



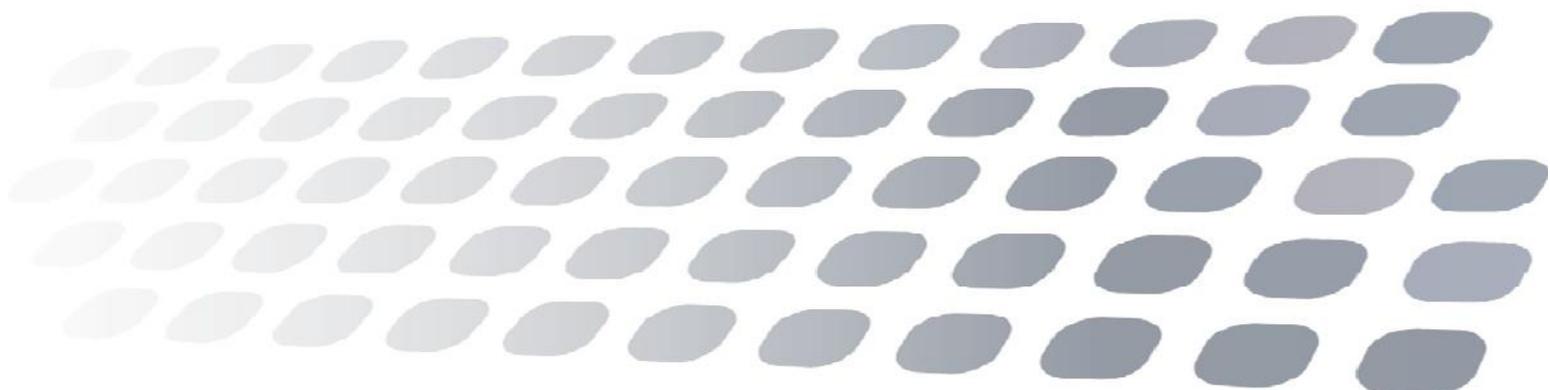
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CENTRO STUDI SUL FEDERALISMO

PERSPECTIVES ON FEDERALISM



ISSN: 2036-5438

## *A New Start for Perspectives on Federalism*

by

Giuseppe Martinico\* and Roberto Castaldi\*

Perspectives on Federalism, Vol. 7, issue 2, 2015



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E - I



## Abstract

*Perspectives on Federalism* is closing its seventh year and its issue 2/2015 confirms the interdisciplinary nature of this intellectual enterprise. This issue is a very rich one, as it includes legal, historical and philosophical contributions. In spite of the evident diversities of these articles, we can identify three main connecting themes: latest developments in EU law, history of thought and European integration, and constitutional developments in national and supranational contexts.

## Key-words

EU law, history of European integration, constitutional developments, interdisciplinarity



*Perspectives on Federalism* is closing its seventh year and its issue 2/2015 confirms the interdisciplinary nature of this intellectual enterprise.

Over the years, our Journal has grown quickly, thanks to the dedication and commitment of our previous Editor in Chief, Umberto Morelli, and to the steady support of the [Centro Studi sul Federalismo](#) and the [Compagnia di San Paolo](#).

We have published a number of relevant contributions and hosted some very rich special issues, entrusted to established or young scholars in Federal Studies, who have served as guest editors (see, for instance, the special issues edited by Søren Dosenrode - [Vol. 2, issue 3, 2010](#)- and that by Paulus Blokker and Werner Reutter, [Vol. 7 issue 1, 2015](#), among others).

We have also published the proceedings of two international symposia of the IACL (International Association of Constitutional Law) working group on “[subnational-constitutions-in-federal-quasi-federal-constitutional-states](#)” (respectively, [Vol. 4, Issue 2, 2012](#) and [Vol. 6, Issue 2, 2014](#)).

The Editors in chief of the Journal are also happy to announce a very important achievement: we have finally remedied its backlog and recently signed an important agreement with [de Gruyter](#). This marks the beginning of a new important season for *Perspectives on Federalism* and we are very proud of this.

To celebrate this important event we have wrapped a very rich issue including legal, historical and philosophical contributions.

In spite of the evident diversities of these articles, we can identify three main connecting themes:

- Latest Developments in EU law
- History of Thought and European Integration
- Constitutional Developments in national and supranational contexts.

Concerning the first block of contributions, in her article [Mari Minn](#) dealt with the issue of supranational competence over patent law, looking at the TRIPS Agreement and at the decision of the CJEU in the Daiichi Sankyo case (CJEU case C-414/11 Daiichi Sankyo v DEMO Anonimos).



[Márk Némédi](#) instead explored the problematic case-law of the European Court of Justice on the *ne bis in idem* principle (also in light of the recent developments after the entry into force of the Lisbon Treaty) and its implications on mutual trust.

In their essay [Werner Vandebrouwaene, Patricia Popelier and Christine Janssens](#) dealt with Art. 260 TFEU, especially looking at how to mitigate federal concerns in the context of infringement procedures and financial sanctions within the mechanism governed by this provision.

Concerning the second block, in his article [Tommaso Visone](#) explored Albert Camus' thought in his series of essays "Neither Victims Nor Executioners" (1946), where Camus stressed the importance of fighting for a new democratic world order against the condition of international dictatorship immanent in the XX century interdependent world. In his work, [Paolo Caraffini](#) instead looked at the European Movement International (EM) stance in defense of the Community institutions established under the Treaties of Paris and Rome during the so-called "empty chair crisis", seen as a fundamental turning point in the history of European integration.

Concerning the third block [Jurgen Goossens and Pieter Cannoot](#) offered an interesting account of the most important institutional evolutions of Belgian federalism between 2012 and 2014. The Authors argue that in spite of its importance the sixth state reform does not exclude the possibility of further evolutions, on the contrary further developments are to be expected.

[Edward Grodin](#) wrote a comparative essay on the degree of convergence between the United States and the European Union regarding the structural role of administrative agencies and the so called "non- delegation doctrine".

As always, we would like to thank our readers for their support and recall that *Perspectives on Federalism* is open to other special issues. We also invite colleagues and scholars interested in that to submit new proposals.

The Editors in Chief with the other members of the Scientific Board and Editorial Committee will evaluate the project as soon as possible.

The peer review mechanism will be centralized in order to guarantee- as always- the quality of the articles.

This is a tentative list of topics of interest to the Journal:



- Fundamental Rights Protection in the EU (especially after Opinion 2/13 of the Court of Justice of the EU and in light of the worrying situation in Hungary and elsewhere).
- National Borders and EU migration policies.
- Secession in Europe: What Role for the EU?
- The EU in a Comparative Perspective: Comparing the EU with other Supranational Organizations.

This is not an exhaustive list, other topics can be proposed and we will be very happy to consider them for publication.

Last but not least, we would like to announce that the next issue (3/2015) of our Journal will be devoted to Solidarity in Hard Times and will include some of the papers presented in an international conference held in Madrid on 11 - 12 - June – 2015.

#### The Editors

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# Patenting in Europe: The Jurisdiction of the CJEU over European Patent Law

by

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Perspectives on Federalism, Vol. 7, issue 2, 2015





## Abstract

This paper will deal with EU competence over patent law, especially in the context of the TRIPS Agreement with reference to the ruling of CJEU in the Daiichi Sankyo case (CJEU case C-414/11 Daiichi Sankyo v DEMO Anonimos). The first part will explain the process of claiming patents at the national as well as the European level in order to understand the complexity of patent law, the second part will deal with the implications of jurisdiction and developments in EU patent regulations, the third part will deal with the effects of EU competence over the TRIPS patent provisions and the fourth part will deal with the interpretation of substantive patent law in the light of the Daiichi Sankyo case.

## Key-words

Substantive patent law, EU competence, TRIPS Agreement



## 1. Patenting inventions in the EU – national and European approaches

The protection and enforcement of intellectual property rights are crucial for Europe's ability to stimulate innovation and compete in the global economy; intellectual property rights are key means through which companies and inventors generate returns on their investment in knowledge, innovation and creativity. A recent study has estimated that IPR-intensive sectors account for around 39% of the EU's GDP (EPO Industry Level Analysis Report: 2013) while 90% of the EU's trade with the rest of the world is related to European intellectual property intensive industries. Knowledge-based industries play a core role in the 'Global Europe' (COM (2006) 567 final) and 'Europe 2020' (Horizon 2020) strategies.

The European Charter of Fundamental Rights states that intellectual property shall be protected, meaning that the EU therefore recognizes its responsibility for protecting the IP rights of its citizens (Art. 17(2) Charter of Fundamental Rights). The protection of IP rights in the context of the establishment and functioning of the internal market is also envisioned in article 118 of the TFEU. Furthermore, article 207 (1) of the TFEU states that the common commercial policy of the EU is based on uniform principles including, among others, the commercial aspects of intellectual property rights. Common commercial policy is conducted in the context of the principles and objectives of the Union's external actions. According to Article 262 of the TFEU the Council may adopt provisions to confer jurisdiction on the Court of Justice of the European Union in disputes relating to the application of acts on the basis of treaties which create European intellectual property rights.

The EU's competence to create European intellectual property rights thus comes within its shared competence with the Member States for matters relating to the internal market (C- 274/11 Kingdom of Spain v Commission). So far the EU has adopted Union wide legislation on patent law only for Biotechnological inventions (Directive 98/44/EC), and on the enforcement of intellectual property rights. Although the patent law provisions are in most part harmonized within the EU, the CJEU has so far been reluctant in dealing with the interpretation of substantive provisions of patent law in regards of patentable subject matters as quite often the Union hasn't legislated in the area.



Currently, the EU does not provide for a unified EU-wide patent protection, nor does it have at its disposal any legal mechanisms, or the judicial infrastructures, to counteract the fragmentation of the internal market, owing to the diverging interpretation of the scope of protection of European patents in national courts (Straus 1996). At the moment, obtaining patents in all different fields of technology within Europe is governed outside the EU legal framework, by the European Patent Convention (Aerts 2014: 88). Both EU and non-EU Member States are the contracting parties to the convention.

In order to understand the complexity of patent law and how it fits within the competence of the EU, it is useful to explain how patents are obtained inside the Union. Bearing in mind that there is no such thing as a European patent then it means that although the European Patent Office (EPO) is responsible for doing the patent search as well as technical analysis of the patent subject (for European patent applications), the patent granted has, in the later stage, to be validated in selected EU Member States in order to take effect and therefore an European patent eventually becomes just a bundle of national patent rights enforceable according to national legislation of a specific jurisdiction.

Therefore, the fundamentally autonomous procedures for the granting of European patents, is linked to the national patent law of the Member States of the European Patent Organization, and at a number of stages it interfaces with the national legal systems (Herwig et al. 2011: 89). Patent applications can be applied for either nationally, regionally (European patents under European Patent Convention - EPC) or internationally (under Patent Cooperation Treaty - PCT). It means that different rules apply for each case. In most countries in case of national patent applications, the local patent office performs patent searches as well as technical analysis. But since EU Member States operate on different systems of viewing patent applications, respectively either using the system of registration like in Latvia, Lithuania, Macedonia or examination system like Estonia, Norway, Sweden then it means that the criteria for assessing patentability vary quite significantly among the Member States. In consequence, where there is no provision for the requirement to perform examination in countries where the registration system exists, patents are thus granted only if formal requirements are met, while novelty and inventive step is not evaluated at all. Furthermore, legislation for procedures is also different, for example the grace period before filing date (any act that makes an invention available



before the filing date or priority date, has the effect of barring the invention from being patented).

According to the provisions of the EPC, national courts are competent to decide on both the infringement and validity of European patents. In practice, this gives rise to a number of difficulties: high costs, time factor, diverging court decisions and thus an overall lack of legal certainty. Forum shopping is also inevitable. In consequence, despite patent law being in most part harmonized in the Union, differences in interpreting legal norms as well as procedural laws exist (for example the availability of interim injunctions in a specific jurisdiction, presenting evidence and proving its case) and therefore create different outcomes for patentees as well as for third persons.

Traditionally, patent law has always enjoyed national treatment, first established in the Paris Convention, as Member States of the Convention are free to determine the scope of patentability, subject matter and procedures (Art. 2 Paris Convention). Patent law has a national character, and even in case of issuing an European (regional) patent for a subject matter, the European patent (regional) has to, as mentioned already, be validated in selected Member States. As long as formal requirements are fulfilled, the patent eventually ends up being a national patent, its enforceability being governed by the independent laws of the numerous contracting states (Zekos 2006: 426).

The national characteristic of patent law is also evident in different provisions of the EPC, for in each of the contracting states for which the European patent is granted, this has the effect of, and is subject to, the same conditions as a national patent granted by that state, unless otherwise provided in the EPC (Art. 2(2) EPC). Under Article 67(1) EPC, European patent application provisionally confers on the applicant the same rights as would be conferred by a national patent granted in those states. In addition, the European patent can only be revoked under the laws of a contracting state on certain grounds (specified in EPC Articles 138 and 139) with effect only in that State.

The same principle is evident in a CJEU judgment where the court said that a European patent continues to be governed, (as Articles 2(2) and 64(1) of the EPC), by the national law of each of the contracting states for which it has been granted. By the same token, any action for infringement of a European patent must, as is apparent from Article 64(3) of that convention, be examined in the light of the relevant national law in force in each of the states for which it has been granted. European patents, once conferred,



basically become a bundle of national rights, where disputes have to be solved by national courts of the contracting states (COM (2011) 287 final). The patent opposition procedure of the European patent is therefore the only exception to the rule that, after the grant of a patent, the right becomes a bundle of national rights; the opposition procedure (reviewed by the Boards of Appeal of EPO) is a centralized procedure for the evaluation of validity of a European patent directly after grant, thus affecting the patent right in all EU Member States (Aerts 2014: 88-89).

National patents, whether or not granted by EPO, continue to be subject to the Brussels I Regulation regarding rules assigning jurisdiction (Cook: 2012, 569). This means that under the EPC patents, either national or regional (EU), are enforced at national level, on per-country basis. Furthermore, the European Court of Justice held that European patents are national rights that must be enforced nationally, that it was unavoidable that infringements of the same European patent have to be litigated in each relevant national court, even if the lawsuit is against the same group of companies, and that cross-border injunctions are not available (C-4/03 *Antriebstechnik v Lamellen*; C-539/03 *Roche v Primus*).

The national treatment principle is also present in article 3 of the TRIPS Agreement as well as the Paris Convention. The applicability of national law also derives from article 8 of Regulation (EC) 864/2007 regarding the laws applicable to non-contractual obligations in the context of intellectual property rights. When viewed from the practice standpoint, it could be stated that, despite the existence of international agreements, the states still have certain discretion in applying national patent law in local patent offices when going through with actual patent applications in every day practice. Such national competence is especially evident for national patent applications when each country continues to conduct separate patent examinations (Webster et al. 2012: 6).

The whole picture may change when the Unified Patent package enters into force, as alongside the Unified Patent national as well as regional European patents will continue to exist. Therefore, in order to seek for protection in the EU, the applicant will have options to either apply separately for the national patent in every Member State of interest, or as a second option, for the European (regional) patent, and then have it validated as is the currently existing option, or as a third option, have the patent validated as an Unified Patent, or as the last option to apply for the Unified Patent and have it later validated in



EU Member States that are not part of the Unified Patent package. Still, even in case of applying for the European Unified Patent, it will not be granted if the set of patent claims differ between the Member States where they were applied for and the Unified Patent it would create significant risks considering that Unified Patent system works on the all-or-nothing principle.

Also, as the national patent claims and regional European patents will remain to exist alongside the Unified Patent system, there is a concern that it will affect dispute settlement and jurisdiction issues because the Unified Patent Court will not have any jurisdiction over national patent disputes, or over disputes involving non-Members of the Unified Patent package. Therefore, in extreme situations, when the infringement claim for example involves identical patent claims granted on national level, regional level as well as under the Unified system in three different countries, then it could very well mean that the jurisdiction will fall within the competences of the CJEU, the Unified Patent Court as well as the national court.

Enhanced cooperation in the area of unified patent protection is aimed at fostering scientific and technological advance and the functioning of the internal market. In other words, it furthers the objectives of the Union, protects its interests and reinforces its integration process in accordance with article 20(1) of the TEU (C- 274/11 Kingdom of Spain v Commission). In the context of this unified patent scheme, the EPO has been entrusted with the task of granting unified patents, if the system eventually takes effect. It is also foreseen that the EPO will be in charge of centrally administering the unitary patent, levying the annual renewal fees and distributing them to the participating EU Member States. The role of EPO will still remain in question considering that in the current state of affairs it is not linked to the EU.

## **2. The implications of jurisdictions and developments in EU patent regulations**

Substantive patent law relates mainly to acts of direct or indirect infringement. In this regard, simple judicial cooperation and discussions alone cannot avoid contradictory interpretations of European patent law as there is a lack of uniform rules of interpretation throughout Europe (Luginbuehl 2011: 137). As already mentioned, according to the EPC



art 2 (2) and article 64 (1) the grant of European patents falls in the competence of national laws. Following this logic, all cases of patent infringements, should also be dealt by national laws that established the legal basis for granting a patent in a specific territory in the first place. Therefore, substantive patent law should, by deduction from the same logic, also be interpreted according to national laws. Article 16(4) of the Brussels I Regulation provides for exclusive jurisdiction of national courts in proceedings concerned with the registration or validity of patents (van Engelen 2010).

As for European patent claims, according to articles 1 and 2 of the Protocol on Jurisdiction and the Recognition of Decisions in respect of the Right to the Grant of a European Patent, the courts of the Contracting States shall, in accordance with Articles 2 to 6, have jurisdiction to decide claims, against the applicant, to the right to the grant of a European patent in respect of one or more of the Contracting States designated in the European patent application. From the logic of article 16(4) of the Brussels I Convention, one could therefore deduct that the exclusivity of national competence extends not only to infringement cases, but also to the claims regarding challenges to patent registration and validity. Just as a remark, needless to say, the grounds for challenging validity and infringement claims have different grounds.

In *GAT v LuK*, the CJEU held that Article 16(4) of the Brussels Convention is to be interpreted as providing exclusive jurisdiction to the courts of the territory of registration in all matters concerning the validity of a patent, irrespective of how such issue is raised. Any proceedings which relate to the validity of the patent may only be heard by the courts in the territory in which the patent is granted (*C-4/03 Antriebstechnik v Lamellen*). In addition the exclusive national jurisdiction provided for by that provision should apply whatever the form of proceedings in which the issue of a patent's validity is raised. Considering that for challenging the validity of European patents in pre-and post-grant proceedings under the provisions of EPC, there is no principle of binding case law (*EPO T- 1099/06, Max-Planck-Gesellschaft v BASF*) then it means that the binding effect of the EPO's Boards of Appeal decisions is extremely limited.

A patent held to be valid by the EPO in respect of some or all of the claimed subject matter can still be attacked at the national level. Furthermore, the national challenges of patent validity can be brought before the national court despite the limitation of the 9 month time period foreseen for challenging validity claims for European patents granted



by EPO, meaning that the national litigation on validity can, in principle, take place in parallel to the EPO claims. It is important to point out though that as a general principle, the EPO's decisions should enjoy primacy before national patent decisions while national decisions regarding patentability should have no effect on future application procedures at EPO. Both applications either under PCT or EPC can be made directly without applying for a national patent first, and in regards of a European patent then in the case of invalidation in one of the Member States, it still remains valid in others.

The validity claim of a patented subject matter made in national jurisdictions should be contested in the place of patent registration. While the EPO centralized procedure is without any doubt the cheapest and fastest way to challenge patent grant (around half the price compared to litigation in each EPC contracting state separately), as opposed to challenging the validity at the national level, it has a time limit (Thomas et al. 2014). At the same time, both the litigation and the EPO procedures for challenging the validity are time consuming, usually taking around 5 years before the final decision is reached. In the context of patent rights, it certainly has a crucial significance as the economic situation is in constant flux.

In this context, it is interesting to point out the characteristic of European patent law meaning that national patents may actually co-exist alongside European patents, thereby simultaneously falling under the same jurisdiction. For example it may occur in a situation mentioned in article 139(3) of the EPC: Any Contracting State may prescribe whether and on what terms an invention disclosed in both a European patent application or patent and a national application or patent having the same date of filing or, where priority is claimed, the same date of priority, may be protected simultaneously by both applications or patents.

In an era in which intellectual property rights are still for the most part national rights – and a proprietor mostly owns a bundle of national intellectual property rights instead of one supranational IP rights– having to deal with an infringement in multiple jurisdictions still means litigation might be needed in a great number of countries to enforce intellectual property rights within the European Union (Cook 2012: 596). The comprehensive and exclusively applicable set of rules of the Brussels Convention should be applied by the national courts in an uniform way and, in order to ensure uniformity of the judgments, the Contracting States to the Brussels Convention agreed in the Luxembourg Protocol of June 3, 1971, that the supreme courts of the Contracting States can submit questions of



interpretation to the European Court of Justice for preliminary rulings (Mayss 1998: 230-237).

As already mentioned, cases related to infringements of patent rights also fall in the competence of national courts. Under Article 64(3) of EPC, any infringement of a European patent shall be dealt with by national law, with the EPO having no legal competence to deal with, and to decide on patent infringements, in the Contracting States to the EPC. It means that patent infringement of both national and European Patents are dealt with by national courts. There is currently no avenue of appeal from the EPO to the CJEU directly.

In the same way as for the cases dealing with patent infringement in the context of multiple locations, the EU patent cannot be disputed in a centralized manner but every infringement case (although potentially being identical) has to be sued in every single territory separately and therefore is dealt with national jurisdiction. For example, The CJEU ruled in *Roche v Primus* that a patentee cannot rely upon Article 6(1) of the Brussels Convention to bring proceedings for infringement of a European patent against defendants incorporated in other Contracting States, even where such defendants are connected by being part of the same group, and have acted in an identical or similar manner in accordance with a common policy conceived by one of them (C-539/03 *Roche v Primus*).

From the patent owner's perspective, such multiple claims are not only costly but also time consuming, and also different procedural rules are applied meaning that the same case might end up with contradictory judgments in every national jurisdiction. The Court has held that for Article 6(1) of the Brussels Convention to apply there must exist, between the various actions brought by the same plaintiff against different defendants, a connection of such a kind that it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings (C-616/10 *Solvay v Honeywell*).

However, in order to determine whether there is a likelihood of contradiction, it is not sufficient that there might be a divergence in the outcome of the dispute, because the divergence must also arise in the context of the same situation of law and fact. Therefore, there must be a close connection between the claims, and even if it is targeted against the same defendants in all states or in case of different defendants, still dealing with the same type of infringement, it is not enough to tie the cases together.



As a general rule applicable to patent infringement claims, according to the Brussels Convention article 2, the case should fall in the competence of the court where the defendant is domiciled. As patent litigation is usually linked to legal entities then it may create not only confusion but also a chance for forum-shopping, as for legal entities the place of domicile can be defined very differently among Member States. The whole picture becomes foggier when dealing with a litigation involving a branch of the main business or in case of multiple co-defendants. For example, under current circumstances it could very well happen that an American company holding a European patent that is validated in Germany, England and the Netherlands may sue the infringer domiciled in France, for a patent infringement occurred in Germany, in the Netherlands national court. It gets even more confusing in cases related to tort or delict as according to article 5 of the Brussels Convention the case should be reviewed in the jurisdiction where the harmful event occurred. The problem is that this concept can be interpreted in either being a place where the harmful event actually occurred or the place that gave rise to the harmful event.

Also, from the patentee's perspective, other determinants that could affect the final outcome of the case should be taken into account when calculating where to bring the action to court, such as the availability of interim junction measures in the national jurisdiction or even proving one's case and providing evidence that is also practiced differently among Member States. Moreover, there are aspects to take into consideration in respect of the diverging quality of national courts (as there are usually no patent or intellectual property specific courts, then the judge is expected to not only have legal knowledge but also expertise in the area of chemistry, engineering etc. to be able to understand the real substance of the case) and in different practices which could lead to diverging court decisions.

As for the future of litigation procedures, Community competence will probably gradually replace current practices after the ratification of the Community Patent package as patent litigation concerning validity and infringement will be handed to the Unified Patent Court having the competence only over the contracting states (excluding for example Spain). The Unified Patent Court will also have competence over currently existing regional European patents (at least during the transition period of 7 years if the patentee explicitly decides to opt-out for example in a licensing agreement).



However controversy in patent claims may arise where the patent claim is challenged only in one Member State, as in that case both the Unified Patent Court as well as the local one will enjoy jurisdiction and it might lead to forum shopping. The problem of forum shopping currently exists too, as the Brussels Convention allows considerable flexibility for patentees when seeking enforcement of their IP rights. For example, Article 2 (as a general rule) of the Brussels Convention ( Council Regulation EC 44/2001) states that the plaintiff may sue the defendant in the latter's domicile, meaning that in case of patent infringement, there is no need to bring a patent infringement action in a country where the infringement occurred (Bender 2000: 9).

Forum shopping in patent matters is exercised also in national level as the quality and the experience of courts varies greatly (Luginbuehl 2011: 42).

In conclusion, considering that with the unified patent package national as well as regional European patents will still remain in co-existence with the unified patent, further confusion might be created on determining jurisdiction and the place of litigation. This is especially important when considering that the EPO decisions will become appealable to the Unified Patent Court (the first instance of the UPC may and the court of appeal must address the prejudicial questions regarding the applicability of EU law to the European Court of Justice), while the latter will still have no jurisdiction over national patent disputes or disputes involving Member States that are not part of the unified system.

### 3. The effects of EU competence on the TRIPS patent provisions

After the entry into force of the Lisbon Treaty, in terms of the EU's exclusive common commercial policy, competence now covers commercial aspects of intellectual property rights and is likely to be broader than the EU's internal exclusive competence to legislate IP. Although the TRIPS Agreement was signed as a mixed agreement, the rulings of CJEU could *de facto* harmonize the Member States laws even for parts belonging to their sphere of competence (Mylly 2014: 8). Therefore, Member States are in practice subject to a collective management of many mixed agreements whereby the Commission is often in charge of the negotiation of international agreements. On the other hand, taking into account that the EU possesses legal personality doubts might be raised in regards of the extent of its actual competence, bearing in mind that such an entity could be either limited



according to their limitations of competences, or whether it is indeed unlimited and independent of the limited competences of an organization.

If it was limited, it would mean that the EU would only be bound to those parts of the WTO agreement for which it had competence (Steinberger 2006: 841). Considering the breadth of art 216 of the TFEU one could say that the EU has unlimited legal personality and therefore could potentially bind itself to all provisions of the WTO agreement. This would mean that Member States are not only absent for the negotiating aspect, as intellectual property law falls in the sole external competence of the Union, but it also can be said that the final effects of TRIPS are determined by the EU, and through the final interpretation of the CJEU. Although article 3 (1) of the TFEU states that the areas of exclusive competence only refer (among other areas) to aspects of common commercial policy, in the light of art 207 TFEU that declares intellectual property law as belonging to the commercial sphere of the Union, the competence obviously embraces a much wider spectrum than it initially appears.

In one of the first documents dealing with the issue, Opinion 1/94 of the Court of Justice, the Commission recognized that there is a connection between intellectual property law and the trade of goods, as the objective of TRIPS is to harmonize the protection of intellectual property on a worldwide scale. At the same time, the Commission of the day did not recognize the exclusive external competence of the EU as regards TRIPS. The Commission stated that the EU shared joint competence to conclude TRIPS (Opinion 1/94) and that the exclusive competence of the EU was limited to certain areas of intellectual property law and it did not necessarily extend to commercial aspects of the latter. It was stated in the Opinion that intellectual property rights do not relate specifically to international trade; they affect internal trade just as much as, if not more than, international trade. Also, the Commission pointed out the fact that there were many areas of intellectual property law covered by TRIPS that had not been harmonized in the Union level by that time. As for patent law, there are currently two directives legislated on the Union level, namely the Biotech Directive (Directive 98/44/EC) and the Directive on the Enforcement of Intellectual Property Rights (Directive 2004/48/EC).

This scenario has recently changed with the entry into force of the Lisbon Treaty, as intellectual property rights are considered to fall fully within the context of the international commercial policy of the Union.



On the one hand this certainly strengthens the EU's position not only from the legal aspect, but from the political aspect as well considering that in this way the EU could maintain its image as a global market player, while at the same time clearing any uncertainty as regards to defining competence; especially useful when negotiating international agreements as there is no need for defining the line between the competence of the Union and of its Member States. The TRIPS Agreement states that the term intellectual property refers to all categories of intellectual property, therefore it should embrace everything from copyright to undisclosed data and the protection of integrated circuits.

On the other hand the preamble of the TRIPS Agreement clearly states that it is primarily targeted at the liberation of international trade and to strengthen the protection of intellectual property right on a worldwide scale (TRIPS Agreement preamble). Considering that the substantive contents of TRIPS is not particularly trade related, one could say that there is some room for debate as to what might exactly be considered under the notion of the EU's common commercial policy in the context of trade agreements relating to commercial aspects of intellectual property rights. It seems that in the case where an act is targeted to promote, facilitate or govern international trade, it should fall within the notion of common commercial policy, but whether the idea was to create a link of extension between TRIPS and TFEU art 207, meaning that the commercial aspects of intellectual property rights are meant as the ones encompassing in TRIPS, is not certain.

It has been argued that the notion of commercial aspects of intellectual property rights envisioned in art 207 TFEU can be viewed either *via* applying dynamic, or static interpretation (Dashwood et al. 2001: 72). Therefore it is not certain whether art 207 TFEU has a narrower meaning of intellectual property rights compared to what is envisioned in TRIPS, as it does not contain an exposition of such rights. Whatever the notion may be, TFEU art 207 (6) states that exercise of the competences conferred by Article 207(6) in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonization of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonization. Taking into account current practices, for example in the light of CJEU decision on Daiichi Sankyo case (C-414/11), there is obviously a gap between a written text and the reality.

While trade and intellectual property rights have not always gone hand in hand, the



approach, as already mentioned, has changed. Intellectual property law has now become a part of the trade agenda. Although the TRIPS Agreement was signed as a mixed agreement, the uncertainty regarding competence already arose during the negotiations of the Uruguay Round. Despite having agreed upon who should be conducting the negotiations, there was certainly doubt as to who should eventually sign the agreement; Member States viewed TRIPS as a mixed agreement but the Union itself saw the WTO agreement as something falling within its sole competence as the latter had the competence to conclude international agreements in the area of commercial policy. Considering that the European Community can be considered as possessing legal personality at that time, it is therefore bound by the treaty provisions; hence the European Community as well as its Member States became party to the agreement because otherwise neither would have been competent to sign the treaty alone (Steinberger 2006: 839).

It is interesting to observe that at the time (from 1986 until the entry into force of TRIPS in 1994) intellectual property law was not considered as a part of common commercial policy, but such an interpretation was slowly starting to change. If the Community had managed to maintain its position, it would have meant that it could have had the right to harmonize the Union's intellectual property protection while at the same time escaping from constraints otherwise applicable (voting for example). Considering that the Agreement was signed by both the Union as well as its Member States, it created uncertainty to third countries as there would always be a need to draw a line between competences. This issue however, was resolved by the entry into force of the Lisbon Treaty as already discussed above.

Post Opinion 1/94, one could deduce that, as for substantive patent provisions, the Member States could still have had the competence to rely on national law when interpreting its provisions where: 1\ there is no Union wide legislation put down that does not recognize the Union's exclusive competence as regards to TRIPS, 2\ there was minimal harmonized legislation on the Union's level, and 3\ the fact that the TRIPS Agreement was initially signed as a mixed agreement setting only general standards. Such a viewpoint can be backed up by CJEU's decision for Merck Generics (before the Lisbon Treaty) (C-431/05 Merck Genericos v Dohme ) where the court ruled that the Member States would remain principally competent in the areas where the Union itself had not yet legislated, as in that case the Union lacked the competence to interpret the TRIPS



provisions (C-431/05 Merck Genericos v Dohme).

Therefore one could say that, at the time, patent law for example could not fall in the sole competence of the Union due to the lack of harmonized legislation. However, with the entry into force of the Lisbon Treaty, and especially in the light of the Daiichi Sankyo case, substantive patent law, irrespective of whether legislated or not, would now fall within the sole competence of the Union as falling in the category of foreign trade, or more precisely, using the broader notion of the TFEU, to the commercial sphere of the latter. Therefore, what may be deduced is that the Union's competence is in fact broader than that simply envisioned in the TRIPS, which only deals with the trade related aspects of intellectual property rights, which are obviously a narrower notion compared to the one in the TFEU (commercial aspects). Of course, it raises another concern as to whether any possible future agreements containing intellectual property provisions would also fall within the competence of the Union, as while the competence over the TRIPS can be justified by its trade related nature, it is questionable whether the Union will have sole competence for any other type of intellectual property related agreement even after the Daiichi Sankyo case, as the notion of commercial aspects of intellectual property rights are not so far clearly defined.

It is still a matter for debate as to whether after the Daiichi Sankyo case there is a need to further worry about drawing a distinguishing line between on the one hand the commercial aspects of intellectual property law, and on the other non-commerce related intellectual property law, when simply interpreting substantive patent law for example. However it certainly makes a difference when negotiating Free Trade Agreements with third countries which obviously would still be covered by the exclusive competence, although in the context of TRIPS, it would not extend to 'TRIPS plus provisions'<sup>1</sup> that fall outside the TRIPS Agreement but at the same time are widely enforced during negotiations for Free Trade Agreements. The other side of the coin is the fact that while acknowledging its wide competence in the area of intellectual property law, the Union also takes on responsibility for its role as an international body.



#### 4. Interpretation of substantive patent law in the light of the *Daiichi Sankyo* case

The entry into force of the Lisbon Treaty provided a new impetus for reconsidering the role of the Court of Justice in the field of substantive patent law. The establishment of the EU's exclusive competence in the field of common commercial policy has an impact on the determination of legal effects of the patent provisions of the TRIPS Agreement (Dimopoulos and Vantsiouri 2012: 10). At the time of the entry into force of the Lisbon Treaty, jurisdiction to interpret the TRIPS Agreement, whether that of the Court of Justice or that of the national courts, was determined on the basis of whether the specific subject-matter at issue fell within the European Union's or the Member States' area of competence.

The EU is a signatory to the TRIPS Agreement, as opposed to the EPC or Paris Convention. The WTO Agreement, of which the TRIPS Agreement forms part, was signed by the Community and subsequently approved by the Council (Council Decision 94/800/EC). As for the EPO and its relation to TRIPS, the Enlarged Board of Appeal observed in G 2/02 and G 3/02 that although the EPO is not a party to TRIPS, and not bound by it, the national legal systems of the EPC Contracting States might be affected by TRIPS and they may be under an obligation to see to it that the EPC is in conformity with TRIPS (EPO case-law of the Boards of Appeal).

According to article 216(2) of the TFEU, TRIPS, as a WTO agreement, is binding on EU institutions as well as its Member States. The TRIPS Agreement forms an integral part of the WTO, in accordance with the article 2 of the WTO Agreement, and cannot be dealt with in isolation (Appleton et. al: 2005, 115). However, WTO norms can be relied upon in order to review measures that are designed to execute a particular obligation undertaken by the WTO, or if the Union act explicitly refers to specific provisions of the WTO agreements, as the two cases below illustrate (C- 69/89 *Nakajima v Council* and C- 70/87 *Fediol v Commission of the European Communities*).

In the *Nakajima* case, a litigant argued that the European Council's anti-dumping regulation did not comply with the anti-dumping measures of the GATT; in its decision, the CJEU found that this regulation was adopted to comply with the EU's WTO obligations, and as a result, the regulation could be examined for legality with regard to



WTO obligations. The Fediol case dealt with the existence of a regulation that permitted producers to complain to the Commission about illicit commercial practices of third-party countries (C-70/87 Fediol v Commission of the European Communities). The Court found that, although the GATT had no direct effect, the flexibility that characterizes the provisions of GATT in several areas did not prevent the Court from interpreting and applying the rules of GATT regarding a given case, in order to establish whether certain specific commercial practices should be considered incompatible with those rules. Also, since the economic agents concerned are entitled to rely on the GATT provisions as a basis for their complaint, they had the right to request that the Court review the legality of the Commission's decision in applying those provisions.

Conversely, in the FIAMM case (C-120/06 and C-121/06 FIAMM and Fedon v Council), that dealt with non-contractual liability of EU institutions in the event of breach of WTO obligations, the CJEU found that plaintiffs could not rely on WTO law when arguing for invalidity or for damages; WTO agreements are not in principle among the rules in the light of which the Community courts review the legality of action by the Community institutions. Consequently, the court affirmed that there is no possible way, absent Nakajima and Fediol, for private litigants to invoke WTO law before a court to obtain damages or invalidate EU law.

Therefore, the Nakajima and Fediol cases are the two exceptional scenarios that would create the possibility to rely on WTO/GATT law in order to review the lawfulness of EU acts.

The issue regarding the interpretation of the TRIPS provisions has gained particular attention considering that the agreement was concluded by the EU as well as its Member States as a mixed agreement that has the same legal status in the Union legal order as purely Union agreements, insofar as the provisions fall within the scope of Union's competence (Aerts 2014: 88-89). In this context, before answering the question regarding direct effect, the court should presumably first of all solve the dilemma regarding competence. The latter position has attracted opposing views starting from the 1980s until the Daiichi case decided a few years ago.

As for mixed agreements, Member States must exercise their external competence in consistency with the EU law. They must therefore secure the primacy of mixed agreements over national law, as Member States are accountable under EU law for mixed agreements



in their entirety due to the obligation of loyalty codified in articles 216 (2) TFEU and 4(3) of TEU (Mylly 2014: 9). The CJEU has so far been quite modest in interpreting the TRIPS provisions concerning substantive provisions of patentable subject matters, although TRIPS is by its nature of being an WTO Agreement, an area of interest to the EU in general. The CJEU has in its earlier proceedings stated that the substantive interpretation of patent law lies outside its jurisdiction and therefore Member States can decide whether, according to national law, they apply the Agreement directly and how they interpret the provisions of TRIPS in patent related matters (C- 431/05 Merck Genericos v Dohme).

The lack of uniform interpretation of the TRIPS provisions regarding patentable subject matter has led to different levels of protection of patent rights being offered. At the same time it is vital to point out that the TRIPS Agreement only establishes minimum standards for patent protection, and even if its provisions were not to fall within the competence of the EU, it is questionable whether it has any drastic effects to national patent legislation or implementation of TRIPS norms in general.

According to the Article 27 (1) of the TRIPS Agreement, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. WTO Members have to provide patent protection for any invention, whether a product (such as a medicine) or a process (such as a method of producing the chemical ingredients for a medicine) with some reservations (WTO factsheet: 2006, 5). For example, Members may exclude from patentability inventions where the prevention of the commercial exploitation within their territory is necessary to protect public order or morality, including the protection of human, animal or plant life or health, or to avoid serious prejudice to the environment.

The CJEU has previously held that where a provision can apply both to situations falling within the scope of both national law and Union law then that provision should be interpreted uniformly. In the benchmark case Dior (C-300/98 Dior SA v Tuk Consultancy) the CJEU held that in areas under the TRIPS Agreement where the EU has not yet legislated, Union law is deemed to fall outside the competence of the Union as there are no rules laid down in the EU level. This case, however concerned the interpretation of a specific provision in the TRIPS Agreement that was not yet legislated on the Union level.



Similar interpretation of the TRIPS was confirmed by the CJEU in the Merck Genericos decision (C- 431/05 Merck Genericos v Dohme).

In Merck case the Court stated that it was not contrary to community law that a specific article of the TRIPS Agreement was directly applicable, and Member States remain principally competent to decide whether they implement those norms directly, or not, according to their national laws. A similar viewpoint was confirmed in Hermes case where the Court concluded that jurisdiction to interpret the TRIPS Agreement, whether that of the Court of Justice or that of the national courts, was determined on the basis of whether the specific subject-matter at issue fell within the European Union's sphere of competence, or the Member States' area of competence (C-53/96, Hermes v FHT Marketing).

This approach has recently received an opposing view from the Commission, as it has stated that the principle established in the context of Merck Genericos and Dior is no longer valid as the TFEU that entered in force in 2012 makes a clear reference to commercial aspects of intellectual property rights. It means that according to the recent interpretations of the CJEU, rules of patentability (covered by TRIPS article 27) that by general principle should be subject to national law, are from now on considered as falling in the competence of the EU. The CJEU concluded that the TRIPS Agreement as a whole is related to the commercial aspects of intellectual property and, as such, falls within the field of common commercial policy.

The TRIPS Agreement states that, for the purposes of the Agreement, the term intellectual property refers to all categories of intellectual property that are the subject of Sections 1 to 7 of Part II of the TRIPS Agreement, namely copyright and neighboring rights, trademarks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits, and undisclosed information. In this context, TRIPS is viewed as an international treaty promoting and governing international trade; therefore IP law, as a branch of commercial policy, falls in the context what was envisioned in Lisbon Treaty (TFEU article 207(1)) as regards to common external action for trade. It can thus be deduced that for the interpretation of intellectual property law in general, the commercial aspect makes no difference as even in the context of the TRIPS Agreement, intellectual property law is defined in a broader sense and therefore embraces the whole category of the latter.



The concepts held valid so far were turned upside down with the ruling on the Daiichi Sankyo case (C- 414/11 Daiichi Sankyo v DEMO Anonimos) regarding not only substantive patent law, but more broadly intellectual property law in general. Contrary to the Advocate General's observations, the CJEU held that article 27 falls within the exclusive competence of the EU, including the common commercial policy and particularly commercial aspects of intellectual property. The Court also noted that its opinions prior to treaty modifications were no longer applicable. The CJEU further stated that, based on those conclusions, there was no further need to consider whether national courts may accord direct effect to Article 27, as the first question regarding competence was determined, in that competence belonged to the EU. This is a major decision in respect of international intellectual property law within the EU because all the TRIPS provisions may fall within the exclusive competence of the EU.

Firstly, a few words about the Daiichi Sankyo case, which evolved around two aspects. The first was the question of whether the substantive provisions regarding art. 27, (patentable subject matter), of the TRIPS Agreement, falls within the competence of the EU or whether the Member States continue to have a primary competence, and if so then can Member States accord direct effect to that provision. The second question was more specific to intellectual property law, as there was a doubt whether in the case the additional certificate of protection, or even the ground patent, applied solely to the manufacturing process of an active ingredient or would also embrace the active ingredient itself. As for the latter question the court said that the process patent does not extend to the active ingredient but solely to the process.

In seeking to determine the scope of competence of the EU the defendants of the litigation in the Daiichi case pointed out that the TRIPS Agreement was concluded by the Community and its Member States by virtue of shared competence. As the TRIPS Agreement was concluded as a mixed agreement, then in interpreting its provisions it is important to establish the dividing line between the obligations which the European Union assumes and those which remain the responsibility of the Member States (C- 414/11 Daiichi Sankyo v DEMO Anonimos). Therefore, it must be determined whether the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it. The European Commission on the other hand argued that the case-law that was valid for Dior and Merck Genericos, was no longer relevant for



the TRIPS Agreement, since it applied only to agreements which fall within the shared competence of the European Union and the Member States, not to those for which the European Union has sole competence.

The European Commission also added that the TRIPS Agreement as a whole relates to ‘commercial aspects of intellectual property’ within the meaning of Article 207(1) TFEU. Consequently, that agreement in its entirety falls within the field of the common commercial policy (C-414/11 *Daiichi Sankyo v DEMO Anonimos*). The CJEU supported the view of the Commission and concluded in its decision that article 27 of the TRIPS Agreement indeed falls within the competence of the EU, as it is first of all targeted to external actions of the Union; and although those rules (TRIPS) do not relate to the details, as regards customs or otherwise, of operations of international trade as such, they have a specific link with international trade. To regard the rules on patentable subject-matter in Article 27 of the TRIPS Agreement as falling within the field of the common commercial policy, rather than the field of the internal market, reflects the fact that the context of those rules is the liberalization of international trade, not the harmonization of the laws of the Member States of the European Union (C- 414/11 *Daiichi Sankyo v DEMO Anonimos*).

