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EUROPEAN FORUM

Editorial

The European Parliament at the First Crusade

On 21 October 2019, in a piece published on *Verfassungsblog*, twenty-nine influential experts in European affairs have harshly rebuked the European Parliament for rejecting the nomination of Sylvie Goulard to the new European Commission (*Fairness, Trust and the Rule of Law: Statement on the European Parliament's confirmation procedure concerning Sylvie Goulard*, www.verfassungsblog.de).

Noting that "the campaign against Sylvie Goulard has been widely understood as a political revenge against the French President", who had successfully opposed the model of the *Spitzenkandidaten*, the co-signatories suggested that "[n]othing in the Treaties, yet, requires the application of this model", and express their deep concern "not only regarding the fairness of the process in the given circumstances, and the respect of the rule of law, but also for the political consequences this way to proceed may have for the role of the European Parliament, its credibility in the eyes of citizens, and the EU in the future".

This story vividly epitomizes – well beyond the personal destiny of the candidate, whose qualification and morality entirely remain beyond the scope of the present editorial – the turbulent passage which is following the May 2019 elections. The stakes are high and include values of public concern: the rule of law, the relations between the European Parliament and the European Council, the future of the EU. It is against these benchmarks that the legality and the soundness of the behaviour of two major actors of the EU institutional system must be assessed.

The procedure of appointment of the Commission is, notoriously, quite elaborate. This complexity mirrors the manifold role assigned to this institution and the varying degree of allegiance owed by the Commission to the other stakeholders of the EU political system. In particular, whereas all these stakeholders do have a say in that process, none can really claim the role of the king maker.

Art. 17, para. 7, TEU assigns to the European Council the power to propose a candidate for President of the Commission, who, however, will be elected by the European Parliament by absolute majority voting. Each Member State, acting individually, identifies one candidate for Commissioner, with a sort of *agrément* of the President and a formal consent of the Council. Finally, the Commission, as a body, is subject to a vote of consent by the European Parliament and, then, it is appointed by the European Council.

This quite baroque procedure bears some resemblance to procedures applicable to the appointment of the executive in parliamentary systems; yet, it breaks away from

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them in other regards. In particular, the circumstance that, *de facto*, each Commissioner is selected by its Member State makes it implausible to have a politically cohesive Commission, at least along the lines of the national political dynamics.

Far from being an oddity of the system, the multiple allegiances of the Commission provide, paradoxically, the best means to preserve its independence. In turn, the independence of the Commission secures the performance of its main task, namely acting as the custodian of the Treaties and of the project of the "ever closer Union". It is around this project that the Commission has, sometimes very successfully, created its internal political cohesion.

In turn, the degree of influence of the European Parliament on the political course of the Union greatly depends on its own internal cohesion and on its capacity to establish a close link with the Commission, and, in particular, with its leading figure. In spite of the swinging relations between these two institutions – each being a jealous custodian of its own prerogatives – they broadly share a common vision of the Union, opposed to that based on the dominance, or even the omnipotence, of the Member States.

This is the legal and political background against which the vicissitudes of the appointment of the President of the Commission, and, in particular, the *Spitzenkandidaten* system, must be assessed. At a superficial sight, this system may be regarded as a first step in a process of the parliamentarisation of the European political system. In the same vein in which the executive depends on the confidence vote of the Parliament, so the argument goes, the Commission takes office on the basis of the parliamentary election and will be dissolved by a sort of no confidence vote, called, in the European jargon, a censure. In this perspective, the duty of the European Council to propose a *Spitzenkandidat* as President of the Commission would be the equivalent to the duty of the president of the republic or of the monarch, to invite the winner of the parliamentary election to form a new government.

In spite of this vague analogy, however, it is apparent that the *Spitzenkandidaten* system does not bring the EU political system closer to a parliamentary system, whereby the executive is the expression of the majority in a parliament. The *Spitzenkandidaten* system is rather based on the underlying idea that the entire parliament, or at least its overwhelming majority, rallies behind a leading figure, which may unite the efforts of the two supranational institutions to progress the process of integration. Far from altering the institutional pluralism of the European form of governance, the *Spitzenkandidaten* system is a practical expedience to shift the balance of power in favour of the Parliament *vis-à-vis* the two Councils, and to attenuate the grip of the Member States on the process of integration.

In the aftermath of the 2019 elections, and of the rise of the populist parties, however, the implied premise of that system, namely the internal cohesion of the European Parliament, began to fade. The mechanism of the *Spitzenkandidaten* came to a gridlock and it soon became clear that none of the two main pretenders to the throne, the lead-

ers of the EPP and of the S&Ds, could have gathered sufficient consent from the Parliamentary rows to be imposed to the Council, as it took place in the 2014.

Possibly anxious to re-affirm its hold on the political system of the Union, the European Council went along its own path. It selected, in splendid isolation, Ms. von der Leyen as candidate for the Presidency of the Commission, and proposed her to the European Parliament.

The consequence of this path is well known. A few days after the proposal, the European Parliament only narrowly elected Ms. von der Leyen President of the Commission. Various political groups were torn apart, between bowing to the European Council and the chaos that could have ensued had the European Parliament voted otherwise. The process of appointment of the other members was dotted by parliamentary skirmishes and manoeuvrings and some of the candidates were rejected by the European Parliament after informal hearings, among them Ms. Goulard. Consequentially, the parliamentary vote of consent was postponed. At the time of writing, the new Commission is still unable to take office.

These events can be hardly told as a story about little paybacks and legal misconducts. This is a story about the evolving European Constitutional framework, about its fragilities, about its enduring contradictions.

In the *Editorial* published in the previous issue, this Journal expressed deep concern that the result of these elections, the rupture of the solidarity pact among the main forces of the Parliament, and the inevitable loss of weight of that institution, could disrupt the delicate institutional balance over which the political edifice of the EU has been built. At the first trial, hélas, this prophecy seems to come true.

There were a number of moves which the European Council could have attempted to prevent this rupture. From the holding of "appropriate consultations", as suggested by Art. 17, para. 7, TEU to the exercise of the passive virtues, waiting for the European Parliament to find its internal balance. By so doing, the European Council would have demonstrated respect for the role of the European Parliament and longsighted political wisdom.

Far from being irreprehensible, thus, the unilateral choice of the future President of the Commission seems to have been inspired by the desire of the heads of State or Government of the Member States to re-take the full lead, at the expense of the European Parliament. By no means, however, this twist is a zero-sum game. In the complex institutional system of the EU, the loss of prestige, influence and power of one institution will hardly be compensated by the gain of another. The loss of influence of the European Parliament will fatally disturb the institutional balance, in such a way that it will be hard to recast it. If this is the first backlash of the populist wave in Europe, the process of the European integration is to have harsh days ahead.

E.C.

ARTICLES

FRIENDS WITH BENEFITS? POSSIBILITIES FOR THE UK'S CONTINUED PARTICIPATION IN THE EU'S FOREIGN AND SECURITY POLICY

RAMSES A. WESSEL*

ABSTRACT: Despite the ambition of the United Kingdom that Brexit should not lead to a complete detachment from the European Union's foreign, security and defence policy – and, on the contrary, should lead to a new partnership – a post-Brexit cooperation on CFSP and CSDP matters raises a number of questions under both EU and international law. The present *Article* points to a number of restrictions in both EU primary and secondary law to allow the UK to maintain its participation in the key decision-making organs. At the same time, it assesses possibilities based on existing practices for third States to participate in EU external action.

KEYWORDS: Brexit – foreign policy – CFSP – CSDP – EU – United Kingdom.

I. INTRODUCTION

The United Kingdom has frequently indicated that Brexit should not lead to a complete detachment from the European Union's foreign, security and defence policy,[1] but that

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[1] See already the remarks made by Prime Minister Cameron after the referendum; C. TANNOCK (MEP), *Brexit: The Security Dimension*, February 2017, www.charlestannock.com. The EU's negotiating guidelines for Brexit note that "[t]he EU stands ready to establish partnerships in areas unrelated to trade, in partic-

in this area EU membership should be replaced by a new security partnership, "that is deeper than any other third country partnership and that reflects our shared interests, values, and the importance of a strong and prosperous Europe".[2] In fact, given the – perceived – more intergovernmental nature of the Common Foreign and Security Policy (CFSP),[3] a continued participation in this policy area is often seen as easier to realise than participation in certain parts of the internal market.[4]

The wish to stay connected to CFSP may stand in stark contrast to the well-documented attempts by the UK to prevent any further integration in that area. The UK has a long history of blocking new initiatives to further integrate CFSP into the Union's legal order.[5] The somewhat peculiar situation of CFSP being the only policy area (apart from the European Neighbourhood Policy) in the TEU rather than in the TFEU was presented by the then British Foreign Minister Miliband in a victorious manner: "Common foreign and security policy remains intergovernmental and in a separate treaty. Im-

ular the fight against terrorism and international crime, as well as security, defence and foreign policy"; European Council, *Guidelines Following the United Kingdom's Notification under Article 50 TEU*, Doc. EUCO XT 20004/17, 29 April 2017, p. 7. See also the 2017 UK position paper: HM Government, *Foreign policy, defence and development: a future partnership paper*, 12 September 2017, www.gov.uk.

[2] See the UK position paper 'Foreign policy, defence and development: A future partnership paper', 2017; HM Government, *Foreign policy, defence and development*, cit. See also the speech by PM Theresa May at Munich Security Conference on 17 February 2018 (T. MAY, *Prime Minister Theresa May's speech at the 2018 Munich Security Conference*, 17 February 2018, www.gov.uk): "Europe's security is our security. And that is why I have said – and I say again today – that the United Kingdom is unconditionally committed to maintaining it. The challenge for all of us today is finding the way to work together, through a deep and special partnership between the UK and the EU, to retain the co-operation that we have built and go further in meeting the evolving threats we face together".

[3] Elsewhere I have extensively dealt with the legal nature of CFSP; see recently for instance R.A. WESSEL, *Integration and Constitutionalisation in EU Foreign and Security Policy*, in R. SCHÜTZE (ed.), *Governance and Globalization: International and European Perspectives*, Cambridge: Cambridge University Press, 2018, p. 339 *et seq.*; or R.A. WESSEL, *Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?*, in *European Foreign Affairs Review*, 2015, p. 123 *et seq*.

[4] Cf. the position paper Post-Brexit EU-UK Cooperation on Foreign and Security Policy by the Chairman of the House of Commons Foreign Affairs Committee: Crispin Blunt MP, *Post-Brexit EU-UK Cooperation on Foreign and Security Policy*, April 2017, available at www.blunt4reigate.com, p. 4 ("The CFSP and CSDP are already substantially intergovernmental in nature, respecting the autonomy of EU member states in foreign and defence policy. Therefore, it should be possible to conceive of mechanisms for a high degree of involvement of the UK, voluntarily and without a veto, in EU foreign, security and defence issues, respecting the autonomy of both the EU and UK").

[5] See for a comprehensive and very helpful analysis P.J. CARDWELL, *The United Kingdom and the Common Foreign and Security Policy of the EU: from pre-Brexit "Awkward Partner" to post-Brexit "Future Partnership"?*, in *Croatian Yearbook of European Law and Policy*, 2017, p. 12 *et seq.* Cf. also D. SEAH, *The CFSP as an Aspect of Conducting Foreign Relations by the United Kingdom: With Special Reference to the Treaty of Amity & Cooperation in Southeast Asia*, in *International Review of Law*, 2015, p. 1 *et seq.*; A. MENON, *Defence Policy and the Logic of "High Politics"*, in P. GENSCHEL, M. JACHTENFUCHS (eds), *Beyond the Regulatory Polity?: The European Integration of Core State Power*, Oxford: Oxford University Press, 2013, p. 66 *et seq.*

portantly [...] the European Court of Justice's jurisdiction over substantive CFSP policy is clearly and expressly excluded".[6]

Despite the fact that "keeping CFSP intergovernmental" and "keeping the Court out" has not proven to be very successful,[7] the very perception of an intergovernmental CFSP renders it logical for the UK to continue participating, despite its intention to leave the European Union. With a view to the UK position paper on continued participation in CFSP, it has even been observed that "in stressing the UK's contribution to the CFSP and ability to project its own priorities and set the debate [...] the document seems as though it is a case for being part of the EU, rather than setting out a 'new' arrangement".[8] Indeed, many of these documents read as a plea for a full opt-in and CFSP is presented as one of the "cherries" that can easily be picked. Indeed, EU foreign policy did not play a major role in the referendum campaign,[9] and, overall, the UK has always been quite supportive of the agreed CFSP policies and decisions.[10] It has been observed that the UK "long ago recognized the fact that the EU is Britain's 'point of departure' when it comes to foreign policy rather than the first thing that Britain bumps into"[11] and that "it was generally strongly in the UK's interests to work through the EU in foreign policy",[12] if only to "upload" its own policy preferences.[13] The latter quote is from a UK position paper, that deserves to be quoted more in length, as it clearly balances the advantages and disadvantages of UK involvement in CFSP:

[6] Secretary of State for Foreign and Commonwealth Affairs (David Miliband), House of Commons Debate, 20 February 2008, col 378.

[7] Cf. R.A. WESSEL, *Integration and Constitutionalisation in EU Foreign and Security Policy*, cit.; as well as C. HILLION, R.A. WESSEL, *The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP*, in S. BLOCKMANS, P. KOUTRAKOS (eds), *Research Handbook in EU Common Foreign and Security Policy*, Cheltenham, Northhampton: Edward Elgar Publishing, 2018, p. 65 *et seq.*

[8] P.J. CARDWELL, *The United Kingdom and the Common Foreign and Security Policy of the EU*, cit., p. 18. Cf. also C. HILLION, *Norway and the Changing Common Foreign and Security Policy of the European Union*, Norwegian Institute of International Affairs (NUPI) Report 1/2019, www.nupi.no, who concludes that the UK's "technical note on consultation and cooperation on external security" – "ironically [displays] greater enthusiasm for the strengthening of the policy than at any point of its membership". The "technical note" can be found here: www.gov.uk.

[9] K.A. ARMSTRONG, *Brexit Time: Leaving the EU – Why, How and When?*, Cambridge: Cambridge University Press, 2017, p. 32; J. BLACK, A. HALL, K. COX, M. KEPE, E. SILFVERSTEN, *Defence and Security after Brexit*, Santa Monica, Cambridge: RAND Corporation, 2017, www.rand.org, p. 17.

[10] P.J. CARDWELL, *The United Kingdom and the Common Foreign and Security Policy of the EU*, cit., p. 12. The quotes below were also found by Paul Cardwell.

[11] D. ALLEN, *The United Kingdom: a Europeanized Government in a non-Europeanized Polity*, in S. BULMER, C. LEQUESNE, *The Member States of the European Union*, Oxford: Oxford University Press, 2005, p. 138 *et seq.*

[12] HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union – Foreign Policy*, July 2013, www.gov.uk, p. 87.

[13] H. DIJKSTRA, S. VANHOONACKER, *The Common Foreign and Security Policy*, in *Oxford Research Encyclopedia of Politics*, Oxford: Oxford University Press, 2017, www.oxfordre.com.

> "The key benefits included: increased impact from acting in concert with 27 other countries; greater influence with non-EU powers, derived from our position as a leading EU country; the international weight of the EU's single market, including its power to deliver commercially beneficial trade agreements; the reach and magnitude of EU financial instruments, such as for development and economic partnerships; the range and versatility of the EU's tools, as compared with other international organisations; and the EU's perceived political neutrality, which enables it to act in some cases where other countries or international organisations might not.
> Again according to the evidence, the comparative disadvantages of operating through the EU are: challenges in formulating strong, clear strategy; uneven leadership; institutional divisions, and a complexity of funding instruments, which can impede implementation of policy; and sometimes slow or ineffective decision-making, due to complicated internal relationships and differing interests. One commentator summarised it thus: 'The issue is not legal competence, but competence in general.' Some argued that the EU is at its most effective when the Member States, in particular the UK, France and Germany, are aligned and driving policy".[14]

Thus it might not have come as a surprise that the Political Declaration of November 2018 on the future EU-UK relationship foresees a "security partnership", which "should comprise law enforcement and judicial cooperation in criminal matters, foreign policy, security and defence, as well as thematic cooperation in areas of common interest".[15] The Political Declaration continues by stating that "[t]o this end, the future relationship should provide for appropriate dialogue, consultation, coordination, exchange of information and cooperation mechanisms. It should also allow for secondment of experts where appropriate and in the Parties' mutual interest".[16] And, "[t]he High Representative may, where appropriate, invite the United Kingdom to informal Ministerial meetings of the Member States of the Union".[17] Where continued participation in the Common Security and Defence Policy (CSDP) is concerned, "the future relationship should therefore enable the United Kingdom to participate on a case by case basis in CSDP missions and operations through a Framework Participation Agreement".[18] In ad-

[14] HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union*, cit., p. 7.

[15] Political Declaration of 22 November 2018 setting out the framework for the future relationship between the European Union and the United Kingdom, Doc. XT 21095/18 BXT111 CO EUR-PREP 54, available at www.assets.publishing.service.gov.uk (hereinafter, Political Declaration), para. 81. This quote is repeated in European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators' level on 17 October 2019, to replace the one published in OJ C 66I of 19.2.2019, 17 October 2019, Doc. TF50 (2019) 65, ec.europa.eu (hereinafter, 2019 Revised Political Declaration), para. 79.

[16] Political declaration, cit., para. 95. Repeated in the 2019 Revised Political Declaration, cit., para. 93.

[17] Political Declaration, cit., para. 97. Repeated in the 2019 Revised Political Declaration, cit., para. 95.

[18] Political Declaration, cit., para. 101. Repeated in the 2019 Revised Political Declaration, cit., para. 99. This echoes the objective of the UK to have "a continued contribution to CSDP missions and opera-

dition, continued collaboration is foreseen in projects of the European Defence Agency (EDA),[19] the European Defence Fund (EDF), the European Union Satellite Centre (EUSC) and in Permanent Structured Cooperation (PESCO), the new arrangements to strengthen defence cooperation between the Member States.[20]

Despite these clear intentions, a post-Brexit cooperation on foreign, security and defence matters raises a number of questions under both EU and international law. After all, the Treaties have established a cooperation between the Union and its Member States on foreign and security policy; no reference is made to any participation of third States in this policy area. On the contrary perhaps, as the Treaty provisions underline the need for consistency in many provisions,[21] imposing a binding obligation of coherence in EU external relations on the Union, connecting the list of policy objectives in Art. 21, para. 2, TEU to each other, and to the functioning of pertinent legal principles. CFSP is clearly connected to many other external policies of the Union, including sanctions, migration, trade, development, and environmental and energy policy. Moreover, 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".[22]

It will not be easy to uphold these rules and principles when participating third States are not equally bound by them. In that respect it should also be remembered that CFSP is a *Union* competence (e.g. Arts 24, para. 1, and 25 TEU and Art. 2, para. 4, TFEU). In fact, throughout Title V TEU (on CFSP) it is made clear that *the Union* is in charge, loyally supported by the Member States (Art. 23, para. 3, TEU). This also implies that for a well-functioning CFSP, the application of the Union principles is essential.[23]

tions, including UK personnel, expertise, assets, or use of established UK national command and control facilities". See HM Government, *Foreign policy, defence and development*, cit.

[19] Continued participation of the UK in the EDA could take place on the basis of an administrative agreement, following the example by Norway that is allowed to participate in the agency's research and technology projects. See also S. LAIN, V. NOUWENS, *The Consequences of Brexit for European Defence and Security*, in *Occasional Paper Royal United Services Institute for Defence and Security Studies*, August 2017, rusi.org.

[20] Political Declaration, cit., paras 104 and 106. Repeated in the 2019 Revised Political Declaration, cit., paras 102 and 104.

[21] Thus, Art. 21, para. 3, TEU provides: "The Union shall respect the principles and pursue the objectives [...] in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies. 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".

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

[23] Cf. R.A. WESSEL, *General Principles in CFSP Law*, in V. MORENA-LAX, P. NEUVONEN, K. ZIEGLER (eds), *Research Handbook on General Principles of EU Law*, Cheltenham: Edward Elgar Publishing, forthcoming.

While third State participation in CFSP and CSDP is far from unusual and scenarios for a post-Brexit participation of the UK in the Union's foreign, security and defence policy have been investigated,[24] the present *Article* will address a number of key legal questions related to a continued participation of the UK in this area. Section II will address the issues from a European law perspective, whereas section III will focus on international law aspects of the participation of the UK in CFSP and CSDP.

II. European law aspects of post-Brexit EU-UK cooperation

II.1. Legal institutional possibilities and obstacles

To start with the obvious: the term "common" in Common Foreign, Security, and Defence Policy refers to the Union and its *Member States*. Art. 26, para. 2, TEU entails a general competence for the Council to "frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council". The Council, in turn, "shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote" (Art. 16, para. 2, TEU). The CFSP provisions do not foresee the participation of non-EU States in the decision-making process. And, indeed, Art. 28, para. 2, TEU provides that the CFSP Decisions "shall commit *the Member States* in the positions they adopt and in the conduct of their activity".[25] In short, as also explained by the Comments on the Council's Rules of Procedure:

> "It should be noted that it follows from the system of the Treaties, and from Article 16 TEU in particular, that the representation of the governments of the Member States of the Council is composed of nationals of the Member State concerned or, in any event, of a national of one of the Member States of the European Union. Therefore, the presence at a Council meeting of a national of a third State as a member of the delegation of a member of the Council should be ruled out, as it could be regarded by the other members of the Council as a factor which could affect the decision-making autonomy of the Council".[26]

This also prevents that – on the basis of Art. 4 of the Council's Rules of Procedure – "a member of the Council who is prevented from attending a meeting may arrange to be represented" by a UK representative. Any attempt to provide a formal role to the UK in CFSP decision-making would thus require a treaty modification. This is not to say that

[24] See e.g. R.G. Whitman, *The UK and EU Foreign, Security and Defence Policy after Brexit: Integrated, Associated or Detached?*, in *National Institute Economic Review*, 2017, p. 48; M. Chalmers, *UK Foreign and Security Policy after Brexit*, in Royal United Services Institute for Defence and Security Studies (RUSI) Briefing Paper, January 2017; www.rusi.org.

[25] Emphasis added.

[26] Council of the European Union, Council Comments on the Council's Rules of Procedure, 2016, www.consilium.europa.eu, p. 16.

all forms of participation of the UK in CFSP and CSDP are excluded (Section II.3 will explore some practice of third country participation in CFSP). In institutional terms, several options have been discussed in the literature. First of all, the Treaties are silent on the *presence* of third countries during the EU decision-making procedures. Yet, in the above interpretation offered by the Comments on the Rules of Procedure, the "presence" of third States during Council – and European Council – meetings seems excluded.[27] At the same time, the Rules seem to provide some leeway to invite representatives of third countries to attend some of the Council's work. In view of the importance of this issue for a possible UK presence during Council meetings, the Comments on the Council's Rules of Procedure deserve to be quoted in length (emphasis added):

> "Participation in Council meetings must not be confused with the *occasional presence of representatives of third States* or of international organisations, who are sometimes invited as observers to attend certain Council meetings or meetings of Council preparatory bodies concerning a specific item.
> Article 6(1) CRP provides that '[…] the deliberations of the Council shall be covered by the obligation of professional secrecy, except insofar as the Council decides otherwise'. Under this article, the Council may, whenever it considers it appropriate, decide by a simple majority to open its deliberations – or to disclose their content, inter alia by forwarding documents – to certain persons (or categories of persons).
> *The presence of observers* must be authorised by the Council for a specific item on the agenda. In this case, the Presidency must warn the Council members of this fact in advance. In respect of this item, the Council (or the relevant preparatory body) implicitly decides, by simple majority, to set aside the professional secrecy provided for in Article 6(1). The observer must leave the room once the deliberations on this item have ended, or when requested to leave by the Presidency. The third-party observer may be invited by the Council Presidency to state his or her views or inform the Council concerning the subject at issue.
> From a legal point of view, *the third party does not participate in the deliberations leading to the taking of a decision by the Council*, but simply provides the Council with information which it can draw upon before taking its decision.
> *The same rules apply to meetings of the Council's preparatory bodies*. The Presidency is responsible for organising the proceedings so as to preserve the Council's decision-making autonomy".[28]

With regard to the European Council, the regulatory provisions are (even) stricter as its Rules of Procedure provide that "meetings in the margins of the European Council with representatives of third States […] may be held in exceptional circumstances only, and with the prior agreement of the European Council, acting unanimously, on the initi-

[27] While the Rules of Procedure of both the Council and the European Council do not address this issue expressly, these Rules imply that only representatives of Member States are present.

[28] Council Comments on the Council's Rules of Procedure, cit., p. 39 (emphasis added). See also European Parliament, Policy Department for External Relations, Directorate General for External Policies of the Union, *CSDP after Brexit: The Way Forward*, study by F. Santopinto, Brussels: European Union, 2018.

ative of the President of the European Council".[29] Here, any presence of third countries during formal meetings seems to be fully excluded and even meetings "in the margin" of the European Council are subject to strict conditions. However, despite the fact that for the UK being present at European Council meeting might politically be important, the influence of this institution on key foreign policy issues has been doubted.[30]

But, what about the lower organs? While the same rules apply to "the Council's preparatory bodies", participation of third States in the Political and Security Committee (PSC) or in Working Parties has proven to be possible in practice, albeit not in Coreper (see further below). At the same time, the question is whether presence at informal Council meetings (e.g. so-called "Gymnich meetings" organised by the rotating Presidency) is also to be excluded. The Political Declaration on the future relationship seems to leave this option open (see further below). In any case, unless anything else is arranged for, participation of the UK in specific CSDP bodies, such as the European Institute for Security Studies, the European Defence Agency, and the European Satellite Centre will have to come to an end.[31]

While the above rules seem to underline that even on the basis of a special agreement an observer status of the UK at Council or Coreper meetings would be in conflict with primary law rules,[32] such a status could perhaps be foreseen for the UK in certain working parties.[33] However, the EU does not seem to be in favour of any form of "half-member" status, let alone of voting rights for non-members.[34] While High Representa-

[29] Art. 4, para. 2, of the Rules of Procedure of the European Council.

[30] See L. LONARDO, *The Relative Influence of the European Council in EU External Action*, in *Journal of Contemporary European Research*, 2019, p. 51: "while it is true that the European Council is influential in the external relations of the EU, this might be the case only on non-critical issues. Instead, it fails to express an influential position when highly divisive topics are on the table, and there is no evidence of its influence".

[31] Cf. Art. 156 of the Withdrawal Agreement, that deals with the budgetary questions during transition: "Until 31 December 2020, the United Kingdom shall contribute to the financing of the European Defence Agency, the European Union Institute for Security Studies, and the European Union Satellite Centre, as well as to the costs of Common Security and Defence Policy operations".

[32] Something for instance suggested by R.G. WHITMAN, *The UK and EU Foreign and Security Policy: An Optional Extra*, in *The Political Quarterly*, 2016, p. 254 *et seq.*

[33] See also J.C. PIRIS, *If the UK votes to leave: the seven alternatives to EU membership*, Centre for European Reform, 2016, www.cer.eu. In an influential position paper, Blunt has argued for far-reaching participation in for instance the PSC; Crispin Blunt MP, *Post-Brexit EU-UK Cooperation on Foreign and Security Policy*, cit.

[34] See also European Commission, *Foreign, Security and Defence Policy*, 15 June 2018, ec.europa.eu, in which the EU informally reacts to some of the UK's proposals.

tive Mogherini seemed ready to explore the options,[35] the idea met with some critics among other officials, even where observer status in the PSC would be concerned.[36]

II.2. The withdrawal agreement

The Withdrawal Agreement that was agreed upon between the EU and the UK in November 2018 does not devote too much text to CFSP, but basically extends the pre-Brexit situation during a transition period (until 31 December 2020).[37] The 2019 version of the Agreement did not add anything on CFSP. The general starting point is the following: "Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period" (Art. 127, para. 1, of the Withdrawal Agreement). The UK's participation in CFSP is, however, made dependent on what will be agreed upon in the future relations agreement:

> "In the event that the Union and the United Kingdom reach an agreement governing their future relationship in the areas of the Common Foreign and Security Policy and the Common Security and Defence Policy which becomes applicable during the transition period, Chapter 2 of Title V of the TEU [CFSP] and the acts adopted on the basis of those provisions shall cease to apply to the United Kingdom from the date of application of that agreement".[38]

It is interesting to note that, despite the general rule that nothing changes, the participation of the UK in PESCO in defence matters is excluded;[39] the UK can participate on an "exceptional basis" only:

> "for the purposes of Article 42(6) and Article 46 TEU and of Protocol (No 10) on permanent structured cooperation established by Article 42 TEU, any references to Member States shall be understood as not including the United Kingdom. This shall not preclude the possibility for the United Kingdom to be invited to participate as a third country in individual projects under the conditions set out in Council Decision (CFSP) 2017/23151 on an exceptional basis, or in any other form of cooperation to the extent allowed and

[35] European External Action Service (EEAS), *Remarks by HR/VP Mogherini at the EU Institute for Security Studies event on "The future of EU foreign, security, and defence policy post Brexit"*, 14 May 2018; eeas.europa.eu.

[36] J. Lis, *Brexit's toll on foreign policy: Losing our reputation day after day*, in *Politics,* 17 July 2017, www.politics.co.uk.

[37] The text was adopted on 14 November 2018 and endorsed in a special session of the European Council on 25 November 2018. See Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 5 December 2018, ec.europa.eu.

[38] Art. 127, para. 2, of the Withdrawal Agreement.

[39] See extensively on PESCO: S. Blockmans, *The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?*, in *Common Market Law Review*, 2018, p. 1785 *et seq.*

under the conditions set out by future Union acts adopted on the basis of Article 42 (6), and Article 46 TEU".[40]

Despite the in principle exclusion of the UK from PESCO, the withdrawal agreement foresees the possibility to continue participation in some of the CSDP institutions and operations,[41] including financial contributions.[42] At the same time, the UK will remain bound by CFSP decisions, unless it makes "a formal declaration to the High Representative of the Union for Foreign Affairs and Security Policy, indicating that, for vital and stated reasons of national policy, in those exceptional cases it will not apply the decision". Yet, even in that case, the rule continues to apply that it "shall refrain from any action likely to conflict with or impede Union action based on that decision".[43]

The situation after the transition period will thus depend on what can be agreed upon in the future relationship agreement. Some hints may already be found in the 2018 Political Declaration that was adopted alongside the Withdrawal Agreement and that was partly revised in 2019. The general plan seems to be to "design flexible and scalable cooperation that would ensure that the United Kingdom can combine efforts with the Union to the greatest effect, including in times of crisis or when serious incidents occur".[44] To that end the declaration *inter alia* also foresees that the UK, upon invitation by the High Representative, joins "informal Ministerial meetings of the Member States of the Union"[45] and that it participates "on a case-by-case basis in CSDP and operations through a Framework Participation Agreement".[46]

[40] Art. 17, para. 7, let. a), of the Withdrawal Agreement.

[41] Yet, Art. 129, para. 7, of the Withdrawal Agreement provides a number of limitations: "During the transition period, the United Kingdom shall not provide commanders of civilian operations, heads of mission, operation commanders or force commanders for missions or operations conducted under Articles 42, 43 and 44 TEU, nor shall it provide the operational headquarters for such missions or operations, or serve as framework nation for Union battlegroups. During the transition period, the United Kingdom shall not provide the head of any operational actions under Article 28 TEU".

[42] Art. 157 of the Withdrawal Agreement: "Until 31 December 2020, the United Kingdom shall contribute to the financing of the European Defence Agency, the European Union Institute for Security Studies, and the European Union Satellite Centre, as well as to the costs of Common Security and Defence Policy operations, on the basis of the contribution keys set out in point (a) of Article 14(9) of Council Decision (EU) 2016/13531, in Article 10(3) of Council Decision 2014/75/CFSP2, in Article 10(3) of Council Decision 2014/401/CFSP3 and in the second subparagraph of Article 41(2) of the Treaty on European Union, respectively, and in accordance with Article 5 of this Agreement".

[43] *Ibid.*, Art. 129. See on the legal implications of this rule R.A. Wessel, *Resisting Legal Facts*, cit.

[44] Art. 94 of the Political Declaration, cit., and Art. 92 of the 2019 Revised Political Declaration, cit.

[45] Art. 97 of the Political Declaration, cit.

[46] *Ibid.*, Art. 101.

The latter will certainly also be beneficial to the EU. The UK is one of only two Member States that has a nuclear capacity, it is one of the five spending 2% of its GDP on defence, and it is a permanent member of the UN Security Council.[47]

II.3. Third country participation in CFSP

The participation of third States in CFSP and CSDP policies and actions has become common practice and also seems to contribute to the objective in Art. 21 TEU that "[t]he Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share [its] principles". Indeed, there are precedents for the situation the UK faces. EU-third State cooperation on foreign affairs usually takes place on the basis of some form of agreement that functions as the base for their cooperation. Some third States – Norway and Iceland in particular – take part in various theme specific Council working groups.[48] Candidate countries show that it is even possible to be an observer in the PSC.[49] However, the EU has no experience in giving observer rights that include the right to speak and agenda making to a non-EU member/non-candidate country in high-level formations such as the PSC, Coreper or the Foreign Affairs Council. Apart from the legal obstacles discussed above, granting such rights to the UK could also have political consequences. It has been observed that it could open the door to similar requests from other non-EU members such as Switzerland, Norway, or Turkey (see further below). Moreover, it can possibly create political tensions in certain other EU Member States, like Sweden, Denmark and others, where Eurosceptic political parties could be tempted to push for "half-member" status.[50]

a) Templates for third country participation in CFSP.

In practice, third country participation in CFSP currently takes place on the basis of agreed frameworks for cooperation. Despite the fact that the future EU-UK foreign and security cooperation will most likely have a different basis, we will briefly mention some examples as they have been part of the debate on the scenarios. The first type of cooperation is formed by the EFTA/EEA agreements.[51] While these agreements do not for-

[47] Cf. L. Lonardo, *EU Common Foreign and Security Policy after Brexit: A Security and Defence Treaty for the "Deep and Special Partnership"*, in *Dublin City University (DCU) Brexit Institute Working Paper*, no. 4/2018, p. 5.

[48] P. Rieker, *Outsidership and the European Neighbourhood Policy: The Case of Norway*, in *Global Affairs*, 2017, p. 1 *et seq.*; C. Hillion, *Norway and the Changing Common Foreign and Security Policy of the European Union*, cit.

[49] J. Lis, *Brexit's toll on foreign policy*, cit.

[50] J.C. Piris, *If the UK votes to leave,* cit. The possibility of voting rights for the UK was also excluded by the HR/VP in answering questions by reporters (cfr. EEAS, *Remarks by HR/VP Mogherini at the EU Institute for Security Studies event on "The future of EU foreign, security, and defence policy post Brexit"*, cit.); European Parliament Resolution 2018/2573(RSP) of 7 March 2018 on the framework of the future EU-UK relationship.

[51] See on the EEA in relation to Brexit: C. Hillion, *Brexit Means Br(EEA)xit: The UK Withdrawal from the EU and its Implications for the EEA*, in *Common Market Law Review*, 2018, p. 135 et seq.

mally include cooperation on foreign and security policy, the EU has the habit of inviting EFTA/EEA countries to join EU statements and position on foreign policy.[52] Furthermore, the EEA Council meets twice a year with representatives of the Commission and the European External Action Service (EEAS). Representatives of the European Council are present at those meetings as well as the representatives of the rotating Council presidency. During this EEA Council meeting, foreign policy is openly discussed while searching for consensus between the EU and the EEA nations.[53] The EU-Norway relationship serves as a good example of a continuous dialogue with the EU on numerous foreign policy issues.[54] This is done through a formal format that consists of two meetings per year between the Norwegian foreign ministers and the foreign minister of the EU. Additionally, there are several meetings where officials from Norway meet together with their counterparts from Iceland and Lichtenstein in CFSP working groups. So far, Norwegian officials have participated in CFSP working groups that operate in policy areas that Norway has an interest in, such as the Balkans, Russia, anti-terrorism coordination and the Middle-East peace process. In the end, Norway is invited to sign EU foreign policy statements and thus to align its position to that of the EU.[55] Norway's policy is to join EU statements whenever possible.[56] It has been observed that "Norway has thus been involved in essentially all of the core aspects of the EU CFSP".[57] Apart from Norway (and Iceland) as active CFSP participants, Switzerland is worth mentioning as well. As a non-EEA EFTA member Switzerland joins the EEA Council meetings and regularly joins EU foreign statements and participates in EU missions.[58]

Third country participation in CFSP is also possible on the basis of a Partnership and Cooperation Agreement (PCA). While some PCAs do not expressly refer to foreign policy cooperation (e.g. the one with the Philippines), the EU-Ukraine PCA did as it allowed

[52] See also K. ZAREMBO, *Ukraine in EU security: an undervalued partner*, in *FRIDE Policy Brief*, 2011, p. 88; as well as Norwegian Ministry of Foreign Affairs, *Cooperation on foreign and security policy*, 2013, www.regjeringen.no; A. ISLEIFSSON, *Brothers without Arms: Explaining Iceland's Participation in European Union CSDP Operations*, Lund University, Department of Political Science, Master's Thesis in European Affairs, Spring 2014, available at www.pdfs.semanticscholar.org; and European Commission, *Screening Report Iceland*, 2011, available at edz.bib.uni-mannheim.de.

[53] See for instance: EEA Council meeting, Conclusions of the 46th meeting, 15 November 2016; www.efta.int.

[54] See C. HILLION, *Norway and the Changing Common Foreign and Security Policy of the European Union*, cit.

[55] P. RIEKER, *Norway and the ESDP: Explaining Norwegian Participation in the EU's Security Policy*, in *European Security*, 2006, p. 281 *et seq*.; H. SJURSEN, *Reinforcing Executive Dominance: Norway and the EUs Foreign and Security Policy,* in E. ODDVAR ERIKSEN, J.E. FOSSUM (eds), *The European Union's Non-Members: Independence under Hegemony?*, Routledge, 2015, p. 189 *et seq*.

[56] Norwegian Ministry of Foreign Affairs, *Cooperation on foreign and security policy*, cit.

[57] C. HILLION, *Norway and the Changing Common Foreign and Security Policy of the European Union*, cit., p. 5.

[58] Cf. Council Conclusions of 28 February 2017 on *EU relations with the Swiss Confederation*.

Ukraine to join EU statements and positions as well as having high-level dialogues at ministerial level and regular meetings at senior official level.[59]

More comprehensive and in-depth cooperation is possible on the basis of an Association Agreement (AA). In the, more recent, AA between the EU and Ukraine, for example, Art. 7 concerns cooperation on foreign and security policy and provides that: "The Parties shall intensify their dialogue and cooperation and promote gradual convergence in the area of foreign and security policy, including the Common Security and Defence Policy (CSDP), and shall address in particular issues of conflict prevention and crisis management, regional stability, disarmament, non-proliferation, arms control and arms export control as well as enhanced mutually-beneficial dialogue in the field of space".

Similar cooperation can be found in a number of Stabilisation and Association Agreements (SAAs).[60] Thus, in the EU-Serbia SAA, Art. 10 provides for "an increasing convergence of positions of the Parties on international issues, including CFSP issues, also through the exchange of information as appropriate, and, in particular, on those issues likely to have substantial effects on the Parties" as well as "common views on security and stability in Europe, including cooperation in the areas covered by the CFSP of the European Union".[61] In general, candidate countries – which basically are almost all countries that have signed an SAA – are invited to join Gymnich meetings and participate as observers in the PSC.

More generally, the EU has gained experience with third country participation in CFSP through its European Neighbourhood Policy (ENP). As the agreements are all tailored made, they do not all deal with foreign policy issues in the same manner. An example can be found in the EU Georgia Action Plan, which – as "Priority area 7" – mentions the goal to "Enhance EU-Georgia cooperation on Common Foreign and Security Policy, including European Security and Defence Policy. Georgia may be invited, on a case by case basis, to align itself with EU positions on regional and international issues".[62]

Similar notions may be found in so-called Framework Agreements. Thus, Art. 3 of the 2017 Agreement with Australia provided for political dialogues and cooperation in

[59] Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine, signed on 14th June 1994, entered into force on 1st March 1998.

[60] Cf. D. ĐUKANOVIĆ, *The Process of Institutionalization of the EU's CFSP in the Western Balkan Countries during the Ukraine Crisis*, in *Croatian International Relations Review*, 2015, p. 81 *et seq*.

[61] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, signed on 29th April 2008, entered into force on 1st August 2013.

[62] EU-Georgia Action Plan, 2006, eeas.europa.eu.

the area of foreign policy,[63] as does the Strategic Partnership Agreement with Canada, that was negotiated alongside CETA.[64]

These examples reveal the experience of the European Union with the participation of third States in foreign and security policy. It has become clear by now that the future arrangement with the UK will most probably be a separate agreement. Yet, examples can be drawn from the many existing agreements and arrangements.[65] In addition, ad hoc alignment with EU policies and actions remains possible. This will be particularly relevant in relation to (existing and new) sanctions.[66]

b) Third country participation in CSDP.

Finally, third country participation has proven to be possible in CSDP missions, both civilian and military. Around 45 non-EU countries have contributed troops to CSDP missions and operations (approximately 30 if one detracts third countries that have since then become Member States). Four non-EU countries have participated in EU Battlegroups: Turkey, Norway, Ukraine and Macedonia.[67] This has included, for example, all NATO members, and all EU candidate countries. The legal basis for such cooperation has been a treaty in the form of a Framework Participation Agreement (for more structural participation in CSDP missions), or a Participation Agreement (for *ad hoc* participation in a mission). These agreements are concluded in the form of bilateral EU-only agreements on the basis of Arts 37 TEU and 218 TFEU.[68] Thus, for instance, the FPA with Turkey reveals the procedural rights of the participating country: "The Republic of Turkey shall have the same rights and obligations in terms of day-to-day management of the operation as European Union Member States taking part in the operation, in accordance with the legal instruments referred to in Article 2 (1) of this Agreement".[69] This principle returns in all FPAs. Third countries are not involved in drafting the operations. They typically receive access to relevant documents once the participation has been accepted by the Political and Security Committee (PSC). In practice, third countries are ex-

[63] Framework Agreement between the European Union and its Member States, of the one part, and Australia, of the other part, signed on 7th August 2017.

[64] 2016 Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part.

[65] In that respect, Art. 97 of the Political Declaration, cit., indeed foresees a "Political Dialogue on Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP) as well as sectoral dialogues".

[66] It has been observed that the European Union Withdrawal Bill 2017-19 will copy existing EU sanctions measures into UK law and may also provide a legal basis for new sanctions regimes. See L. LONARDO, *EU Common Foreign and Security Policy after Brexit*, cit., p. 9.

[67] See A. BAKKER, M. DRENT, D. ZANDEE, *European defence: how to engage the UK after Brexit?*, Clingendael report, July 2017; www.clingendael.org, p. 11. This report also provides a good overview of the current and past participation of the UK in CSDP missions.

[68] See also L. LONARDO, *EU Common Foreign and Security Policy after Brexit,* cit., p. 10; and A. BAKKER, M. DRENT, D. ZANDEE, *European defence,* cit.

[69] Art. 6, para. 5, of Section 2, of Annex II, of Turkey's FPA.

pected and required to accept the EU's schedule and procedures, and "by nature, non-member states' participation in EU operations requires a certain degree of acceptance of EU practices, as well as a degree of subordination".[70]

This latter point may be difficult for the UK to swallow, yet full participation in the preparation and formation of CSDP missions through, *inter alia*, the Civilian Committee, the EU Military Committee, the Politico-Military Group, the Civilian Planning and Conduct Capability, and the EU Military Staff will be difficult to realise. Apart from legal obstacles, other States that contribute extensively to CSDP missions – such as Turkey – are expected to demand equal treatment.[71] A possible starting point may be offered by the position of Norway. Norway has contributed assets and personnel to a large variety of CSDP missions and operations. This country currently has access to a regular dialogue with regards to EU foreign and security policy. Moreover, Norway's agreement allows the country to join CSDP missions and operations, as well as cooperation in the European Defence Agency (EDA).[72] Nevertheless, Norway struggles with similar decision-shaping problems.[73]

III. International law aspects of post-Brexit EU-UK cooperation

Brexit cannot merely be settled on the basis of European Union law. While future relations with the UK will be covered by EU external relations law, it is equally clear that any legal post-Brexit cooperation, including CFSP, will primarily take place on the basis of international law.[74] International law also has something to say on the continuation of currently existing agreements, for instance in relation to ongoing CSDP missions. Furthermore, questions of international responsibility and dispute settlement may arise. This section will briefly highlight some of the international legal aspects related to the UK's participation in CFSP as a third State.

