power belongs to the Member States through the Management board and to the Executive Director appointed by the Management Board and accountable to him. The Commission proposed the creation of a new supervisory board made of the Deputy Executive Director, four senior officials of the Agency and one representative of the Commission in order to advise him, in other words, not to leave him to decide on such important and delicate issues alone. The Council and the Parliament seem willing to delete this provision, but do not seek to address the issue otherwise. It is true that the issue is new, as most of the literature on agencies to date has focused on the issue of accountability of the agencies rather than their independence,⁷ but independence must also be addressed, as the agencies in the area of freedom, security and justice are confronted more often than the others with highly political and even politicised issues.

Finally, contrary to what it pretends, the Proposal does not create a European Border and Coast Guard (EBCG). It is important to understand the meaning of this notion and differentiate it from integrated border management,⁸ which is not easy due to the proliferation of notions lacking a precise meaning.

European integrated border management (generally abbreviated IBM) refers to the material dimension of border policy. It was defined in Council Conclusions of 4-5 December 2006 and for the first time it will be introduced into hard law by the Proposal. It is often presented as a four-tier model comprising measures in third countries (like the visa policy), measures with neighbouring countries, border control measures and measures within the Schengen Area (in particular return). However, IBM is not only about where border controls take place, but also about the function and scope of those controls. Art. 4 of the Proposal lists no less than ten elements, in particular the prevention and detection of illegal border crossings, analysis of the risks for internal security, cooperation between Member States, cooperation between the different agencies responsible for border control or other tasks carried out at the border, cooperation with third and particularly neighbouring countries, measures to counter cross-border crime, return of third-country nationals staying illegally, use of large scale information systems like the Schengen Information System (SIS), quality control and even solidarity mecha-

⁷ See for instance M. BUSUIOC, *European Agencies: Law and Practice of Accountability*, Oxford: Oxford University Press, 2013, who however mentions the issue of double hats when the members of the Board's Agency are also the heads of the national agencies in the same area.

⁸ One should keep in mind that the legal basis of the European borders policy (Art. 77 TFEU) uses the different notion of an “integrated management system” as the ultimate objective.

nisms. This long list reflects the tasks that the legislator would like to be managed in an integrated way, with the notable exception of customs, as the Council would like to underline in the preamble.

The EBCG refers to the institutional dimension of border policy and deals with the place assigned to the European and national levels in the area of border controls. One does not understand immediately Art. 1 of the Proposal following which “A European Border and Coast Guard is hereby set up to ensure a European integrated border management [...]”. An institutional operation like the creation of the EBCG does indeed not automatically have an effect on the tasks of border guards. Jorrit Rijpma accurately notes that the Agency’s tasks listed in Art. 7 of the Proposal do not reflect all the elements of IBM listed under Art. 4 and are silent regarding internal security in particular,⁹ which is rather strange at a moment when security is one of the EU’s top priorities.

But there is more. Art. 3, para. 1, of the Proposal, following which “the EBCG Agency and the national authorities of Member States which are responsible for border management shall constitute the EBCG” is a rather strange and complicated provision. The EBCG appears to be a legal fiction composed of the new European Agency that will replace Frontex and the national border guards. As explained by Jörg Monar,¹⁰ the idea of creating a European Border Guard was launched by Italy and Germany in 2001, but it lost momentum with the feasibility study for the setting up of a “European Border Police”¹¹ carried out by some Member States which advocated, despite its title, a network model prefiguring the creation of the Frontex Agency in 2004. One should note that following Art. 33, para. 2, let. a) introduced in the Frontex Regulation 2007/2004 in 2011, “The first evaluation following the entry into force of Regulation (EU) No 1168/2011 shall also analyse the needs for further increased coordination of the management of the external borders of the Member States, including the feasibility of the creation of a *European system of border guards*”. This last notion – one more! – appeared with the Hague and Stockholm programmes adopted by the European Council respectively in 2004 and 2009 for the programming of the development of the Area of Freedom, Security and Justice.¹² The consultancy company in charge of this study proposed an approach in 3 phases. Under the last one, called “full integration at EU level”, a “European Border Corps” similar to the European Border Police initially envisaged would be created.

Trying to find a way through all the notions that are used leads us to realise that the Proposal, despite its misleading title, does not create a true “European Border Guard”

⁹ J. RIJPMAN, *The Proposal for a European Border and Coast Guard*, cit., p. 14.

¹⁰ J. MONAR, *The Project of a European Border Guard: Origins, Models and Prospects in the Context of the EU’s Integrated External Border Management*, in M. CAPARINI, O. MARENIN, *Borders and Security Governance*, LIT Verlag, 2006, www.dcaf.ch.

¹¹ www.statewatch.org.

¹² See about this S. CARRERA, *Towards a Common European Border Service*, in *Ceps Working Document no. 331*, June 2010, www.ceps.eu.

understood as a European body made of borders guards replacing national border guards but rather a "Frontex +" Agency following the expression of Sergio Carrera and Leonhard den Hertog.¹³ The fact that national border guards will remain almost untouched proves this. This is not only an institutional discussion. It also has important consequences for the issue of solidarity inside the EU, which must be considered in liaison with the allocation of responsibilities between the EU and its Member States.

III. AN OLD LOGIC! PRIORITISING RESPONSIBILITY OVER SOLIDARITY

While the competence to legislate on borders is a shared one, Art. 1, para. 2, of the Frontex Regulation 2007/2004 states clearly that "the responsibility for the control and surveillance of external borders lies with the Member States". The Commission Proposal pretends to share this responsibility between the new Agency and the national authorities in charge of border management (Art. 5, para. 1). However, the preamble of the proposal is clear on the way this responsibility will be shared by saying that "Member States retain the primary responsibility for the management of their section of the external borders in their interest and in the interest of all Member States" (point 5). This is actually an under-statement as, despite the strengthening of the prerogatives of the Agency, border controls will in principle still be implemented by each Member State. This is confirmed by Art. 5, para. 1, let. a), of the Proposal, which the Council wishes to amend to read "Member States shall ensure the management of *their* external borders". This indicates clearly that there are no European borders that would be controlled by the Agency.

However, Member States do not control their external borders only in their own interests but also in the interest of the Schengen Area (and even the Northern States like the UK and Ireland which do not participate in it). If border guards simultaneously fulfil a double function at national and European level, they remain organically national as their appointment, salary and equipment correspond to a responsibility of each of the Member States. The longer a Member States' external border, the more they are supposed to contribute to the Schengen Area by implementing controls. It is easy to understand that burdens generated by border controls are unequally distributed between Member States when we compare Luxembourg, which only has a small airport, with Greece with its many islands or Italy with its long coast. This is what is called asymmetric burdens between the EU Member States.

Strong solidarity is therefore needed in the area of borders if their control is left to Member States, as it is still the case in the Commission Proposal on the EBCG. There is actually an inversely proportional relationship between responsibility and solidarity: the

¹³ S. CARRERA, L. DEN HERTOOG, *A European Border and Coast Guard: What's in a Name?*, in *CEPS Paper in Liberty and Security in Europe* no. 88, March 2016, www.ceps.eu.

more responsibility given to the EU, the less there is a need for solidarity between Member States; the less responsibility the EU has, the more there is a need for solidarity between Member States. This has been recognised by Art. 80 TFEU following which “The policies of the Union set out in this Chapter (including external borders) and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this chapter shall contain appropriate measures to give effect to this principle”. This provision, however, is disregarded by the EU institutions and poorly applied.

Jörg Monar has clearly shown this by analysing the EU funding which is the main tool for implementing solidarity in border policy. While acknowledging that financial solidarity has been expanded for the period 2014/20 compared to the previous financial perspectives and that the amounts are distributed between Member States on the basis of burden indicators,¹⁴ he considers that “the financial envelope must be regarded as very modest” in comparison with the costs faced by the Member States and that “it may even be regarded as verging on the purely symbolic” in comparison with other European policies.¹⁵ If adopted, the Proposal on the EBCG would do little to change this. The level of solidarity will of course improve with the increase of the prerogatives, budget and human resources of the new Agency in comparison with the means currently allocated to Frontex, but only in a limited way.

This does not mean that the Proposal will not contribute to solving the crisis at the Greek external borders. On the contrary, the substitution mechanism described above presenting solidarity as a sanction with the diminishing of the sovereignty of an irresponsible Member State, can make it more acceptable. Instead of being unwilling to acknowledge the help provided to Greece, which is sometimes considered a reward for an irresponsible Member State, political leaders will have the possibility to claim they are sanctioning Greece by depriving it of part of its sovereignty with the EBCG Agency taking over the control of its external borders.

The new mechanism envisaged to deploy Border Guards in a Rapid Border Intervention should also be more efficient than the current one used in Greece. The Proposal envisages the creation of a “Rapid Reserve Pool” (RRP) as a “standing corps placed at the immediate disposal of the Agency and which can be deployed from each Member State within three working days from when the operational plan is agreed by Frontex Executive Director and the Host Member States” (Art. 19, para. 5). This RRP should be made of a minimum of 1500 national border guards that Member States would have to

¹⁴ See also on this point European Court of Auditors, Special Report 15/2014, *The External Borders Fund Has Fostered Financial Solidarity but Requires Better Measurement of Results and Needs to Provide Further EU Added Value*, point 31, p. 21.

¹⁵ J. MONAR, *Solidarity as a Challenge for the EU: The Case of Justice and Home Affairs*, in *EUの連帯*, 2015, p. 14.

deploy without having the possibility to argue that they are “faced with an exceptional situation substantially affecting the discharge of national tasks” as they can do when it is about complementing the RRP with extra border guards (Art. 19, para. 6).