Taking these aspects into account, it is interesting to note that this exclusive competence over substantive patent law is not affected by the fact that the EU has not yet legislated in the specific field, apart from limited sectorial interventions (Directive 98/44/EC). As discussed in respect of the *Dior* or *Merck* cases, the key factor in determining EU competence at the time was whether the Union had exercised EU wide legislation in the field or not. Apparently, this aspect is no longer relevant. Therefore, the lack of common rules on substantive patent law no longer seems to be an impediment for the determination of EU competence.

With regard to the eventual direct effect of TRIPS (in the meaning of the possibility of directly relying on international agreements), it is no longer a question of national laws of Member States (as previously held in *Dior* case C-300/98). Presumably, Member States can interpret Community law as far as may be possible in the light of the wording and purpose of TRIPS (Dimopoulos and Vantsiouri 2012: 12). As the Advocate General wrote in his opinion in *Daiichi* case, TRIPS article 27 does not have direct effect, in that it is not a provision that can be relied on directly by individuals either against the public authorities or, as in this case, against other individuals. Therefore the question of direct effect should



first of all start with the question regarding competence that determines whether there is even a need to deal with the matter of direct effect after resolving the first question at issue.

The directive on the enforcement of intellectual property rights clearly states that it does not apply to Member States' international obligations, especially to TRIPS. It also adds that at the international level, all Member States, as well as the Community itself as regards matters within its competence, are bound by the TRIPS Agreement and further, all TRIPS provisions may fall within the exclusive competence of the EU. (Directive 2004/48/EC). Furthermore, as the CJEU not only found that the EU has external competence as regards of the TRIPS Agreement, it also said that article 27 of the Agreement determining the patentable subject

It could be argued that this creates confusion in regard of the EU's competence to decide on national laws regarding patentable subject matters, (considering that there are differences in national laws for software patents and also regarding the procedures for granting patents as some Member States apply registration method while others apply examination method). Moreover, in the context of European patents, which basically become national patents after validation procedures, and considering that at this point the EPO is not related to the Union, the former's decisions as regards to granting of patents should not form a part of the competence.

Also, this raises questions in cases of validity claims as patents may be challenged at EPO during the period of nine months after the conferral of a patent, but in cases where this period is missed by a third party interested in challenging the patent, then it is up to the national court to deal with such issues. The situation becomes even more complicated in cases where there is a concurrent validity claim being contested at a national court while the EPO's decision on European patent is still pending. It means that once again, on the one hand the EU has no competence to interfere in decisions regarding the EU patent validity provided by EPO but on the other, once the patents are validated nationally, their validity suddenly does become a concern of the Union. With the decision on the *Daichi* case the CJEU ruled that the EU has exclusive competence on how EU Member States apply the patentability provisions of the Agreement on TRIPS. In effect, the EU Member States are not permitted to make their own law on the subject of the TRIPS provisions.



The CJEU may currently give opinions only in limited areas such as the biotech patenting, as this is governed by specific EU legislation, but the *Daiichi* ruling could potentially be used as legal basis for appeals from national courts to the CJEU on patent matters more generally. It may have a particular significance in areas such as software patenting where there are differences between national laws and the EPC (which both have exclusions from patenting computer programs as such) and the provisions of TRIPS, which contain no such exclusion (Swann 2013). As can be deduced from the *Daiichi* case the EU has a broad competence; the EU's external competence now codified in article 216 TFEU is formulated as broadly as the EU's internal competence based on article 351 (1) TFEU. The EU has thus competence, among other situations, when it is necessary to conclude an agreement or take internal action in order to achieve, within the framework of its policies, one of the objectives referred in the treaties (Mylly 2014: 7).

At the same time TRIPS continues to an extent in having a direct effect in the Union. According to the *Daiichi* case, all TRIPS provisions may fall within the exclusive competence of the EU. Certainly, many provisions of intellectual property law have been harmonized, restricting the competence of Member States to a very narrow field. However, this finding may lead, as the Advocate General wrote, to the general and immediate 'expulsion' of the Member State from the negotiations of such agreements, and to affect indirect harmonization. As a result, as mentioned above, almost no intellectual property law provisions are left to EU Member States (Mateu 2014). It means that for substantive patent law then even in the case where the EU has not legislated in the field, it still has the competence over the interpretation of patent norms on the national level, and actually also for European patents as they also become national patents after the validation procedure.

Therefore, even if the EU has no competence to interfere with the decisions of EPO in the framework of EPC, it can interfere in a later stage when European patents become national patents after the validation at local patent offices; and this competence does not only affect patent infringement cases but also patent validation claims. At the same time, considering that the TRIPS Agreement only establishes minimum standards for setting patentability criteria, then from the substantive patent law perspective, it should not create any significant change (it will most probably affect the issues related to patentability of computer programs that have, despite the *Daiichi* case, been an issue of debate for a while now anyway).



## 5. Conclusion

In conclusion, it can be said that there is some change ahead for European patent law not only in the light of the *Daiichi Sankyo* case that has changed the interpretation of substantive patent law deriving from the TRIPS Agreement, but also in the light of the new unified patent package that may soon take effect. It is difficult to predict the final outcome, but what is certain so far is that with the unified patent package national, as well as current regional European patents, will continue to co-exist. And, with the addition of international applications, as well as the possibility of filing unified applications, confusion might be created. Also, the Unified Patent Court will have no jurisdiction over national patent disputes or disputes involving Member states that are not part of the unified patent package (Spain for example). At the same time it will have jurisdiction over not only the unified patents but also the currently existing regional European patents, at least during the transition period of seven years. In contrast to the current state of affairs, the EPO's decisions will become appealable to the Unified Patent Court, and there will be the possibility to make references to CJEU for preliminary ruling. Considering that the unified patent package does not cover all EU member states (for example Italy only takes part of the unified patent court but not the unified patent package itself), it could lead to further confusion. Also, the role of EPO will need to be clarified as currently it is in no way connected to any EU institutions, but it seems that in the future it is expected to move closer to the latter considering that EPO will be in charge of administering unified patents.

As for the substantive patent provisions of TRIPS, and the possibility for applying direct effect, it seems that it still continues to be exempt as substantive patent provisions fall in the competence of the EU and form an integral part of its commercial policy. Therefore, the question regarding applying direct effect is in fact no longer valid. Previous interpretations regarding competence, as set out in the *Dior* and *Merck* cases that exempted the EU competence as long as there had not yet been legislation at the EU level, seem to be no longer relevant in the light of the *Daiichi Sankyo* case. Considering that currently the CJEU can give limited opinions on substantive patent provisions (on the *Biotech Directive* for example), after the *Daiichi Sankyo* case, its competence on patent matters may become wider in the future. At the same time, almost no intellectual property



provisions are still left to the Member states, but in the context of TRIPS Agreement, it is also useful to keep in mind that as far as interpreting its substantive provisions, it only creates general standards.

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<sup>1</sup> Limitations on the use of compulsory licensing, extending patent protection term beyond the original provisions of TRIPS, forcing data exclusivity provisions for developing countries to avoid generic competition in pharmaceutical industry for example etc.

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## Belgian Federalism after the Sixth State Reform

by

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## Abstract

This paper highlights the most important institutional evolutions of Belgian federalism stemming from the implementation of the sixth state reform (2012-2014). This reform *inter alia* included a transfer of powers worth 20 billion euros from the federal level to the level of the federated states, a profound reform of the Senate, and a substantial increase in fiscal autonomy for the regions. This contribution critically analyses the current state of Belgian federalism. Although the sixth state reform realized important and long-awaited changes, further evolutions are to be expected. Since the Belgian state model has reached its limits with regard to complexity and creativity, politicians and academics should begin to reflect on the seventh state reform with the aim of increasing the transparency of the current Belgian institutional labyrinth.

## Key-words

Belgium, state reform, Senate, constitutional amendment procedure, fiscal autonomy, distribution of powers, Copernican revolution



## 1. Introduction

After the federal elections of 2010, Belgian politicians negotiated for 541 days in order to form the government of Prime Minister Di Rupo, which took the oath on 6 December 2011. This resulted in the (unofficial) world record of longest government formation period. After the Flemish liberal party (Open VLD) elicited the end of the government of Prime Minister Leterme, Belgian citizens had to vote on 13 June 2010. The right-wing nationalist party (N-VA) convincingly won the elections in Dutch-speaking Flanders, while the Socialist party (PS) acquired the most votes in French-speaking Wallonia. Negotiations of nearly a year and a half finally resulted into the so-called *Butterfly Agreement* on the sixth state reform of 11 October 2011.<sup>1</sup> This reform *inter alia* included a transfer of powers worth 20 billion euros from the federal level to the level of the federated states (i.e. the regions and communities), a profound reform of the Senate, and a substantial increase in fiscal autonomy for the regions. The agreement was converted into legislation during the years 2012 to 2014 and is currently being implemented at the level of the states. Therefore, it is time to take a closer look at the current state of Belgian federalism after the sixth state reform and to reflect on its future.

In this regard, the following topics will be analysed: the ‘trick’ with the constitutional amendment procedure in article 195 of the Constitution (1.); the historical split of the electoral and judicial district Brussels-Halle-Vilvoorde (2.); the reform of the Senate (3.); the modification of the Special Finance Act, including the substantial increase in fiscal autonomy for the regions (4.); the distribution of powers between the federal level, the regions and communities (5.); the future of Brussels (6.) and finally the future of Belgian federalism (7.).

## 2. Amendment of article 195 of the Constitution

The implementation of the sixth state reform (2012-2014) through several constitutional amendments shows that the constitutional amendment procedure is at odds with the current Belgian federal cooperation model (Popelier 2012: 442). In order to implement the *Butterfly Agreement* on the sixth state reform, Parliament temporarily altered



the constitutional amendment procedure itself in article 195 of the Constitution by adding a divergent ‘transitional provision’ to the amendment procedure, which provoked substantial criticism.

Article 195 of the Constitution prescribes the constitutional amendment procedure, which contains three phases. Firstly, Parliament (i.e. the Chamber of Representatives and the Senate) and the King each adopt a list of constitutional provisions which are ‘declared to be revisable’. After approval of this list the dissolution of Parliament automatically follows, with the organisation of new elections within 40 days. Afterwards, the newly elected Parliament has the power to (only) amend those constitutional provisions which were declared to be susceptible to revision by Parliament and the King in their joint list. In order to amend the constitution, two thirds of the members of each Chamber of Parliament are required to be present, and two thirds of the members present must approve the amendment.

The procedure of article 195 dates back to the first Belgian constitution of 1831. At that time, there were legitimate reasons for its rigidity; it was the main aim of article 195 to avoid the possibility that an accidental majority could substantially amend the constitution without prior consultation of the voters.

In 2011, the list of constitutional provisions which were designated to be susceptible to revision did not contain all articles required for the implementation of the agreement on the sixth state reform. However, after a regime crisis of 541 days politicians wanted to avoid the organization of new elections. As a result, the negotiators of the sixth state reform used their legal toolbox in order to implement the entire agreement without the approval of a new revision statement and without new elections. The list included article 195 of the Constitution, namely the constitutional amendment procedure itself. Consequently, the negotiators decided to add a ‘transitional provision’ to article 195, which was only valid during the same legislative term and gave authority to immediately revise the necessary constitutional provisions. From a strictly legal perspective, one could argue that a two-thirds majority was permitted to amend article 195 in this way, even though the constitutional amendment procedure and its guarantees were in practice temporarily set aside.

The transitional provision contained an exhaustive list of constitutional provisions susceptible to immediate revision. An amendment could only be adopted with a two-thirds



majority as required by article 195 and was not seen as a revision statement leading to dissolution of Parliament.

### 2.1. Guarantees of article 195

It has already been argued on a regular basis that the amendment procedure in article 195 of the Constitution is too rigid (Van Nieuwenhove 2012: 156). Legal scholars have questioned whether the aims of this procedure outweigh its adverse effects.

In theory, the Constituent Assembly aimed to ensure that the voters could express their opinion in an election about the constitutional provisions susceptible to revision. In practice, however, Parliament uses, or indeed abuses, the approval of a revision statement as the standard procedure to rescind parliament and hold new elections. Afterwards, the election campaign is often dominated by general policy issues instead of a thorough debate about the revision statement.

It was the intention of article 195 to avoid a rash approval of constitutional amendments, as the Constitution guarantees the fundamental basic principles which are essential to the rule of law. Consequently, it should not be possible to amend a constitution through the regular legislative procedure. A more rigid procedure ought to safeguard the fundamental character of the Constitution, which is obviously more than ‘*a scrap of paper*’.<sup>11</sup>

### 2.2. Criticism

The opposition parties heavily criticized the ‘trick’ with article 195 of the Constitution described above, as it dodged the guarantees of the amendment procedure. The Flemish right-wing nationalist party (N-VA) *inter alia* referred to article 187 of the Constitution, which forbids a partial or entire suspension of the Constitution. They argued that the transitional provision did not regulate the transition from an old to a new arrangement, but in fact constituted a temporary suspension of the Constitution (Vandernoot 2013). From the beginning of the consecutive legislative term, the ordinary amendment procedure would, once more, become the applicable law. Nevertheless, it is remarkable that N-VA itself, when the party was still involved in the negotiations, also launched several proposals which required the amendment of articles over and above those susceptible to revision. It seems highly unlikely that N-VA would have proposed to wait another legislative term



rather than take advantage of some constitutional high-tech; the duty of the opposition is, of course, to oppose.

Moreover, N-VA petitioned the Venice Commission of the Council of Europe to scrutinize the temporary revision of article 195 of the Constitution.<sup>III</sup> The Commission argued that the amendment procedure ought to safeguard some important guarantees, but at the same time stated that in practice these aims have not always been fully accomplished. As a result, the Venice Commission refuted the arguments of the opposition regarding the guarantees of article 195. Furthermore, the Commission decided that article 195 of the Constitution had not been suspended though indeed it had been altered. On 20 June 2012, the Venice Commission thus ruled that the ‘transitional provision’ neither violated the letter and the spirit of the Constitution nor international norms and standards.<sup>IV</sup>

### 2.3. Towards a reform of article 195?

Although the Venice Commission ruled that the transitional provision was not unconstitutional, the ‘trick’ can still be criticised. Indeed, the adoption of the ‘transitional provision’ could be used as a precedent, so that in the future only one article, namely article 195 of the Constitution, might be declared susceptible to amendment. Such an evolution would of course blatantly undermine the guarantees provided by article 195.

The initiation of a debate about a sustainable reform of article 195 is recommendable, as the efficacy of the current procedural guarantees is highly questionable. We believe that it is time to thoroughly modernise the constitutional amendment procedure, and adapt it to the current federal cooperation model, instead of relying on the ‘trick’ with article 195 for possible future state reform. Some politicians are reluctant to discuss such reforms, as they fear that a simplification of the amendment procedure would make further devolution to the regions and communities easier and would thus contribute to the dismantlement of the federal level.

Despite an explicit demand of N-VA, in view of facilitating its institutional reformist agenda after the next election, the intention to include article 195 in the revision statement at the end of the current legislative term has not been mentioned in the coalition agreement of the new government of Prime Minister Michel. Undoubtedly, this important debate will be revived at the end of the current legislative session.



### 3. The split of Brussels-Halle-Vilvoorde

The electoral district of Brussels-Halle-Vilvoorde (BHV) dates back to 1830, the year in which Belgium became independent. Ever since the state reforms after 1970 which gave rise to the regions and communities, the electoral district BHV has been a constant source of friction in Belgian politics. In 2002, while an amendment of the federal Election Act merged the majority of the former electoral constituencies based on communal districts into provincial electoral districts, in Flemish-Brabant the existing electoral districts BHV and Leuven remained unchanged. The BHV district spanned two regions (and two language areas), namely the Flemish Region and the bilingual Brussels-Capital Region. It included the 19 municipalities of the bilingual Brussels-Capital Region as well as 35 municipalities of the province Flemish-Brabant.

Most of the Flemish parties, however, considered BHV as a mechanism supporting the ‘Frenchification’ of the Flemish areas adjacent to Brussels. In federal and European elections, French-speaking politicians from Brussels could win votes in the 35 Flemish municipalities of Flemish-Brabant. The Flemish politicians, in their turn, also benefited from the BHV district to get better electoral results in Brussels. Nevertheless, BHV became a symbol of the anomalies and antagonisms in Belgian federalism.

In 2003, the Belgian Constitutional Court ruled that, in view of the new provincial electoral districts, maintaining the old communal districts Leuven and BHV constituted an unacceptable inequality.<sup>v</sup> The Court gave the legislature four years to resolve the ‘BHV-problem’ (Peeters and Mosselmans 2009: 5). Despite the Court’s decision, the BHV case dominated Belgian politics for a period far exceeding these four years and resulted in the fall of the Leterme-II government in 2010. It was apparent that a compromise on BHV had to be reached before a new government could be formed.

On 14 September 2011, more than eight years after the landmark decision of the Constitutional Court, an agreement was reached on the split of the BHV electoral district. The agreement was implemented by Chapter 2 of the Act of 19 July 2012 amending the federal Election Act. The province of Flemish-Brabant became a separate provincial electoral district. The district includes the former communal districts of Halle-Vilvoorde and Leuven. In addition, the Brussels-Capital electoral district was created. As a compensation for the Flemish demand to split BHV, the Act grants French-speaking



citizens 'special modalities' in the six suburban municipalities with facilities<sup>VI</sup> surrounding Brussels.

These 'special modalities' guarantee a status quo for the acquired rights of the French-speaking citizens living in these six municipalities. They retain the choice to vote for political candidates of the Flemish-Brabant district or for those of Brussels Capital. In other words, these voters retain the right to vote for candidates in Brussels, even though they are taken into account to calculate the number of parliamentary seats accorded to Flemish-Brabant. This special regime is entrenched in article 16*bis* of the Special Act on Institutional Reform. As a result, an alteration of this regime requires in each parliamentary Chamber a majority of the votes cast both in the Flemish and the French language group as well as an overall two-thirds majority of the votes cast in each Chamber.

The institutional opposition did not agree with this solution for BHV. Several French-speaking parties criticised the loss of the right of the inhabitants of the remaining 29 municipalities of Halle-Vilvoorde to vote for candidates from Brussels. They regarded the compensatory measures to be inadequate. On the other side, according to the Flemish opposition parties too many concessions were made to obtain the split. The main criticisms related to the practical consequences of the split for Flemish-Brussels representation in the Chamber of Representatives. A Fleming elected in the district of Brussels Capital would become a rarity, as it would in practice only be possible if almost all Flemish parties were to come together to constitute one electoral list. This Flemish fear indeed came true in 2014, because in the recent federal election only French-speaking politicians were elected in Brussels Capital.

### 3.1. Special dispute settlement in the suburban municipalities of Brussels

Disputes between the communities, mostly concerning the correct interpretation of the Belgian language legislation, regularly arise in the six municipalities with facilities in the suburban area of Brussels. Consequently, the sixth state reform provided a legal solution to address these problems. From now on, *all* administrative disputes originating in these six municipalities *could* be settled by the General Assembly of the Council of State (Baeckeland and Nelissen 2014: 258; Velaers 2014a: 172). This assembly now also has the final word on disputes concerning the appointment of mayors in these six municipalities (Remiche and Van den Eynde 2013). The General Assembly has a bilingual French-Dutch composition



which seemed advisable for cases concerning delicate language issues. On the other hand, the assembly now also has jurisdiction over disputes which are not at all related to tensions between the Flemish and French Communities, such as the annulment of a planning permission for building a henhouse. This 'legal overkill' has rightly been criticised by the Flemish institutional opposition.

In the meantime, the General Assembly of the Council of State has ruled for the first time on a dispute about the interpretation of the above-mentioned language facilities.<sup>vii</sup> On the one hand, the Council of State acknowledges the primacy of the Dutch language in the six Flemish suburban municipalities. On the other hand, it points out that the administrative requirement demanded by the Flemish Government to express one's language preference every single time violates the minority rights of the French-speaking citizens. Hence, the Council of State concludes that a request for language facilities only has to be renewed every four years.

### 3.2. Reform of the BHV judicial district

The agreement on the sixth state reform not only included the split of the BHV electoral district and the special regime for the municipalities with facilities, but also provided a reform of the BHV judicial district (Gosselin 2013). This judicial district was difficult to manage due to its complex structure. The Act of 19 July 2012 on the reform of the judicial district of Brussels implemented a thorough reform. The Act split the former prosecutor's office into a prosecutor's office of Halle-Vilvoorde and a prosecutor's office of Brussels. As a result, the prosecutor's offices are able to decide on their own policy, taking into account the specific criminal activities most frequently occurring in their district. However, the courts themselves were not territorially divided. They are duplicated based on language; every court is now divided into two monolingual sections. Consequently, there is no real split of the BHV judicial district (Vandenbruwaene 2014: 207; Vanlerberghe 2014: 202). With some minor exceptions, this Act has recently passed constitutional review.<sup>viii</sup>

Generally, we can conclude that the negotiations on the split of Brussels-Halle-Vilvoorde were conducted in a typical Belgian way. In order to reach an agreement on the sixth state reform, both Flemings and Walloons made concessions. As BHV afflicted



Belgium for almost fifty years and led to an institutional crisis, it is important that an agreement has finally been reached.

#### 4. Reform of the Senate

The Belgian Senate looks completely different after the sixth state reform. A thorough reform of the bicameral system has been implemented, whereby the composition and legislative powers of the Senate were revised. From now on, the Senate is an assembly primarily representing the interests of the federated entities on the federal level, which fills a gap in the Belgian federal state structure. It is appropriate in a federal state that the federated entities have a say in (federal) matters which concern them (Goossens and Cannoot 2013: 6). Representation of the interests of federated entities principally – though not always – takes place within a second federal chamber (Popelier 2014: 57). Patricia Popelier theoretically distinguishes four sets of powers that can be distributed to the second chamber: (1) powers that directly relate to the federal state structure and functioning of the federated entities, (2) powers that influence the policy discretion of the federated entities, such as concurring powers, (3) powers that indirectly influence the discretion of the federated entities and (4) powers that do not relate to the federated entities (Popelier 2014: 59). Moreover, it is only if a second chamber is composed of a delegation *from* the Parliaments of the federated entities, that it should be expected to play a significant parliamentary role at the federal level (Popelier 2014: 58). After the reform, it is now up to the Senate to fulfil its new role as chamber of the federated entities.

##### 4.1. New composition

The new Senate has become smaller (Fornoville 2014: 28): it now consists of 60 senators instead of 71. There are no longer directly elected senators; in the new Senate, 50 out of the 60 seats are occupied by senators who are appointed *by and from* the Parliaments of the communities and regions. Among these senators, the distribution of seats is based on the electoral results in the communities and regions. Before the sixth state reform, the Senate already had 21 so-called ‘community senators’, designated by and from the Parliaments of the communities. Although in this way the communities were represented at the federal level, the seats of the community senators were distributed based on the



election results for the federal Senate and there were no representatives of the regions.

The other ten senators are ‘co-opted senators’. The technique of co-optation was initially introduced to involve experts (technocrats) in the parliamentary work of the Senate. They were presumed to improve the quality of the debate and the legislation. Unfortunately, nowadays this category of senators is primarily used to provide a seat for politicians who could not be directly elected. Parliament preserved co-optation in the sixth state reform as a compensation for the split of the Brussels-Halle-Vilvoorde electoral district in order to ensure that (Flemish) Brussels politicians could still become members of the Senate.

Maintaining the technique of co-optation is a stain on the character of the reform (Muyllé 2014: 114). The distribution of the ten seats is based on the election results of the Chamber of Representatives, which is inconsistent with the idea of the Senate as a chamber of the federated entities. Given the considerable reduction of legislative powers of the Senate, it would have been more rational to have given these co-opted politicians a seat in the Chamber instead. Either way, we believe that co-optation should be abolished since non-elected technocrats already work in the cabinets and as parliamentary staff members. Moreover, if experts want to become a Member of Parliament, they should participate in the elections.

#### 4.2. Vast reduction of powers

The sixth state reform curtailed the powers of the Senate and transformed the institution into a non-permanent body which now holds a plenary meeting eight times per year. The unicameral procedure, in which the legislative power is vested in the Chamber of Representatives and the King without involvement of the Senate, became the standard legislative procedure. The unicameral procedure applies to all matters for which the optional or full bicameral procedure has not explicitly been prescribed by the Constitution. As a compensation, a second reading has been introduced in the Chamber of Representatives. As a result, the Senate will have substantially less legislative work.

The remaining powers of the Senate mainly relate to institutional matters: the revision and coordination of the Constitution, the adoption of special majority acts, and ordinary acts with an institutional character. The Senate no longer participates in the everyday management of the country, but through the Senate the federated entities now have full co-



decision power and thus potentially veto power regarding institutional matters.

However, it is doubtful whether the Senate will be able to adequately act as a full-fledged chamber of the federated entities, since the scope of its powers is very limited. In contrast to the German *Bundesrat*, the Belgian second chamber has limited power to regulate matters with a possible impact on the policy of the federated entities, such as the federal budget (Popelier 2014: 90; Van der Besien 2014: 132). Without new negotiations about a next state reform, the Senate will in practice have almost no substantive work, unless it were to proactively take the role of institutional bridge-builder between the regions and communities as well as think-tank regarding the institutional future of Belgium (Goossens and Cannoot 2013: 7). It should be mentioned that article 42 of the Constitution still stipulates that senators represent the entire nation, even though it was the intention to transform the Senate into a chamber that represents the federated entities.

#### 4.3. Senate: quo vadis?

The shortcomings of the Senate reform can be attributed to the absence of a clear vision regarding the future, and the appropriate role, of the Senate (Van der Besien 2014). For instance, most Flemish political parties preferred the abolition of the institution and thus were in favour of the end of bicameralism. Ultimately, the Senate's role could easily be taken over by a special institutional committee within the Chamber of Representatives. Moreover, the interests of the communities and regions are already protected by several other instruments: the presence of language groups in the Chamber of Representatives, the language parity of the federal government, and suspension mechanisms such as the alarm bell procedure and the procedure for conflicts of interest (Popelier 2014). On the other hand, some people advocate the idea of a more influential Senate with full legislative powers for the federated entities at the federal level.

We believe that a well-functioning Senate could be of great value in a federal state. One could opt for a full-fledged chamber of the federated entities, and increase its legislative powers to become similar to those of the German *Bundesrat*. If the current Senate wants to uphold its *raison d'être*, it should become a consultation platform where representatives of the federated entities work together on sensitive topics which may lead to disagreements between the communities and regions, and it should reflect on possible future steps in the evolution of the (con)federal Belgian State.



For now, however, Belgium has an institution whose current value and role are not clear. It is up to the politicians to make a deliberate choice. They should either abolish the Senate and leave its tasks to the Chamber of Representatives, or ensure that the Senate actively resolves tensions between the communities and regions and prepares future institutional steps.

## **5. Reform of the Special Finance Act and fiscal autonomy for the regions**

The institutional agreement on the sixth state reform announced a substantial reform regarding the financing of the federated entities. The Special Finance Act of 6 January 2014 substantially expanded the fiscal autonomy of the regions. We will now outline the main principles of the reform.

During the process of Belgium's transformation into a federal state, a complex set of rules had been created to finance the powers of the regions and communities. The third state reform of 1988 led to the adoption of the Special Finance Act, which determined that the financing of the regions and communities mainly stems from allocated parts ('dotations') of federal personal income tax and value-added tax.

Although these dotations are allocated parts of federal taxes, to a certain extent accountability of the regions and communities still remains (Goossens and Van Belle 2012: 1191). As the financial resources are limited, the efficiency level results in more or less financial resources which can be spent for implementing policies. Nevertheless, the recent reform of the Special Finance Act mainly focuses on accountability through fiscal autonomy for the regions. Henceforth, politicians of the regions now have to make choices and justify how they will generate tax revenue in order to accomplish their policy goals. At the time of elections, fiscal autonomy results in democratic accountability. Although the notions 'autonomy' and 'accountability' are quite similar, they ought to be distinguished from each other (Goossens and Van Belle 2012: 1191).

### **5.1. Regional fiscal autonomy**

Regional fiscal autonomy in the sixth state reform is expanded by the power for the regions to impose unlimited 'extensive surcharges' (a certain percentage on top of the



standard tax) in respect of personal income tax. This fiscal autonomy replaces the previous dotation from the revenue of personal income tax. In addition, the regions can now also impose tax increases or decreases, as well as reductions in federal personal income tax concerning matters for which they are competent. The sum of the surcharges, reductions, tax increases and decreases is called the ‘regional personal income tax’. Nonetheless, the powers transferred to the regions in the sixth state reform are financed with new dotations instead of increased fiscal autonomy (Goossens and Van Belle 2014: 1).

## 5.2. Financing of communal powers

The powers transferred to the communities in the sixth state reform (e.g. family benefits, care for the elderly, and healthcare) are financed by new dotations. In contrast to the regions, the communities have not acquired any fiscal autonomy, because this might cause problems with regard to the territorial division of powers and the principle of equality in Brussels, as both the Flemish and the French Community are competent on the territory of Brussels. Giving fiscal autonomy to the communities could lead to the establishment of sub-nationalities and an unjustified differential treatment of neighbours in Brussels who might be subjected to different tax rules. As a result, the communities still mainly receive their income from allocated parts (dotations) of the revenue of federal personal income tax and value-added tax.

## 5.3. New solidarity mechanism

Before the sixth state reform, the national solidarity compensation could result in so-called ‘perverse effects’, such as the ‘development trap’. In the latter case a region would receive less dotations in spite of increased tax profit due to economic growth in the region. The sixth state reform has maintained a national solidarity mechanism, but in a more limited way and without perverse effects.

## 5.4. Temporary transitional mechanism

As Wallonia would most likely receive less income in the case of increased regional fiscal autonomy, a (temporary) transitional mechanism was proposed in order to seal the deal during the negotiations on the sixth state reform (Pagano 2013). It was agreed that a region or community could neither be structurally impoverished, nor financially gain or



lose in the first year that the reform of the Special Finance Act enters into force (Goossens and Van Belle 2014: 1). As from budget year 2015, a transitional amount will be provided for the communities and regions in order to offset the impact of the reform. This amount remains the same in nominal value during the first ten years. During the subsequent ten years, it will decrease linearly (with a gradual decrease of 10% per year) until it has completely vanished. Hence, Wallonia has been given the time to economically strengthen itself and to increase its income tax revenue.

### 5.5. 'Proper funding' of Brussels

The sixth state reform also provides 'proper funding' of the Belgian capital city (Yernault 2013). There are several reasons why Brussels needs additional funding. Firstly, fiscal autonomy concerning personal income tax as an accountability mechanism is not effective for Brussels. The wages of many employees cannot be subjected to taxation in Brussels, as many of them are commuters who live in other regions. Secondly, Brussels loses significant tax revenue due to the presence of many international and national public institutions which enjoy exemption from property taxation. Finally, the status of Brussels as capital city and headquarters of numerous international institutions entails additional tasks and costs.

Therefore, the additional funding for Brussels will be 461 million EUR by 2015 (Goossens and Van Belle 2012: 1205). One part of this funding is allocated to a specific purpose, for the additional burdens that Brussels bears in comparison to other regions with regard to bilingualism, mobility, training and safety. The other part of the financing is called the 'dead hand' compensation, and is a compensation for the loss of revenue due to the exemption from property tax of numerous buildings. In addition, a structural refinancing is provided for commuters (financed by the other two regions) and international officials (financed by the federal government). After 2015, the additional 'proper funding' of the Brussels-Capital Region will be limited to maximum 0.1% of the GDP.

### 5.6. Climate accountability and contribution to public expenses

The reform of the Special Finance Act also introduced a climate accountability mechanism for the regions and communities. If a region or community exceeds, or fails to reach, the targets on greenhouse gas emission reduction as defined by the National Climate



Committee, there will respectively be a financial bonus or malus which will be paid or received by the federal government (Pas 2014: 360).

It is mainly the federal government that pays pensions, even of civil servants of the communities and regions. Traditionally, the regions and communities contributed to these pensions only to a very limited extent based on the Special Act of 5 May 2003. Following the sixth state reform, the financial contribution of the regions and communities in respect of pensions will progressively increase from 2016 onwards. Moreover, the regions and communities will also be required to significantly contribute to the public financing of the State (250 million EUR in 2014, 1.25 billion EUR in 2015 and 2.5 billion EUR from 2016) and the increasing aging cost of the population (a contribution of 0.23% of GDP by 2030), which will have a substantial impact on their budget.

## 6. Transfer of powers in the sixth state reform: Copernican revolution?

Since 1970, the Belgian Constitution has mentioned the existence of communities and regions. The establishment of these unique federated entities has particular historical origins. Flemish politicians wanted to establish communities to acquire cultural autonomy and protect their language and culture. Walloon, mainly left-wing, politicians on the other hand, pursued economic autonomy via the establishment of regions.

Over time, the communities have acquired legislative powers concerning so-called ‘person-related’ matters, such as education, culture and assistance to persons. Economic and ‘place-related matters’, such as spatial planning, public works and agriculture, were transferred to the regions. Other federal countries, such as Germany, Switzerland and the U.S., only have one type of federated state, respectively Länder, cantons and states, based on territory alone. Thus, the unique division of the federated level in Belgium into communities and regions is remarkable and complex.

### 6.1. Extensive transfer of powers

In light of the historical evolution of Belgian federalism, the sixth state reform is undoubtedly a major reform. The whole package of power transfers is extensive (ca. 20 billion euros), especially in comparison with previous state reforms. In addition, for the first time powers regarding social security were transferred to the federated entities, as the



power concerning family allowances is decentralized from the federal level to the communities. In Brussels, however, the latter power is transferred to the ‘Common Community Commission’, composed of members of the Brussels-Capital regional parliament. Consequently, the Flemish and French Communities are not competent in Brussels regarding family allowances. The same evolution, which is a break with the past, can be noticed with regard to juvenile criminal law: a transfer of powers to the communities, but in Brussels the (regional) Common Community Commission is competent (Ludmer 2013, Pas 2014: 346).

Moreover, the powers of the communities are expanded in the field of healthcare. In the field of justice, the communities are now competent for the enforcement of penalties, first line legal assistance and juvenile criminal law. On the other hand, certain aspects of the prosecution policy are transferred both to the regions and communities. A large number of powers are also transferred from the federal level to the regions, such as important aspects of labour market policy and road safety. With regard to tourism, the power of the communities is transferred to the regions, notwithstanding a few exceptions.

Due to these power transfers, a paradigm shift has been realized with regard to the distribution of powers, whereby one could argue that most powers are now situated on the level of the federated states. The Flemish budget has now indeed become larger than the federal budget, if one does not take into account the federal power and budget concerning social security.<sup>IX</sup>

## 6.2. Copernican revolution?

The extensive transfer of powers prompted former Prime Minister Di Rupo to call the sixth state reform a ‘Copernican revolution’, referring to the renowned statement of former Flemish Minister-President Kris Peeters (Pas 2014: 343). An analysis of the power transfers, however, reveals that the federal level often maintains influence in areas where powers have been transferred to the federated entities. The transfers are characterized by, on the one hand, a high level of fragmentation and, on the other hand, cooperation obligations and increased mutual dependence (Pas 2014: 353).

The current fragmentation is at odds with the intended homogenization of powers, although the feasibility of such homogenization in a federal state has been questioned (Boone 2013: 9, Pas 2014: 350-351). The transfers of powers are very detailed and often



include exceptions. The complex, highly technical distribution of powers will inevitably lead to conflicts. Moreover, the continuous decentralisation of powers could possibly lead to violations of the principles of EU law regarding the internal market and its economic freedom of movement (Pas 2014: 357-358). In the past, the Court of Justice of the EU already indicated that the distribution of specific powers regarding social security to federated entities might be problematic in light of EU law.<sup>x</sup>

The sixth state reform also reinforces cooperative federalism in Belgium. In nineteen cases, a cooperation agreement must be reached between the federal level and the federated states. This policy choice of cooperation agreements is quite remarkable. In 2013, the Council of State issued an opinion stating that ten obligatory cooperation agreements, which should have been reached before the sixth state reform, had still not entered into force.<sup>xi</sup> Consequently, the Council of State requested the special majority legislator to deliberate on the efficacy of this instrument. Nevertheless, the institutional majority ignored the advice. Through expanding cooperation obligations between the federated entities, Belgium could once again face a joint-decision trap (Pas 2014: 352).

Thus, the sixth state reform undoubtedly adds additional complexity to the Belgian institutional structure and distribution of powers. We believe that it is, therefore, time to question the distinction between communities and regions. A new state structure based on one type of federated state, organised on territorial lines as federal countries like Germany, Switzerland and the U.S., would substantially contribute to a simplification of the labyrinthine Belgian state.

## 7. The future of Brussels after the sixth state reform

The Brussels-Capital Region acquired many new powers in the sixth state reform. Although Flemish politicians repeatedly suggested the combination of a transfer of powers and additional financial means for this region with an internal institutional reform, a simplification has (again) not been achieved. Brussels remains a tangle of institutions, so that a thorough structural reform is still urgent.

### 7.1. The Brussels Region-Community



Former Flemish Minister-President, Kris Peeters, stated on several occasions that Brussels would never be a full-fledged region, thereby reflecting the vision of several Flemish political parties.<sup>xii</sup> However, legally, this statement does not make sense. In fact, Brussels *is* a full-fledged region and in the sixth state reform it acquired even more powers than the other regions. One could now call Brussels a ‘super-region’ or ‘region-community’ (Velaers 2014b: 1023).

As mentioned above, the person-related powers regarding juvenile criminal law and family allowances were transferred to the communities, though in Brussels these passed to the Common Community Commission which is composed of members of the Brussels-Capital regional parliament (Pas 2014: 346). This transfer marked the first time in Belgian institutional history that community powers were allocated to the Brussels-Capital Region. This transfer of powers is remarkable, as the bilingual character of Brussels and the lack of an own autonomous culture are traditionally invoked as arguments against granting community powers to Brussels.

The latter view, which predominated during previous state reforms, has been replaced by a more pragmatic manner of thinking. Although Brussels still caused deep discussions during the sixth state reform negotiations, the attention has shifted towards defending the interests of the region’s inhabitants, rather than to traditional institutional antagonisms (Velaers 2014b: 1023). Moreover, the transfer of powers regarding juvenile criminal law and family allowances to the Common Community Commission was considered to be a constitutional necessity. The existence of different family allowance and juvenile criminal law regimes of the French and Flemish Community on the Brussels territory could have led to the establishment of sub-nationalities and a differential treatment, which might be incompatible with the constitutional principle of equality (Dumont and Van Drooghenbroeck 2011).

## 7.2. Towards a simplification of the Brussels labyrinth?

During the negotiations on the sixth state reform, a simplification of the labyrinthine structure of Brussels institutions was proposed. However, the patchwork of municipal, communal and regional institutions has, regrettably, remained intact.

Brussels has too often been the scene for institutional conflicts and has been the subject of many compromises, so that the structure of Brussels became very complex. The



current complex structure originates from the different interests of the federal level, the Flemish and French Communities, the Brussels-Capital Region and the European Union, which each influences Brussels politics. One cannot ignore the special position of Brussels in Belgian federalism as capital of the country, which brings about specific challenges (Velaers 2014b: 985). In addition, 28% of the population in Brussels does not have the Belgian nationality, which gives rise to challenges with regard to multiculturalism. Brussels is also *de facto* the capital of the EU and has a strong international character, causing the need for a customized approach.

In conclusion, a simplification of the existing patchwork of Brussels institutions is urgent (Velaers 2014b: 1024). As Brussels faces many socioeconomic challenges due to its status of bilingual and multicultural capital, it is questionable whether it is possible to deal with these challenges without providing a solid solution for the institutional problems. In this regard, it could be necessary for the communities to decrease their influence in Brussels in order to enable a simplification of the institutions and the distribution of powers.

### 7.3. 'Frenchification' of Brussels

Due to the Frenchification starting at the end of the 18th century, there is in practice no real bilingualism in Brussels. In the legal sense the Belgian capital is bilingual, but French has gradually taken the upper hand. Consequently, as part of the deal on the reform of the Brussels judicial district, the *Butterfly Agreement*, for instance, stipulated that the public prosecutor of the Brussels Public Prosecution Service needed to be French-speaking. However, the Constitutional Court recently annulled this provision.<sup>XIII</sup> Nevertheless, the annulled provision is a clear indicator of the mind-set resulting from the substantial Frenchification, which is strikingly illustrated by the final report of the Taskforce Brussels in 2012.<sup>XIV</sup> The number of Brussels inhabitants whose spoken French is classed as 'well' to 'excellent', remains stable at 95.5%. In contrast, the Dutch-speaking group is limited to 28.2%. Moreover, only 17.2% of the French-speaking Brussels inhabitants speak Dutch to their Dutch-speaking friends.

The gap between legal bilingualism and the actual dominance of French is substantial. In fact, the fear of some Flemish inhabitants of Brussels that the influence of the Flemish Community and the use of Dutch will diminish, is justified. The reason why Brussels is still



officially bilingual only has historical and political reasons: for centuries, Brussels used to be a Dutch-speaking town and the city still remains the capital of the Flemish Community.

The question rises whether the Flemish-speaking inhabitants of Brussels believe that the ties with the Flemish Community are still desirable and necessary, because Brussels' citizens seem to be increasingly convinced that they form a group which should govern Brussels without interference from the French and Flemish Communities. Cutting the ties between Brussels and the communities thus gradually seems to be entering the Brussels mind-set (Vuye 2012: 246-247). In order to fulfil the increased desire for self-governance in Brussels, a new state structure has been advocated in legal doctrine (Vande Lanotte 2011).

In conclusion, the initial intentions of the sixth state reform regarding a simplification of the Brussels patchwork were laudable, but the execution should have been better and more transparent. Therefore, Brussels will also in the future remain the constitutional laboratory of Belgium.

## 8. The future of Belgian federalism

It should be apparent to the reader by now that Belgium has not yet reached the final stage of its institutional evolution. The implementation of the sixth state reform may therefore be seen as the first step towards the seventh reform of Belgian federalism. The strong Flemish nationalistic movement, the desire for self-governance in Brussels, and the inefficiency of the current federal structure will in all likelihood eventually lead to a seventh state reform with new power transfers to the federated entities (Velaers 2013: 571). However, it is doubtful whether this new state reform will be realised in the next few years. A recent survey (2014) shows a decline of 15.6% in the desire of Flemish voters to grant more powers to the federated entities, in comparison to the situation before the sixth state reform. The survey shows that currently the majority of Flemings (57.5%) are in favour of either the current state structure (32.8%) or more powers to the federal level (13.2%) or even a unitary state (11.2%). The same survey also indicates that employment (43%), healthcare (36.9%) and pensions (32.4%) were regarded to be the crucial themes for the voters in the 2014 federal elections. Hence, the main focus of the election was not inspired by the need for institutional reform.



The power transfers of the sixth state reform have resulted in a paradigm shift, since the lion's share of powers – excluding social security – is now situated at the level of the federated states. The sixth state reform also thoroughly revised the Special Finance Act, which considerably increased the fiscal autonomy of the regions. Nevertheless, large fixed dotations are still allocated to the communities and regions. Undoubtedly, calls for further raising the level of fiscal autonomy and accountability of the federated entities will be put on the table in the future.

### 8.1. Towards a Belgian Union with three or four states?

The transfer of powers in the sixth state reform resulted in a blurred distinction between the powers of the communities and regions. For the first time, the Brussels Common Community Commission has been granted 'person-related' powers which are traditionally allocated to the communities. This blurred boundary between regions and communities could be the stepping stone to create a new state structure, based on one type of federated entity. Such a transformation might also raise the question of the possibility of 'recentralisation' of powers in certain areas, as the previous state reforms have led to considerable fragmentation of powers. There are no real constitutional taboos in this regard. According to Verdussen (2013: 575), the constitutional framework could be thoroughly rethought, possibly leading to the abolition of the distinction between communities and regions.

Renowned Belgian politician and professor of constitutional law, Johan Vande Lanotte, among others, defends this vision for the future (Vande Lanotte 2011). According to Vande Lanotte, Belgium should become a Union of four federated states, namely Flanders, Wallonia, Brussels and the German-speaking region. Professor Stefan Sottiaux also suggests the creation of the 'United States of Belgium' (Sottiaux 2011). Such an institutional system would be transparent and would enable the federated states to adopt different policies to adequately tackle their own specific problems. For instance, Brussels has typical metropolitan problems, such as migration, transport and employment for poorly educated workers. Challenges requiring a collaborative approach with other states could be dealt with through cooperation agreements. Article 1 of the Constitution, which proclaims that Belgium is a federal state consisting of regions and communities, should be altered to reform the Belgian state in the way suggested by Vande Lanotte and Sottiaux. Moreover,



we believe that it would be advisable to submit such a significant constitutional reform to the voters for the sake of democratic legitimacy.