[70] T. Tardy, *CSDP: Getting Third States on Board*, in *European Union Institute for Security Studies*, 6/2014, www.iss.europa.eu.

[71] See also the European Parliament study *CSDP after Brexit: The Way Forward*, cit., p. 19: "should London be granted too many privileges, many other countries would go back on the attack to call for similar rights".

[72] F. Cameron, *After Brexit: Prospects for UK-EU cooperation on foreign and security policy*, European Policy Centre, 2017, available at www.epc.eu.

[73] N. Koenig, *Towards Norway Plus? EU-UK defence cooperation post-Brexit*, Jacques Delors Institut Berlin, 7 February 2018, www.delorsinstitut.de.

[74] See in general on the international law aspects for instance J. Odermatt, *Brexit and International Law: Disentangling Legal Orders*, in *Emory International Law Review*, 2017, p. 1051 *et seq.*; G. Van der Loo, S. Blockmans, *The Impact of Brexit on the EU's International Agreements*, in *CEPS Commentary*, 15 July 2016; www.ceps.eu; as well as R.A. Wessel, *Consequences of Brexit for International Agreements Concluded by the EU and its Member States*, in *Common Market Law Review*, 2018, p. 101 *et seq.*

III.1. Existing and new CFSP/CSDP agreements

Interestingly enough, agreements in the area of CFSP and CSDP are concluded as so-called "EU-only" agreements. These are bi-lateral agreements between the EU and a third State that are not co-signed by the EU Member States, as would be the case for mixed agreements. Most of the agreements regulate the status of a CSDP mission in a host State.[75] As I have argued more extensively elsewhere,[76] based on both treaty law and EU law arguments, it is not obvious that the UK can continue to rely on these agreements in a situation in which it would continue to participate in an ongoing mission post-Brexit. Agreements concluded by the EU usually apply to the territories in which the Treaty on European Union is applied.[77] Unless some kind of transitional regime is agreed to,[78] the territory of the UK will no longer be covered by the agreements after Brexit-day. Art. 216, para. 2, TFEU furthermore makes clear that international agreements concluded by the EU are (arguably *only*) "binding upon the institutions of the Union and its Member States". From the EU side the situation is therefore quite clear: international agreements concluded by the EU are no longer binding on the UK. The latter is neither bound through EU law (Art. 216, para. 2, TFEU), nor on the basis of international treaty law (Art. 34 of the 1969 Vienna Convention on the Law of Treaties, hereinafter VCLT[79]).

The argument that the EU merely concluded the agreements "on behalf of" its Member States and that the UK would thus remain bound once the competences are returned to it seems problematic. This argument is often linked to the notion of "succession". Yet, the Treaty on European Union clearly presents the EU as a separate international actor and the text of the agreements does not indicate the UK (or any other Member State) as a

[75] The international agreements concluded under the CFSP may be found in the EU database. See for a recent example the Agreement between the European Union and the Republic of Moldova on security procedures for exchanging and protecting classified information in OJEU L106, of 22 April 2017.

[76] R.A. Wessel, *Consequences of Brexit for International Agreements Concluded by the EU and its Member States*, cit.

[77] See for instance Art. 360, para. 1, of the 2014 Association Agreement between EU and Central American States, which provides: "For the EU Party, this Agreement shall apply to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties". Or Art. 52 of the 2010 EU-Korea Framework Agreement: "This Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union is applied and under the conditions laid down in that Treaty, and, on the other hand, to the territory of the Republic of Korea". Compare also Art. 29 VCLT, which sets out that a treaty is binding on a party in respect of its entire territory.

[78] See also European Council, *Guidelines Following the United Kingdom's Notification under Article 50 TEU*, cit. More extensively: M. Dougan, *An Airbag for the Crash Test Dummies? EU-UK Negotiations for a Post-Withdrawal "Status Quo" Transitional Regime Under Article 50 TEU*, in *Common Market Law Review*, 2018, p. 57 *et seq*.

[79] Art. 34 VCLT provides: "A treaty does not create either obligations or rights for a third State without its consent". Art. 34 VCLT is considered a principle of customary international law and is as such also binding on the Union; Court of Justice, judgment of 25 February 2010, case C-386/08, *Brita*, paras 40-45.

contracting party. Furthermore, as also held by Odermatt, it is far from clear that international law accepts the succession of international organizations by former Member States. The Vienna Convention on Succession of States in Respect of Treaties, for example, applies only "to the effects of a succession of States in respect of treaties between States" and it is clear that the EU is not a State.[80] In any case, viewing Brexit as resulting in a succession of (parts of) the EU by the UK remains somewhat problematic.

This implies that – unless all parties involved agree differently – the UK's position in relation to ongoing and new missions will have to be settled on the basis of a new Framework Partnership Agreement (see above).[81] This can be a separate agreement, but it could also be a chapter in the more general new partnership agreements that is envisaged to regulate the new relationship between the EU and the UK.

III.2. International responsibilities and dispute settlement

It is a truism that with Brexit international responsibilities between the Union, its Member States and the UK will shift. So far, academics have largely focused on the division on international responsibilities between the Union and its Member States, for instance in relation to military missions.[82] New questions arise in relation to responsibilities flowing for earlier international agreements, including those regulating ongoing missions. The final Withdrawal Agreement and/or the future relationship agreement will have to cover how to deal with responsibilities flowing from pre-Brexit actions.

The Withdrawal Agreement foresees the establishment of "[a] Joint Committee, comprising representatives of the Union and of the United Kingdom", that "shall be responsible for the implementation and application of this Agreement".[83] For dispute settlement between the Union and the UK it is interesting that the Withdrawal Agreement provides that the parties "shall only have recourse to the procedures provided for in

[80] J. Odermatt, *Brexit and International Law*, cit., p. 1059. The non-state nature of the EU was confirmed by the Court of Justice, opinion 2/13 of 18 December 2014, para. 156.

[81] This seems also foreseen in Art. 101 of the Political Declaration, cit.: "The Parties welcome close cooperation in Union-led crisis management missions and operations, both civilian and military. The future relationship should therefore enable the United Kingdom to participate on a case by case basis in CSDP missions and operations through a Framework Participation Agreement".

[82] See for instance A. Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control*, Cambridge: Cambridge University Press, 2016; F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights*, Antwerp, Oxford, Portland: Intersentia, 2009. Cf. also A. Sari, R.A. Wessel, *International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime*, in B. Van Vooren, S. Blockmans, J. Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension*, Oxford: Oxford University Press, 2013, p. 126 *et seq*.; R.A. Wessel, L. den Hertogh, *EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?,* in M. Evans, P. Koutrakos (eds), *International Responsibility: EU and International Perspectives*, Oxford: Hart, 2013, p. 339 *et seq.*

[83] Art. 164 of the Withdrawal Agreement.

this Agreement".[84] The Joint Committee plays a first role, but "if no mutually agreed solution has been reached within 3 months after a written notice has been provided to the Joint Committee [...] the Union or the United Kingdom may request the establishment of an arbitration panel. Such request shall be made in writing to the other party and to the International Bureau of the Permanent Court of Arbitration".[85] Obviously – keeping in mind the Union's views on its autonomy[86] – "a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89 (2)"[87] shall not be decided by the arbitration panel, but by the CJEU.[88]

No specific provisions in this regard can be found in relation to CFSP and CSDP. This seems to imply that any conflicts over CFSP issues are also to be solved on the basis of the procedures of the Withdrawal Agreement. Unless, indeed, the question concerns the interpretation of EU law. The question is how this will play out in cases in which the CJEU does not have jurisdiction given the restrictions it faces in the CFSP area.[89] Following the text of the Withdrawal Agreement it could then be up to the arbitration panel to rule. Yet, the experience with opinion 2/13 has revealed the CJEU's reluctance to accept possible interference by other courts even in cases where it itself lacks jurisdiction.[90]

IV. Conclusion

Despite the clear ambitions of the UK to continue participating in the Common Foreign, Security and Defence Policy – and its desire to be "friends with benefits" – questions arise from both an EU law and an international law perspective as to the realisation of these ambitions.

With regard to EU law, the present *Article* points to a number of restrictions in both EU primary and secondary law to allow the UK to maintain its participation in the key decision-making organs. This is not to say that any close cooperation will be excluded.

[84] *Ibid.*, Art. 168.

[85] *Ibid.*, Art. 170, para. 1.

[86] Among the many publications on the autonomy of the EU, see for instance T. Molnár, *The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States,* in *Hungarian Yearbook of International Law and European Law*, 2015, p. 433 *et seq*.; as well as C. Contartese, *The Autonomy of the EU Legal Order in the CJEU's External Relations Case-Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again*, in *Common Market Law Review*, 2017, p. 1 *et seq*.

[87] Art. 89, para. 2, of the Withdrawal Agreement: "If, in a judgment referred to in paragraph 1, the Court of Justice of the European Union finds that the United Kingdom has failed to fulfil an obligation under the Treaties or this Agreement, the United Kingdom shall take the necessary measures to comply with that judgment".

[88] *Ibid.*, Art. 174, para. 1. A similar provision can be found in Art. 134 of the Political Declaration, cit.

[89] See C. Hillion, R.A. Wessel, *The Good, the Bad and the Ugly*, cit.

[90] *Ibid*., as well as more extensively: A. Łazowski, 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, p. 179 *et seq*.

The existing regimes with other third countries provide ample examples of alignment of the UK with EU possibilities and the use by the EU of UK diplomacy and capabilities. In a political sense, however, the legal restrictions imply that, as one observer held: the "UK would have to accept a foreign policy role as a 'rule taker' rather than as a 'rule maker', and as a follower rather than as a leader".[91] Obviously, future arrangements may lead to an unprecedented form of cooperation in this area, but given both some primary law restrictions and political positions taken by the EU,[92] any "half member" status will probably have to be excluded (even) in the area of CFSP. Despite the obvious mutual benefits of a close cooperation on foreign and security policy, legal requirements of consistency also support the notion that CFSP cannot be the cherry to be picked. Over the years, the integration of CFSP and other external relations policies has become more intense and general Union principles largely apply to the CFSP regime.

Furthermore, it is clear that post-Brexit EU-UK relations will be covered by international law. Despite the fact that both the Withdrawal Agreement and any future relations agreement will be "an integral part" of EU law,[93] parties will have to follow the applicable international rules and principles. The new agreements will in particular have to regulate the new division of international responsibilities; not just for new EU external action the UK will participate in, but also for claims flowing from previous or ongoing actions and missions. Finally, with regard to any dispute settlement on CFSP and CSDP issues, the current provisions are unclear as to the role of the CJEU whenever questions of EU law interpretation arise in international arbitration.

[91] P.J. CARDWELL, *The United Kingdom and the Common Foreign and Security Policy of the EU,* cit., p. 21. Cf also the monograph by the late S. DUKE, *Will Brexit Damage our Security and Defence? The Impact on the UK and EU*, London: Palgrave Macmillan, 2019.

[92] The position of the European Parliament has also been quite clear in this respect: "The European Parliament notes that, on common foreign and security policy, the UK as a third country will not be able to participate in the EU's decision-making process and that EU common positions and actions can only be adopted by EU Member States; points out, however, that this does not exclude consultation mechanisms that would allow the UK to align with EU foreign policy positions". European Parliament Resolution 2018/2573(RSP) of 14 March 2018 on the framework of the future EU-UK relationship.

[93] To quote the famous Court of Justice, judgment of 30 April 1974, case 181/73, *Haegeman v. Belgian State*.

ARTICLES

DIFFERENTIATED INTEGRATION IN EUROPE AFTER BREXIT: A LEGAL ANALYSIS

GIACINTO DELLA CANANEA*

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ABSTRACT: It is self-evident that the European Union has evolved over time and so has the relationship between unity and differentiation. Understanding the nature of this evolution is more difficult. This *Article* seeks to explicate this development, not by a temporal analysis, but by delineating two opposite political visions of the European construction, that is, the vision that is centred on the "ever closer union among the peoples of Europe" and that which postulates a wide and loose union. The differing solutions provided by these visions are examined with regard, first, to some mechanisms of differentiated integration, which are considered against the twin criteria of clarity and coherence and, second, with regard to other legal mechanisms, which imply an interaction between EU members and third countries. This can be useful for a better understanding of the institutional and legal options that are available for the future.

KEYWORDS: European Union – European integration – ever closer union – differentiated integration – enhanced cooperation – European Economic Area.

I. INTRODUCTION

The outcome of the referendum that has been held in the United Kingdom about leaving the European Union (Brexit) has fuelled the debate, in political and academic circles,

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about the future of the EU, in particular from the perspective of differentiated integration.[1] This *Article* seeks to contribute to the debate, by arguing that it should be made clear that the differing solutions that are proposed for the challenges with which the Union is confronted are based not only on different legal foundations, but also on distinct visions of the European construction. For analytical purposes, two opposite political visions can be delineated. At this stage, it suffices to characterize each of them in the briefest terms. There is, first, the vision that is centred on the idea, or ideal, of an "ever closer union among the peoples of Europe", as provided by the Treaty of Rome's preamble. The other vision of Europe postulates a wide and loose union where the members do not necessarily wish to change the current state of things.

It is precisely because these are political visions that they provoke passionate debates. But, for all their importance in social and political life,[2] passions do not help analytical clarity and coherence.[3] My intent is to show the difference between a vision of the European construction that purports the achievement of the "ever closer union" and that of a wider and looser union. This distinction will be clarified in the first part of the *Article*. Next, some mechanisms of differentiated integration will be considered against the twin criteria of clarity and coherence. Finally, there will be a discussion of other legal mechanisms, which imply an interaction between EU members and third countries. This might be helpful for a better understanding of the how the issues arising from Brexit can be considered.

II. Two visions of Europe

II.1. A first cut at the argument

When discussing about differentiated integration, it is important to bear in mind that there is, not surprisingly, variety of opinions about the nature and purposes of European integration. Two opposite visions of Europe can be delineated. The vision of unified Europe that is based on the idea of the "ever closer union", whilst recognizing the diversity of European peoples not only, descriptively, as an element of the real but also, prescriptively, as an element that must be preserved, aims at strengthening the ties between them. The other vision, which aims at achieving a wider and looser union, pays less attention to those ties and favours greater flexibility.

[1] For a discussion of the theories of European integration, see F.G. Snyder, *European Integration*, in D.S. Clark, *Encyclopedia of Law and Society*, Thousand Oaks: Sage, 1994, p. 1 *et seq.*; A. Stone Sweet, *Integration and the Europeanization of the Law*, in P. Craig, R. Rawlings (eds), *Law and Administration: Essays in Honour of Carol Harlow*, Oxford: Oxford University Press, 2003, p. 197 *et seq*.

[2] See A.O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph*, Princeton: Princeton University Press, 1977.

[3] P. Craig, *Constitutions, Constitutionalism and the European Union*, in *European Law Journal*, 2001, p. 125 *et seq*.

None of these visions is perfect. Nor can they be included in a sort of Hegelian dialectic, where the thesis and the antithesis culminate in a synthesis of some type. My intent is, rather, to show that the differences between the two visions of Europe are so profound that the significance of some central elements of European integration will differ depending upon the framework within which they are considered. This applies, in particular, to the various mechanisms of differentiated integration, which will be considered later.

II.2. An "ever closer union"

With regard to the first political vision of Europe, three are the main themes underlying it: first, the meaning and relevance of the "ever closer union"; second, some elements of flexibility.

The first vision is well grounded in the genetic act of modern European integration, the Declaration of 9 May 1950 delivered by Robert Schuman, as well as by the Founding Treaties. The Declaration was premised on the necessity to eliminate the "age-old opposition of France and Germany".[4] However, its drafters were fully aware of the importance, for a polity, of the cultural and social construction of the sense of belonging. They thus proposed the creation of a community, viewed as a "first step in the federation of Europe", through the achievement of a "*de facto* solidarity" between the Member States.[5]. The Treaty establishing the European Coal and Steel Community (Treaty of Paris) was based on the same strategy, but with an important linguistic shift. It did no longer refer only to the States, but aimed at laying the foundations of a community of peoples (a "*communauté plus large et plus profonde entre des peuples longtemps opposés*").[6] The Treaty establishing the European Economic Community (Treaty of Rome) sought to achieve the same goal. According to its preamble, this Community was created "*among peoples* long divided by bloody conflicts". An adequate awareness of such conflicts was not, however, an obstacle to the choice of those peoples to give, through the institutions thus created, "direction to *their future common destiny*". The Community was thus the first step towards "an ever closer union among the peoples of Europe". This formulation was explicitly teleological, in the sense that it set out the *telos* of European integration.[7]

That not only the founding States, but also their peoples, are constitutionally relevant is of importance in helping us to understand the nature of the legal order of the Community. The Court of Justice, for example, referred to it in its famous ruling in *Van Gend en Loos*, when it argued that the European Economic Community (EEC) constituted

[4] The Schuman Declaration – 9 May 1950, europa.eu.

[5] *Ibid*.

[6] Preambule du Traité instituant la Communauté Européenne du Charbon et de l'Acier, 18 April 1951.

[7] For this terminology, see J.H.H. Weiler, *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999, and J.H.H. Weiler, *Europe in Crisis – On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'*, in *Singapore Journal of Legal Studies*, 2012, p. 248 *et seq*.

a "new legal order of international law" and established the direct applicability of the Treaty of Rome.[8] This is not to say, however, that the Treaty of Rome was based on strong democratic mechanisms in the sense that all public power was channelled through parliaments.[9] Quite the contrary, it simply set up a Common Assembly, certainly not an all-powerful body, though its institutional connection with national parliaments could be viewed in a different light today, in a period in which new attempts are being made to strengthen the ties between representative institutions.

The shift from States to peoples has had a number of important repercussions, the first of which is the pluralist conception of the social element. The Community was not simply premised on the recognition of the existence of a plurality of peoples but, precisely because its *telos* was to give rise to an "ever closer union" between those peoples, on the common understanding that no step would be taken to forge a single people or *demos*. Another consequence concerns the social element, which has a pluralist connotation. This has a further consequence, from the viewpoint of flexibility and of the differentiation that it can allow. Since the beginning, the legal order of the Community has been characterized by the existence of legal mechanisms allowing some form of flexibility. They can be justified in a simple manner: without some degree of flexibility the execution of legislation in very different areas of the same legal system can be very hard, if not impossible.

The Treaty of Rome provided for both a transitional period and for special arrangements. The transitional period was provided in order to give all the Member States enough time to adjust their internal institutional and legal arrangements to cope with the obligations stemming from their membership. Special legal arrangements were laid down either for some policies, by way of specific derogations, or for some parts of the territory of the Member States that were outside Europe. Interestingly, the Treaty of Rome expressed the partners' will to "to associate with the Community the non-European countries and territories which have special relations with Belgium, France, Italy, and the Netherlands".[10] It also specified that nothing precluded the existence of a regional union between Belgium, Luxembourg and the Netherlands, which stipulated an agreement in 1958. After the accession of Denmark, Ireland and the UK, other norms gave the latter some opt-out clauses and specified that the Treaty establishing the European Community (TEC) applied only partially to the Isle of Man and did not apply as

[8] Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos v. Administratie der Belastingen* (holding at para. II, that the "Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples").

[9] See P. Craig, *The Community Political Order*, in *Indiana Journal of Global Legal Studies*, 2003, p. 79 *et seq*.

[10] Art. 131, para. 1, TEC. For further analysis, see D. Hanf, *Flexibility Clauses in the Founding Treaties: From Rome to Nice*, in B. de Witte, D. Hanf, E. Vos (eds), *The Many Faces of Differentiation in EU Law*, Antwerpen: Intersentia, 2001, p. 4 *et seq*.

such to the Faroe Islands, though it could have been extended to them subsequently. However, these were very limited and specific areas, which could justify limited exceptions without undermining the postulates of the other conception of the constitutional framework of the Community.

II.3. A WIDER AND LOOSER UNION

The other vision of Europe, going ideally from the Atlantic Ocean to the Urals, is not new, though it has gained consent in the last two decades. Some elements of this vision can be traced in the Treaty of Paris. Its Preamble emphasized the intent to create a "broad" community. Accordingly, the Treaty of Paris established that "[a]ny European State may request to accede to the present Treaty".[11] The Treaty of Rome used slightly different words. It established that "any European State may apply to become a member of the Community".[12] It added a new element; that is, the Community's capacity not only to conclude treaties with third countries and international organizations, but also to "establish an association" involving reciprocal rights and obligations.[13]

This political vision of the Community was converted into reality during the following decades. While membership has remained unchanged until 1973 and has changed by way of limited accessions during the following three decades,[14] it has changed more radically after 2000, when ten new members have acceded the EU, followed by other three in the following years. An important step has thus been made toward the "broad" union envisaged fifty years earlier and a new policy has replaced that of gradual and limited extension of membership, with the consequence that the number of Member States was almost doubled.[15]

This was not without institutional consequences. If the 1990s had seen the rise of subsidiarity, which appeared both as a rationale and an operating tool for resolving the practical problems raised by the widening scope of Community policies, the following decade has been characterized by discourses about flexibility and differentiation. Many have argued that new and more flexible policy methods were necessary,[16] including various forms of differentiated integration. Others have underlined the necessity to respect national constitutional identities. Both arguments can be better understood in the context of an analysis of the values upon which the Union is founded.

[11] Art. 98, para. 1, of the Treaty of Paris.

[12] Art. 237, para. 1, TEC.

[13] Art. 238, para. 1, TEC.

[14] Denmark, Ireland and the UK in 1973; Greece in 1980; Portugal and Spain in 1985; Austria, Finland and Sweden in 1995.

[15] See C. LEQUESNE, *Les perspectives institutionnelles d'une union élargie*, in *Pouvoirs*, 1994, p. 129 *et seq.*

[16] See H. WALLACE, *Flexibility: A Tool of Integration or a Restraint on Disintegration?*, Oxford: Oxford University Press, 2000.

As observed earlier, some elements of flexibility have been laid down since the early period of European integration. They are perfectly compatible with the first vision of Europe, that centred on the idea of an "ever closer union". What characterizes the other vision of Europe, therefore, is not the recognition that some form of flexibility and differentiation is simply necessary. It is, rather, the use of normative and functional arguments in favour of institutional mechanisms that allow the Member States to follow different rules and paths, not just for a limited period of time, but for a longer period or forever.

Normatively, two main arguments might be used to support an increased differentiation of EU institutional and legal mechanisms. Firstly, it is coherent with the increasing internal differentiation of the EU. Secondly, it accords a prominent role to pluralism.[17] The consequences of this change in attitude are important. There is the provision according to which the Union "respects the national identities" of its Member States.[18] Other provisions aim at protecting cultural diversity. Interestingly, there is a shift between the Charter of Fundamental Rights of the European Union (Charter) and the Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon). While the former imposed on the Union the obligation to respect "cultural, religious, and linguistic diversity",[19] the latter provides that the EU shall respect its "*rich* cultural and linguistic diversity".[20]

Functionally, it might be argued that a Union of almost thirty members, with very different political cultures and policy processes, requires a much greater degree of flexibility and differentiation. This is not necessarily an obstacle to the traditional functional or neo-functional strategy of creating *de facto* solidarity between the peoples of Europe on concrete issues. Rather, an approach that leaves much room for different national choices may preserve the dynamic of integration. In this sense, some observers have pointed out that, without the distinction between the various phases of the Economic and Monetary Union (EMU) and the opt-out clauses for Denmark and the UK, it would not have been possible for the other Member States to proceed in this path. This is an important point to which we shall return in the next section. Meanwhile, it is important to observe that, for all its appeal, the increasing recourse to differentiation is not without difficulties. In particular, it raises serious issues from the point of view of accountability, which is always more difficult in non-unitary frameworks than in unitary ones.[21]

[17] For this perspective, see C. HARLOW, *Voices of Difference in a Plural Community*, in *American Journal of International Law*, 2002, p. 339 *et seq*. See also P. MANIN, J.V. LOUIS (eds), *Vers une Europe différenciée? Possibilité et limites*, Paris: Pedone, 1996.

[18] Art. 4, para. 2, TEU, according to which national identities are "inherent in the fundamental structures, political and constitutional, inclusive of regional and local self-government" of each country.

[19] Art. 22 of the Charter.

[20] Art. 2 TEU (emphasis added).

[21] For this remark, see P. CRAIG, *European Governance: Executive and Administrative Powers Under the New Constitutional Settlement*, in *International Journal of Constitutional Law*, 2005, p. 436.

III. Institutional mechanisms of differentiated integration within the EU

Thus far, we have seen that there is a tension inherent between two visions of Europe, with important consequences about the goals of the Union, the conception of its peoplehood and the legal tools for ensuring coherence and unity. We cannot, however, content ourselves with delineating this distinction. We must subject existing or proposed institutional mechanisms to careful scrutiny under the twin criteria of clarity and coherence.

There is, in particular, the need to ensure coherence between ends and means. Keeping this in mind, our discussion will continue with an analysis of what has been probably the single most important achievement after Maastricht; that is, the EMU. As a second step, enhanced cooperation procedures will be considered. Next, we will look at a recent and controversial treaty between most EU members, but not all; that is, the Fiscal Compact.

III.1. No "ever closer" monetary integration within the EMU

Given the object and purposes of this *Article*, no attempt will be made here to synthetize the complex legal and institutional arrangements on which the EMU is based.[22] Suffice it to mention few legal norms and facts that are substantially undisputed. First of all, the EMU is the main innovation from the viewpoint of the transfer of sovereign powers from the Member States to the EU, which is particularly visible in the adoption of a single currency. Secondly, and as a specification of this, institutionally the EMU consists of three distinct, though related, parts. There is the economic part, which rests in the hands of national governments, though under a set of common rules, while national budgetary policies are constrained by common targets, standards and checks, within the procedure of multilateral surveillance. There is, finally, monetary policy-making, which is conferred to the European Central Bank (ECB). Thirdly, institutional differentiation has been increased by the different choices made by the Member States. Three phases or stages were envisaged and while all the States that were members of the EU were included in the first one and could move to the next, the norms governing the EMU did not impose on them to ask to be included in the third stage, as it will soon be explained. A differentiated membership has thus emerged. Last but not least, unlike traditional common policies, the EMU is characterized by a complex variety of rules, including guidelines and technical opinions, and

[22] On the road to the EMU, see N. Thygesen, *The Delors Report and European Economic and Monetary Union*, in *International Affairs*, 1989, p. 637 *et seq*. For an outline of the main issues, see J.V. Louis, *The Economic and Monetary Union: Law and Institutions*, in *Common Market Law Review*, 2004, p. 575 *et seq.*, and F.G. Snyder, *EMU – Integration and Differentiation: Metaphor for European Union*, in P. Craig, G. de Búrca (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, p. 687 *et seq*. But see also G. Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?*, Cambridge: Cambridge University Press, 2014, p. 20 (referring to the EMU as an example of the more general crisis of the EU).

by the exemption from the ordinary mechanisms for ensuring compliance. All the rest is controversial, to say the least. In particular, it is disputed whether the policies followed by the ECB have saved the Euro, and with it the EU itself, or have just dissipated resources that should have been used otherwise.

The main question that arises is, however, another; that is, how the first and the third aspects mentioned earlier – that is, the fundamental importance of the EMU and its differentiated membership – can be reconciled. Jean-Victor Louis has suggested a twofold explanation, pragmatic and normative. Pragmatically, granting to Denmark and the UK an "opt-out" clause was the only way to obtain their consent to the revision of the Treaties, in view of the unanimity that was required. Normatively, he acknowledged that the special status granted to these members was "singular". But he argued that, although such status appeared to be of indefinite duration, it was "*de facto* only temporary if the objective of an ever closer union is to be safeguarded", and added that it was with this idea in mind that such status was conceded.[23] This is a very helpful contribution to the understanding of the complex decisions taken by the European Council. The normative argument that he has advanced is however problematic in some respects, in particular with regard to the potential dismissal of the goal of the "ever closer union". A distinct but related question is whether the course of events made such goal unattainable.

Let us begin by clarifying a preliminary issue. It is often asserted that Denmark and the UK were granted an opt-out clause from the EMU, but this is not wholly correct. In fact, they were included in the EMU, but were not required to participate in its third stage, with the further caveat that Denmark obtained the acknowledgement of its right to take part in the third phase, after a positive assessment by the Council.[24] As regards the UK, all EU countries "recognized" that it "shall not be obliged or committed to move to the third stage" of the EMU without a decision of its representative institutions,[25] which according to the standard account means that it was granted an opt-in clause.

That said, normatively, the fact that the concession of a specific status to the UK and Denmark was "*de facto* only temporary" because of the necessity to safeguard the goal of the "ever closer union" is a weak counter to the literal argument that such status was conceded without any explicit deadline. There is a strong argument that runs in the contrary direction. As the Protocol no. 15 on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland (Protocol no. 15) on the EMU specified unequivocally, the UK "shall retain its powers in the field of monetary policy according to national law".[26] As a consequence of this, a different law was to be, and was, applied.

[23] J.V. Louis, *Differentiation and the EMU*, in B. de Witte, D. Hanf, E. Vos (eds), *The Many Faces of Differentiation in EU Law*, cit., pp. 43-44.

[24] Art. 1, para. 1, of Protocol no. 16 on Certain Provisions Relating to Denmark (Protocol no. 16).

[25] Arts 1, and 9, let. c), of Protocol no. 15 on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland (Protocol no. 15).

[26] *Ibid.*, Art. 4. By virtue of Art. 4, some clauses of the EU Treaty did not apply to the UK.

Moreover, and as a variant of the preceding argument, the Treaty on European Union (Treaty of Maastricht) was an agreement between sovereign States and conventional international law is based, though not exclusively, on their explicit consent. As a result, it is hard to see how the fact that the specific status was conceded to the UK with the idea in mind that this situation would not last for a long time could influence the exercise of rights and duties under the Treaty. Even if it could be said that all partners agreed on this, this would not be conclusive against the ordinary criteria of interpretation.

Finally, the argument advanced by Louis with regard to the necessity to safeguard the goal of the "ever closer union" is ambiguous, in the sense that it can be read in two distinct ways. It is one thing to say that the Treaties and the other parts of the constitutional framework of the EU must be interpreted systematically, with the consequence that the specific status conceded to Denmark and the UK had to be used in the light of their commitment to contribute to the achievement of the "ever closer union". It is another thing to say that, in the light of this commitment, their specific status *de facto* has a limited duration. We must be very careful when deducing particular consequence from a very general clause of the Treaty's preamble. It is hard to see how it would possible to convert a permanent clause into a temporary one.

These findings support the conclusion that the solution envisaged by the drafters of the provisions governing the EMU, whilst allowing Denmark and the UK to join the Euro when they meet the requisite prescribed by the Treaties, at least potentially, deviated from the goal of the "ever closer union". It remains to be seen how this potentiality was converted into reality and it is in this respect that the explanation provided by Louis is particularly helpful. Even a quick look at the course of the events shows, on the one hand, that both British and Danish officers participated in a variety of decision-making processes concerning the EMU and, on the other hand, that, soon after 1992, several measures were taken by national policy-makers, in particular within the UK, in order to make full membership possible.[27] For example, between 1993 and 1999 the Bank of England constantly monitored the preparation for the adoption of the single currency. Some years later, Gordon Brown, then Chancellor of the Exchequer, set out the economic conditions that had to be fulfilled so that this could occur.[28] This was not the case, however, though the adoption of the single currency was still supported by some economists when the crisis begun.[29] A different choice has been made and its consequences are so well-known that few hints will suffice for our purposes here. The UK has kept its currency and has re-

[27] See, however, T. PROSSER, *The Economic Constitution*, Oxford: Oxford University Press, 2014, p. 142 (noting the "partial acceptance by the UK" of the objectives set out by the ECB).

[28] See the statement by Gordon Brown, *UK Membership of the Single Currency*, 27 October 1997, publications.parliament.uk.

[29] See W. BUITER, *Why the United Kingdom Should Join the Eurozone*, in *International Finance*, 2008, p. 269 *et seq*. For a survey of the literature, see T. SADEH, A. VERDUN, *Explaining Europe's Monetary Union*, in *International Studies Review*, 2009, p. 277 *et seq*.

mained relatively insulated from the effects of the policies carried out by the ECB. Institutionally, this implies that the Governor of the Bank of England takes part only in the meeting of the General Council, a body with limited powers, but is not involved in decisions concerning the fixing of rates or, to refer the most salient decision taken by the ECB in the last years, in the purchase of national bonds. More concretely, the consequence of all this for citizens is that, unlike in other EU countries, in the UK a visitor needs to change currency.[30] In sum, the provisions of the Treaty determined a potential breach with the ideal of the "ever closer union", though they left the door open.

Looking at the course of the events has a further advantage. It reveals that there is not simply a two-tier legal regime, whereby all EU countries are within the third stage except those who either cannot join it or do not wish to do so. Indeed, there is a more complex situation, with: *a*) nineteen countries within the Eurozone; *b*) other EU countries that are obliged to meet convergence criteria and that do so not without some difficulties (with the exception of Sweden); *c*) Denmark and the UK (until the end of negotiations for its exit from the EU) that have a specific status; *d*) some smaller European States (Andorra, Monaco, San Marino and Vatican City) that are using the Euro on the basis of a specific agreement; *e*) two Balkan countries that are unilaterally using the Euro (Kosovo and Montenegro). This last element shows the existence of asymmetric relationships between legal orders, which is not unknown to legal theorists,[31] and that raises interesting issues from the viewpoint of both effectiveness and accountability.

III.2. Enhanced cooperation: nature, rationale and impact

As a second step, let us consider enhanced cooperation. There is a brief overview of the provisions on enhanced cooperation that have been laid down since the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (Treaty of Amsterdam). On this basis, the rationale for enhanced cooperation is examined. Finally, we must consider some difficulties that have emerged in institutional practice.

Although some consider the provisions enacted by the Treaty of Amsterdam as a generalization of previous experiments in flexibility that had been agreed within the Treaty of Maastricht, institutional mechanisms differed, particularly with regard to the role of institutions.[32] Moreover, those provisions initially excluded common foreign and

[30] G. Dinan, *Ever Closer Union. An Introduction to European Integration*, Basingstoke: Palgrave McMillan, 2005.

[31] From the viewpoint of general theory of law, see S. Romano, *L'ordinamento giuridico*, Firenze: Sansoni, 1946, Engl. transl. *The Legal Order*, Abingdon: Routledge, 2017.

[32] See J.H.H. Weiler, *Editorial: Amsterdam, Amsterdam*, in *European Law Journal*, 1997, p. 309 (for the claim that the Treaty was important not only for its existence, but also for its institutional contents) and, for further details on enhanced cooperation, H. Kortenberg, *Closer Cooperation in the Treaty of Amsterdam*, in *Common Market Law Review*, 1998, p. 833 *et seq*.

security policies. A change occurred with the Treaty of Nice Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (Treaty of Nice), though its Art. 27 B still excluded all "matters having military or defence implications". It has been the Treaty of Lisbon, therefore, that has generalized enhanced cooperation, though within the substantive limits and procedural constraints that will now be clarified.

The essence of enhanced cooperation is that, according to the first paragraph of Art. 20 TEU, some Member States, not necessarily all, "may make use" of the Union's institutions. It is, therefore, a mechanism that is "constituted" and regulated by the Treaty and which takes place within the institutional framework of the EU, unlike those of purely intergovernmental nature that will be examined earlier. The justification for the use of EU institutions is that the goal of enhanced cooperation is to "further the objectives of the Union, protect its interests and reinforce its integration process".[33] However, its scope is limited to the areas for which the Union has non-exclusive legislative competence. Moreover, by virtue of the second paragraph of Art. 20 TEU, it is only if the Council has "established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole" that an enhanced cooperation may take place. The Treaty also sets out a requisite concerning the minimum number of EU members (nine) that must be involved,[34] and specifies that the procedure laid down in Art. 329 TFEU shall be used. This requires the authorization issued by the Council, acting on a proposal made by the Commission and with the assent of the European Parliament. Participation in an enhanced cooperation has relevant legal consequences, in the sense that, though all members of the Council are enabled to participate in its deliberations, only those that represent the Member States participating in it "shall take part in the vote".[35] On the other hand, their decisions will neither be binding on the other members of the EU nor will be regarded as part of the *acquis communautaire*.

Three comments can be made on the preceding textual analysis. They concern the nature, the rationale, and the impact of enhanced cooperation. Functionally, there is an analogy between enhanced cooperation and treaty revisions, because they both seek to adjust the process of European integration to the varying necessities and to the difficulties that inevitably arise in a Union of 27 (or 28) Member States.[36] However, there is also a fundamental difference. Unlike treaty revision, enhanced cooperation leaves the existing constitutional framework unaltered and is, therefore, not subject to ratification processes within national legal systems.

[33] Art. 20, para. 1, TEU.
[34] Art. 20, para. 2, TEU.
[35] Art. 20, para. 1, TEU.
[36] On this linkage, see P. Craig, *The Lisbon Treaty*, Oxford: Oxford University Press, 2013.

The rationale of enhanced cooperation becomes clear when considering that, according to the Treaty, enhanced cooperation is viewed as a "last resort", when it has become undisputed that the members of the EU either cannot or do not wish to proceed in the same direction and with the same pace, though all members can join at a later stage, if they wish to do so. It is, therefore, an institutionalized differentiated integration, in the sense that it differs from the closer integration that can be achieved by the members that choose to sign an agreement outside EU Treaties, as it happened with the 1985 Schengen Agreement and more recently with the 2005 Prüm Convention. To the extent to which enhanced cooperation can work as an instrument of the "ever closer union", without obliging all the Member States to accept the same ties simultaneously, it can be said to be a flexible tool, which is compatible with both visions of the Union. Precisely for this reason, however, it has a certain ambiguity.[37]

Moreover, enhanced cooperation has been less relevant and significant than expected by its proponents. Soon after the entry into force of the Treaty of Amsterdam, EU institutions expressed concern about the development of enhanced cooperation outside the Treaties, as a consequence of enlargement.[38] After the big enlargement, few steps have been taken by national governments to use enhanced cooperation, even when they intended to "reinforce the process of integration" in the area of the EMU. They have preferred to stipulate international treaties, as they did in 2012 for the "Fiscal Compact". It is interesting, therefore, to take it into consideration.

III.3. "Internal" international agreements: the Fiscal Compact

In addition to enhanced cooperation, there is another instrument that can be regarded as an alternative to the revision of the treaties; that is, the conclusion of international agreements between either all Member States or only some of them. These are international treaties. They are, therefore, subject to the principles and rules of public international law on the law of treaties, in addition to the limits stemming from EU law,[39] for example with regard to the relations with third countries, under the doctrine of preemption. However, this "parallel track" has always existed, as was observed earlier with regard to the 1965 Treaty establishing the Benelux Economic Union (Benelux Treaty). It

[37] For this remark, see H. Bribosia, *Les coopérations renforcées*, in G. Amato, H. Bribosia, B. de Witte (eds), *Genèse et destinée de la Constitution européenne: Commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives*, Bruxelles: Bruylant, 2007, p. 48. See also D. Thym, *The Political Character of Supranational Differentiation*, in *European Law Review*, 2006, p. 781 *et seq.* (seeing in this the emergence of an "asymmetric constitutionalism").

[38] See B. de Witte, *Chameleonic Member States: Differentiation by Means of Partial and Parallel Agreements*, in B. de Witte, D. Hanf, E. Vos (eds), *The Many Faces of Differentiation in EU Law*, cit., p. 239.

[39] *Ibid.*, p. 232 (distinguishing partial agreements, concluded between some Member States within the institutional framework of the EU, from parallel agreements, involving all of them, and placing less emphasis on the involvement of third countries).

has become increasingly important during the economic and financial crisis. An interesting example is the Fiscal Compact.[40] An analysis of its process, rationale and relationship with EU law can help us understand the distinctive features of this form of differentiated integration.

When the crisis burst out, most political leaders affirmed that the existing legal framework needed to be adjusted. On the one hand, it was adjusted for all the Member States, through a further change of the Stability and Growth Pact, enacted in 1996 and already modified in 2005. On the other hand, it was adjusted by way of an international agreement negotiated by most members, but not by all. Initially, there was a Franco-German proposal to amend the Treaties in order to tighten the framework of budgetary rules for the Member States. That proposal was vetoed by the UK, on the grounds that its representatives had not managed to obtain adequate safeguard against the undesired impact of those tightened rules on the UK's financial services industry, an aspect that certainly has not lost its relevance in the context of Brexit. The negotiation process that followed was not easy for some members, who were afraid of meeting strong opposition during their ratification processes. In particular, the Czech Republic decided that it was not in a position to sign the treaty. Quite the contrary, Italy used that process instrumentally, in order to secure an amendment of the national constitution. Eventually, on 30 January 2012, 25 Member States agreed to the Fiscal Compact.

At its roots there is not only the fact that, even when action by a group of Member States is regarded as justified from the viewpoint of the Union's goals and processes, national politicians often show a strong preference for cooperating outside the Treaties. There are also two important factors, greater flexibility and time. If the decisions to be taken are left to be determined through unconstrained political processes, then an even greater flexibility can be attained. Accordingly, decisions will be reached on shorter time horizons than for comparable behavior regulated by EU rules. But there can be another justification for so doing: the opposition by one or more members to the proposed innovation, as it happened with the Fiscal Compact.

It is precisely because the Fiscal Compact is not an EU Treaty that it has a complex relationship with EU law. The preamble clearly reveals that the intent of the contracting parties is to proceed on the path of integration. They regard their economic policies "as a matter of common concern" and express their desire to "develop ever closer coordination of economic policies within the euro area".[41] This intent is confirmed by Art. 2, which refers to the parties' will to "foster budgetary discipline through a fiscal compact". However, the Fiscal Compact has but a limited impact on existing EU rules for two reasons that are related but distinct. Firstly, the general basis of the rules set out by EU

[40] 2012 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), usually referred to as "Fiscal Compact", available at www.consilium.europa.eu.

[41] See the first two indents of the Fiscal Compact's Preamble.

Treaties is the prior consent of the States. It is this consensus that performs the basic legitimizing function. Without their consent, the two EU members that have not signed the Fiscal Compact, are not bound to respect the canons of conduct that it lays down, in particular the "rule" that "the budgetary position of the general government [...] shall be balanced on in surplus".[42] Secondly, and consequently, several provisions of the Fiscal Compact clarify that the new treaty entails no change of the obligations stemming from existing EU Treaties. While Art. 2 does so in a general way, by ensuring that the Fiscal Compact will be interpreted and applied consistently ("in conformity") with EU Treaties,[43] Art. 3 does so with regard to the more innovative and controversial rule about budget deficits, which will be applied by the contracting parties "in addition and without prejudice to their obligations under" EU law. In addition to these limits, the new rules have a differentiated application. While they "apply in full" to the Member States whose currency is the Euro,[44] they apply to the other parties under the conditions set out in Art. 14. Leaving aside the conditions that referred to the entry into force of the Fiscal Compact, it can be observed that it will apply to the States with a derogation or with an exemption, as in the case of Denmark, as from the date when the decision abrogating that derogation or exemption takes effect.[45] This, incidentally, confirms that the position of Denmark (and the UK) differs from that of the other members of the EU. There is, finally, a provision that is increasingly important in the political debates about the EMU; that is, Art. 16 of the Fiscal Compact, which regulates the process of "incorporation". It establishes that "within five years [...] the necessary steps will be taken [...] with the aim of incorporating the substance of this Treaty" into the legal framework of the Union. But precisely with regard to the substantial part of the Fiscal Compact in some Member States there is much less consensus than there was five years ago concerning the soundness of the tighter rules on public debt and deficit. Tighter budgetary standards have been criticized on grounds that they codify debt-reduction policies, with a huge and negative impact on social programs. What is controversial is, moreover, their imposition by a treaty, as opposed to a national constitution.[46]

[42] Art. 3, para. 1, let. b), of the Fiscal Compact.

[43] *Ibid.*, Art. 2, para. 1, which refers to both "the Treaties on which the European Union is founded" and to "European Union law, including procedural law". The following indent puts even more emphasis on the necessity of consistency, by affirming that compatibility is requisite for applying the Fiscal Compact. See, however, P. CRAIG, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, in *European Law Review*, 2012, p. 231 *et seq.* (arguing that the Fiscal Compact raises the question concerning the extent to which a treaty outside the confines of the Lisbon framework can confer new powers on EU institutions) and, for further remarks, K. TUORI, *The European Financial Crisis: Constitutional Aspects and Implications*, in *EUI Working Papers,* no. 28, 2012.

