HIGHLIGHT

THE EU SOLUTION TO DEAL WITH THE DUTCH REFERENDUM RESULT ON THE EU-UKRAINE ASSOCIATION AGREEMENT

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On 6 April 2016 the Dutch population was asked to be *voor* (in favour) or *tegen* (against) the act to approve the Association Agreement between the European Union, its Member States and Ukraine.[1] The referendum was the first that was organised on the basis of the new Dutch Advisory Referendum Act, which allows for a non-binding advice of the population on acts that have already been approved by Parliament. The turnout was low (32 per cent) but just enough to render the result valid.[2] Of that 32 per cent, 61.1 per cent of the voters indicated to be against the approval act. A small minority of the total electorate in the Netherlands and, indeed, a very small fraction of the combined electorates in the other EU Member States and Ukraine.

Yet, apart from this political problem, the situation resulted in a number of legal complexities. Despite the non-binding nature of the referendum, governmental and well as parliamentary representatives indicated their willingness to take the result seriously. In their view, the political climate demanded a serious response and effort to due justice to the sentiments that were (allegedly) behind the 'no' vote. The lobby behind the referendum simply demanded the non-ratification of the Association Agreement. The problem is that the Agreement can only enter into force once it has been ratified by *all* parties (Art. 486 of the Agreement). Hence, the Dutch government was faced with the

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[1] Association Agreement of 21 March 2014 between the European Union and its Member States, of the one part, and Ukraine, of the other part, eeas.europa.eu.

[2] See R.A. WESSEL, A. ŁAZOWSKI, *Dutch Farce on Ukraine: Is There a Way Out?*, in *EUobserver*, 8 April 2016, euobserver.com.

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question of how to get parliamentary support for the ratification to prevent a situation in which a small part of the total electorate of all parties would block an intensified co-operation between the EU and Ukraine, and perhaps even disturb the geo-political situation in view of the EU's approach towards the Russian Federation. Prime Minister Mark Rutte announced to do his best to broker the adoption of, what he called, a 'legally binding declaration' that would do justice to the concerns of the Dutch no-voters.

After a long period of difficult (and according to Rutte, occasionally, not very pleasant) discussions, on 15 December 2016 the European Council presented a solution. Quite surprisingly to many, the EU/Dutch solution to prevent a possible non-ratification by the Netherlands of the EU-Ukraine Association Agreement, was not the adoption of a Declaration (or perhaps even a Protocol), but a "Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council".[3] This Decision is to take effect once the Netherlands has ratified the Agreement and the European Union has concluded it. Decisions like these are taken in the framework of the European Council, and not by the European Council. Like framework decisions taken by the (regular) Council, they are believed not to be in need of a legal basis in EU law as the (European) Council meeting is merely a pragmatic venue to allow the states to conclude an agreement (as also confirmed by the Council's legal service in a leaked document).[4] Usually, they are needed once Decisions cannot (solely) be taken by the Institutions, and Member States in their capacity as 'states' need to step in. Indeed, not being an EU decision, the 'Decision' thus adopted seems to be nothing less than an international agreement.[5] This is confirmed by the fact that "The European Council notes that the Decision set out in the Annex is legally binding on the 28 Member States of the European Union, and may be amended or repealed only by common ac-

[3] Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, annexed to the European Council Conclusions on Ukraine of 15 December 2016, www.consilium.europa.eu.

[4] As noted by the European Council's Legal Counsel, this is not the first time that this instrument is used in a case like this: for instance, decisions of the Heads of State or Government, meeting within the European Council, taken in December 1992 and in June 2009 to address certain problems raised by the Government of a Member State following a referendum in that State or decisions taken by common agreement of the representatives of the Member States, including at the level of Heads of State or Government, in December 1992, October 1993 and December 2003 on the location of the seats of a number of EU institutions and bodies, in the context of Art. 341 TFEU. See European Council, Opinion of the Legal Counsel, Brussels, 12 December 2016 (OR. en), EUCO 37/16, LIMITE, JUR 602, www.bnr.nl.

[5] *Ibidem*: "With regard to its legal nature and effects, the draft Decision of the Heads of State or Government should, in the present case as well as in previous instances, be regarded - although it does not require the accomplishment of the formalities generally needed for self-standing agreements - as an instrument of international law, by which the EU Member States agree on how they understand and will apply, within their competences, certain provisions of an act by which they are otherwise all bound."

cord of their Heads of State or Government".[6] Hence, where the Dutch government repeatedly informed the public that it aimed for a "legally binding declaration", they ended up with something that seems nothing short of an additional international agreement; although the Court's case law on this point is not conclusive.[7] In any case, it is another example of EU Member States finding a way to use an non-EU instrument to deal with an EU issue (see earlier comments on this in *European Papers*)[8].

One may argue that a solution like this should be discussed with all parties to the EU-Ukraine Association Agreement, who would then have a possibility to find out whether the content of the new agreement affects their earlier approval of the Association Agreement.[9] The new Decision seems to have solved this dilemma in two ways. First of all, it claims to be "in full conformity with the EU-Ukraine Association Agreement and the EU treaties". Secondly, in a more substantive sense, the five points in the Decision merely repeat what is or is not in the Association Agreement,[10] thus making it a le-

[6] As set out in the European Council Conclusions on Ukraine, cit.