Nevertheless, critics of this vision of a Belgian Union with federated states have argued that Brussels would not be able to function without the funding of the other states (Vuye 2012: 252). This is far from being true, as Brussels has a lot of corporation seats. Thus, a decentralisation of corporate taxation would immediately solve the financial problems of Brussels. Moreover, the proximity of Brussels Airport is a huge motor for both local economy and employment.

According to Hendrik Vuye, N-VA fraction leader in the Chamber of Representatives, and constitutional expert, the key word for the further evolution of Brussels – and Belgium in general – is ‘asymmetry’ (Vuye 2012: 259). According to Vuye, the Walloon and Flemish visions of Brussels do not have to be the same. On the contrary, it will only be when the two communities can constitutionally realize their different visions that Brussels will be able to flourish. In Vuye’s vision, Flanders can maintain its institutional connection to Brussels, whilst the French-speakers can develop the French Community Commission (COCOF) into a full-fledged community.

## 8.2. Towards a crucial role for the reformed Senate or its abolition?

The reformed Senate could play a crucial role in a seventh reform of the Belgian state. As described above, the Senate is now a full-fledged chamber of the federated entities, mainly competent for institutional matters. We believe that the senators should be proactive in preparing for future steps in the institutional reform of Belgium by gathering information through expert hearings and debates. The Senate should thus act similarly to the Convention on the Future of Europe, which drafted the notorious EU Constitutional Treaty. It is clear that the current legislative term will be decisive for the role and the future existence of the Senate. If the chamber does not act as a useful platform of (institutional) communication between the regions and communities, it would be better that the Senate be dissolved, and that its function should be integrated within the Chamber of Representatives.

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<sup>I</sup> The ‘Butterfly Agreement’ was named after the bow tie typically worn by former Prime Minister Di Rupo. See [http://www.lachambre.be/kvvcr/pdf\\_sections/home/NL.dirupo.pdf](http://www.lachambre.be/kvvcr/pdf_sections/home/NL.dirupo.pdf).

<sup>II</sup> This quote refers to the legendary remarks made by former Prime Minister Tindemans when he resigned from office.

<sup>III</sup> The Venice Commission focuses on the improvement of democracy and the rule of law. See <http://www.coe.int/en/web/about-us/who-we-are>.

<sup>IV</sup> The full report of the Venice Commission is available at: <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282012%29010-e>.

<sup>V</sup> Const. Court 26 May 2003, 73/2003, available at: <http://www.const-court.be/public/n/2003/2003-073n.pdf/>.

<sup>VI</sup> These facilities entitle the French-speaking citizens living in this Flemish area to communicate with the municipal authorities in French.

<sup>VII</sup> Council of State 20 June 2014, 227.775, available at: <http://www.raadvst-consetat.be/arr.php?nr=227775&l=nl>.

<sup>VIII</sup> Const. Court 30 June 2014, 96/2014, available at: <http://www.const-court.be/public/n/2014/2014-096n.pdf>.

<sup>IX</sup> See the remarks by Secretary of State for Institutional Reform Servais Verherstraeten, available at: <http://www.knack.be/nieuws/belgie/wat-zal-u-voelen-van-de-zesde-staats hervorming-vandaag-niets-morgen-al-heel-wat-meer/article-opinion-262455.html>.

<sup>X</sup> See Const. Court 21 January 2009, 2009/11, available at: <http://www.const-court.be/public/n/2009/2009-011n.pdf>.

<sup>XI</sup> Senate, *Parliamentary Documents*, 5-2232/3, available at: <http://www.senate.be/www/?MIval=/publications/viewPub.html&COLL=S&LEG=5&NR=2232&VOIG NR=3&LANG=nl>.

<sup>XII</sup> See [http://www.nieuwsblad.be/cnt/dmf20110402\\_008](http://www.nieuwsblad.be/cnt/dmf20110402_008).

<sup>XIII</sup> Const. Court 30 June 2014, 96/2014, available at: <http://www.const-court.be/public/n/2014/2014-096n.pdf>.

<sup>XIV</sup> Flemish Community Commission, Task Force Brussel Report, available at: [http://brussel.vlaanderen.be/UserFiles/File/TFB\\_eindrapport\\_20120208.pdf](http://brussel.vlaanderen.be/UserFiles/File/TFB_eindrapport_20120208.pdf).

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**An Internationally Intelligible Principle:  
Comparing the Nondelegation Doctrine in the  
United States and European Union**

by

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## Abstract

This article analyzes the degree of convergence between the United States and the European Union regarding the structural role of administrative agencies. As will be argued, the United States and European Union have arrived at the same broad conclusion about a “nondelegation doctrine”: delegations to administrative agencies should be permitted so long as some limiting principle governs the exercise of that power and allows for sufficient judicial review. However, the Supreme Court has taken a more permissive approach than the Court of Justice in defining the limiting principle. The United States has loosened the reins for the sake of modern administration while the European Union has maintained a firmer grip to keep better control over the Europeanization project. Stated another way, the nondelegation doctrine is simply a reflection of the systems’ relative levels of integration. Thus, the nondelegation doctrine will be stretched in Europe as functional regulatory demands arise from wider and deeper integration. At the same time, the focus will be redirected from substantive limits to procedural controls; accordingly, this Note advocates for a European Administrative Procedure Act.

## Key-words

Nondelegation doctrine, separation of powers, intelligible principle, administrative agencies, Meroni



## 1. Introduction

“[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>I</sup> So stated the Supreme Court in *Mistretta v. United States* (1989) in upholding Congress’s delegation of authority to the United States Sentencing Commission to promulgate federal sentencing guidelines.

*Mistretta* follows a long history of delegations surviving the nondelegation doctrine.<sup>II</sup> According to the purest form of this doctrine, Congress cannot delegate its legislative authority to another branch.<sup>III</sup> While the doctrine has been cited in judicial reasoning from time to time, it has not functioned to invalidate a statutory delegation since 1936.<sup>IV</sup> In fact, so long as Congress has provided an “intelligible principle” to guide agency action, a delegation will survive under the doctrine.<sup>V</sup>

Similarly, the Court of Justice of the European Union (“Court of Justice”) has enunciated its own version of a nondelegation doctrine. As early as 1958, the Court of Justice made it clear that delegations that confer clearly defined powers governed by objective criteria allowing for appropriate judicial review will be upheld.<sup>VI</sup> Though the European Union differs structurally from the United States, the similarity of the two nondelegation doctrines implies some level of congruence in how courts assess delegated powers.

This Note shall analyze, through comparative study, the degree of convergence between the two systems as regards the structural role of administrative agencies. The nondelegation doctrine will serve as the lens through which to view this role. As will be argued, the United States and European Union have arrived at the same broad conclusion about the nondelegation doctrine: delegations should be permitted so long as some limiting principle governs the exercise of that power and allows for sufficient judicial review.

However, while both systems allow delegations of power to agencies, the Supreme Court has taken a decidedly more permissive approach than the Court of Justice in defining the limiting principle. In the United States, the functional needs of the modern regulatory state have come to trump concerns for overly broad exercises of power by subsidiary bodies. Meanwhile, E.U. nondelegation doctrine has depended more heavily on the process



of European integration. The E.U. judiciary has clung to a narrower vision of delegation as a way of protecting an institutional balance within the Union. In sum, though the two systems have rejected a strict nondelegation doctrine, the United States has loosened the reins for the sake of modern administration while the European Union has maintained a firmer grip to keep better control over the Europeanization project.

Yet, stated another way, the key issue remains the same; the nondelegation doctrine is simply a reflection of the systems' relative levels of integration, with the United States composing a true federal union and the European Union blending elements of supranationalism and intergovernmentalism. Thus, if the U.S. experience can provide any foreshadowing of things to come in the E.U. context, the nondelegation doctrine will be stretched as functional regulatory demands arise from wider and deeper European integration. At the same time, the focus will be redirected from substantive limits to procedural controls; accordingly, this Note advocates for a European version of the Administrative Procedure Act (A.P.A.).

To present this argument, Part II will briefly describe the constitutional structures within which the nondelegation doctrine operates in the United States and European Union. Part III will detail the state of American nondelegation doctrine, while Part IV will present the European Union version. Part V will delve deeper into a comparative analysis of the two approaches to nondelegation. This analysis will tackle to what extent the nondelegation approaches represent a convergence or divergence. Moreover, the analysis will attempt to reconcile the difference in U.S. and E.U. constitutional structures vis-à-vis the nondelegation doctrine. This will entail a broader discussion about the “federalizing” of the European Union. Afterwards, Part VI will consider counterarguments, primarily those favoring a strong nondelegation doctrine on normative grounds. Lastly, Part VII offers policy recommendations on how to remedy the potential accountability gap created through permissive delegations.

## 2. Background: Constitutional Structures in the U.S. and E.U. contexts

Any comparative analysis involving the United States and European Union necessitates an overview of their divergent constitutional structures. The United States is a federal republic with powers divided between the federal and state levels.<sup>vii</sup> The federal



Constitution divides powers among three branches of government: executive (formally vested in the President, but in practice exercised by administrative departments and agencies), legislative (bicameral, directly-elected representation through the Senate and House of Representatives, jointly referred to as Congress), and judicial (composed of the Supreme Court and lower federal courts).<sup>VIII</sup> For the purposes of the nondelegation doctrine, the typical pattern entails a transfer of legislative authority from Congress to administrative agencies in the executive branch, with the courts supervising the legitimacy of these delegations.<sup>IX</sup>

By contrast, the European Union represents a partly-supranational, partly-intergovernmental entity comprising twenty-eight Member States.<sup>X</sup> While the European Union has been referred to as *sui generis*,<sup>XI</sup> it bears certain structural similarities to the United States.<sup>XII</sup> The European Commission (“Commission”) exercises the executive powers of the European Union and is tasked with proposing and implementing E.U. legislation, enforcing E.U. Treaty and secondary law, and managing the overall administration of E.U. programs.<sup>XIII</sup> Like the U.S. bicameral legislature, the Council of the European Union (“Council”) and the European Parliament (“Parliament”) share E.U. legislative powers, typically deciding upon legislation through co-decision.<sup>XIV</sup> The Council is composed of national ministers organized into policy-area groupings, while the Parliament is a legislature of directly elected representatives from each Member State.<sup>XV</sup> The E.U. judiciary has a first-instance level of review through the General Court and a “supreme court” through the Court of Justice.<sup>XVI</sup> Lastly, the European Council, composed of the heads of state or government of all E.U. Member States, plays an agenda-setting role in determining the overall direction of E.U. integration.<sup>XVII</sup>

### 3. Nondelegation in the United States

Nondelegation has been present in American jurisprudence since the early nineteenth century. In *Wayman v. Southard* (1825), the Court addressed whether Congress could delegate the power to set rules regulating judicial proceedings to the courts themselves.<sup>XVIII</sup> The Court concluded that while Congress cannot delegate “strictly and exclusively legislative [powers],” it can delegate “powers which the legislature may rightfully exercise



itself.”<sup>XXIX</sup> Specifically, the Court distinguished between (but did not define) exclusive powers and delegable “details”:

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.<sup>XX</sup>

Thus, although the Court acknowledged the intellectual foundation for a nondelegation theory, it did not resolve the precise contours of its operation.<sup>XXI</sup>

The doctrine did not resurface until 1892 in *Field v. Clark*.<sup>XXII</sup> In *Field*, importers challenged the Tariff Act of 1890, which in part required the President to suspend provisions of the Act permitting free trade reciprocity and levy duties upon finding that a foreign nation imposed tariffs on certain goods.<sup>XXIII</sup> The importers argued that the statute impermissibly delegated legislative authority to the President.<sup>XXIV</sup> The Court did not view the statutory delegation in this case as a transfer of legislative authority; rather, since the legislation premised presidential action upon a congressionally defined condition precedent, the President exercised executive power when suspending the provision.<sup>XXV</sup> Yet, the Court stated that the fact that Congress “cannot delegate legislative power to the president is universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution.”<sup>XXVI</sup> The Court provided a slightly more substantive outline of the doctrine than the *Wayman* court, distinguishing between “the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.”<sup>XXVII</sup> At the same time, the Court seemed to undercut its nascent doctrine by carving out an exception for foreign affairs powers whereby the President should have broad authority to conduct trade policy.<sup>XXVIII</sup> The immediate exception-making premised on important policy grounds foreshadowed later developments of the doctrine resulting in permissive delegations.

The modern nondelegation test derives from *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). As in *Field*, the Court in *Hampton* faced a constitutional challenge by importers to a presidential proclamation raising duties pursuant to the Tariff Act (this time, the 1922 Act).<sup>XXIX</sup> However, *Hampton* differed from *Field* in two respects. First, the statute



added an agency layer between the President and Congress; it premised the President's authority to issue the proclamation on an investigation and report issued by the United States Tariff Commission detailing production cost differences.<sup>xxx</sup> Second, the Court enunciated an "intelligible principle" test to outline the contours of the nondelegation doctrine left unaddressed by the *Wayman* decision: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power."<sup>xxxi</sup> This delegation should be informed by "common sense and the inherent necessities of the governmental co-ordination."<sup>xxxii</sup> Importantly, the Court recognized that were Congress able to regulate tariffs under its commerce powers, but unable to delegate rate-making to another body, the power would be rendered a nullity in practice.<sup>xxxiii</sup> As such, the Court opened the door to a permissive nondelegation doctrine, flexible according to the evolving policy needs of government.

Less than a decade after *Hampton*, following the Great Depression and in the midst of New Deal government expansion, the Court for the first and only time held delegations invalid under the nondelegation doctrine in three cases between 1935 and 1936.<sup>xxxiv</sup> In *Panama Refining Co. v. Ryan* (1935), the Court held that section 9(c) of the National Industrial Recovery Act of 1933 ("NIRA"), which authorized the President to prohibit the transportation of petroleum in excess of state quotas, represented an unconstitutional delegation of legislative power.<sup>xxxv</sup> First, the Court characterized the delegation as an unqualified and unlimited grant of legislative policymaking to the President lacking any discernible criteria.<sup>xxxvi</sup> Second, the Court reviewed its nondelegation jurisprudence (which had upheld the delegation in every instance) and concluded that the cases collectively stood for the proposition that "there are limits of delegation which there is no constitutional authority to transcend."<sup>xxxvii</sup> In dissent, Justice Cardozo found adequate standards to guide executive action, stemming largely from a combination of the statement-of-policy section of NIRA and statutory canons of construction (constitutional avoidance and structural reading of the statute).<sup>xxxviii</sup> Cardozo emphasized the need for permissive delegation given modern governance: "In the complex life of to-day, the business of government could not go on without the delegation, in greater or less degree, of the power to adapt the rule to the swiftly moving facts."<sup>xxxix</sup>



In *A.L.A. Schechter Poultry Corp. v. United States* (1935), the Court invalidated another NIRA delegation to the President, which allowed him to approve industry-developed fair competition codes, impose additional conditions, or prescribe his own code.<sup>XLI</sup> After rejecting the importance of exigent circumstances (i.e., the Great Depression) in constitutional analysis,<sup>XLI</sup> the Court declared that NIRA did not adequately constrain the President's authority; rather, it granted him "unfettered discretion to make whatever laws he [thought] may be needed or advisable for the rehabilitation and expansion of trade or industry."<sup>XLII</sup> According to the Court, the ability to make fair competition codes without controlling standards from Congress crossed the line of unconstitutional delegation.<sup>XLIII</sup>

Lastly, in *Carter v. Carter Coal Co.* (1936), the Court found an unlawful delegation of legislative power under the Bituminous Coal Conservation Act of 1935 to private industry groups who were permitted to regulate wages and hours.<sup>XLIV</sup> For the Court, the grant of authority to private parties represented a "legislative delegation in its most obnoxious form."<sup>XLV</sup> Unlike *Panama Refining* and *Schechter*, *Carter* provides virtually no analytical support beyond its conclusory rejection of delegations to private parties.<sup>XLVI</sup>

Following the trilogy of strict nondelegation applications, the Court immediately began to loosen its approach. In late 1936, the same year as the *Carter* decision, the Court decided *United States v. Curtiss-Wright Export Corp.*<sup>XLVII</sup> While the case carries particular weight as a statement of presidential power in national security and foreign affairs,<sup>XLVIII</sup> it also offers insight into the limits of the nondelegation doctrine. In upholding a delegation to the President to impose an arms embargo if he found that it would contribute to the peaceful resolution of the Chaco War, the Court recognized a distinction between international and internal affairs:

It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.<sup>XLIX</sup>

*Curtiss-Wright* initiated an as-of-yet unbroken chain of judicially-affirmed delegations.<sup>L</sup> Notably, with world war providing a context for enhanced legal realism, the Court in *Yakus*



*v. United States* transformed its analysis into a more permissive review for “absence of standards.”<sup>LI</sup>

The *Mistretta* case exemplifies the modern trend in favor of permissive delegations. In *Mistretta*, the Court upheld a delegation to an independent agency within the judicial branch, the United States Sentencing Commission, authorizing it to formulate sentencing guidelines with a continuing obligation to periodically review and revise the standards.<sup>LI</sup> Citing *Field* and *Hampton*, the Court concluded that while the nondelegation doctrine stems from separation of powers principles, the complexity of modern governance necessitates broad delegation to coordinate governmental branches.<sup>LI</sup> A delegation will be “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”<sup>LIV</sup> The Court also favorably cited the “absence of standards” iteration of its nondelegation approach.<sup>LV</sup> Thus, *Mistretta* confirmed the suitability of extremely broad delegation whereby Congress need only specify the agency, a policy goal, and some reviewable outer limit.

Aside from *Mistretta*, the quintessential representation of the modern U.S. approach to nondelegation is *Whitman v. American Trucking Associations* (2001).<sup>LVI</sup> The Clean Air Act requires the Environmental Protection Agency (“EPA”) to promulgate rules for air pollutants and empowers the EPA Administrator to revise the standards every five years.<sup>LVII</sup> American Trucking Associations challenged the EPA’s national ambient air quality standards for particulate matter and ozone.<sup>LVIII</sup> Interestingly, the D.C. Circuit held that the EPA failed to articulate an intelligible principle to guide its agency action.<sup>LIX</sup> On appeal, the Court disagreed.<sup>LX</sup> The Court noted that nondelegation analysis applies solely to Congress’s statutory delegation, not to an agency’s interpretation of the statute.<sup>LXI</sup> Moreover, in reviewing its nondelegation jurisprudence, the Court concluded that it has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>LXII</sup> Ultimately, the Court reaffirmed the appropriateness of *Hampton*’s intelligible principle test and acknowledged a wide margin of discretion for delegations.<sup>LXIII</sup> However, the Court harkened back to *Wayman*’s important subjects-details distinction, qualifying the intelligible principle test with degrees of requisite congressional guidance based upon the scope of the delegation.<sup>LXIV</sup> This represents a subtle step backward for the permissive nondelegation doctrine, one which should not be followed going forward.



#### 4. Nondelegation in the European Union

Nondelegation has been a concern in the European Union since its inception. In 1958, the Court of Justice decided *Meroni v. High Authority*.<sup>LXV</sup> Meroni, an Italian steel company, sought annulment of a High Authority (now the Commission) decision that required the company to pay into a price stabilization system for ferrous scrap metal.<sup>LXVI</sup> The High Authority delegated the regulation of this system to an independent agency established under Belgian private law, the Imported Ferrous Scrap Equalization Fund.<sup>LXVII</sup> The court found that the High Authority had in fact delegated powers since the Fund fully administered the system and retained the power to collect payments; the High Authority would only intervene upon the Fund's request (which occurred in this case).<sup>LXVIII</sup> As to the lawfulness of the delegation, the court held that the High Authority could not delegate power that it could not exercise itself under the Treaty because that would lead to an agency potentially holding powers more extensive than the delegating authority.<sup>LXIX</sup> The court further concluded that an agency's use of its own powers had to derive from an express delegation and be "subject to precise rules" to enable judicial review.<sup>LXX</sup> Yet, the court held that the High Authority, as a matter of right stemming from its Treaty powers, could delegate authority to another body so long as it found a delegation necessary and compatible with the Treaty, retained a supervisory role, and laid down conditions to govern the authority.<sup>LXXI</sup> Such conditions could not, however, leave a "wide margin of discretion" to the body:

The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy. A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility.<sup>LXXII</sup>

Thus, according to the *Meroni* doctrine, a subordinate body can exercise only clearly



defined powers supervised by the delegating authority that do not entail actual policy decisions.

The *Meroni* doctrine exists alongside a further limitation on delegated powers enunciated in the *Romano* judgment. *Romano* concerned an Italian citizen living in Belgium whose Belgian pension was reduced, pursuant to Belgian law, based upon receipt of an Italian pension.<sup>LXXIII</sup> *Romano* challenged the exchange rate used to calculate the reduction, which Belgian authorities derived from a decision of the Administrative Commission on Social Security for Migrant Workers, a subordinate body of the European Commission.<sup>LXXIV</sup> The Council of Ministers (now the Council) had delegated to the Administrative Commission the power to set the date determining the applicable exchange rate.<sup>LXXV</sup> In a preliminary ruling,<sup>LXXVI</sup> the Court of Justice held that “a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law.”<sup>LXXVII</sup> The court premised its conclusion on both the powers of the Commission and the Community judicial system.<sup>LXXVIII</sup> Therefore, as reflected in *Meroni* and *Romano*, the Court of Justice viewed the sufficiency of judicial review as an essential component of valid delegations.<sup>LXXIX</sup>

Recently, the Court of Justice had the opportunity to revisit the two doctrines in *United Kingdom v. Parliament and Council*. In November 2010, following the 2007-08 financial crisis, the E.U. legislature passed Regulation 1095/2010 establishing the European Securities and Markets Authority (“E.S.M.A.”).<sup>LXXX</sup> E.S.M.A. possesses distinct legal personality, meaning it is an independent E.U.-level agency constituted under E.U. public law.<sup>LXXXI</sup> However, it is accountable to the Parliament and Council.<sup>LXXXII</sup> In March 2012, Regulation 236/2012 granted E.S.M.A. authority to, *inter alia*, outlaw “short-selling” and related financial transactions.<sup>LXXXIII</sup> The United Kingdom challenged this power on a number of grounds, including impermissible delegation.<sup>LXXXIV</sup> The court first distinguished the facts of *Meroni*, noting that the body in *Meroni* was a private-law entity endowed with a wide margin of discretion; in this case, the E.U. legislature created E.S.M.A. as an E.U. entity under E.U. law with certain conditions and limiting criteria.<sup>LXXXV</sup> This led the court to conclude that the delegation to E.S.M.A. fell within the permissible “clearly defined powers” category of *Meroni* which enabled sufficient judicial review.<sup>LXXXVI</sup> The court proceeded to clarify that the *Romano* judgment did not add anything analytically to the *Meroni* doctrine as regards delegated powers to entities like E.S.M.A.; while E.S.M.A. must adopt generally applicable



measures, seemingly in contravention of *Romano*, the Treaty of Lisbon specifically contemplates E.U. bodies taking acts of general application.<sup>LXXXVII</sup> As such, the court seemed to overrule *Romano* insofar as E.U. agencies are concerned.<sup>LXXXVIII</sup> Similarly, the court rejected the argument that Articles 290 and 291 of the Treaty on the Functioning of the European Union (“TFEU”) represent a “closed system” for delegating powers to the Commission and thereby preclude delegations to other E.U. bodies.<sup>LXXXIX</sup> Though the Treaty of Lisbon does not explicitly address delegations to agencies, the provisions concerning judicial review implicitly recognize the possibility.<sup>XC</sup> The court placed E.S.M.A.’s power in context, stating that E.S.M.A. possessed the expertise necessary to deal with threats to the Union’s financial stability and accordingly must be able to temporarily restrict short sales.<sup>XCI</sup> Lastly, the court asserted that the E.U. legislature enjoys discretion in delegating the power to implement harmonizing measures, especially “where the measures to be adopted are dependent on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately.”<sup>XCII</sup>

## 5. Analysis

With *Whitman* and *Parliament and Council* representing the current state of the nondelegation doctrine in the United States and European Union, respectively, it is possible to identify areas of convergence and divergence. First, simply put, each system has formulated a nondelegation doctrine. The courts have taken it upon themselves, as guardians of their constitutional documents, to craft a judicially cognizable standard for adjudging the proper roles of governmental branches.<sup>XCIII</sup> The very presence of a nondelegation doctrine in both systems implies a fundamental concern with upholding the structural integrity of the constitutional system. Accordingly, at its core, the nondelegation doctrine “is rooted in the principle of separation of powers . . . .”<sup>XCIV</sup>

Notably, both systems have rejected the nondelegation doctrine in its strictest sense, quashing any suggestion that the legislature cannot delegate legislative powers in some form to another body. Even the *Meroni* doctrine, arguably more rigid a test than any iteration of the U.S. nondelegation doctrine, looks and acts more like a clear statement rule than a grand prohibition on delegated power: so long as the legislature expressly delegates the power and in doing so specifically outlines the content and scope of the delegation, the



court will likely uphold the delegation.<sup>XCv</sup> Viewed in this light, the *Meroni* doctrine seems to fit the pattern of “nondelegation canons” described by Cass Sunstein.<sup>XCvI</sup> Moreover, this rejection of a “strong” nondelegation doctrine reflects the fact that a total prohibition on delegation is “unworkable.”<sup>XCvII</sup> Whether for reasons of legislative imprecision, lack of technical expertise, or acknowledging the inherent policy-setting roles imbued in executive and judicial functions, the legislature must possess enough leeway to delegate some degree of legislative power; the debate is in defining that degree.<sup>XCvIII</sup>

Relatedly, courts in both systems have premised their nondelegation doctrines partly on the sufficiency on judicial review. The concern for the Community judicial system permeates the *Meroni*, *Romano*, and *Parliament and Council* judgments. In particular, the court’s central distinction in *Meroni* between “clearly defined executive powers” and “discretionary powers” rested on the delegation’s amenability to judicial review for overly broad policymaking authority.<sup>XCIX</sup> In fact, the distinction drawn in *Field* between policymaking discretion and executive authority closely tracks the key language in *Meroni*.<sup>C</sup> Moreover, the Court in *Whitman* emphasized the role of the courts in assessing the validity of delegations under the intelligible principle standard.<sup>CI</sup> As such, judicial attention to the balance of powers issues in nondelegation cases shows as much concern with judicial power as with ensuring a legislative-executive separation.

Likewise, both systems’ courts have justified their nondelegation doctrine to some extent on the necessities of modern governance. In *Hampton*, *Mistretta*, and Justice Cardozo’s dissent in *Panama Refining*, the Court has explicitly grounded its permissive approach to nondelegation in the intricacies of, in the words of Justice Blackmun, “our increasingly complex society, replete with ever changing and more technical problems.”<sup>CII</sup> The Court of Justice acknowledged this basis in *Parliament and Council*, stressing the need to act quickly with appropriate technical expertise in situations that could destabilize the E.U. system, such as the financial crisis.<sup>CIII</sup> Interestingly, this “first responder” approach to administrative law echoes Justice Cardozo’s sentiments in *Panama Refining*, in the midst of the Great Depression.<sup>CIV</sup> Thus, taking a permissive approach to nondelegation serves the crucial purpose of enabling a flexible governmental approach to problem-solving.

On the other hand, the United States and the European Union operate under different institutional designs. The glaring difference between the U.S. and E.U. systems in this regard relates to their constitutional documents. While U.S. courts have read the



nondelegation limitation into the text of the Constitution, the TFEU expressly lays out the terms and conditions of certain delegations. Article 290 TFEU requires that the legislative act (most likely passed through co-decision of the Council and Parliament) explicitly define the “objectives, content, scope and duration” of the delegation as well as any conditions placed upon it.<sup>CV</sup> Moreover, the Article makes a distinction between “essential elements of an area,” which are reserved for the E.U. legislature and cannot be delegated, and “non-legislative acts of general application to supplement or amend certain non-essential elements,” which the Commission may pursue through delegated power.<sup>CVI</sup> Like the similar language distinguishing discretionary and clearly-defined powers in *Meroni* and *Field*, the TFEU language here bears a striking resemblance to *Wayman*’s distinction between “important subjects” and “details.”<sup>CVII</sup> Thus, some delegations in the E.U. system, specifically those powers given to the Commission, fall under express Treaty regulation.

After the Court of Justice’s holding in *Parliament and Council*, that Articles 290 and 291 do not define the full range of allowable delegations,<sup>CVIII</sup> E.U. agencies can be the beneficiaries of a delegation from the Council and Parliament. This sort of judicial gloss on the E.U.’s constitutional document echoes the Supreme Court’s structural reading of legislative powers in U.S. nondelegation cases.<sup>CIX</sup> In practical terms, Article 290 and *Meroni* impose similar requirements on delegations: explicit statements of delegated authority subject to certain conditions and limiting criteria.<sup>CX</sup> Considered alongside the broad “intelligible principle” standard in U.S. courts, the E.U. standard for delegations certainly seems more stringent.<sup>CXI</sup>

However, this stringency may be explained with reference to institutional dynamics. In Congress, both the House of Representatives and the Senate are directly elected, and the executive branch acts as the hub for implementing law.<sup>CXII</sup> The European Union has not reached the same high level of integrated federalism. While the Parliament derives from Europe-wide democratic elections,<sup>CXIII</sup> the Member State ministers who compose the Council represent state interests pursuant to their national ministerial appointment.<sup>CXIV</sup> Moreover, the Commission does not mirror the U.S. executive branch in form or substance. Because of the E.U.’s federal nature,<sup>CXV</sup> embodying dual competencies with dual governance structures, implementation of E.U. legislative acts primarily occurs at the Member State level; granting delegated authority to E.U. agencies thus “Europeanizes” a power the relevant national authorities currently exercise.<sup>CXVI</sup> Additionally, the Commission



drafts and proposes laws,<sup>CXVII</sup> functions carried out by Congress in the U.S. context.<sup>CXVIII</sup> In the aggregate, these different designs create different perceived needs for a stricter or looser nondelegation doctrine.

However, because the constitutional documents in both systems do not provide a framework for agency creation or authority, agencies are creatures of statute.<sup>CXIX</sup> The statutory nature of agencies results in another intriguing divergence: while in the United States Congress proposes and passes legislation subject only to presidential veto, in the European Union the Treaties split those functions between the Commission as initiator and the Council and Parliament as co-legislators.<sup>CXX</sup> Thus, the executive suggests the formation of new E.U. public agencies, an exercise of power reserved to the legislature in the United States. This gives the Commission greater control over the ultimate regulatory direction of the European Union.

Like their constitutionally enumerated counterparts, agencies in the two systems share other structural convergences and divergences. In the United States, agencies exist almost exclusively as a constitutional matter within the executive branch.<sup>CXXI</sup> Yet, “independent” agencies in the U.S. context, while composing a *de facto* fourth branch of government,<sup>CXXII</sup> exhibit various traits that functionally separate them from the executive, such as limits on presidential authority to remove agency heads.<sup>CXXIII</sup> In the European Union, aside from a handful of bodies providing direct support to Commission-managed programs, agencies maintain total institutional separation from the Commission; the vast majority exists as structurally-independent “decentralized agencies.”<sup>CXXIV</sup> To illustrate, while the EPA (the agency in *Whitman*) is an “independent” agency whose administrator serves at the pleasure of the President,<sup>CXXV</sup> E.S.M.A. (the agency in *Parliament and Council*) resides completely outside of the Commission and is led by an independent Board of Supervisors.<sup>CXXVI</sup> However, when E.U. legislation delegates implementation powers to the Commission, delegations operate within the institutional quirk of the committee procedure, also known as comitology.<sup>CXXVII</sup> Through this procedure, representatives from the Member States directly assist the Commission in implementing E.U. law.<sup>CXXVIII</sup> Recently, pursuant to Article 291 TFEU, Regulation 182/2011 set down rules governing this procedure, including guidelines for when a committee seeks to adopt “acts of general scope.”<sup>CXXIX</sup> Moreover, Article 11 of the Regulation allows the Parliament and Council to intervene when they feel that a draft implementing act exceeds the implementing power in the



legislation.<sup>CXXX</sup> This synergistic relationship between the E.U.'s supranational and intergovernmental elements permits a type of quasi-legislative functionalism that could not occur in the U.S. executive branch. The presence of this institutional structure also helps explain why the European Union has not generally resorted to creating independent agencies for regulatory purposes.

Whether independence carries a connotation of neutrality versus structural separateness impacts other considerations in the nondelegation analysis, such as accountability and democratic legitimacy. In the U.S. context, each governmental branch serves as a potential check on agency power. Congress enables (or later amends or revokes) the delegation, defines its scope, and subsequently exercises budgetary and oversight roles; the President can veto the delegation, exert the inherent political capital of the presidency to informally influence agency action, and may remove the agency head where the agency organization allows (as is the case with the EPA); the courts review the delegation itself as well as the agency's exercise of that power under the Constitution, enabling statute, regulations, and the federal A.P.A.<sup>CXXXI</sup> Since agency enabling statutes presuppose an act of Congress, the democratic legitimacy of agencies stems from the legislature. Likewise, independent E.U. agencies derive democratic legitimacy from the legislative participation of the European Parliament. Moreover, the Court of Justice has authority under the TFEU to review the legality of agency acts.<sup>CXXXII</sup> As such, while agencies in both systems possess characteristics of functional independence, this institutional separation does not equal unaccountability.

These considerations beg the question: Who is the court protecting by enforcing a nondelegation doctrine? The legislature has made a policy choice, and sometimes that choice is to grant a large degree of discretion to technical experts. As Thomas Merrill has argued, “[g]iven the realities of modern government, Congress is better suited to answer questions about which institution should make policy than it is to make policy itself.”<sup>CXXXIII</sup> Agencies in this sense do not usurp a power; the legislature serves as a willing donor, with agencies embodying able receivers. As such, if separation of powers drives the doctrine, the court can only be trying to protect the legislature from itself—which unnecessarily interferes with the legislature's policymaking prerogative. If the anxiety revolves around the elected legislature legislating itself out of existence and handing it over to unelected bureaucrats, then the abovementioned points of accountability negate such concerns. Since directly elected representatives, whether the President or Congress, exercise a number of



oversight roles (including the ability to disenable the agency), the People ultimately control the agency.

Perhaps this is why, aside from the “local aberration” of invalidations between 1935 and 1936, the Court has consistently reaffirmed delegations of legislative power.<sup>CXXXIV</sup> The United States has instead taken a pragmatic approach to delegation, informed by the complications arising out of modern governance.<sup>CXXXV</sup> A flexible doctrine accommodating such modern governance challenges derives in part from a basic insight of the law of agency: the principal often grants authority to the agent in terms of broad goals rather than enumerated commands.<sup>CXXXVI</sup> In addition, after the “local aberration” period, “[t]he New Deal had become so well-established that comporting with ‘the requirements of the administrative process’ had itself become a justification for legislative delegations.”<sup>CXXXVII</sup> With courts recognizing that agencies should be able to possess broad authority to regulate the substance of congressional policy, the legislative role has shifted to procedural and institutional specification.<sup>CXXXVIII</sup> The key point is that under this arrangement Congress decides how best to achieve its policy objectives.

While the Court of Justice applied the *Meroni* criteria to E.S.M.A., an E.U. agency,<sup>CXXXIX</sup> it broadly paved the way for agency delegation, premised on the notion that delegations to agencies must be placed in their proper legal, institutional, and social context.<sup>CXL</sup> Consequently, some commentators argue that the *Meroni* doctrine has become increasingly weakened in practice.<sup>CXLI</sup> In fact, whereas there were no E.U.-level agencies at the time of *Meroni*, there are now forty.<sup>CXLII</sup> These agencies have emerged in waves at key points in the E.U. integration process.<sup>CXLIII</sup> With the significantly increased workload and variety of new tasks resulting from enlargement in particular, there was an obvious need for the creation of new European administrative bodies, particularly to unburden the European Commission.<sup>CXLIV</sup> Therefore, with the Court of Justice recognizing the modern administrative need for agency delegation, one should expect that the strict *Meroni* doctrine will loosen as the European Union faces growing regulatory challenges. While the Court of Justice in *Parliament and Council* missed an opportunity to eject the formal *Meroni* language, the fact that it still upheld E.S.M.A.’s power to heavily interfere in financial markets shows how little practical significance the *Meroni* approach retains.

In sum, while the United States and European Union have come to allow for varying degrees of delegation in spite of a stated nondelegation doctrine, the form of their



nondelegation doctrines reflect their respective levels of integration at a given moment in time. Supposing that E.U. federalism continues to look more and more like U.S. federalism, one should similarly expect E.U. administrative law to mirror the state of American administrative law. This leads to one probable outcome in particular: decreasing judicial interference in the *substance* of delegation, increasing judicial interference in *processes* governing agency action. A process-oriented oversight structure acknowledges the legislative prerogative to solve problems in whatever way the legislature feels appropriate while subjecting agency action to some form of accountability. The United States shifted toward process-oriented control through the A.P.A. in 1946, intending to structure judicial review of agency action and provide individuals with procedural rights and means of redress in their interactions with the administrative state.<sup>CXLV</sup> A European corollary to the A.P.A. would harmonize the currently fragmented system of procedural protections set out in E.U. secondary law, thereby creating a standardized and easily comprehensible check on arbitrary agency action.<sup>CXLVI</sup> Earlier commentary expressing hesitation about an E.U. A.P.A. due to a lack of hierarchical control<sup>CXLVII</sup> is increasingly unpersuasive with the ascent of the Parliament's powers as a co-legislator. As E.U. agencies gain greater regulatory powers (like those possessed by E.S.M.A.), an E.U. A.P.A. would help ameliorate a perceived 'democratic deficit' and make agencies more accountable.<sup>CXLVIII</sup>

## 6. Counterarguments

This Note has presented a comparative analysis of the nondelegation doctrine in the United States and European Union, broadly concluding that while both systems apply it with varying degrees of permissiveness, the doctrine must be placed into its historical and structural context to fully understand its contours. Before offering recommendations on the best way forward, it is necessary to address two likely retorts to this analysis. First, some commentators argue in favor of a strict nondelegation doctrine on formalistic, normative grounds.<sup>CXLIX</sup> Typically, proponents of this view point to the text of the Constitution, specifically Article I, Section I,<sup>CL</sup> for the proposition that "legislative power" cannot be delegated.<sup>CLI</sup> They see the nondelegation doctrine as a guardian of constitutional sanctity, preventing violations of the separation of powers enshrined in the Constitution's text.<sup>CLII</sup> While a debate about the pros and cons of formal versus functional approaches to



legal analysis is beyond the scope of this Note, the argument proposed herein adopts an unambiguously functional approach. Functionalism accords with this Note's core conclusion that the nondelegation doctrine is contextual, with each version rooted in the pragmatic needs of the particular governance system (for the United States, a modern administrative state; for the European Union, the appropriate level of integration).

Second, as with any comparative study, one could assail the comparison as an apples-to-oranges problem. However, as laid out in Part II, the two systems share an increasingly similar federal structure.<sup>CLIII</sup> This constitutional convergence facilitates an interesting comparative perspective on the ways in which the nondelegation doctrines in the two systems meet and depart. The similarities and dissimilarities of each version of the doctrine encapsulate the very context this Note has sought to draw out.

## 7. Conclusions and Policy Recommendations

As it stands, the E.U. delegation framework looks a lot like the early days of American nondelegation jurisprudence. Despite the Court of Justice opening the door to agency delegation and essentially overruling the *Romano* doctrine in *Parliament and Council*, the court's application of *Meroni* (to a Union agency no less) illustrates that the nondelegation doctrine still formally operates. However, it is only a matter of time before the Court of Justice will have to loosen its nondelegation language.<sup>CLIV</sup> Judicial review does not hold the same weight anymore as a suitable justification for the strictness of *Meroni* given that the TFEU unambiguously allows the Court of Justice to hear cases dealing with E.U.-level agency acts.<sup>CLV</sup> Furthermore, strict application of the *Meroni* doctrine could stifle the functional development of the European Union. In a system where the lines between executive, legislative, and judicial powers are blurred by design, requiring such a strict adherence to delegation criteria seems like overkill.

A more permissive nondelegation doctrine should be established in the United States and European Union. In the U.S. context, maximization of the functional benefits of delegation necessitates the broadest possible standard.<sup>CLVI</sup> While the intelligible principle test represents a marked improvement over earlier nondelegation standards, as well as the strict *Meroni* doctrine, the Court should return to the *Yakus* approach: so long as the enabling statute does not have an "absence of standards," judicial review is possible and



the delegation should therefore be upheld. Even the *Yakus* standard may not be as permissive as modern government can accommodate; the A.P.A. itself recognizes the possibility of completely standardless delegations, and not only upholds them but bars any form of judicial review.<sup>CLVII</sup> Likewise, the Court of Justice should loosen the *Meroni* doctrine. E.U. integration has advanced significantly in the fifty-plus years since *Meroni*, and the court should have done more to recognize the major development of institutional structures and democratic legitimacy than it did in *Parliament and Council*. Going forward, the Court of Justice should embrace the significant changes since *Meroni* and adopt a more permissive standard. The court in *Parliament and Council* implied a willingness to look at the context within which a delegation occurs as a way of validating the transfer of authority.<sup>CLVIII</sup> Both systems can benefit from adopting a permissive nondelegation standard—the United States gets a more productive administrative state and the European Union gets an increasingly Europeanized system of administration.

Yet, to balance out a permissive delegation standard, steps can be taken to ensure adequate accountability. One suggested route, which the Parliament has investigated, is the creation of a Law of Administrative Procedure of the European Union, essentially an E.U. A.P.A.<sup>CLIX</sup> Such a development could help guide agency action, allowing permissive delegation while simultaneously framing and limiting the operation of those powers. Another option would entail a formal treaty amendment explicitly stipulating the permissible level of delegation to agencies. However, this option should be considered less desirable in view of the treaty's rather strict treatment of delegations to the Commission in Article 290 TFEU. Moreover, constitutionalizing a nondelegation doctrine, however loose, would lock in an inflexible standard that could hold back the functional evolution of the E.U. system. In addition, more effective legislative drafting would allow for more precise judicial review and could help avoid the application of nondelegation principles altogether. Lastly, ensuring sufficient input legitimacy represents the key to giving broad delegations a democratic backbone. The increasing powers and participation of Parliament<sup>CLX</sup> and the new European Citizens' Initiative procedure<sup>CLXI</sup> give E.U. citizens a greater voice in the scope of integration. In both the United States and the European Union, broad delegations to agencies that result in tangible public gains will help secure continued support for a modern administrative system.



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<sup>I</sup> *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

<sup>II</sup> *See infra* Part III.

<sup>III</sup> *See Locke 1690-1988*: 363 (“The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands.”).

<sup>IV</sup> The Supreme Court has cited the nondelegation doctrine on only three occasions to strike down a statute: *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>V</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>VI</sup> Case 9/56, *Meroni & Co, Industrie Metallurgiche S.p.A. v High Auth. of the European Coal & Steel Cmty.*, 1958 E.C.R. 133, 152.

<sup>VII</sup> *See generally* Onuf 1983: xiii-xvii (describing the United States as a federal republic).

<sup>VIII</sup> U.S. CONST. arts. I-III.

<sup>IX</sup> *See* Posner & Vermeule 2002: 1721 (defining the doctrine).

<sup>X</sup> For an introduction to the European Union, see generally Dinan 2010.

<sup>XI</sup> *See, e.g.*, Phelan 2012: 367 (“It is widely agreed that the EU is a *sui generis* international organization . . .”).

<sup>XII</sup> *See generally* Fabbrini 2007 (arguing that the two systems are converging).

<sup>XIII</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 17, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

<sup>XIV</sup> *Id.* at arts. 14 & 16.

<sup>XV</sup> *Id.*

<sup>XVI</sup> *Id.* at art. 19.

<sup>XVII</sup> *Id.* at art. 15.

<sup>XVIII</sup> *Wayman v. Southard*, 23 U.S. 1, 3 (1825).

<sup>XIX</sup> *Id.* at 42-43.