[44] Art. 1, para. 2, of the Fiscal Compact.

[45] *Ibid.*, Art. 14, para. 5.

[46] For critical remarks, see M. EVERSON, C. JOERGES, *Between Constitutional Command and Technocratic Rule: Post Crisis Governance and the Treaty on Stability, Coordination and Governance ("The Fiscal Compact")*, in C.

In the light of these findings, the distinctive features of this form of differentiated integration, from an institutional point of view, can be viewed more clearly than hitherto. First, State consensus performs the usual basic normative function, in the sense that it is of central importance in shaping the interaction between the Member States. However, while in the case of the Maastricht clauses their consensus was expressed by all members and within the provisions of the Treaties, in this case it concerns most members, but not all. As a further consequence, while the Treaty of Maastricht distinguished between members with or without specific clauses, the Fiscal Compact makes EU membership more differentiated than before, with two categories of contracting parties, those within and outside the Eurozone, and the remaining two members of the EU that did not sign the new treaty. The question that thus arises is whether this type of agreement reinforces the perspective of a sort of Europe *à la carte*. This question will now be addressed.

III.4. A TWO-SPEED EUROPE: CONCEPT AND ISSUES

As observed initially, few topics have aroused as much controversy in the literature about the EU as differentiated integration. Opinions differ markedly both as to the justification for the existence of such form of integration and as to the shape that it should assume. It is, therefore, not surprising that different concepts are used in differing ways. However, if we move beyond nominalism, in an attempt to understand the nature of the interactions between the Union's partners, it becomes evident that a juxtaposition of some forms of differentiated integration is unjustified. This is the case of two-speed Europe and Europe *à la carte*. While some observers, including Usher, put them on an equal basis,[47] they differ. The term "two-speed Europe" designates processes that are used to reach more expedite decisions for some members of the EU, who sooner or later are joined by the others.[48] Quite the contrary, the term Europe *à la carte* designates a scenario in which certain countries would join some policies while others would join other policies, with the consequence that there can be only a very low common denominator.[49] For this reason, unlike the idea of two-speed, the idea of a Europe *à la carte* is hardly coherent with the first vision of a unified Europe, that which seeks to achieve an "ever closer union" between the peoples of Europe.

This does not mean, however, that the other idea, that of a two-speed Europe, is without difficulties. These become evident when considering the joint Declaration of the

HARLOW, P. LEINO, G. DELLA CANANEA (eds), *Research Handbook on EU Administrative Law*, Cheltenham: Edward Elgar, 2017, p. 171. New changes have been envisaged by the European Commission, *The Five President's Report: Completing Europe's Economic and Monetary Union*, 22 June 2015, ec.europa.eu.

[47] J.A. USHER, *Variable Geometry of Concentric Circles: Patterns for the European Union*, in *International and Comparative Law Quarterly*, 1997, p. 253.

[48] For further analysis, see J.C. PIRIS, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge: Cambridge University Press, 2012.

[49] See R. DAHRENDORF, *A Third Europe*, in *EUI Jean Monnet Lecture*, no. 3, 1979.

Leaders of 27 Member States and of the European Council, the European Parliament and the European Commission of 25 March 2017 (The Rome Declaration), in the sixtieth anniversary of the Treaty of Rome.[50] The Rome Declaration has both a retrospective and a prospective, which deserve a detailed analysis.

The retrospective is a bit rhetoric, as it often happens in this type of documents. There is a strong emphasis on the decision "to bond together and rebuild our continent from its ashes" and on the construction of a "community of peace, [...] with unparalleled levels of social protection and welfare".[51] For sure, that of the EC/EU can rightfully be seen as a success story from the point of view of the achievement of the initial goals of peace and prosperity. The Rome Declaration proudly states "we have built a unique Union with common institutions and strong values, a community of peace, freedom, democracy, human rights and the rule of law".[52] This statement is not unreasonable if we compare Europe, and more particularly the EU, with other regions of the world. However, as we shall argue later, there are some difficulties with it.

The prospective part of the Rome Declaration seeks to combine unity and diversity. Its *incipit* underlines the importance of the "construction of European unity". The importance of unity is reiterated by the second paragraph, according to which "today we are united and stronger". There is still another paragraph (the fourth) that begins by affirming the ambitious goal of "even greater unity" and continues with this challenging statement: "we will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later".

There is, again, a similarity with enhanced cooperation; that is, flexible integration. But there is also a distinctive trait, in the sense that a two-speed Europe can be achieved in more than one way. Its essence is that integration requires some 'pioneers'; that is, some members of the club choose to be more closely integrated in a new policy field, on the assumption that, if it works, the others will join them. This idea can be appealing for several reasons. It appears to be susceptible to revitalize the functional method, by encouraging sector or issue-specific coalitions of partners willing to proceed with the same pace. From the viewpoint of economic theory, it can make sense to say that, unlike other "clubs" or organizations, the EU provides several "goods", which may

[50] Declaration of the Leaders of 27 Member States and of the European Council, the European Parliament and the European Commission (The Rome Declaration).

[51] *Ibid*.

[52] *Ibid*.

have different relevance or significance for its members.[53] This may foster competition between different policy approaches.[54]

There are, however, some difficulties with the strategy delineated by the Rome Declaration. First, it rests on an unclear assumption. It is questionable whether in the past what was really allowed was the acceptance of "different paces and intensity where necessary". Arguably, the mechanisms concerning the EMU did much more than allowing different paces. They allowed some members of the club not to proceed on the path of monetary integration. This is of significance when thinking about a strategy aiming at achieving unity, whatever the veracity of the intent of the Rome Declaration's authors.

Secondly, the idea to "act together, at different paces and intensity where necessary" may take different forms. Some are based on the Treaties, such as enhanced cooperation. Other forms of cooperation between the Member States lie outside the Treaties, as the Fiscal Compact, because not all EU countries agreed about it and its inclusion within the architecture of the EU requires a series of steps and, of course, the consensus of all partners. Those who think that it suffices to say that the EU will proceed "at different paces and intensity where necessary" are therefore mistaken. To borrow a term used in one of the first studies on differentiated integration, this was but a "misleading simple idea".[55]

Thirdly, it is not clear how the partners would move in the same direction. There is an inner tension between the desire to get all members of the EU involved and the role of the promoters or pioneers. For example, some political leaders who did not wish to join the Eurozone feared to be left behind. Their fear becomes more evident when, instead of multi-speed Europe, other terms are used, such as multi-tier Europe, which has a hierarchical and pejorative connotation.

IV. Legal mechanisms of integration beyond the EU

With these *caveats* in mind, let us consider the forms of differentiated integration that involve other European countries. They include the treaties that are agreed by all the members of the EU with other groups of countries, such as the 1992 Agreement on the European Economic Area (EEA Agreement), or by some members with third countries,

[53] See J. Pisani-Ferry, *Intégration monétaire et géométrie variable*, in *Revue économique*, 1996, p. 495 *et seq.* (for the thesis that preserving the single market and enhancing convergence are distinct objectives).

[54] G. Majone, *Europe as the Would-Be World Power: the EU at Fifty*, Cambridge: Cambridge University Press, 2009. On "pioneer groups", see B. de Witte, *Future Paths of Flexibility: Enhanced Cooperation, Partial Agreements and Pioneer Groups*, in J.W. de Zwaan, F.A. Nelissen, J.H. Jans, S. Blockmans (eds), *The European Union: An Ongoing Process of Integration: Liber Amicorum Alfred E. Kellermann*, The Hague: T.M.C. Asser Press, 2004, p. 141.

[55] F. De La Serre, H. Wallace, *Flexibility and Enhanced Cooperation in the European Union: Placebo Rather than Panacea*, Paris: Groupement d'Etudes et de Recherche "Notre Europe", Research and Policy Paper no. 2, 1997, p. 5 *et seq*.

as it happens with the rules established under the Schengen Agreement. Space limits preclude an examination of other legal mechanisms, including those with the European countries that wish to become members of the EU, such as Serbia and Montenegro, and those with non-European countries that wish to establish a closer partnership with the EU, particularly in the Mediterranean area.[56]

IV.1. A single market beyond the Union: the European Economic Area

What has been said earlier with regard to monetary policy raises the further question whether a similar asymmetry occurs with regard to the other main instrument of the EU, the single market. This question is interesting in itself, for an understanding of the legal mechanisms of integration beyond the EU, and for its practical implications, because some observers suggest that the UK might be a member of the EEA.

The standard account about the EEA highlights three main features: first, that the EEA is an area where persons, goods, services and capitals can circulate freely, which exists since January 1st 1994, upon entry into force of the EEA Agreement; second, that membership of the EEA is open to EU countries as well as to the members (Iceland, Liechtenstein and Norway) of the European Free Trade Area Association (EFTA); third, that EFTA members must adopt most EU legislation concerning the single market and, correspondingly, are able to influence the content of such legislation by way of "decision-shaping" processes at an early stage of EU legislation.

There is nothing basically wrong with this standard account. However, for an adequate understanding of the available options, at least two other aspects must be taken into consideration. On the one hand, while the forms of differentiation that were examined previously imply an institutional differentiation within the Union, the EEA is a regulatory regime for applying the rules governing the single market beyond its borders. Consequently, some non-EU countries have simply accepted large amounts of substantive EC/EU law. There is, therefore, an asymmetric relationship between their legal orders and that of the EU. On the other hand, within the other members of the EEA, there is a difference between the paths followed by Norway and Switzerland. While Norway has negotiated through the EEA, Switzerland has not joined the EEA, but has entered into a series of bilateral agreements with the EU.

These findings support the following four conclusions. First, the EEA does not constitute a form of differentiated integration between the Member States of the EU. It is, rather, a form of cooperation between the EU and other European countries. Secondly, and consequently, although it could be said that such cooperation might be beneficial to a further integration of non-EU members, this is just a potentiality. Meanwhile, it is a

[56] See, for further analysis, R. Wessel, *Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the New Constitution for Europe*, in J.W. de Zwaan, F.A. Nelissen, J.H. Jans, S. Blockmans (eds), *The European Union*, cit., p. 123 *et seq*.

cooperation that is limited to the rules governing the single market and is, therefore, coherent also with the vision of a wide and loose union. Thirdly, such cooperation is based on a variety of legal sources, as it can be established either by accessing EFTA or by negotiating several bilateral agreements. Accordingly, referring to the EEA only provides a generic solution; that is, the devil is in the details. Finally, the asymmetry that has been noticed is relevant from a twofold viewpoint: theoretically, it confirms that relations between legal orders can be either symmetric or asymmetric; institutionally, it is problematic with regard to democratic standards.

IV.2. Schengen's mixed membership

As observed initially, there are two distinct frames in the present analysis: one concerns the institutional mechanisms of differentiated integration within the EU and the other the legal mechanism of integration outside the Union. It might, therefore, come as a surprise that the rules of the Schengen Agreement are examined here, but this is not unjustified.

It can be helpful to begin by saying that, while the Treaty of Maastricht allowed differentiated integration within a partially new area, that of monetary policy, the Schengen Agreement of 1985 was more problematic, because its object was the regulation of free movement of persons, as distinct from citizens or workers. This was one of the pillars of the European Community, as it was envisaged by the Treaty of Rome in 1957; that is, a Community where the citizens of the Member States could freely travel. However, almost 30 years later, systematic controls of identity documents were still in place at the borders between most Member States, with the notable exception of the Benelux countries. It was precisely these countries, together with France and (West) Germany, which in 1985 signed the agreement aiming at progressively dismantling common border controls. The contracting parties agreed on the harmonization of their visa and asylum policies, allowing their nationals and other residents to cross borders without police controls.

This legal framework has been subsequently modified in three ways. First, in 1990 the Agreement was supplemented by the Schengen Convention, which established an area without border controls.

Secondly, and more importantly, during the Intergovernmental Conference that drafted the Treaty of Amsterdam all the Member States, except the UK and Ireland, agreed to incorporate the Schengen rules within the Union's legal framework. The Protocol no. 19 integrating the Schengen Acquis into the Framework of the European Union (Protocol no. 19) annexed to the Treaty clarified that such incorporation was achieved with a view to developing more rapidly "an area of freedom, security and justice". It also noticed that Ireland and the UK had not signed the Schengen Agreement, though they could accept some of its

provisions and could at any time request to take part in the entirety of the *acquis*.[57] Conversely, Protocol no. 19 mentioned the intent of Iceland and Norway to become bound by the Schengen rules. The form of "cooperation" that thus emerged was based on a "mixed" membership.[58] This feature has been confirmed by later agreements, for example with Switzerland. In brief, the enhanced cooperation that initially was promoted only by some members of the EU has been opened to other European countries.

Thirdly, the incorporation of the Schengen *acquis* allowed EU institutions to step in. In particular, the Council replaced the Executive Committee and the Court of Justice was enabled to exercise judicial review within certain limits,[59] which have mainly been eliminated by the Treaty of Lisbon, together with the "three-pillars" structure of the EU.[60] For example, the Court of Justice has found that the application of a rule set out by the Schengen Agreement is incompatible with the right of free movement that stem from Community law for third country nationals who are family members of EU citizens.[61]

Once again, when considering differentiated integration, it is clear that the voluntary consensus of the State, of each State, is of central importance. Two elements are crucial in determining the nature of the voluntary consensus. First, the voluntary nature of the agreement is not vitiated by inequality in the bargaining power of the parties, because the rules that are incorporated have been set out only by some of them. On the one hand, as noticed by the Protocol's Preamble, those rules "aimed at enhancing European integration". Their goal was thus a deeper integration. On the other hand, though the *acquis* must be preserved, EU institutions can develop it. For example, they have established a European Border Surveillance System.[62] Second, with the Treaty of Amsterdam it has become clear that even with regard to one of the central elements of the EC, the free movement of persons, where Union's action would have been justified, a deepened integration remains subject to the voluntary consensus of each State. It is

[57] Art. 4 of Protocol no. 19 Integrating the Schengen *Acquis* into the Framework of the European Union (Protocol no. 19).

[58] *Ibid.*, Art. 1.

[59] *Ibid.*, Art. 2. For further analysis, see H. WALLACE, *Flexibility: A Tool for Integration or a Restraint on Disintegration*?, in K. NEUNREITHER, A. WIENER (eds), *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy*, Oxford: Oxford University Press, 2000, p. 175 *et seq*.

[60] Art. 276 TFEU, keeps some limits, on which see P. CRAIG, *The Treaty of Lisbon: Process, Architecture and Substance*, in *European Law Review*, 2008, p. 144.

[61] Court of Justice, judgment of 31 January 2006, case C-503/03, *Commission v. Spain* [GC], paras 33-35. On the issues concerning non-EU nationals, see C. HARLOW, E. GUILD (eds), *Implementing Amsterdam: Immigration and Asylum*, Oxford: Hart, 2001, and G.I. WOLF, *Efforts toward "An Ever Closer" European Union Confront Immigration Barriers*, in *Indiana Journal of Global Legal Studies*, 1996, p. 228 (noting the increased perception of a "fortress Europe").

[62] See Regulation (EU) 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), and Court of Justice, judgment of 8 September 2015, case C-44/14, *Spain v. European Parliament and Council* (rejecting the action brought by Spain against the possibility that the UK is involved in the new regime).

in this sense and within these limits that the Schengen Agreement has been considered as a sort of *interim* arrangement, in view of a *communautarisation* of its rules.[63]

IV.3. A Europe of concentric circles: a "misleading simple idea"

In the light of the remarks that have made thus far, another interesting and important question arises; that is, whether the various forms of interaction within and beyond the EU can be summarized by the referring to the idea of a "Europe of concentric circles".

As observed for other terms, this metaphor has both a descriptive and a prescriptive side. Descriptively, it is noticed that some non-EU countries have accepted to apply the principles and rules of the single market, an aspect to which we will return later. Likewise, Turkey has accepted certain parts of EU law in the framework of the customs union that it agreed with the EU. Other Balkan countries have accepted part of the *acquis communautaire* and in particular the general principles of law developed by the Court of Justice, as is normally requested to the States that wish to become members of the EU. Conversely, the UK is not involved in the border-free Schengen area, which is so strategic for the freedoms of EU citizens to travel without visas or passports, and other five members of the EU followed it, including Ireland, which does not wish to take part in common actions in the field of defence. The general conclusion that is drawn from all this is that there is a greater differentiation of EU law than there was in the past. The description turns into a prescription, when it is observed that this is the inevitable price to pay for the construction of a larger area of peaceful cooperation in Europe.

There are, however, some difficulties with this irenic view of a Europe of concentric circles. First of all, the outer circle, that of non-EU countries, is far from being homogeneous, because some of them joined the EEA, while another has only agreed on a customs union.

Secondly, the inner circle – the EU – is itself differentiated not only with regard to monetary and fiscal issues. On the one hand, within the EU there are different views about the construction of the area of freedom, security and justice, as we have seen with regard to the Schengen *acquis*. Moreover, only 14 members have ratified the Prüm Convention, which aims at strengthening police cooperation through exchange of information and, thus, security. On the other hand, there are very different views with regard to one of the main values upon which the EU is founded; that is, the respect for fundamental rights. When the last Intergovernmental Conference discussed about the incorporation of the Charter, some Member States dissented. A protocol added to the Treaty of Lisbon now affirms that the Charter does not extend to Poland and the UK the "ability" of the Court of Justice to "find" that their "laws, regulations or administrative provisions, practice or actions' are inconsistent with the Charter".[64] Legal scholarship

[63] See B. de Witte, *Chameleonic Member States*, cit., p. 241.

[64] Art. 1, para. 1, of Protocol no. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (Protocol no. 30). See also Declaration no. 61 by

has expressed strong reservations concerning the legal value and effects of this protocol, which on other hand reaffirms the obligations stemming from EU law, including its general principles and thus fundamental rights as they stem from the European Convention on Human Rights (ECHR) and common constitutional traditions.[65]

A more critical remark might be that any attempt to limit the scope and effectiveness of individual rights, even indirectly, for example through a limitation of judicial independence, might lead to the destruction of the moral foundations on which the "legal order of a new kind" has been built. Interestingly, this was precisely the point of attack of the Commission in respect of Polish legislation and the Court of Justice endorsed its argument. The Venice Commission, too, criticized certain measures taken by Polish policy-makers from the viewpoint of the Council of Europe's standards concerning the rule of law.[66]

For the sake of clarity, I am at present making no claim about the nature of this controversy and the measures that could be adopted in order to solve it. This is a complex question that must be considered on its own, not tangentially. The present aim is more limited. It is to enquire whether one can coherently construct a theory of differentiated integration that rests on the assumption that there is an inner and more integrated circle – the EU – and a an outer and less integrated circle. The conclusion that is suggested here is that this is not plausible. Whatever its apparent appeal, the idea of a Europe of concentric circles is but another "misleading simple idea".[67]

V. Conclusion

This *Article* has two major themes. The first is that there is a tension inherent between two political visions of Europe, one centred on the "ever closer union" and the other on the achievement of a wide and loose union. Precisely because these are not simply different, but conflicting political visions of what the EU is and should be, it is necessary to be fully aware of their consequences, which is not always the case. A clear example is provided by the illusion, which emerges from the recent Rome Declaration, that it is possible to live together harmoniously for a prolonged amount of time despite conflict-

the Republic of Poland on the Charter of Fundamental Rights of the European Union (Declaration no. 61), affirming that the EU Charter does not affect in any way the Member States' capacity to legislate in the sphere of family law and public morality.

[65] See J. Ziller, *Les nouveaux traités européens: Lisbon et après*, Paris: Montchrestien, 2008, p. 105; I. Pernice, *The Treaty of Lisbon and Fundamental Rights*, in S. Griller, J. Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Wien: Springer, 2008, p. 235 *et seq*. See also P. Craig, *The Treaty of Lisbon*, cit., p. 163 (observing the UK's insistence on the Protocol is "problematic").

[66] See Venice Commission, Poland – Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session on 11 December 2017, CDL-AD(2017)031-e.

[67] F. De La Serre, H. Wallace, *Flexibility and Enhanced Cooperation*, cit., p. 5.

ing ideas about the ultimate ends of the European construction and, to some extent, about what its common values concretely mean. The second theme concerns differentiated integration. When considering the institutional and legal mechanisms of integration that exist within and outside the EU, such as the EMU and the EEA, respectively, it soon becomes evident that some of them are more coherent with one vision of Europe than with the other one.

ARTICLES

THE TRANSFORMATION OF REGULATORY COOPERATION THROUGH ITS INCLUSION IN FREE TRADE AGREEMENTS: WHAT IS ITS ADDED VALUE?

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ABSTRACT: The nature of trade relations in the EU is changing. Free trade agreements (FTAs) are expanding their utility, turning into governance mechanisms of the EU armoury instead of pure trade-relation regulators. This transformative capacity primarily stems from the inclusion of commitments in FTAs that go beyond pure economic governance, such as the chapters on regulatory cooperation. Although regulatory cooperation does not constitute a new trend in EU trade, under the present state, it represents an original shift. Indeed, the placement of regulatory cooperation within a legally binding treaty is at odds with the past choices of negotiation and commitment. This *Article* addresses this dichotomy. By analysing the inclusion of regulatory cooperation in a legally binding treaty, the Author seeks to understand its contribution to the implementation of these commitments, drawing arguments from the past and present, intra and extra EU experiences.

KEYWORDS: regulatory cooperation – institutionalisation – legalisation – FTAs – trade governance – regulation.

I. INTRODUCTION

The nature of trade relations in the EU is changing. Free trade agreements (FTAs) are expanding their utility, turning into governance mechanisms of the EU armoury instead

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of pure trade-relation regulators. This transformative capacity primarily stems from the inclusion of commitments in FTAs that go beyond economic governance, such as the chapters on regulatory cooperation. Although regulatory cooperation does not constitute a new trend in EU trade, under the present state, it represents an original shift. The positioning of regulatory cooperation within an FTA is an element of such importance that it could be considered a characteristic of this re-established regulatory cooperation because it defines and places it on a different playing field than before. This is primarily because, until recently, regulatory cooperation has been considered a matter of low politics[1] and has been attempted outside a strictly legal environment based on political agreements and declarations. The placement of regulatory cooperation within a legally binding treaty is at odds with the past choices of negotiation and commitment. On the first level, one could see a better match between the less rigid forms and complex regulatory dialogues that require some flexibility.

This *Article* addresses this dichotomy. By analysing the inclusion of regulatory cooperation in a legally binding treaty, the Author seeks to understand its contribution to the implementation of these commitments, drawing arguments from the past and present, intra and extra EU experiences. In Section II, the *Article* provides an overview of the highlights of previous activities on regulatory cooperation outside an FTA. The analysis begins with the past, reaching the present status of regulatory cooperation activities through their inclusion in an FTA in Section III, which examines the compatibility of the two, essentially by asking whether an FTA structure can properly accommodate such activities, fulfilling their trade liberalising effect, while also adjusting to the imperatives of regulation, as the latter are mandated by contemporary trade structures. Having set the background by taking the previous two Sections as a basis, the rest of the *Article* locates where the added value of the inclusion lies, relying on the concepts of institutionalisation and legalisation for this exercise. Section IV goes against arguments of institutionalisation based on the plethora of activities mentioned in Section II. Section V proposes that the added value of the inclusion lies in the concept of legalisation. Finally, Section VI concludes the work.

II. Transatlantic regulatory cooperation outside an FTA structure

Before including it in an FTA structure, the EU made various efforts to begin a regulatory dialogue, in particular in the transatlantic realm. For a holistic regulatory cooperation initiative of the EU, the most comprehensive case study to examine would be the EU–US regulatory cooperation. Transatlantic regulatory cooperation between the EU and the US serves as a good case study because it not only illustrates three decades of history

[1] K. Nicolaidis, *Regulatory Cooperation and Managed Mutual Recognition: Elements of a Strategic Model*, in G.A. Bermann, M. Herdegen, P.L. Lindseth (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects*, Oxford: Oxford University Press, 2001, p. 571 *et seq.*

dating back to the Transatlantic Declaration of the 1990s, it also provides a comprehensive overview of regulatory cooperation activities along a continuum, ranging from low profile to highly coordinated activities. Hence, based on this plurality of initiatives and the relevant successes and failures that accompanied them, one can safely derive conclusions on the effectiveness of the regulatory cooperation policy of the EU at that time and juxtapose it with more recent developments with its inclusion in an FTA, which will be examined later.

The first steps on regulatory cooperation in the context of EU–US relations were taken after the end of the Cold War, which set the economic collaboration between the two superpowers on a new basis.[2] Triggered by the determination of the Bush Administration to observe the transformation of the European integration closely, transatlantic relations expanded beyond security matters to trade issues.[3] Since then, transatlantic economic relations have been shaped by the two political declarations of utmost importance for the design of economic transatlantic relations, namely the Transatlantic Declaration[4] and the New Transatlantic Agenda,[5] and are still developed within their context.

Regulatory cooperation, considered an indispensable tool of economic integration, held a high position in the agenda in political talks, to which the various summits later gave substance. The choice of vocabulary chosen to describe the ambition of the transatlantic declarations reveals the commitment and belief that regulatory cooperation was the answer to the emerging nonregulatory tariff barriers to trade. Since then, regulatory cooperation has monopolised the interests of various initiatives that followed. It constituted the central axis of separate agreements and has been examined through the lenses of horizontal and sectoral mechanisms. Most importantly, the 1998 Transatlantic Economic Partnership (TEP), the agreement that actually shaped transatlantic economic relations, viewed regulatory cooperation activities as part of its core activities. In fact, being part of a compromise, TEP's significance for transatlantic economic relations was enormous because it carried the weight of the failure to reach an agreement on an FTA.[6] Moreover, its strong orientation towards the abolition of nonregulatory barriers to trade was informing for the necessity of regulatory cooperation at the time. All subsequent regulatory activities of sectoral and horizontal nature, the most important of which are briefly outlined below, were materialised under the auspices of the TEP.

[2] R. STEFFENSON, *Managing EU–US Relations: Actors, Institutions and the New Transatlantic Agenda*, Manchester: Manchester University Press, 2005, p. 61 *et seq*.

[3] J. PETERSON, *Get Away from Me Closer, You're Near Me Too Far: Europe and America After the Uruguay Round*, in M.A. POLLACK, G.C. SCHAFFER (eds), *Transatlantic Governance in the Global Economy*, Lahnam: Rowman & Littlefield, 2001, p. 54.

[4] 1990 Transatlantic Declaration on US–EC Relations, available at www.europarl.europa.eu.

[5] The New Transatlantic Agenda, 1995, available at www.europarl.europa.eu.

[6] See J. PETERSON, *Get Away from Me Closer*, cit., p. 53.

The absence of a cooperation framework brought disputes, such as the one on hush kits, to the centre of attention. To avoid new transatlantic adventures, the Early Warning Mechanism initiative was the first step in this direction.[7] The subsequent Guidelines on Regulatory Cooperation and Transparency gave clearer direction to the regulatory authorities by mapping the landscape of the promoted horizontal cooperation.[8] Seeking coordination on a higher political level, the establishment of the High Level Regulatory Cooperation Forum was a more coordinated effort to group existing sectoral and horizontal dialogues. Finally, the creation of the Transatlantic Economic Council made an ultimate effort to revitalise the dialogue built upon past mistakes, providing high political oversight and bringing hidden actors, such as legislators and stakeholders to the epiphany.[9] As for sector-specific dialogues, they were established and enhanced mainly under the roadmaps of 2004 and 2005.[10]

Despite the absence of an FTA framework and the regulation of trade relations on a political level, the efforts to invigorate regulatory cooperation activities were numerous and continuous. However, the existence of systemic problems rooted mainly in the legally fragile nature of the initiatives impeded the implementation of regulatory cooperation.

III. FTA structures regulatory cooperation and regulation imperatives: conflict or harmony?

Responding to those systemic failures and choosing to initiate regulatory cooperation on more legalistic terms, the EU abandoned the legally weak "political treaties",[11] a term that captures the general quality of previous forms of regulatory cooperation. Regulatory cooperation as it now stands in the new FTAs is seen again as an ensemble of commitments targeting unnecessary, duplicative, and trade-disruptive regulatory barriers to trade, only this time addressed in more legalistic terms and grouped under a chapter of a legally binding treaty. As discussed, until recently, the idea was quite mature in other fora and under different forms. However, the auspices of an FTA advocate for a different understanding in the context of an FTA. Before any discussion on the possible advancement

[7] K.W. Abbott, *US–EU Disputes over Technical Barriers to Trade and the "Hushkits' Dispute"*, in M.A. Pollack, E.-U. Petersmann (eds), *Transatlantic Economic Disputes: The EU, the US, and the WTO*, Oxford: Oxford University Press, 2003, p. 247 *et seq*.

[8] Guidelines on Regulatory Cooperation and Transparency, April 2002, available at www.ustr.gov.

[9] T. Takacs, *Transatlantic Regulatory Cooperation in Trade*, in E. Fahey, D. Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders*, Cambridge: Cambridge University Press, 2014, p. 177.

[10] 2004 Roadmap for EU-US Regulatory Cooperation and Transparency, Section I: Specific Sectoral Cooperation, available at www.ustr.gov.

[11] The term "political treaties" is borrowed from Judge Baxter from his contribution on the variability of international law. According to this Article, political treaties, such as joint communications and joint declarations, are a category of soft law, as opposed to treaties that introduce hard law. R.R. Baxter, *International Law in Her Infinite Variety*, in *International and Comparative Law Quarterly*, 1980, p. 549.

through the inclusion in an FTA, one must first assess the compatibility of the FTA structure with the nature of regulatory cooperation, as the latter is influenced by the imperatives of contemporary regulations. One could pose the question regarding whether a legally rigid environment can properly accommodate such activities, given that contemporary and effective regulation transcends borders and requires the participation of many actors. Compatibility is thus assessed from that perspective. In other words, regulatory cooperation in this case cannot be understood distinctly from the FTA in which it is situated. The same applies for the reverse. The FTA structures must be equally informed by the nature and sequence of the regulation they try to control. Hence, during the process of reflection upon the appropriateness of an FTA to incorporate such a process, one should examine these structures in light of the regulation they address.

III.1. The changing nature of regulation

The nature of regulation follows the imperatives of the production organisation because it is influenced by technological developments and increasing specialisation, according to Hoekman and Sabel.[12] The key to their analysis is the dominance of value chains, in other words the disintegration of production and its organisation into vertical structures where the design and production of each component of a final product constitutes a different task run by different actors. Globalisation has further disintegrated the nature of production by allocating various production areas across the world on the basis of cost-saving criteria.[13] Production has become a global multi-step process. Regulation follows these characteristics closely, covering each step of this long process because every component of production is regulated, and it is global because each step falls under different regulatory jurisdictions. Eventually, the time comes when different components produced according to different regulations must cross borders to be assembled into the final product. While regulatory competition implies that differences in regulation mirror differences in preferences, instances where different regulations are duplicative generate unnecessary extra conformity costs that are reflected on the final price.[14] Such cases require effective and efficient regulation. Given today's architecture of trade relations, it is imperative that regulations not only fulfil their primary purpose to regulate markets but also facilitate efficiently adopted and applied trade.

Vertical disintegration and the resulting dominance of supply chains not only aim for effective results but have also exercised considerable influence on the way regula-

[12] B. Hoekman, C. Sabel, *Trade Agreements, Regulatory Sovereignty and Democratic Legitimacy*, in *EUI Working Papers*, RSCAS 2017/36, www.cadmus.eui.eu, p. 4.

[13] *Ibid.*

[14] *Ibid.*, p. 1. According to Hoekman and Sabel, non-tariff measures may be exclusionary in the sense that they restrict a certain activity. They also may be the result of successful lobbying by enterprises, may be duplicative, and may reflect different preferences.

tion is created. Earlier considered an exclusive task of regulators based on scientific data, regulation now forms part of a learning factory, a chain that implicates the presence of major actors in the production. In principle, regulation aims to express a society's tolerance towards risks.[15] Risk allocation can be based on scientific facts. It can also be a task burdening mass producers acting within the organisational structure of global value chains, where producers are required to hold rigorous controls over their production and determine and fix issues before they affect the final product or part of the supply. The chance of risk increases, and the risk allocation exercise becomes even more demanding as the evolution of technological innovation increases and becomes an integral part of production activities. In this continuously uncertain environment, enterprises choose to collaborate together and rely on the expertise of experienced suppliers when a new design is in the making. This inevitably creates a continuum of cooperation between non-regulators of doing by learning, where risks are minimised through a systematic collection and analysis of data. These results are further reported to the regulators that must translate the risks into concrete regulations. This collaborative system of reporting and learning has been captured under the term "meta-regulation".[16]

The concept of "meta-regulation", a facilitating mechanism arising out of the need for regulation to keep pace with the advancement of production, is thus changing the character of regulation. Regulation is not static but is a fluid concept that must closely assess the dangers and risks that innovation of production may hide. Considerable information asymmetry exists between the regulator and the cause of risks, a gap that production actors are called to address by reporting potential hazards to regulators. Inevitably, this kind of regulation must be taken into consideration in the context of an FTA.

III.2. Compatibility of regulation and FTA structures for regulatory cooperation

Due to the differences regarding the sought priorities, trade objectives and domestic regulation have proven difficult to reconcile.[17] However, the contemporary organisation of production and the associated risks make them mutually dependent and mandate their harmonious coexistence, characteristically called a "21st Century approach to regulatory coherence" by Bollyky.[18] To what extent FTA structures can reconcile trade objec-

[15] J.B. Wiener, A. Alemanno, *The Future of International Regulatory Cooperation: TTIP as a Learning Process toward a Global Policy Laboratory*, in *Law and Contemporary Problems*, 2015, p. 122.

[16] C. Coglianese, E. Mendelson, *Meta-regulation and Self-regulation*, in R. Baldwin, B. Cave, M. Lodge (eds), *The Oxford Handbook of Regulation*, Oxford: Oxford University Press, 2010, p. 140 *et seq*., especially p. 150.

[17] T.J. Bollyky, *Regulatory Coherence in the Trans-Pacific Partnership Talks*, in C.L. Lim, D. Elms, P. Low (eds), *The Trans-Pacific Partnership: A Quest for a 21st Century Trade Agreement*, Cambridge: Cambridge University Press, 2012, p. 174.

[18] *Ibid.*, p. 180.

tives and regulation is thus the central question. As mentioned, scholars have raised this question of the suitability of an FTA to host regulatory cooperation on the described level of such complexity and interdependence. According to them, the emerging presence of these information chains that demand the input of non-traditional actors for regulatory purposes was not initially present in the regulatory cooperation chapters that seem to coordinate the dialogue channels between regulators.[19] They argue that the commitments enshrined in the chapters focus on drawing parallels between the established practices by mandating the adoption of certain practices within the regulatory procedure that aim to create frameworks that are interchangeable and that this aim inevitably places key actors that are situated on a governmental level at the epicentre.[20] Indeed, the explicit reference to a "regulatory authority" as the addressee of the commitments in the chapter on regulatory cooperation of the EU-Japan FTA is indicative of its orientation towards the activities of actors that are subject to the regulatory mandate.[21] The wording depicts regulators as the main subject of cooperation. However, this does not necessarily mean that the chapters overlook the complex task of regulation and the plurality of the actors implicated therein. This is true for two reasons. First, despite the detailed enumeration of the activities to take place, the organisational and institutional parts of both chapters have been outlined with laconism. Indeed, the chapters provide a *framework* for regulatory cooperation. Within this framework, regulators are expected to be the *de facto* protagonists, as the regulators are officially given the much-anticipated legal mandate to initiate dialogue as official representatives. Beyond that, the nature of relations and interdependencies that develop within frameworks that handle such sensitive and complex issues is unpredictable, which is the reason why their implementation cannot be predicted. While regulators are situated within a territorial environment, industry presumably is not.

Second, the linkage between regulation and production is highlighted through various commitments. Representative of this is the case of the 2016 Comprehensive and Economic Trade Agreement (CETA), where the instruction of consultation procedures with private entities, which may include, *inter alia*, business representatives, is mandated in a sole article.[22] Beyond this particular article, industry's role varies within the chapters and can range from substantial input to a regulation under preparation, contacts on an informal basis, and participation in the committee's workings.[23] The participation of production actors is thus spread within the chapters' workings and can appear

[19] B. HOEKMAN, *"Behind-the-border" Regulatory Policies and Trade Agreement*, in *East Asian Economic Review*, 2018, p. 254.

[20] *Ibid.*

[21] Art. 18.2, let. a), of the 2019 EU and Japan's Economic Partnership Agreement (hereinafter EU–Japan EPA), available at ec.europa.eu.

[22] Art. 21 of CETA.

[23] Art. 21.8 of CETA and Art. 18.7 of the EU-Japan EPA.

in various important instances, as are the development of a regulation and the orientation of the cooperation activities through invitations to the meetings of the coordinating body. Their presence in the regulatory process and the necessity of their contribution as directly implicated entities is thus not ignored; on the contrary, it is welcomed.

IV. Tighter institutionalisation through inclusion in an FTA

Nowadays, scholars that conduct research in the various EU external relations increasingly aim to describe the intensification of the actions through the creation of entities using the term "institutionalisation". In addition, in the area of trade, with the rise of the "living" FTAs that the EU has been signing with its trade partners, this term has been used to signify the sudden appearance and proliferation of institutions that accompany and frame the actions included therein.[24] Especially in the realm of regulatory cooperation, claims of the "institutionalisation" of regulatory cooperation through FTAs contrast with the failures of the previous transatlantic efforts.[25] In essence, it is argued that the "added value" of FTAs is their contribution to a better institutionalisation of regulatory cooperation. However, many cases lack a description of the term and understanding of institutionalisation and how it fits into their positioning on the institutionalisation of regulatory cooperation, partially due to the recent appearance in the field of EU external relations.

This Section opposes those arguments and depicts the institutionalisation of regulatory cooperation even before its inclusion in an FTA. It begins by analysing how institutionalisation has primarily been understood in social, legal, and international relations literature, particularly regarding European integration. The understanding of institutionalisation has been applied to the previous transatlantic developments to make the argument that FTAs do not contribute to tighter institutionalisation but to something different.

IV.1. On the nature of institutionalisation in European integration and beyond

The concept of institutionalisation is a term primarily used as a conceptual tool in social and behavioural sciences.[26] It has been promulgated in recent years by legal and political science scholars studying European integration to capture and explain in an interdisciplinary manner the constant changes in governance both within and beyond the

[24] See D.P. Steger, *Institutions for Regulatory Cooperation in "New Generation" Economic and Trade Agreements*, in *Legal Issues of Economic Integration*, 2011, p. 109.

[25] E. Fahey, *Introduction: Institutionalization Beyond the Nation State: New Paradigms? Transatlantic Relations: Data, Privacy and Trade Law*, in E. Fahey (ed.), *Institutionalization Beyond the Nation State*, Cham: Springer, 2018, p. 8 *et seq*.

[26] The process of institutionalisation lies at the core of neo-institutionalism in organisation theory. For example, see T.B. Lawrence, M.I. Winn, P. Deveraux Jennings, *The Temporal Dynamics of Institutionalization*, in *Academy of Management Review*, 2001, p. 624 *et seq*.

nation state.[27] According to its understanding in organisation theory, institutionalisation is the process by which certain structures are consolidated, and it is a process triggered by persistent normative, mimetic, and coercive forces.[28] This process often leads not only to consolidation of practices but also to their legitimation,[29] and this is also how institutionalisation has been described within the nation state, as the process by which a practice gains general acceptance.[30]

A similar understanding is also present in the literature dealing with the institutionalisation of European integration. In fact, there are two elements on which analyses have heavily focused. The first one is the concentration on European institutions. Mark Pollack discussed connecting the EU's dense institutionalisation in comparison to other supranational settings to the proliferation of intergovernmental and supranational institutions that surround it and the augmenting body of EU legislation, known as *acquis communautaire*.[31] The second and most important element is, as mentioned, the perception of institutionalisation as a process of formalisation. The gradual process of institutionalisation coincides with the consolidation of a set of norms and formalities that create particular communication dynamics and shape the routines in the European sphere within structures.[32] Thus, relevant institutionalisation debates tend to concentrate on the process of formalisation and stabilisation of formal or informal institutions and procedures.[33] Similarly, institutionalisation has been used regarding implicated actors in expressing their establishment within a given field. In the realm of the changing landscape of EU regulation for example, institutionalisation and de-institutionalisation have been employed to describe the gradual establishment of agencies and networks as regulatory actors.[34]

According to another strand of the literature, institutionalisation as a notion in the EU context has been detached from its process-centric character and is considered the result

[27] See, for example, S. SAURUGGER, F. MÉRAND, *Does European Integration Theory Need Sociology?*, in *Comparative European Politics*, 2010, p. 1 *et seq.*; S. SAURUGGER, *Sociological Approaches to the European Union in Times of Turmoil*, in *Journal of Common Market Studies*, 2015, p. 70 *et seq*.

[28] G. SCHREYÖGG, J. SYDOW, *Organizational Path Dependence: A Process View*, in *Organization Studies*, 2011, pp. 321 and 330; M. SCHNEIBERG, S.A. SOULE, *Institutionalization as a Multilevel, Contested Process: The Case of Rate Regulation in American Fire Insurance*, in G.F. DAVIS, D. MCADAM, W.R. SCOTT, M.L. ZALD (eds), *Social Movements and Organizational Theory*, Cambridge: Cambridge University Press, 2005, p. 1.

[29] E. FAHEY, *Introduction*, cit.

[30] R.S. KATZ, W.J. CROTTY (eds), *Handbook of Party Politics*, Trowbridge: Sage, 2006, p. 206.

[31] M. POLLACK, *New Institutionalism*, in A. WIENER, T. DIEZ (eds), *European Integration Theory*, Oxford: Oxford University Press, 2004, p. 137.

[32] E.M. IMMERGUT, *The Theoretical Core of the New Institutionalism*, in *Politics and Society*, 1998, p. 5 *et seq.*; see also M. GREEN COWLES, T. RISSE, J. CAPORASO, *Transforming Europe: Europeanisation and Domestic Change*, Ithaca, NY: Cornell University Press, 2001, p. 3.

[33] See S. SAURUGGER, F. MÉRAND, *Does European Integration Theory Need Sociology?*, cit., p. 7.

[34] D. LEVI-FAUR, *Regulatory Networks and Regulatory Agencification: Towards a Single European Regulatory Space*, in *Journal of European Public Policy*, 2011, p. 825.

of the consolidation of procedures and structures that are difficult to change.[35] Others have highlighted the constant change that came with European integration with higher levels of institutionalisation.[36] Recently, academics have tried to capture the essence of the general notion beyond the nation.[37] Their analysis begins from the new European governance trend of promotion of international institutions in various instances and extends accordingly to capture the associated procedures that these institutions promote. Institutionalisation beyond the nation state is understood as a sign of the times, as an "antidote to concerns about the delegation of authority beyond the Nation State", a factor that establishes a certain practice and legitimises it.[38] According to Fahey, institutionalisation beyond the nation state should better be described as the *process* of intense cooperation and interaction rather than its *outcome*, institution, or situation.[39]

As outlined above, there is a cross-disciplinary convergence in treating institutionalisation as a process, with a few scholars instead viewing it as a result. Institutionalisation, however, has also been treated independently of the process/result debate of institution/procedure building. According to Bélanger and Fontaine-Skronski, institutionalisation depicts "the degree to which institutional rules govern more the actions of the actors", in other words "the degree to which state behavior, in a particular area of cooperation, falls within the scope of particular rules".[40] The focus is not on whether institutionalisation is to happen during the development or with the creation of an institution. Institution-building, either as a process or result, does not have any significance. What matters is the range of activities covered by these institutional rules.[41] The richer the range, the greater the institutionalisation of the particular area of cooperation.

IV.2. Was transatlantic regulatory cooperation institutionalised?

Institutionalisation, understood in one way or another, was not absent from the transatlantic paradigm of regulatory cooperation. The institutionalisation of regulatory cooperation, understood as rule coverage, under the theory of Bélanger and Fontaine-Skronski, cannot be disputed because the various initiatives described above range

[35] P. Petrov, *Early Institutionalisation of the ESDP Governance Arrangements: Insights from the Operations Concordia and Artemis*, in S. Vanhoonacker, H. Dijkstra, H. Maurer (eds), *Understanding the Role of Bureaucracy in the European Security and Defence Policy*, in *European Integration online Papers (EIoP)*, 2010, eiop.or.at.

