The Institutional Functioning of the EU

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Dr. Maja Brkan
EUROPEAN PARLIAMENT 2014 ELECTIONS: WAS IT DIFFERENT THIS TIME?

Sten Ritterfeld

1. Introduction

May 22-25, 2014 were the election days for the new European Parliament. It did not come as a surprise that the turnout was lower once again, a trend that has sustained ever since the start of the direct elections in 1979. Despite the importance of the European Union (EU) nowadays for legislation, political decisions, and foremost the economy, the citizens do not show up in high numbers for European elections. The voters that did show up had a tendency to vote anti-establishment parties more than ever before in European elections.

Even though this election was yet another one where the EP, the principal democratic organ of the EU, held more powers, the citizens did not seem impressed. The struggles and efforts the EU and its Member States went through to bring down the democratic deficit have not had the desired effect of a higher turnout. Even the connection between the Parliament election and the Commission Presidency and the co-decision of MEPs on budgetary issues during the euro crisis, which the EU highly acclaimed of making the election ‘different this time’\(^1\) was not effective. What is the democratic deficit, and what did the EU do to make the democracy of the EU more favourable for the voter? Did it work? How do the elections of 2014 compare to the elections in 2009? This paper tries to answer all these questions satisfactorily. These are very complex issues, and due to space constraints, unfortunately not all issues can be elaborated on as much as they deserve.

2. The democratic deficit

The so-called democratic deficit is a much discussed issue in the realm of democratic legitimacy of the EU. Usually, the term is defined as the ‘lack of popular consent’,\(^2\) or the ‘disjunction between power and electoral accountability’.\(^3\) However, this definition is too vague to capture the entire notion of what this deficit encompasses.\(^4\) It also depends which point of view is adapted. Opinions differ when it comes to the content of democratic legitimacy, and thus the democratic deficit.\(^5\) There are many issues pertaining the democratic deficit, however this paper will only discuss a selection of five issues that come with the democratic deficit due to space constraints.

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Firstly, the division of legislative power in the EU: the European Commission and the Council of Ministers, both crucial in the legislative process, are appointed and not elected directly, and there is no accountability between these institutions.\(^6\) Secondly, following from this first point, there is ‘executive dominance’. Both the Commission and the Council with their executive and non-elected nature benefit from the competence transfers from Member States to the EU. In the national structures of the Member States, the parliaments play a principal role. They propose, vote and check on the executive branch. The EP is less powerful in these areas.

Thirdly, Comitology, the by-passing of democracy in very technical regulations by the Commission threatens the democratic legitimacy of the EU.

Fourthly, Brussels now regulates matters previously regulated by national parliaments - the distance between such matters and the citizens increases, which is likely not to contribute to the interest of EU citizens.

Fifthly, the EU has been criticized for a lack of transparency and for being too complex. Many decisions are made behind closed doors, and the decisions that are made are achieved by legislative procedures that are very difficult to understand.\(^7\)

2.1 The division of legislative power

To establish a common market, it quickly became clear to the governments of the Member States that unanimity had to be abolished in all decisions. Otherwise, the Member State that would be affected most negatively could always veto a proposal. Qualified Majority Voting (QMV) was introduced as a solution, which made decision making easier, but also removed the strong power of national parliaments that could instruct their government to veto a proposal. Thus, it was agreed that the legislative powers of the EP had to increase.\(^8\)

Before the Single European Act 1986 (SEA), the EP was no more than a consultative body that the Council was obliged to consult, but whose opinion it could ignore completely, as becomes clear when looking at Article 138 of the European Economic Community Treaty (EEC Treaty). The SEA introduced the co-operation procedure. This meant for the Parliament that it could introduce amendments to legislation the Council discussed. These must be taken into consideration, and a common position of the Council for a second reading would be submitted. Here, it could be amended again, and so forth. If this position would be rejected by an absolute majority of the Parliament, the Council can then only adopt it by unanimity.\(^9\) The assent procedure was also created with the SEA, which required approval of the Parliament to pass legislation.

The Maastricht Treaty created the co-decision procedure, which was later enshrined in the Lisbon Treaty as the Ordinary Legislative Procedure (OLP). This procedure adds a conciliation committee between Council and EP if there is no agreement after the second reading.\(^10\) Both QMV and OLP have been expanded to most areas now since the Maastricht Treaty of 1992.\(^11\)

In accordance with these changes, the decisions the EP was allowed to make also expanded. Since the Maastricht Treaty, the EP gained the right to consent to the College of Commissioners as a whole and can exercise scrutiny in hearings of Commissioners-

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\(^7\) P. Craig and G. de Búrca, *EU Law - Text, Cases, and Materials*, p. 150.
\(^10\) Ibid., p. 23.
Designate. It can put forward to the Commission a non-binding proposal for legislation. It also received the right to approve the nominee for the Presidency of the European Council. The Lisbon Treaty increased its powers further by giving the EP the right to vote on the nominee for President of the Commission proposed by the European Council, who is chosen by taking into account the elections of the EP. All these expansions of power were mainly introduced to close the democratic deficit. It was believed that the EP would look more like a real parliament, and thus stimulate voters more. However, the speed at which the turnout decreased has only increased since the first elections post-Maastricht in 1994.