<sup>XX</sup> *Id.* at 43; *see also id.* at 46 (“The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.”).

<sup>XXI</sup> *Ziaja* 2008: 931.

<sup>XXII</sup> *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

<sup>XXIII</sup> *Id.* at 680.

<sup>XXIV</sup> *Id.* at 681.

<sup>XXV</sup> *Id.* at 692-93.

<sup>XXVI</sup> *Id.* at 692.

<sup>XXVII</sup> *Id.* at 693-94 (citing *Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm’rs*, 1 Ohio St. 77, 88 (1852)).

<sup>XXVIII</sup> *Id.* at 691 (“[I]n the judgment of the legislative branch of the government, it is often desirable, if not essential, for the protection of the interests of our people against the unfriendly or discriminating regulations established by foreign governments, in the interest of their people, to invest the president with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.”); *see also* *Ziaja* 2008: 932 (“The effect of adopting the nondelegation doctrine, creating an exception to it, and then applying it to the Tariff Act effectively rendered the Court’s first formal recognition of the doctrine dictum, if not also incomprehensible.”).

<sup>XXIX</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 404 (1928).

<sup>XXX</sup> *Id.* at 402.



XXXI *Id.* at 409.

XXXII *Id.* at 406.

XXXIII *Id.* at 407 (“If Congress were to be required to fix every rate, it would be impossible to exercise the power at all.”); *see also* Wertkin 2002: 1065 (“Because the Court granted Congress the power to regulate intrastate commerce by tariffs, the Court necessarily had to grant to Congress the flexibility to implement those regulations by allowing broad delegation.”).

XXXIV *See supra* note IV.

XXXV *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935). Section 9(c) of NIRA read:

The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed \$1,000, or imprisonment for not to exceed six months, or both.

XXXVI *Id.* at 415.

XXXVII *Id.* at 430. This legal reasoning has rightly been referred to as “judicial slight of hand” and “the old switcheroo.” *See* Ziaja 2008: 945.

XXXVIII *Panama Refining*, 293 U.S. at 439-40 (Cardozo, J., dissenting).

XXXIX *Id.* at 441.

XL *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521-23, 551 (1935).

XLI *Id.* at 528.

XLII *Id.* at 537-38.

XLIII *Id.* at 541-42.

XLIV *Carter v. Carter Coal Co.*, 298 U.S. 238, 311-12 (1936).

XLV *Id.* at 311. Interestingly, the D.C. Circuit recently cited *Carter’s* conclusory prohibition on delegations to private parties in striking down a delegation allowing Amtrak and the Federal Railroad Administration to jointly develop certain regulations for rail services. *Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013) (quoting *Carter*, 298 U.S. at 311) (“Federal lawmakers cannot delegate regulatory authority to a private entity. To do so would be ‘legislative delegation in its most obnoxious form.’”); *see also id.* at 671 (“Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority.”).

XLVI *See* Bergin 2001: 371 (arguing that the Court “treated the outcome as a foregone conclusion”).

XLVII *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

XLVIII *See* Landau 2012: 1943 (discussing the importance of *Curtiss-Wright* for that reason).

XLIX *Curtiss-Wright*, 299 U.S. at 320.

L *See* Posner & Vermeule 2002: 1722 (describing the short string of invalidated delegations as a “local aberration”); Sunstein 2000: 322 (referring to them as an “anomaly”).

LI *See* *Yakus v. United States*, 321 U.S. 414, 426 (1944) (“Only if we could say that there is an absence of standards for the guidance of the . . . action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means.”).

LII *Mistretta v. United States*, 488 U.S. 361, 368-69 (1989).

LIII *Id.* at 372.

LIV *Id.* at 372-373 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

LV *Id.* at 379 (quoting *Yakus*, 321 U.S. at 426).

LVI *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001).

LVII 42 U.S.C. §§ 7408, 7409(d)(1) (2006).

LVIII *Whitman*, 531 U.S. at 463.

LIX *Am. Trucking Ass’ns v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

LX *Whitman*, 531 U.S. at 472.

LXI *Id.*

LXII *Id.* at 474-75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

LXIII *See id.* at 475-76 (“Section 109(b)(1) of the CAA . . . fits comfortably within the scope of discretion permitted by our precedent.”).



LXIV *See id.* at 475 (“[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. . . . While Congress need not provide any direction to the EPA regarding the manner in which it is to define “country elevators,” . . . it must provide substantial guidance on setting air standards that affect the entire national economy.”).

LXV Case 9/56, *Meroni & Co, Industrie Metallurgiche S.p.A. v High Auth. of the European Coal & Steel Cmty.*, 1958 E.C.R. 133. Though the court decided the case the same year as the coming-into-force of the Treaty of Rome, the case was filed on December 12, 1956, and thus arose under the Treaty of Paris.

LXVI *Id.* at 135.

LXVII *Id.* at 135-36.

LXVIII *Id.* at 147-49.

LXIX *Id.* at 150.

LXX *Id.* at 151.

LXXI *Id.* at 152.

LXXII *Id.*

LXXIII Case 98/80, *Giuseppe Romano v. Institut National d’Assurance Maladie-Invalidité*, 1981 E.C.R. 1242, 1243.

LXXIV *Id.* at 1243-44.

LXXV *Id.* at 1244.

LXXVI Under the Article 267 TFEU preliminary reference procedure, any national court or tribunal can (and sometimes must) request the Court of Justice to rule on questions of E.U. law. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

LXXVII *Romano*, 1981 E.C.R. at 1256.

LXXVIII *Id.*

LXXIX Compare text accompanying notes LXXI-LXXIII, and Chamon 2010: 298 (“[I]t was . . . the concern for the Treaty’s system of judicial protection that was central to the Court’s reasoning in *Meroni* and if the *Meroni* ruling is to be a guide in the process of *agencification*, this general concern should be honoured.”), with Geradin 2004: 10, n. 54 (“[*Romano*] can be distinguished from [*Meroni*] since the Court did not explicitly rely on the ‘institutional balance’ principle but on Article 155 (now 211) of the EC Treaty, which states the missions of the Commission.”).

LXXX Regulation 1095/2010, Establishing a European Supervisory Authority (European Securities and Markets Authority), 2010 O.J. (L 331) 84 (EU).

LXXXI *Id.* at arts. 1, 5.

LXXXII *Id.* at art. 3.

LXXXIII Regulation 236/2012, art. 28, 2012 O.J. (L 86) 1, 19 (EU).

LXXXIV Case C-270/12, *United Kingdom of Great Britain and N. Ireland v. Parliament & Council* ¶¶ 28-34 (Jan. 22, 2014), <http://curia.europa.eu/juris/liste.jsf?num=C-270/12>.

LXXXV *Id.* ¶¶ 43, 45.

LXXXVI *Id.* ¶¶ 53-54.

LXXXVII *Id.* ¶¶ 64-66. The court referred to Articles 263 and 277, which govern various types of judicial review. This provides further evidence that one of the court’s chief concerns in reviewing delegations is the sufficiency of judicial review.

LXXXVIII *Repasi* 2014: 3.

LXXXIX Case C-270/12, *supra* note LXXXIV, ¶¶ 78, 86; *see also* Ankersmit 2014 (using the “closed system” terminology and explaining the court’s reasoning).

XC Case C-270/12, *supra* note LXXXIV, ¶¶ 79-81.

XCI *Id.* ¶ 85.

XCVI *Id.* ¶ 105.

XCVII Similarly, parallels have been drawn between the principles of judicial review enunciated in *Marbury v. Madison* and the E.U.’s *Van Gend & Loos*. *See* Halberstam 2010 (making the comparison); *cf.* Bermann 2004 (discussing the particular challenges for “vertical” constitutional review in the E.U. system when compared to “horizontal” constitutional review in the United States).

XCVIII *Mistretta v. United States*, 488 U.S. 361, 371 (1989); *accord* Case 9/56, *Meroni & Co, Industrie Metallurgiche S.p.A. v High Auth. of the European Coal & Steel Cmty.*, 1958 E.C.R. 133, 152 (arguing that to allow discretionary powers would undercut the “guarantee” of a “balance of powers which is characteristic of



the institutional structure of the Community”).

<sup>xcv</sup> See *Meroni*, 1958 E.C.R. at 151-52 (delegation must be expressly made and encompass clearly defined executive powers).

<sup>xcvi</sup> See Sunstein 2000: 315-16 (“[The nondelegation doctrine] has been relocated rather than abandoned. Federal courts commonly vindicate not a general nondelegation doctrine, but a series of more specific and smaller, though quite important, nondelegation doctrines. Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so.”).

<sup>xcvii</sup> Clark 2000: 627.

<sup>xcviii</sup> See *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) (“Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.”)

<sup>xcix</sup> See *Meroni*, 1958 E.C.R. at 152 (stating that delegations are valid when they can be “subject to strict review in the light of objective criteria determined by the delegating authority”).

<sup>c</sup> Compare *id.* (“The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy. A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility.”), with *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693-94 (1892) (citing *Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm’rs*, 1 Ohio St. 77, 88 (1852)) (“The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.”).

<sup>ci</sup> See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473 (2001) (“Whether the statute delegates legislative power is a question for the courts . . .”); see also *Mistretta* 488 U.S. at 416-17 (Scalia, J., dissenting) (“Precisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution’s structural restrictions that deter excessive delegation.”).

<sup>cii</sup> *Mistretta*, 488 U.S. at 372.

<sup>ciii</sup> Case C-270/12, *supra* note LXXXIV, ¶ 105.

<sup>civ</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388, 441 (1935) (Cardozo, J., dissenting) (arguing that government would not function properly if it could not rapidly respond to “swiftly moving facts”); accord *Seidenfeld & Rossi* 2000: 5 (“[T]he demands of the modern state call for a more flexible government structure that can gather necessary information about, and respond more readily to, problems that may call for technical solutions and quick action.”).

<sup>cv</sup> TFEU, *supra* note LXXVI, at art. 290(1)-(2).

<sup>cvi</sup> *Id.*

<sup>cvi</sup> Compare TFEU, *supra* note LXXVI, at art. 290(1) (“A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. . . . The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.”), with *Wayman v. Southard*, 23 U.S. 1, 43 (1825) (“The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”).

<sup>cvi</sup> See Case C-270/10, *supra* note LXXXIV, ¶¶ 78-85 (arguing that the delegation to E.S.M.A., while not falling under article 290 or 291, nonetheless was permissible as a component of the rules regulating the E.U. financial system).

<sup>cix</sup> Justice Thomas criticized the Court’s nondelegation jurisprudence for not being textually grounded, stating that “the Constitution does not speak of ‘intelligible principles.’” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

<sup>cx</sup> Compare TFEU, *supra* note LXXVI, at art. 290(1)-(2) (“The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. . . . Legislative acts shall explicitly lay



down the conditions to which the delegation is subject . . .”), *with* Case 9/56, *Meroni & Co, Industrie Metallurgiche S.p.A. v High Auth. of the European Coal & Steel Cmty.*, 1958 E.C.R. 133, 151 (“A delegation of powers cannot be presumed and even when empowered to delegate its powers the delegating authority must take an express decision transferring them. . . . [T]he power of the High Authority to authorize or itself to make the financial arrangements mentioned in Article 53 of the Treaty gives it the right to entrust certain powers to such bodies subject to conditions to be determined by it and subject to its supervision.”)

CXI *See* Geradin 2004: 14 (suggesting that the E.U. loosen its nondelegation doctrine).

CXII *See supra* note VIII and accompanying text.

CXIII Treaty of Lisbon, *supra* note XIII, at art. 14(3) (“The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.”).

CXIV *Id.* at art. 16(2) (“The Council 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.”)

CXV Some have called for a federal structure more closely akin to the United States. For that perspective, see José Manuel Durão Barroso, President of the European Comm’n, State of the Union 2012 Address to the Plenary Session of the European Parliament, SPEECH (2012) 596 (Sept. 12, 2012), *available at* [http://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm) (“[W]e will need to move towards a federation of nation states.”).

CXVI *See* Geradin 2004: 10 (“In the EU context, . . . implementation powers lie with national administrations.”).

CXVII Treaty of Lisbon, *supra* note XIII, at art. 17(2) (“Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.”).

CXVIII U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”).

CXIX Geradin 2004: 9.

CXX *See supra* Part II.

CXXI One notable exception is the United States Sentencing Commission (the agency at issue in *Mistretta*), which resides within the judicial branch. A few agencies are considered “legislative,” such as the Congressional Budget Office and the Library of Congress.

CXXII *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 525-26 (2009) (referring to independent agencies as the “Headless Fourth Branch”).

CXXIII Independent agencies officially reside within the executive branch but do not fall within a federal department, which are led by Cabinet secretaries. *See* Meazell 2012: 1777 (“Whereas executive agencies are typically headed by individuals who serve at the will of the president, independent agencies are headed by multimember groups of people who are removable only for cause.”). *But see* Datla & Revesz 2013: 772 (“[T]here is no single feature—not even a for-cause removal provision—that every agency commonly thought of as independent shares. Moreover, many agencies generally considered to be executive agencies exhibit at least some structural attributes of independence.”).

CXXIV There are currently over forty E.U. agencies, divided into four categories: decentralized agencies, executive agencies, EURATOM agencies, and the European Institute of Innovation and Technology (E.I.T.). For a complete list, see AGENCIES AND OTHER EU BODIES, [http://europa.eu/about-eu/agencies/index\\_en.htm](http://europa.eu/about-eu/agencies/index_en.htm) (last visited Oct. 10, 2015).

CXXV 42 U.S.C.A. § 4321 (West 2014).

CXXVI Regulation 1095/2010, *supra* note LXXX, at arts. 40 & 42. The Board of Supervisors is composed of an independent Chairperson as well as representatives from the Member States, Commission, and other E.U. bodies, though only the Member State representatives have voting power.

CXXVII For a detailed description of comitology, see *Comitology in Brief*, EUROPA, <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=implementing.home> (last visited Oct. 10, 2015).

CXXVIII *Id.*

CXXIX Regulation 182/2011, Laying Down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission’s Exercise of Implementing Powers, art. 2(2)(a), 2011 O.J. (L 55) 13, 14 (EU).

CXXX *Id.* at art. 11.

CXXXI *See supra* note VIII.

CXXXII TFEU, *supra* note LXXVI, at arts. 263, 277.

CXXXIII Merrill 2004: 2097.



- CXXXIV Posner & Vermeule 2002: 1722.
- CXXXV See *supra* note CII and accompanying text.
- CXXXVI See Posner & Vermeule 2004: 1744-45 (applying principal-agent principles to congressional delegation).
- CXXXVII Ziaja 2008: 961 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940)).
- CXXXVIII See Weaver 2014: 279 (“Each delegation specifies the various institutional designs and mechanisms through which Congress can check agency action in each unique context. Sometimes Congress delegates broadly. Sometimes Congress cabins agency authority. Sometimes Congress requires agencies to adhere to procedural requirements that go beyond those required in the Administrative Procedure Act (“APA”). . . . Carefully making these institutional design choices helps ensure that agencies stay within the bounds of their delegated authority.”); see also Merrill 2004 and accompanying text.
- CXXXIX See Chamon 2010: 297-98 (“The assertion that *Meroni* applies to Union Administration . . . does not sit well with a modern view on administration and, rather, amounts to conflation, since *Meroni* only dealt with delegation of powers to bodies established under private law.”).
- CXL Case C-270/12, *supra* note LXXXIV, ¶ 85 (“Article 28 of Regulation No 236/2012 cannot be considered in isolation. On the contrary, that provision must be perceived as forming part of a series of rules designed to endow the competent national authorities and ESMA with powers of intervention to cope with adverse developments which threaten financial stability within the Union and market confidence. To that end, those authorities must be in a position to impose temporary restrictions on the short selling of certain stocks, credit default swaps or other transactions in order to prevent an uncontrolled fall in the price of those instruments. Those bodies have a high degree of professional expertise and work closely together in the pursuit of the objective of financial stability within the Union.”)
- CXLI See, e.g., Kelemen & Majone 2012: 228 (“Over time, . . . we can observe a gradual decrease in the constraints imposed by the *Meroni* doctrine and a gradual increase in the authority delegated to EU agencies.”).
- CXLII See *supra* note CXXIV.
- CXLIII See Geradin 2004: 8-9 (placing these ‘agencification’ waves in the mid-1970s, 1990s, and early 2000s, coinciding with, *inter alia*, the first wave of enlargement, development of the single market/Euro, and the Eastern enlargement, respectively).
- CXLIV Saurer 2009: 444.
- CXLV See Bressman 2003: 472-73 (discussing the A.P.A.’s primary purposes).
- CXLVI See Geradin 2004: 5.
- CXLVII See, e.g., Lindseth 1999: 693-95 (expressing skepticism about an E.U. administrative code because, unlike presidential oversight in the United States, the European Union does not have the requisite structures in place to keep agencies ‘under control’).
- CXLVIII See Majone 1994: 95 (“The adoption of something like an Administrative Procedures Act [sic] for the European Union could do more to make public accountability possible than the wholesale transfer of traditional party politics to Brussels.”).
- CXLIX See Sarvis 2006: 317 (“[T]he nondelegation doctrine—that legislative power cannot be delegated to the executive consistently with the Constitution—should be viewed as an important protector of constitutional values whose judicial enforcement is both desirable and practicable.”); Lawson 2002: 332 (“[T]o abandon openly the nondelegation doctrine is to abandon openly a substantial portion of the foundation of American representative government.”); Schoenbrod 1985: 1226 (“The delegation doctrine is ritualistically invoked, but fails to check agency discretion or to ensure electoral accountability for the rules promulgated.”).
- CL “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. CONST. art. I, § 1.
- CLI See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (emphasizing that the Vesting Clause grants “all” legislative power to Congress). Though Justice Scalia penned the 9-0 opinion in *Whitman*, his approach in earlier cases indicated greater hostility to delegated powers. See *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment) (referencing the Vesting Clause and Lockean nondelegation, though discussing the doctrine in the context of legislative history as a form of delegation); see also Manning 1997: 698 (“If Congress effectively relies on its components to speak for the institution—to express Congress’s detailed intent—the practice offends the Lockean injunction against the delegation of legislative authority.”).
- CLII See, e.g., McCarthy & Roberts 2001: 139 (arguing for a strong nondelegation doctrine on separation of



powers grounds).

<sup>CLIII</sup> See Fabbrini 2007: 2 (“[A] process of *institutional convergence* is taking place between the EU and the USA.”). See generally Menon & Schain 2006 (presenting multiple comparative analyses of U.S. and E.U. federalism).

<sup>CLIV</sup> See Pelkmans & Simoncini 2014: 6 (arguing that the *Meroni* doctrine should be ‘mellowed’ “where a compelling case has been made for the sake of the establishment and proper functioning of the single market”); Griller & Orator 2007: 2 (“[T]he very strict limits to the delegation of powers to agencies as established by the ECJ’s jurisprudence might be loosened to a certain extent without giving up their legal fundamentals.”).

<sup>CLV</sup> Ankersmit, *supra* note LXXXIX.

<sup>CLVI</sup> Recently, the Court had a rare but significant opportunity to clarify the scope of the nondelegation doctrine as applies to private entities carrying out semi-public functions in a challenge to Amtrak’s standard-setting role for railroad services. *Ass’n of Am. R.R.s v. U.S. Dep’t of Transp.*, 721 F.3d 666 (D.C. Cir. 2013), *cert. granted* 134 S. Ct. 2865 (June 23, 2014) (No. 13-1080). In *Association of American Railroads*, the D.C. Circuit invalidated a statute (on nondelegation grounds and with reference to *Carter Coal*) that empowered Amtrak (a federally chartered corporation) and the Federal Railroad Administration (a federal agency) to jointly develop certain performance measures for passenger rail service. *Id.* at 673 (“Section 207 [of the Passenger Railroad Investment and Improvement Act of 2008] is as close to the blatantly unconstitutional scheme in *Carter Coal* as we have seen.”). However, as the district court noted, promulgation of the standards requires the approval of the Federal Railroad Administration, and the Surface Transportation Board (a federal agency) retains ultimate enforcement authority over the statutory scheme. See *Ass’n of Am. R.R.s v. Dep’t of Transp.*, 865 F. Supp. 2d 22, 32-35 (D.D.C. 2012), *rev’d* 721 F.3d 666 (D.C. Cir. 2013), *cert. granted* 134 S. Ct. 2865 (June 23, 2014) (No. 13-1080). As such, the facts are distinguishable from the statutory scheme in *Carter Coal*, which did not involve such governmental checks on the private party’s delegated authority. See *supra* note XLV and accompanying text. In March 2015, the Court vacated and remanded the D.C. Circuit decision, holding that Amtrak is a governmental entity for separation of powers purposes. *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1233 (2015). Therefore, for now, the nondelegation doctrine’s boundaries remain untouched.

<sup>CLVII</sup> A.P.A. § 701(a)(2) prevents judicial review where “agency action is committed to agency discretion by law.” The Court has interpreted this language to cover instances where a delegation’s extremely broad language provides “no law to apply” and “no judicially manageable standards.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Amee Bergin has argued that this “no judicially manageable standards” interpretation of A.P.A. § 701(a)(2) is not reconcilable with the nondelegation doctrine’s “intelligible principle” test, leading Bergin to argue that the A.P.A. provision is unconstitutional. Bergin 2001: 396. As evident in *Chaney*, the Court has not agreed with Bergin’s analysis, and it has applied the exception numerous times. See, e.g., *Dalton v. Specter*, 512 U.S. 1247 (1994); *Lincoln v. Vigil*, 508 U.S. 182 (1993); *Webster v. Doe*, 486 U.S. 592 (1988). The existence and use of the “committed to agency discretion” exception accentuates the nondelegation doctrine’s demise as a meaningful substantive control.

<sup>CLVIII</sup> See *supra* notes XCI, CVIII and accompanying text.

<sup>CLIX</sup> European Parliament Resolution of 15 January 2013 with Recommendations to the Commission on a Law of Administrative Procedure of the European Union, EUR. PARL. DOC. 2024(INI) (2012); see also Chamon 2010: 49 (arguing in favor of a European A.P.A.). A similar solution has been suggested in the realm of international delegations, such as to treaty bodies. See Zaring 2013: 109-12 (calling for an International A.P.A. regulating congressional delegations to international bodies).

<sup>CLX</sup> See Hosli et al. 2013: 1122-23 (“The European Parliament (EP) is frequently seen as the ‘big winner’ of the Lisbon Treaty, given the fact that several changes (e.g. extension of co-decision as the ordinary legislative procedure, introduction of the assent procedure to international agreements) have significantly extended its powers.”).

<sup>CLXI</sup> Treaty of Lisbon, *supra* note XIII, at art. 11.



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*Ne bis in idem:*  
a separation of acts in transnational cases?

by

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## Abstract

This paper analyses the case-law of the European Court of Justice on the substantive scope of *ne bis in idem* in transnational cases and evaluates the findings in light of the different concepts of legal interests inherent in the concept of crime as a material notion. I argue that the application of the interpretation of the ECJ to crimes against collective interests is insufficiently justified. As a result, the interpretation of *ne bis in idem* based on material facts appears only partially correct and a sense of distrust seems to be cemented between member states creating obstacles to a successful reform of the principle. Part one attempts to defend that the reasoning put forward by the court lacks relevance and evaluates how this affects mutual trust. Part two analyses this interpretation in the light of different forms of legal interest. Part three examines how later case-law has tried to explain the problematic interpretation of early cases and its relationship with the Charter of Fundamental Rights of the European Union. The article will conclude by summarising the findings which may put into perspective the more general challenges of cooperation in criminal matters within the EU.

## Key-words

scope of the transnational *ne bis in idem*; substantive criminal law; material facts; mutual trust; freedom of movement; area of freedom, security and justice



## 1. Introduction and goal of the research

This paper analyses the case-law of the European Court of Justice (the ‘ECJ’ or the ‘Court’) on the substantive scope of *ne bis in idem* in transnational cases and evaluates the findings in light of the different concepts of legal interests inherent in the concept of crime as a material notion. I argue that the application of the interpretation of the ECJ to crimes against collective interests is insufficiently justified. As a result, the interpretation of *ne bis in idem* based on material facts appears only partially correct and a sense of distrust seems to be cemented between member states creating obstacles to a successful reform of the principle.

*Ne bis in idem* essentially means the principle that no one shall be tried twice (commonly referred to as the criterion of ‘bis’) for the same acts (commonly referred to as the criterion of ‘idem’). It is recognised as a fundamental (or in fact constitutional) principle or fundamental right by EU member states and can be found in a variety of international law instruments (for a useful overview in this regard see Conway 2003).

Introducing a principle which bars prosecution in a member state based on a prior final judgment of the authorities of another member state (the ‘transnational application’ of the principle) is a uniquely European achievement, the only successful attempt to date. The central premise of this paper will be the problematic interpretation given by the ECJ to the criterion of *idem* in that transnational context on the basis of the flexible wording of Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 (the ‘CISA’). It follows that I am not interested in the interpretation of *ne bis in idem* in all its forms, in particular when confined to a single legal order (as a general principle of EU law or as a fundamental right), or with regards to all its elements. I will focus only on the *idem* criterion in the transnational context.

It could not be deduced from the wording of Art. 54 CISA what the ‘same acts’ in a transnational context should precisely mean. Thus, the Court was led to choose between interpreting the ‘same acts’ as meaning the ‘same facts’ (the ‘factual interpretation’) or as meaning the ‘same offences’ (the ‘interpretation based on the identity of legal qualification’; on this point see also Wasmeier 2006: 127).



The ECJ opted for the factual interpretation (C-436/04, *Van Esbroeck*, paras. 35-36; C-150/05, *Van Straaten*, paras. 47-48). It held that the application of an interpretation based on the identity of legal qualification would create obstacles to the freedom of movement. Such a solution, the Court explained, would be prone to differences between the unharmonised criminal statutes and policies of the member states.

I argue that the reasoning of the Court lacks sufficient relevance to support this conclusion. Different criminal laws are not the only reason why differences in the qualification of the same material facts may occur in different member states. After assessing the origin and consequences of the resulting deficit of justification in the case-law, I will illustrate the possible effects of an alternative basis of interpretation: the systemic role of different forms of legal interests in criminal law. To do so, I will describe the role of the legal interest in national criminal laws based on the distinction between crimes against individual and collective interests inherent in the concept of crime as a material notion.

The argument of this paper will be based on Art. 54 CISA. Article 50 of the Charter of Fundamental Rights of the European Union (the 'CFR'), binding since 1 December 2009, introduced *ne bis in idem* as a fundamental right. However, the subsequent case-law did not (yet) directly address the problem of interpreting *idem*. I will suggest, along the lines of existing arguments in the case-law and scholarship, that adherence to the factual interpretation can be anticipated in this respect.

Some authors (van den Wyngaert and Stessens 1999; Peers 2004; Vervaele 2005; Sharpston, Fernández-Martín 2008) already expressed their similar concerns with regards to the interpretation of *idem*. However, those studies were either not yet conducted on the basis of the Court's case-law or include a more general treatment of the matter. The present study aims to be more specific and dogmatic in its comparison of the Union case-law and national criminal laws.

It is not however my goal to work out a clear reform proposal on *ne bis in idem*. I wish only to clarify that a problem exists and suggest the relevance of legal interest, as a concept, to solving it. Part one attempts to defend that the reasoning put forward by the Court lacks relevance and evaluates how this affects mutual trust. Part two analyses this interpretation in the light of different forms of the legal interest. Part three examines how the later case-law tried to explain the problematic interpretation of the early cases and its relationship



with the CFR. The article will conclude by summarising the findings which may put into perspective the more general challenges of cooperation in criminal matters within the EU.

An evaluation of the relationship between the right to free movement and *ne bis in idem* is outside the scope of this paper. I will neither endorse nor criticise the decision of the Court to identify *ne bis in idem* as an instrument functioning within the area of freedom, security and justice. Nevertheless, the story of *ne bis in idem* in transnational cases might prove as an interesting case study on how the Court uses concepts which were not primarily devised to regulate cooperation in criminal matters to do just that.

## 2. The European experience: a broad interpretation of *idem*

The Court's early case-law on *idem*, based on Art. 54 CISA, appears to raise two problems: first, the argument of the Court to support the factual interpretation of Art. 54 CISA appears to lack sufficient relevance (in C-436/04, *Van Esbroeck* and C-436/04, *Van Straaten*) and fails to justify the application of *ne bis in idem* in the cases at hand and second, the very same reasoning seems to be present in the case-law on mutual trust (Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*) giving rise to similar concerns.

### 2.1. The justification of a factual interpretation

*Ne bis in idem* as a transnational rule in Art. 54 CISA was introduced into the EU legal order by the Annex of the Treaty of Amsterdam, which came into force on 1 May 1999, with the following wording:

‘A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.’ (emphasis added)

The expressions used by the contracting states to refer to the concept of *idem* within the different language versions of Art. 54 CISA provide little help in determining the meaning of the criterion of *idem*. There are also no preparatory documents of the CISA



available (van den Wyngaert and Stessens 1999: 795). The Commission Staff Working Document annexed to the Green Paper of 2005 highlighted the flexibility of the understanding of the scope of the *ne bis in idem* provision in the CISA, also comparing it to other documents as follows:

[...] the authentic 1990 versions, Dutch (“feiten”), French (“faits”) and German (“Tat”, which in the legal language refers to a factual conduct). The official English translation [...] uses a more flexible term (“same acts”). However, the EU Convention on Double Jeopardy of 1987 also refers to “same facts”. The jurisprudence of the European Court of Human Rights refers to the “same essential elements”.’ (Commission Staff Working Document 2005: 56, fn. 128)<sup>1</sup>

Whether the ‘same acts’ are to be interpreted in a factual manner or on the basis of the identity of legal qualification is crucial in the transnational context. As opposed to a factual solution, the differences between legal qualifications of the same facts in different member states may lead to a very limited scope of the principle. Thus, the primary source of interpretative difficulties seemed to be at the outset the unclear text of Art. 54 CISA.

The Court correctly observed, throughout the case-law, that the environment of criminal law was (and remains) largely unharmonised and, in those circumstances, identical acts (at this point as an undefined concept) may be regulated differently by the member states. As Professor Mitsilegas highlighted, this problem was brought to the attention of the Court by the member states (Mitsilegas 2009: 149).

It is characteristic to the case-law of the Court that the key terms used by the Court in its reasoning also had no available definition in EU law. There was no general definition of the terms ‘act’ or ‘crime’ in the sense of a definition similar to the provisions of the general part of criminal law, as conceived of in civil law jurisdictions. No settled definition of the nature and role of ‘legal classification’ or the ‘legal interest’, two central terms used by the Court, was available either, nor did a clear definition of positive conflicts of jurisdiction exist.

An understanding of the latter was later mentioned by the Green Paper of 2005 referring to ‘multiple prosecutions on the same cases’ (COM(2005) 696 final: 3; the first cases were only decided one year later). The importance of defining what precisely the



same case shall mean seems trumped here by an urge to address a problem of multiple member states asserting their jurisdiction.

The Court's assessment of the first cases *Van Esbroeck* and *Van Straaten* was conducted in this rather vague legal environment. Mr Van Esbroeck was convicted by the Court of First Instance in Bergen (Norway) for the import of narcotic drugs. Sentence served, he was subsequently prosecuted by the Correctionele Rechtbank te Antwerpen in Belgium, where the substances originated from, for the export of the same drugs. The Antwerp Court of Appeal upheld conviction by the first instance, based on Art. 36(2)(a) of the applicable 1961 UN Single Convention on Narcotic Drugs, which regards those offences as different acts. Questions for preliminary reference were raised only after a subsequent (second) appeal (C-436/04, *Van Esbroeck*, paras. 14-16).

The facts of the case of *Van Straaten* were very similar. Mr Van Straaten was convicted in the Netherlands for several crimes, and acquitted for the charge of drug trafficking, concerning substantial amounts of heroin, by a final sentence. The drugs formed part of a larger consignment of which he was in earlier possession in Italy, thus the question was raised whether the acts could be considered the same and whether Italy is barred from pursuing prosecution based on the prior sentence brought in the Netherlands (C-150/05, *Van Straaten*, paras. 19-30).

It is perhaps in light of the above lack of definition that AG Ruiz-Jarabo Colomer commenced his reasoning by stating as regards the interpretation of *idem* that 'the contingent nature of criminal law policies and the characteristics of criminal proceedings are not conducive to the creation of universally valid rules.' (Opinion in C-436/04, *Van Esbroeck*, para. 39) The meaning of *idem* could not be decided solely based on the wording of Art. 54 CISA either. Therefore, he turned to the objectives of the area of freedom, security and justice and the Schengen cooperation to find interpretative guidance.

In doing so, he observed three important reasons for rejecting an interpretation based on the identity of legal qualification: first, the importance of an extensive interpretation of safeguards to personal dignity; second, to respect the declared objective of Art. 54 CISA, which is to ensure freedom of movement for persons (also enshrined in Art. 2 TEU [now Art. 3 TFEU]); and third, to observe that the Schengen *acquis* was designed in essence to remove borders for both persons and goods. (Opinion in C-436/04, *Van Esbroeck*, para. 52)



As regards personal dignity, the AG correctly grasped the essence of *ne bis in idem* in protecting the offender from the inhuman treatment represented by multiple prosecutions and punishment for the same offence (Opinion in C-436/04, *Van Esbroeck*, fn. 10). Though it was not separately mentioned by the Court, this is also inherent in the effort to prevent *ne bis in idem* to be interpreted on the basis of merely textual differences in criminal statutes.

In relation to the freedom of movement of persons, the Court followed, with slight shifts in emphasis, every measure of the Opinion of the AG (Opinion in C-436/04, *Van Esbroeck*, para. 45). The core argument of the Court to support a factual interpretation of *idem* is set out in the judgment in *Van Esbroeck* (C-436/04, *Van Esbroeck*, paras. 35-36) and was repeated verbatim in the judgment in *Van Straaten* (C-150/05, *Van Straaten*, paras. 47-48). For these reasons I bypass presenting the AG's opinion separately, and proceed directly to the reasoning of the judgments, delivered on the same day, as follows:

'35. Because there is no harmonisation of national criminal laws, a criterion based on the legal classification of the acts or on the protected legal interest might create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States.

36. In those circumstances, the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together.'

This reasoning was confirmed and heavily relied upon by the subsequent case-law (*cf.* C-467/04, *Gasparini and others*, para. 54; C-288/05, *Kretzinger*, para. 33; C-367/05, *Kraaijenbrink*, para. 26).

According to the judgment, an interpretation of *idem* based on the identity of legal qualification ('the same acts' equals 'the same offense') would hamper the freedom of movement *because of* the lack of criminal law harmonisation in the EU (C-436/04, *Van Esbroeck*, para. 35, C-150/05, *Van Straaten*, para. 47) and *because of* the differences which therefore remain between the criminal laws of the member states. The AG considered that such differences would create as many obstacles to the freedom of movement, as there are penal systems in Europe (Opinion in C-436/04, *Van Esbroeck*, para. 45).



The Court observed that these findings are further reinforced by the objective of Art. 54 CISA, ‘which is to ensure that no one is prosecuted for the same acts in several Contracting States on account of his having exercised his right to freedom of movement’ (emphasis added) (C-436/04, *Van Esbroeck*, para. 33; quoting: Joined Cases C-187/01 and C-385/01, *Gözütok and Brügger*, para. 38; C-469/03 *Miraglia*, para. 32). Subsequent case-law and scholarship widely confirmed that view (Mitsilegas 2009: 143; Vervaele 2005: 100; Wasmeier 2006: 121; Joined Cases C-187/01 and C-385/01, *Gözütok and Brügger*, para. 33; C-469/03 *Miraglia*, para. 32; C-436/04, *Van Esbroeck*, para. 33; C-150/05, *Van Straaten*, para. 57; C-467/04, *Gasparini and others*, para. 27; C-297/07, *Bourquain*, para. 49).

The question of national borders was only briefly included by the AG in the Opinion. Perhaps trumped by the already existing reasoning based on the freedom of movement it was not taken on board by the Court. It is nevertheless telling that besides the objective of the Schengen cooperation to remove borders, it was very hard to explain why the existence of national borders shall not be relevant to the interpretation of Art. 54 CISA. After all, import and export seemed, perhaps also to the AG, decidedly different crimes.

The Opinion in *Van Esbroeck* laconically stated that it ‘is ludicrous to refer to import and export in a territory governed by a legal system which, in essence, is designed to remove borders for both persons and goods.’ (Opinion in C-436/04, *Van Esbroeck*, para. 52) The AG quoted the argument of Brammertz who emphasised that there is no reason to divide import and export on the basis of a border which is not even physically presented in the ground (Opinion in C-436/04, *Van Esbroeck*, fn. 25).<sup>11</sup>

Based on those arguments against the interpretation based on the identity of legal qualification, the Court concluded that the ‘same acts’ must in essence be interpreted as meaning the *same set of material facts*, which are inextricably linked together (C-436/04, *Van Esbroeck*, para. 38) in time, space and by their subject-matter (C-150/05, *Van Straaten*, paras. 47 and 53) and which therefore make up an inseparable whole (C-367/05, *Kraaijenbrink*, para. 28). It is essential to disregard, in the application of *ne bis in idem*, the differences in legal qualification and legal interest which exist between the criminal laws of the contracting states (C-150/05, *Van Straaten*, paras. 47 and 53).

Even though the ECJ must leave it to the national courts to decide whether the relevant conduct constituted the same set of material facts (C-436/04, *Van Esbroeck*, para.



38; C-150/05, *Van Straaten*, para. 52), given the facts of the first cases, the above argument of the Court alone raises obvious problems.

Specifically, the relevance of the core argument of the Court can be contested. Relevance, in this context, shall mean that the premises on which the conclusion of the Court (the factual interpretation of *idem*) is based are all relevant in light of the case-file. Only such premises seem to be able to support the truth-value of the conclusion.

The Court appears to have erred at least in asserting that, in the above cases, criminal law harmonisation was absent. Partly as a consequence, the judgments inaccurately suggest that the lack of harmonisation was the reason why the application of the criminal laws of the contracting states produced a different outcome (import on one side of the border and export on the other). Given that the Court should address the facts of the cases before it and give opinion on the meaning of Community law in light of those facts, if there can be other reasons for a different outcome in legal qualification in different member states, the ECJ did not correctly select this central premise of its core argument.

Taking the judgment in *Van Esbroeck*, the harmonisation missed by the AG and the Court was in fact present in the legislation of both Norway and Belgium, though not due to EU action, but on the basis of the UN Single Convention on Narcotic Drugs, signed in New York on 30 March 1961 (the ‘Single Convention’). The offences of import and export of contraband trafficked by Mr Van Esbroeck were criminalised based on the implementation of Art. 36 Single Convention in Norway (*cf.* Article 162b of Act No. 10 of 22 May 1902 on the general civil penal code of Norway, as amended several times) and Belgium (*cf.* Article 2a, § 1 of the Law of 24 February 1921 on trafficking of poisonous substances, soporifics, narcotics, disinfectants or antiseptics). It cannot be doubted either that the legal interests protected by the criminal statutes of Norway and Belgium were therefore identical.

It is apparent that the qualification in the contracting states as import and export was not different by virtue of a lack of harmonisation. Given the criminal laws of the member states and the extensive international legislation in this field, there is no way import and export could be harmonised to realise the same crime in terms of qualification.

The Court failed to adhere to the reality of the case-files at hand. It cannot be contested that in the field of criminal law in the EU there is a lack of harmonisation in perhaps the majority of cases. ‘In those circumstances’, this absence of harmonisation can



bear relevance. It is plausible that if (and only if) *ne bis in idem* were interpreted on the basis of the identity of legal qualification, in certain circumstances one was to worry about the negative effects of that absence of harmonisation on the freedom of movement. But this was not the case here.

Subject to this assessment, the relevance of the Court's argument is prejudiced because we can indeed conceive of cases in which a set of material facts inextricably linked together realise multiple crimes yet where those crimes could never be 'harmonised' to a degree that they become identical. In lack of relevance, the Court's conclusion on the interpretation of *idem* is only true in the limited circumstances where the premises of the argument are also true. It is therefore to be accepted that in cases where the absence of law harmonisation *is* the reason of a different qualification, the material facts can provide a suitable lowest common denominator. In those circumstances the factual interpretation will eliminate from the evaluation any discrepancies resulting from different criminal policies of member states.

In trafficking cases however, such as in *Van Esbroeck* and *Van Straaten*, the reason for a different qualification in the different contracting states is something other than the absence of harmonisation. The Court failed to address the theoretical problem that arises here directly from the facts of the first cases. Its conclusions only follow from the limited premises taken for granted. It failed to explore the implications on the meaning of *idem* in a situation, where criminal authorities come to a different outcome, but not due to the absence of harmonisation.

This is even more troublesome as the first references for preliminary ruling were precisely raised to obtain an answer to this question. Because of the irrelevance of the argument it appears that the conclusion of the Court lacks justification. The Court fell short of providing a clear explanation as to why the factual interpretation shall also apply in cases where harmonisation is in fact present and is in any case not the source of the different legal qualification.

There is room for a critical appraisal of the factual interpretation of *ne bis in idem* to trafficking cases. In fact, a broader underlying problem begins to emerge. It concerns the question whether there is a group of cases, characterised by common features, to which a different interpretation of *ne bis in idem* may be preferred. I will address this question in the following, Part 3 of this paper.



Prior to that it is necessary to discuss a second preliminary question: mutual trust. Member states heavily contested the factual interpretation of the Court. In multiple cases they demanded, on the basis of the different legal interest, that *ne bis in idem* shall not apply (cf. the submissions of the Czech Government in C-436/04, *Van Esbroeck*, para. 26 and of the Spanish and German Governments in C-288/05, *Kretzinger*, para. 32). In such cases it is common to refer to member states' behaviour as distrustful (Janssens 2013: 143).

However, the irrelevance of the central argument of the Court in favour of the factual interpretation, which is now binding, has certain implications to the extent of mutual trust inherent in the Schengen *acquis*. In order to assess the level of trust that can actually reasonably be expected from member states under such circumstances, it is necessary to revisit an earlier section of the case-law of the Court.

## 2.2. The problem beyond distrust

The ECJ based its interpretation of *idem* partly on mutual trust in both of the above mentioned landmark cases (C-436/04, *Van Esbroeck*, para. 30; C-150/05, *Van Straaten*, para. 43). The problems around the arguments of the Court presented in Part 2.1. of this paper however raise questions: how much trust can be expected from the member states in such circumstances. What is the nature of mutual trust as regards *ne bis in idem* in transnational cases?

Notwithstanding the binding nature of the ECJ case-law, the submissions of member states before the Court claiming respect for the different legal interest should be taken as a sign of concern about the application of the factual interpretation. For these reasons, I find it necessary to briefly assess the origins and implications of mutual trust on the basis of the ECJ's early judgments.

*Gözütök and Brügge* (Joined Cases C-187/01 and C-385/01, *Gözütök and Brügge*) was the first landmark case in which a measure of interpretation was given to mutual trust and the relevance of criminal law qualification in the interpretation of Art. 54 CISA (Mitsilegas 2013: 144; Vervaele 2004; Thwaites 2003). Unlike in other fields of EU law, the Court held in its judgment that based solely on the existence of Art. 54 CISA, mutual trust (a 'high level' of trust) already exists between the member states as regards their cooperation through *ne bis in idem* (Mitsilegas 2009: 107; Joined Cases C-187/01 and C-385/01, *Gözütök and Brügge*, para. 33). This mutual trust is not conditional upon harmonisation nor does it



spring from a prior assessment of convergence between criminal laws (Vervaele 2005: 113); it is implied on the basis of the legislative will behind the Schengen *acquis* (Mitsilegas 2009: 106-107).

The Court in essence held that since Art. 54 CISA does not contain any further clarification, its interpretation shall give precedence to the object and purpose of the provision rather than to procedural or purely formal matters (Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 35; Vervaele 2005: 113). As the principle must have proper effect (*effet utile*), the rule of *ne bis in idem* must mean that differences in the outcome of the application of one or the other legal system to the same acts, shall not adversely influence the recognition of Union judgments.