[36] A. Stone-Sweet, W. Sandholtz, N. Fligstein (eds), *The Institutionalization of Europe*, Oxford: Oxford University Press, 2001.

[37] See generally E. Fahey (ed.), *Institutionalization Beyond the Nation State*, cit.

[38] M. Zürn, *Opening up Europe: Next Steps in Politicization Research*, in *West European Politics*, 2016, p. 164.

[39] See E. Fahey, *Introduction*, cit., p. 4.

[40] L. Bélanger, K. Fontaine-Skronski, *"Legalization" in International Relations: A Conceptual Analysis*, in *Social Science Information*, 2012, pp. 238 and 240.

[41] *Ibid.*

from horizontal to sectoral initiatives, comprising diverse rules and many emergent actors, covering a wide range of regulatory cooperation activities. For example, the regulatory cooperation guidelines were as comprehensive content-wise as the contemporary FTA chapters, while the mutual recognition agreements (MRAs) were the product of sectoral cooperation. In the context of the guidelines, the High Level Regulatory Cooperation Forum eventually proceeded to a joint examination and comparison of their impact assessment procedures.[42] As far as sector-specific dialogue is concerned, its highlight until today is the MRA, which concerns mutual recognition of the conformity assessment procedures over six sectors: telecommunications and information and communications technology (ICT) equipment, sport boats, medical devices, pharmaceuticals, electronics, and electromagnetic compatibility.[43] With actual, although limited results, it is difficult to argue that regulatory cooperation activities were not regulated. They were indeed regulated but were not under strict legal terms.

Second, turning to the literature debate on the process and result of institution-building, one can observe the development of institutional structures through the consecutive agreements. Indeed, the functioning of initiatives such as the Early Warning Mechanism, the High Level Regulatory Forum, or the Transatlantic Economic Council came along with institutional development and establishment, despite being disregarded during the formation of two major regulatory acts, the Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH) Directive by the EU and the 2002 Sarbanes-Oxley Act by the US.[44]

Under both scenarios, institutionalisation could not provide adequate results, and neither rule coverage nor weak institutions are to blame. On the contrary, both adequate rule coverage and institutional structures were unable to perform due to their legally weak method of regulation. The latter can be confirmed by the existing literature, which has associated these shortcomings with a variety of reasons deeply rooted in the lack of legal bindingness and its implications. Indeed, the lack of legal bindingness lies at the root of the problem, meaning that it causes inconsistency between several mandates, provides no base for additional funding, and places no substantial pressure on regulators. Regarding the inconsistency of mandates, regulatory cooperation is a task largely left to regulators,

[42] A. MEUWESE, *EU–US Horizontal Regulatory Cooperation: Mutual Recognition of Impact Assessment?*, in D. VOGEL, J.F.M. SWINNEN (eds), *Transatlantic Regulatory Cooperation: The Shifting Roles of the EU, the US and California*, Cheltenham: Edward Elgar, 2011, p. 249 *et seq*.

[43] G. SCHAFFER, *Managing US–EU Trade Relations through Mutual Recognition and Safe Harbor Agreements: "New" and "Global" Approaches to Transatlantic Economic Governance?*, in E.-U. PETERSMANN, M.A. POLLACK (eds), *Transatlantic Economic Disputes*, cit., p. 303.

[44] *Ibid*. Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

who are called to conciliate their main internal regulatory tasks, as these are mandated by their own constitutional framework with cooperation mandated by executive agreements with foreign counterparts.[45] These two tasks may be contradictory in nature. When called to choose between the fulfilment of their constitutional mandate and cooperation with foreign counterparts, regulators will choose to proceed with complying with internal requirements. Furthermore, the lack of a formal mandate means that the internal regulatory environment may not always be structurally ready to accommodate regulatory cooperation. That may happen because regulators are not accustomed to considering trade interests during the development of regulatory acts due to the structure of the regulatory system, which may not provide them with this possibility. This is the case of the US, which, unlike the EU regulatory system, is not accustomed to reconciling regulatory objectives with an internal market.[46] Regulatory action in the US is divided between the varying agencies, which follow a strict mandate and are isolated from trade matters.[47] Furthermore, regulators usually have no further funding for the accomplishment of regulatory cooperation and are called to cover potential costs from their existing funds, which are dedicated for internal purposes.[48] Finally, apart from these institutional problems, the lack of legal bindingness can also stand behind certain *attitudes*. The example of the lack of coordination for the development of the REACH Directive and the Sarbanes–Oxley Act in the US, despite existing available cooperation mechanisms, is indicative of the attitude of regulators towards regulatory dialogue. In the end, the particular soft law nature of the experiment could not provide enough reasons for regulators to cooperate, even though the political willingness at higher levels to activate and advance a regulatory dialogue was apparent.

V. Stronger legalisation through inclusion in an FTA

The conceptualisation of impediments to the successful operation of regulatory cooperation indicated the lack of legally strong rules as the weakest element. As noted, this feature does not substantially coincide with the concept of institutionalisation as examined above, even though it has been associated in the literature.[49] Interestingly, legal bindingness has been used as one of the measurement units that builds the concept of "legalisa-

[45] J.R. Paul, *Implementing Regulatory Cooperation through Executive Agreements and the Problem of Democratic Accountability*, in G.A. Bermann, M. Herdegen, P.L. Lindseth (eds), *Transatlantic Regulatory Cooperation*, cit., p. 385 *et seq*.

[46] See G. Schaffer, *Managing US–EU Trade Relations through Mutual Recognition and Safe Harbor Agreements*, cit., p. 309.

[47] *Ibid*.

[48] K. Jensen, *International Trade and Negotiations in Global Value Chains*, Centre for International Governance Innovation, Conference Report – Washington, DC, 13 March 2017, available at www.cigionline.org.

[49] See E. Fahey, *Introduction*, cit., p. 8.

tion".[50] Legalisation is a conceptual tool developed by international relations scholars. Legalisation as a concept is associated but not equated to institutionalisation. Legalisation is a particular form of institutionalisation, characterised by three components: obligation, precision, and delegation.[51] According to this construction, the element of obligation measures how binding the undertaken commitments are, the element of precision refers to how precise the rules are, and the element of delegation is used to depict whether a third party has a delegated authority, *inter alia* on issues of interpretation, implementation, monitoring, and dispute settlement.[52] Legalisation, composed of these three components is a concept that is empirically built and inspired by characteristics found in institutions.[53] More specifically, it examines the degree to which these components are to be found in each institutional structure. Legalisation of institutions can take several forms and can range from low to high; its form and intensity depend on the combination of the degrees of the various components.[54] The following Section will firstly examine how the "obligation" part is strengthened in the chapters of Regulatory Cooperation and will discuss how similar levels of obligation have proven effective.

V.1. The "obligation" element

Based on this concept, considering the lack of legal bindingness that characterised the previous efforts on regulatory cooperation, when analysing the contribution of FTAs to the development of the legalisation of regulatory cooperation, particular attention should be paid to "obligation", which measures the legal bindingness of the commitments. In other words, one should examine whether the inclusion in an FTA strengthens the obligation criterion, the weakness of which lies behind the implementation problems during past initiatives. This Section, after locating provisions that could be argued to weaken the enshrined obligation, argues for a high degree of obligation due to the commitments' qualification as international obligations.

However, before any analysis we should first become acquainted with the fundamental provisions of the chapters on regulatory cooperation, the formulation of which aims to weaken the obligation established by the inclusion of the chapters within FTAs, which are legally binding international treaties. Despite this qualification, the strength of the obligation has been questioned on the basis of existing reserve clauses that highlight the voluntary character of the activities and the non-submission of the EU-Japan chapter on the agreement's dispute settlement mechanisms.

[50] K.W. Abbott, R.O. Keohane, A. Moravcsik, A.-M. Slaughter, D. Snidal, *The concept of Legalization*, in *International Organization*, 2000, p. 401.

[51] J. Goldstein, M. Kahler, R.O. Keohane, A.-M. Slaughter, *Introduction: Legalization and World Politics*, in *International Organization* 2000, pp. 385 and 396.

[52] See K.W. Abbott, R.O. Keohane, A. Moravcsik, A.-M. Slaughter, D. Snidal, *The Concept of Legalization*, cit.

[53] *Ibid.*, p. 403.

[54] See J. Goldstein, M. Kahler, R.O. Keohane, A.-M. Slaughter, *Introduction*, cit., p. 388.

On the voluntary character of the activities, Art. 21.2.6 CETA states the following: "[t]he Parties may undertake regulatory cooperation activities on a voluntary basis. For greater certainty, a Party is not required to enter into any particular regulatory cooperation activity, and may refuse to cooperate or may withdraw from cooperation. However, if a Party refuses to initiate regulatory cooperation or withdraws from cooperation, it should be prepared to explain the reasons for its decision to the other Party".

Moreover, Art. 18.6.2 of the 2019 EU-Japan Economic Partnership Agreement (EU-Japan EPA) states the following in a similar fashion: "[t]he Parties may engage in regulatory cooperation activities on a voluntary basis. A Party may refuse to engage in or withdraw from regulatory cooperation activities. A Party that refuses to engage in or withdraws from regulatory cooperation activities should explain the reasons for its decision to the other Party".

Such protective clauses, along with the careful formulation of other provisions,[55] have provided fertile ground for the development of arguments on the "soft" law nature of the commitments. However, a detailed discussion of the said debates not only exceeds the purposes of the argument, but also comes at odds with it. And this is because for the purposes of this Section, that of discussing the nature of the obligation envisaged in the regulatory cooperation chapters, obligation is not viewed as it does originally, as having various nuances, ranging from high to low. Instead, this Section adopts a binary distinction of legality, as does Kal Raustalia in his influential piece of work, thus rejecting the usefulness of the concept of "soft law".[56] According to this view, the concept of soft law is redundant, because evidence suggests that legality should better be seen on a binary scale.[57] Soft law (qualifying neither as hard law nor as non-law) can only exist as a phenomenon if we understand legality as obligation in legalisation is understood, on a spectrum. Only then is it possible to place soft law somewhere between law and non-law.[58] However, such a view would obscure rather than help us to assess

[55] Apart from these clauses, other provisions have tried to secure the prerogatives of the regulators, as they are established by the respective legal orders, by highlighting the nonlimiting character of regulatory cooperation. An example of this is Art. 21.2.4 CETA, which begins "[w]ithout limiting the ability of each party to carry out its regulatory, legislative and policy".

[56] K. Raustalia, *Form and Substance in International Agreements*, in *American Journal of International Law*, 2005, p. 581 and p. 586 *et seq.*

[57] Indeed, Prosper Weil argues that "whether a rule is hard or soft does not, of course, affect its normative character. A rule of treaty or customary law may be vague, 'soft', but as the above examples show, it does not thereby cease to be a legal norm". See P. Weil, *Towards Relative Normativity in International Law?*, in *American Journal of International Law*, 1983, pp. 413-414.

[58] Soft law is not always perceived as something between hard law and soft law. For example, Guzman in his influential contribution equates soft law with non-binding agreements. See A.T. Guzman, *The Design of International Agreements*, in *European Journal of International Law*, 2005, p. 580.

legal bindingness at the international level, since, at it will be shown, the determination on the quality of a rule as hard or soft comes from elements other than its form.[59]

Indeed, as Raustalia demonstrates, there is no evident state practice that grounds the existence of soft law in the reality of international treaty-making; soft law thus does not appear as a distinct category, instead, states negotiate and conclude either binding or non-binding agreements.[60] This strict dichotomy does not allow room for new categories of law as is soft law, hence, scholars tend to judge the "softness" based on criteria other than the legal form of the agreement. They rather focus on the substance of a commitment instead, as is for example the consequential and influential nature of a rule based on its preciseness[61] or on the structure of an agreement, as is its ability to be enforced.[62] Indeed, it has been widely argued in the literature that the text of a treaty may not necessarily encompass exclusively legal obligations, an example constituting the preambles of a treaty that serves among others as normative guidance to the main body.[63] Regarding the main treaty body, for these commentators it is thus not uncommon that a treaty comprises apart from solid legal obligations also declarations of intent and aspirations regarding the objectives to be fulfilled, that are of sub-legal, and even non-legal nature.[64]

Making a judgement on the legality of each separate provision[65] based on its substance and its ability to influence behaviour[66] and on its ability to be enforced conflates three distinct notions.[67] Substance and structure along with legality of course constitute

[59] See K. RAUSTALIA, *Form and Substance in International Agreements*, cit., p. 586.

[60] *Ibid.*, p. 587.

[61] Regarding commitments included in human rights treaties, Judge Baxter insisted on their vague formulation to rule out any possibility to influence State behaviour. See R.R. BAXTER, *International Law in Her Infinite Variety*, cit.

[62] *Ibid.*, p. 562.

[63] L. ORGAD, *The Preamble in Constitutional Interpretation*, in *International Journal of Constitutional Law*, 2010, p. 723.

[64] See generally A.E. BOYLE, *Some Reflections on the Relationship of Treaties and Soft Law*, in *International and Comparative Law Quarterly*, 1999, p. 906. Also Brown Weiss admits that provisions included in international agreements that are hortatory are referred as "soft law". However, she seems to recognise the complications that come with the use of the term "soft law" by referring to either legally binding or non-legally binding agreements. E. BROWN WEISS, *Introduction*, in E. BROWN WEISS (ed.), *International Compliance with Non-binding Accords*, Oxford: Oxford University Press, 1997, p. 3; D. SHELTON, *Law, Non-Law and the Problem of Soft Law*, in D. SHELTON (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, Oxford: Oxford University Press, 2003, p. 10 *et seq.*; R.R. BAXTER, *International Law in Her Infinite Variety*, cit., p. 554.

[65] F.V. KRATOCHWIL, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge: Cambridge University Press, 2011.

[66] J. BRUNNEE, S.J. TOOPE, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, in *Columbia Journal of Transnational Law*, 2000, p. 65.

[67] For those who understand soft law as the type of commitment that is not subject to a dispute settlement mechanism, treaties can include both hard and soft law commitments, the hard being the ones that

three components on the basis of which the design of international agreements is examined, however, they represent different aspects of each agreement and thus should not be muddled.[68] In other words, the status of a rule as law, represented by the dimension of "legality" is by no means dependent on how effective a rule is.[69] Of course, some rules may bring better results than others, but this does not deprive them of their status as law. That said, when it comes to the type of obligation in the case of regulatory cooperation commitments, particular attention should be given to whether these "reserve clauses" belong to the Legality or form part of the substance or structure of the agreement.

a) Legality and substance.

As far as the examination of the design of an international agreement is concerned, "substance" reflects the extent to which states have agreed to change their behaviour.[70] "Substance" encompass of course how vaguely or precisely the rules are defined; however, its scope though reaches beyond that. Its best proxy would be the description of the "depth" of the agreement, signaling the "the extent to which an arrangement requires states to depart from what they would have done in its absence".[71] Such an indicator constitute the provisions that outline the voluntary character of regulatory cooperation in FTAs. By giving a voluntary character to the initiation of cooperation, these provisions are an indication of how much the parties are called upon to alter their behaviour.

In this case, parties are called to voluntarily change their behaviour. The fact that the voluntary initiation of cooperation does not give much "depth" to the commitments, given the margin of discretion bestowed to the parties, is a different issue, one of depth and substance and not of legality. It is through the practice of "reserving" that the parties manage the "depth" of their commitments, that is why international arrangements present significant variations with regard to their depth. Depth can also be a relative unit, with the same obligation being deep for the one party but shallow for the other.[72] Be it as it may, in any case "depth" does not impinge upon the legality of the commitments.

are enforceable through an adjudication mechanism and the soft being the ones that range from non-adjudication to milder forms of reconciliation procedures. However, this vision of soft law is only acknowledged, not shared. See A.E. BOYLE, *Some Reflections on the Relationship of Treaties and Soft Law*, cit., p. 902.

[68] Also in the legalisation concept, obligation, precision and delegation are three distinct elements, which, although seen together as an overall concept, each one taken separately is viewed and assessed on its own.

[69] Effectiveness should also not be muddled with compliance. As explained by Kal Raustalia, compliance and effectiveness should be viewed separately, because effectiveness provides the causal linkage between a rule and a behaviour; compliance only demonstrates the conformity between the rule and the behaviour. See K. RAUSTALIA, *Compliance and Effectiveness in International Regulatory Cooperation*, in *Case Western Reserve Journal of International Law*, 2000, pp. 387 and 398.

[70] See K. RAUSTALIA, *Form and Substance in International Agreements*, cit., p. 584.

[71] G.W. DOWNS, D.M. ROCKE, P.N. BARSOOM, *Is the Good News About Compliance Good News About Cooperation?*, in *International Organization*, 1996, pp. 379 and 383.

[72] One example is the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), that on the one hand required substantive changes to the IP regime of many developing states, which was not the case for the US or Europe for example.

b) Legality and structure.

The same framework, the need to distinguish between legality and the various design elements, in this case, structure, applies to the exclusion of the regulatory cooperation chapter in EU-Japan from the dispute settlement mechanism.[73] Leading scholars apart from Raustalia, on whose framework the present analysis heavily relies, also separate the designation of an adjudication mechanism from legality, agreeing that it remains a design element, which is different and independent from the legal form of a commitment.[74] Even commentators that accept the dichotomy between soft and hard law and equate it to binding and non-binding commitments, understand and present adjudication on a separate basis.[75] Adjudication is thus not associated with legality, but with an enhancement of credibility instead, where also the design element of "hard law" aims as well.[76]

The irrelevance of this element for the presence of an international obligation has been also confirmed by jurisprudence of the Court of Justice. Interestingly enough, the case under consideration, *France v. Commission*, dealt with another regulatory cooperation chapters initiative, namely the 2002 EU-US Guidelines which were agreed as a political declaration during one of the various bilateral summits.[77] These Guidelines outlined in a quite detailed and coherent manner a series of activities that regulators were encouraged to undertake in order to initiate a sustainable dialogue. Quite alarmed by the content of the Guidelines and the impact they could have on the Commission's right of initiative, France brought an action for annulment against the Commission before the Court of Justice arguing that in fact the Guidelines were concluded as an international agreement, not falling under the Union's competences, the binding character of which could have a serious impact on the Commission's right of initiative.[78] Before deciding on the compatibility of the Guidelines with the legislative prerogatives of the Commission, the central question that had to be answered was whether the Guidelines were in fact an international agreement, concluded outside the scope of the Commission's competences, and could as such be challenged as a legal act of the Commission under Art. 230 EC Treaty. To answer this question, AG Alber went beyond the form of the agreement, and looked into the content of the Agreement, developing an analytical framework which included various dimensions upon which it based its Opinion. AG Alber com-

[73] Art. 18.19 of the EU-Japan EPA.

[74] See A.T. GUZMAN, *The Design of International Agreements*, cit., p. 581, presenting the design elements of "hard law, dispute resolution and monitoring as three self-standing design elements".

[75] For example Guzman who uses hard/soft law as synonyms for binding/non-binding agreements respectively himself, admits that one cannot distinguish these two categories of commitment, the kind of legality in other words (hard/soft – binding/non-binding) neither on the basis of an adjudication clause nor on the effects on the behaviour. See A.T. GUZMAN, *The Design of International Agreements*, cit., p. 583, note 21.

[76] A. GUZMAN, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Settlement Mechanisms*, in *Journal of Legal Studies*, 2002, p. 303.

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

[78] Opinion of AG Alber delivered on 25 September 2003, case C-233/02, *France v. Commission,* para. 54.

mented on the following elements in order to assess the legal nature of the Guidelines: *a*) the context that placed the Guidelines; *b*) the intention of the parties; *c*) the use of language; *d*) the objectives pursued.[79]

[79] Shortly, the Opinion of AG Alber argued the following. Regarding what is relevant, as mentioned above, the inclusion into a legally binding Treaty is of importance, even though not decisive on its own. AG's "context" criterion confirms that the choice of venue is indicative of the intention of the parties to dress their commitment in more formal clothes. Indeed, by arguing for the weak character of the cooperation activities as introduced in the Guidelines, due to the fact that they were founded in the context of a political arrangement, the Transatlantic Economic Partnership (Opinion of AG Alber, *France v. Commission*, cit., para. 59) one can expect some added value through the inclusion in a legally binding agreement, which changes the negotiating and decision-making environment, and thus influences the character of the agreement as a whole. This "upgrade" carries the history of countless efforts to promote the regulatory dialogue through the soft, legally fragile "political treaties", to quote Judge Baxter and signals the intention to commit further along more legalistic lines. Judge Baxter uses the term "international agreements" in order to expand his analysis also to agreements other than binding treaties (as understood for the purposes of 1969 Vienna Convention on the Law of Treaties). One of the categories of international agreements that he discerns are the "political treaties". These political treaties, examples of which are joint communications and joint declarations, are, according to his analysis, a category of soft law, as opposed to treaties that introduce hard law. See R.R. BAXTER, *International Law in Her Infinite Variety*, cit., p. 551. This venue also instructs that cooperation is not taking place in a legal vacuum. FTAs create a whole new structure of trade relations between the parties – which is of course juxtaposed to the multilateral one, but which also functions independently on some issues – and constitute a new source of authority themselves. Martha Finnemore and Stephen J. Toope make the same argument with regard to legalisation of monetary affairs and the impact of the element of obligation to the decisions taken under Art. VIII of the 1944 IMF Agreement, in order to argue that authority and normativity do not derive exclusively from the obligation imposed by a single provision, but also from the wider legal environment that frames these actions, which encompasses the activities and supports them with a firm legal background and relevant expertise. See M. FINNEMORE, S.J. TOOPE, *Alternatives to Legalization: Richer Views of Law and Politics*, in *International Organization*, 2001, p. 752. Regarding the intention of the parties, it is, according to the AG, an important factor that guides about the legal nature that the parties intended to ascribe to an international arrangement; however, it is not decisive. He noted particularly that the intention of the parties to give voluntary character to the Guidelines should be read in conjunction with other elements as well (Opinion of AG Alber, *France v. Commission*, cit., para. 80). The voluntary character of the commitments, stated clearly in both FTAs, is to a certain extent informative, however, not decisive about the legal value of the commitments as such. Another dimension that merits consideration is, according to AG Alber, the use of language. "Legalization implies a discourse primarily in terms of the text purpose and history of the rules, their interpretation, admissible exceptions" (K.W. ABBOTT, R.O. KEOHANE, A. MORAVCSIK, A.-M. SLAUGHTER, D. SNIDAL, *The Concept of Legalization*, cit.) note the instigators of legalisation while unfolding the different dimensions and content of the obligation criterion. Applying this framework to the regulatory cooperation chapters, and beginning from the discourse in terms of language, the vocabulary according to which the main provisions are formulated, the use of the obligatory "shall", is indicative of the mandatory nature of the terms, and the hard type of obligation. Such vocabulary is used for example in CETA with regard to Art. 21.5 dealing with the compatibility of regulatory measures ("each Party shall, when appropriate, consider the regulatory measures or initiatives of the other party on the same or related topics") and Art. 21.7 on further cooperation dealing with information exchange ("the Parties shall periodically exchange information of ongoing or planned regulatory projects in their areas of responsibility"). Similar language is used repeatedly in outlining the procedure of regulatory cooperation to be un-

However, it is the starting point of the AG's thoughts that confirms our argument. Indeed, AG Alber commenced his assessment by stating what is irrelevant for the characterisation of a commitment as a legally binding one. According to his analysis, the presence or absence of dispute settlement and liability provisions is irrelevant to the qualification of the Guidelines as an international agreement.[80] Indeed, it is interesting that the same argument raised at the time by the Commission to argue against the legal value is raised also today for the same reason. The choice to subject a commitment to dispute settlement may instead influence the level of effectiveness, as a matter of enforcement, but not its qualification as an obligation as such.

Based on the argumentation provided in the previous two Sections, confirming the existence of a binding international obligation raises significantly the "obligation" criterion. As outlined above, the insistence of a voluntary cooperation and the choice in EU-Japan to exclude the provisions from dispute settlement refers to the substance and structure of the chapters, not their legality, and thus must not be seen as a factor to deprive the commitments from their quality as a legal obligation. As an international obligation created through its inclusion in an FTA, certainly the conditions under which regulatory cooperation activities are conducted are altered. Indeed, such an obligation carries a heavier legal significance, one that has the power to oversee, prevent and give solutions to internal implementation problems, as the one faced in earlier efforts, exactly because of the weight it carries as an international commitment.

V.2. Evidence from regulatory cooperation included in FTAs beyond the EU

Apart from the theoretical question on the legalisation of regulatory cooperation, it is worth mentioning that practice has associated the presence of an FTA and the achieved results of regulatory cooperation activities. In other words, an empirical connection seems to exist between the existence of an FTA and the advancement of regulatory cooperation activities, the latter taking place either within or outside the FTA structures.

dertaken in Art. 18.12 of the EU-Japan EPA. Furthermore, the AG took into consideration the objectives pursued. He argued that the objectives as described in the Guidelines, also militated in favour of the non-binding nature of the commitments. However, one can see that the objectives as described in the regulatory cooperation chapters of modern FTAs, go much further than the objectives pursued with the Guidelines. While the objectives of the Guidelines qualify more as process-orientated, the objects of the regulatory cooperation chapters of the CETA is more result-orientated. The main objective of the Guidelines was to facilitate the dialogue between regulators: this objective is of course present in the new chapters on regulatory cooperation in the FTAs, which however, go even further, by actually setting an objective to the process of regulatory cooperation, that being the elimination of unnecessary regulatory barriers, the advancement of the quality of the regulation and the concomitant invigoration of the business sector. Thus, the aim is not solely to initiate a dialogue and to build trust between the regulators, but goes further, to the actual elimination of duplicative, unnecessary trade barriers.

[80] Opinion of AG Alber, *France v. Commission*, cit., para. 19.

These preliminary assumptions can be extracted from regulatory cooperation efforts beyond the EU, where the FTA structure has supported regulatory cooperation activities.[81] One example is that of the 1992 North American Free Trade Agreement (NAFTA). Regulatory cooperation between the NAFTA partners, although initiated by the FTA, was only advanced later. The NAFTA saga begins with the inability of the NAFTA institutional structures to have any result. The trilateral Committee on Standards-Related Measures and the working groups comprising it, established under the FTA, did not advance the works on regulatory cooperation due to a lack of political oversight.[82] The Security and Prosperity Partnership (SPP) did manage to incorporate to a certain extent the kind of cooperation envisaged in NAFTA.[83] In a way, it completed it. Thus, the subject was treated once more under the SPP, an executive-type cooperation, with greater success.[84] Later, to intensify the ongoing success, the parties established an even tighter form of cooperation, bilateral this time, the US-Canada Regulatory Cooperation Council, which also implicated the direct participation of regulatory agencies.

This case eventually demonstrated better achievements than the EU regarding regulatory cooperation. Regulatory cooperation was based on a firm background, a legal instrument that regulated solid trade relations. It is not a coincidence that, in the realm of NAFTA, the SPP brought far better results in the branch of regulatory cooperation than in security, which was not supported by a previous legal instrument.[85] Hence, should regulatory cooperation operate more efficiently under an FTA structure, its inclusion in the EU FTAs is heading in the right direction.

VI. Conclusion

More than one factor led to the inclusion of regulatory cooperation in FTAs. In the multilateral setting, legal commitments of low cooperation that concentrated on non-

[81] Another example of regulatory cooperation based on an FTA is the example of Australia and New Zealand, built within the 1983 Australia-New Zealand Closer Economic Relations Trade Agreement. With its final goal being the establishment of a single market, this FTA approached regulatory cooperation via joint accreditation based on international standards, harmonisation, various MRAs, and the creation of a joint regulator, the Australia-New Zealand Food Authority. The joint regulatory authority was the result of the 1995 Agreement on Establishing a System for Development of Joint Food Standards. This agreement finally led the adoption of a joint Australia-New Zealand Food Standards Code in 1999. See D.P. Steger, *Institutions for Regulatory Cooperation in "New Generation" Economic and Trade Agreements*, cit., p. 115.

[82] D.P. Steger, *Institutions for Regulatory Cooperation in "New Generation" Economic and Trade Agreements*, cit., p. 112.

[83] L. Bélanger, *Governing the North American Free Trade Area: International Rule Making and Delegation in NAFTA, the SPP and Beyond*, in *Latin American Policy*, 2010, pp. 22 and 31.

[84] *Ibid.*, p. 31.

[85] L. Bélanger, *Le régionalisme "soft" en Amérique du Nord: le cas du Partenariat pour la sécurité et la prospérité*, in J.-M. Lacroix, G. Mace (eds), *Politique étrangère comparée Canada/États-Unis*, Bruxelles: Peter Lang, 2012, p. 157.

discrimination (Art. 2.1 of the 1995 Technical Barriers to Trade Agreement, hereinafter TBT Agreement, and Art. 2.3 of the 1995 Sanitary and Phytosanitary Measures Agreement, hereinafter SPS Agreement) and rationality requirements (Art. 2.2 TBT and Art. 2.2 SPS) were inadequate to trigger a substantial regulatory dialogue. Apart from that, other efforts primarily in the bilateral political arena were condemned to failure because of their legal weaknesses. To cure both weaknesses, the coordination of regulatory cooperation activities under the premises of an FTA marks the beginning of a different era for their materialisation, mainly through its contribution to the "legalisation" of regulatory cooperation. With a stronger focus on obligation, it remains to be examined how strong the other constituents, precision and delegation, are in FTA regulatory cooperation. However, it is safe to argue that, with inclusion in a legally binding treaty, cooperation activities are placed on a different playing field, and commitments are vested with the armoury of an international obligation, an armoury that better and more effectively serves implementation and enforcement.

ARTICLES

EUROPEAN EXTERNAL MIGRATION FUNDS AND PUBLIC PROCUREMENT LAW

THOMAS SPIJKERBOER* AND ELIES STEYGER**

ABSTRACT: Since 2014, the European Union has established three funds (for Africa, Syria, and refugees in Turkey) to implement its external migration policy. In this *Article*, we analyse whether these funds and their implementation are compatible with EU public procurement law. This leads to a mixed picture. The wholesale exemption of expenditure under the EU Trust Fund for Africa from public procurement is incompatible with EU law; the exemption is not motivated, and it is implausible that there is a crisis in all 26 African countries where the Trust Fund operates thorough the duration of the Trust Fund. However, some more limited exceptions may apply, allowing for exempting particular projects from public procurement. Whether or not public procurement has taken place is often not transparent. It is remarkable that the notion of emergency is used in a cursory manner. It is equally remarkable that European public procurement law is not well integrated in external migration policy.

KEYWORDS: public procurement law – migration law – EU Trust Fund for Africa – facility for refugees in Turkey – Trust Fund in response to the Syrian crisis – external migration policy.

I. INTRODUCTION

In 2014-2015, the European Union adopted three financial measures in order to cooperate with neighbouring countries in the field of migration policy. Under the three instruments, not only migration policy projects were funded, but also humanitarian and security related projects. By July 2019, the Trust Fund in response to the Syrian crisis,

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also called the Madad Fund, was worth a total of 1.8 billion euros;[1] the European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa was worth 4.6 billion euros;[2] and the Refugee Facility for Turkey[3] (later changed to Facility for Refugees in Turkey)[4] 5.6 billion euros.[5]

For the projects implemented through these financial measures, there is often no open competition. Instead, potential implementing partners bring their projects to the attention of EU delegations in the country concerned and the European Commission.[6] These carry out a first scrutiny of potential projects. Subsequently, an informal expert group carries out an examination of the project proposals. In the background, there is an on-going negotiation between the Commission, the EU Member States, the third

[1] Commission Decision C(2014) 9615 of 10 December 2014 on the establishment of a European Union Regional Trust Fund in response to the Syrian crisis, "the Madad Fund". For financial details compare Commission Implementing Decision C(2014) 9614 final of 10 December 2014 on the constitutive contribution to the European Union Regional Trust Fund in response to the Syrian crisis, "the Madad Fund", to be financed from the general budget of the European Union; Commission Implementing Decision C(2015) 7695 of 13 November 2015 adopting the special measure for the 2015 DCI contribution to the European Union Regional Trust Fund in response to the Syrian crisis to be financed from the general budget of the European Union; Commission Implementing Decision C(2016) 7898 of 8 December 2016 on the 1st special measure for the 2016 ENI contribution to the European Union Regional Trust Fund in response to the Syrian crisis, the "Madad Fund", to be financed from the general budget of the Union; Implementing Decision C(2017) 4290 final of 26 June 2017 on the first special measure for the 2017 ENI contribution to the European Union Regional Trust Fund in response to the Syrian crisis, the 'Madad Fund', to be financed from the general budget of the Union; Implementing Decision C(2017) 8187 final of 8 December 2017 on the second special measure for the 2017 ENI contribution to the European Union Regional Trust Fund in response to the Syrian crisis, the 'Madad Fund', to be financed from the general budget of the Union; Commission Implementing Decision C(2018) 7776 of 27 November 2018 on the financing of the special measure for the 2018 DCI contribution to the European Union Regional Trust Fund in response to the Syrian crisis. Commission, Financial state of play, July 2019.

[2] Commission Decision C(2015)7293 of 20 October 2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa. Financial state of play, July 2019.

[3] Commission Decision C(2015) 9500 of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism – the Refugee Facility for Turkey.

[4] Commission Decision 2016/C 60/03 of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015.

[5] Art. 4 of Decision C(2015) 9500, cit. Financial state of play, July 2019.

[6] Annex I, para. 4, of the Constitutive Agreement of the Madad Fund (*infra*, Section III.2) provides that the Commission may call upon expertise from the field to identify actions. In an action fiche from the Madad Fund, it is explicitly mentioned that the proposed action builds on several concept notes submitted by different networks and partnerships. See the Action Document for EU Trust Fund to be used for the decisions of the Operational Board, 1 April 2016, ec.europa.eu, p. 11, where the term "applicant" is used for the beneficiary of the project. The project supports the Kenyan National Counter Terrorism Centre, which will be granted 5 million euros.

country involved and sometimes the potential implementing partner.[7] In the words of the European Court of Auditors, the selection of projects is "not fully consistent and clear".[8] Others have called it "opaque".[9]

In light of these concerns about the transparency of the way in which large amounts of public funds are spent, we will analyse how expenditure under the migration funds relates to European public procurement law. In order to do so, in a first paragraph we give a summary outline of European Union public procurement law (Section II). Subsequently, we will describe the three external migration funds, with particular attention for their financial management (Section III). In order to get an idea of the actual implementation, we then describe five individual projects, again with particular attention for their financial management (Section IV). In Section V, we draw some conclusions on the relation between public expenditure under the external migration funds and EU public procurement law.

II. European Union public procurement law

The main features of European public procurement law, as applicable to the Member States of the European Union, are laid down in three directives concerning public procurement in general,[10] on the award of concession contracts[11] and on procurement by entities operating in the water, energy, transport and postal services sectors.[12] For the current subject matter, we can limit ourselves to Directive 2014/24.

Public procurement law aims to bring the award of public contracts by or on behalf of the Member States in consonance with the principles of the TFEU, in particular with the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles deriving thereof, such as equal treatment, non-

[7] S. Carrera, L. den Hertog, J. Núñez Ferrer, R. Musmeci, M. Pilati, L. Vosyliut, *Oversight and Management of the EU Trust Funds. Democratic Accountability Challenges and Promising Practices*, Brussels: European Parliament, February 2018, p. 28 *et seq*.

[8] European Court of Auditors, *European Union Trust Fund for Africa: flexible but lacking focus*, 2018, pp. 17-25. The European Court of Auditors also issued a report on the Facility for Refugees in Turkey, which does not address procurement issues: European Court of Auditors, *The Facility for Refugees in Turkey: helpful support, but improvements needed to deliver more value for money*, Special Report no. 27/2018, eca.europa.eu.

[9] S. Carrera, L. Den Hertog, J. Núñez Ferrer, R. Musmeci, M. Pilati, L. Vosyliut, *Oversight and Management of the EU Trust Funds*, cit., pp. 29 and 75.

[10] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

[11] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

[12] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

discrimination, mutual recognition, proportionality and transparency.[13] One may summarise the Directive's general aim as to open up markets for public contracts, stimulating competition and as a consequence the proper spending of public money.

The Directive is and, in light of Art. 288 TFEU, only can be addressed to the Member States. Regulation 966/2012 provides that public contracts awarded by the institutions of the European Union shall be subject to public procurement and sets down the rules for the procedures.[14] The institutions of the Union are not directly bound by the Directives. However, since the Regulation follows from the same fundamental principles of the TFEU as the Directives, the institutions practically apply the provisions of the Regulation along the lines of the Directive. It comes as no surprise that the General Court applies these principles in the context of the Regulation in the same way as in the context of the Directive.[15] So even though the institutions do have some liberty to diverge from the provisions of the Directive, and of course the Union legislator has the opportunity to deviate from the application of the directives in its own regulations, public procurement law applicable to the institutions of the Union has to be very much in consonance with the procurement law applicable to the Member States. This is not just a technicality; the Directive and the Regulation are implementations of the same fundamental principles.

In general, this means that the institutions of the EU and their subsidiaries as well as the Member States should apply the principles and procedures of the Directive. Public contracts should be awarded through pre-announced, transparent, open, non-discriminatory and objective procedures, which provide for a tender on the broadest possible basis, unless an exception to this principle applies. The tender (regardless whether it is issued by Member States or by EU institutions) must be published in the Official Journal of the European Union by the contracting authorities. The full procurement procedure (especially publication in the Official Journal) only has to be fulfilled above certain financial thresholds; Art. 118 of Regulation 966/2012 refers to Directive 2004/18, which has been replaced by Directive 2014/24. The thresholds vary from over 5 million euros for public works contracts to between 134.000 and 750.000 euros for public supply and services contracts.[16]

Arts 101 and 102 of Regulation 966/2012 provide that public contracts shall be subject to public procurement. A public contract is defined as a written contract for pecuniary interest between economic operators and contracting authorities, in order to obtain, for a price paid (in part) from the EU budget, the supply of movable or immovable assets, the execution of works or the provision of services. This includes building con-

[13] Recital 1 of Directive 2014/24/EU, cit.

[14] Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union.

[15] General Court, judgment of 28 January 2009, case T-125/06, *Centro Studi Manieri v. Council*, paras 41, 81 and 86.

[16] Art. 4 of Regulation 966/2012, cit.

tracts, supply contracts, works contracts, and service contracts.[17] Art. 104 of Regulation 966/2012 and Arts 27-30 of Directive 2014/24 prescribe the same procedures: the open procedure in which all candidates may apply for the contract under the conditions prescribed in the procurement documents; the restricted procedure with pre-selection of candidates, the contest, the negotiated procedure, and the competitive dialogue. The choice which procedure to use is not entirely up to the contracting authorities. The open and restricted procedures are favoured over the more limited procedures.

The Directive contains several specific exceptions to the duty to use the public procurement procedures. The most important are defence contracts[18] and contracts in circumstance of emergency. Defence contracts are excluded insofar as they fall within the scope of the *lex specialis* of Directive 2009/81,[19] or when public procurement would require disclosure of confidential information or other essential security interests. The Regulation does not contain a defence exception, presumably because at this moment the EU does not have a defence budget.

For emergency situations, Art. 32, para. 2, let. c), of Directive 2014/24 contains an exception by allowing the use of the negotiated procedure without publication, if this is necessary for reasons of extreme urgency brought about by unforeseeable events and the normal procedures cannot be applied. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority. Regulation 966/2012 does not explicitly contain this exception, but at Art. 190, para. 4, exempts civil protection operations and humanitarian operations in the field of external action.[20]

Another exception to the obligation to apply the procedures of the Directive is in case the contracting authority is allowed to award a public service contract to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law, regulation or published administrative provision which is compatible with the TFEU (Art. 11 of Directive 2014/24). Those public contracts are only allowed if and when the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments, and more than 80 per cent of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority.[21] No private participation in the controlled legal person is allowed. This exception had not been

[17] *Ibid.*, Art. 101.

[18] Arts 15-17 of Directive 2014/24, cit.

[19] Directive 2009/81of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

[20] The financing of external action is further regulated by Regulation 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action.

[21] Art. 12 of Directive 2014/24, cit.

adopted in the Regulation, but since the historical development of the exception derives from case-law from the Court of Justice, to us it seems safe to assume that it may be applied by the EU institutions and their subsidiaries as well.[22]

Another exception is embedded in Art. 32, para. 2, let. b), of Directive 2014/24. When the works, supplies or services can be supplied only by a particular economic operator for a restricted number of reasons, among others when competition is absent for technical reasons, it is not required to follow a public procurement procedure. This exception cannot be found in the Regulation, but it is reasonable to assume it is applied in the same vein for procedures within the scope of the Regulation.

In case of indirect management (*infra*, Section III.1), procurement procedures shall be laid down in the financing agreements between the Commission and the implementing entity.[23] The European Commission can adopt delegated acts on procurement in the field of external action.[24] The contents of these delegated acts have to conform to the basic principles of the TFEU and the purpose of the Regulation, which in conjunction with the Directive has to be interpreted functionally.[25] Regulation 1268/2012[26] contains a chapter on procurement, which contains rules that are equivalent to those in Regulation 966/2012 (Arts 121-172), and a chapter on grants (Arts 173-208). Regulation 1268/2012 specifies that, in case of indirect management, procurement rules equivalent to those applicable to the Commission have to apply.[27] Art. 154 of Regulation 1268/2012 reduces the applicable time limits to 10 or 15 calendar days for parties to respond to an invitation for tenders, in cases of "duly substantiated urgency". On grants, the regulation specifies that they may be awarded without a call for proposals for the

[22] *Centro Studi Manieri v. Council*, cit., para. 41.

[23] Art. 190, para. 3, in conjunction with Art. 189 of Regulation 966/2012, cit.

[24] *Ibid*., Art. 190, para. 1.

[25] Court of Justice, judgment of 20 September 1988, case C-31/87, *Beentjes*.

[26] Commission Delegated Regulation 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union. Commission Delegated Regulation 1268/2012 has been replaced by Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012), see Commission Implementing Decision (EU) 2018/1614 of 25 October 2018 laying down specifications for the vehicle registers referred to in Article 47 of Directive (EU) 2016/797 of the European Parliament and of the Council and amending and repealing Commission Decision 2007/756/EC. This has not affected the content of the provisions relevant for this *Article*. As Commission Implementing Regulation 1268/2012 was in force at the time of the adoption of the measures under discussion here, we refer to this legal instrument.

[27] Art. 60 of Regulation 966/2012, cit., in conjunction with Art. 38, para. 1, of Regulation 1268/2012, cit.; Art. 40, let. f), of Regulation 1268/2012, cit. See in particular Arts 36 and 38 of Regulation 1268/2012, cit.

purposes of humanitarian aid and civil protection operations or for crisis management aid;[28] as well as in "exceptional and duly substantiated emergencies".

From this short overview, it appears that contracts subjected to procurement law, must be awarded according to fairly strict, transparent procedures in which the contracting authority has little freedom to deviate from the prescribed procedures.

III. The three funds

The first level at which EU public procurement law is implemented in the current context is that of the migration funds. Two of these funds are EU Trust Funds (EUTFs), which are regulated in Regulation 966/2012 (Section III.1). After that, the two Trust Funds for Syria and Africa will be addressed (Section III.2). The crisis exception in the Trust Fund for Africa will be analysed in Section III.3, after which the *sui generis* instrument of the Facility for Refugees in Turkey will be discussed (Section III.4).[29]

III.1. Trust Funds

Art. 187, para. 1, of Regulation 966/2012 provides that the Commission may create trust funds under an agreement with other donors, for emergency, post-emergency or thematic actions. The Commission can adopt delegated acts on the management, reporting and governance of trust funds.[30] Regulation 2015/323 is the financial regulation applicable to the 11th European Development Fund (2014-2020).[31] Art. 42 of Regulation 2015/323, on Union trust funds, stipulates that Art. 187 of Regulation 966/2012 shall apply. Trust funds shall be implemented directly by the Commission[32] *i.e.* by its departments, including through delegation to Union delegations,[33] or to executive agencies.[34] Emergency or post-emergency trust funds may also be managed indirectly[35] by: third countries or the bodies they have designated;[36] international organisations and

[28] For the definition of crisis, see Art. 190, para. 1, let. a) and b), and para. 2, of Regulation 1268/2012, cit.