If the Proposal on the EBCG can be considered a concrete sign of solidarity towards Greece by contributing to a solution to the crisis at its external borders in the short term, it still raises serious questions in the long term regarding the balance established between responsibility and solidarity.

Firstly, the RRP looks extremely modest as it corresponds only to two or three per cent of the total number of national border guards. One can of course argue that, apart from the RRP, Member States also have the obligation to provide supplementary border guards to the Agency, the total number of staff necessary for European Border Guards Team being determined by its management board. However, such a mechanism already exists in the current Frontex Regulation 2007/2004 (Art. 3, let. b)) and does not work as it should due to the resistance of Member States to provide the necessary staff. One may wonder if there is a reason why it would improve once the EBCG is adopted. Let us hope that the creation of the RRP will not have the perverse consequence of allowing Member States to consider that they have done their duty by contributing to it and have no further duty to provide human resources to the rest of the European Border Guard teams, knowing that they will in that case still be authorised to invoke an “exceptional situation substantially affecting the discharge of national tasks” (Art. 19, paras 3 and 6).

Secondly, the EBCG provides only a temporary solution to a structural problem as the envisaged tools are conceived as temporary.¹⁶ Such an ambiguity raises the question of whether the EU expects one Member State facing a disproportionate pressure at its external borders due to its geographical location to take the measures necessary to regain control of the situation with its own means in the future. This would mean that responsibility would override solidarity as time goes by.

The current level of solidarity seems to be in contradiction with the Treaty. Contrary to what is often said, Art. 80 TFEU does not put the principle of responsibility – following which Member States should control their section of the external borders themselves – in opposition to the principle of solidarity – following which overburdened Member States should get help from the EU. On the contrary, Art. 80 TFEU is about “the principle of solidarity *and* fair sharing of responsibility”. Instead of an opposition between two principles, this provision – which itself deserves an in-depth analysis that cannot be developed in the present publication – can be considered to complete the rather large idea of solidarity with a more precise and demanding idea of *fair* sharing of responsibility.

¹⁶ See Arts 14, para. 2, regarding Rapid Border Interventions, and 15, para. 3, let. b), regarding Joint Operations.

IV. CONCLUSIONS

Our analysis leads to the conclusion that the EBCG Proposal is not an ambitious proposal. It envisages a short-term solution to the structural problem of the crisis at the Greek borders, which instead requires a fundamental change. In order to understand the level of ambition of the Commission Proposal, it is important to avoid any misunderstanding regarding what the proposed "European Border and Coast Guard" is, as one can easily get lost in the different concepts that have been proposed over time regarding the institutionalisation of the common border policy. Actually, the name "EBCG" proposed by the European Commission is a flag of convenience that is misleading. It is only a legal fiction made of the addition of the new Agency to the national authorities of Member States that remain mainly responsible for border management. It has nothing to do with the European Corps, Guard or Police imagined before, including by the Commission, to replace the national border guards.

The Proposal is therefore not the end of the evolution of the institutional organisation of border controls in the EU. Unless the Rapid Reserve Pool and the European Border and Coast Guard Teams grow to the point that they will almost replace the border guards of some Member States unable to face disproportionate pressures, the need for more solidarity will increase. The case of Italy, which is beginning to face an increasing number of arrivals, shows, if it was necessary, that the Greek case is not the only one. It is good to remember that the previous idea of creating a European body for guarding the external borders was supposed to answer to the need for more burden sharing between the Member States.

One could be tempted to conclude that more financial solidarity between Member States in the border policy is the solution or, from a Euro-careful point of view, the remedy to avoid the creation of a true EBCG replacing the national border guards. However, the Member States that would be requested to contribute more and more financially will understandably argue that they want to decide about how their money is used, in particular if they do not trust, as it is the case for the moment, the Member States in charge of the Southern external borders. Therefore, a real solution seems to require progress towards a model where the responsibility for the control of the external borders would no longer be shared with Member States, but rather would become extremely centralised into a European Agency, a real and not a fictive European Border and Coast Guard. The Commission Proposal so appears as a typical example of another EU attempt to transform a crisis into an opportunity in order to progress a bit more in the process of European integration.

This may be the right strategy as it would be better to have the EBCG as proposed rather than nothing due to the fact that a fully-fledged European Agency would be politically unacceptable, and even legally impossible in the absence of a sufficient legal basis

in the Treaty.¹⁷ This may be true, but it means that we are just waiting to accomplish the enormous but necessary step towards a kind of federal integration in the common border policy by creating a centralised agency for borders. It would also mean that we risk creating false expectations in the future by proposing a fake ECBG. In the meantime, it is contradictory that the Commission sticks to the old logic of responsibility when proposing a reform of the common border policy, when at the same time, it accepts a new logic of solidarity in the common asylum policy in its proposal to reform the “Dublin” mechanism of determining the Member State responsible for examining an asylum application¹⁸ which includes a distribution key reflecting the population and GDP of each Member State in the European Union.

¹⁷ J. RIJPMAN, *The Proposal for a European Border and Coast Guard*, cit., p. 26.

¹⁸ Commission Proposal for a Regulation 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 (recast), COM(2016)270 final.



DIALOGUING WITH CAROL HARLOW ON “THE LIMPING LEGITIMACY OF EU LAWMAKING: A BARRIER TO INTEGRATION”

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ABSTRACT: The paper gets back to Carol Harlow's sobering assessment on Europe's general failure to limit the legally and politically turbulent and expansionary flow of lawmaking. It questions what is left of EU law's integrative capacity in the wake of the current polymorphous crisis of EU integration.

KEYWORDS: EU law-making – integration through law – European lawyers – democratic deficit – Eurozone crisis – ECB.

I. INTRODUCTION

In the wake of a Eurozone crisis that has been featured by new spill-overs of the European Union (EU) in domains such as budgetary, economic and social policies, time has come once again to reconsider the haunting issue of EU lawmaking's legitimacy. Ever since the late 1950s, the question has been a defining one for the Union. The very first legal commentators of the Treaty of Rome had pointed out that its major originality in the field of international law lied in its being a “*law-making treaty*”: instead of just establishing mutual commitments between the high contracting parties, it was also setting up a common legislative framework to be used for the purpose of the Common Market. Some prominent scholars of the time even considered – rather counter-intuitively – that, while the Commission was certainly less central than the High authority, overall “the Rome treaties were much more supranational than the ECSC Treaty”¹ for they laid down a legislation system that allowed for unforeseeable yet promising developments in the future. There is no doubt that the historical trajectory of the European Union has

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¹ Former CJEU judge and High authority's Legal Adviser N. CATALANO, *La Cour en tant que juridiction fédérale et constitutionnelle*, in *Dix ans de jurisprudence de la Cour de justice des Communautés Européennes*, Cologne: Carl Heymanns verlag KG, 1965.

provided full confirmation for this intuition. Yet, while all scholars have agreed for a long time now that the expansionary dynamics of the EU has come in large part from its lawmaking capacity, the definition of the nature of this legislative system has been one of the trickiest scholarly and political debate. “Inter-governmentalists” have long insisted on the idea that EU law-making was a mere delegation under the control of *principals* while “integrationists” viewed this legislation capacity in the context of the formation of political system in its own rights. It is right at this difficult crossroads that stands Carol Harlow’s important paper that chooses an axiologically neutral position to reconsider the issue. While most discussions on the subject matter end up taking a methodologically “nationalist” or “Europeanist” view, she has taken the difficult yet heuristic decision to stand in between “both sides of the integration argument”. “Navigating this Rubicon”² may prove more challenging as it requires to question taken-for-granted narratives and perspectives; yet the view one gets from there is certainly unique and privileged. However, in this journey down the tumultuous river of EU lawmaking processes, the author is able to provide a thick description that combines recent developments with historical legacies, alternating close-ups and bird-eye perspectives.

II. NAVIGATING THE TUMULTUOUS WATERS OF THE EUROPEAN RUBICON

While the article provides balanced views on the many attempts to connect Europe with legitimacy, there is one element that seems to be an indisputable *acquis*: the traditional theory of delegation, no matter whether framed in terms of international law or in terms of principal/actor, has long proved incapable to account for the multifaceted expansion of EU lawmaking and to limit, both symbolically and legally, its continuous and turbulent flow. As aptly described by Carol Harlow, the dynamics of delegation and sub-delegation that has featured EU integration along the way has led to a continuous lengthening and complexifying of the chain of delegation. From the already old phenomenon of comitology to the more recent agencification process, more and more institutions have *de facto* taken on regulatory powers of their own at the EU level. This has resulted in a “general failure to respect the subsidiarity principle”, a notion that had precisely been designed, from the Maastricht to the Lisbon Treaty, with a view to provide a last rescue to the legal fiction of delegation by Member States. While there is good evidence that the dynamics of expansion of lawmaking were already at play as early as the 1960s, the reader is left with the pressing and yet untouched question as to whether the *current* stage of the EU post-“Eurozone crisis” has not brought the state of affairs to new levels of contradictions. While Carol Harlow suggests here and there elements in that direction, one wonders how the progressive formation of a complex “eco-

² K. NICOLAÏDIS, *European Democracy and its Crisis*, in *Journal of Common Market Studies*, 2013, p. 351 *et seq.*

nomic government" has affected the issue, after so much energy had been spent by Lisbon Treaty's drafters to try, once again, to channel the unruly processes of EU lawmaking. The rather unstable division of labour that had *de facto* emerged between issues of "market regulation", of EU competences, and issues of redistributive policies, of national competences, seems to have definitely lost ground under the pressure of emergency. The rise of the European Central Bank (ECB) in this context, arguably one of the best examples of the dynamics of autonomization of an "agent" from its "principal", strikes as the great absent of Carol Harlow's account. Drawing from a mandate that had intentionally been designed in very narrow and technical terms ("defence of price stability"), the ECB has progressively expanded the scope of its regulatory action way beyond the mere handling of monetary supply to the supervision of private banks, the contracting of Memorandum of Understanding with bailed-in Member States, and the surveillance of its implementation in the field of economic, fiscal and social policies through the Troika. While there is no doubt that the ECB performs a lawmaking function, the former often takes on highly original forms (communications, press conferences) that escape formal procedures, further challenging legal controls. In the end, the Eurozone crisis seems to have dashed the hopes that had once been put in the capacity of the Lisbon Treaty to channel the future developments of the European Union within formal institutional procedures and legal instruments. The fiction of a "delegation" from the sovereign to EU bodies that was supposed to allow for political responsibility now essentially appears in its essentially negative dimension of lure or simulacrum.