*Ne bis in idem* therefore implies that member states have mutual trust in each other's criminal laws and 'each of them [the member states] recognises the criminal law in force in the other member states even when the outcome would be different if its own national law were applied.' (Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 33)

It is immediately apparent how the reasoning of the Court adhered to a logical pattern similar to that of the judgments in *Van Esbroeck* and *Van Straaten*. The Court first established that nowhere ('neither in Title VI of the Treaty on European Union [...], or in the Schengen Agreement or the CISA itself' [Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 32]) is the application of *ne bis in idem* made conditional upon the harmonisation of criminal laws. Then it determined that '[i]n those circumstances' Art. 54 CISA must imply mutual trust and recognition (Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 33).

In those circumstances, a critical approach is warranted to mutual trust and recognition along the lines already illuminated regarding the factual interpretation of *idem*. Mutual trust and recognition seem not to extend to cases in which harmonisation is not the source of the difference in legal qualification.

It cannot be contested that a direct disregard of the requirements following from Art. 54 CISA and the Court's case-law shall be viewed, besides constituting a violation of EU law, as characteristic of distrust. As Professor Mitsilegas emphasised, the later case of *Kretzinger* was an instance of outright opposition by the German authorities to recognise the decisions brought about by Italy. The existence of those decisions was well-known to the German court of first instance (Mitsilegas 2009: 150-152). Only through appeal against the



second decision was the defendant able to achieve that a question is referred to the ECJ for preliminary ruling.

However, the conclusion of the Court suggesting such a general mutual trust to exist between member states seems, subject to the above, flawed. According to the Court, mutual trust and recognition only exist due to the existence of Art. 54 CISA in a field of law characterised by the absence of law harmonisation. The judgment seems to ignore the fact that the different wording of criminal statutes is not the only reason why the acts realised by the same offender may be considered separate. What is compared is not (only and in all cases) the wording of criminal statutes, but the resulting qualification.

*A fortiori* it seems inaccurate to suggest that member states are distrustful in cases where they are suspicious about the factual interpretation of *idem*. The above described mutual trust does at all not seem to extend to cases where legal qualification differs due to reasons other than the absence of harmonisation. This restricted, implied mutual trust does not justify distrust in trafficking cases.

In the following part, I will attempt to provide a possible explanation for the relationship between the Court's general reasoning and the concepts of legal interest inherent in the criminal laws of the member states. This approach may provide an explanation also for why member states claim that the Court should have taken into consideration legal interests in the interpretation of *ne bis in idem* in such cases.

### 3. Material facts and crime as a material notion

Simply stated, the argument I wish to defend is that *committed* offences are not identified by the wording of the relevant criminal provisions. Their quantification should be based on their material content.

It appears that the Court was forced to consider the question of harmonisation as important. In interpreting Community concepts, the Court is essentially confined to Community law, unless it is otherwise specifically authorised to provide interpretation in the light of national law. Such authorisation was not present in the CISA or elsewhere. Furthermore, as I mentioned above, the Community legal order does not define the concepts of crime, legal qualification or legal interest. In fact there is very little that is offered in EU law concerning a general definition of crime or the general principles of



criminal law (essentially the provisions of the general part of criminal law, as conceived of in civil law jurisdictions).

In those circumstances, the Court could not draw conclusions from existing criminal law concepts. It arguably found itself confined to consider legal qualification in criminal law simply as an exercise of correlating material facts to criminal provisions. That situation indeed suggests, along the lines of the case-law, that the most important concepts relevant to the interpretation of *idem* are the identity of material facts and the identity of criminal provisions. The interpretation of Art. 54 CISA based on the identity of material facts would indeed, in a number of cases, imply that *ne bis in idem* does not apply because of the mere differences in how criminal provisions are formulated by member states. Thus, I cannot contest that in some cases, as I will elaborate below, the Court's decision to apply a factual interpretation is warranted.

The central argument of the Court's case-law proved nevertheless invalid. In the landmark case of *Van Esbroeck*, the different legal qualification in the different contracting states was not the result of the absence of harmonisation, as the Court suggested. This proves that the Court's above reasoning does not address all issues around the interpretation.

The case-law, due to the abovementioned contextual limitations, does not seem to bring to light the core theoretical issue around the interpretation of *idem*. Instead of attempting to improve on the available factual interpretation, it is perhaps more important to investigate from the perspective of national criminal laws, how the identical or separate nature of acts should be determined.

I argue that even in a borderless area of justice, certain forms of crime distinguish themselves from others on the basis of the interests the relevant criminal provisions protect. What can split opinions over the factual interpretation of the transnational concept of *ne bis in idem* seems to be the systemic role of the classical division of legal interests into *individual* and *collective interests* (Anastasopoulou 2005: 27; Duff 2013: Section 4; Hefendehl 2012: 507).

Member state legal orders conceive of crime in their jurisdiction not solely as qualification, but as conduct which represents harm, or at least danger, or a certain wrongdoing to interests protected by their criminal law (Roxin 2006: 13-14; Eser 1966: 347). As Professor Eser highlighted quoting Jerome Hall, 'harm is the very essence of the



crime or, as Hall calls it, the „fulcrum between criminal conduct and the punitive sanction.” (Eser 1966: 345) Harm is the *ratio essendi* of crime as committed, which – in conjunction with the subjective *mens rea* – triggers punitive reaction and is ‘in one way or another [...] almost universally recognized as a material element of criminal law.’ (Eser 1966: 363)

The resulting concept of crime can be referred to as the material notion of crime (Roxin 2006: 8-47). Whether criminal law is conceptualised as instrumental or moralistic, some form of harm or danger to certain goods or interests or wrongdoing plays an essential role in creating the basis on which certain criminalised conduct is linked to legal punishment (Duff 2013: Section 4).

The role of the legal interest is to represent and qualify the interests on which harm is inflicted (Roxin 2006: 8-47). The role of differentiating individual and collective legal interests is relevant, as it helps to specify the carrier of the legal interest<sup>III</sup>, the person or community whose interests are affected by the relevant criminal conduct.

In the case of individual interests, such as life, physical integrity, private property, etc., the carrier of the legal interest is the individual, whose dignity of existence is the basis for criminalisation (Anastasopoulou 2005: 28, quoting Baumann/Weber/Mitsch, Jescheck/Weigend, Hassemer, Martin; see also in detail Feinberg 1984). This is true even if the concept of collective interest also protects a broader trust in the security and order of a society.

The factual interpretation devised by the ECJ appears relevant and addresses an important theoretical problem in case of violations of *individual interests*. The possibility of divergent qualifications and formulations of interests by member states may create an unpredictable application of *ne bis in idem*. While this is true, the legal interest concerned in the criminal proceedings in all relevant member states will essentially be the same personal legal interest irrespective of its formulation.

Based on the identity of the holder of the legal interest, it is ensured that the member states assert jurisdiction over the same instance of harm and substantively the same crime. Therefore, in such cases the identity of material facts is likely to coincide with the identity of the carrier of the legal interest, whatever the formulation of the legal interest may be. It is clear that in the later case of *Bourquain* (C-297/07, *Bourquain*, para. 19) an act of murder



constituted both a single set of material facts and, without doubt, one single violation of an individual legal interest: human life.

In the application of *ne bis in idem* to crimes against individual interest the factual interpretation favouring free movement indeed continues to be preferable. Divergent formulations are possible in the case of the criminal provision or legal interest invoked protecting the same carrier. The Court's apt reasoning asserts that relying on the factual interpretation is necessary to avoid the negative effects on the freedom of movement and the dignity of the offender.

*Collective legal interests* on the other hand are usually carried by the entirety of society. They concern interests of the broader public, such as the undisturbed and reliable functioning of a member state's economy, public order, the integrity of essential state functions (see in detail at Hefendehl 2002). This is based on the consideration that it is the objective of criminal law to ensure the smooth functioning of society and the preservation of order (Walker 1980: 18, quoting Devlin 1965: 5). Therefore, collective or shared goods provide essential preconditions for individual flourishing ([also references by] Duff 2013: Section 4).

The member state, as a collective entity, is the carrier of the legal interest in cases of continuing transnational crime. It is (at least partially) in the interest of the entire society of a member state to repress the illegal trafficking of contraband into or from the state territory and to prevent the circulation thereof on the market. Similarly, it is in the interest of the entire society to preserve the member state's environment, to ensure budget incomes or to prevent money laundering. Collective interests appear to be relevant to a larger variety of crimes, including i.a. environmental crimes with effects across multiple member states, terrorist activities or large-scale cybercrimes against multiple (or joint) member state interests.

What distinguishes transnational crimes against collective legal interests is that the carriers whose legal interests are violated by the same material facts (the different member states) are not identical. Also in this case, the formulation of legal interests and criminal provisions may differ from member state to member state.

In light of the case-law, the conventional concept of jurisdiction in continuing transnational crimes appears to be superseded only because of the objectives of the European cooperation after the Treaty of Amsterdam (*cf.* Opinion in C-436/04, *Van*



*Esbroeck*, para. 52): to ensure the right to freedom of movement in the area of freedom, security and justice (Art. 2 TEU [now Art. 3 TFEU]) and to remove borders in the Schengen cooperation (Preamble to the CISA). Those objectives without doubt are meant to facilitate an ever closer Union (Art. 2, 2nd subpara. TFEU [former Art. 1 TEU]).

Yet in cases of trafficking in contraband, every time an offender crosses a new border, his acts violate the relevant legal interest of a new carrier, the collective in the member state he has entered. Every time the effects of the acts of an offender are felt in a new member state, those effects constitute the violation of a new carrier's legal interest. Crimes against collective interests can in this sense be considered domestic to the affected member states and materially distinct.

Van den Wyngaert and Stessens asserted convincingly in 1999 (before the case-law of the Court was available) that in case of continuing transnational crimes, Art. 54 CISA does not, in the context of international law, bar states from punishing such crimes partially committed in their territory (Van den Wyngaert, Stessens 1999: 795). That argument was based on the conventional jurisdictional principle of territoriality paired with an analysis of the wording of the CISA. They envisaged the relevance of Art. 36(2), pt. (a) of the Single Convention to the interpretation which states that, when committed in different states, acts of drug trafficking shall constitute separate offences (Van den Wyngaert, Stessens 1999: 795).

Despite the definitive interpretation of *ne bis in idem* delivered by the ECJ, the concerns raised by van den Wyngaert and Stessens appear to still be present today. In Part 2.1. of this paper I mentioned that both case-law and scholarship maintain that *ne bis in idem* avoids a scenario in which the offender is prosecuted twice for the same acts *on the account of* having exercised the freedom of movement. Exactly the contrary seems to be true in case of crimes against collective interests.

It seems more accurate to say that the offender, committing crimes against collective interests, would in fact be enabled by the factual interpretation of *ne bis in idem* to commit crimes of the same nature in a sequence of member states he enters. Art. 54 CISA clears the path in front of the offender, thus allowing him to proceed from member state to member state with impunity, trusting in the applicability of *ne bis in idem*.

An important *caveat* shall be introduced here. The definition of legal interest and the specification of the relevance of certain crimes to individual and collective legal interests is



itself much disputed (see for a cross-cut Roxin 2006: 8-47). Elaborating a definitive position seems at this point as little possible as desirable. However, the inconsistencies highlighted herein can nevertheless be addressed by a supranational discussion and eventually legislative solution.

In Part 2.2. of this paper, I show that the Court applied a very similar reasoning (based on the absence of harmonisation) to mutual trust as it did to justify the factual interpretation of *idem* later on. I also show that it is therefore inaccurate to suggest that member states behave distrustful by reason of having doubts over the justification of the factual interpretation in cases where the argument of the Court seems to misinterpret the facts.

Subject to the above discussion, I daresay that since mutual trust is restricted to harmonisation-intensive cases, in the case of crimes against collective interests a critical attitude towards the factual interpretation is a natural state of affairs in the member states. This critical attitude is not *per se* distrust, it should perhaps be viewed as a genuine claim for a clear justification of an interpretation of *ne bis in idem* faithful to the theoretical problems raised herein. This claim might be the reason for the three further preliminary references raised by national judges, asking for the interpretation of *idem*, even after the Court delivered a definitive interpretation in *Van Esbroeck* and *Van Straaten*.

#### 4. Interpreting the early case-law: later-judgments and the CFR

It remains to focus on the later developments of the ECJ case-law and European legislation. Two aspects must be assessed: how the factual interpretation has fared under the circumstances of later cases before the Court; and how the fundamental right enshrined in Art. 50 CFR might influence future interpretation. In both respects, the emphasis is on how the Court attempted to refine the early interpretation of *idem*.

##### 4.1. The later case-law: the road to the CFR

By the time the Court had to deliver on *Gasparini and others*, there was a clear tension between the interpretation of Art. 54 CISA and the interpretation of *ne bis in idem* as a general principle of EC law (Opinion in C-467/04, *Gasparini and others*, para. 63). AG Sharpston attempted a more comprehensive analysis of the context of Art. 54 CISA and



found, due to a dearth of legislative clarification, a further tension between the right to freedom of movement and a high level of safety and the effective control of crime as two equally important and fundamental objectives of the area of freedom, security and justice (Opinion in C-467/04, *Gasparini and others*, paras. 82-84 and 97).

The case of *Gasparini and others* is even more relevant here, as the objective of a high level of safety appears to counter-balance the freedom of movement as objectives of the Treaties. As the Court however did not consider this a viable basis for the limitation of the applicability of the factual interpretation, it remains to date only a possibility.

With regard to the tension between different forms of *ne bis in idem*, in its judgment in *Cement* (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 A/S et al. v. Commission of the European Communities*), the ECJ set a higher bar to qualify the basis for the two accusations as the same acts compared to *Van Esbroeck* (Opinion in C-467/04, *Gasparini and others*, para. 155). It applied the ‘threefold condition’ of ‘identity of the facts, unity of offender and unity of the legal interest protected.’ (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 A/S et al. v. Commission of the European Communities*, para. 338) In her Opinion, the AG proceeded to see why in such cases, and not in transnational cases, the legal interest should be endorsed, even though as matter of logical necessity substantially similar Union concepts shall be interpreted in fundamentally the same way (Opinion in C-467/04, *Gasparini and others*, para. 156; Sharpston, Fernández-Martín 2008: 445).

The AG admitted that it lies at the heart of a domestic principle of *ne bis in idem* that society has ‘one shot’ at settling its accounts with the offender (Opinion in C-467/04, *Gasparini and others*, paras. 70-72). That is the essence of the double jeopardy rule which, it should be noted, only applies with full theoretical purity in cases confined to a single legal order governed by a uniform set of rules (Opinion in C-467/04, *Gasparini and others*, para. 72).

The *transnational nature* of Art. 54 CISA distinguishes it from the general principle of EC law and warrants a departure from its interpretation. In transnational cases she did not supersede the main interpretative basis of the earlier cases, only stated that the freedom of movement would be hollowed out, were the legal interest the factor determining the identity of acts. That led to the conclusion which essentially corresponded to the Van



Esbroeck-doctrine, which was thus confirmed both by the AG and the Court (C-467/04, *Gasparini and others*, paras. 54-56). Thus, in the area of freedom, security and justice ‘different domestic legal orders may be expected to seek to protect very varied legal interests through the medium of their criminal laws.’ (Opinion in C-467/04, *Gasparini and others*, para. 158)

Despite reaching the important observation that a balance needs to be struck between the freedom of movement and a high level of safety ensured to citizens (none of which objectives of the area of freedom, security and justice was given precedence over the other by Art. 2 or 29 TEU), much like in the earlier case of *Miraglia*, the AG in *Gasparini and others* also only viewed such a balance to be relevant to require a substance-based assessment of the case in the first member state as necessary to trigger *ne bis in idem*. As in *Miraglia*, a decision on the discontinuance of investigation on the basis that a criminal procedure is already initiated in another member state did not bar further prosecution (C-469/03, *Miraglia*, para. 36), a time-bar based on the law of the first member state shall also have no such effect, subject to certain conditions (Opinion in C-467/04, *Gasparini and others*, para. 120) as that would mean a similar absence of a substance-based assessment of the case in the first member state. Such a solution would not have prejudiced the notion of mutual trust either (Opinion in C-467/04, *Gasparini and others*, para. 106 and on-going).

The reasoning of the AG was not accepted by the Court, which shows that the Court attributes even less relevance to the high level of safety in interpreting the principle. The Court concluded, based on an argument on mutual trust, that a time-bar shall also trigger the application of *ne bis in idem* (C-467/04, *Gasparini and others*, para. 28-33).

The reference to a high level of safety did not even come close to being extended to influence the general meaning of the same acts. The reasoning of the AG reinforces the idea of *ne bis in idem* as a free-standing, *propriae naturae* principle, a uniquely supranational concept within the Community (Opinion in C-467/04, *Gasparini and others*, para. 81). In that regard, the primary task of the ECJ within its ‘hermeneutic monopoly’, lacking legislative measures, is to give proper effect to the principle in the context in which it applies (Opinion in C-467/04, *Gasparini and others*, para. 80). Some reasoning can be supplied therefore to support that even in cases where a difference of qualification or the legal interests is not a result of the lack of harmonisation, *ne bis in idem* must receive that proper effect, which must be grounded in a uniform interpretation.



The main line of reasoning in *Gasparini and others* was later confirmed as an autonomous, supranational concept by the subsequent case-law (cf. C-288/05, *Kretzinger*, para. 29; C-261/09, *Mantello*, para. 39). The later case-law of the Court, before Art. 50 CFR became binding law in 2009, essentially maintained the earlier findings and even ascertained their individual implications in a variety of special circumstances.

Mr Kretzinger received multiple consignments of contraband foreign tobacco in one member state and imported the same tobacco into another member state and continued to be in possession of the same there. From the outset, he intended to transport the tobacco to a single final destination (the United Kingdom) through multiple member states. (C-288/05, *Kretzinger*, paras. 14-15) Apart from ascertaining the application of *ne bis in idem* regarding first decisions brought *in absentia*, the ECJ reaffirmed that national courts, when carrying out their assessment, must confine themselves to examining whether the relevant acts constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter, and considerations based on the legal interest protected are not to be deemed relevant (C-288/05, *Kretzinger*, para. 34).

In *Kraaijenbrink*, the Court affirmed that even a chain of individual money laundering acts, relating to the proceeds of the same act of drug trafficking (C-367/05, *Kraaijenbrink*, paras. 13-14), may be considered the same acts where they proceed through the national borders. Thus, the Court itself verified that the complete identity of facts is not necessary to establish *idem* (C-367/05, *Kraaijenbrink*, para. 36). It also affirmed however that the unity of the *mens rea* alone does not suffice for an inextricable link where such a link otherwise does not follow from the material facts themselves (though it might strengthen the link between facts; C-367/05, *Kraaijenbrink*, para. 29).

In further cases closed before the CFR became binding in December 2009, the Court provided some details to the interpretation of *idem*, though the questions were aimed at essentially different points.

In *Bourquain*, the Court was presented with a case-file on an act of murder, thus the identity of material facts received less attention. The procedure essentially concerned the applicability of Art. 54 CISA subject to the enforcement requirement, where criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts was finally disposed of in another Contracting State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never have



been enforced. The Court affirmed the applicability of the principle and the identity of the material facts did not stand in question (C-297/07, *Bourquain*, para. 53).

In the judgment in *Mantello*, the Court laid down that the interpretation of *ne bis in idem* under Art. 54 CISA extends to the rule contained in Article 3(2) of Framework Decision 2002/584/JHA on the European Arrest Warrant. Subject to that decision, in the broader context, *ne bis in idem* is essentially interpreted in accordance with the Van Esbroeck doctrine also as regards Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (C-261/09, *Mantello*, para. 44). This reinforces observations that logically, *ne bis in idem* shall be interpreted uniformly throughout the EU legal order, which might bear, according to Tomkin, implications in favour of a factual approach in the later interpretation of Art. 50 CFR (Tomkin 2014: 1398-1399).

In essence, the core of the interpretation of the judgment in *Van Esbroeck* was carried through and further elaborated upon in the later cases, without a material restriction on the factual interpretation. In that respect the later case-law can be viewed as a bridge between the earlier cases and the case-law directly based on the CFR. A separate assessment of the latter will now follow.

#### 4.2. *Ne bis in idem* as a fundamental right of the European Union

Art. 50 CFR introduced a fundamental right not to be tried or punished twice in criminal proceedings for the same criminal offence (the ‘fundamental right’) with the following wording:

‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.’ (emphasis added)

The CFR did not inherit the ambiguous expression ‘the same acts’ from CISA. Instead, it refers to ‘an offence’, which brings it closer to the wording of Article 4, Protocol 7 of the European Convention on Human Rights (the ‘ECHR’). The departure from the wording of CISA could suggest that the fundamental right is to be interpreted on the basis of the identity of legal qualification. This would give the fundamental right a narrower scope and,



if true, it would have changed the understanding of *ne bis in idem* in the EU significantly.

However, for structural and empirical reasons, even in the current absence of definitive ECJ case-law, such departure from the already existing case-law seems unlikely. In fact, a degree of convergence can be anticipated between the interpretation of the earlier case-law and the CFR. I will devote the remainder of this part to ascertain the basis for that proposition.

The Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), which are to be considered in the interpretation of the CFR (Art. 6(1), 3rd subparagraph TEU; Art. 52(7) CFR; C-617/10, *Åklagaren v Åkerberg Fransson*, para. 20), state that the ‘very limited exceptions’ in Arts. 54 to 58 CISA which permit ‘member states to derogate from the ‘*non bis in idem*’ rule are covered by the horizontal clause in Art. 52(1) CFR concerning limitations’ (C-129/14 PPU, *Spasic*, paras. 54-55). Thus, the enforcement requirement (‘if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced’) and the requirement of final judgment specified in Art. 54 CISA both apply in case of Art. 50 CFR.

Moreover, Art. 52(3) CFR can be interpreted in a manner requiring the essential meaning of Art. 50 CFR to correspond to the meaning of Art. 4 Protocol 7 ECHR. Though since the ECHR applies only in cases confined to a single legal order, the room for uniform interpretation is difficult to delineate in transnational cases. Even so, the latest case-law yields some valuable precursors to a close relationship between the fundamental right and the ECHR, as suggested by the AG and Court in the case of *Åkerberg Fransson* (C-617/10, *Åklagaren v. Åkerberg Fransson*), probably the most significant judgment of the ECJ opening up the post-CFR period.

The case of *Åkerberg Fransson* was significant in more respects. The most important aspects relate to the application of the restriction in Art. 51(1) CFR (as regards admissibility), the extension of the applicability of the CFR to sanctions criminal in nature (administrative penalties for failing to declare and pay VAT) and the scope of the facts as suggested by AG Cruz Villalón.

As regards Art. 51(1) CFR, the Court observed that fundamental rights are only addressed to the member states where they implement Union law as, in line with Art. 6(1) TEU, the application of fundamental rights may not extend Union competences beyond the boundaries laid down in the Treaties. It follows that fundamental rights can neither be



applied in cases where the member states do not implement Union law, nor does the ECJ have jurisdiction to ascertain any such application outside the scope of Union law.

The ECJ observed that there is a direct link between the collection of VAT revenue in accordance with European Union law and the availability to the European Union budget of the corresponding VAT resources. A lack of collection in respect of the first may lead to the reduction also in the second. Besides, several legislative measures have been taken at supranational level to ensure the effective collection of VAT in the Union (*cf.* Council Directive 2006/112/EC; Art. 4(3) TEU; Art. 325 TFEU).

The Court stated that subject to the above, tax penalties and criminal sanctions constitute an implementation of the referenced Union legislation, and thus fall into the ambit of Union law for the purposes of the application of Art. 50 CFR with a view to Art. 51(1) CFR. The Court essentially held that implementation does not require the relevant national provisions to be put in place by the member state, based on a clear command of Union law with a specific content, but it is sufficient if the relevant penalties and sanctions are designed to ensure the effect of Union law (penalise the violation of its transposing measures).

As regards penalties criminal in nature, Art. 50 CFR does not preclude member states from implementing parallel administrative and criminal penalties for tax offences. Only if the tax penalty is criminal in nature is its joint application with applicable criminal sanctions precluded.

To test whether such a penalty is criminal in nature, the ECJ held that three conditions shall be assessed (the so-called *Engel* criteria in the case-law of the European Court of Human Rights [the 'ECtHR']): the legal qualification of the offence under national law, the nature of the offence, and the nature and degree of severity of the penalty that the person concerned is liable to incur. Thereby, the Court essentially imported ECtHR case-law, with the solicitation of its earlier judgment in *Bonda* (C-489/10, *Prokurator Generalny v. Bonda*, para. 37, referring to ECHR, *Engel and Others v. the Netherlands*, §§ 80 to 82 and ECHR, no. 14939/03, *Sergey Zolotukhin v. Russia*, §§ 52 and 53). Thus, the Court ascertained that even though Union law does not govern the relationship between the regime established by the ECHR and the member states legal orders, it avails itself of the ECtHR case-law under Art. 52(3) CFR where the proper effect of Union law so requires.

Finally, while the Court was not called to address directly the meaning of *idem* (the



wording ‘an offence’) in *Åkerberg Fransson*, nevertheless, AG Cruz Villalón considered what the provision might entail in this regard, given the current stage of development of both EU law and the case-law of the ECtHR. The ECtHR had previously ruled in the case *Zolotukhin v Russia* (No. 14 939/03, *Sergey Zolotukhin v Russia*) where, though in a case confined to a single legal order, the ECtHR substantially adopted the factual interpretation of *ne bis in idem* after conducting a survey on the different interpretations of *ne bis in idem* throughout major legal orders (Opinion in C-617/10, *Åklagaren v. Åkerberg Fransson*, para. 77). That interpretation was consistent with the interpretation given by the ECJ on the basis of Art. 54 CISA (Opinion in C-617/10, *Åklagaren v. Åkerberg Fransson*, para. 77).

Thus, AG Cruz Villalón subscribed to the view that, based on Art. 52(3) CFR, the *Zolotukhin* line of reasoning (No. 14 939/03, *Sergey Zolotukhin v Russia*, paras. 78-84) may be adopted for the purpose of interpreting the CFR provision (Opinion in C-617/10, *Åklagaren v. Åkerberg Fransson*, para. 91).

Even if, in the future, the ECJ would later divert from that approach, the wording of Art. 50 CFR seems to be essentially linked to the fact that (as made clear by Art. 51(1) CFR) the CFR only applies in cases where member states are implementing Union law. It forwards the view, also argued elsewhere in the case-law on Art. 54 CISA (C-467/04, *Gasparini and others*, para. 154), that a concept closer to the identity of an offense can be accepted where its application is substantially confined to a single legal order.

It shall be noted in that regard that an interpretation based on the identity of legal qualification and the legal interest could also be supported by the fact that based on Art. 51(1) CFR, the fundamental right only applies where the member states are implementing Union law. This could be considered, as we have seen in other cases, indeed a single legal order. However, the conclusions of *Åkerberg Fransson* show that it is sufficient that the case falls within the broader ambit of secondary legislation, as the Swedish provisions on sanctions for VAT evasion did. As this broad nexus does not itself equate implementation with harmonisation, as would be required by the earlier case-law on *ne bis in idem*, it appears to be a weaker reason to divert from the earlier case-law.

In those circumstances it can be assumed with a degree of probability that the interpretation of Art. 50 CFR regarding the substantive scope of the provision in transnational cases, will follow the lines of the earlier case-law based on Art. 54 CISA.

In the latest cases before the ECJ, *M* and *Spasic*, the application of the factual



interpretation of the same acts, specifically those of sexual violence against a child and counterfeiting money, did not come in question. It was neither questioned, nor in fact to be clarified, whether the acts were the same. The ECJ verified the applicability of the restrictions under Art. 54 CISA to the CFR, as indicated in the Explanations to the CFR.

In *M*, it ascertained the applicability of the criterion of final judgment in the CISA case-law as an exception to the fundamental right. Thus, a sentence on discharge, which leaves the possibility to reopen the case on the basis of new evidence, can be regarded as final also under the CFR (C-398/12, *M*, para. 25).

The question similarly only circled the topic of substantive scope in the most recent decided case of *Spasic*, where both questions with regards to the applicant were related to the application of the enforcement requirement of Art. 54 CISA under Art. 50 CFR (C-129/14 PPU, *Spasic*, para. 41). Nevertheless, AG Jääskinen specifically held that the case fully comes under the scope of Art. 54 CISA, as the requirements of the same facts are fully satisfied with a view to the commanding case-law, the proceedings ‘concern the same acts and, *mutatis mutandis*, the offence of fraud.’ (Opinion in C-129/14 PPU, *Spasic*, para. 36-37) It appeared thus that both the conditions for the application of the CISA and the CFR have been satisfied, without having to separately assess the exact meaning of Art. 50 CFR in relation to the CISA.

The Court held that the mere payment of a fine by a person sentenced by the self-same decision of a court of a member state to a custodial sentence that has not been served is not sufficient to satisfy the enforcement condition (C-129/14 PPU, *Spasic*, para. 86).

## 5. Concluding remarks

In this paper, I examined the arguments raised by the ECJ in the process of developing a uniform interpretation of Art. 54 CISA. The Court opted in a sequence of cases to base the meaning of *idem* on the identity of a set of inextricably linked material facts. Despite the strong criticism this approach elicited from member states, it appears that those early findings of the Court will, also on the basis of Art. 50 CFR, continue to determine the substantive scope of *ne bis in idem* in transnational cases.

However, the analysis also concluded that the same case-law, despite the clear questions raised by the referring judges, assessed a theoretical problem different from the



one arising from the facts. As a result, the core argument of the Court lacks the necessary relevance to support the conclusion that a factual interpretation is the most apt in *all* cases coming under the scope of *ne bis in idem*.

As a conclusion of Part 3, I suggested that the theoretical problem which should be addressed is the conceptual role of a distinction between different forms of legal interests protected by the criminal laws of the member states. The current factual interpretation appears, *ceteris paribus*, correct only in case of crimes against individual interests. Crimes against collective interests violate distinct interests of multiple carriers and are therefore considered as materially distinct crimes by national criminal laws.

Subject to the above, a reform appears desirable. A broader discussion on the treatment of different crimes under *ne bis in idem* should precede the creation of the supranational provisions. This is something the procedure of integrating the Schengen *acquis* into Union law has definitely lacked. Only after those preliminary affairs have been dealt with, can individual dignity be properly weighed against the claim of member states for the right to punish. It is of foremost importance to clearly establish the competence of the European Union to make legislation based on which individual dignity, stemming from the EU legal order, may supersede the criminal laws of the member states in the vacuum of justification elaborated in this paper.

I restricted the objective of this paper to ascertaining the core problem around the factual interpretation of *ne bis in idem*. It perhaps deserves extensive further research to ascertain how the legal framework could and should be amended.

Parallel to the discussion on *ne bis in idem*, it is often asserted that general rules on jurisdiction in criminal matters at EU level could supersede the problem. A Communication from the Commission to the Council and the European Parliament in 2000 stated that ‘an EU-wide system of jurisdiction would all but make *ne bis in idem* unnecessary at EU level, given that for each case, only one Member State would be competent to rule.’ (COM/2000/0495 final, point 6.2)

However, even a discussion on EU jurisdictional rules could not escape taking into account the role of different forms of legal interests in national criminal laws. To maintain the already afforded level of protection, the member states were to explicitly agree that only one of them shall have the right to punish offenders of transnational crimes proceeding through the territory of multiple states. Considering the general attitude of member states



and the above discussion, such an agreement will be difficult to reach (on this point I agree with the concerns raised by Peers 2006: 220).

Lifting the safeguard of *ne bis in idem* in case of offenders of crimes against collective values could be the other solution. As a serious limitation to the freedom ensured by the current interpretation, it is a less costly enhancement of criminal reaction than the adoption of additional measures to combat serious transnational criminality. Should member states decide to apply this option in the future, this must be spelled out in due legal form.

The accession of the EU to Protocol No 7 of the ECHR could be seen as an occasion to re-think how *ne bis in idem* should be interpreted in transnational cases in the EU. It is not likely though that the ECHR alone can solve the interpretative challenges in a transnational context. *Ne bis in idem* under the ECHR applies within a single national legal order and even so, as I attempted to highlight, the ECtHR itself adopted, in certain circumstances, the Van Esbroeck-doctrine.

In my view, *ne bis in idem* should remind us of the importance of taking a cautious approach to the development of complex Union concepts which are systematically opposed by member states. As we have seen in historical cases such as *Solange*, it pays to be suspicious where a distrustful attitude becomes common among member states. Acting upon that suspicion might yield the desired rewards of a progressive (or at least in-depth) discussion.

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<sup>1</sup> In addition it shall be noted that Article 4 of Protocol No 7 of the European Convention on Human Rights and Fundamental Freedoms and Article 14(7) of the International Covenant on Civil and Political Rights also use the expression 'an offence'.

<sup>11</sup> The Opinion of the AG quotes Brammertz, S., 'Trafic de stupefiants et valeur internationale des jugements répressifs à la lumière de Schengen', *Revue de droit pénal et de criminologie*, November 1996, 1077-1078: 'Why regard trafficking between Eupen and Liège as a single criminal offence and divide trafficking between Eupen and Aix-la-Chapelle into two distinct acts on the basis of a border which is not physically represented on the ground?' (Opinion in C-436/04, *Van Esbroeck*, fn. 25) One might ask whether it would have made a difference if the border were physically represented on the ground.

<sup>111</sup> The term 'carrier of the legal interest' follows the meaning of the commonly used term in German scholarship (Rechtsgutsträger). I borrowed the translation from Simester et al. (eds.) 2014: fn. 34, where further guidance can be found regarding the difficulties that characterise translating the relevant terms into the English language.



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# International Dictatorship or International Democracy. A Discussion of Albert Camus' 1946 Considerations

by

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## Abstract

In the series *Neither Victims Nor Executioners* (1946) the Franco-Algerian writer Albert Camus argued for the need of a relative utopia that would allow man, who refused the logic of murder and violence, to revolt against their historical condition. To this end Camus stressed the importance of fighting for a new democratic world order that would have reversed the condition of international dictatorship immanent in the interdependent world of the 20th century. In the series of essays another reading is possible; an attempt to find a new political way after the end of the classic modern world - a system founded on the supremacy of European nation-States - and to consider such an attempt as an interesting standpoint to face current transnational challenges.

## Key-words

Camus, International Democracy, International Dictatorship, Fear, Utopia, World Order



*«...l'histoire n'est que l'effort désespéré des hommes pour donner corps aux plus clairvoyants de leurs rêves». Albert Camus, Ni victimes ni bourreaux, 1946*

The current era is marked by transnational problems and crisis, with migration, war, unemployment, recession, and terrorism shattering the lives of human beings across several regions of the world in a vicious dynamic of interaction that does not respect national borders<sup>I</sup>. In such a devastating spiral consideration for human life decreases; man becomes a sort of object on which is normal and rightful to practice and impose physical, moral and psychological violence<sup>II</sup>. Thus, in the contemporary scenario we see the simultaneous and connected development of an interdependent transnational crisis, and a deep devaluation of human dignity. In this connection it is possible to identify a key feature not only of current times but also of the entire twentieth century, a sort of unresolved issue that continues to recur in new guises<sup>III</sup>. In order to better understand and critique some crucial and original elements of this connection, and of our epoch, it is interesting to analyze some of the Franco-Algerian writer Albert Camus' considerations in his famous series of essays *Neither Victims Nor Executioners* (published in the journal "Combat" in 1946)<sup>IV</sup>.

## 1.

At the outset Camus noticed that much as the seventeenth century was the century of mathematics, the eighteenth that of the physical sciences, and the nineteenth that of biology, "our twentieth century is the century of fear"<sup>V</sup>(Camus 2002b : 636). For Camus, it was not only the dangerous new scientific development but also the new existential condition of human beings that created the "humus" for the development of fear. In fact the removal of any perspective on the future and the increasing silence among individuals and peoples created an inhumane context in which fear and terror became structural features:

*"Ce qui frappe le plus, en effet, dans le monde où nous vivons, c'est d'abord, et en général, que la plupart des hommes (sauf les croyants de toutes espèces) sont privés d'avenir. Il n'y a pas de vie valable*



*sans projection sur l'avenir, sans promesse de mûrissement et de progrès. Vivre contre un mur, c'est la vie des chiens. Eh bien ! les hommes de ma génération et de celle qui entre aujourd'hui dans les ateliers et les facultés ont vécu et vivent de plus en plus comme des chiens. Naturellement, ce n'est pas la première fois que des hommes se trouvent devant un avenir matériellement bouché. Mais ils en triomphaient ordinairement par la parole et par le cri. Ils en appelaient à d'autres valeurs, qui faisaient leur espérance. Aujourd'hui, personne ne parle plus (sauf ceux qui se répètent), parce que le monde nous paraît mené par des forces aveugles et sourdes qui n'entendront pas les cris d'avertissements, ni les conseils, ni les supplications... Le long dialogue des hommes vient de s'arrêter. Et, bien entendu, un homme qu'on ne peut pas persuader est un homme qui fait peur... Nous vivons dans la terreur parce que la persuasion n'est plus possible, parce que l'homme a été livré tout entier à l'histoire et qu'il ne peut plus se tourner vers cette part de lui-même, aussi vraie que la part historique, et qu'il retrouve devant la beauté du monde et des visages ; parce que nous vivons dans le monde de l'abstraction, celui des bureaux et des machines, des idées absolues et du messianisme sans nuances. Nous étouffons parmi les gens qui croient avoir absolument raison, que ce soit dans leurs machines ou dans leurs idées. Et pour tous ceux qui ne peuvent vivre que dans le dialogue et dans l'amitié des hommes, ce silence est la fin du monde”<sup>VI</sup> (Camus 2002b : 636-639).*

Thus, according to Camus, for men who did not want to use violence or to suffer it, it was necessary to come to terms with such a situation of fear, and the realization of what was implied and rejected. Moreover, it was “a world where murder is legitimate, and where human life is considered trifling” (Camus 2002b: 640). Once this was realized any man who wanted to revolt<sup>VII</sup> against “murder” and “violence” - either committed or suffered – had to see the problem from another point of view that would have necessitated a critical analysis of the human being’s role in the face of reality, and in particular within the sort of new political condition that, having begun in the nineteen-thirties, was fixed by the World War II<sup>VIII</sup>.

## 2.

So what was the role of the subjects who, rejecting any legitimization of murder, refused the logic of violence in the face of reality<sup>IX</sup> ? They had to choose a utopia<sup>X</sup> that



would have helped to save what was possible to save, starting from the human bodies, or better from the same possibility of a future. As Camus said:

*“Sauver ce qui peut encore être sauvé, pour rendre l’avenir seulement possible, voilà le grand mobile, la passion et le sacrifice demandés. Cela exige seulement qu’on y réfléchisse et qu’on décide clairement s’il faut encore ajouter à la peine des hommes pour des fins toujours indiscernables, s’il faut accepter que le monde se couvre d’armes et que le frère tue le frère à nouveau, ou s’il faut, au contraire, épargner autant qu’il est possible le sang et la douleur pour donner seulement leur chance à d’autres générations qui seront mieux armées que nous”<sup>XI</sup> (Camus 2002b : 669).*

This utopia was seen as “relative” , a direct polemic against the Marxist idea of an “absolute” utopia that – in adopting the logic of “*la fin justifie les moyens*”<sup>XII</sup> – would legitimate any kind of barbarism and violence in the name of history and of its eschatological end<sup>XIII</sup>. In this sense such a utopia would be the equivalent of a “*pensée politique modeste*” or “*délivrée de tout messianisme, et débarrassée de la nostalgie du paradis terrestre*” (Camus 2002b : 644), and was, for Camus, the only possible position for those who wanted to change the world situation in a way that avoided reducing men to a tool :

*“Après avoir un peu réfléchi à cette question, il me semble que les hommes qui désirent aujourd’hui changer efficacement le monde ont à choisir entre les charniers qui s’annoncent, le rêve impossible d’une histoire tout d’un coup stoppée, et l’acceptation d’une utopie relative qui laisse une chance à la fois à l’action et aux hommes. Mais il n’est pas difficile de voir qu’au contraire, cette utopie relative est la seule possible et quelle est seule inspirée de l’esprit de réalité”<sup>XIV</sup> (Camus 2002b : 652-653).*

But in order to move towards such a relative utopia, to realize it as part of history, it was necessary to consider the new political, social and economic conditions created during the nineteen-thirties and ‘forties. The “century of fear” was also the century of world interdependence, of a context that was no longer governable from a national or local point of view. It was an epoch that, according to Camus, gave rise to the issue of a new universal order.



### 3.

It is from this perspective that I argue that Camus' analysis is one of the most penetrating of his time<sup>xv</sup>. On this point it is important to underline that, since 1944, he had been exposed to Altiero Spinelli's federalism through his engagement inside the "*Comité français pour la fédération européenne*". A product of these encounters with Spinelli was a developed definition of his conviction on which he had reflected since 1939: that the age of European nation-State as an autonomous and constructive political actor was over<sup>xvi</sup>. In the new era of interdependence it was impossible to have an independent internal and foreign policy as was the case in the nineteenth century<sup>xvii</sup> (a point already understood by Coloni and Spinelli in 1943). At the same time Camus refused to align himself with either of the two international superpowers: the U.S.A and the U.S.S.R. In fact, in accordance with his social-libertarianism<sup>xviii</sup>, he rejected not only Russian totalitarianism but also the idea of accepting American ideological and political hegemony. Indeed although he considered the latter as a lesser evil (compared to the USSR) it was, nevertheless, to be avoided<sup>xix</sup>. Thus it is interesting to notice how the following analysis by Camus was fostered by the idea of finding a different political direction beyond the alternatives represented by communism and capitalist democracy,<sup>xx</sup> and that such a direction emerged from a critical discussion of the role of the nation-State in a world that had become evidently interdependent:

*“Nous savons aujourd’hui qu’il n’y a plus d’îles et que les frontières sont vaines. Nous savons que dans un monde en accélération constante, où l’Atlantique se traverse en moins d’une journée, où Moscou parle à Washington en quelques heures, nous sommes forcés à la solidarité ou à la complicité, suivant les cas”<sup>xxi</sup> (Camus 2002b : 653).*

For Camus it was important to fully understand all the implications of change that related to the changing dominance of Western civilization, put into question by processes of decolonization. In fact:

*“Nous centrons aujourd’hui nos réflexions autour du problème allemand, qui est un problème secondaire par rapport au choc d’empires qui nous menace. Mais si, demain, nous concevions des*



*solutions internationales en fonction du problème russoaméricain, nous risquerions de nous voir à nouveau dépassés. Le choc d'empires est déjà en passe de devenir secondaire, par rapport au choc des civilisations. De toutes parts, en effet, les civilisations colonisées font entendre leurs voix. Dans dix ans, dans cinquante ans, c'est la prééminence de la civilisation occidentale qui sera remise en question*<sup>XXII</sup> (Camus 2002b : 659).

In such a scenario there was no possible space for national states' or particular solutions of any kind. For Camus revolution could exist only as a global revolution:

*“La vérité, que je m'excuse d'écrire en clair, alors que tout le monde la connaît sans la dire, c'est que nous ne sommes pas libres, en tant que Français, d'être révolutionnaires. Ou du moins nous ne pouvons plus être des révolutionnaires solitaires parce qu'il n'y a plus, dans le monde, aujourd'hui, de politiques conservatrices ou socialistes qui puissent se déployer sur le seul plan national. Ainsi, nous ne pouvons parler que de révolution internationale. Exactement, la révolution se fera à l'échelle internationale ou elle ne se fera pas*<sup>XXIII</sup> (Camus 2002b : 650-651).

The regime of dictatorship that Camus denounced as typical of his context was a system of “international dictatorship” in which governments – the executive powers - made international law without caring for the people's will (Camus 2002b : 657). It is interesting to note how different Camus's concept of dictatorship was when compared to classic or modern ones<sup>XXIV</sup>. First it was not conceived simply as the unlimited dominant power of the State (nor as a temporary measure to protect the ordinary functioning of the State through the suspension of its normal political equilibrium in favour of a single leader), but as the power of a specific institution of the State - the executive power – to make law in place of the others. Second, and more interestingly, this “international” dictatorship was founded on the need, following the new interdependence of the twentieth century, for “international law” that – without a world parliament – could be made only by states' executives. Thus governments, lacking any control at the international level, ended up as the arbitrary masters of this law, with the consequent destruction of the basis of democracy (“une forme de société où la loi est au-dessus des gouvernants”). Thus for people who wanted to change the world – in accordance with the “relative utopia” that we saw above - it was clear that the target had to be different from that of the past :



*“Nous savons donc tous, sans l’ombre d’un doute, que le nouvel ordre que nous cherchons ne peut être seulement national ou même continental, ni surtout occidental ou oriental. Il doit être universel. Il n’est plus possible d’espérer des solutions partielles ou des concessions”* (Camus 2002b : 654). And again *“Oui, nous devons enlever son importance à la politique intérieure. On ne guérit pas la peste avec les moyens qui s’appliquent aux rhumes de cerveau. Une crise qui déchire le monde entier doit se régler à l’échelle universelle. L’ordre pour tous, afin que soit diminué pour chacun le poids de la misère et de la peur, c’est aujourd’hui notre objectif logique”*<sup>xxv</sup> (Camus 2002b: 664).