[29] See for a related discussion on the European Development Fund, V. Dimier, *Eurafrica and Its Business: the European Development Fund Between the Member States, the European Commission and European Firms*, in *Journal of European Integration History*, 2017, p. 187 *et seq.*

[30] Art. 187, para. 9, of Regulation 966/2012, cit.

[31] Regulation (EU) 2015/323 of the Council of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund.

[32] Art. 187, para. 2, of Regulation 966/2012, cit.

[33] Compare Art. 56, para. 2, of Regulation 966/2012, cit.

[34] *Ibid.*, Art. 62.

[35] *Ibid.*, Art. 187.

[36] *Ibid.*, Art. 58, para. 1, let. c), sub-let. i).

their agencies;[37] public law bodies;[38] or bodies governed by private law with a public service mission.[39]

Indirect management has to be in conformity with the general rules of Art. 60 of Regulation 966/2012, which requires sound management, transparency and non-discrimination. Indirect management will be supervised by the Commission and Union delegations.[40] A Board of each Trust Fund is established to ensure the representation of the donors, and of the non-contributing Member States as observers, and to decide upon the use of the funds.[41]

III.2. The Trust Funds for Syria and Africa

The Trust Funds for Syria and Africa are established through Constitutive Agreements which are very similar.[42] The Constitutive Agreements establish the funds as an emergency trust fund in the sense of Art. 187 of Regulation 966/2012.[43] The funds, which shall not have legal personality, are managed by the Commission, on behalf of the donors (in practice: the EU Member States) and the European Union.[44] The Constitutive Agreements set up a Trust Fund Board (consisting of the contributing Member States, the Commission, and as observers the non-contributing Member States and, for the Madad Fund, a representative of the Syria Recovery Trust Fund)[45] which establishes and reviews the overall strategy of the Trust Fund; and an Operational Committee (with a similar composition)[46] which decides about the allocation of funds to individual actions.[47] The Commission is the manager of the funds,[48] and is responsible for implementation of actions financed under the funds, directly or indirectly through imple-

[37] *Ibid.*, Art. 58, para. 1, let. c), sub-let. ii).
[38] *Ibid.*, Art. 58, para. 1, let. c), sub-let. v).
[39] *Ibid.*, Art. 58, para. 1, let. c, sub-let. vi).
[40] *Ibid.*, Art. 188.
[41] *Ibid.*, Art. 187, para. 4.
[42] The Commission has concluded separate Constitutive Agreements with each Member State. The text of the Constitute Agreement for the Trust Fund for Africa can be found at ec.europa.eu. The text of the Constitutive agreement for the Trust Fund for Syria can be found at ec.europa.eu. On the Trust Funds for Syria see A. Kalicka-Mikołajczyk, *The Madad Fund – the European Union Trust Fund in Response to the Syrian Crisis*, in *Silesian Journal of Legal Studies*, 2016, p. 121 *et seq*.
[43] Art. 1, para. 1, of both Constitutive Agreements, cit.
[44] *Ibid.*, Art. 1, para. 2.
[45] *Ibid.*, Art. 5, para. 1.
[46] *Ibid.*, Art. 6, para. 1.
[47] *Ibid.*, Art. 4, para. 1.
[48] *Ibid.*, Art. 7.

menting partners.[49] As such, the Commission has to exercise the same level of care as it exercises in managing the budgets under the Treaties.[50]

Annex I to the Constitutive Agreement of the Madad Fund, para. 4.1,[51] provides that actions can be implemented either directly by the European Commission through grants or procurement contracts, or delegated to host country governments, the national agencies of Member States or the agencies of other donors or international organisations.[52] Furthermore, given the funds' objective in an emergency and post-emergency situation, flexible crisis procedures as authorised by applicable Commission rules and regulations. The Constitutive Agreements provides that implementation shall be done in accordance with the implementing modalities provided for in the applicable Commission rules and regulations.[53] The Constitutive Agreement of the EUTF Africa adds to this that, to prevent duplication, delegated cooperation with Member States is to be preferred, while delegated cooperation with other donors will also be considered.[54]

The Commission Decision on the establishment of the EUTF Africa contains a hidden provision on procurement. Art. 3 of Decision C(2015) 7293 contains four unnumbered sentences:[55] one on internal delegation within the Commission; one on the applicable rules and procedures; one on overhead. And in between these a sentence providing that for the purpose of the implementation of the Trust Fund, the countries covered by the EUTF Africa "are considered to be in crisis in the sense of paragraph 2 of Art. 90 of the Rules of Application" for the duration of the Trust Fund. Art. 90 of the Rules of Application[56] concerns the recovery of fines or other penalties and does not refer to crisis. Most likely, the text intends to refer to Art. 190 of Regulation 1268/2012, which concerns exceptions to calls for grant proposals. Normally, grants are issued after a call for proposals.[57] Grants may be awarded without a call for proposals in case of, *i.a.*, humanitarian aid and civil protection operations or for crisis management; and in other excep-

[49] *Ibid.*, Arts 4, para. 1, and 7, para. 2, let. c). In principle, implementation contracts also fall under public procurement law. Exceptions may apply for emergencies, public right, etc. – *supra* Section II. We leave this issue aside for the moment.

[50] Art. 7, para. 4.1, of both Constitutive Agreements.

[51] The Annexes form an integral part of the Constitutive Agreement pursuant to Art. 22 of the Constitutive Agreement.

[52] Similar: Art. 2 of Commission Decision C(2014) 9615, cit.; Art. 2 of Commission Implementing Decision C(2015) 7695, cit.; Art. 2 of Commission Implementing Decision C(2016) 7898, cit.; Art. 2 of Decision C(2017) 4290, cit.; Art. 2 of Decision C(2017) 8187, cit.

[53] Art. 10 of both Constitutive Agreements, cit.

[54] Art. 10 of the Constitutive Agreement EUTF Africa, cit.

[55] Commission Decision C(2015) 7293 of 20 October 2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa.

[56] Regulation 1268/2012, cit.

[57] *Ibid*., Art. 189.

tional and duly substantiated emergencies.[58] Whether this general crisis exception for grants under the Trust Fund for Africa is compatible with European law will be addressed *infra*, Section III.3.

From this outline, it becomes clear that both funds are established as emergency trust funds. This has the dual effect of allowing for indirect management (for which a preference is made explicit for the EUTF Africa), while the existence of an emergency also allows for exceptions to normal public procurement law.

III.3. The crisis exception in the Trust Fund for Africa

Art. 3 of Decision C(2015) 7293 declares a crisis in all countries covered by the EUTF Africa for the duration of the Trust Fund in the sense of Art. 190, para. 2, of Regulation 1268/2012. Art. 10 of the Constitutive Agreement establishing the EUTF Africa stipulates that "given the Trust Fund's objective in a crisis and post-crisis situation, flexible procedures appropriate to the local environment will be used to ensure that the Fund is effective and responsive".[59] Are these provisions compatible with European procurement law?

It is established case-law that exceptions to the law and main principles of the European Union must be interpreted restrictively and must comply with the principle of proportionality so as not to hinder the useful effect of European Union law. It follows that a legal measure restricting the application of European law is only allowed if and when it is necessary, as well as suitable with regard to its legitimate aim. This principle of proportionality fully applies to public procurement law. The result is that in procurement procedures contracting parties are supposed to adhere to the rules and principles of the Directives or the Regulation and refrain from demands that are not necessary for the public contract at hand. Case law also prevents Member States from adopting legislation restricting the procedures for public contracts, even though they intend to do so with a legitimate aim.[60] When regulating authorities in the Member States restrict the obligations of contracting parties or tenderers in public procurement law, this may be challenged in court and ultimately before the Court of Justice. An examination of the restriction against the principle of proportionality is then inevitable.[61] This examination considers the proportionality of the restriction against the particular public contract awarded.

The application of the concept of crisis on the basis of Art. 190 of Regulation 1268/2012 has to comply with the proportionality principle. The crucial question is

[58] For the definition of crisis see *ibid.*, Art. 190, para. 1, let. a) and b), and Art. 190, para. 2.

[59] Art. 10 of the Constitutive Agreement establishing the Madad Fund contains the same provision. We accept the existence of a crisis in that context; in addition, projects funded through the Madad Fund are also covered by the humanitarian exception to public procurement. For that reason, we will not discuss the Madad Fund in this Section.

[60] Court of Justice: judgement of 3 April 2008, case C-346/06, *Rüffert*; judgement of 18 September 2014, case C-549/13, *Bundesdruckerei*.

[61] Court of Justice, judgement of 17 November 2015, case C-115/14, *RegioPost*, para. 87.

whether in a third country there is a crisis which justifies non-application of procurement procedures, for example because immediate action is necessary in face of a natural disaster (an earthquake, a tsunami, a hurricane) or a conflict (for example a civil war). The term crisis is defined in Art. 190, para. 2, as follows:

> "Crisis situations in third countries shall be understood as situations of immediate or imminent danger threatening to escalate into armed conflict or to destabilise the country. Crisis situations shall also be understood as situations caused by natural disasters, manmade crisis such as wars and other conflicts or extraordinary circumstances having comparable effects related inter alia to climate change, environmental degradation, privation of access to energy and natural resources or extreme poverty".

The term crisis is thus defined as a situation which does not necessarily cover an entire country ("crisis situations *in* third countries").

Art. 3 of Decision C(2015) 7293 fails to substantiate why there would be a crisis situation throughout the 26 countries covered by the Trust Fund. This alone is already sufficient reason to doubt the compatibility of this provision with Art. 90 of Regulation 1268/2012. It is conceivable that it could be substantiated that there is a crisis throughout a particular country, like South Sudan. Also, the presence of a UN Force in Mali could be grounds to argue there is, or was at a particular moment, a crisis situation in the north of Mali.[62] In such situations, it is conceivable that the European Commission could establish that the situation is so urgent that public procurement would hinder an effective response to the situation. It is however far-fetched to claim that there is a crisis which makes procurement impossible in stable countries such as Ghana, Morocco or Kenya. Below, we will address two long-term projects in Mali (stimulating the cashew sector and improving civil registries). For both projects, it is implausible that it can be argued that procurement is not possible because of the security situation, because the projects are not direct responses to immediate security issues. They do not consist of actions such as sending troops, or humanitarian aid. These projects illustrate that the fact that there may conceivably be a crisis situation *in* a country does not imply that the crisis exception of Art. 190 of Regulation 1268/2012 can be applied to *all* projects in that country.

For these reasons, the provision of Art. 3 of Decision C(2015) 7293 is incompatible with European law for two reasons. First, no grounds are adduced to substantiate that there is a crisis in all 26 African countries for the entire duration of the Trust Fund. Second, the general nature of the exception makes the provision evidently overbroad. While it is conceivable that for particular projects it can be established that the situation

[62] Security Council, Resolution 2100 of 25 April 2013, S/RES/2100 (2013), preamble and para. 16, let. a), sub-let. i).

is so urgent as to override the interests served with public procurement procedures,[63] the general exception is disproportional.

An issue which merits separate attention is the covert nature of the crisis exception. Art. 3 of Decision C(2015) 7293 addresses four unrelated issues, which makes its contents intransparent. Furthermore, on the issue at stake here, it merely declares a crisis without specifying the consequences of this. And finally, the typo (Art. 90 instead of 190) makes the reference to Regulation 1268/2012 very hard to follow. One may ascribe this intransparent way of drafting a legal provision to the sloppiness which came with the haste of the Valletta summit, at which the EUTF Africa was set up. Another explanation could relate to the political tensions between the African Union and the European Union in the run-up to the Valletta summit.[64] It would not have been helpful if the Commission would have declared a general crisis in large parts of Africa, as this might conceivably have antagonised the African Union.

III.4. Facility for Refugees in Turkey

The Facility is not a financial instrument but a coordination mechanism, based directly on Arts 201, para. 2, and 214, para. 6, TFEU.[65] The Commission has established a coordination mechanism to assist Turkey in the immediate humanitarian and development needs of refugees, host communities, and national and local authorities.[66] The facility has been extended for 2018 and 2019.[67] The Facility aims at coordinating and streamlining actions financed from the EU budget and bilateral contributions from member States.

The legal setup of the facility has been changed substantially over time. In its original version, dating from November 2015, the Facility was to coordinate an amount of 3 billion euros, of which 500 million euros from the EU budget, and 2.5 billion euros from the Member States in accordance with a distribution key.[68] The Commission coordinated the actions by setting priorities and coordinating the allocation of resources.[69] The Commission retained the responsibility for the final decision on the set-

[63] Apparently unaware of the general exception, two action fiches on Nigeria do justify using a direct grant: see Linking Relief, Rehabilitation and Development and promoting the stability and safety of communities in displacement in North East Nigeria, no. T05-EUTF-SAH-NG-01, available at ec.europa.eu, p. 8, and Investing in the Safety and Integrity of Nigerian Girls (I-SING), no. T05-EUTF-SAH-NG-02, available at ec.europa.eu, p. 11.

[64] See T. Bunyan, *EU-Africa: Fortress Europe's neo-colonial project*, in *Statewatch*, November 2015, www.statewatch.org, and the sources mentioned there.

[65] Opening sentence of the preamble of Decision C(2015) 9500, cit.

[66] *Ibid.*, Art. 1.

[67] Commission Decision 2018/C 106/05 of 14 March 2018 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 as regards the contribution to the Facility for Refugees in Turkey.

[68] Art. 4 of Decision C(2015) 9500, cit.

[69] *Ibid.*, Art. 3, para. 1.

ting of priorities, the identification of actions and on the allocation of funds.[70] It also selected and coordinated the implementation of actions.[71] A steering committee, consisting of the Commission and Member States, was to provide strategic guidance and monitor the implementation of the Facility. Turkey was an advisory member of the steering committee.[72] The 2.5 billion euros Member State contributions to the Facility were to be included into the EU budget as external revenue. Contributions from the EU budget were to be implemented in accordance with the financial rules and regulations of the respective funds. Member State contributions were to be implemented, directly or indirectly, by the Commission.[73]

In February 2016, the original decision was amended via a decision[74] and a Common Understanding between the EU Member States and the Commission.[75] The main changes are the following:

a) the name is changed to Facility for Refugees in Turkey;[76]

b) the express inclusion of conditionality; assistance is to be give on the condition that Turkey implements its commitments under the EU-Turkey Joint Action Plan;[77]

c) the source of the contributions is changed to 1 billion euros from the EU budget and 2 billion euros from the Member States;[78]

d) the provision stipulating that *the Commission* shall coordinate the actions is replaced by the provision that *the Facility* shall coordinate Union and Member States' actions by setting priorities and by indicating the instruments to be used for the implementation of actions;[79]

e) the provision on the Commission's responsibility for final decisions is replaced by a provision indicating that the Commission shall chair the steering committee and have a leading role in coordinating its work; the Commission's competence is limited to the right to veto strategic guidance of the steering committee on the sole ground of legality;[80]

[70] *Ibid.*, Art. 5, para. 2.

[71] *Ibid.*, Art. 6, para. 1.

[72] *Ibid.*, Art. 5.

[73] *Ibid.*, Art. 6, paras 3 and 4.

[74] Commission Decision C(2016) 855 of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015.

[75] See Common Understanding Establishing a Governance and Conditionality Framework for the Refugee Facility for Turkey, available at www.statewatch.org.

[76] Art. 1 of Decision C(2015) 9500, cit., as amended by Decision C(2016) 855, cit., sole Art., para. 2, first and second indent.

[77] Decision C(2016) 855, cit., *passim*, and Common Understanding Establishing a Governance and Conditionality Framework for the Refugee Facility for Turkey, cit., para. D.

[78] Sole Art., para. 2, fifth and sixth indent, of Decision C(2016) 855, cit.

[79] *Ibid.*, sole Art., para. 2, third indent.

[80] Art. 5, para. 2, of Decision C(2015) 9500, cit., as amended by Decision C(2016) 855, cit., sole Art., para. 2, eighth indent.

f) the provision that Member States' contributions are included into the EU budget as external revenue has been deleted in the Decision,[81] and moved to the Common Understanding.[82]

These changes turn the Facility from an EU entity into a potentially intergovernmental entity. The new institutional provisions suggest that it is now the steering committee (and not the Commission) that decides about the setting of priorities, the identification of actions and the allocation of funds. However, the amended provision on the competence of the steering committee is not clear about this. The amended system provides that the steering committee shall provide strategic guidance, which will consist in setting overall priorities, types of actions to be supported, the instruments to be used, and conditionality. It will also permanently monitor and assess the implementation of actions, including respect of the conditionality requirements. This means that an explicit provision on which entity decides about the adoption of actions is lacking.[83]

The (unchanged) provision on implementation modalities provides that the Commission shall select and coordinate the implementation of relevant actions.[84] The Common Understanding adds that the Commission shall be responsible for managing the contributions.[85] The (unchanged) Art. 3, para. 3, of Decision C(2015) 9500 indicates a preference for grants, except if the nature of the project requires another form. The Commission has adopted a special measure approving spending 1.4 billion euros on education, health, municipal infrastructure and socio-economic support to refugees in Turkey in the financial Instrument for Pre-accession Assistance (IPA).[86] This Decision stipulates that "it is appropriate to authorise the award of grants without a call for proposals to the bodies identified in the Annex and for the reasons provided therein",[87] and in accordance with the conditions specified therein.[88] Implementation shall be direct or indirect; indirect management may be entrusted to the entities identified in the

[81] Art. 6, para. 4, of Decision C(2015) 9500, cit., as amended by Decision C(2016) 855, cit., sole Art., para. 2, twelfth indent.

[82] Common Understanding Establishing a Governance and Conditionality Framework for the Refugee Facility for Turkey, cit., para. C.

[83] A press release of 19 July 2019 states that: "The European Commission today adopted a new set of assistance measures worth €1.41 billion". See Commission, Press Release IP/2019/4389 of 19 July 2019.

[84] Art. 6, para. 1, of Decision C(2015) 9500, cit.

[85] Common Understanding Establishing a Governance and Conditionality Framework for the Refugee Facility for Turkey, cit., p. 2.

[86] Commission Implementing Decision C(2016) 4999 of 28 July 2016 adopting a Special Measure on education, health, municipal infrastructure and socio-economic support to refugees in Turkey, to be financed from the General Budget of the European Union for the years 2016 and 2017.

[87] *Ibid.*, recital 5. The justifications in the Annex concern the monopoly position of the Turkish Ministry of National Education, of the Turkish Ministry of Health, and the particular expertise and experience of the International Finance Corporation.

[88] Art. 4 of Decision C(2016) 4999, cit.

Annex.[89] The implementing partners are mentioned in the preamble (recital 6): the European Investment Bank, the Agence Française de Développement, the Council of Europe Development Bank, the World Bank Group, including the related International Finance Corporation, the European Bank for Reconstruction and Development, and the Kreditanstalt für Wiederaufbau.

The entities which implement actions through indirect management act as subsidiaries of the European Commission, both under Trust Funds and under the coordination mechanism that the Facility is. Therefore, they are in principle beholden to the rules of public procurement as laid down in the Regulation. In the next chapter we will review a number of projects subsidized by the abovementioned funds.

IV. Five projects

Until July 2019 projects amounting to 12 billion euros have been funded under the three external migration funds.[90] Analysing all of them is beyond the scope of this *Article*. We have selected five projects covering all three funds. This selection is too small to be representative. Instead, we have selected the projects with an eye to diversity. The first project, on civil registries in Mali, is a typical good governance project in the field of a core state function: establishing the population of a state. The second one, on the cashew sector in Mali, is a traditional development project which is only marginally related to migration and focuses on private actors. The third one, repatriation from Libya, looks at a major humanitarian/migration project. In the fourth project, providing the Turkish Coast Guard with boats built by a private shipyard concerns a standard procurement situation in the field of migration management, with the peculiarity that it is implemented by the International Organization for Migration (IOM), an intergovernmental organisation with UN status. The final project is one of the massive financial transfers to allow international and national organisations to assist the 5.6 million Syrian refugees in Iraq, Jordan, Lebanon and Turkey. By including projects from different fields (good governance, development, humanitarian assistance, migration management), projects with direct (Section III.1) and indirect (Section III.2, III.4, III.5) as well as mixed (Section III.3) management, and projects implemented by UN organisations (repatriation, coast guard boats) as well as European development agencies (both projects in Mali, Syrian refugees) we aim to cover a selection of projects typical for the activities of the funds.[91] Also, we have selected both projects which at first sight seemed to be cov-

[89] *Ibid.*, Art. 3; compare recital 6.

[90] Commission Decision C(2015)7293, cit.; Commission Decision C(2015) 9500, cit.; Constitutive Agreement of the Madad Fund, cit.

[91] Together, these organisations implement 74 per cent of the migration management projects funded through the three migration funds. See T. Spijkerboer, *The Migration Management Cartel. Europe's Migration Funds as a Global Political Project*, on file with Authors.

ered by an exception to public procurement (humanitarian aid to Syrian refugees) as well as projects where at first sight that seems far-fetched (cashews), as well as projects in between. Therefore, we believe that the projects give an impression of the public procurement issues that are at stake in the European migration funds. There may be other issues that do not occur in the five projects discussed here; and we are unable to say anything about the frequency of the issues signalled here.

To determine whether a public contract should be procured according to the procedures mentioned in the Regulation, two aspects of the project will be reviewed.

Firstly, one should determine whether the contracting authority is an authority falling within the scope of Regulation 966/2012, *i.e.* whether the authority is one of the EU institutions or a subsidiary thereof.

Secondly, it should be decided whether the scope of the contract falls within the scope of the exceptions of the Regulation, and, if so, whether the applicable exception can be reasonably applied by the Commission as it is.

IV.1. Civil registries in Mali

A first project concerns civil registries in Mali, and was approved by the Operational Committee for the Sahel and Lake Chad window of the EUTF Africa on 14 December 2016.[92] It is planned to run from 28 April 2017 until 28 March 2021.[93] The action fiche states that the project amounts to 25 million euros.[94] The EUTF website refers to a budget of 8 million euros, of which 13.250.000 euros are funded,[95] while it also refers to an identically names "sibling project" with a 17 million euros budget of which 11.750.00 euros has been funded.[96] If one adds both budgets, and both amounts of funding, all adds up to the 25 million euros in the action fiche. The project is implemented through direct management. The Commission was to sign a services contract with Civipol (the consulting and service company of the French Ministry of the Interior), which was to sign a sub-contract with Coopération Technique Belge (the Belgian development agency, which changed its name to Enabel in 2017).[97] They are to work in partnership with

[92] Comité Opérationnel – Formation Sahel et lac Tchad, Orde du jour, 14 December 2016, p. 2, on file with Authors.

[93] Programme d'appui au fonctionnement de l'état civil au Mali: appui à la mise en place d'un système d'information sécurisé, no. T05-EUTF-SAH-ML-08-01, ec.europa.eu.

[94] Programme d'appui au fonctionnement de l'état civil au Mali: appui à la mise en place d'un système d'information sécurisé, no. T05-EUTF-SAH-ML-08, ec.europa.eu. A similar project was implemented in Senegal by the same partners: Programme d'appui au renforcement du système d'information de l'état civil et à la création d'un fichier national d'identité biométrique, no. T05-EUTF-SAH-SN-07, ec.europa.eu.

[95] Programme d'appui au fonctionnement de l'état civil au Mali, no. T05-EUTF-SAH-ML-08-01, cit.

[96] Programme d'appui au fonctionnement de l'état civil au Mali: appui à la mise en place d'un système d'information sécurisé, no. T05-EUTF-SAH-ML-08-02, ec.europa.eu.

[97] *Ibid.*, p. 15.

the Sant'Egidio Community (a Christian community of lay people).[98] Confusingly, the EUTF website mentions as implementing partners (a term used for indirect management) Civipol for the 8 million euros version of the project,[99] and Enabel for the 17 million euros version of the project.[100] A European Commission webpage giving an overview of the EUTF in the Sahel and Lake Chad states that information about the contractual status of adopted actions can be accessed via a link,[101] but this leads to a page for which permission is required.[102]

The aim of the project is to provide Mali with a digitalised civil registry which is linked to a biometric database, so as to secure the identity of the population and to be accessible for other governmental users.[103] This new project follows an earlier project led by the United Nations Development Programme (UNDP) in 2013-2016. One of the aims of that project, of which 16.800.000 euros was contributed by the EU, was the "perennisation" of the civil registry, and the action fiche mentions that the earlier project "has financed the first year of the implementation of the perennisation of the civil registry".[104] One of the reasons why the Malian civil registry has weaknesses despite this earlier project is the "very important gap" between the financial efforts of donors and the "feeble level of political involvement for an institutional reform of the system".[105]

The project has two concrete aims, namely the consolidation of the civil registry system, and to have a consolidated central civil registry database which is connected with other civil registry centres, including municipalities and consulates.[106] Concrete activities include assistance in revising the regulatory and management framework; capacity building; sensibilisation of the population as to the importance of declaring facts to the civil registry; and the creation of a national civil registry database linked to a biometric database and interconnected to municipalities and consulates abroad.[107] The most significant budget items are the following.

First, a 2 million euros budget item for support to the management of the civil registry and reinforcement of the interaction between the actors.[108] The concrete activities

[98] More information about the Sant'Egidio Community available at www.santegidio.org.

[99] Programme d'appui au fonctionnement de l'état civil au Mali, no. T05-EUTF-SAH-ML-08-01, cit.

[100] Programme d'appui au fonctionnement de l'état civil au Mali, no. T05-EUTF-SAH-ML-08-02, cit.

[101] See https://ec.europa.eu/europeaid/regions/sahel-region-and-lake-chad-area-projects_en.

[102] See https://ec.europa.eu/europeaid/overview-contractual-status-each-adopted-action-under-sahel-region-and-lake-chad-area-window_en.

[103] Programme d'appui au fonctionnement de l'état civil au Mali: appui à la mise en place d'un système d'information sécurisé, no. T05-EUTF-SAH-ML-08, cit., p. 2.

[104] *Ibid.*, p. 4.

[105] *Ibid.*, pp. 4-5.

[106] *Ibid.*, p. 7.

[107] *Ibid.*, pp. 7-9.

[108] *Ibid.*, p. 16.

are support for finalising the national strategy of the civil registry; capacity building of the National Directorate of the Civil Registry; support regular meetings of the steering group; and facilitation and reinforcement of the interoperability between the "producer" sectors of the civil registry (national and decentralised state services and the civil registry processing centre) in the fields of health, justice, territorial administration and the ministry of Malians abroad.[109] The activity which can explain the size of the budget item is the reinforcement of interoperability, which most likely requires information technology (IT) services.

Second, a 5 million euros budget item for improving the service provision by the civil registry.[110] The concrete activities for this are support, in the form of advice or technical assistance, to local civil registry actors; capacity building at the local level; support the creation and functioning of reporting centres (where people can report births, deaths and such[111]); logistical support (means of transportation) for civil registry agents; and support in the form of equipment for civil registry centres.[112] This activity includes constructing and maintaining buildings (the reporting centres), acquiring motorbikes and cars (means of transportation), and acquiring IT equipment. Together, this can explain the size of the budget item.

Third, a 3 million euros budget item for support of archiving.[113] This concretely consists of creating civil registry archives; rehabilitation and equipment of the archive rooms of civil registry centres; indexation and digitalisation of the registries, including the archives.[114] This activity consists of acquiring IT equipment, and using it to digitalise the available civil registry data.

Forth, a 5,5 million euros budget item consists of updating the IT solution of the civil registry.[115] Concretely, this consists of elaborating the specifications for updating the IT application for civil registry management; IT equipment (presumably: acquisition of this) for civil registry centres, including consulates; digitalising the National Directorate of the Civil Registry; progressive deployment of the IT solution throughout the territory; and maintenance of the database.[116] This activity consists of acquiring IT equipment, and using it to keep civil registry data up to date.

Fifth, a 6 million euros budget item for upgrading the already existing biometric census civil registry database.[117] This is to consist concretely of organising hearings and

[109] *Ibid.*, p. 8.
[110] *Ibid.*, p. 16.
[111] *Ibid.*, p. 3.
[112] *Ibid.*, p. 9.
[113] *Ibid.*, p. 16.
[114] *Ibid.*, p. 9.
[115] *Ibid.*, p. 16.
[116] *Ibid.*, p. 9.
[117] *Ibid.*, p. 16.

enrolment operations; and support for the establishment and use of the civil registry database in consular posts.[118] The size of the budget item can be explained by acquiring and installing IT equipment at consular posts.

Although it is not clear whether this project is implemented through direct (as stated in the action fiche) or indirect (as suggested on the EUTF website) management, the European Commission as well as the Member State agencies Civipol and Enabel fall in the scope of Regulations 966/2012 and 1268/2012, and are bound by their public procurement rules (in case of indirect implementation on the basis of Art. 60 of Regulation 966/2012 in conjunction with Art. 38, para. 1, of Regulation 1268/2012). Because the crisis-based blanket exclusion EUTF for Africa is not acceptable (*supra*, Section III.3), public procurement procedures have to be followed unless a specific exception applies. The project does not concern defence contracts in the sense of Arts 15-17 of Directive 2014/24 and of Directive 2009/81. Also, it is evident that there is no situation where an exception to normal procurement procedures is necessary for reasons of extreme urgency brought about by unforeseeable events (Art. 32, para. 2, let. c), of Directive 2014/24). Equally, the project does not fall under the exception for civil protection operations and humanitarian operations in the field of external action (Art. 190, para. 4, of Regulation 966/2012). Even if one were to apply, *mutatis mutandis*, the exception for grants from Art. 190 of Regulation 1268/2012, the project does not concern crisis management or another exceptional and duly substantiated emergency. One exception that does apply concerns the Malian public authorities involved in the project. They exercise an exclusive right which they enjoy pursuant to a law (Art. 11 of Directive 2014/24 as applied by the General Court in *Centro Studi Manieri v. Council*).[119]

If we assume that the project was implemented through direct management, as the action fiche specifies, then the Commission was held to apply public procurement procedures for the service contract with Civipol and its sub-contract with Enabel.[120] The relation with Sant'Egidio is more opaque, but the same applies. From the action fiche, it is clear that no form of public procurement procedure took place, and on the basis of available information this seems problematic. This is all the more compelling, as a partly overlapping project was implemented by UNDP in the years 2013-2016; UNDP and the entities it worked with would have been plausible implementing partners as well.

Both in case of direct and of indirect management, the contracts for the acquisition of IT equipment and the services contracts for the installation, maintenance and updating of IT systems (as shown above these probably covered the largest part of the budg-

[118] *Ibid.*, p. 10.

[119] *Centro Studi Manieri v. Council*, cit., paras 145-146.

[120] Action fiche, cit., p. 14. The exception of Art. 12 of Directive 2014/24/EU, cit., does not apply, as neither Civipol nor Enabel are controlled by the European Commission.

et) should have been subject to public procurement. No information is available as to whether public procurement took place.

IV.2. Cashews in Mali

A project aiming at improvement of the cashew sector in Mali was approved by the Operational Committee for the Sahel and Lake Chad window of the EUTF Africa on 14 January 2016 during its first meeting.[121] The project started on 8 October 2016, and the planned end date is 8 October 2020.[122] The project amounts to 14 million euros, of which 13,5 million euros will be provided by the Trust Fund, and 500.000 euros by the implementing partner, the Spanish development agency Agencia Española de Cooperación Internacional para el Desarrollo (AECID).[123] The project is implemented through indirect management by AECID. Why this would be the most appropriate implementing partner is not established in the paragraph on implementation modalities in the action fiche.[124] AECID will conclude a sub-contract with the Malian Ministry of Rural Development.[125] AECID and the Ministry will sign partnership agreements with other partners, most notably with TRAGSA (Transformation Agraire SA, a Spanish public enterprise),[126] international non-governmental organizations (NGO) and their local partners, and other public and private institutions (such as APCAM, which presumably refers to the Assemblée Permanente des Chambres d'Agriculture du Mali, agricultural professional organisations, and cashew interprofessionnal – inter-branch – organisations).[127] The action fiche does not mention procurement for sub-contracting.

Since 2010, an entity referred to as Coopération Espagnole (which may well be identical to the implementing partner of this project, AECID) has supported the cashew sector in the Sikasso region in Mali in a 7 million euros project.[128] The new project's aim is to reduce the root causes of emigration by increasing economic and employment opportunities as well as food security, through improving the production, commercialisation and processing of cashew and its products. The project covers not only the Sikasso region, but also the Kayes and Koulikoro regions which, the action fiche states, are strongly affected by poverty, emigration and food insecurity. The project is seen as part

[121] Comité Opérationnel – Formation Sahel et lac Tchad, cit. p. 1.

[122] Projet d'Appui à la Filière de l'Anacarde au Mali (PAFAM), no. T05-EUTF-SAH-ML-02-01, ec.europa.eu.

[123] *Ibid*. The action fiche mentions 13.576.233 euros as the total estimated cost, all of which is to be funded from the Trust Fund.

[124] *Ibid.*, p. 12.

[125] *Ibid.*

[126] *Ibid.*, pp. 11-12.

[127] *Ibid*.

[128] *Ibid.*, pp. 1, 4.

of both regional and national development policies.[129] The main part of the budget (9,7 million euros) consists of activities to increase employment in growing, processing and selling cashews and cashew products. The main activities to this end are setting up 13 nurseries in the 13 geographical areas targeted by the project, so as to plant new cashew tree varieties; to train the women who grow and process cashews, and the men who sell cashew products; to build storage and processing installations (including two run by women); implementing a commercial strategy at the national, regional and international level; and to engage in literacy training and registering land ownership.[130] The two other substantive components are to implement a nutrition information campaign (budget just over 500.000 euros) and to promote the Malian cashew sector (budget just over 500.000 euros). The budget also contains a budget item of over 2 million euros for coordination, management, follow-up and communication.[131]

The project consists of several separate activities which contain services, supply activities, and works contracts. All the activities deal with the production, sale and processing of cashews. The activities are all in service of the improvement of the mostly female population and the improvement of the nutrition situation of the population. In principle, such contracts are subject to public procurement. Since the working territory is Mali, the project falls within the scope of the problematic general crisis exception for EUTF Africa (*supra* Section III.3). Even apart from our general observations about that exception, it has to be pointed out that the project's relation to EU migration policy is very thin.[132] Also, the content of the program (including its embeddedness in long term and larger development policies) does not justify the exempting of the contracting authorities from their duty to award the contract according to the rules of Regulation 966/2012. The programme is supposed to last several years and does not seem to be bound to specific parameters which necessitate an urgent and rapid implementation.

However, since the Spanish development agency AECID is implementing the programme by indirect management, it can be argued that it can award contracts to TRAGSA without using the procurement rules. AECID is a Spanish State agency, and TRAGSA is a company controlled entirely by the Spanish state. The Court of Justice ruled

[129] *Ibid.*, pp. 3-4.

[130] *Ibid.*, pp. 7-8.

[131] *Ibid.*, p. 13.

[132] *Ibid.*, p. 2 mentions that in 2013 over 195.000 Malians emigrated. In a table, at p. 2, it refers to the high percentage of the population living outside their locality. In doing so, the action document conflates and problematizes domestic, regional, and Europe-oriented migration. Comparison with Eurostat data on immigration, asylum and irregular migration shows that Malian emigration was overwhelmingly to other African countries. In 2013, immigration to EU Member States concerned 2.907 Malians. 6.630 Malians asked for asylum in EU Member States. 415 Malians were refused entry at EU external borders. 4.145 Malians were found to be illegally present in EU Member States. In total, 93.792 (of whom two thirds in France) Malian nationals had a valid residence permit in an EU Member State on 31 December 2013 (source: Eurostat).

that TRAGSA is a public undertaking acting as an instrument and technical service of Spanish public authorities, over which the public authorities exercise a control similar to that which they exercise over their own departments, while TRAGSA also carries out the essential part of its activities with those same authorities. Therefore, TRAGSA could not be considered as a third party in its relation with the Spanish authorities, and consequently it could be awarded a contract without procurement procedure.[133]

Furthermore, the sub-contract with the Malian Ministry of Rural Development may be subject to the exception of the exclusive right which the Ministry may enjoy pursuant to a Malian law (Art. 11 of Directive 2014/24). To the extent that the Assemblée Permanente des Chambres d'Agriculture du Mali exercises a public function, this exception may apply as well.

And finally, one might argue that, in light of the security situation in Mali,[134] the crisis exception applies. However, the cashew project is only remotely related to the security crisis in Mali, and is part of long standing and comprehensive development policies. Therefore, it seems artificial to apply this exception to this project.

Therefore, on the basis of the available information it seems likely that contracts can be granted by AECID to TRAGSA without procurement procedures, and this may apply to contracts with Malian public authorities as well. For other contracts (those with international NGOs and their local partners, professional organisations and other partners) normal public procurement law applies. Whether or not these have been followed in this project is not clear from the available information.

IV.3. Libya

A project to support the protection and humanitarian repatriation of vulnerable migrants in Libya was approved by the Operational Committee of the North Africa Window on 16 December 2016.[135] Its starting date is 16 December 2016 (the same date as the adoption of the project), while no end date is given.[136] The project amounts to 20 million euros according to the action fiche, and 19,8 million euros according to the web-

[133] Court of Justice, judgement of 19 April 2007, case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo)*.

[134] On 25 April 2013, the UN Security Council established the United Nations Multidimensional Integrated Stabilization Mission in Mali in light of the security situation, Resolution 2100(2013); compare Security Council: Resolution 2164 of 25 June 2014, UN Doc. S/RES/2164 (2014); Resolution 2227 of 29 June 2015, UN Doc. S/RES/2227(2015); Resolution 2295 of 29 June 2016, UN Doc. S/RES/2295(2016); Resolution 2364 of 29 June 2017, UN Doc. S/RES/2364(2017); Resolution 2391 of 8 December 2017, UN Doc. S/RES/2391(2017); and Resolution 2423 of 28 June 2018, UN Doc. S/RES/2423(2018).

[135] Operational Committee – North Africa Window, Agenda, 16 December 2016, p. 1, on file with Authors.

[136] Supporting protection and humanitarian repatriation and reintegration of vulnerable migrants in Libya, no. T05-EUTF-NOA-LY-02, ec.europa.eu.

site.[137] The project is to be implemented by indirect management by IOM for a 16,8 million euros component, and by direct management in the form of grants to civil society organisations for a 3 million euros protection fund.[138] IOM is argued to be well placed to implement the project, and for the repatriation component it is said to be the only organisation able to perform this kind of interventions in Libya at that moment.[139] For the grants to be awarded for the protection fund, the action fiche sets out eligibility criteria, essential selection and award criteria, and argues that pursuant to Art. 192 of Regulation 966/2012, EU financing may amount to 100 per cent instead of the usual 80 per cent because full funding is essential for the action to be carried out; this will be justified in the grant award decision. The action fiche refers to the general crisis exception in the EUTF Africa to argue that "flexible procedures" are applicable.[140] It does not explicitly refer to procurement, but from the context it is evident that this is what is meant.

The IOM component of the project consists of four concrete activities. The first is to equip the Libyan Coast Guard and Port Security officials with infrastructure at disembarkation and reception facilities, as well as life-saving equipment (to be identified with the Libyan authorities). Whether this may include the acquisition of coast guard boats is not clear from the document. This will include training to use the equipment, as well as human rights training.[141] The second activity consists of improving the management capacity and the living standards in Libya migrant detention centres.[142] Both of these activities are highly controversial. They are criticised as forms of aid and assistance to human rights violations by the Libyan Coast Guard both during interceptions at sea and by other Libyan state agents in the detention centres to which intercepted migrants are returned. In this perspective, these activities are outsourced forms of European border control. The EU and IOM respond to this criticism by arguing that the projects with the Libyan Coast Guard and in Libyan detention centres are making a bad situation slightly better.[143] A third activity is the repatriation of detained migrants, which involves interviews with migrants, getting their paperwork in order, doing medical checks, assisting them during their trip, and facilitating onward travel to their final destination, as well as

[137] The difference might be explained if we assume that for some reason the budget on the website does not include a 200.000 euros budget item for evaluation and monitoring which is in the budget, Supporting protection and humanitarian repatriation and reintegration of vulnerable migrants in Libya, no. T05-EUTF-NOA-LY-02, cit., p. 18.

[138] *Ibid.*, pp. 16 and 18.

[139] *Ibid.*, p. 16.

[140] *Ibid*.

[141] *Ibid.*, p. 10.

[142] *Ibid*.

[143] *I.a.* Human Rights Watch, *No Escape from Hell. EU Policies Contribute to Abuse of Migrants in Libya*, 21 January 2019, www.hrw.org; IOM, *Protecting Migrants in Libya Must Be Our Primary Focus*, 2 April 2019, www.iom.int.

reintegration assistance in the country of origin.[144] A fourth activity is the collection, reporting and dissemination of data on migrants in Libya.[145]

The protection fund serves to cover urgent needs of migrants inside and outside detention centres. These include assistance to victims of grave human rights violations (including gender-based violence), access to critical health services, to basic sanitation and hygiene facilities, and food and water.[146]

This project consists of a combination of services and works contracts. Apart from the crisis-exception for the whole of EUTF Africa, whether the more specific crisis exceptions apply to the first two activities (the Coast Guard and the detention centres) is intertwined with the evaluation of the criticism of these activities. If one agrees that they are humanitarian activities, then they are thereby urgent (because people are dying at sea, and are exposed to inhuman conditions at disembarkation, reception and detention centres). If one agrees with the critique holding that these activities aid and assist inhuman treatment and are forms of externalised European border control, then they cannot benefit from the humanitarian exception to procurement (because the activities are not humanitarian but, quite the opposite, participate in human rights violations); and the activities cannot benefit from the crisis exception either because activities that should not be undertaken at all (because they constitute violations of international law) do not have to be undertaken urgently either.

For the repatriation activities, if we accept the factual claim that currently only IOM can carry out this project, then the exception which is contained in Art. 32, para. 2, let. b), of Directive 2024/14 could be applicable and procurement procedures are not required. Also, the crisis exception of Art. 190 of Regulation 1268/2012 may be applied because the conditions to which migrants are exposed by Libyan authorities are so dire that getting people out of the country is urgent. For the data collection activities, it seems very hard to argue that no public procurement is required, as no exception seems applicable. An obvious approach would seem to split the contract and use a public procurement procedure for the data collection activities.

The protection fund consists of grants. No exceptions to public procurement seem to be applicable, although there may be reasons to apply shortened procedures. The Commission intends to issue grants to civil society organisations, more specifically "experienced organisations active in the field of protection and migration in Libya, with a particular focus on vulnerable and most-at-risk migrant populations," and refers to a lead applicant.[147] Earlier, the action fiche refers to "local [civil society organisations, CSOs] and NGOs, such as Ayadi Al Khair Society (AKS), Multakana Centre, Shaik Tahir Al

[144] Supporting protection and humanitarian repatriation and reintegration of vulnerable migrants in Libya, no. T05-EUTF-NOA-LY-02, cit., p. 11.

[145] *Ibid.*, pp. 11-12.

[146] *Ibid.*, p. 12.

[147] *Ibid.*, p. 16.

Zawi Charity Organisation (STACO), Psychosocial Support Team/Psychosocial Network (PSS), IDPs Union, the Libyan Red Crescent and International Organisation for Cooperation and Emergency Aid (IOCEA)".[148] The action fiche mentions eligibility criteria and essential selection and award criteria,[149] which suggests that a form of competition for grants has taken place.

Concluding: for the repatriation activities, if the claim that IOM is the only organisation capable of carrying that out is correct, public procurement is not required. For data collection, no public procurement procedures have been followed while this seems not justified under any exception. For the grants in the framework of the protection fund, the action fiche suggests that some form of competition has taken place, and that seems appropriate.

IV.4. Turkish Coast Guard boats

A fourth project aims to enhance the capacity of the Turkish Coast Guard to carry out search and rescue operations. It has a budget of 20 million euros, and is categorised as non-humanitarian assistance.[150] The project implements the Instrument contributing to Stability and Peace. It is based on application of Art. 3, para. 1, let. a), of Regulation 230/2014,[151] which creates a legal basis for technical and financial assistance in a situation of urgency, crisis or emergent crisis. The Commission decision adopting the project emphasises that there is a crisis, for which it refers both to Turkey's "migration management challenge" as well as to the "tragic incidents" in which migrants lost their lives.[152] The project is to be implemented through indirect management.[153] The Annex to the decision argues that IOM is the appropriate implementing partner, on account of its expertise and experience with the situation in Turkey.[154]

The project is to consist of three components. First, the Turkish Coast Guard will receive at least five search and rescue boats as well as lifesaving equipment. Second, the Turkish Coast Guard will receive training in the fields of responding to changing migration flows, preventing irregular migration and safeguarding the human rights of migrants. Finally, a mobile team will provide psychological support to Turkish Coast Guard

[148] *Ibid.*, p. 15.