III. TAMING THE BEAST. WHAT IS LEFT OF EU LAW'S INTEGRATIVE CAPACITY?

These centrifugal dynamics of EU lawmaking exemplified by Carol Harlow eventually comes down to one daunting puzzle: what is left of EU law's integrative capacity? Historically indeed, Euro-lawyers have been the prime promoters of unity and coherence in the Union.³ EU law came to existence as a new body of knowledge at a time when *Europe* was made of a heterogeneous and oft conflicting set of Treaties, Communities, institutions and policies. While scholars often debate the novelty of "direct effect" and "supremacy" case-law from the angle of the relationship between Europe and Member States, they tend to overlook the fact that the framing of a *unique* legal doctrine (Europe's autonomous legal order) for all Treaties and Communities was also a symbolic coup at a time when there were three European Executives and very little coordination between the three Communities. From then on, EU law would become the main provider of unification technique counterbalancing the oft heterogeneous development of European integration and a unifying glue allowing for a common "institutional terrain" to

³ A. VAUCHEZ, *Brokering Europe. Euro-lawyers and the Making of a Transnational Polity*, Cambridge: Cambridge University Press, 2014.

exist. Faced very early on with the necessity to limit the “special and unorthodox processes” in EU lawmaking, the CJEU has acted as a key guardian of the “*unité opérationnelle des Communautés européennes et de ses institutions associées*”.⁴ To quote one of the founding fathers of this doctrine, judge and law professor Pierre Pescatore, “*c’est en tant que représentante de cette idée d’ordre placée au dessus des Etats que la Cour de Justice apparaît dans la structure institutionnelle*”.⁵ This collective *habitus* of Euro-lawyers was certainly brought to culmination in the undertaking of the constitutional Treaty, a project which allowed to finally re-assemble Europe’s bits and pieces into the most advanced and rational legal format, that of a Constitution. Yet, it all occurs as if the balancing act that the European Court of Justice has continuously managed between being “cognitively open” to Europe’s new spill overs, yet “normatively closed” through the tenacious defence of overall legal and institutional cohesion, have now come to a point of crisis. From the remains of the *Meroni* doctrine to the *Pringle* case, the CJEU is now having a hard time taming the beast; all the more so now that the European Commission, a traditional ally in the promotion of Europe’s legal unity, has been hampered by a “managerial turn” exemplified in the paper by the “Better Regulation” policy that, paradoxically, has further undermined the centrality of legal categories to the advantage of a managerial jargon of “road-maps” and “impact assessments”. Furthermore, the recent handling of the Eurozone crisis and the related blossoming of sites of economic governance within as well as outside the framework of the EU Treaties seem to have confirmed that EU law’s traditional role as Europe’s overarching *integrative* frame is now seriously at risk.

What is striking however is that the legal crisis of the delegation paradigm that Harlow analyses has not undermined its political centrality. The traditional doctrine of delegated executive legislation remains the main cognitive frame that the medias and the politicians use when accounting for the relationship between Member States and the EU. Suffice it to consider the focus of news coverage on the European Council meetings, featuring the choreographed arrivals of official vehicles and other “family” photo-ops with the heads of State, and lauding the “high-level politics” of intergovernmental conferences. Heads of State and government have rarely done anything to deflect this mirror held up by journalists. The image reflected is rather flattering for them: alone at the helm of the government of Europe, decked out as the genuine political sovereigns of the realm, this picture relegates the Commission, the agencies or the ECB to the status of apolitical institutions handling tedious technical assignments. The honour of democracy seems intact, as the hierarchical chain of command is reasserted, distinguishing

⁴ B. VAN DER ESCH, *L’unité du Marché commun dans la jurisprudence de la Cour*, in *Cahiers de droit européen*, 1970, p. 303 et seq.

⁵ P. PESCATORE, *Le droit de l’intégration*, Leiden: Sijthoff, 1972, p. 362.

the principal – the sovereign States – from the agent – the European institutions that hold a *delegated* competence.

IV. THE HOLY GRAIL OF LEGITIMACY

Hence the fact that the daunting issue of legitimacy continues to follow EU lawmaking like a shadow. Carol Harlow's account shows that there has been no lack of attempts to meet this challenge. From the election of the European Parliament by universal suffrage (1979) to the creation of European political parties (1993), from the European Citizen's Initiative to the mechanism for the parliamentary investiture of the Commission (2007), the European Union has now donned all the arsenal of democracy. Better still, the whole repertoire of contemporary national democracies is now found in the Lisbon Treaties, with a surprising parallelism of words and forms with the national level. There are, pell-mell, the tools of direct democracy (the right to petition and popular initiative); the latest recipes from the participatory movement (institutionalized dialogue with "representative associations and with civil society"); the key buzzwords of new modes of governance (transparency, accountability); and even the "democracy by law" that, via the Charter of Fundamental Rights, allows citizens to assert their rights and freedoms before a supranational court. And yet, while Europe's democratic arsenal is certainly second to none, it seems that the potential of these many policies in terms of legitimacy has been much weaker than it had been initially hoped for. Providing a balanced and empirically-grounded account of these many attempts, Harlow shows the various counter-veiling forces and contradictions that have limited their legitimizing effects on EU lawmaking. Mostly geared towards the Commission, the transparency policies have had a hard time keeping pace with the moving of Europe's power balance, in particular in times when the power balance has shifted to arenas such as the European Council, the trilogue or the Eurogroup, that remain opaque. Both the participatory mechanisms and the Citizens' Initiative that had been conceived as levers to open up "Brussels' bubble" have been up to now for the most part captured by EU "organized society" and watered down by "bureaucratic proceduralism".⁶

The many European deadlocks and deadends down the road to holy land of legitimacy provide a discomfiting picture. What ultimately comes out of Harlow's balanced and detailed exploration is that both "integrationists" and "inter-governmentalists" paradigms now produce decreasing intellectual returns. While she acknowledges the fact that delegation "no longer suffice as a ground for the legitimation of executive lawmaking", she concludes that we are still lacking "a true sense of representative legitimacy at Union level". The idea that EU law-making framework was merely "delegated" has been repeatedly contradicted by facts suggesting the autonomization of the European

⁶ Cf. A. VAUCHEZ, *Democratizing Europe*, London: Palgrave, 2015.

"agents" and the ever-expanding scope of EU law. Symmetrically, it has become equally clear that, as the classical issues of democracy – sovereignty, representation and political responsibility – remained deeply entangled with national politics, the issue of EU lawmaking's legitimacy was bound to come back over and over again. On the whole then, the view from the Rubicon seems rather bleak: no matter which side of "integration argument" one is taking, Europe's lawmaking is facing a perennial state of crisis. At this point of the journey, one would have hoped for a conceptual *aufhebung* of some sort exploring new paths that would allow to bridge Europe's baroque lawmaking process to a political sovereign. Surprisingly enough, the one possible avenue that the Lisbon Treaty has opened in that direction, the entry of national parliaments into EU policymaking through the "yellow", "orange" and maybe now "green" cards, is met with a lot of scepticism. Carol Harlow spends her harshest words on this procedure which is viewed as no less than a "dangerous incursion into the autonomy of national constitutions", as if the main result of the paper had not precisely pointed at the fact that this very autonomy had become a mere fiction... In a context featured by the formation of an "independent branch" with European and national ramifications (transnational networks of national central banks, of competition authorities and of constitutional courts) that cut across the national/European borders, the development of a countervailing transnational parliamentary force still remains to be explored both conceptually and normatively.