[7] See in particular Court of Justice, judgment of 28 April 2015, case C-28/12, *Commission v. Council* [GC], in which the Court held that under the circumstances, a similar decision could be seen as an act of the Council:

"15. In this instance, since the contested decision relates to the signing of the Accession Agreement and the Ancillary Agreement on behalf of the European Union and to the provisional application of those agreements by, first, the European Union and, second, the Member States, it follows that the Council participated in the decisions made in respect of all of those matters [...]

16. Furthermore, it is not in dispute that the contested decision has legal effects.

17. In those circumstances, the contested decision must be regarded as an act of the Council against which an action for annulment may be brought under Article 263 TFEU [...]".

[8] See E. CANNIZZARO, *Editorial: Disintegration Through Law*, in *European Papers*, 2016, www.europeanpapers.eu, pp. 3-6; as well as G. FERNÁNDEZ ARRIBAS, *The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem*, in *European Papers – European Forum*, *Insight* of 17 October 2016, www.europeanpapers.eu, pp. 1-8.

[9] Cf. also the Opinion of the European Council's Legal Counsel, cit.: "unless Ukraine declares that it accepts the Decision, its provisions cannot constitute an interpretative instrument binding on Ukraine by virtue of Article 31(2)(b) of the Vienna Convention on the Law of Treaties".

[10] The Decision on the EU-Ukraine Association Agreement, cit., lists them as follows:

– The Agreement does not confer on Ukraine the status of a candidate country for accession to the Union, nor does it constitute a commitment to confer such status to Ukraine in the future.

– It does not contain an obligation for the Union or its Member States to provide collective security guarantees or other military aid or assistance to Ukraine.

– The Agreement does not grant to Ukrainian nationals or Union citizens, respectively, the right to reside and work freely within the territory of the Member States or Ukraine. The Agreement does not affect the right of Member States to determine volumes of admission of Ukrainian nationals to their territory in order to seek work, whether employed or self-employed.

– The Agreement does not require additional financial support by the Member States to Ukraine, nor does it change each Member State's exclusive right to determine the nature and volume of its bilateral financial support.

– The fight against corruption is central to enhancing the relationship between the Parties to the Agreement.

gally less relevant document (without denying the political importance). Obviously, the Decision could not have contained elements that would contradict the EU-Ukraine Association Agreement or EU law in general; which puts the "legally binding" nature of the Decision somewhat in perspective. Not being a reservation, it is 'merely' a document in which the Heads of State and Government of the EU states that are a party to the Association Agreement lay down an agreed interpretation. The Council's legal service formulated the legally binding nature as follows:

> "It has nevertheless legal force in order to exclude, as among the Member States of the EU, certain interpretations that could be given to the language of the agreement and certain forms of action that could be considered on its basis. In case the EU Court of Justice would have to interpret the provisions of the association agreement in the future, the draft Decision could also be used in its reasoning to assess the intentions of the EU Member States as to the scope of the commitments undertaken when becoming parties."[11]

Obviously, this joint interpretation by the EU state parties does not necessarily bind the two other parties, the EU and Ukraine. In that sense it can (only) been seen as a self-binding common understanding which is hard to deny at a later stage (and, politically, that was most probably the objective).

In the beginning of 2017, the two Dutch Chambers of Parliament will probably (and allow me to say, hopefully) agree with Prime Minister Rutte's view that the Decision took both the main concerns of the 'no' voters into account as well as the interests of the other parties to the Agreement. This will then open the door to ratification by the Netherlands and hence to the entry into force of the Association Agreement.

Are "Decisions" like these generally a good solution to deal with the non-ratification of mixed agreements by certain Member States? The answer should probably be "no". In the Dutch case, it will probably prevent a non-ratification, but it would have been better to have clarified the points that are addressed by the Decision beforehand. Indeed, the Decision is legally unharmful as it does not create rights or obligations that are not yet part of the Agreement. Yet, the fact that only a number of parties to an Agreement get together to prepare a ("binding") view on what they see as the interpretation of a number of key elements in the Agreement, after most parties and their Parliaments had already approved the Agreement, should not form a precedent for future situations. Furthermore, there was a serious risk that the Decision would not be acceptable for either the other parties or for the Dutch Parliament. This would have led to a situation in which a handful of citizens would have been given a chance to seriously jeopardise the relations between the European Union and its neighbours. We will certainly be confronted with similar situations in the future now that "mixity" is here to stay. On 21 December 2016 Advocate General Sharpston argued that another Agreement, the EU-

[11] European Council, Opinion of the Legal Counsel, cit.

Singapore Free Trade Agreement can only be concluded by the European Union and the Member States acting jointly.[12] Whereas the Commission argued that the Agreement could be concluded as an "EU-only" agreement, the AG points to a number of elements in the Agreement in relation to which the EU lacks an exclusive competence. And, indeed, as also acknowledged by the AG, difficulties may arise from a ratification process involving all of the Member States alongside the EU.

[12] Opinion of AG Sharpston delivered on 21 December 2016, Opinion procedure 2/15.