[149] *Ibid.*, p. 16.

[150] European Union, EU Facility for Refugees in Turkey: projects committed/decided, contracted, disbursed – Status on 16/1/2019, 30 September 2019, ec.europa.eu, p. 7.

[151] Regulation 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace.

[152] Recitals 1-2 of Commission Implementing Decision C(2016) 3103 of 23 May 2016 on the exceptional assistance measure in favour of Turkey – Enhancing the capacity of the Turkish Coast Guards to carry out search and rescue operations.

[153] *Ibid.*, Art. 3.

[154] *Ibid.*, Annex, p. 7.

staff to prevent potential burnout.[155] Although no budget is given in the Annex, it is obvious that the acquisition of the coast guard boats will have been the main expense.

Neither the Decision nor the Annex claim or establish that the crisis situation is of such nature that no public procurement is possible. Although the acquisition of the boats is labelled as a mixed migration control/humanitarian project, it is labelled as non-humanitarian in the contract status overview, and as complementary to humanitarian aid in recital 8 of the Commission Decision. Therefore, the humanitarian aid exception has not been applied. It seems logical that the civil protection exception (which in this case could be applicable if saving lives were the main aim) is also not invoked in the decision. The defense exception is not invoked either, and this seems correct as the coast guard is a police organization, not a military one.[156] As the Commission decision does not invoke any of the exceptions, it seems to consider itself bound by the rules of public procurement. In substance, this seems appropriate: the situation does not seem to have been so urgent that the (if necessary: shortened) public procurement procedures could not have been followed.[157]

IOM has made public that, indeed, six boats were given to the Turkish Coast Guard, of which IOM emphasises the life-saving capacities while the Turkish rear admiral emphasises the fight against irregular migration.[158] Commissioner Hahn has informed a member of the European Parliament that the boats have been built by Damen Antalya.[159]

IOM Ankara has stated that it was IOM that "sent a proposal with the project and we were chosen to implement the project".[160] IOM has applied its normal procurement procedures:[161] "There were I think 6 companies who responded in this case, we looked at pricing and the products proposed. We did so in constant contact with the Turkish Coast Guard to see what they wanted. Damen was chosen because they have a shipyard in Antalya, in the country, which is great. The Turkish Coast Guard and IOM are

[155] *Ibid.*, p. 6.

[156] This is clear from a video of the delivery of the first tow boats on 15 June 2016 on YouTube (Aysun Hoche, *Damen Shipyards Antalya Coast Guard Boats Delivery. 15.06.2017*, www.youtube.com). There are no guns on the boat, which is of a civilian nature.

[157] In this context, the Commission Implementing Decision C(2016) 3103, cit., mentions that the Turkish Coast Guard also received five inflatable boats and four thermal cameras (budget: about 1,7 million euros) under the Instrument for Pre-Accession Assistance in 2007, and ten patrol boats in 2008. See also Commission Decision of 2007 adopting a national programme for Turkey under the IPA-Transition Assistance and Institution Building Component for 2007, on file with Authors, and Commission Decision of 2007 adopting a national programme for Turkey under the IPA-Transition Assistance and Institution Building Component for 2008, on file with Authors. These texts refer to "tendering procedures" for these contracts.

[158] IOM, *EUR 20 Million EU Project in Support of Turkish Coast Guard Seeks to Save More Migrant Lives*, 16 June 2017, www.iom.int.

[159] European Parliament, *Answer given by Mr Hahn on behalf of the Commission*, 21 June 2018, www.europarl.europa.eu.

[160] Telephone interview with Lanna Walsh, IOM Ankara, 4 October 2018, on file with Authors.

[161] We have not been able to identify the rules and procedures which IOM applies to its procurement.

nearby which may have reduced costs. In any case it was more convenient and it made sense. Damen is very sophisticated, this boat can right itself when capsized and it can operate in very stormy weather".[162] Our written request to be shown the call for tenders for the boats remained without response.

In this case, the available information suggests that the normal public procurement rules applied. It also seems that the Commission considered itself bound by it. From the statements of IOM Ankara, it appears that IOM considered itself bound by public procurement rules, and applied them, or at least introduced some form of competition to award the contract.

IV.5. Syrian refugees

The contract status for the Turst Fund for Syria mentions a project, funded through the Instrument Contributing to Stability and Peace, entitled "Improving school conditions, access to economic opportunities, local administration, social cohesion and dialogue facilitation for refugee, IDP and host communities", targeting Iraq, Lebanon, Jordan and Turkey. As starting date 15 June 2016 is mentioned, and it will run for 36 months. The budget amounts to 74,6 million euros, of which in October 2018 49,7 million euros had been disbursed. The main project partner is GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit, the German development agency), in partnership with Expertise France (the French public international cooperation agency) and AECID.[163] The project has been approved as part of a multi-project action fiche "Regional resilience and local development programme for Syrian refugees and host communities" with a total budget of 128 million euros.[164] In the multi-project action fiche the project mentioned on the contract status is not mentioned or otherwise visible. The action fiche embeds the funding decision in much larger multilateral funding programmes for the four countries involved.[165] Likewise, the objectives and activities are described in general terms. The multi-project action fiche allows for direct management in the form of grants, but the contract status shows that in this case implementation takes place through indirect management, with GIZ as the principal implementing partner, in cooperation with Expertise France and AECID. The other potential partners mentioned in the multi-project action fiche are the Italian Cooperation (presumably the Italian Agency for Development Cooperation, AICS), AfD (which probably is not meant to refer to the extreme right German political party but to the Agence Française de Développement), IOM and the Unit-

[162] Telephone interview with Lanna Walsh, cit.

[163] EU Regional Trust Fund in Response to the Syrian Crisis, the "Madad Fund". Projects contracted – Status on 25 October 2018, ec.europa.eu, p. 1.

[164] *Action Document for EU Trust Fund to be used for the decisions of the Operational Board*, cit. We base our assumption that this multi-project action fiche is the basis for this contract on an email from the EU Regional Trust Fund in Response to the Syrian Crisis of 3 September 2018, on file with Authors.

[165] *Ibid.*, pp. 2-5.

ed Nations programme UN-HABITAT.[166] However, these other potential partners do not figure in the contract status for the project under discussion here.

The GIZ website gives some more information about the project.[167] The project consists of improving basic social services for internally displaced persons (in Iraq), refugees and local populations. There is an emphasis on education, including acquiring school buses. An important characteristic is assisting refugees and local communities together, and to facilitate their integration through, *i.a.*, community centres offering training, advice and counselling.

Evidently, this project is exempted from public procurement on the basis of Art. 190, para. 4, of Regulation 966/2012 – the exception for humanitarian operations in the field of external action. We have no information on whether public procurement procedures were used. A supply contract concerning providing school buses, or a services contract for trainings, could result in better outcomes as well as in transparency. In all situations it remains to be seen whether the value of the individual contracts would necessitate public procurement.

V. Conclusion

The European external migration funds are subject to the ordinary public procurement rules to which both the Member States and EU institutions themselves are subject. Regulation 966/2012 and Regulation 1268/2012 prescribe open, transparent and objective procedures so as to open up markets for public contracts, stimulating competition and therefore quality of contractors and the proper spending of public money.

When we look at the compatibility of expenditure under the three funds with public procurement law, a mixed picture emerges. The wholesale exemption of expenditure under the EUTF for Africa from public procurement law via Art. 3 of Decision C(2015) 7293 is incompatible with EU law, both because no grounds are given for declaring a crisis in the 26 African countries involved, and because for most of these countries this is far-fetched (*supra* Section III.3). On the other hand, humanitarian aid projects funded via the Madad Fund and the Facility for Refugees in Turkey are exempted from public procurement law (*supra* Section IV.5). Furthermore, the more specific exceptions for public undertakings (*supra* Section IV.1, IV.2), for exclusive rights (*supra* Section IV.1, IV.2) and for organisations with unique capacities (*supra* Section IV.3) seem to apply in some cases. Whether public procurement has taken place, and if so how is not always transparent (*supra* Section IV.3).

From a migration law perspective, the cursory reliance of the notion of emergency fits with a more general tendency in the field to consider ordinary rules, standards and

[166] *Ibid.*, p. 14.

[167] Supporting refugees and host communities in the countries bordering Syria, available at www.giz.de.

procedures inapplicable because of an assumed emergency. Other examples are the continued internal border controls[168] and the prohibition of inhuman treatment in migration detention cases.[169] From a public procurement law perspective, it is remarkable that European public procurement law is not well integrated into external migration policy. This leads to a situation where the expenditure of billions of euros is vulnerable to political challenges, as well as to legal challenges from parties whose interests may have been harmed by the failure to apply public procurement procedures.

[168] E. KARAGEORGIOU, T. SPIJKERBOER, *Solidarity With/Out Borders*, in *RLI Blog on Refugee Law and Forced Migration*, 13 June 2019, rli.blogs.sas.ac.uk.

[169] European Court of Human Rights: judgment of 15 December 2016, no. 16483/12, *Khlaifia et al. v. Italy*, paras 179-185; judgment of 25 January 2018, no. 22696/16, *J.R. et al. v. Greece*, paras 138 and 143.

ARTICLES

THE *NE BIS IN IDEM* PRINCIPLE AS A LIMIT TO THE RESUMPTION OF COMPETITION PROCEEDINGS: AN ANALYSIS OF THE *REBAR CARTEL* SAGA

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ABSTRACT: This *Article* analyses the risks posed by the ability of EU competition authorities to resume proceedings following the judicial annulment of an infringement decision on procedural grounds. After introducing the notion of *parallel proceedings* in EU competition public enforcement, a taxonomy of possible instances of parallel proceedings is presented, whose resumption following the judicial annulment of a decision on procedural grounds is categorized as *horizontal* parallel proceedings either *at the national level* or *at Union level*. It is argued that although the only viable way to limit the proliferation of parallel proceedings is a coherent and reliable application of the *ne bis in idem* principle, this approach is currently impaired by the principle's narrow construction by the CJEU in competition matters. After a critical review of the current *PVC II* case law, which enables an enforcer to resume proceedings and readopt a decision annulled on procedural grounds, the *Article* proposes a twofold test underlying a broader application of the *ne bis in idem* principle as a limit to this type of parallel proceedings. The test is then applied via a detailed case study of the *Rebar cartel* litigation, a concrete and ongoing instance of horizontal parallel proceedings at the Union level. The *Article* concludes that in the *Rebar cartel* case, the *ne bis in idem* principle should have prevented the Commission from resuming proceedings.

KEYWORDS: competition law – public enforcement – parallel proceedings – *ne bis in idem* – annulment on procedural grounds – *Rebar cartel*.

I. INTRODUCTION

I.1. THE PERILS OF PARALLEL PROCEEDINGS IN EU COMPETITION LAW

Under Arts 101 and 102 TFEU,[1] anti-competitive agreements, concerted practices and decisions of associations of undertakings, on the one hand, and abuses of a dominant position, on the other hand are prohibited.[2] The undertakings concerned are required to cease the infringement and to refrain from future anti-competitive behaviour. More importantly, they may also be subject to hefty fines to promote deterrence.[3]

The effectiveness of EU competition law is assured by a dual system of enforcement. On the one hand, public enforcement is carried out by the Commission and national competition authorities (NCAs) pursuant to their institutional mandates. On the other hand, private enforcement is triggered by actions for damages brought by claimants that have suffered concrete harm due to the infringement of EU antitrust rules.[4]

[1] These provisions correspond to Arts 53 and 54 of the Agreement on the European Economic Area (EEA Agreement).

[2] For a thorough analysis of the conditions under which concerted and unilateral practices are considered anti-competitive and thus prohibited, see the relevant chapters of A. JONES, B. SUFRIN, *EU Competition Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2016.

[3] Under Art. 23 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, as subsequently amended, fines should be based on the gravity and the duration of the infringement and cannot exceed 10 per cent of the overall annual turnover of each undertaking concerned.

[4] See Court of Justice, judgment of 20 September 2001, case C-453/99, *Courage and Crehan*, where the Court first acknowledged the right of any individual to full compensation for harm suffered, provided

This *Article* focuses exclusively on public enforcement. After all, this is the domain where the application of the *ne bis in idem* principle arises more frequently, as its current applicability in private enforcement disputes has hitherto been residual.[5]

The public enforcement of the competition rules laid down in the TFEU is governed by a set of EU secondary acts. First, Council Regulation 1/2003[6] provides the general framework applicable to all antitrust proceedings under Arts 101 and 102 of the TFEU. Second, Commission Regulation 773/2004[7] implements the latter Regulation with detailed rules as to the conduct of such proceedings. Third, Regulation 1/2003 empowers NCAs to apply Arts 101 and 102 alongside the Commission, thereby innovating the relationship between EU and national competition laws with respect to the former regime under Regulation 17/62.[8] Finally, Regulation 1/2003 created the European Competition Network (ECN) consisting of NCAs and the Commission itself, to enhance the cooperation between competition enforcers within the EU and provide an administrative mechanism to better allocate cases amongst the authorities concerned.[9]

Worryingly, the public enforcement regime enacted by Regulations 1/2003 and 773/2004, as interpreted by the case law of the CJEU, gives rise to a significant risk of *parallel proceedings*.[10] These may be defined – borrowing terminology that originated within criminal and civil law and adjusting it to competition matters – as simultaneous or succes-

that a causal relationship exists between that harm and an infringement of competition law. See also Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[5] With regard to the *ne bis in idem* principle in EU competition public enforcement, see *infra* Section I.3. Nevertheless, national rules allowing for the award of punitive damages when the defendant has already been punished for the same antitrust violation by a public enforcement authority may also give rise to the applicability of the *ne bis in idem* principle in the context of private enforcement: see England and Wales Court of Appeal, judgment of 14 October 2008, *Devenish Nutrition Ltd*, [2008] EWCA Civ 1086.

[6] Regulation 1/2003, cit.

[7] Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, as subsequently amended.

[8] Council Regulation (EEC) 17 of 6 February 1962, First Regulation implementing Articles 81 and 82 of the Treaty, as last amended by Regulation (EC) 1216/1999.

[9] See Recitals 15-18 of Regulation 1/2003, cit. With regard to the ECN and the case allocation mechanism, see the Commission Notice of 27 April 2004 on cooperation within the Network of Competition Authorities (Network Notice).

[10] See R. NAZZINI, *Fundamental Rights Beyond Legal Positivism: Rethinking the Ne Bis in Idem Principle in EU Competition Law*, in *Journal of Antitrust Enforcement*, 2014, p. 270 *et seq.*; R. NAZZINI, *Parallel Proceedings in EU Competition Law*, in B. VAN BOCKEL (ed.), *Ne Bis in Idem in EU Law*, Cambridge: Cambridge University Press, 2016, p. 133 *et seq*.

sive investigations, carried out by the same competition authority or different ones, against the same undertakings for infringements arising from a common set of facts.[11]

On a general level, it may be argued that such a duplication of proceedings and decisions by the Commission and/or NCAs is favoured by the broad prosecutorial discretion to which European competition authorities are entitled. They may autonomously define the scope and extent of their investigations, and they are free to join, divide, close, and re-open cases according to convenience and on grounds of supposed administrative efficiency. The parties to those cases may only challenge such administrative choices after the adoption of the related decisions, by means of *ex post* judicial review.

I.2. The classification of parallel proceedings and the resumption of proceedings following the annulment of a decision on procedural grounds as an instance of horizontal parallel proceedings

Instances of parallel proceedings in competition matters may be classified according to the position that the authorities whose specific proceedings are at issue occupy within the EU public enforcement hierarchy.[12]

The first category under consideration concerns what may be referred to as *vertical* parallel proceedings: the simultaneous or successive opening of multiple investigations by the Commission and one or more NCAs involving the same allegedly anti-competitive conduct.

The second category under analysis may be referred to as *horizontal* parallel proceedings *at the Union level*: subsequent multiple investigations undertaken by the Commission against the same allegedly anti-competitive conduct.

The third category mirrors the previous one, as it also refers to *horizontal* parallel proceedings but *at the national level*: the simultaneous or successive opening of multiple investigations by the same or several NCAs involving the same allegedly anti-competitive conduct.

The fourth and last category refers to instances of parallel proceedings *within and outside the EU*, thus involving simultaneous or subsequent enforcement by European and third-country competition authorities for the same allegedly anti-competitive behaviour.

Providing actual cases for each of these categories falls outside the scope of this *Article*,[13] which focusses solely on a specific type of *horizontal* parallel proceedings: the re-

[11] See N. Erk, *Jurisdictional Disputes in Parallel Proceedings: A Comparative European Perspective on Parallel Proceedings Before National Courts and Arbitral Tribunals*, Alphen aan de Rijn: Kluwer Law International, 2014, p. 17 *et seq*.

[12] The classification suggested in the text was indirectly inspired by G. Donà, *Ne bis in idem et les pouvoirs d'imposer des amendes des autorités européennes et nationales de concurrence*, in *Proceedings of the XXX General Congress of the Union des Avocats Européens – Colloque de l'Union des Avocats Européens*, Bruxelles: Larcier, forthcoming.

sumption of proceedings following the judicial annulment of a decision on procedural grounds. Cases of this kind arise where the competition authority makes a procedural mistake or is responsible for a behavioural shortcoming severe enough to result *per se* in the annulment of the decision at issue.

As will be discussed in Section II, in such a case the relevant case law does not preclude an enforcer from resuming proceedings afresh and readopting a new decision which may be materially identical to the annulled one.[14] As a consequence, undertakings concerned by the resumption of proceedings may be declared in breach of competition rules, and thus heavily fined, even where the effective enforcement of EU competition law would not so require. More worryingly, that may also be the case where the procedural defect affecting the validity of the decision was objectively attributable to an enforcer who subjectively acted in bad faith or with gross negligence. This situation may arise, for instance, where the competition authority violates the rights of defence of the undertakings concerned by the proceedings in order to secure a finding of liability or simply speed up the adoption of a prohibition decision.[15]

From a theoretical standpoint, this type of *horizontal* parallel proceedings may fall either under the *Union-level* or the *national-level* categories, depending on whether the relevant competition authority happens to be the Commission or an NCA and, by extension, whether the court annulling the decision is the CJEU or a national court.[16] In this light, Section III presents the *Rebar cartel* litigation, an extraordinary case that has already lasted twenty years and is still ongoing, as a case study of *horizontal* parallel proceedings *at the Union level*.

I.3. The inadequacy of the discretionary prosecutorial restraint and the *ne bis in idem* principle as a limit to parallel proceedings

Under Regulation 1/2003, the inevitable abuses deriving from such a potential proliferation of parallel proceedings in the public enforcement of EU competition law are meant to be prevented *physiologically* by making use of the competition authorities' power to

[13] For a number of concrete competition cases involving parallel proceedings, see R. Nazzini, *Parallel Proceedings in EU Competition Law*, cit., p. 133 *et seq*.

[14] See *infra* Section II.1.

[15] See *infra* Section II.2.

[16] Even where an NCA adopts a decision applying EU competition rules under Regulation 1/2003, cit., national courts retain competence over the judicial review of that decision. Obviously, national courts may always refer a preliminary reference to the Court of Justice under Art. 267 TFEU, requesting it to interpret the relevant EU primary or secondary law, or to ascertain the validity of the applicable EU secondary law.

refrain from starting or continuing an investigation for material conducts which have been – or are being – dealt with by the same or another European enforcer.[17]

However, the broad discretionary nature characterising such prosecutorial restraint makes it an ineffective – and arguably inappropriate from a legal certainty standpoint – means to prevent multiple proceedings and decisions.[18] Besides calling *de lege ferenda* for a widely advocated reform of the current public enforcement regime,[19] the only viable way to adequately limit *de lege lata* the proliferation of parallel proceedings is a coherent and reliable application of the *ne bis in idem* principle.[20] Such an assertion builds upon a number of premises which are well known but are nevertheless worth discussing briefly here.

First, the principle of *ne bis in idem*, which may be defined at a general level as the prohibition to be prosecuted or punished twice for the same offence, is a fundamental right recognised by the EU legal order.[21] It is now enshrined in Art. 50 of the Charter of Fundamental Rights of the European Union (Charter), which applies to EU institutions as well as Member States when they are implementing Union law.[22] Yet even before the Charter acquired the same legal value as the Treaties,[23] the *ne bis in idem* principle was

[17] See Arts 3, 11 and 13 of Regulation 1/2003, cit., and paras 5 to 42 of the Network Notice, cit. See also R. NAZZINI, *Parallel Proceedings in EU Competition Law*, cit., p. 131 *et seq*.

[18] For a comprehensive analysis as to why this discretionary prosecutorial restraint, while theoretically designed to avoid the occurrence of parallel proceedings within the ECN, does not do so in practice, or in any case does not do so in a consistent and reliable manner, see R. NAZZINI, *Parallel Proceedings in EU Competition Law*, cit., p. 137 *et seq*.

[19] See J. KILLICK, P. BERGHE, *This Is Not the Time to Be Tinkering with Regulation 1/2003 – It Is Time for Fundamental Reform – Europe Should Have Change We Can Believe In*, in *Competition Law Review*, 2010, p. 259 *et seq*.; M. MEROLA, N. PETIT, J. RIVAS (eds), *10 Years of Regulation 1/2003*, in *GCLC Annual Conference Series*, Bruxelles: Bruylant, 2015; D. FOSSELARD, G. CARNAZZA, *The Review of Regulation 1/2003: Any Lessons to Be Learnt from the NCAs' Procedural Rules?*, in *Concurrences Review*, no. 1, 2017, www.concurrences.com. See also Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive).

[20] See W. DEVROE, *How General Should General Principles Be? Ne Bis in Idem in EU Competition Law*, in U. BERNITZ, X. GROUSSOT, F. SCHULYOK (eds), *General Principles of EU Law and European Private Law*, Alphen aan de Rijn: Kluwer Law International, 2013, p. 401 *et seq*.; R. NAZZINI, *Fundamental Rights Beyond Legal Positivism*, cit., p. 270 *et seq*.

[21] For a broad contextualisation of the *ne bis in idem* principle in its European dimension, see B. VAN BOCKEL, *The 'European' Ne Bis in Idem Principle*, in B. VAN BOCKEL (ed.), *Ne Bis in Idem in EU Law*, cit., p. 13 *et seq*.; B. VAN BOCKEL, *The Ne Bis in Idem Principle in EU Law*, Alphen aan de Rijn: Kluwer Law International, 2010.

[22] See Art. 51, para. 1, of the Charter. With regard to the extensive scope of application given to the Charter, see also Court of Justice, judgment of 26 February 2013, case C-617/10, *Åkerberg Fransson* [GC], paras 16-31.

[23] See Art. 6, para. 1, TEU.

already recognised as a general principle of Union law,[24] and should thus continue to be applicable as such alongside Art. 50 of the Charter.[25] The meaning and scope of the rights protected under the Charter must be interpreted in light of the corresponding rights guaranteed by the European Convention on Human Rights (ECHR), although Union law may provide more extensive protection.[26] Even prior to the entry into force of the Charter, the CJEU had always interpreted the general principle of *ne bis in idem* in line with the "right not to be tried or punished twice" provided for in Art. 4 of Protocol no. 7 to the ECHR and the related case law of the European Court of Human Rights.[27] Moreover, while other provisions dealing with the *ne bis in idem* principle in EU secondary law (such as Arts 54-58 of the Convention implementing the Schengen Agreement[28] and Art. 3, para. 2, of the Framework Decision on the European Arrest Warrant[29]) are not directly relevant to the competition domain, the CJEU's case law concerning their interpretation may nonetheless serve as an indirect means to further qualify Art. 50 of the Charter and the aforementioned general principle of Union law.[30]

Secondly, the fines imposed by the Commission and NCAs to sanction competition infringements are *criminal in nature* for the purpose of applying *ne bis in idem* rules,[31] thus "[t]he *ne bis in idem* principle must be observed in proceedings for the imposition of fines under competition law".[32] With regard to the European Convention on Human

[24] See Art. 6, para. 3, TEU. For a thorough reconstruction of the CJEU's case law on the *ne bis in idem* principle, see also D. SARMIENTO, *Ne Bis in Idem in the Case Law of the European Court of Justice*, in B. VAN BOCKEL (ed.), *Ne Bis in Idem in EU Law*, cit., p. 103 *et seq*.

[25] However, its status as a general principle of law has arguably lost most of its autonomous significance after the entry into force of the Charter: cf. W.P.J. WILS, *EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention On Human Rights*, in *World Competition*, 2011, p. 207; D. SARMIENTO, *Ne Bis in Idem in the Case Law of the European Court of Justice*, cit., p. 111.

[26] See Art. 52, para. 3, of the Charter, also referred to as the "homogeneity clause".

[27] For such an affirmation in a case dealing specifically with competition matters, see Court of Justice, judgment of 15 October 2002, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others (PVC II)*, para. 59.

[28] Convention of 19 June 1990 implementing the Schengen Agreement, included in the "Schengen Acquis" as referred to in Art. 1, para. 2, of Council Decision 1999/435/EC of 20 May 1999 (the Convention implementing the Schengen Agreement, or CISA).

[29] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as subsequently amended (the Framework Decision on the EAW).

[30] See R. NAZZINI, *Fundamental Rights Beyond Legal Positivism*, cit., p. 273.

[31] See Opinion of AG Kokott delivered on 8 September 2011, case C-17/10, *Toshiba Corporation and Others*, para. 101. For the limited relevance of the legal characterisation of the procedure concerned with regard to the applicability of the *ne bis in idem* principle, see also B. VAN BOCKEL, *The 'European' Ne Bis in Idem Principle*, cit., p. 39 *et seq*.

[32] Court of Justice, judgment of 14 February 2012, case C-17/10, *Toshiba Corporation and Others* [GC], para. 94.

Rights, this stems from the autonomous notions of "criminal charges" under Art. 6 of the ECHR and "criminal proceedings" under Art. 4 of Protocol no. 7 to the ECHR, a substantive threefold test developed by the European Court of Human Rights since its 1976 *Engel* judgment.[33] Competition proceedings – and in general administrative investigations which may result in the imposition of severe fines – are considered *criminal* within the meaning of these provisions, according to well established case law of both the European Court of Human Rights and the Court of Justice.[34] As to the Charter of Fundamental Rights, its "homogeneity clause" requires the notion of "criminal proceedings" under Art. 50 of the Charter to be interpreted in conformity with the broad meaning given to that same wording under Art. 4 of Protocol no. 7 to the ECHR. This assumption is confirmed by the Explanations of the Charter,[35] and it is implicitly followed by the case law of the Court of Justice[36] according to which "the application of Article 50 of the Charter is not limited to proceedings and penalties which are classified as 'criminal' by national law, but extends regardless of such a classification to proceedings and penalties which must be considered to have a criminal nature".[37]

Thirdly, with regard to the definition of "same offence" (*idem*) for the purpose of applying the *ne bis in idem* rules, the CJEU in competition matters continues to apply the *Aalborg Portland* threefold test, requiring identity of the facts, identity of the offender, and

[33] European Court of Human Rights, judgment of 8 June 1976, no. 5100/71, *Engel and Others v. The Netherlands*. For the consistent interpretation of the ECHR as a whole, the Court found that it was appropriate for the applicability of the *ne bis in idem* principle to be governed by the same *Engel criteria*: see European Court of Human Rights, judgment of 15 November 2016, nos 24130/11 and 29758/11, *A and B v. Norway*, paras 105-107.

[34] European Court of Human Rights: judgment of 21 February 1984, no. 8544/79, *Öztürk v. Germany*; judgment of 25 August 1987, no. 9912/82, *Lutz v. Germany*. Court of Justice: judgment of 8 July 1999, case C-235/92 P, *Montecatini*, paras 175-176; *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit., para. 59; judgment of 29 June 2006, case C-289/04 P, *Showa Denko*, para. 50. See also A. Rosanò, *The Concept of Criminal Law in the Opinions of the Advocates General: Justification of Punitive Powers and Human Rights*, in *New Journal of European Criminal Law*, 2016, p. 59 *et seq*.

[35] Explanations of 14 December 2007 relating to the Charter of Fundamental Rights (the Explanations of the Charter). The paragraph entitled "Explanation on Article 50" therein states that "[a]s regards the situations referred to by Article 4 of Protocol No 7, […] the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR".

[36] See *Åkerberg Fransson* [GC], cit., paras 33-36, providing three criteria for asserting whether administrative penalties are "criminal" in nature for the purpose of applying Art. 50 of the Charter. See also Court of Justice, judgments of 20 March 2018: joined cases C-596/16 and C-597/16, *Di Puma and Zecca* [GC], paras 38-40; case C-537/16, *Garlsson Real Estate and Others* [GC], paras 28-35; and case C-524/15, *Menci* [GC], paras 26-33, three recent cases where the Court found the administrative fines at issue to be punitive in character, and thus that the fines were of a *criminal nature* within the meaning of Art. 50 of the Charter.

[37] *Menci* [GC], cit., para. 30; *Garlsson Real Estate and Others* [GC], cit., para. 32.

identity of the legal interest protected.[38] The third requirement precludes the applicability of the *ne bis in idem* principle whenever the former and the subsequent offence at issue preserve different legal interests. Arguably no other offence under Union or national law protects the same interest guaranteed by Arts 101 and 102 TFEU, namely the prevention and punishment of behaviours distorting or eliminating competition within the internal market.[39] Consequently, the *ne bis in idem* principle is currently deemed to be applicable only when an undertaking is prosecuted or punished a second time on grounds of the same infringement of EU competition rules – and not of other EU rules or national competition rules – in respect of which that undertaking has already been penalised or declared not liable by a previous final decision on the merits adopted by the Commission or an NCA.[40] It is mostly due to this overly restrictive judicial interpretation as to the meaning of *idem*, in spite of the Court of Justice's more lenient jurisprudence on the point in areas of law other than competition,[41] that the ability of the *ne bis in idem* principle to effectively limit parallel proceedings in antitrust matters is impaired.[42]

The principle of *ne bis in idem* acts as a powerful incentive for competition authorities to thoroughly investigate alleged infringements. The bar it poses against further proceedings once parties concerned by an investigation have already been acquitted or convicted forces public enforcers to conduct their proceedings as efficiently and competently as they can, knowing that, in principle, they will not have a second opportunity to prosecute those parties for that same infringement. Thus, authorities are strongly encouraged not to leave any stone unturned in their investigations, as cases should be brought only where there is enough evidence for these to be upheld in the subsequent judicial appeal which parties are, in turn, likely to bring against them. It also means that resources are less likely

[38] Court of Justice, judgment of 7 January 2004, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others*, para. 338. See also *Toshiba Corporation and Others* [GC], cit., para. 97, where the Court expressly reaffirmed the three requirements referred to in the main text.

[39] See A. JONES, B. SUFRIN, *EU Competition Law: Text, Cases, and Materials*, cit., p. 91 *et seq*.

[40] See R. NAZZINI, *Fundamental Rights Beyond Legal Positivism*, cit., p. 275 *et seq*. See also Opinion of AG Kokott, *Toshiba Corporation and Others*, cit., para. 112.

[41] This is particularly true with regard to the Area of Freedom, Security and Justice (AFSJ) domain, where the CJEU applies a twofold conduct-based test to the *ne bis in idem* principle: see D. SARMIENTO, *Ne Bis in Idem in the Case Law of the European Court of Justice*, cit., p. 123 *et seq*.; B. VAN BOCKEL, *The 'European' Ne Bis in Idem Principle*, cit., p. 47; Opinion of AG Kokott, *Toshiba Corporation and Others*, cit., para. 116.

[42] See Opinion of AG Kokott, *Toshiba Corporation and Others*, cit., paras 111-124, suggesting that the Court should also adopt a conduct-based test for the definition of *idem* in competition matters. See also, among the many authors endorsing the approach suggested by AG Kokott, R. NAZZINI, *Fundamental Rights Beyond Legal Positivism*, cit., p. 285 *et seq*.; G. DI FEDERICO, *EU Competition Law and the Principle of Ne Bis in Idem*, in *European Public Law*, 2011, p. 254 *et seq*.; G. MONTI, *Managing Decentralized Antitrust Enforcement: Toshiba*, in *Common Market Law Review*, 2014, p. 277 *et seq*.; A. ROSANÒ, *Ne Bis Interpretatio In Idem? The Two Faces of the Ne Bis in Idem Principle in the Case Law of the European Court of Justice*, in *German Law Journal*, 2017, p. 50 *et seq*.

to be wasted on investigations leading nowhere, thereby improving the enforcers' efficiency. Furthermore, provided that it is not construed as restrictively as it is at present, the *ne bis in idem* principle works as an *ex post* counterbalance to the lack of parties' involvement in the *ex ante* process of case allocation within the ECN, enabling parties to bring actions before the CJEU or national courts to regulate in retrospect cases of parallel proceedings impartially and in accordance with the law.[43]

The following section presents a twofold test conveying a broader way to construe the *ne bis in idem* principle, which is deemed capable of providing a better-balanced limit to the resumption of proceedings following the annulment of a decision on procedural grounds.[44] Furthermore, in Section IV that test is applied to the *Rebar cartel*, the case of *horizontal* parallel proceedings *at the Union level* which is the subject-matter of the case study discussed in Section III, the argument being that the *ne bis in idem* principle should have prevented the Commission from resuming proceedings.

II. The current freedom to resume proceedings following the annulment of a decision on procedural grounds *vis-à-vis* a broader way to construe the *ne bis in idem* principle as a limit to such resumption

II.1. The current *PVC II* case law or the freedom to resume proceedings following the annulment of a decision on procedural grounds

Under Art. 263, para. 2, TFEU, for an annulment action to be well-founded on procedural grounds either there must have been a "lack of competence" of the institution to adopt the contested act in first place or the challenged defect must have entailed the "infringement of an essential procedural requirement". Thus, minor procedural defects do not affect *per se* the validity of a decision adopted pursuant to Regulation 1/2003.[45] As previously mentioned, under the current case law, the annulment of a Commission decision by the CJEU on grounds of a procedural defect does not preclude the Commission from resuming proceedings against the same undertaking for the same anti-competitive conduct already addressed by the annulled decision. Such freedom gives rise to an instance of what were previously defined as *horizontal* parallel proceedings *at the Union level*. The same case law should be applicable to NCAs whose decisions applying EU competition rules are annulled by national courts on procedural grounds, thus providing an example of *horizontal* parallel proceedings *at the national level*.[46]

[43] See R. Nazzini, *Parallel Proceedings in EU Competition Law*, cit., p. 138 *et seq*.

[44] See *infra* Section II.2

[45] See K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford: Oxford University Press, 2015, p. 253 *et seq*.

[46] See *supra* Section I.2.

Such a conclusion follows from the *PVC II* case law rendered by the Court of Justice in the final appeal case of the *PVC cartel* saga.[47] The case concerned a group of major petrochemical producers that had been fined by the Commission in 1988 by means of a first decision prohibiting collusive practices which amounted to a cartel in the polyvinylchloride (PVC) sector.[48] The undertakings concerned challenged the first PVC Decision and, in 1994, the Court of Justice set aside the judgment at first instance and annulled the decision as it considered the latter to be vitiated by essential procedural defects.[49] In that same year, the Commission readopted a second infringement decision in relation to the same undertakings which had already been the subject of the first PVC Decision, imposing fines of the same amount as those imposed by the first decision annulled by the Court on procedural grounds.[50] The undertakings concerned challenged the second PVC Decision too, claiming, *inter alia*, that the Commission could not readopt a fresh decision after the Court of Justice had annulled a previous decision materially identical to the readopted one, as such readoption amounted to a violation of the principle of *ne bis in idem*. Both the Court of First Instance and the Court of Justice on appeal dismissed the argument.[51]

The Court of Justice, in its judgment on appeal, reaffirmed that:

> "the principle of *non bis in idem*, which is a fundamental principle of [Union] law also enshrined in Art. 4(1) of Protocol No 7 to the ECHR, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision".[52]

However, the Court also stated that:

[47] *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit. See also R. WESSELING, *Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, Limburgse Vinyl Maatschappij NV (LVM) and Others*, in *Common Market Law Review*, 2004, p. 1141 *et seq*.

[48] Commission Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty, Case IV/31.865 – *PVC* (first PVC Decision).

[49] Court of Justice, judgment of 15 June 1994, case C-137/92 P, *BASF and Others (PVC I)*, para. 78. The Court of Justice set aside the appealed judgment because it considered that the Court of First Instance had erred in law in declaring the decision at issue non-existent rather than annulling it on essential procedural grounds.

[50] Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty, Case IV/31.865 – *PVC* (second PVC Decision).

[51] *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit., paras 54-69. The Court of First Instance had reduced the fines imposed on some of the applicants but had dismissed the remainder of the action for annulment of the decision at issue. The Court of Justice on appeal partially set aside the judgment of first instance but also dismissed the remainder of the action for annulment.

[52] *Ibid*., para. 59.

> "[the *ne bis in idem* principle] does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was annulled for procedural reasons without any ruling having been given on the substance of the facts alleged, since the annulment decision cannot in such circumstances be regarded as an 'acquittal' within the meaning given to that expression in penal matters. In such a case, the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them".[53]

It follows from the above case law that the Commission may make serious procedural mistakes – including defects expressly qualified as violations of "essential procedural requirements" by the Court of Justice,[54] thereby affecting the validity of an infringement decision – without losing the power to resume proceedings after the decision has been annulled by the CJEU. Indeed, in practice, the Commission normally readopts infringement decisions which have been set aside solely on procedural grounds: that was the case in the aforementioned *PVC* case,[55] in the *Steel Beams* case,[56] in the *Alloy Surcharge* case,[57] in the *Gas Insulated Switchgear* case,[58] and in the *Rebar cartel* case, which is the subject-matter of the case study discussed *infra* in Sections III and IV.

There is no reason not to consider the abovementioned *PVC II* case law concerning Commission decisions as applicable to NCA decisions too, provided that they apply EU competition rules, and not exclusively national competition rules, to a given case. Hence, NCAs too may make serious procedural mistakes which affect the validity of an infringement decision without losing the power to resume proceedings after the decision has been annulled by a national court on procedural grounds.[59]

II.2. A broader way to construe the *ne bis in idem* principle as a better-balanced limit to further proceedings following the annulment of a decision on procedural grounds

The Court of Justice's aforementioned *PVC II* case law can be further divided into two mutually dependent arguments. Firstly, the judicial annulment of a decision on proce-

[53] *Ibid*., para. 62.

[54] See *BASF and Others (PVC I)*, cit., para. 78.

[55] Second PVC Decision, cit.

[56] Commission Decision C(2006) 5342 final of 8 November 2006 relating to a proceeding under Article 65 of the ECSC Treaty, Case COMP/C.38.907 – *Steel beams*.

[57] Commission Decision 2007/486/EC of 20 December 2006 relating to a proceeding under Article 65 of the ECSC Treaty, Case COMP/F/39.234 – *Alloy surcharge – Readoption*.

[58] Commission Decision C(2012) 4381 final of 27 June 2012 amending Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 of the EC Treaty (now Article 101 of the Treaty on the Functioning of the European Union) and Article 53 of the EEA Agreement to the extent that it was addressed to Mitsubishi Electric Corporation and Toshiba Corporation, Case COMP/39.966 – *Gas Insulated Switchgear – Fines*.

[59] See R. Nazzini, *Parallel Proceedings in EU Competition Law*, cit., p. 134.

dural grounds does not constitute a ruling on the merits of the facts alleged, thus "[...] the annulment decision cannot in such circumstances be regarded as an 'acquittal' within the meaning given to that expression in penal matters".[60] Secondly, the fines imposed as a result of the second set of proceedings "[...] are not added to those imposed by the annulled decision but replace them".[61] Both strands of reasoning appear not to be entirely convincing.[62]

With regard to the effect of a judgment annulling an infringement decision for procedural reasons, it is not apparent that the judgment is the only relevant decision for the purposes of applying the *ne bis in idem* principle. The relevant decision to that effect may indeed be intended as the annulled decision, which established the infringement and imposed a penalty in the first place and which, after the judicial annulment, is no longer amenable to appeal and, thus, is "final" for the purposes of *ne bis in idem*. The objection to this argument – which lays the theoretical foundations for the *PVC II* case law – is that, once a decision has been set aside, it ceases to exist as an act producing legally binding effects and it is, therefore, impossible to say that there still is a "final" acquittal or conviction within the meaning of Art. 50 of the Charter.[63] However, it could be reasonably replied that a conviction does not simply cease to exist because it has been annulled. While it is indisputable that its legal effects are set aside retroactively (*ex tunc*), its significance *per se* cannot be disregarded in all respects. The essential purpose of the *ne bis in idem* principle is to protect the right of a person not to be subjected to a second prosecution or conviction once he or she has already been the subject of proceedings on the merits resulting in a final decision. In the case of the procedural annulment of a conviction, the defendant has actually been placed in jeopardy and there has been a substantive assessment of the case in proceedings in which he (should have) had the opportunity to exercise his or her rights of defence.[64] It may thus be argued that a decision ascertaining an undertaking's liability for the infringement of EU competition rules is "final" for the purposes of applying the *ne bis in idem* principle, and that the latter

[60] *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit., para. 62. See also Court of First Instance, judgment of 1 July 2009, case T-24/07, *ThyssenKrupp Stainless*, para. 190; upheld on appeal by the Court of Justice, judgment of 29 March 2011, case C-352/09 P, *ThyssenKrupp Nirosta*.

[61] *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit., para. 62.

[62] See R. NAZZINI, *Parallel Proceedings in EU Competition Law*, cit., p. 155 *et seq*.

[63] See R. WESSELING, *Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, Limburgse Vinyl Maatschappij NV (LVM) and Others*, cit., p. 1144 *et seq*.

[64] It should be noted that the defendant may not have had such an opportunity, as an annulment on procedural grounds may well depend on the violation of the parties' rights of defence, which "constitutes infringement of an essential procedural requirement": see Court of Justice, judgments of 21 September 2017, case C-85/15 P, *Feralpi*, para. 45; joined cases C-86/15 P and C-87/15 P, *Ferriera Valsabbia and Valsabbia Investimenti*, para. 48; case C-88/15 P, *Ferriere Nord*, para. 53; case C-89/15 P, *Riva Fire*, para. 47. The case that gave rise to these four judgments, *the Rebar cartel*, is thoroughly analysed *infra* in Section IV.

should consequently bar further proceedings concerning an infringement that has already been "finally" established.

It should also be noted that whether a decision has been annulled on procedural grounds or there has been a ruling on the merits may not be indisputable. In a recent case, an Italian oil and gas multinational challenged the Commission's decision to reopen proceedings in the *Butadiene Rubber cartel*, a case concerning the fixing of prices and sharing of customers in the market for certain types of synthetic rubber, after the Commission's previous prohibition decision had been partially set aside by the General Court.[65] In its application, the undertaking alleged, *inter alia*, the infringement of the *ne bis in idem* principle, claiming that the resumption of proceedings conflicted with the General Court's ruling insofar as the latter did not merely establish a procedural defect of the Commission decision but, by exercising its unlimited jurisdiction under Art. 261 TFEU and Regulation 1/2003, it re-determined the amount of the fine and substituted the Commission's original assessment with its own.[66] Eventually, the Commission decided to close the proceedings without readopting an infringement decision and the General Court declared that there was no longer any need to adjudicate on the action as it had become devoid of object.[67]

Similarly, in another case which is still pending as of this writing, a Spanish paper manufacturer challenged the Commission's readoption of a settlement decision in the *Envelopes cartel*, a case involving five European companies which had coordinated prices and allocated customers in the market for certain types of paper envelopes. The Commission's previous decision was partially annulled by the General Court insofar as it had imposed a fine on the Spanish undertaking, due to the lack of sufficient reasoning concerning the discretionary fine reductions applied to that company.[68] In its readopted decision, the Commission considered that the General Court's partial annulment had not called into question the undertaking's liability for the cartel and merely addressed the procedural error ascertained by the ruling, thereby re-imposing on the undertaking a new fine identical to the one imposed in the original decision.[69] In the pending case, the undertaking concerned by the readoption claimed before the General Court that the new decision amends the original one, despite the fact that the first decision has become final, with the sole exception of the fine originally imposed on the applicant, which was annulled by the General Court in the exercise of its unlimited jurisdiction as to the merits of the case. The undertaking thus alleged, *inter alia*, the violation of the *ne bis in idem* principle, claiming

[65] General Court, judgment of 13 July 2011, case T-39/07, *Eni*.