Last but not least, the author spends her concluding by a useful sceptical note of the very notion of "legitimacy", pointing at the fact that "at the end of the day, 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*". Interestingly, this runs counter to the notion of "legitimacy" that emerged in EU quarters: EU reformers and treaty-drafters have seen legitimacy as something vertical that can be engineered in the framework of European Treaties, provided that one eventually finds the *right* recipe, effectively adjusted to the specific features of Europe's polity. Most sociological studies however contradict this vertical and rationalized understanding of legitimacy. Rather than something that can be designed and applied top-down, legitimacy comes to existence through social and political transactions between institutions, professions and social groups at both the European and the national level. From this point of view, Europe's legitimacy (or lack thereof) finds its roots in the social and political platform that has turned Europe into a central and taken-for-granted institution. Thereby, the "limping legitimacy" of the EU does not come from ill conceived treaty instruments but, as hinted by Carol Harlow in her concluding remarks, from the type of relationship built with classes, professions and social groups. And yet, the "civil society" that is expected to drive the democratic transformation of the Union remains heavily dominated by sector-specific professionals and policy officers working in Brussels and major European capitals. The steady expansion of EU regulation, in areas such as equal rights and non-

discrimination, environment, development aid, etc., has in no way broken down the glass ceiling that make up Europe's invisible social and professional barrier. Instead, when journalists, social activists, trade unionists and politicians come into contact with the European Union, they are seized in the grip of an attractive force, and themselves espouse the profiles and discourse of this "specialized public space". Called to Europe by selection processes that have integrated the specific skills required for the practice of European public affairs, the new recruits are already inclined to reproduce the expert and apolitical forms of EU sociability. Hence the continuous risk that the EU's many democratic attempts fall into "Astroturf representation" and "bureaucratic proceduralism". As the article gets to a close, the reader may feel a little bit dizzy and frustrated by an island of hope that could have brought him to safer quarters, but she/he is by now fully convinced that there is no other way forward for the European journey than through the tumultuous waters of the Rubicon river...



AVOTINŠ V. LATVIA. THE UNEASY BALANCE BETWEEN MUTUAL RECOGNITION OF JUDGMENTS AND PROTECTION OF FUNDAMENTAL RIGHTS

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ABSTRACT: The intersections between recognition and enforcement of foreign decisions in civil and commercial matters and protection of fundamental rights have been a subject of growing interest in the recent case-law of the European Court of Human Rights. The judgment of the Grand Chamber in *Avotiņš v. Latvia* is especially relevant, insofar as it concerns the system of mutual recognition of decisions established under EU law and its compatibility with Art. 6 of the European Convention. Even though the CJEU has recognised that mutual recognition of judgments between EU Member States cannot hamper the right to a fair trial, the judgment in *Avotiņš v. Latvia* calls for a greater attention to the observance of the rights of defence. The European Court points out the necessity of a control of the foreign judgment by the courts of the requested State in order to prevent violations of fundamental rights protected by the European Convention. The principles laid down in the judgment are thus likely to set some limits to the existing freedom of circulation of judgments enacted by EU acts adopted on the basis of Art. 81 TFEU.

KEYWORDS: European Convention on Human Rights – recognition of judgments – right to a fair trial – European judicial area – rights of defence – equivalent protection.

I. PRELIMINARY REMARKS

It is common ground that one of the objectives most successfully pursued by the European Union is the creation of a European judicial area in civil and commercial matters. In that field European integration has significantly progressed after the conclusion, between the Member States of the European Economic Community and in accordance with the *proviso* of Art. 220 of the EEC Treaty,¹ of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments.

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¹ Art. 220 of the EEC Treaty: “Member States shall, in so far as necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals: [...] the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards”.

In that context, the principle of automatic recognition of judgments in other Contracting States and the prohibition of any review as to their substance were laid down,² while the traditional requirement for intermediate, *ad hoc* proceedings was retained only for the phase of enforcement. In accordance with these principles, the ECJ has consistently held that the grounds for non-recognition or for non-enforcement of judgments listed in Art. 27 of the Convention, being “an obstacle to the achievement of [...] the free movement of judgments”, have to be subject to strict interpretation.³

In the interpretation of the Brussels Convention the CJEU repeatedly highlighted the pivotal role of free circulation of judgments, based on the “mutual trust” between national judges.⁴ Unsurprisingly, Art. 81 TFEU, as amended by the Lisbon Treaty, now explicitly establishes the “principle of mutual recognition of judgments and of decisions in extrajudicial cases” as the very cornerstone of the European judicial area in civil matters.

However, in the implementation of that principle the European institutions did not follow a uniform approach, but moved from a sectoral perspective, adopting different rules on recognition and enforcement of judgments depending on the different matters concerned.

On the one hand, in some matters the enforcement of judicial decisions is still subject to the requirement of *exequatur*,⁵ even though under a simplified and expeditious procedure on the model of the now repealed Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. On the other hand, some EU acts removed completely the requirement of *exequatur*, replacing it with a certificate issued by the courts of the Member State of origin.⁶ That process received new impetus with the adoption of the Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 Decem-

² On these principles, see C. Tuo, *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti e reciproca fiducia*, Padova: Cedam, 2012, p. 32 *et seq.*

³ Court of Justice, judgment of 2 June 1994, case C-414/92, *Solo Kleinmotoren*, para. 20.

⁴ See, e.g., Court of Justice, judgment of 9 December 2003, case C-116/02, *Gasser*, para. 72; judgment of 10 February 2009, case C-185/07, *Allianz*, para. 30. On the principle, K. LENAERTS, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, in *Il Diritto dell'Unione europea*, 2015, p. 525 *et seq.*

⁵ This is the case of the Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000, with regard to decisions in matters of parental responsibility, and of the Regulation (EU) 650/12 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

⁶ See Arts 41 and 42 of Regulation 2201/2003, with regard to decisions in matters of right of access to a child and of return of an abducted child; Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims; Regulation (EC) 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters of maintenance obligations.

ber 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

While these measures share the principle of automatic enforcement of decisions emanating from other Member States and consequently aim at concentrating the litigation in the Member State of origin,⁷ they diverge as to the remedies available to the party against whom recognition or enforcement is sought. It is remarkable that in several instruments establishing the principle of the abolition of *exequatur* the traditional grounds for non-enforcement of judgments, including public policy clause, are completely or partially removed.

In particular, Arts 41 and 42 of the Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000,⁸ do not provide any remedy against the certificate issued in the Member State of origin. Accordingly, in *Aguirre Zarraga* the CJEU denied that the courts of the Member State of enforcement possess an extraordinary power of review, even when a violation of fundamental rights is at stake.⁹

It is also worth noting that a case involving the application of those rules gave, for the first time, the occasion for a dialogue between the CJEU and the European Court of Human Rights with regard to mutual recognition of judgments. In the admissibility decision in *Povse v. Austria*¹⁰ the European Court of Human Rights accepted that under Regulation 2201/2003 it is primarily for the courts of the Member State of origin to make use of ordinary domestic remedies in order to avoid violations of fundamental human rights occurred in the course of proceedings before them.¹¹ In doing so, the European Court highlighted that in that case a preliminary ruling had been requested by Austrian courts; accordingly, it extensively referred to the interpretation of the Regulation 2201/2003, as provided by the CJEU.¹²

In other instruments, a different approach was followed. Thus, under Art. 10 of Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April

⁷ F. SALERNO, *Garanzie processuali*, in R. BARATTA (a cura di), *Diritto internazionale privato*, Milano: Giuffrè, 2010, p. 156 *et seq.*

⁸ See footnote 4, *supra*. See also U. MAGNUS, Art. 42, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, Munich: Sellier, 2012, p. 360 *et seq.*

⁹ Court of Justice, judgment of 22 December 2010, case C-491/10, *Aguirre Zarraga*, paras 46 and 70.

¹⁰ European Court of Human Rights, decision of 18 June 2013, no. 3890/11, *Avotinš v. Latvia*. See P. McEAVY, *The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?*, in *Netherlands International Law Review*, 2015, p. 365 *et seq.*

¹¹ For a detailed analysis of these decisions, see also P. PIRODDI, *Armonia delle decisioni, riconoscimento reciproco e diritti fondamentali*, in G. BIAGIONI (a cura di), *Il principio dell'armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, Torino: Giappichelli, 2015, p. 54 *et seq.*

¹² Court of Justice, judgment of 1 July 2010, case C-211/10 PPU, *Povse*.

2004 creating a European Enforcement Order for uncontested claims¹³ a special procedure of withdrawal of the certificate is available: it can be undertaken when the certificate was “clearly wrongly granted” and the requirements laid down in the Regulation, concerning especially service of the document instituting the proceedings but not including compatibility with public policy, were not met.¹⁴

Likewise, Regulation 4/2009 ensures the defendant the right to apply for review of the decision before the courts of the Member State of origin, when the ruling was made *in absentia* and the defendant was not served with the act instituting the proceedings.

On the contrary, Regulation 1215/2012 sticks to the traditional model, insofar as it provides for a list of grounds for refusal of recognition or enforcement of judgments which can be invoked in the Member State addressed; among such grounds are (a) the violation of the defendant’s right of defence in case of default judgments when the documents instituting the proceedings have not been served in sufficient time and in such a way as to enable the defendant to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so and (b) the manifest contrast of recognition with public policy in the Member State addressed.¹⁵

Accordingly, the process of abolition of *exequatur* proceedings in civil matters as between Member States shows a tendency of EU law to take into account the need for sufficient procedural guarantees for the defendant.

However, the judgment of the Grand Chamber of the European Court of Human Rights in *Avotiņš v. Latvia*¹⁶ seems to cast some doubts on the compatibility of this process with the protection granted by the European Convention. Even though the European Court found no violation of the right to a fair trial in the particular case, the extensive remarks on the key features of mutual recognition of civil decisions under EU law, im-

¹³ See footnote 6, *supra*.

¹⁴ F. SEATZU, *Le garanzie del diritto alla difesa del debitore nel regolamento n. 805/2004 istitutivo del titolo esecutivo europeo per i crediti non contestati*, in N. BOSCHIERO, P. DE CESARI (a cura di), *Verso un «ordine comunitario» del processo civile*, Napoli: Editoriale Scientifica, 2008, p. 45 *et seq.* On the issue of the compatibility of the Regulation 805/2004 with the protection of fundamental rights, see also L.R. KESTRA, *The Impact of European Convention on Human Rights on Private International Law*, The Hague: T.M.C. Asser Press, 2014, p. 273.