This task would have involved some significant corollaries such as:

*“1° que la politique intérieure, considérée dans sa solitude, est une affaire proprement secondaire et d’ailleurs impensable. 2° que le seul problème est la création d’un ordre international qui apportera finalement les réformes de structure durables par lesquelles la révolution se définit ; 3° qu’il n’existe plus, à l’intérieur des nations, que des problèmes d’administration qu’il faut régler provisoirement, et du mieux possible, en attendant un règlement politique plus efficace parce que plus général”*<sup>xxvi</sup> (Camus 2002b: 663).

According to such a view, the only new universal order that was possible and desirable in order to concretely delegitimize the logic of violence and murder, was one of international democracy order; an order that in Camus’ conceptualization was implicit on the people’s consensus.<sup>xxvii</sup>

#### 4.

By international democracy Camus meant a system that completely overturned - revolutionized – the kind of dictatorship that he observed in his times. It was clear for Camus that in an interdependent world the people can only choose between two different kinds of international political regime, democratic or dictatorial:

*“Mais qu’est-ce que la démocratie internationale ?... Qu’est-ce que la démocratie nationale ou internationale ? C’est une forme de société où la loi est au-dessus des gouvernants, cette loi étant*



*l'expression de la volonté de tous, représentée par un corps législatif. Est-ce là ce qu'on essaie de fonder aujourd'hui ? On nous prépare, en effet, une loi internationale. Mais cette loi est faite ou dé faite par des gouvernements, c'est-à-dire par l'exécutif. Nous sommes donc en régime de dictature internationale. La seule façon d'en sortir est de mettre la loi internationale au-dessus des gouvernements, donc de faire cette loi, donc de disposer d'un parlement, donc de constituer ce parlement au moyen d'élections mondiales auxquelles participeront tous les peuples. Et puisque nous n'avons pas ce parlement, le seul moyen est de résister à cette dictature internationale sur un plan international et selon des moyens qui ne contrediront pas la fin poursuivie<sup>xxviii</sup> (Camus 2002b: 657).*

The supremacy of executive powers – that made international law, and which ended up with control over national parliaments - was equated with an international dictatorship, which it was necessary to resist. This resistance was finally to lead to a reversal of such a dictatorship in a system in which a legislative assembly – in a new universal formation - would take back authority over the executive powers, creating an international democracy. In order to attain the latter it would be necessary to sign a new social contract among individuals that would have helped to go beyond the logic that ruled contemporary governments, preventing them from becoming part of the transformation imagined by Camus:

*“Ils [the engaged men] admettront qu'ils n'ont pas grand-chose à attendre des gouvernements actuels, puisque ceux-ci vivent et agissent selon des principes meurtriers. Le seul espoir réside dans la plus grande peine, celle qui consiste à reprendre les choses à leur début pour refaire une société vivante à l'intérieur d'une société condamnée. Il faut donc que ces hommes, un à un, refassent entre eux, à l'intérieur des frontières et pardessus elles, un nouveau contrat social qui les unisse suivant des principes plus raisonnables<sup>xxix</sup> (Camus 2002b: 664-665).*

As a resistant/constituent subject Camus thus imagined a movement that could base itself inside nations, on work-communities and, internationally, on intellectual communities:

*“... les premières, selon des contrats de gré à gré sur le mode coopératif, soulageraient le plus grand nombre possible d'individus et dont les secondes s'essaieraient à définir les valeurs dont vivra cet ordre*



*international, en même temps qu'elles plaideraient pour lui, en toute occasion. Plus précisément, la tâche de ces dernières serait d'opposer des paroles claires aux confusions de la terreur et de définir en même temps les valeurs indispensables à un monde pacifié. Un code de justice internationale dont le premier article serait l'abolition générale de la peine de mort, une mise au clair des principes nécessaires à toute civilisation du dialogue pourraient être ses premiers objectifs. Ce travail répondrait aux besoins d'une époque qui ne trouve dans aucune philosophie les justifications nécessaires à la soif d'amitié qui brûle aujourd'hui les esprits occidentaux. Mais il est bien évident qu'il ne s'agirait pas d'édifier une nouvelle idéologie. Il s'agirait seulement de rechercher un style de vie*<sup>xxx</sup> (Camus 2002: 665-666).

Such an effort towards international democracy and peace had to be led by men who refused to be either victims or executioners and who accepted the consequences of that choice. Camus did not know if they would have concretely begun such a revolt. But he firmly insisted on its rationale, affirming the importance for men to react rationally, with a moral and political fight, against the inhumanity and the nihilism of their historical context<sup>xxxI</sup> :

*“Oui, ce qu'il faut combattre aujourd'hui, c'est la peur et le silence, et avec eux la séparation des esprits et des âmes qu'ils entraînent. Ce qu'il faut défendre, c'est le dialogue et la communication universelle des hommes entre eux. La servitude, l'injustice, le mensonge sont les fléaux qui brisent cette communication et interdisent ce dialogue. C'est pourquoi nous devons les refuser. Mais ces fléaux sont aujourd'hui la matière même de l'histoire et, partant, beaucoup d'hommes les considèrent comme des maux nécessaires. Il est vrai, aussi bien, que nous ne pouvons pas échapper à l'histoire, puisque nous y sommes plongés jusqu'au cou. Mais on peut prétendre à lutter dans l'histoire pour préserver cette part de l'homme qui ne lui appartient pas. C'est là tout ce que j'ai voulu dire*<sup>xxxII</sup> (Camus 2002: 670).

## 5.

The *Neither Victims Nor Executioners* series is, of course, deeply marked by the context of its publication that saw the beginning of Cold War and the desire to react against what had been determined by the outcome of World War II<sup>xxxIII</sup>. But it would be erroneous to consider this text as merely a product of such a specific context. As was demonstrated by Neil Foxlee in a recent book, it is useful to adopt a multi-contextual approach to



understand the meaning of a text (Foxlee 2010). Thus in our case it is also possible to discover a part of the meaning of the same text by considering it as a product of the great crisis of the interwar period that would mark all the twentieth century. From this point of view *Neither Victims Nor Executioners* is a critical reflection on what had structurally changed in the twentieth century compared to the world of the nineteenth century, and also on the dangerous identity of new times. Camus forced people who wanted to react against such a *Stimmung* to see the most immediate political choice that they had to make, but through new lenses. In fact in a world that had become interdependent the alternative was to remain in an existing regime of international dictatorship - in which the executive powers were sovereign through their ability to make law in and for the international space - or to fight, with instruments that were not contradictory to their main aim, for a regime of international democracy in which the people would be sovereign through the control of a new world parliament over the executive powers. For Camus, the creation of a new world order<sup>XXXIV</sup> had to be the main effort of his fellows who did not want to legitimize the existing condition of widespread fear. In fact it was impossible to concretely protect dialogue, justice and peace - thus delegitimizing the logic of murder - without a universal law, founded on the consensus of world people<sup>XXXV</sup>. Camus fiercely stressed the importance of removing the power of the law (a point he examined in several writings) from those who wanted to use it for criminal intentions, and especially from governments such as those of the U.S.S.R and the U.S.A. that were able to act as hegemons in the international space (also through the UN, see Foley 2014: 44).

From this point of view the thought of Camus was radical: it was strictly necessary to reverse the regime of international dictatorship and it was only possible to do so by working towards an international democracy, for alternatively the nihilism of legitimate murder would have continued unabated. He was, also, the first twentieth century intellectual who unequivocally adhered to the rejection of the logic of murder - not only of war - with the creation of a new world democracy<sup>XXXVI</sup>. For Camus, this involved the idea of the creation, through a civil society transnational movement, of a new style of life, with new principles, that would have prepared the path towards the creation of the world parliament and would have stimulated the drive towards a new universal law. In this sense his message simultaneously had moral and political weight. In such a thought there was, in fact, the idea of educating - through bottom up political action - civil society to adopt



another kind of behavior and of co-existence that, in the end, would have involved the mutual agreement of each part about the creation of a new universal and democratic order. From this point of view the direction indicated by Camus was particularly narrow and in a certain measure contradictory: in order to obtain a kind of international democracy (and with it a strategic result against the logic of violence and murder and the consequent spirit of fear) it was necessary to create a new lifestyle with a slow transnational non-governmental action in a moment in which it was necessary to find a rapid global answer to common and ruinous problems. But at the same time Camus' interest was less focused on political strategy than on finding the beginning of a new logic, useful to conceive and transform the future of the world, to reveal the true big issues of his century and to change the mind of some decisive political actors: the men who, preferring the logic of dialogue, refused to be victims or executioners.

## 6.

It is possible to accuse Camus of being more utopist than those he accused of being in favor of an “absolute Utopia”, or to be too influenced by the “Jacobin” idea of the supremacy of the legislative power over the executive one<sup>xxxvii</sup>. But, finally, it could be more worthwhile evaluating if the question that he stressed is completely out of touch with today's reality. Yes, of course, our world is politically disunited, divided into regional areas and more fragmented than the world of Cold War (Colombo 2010). But can such a multipolar and non-democratic world find a way to manage transnational problems and to fight the return of the legitimization of violence on a global scale? And if the answer is no, that the situation will continue unchanged, the perspective stressed by Camus might still preserve some critical suggestions for us.

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<sup>1</sup> See the analytical section in *Les convivialistes* 2013.



<sup>II</sup> It is important to notice that our problem it is not only a matter of imposed or received violence. There is also a problem linked with the “desire” to be victim. In fact, as stressed by Wendy Brown, we can also desire to suffer violence and we can found our formation as subjects on such a masochism (Brown 2001: 45-61).

<sup>III</sup> Toni Jundt argues that considering all the deep differences rooted in particular 20th century contexts - we must not undervalue the continuity of our history and of our problems that are for many aspects the same of the 20th century (Jundt, 2009: 1-22).

<sup>IV</sup> See Camus 2002b: 631-672. For the history of the journal see Lévi-Valensi 2002a: 19-70 and for the relationship between Camus and “Combat” see Lévi-Valensi 2002b: 71-109. See also Todd 1996: 501-602. Regarding the thought of Camus – and the bibliography concerning him - see Hughes 2007; Guérin 2009; Vanborre 2012; Bresolin 2013 and Foley 2014.

<sup>V</sup> This issue of the relevance of fear returned inside “*La peste*” (1947) and in the play “*L’état de siège*” (1948) where revolt is possible only if fear is faced and defeated. See Camus 2013a : 758.

<sup>VI</sup> “The most striking feature of the world we live in is that most of its inhabitants - with the exception of pietists of various kinds - are cut off from the future. Life has no validity unless it can project itself toward the future, can ripen and progress. Living against a wall is a dog's life. True - and the men of my generation, those who are going into the factories and the colleges, have lived and are living more and more like dogs. This is not the first time, of course, that men have confronted a future materially closed to them. But hitherto they have been able to transcend the dilemma by words, by protests, by appealing to other values which lent them hope. Today no one speaks any more (except those who repeat themselves) because history seems to be in the grip of blind and deaf forces which will heed neither cries of warning, nor advice, nor entreaties... Mankind's dialogue has just come to an end. And naturally a man with whom one cannot reason is a man to be feared... We live in terror because persuasion is no longer possible; because man has been wholly submerged in History; because he can no longer tap that part of his nature, as real as the historical part, which he recaptures in contemplating the beauty of nature and of human face, because we live in a world of abstractions, of bureaus and machines, of absolute ideas and of crude messianism. We suffocate among people who think they are absolutely right, whether in their machines or in their ideas. And for all who can live only in an atmosphere of human dialogue and sociability, this silence is the end of the world”. Translation by the author.

<sup>VII</sup> « *Qu'est-ce qu'un homme révolté ? Un homme qui dit non* » (Camus 1951 : 27). It is important to notice that in November 1946 Camus has already begun – with *Lettres à un ami allemande* (1945); *Remarque sur la révolte* (1945) and with *La crise de l'homme* (March 1946) - his reflection on the revolt and the rebel that will bring him to publish *La peste* (1947) and *L'homme révolté* in 1951. Thus the same series of 1946 could be consider an elaboration's moment of such a thought that Camus in 1957 defined as the “positive” phase of his work. See Valle, 2013:11-18. Regarding the relations among the different phases, or “cycles”, lived by Camus' thought see Novello 2010: 8.

<sup>VIII</sup> See Camus 2002b: 659-660.

<sup>IX</sup> Camus wrote this series especially having in mind the points of view and the contradictions of contemporary French and European Socialists which the journal “Combat” regularly used to address.

<sup>X</sup> “... *l'utopie est ce qui est en contradiction avec la réalité*”. Camus, 2002b : 642-643

<sup>XI</sup> “To save what can be saved so as to open up some kind of future - that is the prime mover, the passion and the sacrifice that is required. It demands only that we reflect and then decide, clearly, whether humanity's lot must be made still more miserable in order to achieve far-off and shadowy ends, whether we should accept a world bristling with arms where brother kills brother; or whether, on the contrary, we should avoid bloodshed and misery as much as possible so that we give a chance for survival to later generations better equipped than we are”. Translation by the author.

<sup>XII</sup> This is essentially the logic that Camus wanted to destroy. In 1951, regarding the issue, he wrote “*La fin justifie les moyens? Cela est possible. Mais qui justifiera la fin ? A cette question, que la pensée historique laisse pendante la révolte répond : les moyens*”. Camus 1951: 365. Also in the series of essays of 1946 he underlines how “*Dans les perspectives du marxisme, cent mille morte ne sont rien, en effet, au prix du bonheur de centaines de millions de gens. Mais la mort certaine de centaines de millions de gens, pour le bonheur supposé de ceux qui restent, est un prix trop cher. Le progrès vertigineux des armements, fait historique ignoré par Marx, force à poser de nouvelle façon le problème de la fin et des moyens. Et le moyen, ici, ferait éclater la fin. Quelle que soit la fin désirée, si haute et si nécessaire soit-elle, qu'elle veuille ou non consacrer le bonheur des hommes, qu'elle veuille consacrer la justice ou la liberté, le moyen employé pour y parvenir représente un risque si définitif, si disproportionné en grandeur avec les chances de succès, que nous refusons objectivement de le courir*” Camus 2002b : 656.



XIII For Camus' critique of Marxist historical theodicy see Sharpe 2015: 135-148.

XIV "Those who want to change the world must, it seems to me, now choose between the charnel-house threatened by the impossible dream of history suddenly struck motionless, and the acceptance of a relative Utopia which gives some leeway to action and to mankind. Relative Utopia is the only realistic choice...". Translation by the author.

XV In the 'forties a very similar analysis was developed by Altiero Spinelli and Eugenio Colorni; in a couple of letters in 1943 they stressed the new importance of international politics and the end of any space for a national revolution or for a national politics independent from the world powers. See Spinelli, 1993: 189-218. It's important here to underline that Camus had been in touch with Spinelli since 1944 (they finally meet in 1945) and that he was engaged in the struggle for European federation. See Gouzy 2010: 273-275 and Camus 1945: 16-20. Another important analysis on the new relevance of international politics by Alexandre Kojève in *Esquisse d'une doctrine de la politique française* (1945) affirmed that in the 20th century Nation-States were no more political realities because of the new technological situation that needed new transnational actors as Empires. About this text of Kojève and the problems related to its publication see the considerations of Tedesco, 2006: 373-401.

XVI See the articles in « Le Soir Républicain » in Camus 1978: 611-657.

XVII One of the most interesting, and fundamental accounts of such an intellectual and political encounter was the letter that Spinelli sent to Camus on 18<sup>th</sup> March 1945. In this letter Spinelli strongly defended the positive connection between the future of democratic civilization and the European federalist choice. According to this letter it would have been impossible to create any democratic order on the basis of European nation-State and it was necessary to rationally persuade the new political class that the nation-State era was ended. See Spinelli 1996: 490-492.

XVIII On this see also the discussed book by Onfray, 2012.

XIX E.g. In 1948 he distinguished among two kind of *technolâtries*: the Russian one, or totalitarian and the American one or "total", centered on soft power that he considered more seductive and penetrant (Todd 1996 :626-627).

XX It is not the case that in 1948 Camus supported the *Rassemblement démocratique révolutionnaire* that was founded on a program that tried to individuate an alternative to communism and capitalist democracy. Furthermore this movement was in favor of a kind of European federalism (see Todd 1996: 620-626).

XXI "We know today that there are no more islands, that frontiers are just lines on a map. We know that in a steadily accelerating world, where the Atlantic is crossed in less than a day and Moscow speaks to Washington in a few minutes, we are forced into fraternity - or complicity". Translation by the author.

XXII "Today we concentrate our political thinking on the German problem, which is a secondary problem compared to the clash of empires which threatens us. But if tomorrow we resolve the Russo-American conflict, we may see ourselves once more outdistanced. Already the clash of empires is in process of becoming secondary to the clash of civilizations. Everywhere the colonial peoples are asserting themselves. Perhaps in ten years, perhaps in fifty, the dominance of Western civilization itself will be called into question". Translation by the author

XXIII "The truth is - excuse me for stating openly what every one knows and no one says - the truth is that we French are not free to make a revolution. Or at least that we can be no longer revolutionary all by ourselves, since there no longer exists any policy, conservative or socialist, which can operate exclusively with a national framework. Thus we can only speak of world revolution. The revolution will be made on a world scale or it will not be made at all". Translation by the author.

XXIV About these meanings see Nolte 1972: 900-924 and Bracher 1993.

XXV "We know, then, without shadow of a doubt, that the new order we seek cannot be merely national, or even continental; certainly not occidental nor oriental. It must be universal. No longer can we hope for anything from partial solutions or concessions". And again "Yes, we must minimize domestic politics. It's impossible to cure plague with remedies used for headache. A crisis which tears the whole world apart must be met on a universal scale. A social system for everybody which will somewhat allay each one's misery and fear is today our logical objective". Translation by the author.

XXVI "(1) domestic policy is in itself a secondary matter; (2) the only problem is the creation of a world order which will bring about those lasting reforms which are the distinguishing mark of a revolution; (3) within any given nation there exist now only administrative problems, to be solved provisionally after a fashion, until a solution is worked out which will be more effective because more general". Translation by the author.

XXVII "*L'ordre c'est le peuple qui consent*". Camus, 2002a: 177.



XXVIII “But what is international democracy?... International - or national - democracy is a form of society in which law has authority over those who govern, law being the expression of the common will as expressed in a legislative body. An international legal code is indeed now being prepared. But this code is made and broken by governments, that is by the executive power. We are thus faced with a regime of international dictatorship. The only way of extricating ourselves is to create a world parliament through elections in which all peoples will participate, which will enact legislation which will exercise authority over national governments. Since we do not have such a parliament, all we can do now is to resist international dictatorship; to resist on a world scale; and to resist by means which are not in contradiction with the end we seek”. Translation by the author.

XXIX “... little is to be expected from present-day governments, since these live and act according to a murderous code. Hope remains only in the most difficult task of all: to reconsider everything from the ground up, so as to shape a living society inside a dying society. Men must therefore, as individuals, draw up among themselves, within frontiers and across them, a new social contract which will unite them according to more reasonable principles”. Translation by the author.

XXX “...the former, organized co-operatively, would help as many individuals as possible to solve their material problems, while the latter would try to define the values by which this international community would live, and would also plead its cause on every occasion. More precisely, the latter's task would be to speak out clearly against the confessions of the Terror and at the same time to define the values by which a peaceful world may live. The first objectives might be the drawing up of an international code of justice whose Article No. 1 would be the abolition of the death penalty, and an exposition of the basic principles of a civilization of dialogue. Such an undertaking would answer the needs of an era which has found no philosophical justification for that thirst for fraternity which today burns in Western man. There is no idea, naturally, of constructing a new ideology, but rather of discovering a style of life”. Translation by the author.

XXXI The criticism of those who considered the history as the “tribunal of the world” is a central element of Camus' thought (e.g. Camus 1951: 173-191). It explains also his aversion for Hegel – or better, considering the influence of the Kojève's interpretation (Sabot 2009: 45-60), for a “French Hegel” (Baugh 2003) – and the vision that Camus had about justice: “*Je continue à croire que ce monde n'a pas de sens supérieur. Mais je sais que quelque chose en lui a du sens et c'est l'homme, parce qu'il est le seul être à exiger d'en avoir. Ce monde a du moins la vérité de l'homme et notre tâche est de lui donner ses raisons contre le destin lui-même*” (Camus 2013b : 484).

XXXII “Yes, it is fear and silence and the spiritual isolation they cause that must be fought today. And it is dialogue the universal intercommunication of men that must be defended. Slavery, injustice and lies destroy this intercourse and forbid this dialogue; and so we must reject them. But these evils are today the very stuff of History, so that many consider them necessary evils. It is true that we cannot 'escape History', since we are in it up to our necks. But one may propose to fight within History to preserve from History that part of man which is not its proper province. That is all I have to say here”. Translation by the author.

XXXIII On the importance of 1946 for the beginning of Cold War see Engerman 2010: 34-41.

XXXIV On the issue of world order in modern and contemporary history see Mark Mazower 2012.

XXXV Camus compared this future universal “law” to the “law of majority” affirming that “*Les problèmes que pose aujourd'hui le droit de veto sont faussés parce que les majorités ou les minorités qui s'opposent à l'O.N.U. sont fausses. L'U.R.S.S. aura toujours le droit de réfuter la loi de la majorité tant que celle-ci sera une majorité de ministres, et non une majorité de peuples représentés par leurs délégués et tant que tous les peuples, précisément, n'y seront pas représentés. Le jour où cette majorité aura un sens, il faudra que chacun lui obéisse ou rejette sa loi, c'est-à-dire déclare ouvertement sa volonté de domination*”. Camus 2002: 659.

XXXVI On this point it is possible to say that while the idea of the relation between world democracy and peace was introduced by several intellectuals in nineteenth century debates, no attention was dedicated, before Camus, to the issue of the legitimacy of violence and murder in the absence of a universal order (with its psychological, ethical and dualist – the will to be dominant or dominated – aspects).

XXXVII E.g. Robespierre affirmed several times the supremacy of the Parliament on the other institutions of the State because, in his view, the Legislative Assembly was decisive to give form to the sovereign power of the people (Battista 1997: 16).



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## Article 260 TFEU Sanctions in Multi-Tiered Member States

by

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## Abstract

The question at hand is located at the intersection of EU law and national constitutional law, and aims to answer the following problem: namely, how to mitigate federal concerns in the context of infringement procedures and financial sanctions under art. 260 TFEU. This article approaches this question both from the perspective of the Commission and the Court of Justice, as well as from the vantage point of the central and regional governments involved. After analysing the composition of the financial sanctions, we cover the involvement of subnational entities in the infringements proceedings in six tiered Member States (Austria, Belgium, Germany, Italy, Spain, and the UK) and the relevant national provisions for the partition of financial sanctions. The conclusions pertain to both the central and regional level and the EU institutions concerned, adhering to the multi-level relationship subjacent to this article.

## Key-words

Federalism, regions, EU law, infringement procedures 260 TFEU, financial sanctions



## 1. Introduction

The dynamic process of constitutionalism in the European legal space features the increased recognition of several actors at the constitutional plane, including civil society, and autonomous regions. The position of regions *vis-à-vis* EU law is a well-known topic of scholarly debate, has been a subject of Treaty Reforms, and has challenged the Court of Justice on more than one occasion. The regional tax cases<sup>I</sup> are but one example where the need for effective and uniform implementation of EU law no longer buttresses a strategy of ‘regional blindness’ (Ipsen 1966: 256; Weatherill 2005: 1; Lenaerts & Van Nuffel 2005: 532-37; Panara & De Becker 2011: 297-344). This article initiates an inquiry in that same vein, more precisely with respect to the position of regions under art. 260 TFEU sanctions: how should and can EU and national constitutional law coordinate in order to recognize each actor, Member State or region, and its autonomy, but still maintain their principal objectives such as the uniform implementation and the effectiveness of EU law? Two recent cases, both infringement proceedings imposing financial sanctions on a Member State for regional failures, illustrate this vexing and complex problem.<sup>II</sup>

Financial sanctions, i.e. the lump sum and periodic penalty, aim at ensuring compliance with EU obligations. The infringement procedure has been rendered more effective (Kotzur 2015: 870; Hadroušek 2012: 235) subsequent to the Lisbon Reform, a necessary development in view of an ever-expanding *acquis*, 28 Member States and the intricate complexities of present-day governance. The application of article 260 (2) and (3) TFEU in tiered Member States raises important questions. From their perspective, subnational entities with legislative powers – generic ‘regions’ henceforth – need to defend and maintain their autonomy; on the one hand in a supranational context without an adult voice for those regions,<sup>III</sup> and, on the other hand, versus a central government that is charged with primary – one is tempted to say ‘sole’ – responsibility under EU law.<sup>IV</sup> The latter may lack the domestic instruments and legitimacy to perform a supervisory role, triggering further problems. Thus in case C-358/03, the federal government of Austria did not dispute the infringement as such, but argued that a judgment from the ECJ is needed in order to enable a substitution to implement the directive in the obstructive region of



Carinthia.<sup>V</sup> In Belgium, a similar requirement of prior judgement is required to allow the federal government to temporarily intervene.<sup>VI</sup>

This article starts from article 260 (2) TFEU and the Court's application of it (section 2). To this point, federal issues have only played a minimal role.<sup>VII</sup> We can nonetheless reasonably expect this problem to reoccur, and gain significant traction, in the future. How to align article 260 TFEU financial sanctions with a federal or regional system is a problem best dealt with by the Member State concerned. At least, this is the common wisdom and the traditional opinion of the Court. The next section (section 3) will cover selected Member States and the arrangements in place to allocate or divide the responsibility for article 260 financial sanctions in Austria, Belgium, Germany, Spain, Italy and the United Kingdom.<sup>VIII</sup> These Member States, categorized as federal or regional systems, have a tiered dimension, where regions with legislative powers are responsible for the transposition and implementation of EU law. Depending on the overall *telos* of the multi-layered system in the Member State under scrutiny, different strategies with respect to this problem can be distilled. Germany, for instance, recognizes the central, gate-keeping role of the federal government, constitutionally enshrined in article 104a (6) GG, while the UK and Spain rely on intergovernmental negotiations. This section, containing a functional comparison, will end with a summary.

The final section (4) draws up a synthesis of the inquiry, and offers guidelines for the relevant parties to the problem of article 260 TFEU financial sanctions in multi-tiered Member States: what can the Commission and the Court of Justice do to mitigate the existing problems and concerns? And what arrangements can Member States put in place to comply both with the EU's interest in implementation and the national, vertical institutional balance? The diversity of (quasi-)federal arrangements buttresses the Court's default position of rejecting federal arguments<sup>IX</sup>, but only to a certain extent. This article will defend the proposition that both the Commission and the ECJ should take federal concerns into account to a certain extent, chiefly by offering more transparency in the composition of the sanctions and thus allowing for an internal allocation of responsibility.



## 2. Article 260 TFEU

“*Panta rhei*” and the same goes for constitutional law. In an age of globalization and localism, the unitary nation state with a static conception of legal power no longer thrives. Instead, competences migrate along a bi-dimensional axis: towards the EU level, and to regions, yielding a complex picture that illustrates the high coordination costs associated with multilevel governance (Piattoni 2010: 26). The EU directive has long been one of the prime examples of the coordination and cooperation between different levels of government, primarily between the EU and the national Member-States. Institutionally, the EU was not conceived to incorporate regional and local concerns. However, this “regional blindness” is gradually declining, allowing for a direct role of regional actors on the EU stage. Moreover, due to the increased competences regions enjoy at the national level, their role in the implementation of EU law increases.<sup>x</sup> This important role brings about questions with regards to the legal mechanisms ensuring implementation and compliance.<sup>xi</sup> The EU directive is an important legislative instrument, but its transposition is no sinecure. The following figures substantiate this, from which we infer a significant correlation between the extent of regionalization of a Member State and problems with the implementation of EU law.



Table 1. Infringement proceedings per selected MS

Member State	Pending inquiries ex art. 258 TFEU per 31.12.2013 <sup>XII</sup>	Cumulative court cases 1952-2014 failure to fulfil obligations <sup>XIII</sup>	Declared infringements 2010-2014 <sup>XIV</sup>	Degree of regionalization <sup>XV</sup>
Austria	49	136	14	18
Belgium	75	382	26	28.1
Germany	63	278	13	29.3
Spain	90	241	32	13.5
Italy	104	641	34	22.7
United Kingdom	53	137	9	9.5
<i>Average EU-27<sup>XVI</sup></i>	<i>48<sup>XVII</sup></i>	<i>no data<sup>XVIII</sup></i>	<i>10</i>	<i>9.4<sup>XIX</sup></i>

Despite a certain correlation between the extent of regionalization and the implementation record as witnessed by these infringement numbers, some divergences do exist. Spain and Belgium show roughly similar infringement data, but are of a very different tiered system. Before we can address this issue, we will set out the practice of art. 260 TFEU.

## 2.1. General application

The infringement proceedings under article 258 and 260 TFEU offer the Commission a powerful weapon to ensure full compliance with EU law. Originally devised as a weapon of last instance, only exceptionally to have recourse to, the infringement procedure has evolved into a normal, reasonably transparent and technical procedure (Prete & Smulders 2010: 60).

Following the Lisbon reform, the Commission can now petition the Court, after a shortened administrative phase<sup>XX</sup>, for a financial penalty in case of non-compliance with a previous infringement declaration by the ECJ, or, in case of the non-communication of measures of transposition of directives - as respectively stated in article 260, para 2 and 3 TFEU. The general approach of the Commission to these financial sanctions has been set



out in a Communication from 2005,<sup>XXI</sup> together with an extra communication in 2011 on the use of article 260 (3) TFEU.<sup>XXII</sup> Statistical data used for calculation, such as the GDP per country, is updated annually.<sup>XXIII</sup>

The introduction of the new paragraph three is important for the question at hand, since the Commission indicated that she reads the ‘obligation to notify measures transposing a directive adopted under a legislative procedure’ as a comprehensive duty to transpose and communicate all measures under the directive concerned. I.e. the partial transposition, albeit materially or territorially, does not suffice to meet this obligation, and may thus trigger an article 260(3) procedure.<sup>XXIV</sup> Thus far, no 260(3) procedure has ultimately led to financial sanctions.<sup>XXV</sup>

The rule of thumb is to compute the financial penalty as petitioned by three main factors, namely, the duration and the seriousness of the infringement, and the necessity to deter future infringement.<sup>XXVI</sup> The penalty payment is the product of four variables: the basic flat-rate amount (€ 640), a coefficient for seriousness of infringement (ranging from 1 to 20), a coefficient based on the number of days an infringement persisted (ranging from 1 to 3)<sup>XXVII</sup>, and the capability to pay, expressed in the “n” factor.<sup>XXVIII</sup> The lump sum is calculated in the same manner, by multiplying the same coefficient for seriousness and the “n” factor, a basic flat-rate amount (one third of aforementioned flat-rate amount), and the number of days of the infringement.<sup>XXIX</sup>

Since the basic flat-rate amount and the “n” factor are predetermined, the case-law focuses mainly on the coefficients of duration and seriousness. In the interest of legal certainty, the Commission indicated that the two most important parameters to assess the seriousness of the infringement are the importance of the Union rules at stake, and the consequences of the infringement on general and particular interests.<sup>XXX</sup> In the first category reside obviously the four fundamental freedoms and human rights. Additionally, the Commission considers the behaviour of the Member State as important. Such behaviour may thus constitute aggravated circumstances; specifically, if any honest attempt at national implementation is missing, or if loyal cooperation is rather absent. On the other hand, if there are real problems of interpretation or intrinsic difficulties to comply<sup>XXXI</sup> with the declaratory judgment at short notice, these considerations may mitigate to a certain extent the severity of the infraction. On the criterion of the consequences for general and



particular interests, the Commission cites, for instance, the impact of the infringement on the functioning of the Union, or the magnitude of the population affected.

The case law diverges to some extent from these guidelines.<sup>xxxii</sup> The next section will aggregate the recent decisions.

## 2.2. Case law

The ECJ never fails to affirm the non-binding nature of the Commission's proposal for the computation of financial sanctions. Though essentially non-binding, they provide a useful point of reference.<sup>xxxiii</sup> A joint analysis of both the case law and the Commission's communications reveals a significant amount of mutual accommodation and cross-fertilization.

### 1. Penalty payment

When the Court imposes a penalty payment, the three criteria of duration, seriousness and ability to pay form a recurring pattern. In older cases, the Court explained in detail how it treated the Commission's proposal: when it raised the proposed coefficient of duration or seriousness,<sup>xxxiv</sup> when it lowered them,<sup>xxxv</sup> or when it maintained them.<sup>xxxvi</sup> In more recent cases, however, the Court no longer argues on the basis of the Commission's proposal, but develops an autonomous assessment on the three criteria. This tendency is deplorable from our vantage point, since transparency in the computation of the sanctions is precisely what enables national mechanisms to adequately divide the responsibility among the governmental levels concerned.<sup>xxxvii</sup> The quasi-mathematical formula from the Communication becomes reduced to a complex balancing act. The Court takes up several arguments it deems relevant and 'weighs' them.

When assessing the coefficient of duration, the ECJ turns first to an abstract opinion.<sup>xxxviii</sup> Next to this general finding, the Court also considers the character of the infraction, the difficulty to complete the implementation, and the measures already taken by the Member State.<sup>xxxix</sup> For an assessment of the seriousness, the Court seems to operate along the same lines by first seeking out the "importance" of the infringed obligation. For instance, breaches in the fields of human health, the environment or state aid, are considered quite serious.<sup>xl</sup> This abstract form of scrutiny is combined with or exchanged for an *in concreto* assessment: the Court will inquire into the extent of the



infraction and what measures the Member State has adopted meanwhile to alleviate the infringement.<sup>XLI</sup>

Finally, when the Court turns to the third criterion, the Member State's ability to pay, it invariably follows the Commission's calculation of the "n"-factor. The only digression found in the case law concerns the application of a recent update due to inflation and changes in the GDP of the Member State,<sup>XLII</sup> or the application of mitigating circumstances because of the financial crisis.<sup>XLIII</sup>

## 2. *The lump sum*

The Court draws upon the following determinants: the duration since the first judgment declaring the infringement, the seriousness of the breach and the attitude of the Member State. On the duration, the ECJ does not limit itself to a mechanical multiplication based on the number of days, but often it seeks out mitigating or aggravating circumstances that explain the Member States' posture in that period. The same considerations explained above, when assessing the duration with respect to the penalty payment, resurface: the character of the breach, the difficulty to achieve full compliance, and the interim measures adopted.<sup>XLIV</sup> The Court does not subscribe to the Commission's proposition that duration should only be taken into account when computing the penalty payment.<sup>XLV</sup> This is regrettable, since it would partially alleviate some of the concerns following the cumulative imposition of the sanctions.<sup>XLVI</sup>

The Court's treatment of the criterion of seriousness runs likewise largely parallel. Thus, the ECJ indicates which subject matter it deems to be of high importance,<sup>XLVII</sup> and it reviews the behavior of the Member State in the past.<sup>XLVIII</sup> Contrary to the practice in computing the penalty payment, the question to what extent public or private interests are affected by the infraction gains more attention.<sup>XLIX</sup>

On the attitude of the Member State, the Court regularly inquires if the cooperation with the Commission was sufficiently loyal, i.e. if the exchange of relevant information occurred in a timely manner. The question of whether the Member State has committed (similar) violations in the past – often treated when the criterion of seriousness is discussed – sometimes arises when assessing the attitude of the Member State.<sup>L</sup>



The considerations employed by the Court to compute the two types of sanctions are significantly intertwined, as exemplified by the multiple internal citations in a decision.<sup>LI</sup> This finding detracts from the transparency and coherence of the computation of both types of sanctions. In particular, with respect to multi-tiered Member States, the following problems cannot be answered by recourse to the ECJ's decision. A question that springs to mind concerns the responsibility of regions that do not - or no longer - partake in the breach at the stage of the second judgment under article 260 (2) TFEU but nevertheless have an influence on the computation of the sanctions, for instance because of a past implementation record. The next section will address in more depth the two leading cases where 'regional infringements' gave rise to a financial penalty.

### 2.3. Composition of sanctions in case of regional involvement

Cases C-610/10 and C-533/11 are of specific importance to the research question proposed. In both cases, the national government was not directly involved in the conduct under scrutiny. In the Spanish case, the Commission filed suit under article 260(2) TFEU because Spain had failed to recover illegal state aid from a company, even after a declaration of infringement.<sup>LII</sup> Though the original case cast a wider net,<sup>LIII</sup> the petition seeking financial sanctions under article 260(2) TFEU only envisaged the illegal state aid that was granted by the Autonomous Community of the Basque Country.<sup>LIV</sup> Thus a number of remarkable passages appear in the judgment, such as Spain communicating the actions of the Basque government,<sup>LIV</sup> or pleading a reduction of the "n"-factor since the Basque country only accounts for 6,24 % of the Spanish GDP.<sup>LVI</sup> Unsurprisingly, the latter argument did not find a receptive ear in Luxembourg.<sup>LVII</sup> Additionally, two other regions were involved in the initial case of illegal state aid. When the Court computed the penalty payment and the lump sum, considering the long duration of the infringement, this behaviour of other regions indirectly contributed to the weight of the penalty.<sup>LVIII</sup>

Case C-533/11 displays similar traits. The failure of Belgium to correctly transpose directive 91/271/EC of May 21<sup>st</sup>, 1991 concerning urban waste management<sup>LIX</sup> led to the declaration of infringement in 2004.<sup>LX</sup> According to Belgian federal division of competences, urban waste is a matter exclusively assigned to the regions.<sup>LXI</sup> Again, while in the initial infringement proceedings all three regions were to a certain extent at fault, the



amended petition of the Commission only envisaged 13 local communities under the responsibility of the Brussels and Walloon Region.<sup>LXII</sup> Moreover, at the hearing, the Commission confirmed only five local communities, in the Walloon Region, were not in conformity with the obligations of the directive. Similar to *Commission v Spain*, the financial sanctions, while seemingly addressing only the single region at fault in the ultimate phase, were composed based on the past behaviour of other regions with respect to the transposition.<sup>LXIII</sup>

Both cases illustrate a misalignment of the behaviour of the regional entities and the computation of the financial sanctions. This is especially apparent in the calculation of the factor of duration, since some of the regions might comply before the date of the deadline set in the Commission's Reasoned Opinion; and in the factor of seriousness, because there the past behaviour of other components of the Member State,<sup>LXIV</sup> or the number of citizens affected can be drawn into the equation.<sup>LXV</sup> From the vantage point of the subnational levels of government, a qualitative difference exists between non-differentiable and differentiable criteria that compose the computation of the lump sum and the penalty payment. Of course, it is up to national law to implement this difference.

The next section will look in more depth at the national mechanisms that ensure compliance with EU law and how the regional point of view is incorporated into the infringement proceedings. Lastly, we will analyse the different mechanisms that divide financial sanctions under article 260 TFEU between the responsible governmental layers.

### 3. National mechanisms in Austria, Belgium, Germany, Spain, Italy and the UK

Austria, Germany, Belgium, the United Kingdom, Italy, and Spain are being selected for study since regional bodies with legislative powers feature – to varying degree – in their constitutional system. ‘Tiered’ MS is our connotation comprising both federal and regional states.

The particular mechanisms surrounding the implementation of EU law in the selected multi-tiered Member States show different traits, inspired by the overall logic of the balance between the governmental layers. We will review these mechanisms with the following questions in mind: firstly, is there a supervisory role for the national government



(section 3.1)? Secondly, how and when are competent regions involved in the infringement proceedings under articles 258 and 260 TFEU (section 3.2)? Finally, in the case of financial penalties based on article 260 TFEU, how are they allocated to the responsible governmental layer (section 3.3)?

These questions connect the enforcement mechanisms with the responsibility to implement EU law. Referring to the figures above in [table 1], the discrepancies between countries with a higher degree of regionalization, but a relatively low amount of infringement cases, can be explained due to a better functioning monitoring system or better intergovernmental cooperation. This is an important finding, considering the obligation of Member States to put optimal mechanisms in place in order to optimize the implementation and enforcement of EU law.<sup>LXVI</sup> We will revisit this point infra when discussing the national substitution mechanisms.

### 3.1. The national Member State as guarantor of EU obligations?

The six selected Member States, where differing degrees of regionalization play, seem to have a common trait with respect to compliance with EU law. From a cooperative system, like Germany, to a dual system, like Belgium, a provision allowing the national government to intervene or take control to ensure compliance following a (predetermined) breach of EU law, is installed.