[66] See the summary of the application brought on 4 June 2012, case T-240/12, *Eni*.

[67] General Court, order of 7 March 2014, joined cases T-240/12 and T-211/13, *Eni*.

[68] General Court, judgment of 13 December 2016, case T-95/15, *Printeos and Others*.

[69] Commission Decision C(2017) 4112 final of 16 June 2017 amending Decision C(2014) 9295 final relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement, Case AT.39780 – *Envelopes*.

that, by re-imposing a fine equivalent to the one annulled by the General Court, the Commission had contravened the Court's ruling rendered on the first decision.[70]

As to the argument that the second penalty merely replaces the previously imposed one and is not added to it, it should be emphasised that the scope of protection granted by the *ne bis in idem* principle does not limit itself to the right not to be punished twice but encompasses likewise the right not to be prosecuted twice. This stems from the fact that the *ne bis in idem* rules are applicable not only where there has been a previous conviction, but also where the first decision amounts to a final acquittal, as is made apparent by the same wording of both Art. 4 of Protocol No. 7 to the ECHR and Art. 50 of the Charter. In the light of the twofold scope of applicability, the fact that, when the first decision is judicially annulled, the second fines are not added to the previous ones but only replace them, is irrelevant and based on an incorrect understanding of the *ne bis in idem* principle. From the viewpoint of the defendant, what matters is that the Union's *ius puniendi* has already been exercised in proceedings on the merits resulting in a decision that is no longer amenable to appeal. The fact that the *ius puniendi* was invalidly exercised should not detract from the protection afforded to the defendant, provided that the procedural error affecting the validity of the decision meets certain conditions discussed in the text below.

It has been recently suggested that the *PVC II* case law, in so far as it *does* currently prevent the reopening of proceedings where the CJEU has annulled a decision of the Commission by ruling on the substance of the case and not merely on procedural grounds, should be superseded as it would undermine the effective enforcement of EU competition law. According to this arguable opinion, the *ne bis in idem* principle should not impede the Commission from resuming proceedings in cases where the annulment of its decision was indeed grounded on a substantive error in the Commission's assessment of the infringement, but the Court did not exclude the violation of EU competition rules by the undertakings concerned.[71] By contrast, the opposite argument is made here: the *PVC II* case law blatantly clashes with the fundamental right rationale of the *ne bis in idem* principle, inasmuch as it does not preclude the Commission – or an NCA – from resuming proceedings where Union – or national – courts have annulled an infringement decision on procedural grounds, provided that the procedural defects affecting the validity of the decision meet the conditions hereafter. The *PVC II* case law should thus be replaced by a more nuanced approach.[72]

[70] See the summary of the application brought on 27 July 2017, case T-466/17, *Printeos and Others*, pending.

[71] The *revirement* of the current *PVC II* case law in the restrictive sense mentioned in the text was recently suggested by A.P. Biolan, *Reopening EU Competition Investigations after Judicial Annulment: Beyond Procedural Errors*, in *Journal of European Competition Law & Practice*, 2017, p. 83 *et seq*..

[72] See R. Nazzini, *Parallel Proceedings in EU Competition Law*, cit., p. 157.

It is indisputable that the need to ensure the effective enforcement of EU competition law may indeed justify the limitation of the protection granted by the *ne bis in idem* principle when the first decision has been annulled on procedural grounds. An enforcement of competition rules that is truly effective requires a rule according to which procedural errors done by the enforcer do not necessarily preclude the possibility of establishing the merits of an alleged infringement. Where these procedural errors affect the validity of a decision, in principle, the reopening of the case should not be barred, provided that the defect can be remedied. The undertaking concerned has the right to proceedings conducted in accordance with the law and, where the undertaking reckons that the authority has breached the law governing the procedure, that right may be enforced by challenging before a court of law the decision that closed said proceedings. In these circumstances, if an action brought on procedural grounds is successful, the *ne bis in idem* guarantee must yield to the public interest in effective competition enforcement. However, even if this sensible line of reasoning were to be embraced, an unlimited – and almost indefinite –[73] possibility of resuming proceedings following the annulment of a decision on procedural grounds seems to be an excessive sacrifice of the *ne bis in idem* fundamental right on the altar of effective enforcement. Furthermore, it may also be argued that allowing the enforcer to reopen a case time and again notwithstanding serious procedural defects in the proceedings is likewise not desirable from a public interest point of view, taking into account the disciplinary and efficiency considerations presented *supra* in Section I.

An alternative approach to the (non-)preclusive effect of the setting aside of a decision on procedural grounds, one which would possibly answer the significant concerns raised by the current *PVC II* case law, may be to frame a test capable of better balancing the three conflicting interests: the protection of the concerned undertaking's fundamental right not to be tried again, the need to safeguard the effective enforcement of EU competition law, and the requirement that competition authorities conduct their proceedings abiding by the law which governs the latter in the most efficient way possi-

[73] Under Art. 25 of Regulation 1/2003, the power to impose penalties in respect of substantive infringements of EU competition rules is subject to a double limitation period: a five-year period (so-called "short limitation period") and a ten-year period (so-called "long limitation period") both running from the day of the end of the infringement. On the one hand, any action taken by the Commission or NCAs for the purpose of investigating an infringement interrupts the short limitation period with regard to all undertakings that have participated in the infringement, making it start afresh. This short limitation period is also suspended for the entire duration of judicial proceedings before the Union Courts. On the other hand, the long limitation period is not subject to any interruption; however, as is the case for the short limitation period, it is suspended for the entire duration of judicial proceedings before the Union Courts. Hence, in the case of a judicial annulment on procedural grounds, the *PVC II* case law ensures that the Commission's (or NCA's) *ius puniendi* is not time-barred. Even more so in the case of subsequent annulment on procedural grounds of multiple decisions, as happened in the context of the *Rebar cartel*, the subject-matter of the case study analysed *infra* in Section III.

ble. It is here proposed that a twofold test would be suitable. The resumption of proceedings following the judicial annulment of a decision on procedural grounds should only be allowed, on a strict case-by-case basis, provided that: *a*) the effective enforcement of EU competition law requires such resumption, and *b*) the procedural defect affecting the validity of the decision is not objectively attributable to the prosecuting authority or, if it is so attributable, the prosecuting authority did not subjectively act in bad faith or with gross negligence. Failing to meet either of these two cumulative conditions should bar the prosecuting authority from resuming the proceedings.[74]

The first requirement implies that whenever a fresh prosecution of the specific infringement at issue would be objectively ineffective or inefficient, the prosecuting authority should be barred from reopening proceedings. This might be the case where the timeframe between the adoption of the decision and its judicial annulment has been particularly prolonged,[75] and the anti-competitive conduct had already ceased before the start of the investigation or during the proceedings leading to the adoption of the decision. In such circumstances, the enforcer has already achieved both its primary objective, the restoration of undistorted competition, and its secondary function of deterring future anti-competitive restrictions on the same relevant market, with the result that only the imposition of penalties, its retributive function, would be compromised by the preclusive effect of the *ne bis in idem* principle.[76] A similar approach would also be appropriate where the theory of harm on which the authority has grounded its case is particularly feeble, or the evidence it has gathered in support of that theory is particularly weak, and the Court, despite annulling the decision for procedural defects and hence having absorbed the pleas in law (or grounds of appeal) on the merits without examination,[77] nonetheless in *obiter dicta* suggests that it does not share the substantive conclusions of the enforcer as to the existence of the infringement in the first place.

[74] The test referred to in the main text is a refined version of the one first suggested by R. Nazzini, *Fundamental Rights Beyond Legal Positivism*, cit., p. 297.

[75] This is usually the case where the decision is upheld at first instance and annulled on appeal. Even more so in the context of the *Rebar cartel*, the facts of which are further analysed *infra* in Section III, where the first infringement decision was adopted by the Commission in 2002 and annulled on procedural grounds by the Court of First Instance in 2007. The Commission readopted a second decision in 2009 which was first upheld by the General Court in 2014 and subsequently annulled also on procedural grounds by the Court of Justice at the end of 2017, almost 18 years after the case was originally brought by the Commission.

[76] As argued *supra* in Section I, this *Article* does not focus on the private enforcement of EU competition law. In any case, while a decision establishing an infringement significantly simplifies the burden of proof when bringing actions for damages against parties to an alleged infringement, it is also true that the claimant is always required to prove the damage it has suffered, potentially using the same evidence relied on by the public enforcer whose decision was annulled on procedural grounds.

[77] See, e.g., *Ferriere Nord*, cit., para. 56. The latter judgment is among those discussed *infra* in the context of the *Rebar cartel* case, in Section III.

The second requirement – which is additional and not alternative to the first one – implies that where the procedural defect, which must be serious enough *per se* to affect the validity of the decision,[78] is indeed objectively attributable to the prosecuting authority, who erred intentionally or with gross negligence, the resumption of proceedings should be likewise precluded. Up until now, the case of an enforcer willingly tweaking the procedure to cover its shortcomings has never occurred. However, if that regrettable situation were to occur, there is no apparent reason not to punish the authority's lack of discipline and violation of good faith by re-expanding the scope of the *ne bis in idem* protection.[79] As to procedural defects caused by an enforcer's gross negligence, that might be the case where the error at issue amounts to a macroscopic violation of the procedure that hinders substantially the rights of defence of the undertaking concerned by the proceedings, or – as implausible as it may seem – where the authority has made a first procedural error which led to a first annulment of the decision, and, in the context of the proceedings for the readoption of that decision, it makes a second procedural error closely connected to the first one which leads to a second annulment of the readopted decision.[80]

In Section IV, this twofold test is applied to the *Rebar cartel*, arguing that the *ne bis in idem* principle should have prevented the Commission from resuming proceedings a third time, on grounds that such further reopening of the case fails to meet both abovementioned cumulative requirements.[81]

III. The Commission's *Rebar cartel*: an endless saga

III.1. Considerations on the case selection

Following a qualitative approach based on the case study methodology,[82] the limits to further proceedings arising from the extensive way to construe the *ne bis in idem* principle which were presented in the previous section are here applied to the *Rebar cartel*. The case concerns a group of Italian steelmakers who allegedly participated in a cartel on the market for reinforcing bars (so-called "rebars"),[83] thereby violating a provision

[78] With regard to procedural defects affecting the validity of a decision, see *supra* Section II.1.

[79] Cases falling within this category may be limited in number, as it is likely that, in most instances where the shortcomings are attributable to the Commission's bad faith, the readoption of the decision would not be necessary to pursue the objective of effective enforcement, so that the readoption would be barred by the first limb of the proposed test.

[80] This latter example of procedural defect, which is deemed grossly negligent, is inspired by the *Rebar cartel*: for a deeper analysis of the facts of the case, see *infra* Section III.2.

[81] With regard to the application of the test suggested in the text to the *Rebar cartel*, see *infra* Section IV.

[82] See D. Collier, *Understanding Process Tracing*, in *PS: Political Science & Politics*, 2011, p. 823 *et seq*.; G. King, R.O. Keohane, S. Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research*, Princeton: Princeton University Press,1994.

[83] With regard to what "rebar" is, see *infra* note 88.

which has been subsequently replaced by Art. 101 TFEU. Proceedings were originally brought by the Commission in the early 2000s and – as astonishing as it may seem – the case is still pending at the time of writing, almost 19 years later. The Commission's first infringement decision was adopted in 2002 and annulled by the Court of First Instance on procedural grounds in 2007. A second Commission decision was readopted in 2009 but was subsequently annulled by the Court of Justice also on procedural grounds in 2017. At the start of 2018, the Commission resumed proceedings once again and a third infringement decision was adopted in July 2019. The relevant details of this case spanning almost two decades are presented in the following sub-sections, whereas in Section IV, applying the test developed in Section II.2, it is argued that the Commission should have been barred from resuming proceedings a third time, let alone adopting a third infringement decision.

Several instances where the Commission readopted a decision which had been annulled by the CJEU on procedural grounds were provided in Section II.1. The choice to focus this qualitative analysis on the *Rebar cartel* rests on a number of reasons. First and foremost, the present analysis takes advantage of a direct knowledge of the facts and privileged access to the case file of the *Rebar cartel*.[84] Admittedly, this means that the critical distance from the case might be less than if its process-tracing were to be done by means of purely external observance. However, the great benefit of such an extensive and direct knowledge of the circumstances of the case outweighs the cost of said lack of detachment.

In any case, irrespective of the extensive access to the case file and direct knowledge of the related facts, the selection of the *Rebar cartel* as the subject-matter of this case study follows the logic of the most likely scenario. It does so in a twofold sense. On the one hand, assuming a prescriptive approach, this case involves precisely the kind of situation that calls for the limits to further proceedings that were advocated in Section II.2. As will be discussed below, the Commission's shortcomings during this procedure did not limit themselves to the first set of proceedings, thereby resulting in the annulment of the first decision – a fact which would arguably be *per se* enough in order to consider said limits applicable to the case at issue. In fact, the Commission's shortcomings were furthermore repeated in the second set of proceedings, which also resulted in an annulment of the second decision. Hence, the *Rebar cartel* is indeed the appropriate subject-matter of a case study to show why the need for the aforementioned limits is concretely relevant and their applicability is not consigned to merely hypothetical situations, regardless of whether the CJEU actually ends up following them in the case in question.

[84] As disclosed *supra*, in the first footnote, in 2016 the Author undertook an internship at one of the law firms involved in the litigation of the *Rebar cartel* case.

On the other hand, the facts of the *Rebar cartel* appear to be so glaring that, if any case is most likely to prompt the CJEU to change its jurisprudence in the direction here advocated, it is this case or a closely similar one. As the well-known legal maxim in common law jurisdictions goes, "hard cases make bad law".[85] Thus, if the Court of Justice were to actually reconsider its case law concerning annulments on procedural grounds, it would be advisable to do so in the *Rebar cartel*, as it is a case to which the aforementioned limits to further proceedings should apply beyond doubt.

Lastly, as a further confirmation of the relevance of the case selection, it should be noted that the *Rebar cartel* case was nominated by *Global Competition Review* for its 2018 *GCR Awards*, in the category *Behavioural matter of the year – Europe*.[86]

III.2. The 2002 infringement decision and its first annulment

From October to December 2000, the European Commission carried out a number of surprise inspections at the offices of all of the main Italian steel producers and at the premises of the main Italian steelmakers' association, *Federacciai*. In 2002, the Commission formally commenced proceedings against 11 Italian steel producers and *Federacciai*, pursuant to Art. 65, para. 4, of the Treaty establishing the European Coal and Steel Community (ECSC Treaty).[87] On the basis of the information gathered during the dawn raids and the firms' answers to some requests for information, the Commission became convinced that the undertakings concerned by the investigation had used the regular meetings of their main trade association to set up between 1989 and 2000 a cartel with the object of fixing prices and limiting or controlling output or sales on the Italian market for concrete reinforcing bars.[88] Among the 15 States that were Members of the EU at that time, the country with the largest production of rebar was indeed Italy. The Steelmakers concerned accounted for almost 80 per cent of the relevant market and their turnover for reinforcing bar totalled some EUR 900 million in 2000-2001.

[85] The maxim was probably first referred to in UK House of Lords, judgment of 14 March 1837, *Hodgens v. Hodgens*, [1837] 7 ER 124 (HL) [378] (Lord Wynford), but it is best known for its appearance in the US Supreme Court judgment of 14 March 1904, *Northern Securities Co v. United States*, 193 US 197, 400 (1904) (Holmes, J, dissenting), a landmark case dealing with the application of the Sherman Antitrust Act of 1890 (26 Stat. 209, 15 USC §§ 1–7) which resulted in the dissolution of the appellant securities company and set a precedent for future antitrust rulings.

[86] See Global Competition Review, *GCR Awards 2018*, 7 February 2018, globalcompetitionreview.com.

[87] Under its Art. 97, the ECSC Treaty was concluded for a period of fifty years from the date of its entry into force, which occurred on 23 July 1952. Thus, the ECSC expired on 23 July 2002 and its former competences are now exercised within the framework of the current TEU and TFEU. Under Art. 65(4) of the ECSC Treaty – which was still in force when the case was initiated – the Commission had exclusive competence in applying (what were then) Community competition rules to the coal and steel sectors.

[88] Reinforcing bars (rebar) are a long hot-rolled steel product in coils or bars of 5 mm and over, 6 m, 12 m, 14 m or, more rarely, 18 m long, with a smooth, crenelated or ribbed surface. Rebar is used principally in the construction industry to strengthen concrete.

In March 2002, the Commission notified to the undertakings concerned a Statement of Objections (SO) expressly referring to Art. 36 of the ECSC Treaty,[89] following which the undertakings were heard in a first oral hearing before the Hearing Officer in June 2002,[90] without the participation of the representatives of the national competition authorities. In August 2002, the Commission issued an additional SO explaining its position concerning how the procedure would continue following the expiry of the ECSC Treaty,[91] stating explicitly that it had initiated proceedings under Regulation 17/62 – the secondary act regulating the public enforcement system of EU competition rules before the enactment of Regulation 1/2003. A second oral hearing before the Hearing Officer took place in September 2002, this time in the presence of NCAs' representatives, however the undertakings were only allowed to express themselves in relation to the expiry of the ECSC Treaty and not on the merits of the case. The proceedings culminated in December 2002, with the adoption of a decision establishing the infringement of Art. 65, para. 1, of the ECSC Treaty.[92] In the infringement decision, the Commission took the view that the 11 undertakings concerned by the proceedings had engaged in a single, complex and continuing infringement amounting to a cartel. As a consequence, it imposed on the undertakings penalties amounting to EUR 83.25 million and ordered them as well as their trade association *Federacciai* to put an end to, and refrain from repeating, the anti-competitive conduct.

The undertakings concerned challenged the Commission decision before the (back then) Court of First Instance. All the applications relied on a common plea in law, the Commission's lack of competence to establish an infringement of Art. 65 of the ECSC Treaty at the time of the adoption of the contested decision. Italy itself intervened in

[89] A Statement of Objections is adopted by the Commission at the end of the investigative phase and represents the opening of the formal procedure to assert violations of the EU antitrust rules. The SO is notified to the parties so that they can exercise their rights of defence. Its adoption does not bind the Commission as to the outcome of the case. For coal and steel cases the SO was provided for in Art. 36 of the former ECSC Treaty, while under the current EU Treaties, it is provided for in Art. 10 of Regulation 773/2004, cit. See A. JONES, B. SUFRIN, *EU Competition Law*, cit., p. 931 *et seq*.

[90] The right to be heard before the Hearing Officer is one of the main procedural rights to which undertakings involved in competition proceedings are entitled. For further reference to the role and functions of the Hearing Officer as the guardian of the procedural rights of parties to competition proceedings, see A. JONES, B. SUFRIN, *EU Competition Law*, cit., p. 930 *et seq*.

[91] As mentioned *supra*, the ECSC Treaty, upon which the Commission based its case, had expired just a month before, on 23 July 2002. The Commission also issued a notice to explain how the (then) EC competition rules would apply in the future to the coal and steel sectors following the expiry of the ECSC Treaty: see Commission Communication of 26 June 2002 concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty (Communication on the expiry of the ECSC Treaty).

[92] Commission Decision C(2002) 5807 final of 17 December 2002 relating to a proceeding under Article 65 of the ECSC Treaty, Case COMP/37.956 – *Reinforcing bars*, ("2002 Decision" or "first decision"). Art. 65, para. 1, of the ECSC Treaty was the provision prohibiting concerted anti-competitive conduct in the coal and steel sectors and corresponds to what is now Art. 101 TFEU.

each case, supporting the applicants' contentions against the Commission,[93] and a joint hearing common to all the cases was held on 19 September 2006.

By its judgments of 25 October 2007, the Court of First Instance upheld all of the undertakings' applications and quashed the 2002 infringement decision in its entirety.[94] The Court preliminarily noted that the contested decision, which only contained references to provisions of the ECSC Treaty, was adopted after the ECSC Treaty had expired. It explained that the Commission's decision finding an infringement of Art. 65, para. 1, of the ECSC Treaty and imposing a fine on undertakings alleged to have participated in a cartel was expressly based solely on Art. 65, paras 4 and 5 of that Treaty and contained no reference to any legal basis under Regulation 17/62. The fact that, in the second SO sent to the undertakings, the Commission stated that it had opened new proceedings on the basis of Regulation 17/62 and referred explicitly to Art. 3 of that Regulation was not in itself sufficient to justify a finding that the legal basis of the decision was constituted by Regulation 17/62.[95]

The Court further held that, although the principles governing the succession of legal rules may lead to the application of substantive provisions which are no longer in force at the time of the adoption of a measure by a Community institution, the Commission was no longer able, after the expiry of the ECSC Treaty, to derive competence from Art. 65, paras 4 and 5, of the ECSC Treaty in order to establish an infringement of Art. 65, para. 1, of that Treaty and to impose fines on the undertakings which had participated in the infringement, since the provision constituting the legal basis of a measure must be in force at the time that it is adopted. The Commission's competence in that respect was not affected by the fact that the ECSC Treaty constituted a *lex specialis* in relation to the EC Treaty (as the TFEU then was) in accordance with Art. 305, para. 1, of the EC Treaty.[96] Nor was the Commission's competence affected by the indivisibility of the Community (now Union) legal order resulting from the Merger Treaty and the need for coherence in the interpretation of the substantive provisions contained in the

[93] See, e.g., Court of First Instance, order of 27 July 2004, case T-94/03, *Ferriere Nord*, by which the Italian Republic was allowed to intervene in support of the form of order sought by the applicant.

[94] Court of First Instance, judgments of 25 October 2007, joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, *SP and Others*; case T-45/03, *Riva Acciaio*; case T-77/03, *Feralpi Siderurgica*; case T-94/03, *Ferriere Nord*.

[95] *SP and Others*, joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, cit., paras 76-101.

[96] Art. 305 of the EC Treaty was repealed by the Treaty of Lisbon of 2007. Para. 1 of Art. 305 provided as follows: "The provisions of this Treaty shall not affect the provisions of the Treaty establishing the European Coal and Steel Community, in particular as regards the rights and obligations of Member States, the powers of the institutions of that Community and the rules laid down by that Treaty for the functioning of the common market in coal and steel".

various Community (now Union) Treaties, or by the principles governing the succession of substantive and procedural legal rules.[97]

III.3. The 2009 readopted decision and its second annulment

By letter of June 2008, the Commission informed the undertakings concerned of its intention to readopt the decision based on a different legal basis. The Commission considered that, given the limited scope of the annulment, the new decision would be based on the evidence presented in the two SOs sent to the undertakings concerned in the course of the original procedure in 2002. In their observations, the undertakings requested the Commission to hold a new oral hearing in order to develop their defence in front of the Hearing Officer. However, the Commission decided not to grant the new hearing, as it took the view that, since the undertakings concerned had already been heard twice in 2002 following the adoption of each of the two SOs, their right to be heard had already been fulfilled in the course of the original procedure, which admittedly was not affected by the annulment of the 2002 Decision.

On 30 September 2009, the Commission readopted a prohibition decision identical to the one originally adopted in 2002, with the difference that the new decision explicitly identified its procedural legal basis in Regulation 17/62.[98] In that decision, the Commission re-established a substantive infringement of Art. 65, para. 1, of the ECSC Treaty and imposed on the undertakings concerned the same EUR 83.25 million penalty which had been imposed by the annulled 2002 Decision.

The undertakings concerned also challenged the second decision before the General Court. All the applications relied on a common plea in law, namely that the Commission had infringed an essential procedural requirement insofar as the decision had not been preceded by a fresh SO or by a new oral hearing before the Hearing Officer. The applicants claimed that, as these procedural steps were not carried out after the resumption of proceedings, the entire procedure followed by the Commission was incomplete and unlawful as the parties' rights of defence had been seriously breached.

On 9 December 2014, the General Court upheld the 2009 Decision, dismissing in whole or in large part all of the undertakings' actions for annulment.[99]

[97] *SP and Others*, joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, cit., paras 113-120.

[98] Commission Decision C(2009) 7492 final of 30 September 2009 relating to a proceeding under Article 65 of the ECSC Treaty, Case COMP/37.956 — *Reinforcing bars, re-adoption*, as amended by Decision C(2009) 9912 final of 8 December 2009 ("2009 Decision" or "second decision").

[99] General Court, judgment of 9 December 2014: joined cases T-472/09 and T-55/10, *SP*; joined cases T-489/09, T-490/09 and T-56/10, *Leali and Acciaierie e Ferriere Leali Luigi*; case T-69/10, *IRO*; case T-70/10, *Feralpi*; case T-83/10, *Riva Fire*; case T-85/10, *Alfa Acciai*; case T-90/10, *Ferriere Nord*; case T-91/10, *Lucchini*; case T-92/10, *Ferriera Valsabbia and Valsabbia Investimenti*.

Six of the original 12 applicants appealed the judgments at first instance before the Court of Justice. All the appellants shared a common complaint: the General Court had erred in law in holding that the Commission was entitled to readopt the contested decision without issuing a new SO, and in assessing that the procedural rules laid down in Regulation 773/2004 and the appellant's rights of the defence had not been infringed. Furthermore, several of the appellants argued that the General Court had infringed Arts 41 and 47 of the Charter, as interpreted in the light of Art. 6 of the ECHR, when it found that the length of the administrative procedure was not excessive for the purposes of those provisions. The Commission's proceedings took, in total, almost 54 months, including the initial procedure and the subsequent readoption procedure. In addition, the two or more years which were necessary for the Commission to readopt the contested decision appeared excessive *per se*. The oral procedure was closed on 8 December 2016, following delivery of the Advocate General's Opinion.[100] In that Opinion, AG Wahl held that the common ground of appeal concerning the Commission's violation of the appellants' rights of defence and the improper conduct of the administrative procedure was to be regarded as well founded. He argued that the Commission did not fully follow the procedure set out in Regulations 1/2003 and 773/2004 before readopting the contested decision. Several key procedural steps had indeed been validly taken pursuant to the provisions in force under the ECSC Treaty. Yet, even though those provisions were similar, they were not identical to the ones laid down in application of Arts 101 and 102 TFEU. As a result, the procedure followed by the Commission in the present cases has adversely affected the possibility for NCAs to participate in it. That participation is important and the failure by the Commission to ensure it could not be overlooked.[101] To this effect, AG Wahl concluded by suggesting to the Court of Justice that the judgments under appeal should be set aside and the contested decision annulled.[102]

By judgments of 21 September 2017, the Court of Justice set aside the judgments at first instance and annulled the 2009 Decision, insofar as it concerned the six appellants.[103] Following the AG's Opinion, the Court held that where, after the annulment of a decision which was adopted on the basis of provisions of the ECSC Treaty for the breach of Art. 65, para. 1, of that Treaty, the Commission readopts, after the expiry of the Treaty, the annulled decision on the legal basis of Regulation 1/2003, the procedure leading to that new decision must comply with the rules laid down by that Regulation, even if the procedure began before it entered into force. Given that the annulment of an EU measure does not

[100] Opinion of AG Wahl delivered on 8 December 2016, case C-85/15 P, joined cases C-86/15 P and C-87/15 P, Cases C-88/15 P and C-89/15 P, *Feralpi and Others*.

[101] *Ibid*., paras 26-29.

[102] *Ibid*., paras 62, 131 and 140.

[103] Court of Justice, judgments of 21 September 2017, case C-85/15 P, *Feralpi*; joined cases C-86/15 P and C-87/15 P, *Ferriera Valsabbia and Valsabbia Investimenti*; case C-88/15 P, *Ferriere Nord*; case C-89/15 P, *Riva Fire*.

necessarily affect the preparatory acts, and the procedure for replacing such a measure may, in principle, be resumed at the very point at which the illegality occurred, the Commission is not obligated to adopt a new SO before readopting a decision establishing an infringement of Art. 65, para. 1, of the ECSC Treaty which was annulled on the ground that the Commission did not have power to adopt it on the basis of that Treaty, as it was no longer in force at the date of adoption of the said decision.[104]

However, further following the AG's Opinion, the Court also noted that, under the procedural rules established by Regulations 1/2003 and 773/2004, it is provided that NCAs are to be invited to participate in the oral hearing which, upon the request of the addressees of the SO, is to follow the issuing of that SO. It follows that the Commission was required, in application of Arts 12 and 14 of Regulation 773/2004, to give the parties the opportunity to develop their arguments during a hearing to which the NCAs were invited. Having regard to the importance of holding such a hearing, at the request of the parties concerned and in accordance with the latter Regulation, the failure to do so constituted an infringement of an essential procedural requirement. Insofar as the right to such a hearing was not respected, it was not necessary for the undertakings the rights of which have been infringed in this way to demonstrate that such infringement might have influenced the course of the proceedings and the content of the decision at issue to their detriment. Accordingly, the procedure was necessarily vitiated, regardless of any possible detrimental consequences for the undertaking concerned that could result from the infringement.[105]

As it found the appeals to be well-founded, the Court of Justice quashed the judgments under appeal without examining the other grounds of appeal, including the alleged breach of Arts 41 and 47 of the Charter on account of the excessive duration of the Commission's administrative procedure. The Court also stated it had the necessary information to give final judgment on the original action for annulment of the 2009 Decision brought at first instance. It thus annulled the decision at issue, to the extent that it concerned the appellants, for infringement of essential procedural requirements.[106]

[104] *Feralpi*, cit., paras 27-40; *Ferriera Valsabbia and Valsabbia Investimenti*, cit., paras 27-40; *Ferriere Nord*, cit., paras 33-44; *Riva Fire*, cit., paras 24-38; all referring to the *PVC II* case law (*Limburgse Vinyl Maatschappij and Others (PVC II)*, cit.).

[105] *Feralpi*, cit., paras 42-48; *Ferriera Valsabbia and Valsabbia Investimenti*, cit., paras 41-51; *Ferriere Nord*, cit., paras 45-56; *Riva Fire*, cit., paras 39-50.

[106] *Feralpi*, cit., paras 56-58; *Ferriera Valsabbia and Valsabbia Investimenti*, cit., paras 61-63; *Ferriere Nord*, cit., paras 57-59; *Riva Fire*, cit., paras 56-58. The decision was not annulled with regard to the original applicants who had not appealed the rulings at first instance. For these parties, the said rulings became *res iudicata* and the 2009 Decision became final for them following the expiry of the time limit to bring appeal.

III.4. The 2018 resumption of proceedings

At the start of 2018, the Commission resumed proceedings once again against the undertakings concerned by the annulment of the 2009 readopted decision, in order to take a final position on the *Rebar cartel* case.[107] It is reasonable to assume that in the letter sent to the undertakings, as the defect affecting the validity of the decision was merely procedural, the Commission might have noted that, pursuant to the *PVC II* case law,[108] it was not barred from re-opening proceedings in the case at hand. In fact, as held by the Court of Justice under that case law, an annulment on procedural grounds does not affect the administrative acts perfected before the essential procedural defect occurred, provided that the resumption of proceedings occurs at the time in the proceedings when such defect has occurred, this moment having occurred in the case at hand when the undertakings were not permitted to be heard on the merits of the case following the first resumption of proceedings in 2008, thereby violating Regulations 1/2003 and 773/2004. Thus, it is also reasonable to assume that the Commission might have considered that it was lawful to rely once again on the evidence gathered during the original investigation in 2000 and that the two 2002 SOs were not affected by the annulment, as the essential procedural defect occurred at a later stage.

Following such a reasoning, the Commission must have taken the view that, for proceedings to be resumed in accordance with the Court of Justice's latest ruling, a new hearing before the Hearing Officer had to be organised, this time to be held in conformity with the requirements of Regulations 1/2003 and 773/2004. To that effect, the Commission must have ensured that this time the NCAs would be invited to participate in the new hearing, unlike what happened in the first hearing held in June 2002.[109] The undertakings would be allowed to exercise their right to be heard in full, without any limitation as to their ability to develop their defence on the merits of the case at hand, unlike what happened during the second hearing in September 2002, where they were only heard in relation to the change of procedural legal basis following the expiry of the ECSC Treaty.

It is equally safe to assume that the Commission might have noted that its power to impose a penalty on the undertakings was not time-barred. It should be pointed out in

[107] The further resumption of proceedings was first revealed by a report published by MLex on 24 April 2018 (available at www.mlex.com), and it is further apparent in General Court, judgment of 8 May 2019, case T-185/18, *Lucchini*, an action brought by one of the undertakings who had not appealed the judgment at first instance that challenged before the General Court the Commission's refusal to extend to the applicant the proceedings in Case COMP/37.956 which have meanwhile been reopened against the undertakings concerned by the annulment of the 2009 Decision. The action was dismissed by the General Court on the ground that the 2009 Decision had become *res iudicata* with regard to the applicant.

[108] *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit.

[109] It is worth noting that the participation of NCAs should not be seen as a purely formalistic requirement. Indeed, it should be recalled that Italy had intervened in the action for annulment against the 2002 Decision in support of the undertakings' conclusions and against the Commission's defence: see *supra* Section III.2.

this regard that, after the annulment of the 2002 Decision, the Commission adopted several acts which interrupted the five-year limitation period provided for in Arts 25, paras 3 and 5 of Regulation 1/2003. Furthermore, under Art. 25, para. 6, of that Regulation, the five-year limitation period was suspended while the court proceedings were pending, so that the time effectively passed cannot have triggered the short limitation period. Similarly, with respect to the ten-year limitation period provided for in Art. 25, para. 5, of Regulation 1/2003, while the Commission may not interrupt that period, the aforementioned suspension pending judicial proceedings prescribed by Art. 25, para. 6, of that Regulation nevertheless applies to the long limitation period too, so that the time effectively passed cannot have triggered the second limitation period either.[110]

At the new oral hearing before the Hearing Officer, which was held on 23 April 2018,[111] the undertakings probably argued that if the Commission were to readopt an infringement decision, the decision should be subsequently annulled by the Union Courts a third time, as such readoption would be contrary to a number of fundamental rights and principles enshrined in both the Charter and the ECHR, including the *ne bis in idem* principle.[112] In that perspective, if the Commission were to adopt a fresh decision, such decision would concretely risk being annulled by the CJEU once again, thereby exposing the Commission to a historic fiasco, not only from a legal standpoint, but also in terms of political and administrative image. Hence, it is likely that the undertakings invited the Commission to close the *Rebar cartel* case once and for all, having account also to the extremely prolonged duration of the procedure (19 years to date), with the evident erosion of any need for sanctioning conduct belonging to a past so far away – and having regard to the precarious situation currently facing the European steel market.[113]

III.5. The adoption of a third decision and further considerations on the outcome of the case

From the Commission's standpoint, the outcome of the second litigation was already by itself a resounding defeat, as its prohibition decisions had never been annulled twice on similar grounds.[114] If the CJEU were to annul a third decision on whatsoever ground, the

[110] With regard to the limitation periods provided for in Art. 25 of Regulation 1/2003, see *supra* n. 73.

[111] See L. Crofts, M. Newman, *Italian concrete-bar makers face EU charges yet again in 18-year cartel saga*, in *MLex*, 24 April 2018, www.mlex.com.

[112] This assumption is based on the pleas raised by the applicant in *Lucchini*, case T-185/18, cit.

[113] See J. Wiśniewska, *The European Steel Sector in a Crisis*, in *Central Europe Energy Partners*, 28 May 2016, www.ceep.be; A. Tovey, *Steel Industry Faces Crisis as 'Safeguards Will Take Too Long to Arrive'*, in *The Telegraph*, 7 June 2018, www.telegraph.co.uk; EUROFER, *Annual Report on the Steel Market 2018*, www.eurofer.org.

[114] The Author was present at the Court of Justice's hearing of 20 October 2016, in which all the appeals seeking the annulment of the 2009 Decision were jointly heard. The Author remembers quite distinctly the firm words with which both the Advocate General and the Judge-Rapporteur addressed the

consequent debacle would be excruciating for the Commission, an institution which praises itself on – and is indeed widely known for – its technical competence and proficient administrative action. Even more so if the CJEU were to actually reconsider its *PVC II* case law in the sense envisaged in this *Article* and, thus, annul the decision on the ground that severe procedural defects may indeed bar subsequent proceedings, where those defects affecting the validity of the decision are attributable to the enforcer's gross negligence or malice.[115] Such a *revirement* by the Court of Justice would indeed mean that the Commission could no longer rely on the current assumption that, even if it were to commit a severe procedural error capable of affecting the validity of a decision, it would not be barred from readopting a fresh decision. Bearing in mind that in recent years the Commission has imposed fines for billions of euros in a number of high-profile cases – all of which are still pending before the Union Courts at the time of writing –[116] the Commission might consider that it is wiser to give up on the *Rebar cartel* (a case where in the end the amount of the fine is *only* 83.25 million euros) than to risk losing the considerable edge that it enjoys under the *PVC II* case law.

From the undertakings' viewpoint, attaining a further judicial annulment of a third decision seems far from guaranteed. Firstly, it is safe to assume that this time the Commission in adopting such third decision will certainly follow the procedure with due diligence, given that its reputation – which was already tarnished by its past mistakes – is on the line, so that the chances the CJEU will find another "infringement of an essential procedural requirement" by the Commission and thus annul the decision once again are rather narrow. Besides, the limits to further proceedings after an annulment on procedural grounds here advocated are reasonable and, as was argued previously,[117] the *Rebar cartel* would be the appropriate case for the Court to embrace such a reversal of its *PVC II* case law – proving indeed that "easy cases make good law". Yet, whoever has engaged in repeated litigation against the Commission before the CJEU is well aware of the inherent *favor communitatis* that seems to characterise most rulings in

two agents and the external lawyer representing the Commission regarding their endeavours to justify the Commission's shortcomings in the proceedings of the case at hand.

[115] With regard to the test developed in order to limit the resumption of proceedings following the annulment of a decision on procedural grounds, see *supra* Section II.2. For the application of the test to the facts of the *Rebar cartel*, see *infra* Section IV.

[116] See the *Intel* case (Commission Decision C(2009) 3726 final of 13 May 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, Case COMP/C-3/37.990 – *Intel*), the *Google Shopping* case (Commission Decision C(2017) 4444 final of 27 June 2017 relating to a proceeding under Article 102 of the TFEU and Article 54 of the EEA Agreement, Case AT.39740 – *Google Search (Shopping)*) and the *Google Android* case (Commission Decision of 18 July 2018, Case AT.40099 – *Google Android*, not published, referred to in Commission Press release IP/18/4581 of 18 July 2018), all of which are still pending before the CJEU (e.g., Court of Justice, judgment of 6 September 2017, case C-413/14 P, *Intel*, setting aside the judgment at first instance and referring the case back to the General Court), where the Commission imposed penalties for 1.06 billion, 2.42 billion and EUR 4.34 billion euros, respectively.

[117] See *supra* Section III.1.

cases to which other Union institutions are parties.[118] The Court would have to show remarkable courage in order to hand the Commission, the guardian of the Treaties, a defeat for the third time in a row. Even more so if the Court were to deprive the Commission of the aforementioned advantage under the *PVC II* case law.

On 4 July 2019, the Commission readopted a new infringement decision, imposing total fines of EUR 16 million on the undertakings concerned by the annulment of the 2009 Decision.[119] In recognition of the long duration of the proceedings, the Commission applied an unprecedented 50 per cent fine reduction to all of the addressees. It is the fourth time that the Commission has granted such an exceptional discount, but it is the first on this scale.[120] It seems reasonable to assume that at least some of the undertakings concerned will again challenge the third decision before the CJEU, on the ground that the Commission's further resumption of proceedings was unlawful and that they should face no fine whatsoever, given that the contested facts date back 30 years.[121]

IV. The *ne bis in idem* as a limit to further proceedings in the *Rebar cartel* case

As discussed in Section II, under the current *PVC II* case law,[122] the annulment of a Commission decision by the CJEU on grounds of a procedural defect does not preclude the Commission from resuming proceedings against the same undertaking, for the same anti-competitive conduct already addressed by the annulled decision. It was argued that the reasoning behind that case law appears not to be convincing and that its rigid preclusion of the applicability of the *ne bis in idem* principle in case of annulments on procedural grounds should thus be replaced by a more nuanced approach.[123]

Under the proposed test, the resumption of proceedings following the judicial annulment of a decision on procedural grounds should only be allowed, on a strict case-by-case basis, provided that: *a*) the effective enforcement of EU competition law requires such resumption and *b*) the procedural defect affecting the validity of the decision is not objectively attributable to the prosecuting authority or, if it is so attributable,

[118] See F. Fontanelli, *La Corte di Giustizia e il "favor communitatis" – Il percorso della giurisprudenza della Corte di Giustizia delle Comunità Europee sul fondamento normativo degli atti della Comunità e dell'Unione*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2010, p. 177 *et seq*.

[119] See Commission Press release MEX/19/3709 of 4 July 2019. The adoption of the third infringement decision occurred during the publishing of the present *Article* and no public version is yet available.

[120] A cartel of smart-chip card makers was given a 10 per cent discount in fines in 2014 to compensate for the length of the probe. A cartel between makers of heat stabilizers received a one per cent discount when fined in 2009, while colluding makers of seatbelt systems got a five per cent reduction in 2019.

[121] See A. Yaïche, N. Hirst, *Comment: Italian Steelmakers' fine two decades on could prompt human-rights appeal*, in *MLex*, 8 July 2019, www.mlex.com.

[122] *Limburgse Vinyl Maatschappij and Others (PVC II)*, cit.

[123] See *supra* Section II.2.

the prosecuting authority did not subjectively act in bad faith or with gross negligence. Failing to meet either of these two cumulative conditions should bar the prosecuting authority from resuming the proceedings.[124]

Applying this twofold test to the *Rebar cartel* described in Section III, it is submitted that the *ne bis in idem* principle should have barred the Commission from resuming proceedings a third time in that case, on the ground that such further reopening fails to meet both of the aforementioned cumulative requirements.

IV.1. The failure to meet the first requirement: the effective enforcement of EU competition law does not require a further resumption of the *Rebar cartel* case

With regard to the requirement that the resumption be demanded by the effective enforcement of EU competition law, this seems not to be the case in the *Rebar cartel*. The Commission started investigating the case in late 2000 and formally opened proceedings in 2002, adopting the first infringement decision at the end of that same year.[125] After the Court of First Instance annulled the 2002 Decision in 2007,[126] the Commission adopted a second decision in 2009, which, after being initially upheld by the General Court in 2014,[127] was ultimately also annulled by the Court of Justice on appeal in 2017.[128] The decision to prosecute the case afresh, almost 20 years after it was commenced, appears difficult to reconcile with an efficient use of the Commission's administrative resources.

Furthermore, having specific regard to the effectiveness of the enforcement action, the Commission itself reckons that the conduct at issue ceased at the latest in July 2000,[129] before its first dawn raids even took place. This means that the Commission has indeed already achieved its primary objective, which is for the alleged restriction to be removed and thus for undistorted competition to be restored. The Commission also seems to have achieved the secondary objective of enforcement, the deterring of future restrictions of competition on the internal market.[130] It follows that the only objective

[124] *Ibid*.

[125] See *supra* Section III.2.

[126] *SP and Others*, joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, cit.; *Riva Acciaio*, case T-45/03, cit.; *Feralpi Siderurgica*, case T-77/03, cit.; *Ferriere Nord*, case T-94/03, cit.

[127] *SP*, joined cases T-472/09 and T-55/10, cit.; *Leali and Acciaierie e Ferriere Leali Luigi*, joined cases T-489/09, T-490/09 and T-56/10, cit.; *IRO*, Case T-69/10, cit.; *Feralpi*, case T-70/10, cit.; *Riva Fire*, case T-83/10, cit.; *Alfa Acciai*, case T-85/10, cit.; *Ferriere Nord*, case T-90/10, cit.; *Lucchini*, case T-91/10, cit.; *Ferriera Valsabbia and Valsabbia Investimenti*, case T-92/10, cit.

[128] *Feralpi*, case C-85/15 P, cit.; *Ferriera Valsabbia and Valsabbia Investimenti*, joined cases C-86/15 P and C-87/15 P, cit.; *Ferriere Nord*, case C-88/15 P, cit.; *Riva Fire*, case C-89/15 P, cit.

[129] See Art. 1 of both the 2002 Decision, cit., and the 2009 Decision, cit., according to which the alleged cartel lasted from 6 December 1989 to 4 July 2000.

[130] In 2017, Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*, ICA) adopted a decision establishing an alleged cartel that also concerned the Italian market for reinforcing

which the Commission has not yet accomplished is the definitive imposition of penalties on the undertakings concerned. It is undeniable that if the preclusive effect of the *ne bis in idem* principle were to be recognised in the *Rebar cartel*, such a "retributive" function of public enforcement would not be fully attained in the case at issue.