¹⁵ On the debate about the proposal of the European Commission to abolish public policy defence, see P. BEAUMONT, E. JOHNSTON, *Can Exequatur Be Abolished in the Brussels I Regulation Whilst Retaining a Public Policy Defence?*, in *Journal of Private International Law*, 2010, p. 249 *et seq.*; G. CUNIBERTI, G. RUEDA, *Abolition of Exequatur. Addressing the Commission's Concerns*, in *RebelsZ*, 2011, p. 286 *et seq.*; X.E. KRAMER, *Abolition of Exequatur under the Brussels I Regulation: Effecting and Protecting Rights in the European Judicial Area*, in *Netherlands Internationaal Privaatrecht*, 2011, p. 633 *et seq.*; P.F. SCHLOSSER, *The Abolition of Exequatur Proceedings Including Public Policy Review*, in *IPraxis*, 2010, p. 101 *et seq.*

¹⁶ European Court of Human Rights, judgment of 25 February 2014, no. 17502/07, *Avotiņš v. Latvia* [GC]. See O. FERACI, *Mutuo riconoscimento e principio della protezione equivalente (Bosphorus): riflessioni a margine della sentenza della Grande Camera della Corte europea dei diritti dell'uomo nel caso Avotiņš c. Lettonia*, in *SIDIBlog*, 15 July 2016, www.sidiblog.org.

PLICITLY suggesting some adjustments, will certainly deserve consideration by the EU institutions. The Grand Chamber's assessment of the EU rules concerning the free circulation of judgments is worth of special attention since it is potentially conflicting with the approach of the CJEU as to the impact of the establishment of a European judicial area on the responsibility of Member States to protect individual fundamental rights.

II. *AVOTIŅŠ V. LATVIA*: THE FACTS OF THE CASE AND THE FINDINGS OF THE EUROPEAN COURT

The case originated in an application by a Latvian national complaining about the violation of Art. 6 of the European Convention on Human Rights, allegedly occurred in the course of proceedings for the declaration of enforceability of a Cypriot judicial decision before Latvian courts.¹⁷

The applicant had signed an acknowledgment of debt deed, promising to repay a sum of money he had borrowed from a Cypriot company; the deed was governed by Cypriot law, as a result of a choice-of-law clause, and contained a clause providing for the non-exclusive jurisdiction of Cypriot courts. On request of the creditor, the Limassol District Court had issued a judgment *in absentia* ordering Mr. Avotiņš to pay the claimant the principal amount of 100,000 US dollars, interest, costs and expenses.

Then, the claimant company sought recognition and enforcement of the decision of the Limassol District Court in Latvia. The request was granted under Regulation 44/2001, but Mr. Avotiņš lodged an appeal against the declaration of enforceability; in particular, he argued that recognition and enforcement of the decision were to be refused on the ground of Art. 34, para. 2, of the Regulation, as he had never been served with the application instituting proceedings before Cypriot courts, the summons having been sent to an address in Riga where he was not resident. The Latvian Supreme Court ultimately dismissed the appeal, stressing the fact that Mr. Avotiņš had failed to challenge the judgment before Cypriot courts.

Following the judgment whereby a Chamber of the European Court of Human Rights held that there had been no violation of Art. 6 of the European Convention,¹⁸ the case was referred to the Grand Chamber. The Grand Chamber upheld the judgment, but engaged in a very careful and detailed reasoning on some general issues.

¹⁷ The initial application was also directed against Cyprus, as Mr. Avotiņš maintained that Cypriot courts had also acted in violation of Art. 6 of the European Convention, ruling *in absentia* notwithstanding the fact that he had not been properly served with the act instituting the proceedings. The Chamber held that for this part the application was inadmissible, being time-barred according to the six-month rule established by Art. 35 of the Convention (see *Avotiņš v. Latvia* [GC], cit., para. 97).

¹⁸ European Court of Human Rights, judgment of 23 May 2007, no. 17502/07, *Avotiņš v. Latvia*. On the Chamber judgment, see O. FERACI, *La tutela 'indiretta' dell'art. 6, par. 1, CEDU in tema di processo contumacia-le civile con riguardo all'efficacia delle decisioni straniere rese da giudici di Stati membri dell'Unione europea*, in *Diritti umani e diritto internazionale*, 2015, p. 188 et seq.

First, it reiterated, referring to its previous decision in *Pellegrini v. Italy*,¹⁹ that Art. 6 of the European Convention on Human Rights can come into play also when a domestic court is called upon to enforce a foreign final judgment in order to assess whether the guarantees of the right to a fair trial were afforded. In this regard, it did not seem to place a special emphasis on the distinction between the enforcement of judgments emanating from a Contracting Party of the European Convention or from a State which is not Party to the Convention.²⁰

Secondly, it held that the presumption of equivalent protection, as developed for the first time by the European Court itself in *Bosphorus v. Ireland*,²¹ was applicable in the instant case.²² It recalled that Latvian courts enjoyed no discretion in applying Regulation 44/2001 to the enforcement of a Cypriot judgment and held that the fact that the matter had not been referred for a preliminary ruling was not decisive,²³ as the applicant had neither submitted a request to that effect before domestic courts nor raised arguments requiring the interpretation by the CJEU.

Nonetheless, while reaffirming its commitment to the needs of European cooperation, the European Court of Human Rights expressed its general concern about the compatibility of mutual recognition mechanisms established under EU law with the European Convention, insofar as they are to be “applied automatically and mechanically”. In this regard, the European Court implicitly built its reasoning upon the previous case of *Šneersone and Kampanella v. Italy*, where it was held that, under the 1980 Hague Con-

¹⁹ European Court of Human Rights, judgment of 20 July 2001, no. 30882/96, *Pellegrini v. Italy*.

²⁰ See para. 98. In the same sense, C. FOCARELLI, *Equo processo e riconoscimento di sentenze straniere: il caso Pellegrini*, in *Rivista di diritto internazionale*, 2001, p. 955 et seq.; O. LOPES PEGNA, *L'incidenza dell'art. 6 della Convenzione europea dei diritti dell'uomo rispetto all'esecuzione di decisioni straniere*, *ivi*, 2011, p. 46 et seq. See, however, P. KINSCH, *Droits de l'homme, droits fondamentaux et droit international privé*, in *Recueil des cours de l'Académie de Droit International de la Haye*, 2005, p. 325 et seq.

²¹ European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus v. Ireland*. On the *Bosphorus* doctrine, see, among others, O. DE SCHUTTER, *Bosphorus Post-Accession: Redefining the Relationships between the European Court of Human Rights and the Parties to the Convention*, in V. KOSTA, N. SKOUTARIS, V.P. TZEVELEKOS, *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing, 2014, p. 177 et seq., and, with regard to the recognition of judgments, G. CUNIBERTI, *Abolition de l'exequatur et présomption de protection des droits fondamentaux. À propos de l'affaire Povse c/ Autriche*, in *Revue critique de droit international privé*, 2014, p. 303 et seq.

²² One can doubt whether in *Avotiņš v. Latvia* the approach should have been exactly the same as in *Bosphorus v. Ireland*. While in the latter case the presumption of equivalent protection concerned the application of substantive provisions of EU law, in the field of judicial cooperation the presumption is expected to come into play with regard to EU acts facilitating the circulation of decisions issued by Member States. In that framework the equivalence between the protection of fundamental rights as afforded not by the European Union, but by different Member States has to be taken into account.

²³ See, by contrast, European Court of Human Rights, judgment of 6 December 2012, no. 12323/11, *Michaud v. France*. In that case the presumption of equivalent protection was rejected as the national court had refused to apply to the CJEU for a preliminary ruling notwithstanding the fact that the CJEU had never had the opportunity to examine the question.

vention on the civil aspects of international child abduction and under Art. 11 of Regulation 2201/2003, the return of an abducted child cannot be ordered automatically and without assessing the child's best interests in each individual case.²⁴ In the European Court's view, the mutual trust between national courts of EU Member States cannot lead to a disproportionate limitation of the power of review of a domestic court called upon to rule on a request for recognition or enforcement of a foreign judgment.

Turning to the facts of the case, the Grand Chamber found that Mr. Avotiņš had not been notified of the summons to appear before the Limassol District Court and that, notwithstanding, Latvian courts made an automatic application of Art. 34, para. 2, of Regulation 44/2001. In doing so, they merely stated that the applicant had not challenged the Cypriot judgment and failed to examine whether a remedy was actually available to him under Cypriot law. However, the European Court also held that in fact Mr. Avotiņš had enjoyed "a perfectly realistic opportunity of appealing" the judgment of the Limassol District Court and that, having accepted the jurisdiction of Cypriot courts and having concurred in the choice of Cypriot law as the applicable law, he should have acquired appropriate information about the Cypriot legal framework, so that the damage incurred was a result of his negligence.

III.1. AUTOMATIC RECOGNITION AND OBSERVANCE OF THE RIGHTS OF DEFENCE: THE CASE-LAW OF THE CJEU

The judgment of the Grand Chamber moves from the assumption (apparently shared by all the parties in the case) that, as a general rule, a violation of Art. 6 of the Convention can take place in the course of proceedings for recognition or enforcement of a foreign judgment if the courts of the State of enforcement do not assess whether the proceedings in the State of origin complied with the requirements of the right to a fair trial. It is then for the State of enforcement to ensure that its courts are empowered to conduct a sufficient review in order to fulfil the obligation to protect fundamental rights. However, when domestic courts are requested to recognise or to enforce foreign judgments under EU instruments, the presumption of equivalent protection is applicable and they can confine themselves to ascertaining whether the protection of fundamental rights was manifestly lacking in the State of origin.