2.2 ‘Executive dominance’

The argument of ‘executive dominance’ holds that the executive will defeat parliamentary power upon transfer of competences of the Member States to the EU. However, as was noted above, the EP gained a much larger role in the legislative process. It becomes more and more just like a national parliament. And the new legislative procedures are effective: the EP can often push through its will.

Considering that the OLP has been expanding ever since it was introduced in the Maastricht Treaty, it can be assumed that this trend will continue. Also, to alleviate this ‘executive dominance’, the Lisbon Treaty provides for the ‘yellow card’ and ‘orange card’ procedures, by which the national parliaments can get directly involved in the EU legislative procedure by giving a reasoned opinion on whether the legislative proposal violates the subsidiarity principle or not. Whereas a ‘yellow card’ only constitutes a warning for the Commission, an ‘orange card’, where half of all national parliaments find a violation, gives the Council and EP the opportunity to vote down the proposal by only a simple majority. Whether this will be effective, remains to be seen, but the possibility is in place. In this view, the argument of ‘executive dominance’ appears much weaker as being a factor for the democratic deficit. The EU seems to be moving away from it through strengthening the EP's powers. Considering the lower turnout again, the ‘executive dominance’ also does not seem to be a factor that will increase voter's turnout in the short run.

2.3 Comitology - the by-passing of democracy

Comitology describes the law-making by the Commission with the assistance of committees consisting of national representatives and experts in the field the committee covers. However, the term is also used to refer to the complex entirety of the committee system. It involves the further elaboration and implementation of more general Regulations that have been passed

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13 I. Bache et al., Politics in the EU, p. 300.
15 P. Craig and G. de Búrca, EU Law - Text, Cases and Materials, p. 150.
19 Ibid.
through the regular legislative procedure. These Comitology committees have started to come into being already in the 1960s, when the Council wanted to reduce its workload on the agricultural policy, and therefore delegated discretionary power to the Commission to create such committees. In subsequent years, the number of committees grew as the Commission invited more interest groups in advisory committees to enhance the quality of democracy in its decisions. This caused a greater complexity of issues, and subsequently required more technical and scientific information, which the Commission received through the creation of even more committees. This influx in the amount of committees created by the Commission possibly also partakes in the political power struggle between Commission, EP and Council. The problem for democratic legitimacy is that these committees cannot be scrutinized by the EP or the Council and they have their own legislative procedure and thus circumvent the democratic procedure: there is no representation of the people in these committees. However, such underrepresentation problems also exist on a national level, where the executive makes use of several committees as well to implement more specific legislation. On a national level, it does not seem to create as much of an issue of discussion as it does on the European level. And again, voter turnouts for national elections seem to remain unaffected by the discussion or the absence of it.

The Lisbon Treaty tried to make the Comitology system more transparent with Articles 291 and 263 of the Treaty on the Functioning of the European Union (TFEU). Article 291 (3) TFEU provides that the EP and the Council ‘shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.’ The Council in accordance with the EP did so in a revised Comitology Decision in March, 2011. Article 291 (3) TFEU curtails the Commission's implementing powers. Previously, the Commission had much discretion in using these delegated and implementing powers from the Council, and used them extensively in creating committees, as stated above, despite the EP's right to information and right to scrutiny. Post-Lisbon, the EP and the Council gained the power to create mechanisms to control this discretion. As this expands the power of the EP compared to its sole previous rights to scrutinize and to information, it seems to alleviate the democratic deficit further. Yet, this provision is not likely to be very impactful, since the Council is still involved in the creation of these mechanisms, and ultimately the Member States will control the exercise of implementing powers.

On the other hand, it must be noted that here the national parliaments may play a larger role, as they have sometimes substantially increased their say in the decisions made on a European level through cooperation with the national executive, and on top of that also gained more powers under the Lisbon Treaty, discussed below.

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23 Ibid.
25 P. Craig and G. de Búrca, EU Law - Text, Cases and Materials, p. 151.
Article 263 TFEU allows for judicial review of legislative acts and ‘acts of the Council, of the Commission and of the European Central Bank’ and ‘of the European Parliament and of the European Council’. If one of the institutional bodies of the EU acts outside its competence, it can now be brought before the European Court of Justice (ECJ) or the General Court (GC) in case of affected individuals or companies. Even though this could imply a major change in checks and balances between the institutions and thus also the Comitology, the Union Courts have given the EU powers broad interpretation in order for it to be able to achieve the treaty objectives.\(^{30}\) It remains to be seen whether this expansion of power actually brought more democracy into the Comitology. That this judicial review can work, is exemplified by the Inuit case, where an individual filed for an annulment of a legislative act created by Comitology.\(^{31}\) It was dismissed by the ECJ, but it shows that the inclusion of citizens themselves in the list of possible applicants, restricted as it may be, is a clear indication of a move to close the democratic deficit.