However, it should be noted that the Commission did indeed collect the fines imposed on the undertaking first by the 2002 Decision and then by the 2009 Decision, albeit provisionally, while the respective annulment actions were pending before the CJEU. This means that, even if the undertakings were refunded after each annulment, the Commission would have held onto the 83.25 million euros in penalties for the better part of the last 15 years, so that it may be argued that the retributive objective was also substantively achieved. The adoption of a third decision in order to definitively impose the penalties, on the basis of an investigation carried out almost 20 years ago, in a market structure that has in the meantime changed substantially – where some of the undertakings concerned have been liquidated, while others have merged into or were acquired by competitors – certainly does not appear to be required by the effectiveness of EU competition law, but rather seems grounded on the Commission's own retaliation for its stained image.

Consequently, with regard to the first requirement of the test here suggested, it would have been a fair compromise between the aforementioned conflicting interests for the *ne bis in idem* principle to preclude the Commission from resuming the proceedings once again in 2018. This follows from the fact that the institutional objectives pursued by the public interest to effective enforcement had already been materially accomplished in the case at hand either with the original 2002 Decision or, at the latest, with the readopted 2009 Decision. The only reason why the retributive function of enforcement could not be officially attained in the *Rebar cartel* – even if it may be argued that essentially it was – is to be found in the errors which the Commission repeatedly committed in the course of the proceedings. Therefore, the CJEU upon appeal should reconsider its *PVC II* case law and conclude that the Commission's third decision is barred by the preclusive effect of the *ne bis in idem* principle as extensively construed above, since the effective enforcement of EU competition law did not require the further resumption of proceedings in 2018.

IV.2. The failure to meet the second requirement: The procedural defect affecting the validity of the 2009 Decision was objectively

bars, in which several of the undertakings involved in the *Rebar cartel* were implicated (ICA, decision no. 26686 of 19 July 2017, case I742 – *Tondini per cemento armato*, published in ICA Bulletin no. 30/2017). However, that decision was annulled by the Regional Administrative Court of Lazio (TAR Lazio) on the merits of the case, as the Court did not accept the theory of harm on which the ICA had built its case (TAR Lazio, judgments of 12 June 2018, nos 6516, 6518, 6519, 6521, 6522, 6523, 6525; appeals pending before the Italian Council of State).

attributable to the Commission and was subjectively caused in bad faith or with gross negligence

Taking a view different from the one just discussed above, it might be counterargued that the effective enforcement of EU competition law nonetheless requires proceedings to be resumed in the specific context of the *Rebar cartel*. Not doing so would mean that market players who have allegedly engaged in serious anti-competitive conduct – to which "hardcore" cartels involving price fixing such as the one at issue unquestionably belong –[131] would end up not being duly punished, as a consequence of a procedural defect that either did not depend on the enforcer or, if it did depend on the enforcer's behaviour, amounted to a guiltless mistake. If that line of reasoning were accepted, it would still be necessary to consider the second requirement of the test, which is additional and not alternative to the first one. In order for proceedings not to be barred by the *ne bis in idem* preclusive effect, the second requirement demands that the procedural defect affecting the validity of the decision must not be attributable to the prosecuting authority or, if it is so attributable, the prosecuting authority must not have acted in bad faith or with gross negligence.

In the context of the *Rebar cartel*, it is not debatable that both the annulment of the 2002 Decision and that of the 2009 Decision were grounded on procedural errors that the CJEU clearly attributed to the Commission. As to the annulment of the first decision, the Court of First Instance, in its 2007 judgments, held that:

> "the Commission confused the provision of substantive law addressed to the undertakings, that is Article 65(1) [ECSC Treaty], with the legal basis for Commission action, that is Article 65(4) and (5) [ECSC Treaty]. It inferred automatically from the applicable provision of substantive law that it has competence to adopt a decision on the basis of a provision which had in the meantime expired. [...] Since, however, it follows from the case-law [...] that the provision constituting the legal basis of a measure must be in force at the time of its adoption, and that, in accordance with Article 97 [ECSC Treaty], Article 65(4) and (5) [ECSC Treaty] had expired on 23 July 2002, the Commission could no longer derive competence from those expired provisions in order to establish an infringement of Article 65(1) [ECSC Treaty] and to impose fines on the undertakings which had allegedly participated in the infringement".[132]

As to the annulment of the second decision, the Court of Justice, in its 2017 judgments rendered on appeal, held that:

[131] For further reference to "hardcore" cartels, see A. Jones, B. Sufrin, *EU Competition Law*, cit., p. 662 *et seq*.

[132] *SP and Others*, joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, cit., paras 119-120. See also – albeit in Italian or French only – *Riva Acciaio*, case T-45/03, cit., paras 95-96; *Feralpi Siderurgica*, case T-77/03, cit., paras 95-96; *Ferriere Nord*, case T-94/03, cit., paras 97-98.

> "before adopting the decision at issue, the Commission was required, in application of Articles 12 and 14 of Regulation No 773/2004, to give the parties the opportunity to develop their arguments during a hearing to which the competition authorities of the Member States were invited. [...] As a result, the General Court made an error in law in holding [...] that the Commission was not obligated to organise a new hearing before adopting the decision at issue, on the ground that the undertakings concerned had already had the opportunity to be heard orally at the hearings of 13 June and 30 September 2002. As the Advocate General pointed out in [...] his Opinion, [...] failure to hold such a hearing constitutes infringement of an essential procedural requirement. In so far as the right to such a hearing, provided for by Regulation No 773/2004, was not respected [by the Commission], it is not necessary for the undertaking, the rights of which have been infringed in this way, to demonstrate that such infringement might have influenced the course of the proceedings and the content of the decision at issue to its detriment".[133]

Once it is established that the defects affecting the validity of both the 2002 Decision and the 2009 Decision are objectively attributable to the Commission, for the *ne bis in idem* preclusion to bar further proceedings it is also necessary to ascertain whether in causing either of those defects the Commission has acted intentionally or with gross negligence. With regard to the 2002 Decision, if it were to be found that the lack of competence which resulted in its annulment was caused by the Commission's wilful or gross negligent conduct, this would mean that the Commission's *ius puniendi* extinguished with the adoption of the first decision, despite its invalidity. Thus, this would inevitably mean that the resumption of proceedings in 2008 was already barred by the preclusive effect of the *ne bis in idem* principle and that the consequent 2009 Decision was adopted unlawfully, regardless of the procedural error which in the end resulted in its actual annulment. Furthermore, this would necessarily imply that the Commission was also barred from resuming proceedings in 2018.

However, arguing that the procedural error which led to the annulment of the 2002 Decision was intentional or the result of serious negligence by the Commission would be rather arduous. The defect in this case occurred as a consequence of an exceptional occurrence: the expiry of the ECSC Treaty, the only Treaty among those establishing the European Communities which was concluded for a definite amount of time.[134] The Commission, right before the expiry of the ECSC Treaty, had indeed issued a notice to explain how the EC (as they then were) competition rules would apply to the coal and steel sectors in the future.[135]

[133] *Feralpi*, case C-85/15 P, cit., paras 43-46; *Ferriera Valsabbia and Valsabbia Investimenti*, joined cases C-86/15 P and C-87/15 P, cit., paras 46-49; *Ferriere Nord*, case C-88/15 P, cit., paras 51-54; *Riva Fire*, case C-89/15 P, cit., paras 45-48.

[134] With regard to the expiry of the ECSC, which occurred on 23 July 2002, see *supra* n. 87.

[135] Communication on the expiry of the ECSC Treaty, cit.

When the *Rebar cartel* case was first opened, the ECSC Treaty was still in force, so that both the substantive and procedural competition rules applicable to the case were provided for in that Treaty. As a consequence, the Commission grounded the first SO solely on the ECSC Treaty, both with regard to its substantive legal basis and its procedural legal basis. Shortly after the expiry of the ECSC Treaty, the Commission issued to the undertakings concerned a supplementary SO which it expressly based on Regulation 17/62. By doing so, the Commission followed the way it said it would handle cases opened under the ECSC Treaty which were still pending after the expiry of that Treaty:

> "If the Commission, when applying the Community [now Union] competition rules to agreements, identifies an infringement in a field covered by the ECSC Treaty, the substantive law applicable will be, irrespective of when such application takes place, the law in force at the time when the facts constituting the infringement occurred. In any event, as regards procedure, the law applicable after the expiry of the ECSC Treaty will be the EC [now EU] law".[136]

Nonetheless, when the Commission finally adopted the 2002 Decision, instead of adopting it under Regulation 17/62 as it had done for the supplementary SO, it ran counter to its own communication by grounding the decision both substantively and procedurally only on ECSC rules, which had meanwhile expired several months before. This was the reason why in its 2007 judgments the Court of First Instance ascertained that the Commission lacked the competence to adopt the 2002 Decision, annulling it as a result.[137] It is apparent that the Commission did not mistake the procedural legal basis of the 2002 Decision intentionally, but rather it did so out of negligence. Yet, arguing in the case at hand that the Commission's negligence was gross would mean not taking account of the peculiar circumstances described above. The balance between the conflicting interests that this test tries to strike is a delicate one. The reason why only gross negligence is considered adequate in order for undertakings to see their *ne bis in idem* right prevail over the public interest in effective enforcement, is that only such high degree of culpability is deemed capable of justifying violations of competition rules not being thoroughly punished. An enforcer who mistakes the legal basis of an act out of simple negligence should surely face the annulment of that act, especially in the EU legal order which is inherently based on the principle of conferral.[138] However, prohibit-

[136] *Ibid.*, para. 31.

[137] *SP*, joined cases T-472/09 and T-55/10, cit.; *Leali and Acciaierie e Ferriere Leali Luigi*, joined cases T-489/09, T-490/09 and T-56/10, cit.; *IRO*, Case T-69/10, cit.; *Feralpi*, case T-70/10, cit.; *Riva Fire*, case T-83/10, cit.; *Alfa Acciai*, case T-85/10, cit.; *Ferriere Nord*, case T-90/10, cit.; *Lucchini*, case T-91/10, cit.; *Ferriera Valsabbia and Valsabbia Investimenti*, case T-92/10, cit.

[138] For further reference to the principle of conferral, which is a fundamental doctrine of EU law laid down in Art. 5 of the TEU, see C. CHALMERS, G. DAVIES, G. MONTI, *European Union Law: Text and Materials*, Cambridge: Cambridge University Press, 2014, p. 199 *et seq*.

ing the readoption of said act *tout court*, as the result of that simple error alone, appears to be a too severe consequence.

Having established that the defect affecting the validity of the 2002 Decision was indeed objectively attributable to the Commission but that the Commission did not subjectively cause the defect in bad faith or with gross negligence, it follows that the Commission's *ius puniendi* was not extinguished with the adoption of that first decision, so the Commission could lawfully resume proceedings in 2008 and readopt a second decision. It now remains to be established whether the further defect leading to the annulment of the 2009 Decision, which the Court of Justice also objectively attributed to the Commission's behaviour, was subjectively caused by the Commission intentionally or by gross negligence. In that regard, it should be recalled that, in 2008, the Commission informed the undertakings concerned of its intention to readopt a decision on the basis of Regulation 1/2003 – which in the meantime had repealed Regulation 17/62 becoming the only procedural legal basis applicable to the enforcement of EU competition rules. On that occasion, the Commission also stated that, given the limited scope of the annulment of the first decision, the new decision would be based on the evidence presented in the two original 2002 SOs, the first of which had been adopted under the ECSC Treaty before its expiry, whereas the supplementary one had been adopted after that Treaty expired and was thus based on Regulation 17/62 – at that time the procedural legal basis applicable to the enforcement of the EC (as they then were) competition rules.

It is not in question whether the Commission could legitimately base a new decision on the original SOs and the evidence acquired pursuant to ECSC rules while these were still in force. Once again, in doing so the Commission was merely following the way it said it would handle cases opened under the ECSC Treaty which were still pending after the expiry of that Treaty:

> "With regard to procedural law, the basic principle [...] is that the rules applicable are those in force at the time of taking the procedural step in question. This means that as from 24 July 2002 [the date of expiry of the ECSC Treaty] on, the Commission will exclusively apply the EC [now EU] procedural rules in all pending and new cases. [...] [P]rocedural steps validly taken under the ECSC rules before expiry of the ECSC Treaty will after the expiry be taken to have fulfilled the requirements of the equivalent procedural step under the EC [now EU] rules".[139]

However, the Commission ran counter to its own communication again, this time arguably in a more severe way. It adopted the 2009 Decision – correctly grounding it on

[139] Communication on the expiry of the ECSC Treaty, cit., para. 26. In this regard, see also Court of Justice, judgment of 6 July 1993, joined cases C-121/91 and C-122/91, *CT Control (Rotterdam) and JCT Benelux*, para. 22; judgment of 12 November 1981, joined cases 212 to 217/80, *Meridionale Industria Salumi and Others*, para. 9.

Regulation 1/2003 – without first holding a new oral hearing, in spite of the fact that several of the undertakings had expressly requested it to do so. The Commission justified its refusal by referring to the fact that the undertakings concerned had already been heard twice in 2002, following the adoption of each of the two SOs, thus taking the view that the undertakings' right to develop their defence in an oral hearing before the Hearing Officer had already been fulfilled in the course of the original procedure, which admittedly had not been affected by the annulment of the 2002 Decision.[140] Yet, by resuming the proceedings in 2008, the Commission was bound to act in accordance with the procedural requirements of Regulations 1/2003 and 773/2004, which in the meantime had become the only procedural legal basis in force in order to find any violation of substantive ECSC/EC/EU competition rules. Under Arts 12 and 14 of Regulation 773/2004, the national competition authorities are to be invited to participate in the oral hearing requested by the addressees of an SO, so that they may contribute to the discussion and express their viewpoint on the merits of the case.

In respect of the two oral hearings that took place before the Hearing Officer in 2002, the first one was held after the original SO was issued, in accordance with the ECSC rules, just a month before the expiry of the ECSC Treaty and before the Commission had actually published its aforementioned Communication providing guidance on the treatment of competition cases resulting from the expiry of that Treaty.[141] Furthermore, national competition authorities' representatives did not participate in that hearing, since such participation was not provided for in the ECSC Treaty. As a consequence, it is reasonable to assume that during the first hearing the imminent expiry of the ECSC Treaty, combined with the lack of guidance on how the Commission would deal with pending cases once that Treaty expired, were the main issues of concern to the undertakings, even if they were formally given the chance to develop their arguments on the merits of the case. With regard to the second hearing following the supplementary SO, which was issued specifically to address the legal consequences of the expiry of the ECSC Treaty for the continuation of the proceedings, while it was conducted in accordance with EC rules and NCAs' representatives were duly invited, the undertakings were asked only to discuss the consequences of the expiry of the ECSC Treaty, which had occurred shortly before,[142] and neither the facts nor the evidence forming the subject-matter of the proceedings were discussed. As a result, the NCAs' representatives did not participate in a hearing in which the full substance of the case was discussed.

By adopting the 2009 Decision without previously organising a fresh oral hearing in which the undertakings concerned by the resumption of proceedings could exercise

[140] See para. 382 of the 2009 Decision, cit.

[141] The first hearing before the Hearing Officer was held on 13 June 2002, while the Commission Communication on the expiry of the ECSC Treaty, cit., was published only on 26 June 2002.

[142] The second hearing before the Hearing Officer was held on 30 September 2002.

their right to be heard in full, without any limitation as to the ability to develop their arguments on the merits of the case at hand, the Commission infringed Arts 12 and 14 of Regulation 773/2004, thereby violating the undertakings' rights of defence. This is the reason why the Court of Justice in its 2017 appellate judgments set aside the General Court's 2014 judgments at first instance and, considering that this infringement constituted an essential procedural infringement, annulled the 2009 Decision too.[143]

The reasons behind the Commission's behaviour cannot be assessed objectively.[144] Even though holding a new hearing after the resumption of the proceedings in 2008 would have cost no more than some extra months in terms of duration of the procedure and the Commission was not pressured by limitation periods,[145] it deliberately chose not to play it safe. The Commission might have taken the view that, as Italy had already intervened in the course of the first judicial proceedings seeking the annulment of the 2002 Decision,[146] by organising a new hearing before the Hearing Officer in which the Italian Competition Authority would also be present, there was the risk that the latter would use the hearing to criticise the merits of the case or the choice to resume the proceedings, thereby lending to the undertakings concerned valuable substantive grounds for challenging once again the readopted decision. Moreover, as the 2009 Decision was adopted right before the quinquennial renewal of the College of Commissioners,[147] the Commission's services might also have been pressured to close as many pending cases as possible, before the Commissioner in charge of Competition changed.[148]

In any case, as much as it would be far-fetched to consider severe in nature the Commission's negligence that led to the annulment of the 2002 Decision, it would likewise be too generous not to consider grossly negligent – if not plainly malicious – the Commission's blatant violation of the parties' rights of defence, which ultimately led to the annulment of the 2009 Decision. Whereas, in the context of the first annulment, the aforementioned balance between conflicting interests leans towards ensuring the public interest in effective enforcement, in the context of the second annulment, it is only

[143] See *Feralpi*, case C-85/15 P, cit.; *Ferriera Valsabbia and Valsabbia Investimenti*, joined cases C-86/15 P and C-87/15 P, cit.; *Ferriere Nord*, case C-88/15 P, cit.; *Riva Fire*, case C-89/15 P, cit.

[144] In order to better understand the Commission's motivations when it adopted the 2009 Decision, the Author tried to interview several case handlers of DG Competition and agents of the Commission's Legal Service whose names appear in the *Rebar cartel* case file, assuring them anonymity. However, all the requests for interviews were expressly or implicitly declined on the reasonable ground that the case is still not closed.

[145] With regard to the limitation periods provided for in Art. 25 of Regulation 1/2003, see *supra* n. 73. See also the relevant considerations discussed *supra* in Section III.4.

[146] See *supra* n. 93.

[147] Due to the entry into force of the Treaty of Lisbon on 1 December 2009, the second Barroso Commission took office only in early 2010, after the European Parliament approved the College of Commissioners, in accordance with the new Art. 17, para. 7, TEU.

[148] Between the first (2004-2009) and the second (2010-2014) Barroso Commission, the competence over the Directorate-General for Competition passed from Neelie Kroes (NL) to Joaquín Almunia (ES).

fair for the equilibrium to shift in favour of the defendants' right not to be prosecuted again. The sanction for an enforcer who, after having already made a first mistake affecting the validity of an act, perseveres in behaving negligently to the extent that it infringes the parties' right to be heard on the substance of the case, with the result that the validity of the readopted act is affected too, should not be limited to the necessary annulment of the readopted act. In these circumstances, such an enforcer should also be barred from resuming the proceedings a third time, irrespective of the fact that the second decision was annulled merely on procedural grounds, as the invalidity stems from the enforcer's grossly negligent (if not deliberate) conduct pursued in the course of the resumed proceedings.

Having established that the defect affecting the validity of the 2009 Decision was objectively attributable to the Commission and that subjectively the Commission acted either in bad faith or – at the very least – with gross negligence, it follows that the Commission's *ius puniendi* was effectively extinguished with the adoption of the second decision. Therefore, the CJEU upon appeal should reconsider its *PVC II* case law and conclude that the Commission's third decision is unlawful with regard to the second requirement of the test here suggested, as the *ne bis in idem* principle construed in the extensive way proposed above should have precluded the Commission from resuming proceedings once again in 2018.

V. Conclusions

This *Article* has argued that the *PVC II* case law, which currently grants to the Commission (and, by extension, national competition authorities applying EU competition rules) the freedom to resume proceedings despite the annulment of their enforcement decision on procedural grounds, is unconvincing. It inadequately addresses the risk of what were defined as *horizontal* parallel proceedings either *at the Union level* (repeated enforcement by the Commission) or *at the national level* (repeated or multiple enforcement by the same or several NCAs).[149] To illustrate this risk, this *Article* analysed a concrete example of this type of *horizontal* parallel proceedings *at the Union level*, the *Rebar cartel*. The case encompasses an extraordinary twenty-year saga that is still ongoing as of this writing, concerning a group of Italian steelmakers who allegedly participated in a cartel on the market for reinforcing bars or "rebar".[150]

It was argued that, beside calling *de lege ferenda* for a widely advocated reform of the current public enforcement regime, the only way to adequately limit *de lege lata* the proliferation of parallel proceedings in competition law which is both judicially enforceable by parties and more respectful of legal certainty is a coherent and reliable applica-

[149] See *supra* Sections I and II.1.
[150] See *supra* Section III.

tion of the *ne bis in idem* principle. However, the application of the *ne bis in idem* principle to that effect is currently impaired by the narrow way in which the CJEU construes it in competition matters, in contradistinction to the Court's more flexible jurisprudence in other areas of law.[151]

It is further argued that the narrow approach to the *ne bis in idem* principle under the *PVC II* case law in the case of annulments on procedural grounds should be replaced by a more nuanced approach. To that effect, a twofold test is proposed which is deemed capable of better balancing the three conflicting interests at stake: the protection of the concerned undertaking's right not to be tried again, the need to safeguard the effective enforcement of EU competition law, and the requirement that competition authorities conduct their proceedings abiding by the law which governs them in the most efficient way possible. Under the proposed test, the resumption of proceedings following the judicial annulment of a decision on procedural grounds should only be allowed, on a strict case-by-case basis, provided that: (a) the effective enforcement of EU competition law requires such resumption and (b) the procedural defect affecting the validity of the decision is not objectively attributable to the prosecuting authority or, if it is so attributable, the prosecuting authority did not subjectively act in bad faith or with gross negligence. Failing to meet either of these two necessary conditions should bar the prosecuting authority from resuming the proceedings.[152]

Finally, this *Article* applied the proposed twofold test to the *Rebar cartel* case. It was argued, in conclusion, that the *ne bis in idem* principle should have barred the Commission from resuming proceedings for a third time, on the ground that such further reopening fails to meet both of the aforementioned cumulative requirements.[153]

[151] See *supra* Section I.3.
[152] See *supra* Section II.2.
[153] See *supra* Section IV.

DIALOGUES
EU EQUALITY LAW

ON CONSTITUTIONAL RIGHTS AND POLITICAL CHOICES

TAKIS TRIDIMAS*

ABSTRACT: The influence of the Court of Justice in the evolution of equality law has been enormous. Interpreting rights provided in EU legislation as mere expressions of pre-existing constitutional rights, as the Court of Justice did in *Mangold* (judgment of 22 November 2005, case C-144/04 [GC]) and *Kučukdeveci* (judgment of 19 January 2010, case C-555/07 [GC]), poses challenges to majoritarianism and carries the risk of ossification. Although such mirroring of legislative and constitutional rights has recently been extended beyond the right to equal treatment, whether EU law is over-constitutionalised remains an open question. EU law is remarkably malleable and constitutionalisation coexists with indeterminacy and deference to the legislature.

KEYWORDS: equality – fundamental rights – legislation – constitutional adjudication – Court of Justice – EU.

I. INTRODUCTION

Muir's exploration of equality makes for a thoughtful, rich, and original contribution to bibliography providing a critique not only on equality but also, more broadly, on rights discourse and the separation of powers in the EU.[1] The book traces the development of equality from a fundamental right to a fully-fledged EU policy through the adoption of extensive legislation at EU level. The book posits, among others, the following: equality is distinct among fundamental rights in that it forms not only a negative right but a self-standing, albeit not autonomous, policy; the Court of Justice has been enormously influential in shaping it; activist case law has fused the legislative expression of equality with the underlying constitutional right thus granting constitutional status to legislative outcomes; the distinction between constitutional and legislative rights should be preserved, otherwise there is a risk of ossification and lip service being paid to majoritarian

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[1] E. MUIR, *EU Equality Law: The First Fundamental Rights Policy of the EU*, Oxford: Oxford University Press, 2018.

processes. The analysis is lucid, reflective and, ultimately, persuasive, making this a first class contribution to EU constitutional law.

II. From rights to policies and the interplay between legislation and case law

In some respects, it may be seen as odd that the EU has developed an equality policy. As Muir points out, the issues that equality law seeks to address are not inherently transnational.[2] There is nothing intrinsically distinct in the EU interest in equality, except in relation to the prohibition of discrimination on grounds of nationality. For other forms of equality, one might have thought that national law is the natural home for developing a normative framework. Yet, for historical and political reasons, especially since the Amsterdam Treaty, equality has been propelled to the forefront of the EU political agenda. In contrast to other fundamental rights, it is not simply a limitation on state power but an aim *per se*, leading to a corpus of law which has its own legal bases, substantive rules, and processes.[3] Equality is a principle that goes to the heart of EU identity. The core reason for this may lie in its seemingly strong legitimating power. Few, if any, principles of justice attract as much societal consensus as equality. Understood in the abstract as meaning that persons in similar situations must be treated in the same way, it carries a persuasive force that disables objection. At EU level, commitment to it encourages a sense of demos and marks the transition from a purely economic to a more balanced, socially-oriented integration paradigm. Equality operates at different levels. It is a core principle that lies at the heart of the EU project as a value (Art. 2 TEU) and a general principle of law (Arts 20 and 21 of the Charter of Fundamental Rights of the EU, hereinafter the Charter); it is a commitment to equal respect of all sovereigns (Art. 4, para. 2, TEU); it is a principle of economic law that underlies the internal market; it is a social principle; and it is a principle of good governance in that it requires decision makers to reason their choices. Muir correctly points out that the EU directives on equality have a transformative aspiration in that they seek to change the mentality of European society.[4] She may however be overrating the distinctiveness of equality policy *vis-à-vis* social policy at least in relation to the commonality of their objectives. As the book acknowledges, equality legislation is a powerful contributor to the EU social model.[5] It is the social rather than the economic aspect of integration that equality poli-

[2] *Ibid.*, pp. 16 and 54.

[3] *Ibid.*, p. 15. As Muir points out, the fundamental right that comes closest to equality in that it has given rise to a detailed EU policy is the right to data protection provided by Art. 16 TFEU, Art. 8 of the Charter, and Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[4] E. Muir, *EU Equality Law*, cit., pp. 2 and 6-7.

[5] *Ibid.*, p. 20.

cy seeks to advance. Muir is correct in acknowledging that the rationale for EU intervention in this area is inherently political. An EU equality policy is a vehicle for legitimizing and bettering the EU as a system of governance.

The influence of the Court of Justice in articulating equality rights has been enormous. This is aptly borne by different generations of cases that can be traced through the rulings in *Defrenne*,[6] *Barber*,[7] *Mangold*,[8] and *Test Achat*.[9] All of them illustrate that the constitutional anchors of equality are firm and that the development of the right owes perhaps more to constitutional adjudication than legislative elaboration. At the very least, the Court of Justice assumes the role of co-driver of the policy and not merely of traffic police. From the cases mentioned above, *Barber* and *Test Achat* are perhaps distinct. In both of them the legislature had spoken but the legislative outcome was placed in Luxembourg's procrustean bed and tailored to the underpinning constitutional right. In *Barber*, a broad interpretation of pay neutralized the exception from equal treatment granted to Member States by Art. 9, let. a), of Directive 86/378[10] in relation to the determination of pensionable age. In *Test Achat*, the Court retained in the statute book Directive 2004/113[11] minus the extensive derogation provided for in Art. 5, para. 2, therein. Another case that would fit Muir's analysis is *Sturgeon*.[12] The Court interpreted Regulation 261/2004[13] on air travel as meaning that passengers are entitled to compensation not only where a flight is cancelled, which is expressly provided in Art. 5 of that regulation, but also where a flight is delayed despite the absence of an express provision to that effect. The Court of Justice pointed out that the dispositions of the regulation led to unequal and inconsistent treatment since delayed passengers were not entitled to compensation even though they could suffer the same or greater loss of time as passengers whose flights were cancelled. *Sturgeon* like *Test Achat* suggests that the articulation of a policy is the result of a cooperative exercise where both the legislature

[6] Court of Justice, judgment of 8 April 1976, case 43/75, *Defrenne v. Sabena*.

[7] Court of Justice, judgment of 17 May 1990, case C-262/88, *Barber v. Guardian Royal Exchange Assurance Group*.

[8] Court of Justice, judgment of 22 November 2005, case C-144/04, *Mangold* [GC].

[9] Court of Justice, judgment of 1 March 2011, case C-236/09, *Association Belge des Consommateurs Test-Achats and Others* [GC].

[10] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

[11] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[12] Court of Justice, judgment of 19 November 2009, joined cases C-402/07 and C-432/07, *Sturgeon and Others*.

[13] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

and the Court play a strong role.[14] Depending on one's perspective, they can provide illustrations of the Court of Justice paying lip service to the legislative process or strong process review. The Court essentially objects to what it sees as an inconsistency between legislative objectives and legislative outcomes perceiving its intervention as a corrective rationalization process. But it is far from being a value neutral one.

III. Ordinary *versus* constitutional legislation

A key issue discussed in the book is the interaction between constitutional and legislative rights. In *Mangold* and *Kücükdeveci*,[15] the Court of Justice viewed the prohibition of discrimination on grounds of age provided in the Framework Directive[16] as a mere illustration of a pre-existing general principle of constitutional status applicable to private relations. *Mangold* represents judicial activism at its strongest. The Court made a series of important pronouncements. First, it held that the prohibition of discrimination on grounds of age is a general principle of law which stems from the national constitutional traditions and international conventions; secondly, it held that it has horizontal effect; thirdly, it found that the German derogation from the principle fell short of the requirements of proportionality. The first pronouncement was supported by shaky foundations. In fact, at the time of the judgment, there was little evidence to suggest that the right to equal treatment on grounds of age was steeped into the constitutional traditions of the Member States. By contrast, until well into the end of the twentieth century, national laws often differentiated on grounds of age in many areas of social and professional life. The second pronouncement, equally bold, was not supported by any specific reasons. The third finding is often forgotten in scholarly discourse, which tends to concentrate on the equality aspects of the case, but is pivotal in that it marks the transition from a principle to an outcome through the lens of strict judicial scrutiny.

The most perplexing element of *Mangold* is the fusion of the constitutional right of equality irrespective of age with its corresponding statutory right provided by the Framework Directive. If the right derives from a directly effective constitutional principle of EU law, what was the function of the Directive in the Court's reasoning? The Court declared that "above all, Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation".[17] What, then, are its legal effects? Its adoption expresses a political choice and therefore bears legitimizing force

[14] For a critique, see T. Tridimas, *Reflections on Equality: Substantive Values and Policy Outcomes*, in I. Govaere, D. Hanf (eds), *Scrutinizing Internal and External Dimensions of European Law, Liber Amicorum Paul Demaret*, Brussels: Peter Lang, 2013, p. 457 *et seq*.

[15] *Mangold* [GC], cit.; Court of Justice, judgment of 19 January 2010, case C-555/07, *Kücükdeveci* [GC].

[16] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Directive).

[17] *Mangold* [GC], para. 74.

but does not explain the outcome reached by the Court. To suggest that the adoption of the directive somehow triggers the direct application of the general principle of equality, which until then lay dormant, is not persuasive.

The constitutional narrative of *Mangold* has a powerful resonance but creates more problems than it resolves. If it is possible to read the legislative version of a right as a mere expression of a constitutional command, how can one distinguish between ordinary and constitutional rights? Muir navigates us skillfully through some troubled waters. To start with, the case law appeared to restrict the *Mangold – Kücükdeveci* approach to the right against discrimination[18] and refused to extend it to social rights. In *Dominguez*[19] the Court of Justice examined the claim entirely by reference to the right to annual leave as provided by Art. 7, para. 1, of the Working Time Directive[20] without reference to Art. 31, para. 2, of the Charter. In *Fenoll*,[21] which concerned the same right, the Court of Justice rejected the relevance of Art. 31, para. 2, on the ground that the claim related to a period before the Charter became binding. In both cases, the inquiry centred on the legislative right without venturing in its constitutional underpinnings, although in *Dominguez* the Advocate General explored and rejected the horizontal effect of Art. 31, para. 2. In *Association de médiation sociale*,[22] the Court was concerned with Art. 27 of the Charter which provides for workers' rights to consultation and information[23] and the exercise of which is governed by Directive 2002/14.[24] It rejected the relevance of Art. 27 on the ground that it lacked sufficient specificity to be directly effective. It had to be given more specific expression by national law and was therefore by itself a *lex imperfecta*.

Muir argues against a liberal reading of directives as incorporating constitutional rights. She submits that three conditions must be met for the fusion of the legislative and the underlying constitutional right to occur: first, there must be a fundamental right which is protected by EU constitutional law, be it the Treaties, the Charter, or a general principle of law; secondly, the legislation must concretise that right; and, thirdly, there must be an

[18] In the light of *Mangold*, not only age equality but all forms of status equality referred to in Art. 19 TFEU should be seen as directly effective constitutional principles. This is strongly supported by Art. 21, para. 1, of the Charter and also by the Court of Justice, judgment of 10 May 2011, case C-147/08, *Römer* [GC], para. 59, and has now been confirmed by Court of Justice: judgment of 17 April 2018, case C-414/16, *Egenberger* [GC], and judgment of 22 January 2019, case C-193/17, *Cresco Investigation* [GC].

[19] Court of Justice, judgment of 24 January 2012, case C-282/10, *Dominguez* [GC].

[20] 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 (Working Time Directive).

[21] Court of Justice, judgment of 6 March 2015, case C-316-13, *Fenoll*.

[22] Court of Justice, judgment of 15 January 2014, case C-176/12, *Association de médiation sociale* [GC].

[23] Art. 27 of the Charter states as follows: "Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices".

[24] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation.

"organic relationship" between the legislation and the constitutional right.[25] The first condition requires the existence of a sufficiently concrete constitutional right which is capable of being invoked by itself. The right must, in other words, be directly effective. The second condition requires that the legislation must give effect to the corresponding constitutional right. The third condition means that the overlap between the two rights must be a deliberate legislative choice which may be attested either by the legal bases of the legislation or objective evidence that the legislation is intended to implement and give concrete expression to a specific primary right. The EU legislature must have made "a conscious choice to shape the corresponding fundamental right".[26] In this context, Muir notes that the Working Time Directive and Directive 2002/14 in issue in *Association de médiation sociale* were adopted on the basis of Art. 137, para. 2, TEC (now Art. 153, para. 2, TFEU) which lacks a clear and specific fundamental rights tone and a strong EU competence.[27] Still, as *Bauer*[28] was later to prove, this is not a barrier to recognizing fusion between the legislative and the constitutional version of a right.

The conditions proposed by Muir are sound. However they do not, nor do they purport to, make up for the fundamental conundrum in the Court's reasoning. The *Mangold – Kücükdeveci* construct suggests that, where a constitutional right recognised by EU primary law is sufficiently specific as to its content, its concretization by a directive lends to the concretised right thus provided the enhanced remedial attributes of its constitutional brethren so that it is no longer a prisoner to the prohibition of horizontal effect. In this model, the adoption of the directive acts as a legitimizing force since the Court only applies an outcome endorsed by the legislature. The right that is applied is no different in content than that recognised by people through their elected representatives. The additional element pertains solely to legal effects. Since the legislature has decided to embody the constitutional right in legislation, the legal effects of that legislation are the same as those of the underlying constitutional right.

This construction however is pregnable to several objections. First, it does not overcome the conundrum of right creation. If the provision of primary law which establishes the right is directly effective, which is a condition for the *Mangold – Kücükdeveci* approach, this assumes that the constitutional norm itself has a minimum ascertainable content in which case the corresponding legislative right has no additional normative force but simply political legitimating value. Secondly, the separation between the content and the effects of the right outlined above eschews the choice of measure by which a constitutional right is concretised. Regulations and directives have different effects by design. If the legislature recognises a right by directive it must be presumed to intend to

[25] E. Muir, *EU Equality Law*, cit., pp. 111 and 117.
[26] *Ibid.*, p. 118.
[27] *Ibid.*
[28] Court of Justice, judgment of 6 November 2018, joined cases C-569/16 and C-570/16, *Bauer* [GC].

attribute to it the effects of directives and not the effects of regulations. In some cases, the adoption of a directive may be the only choice permitted by the Treaty article which serves as legal basis,[29] in which case, remedial enhancement by the judiciary may be seen as going beyond what the Treaty allows. Thirdly, it is still necessary to decide which aspects of the legislative right can be considered simply to mirror the underlying constitutional right rather than be additional ones going beyond the constitutional minimum. One would presume that it is only the former that can have constitutional status and thus enjoy enhanced remedial value.

The bottom line is that the case law does not provide clear criteria for distinguishing between ordinary and constitutional legislation. It would be more persuasive to assert that, where a constitutional right is sufficiently specific, there is a core element that cannot be touched by the legislature and can be invoked irrespective of the existence of legislation. This links with the concept of the essence of the right, now formally acknowledged in Art. 52, para. 1, of the Charter. The Court of Justice came closer to that approach in *Bauer*[30] where, in sharp contrast to *Dominguez* and *Fenoll*, it asserted the autonomous content of Art. 31, para. 2, of the Charter extending to social rights the rights fusion approach of *Mangold – Kücükdeveci*.

Art. 7, para. 2, of Directive 2003/88 requires Member States to grant workers the right of a minimum annual leave[31] and provides that, exceptionally, that right may be replaced by a monetary payment only where the employment relationship is terminated. The issue in *Bauer* was whether the right to payment could be claimed by the heirs of a worker where the employment relationship was terminated upon the worker's death. German law provided that the right to annual leave lapsed upon death and thus did not form part of the estate of the deceased. This was found to be incompatible with Art. 7, para. 2, of the Directive which imposed a clear, precise and unconditional obligation but German law was unambiguous and it was not possible to interpret it so as to comply with EU law. Nonetheless, the Court held that reliance could be placed directly on Art. 31, para. 2, of the Charter against the worker's private employer. The Court held that the right to paid annual leave constitutes an essential principle of EU social law,[32] which is mainly derived from instruments drawn up by the Member States at EU level, such as the Community Charter of the Fundamental Social Rights of Workers and international instruments on which the Member States have cooperated or to which they are party. Art. 7 of Directive 2003/88 (and its predecessor, Art. 7 of Directive 93/104) did not, therefore, themselves establish the right to paid annual leave.[33] The Court further held that, in contrast with Art. 27 of the Charter in issue in *Association de médiation so-*

[29] See e.g. Art. 153, para. 2, let. b), TFEU.
[30] *Bauer* [GC], cit.
[31] Directive 2003/88/EC, cit.
[32] *Bauer* [GC], cit., para. 80.
[33] *Ibid.*, paras 81-82.

ciale, Art. 31, para. 2, of the Charter uses mandatory terms without making the right to annual leave conditional on any further action. It follows that the right to a period of paid annual leave provided for in Art. 31, para. 2, is, as regards its very existence, both mandatory and unconditional in nature, and sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer.[34]

Bauer brings down AG Mengozzi's *dictum* in *Fenoll* that Art. 31 of the Charter "may only serve, if appropriate, as a basis of interpretation".[35] It is also the first case where the Court of Justice extends the *Mangold – Kücükdeveci* approach beyond the right to non discrimination. Its constitutionalisation effect is mitigated by the fact that the right to annual leave had already been introduced by directives before the Charter came into effect. The EU legislature had already spoken so that the effect of the Charter was to elevate the strength of the right rather than expand its content. *Bauer* does not, however, resolve the problems identified above in relation to the *Mangold – Kücükdeveci* approach. The judgment brings to the fore Muir's call for caution and against reading constitutional rights into legislative ones. It does not however necessarily cast doubt on Muir's three conditions that must be met for legislation to be read as mirroring constitutional rights.

In relation to direct effect, *Bauer* somewhat muddled the waters in the following respect. Whilst in relation to Art. 7, para. 1, of Directive 2003/88, the Court of Justice held that it satisfies the classic criteria of direct effect, namely unconditionality and sufficient precision, in relation to Art. 31, para. 2, of the Charter, it referred to its importance as an essential principle of EU social law, its mandatory terms and the lack of caveats such as those provided by Art. 27 in relation to the workers right to consultation. It is however highly unlikely that the Court intended to depart from the traditional conditions for the establishment of direct effect. These are the same in relation to provisions of the Charter and in relation to provisions of the Treaty or any other norm of EU law. Also, although *Bauer* stated that the loss of an acquired right to annual leave would undermine the very substance of the right, it is not clear that only the essence of a right can be horizontally effective. This is not what the Court stated nor would such a proposition necessarily flow from the nature of the right. As *Egenberger* shows, the application of proportionality or the need for balancing is not an *a priori* barrier to reliance on a right against a non-state actor.[36]

[34] *Ibid.*, para. 85. The findings made in *Bauer* in relation to Art. 31, para. 2, of the Charter were confirmed in Court of Justice, judgment of 6 November 2018, case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* [GC].

[35] See Opinion of AG Mengozzi deliveded on 12 June 2014, case C-316/13, *Fenoll*, para. 52.

[36] *Egenberger* [GC], cit., para 80.

IV. Is EU law over-constitutionalised?

Muir is correct in cautioning against the fusion between constitutional and legislative rights and the liberal extension of the *Mangold – Kücükdeveci* approach. Reading legislation as embodying pre-existing constitutional rights attaches to it higher normative status and forecloses political debate. Once a right is recognised to be constitutional, it cannot be changed by legislation. Thus, issues on which reasonable people may differ and where citizens' preferences may vary across time are removed from the political process. Yet these are precisely the issues where in a democracy citizens' voice must be heard. Too much constitutionalisation carries the risk of ossification and raises issues of legitimacy.[37]

Is it then correct to say that EU law is over-constitutionalised? It is correct that EU law has a constitutional bias. First, the principle of primacy establishes a system of hierarchy that constrains the development of national law. Secondly, the Court of Justice reasons as a constitutional court. Through its judicial lens, essentially any issue of EU law is concretised constitutional law. But is there over-constitutionalisation? There is here a set of consequential overlapping questions. How easy is it to achieve a treaty revision? How easy is it to amend EU legislation? How does the Court treat its own precedent and what are the chances of overruling? How strict or flexible is EU law in terms of confining Member State choices? So far, it may be said that EU law has displayed a remarkable degree of malleability. Constitutional indeterminacy reigns.[38] Silent constitutional amendments, policy ingenuity, asymmetrical integration, recourse to international law, and even pragmatic acquiescence have all been part of the Eurozone crisis, and more generally, the EMU experiment. New policy consensus emerges as political priorities change and economic imperatives cause convulsions. The malleability of EU has been assisted by the Court of Justice.[39] The Court's approach in *Mangold* and *Bauer* contrasts with the regression of social rights in the sphere of free movement.[40] In some areas, the case law appears to give too much credence to the EU legislature at the expense of rights. Thus, in *N.S.*[41] the Court of Justice only recognised a reticent exception from mutual recognition relying on the test of systemic deficiencies, a test that nowhere exists in human right law. Also, in most cases, the intervention of the Court of Justice in constitutional matters has a dialogic character. A Court's ruling signals an orientation prompting responses by various political actors which in turn lead to its refinement. An important pronouncement by the Court may go through corrective readjustments in

[37] E. Muir, *EU Equality Law*, cit., pp. 13, 31 and 86; and see further references given therein.

[38] See T. Tridimas, *Indeterminacy and Legal Uncertainty in EU Law*, in J. Mendes (ed.), *EU Executive Discretion and the Limits of Law*, Oxford: Oxford University Press, 2019, p. 40 *et seq*.

[39] See Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

[40] See Court of Justice: judgment of 11 November 2014, case C-333/13, *Dano* [GC]; judgment of 15 September 2015, case C-67/14, *Alimanovic* [GC].

[41] Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. and Others* [GC].

subsequent cases before an area of law reaches a stage of relative equilibrium. This is for example the case with the *Zambrano* ruling.[42] This is not to disagree with Muir that great caution should be exercised before fusing constitutional and legislative rights but to take forward and place in a wider perspective the theme of constitutionalisation of EU law. Muir correctly points that the "downloading" of fundamental rights, namely their concretisation through legislation, is a new development in EU law and wisely counsels against over-enthusiastic constitutional reading of legislative outcomes.

V. Conclusion

Muir's monograph provides an introspective analysis of equality as a contemporary EU policy and brings to the fore the interaction between the legislature and the judiciary in rights creation. It invites the reader to a journey of constitutional reflection in which the traveller will by no means be disappointed.

[42] Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano* [GC]. The dialogic character of sex equality case law is indeed aptly illustrated by Muir by reference to the *Barber* ruling and its aftermath.

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