At first glance, the position taken by the European Court in *Avotiņš v. Latvia* does not seem to be at odds with that of the CJEU.

²⁴ European Court of Human Rights, judgment of 12 July 2011, no. 14737/09: see especially paras 84 and 93-96. On this case, see P. BEAUMONT, K. TRIMMINGS, L. WALKER, J. HOLLIDAY, *Child Abduction: Recent Jurisprudence of the European Court of Human Rights*, in *International and Comparative Law Quarterly*, 2015, p. 39 et seq. Cf. also F. SALERNO, *Giurisdizione ed efficacia delle decisioni stranieri nel Regolamento (UE) n. 1215/2012 (rifusione)*, Padova: Cedam, 2015, p. 35.

In its case-law concerning the 1968 Brussels Convention the CJEU has often reiterated that “the Brussels Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals”. However, “it is settled case-law of the Court that it is not permissible to achieve that aim by undermining in any way the right to a fair hearing”.²⁵ Accordingly, the CJEU showed a clear deference to the protection of fundamental rights, admitting that a Contracting State can refuse to recognise and to enforce a judgment if a violation of those rights occurred in the proceedings in the Member State of origin.

In particular, in *Krombach*²⁶ the CJEU held that the public policy clause provided by Art. 27, para. 1, of the Brussels Convention could come into play also when the decision to be recognised or enforced had been delivered in violation of a fundamental principle in procedural matters.²⁷ Thus, the Court placed a stronger emphasis on the requirements of the right to a fair trial as enshrined in Art. 6 of the European Convention on Human Rights and attached special importance to the case-law of the European Court²⁸. Relying on some judgments of the European Court finding a violation of Art. 6 in similar cases,²⁹ the Court of Justice found on that basis that a manifest breach of the right of defence could amount to an infringement of procedural public policy under general principles of EU law.³⁰

After the entry into force of Regulation 44/2001 the CJEU repeatedly stressed, at least in principle, the relevance of Art. 6 of the European Convention, now reaffirmed by Art. 47

²⁵ See Court of Justice, judgment of 11 June 1985, case 49/84, *Debaecker*, para. 10; judgment of 3 July 1990, case C-305/88, *Lancray*, para. 21.

²⁶ Court of Justice, judgment of 28 March 2000, case C-7/98, para. 44. For an appraisal of the judgment see, among others, S. BARIATTI, *Diritti fondamentali e diritto internazionale privato*, in L.S. ROSSI (a cura di), *La protezione dei diritti fondamentali*, Napoli: Editoriale Scientifica, 2011, p. 422 *et seq.*; A. LOWENFELD, *Jurisdiction, Enforcement, Public Policy and Res Judicata. The Krombach Case*, in T. EINHORN, K. SIEHR (eds), *Essays in Memory of Peter Nygh*, The Hague: T.M.C. Asser Press, 2004, p. 229 *et seq.*

²⁷ In the same vein, Court of Justice, judgment of 2 May 2006, case C-341/04, *Eurofood*, paras 65-66. Cf. F. SALERNO, *L'ordine pubblico internazionale processuale e la tutela dei diritti fondamentali*, in P. PIRRONE (a cura di), Torino: Giappichelli, 2011, p. 142 *et seq.*

²⁸ See especially para. 39.

²⁹ European Court of Human Rights, judgment of 23 November 1993, no. 14032/88, *Poitrimol v. France*; judgment of 21 January 1999, no. 26103/95, *Van Geyseghe v. Belgium*. It is remarkable that, subsequently to the judgment of the CJEU, the European Court of Human Rights held, as well, that the right of Mr. Krombach to a fair trial had been breached by French courts: judgment of 13 February 2001, no. 29731/96, *Krombach v. France*.

³⁰ On the role of the general principles of EU law in the definition of the content of public policy, see A. BRIGGS, *Civil Jurisdiction and Judgments*, Abingdon: Informalaw, 2015, p. 649 *et seq.*; O. FERACI, *L'ordine pubblico nel diritto dell'Unione europea*, Milano: Giuffrè, 2012, p. 94 *et seq.*; C. TUO, *Armonia delle decisioni e ordine pubblico*, in G. BIAGIONI (a cura di), *Il principio di armonia delle decisioni civili e commerciali nello spazio giudiziario europeo*, cit., p. 171 *et seq.*

of the European Charter of Fundamental Rights,³¹ for the interpretation of the grounds for refusal of recognition or enforcement set forth in Art. 34 of the Regulation. However, the CJEU also underlined that, according to the principle of mutual trust, a presumption exists as to the compatibility of a judgment emanating from another EU State with the right to a fair trial and that only exceptionally can such a presumption be rebutted.³²

Consequently, in *Gambazzi*³³ and in *Trade Agency*³⁴ the Court recalled that inconsistencies with the right to a fair trial can lead the courts of the Member State in which recognition or enforcement is sought to consider the foreign decision as incompatible with public policy.³⁵ However, in the above mentioned cases the CJEU instructed the referring courts to take into consideration only “manifest and disproportionate” breaches of the rights of defence; moreover, unlike the judgment in *Krombach*, those judgments do not contain any reference to the case-law of the European Court of Human Rights, while, especially in *Trade Agency*, a great emphasis is placed on the principle of mutual trust between Member States.³⁶

The case-law concerning Art. 34, para. 2, of the Regulation also shows a commitment of the CJEU to the observance of rights of defence. That provision (as well as Art. 45, para. 1, let. b) of Regulation 1215/2012) is modelled on Art. 27, para. 2, of the 1968 Brussels Convention, but contains some amendments restricting the scope of application of the ground for non-recognition or non-enforcement: on the one hand, it is no longer required that service of the act instituting the proceedings be “duly” effected; on the other hand, an exception is provided to the applicability of such ground for refusal when the defendant failed to challenge the decision in the Member State of origin even though a remedy was actually available to that aim.³⁷

Notwithstanding, in *ASML Netherlands* and in *Trade Agency* the Court interpreted in broad terms the powers of domestic courts in the application of the ground of non-recognition or non-enforcement concerning default judgments. Accordingly, in *ASML Netherlands* the CJEU held that the court of the Member State in which recognition or

³¹ For a clear reference to Art. 47 of the European Charter in that context, see Court of Justice, judgment of 25 May 2016, case C-559/14, *Meroni*, paras 43-44.

³² See S. BARIATTI, *Diritti fondamentali e diritto internazionale privato*, cit., p. 407.

³³ Court of Justice, judgment of 2 April 2009, case C-394/07, *Gambazzi*. For a commentary on this decision, see G. CUNIBERTI, *La reconnaissance en France des jugements par défaut anglais (à propos de l'affaire Gambazzi-Stolzenberg)*, in *Revue critique de droit international privé*, 2009, p. 685 et seq.

³⁴ Court of Justice, judgment of 6 September 2012, case C-619/10.

³⁵ However, in those two judgments the CJEU took a more cautious approach, as it did not venture into actually determining whether the decision could be considered as incompatible with public policy or not. On the contrary, it confined itself to setting forth some criteria and left the actual determination of the issue to the referring courts: see *Gambazzi*, cit., paras 41-45, and *Trade Agency*, cit., para. 61.

³⁶ See *Trade Agency*, cit., paras 40 and 43.

³⁷ The CJEU emphasised the different wording of the provision in its judgment of 14 December 2006, case C-283/05, *ASML Netherlands*, paras 18-21.

enforcement is sought can refuse recognition or enforcement when the defendant did not challenge the decision in the Member State of origin because he was simply aware of the existence of the judgment, but was not acquainted with its contents. In *Trade Agency* the Court considered that the court of the Member State in which recognition or enforcement is sought is under the obligation to verify whether the defendant was actually served with the act instituting the proceedings in the Member State of origin, irrespective of the fact that the foreign judgment is, or not, accompanied by the certificate issued by the court of origin using the standard form of the Regulation.

The entry into force of Regulation 1215/2012 is not likely to affect the interpretation of the abovementioned grounds for refusal,³⁸ as the proposal of the European Commission to amend significantly their wording and to modify the set of remedies available to the defendant at the stage of the enforcement of the foreign decision was rejected.

In addition, the CJEU remarked that the rights of defence need to be protected also within the scope of application of Regulation 805/2004 as to the certification of a decision as a European Enforcement Order³⁹ and of Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure as to the declaration of enforceability of an order for payment.⁴⁰

III.2. THE PERSPECTIVE OF THE EUROPEAN COURT OF HUMAN RIGHTS: HOW TO STRIKE A FAIR BALANCE BETWEEN MUTUAL TRUST AND RIGHTS OF DEFENCE?

As remarked also by the Grand Chamber, *Avotiņš v. Latvia* was actually the first case in which the European Court of Human Rights was confronted with the issue of recognition and enforcement of foreign judgments under the Regulation 44/2001.

Remarkably enough, unlike the Chamber, the Grand Chamber engaged in a thorough analysis of the functioning of the EU system of mutual recognition of judgments in civil and commercial matters. The case-law of the CJEU, attempting to strike a balance between the principle of mutual recognition and the observance of the rights of defence, was also extensively quoted. The idea that the courts of EU Member States should presume the effects of another EU State's judgment to be compatible with fundamental rights was accepted. Moreover, the Grand Chamber even discussed the interpretation of Art. 34, para. 2, of Regulation 44/2001, as enshrined in the above mentioned judgments of the CJEU, clarifying that the requirement to make use of every

³⁸ S.M. CARBONE, C. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, Torino: Giappichelli, 2016, p. 350; A. NUYTS, *La refonte du règlement Bruxelles 1*, in *Revue critique de droit international privé*, 2013, p. 30 *et seq.*

³⁹ See Court of Justice, judgment of 17 December 2015, case C-300/14, *Imtech Marine Belgium NV*, paras 37-38.