In Belgium, this right to intervene is an anomaly given the dualistic set-up and the exclusive division of competences. The adage holds that for each individual case, a single entity, federal or regional, can be deemed competent on the matter, to the exclusion of others.<sup>LXVII</sup> One of the exceptions<sup>LXVIII</sup> is article 16 § 3 SAIR that allows the federal government to substitute itself for the regional government, responding to an international judgment and under the requirement of previous consultation with the subnational government concerned. When the article was devised in 1992, the *travaux préparatoires* explicitly referred to the infringement proceedings of article 258 and 260 TFEU.<sup>LXIX</sup> Though it was never applied in practice, this did not dissuade the constituent power to enhance the scope of this article in the recent round of state reform. Article 16 SAIR will now also be applicable with respect to the UN Climate convention, and will even eliminate the requirement of a declaration of infringement, similar to article 260(3) TFEU, but only in matters concerning the reduction of greenhouse gasses.<sup>LXX</sup>



In the UK, the central and supervisory role of the Westminster government is hardly surprising. Not only does the division of competences rest on an intergovernmental agreement that is not susceptible to judicial review,<sup>LXXI</sup> in the annex to the Memorandum of Understanding on devolution is a section on the EU, where several consultation requirements betray a strong cooperative emphasis.<sup>LXXII</sup> Moreover, the European Union Act addresses the implementation of EU law as a concurrent competence.<sup>LXXIII</sup> Point 21 of the Memorandum thus conveys the agreement to sustain regional autonomy in these matters, with the legal proviso of intervention if warranted.<sup>LXXIV</sup> While in federal countries such intervention is of a mere academic nature, in the UK this is no moot point.<sup>LXXV</sup> Additionally, the devolved acts explicitly reserve the law-making powers of Westminster on the devolved territory.<sup>LXXVI</sup> In the specific case of EU law, this and other provisions install a joint compliance mechanism.<sup>LXXVII</sup> Thus, when the implementation of EU law is deemed to require uniformity, this may be done through an act of the Westminster Parliament for the whole of the UK.<sup>LXXVIII</sup>

Germany organizes the participation of the Länder through the Bundesrat, which is composed of members of the regional executive bodies. Article 23 of the Basic Law describes at length the various rights and duties of the Bundesrat concerning EU policy. Next to these participation rights, article 37 of the Basic Law constitutionally enshrines the right of the federation to intervene.<sup>LXXIX</sup> Following the duty of *Bundestreue*, implementation of EU law is a constitutional duty (Putler 2008: 1050), safeguarded by a federal right to intervene. Similar to the Belgian mechanism, no use has been made of this mechanism.<sup>LXXX</sup>

The Austrian constitution contains a similar clause enabling a federal right to intervene.<sup>LXXXI</sup> In *Commission v. Austria* for instance, the federal government admitted in the proceedings that in order to intervene *en lieu* of a recalcitrant Land, a prior judgment declaring the infringement is constitutionally required.<sup>LXXXII</sup> Until now, the substitution clause is applied only once (Kiefer 2011:168). Following a declaration of infringement by the ECJ because of a failure to transpose in full Directive 97/65/EC on the protection of workers,<sup>LXXXIII</sup> the federal government issued a regulation for the Land of Carinthia.<sup>LXXXIV</sup>

In Spain, no similar substitution mechanism exists in the Constitution.<sup>LXXXV</sup> However, the constitutional court derives a particular and partial substitution mechanism to ensure compliance from article 149(3).<sup>LXXXVI</sup> It envisages the case where a matter is regulated by EU law, and is asymmetrically devolved within Spain. For those regions that are not



competent to regulate this matter, the national level will obviously legislate. On the territory of other regions that do enjoy competence in that matter, but have not yet acted, the central norm may be temporarily applicable (Vuillermoz 2003: 684-685). Thus, when a directive expires and is not implemented by one or more Autonomous Communities under its shared powers, the central state may expand its competence so as to remedy – temporarily – the lacuna. A posterior measure of these regions subsequently takes precedence (Chicharro Lázaro 2011: 203-204; Ross & Salvador Crespo 2003: 220). This mechanism does not apply to those powers that are exclusively attributed to an Autonomous Region.<sup>LXXXVII</sup>

In Italy, the Italian Constitutional Court has ruled that the implementation of EU law should follow the division of competences as set out in the Constitution.<sup>LXXXVIII</sup> The 2001 constitutional reform recognized, however, the national responsibility for the implementation vis-à-vis EU institutions. Therefore, the national State can intervene to correct for a regional legislative act or omission, as stipulated in articles 117, paragraph 5 and article 120, paragraph 2 of the Constitution.<sup>LXXXIX</sup> The procedure of this substitution requires a notice from the Prime Minister or the Minister for Community Policy, and if the region fails to comply within a time limit, the national government can enact a measure in order to end the infringement.<sup>XC</sup>

### 3.2. Regional involvement in infringement proceedings

Every Member State under analysis has developed methods for cooperating in supranational litigation, thus giving regions an indirect voice at the EU level. The UK has a specific consultation mechanism on infringement proceedings, which allows a devolved region to take the lead when it concerns devolved matters.<sup>XCI</sup> In Spain, the right to intervene in infringement proceedings where an Autonomous Community is involved, is guaranteed through an intergovernmental agreement<sup>XCII</sup> signed in 1990.<sup>XCIII</sup> The mechanism is quite cooperative, requiring exchange of information in the administrative phase, and allowing for the regional government to submit observations to the Court through the national government (Chicharro Lázaro 2011: 205). In Italy, a similar cooperation agreement between the State and the Regions has been adopted in 2008, with an emphasis on coordination and information exchange.<sup>XCIV</sup> Moreover, since 2012, the national government is required to send quarterly reports on pending inquiries and infringement



proceedings to the House, and to the Regions.<sup>XCv</sup> In Belgium, the involvement of regions in infringement proceedings can take two routes: either through article 16 § 3 SAIR, which requires the federal government to consult with the region that has breached EU law. In practice, cooperation is achieved through the Interministerial Conference on Foreign Policy, and no recourse was ever made to the rights on consultation in article 16 SAIR. When Germany is the subject of an infringement proceeding with a regional dimension, coordination of an agreement ('Einvernehmen') between the federal and the regional level is achieved through the Bundesrat.<sup>XCvi</sup> Note that, as opposed to Belgium, Spain and the UK, this is a collective mechanism (Panara & De Becker 2011: 340-341).

### 3.3. Partition of financial sanctions

The points of departure are the various national mechanisms for redress – for it is the national Member State that needs to pay the fine in the Commission's account.<sup>XCvii</sup> More often than not, the national partition of the financial sanctions will thus take the form of a right to redress. The general thrust of the mechanisms is to allocate the burden to whichever level that bears the responsibility for the infraction. We distinguish three strands. The first variant mitigates this burden by taking the budgetary capacity of the region into account, while the second allocates the amount in full to the region responsible. The third strain tries to divide the sanctions with respect to the share in the infraction, and the size of the financial sanction.

Germany is a case in point to illustrate the first variant. In a rather rigid set-up, a mechanism for division of sanctions was set up, that allocates the burden to the party responsible, and minimizes ad hoc any disagreement. As well as being a rigid system, it is the most detailed of all mechanisms covered. Prior to the arrangement by the law of 2006 – the *Lastentragungsgesetz* – several issues were unclear: should the federal government bear the brunt of the penalty, and what criteria should determine the internal allocation?<sup>XCviii</sup> The 2006 constitutional reform included a new provision: article 104aVI,<sup>XCix</sup> elaborated in the *Lastentragungsgesetz*.<sup>C</sup> This article concerns the financial sanctions following a violation of inter- or supranational obligations of Germany, amongst which are the moderate indemnities imposed by the ECtHR.<sup>ci</sup> To allocate the financial burden, one should follow



the internal division of competences. Hence, the competent authority, Land, *Länder* or *Bund*, is responsible for the financial consequences.<sup>CII</sup> When the ECJ fines Germany under article 260 TFEU, three hypotheses are to be discerned. Firstly, if the infringement of EU law is a joint responsibility of both the federal government and the *Länder*, each bears the financial burden proportionate to their share in the infringement.<sup>CIII</sup> Secondly, if the infringement can be ascribed to two or more *Länder*, but not the federal government, the division between the *Länder* concerned is based on the *Königsteiner*-calculus.<sup>CIV</sup> This calculus determines the share of each Land on a fixed basis, for two-thirds dependent on tax revenue, and for one-third on the size of population.<sup>CV</sup> This method is generally accepted in Germany to determine the share of the regions in joint financing.<sup>CVI</sup> Through the fixed criteria, ad hoc political disagreement is severely reduced. Thirdly, in the specific case of *länderübergreifender Finanzkorrekturen* a rule of solidarity is installed.<sup>CVII</sup> When the Commission opines that a misuse of structural or cohesion funds has occurred in one or more *Länder*, it can assume the same happened in other *Länder*. In this specific case, the sanctions are divided with a fixed share of 15 % for the federal government, and the other 85% for the *Länder*. Out of this 85%, the *Länder* that in fact gave rise to the sanctions carry 50%, and the remaining 35% is divided amongst all *Länder*, according to the *Königsteiner*-calculus.<sup>CVIII</sup>

A second strand builds on the example of the United Kingdom. There exists no legally binding rule to allocate financial sanctions, but according to the *Concordat on Co-Ordination of European Policy Issues*, financial sanctions imposed on the UK because of an act of a devolved body, will be allocated to that body.<sup>CIX</sup> Disputes will primarily be settled through bilateral negotiation; failing that, the matter will be put before the 'Joint Ministerial Committee' (Ross & Salvador Crespo 2003: 225) composed of members of the national and regional government.

Spain has set up a system in the third category. Each governmental level should take up its responsibility in case of a fine. This responsibility will be determined by the national government, after consultation with the regional executives.<sup>CX</sup> Important to note is that the federal government is obliged to take all the relevant criteria as deployed by the ECJ into consideration when deciding on the responsibility.<sup>CXI</sup> Supra, in section 2.3 we highlighted the discrepancy between the composition of the fine and the responsibility of the region in the final judgment, for example as displayed in the computation of the capability to bear



(n-factor). Other examples of that finding are the persecution for general and persistent infringements<sup>CXII</sup>, or the subcriterion of past violations. The Spanish mechanism allows the government to decide upon these issues when allocating the financial burden. A prerequisite for this mechanism to function is a sufficiently transparent reasoning by the ECJ on the determining factors.

The outliers, Italy, Belgium and Austria, both have a minimalistic mechanism, essentially assigning the financial sanction to the region responsible. Belgium has no comprehensive rule outside of the redress mechanism in article 16 § 3 SAIR. The recent imposition of fines in judgment C-533/11 gave rise to some political bickering. The secretary indicated in a plenary hearing of the House that should the regional governments not find any accommodating solution, this right to redress would be put into practice for the first time.<sup>CXIII</sup> Upon submitting this article, no subsequent action could be traced. In Austria, article 3(2) of the 2008 *Finanzausgleichsgesetz* obliges the responsible Länder to shoulder the costs for breaches of EU law following a judgement of the ECJ.<sup>CXIV</sup> The same principle is confirmed in an intergovernmental agreement on the cooperation of regions and local communities vis-à-vis European affairs.<sup>CXV</sup>

Italy has a similar system, where the State has a right of financial redress to the Regions that are responsible under national constitutional law for the infringement of EU law.<sup>CXVI</sup> This right, expanded in article 43 of the Law no 234/2012, envisages three kinds of penalties: a penalty under article 260 (2) and (3) TFEU, a penalty for violation of the European Convention of Human Rights, and the financial charges arising out of the misuse of EU agricultural or structural funds.<sup>CXVII</sup> The damages that can be reclaimed from the Regions are limited to the total amount of the penalty paid, and will be imposed through Ministerial Decree within three months of the notification of the judgement to the Italian State.<sup>CXVIII</sup> Thus far, this redress has only been exercised with respect to violation of the European Convention of Human Rights by municipalities.<sup>CXIX</sup>

The majority of these national provisions have not – yet – been put to the test. Apart from the detailed German arrangement, it is unclear how these mechanisms can successfully address the theoretical complexity of the sanctions in light of regional autonomy. In absence of a structural settlement, we can expect the Belgian clause to be used to redress the fine in the case *Commission v Belgium*. Additionally, Spain is again



involved in infringement proceedings possibly leading to a severe financial penalty for illegal state aid resulting from regional measures.<sup>CXX</sup>

#### 4. Synthesis in propositions

The previous sections have dealt with the problem of regional liability under article 260 TFEU from both the national (C) and the European vantage point (B). It results that both are not perfectly aligned. We offer three propositions to improve this misfit.

*Proposition 1: A more facilitative posture of the Commission and the European Court*

The finding above that the method of computation of the financial sanctions under article 260 TFEU is rather opaque, renders the application of a system of internal partition in multi-tiered Member States even more problematic. The responsibility of each actor has to derive unambiguously from the reasoning of the Court, with respect to both the penalty payment and the lump sum. Indeed, the national Member State is solely responsible before the Court for the compliance with EU law.<sup>CXXI</sup> In other words, the allocation of internal responsibility for the financial sanctions is, from the perspective of the EU, “your problem, not mine” to put it in vulgar terms. This explains the summary rejection of Spain’s argument on the ability to pay of the Basque region.<sup>CXXII</sup> In another – more recent - case, the ECJ even explicitly rejected the question from Spain to be more precise in order to allow for an internal allocation mechanism to function.

“The Kingdom of Spain claims that the Court is required to state, for each of the contested decisions, the sums which have not yet been recovered, since that Member State is obliged, by virtue of its domestic law, to pass on the penalties imposed by the Court to the infra-State entities responsible for the infringement of EU law.

In that regard, it must be pointed out that the allocation of internal central and regional powers cannot have any bearing on the application of Article 260 TFEU, since the Member State concerned is responsible towards the European Union for compliance with obligations arising under EU law.

It follows that a finding of a failure to fulfil obligations made by the Court in the procedure provided for in Article 260(2) TFEU cannot depend on the particular



features of the internal organisation of the Member State concerned.

Furthermore, it follows from the considerations in paragraph 22 of this judgment that it is for the Kingdom of Spain to verify the individual situation of each undertaking concerned and to determine the exact amounts of the aid which should have been recovered under the contested decisions, taking into account the indications given in those decisions.”<sup>CXXIII</sup>

Nonetheless, the Court of Justice does note the respective role of the subnational governments, as for instance in *Commission v Belgium*, where the Court out of its own motion asked the Belgian government and the Commission to indicate “the exact stage of compliance with the judgment in *Commission v Belgium* as of 1 April 2013, listing the agglomerations [...]”.<sup>CXXIV</sup> The Belgian government added that those five agglomerations in point all reside in the Walloon region.<sup>CXXV</sup> The Court did not directly respond to this, obviously for lack of necessity, but did take into account the severe reduction in the number of agglomerations breaching the *Urban Waste* Directive relative to the first judgment.<sup>CXXVI</sup> In another infringement case, under article 258 TFEU,<sup>CXXVII</sup> the Court clearly did indicate in its dictum where the infractions of each competent region reside.<sup>CXXVIII</sup> This detailed declaration followed the decision of the Commission to discontinue the procedure against the national government. The paragraph – only available in French or Dutch – is worth quoting in full:<sup>CXXIX</sup>

« Après avoir examiné la réponse du Royaume de Belgique au regard des compétences qu’il exerce en tant qu’autorité fédérale, la Commission a décidé de ne pas poursuivre la procédure en ce qui concerne cette dernière. La Commission a néanmoins maintenu sa position en ce qui concerne la Région flamande, la Région wallonne ainsi que la Région de Bruxelles-Capitale et émis, par lettre du 17 octobre 2008, un avis motivé dans lequel elle reprochait aux autorités de ces trois Régions de ne pas avoir pris toutes les mesures nécessaires pour transposer complètement les dispositions de la directive 85/337. En conséquence, le Royaume de Belgique a été invité à se conformer à cet avis dans un délai de deux mois à compter de la notification de celui-ci. »



We acknowledge the difference between the binary declaration of an infringement versus the computation of financial sanctions under article 260 (2) or (3) TFEU, but with more rigor and transparency in the reasoning, the national mechanisms to allocate responsibility would be served.<sup>CXXX</sup> The Commission could play a pivotal role in this respect, as it has announced in its communication. In case of several heads of infringement, the Commission could propose separate sanctions if clear and objective data are available.<sup>CXXXI</sup>

*Proposition 2: Regions should be able to submit observations in infringement proceedings where they are responsible*

Regions are no privileged applicants in the sense of art. 267 TFEU and cannot challenge EU legislative acts. A pendant of the privileged status is the ability to intervene in other proceedings. In this respect too, regions are treated on the same footing as private applicants and need to demonstrate an interest. However, infringement proceedings are invariably between the Commission and a Member State and regions are thus under article 40(2) of the Statute of the CJEU precluded to intervene (Materne 2012: 289-290; Wägenbaur 2013: 115). For instance, in *Commission v. Italy*,<sup>CXXXII</sup> the application by the region of Liguria to intervene was rejected.<sup>CXXXIII</sup> The substance of the infringement nonetheless concerned a measure of that very same region. Moreover, the Italian government indicated that it limited itself in transmitting the arguments of Liguria without sharing them with regards to the content. It did not dispute the Commission's point of view; in fact, the Italian government was of the same opinion.<sup>CXXXIV</sup> Without any opinion on the content of the breach, one could question the reconcilability with the rights of defense.

Infringement proceedings are thus conducted by the national government with the freedom to appoint agents and legal counsel. The current state of the law thus heavily relies upon loyal cooperation at the national level. This assumption may be untenable in view of the composition of the sanctions and the national partition. If the federal government for instance, can be exonerated following the national mechanism, it might bring the Court to address the national division of competences. Per hypothesis, in a setting with shared powers or framework competence – it might be hard to precisely allocate the breach. In this case of dissonance between the national and the regional interests, much depends



upon the strength of the national channels of communication and the rights of the regions in the proceedings.

Next to this national perspective, one could question what is exactly lost should art. 40(2) of the Statute be amended as to allow the regions concerned to submit observations directly. On the plus side, it would help the Court in striking a balance between the recognition of constitutional regional autonomy and the necessity of precluding a strategic use of the argument of division of competences.<sup>CXXXV</sup> It would also strengthen the objective of the infringement proceedings, i.e. to ensure full compliance,<sup>CXXXVI</sup> by furthering dialogue and participation, *a fortiori* when the matter at hand is an exclusive regional competence.

*Proposition 3: National implementation*

Section 3.3 above contains a comparative analysis of the national mechanisms allocating the responsibility to bear the financial burden imposed by the ECJ on the Member State. We already evinced the issue that the obligation of article 260(1) TFEU extends to all institutions and levels of the Member State concerned.<sup>CXXXVII</sup> A well-functioning substitution mechanism that ensures compliance at an earlier stage than the invocation of article 260 TFEU may lead to a shared responsibility under EU law.<sup>CXXXVIII</sup> When, for instance, an ex post substitution mechanism is triggered after a declaration of infringement by the ECJ, this optional avenue to ensure compliance may draw the federal government into the material infringement under article 260(1) TFEU. It may even lead the Court to downgrade the findings on the loyal cooperation of the Member State and in turn negatively affect the financial sanctions.

A second problem is of a more practical nature and relates to the necessary expertise and administrative capacity to implement directives in a given field. In the Belgian case, due to the exclusive division of competences, this necessary administrative expertise may be lacking to properly intervene, albeit temporarily. This may be solved by having recourse to the measures enacted by the other regional bodies, and extending them.

To sum up, the characteristics of a well-designed national mechanism are threefold: a) there exists a possibility for a concurrent exercise of powers by allowing a temporal intervention by the national government; b) the division of the financial sanctions is as lucidly set out as possible; c) the national mechanism takes due account of the



requirements of EU law.

## 5. Conclusions

We set out to inquire how federal concerns and interests can be mitigated in the context of infringement procedures and financial sanctions under art. 260 TFEU. This article has analysed this question both from the perspective and practice of the Commission and the Court of Justice, as well as from the vantage point of the central and regional governments involved.

A careful analysis of the composition of financial sanctions has shown that regional responsibility and autonomy fits uneasily into current practice. From the perspective of EU law, the principle of equality, and responsibility, of the Member States precludes any direct imposition of sanctions. Even in the calculation, as we have seen in section B.III, the regional dimension is hardly taken into account.

We have turned to the various national mechanisms of redress to assign the internal responsibility for the financial sanctions under article 260 TFEU. In the six cases we have selected (Austria, Germany, Belgium, UK, Spain and Italy), different national mechanisms have been set up. It appears that these mechanisms are to a large extent untested, and leave large scope for political negotiation. Additionally, in these MS, regions often cannot access the infringement proceedings.

In conclusion, the Lisbon-fuelled enhancements of the article 260 TFEU procedures call for due attention to the structural dimension of several Member States. Timely implementation and compliance are the primordial objective. Failing that, a well-designed national mechanism to divide the sanctions at the national plane<sup>CXXXIX</sup>, and more transparent and coherent reasoning from the Court and the Commission are warranted.

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<sup>I</sup> Case C-88/03, *Portugal v. Commission*, [2006] ECR I-7115; Joined Cases C-428/06 to C-434/06, *UGT La Rioja*, [2008] ECR I-6747; Case C-169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, [2009] ECR I-10821; Greaves 2009.

<sup>II</sup> Case C-610/10, *Commission v. Spain*, judgement of 11 Dec. 2012, nyr; Case C-533/11, *Commission v. Belgium*, judgement of 17 Oct. 2013, nyr.

<sup>III</sup> On the subject of a regional voice in a multilevel setting, three central questions have been addressed in recent scholarship: the possibility to let regions partake in the deliberation of the Council based on art. 16(2) TEU (for an overview see Skoutaris 2012: 216-222; and the *locus standi* of regional entities before the Court of



Justice (see for instance Gamper 2013); Lenaerts & Cambien 2010. Thirdly, on the regional dimension of the subsidiarity principle, see Popelier & Vandenbruwaene 2011.

<sup>IV</sup> Cf. Cygan 2013.

<sup>V</sup> Case C-358/03, *Commission v. Austria*, [2004] ECR I-12055, para 11.

<sup>VI</sup> The right of substitution in article 16 § 3 of the Special Act of Institutional Reform of August 8<sup>th</sup>, 1980 (SAIR).

<sup>VII</sup> See *Commission v. Spain* and *Commission v. Belgium*, cited supra n. II.

<sup>VIII</sup> The first mentioned three States proclaim their federal nature in the respective constitutions (art. 1 Belgian Const., art. 20(1) GG and art. 2 B-VG). On Spain, see Chicharro Lázaro 2011; on Italy, see Grottanelli de' Santi 2006; on the UK, see Leyland 2011.

<sup>IX</sup> “The fact that a Member State has conferred on its regions the responsibility for giving effect to directives cannot have any bearing on the application of Article 226 EC. The Court has consistently held that a Member State cannot plead conditions existing within its own legal system in order to justify its failure to comply with obligations and time-limits resulting from Community directives. While each Member State may freely allocate internal legislative powers as it sees fit, the fact remains that it alone is responsible towards the Community under Article 226 EC for compliance with obligations arising under Community law”; see, for instance, Case C-87/02, *Commission v. Italy*, [2004] ECR I-5975, para 38; *Commission v. Spain* (note II) para 132. This often repeated mantra stems from international law: see article 27 of the Vienna Convention on the Law of Treaties.

<sup>X</sup> Committee of the Regions, White Paper on Multi-Level Governance (2009) 3-4; Christiansen & Lintner 2005.

<sup>XI</sup> A point which travels beyond ‘federal’ Member States, see the recent discussion in France on territorial reform, and the issue of compliance with EU law: Boulet 2015.

<sup>XII</sup> Based on the latest Report of the Commission on the Application of EU Law, COM(2014)612, 11.

<sup>XIII</sup> Based on the Annual Report of the Court of Justice 2014, 120.

<sup>XIV</sup> Based on the Annual Report of the Court of Justice 2014, 106.

<sup>XV</sup> Based on Hooghe, Marks & Schakel 2010: 170-176, compiling an aggregate regional authority index for 42 countries in the period 1950-2006. In the sample of 42 countries are all 28 members of the EU. The aggregate regional authority index is based on 8 indicators composing self-rule (score on 15) and shared-rule (score on 9), compiled per region in the selected country and weighted for population. To interpret the index as reproduced here, the regional authority index varies between 0,0 (e.g. Malta) and 30.6 (Bosnia). Other federal countries (USA: 23.2; Switzerland: 19.5) provide a point of reference too.

<sup>XVI</sup> Obviously, Croatia would reduce the average and is hence omitted.

<sup>XVII</sup> COM (2014)612, 11, the Report of the Commission on the Application of EU Law, counts 1300 open infringing cases. The result, 48, is the quotient, rounded off.

<sup>XVIII</sup> Due to the discrepancy in length of Membership of the EU, an average of the absolute sum of cases yields a partial picture. The next column (infringements declared 2010-14) is a more adequate basis for comparison.

<sup>XIX</sup> Hooghe, Marks and Schakel 2010, incorporate different periods per state, depending on constitutional reforms implemented. We have used the most recent figures per country.

<sup>XX</sup> No requirement of a reasoned opinion: see the Communication from the Commission “Implementation of Article 260(3) of the Treaty” 2011/C 12/01; Materne 2012: 38-47; Prete & Smulders 2010: 31; Kilbey 2010: 383-384.

<sup>XXI</sup> SEC(2005)1658, as amended by SEC(2010)923. See the analysis by Kilbey 2007.

<sup>XXII</sup> 2011/C 12/01.

<sup>XXIII</sup> The last update dates from September 2014: C(2014) 6767.

<sup>XXIV</sup> SEC(2010)1371, point 19; Gáspár-Szilágyi 2013: 283-284. Contra, based on a literal interpretation of article 260(3) TFEU: Träbert 2009: 395.

<sup>XXV</sup> All cases have been withdrawn, see for instance the Order in Case C-329/14.

<sup>XXVI</sup> SEC(2005)1658, point 6.

<sup>XXVII</sup> 0.10 per month of duration, starting from the first judgement (procedure under paragraph 2) or from the date of expiration set in the directive (procedure under paragraph 3).

<sup>XXVIII</sup> See SEC(2005)1658, points 14-18.

<sup>XXIX</sup> See SEC(2005)1658, points 19-24.

<sup>XXX</sup> SEC (2005) 1658, point 16.



XXXI This point relates to the finding of Materne, who concludes from the case-law that only *force majeure* can be successfully relied upon as a defense. See Materne 2012: 263.

XXXII In the words of AG Sharpston: “it is clear from the case-law that the Court’s practice has never been to follow the Commission’s detailed calculations when determining the amount of a lump sum but to determine a suitable amount, having regard to all the circumstances, in round figures. In doing so, it has not generally provided any precise detail of its reasoning but has merely pointed out the various aggravating and mitigating factors taken into account”: Opinion of the Advocate-General in Case C-184/11, *Commission v. Spain* of January 23, 2014, para 126.

XXXIII E.g. Case C-387/97 *Commission v. Greece*, [2000] ECR I-5047, para 89; Case C-70/06, *Commission v. Portugal*, [2008] ECR I-1, para 34; Case C-241/11 *Commission v. Czech Republic*, judgement of 25 June 2013, nyr, para 43; and the Opinions of the Advocate-General in cases C-109/08, [2009] ECR I-4657, para. 72; and in Case C-407/09, [2011] ECR I-11483, para. 46.

XXXIV E.g. Case C-278/01 *Commission v. Spain*, [2003] ECR I-14141, para 47-48 and 53-54; Case C-177/04 *Commission v. France*, [2006] ECR I-2461, para 65-66 (ECJ raises the coefficient of duration from 1,3 to 3); *Commission v. Portugal* (note XXXIII) para 44-47 (ECJ raises the coefficient of duration from 1 to 2); Case C-109/08, *Commission v. Greece*, [2009] ECR I-4657, para 39-41 (ECJ raises the coefficient of duration from 1,1 to 1,5).

XXXV E.g. *Commission v. Spain* (note XXXIV, para 47-48 and 53-54 (ECJ lowers the coefficient of duration from 2 to 1,5); *Commission v. Portugal* (note XXXIII) para 40-43 (ECJ substantially reduces the coefficient of seriousness from 11 to 4).

XXXVI E.g. *Commission v. Spain* (note XXXIV) para 55 (ECJ maintains the coefficient of seriousness of 4); Case C-304/02 *Commission v. France*, [2005] ECR I-6263, para 108 (ECJ maintains the coefficient of seriousness of 10); *Commission v. France* (note XXXIV) para 65-66 (ECJ maintains the coefficient of seriousness of 1).

XXXVII For a critique on the low degree of transparency and consistency, see Craig & de Búrca 2010: 438; Kilbey 2010: 370.

XXXVIII Case C-369/07 *Commission v. Greece*, [2009] ECR I-5703, para 116-117 (ECJ considers 4 years “a considerable period of time”); Case C-496/09 *Commission v. Italy*, [2011] ECR I-11483, para 58-59 (ECJ finds 7 years “a very considerable period of time”); *Commission v. Spain* (note II) para 121 (“an exceptionally long period”); Case C-374/11 *Commission v. Ireland*, judgment of 19 December 2012, nyr, para 40 (ECJ deplores the “particular lengthy character of the infringement”, *in casu* over 19 years). 378/13, Case C-378/13, *Commission v. Greece*, [2014] nyr, para 72.

XXXIX E.g. *Commission v. Spain* (note XXXIV) para 47-48 and 53-54; *Commission v. France* (note XXXIV) para 65-66; *Commission v. Italy* (note XXXVIII) para 48-49; *Commission v. Ireland* (note XXXVIII) para 40.

XL E.g. *Commission v. Spain* (note XXXIV) para 57; *Commission v. Greece*, (note XXXVIII) para 118-122; *Commission v. Italy* (note XXXVIII) para 60-64; *Commission v. Ireland* (note XXXVIII) para 38.

XLI E.g. *Commission v. France* (note XXXIV) para 65-66; *Commission v. Greece*, (note XXXVIII) para 122; *Commission v. Italy* (note XXXVIII) para 62-63.

XLII E.g. *Commission v. Italy* (note XXXVIII) para 65; *Commission v. Spain* (note II) para 131.

XLIII E.g. *Commission v. Ireland* (note XXXVIII) para 44.

XLIV E.g. Case C-568/07 *Commission v. Greece*, [2009] ECR I-4505, para 53; Case C-121/07, *Commission v. France*, [2008] ECR I-9159, para 70; *Commission v. Ireland* (note XXXVIII) para 40; *Commission v. Belgium* (note II) para 57.

XLV *Commission v. Belgium* (note II) para 42 (the Court states that “the criterion relating to the duration of the infringement, [is] according to the Commission’s claim, relevant only for the calculation of the penalty payment”) and para 54 (where the Court does take the duration into account when composing the lump sum payment).

XLVI On the double use of the criterion of duration by imposing both types of sanctions cumulatively, see Prete & Smulders 2010: 53; Kilbey 2007: 754.

XLVII E.g. *Commission v. France* (note XLIV) para 73-78 (importance of environmental protection); *Commission v. Greece* (note XLIV) para 54 (internal market/free movement); *Commission v. Greece*, n. XXXIII) para 38-39 (internal market/free movement); *Commission v. Belgium* (note II) para 55-56 (importance of environmental protection).

XLVIII E.g. Case C-270/11 *Commission v. Sweden*, judgment of 30 May 2013, nyr, para 55; *Commission v. Ireland* (note XXXVIII) para 49.



- XLIX Depending on the elaboration of this point by the Commission, see Case C-270/11 *Commission v. Sweden* (note XLVIII) para 50.
- L E.g. *Commission v. France* (note XLIV) para 66-69; *Commission v. Belgium* (note II) para 60.
- L<sup>I</sup> E.g. *Commission v. Greece* (note XXXVIII) para 148; *Commission v. Spain* (note II) para 145; *Commission v. Ireland* (note XXXVIII) para 52; *Commission v. Belgium* (note II) para 72.
- L<sup>II</sup> Case C-499/99, *Commission v. Spain*, [2002] ECR I-6031.
- L<sup>III</sup> *Commission v. Spain* (note II) para (note 7, 10 and 45).
- L<sup>IV</sup> *Commission v. Spain* (note II) para 4.
- L<sup>V</sup> *Commission v. Spain* (note II) para 61, 85, 86.
- L<sup>VI</sup> *Commission v. Spain* (note II) para 91.
- L<sup>VII</sup> *Commission v. Spain* (note II) para 132.
- L<sup>VIII</sup> See *Commission v. Spain* (note II) para 120-124, and 145.
- L<sup>IX</sup> OJ L 135, 40.
- L<sup>X</sup> Case C-27/03, *Commission v. Belgium*, judgment of July 8<sup>th</sup>, 2004, not reported.
- L<sup>XI</sup> Since 1988, based on article 6, §1, II, 2° SAIR.
- L<sup>XII</sup> *Commission v. Belgium* (note II) para 20.
- L<sup>XIII</sup> *Commission v. Belgium* (note II) para 54, 71.
- L<sup>XIV</sup> SEC(2005)1658, points 16.4, 10<sup>th</sup> indentation.
- L<sup>XV</sup> SEC(2005)1658, points 16.4, 8<sup>th</sup> indentation (size of population affected). This criterion is quite relevant for spatially diverging regions, such as in Belgium – on the territory of Brussels Capital, four autonomous levels of government enjoy competences.
- L<sup>XVI</sup> See, for instance, Joined Cases C-227-230/85, *Commission v. Belgium*, [1988] ECR 8, para 9: “[...] That division of powers does not however release it [Member State] from the obligation to ensure that the provisions of the directive are properly implemented in national law.”; Case C-8/88, *Commission v. Germany*, [1990] ECR I-2321, para 13: “[...] it is for all the authorities of the Member States, whether it be the central authorities of the State or the authorities of a federated State, or other territorial authorities, to ensure observance of the rules of Community law within the sphere of their competence. However, it is not for the Commission to rule on the division of competences by the institutional rules proper to each Member State, or on the obligations which may be imposed on federal and Laender authorities respectively. It may only verify whether the supervisory and inspection procedures established according to the arrangements within the national legal system are in their entirety sufficiently effective to enable the Community requirements to be correctly applied.”
- L<sup>XVII</sup> E.g. Const. Court nr. 146/01, judgement of November 20, 2001, para B.5.2.
- L<sup>XVIII</sup> On the nuances to the principle of exclusivity with respect to matters pertaining to social policy, see Popelier & Cantillon 2013.
- L<sup>XIX</sup> Parliamentary Documents, *Senate*, Special Session 1991-92, nr. 457/1, 2-3.
- L<sup>XX</sup> See article 39 of the Proposal to Amend the SAIR, as adopted December 19<sup>th</sup>, 2013, Parl. Doc., *House*, 2012-13, nr. 3201/5.
- L<sup>XXI</sup> See Leyland 2011; R. Hazell & R. Rawlings, *Devolution, Law Making and the Constitution* 6 (2005).
- L<sup>XXII</sup> See B.4.17 to 26 of the Common Annex to the Concordat on Co-Ordination of EU Policy, [2010] consulted at <https://www.gov.uk/government/publications/devolution-memorandum-of-understanding-and-supplementary-agreement>.
- L<sup>XXIII</sup> Section 2(2) of the European Communities Act 1972, as amended.
- L<sup>XXIV</sup> Point 21: “The devolved administrations are responsible for observing and implementing international, European Court of Human Rights and European Union obligations which concern devolved matters. In law, UK Ministers have powers to intervene in order to ensure the implementation of these obligations.”
- L<sup>XXV</sup> Ross & Salvador Crespo 2003: 219.
- L<sup>XXVI</sup> Art. 28(7) Scotland Act; art. 93(5) Government of Wales Act; art. 5(6) Northern Ireland Act.
- L<sup>XXVII</sup> See for instance art. 57 & 58 Scotland Act. See for an application of this joint responsibility A. Ross, H. Nash, C. Reid, *The Implementation of EU Environmental Law in Scotland*, 13 *Edinburgh Law Review* 224-251 (2009).
- L<sup>XXVIII</sup> Panara & De Becker 2011: 337; Vandamme 2005: 256-262.
- L<sup>XXIX</sup> The first paragraph reads: “If a Land fails to comply with its obligations under this Basic Law or other federal laws, the Federal Government, with the consent of the Bundesrat, may take the necessary steps to compel the Land to comply with its duties.”



LXXX Erbguth 2011: 119.

LXXXI Article 23d(5): “The Laender are bound to take measures which within their autonomous sphere of competence become necessary for the implementation of juridical acts within the framework of European integration; should a Land fail to comply punctually with this obligation and this be established against Austria by a court within the framework of European Union, the competence for such measures, in particular the issuance of the necessary laws, passes to the Federation. A measure taken by the Federation pursuant to this provision, in particular the issue of such a law or the issue of such an ordinance, becomes invalid as soon as the Land has taken the requisite action.”

LXXXII Case C-358/03, *Commission v. Austria* [2004] ECR I-12055, para 11-12.

LXXXIII Case C-111/00, *Commission v. Austria*, [2001] ECR I-7559.

LXXXIV See Ordinance nr. 173/2002, *Bundesgesetzblatt* II April 26, 2002, p. 701.

LXXXV Under Article 149.1.3, the national government enjoys the exclusive competence with respect to international relations, but this cannot supersede the division of competences. See Chicharro Lázaro 2011: 185-186 and 201-203.

LXXXVI Spanish *Tribunal Constitucional*, decision 79/1992 of May 28, 1992 ; STC decision nr. 80/1993 of March 8, 1993, II.3: “[...] que la plena garantía del cumplimiento y ejecución de las obligaciones internacionales y, en particular ahora, del Derecho Comunitario que al Estado encomienda el art. 93 C.E., a pesar de que necesariamente ha de dotar al Gobierno de la Nación de los instrumentos necesarios para desempeñar esa función garantista, articulándose la cláusula de responsabilidad por medio de una serie de poderes que permitan al Estado llevar a la práctica los compromisos internacionales adoptados, tampoco puede tener una incidencia o proyección interna que venga a alterar la distribución de poderes entre el Estado y las Comunidades Autónomas operada por el bloque de la constitucionalidad. Y es que, aun cuando en el art. 93 C.E. se localiza una clara manifestación del monopolio competencial del Estado en orden a la garantía del cumplimiento de los compromisos adquiridos frente a otros sujetos de Derecho internacional, ya que esa garantía de la ejecución -no, desde luego, la ejecución misma- sí puede integrarse en el contenido del art. 149.1.3 C.E. [...]”

LXXXVII In case of exclusive powers of an Autonomous Region, this principle of supplementary state law cannot function. In that case, there is the ‘nuclear option’ of article 155 Constitution, that allows the Senate to authorise extraordinary measures, see Ross & Salvador Crespo 2003: 221; Vuillermoz 2003: 688-690.

LXXXVIII Case 126/1996.

LXXXIX On the relationship between both norms, see Martinico 2012: 370.

XC On the procedure of the Italian substitution mechanism, see article 8 of the Law no. 131/2003, *Gazzetta Ufficiale* n.132 of June 10, 2003; and article 41 of Law No 234 of 24 December 2012, *Gazzetta Ufficiale* no.3 of January 4, 2013.

XCI See points B.4.23 – B.4.24 of the Common Annex to the Concordat on the Co-ordination of European Union Policy.

XCII This agreement was adopted in the CARCE, Conferencia de Asuntos relacionados con las Comunidades Europeas. See Chicharro Lázaro 2011: 192-193.

XCIII *Acuerdo para regular la intervencion de las Comunidades Autonomas en las actuaciones del Estado en procedimientos precontenciosos de la Comision de las Counidades Europeas y en los asuntos relacionados con el TJCE que afecten a sus competencia*, d.d. November 29th, 1990.

XCIV Agreement between the Government, the Regions and the Autonomous Provinces, the Provinces, the Municipalities and the Mountain Communities “on the terms of application of obligations arising out of Italy’s membership of the European Union and on information guarantees from the Government” of January 24, 2008, in *Repertorio atti* of 24.01.2008. A detailed explanation of this agreement by Bertolino 2013: 164-165.

XCv Law No 234 of 24 December 2012 ‘General rules on Italy’s participation in drafting and implementing EU legislation and policies’, *Gazzetta Ufficiale* no.3 of January 4, 2013.

XCvi Art. 7(3) of the *Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union* – EUZBLG.

XCvii The “European Union Own Resources” account, administered by the Commission under article 317 TFEU. The recent judgment in *Commission v. Portugal* addresses the competence of the commission in seeking execution of the financial sanctions based on art. 260(2)TFEU. Nor the Commission, or the General Court, can rule on the conformity of a new (post 260judgement) national measure, which, in that case, lead Portugal to believe the daily sum should be reduced. See Case C-292/11P, *Commission v. Portugal*, judgment of January 15 2014, nyr.



- xcviii Puttler 2008: 1092. An overview of the (fruitless) arguments to base a right to redress on the constitution as it stood, see Böhm 2000.
- xcix Next to this, art. 109(5) covers the execution of the Stability- and Growth Pact with respect to the contributions by the several Länder in case of a joint deficit.
- c Gesetz zur Lastentragung im Bund-Länder-Verhältnis bei Verletzung von supranationalen oder völkerrechtlichen Verpflichtungen (Lastentragungsgesetz, LastG abbreviated), September 5th, 2006, *BGBI. I*, 2105.
- ci Explanatory introduction, Deutscher Bundestag, nr. 16/813, March 7th, 2006, 19.
- cii *Ibidem* and art. 1(1) LastG. This is the so-called ‚*Verursacherprinzip*‘, see Puttler 2008: 1096.
- ciii Art. 1(2) LastG.
- civ Art. 3 LastG.
- cv Puttler 2008: 1096; U. Karpenstein, “AEUV Art. 260” in *Das Recht des Europäischen Union 25* (E. Grabitz, M. Hilf & M. Nettesheim eds., 2013).
- cvi Puttler 2008: 1096.
- cvi Explanatory introduction, Deutscher Bundestag, nr. 16/813, March 7th, 2006, 19. See for a critical opinion: Siekmann 2011: 2179.
- cvi Art. 2(2) LastG.
- cix Art. B 4.25 of the Concordat, *supra* note LXXII.
- cx See article 8 and the Second Additional Disposition of the Organic Law 2/2012.
- cxii From the second indentation of the article cited *supra* n. CX.
- cxii On this, see Wennerås 2006.
- cxiii *Parliamentary Dealings*, Senate, October 24th, 2013, question nr. 5-1141. There are other legal problems associated with this right to redress, including its unsure independence from the right to substitution, and its inapplicability *vis-à-vis* the Brussels Joint Community Commission.
- cxiv *Bundesgesetzblatt* December 28, 2007.
- cxv Art. 10 and 12 of the *Vereinbarung zwischen dem Bund und den Ländern gemäß Art. 15a B-VG über die Mitwirkungsrechte der Länder und Gemeinden in Angelegenheiten der europäischen Integration*, *Landesgesetzblatt* Nr. 93/1992.
- cxvi The general principle of reimbursement was laid for the first time down in article 1, para 1213-23 of the Law no. 296 of December 27, 2006.
- cxvii See, respectively, paragraphs 4, 3 and 10 of article 43. These provisions have abolished the relevant paragraphs of the Law of 2006 mentioned in the previous footnote.
- cxviii Bertolino 2013: 168.
- cxix Bertolino 2013: 172-173.
- cxx See Case C-184/11, *Commission v. Spain* (on fiscal measures by three provinces in the Basque Region).
- cxxi *Commission v. Italy* (note IX) para 38; *Commission v. Spain* (note II) para 132; see also note IX and accompanying text.
- cxxii *Commission v. Spain* (note II) para 132.
- cxxiii Case C-184/11, *Commission v. Spain* [2014], para 42-46.
- cxxiv *Commission v. Belgium* (note II) para 21-23.
- cxxv *Commission v. Belgium* (note II) para 28.
- cxxvi *Commission v. Belgium* (note II) para 57 (with respect to the lump sum) and 70 (with respect to the penalty payment).
- cxxvii Case C-435/09, *Commission v. Belgium*, [2011] ECR I-36.
- cxxviii From the dictum: (own trans.) by failing to take all the measures necessary to implement directive [...], with respect to the Flemish measures [...], with respect to the Walloon measures [...], with respect to the measures of the Region Brussels-Capital [...].
- cxxix *Commission v. Belgium* (note CXXVII) para 27.
- cxix See also the Opinion of AG Kokott in Case C-196/13, *Commission v. Italy* [2014] nyr, at para 72-73, where the absence of a precise list of the landfills to be cleaned up is discussed. The allocation of pecuniary responsibility adds to this problem.
- cxix See SEC(2005)1658, point 13.1.
- cxix Case C-503/06, *Commission v. Italy*, [2008] ECR I-74.
- cxix Per Order of the President of the Court of June 19, 2007.



CXXXIV *Commission v Italy* (note CXXXII) para 22: “La République italienne, dans le mémoire qu’elle a présenté à la Cour, se borne à lui transmettre les arguments de la région de Ligurie en les reproduisant textuellement, mais sans les reprendre à son compte. La République italienne ne présente en outre pas de conclusions tendant au rejet du recours de la Commission ni même à la condamnation de cette dernière aux dépens. De plus, la République italienne a fait savoir à la Cour, dans le cadre de la procédure de référé, qu’elle partageait l’analyse de la Commission et qu’elle a introduit, devant la Corte costituzionale (Cour constitutionnelle), un recours contestant la constitutionnalité de la loi régionale n° 34/2001 sur les mêmes fondements que le présent recours en manquement.”

CXXXV On this balance, see Lenaerts & Cambien 2010: 634.

CXXXVI *Commission v. France* (note XXXVI) para 80: “The procedure laid down in Article 228(2) EC has the objective of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of ensuring that Community law is in fact applied. The measures provided for by that provision, namely a lump sum and a penalty payment, are both intended to achieve this objective”.

CXXXVII See the references in note LXVI and accompanying text.

CXXXVIII In the Italian case, the combination of a substitution mechanism and a right to full redress has led Bertolino to criticize the amount of the redress, arguing that the national government bears some responsibility: see Bertolino 2013: 169.

CXXXIX See for the case of Belgium the recent recommendation of the Senate: *Report on the Implementation of EU Law, Parl Doc* Senate, 2014-15, No 6S131/2, 288-89, recommendations Nos 57 and 58, and the discussion at p. 178-184.

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# De Gaulle, the “Empty Chair Crisis” and the European Movement

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## Abstract

European Movement International (EM) was founded in October 1948 after the Hague Congress held in May to coordinate the initiatives of the major European movements and political forces in favour of the unification of the Old Continent.

The aim of this essay is to analyse EM's stance in defence of the Community institutions established under the Treaties of Paris (1951) and Rome (1957), in the face of the so-called "empty chair crisis". This crisis between the French government and the other Community partners was triggered by proposals made in March 1965 by the Commission of the European Economic Community, chaired by Walter Hallstein, which established a direct relationship between the renewal of the financial regulation of the Common Agricultural Policy, the shift towards a system of "own resources" (from agricultural levies and customs duties) and the strengthening of the European Parliament's powers.

## Key-words

Charles de Gaulle, Empty Chair Crisis, European Movement, French Europeanism, Maurice Faure, Richard Coudenhove-Kalergi



## 1. The European Movement and French Europeanism during the de Gaulle Presidency

From General de Gaulle's 1958 return to power in the wake of the events in Algeria until his retirement in 1969, the European integration process was strongly influenced by the choices of the Fifth Republic. This was certainly due to Paris's traditionally key role in Old Continent affairs but also to the dynamism of the new French leadership, driven by a desire to restore the country's significant and decisive role in international and European politics<sup>I</sup>.

The aim of this essay is to analyse the stance of European Movement International (EM) in defence of the Community institutions, established under the Treaties of Paris (1951) and Rome (1957), in the face of the so-called "empty chair crisis". This crisis between the French government and the other Community partners was triggered by proposals made in March 1965 by the Commission of the European Economic Community (EEC), chaired by German lawyer and Christian Democrat politician Walter Hallstein<sup>II</sup>, which established a direct relationship between the renewal of the financial regulation of the agricultural policy, the establishment of the Community's own resources (from agricultural levies and customs duties) and the strengthening of the European Parliament's powers<sup>III</sup>.

European Movement International (EM)<sup>IV</sup> was founded in October 1948 after the Hague Congress in May to coordinate the initiatives of the major Europeanist movements and political parties in favour of European unification. Duncan Sandys, Winston Churchill's son-in-law, took the initiative and, through the Anglo-French United Europe Movement (UEM), convened a meeting in Paris in July 1947, during which the decision was made to set up a Coordination Committee. The European League for Economic Cooperation (ELEC), the Union of European Federalists (UEF) (Pistone 2008), the European Parliamentary Union (EPU), all of which later pulled out, and the *Conseil Français pour l'Europe Unie*, which was the French section of the UEM, joined it.

Later, in addition to the founding organisations, the Christian-Democrat leaning *Nouvelles Équipes Internationales*, the *Mouvement Socialiste pour les États Unis d'Europe*, the



Council of European Municipalities (CEM) and the *Association Européenne des Enseignants* (AEDE) (Hick, 1992: 174-176) also joined it.

The EM was and still is made up of national councils, based on the organisational model of the international movement, albeit reflecting the peculiarities of each individual country, including political parties, federalist and Europeanist movements, trade unions, business organisations, social forces, associations and the world of culture.

After a long period of inactivity, in particular as a result of the failure of the Treaty of the European Defence Community (EDC) in August 1954, the need to counter the Gaullist vision of a *Europe des États* revitalised the EM, turning it into one of main opponents of the confederalist approach pursued by General de Gaulle (Palayret 1996: 169-177).

De Gaulle strove to reconcile his radical commitment to a traditional view of statehood, based on the absolute sovereignty of the nation-state, with the needs of the modern world, which even at that time were providing the impetus to overcome this view in order to create, at least in Western Europe, a supranational and integrated order. Gaullist political doctrine actually offered a solution to these two contrasting needs by proposing a confederation model for Europe which, acknowledging that only legitimate entities could remain states, envisaged a form of political and economic union based on institutionalised intergovernmental cooperation and respect for the absolute sovereignty of the contracting parties.

Specifically regarding the relationship between Gaullism and movements for European unity, it should be immediately noted that General De Gaulle's ascent to power led to a weakening of federalist and Europeanist movements and organisations in France, except for, of course, the ones supporting the *Europe des États* model pursued by the new government. As pointed out by Alain Greilsammer (1975), this occurred for a number of reasons. First of all, the political staff (ministers, members of parliament and senior officials) had become less and less attentive and involved in the initiatives of the federalists. During the Fourth Republic for many public political figures attending meetings, conferences and public meetings hosted by the federalists in an attempt to garner political and electoral support from these pressure groups was almost considered a duty. However, with de Gaulle's return to power, this practice progressively, yet rather significantly, diminished. Secondly, due to the spread of the confederalist ideas advocated by de Gaulle,



federalist organisations lost their influence as they had neither the human resources nor the material means to counter the Gaullist propaganda. Thirdly, federalist organisations often found themselves on the defensive in an attempt to safeguard Community institutions, which, while harbouring some unconcealed doubts about their inadequate level of integration, particularly at the political level, needed to be defended against “assaults” and strict Gaullist initiatives almost as if they were “a fortress under siege” (Greilsammer 1975: 86-87). Moreover, after the failure of the EDC Treaty, Europeanist and federalist movements suffered deep divisions (Greilsammer 1975: 85-94).

When the Fifth Republic was created, French Europeanism actually seemed rather diverse, although most of the movements, organisations and groups were part of the *Organisation Française du Mouvement Européen* (OFME), the national section of EM International, the board of which was made up of, in succession, diplomat André François-Poncet; jurist René Courtin; René Mayer, former President of the Council of Ministers; and former Minister Pierre Sudreau.

The structure of the French Europeanist and federalist organisations was as follows:

- The European Federalist Movement, the French section of the UEF – known as the Supranational European Federalist Movement after 1959, when it espoused the ideas of Altiero Spinelli and the Italian federalists – the long-time president of which was Henri Frenay (Belot 2003), who was one of the leaders of the French Resistance during World War II.

- French Federalist Movement *La Fédération*, founded in 1944 (Greilsammer 1975: 117-123; Gouzy 1992: 61-89; Bacharan-Gressel 1993: 41-66), the main leader of which was André Voisin, who had contributed to creating the *Centre d'Action Européenne Fédéraliste* (AEF), after leaving the UEF<sup>V</sup>, regarded as being too influenced by Spinelli’s political views and the most radical federalists.

- The European League for Economic Cooperation (ELEC), two of the leading members of the French section of which are worthy of mention: Edmond Giscard d’Estaing and Edouard Bonnefous.

- The aforementioned, Christian Democrat-leaning *Nouvelles Équipes Internationales*, which was founded and long inspired by former Minister Robert Bichet, and which subsequently turned into the European Union of Christian Democrats (EUCD);



- The *Mouvement Socialiste pour les États Unis d'Europe*, chaired by former Minister Gérard Jaquet.

- The Liberal Movement for a United Europe, founded in 1952 and at the time chaired by former Minister André Morice (Gouzy 1996: 55-57).

Some sectoral organisations and movements also joined the OFME, such as the Council of European Municipalities (CEM), the first Secretary-General of which Jean Bareth was also an activist in *La Fédération*; the *Association Européenne des Enseignants* (AEDE); the Union of Resistance Fighters for a United Europe (URPE) and the Association of European Journalists (Gouzy 1996: 56). There were also some pro-Gaullist organisations, such as the French Committee for the European Union and the Movement for the Independence of Europe, which did not join the OFME.

The former was the French section of the Pan-European Union, founded in 1923 by Count Richard Coudenhove-Kalergi (Fondation Archives Européennes 1994; Coudenhove-Kalergi 1965; Brugmans 1970: 57-73; Agnelli 1975; Posselt, 1992: 227-236) and was long chaired by former Minister Louis Terrenoire with Georges Pompidou as vice-president, until he joined the government in 1962.

The Movement for the Independence of Europe was established in 1967 and was a left-leaning, Gaullist movement that was opposed to any supranational development of the Communities. It defined itself as progressive, anti-imperialist and opposed to US policy, which it viewed as hegemonic. Some of its most remarkable members were Emmanuel d'Astier de la Vigerie, René Capitant, Jacques Debu-Bridel as well as others who were close to or members of the French Communist Party, such as Francis Crémieux (Gouzy 1996: 56).

It is also worth mentioning a few international organisations which, albeit not strictly French, had their main centre of activity in France, such as the Action Committee for the United States of Europe (Fontaine 1974), founded by Jean Monnet in October 1955, and the International Centre for European Training (CIFE) (Cagiano, Colasanti 1996), created in December 1954 on the initiative of the UEF, especially that of Alexandre Marc, a member of integral federalism (Gouzy 1996: 57).



## 2. Attitudes Towards de Gaulle's European Policy

Regarding the French Europeanist movements' position on de Gaulle's politics upon his return to power in 1958, it should be noted that in the first three years, from 1958 to 1961, the prevailing approach was based on caution and careful observation, particularly among EM and OFME leaders. General de Gaulle was an enigma and his rise to power had caused mixed reactions within the EM, considering the fact that his first initiatives seemed to presage an attitude in favour of political union.

In order to protect French interests along with other reasons, de Gaulle had not "frozen" the Treaties of Rome, which had entered into force on January 1<sup>st</sup>, 1958, a few months before his return to power. He was aware of the need to modernise the French economy by integrating it into a wider market, and was interested in launching the Common Agricultural Policy (CAP), from which the French countryside (an important constituency of the Gaullist party) would have benefited greatly.

While driven by the desire to safeguard absolute national sovereignty, de Gaulle was convinced of the need for strong cooperation among European states, in particular France and Germany, to meet the challenges of the second half of the 20<sup>th</sup> century and to regain the autonomy of France and Europe in relation to the two superpowers (Pistone 2008: 141-142).

Moreover, it should be noted that some of the organisations already mentioned, such as André Voisin's *La Fédération* and Count Coudenhove-Kalergi's Pan-European Union were very close to General de Gaulle and supported his domestic and European political initiatives, although *La Fédération*, which joined the OFME, always remained autonomous and did not provide its total support.

The representatives of the European Federalist Movement (the EFM, founded in 1959 through the supranational transformation of the old UEF) were, however, wary or hostile, even though this attitude was not immediately apparent. When de Gaulle took power, the French component of the EFM did not immediately oppose the new Republic established by the General for a number of reasons. Firstly, during the Fourth Republic, de Gaulle had taken very different, and sometimes contradictory, positions on European integration. Therefore, it was hoped that he would endorse a plan of political unity in Europe, as at that time he was, among other things, the only European leader with the necessary political



stature and strength to persuade France's partners to agree with a united Europe. Secondly, the majority of French federalists were so opposed to the Assembly system, characteristic of the Third and Fourth Republics, that they could only see positive features in the new Constitution. Finally, de Gaulle seemed like he could end the war in Algeria. In fact, according to the federalists, the plan to quickly integrate Western Europe both politically and militarily, which had reached its peak in the early 1950s with the EDC and the Statute of the European Political Community (EPC), stalled also because in France the issue of Algeria had attracted far more public attention than the idea of European unity. In fact, in 1960, the French Commission of the EFM, after long hesitation, took a clear stance in favour of the independence of the Algerian people (Greilsammer 1975: 95-96).

Upon closer consideration of the French section of the EM (the OFME), it should be pointed out, as stated by Jean-Pierre Gouzy, that the existence of this organisation at least partially depended on the support of the French Foreign Ministry, and what is more "it could not serve as a framework for federalist action openly opposed to the diplomacy of Couve de Murville" (Gouzy 2000: 1019-1020)<sup>VI</sup>.

The OFME and EM leading figure was Maurice Faure, who during the Fourth Republic had strongly supported the process of building a united Europe and was part of the group of federalist integrationist deputies of the Radical Party led by René Mayer (Riondel 1997: 57, 66-70). Faure joined the EM – and was its President from 1961 to 1967 – as well as the EFM, the Action Committee for the United States of Europe and the Liberal Movement for a United Europe (Riondel 1997: 97-99).

During the Fourth Republic, he served as the Under-Secretary of State for Foreign Affairs with responsibility for European Affairs in the Guy Mollet government from February 1956 to May 1957 (Sirinelli, Vandenbussche, Vavasseur-Desperriers, 2003). As Under-Secretary, he participated in the negotiations for the Treaties of Rome (Riondel 1997: 117-136)<sup>VII</sup>.

With the final crisis of the Fourth Republic, Faure acknowledged that General de Gaulle's return to power and the birth of a new Republic were necessary steps, due to the difficult situation France found itself in, but failed to conceal his concern regarding the Gaullists' positions on the European integration process (Riondel 1997: 292).

As for the Central Council of Pan-European Union, chaired by Coudenhove-Kalergi, on June 26<sup>th</sup>, 1958, it welcomed de Gaulle's return as leader of France. A major obstacle to



European integration was precisely France's political and financial instability. The General's rise to power would open the way for new initiatives in the European field, in particular the creation of a political power among the six countries that had signed the Treaties of Rome, also including other democratic states. This new European power would have the task of coordinating foreign and economic policies and building an indissoluble union that would have to obtain the explicit approval of the peoples of the Old Continent. The Pan-European Union also requested that Paris be selected as the seat of the institutions provided for in the EEC Treaty<sup>VIII</sup>.

On July 7<sup>th</sup>, 1958, the OFME, chaired by André François-Poncet, adopted a resolution on the new Constitution of what would soon become the Fifth French Republic. The resolution requested that the provisions of the 1946 Constitution on the transfer of sovereignty to supranational institutions be incorporated into the new constitution, and that they be better defined ('Résolution du Conseil Français du Mouvement Européen sur la Nouvelle Constitution Française' 1958: 5)<sup>IX</sup>.

However, after about two months, on September 10<sup>th</sup>, 1958 to be exact, the Executive Committee of the OFME adopted a resolution which stated that it regretted that none of the articles in the new draft constitution referred to the development of European construction ('Le Mouvement Européen devant la Constitution' 1958: 3).

*La Federation*, however, while regretting that municipal and regional decentralisation measures were not covered by the draft constitution, asked that it be voted on because a negative vote would have plunged the country into chaos, possibly resulting in a dictatorship as the exercise of all freedoms depended on the authority of the executive power ('Le Oui du Mouvement Fédéraliste Européen' 1958: 3).

The EFM's aforementioned non-hostile attitude a priori towards the Fifth Republic, was confirmed in the referendum on the draft constitution (Greilsammer 1975: 95-96). The Executive Committee of the EFM, which met in Paris on September 13<sup>th</sup>, 1958, allowed its members full freedom of conscience for the referendum. However, it should be noted that the emphasis on national sovereignty raised some concern, also because the EFM believed the articles in the new Constitution dealing with international treaties were not clear enough, and concluded the statement by claiming that:



“[...] le Mouvement Fédéraliste Européen se déclare plus que jamais décidé à lutter, le cas échéant, contre la dangereuse illusion d’une prétendue grandeur nationale fondée sur la puissance. Il poursuivra avec la même énergie le combat pour la Fédération Européenne qui demeure pour les peuples du continent la seule voie de salut”<sup>x</sup> (‘Observations du Mouvement Fédéraliste Européen’ 1958: 3).

It was not until June 1959 that the French members of EFM directly attacked Prime Minister Michel Debré, without affecting, however, the President of the Republic (Greilsammer 1975: 96). Only in autumn 1960 were the first articles that were very critical of General de Gaulle’s politics published following a September 5<sup>th</sup>, 1960 press conference (Delmas 1960: 2)<sup>xi</sup>, and the federalists clearly opposed Gaullist politics at the Congress in Lyon in February 1962 (Greilsammer 1975: 96)<sup>xii</sup>.

Following the September 28<sup>th</sup>, 1958 referendum, during which voters overwhelmingly approved the Constitution of the Fifth Republic, René Courtin, Chairman of the OFME Executive Committee, in an article entitled *Nos Nouvelles Tâches*, published in the OFME monthly *Courrier Européen*, stated that there was nothing to prevent the continuation of the construction of a federal Europe after the referendum and in the transition to the new Republic. Compliance with the commitments and deadlines set out by the Treaties of Rome should be ensured (Courtin 1958: 1-2).

At first, Faure also had a favourable impression of the Gaullist position on the Common Market. In fact, as aforementioned, after evaluating the overall positive contribution of the EEC in the trade sector, General de Gaulle honoured France’s commitments by signing the Treaties of Rome, and Prime Minister Debré fully respected them.

Nevertheless, Faure remained cautious and wary, noting that the measures taken until then, especially in the area of trade, had been the simplest ones, also because they were the result of decisions already taken and applied automatically (Riondel 1997: 325-326).

Over time, Faure expressed his clear disagreement with the Gaullist model of *Europe des États* at the National Assembly – of which he was a member, serving on the Foreign Affairs Committee in 1960, in 1962 and again in 1967-68 and in 1970 – at the Parliamentary Assembly of the Communities (of which he was a member from 1959 to 1967)<sup>xiii</sup> and within the Europeanist movements: the Action Committee for the United



States of Europe and, above all, the EM, of which he was elected President on June 22<sup>nd</sup>, 1961, at the Congress of Brussels (and would be re-elected to serve until 1967). In October 1961, he was also appointed President of the Radical Party, succeeding Félix Gaillard, and maintained this position until 1965, and again from 1969 to 1971. Faure became a key figure in French political life, deepening his criticism of Gaullist policy on issues of European integration and harshly opposing the project of constitutional reform for the direct election of the President of the Republic, subjected to referendum on October 28<sup>th</sup>, 1962 (Riondel 1997: 292, 350-355).

Focusing on his role within the EM, it should be noted that Etienne Hirsch, President of the EFM Central Committee, suggested that EM treasurer Baron René Boël consider Faure as a possible successor to Robert Schuman as President of the organisation.

Once elected, Faure's objective was first to revive the EM, which came across as an elite body that was more concerned with influencing the ruling class than the public opinion.

It was also at this time that de Gaulle put forward concrete proposals to develop political cooperation between the countries of the European Community, based on a confederal approach.

On February 10<sup>th</sup> and 11<sup>th</sup>, 1961, a summit of Heads of State and Government as well as Foreign Ministers of the Community took place in Rambouillet. During this summit, a committee, composed of representatives from the six governments and chaired by French Ambassador in Copenhagen Christian Fouchet (Fouchet 1971) was given the responsibility of drawing up proposals to institutionalise political cooperation.

A second summit was held in Bad Godesberg, on July 18<sup>th</sup>, 1961. At this summit, the Heads of State and Government agreed on the possibility of holding regular summit meetings, attended by Foreign Ministers as well, to develop the policies of the six governments. Cooperation would cover not only international relations and defence, but also the fields of education, culture and research. The Fouchet Committee was also asked to table proposals to "provide the union with a statute as soon as possible" ("Comunicati del Vertice Europeo, Bonn 18 luglio 1961').

However, on October 19<sup>th</sup>, 1961, Fouchet presented a draft treaty – which bore his name (Fouchet Plan I) – that was strongly characterised by the Gaullist intergovernmental vision. This was even more evident in the second version of the proposal (Fouchet Plan



II), submitted in January 1962 (Bloes 1970). The issue was also connected to England's first application for membership, and led, in the spring of 1962, to an impasse in negotiations and to the abandonment of the project, due, above all to the hostility of the Netherlands and Belgium.

The EM opposed the Fouchet Plans on several occasions and, in particular, on December 16<sup>th</sup> and 17<sup>th</sup>, 1961, when the OFME was promoting talks on the European political situation, with an introductory report written by René Courtin, Pierre Uri and Georges Vedel<sup>XIV</sup>, and on June 7<sup>th</sup> and 8<sup>th</sup>, 1962 at the Congress for the European Political Community, held in Munich (Riondel 1997: 371).

### 3. The “Empty Chair Crisis” and the October 1965 EM Congress in Cannes

After the events of the late 1950s and early 1960s, 1965 was a crucial year in the history of the EM and of the European integration process in general due to the outbreak of the aforementioned “empty chair crisis” as defined by historiographers and political journalists.

The EM's reaction – after Gaullists decided to suspend the participation of French government representatives in Community body meetings – was extremely harsh.

In an article published in *Le Monde* on July 6<sup>th</sup>, 1965, Etienne Hirsch, President of Supranational EFM, which was part of the EM, underlined the very high risks of returning to a divided Europe. Hirsch sharply criticised de Gaulle's politics because, although he did not do away with the Communities when he came to power, he had always tried to impose his will by pushing to size them down within the intergovernmental framework. However, he accused France's partners of meeting him on his own ground and constantly bargaining, while they should have asserted that Community institutions were supranational in nature, lending support to the Hallstein Commission's proposals (Hirsch 1965)<sup>XV</sup>.

In a letter dated July 9<sup>th</sup>, 1965, EM Secretary General Robert Van Schendel addressed all the member organisations and emphasised the serious crisis triggered by France's decision, a crisis that threatened to jeopardise the fundamental principles of the Communities and that, while appearing to be a disagreement on technical issues, was actually a political one.



Therefore, Van Schendel, mandated by the *Bureau Exécutif*, called for the mobilisation of member organisations and the raising of public awareness in their countries. He also announced that a demonstration was to be held in Brussels on July 19<sup>th</sup>, 1965 as well as an international conference in Nice or Cannes in early October (ACIME, 1965, *copie de la lettre adressée le 9 juillet 1965 par le secrétaire général [...]*).

In a statement to the Italian press agency ANSA, Faure declared that if the partners truly wanted to continue on the path to political integration, “alors la marche en avant pourra reprendre, l’Europe politique s’amorcer, l’Angleterre y participer pleinement. Sinon, nous en reviendrons aux erreurs du passé: axes, alliances, nationalismes, neutralismes, etc.”<sup>XVI</sup> (Riondel 1997: 400).

Faure did not conceal his concern about whether the crisis would deal a fatal blow to the balanced evolution of the European integration process. He sensed that the Gaullists’ goal was to question the roots of the Community method.

As predicted by Van Schendel, a large Europeanist demonstration took place in Brussels on July 19<sup>th</sup> on the initiative of the EM Executive in order to publicly state its reiteration of its desire to achieve the political, economic and social objectives included in the Treaties of Paris and Rome<sup>XVII</sup>.

The statement underlined that the crisis had revealed a “growing difference in Member States’ views on the political and democratic prospects of the European Community” and acknowledged the “persistent opposition that at least one of them displays [has displayed] towards the objectives, institutions, spirit and methods defined by Robert Schuman on May 9<sup>th</sup>, 1950, and subsequently enshrined in the Treaties of Paris and Rome” (*Grande manifestazione europeista a Bruxelles’ 1965: 2*).

The statement went on to specify that the breakdown in negotiations and refusal to continue negotiations were reactions which were not only completely out of proportion with the dissent manifested within the Council, but also “an attack on the Treaty” (*Grande manifestazione europeista a Bruxelles’ 1965: 3*).

However, the EM declared that it was still “incredulous” of a deliberate willingness to stop the development of the Common Market and invited the Council to continue examining the Commission’s proposals, urgently and without any preconditions.

The statement also asked the six governments not to question the application of the Community Treaties, the Commission’s role, majority voting in the Council and the



transition to the third stage of the Common Market (planned for January 1<sup>st</sup>, 1966), stressing that no government had the right to hinder the smooth functioning of the European institutions. An extraordinary congress planned for early October was also convened in Nice; however, later Cannes was chosen as the congress site ('Grande manifestazione europeista a Bruxelles' 1965: 5-6).

At the EM Extraordinary Congress, which took place in Cannes on October 1<sup>st</sup>-3<sup>rd</sup>, 1965, the Community crisis was at the centre of debate. At that meeting, the EM took a clear stance in opposition to the Gaullist positions.

In the letter of convocation, Faure announced the three objectives of the Congress: define the conditions and procedures to reaffirm the Community; demonstrate that now more than ever the foremost leaders in European political, cultural, economic and social life felt that European integration was an imperative, urgent need; and proclaim the EM member's adherence to Community principles and their faith in the unity of Europe (Riondel 1997: 40 2-403).

One thousand delegates gathered at the Congress Palace in *Boulevard de la Croisette* under Faure's chairmanship. In addition to the representatives of the Community's countries, delegates from the Scandinavian, British, Swiss, Spanish, Portuguese, Greek and Turkish sections (*Ibid.*) also participated in it.

Jelle Zijlstra, former Minister of Economy of the Netherlands and member of the *Anti-Revolutionaire Partij* (ARP), presented a report to the Congress entitled *How Can We Make the Emergence of a Wider Europe More Likely?*, in which he pointed out that the conflict with France over the Commission's proposals was to be expected. According to Zijlstra, it was better to do only that which was feasible (i.e., create the customs union as soon as possible) to avoid risking the failure of the Community experience. A political federation needed to be created gradually as history is subject to ebbs and flows. Therefore, patience and a willingness to compromise were needed at the tactical level in anticipation of "a new tidal wave". The Dutch member also displayed little enthusiasm for the hypothesis of the direct election of the European Parliament (EP) without strengthening its powers. The crux of the problem lay in the division of competences between the Community institutions and, in particular, between the Commission and the Council. As long as the center of gravity remained with the Council, the Parliament would continue to be an advisory body,



regardless of its election procedure (ACIME, 1965 Zijlstra, *Come rendere più probabile l'avvento di un'Europa più ampia*: 9 -10).

Leo Tindemans, Secretary-General of the Belgian Christian Social Party, presented a report entitled *Comment Renforcer la Communauté Européenne?* in which it was evident that there were no alternatives to the Treaties of Rome and that abandoning them would lead to chaos (ACIME, 1965 Tindemans, *Comment Renforcer la Communauté Européenne*: 13; 17-18).

The Congress was pervaded by the atmosphere of the electoral campaign of the French presidential elections. François Mitterrand also participated in the event – with Faure leaving the way open for him as General de Gaulle's opponent – and gave a long speech restating his convictions on Europe and his identification with Faure's views.

Other speakers were René Mayer, Pierre Uri, Etienne Hirsch and Baron Jean-Charles Snoy et d'Oppuers who, regarding the attitude to adopt towards the French policy, oscillated between Uri's moderate stance and Hirsch's uncompromising approach (1997 Riondel: 40 3-404).

In the speech of the President of the Italian Council of the European Movement (CIME), Giuseppe Petrilli, he pointed out that the French position questioned the institutional framework of the Treaty, and it was “clear that, behind the pretexts invoked to justify the breakdown in negotiations, the intention was to reduce European economic integration to a mere customs union with a series of measures supporting individual economic sectors and a return to the traditional formulas of intergovernmental cooperation” (ACIME, 1965 *Intervento del Prof. Giuseppe Petrilli*: 1-2).

However, the President of CIME added that the attitude adopted by the French was also an easy excuse to justify the hesitations, misunderstandings, lack of cohesion and clarity of other states where European problems were often considered foreign policy issues that should only be addressed by a handful of specialists. Petrilli reiterated that, given the level of development which had been reached by the six countries, economic integration could only succeed if there was also a unified decision-making process (*Ibid.*: 2-3).

Regarding the EM's role, it was not perceived simply as an advisory body to national governments and the Communities. Rather, the movement's activities needed to be differentiated from those of the government, to better make criticisms and mobilise public opinion.



Another Italian politician, Giovanni Malagodi, Secretary-General of the Italian Liberal Party and President of the Liberal Movement for a United Europe, argued that the situation had not become critical as a result of a simple conflict of interest, but as a result of a conflict with one, basic concept: de Gaulle's, which was "based on an anachronistic notion of the overall values, interests and possibilities of the old-fashioned nation-state" (ACIME, 1965, *Testo del discorso dell'On. Malagodi*).

However, according to Malagodi, de Gaulle was not the only one responsible for the crisis, the apathy of the other partners was also to blame. At this point, in addition to the implementation of the Treaties of Paris and Rome, the building of Europe had to go on, even without France, however, always leaving the door open for it, and working hard on the accession of the United Kingdom. Maintaining the Atlantic link was crucial, as was Europe's definition of common objectives at the global level (ACIME, 1965, *ANSA nr. 199/2*).

The British EM Council, through a memorandum presented to the Congress, asked that UK membership, and that of other countries wishing to join the Community, be put at the centre of political initiative. The British section expressed its full support of extending the Community principle to include foreign policy and defence, as well as the strengthening of the EP, while pointing out that, under the current circumstances, the EM should concentrate its efforts on two priorities: preserving the Communities and ensuring enlargement as quickly as possible (ACIME, 1965 *Memorandum présenté par le Conseil britannique du Mouvement Européen*).

In a speech given at the October 2<sup>nd</sup> Congress, Duncan Sandys pointed out that the UK's possible accession would benefit not only the UK, but the Community itself, at the industrial, scientific and technological levels. Divisions in Europe led to impotence, and the very concept of partnership with the United States did not make sense without political union in Europe. However, regarding this union's form, Sandys confirmed his cautious, gradual approach and discussed building the union in stages, starting with the core Community institutions and including foreign policy and defence. The British representative rejected any ideas on European unification without France, which was supported by Malagodi and others, as aforementioned, as Europe would have been incomplete without France, as it was without the United Kingdom (ACIME, 1965 *Intervention de Rt Hon. Duncan Sandys, 2 Octobre 1965: 1-6*)<sup>XVIII</sup>.



The Cannes congress was also characterised by a harsh attack on Count Coudenhove-Kalergi and his organisation – the Pan-European Union – , which had now taken, as mentioned above, a clearly pro-de Gaulle stance, and several members of the government party joined the French section of the movement to make their stance even clearer.

Pressured by the federalists, a motion to remove Coudenhove-Kalergi as one of the Honorary Presidents of the EM was prepared, since his stance was getting increasingly closer to de Gaulle's, to the point that he condemned the Brussels' Commission for daring to propose the federal solutions which, in his opinion, had come to undermine "collaboration among states". Because of its delicate nature, this question was not publicly voted on during the conference, but was sent to the *Bureau Exécutif* (ACIME, 1965, *Circolare di informazione. 1) L'azione dei federalisti al Congresso straordinario del Movimento Europeo a Cannes*; ACIME, 1965, *elenco dei firmatari la mozione*).

However, Coudenhove-Kalergi, who was informed of the situation, spontaneously resigned in a letter dated October 11<sup>th</sup>, 1965, which was addressed to the President of the EM Maurice Faure and accused the EM of turning into an international anti-Gaullist movement, when it was absolutely clear that the unity of Europe could not be achieved without France's participation, all the more so because France was in favour of European unity. Coudenhove-Kalergi concluded his communication by stating that he could not provide moral support to a movement that divided Europe, rather than unite it (ACIME, 1965 *Lettre Adressée par le Comte Richard de Coudenhove-Kalergi [...] à Monsieur Maurice Faure [...]*, 11 Octobre 1965).

On October 15<sup>th</sup>, 1965, Faure responded to Coudenhove-Kalergi's criticisms noting that the EM was neither against nor in favour of the Fifth Republic, as this would have made no sense. The EM defended the Community Treaties and their economic and institutional constraints, and the letter ended by stating that:

“Ce sont ceux qui chicanent sur le respect des Traités ou qui entravent leur accomplissement et leur développement, qui nous paraissent ‘diviser l’Europe au lieu de l’unir’ et retarder l’avènement nécessaire de la Communauté des peuples de l’Europe sur une base fédérale et démocratique.



Nous voulions nous refuser à la tristesse de vous compter désormais parmi les partisans d'idées qui sont l'opposé de celles que vous aviez semées jadis. Nous avons tort<sup>xix</sup> (ACIME, 1965, *réponse de Monsieur Maurice Faure* [...], 15 octobre).

It should be noted that the relationship between Coudenhove-Kalergi and the EM had long been tense, precisely because of the Pan-European Union's acceptance of the Gaullist model of *Europe des États* (Riondel 1997: 407-408).

Faure gave the closing speech at the Conference in Cannes, which defined the arguments in favour of intergovernmental cooperation as reactionary and outdated (ACIME, 1965 *Discorso di chiusura del Congresso straordinario del Movimento europeo, pronunciato dal Signor Maurice Faure* [...]: 3). According to the President of the EM, the criticism that supporters of European integration were proponents of Europe's submission to the United States was difficult to understand as the opposite was true, namely that the path to independence was founded precisely upon the Europeanist ideal (*Ibid.*: 3-5). Faure argued that European unity up to the Ural Mountains was difficult to achieve – a suggestion often invoked by de Gaulle – due to Eastern Europe's different social-economic regimes (*Ibid.*: 5-6). Moreover, this political decision, likely made independent of the Atlantic Alliance and its friendship with the United States, and founded on the idea that Europe's problems could only be solved within an exclusively European context, led to a resurgence in German nationalism because it established the pursuit of the unity of the country as the main objective of German policy. However, the peaceful reunification of Germany should have been the main objective of the entire free world. Faure stated that he disagreed with the views of those who believed that a disintegration of the West would result in a corresponding relaxation in Eastern Europe (*Ibid.*: 6-7).

The President of the EM went on to reiterate that the Community should continue to operate under the rules of the Treaties, countering those who wished to overpower the competences, prestige and authority of the Community institutions, primarily its driving force, the Commission, the independent, impartial body responsible for ensuring Community interests as well as those of a state that was in a minority in the Council. Moreover, in the work of the Commission, it often adopted a moderate, flexible approach to achieve broad consensus on its initiatives. Although the proposals put forward by the Commission in March 1965 seemed too premature for governments to accept, the latter,



because of the flexibility of the Community framework, would have to act within the framework of the European institutions themselves (*Ibid.*: 7-9).

On the other hand, the Commission, because of its vocation and competences, was expected to be the vanguard and the engine of the Community. It certainly was not expected to step back in its positions, dragged along by other European institutions or national governments (Riondel 1997: 404). In the end, the participants voted unanimously for three resolutions. The first invited governments to create a common front to safeguard the Community, without seeking “an equally dangerous and illusory compromise” on significant issues (ACIME, 1965 *Risoluzioni approvate allo straordinario congresso di Cannes*, October 3<sup>rd</sup>). Europe would find neither salvation nor any guarantees for its future without complying with the spirit and letter of the Treaties. It was also asked to resume the regular meetings of the Council, even without France, so all the decisions required and foreseen by the Treaty could be made, particularly regarding budgetary matters, and to examine the Commission’s proposals in order to reach a decision as quickly as possible regarding the financial regulation and the outstanding agriculture issues.

A second resolution, defined the enlargement of the EEC as the essential objective of the EEC, and called on governments to reach an agreement on the accession of the democratic countries which were willing and able to undertake the commitments laid down by the Treaty of Rome (*Ibid.*: 2-3).

Finally, under the third resolution passed by the Congress, the EM decided to launch a public opinion campaign “to demonstrate the value and necessity of common European institutions for the resolution of problems on which the future of new European generations depends” (*Ibid.*: 3).

#### 4. The 1965 French Presidential Elections

As for French domestic politics, Faure wanted to create a great centrist *rassemblement*, bringing together centre-right and non-Communist, leftist forces. This democratic and Europeanist coalition would balance out the strength of the Gaullist party. To this end, in 1963, Faure made efforts to search for an alternative candidate to de Gaulle, who defended the federal concept of European construction against the confederal concept of the founder of the Fifth Republic.



In the first phase, his choice of candidate was Socialist Gaston Defferre, who was also a fervent Europeanist, an opponent of General de Gaulle's personal power and opposed to any form of agreement with the Communists. However, conflicts between the SFIO (*Section Française de l'Internationale Ouvrière*) and the Popular Republican Movement (MRP) prevented Defferre's candidacy from taking off (Riondel 1997: 416-418).

Faure himself was also proposed as a candidate but he did not seem convinced and, in any case, did not obtain the support of the SFIO, which argued in favour of François Mitterrand, who backed an alliance with the Communists (Riondel 1997: 418-421).

The Radical Party supported Mitterrand's candidacy, but Faure decided to back Jean Lecanuet, with a markedly Europeanist stance, even though it should be noted that, a few months after the presidential elections, Faure veered away from Lecanuet's positions, which he deemed too moderate towards de Gaulle's politics.

It should be noted that in the 1965 presidential elections the OFME took an explicit stance, calling on the French people to express their fidelity to the ideal of a united Europe (ACIME, 1965 *Resolution adoptée à l'unanimité moins deux voix, dans sa séance du 5 Novembre* [...]). It reiterated this stance after the first round of elections, pointing out that forcing de Gaulle into a run-off confirmed the French electorate's broad support of Europeanism. In the second round people were asked to restate this position (ACIME, 1965 *Déclaration adoptée par la Délégation générale de l'Organisation française du Mouvement européen, au cours de sa séance du 15 décembre* [...]).

After the 1965 presidential elections, won by de Gaulle in the run-off, the "empty chair crisis" was resolved under the January 29<sup>th</sup>, 1966 agreements, the so-called "Luxembourg Compromise". It marked the defeat of the Commission's plan to acquire a power which was autonomous from the states and become the embryo of a European government. The primacy of the Council of Ministers was rather confirmed and France, which disagreed with the other five partners on the issue of majority voting, confirmed its right to resort to the veto. The six delegations stated that this discrepancy did not prevent the work of the Community from being resumed according to normal procedure (Loth 2001a, 2007; Gerbet 1994: 269-284; Levi, Morelli, 1994: 162-163).

A week earlier, on January 22<sup>nd</sup>, 1966, the EM *Bureau Exécutif*, which met in Brussels, approved a resolution calling for a prompt resolution of the crisis, stressing that the Treaties of Rome would allow effective decisions to be taken while safeguarding the



essential interests of the States. The document also warned against any solutions that compromised, both openly, by revising the Treaties, and indirectly, through agreements defined “interpretive”, any progress by reintroducing the right to veto and weakening the Commission. Furthermore, the resolution stressed the importance, once the crisis was over, of opening the Community up to countries which were willing to accept Europe’s rules and develop Europe’s political unity based on Community principles (ACIME, 1966 Bureau Exécutif International, Réunion du 22 Janvier [...], *Procès-Verbal*: 5-6; *Ibid.*, *Résolution*).

## 5. Conclusions

The issue analysed highlights the EM as a forum for linking national political dynamics (in this case, French in particular) to supranational and European ones. EM was a movement that safeguarded European Communities against Gaullists’ attempts to profoundly change them, even though it was, by nature, characterised by strong internal pluralism. The gradual emergence, both within the OFME and the international movement, of opposition to General de Gaulle’s politics did not eliminate internal fractures, i.e., divisions between the sectors of the EM that were in favour of developing Community institutions based on a model of institutional or integral federalism and those that were more oriented towards a functionalist and gradualist approach, not to mention the extremely cautious positions taken in terms of support for a supranational Europe by some national councils, such as the UK and Scandinavian councils. Therefore, EM expressed a plural Europeanism, which conflicted with Gaullist politics not only due to opposition, which was certainly broad and prevalent, to its institutional plan regarding Europe but also due to the positions taken by General de Gaulle on Euro-Atlantic relations, as well as on British accession to the Community.

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<sup>1</sup> Regarding Gaullist France’s European policy, many works could be cited, such as, but not limited to: Massip (1963); Beloff (1963); Pinder (1963); Grosser (1965); Juvé (1967); de Gaulle (1970); Couve de Murville (1971); Deniau (1977); Debré (1979); Berstein (1989); de La Gorce (1992); Institut Charles-de-Gaulle (1992 a, b); Maillard (1995); Soutou (1996); Bozo (1996); Vaisse (1998); Gerbet (1994); Peyrefitte (1994-2000); Bitsch (2001); Quagliariello (2003); Malandrino (2005); Bossuat (2005); Mangold (2006); Ludlow (2006); and



Lachaise, Le Béguec, Sirinelli (2007).

<sup>II</sup> Regarding the Hallstein Commission and the personality of its President, cf. in particular, Malandrino (2005); Hallstein (1970); Loth *et al.* (1998), Loth, Bitsch (2007); and Loth (2007a).

<sup>III</sup> As for the “empty chair crisis”, cf. Loth (2001a; 2001b; 2007b); Germond (2006: 79-96); Malandrino (2005: 173-90); Gerbet (1994: 269-284); Levi, Morelli (1994: 162-163); and Di Nunno (2012).

<sup>IV</sup> As for European Movement International, cf. Schöndube (1987: 156-166); Hick (1991; 1992: 171-181); Palayret (1994: 365-383; 1996: 151-178; 2000: 743-781); Mouvement européen/European Movement (2001); Deschamps (2009: 691-694); and Caraffini (forthcoming).

<sup>V</sup> In the spring of 1956, the Dutch federalists and German federalists of *Europa-Union* left the UEF and formed the *Centre d'Action Européenne Fédéraliste* (AEF) with the support of smaller groups, especially the French groups that were part of *La Fédération*. See Morelli (1996).

<sup>VI</sup> However, it should also be added that the public contributions to the OFME were significantly reduced.

<sup>VII</sup> At the time, within the French Radical Party there was strong opposition between three components: the one led by René Mayer, joined also by Faure, which was further right on the political spectrum, supported a liberal economy as well as the supranational integration process of Europe; another component that was further left, the leader of which was Pierre Mendès-France, in favour of a command economy and far more cautious on European issues; and, finally, a component, the main exponent of which was Edouard Daladier, that opposed European integration, also because it was wary of Germany. See Riondel (1997: 67-70, 83-87, 117-120, 164-290).

<sup>VIII</sup> As for the location of the seats of European institutions, the Pan-European Union wanted the Council of Europe to remain in Strasbourg, the European Coal and Steel Community in Luxembourg and the Euratom in Brussels. Cf. ‘Réunion du Conseil Central de l'Union Paneuropéenne’ (1958: 7); ‘Résolution du Conseil Central de l'Union Paneuropéenne’ (1958: 19).

<sup>IX</sup> See also the Archive of the Italian Council of the European Movement (hereinafter ACIME), Fald. 11, b. EST/6, doc. 70, “Organisation Français du Mouvement Européen”, *Communiqué*.

<sup>X</sup> “[...] The European Federalist Movement wishes to declare that, now more than ever, it is determined to fight, if necessary, against the perilous illusion of presumed national greatness founded upon power. It will continue its struggle, with the same unyielding strength, to create a European federation, which is still the only path to salvation for the peoples of this continent”.

<sup>XI</sup> On September 5<sup>th</sup>, 1960, de Gaulle presented his proposal for cooperation between the Western European countries in the fields of politics, economics, culture and defence, which included quarterly meetings of the Heads of State and Government and maintained the appointment of members of the European Parliamentary Assembly by national parliaments. The creation of such a union would be subject to European referendum (Riondel 1997: 366-367). This proposal was followed by the Fouchet Plans initiative.

<sup>XII</sup> It is worth mentioning Mario Albertini's stance, who, while rejecting the General's basic nationalist and confederalist orientation, believed until 1966 that some aspects of his policy objectively promoted progress towards European integration. See Albertini (1961, 1962, 1963, 1966) and also Albertini (1964), in which, unlike Altiero Spinelli's stance, he advocated the need for Europe's nuclear weapons.

<sup>XIII</sup> Faure's appointment to the European Parliamentary Assembly (which changed its name to the European Parliament in 1962) took place in 1959 at the express will of Prime Minister Debré, despite the initial opposition of the Gaullist parliamentary group. However, according to Faure himself, his relationship with Debré was one of deep friendship, going beyond their divergent views on the evolution of the European unification process. Debré felt that appointing Faure was a duty, as he was an expert on Community institutions and did not consider their different views an obstacle. See Riondel (1997: 336).

<sup>XIV</sup> As for the OFME initiative, cf., ACIME, Fald. 36, b. EST/5-A – Bureau Exécutif International 1961-1965, doc. 39, *Bureau Exécutif International – Réunion extraordinaire du 19 janvier 1962 – Procès-Verbal*; *ibid.*, doc. 41, *Rapport introductif sur l'Organisation politique de l'Europe (approuvé par la Délégation générale de l'Organisation française du Mouvement européen)*.

<sup>XV</sup> This article can be found in ACIME, Fald. 35, b. Note informative del Movimento europeo, doc. 118, *Mouvement européen*, *Informations*, n. 24 Juillet 1965, Section IV, pp. 1-2.

<sup>XVI</sup> “Only then can progress continue, can a political Europe be created, and can Britain fully participate in it. Otherwise, we will go on repeating the mistakes of the past: axis, alliances, nationalisms, neutralisms etc.”

<sup>XVII</sup> As for the July 19<sup>th</sup>, 1965, demonstration, see ACIME, doc. 291, Consiglio italiano del Movimento



europeo (CIME), Comunicato stampa n. 27, *Per iniziativa del Movimento europeo indetta per lunedì a Bruxelles una grande manifestazione europeista*, Roma 16 luglio 1965; *Ibid.*, doc. 296 *Réunion extraordinaire du Mouvement européen 19 juillet 1965 – Liste des participants*

XVIII Greek delegate Cassimatis also expressed very strong doubts about the idea of excluding France, at least temporarily, from the European integration process while involving Great Britain. He pointed out that this, in addition to being very controversial, would not allow them to avoid the risk of having to revise the Treaties. See ACIME (1965, *ANSA nr. 199/2*).

XIX “Those who seek loopholes regarding compliance with the treaties or come in the way of their implementation and development are the ones who seem to be “dividing Europe rather than uniting it,” delaying the necessary construction of a Community of the peoples of Europe on a federal and democratic basis. We would have liked to avoid the sadness of now having to include you among the supporters of ideas that are the opposite of the ones you once disseminated. We were wrong.”

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