⁴⁰ Court of Justice, judgment of 4 September 2014, joined cases C-119/13 and C-120/13, *Eco cosmetics GmbH*, paras 41-42.

remedy available in the Member State of origin to challenge the decision is in itself compatible with Art. 6 of the European Convention.⁴¹

Nonetheless, the reasoning of the Grand Chamber is clearly intended to call for a revision of some of the legal features of the EU judicial cooperation in civil matters. This impression emerges from two passages: the first is the one in which the Court stated that “the aim of effectiveness pursued by some of the methods used results in the review of the observance of fundamental rights being tightly regulated or even limited”;⁴² in a second passage, the Court added that “if a serious and substantiated complaint is raised before [domestic courts] to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law”.⁴³

These *dicta* do not necessarily refer to the facts of the case or to the applicable rules of Regulation 44/2001, but are framed in general terms. In the light of the ongoing process of simplification of the procedures for recognition and enforcement of judgments as between EU Member States, the Grand Chamber takes stock of the fact that EU judicial cooperation in civil matters is not based on a uniform model, but that recent EU instruments are clearly devised in such a way as to minimise the power of the courts of the Member State of enforcement with regard to the review of foreign judgments. In that context, the Grand Chamber aims to verify, from the perspective of the correct implementation of the European Convention on Human Rights by EU Member States, to what extent such a process is admissible.

The assessment of the Grand Chamber does not call into question the traditional principle of automatic recognition of judgments and the prohibition to review them as to the substance. Likewise, the European Court does not seem to criticise the abolition of *exequatur* proceedings in itself, provided that it is accompanied by the power of domestic courts to control and to remedy possible violations of fundamental rights. In fact, the total abolition of that power of control by the courts of the State of enforcement is not considered to be acceptable, as those courts cannot, even in the proceedings for the enforcement of a foreign decision under EU measures of judicial cooperation, abdicate their role to adjudicate complaints concerning serious breaches of fundamental rights protected by the European Convention.

⁴¹ See especially para. 118. The European Court seems to imply that, even when the defendant was able to challenge the decision in the Member State of origin, at the stage of recognition or enforcement of the decision he can still complain of the failure to serve him with the document instituting the proceedings (see, however, also para. 98). See, however, Court of Justice, judgment of 28 April 2009, case C-420/07, *Apostolides*, para. 80, in which it was held that the defendant cannot rely upon Art. 34, para. 2, of Regulation 44/2001 when he was actually able to challenge the decision in the Member State of origin.

⁴² *Avotiņš v. Latvia* [GC], cit., para. 114.

⁴³ *Ibid.*, para. 116.

This point seems to mark a crucial difference between the approaches of the CJEU and of the European Court of Human Rights to the protection of fundamental rights in the European judicial area.

According to the CJEU's case-law, the courts of EU Member States are required to assume, pursuant to the principle of mutual trust, that a sufficient protection of the fundamental rights of the parties to the proceedings was ensured in the Member State of origin of the judgment. Under the applicable EU instruments, that presumption can even lead domestic courts to enforce a foreign judgment without exercising any preliminary control. Such an approach can be described as "quasi-federalist", as it builds upon the idea that, given the degree of integration reached in the European judicial area, the judgments emanating from other EU Member States can be considered as potentially equivalent to domestic judgments.

On the contrary, according to the Grand Chamber, the Member State requested should retain an active role even when EU law impose the obligation to recognise automatically or to enforce a decision emanating from another Member State.⁴⁴ This approach is consistent with the principles traditionally governing recognition and enforcement of foreign judgments, but it does not take into account the deeper integration between national legal orders achieved within the European judicial area and shows a clear scepticism about the concentration of all the available remedies for challenging the decision in the Member State of origin.

In the European Court's view, should a Contracting State completely refrain from reviewing judgments emanating from other EU Member States, it could be held responsible for the recognition or for the enforcement of a judgment adopted in violation of fundamental rights. It remains unclear whether such a conduct amounts to an autonomous violation of Art. 6, para. 1, of the European Convention or whether it entails a concurring responsibility of the Member State of enforcement for the violation committed by the Member State of origin. Be it as it may, the Grand Chamber highlighted the concurring obligation of the requested Member State to verify, before the foreign judgment is enforced, that the recognition or the enforcement of the judgment in its legal order does not entail a violation of a right protected by the European Convention.

Thus, the principles recalled by the Grand Chamber appear to be incompatible with the position of the CJEU in the already mentioned *Aguirre Zarraga* case, where it was held that under Regulation 2201/2003 a domestic court cannot refuse enforcement of a decision ordering the return of the child, as the Regulation does not provide for such a remedy, even if a serious violation of a fundamental procedural right is said to have oc-

⁴⁴ On the necessity of having at least a "minimal standard" of control concerning the compliance with the essential guarantees of Art. 6 of the European Convention, see L.R. Kiestra, *The Impact of European Convention on Human Rights on Private International Law*, The Hague: T.M.C. Asser Press, 2014, p. 254 *et seq.*

curred in the Member State of origin.⁴⁵ On the contrary, the reasoning of the Grand Chamber clearly implies that the courts of the Member State of enforcement should always enjoy an extraordinary power of review, in order to ensure that the protection of Convention rights is not impaired, even when no provision to that effect is contained in the applicable EU act.

In matters of recognition of judgments, public policy has traditionally fulfilled the role of preventing foreign judgments conflicting with essential principles of the national legal order from being enforced.⁴⁶ Then, the principle of the abolition of *exequatur*, even though not in contrast with the European Convention in itself, seems to run counter to the necessity to preserve the power of review of the courts of the addressed State, insofar as it implies the abolition of the public policy control, as established by several EU acts.⁴⁷ Accordingly, the control of the respect for public policy can be necessary, even within the European judicial area, in order to allow the requested State to comply with its international obligations in matters of protection of fundamental rights.

Where the protection afforded by the European Convention on Human Rights is at stake, the public policy exception provides for a flexible tool, capable to cover possible violations of fundamental rights under the ECHR;⁴⁸ moreover, given its exceptional nature, such control is expected to come into play exactly when manifest and disproportionate violations are complained of.⁴⁹

Although the case decided concerned an alleged violation of the right to a fair trial, the general tone of the judgment conveys the impression that principles established by the Grand Chamber may have a wider scope and cover the entire set of the individual rights protected by the Convention. Accordingly, the control as to the effective protec-

⁴⁵ However, it must be borne in mind that in *Aguirre Zarraga* the CJEU remarked that it was still open to the defendant to challenge the decision in the Member State of origin and that appeal proceedings had already been brought.

⁴⁶ The function of the public policy clause in the implementation of the right to a fair trial at the stage of recognition and enforcement of foreign judgments is discussed in N. BOSCHIERO, *L'ordine pubblico processuale comunitario ed "europeo"*, in P. DE CESARI, M. FRIGESSI DI RATTALMA (a cura di), *La tutela transnazionale del credito*, Torino: Giappichelli, 2007, p. 188 et seq., and in C. TUO, *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti e reciproca fiducia*, cit., p. 94 et seq.

⁴⁷ See especially Arts 41 and 42 of the Regulation 2201/2003, cit.; Regulation 805/2004, cit.; Regulation 4/2009, cit.

⁴⁸ On the contribution of the European Convention on Human Rights to the establishment of a "European public policy", see J. BASEDOW, *Recherche sur la fonction de l'ordre public européen dans la jurisprudence*, in *Le droit international privé: esprit et methods*, Paris: Dalloz, 2005, p. 55 et seq.; S. CORNELOUP, *Le contrôle de l'ordre public par la Cour européenne des droits de l'homme*, in *Journal européen des droits de l'homme*, 2013, p. 381 et seq.

⁴⁹ On the idea of a "standard minimal" see also P. KINSCH, *Droits de l'homme, droits fondamentaux et droit international privé*, cit., p. 292 et seq. See also G. CUNIBERTI, *The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance, and Efficiency*, in *International and Comparative Law Quarterly*, 2008, p. 33 et seq.

tion of fundamental rights through the public policy clause should cover possible breaches of either procedural or substantive rights (for instance, the right to respect for private and family life;⁵⁰ the right to marry; the right to property;⁵¹ the right to equality between spouses,⁵² etc.).⁵³

However, the European Court seems to accept that the scope of control of the respect for public policy, as a ground for non-recognition or non-enforcement of judgments, is subject to strict interpretation, as it is provided by several EU instruments, including Regulation 1215/2012. To this regard, the European Court of Human Rights did not set out a clear threshold, but the requirement of a “serious and substantiated complaint” of manifestly deficient protection of fundamental rights appears to be compatible with the functioning of the public policy clause as defined by the CJEU in *Krombach* and in *Gambazzi*.

Under this framework, the requirement of an initiative of the defendant before the power of review of domestic courts can be exercised is also certainly acceptable. As the case of Mr. Avotiņš clearly shows, it is for the interested party to make use of the remedies available, both in the Member State of origin and in the Member State of enforcement;⁵⁴ otherwise, such party will not be able to complain about a violation of his/her fundamental rights, as such a violation would be, at least partially, attributable to his/her omission.⁵⁵

⁵⁰ The relevance of Art. 8 of the European Convention as to the recognition of foreign judgments has thus far been emphasised especially in terms of the so-called “positive public policy”, obliging Contracting States to recognise judgments implementing the right to family life in specific cases: see European Court of Human Rights, judgment of 28 June 2007, no. 76240/01, *Wagner and J.M.W.L. v. Luxembourg*; judgment of 3 May 2011, no. 56759/08, *Negrepontis-Giannis v. Greece*. On this issue, P. KINSCH, *La non-conformité du jugement étranger à l'ordre public international mise au diapason de la Convention européenne des droits de l'homme*, in *Revue critique de droit international privé*, 2011, p. 812 et seq.

⁵¹ See European Court of Human Rights, judgment of 18 December 2008, no. 69917/01, *Saccoccia v. Austria*.

⁵² P. HAMMJE, *Droits fondamentaux et ordre public*, in *Revue critique de droit international privé*, 1997, p. 20 et seq.

⁵³ On the invocation of substantive rights protected by the European Convention against recognition and enforcement of foreign judgments, see L.R. KESTRA, *The Impact of European Convention on Human Rights on Private International Law*, cit., p. 275 et seq.

⁵⁴ According to the Grand Chamber, Mr. Avotiņš should have challenged the decision before the Cypriot courts lodging, at the same time, an appeal against the declaration of enforceability of such decision before the Latvian Courts. As pointed out in the dissenting opinion of the President Sajó, this interpretation of Art. 34, para. 2, of Regulation 44/2001 (which is also in line with the Opinion of AG Kokott in *Trade Agency*, cit., paras 53-64) seems to place a disproportionate burden on the defendant, who is forced to bear the costs of litigation in two different Member States, at least when he is served with the decision only at the stage of the enforcement proceedings.

⁵⁵ That solution was already envisaged by O. LOPES PEGNA, *Concentrazione delle difese nello Stato di origine e sue conseguenze per il riconoscimento e l'esecuzione delle decisioni*, in N. BOSCHIERO, P. DE CESARI (a cura di), *Verso un «ordine comunitario» del processo civile*, cit., p. 105.

IV. THE CONSEQUENCES FOR THE EU SYSTEM OF MUTUAL RECOGNITION OF DECISIONS IN CIVIL AND COMMERCIAL MATTERS

It is now possible to briefly consider some implications of the principles set out in the *Avotiņš v. Latvia* judgment by the Grand Chamber.

In assessing the impact of those principles on EU law, account must be taken that the case *Avotiņš v. Latvia* concerned the peculiar field of the recognition and enforcement of decisions in civil and commercial matters within the European judicial area. In that context, the rules contained in EU instruments only provide the necessary framework in order to facilitate the circulation of judgments, but these judgments remain, at least at the present stage of the European integration, the output of a national legal order, as domestic proceedings in civil and commercial matters are governed by EU law only to a very limited extent. Thus, the solution here envisaged by the Grand Chamber, involving the instrumental role of Member States, rather than of the EU, in the implementation of the protection of fundamental rights, cannot be assumed as a general paradigm.

However, mutual recognition of judgments, both in civil and in criminal matters, constitutes the very cornerstone of the European judicial area under Arts 81 and 82 TFEU. Accordingly, the diverging views of the CJEU and of the European Court of Human Rights as to the application and to the limits of the principle of mutual recognition cannot but result in a different appraisal of the overall functioning of the European judicial area. The judgment in *Avotiņš v. Latvia* is certainly directed, according to the scheme of judicial dialogue,⁵⁶ to influence the attitude of the CJEU in defining the functioning of the EU system of mutual recognition of decisions.

As yet, the CJEU has placed a very strong emphasis on the effectiveness of the EU system of recognition and enforcement of decisions in civil and commercial matters, founded on the principles of free circulation and of mutual trust between national judges. Thus, the CJEU repeatedly stressed the autonomy of that system – or rather of the different regimes established by the various EU Regulations – insofar as it spells out the respective powers of the courts of the Member State of origin and of the requested Member State, entrusting principally the former with the task of ensuring the protection of fundamental rights in the proceedings before them. The process should ultimately lead to the establishment of a European judicial area without internal borders, in which “abolition, pure and simple, of any checks on the foreign judgment by courts in the requested country allows national judgments to move freely throughout the Union. Each requested State treats these national judgments as if they had been delivered by one of its own courts”, as it was proposed, for instance, in the 2000 draft programme of

⁵⁶ On the general issue, S. DOUGLAS-SCOTT, *The Court of Justice of the European Union and the European Court of Human Rights After Lisbon*, in S. DE VRIES, U. BERNITZ, S. WEATHERILL (eds), *The Protection of Fundamental Rights in the EU After Lisbon*, Oxford and Portland: Hart Publishing, 2013, p. 153 *et seq.*

measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.⁵⁷

The judgment of the Grand Chamber seems to require a reconsideration of the overall idea. In fact, the obligation of the addressed Member State to perform a review of foreign judgments, in order to prevent cases of manifestly deficient protection of Convention rights, does not allow domestic courts to treat judgments delivered in other EU Member States as national judgments. The *dicta* of the Grand Chamber may thus hamper the integration process in the European judicial area, as they emphasise the individual responsibility of EU Member States in the protection of fundamental rights, while the role of the EU cooperation is limited to allowing the application of the presumption of equivalent protection.

However, it must be added that the CJEU still admits that the recognition of a judgment under the EU instruments leads to it being “incorporated into the legal order of the Member State in which enforcement is sought”.⁵⁸ In that context, the autonomous character of the EU system of mutual recognition of judgments cannot lead to overlook that it is for every Contracting State of the European Convention to ensure that fundamental rights be protected in its legal order.

Turning to the existing framework in civil and commercial matters, the instrument that can give rise to most difficulties is Regulation 2201/2003, as, in matters of right of access and return of abducted children, the principle of mutual recognition, entailing the presumption of observance of fundamental rights by the Member State of origin, requires the courts of the Member State of enforcement to recognise and to enforce *automatically and mechanically* foreign decisions.

For these reasons, the practical effect of the relevant provisions of Regulation 2201/2003, leading to the circulation of judgments in absence of any public policy control and of any evaluation as to the observance of the rights of defence, does not seem consistent with the requirements imposed by the European Convention on Human Rights.

But even EU instruments allowing to a certain extent a power of review of the judgment to be recognised or enforced only through the remedies available in the Member State of origin (namely Regulation 4/2009 and Regulation 805/2004) are likely to grant an insufficient degree of protection of fundamental human rights, as they leave the courts of other Member States no discretion whatsoever in deciding whether enforcement of the decision should be granted. In so doing, those instrument actually deprive the courts of the addressed State of the power to ascertain that in specific circumstances the guarantee of individual rights was manifestly deficient.

⁵⁷ Council Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (2001/C 12/01), section II.A, para. 2, let. b).

⁵⁸ Court of Justice, judgment of 13 October 2011, case C-139/10, *Prism Investments*, para. 40.

In addition, the unusually detailed reasoning on the interpretation of Art. 34, para. 2, of Regulation 44/2001 with regard to the very peculiar issue of the burden of proof⁵⁹ shows that in the European Court's view, when a ground of non-recognition or non-enforcement pertaining to the protection of fundamental rights is invoked, that complaint must be examined in full detail by the courts of the addressed State.

Obviously, it is still to be seen whether the EU institutions will take into account the judgment of the Grand Chamber in the revision of existing instruments⁶⁰ or in the enactment of new instruments in the field of judicial cooperation in civil matters. However, one may wonder whether the CJEU will be ready to align itself with the above summarised remarks of the European Court of Human Rights.

It would not be correct to jump to the conclusion that the CJEU is already familiar with that approach, as it was upheld in the recent judgment in *Aranyosi and Čaldararu*,⁶¹ concerning the interpretation of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. In that case the CJEU accepted that the executing judicial authority can delay the execution of a European arrest warrant and request supplementary information, when in the issuing Member State there are systemic or generalised deficiencies with regard to detention conditions.

The rationale of that judgment cannot be transposed as such to the field of judicial cooperation in civil matters, as in *Aranyosi and Čaldararu* the CJEU referred to the absolute prohibition of inhuman or degrading treatments and to the fundamental value of human dignity, that must be protected in any circumstances. Moreover, in that context the CJEU was able to rely upon the existing case-law of the European Court of Human Rights concerning the violation of Convention rights with regard to detention conditions by Hungarian and Romanian authorities.

Now, the judgment in *Avotiņš v. Latvia* seems to call for a partial departure from the key principle of mutual trust between the judicial authorities of Member States even in civil and commercial matters. It is still to be seen whether the CJEU will accept the guidance of the Grand Chamber on that point or whether it will be reluctant to deviate from

⁵⁹ On this issue, see O. LOPES PEGNA, *Concentrazione delle difese nello Stato di origine e sue conseguenze per il riconoscimento e l'esecuzione delle decisioni*, cit., p. 107.

⁶⁰ Regulation 2201/2003 is currently under revision following the initiative of the European Commission: see the Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and in the matters of parental responsibility and on international child abduction (recast), COM(2016) 190. In matters of recognition and enforcement of decisions concerning right of access or ordering the return of an abducted child, the proposal contains an amended Art. 54 providing for a procedure for rectification or withdrawal of the certificate annexed to the decision, modelled on Art. 10 of Regulation 805/2004.

⁶¹ Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Čaldararu*. The judgment is mentioned in the dissenting opinion of President Sajó, para. 9.

its settled case-law and to abandon its own perspective on the core values of the European judicial area.



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