On top of these Treaty changes, the Commission provides the Comitology Register. This includes the agendas, draft implementing acts, voting results, summary records, and other documents related to the committees.\(^{32}\) Due to the complexity, which is not likely to reduce as there are no major measures on the way to simplify the Comitology, it is still difficult to keep up with the work of the committees. A high complexity does not fare well with a high transparency.

Thus, Comitology is still a factor that needs more work in regard to closing the democratic deficit, though, regarding the Treaty changes and the Comitology Decisions since 1990, it has undergone a change towards more transparency and democracy.

2.4 The ‘distance issue’

The ‘distance issue’ involves the devolution of competences from the Member States to the EU in Brussels, thus bringing them further away from the citizens that are affected by the acts under such competences. Bringing back competences to a national level, so the theory goes, would help alleviate the ‘executive dominance’.\(^{33}\) However, here it should be taken into account what would have happened if the EU would not exist. Governments would make bi- and multilateral international agreements, which will not have the same democratic value as the EU does now. Parliaments would not be able to supervise these agreements due to the amount that would accumulate if the same level of international cooperation as the EU was to be achieved.\(^{34}\) It follows from this, that the distance issue does not matter for where the competence is, but where it is not.

Then here, public opinion comes into play. Public opinion about issues that have an international nature or that will show great advantage through EU cooperation receives the highest support of citizens.\(^{35}\) Support is lowest for areas that are more ‘naturally national’ or where the involvement by the EU could seem threatening, such as taxes, social welfare, education and health.\(^{36}\) The way public opinion is influenced plays a great role in how

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\(^{30}\) P. Craig and G. de Bürca, *EU Law - Text, Cases and Materials*, p. 76-78.


\(^{33}\) P. Craig, in P. Craig and G. de Bürca, *The Evolution of EU Law*, p. 33.

\(^{34}\) Ibid.


\(^{36}\) Ibid.
deficient the European democracy is, as the turnout, and thus the democratic deficit, is influenced by the prominence of the EU in the media. The citizens are more likely to vote if they know more about the EU, no matter whether the news is positive or negative.\(^{37}\) Most news is negative, and thus the chance that the EU is depicted positively should not be estimated too highly, but this also does not seem to matter too much.\(^{38}\) Hence, the potential of media coverage to close the democratic deficit, and close the ‘distance issue’ is available. Knowledge of citizens about the EU for decreasing or even eradicating the democratic deficit is crucial.

2.5 Transparency and complexity

According to the Commission, transparency includes for instance public meetings, access to document and information and the allocation of the budget.\(^{39}\) The Lisbon Treaty aimed at creating greater transparency within the EU. This can be seen from Article 1 of the Treaty on European Union (TEU),\(^{40}\) which states that the Lisbon Treaty ‘marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.’ Article 10 (3) TEU echoes this by providing the right to EU citizens to participate in the democratic life of the EU. There are several other provisions that reinforce this openness and transparency that the EU should achieve.\(^{41}\) The ECJ is open to reading EU legislation in the light of transparency, even if it is not explicitly mentioned.\(^{42}\) It could be said to have developed into a ‘general principle of Community law.’\(^{43}\) What is the influence on the elections?

The turnout of the election of 2014 suggests that it is a quite sensitive issue. As part of the election this year, the political parties of the EP proposed Spitzenkandidaten (frontrunners) that competed against each other for the presidency of the Commission. They campaigned ‘US-style’\(^{44}\) through the EU to attract voters. Citizens got to know the Spitzenkandidaten, and it would feel like ‘betrayal’ if not one of them would become the new president of the Commission. In such a scenario, the EU would once again be subject to criticism of back-door deals, which would undo a lot of work for openness and transparency.\(^{45}\) This shows how sensitive publicity functions in the opinions about the European Union.

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\(^{41}\) Examples include Article 11 TEU and Article 15 TFEU.

\(^{42}\) Cases C-154 and 155/04 The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v. Secretary of State for Health [2005] ECR I-6451, para. 81-82.


\(^{45}\) A. Alemanno, ‘EU Election: This time it was not different, but next time it will be’, Europe's World (2014), http://europesworld.org/2014/05/30/ep-election-2014-this-time-it-was-not-different-but-next-time-it-will-be/#.VH4ODzHF-So (last visited 2 December 2014).
3. Turnout and Results: Elections 2009 compared to 2014

3.1 Turnouts compared

The voter turnout in 2009 was 43 percent, which was, again, a turnout lower than all previous EP elections since 1979. In that year, the first election started with a solid turnout of almost 62 percent. In 2014, this number diminished even further, to the new all-time low of 42.54 percent. What should be noted here, however, is that the difference between the turnouts of 2009 and 2014 is a lot smaller than in previous years. For example, the difference between the EU elections in 1999, with a turnout of 49.51 percent and 2004, with a turnout of 45.47 percent, is much more dramatic.

3.2 Results compared

The austerity measures created unrest among the EU citizens. It led to the creation of anti-austerity movements - disagreement with incumbent governments, as for example Syriza in Greece. It was the chance for anti-EU movements to speak up. Several of such movements and parties came into existence and others grew significantly in the years of the euro crisis, for example, the United Kingdom Independence Party (UKIP) in the UK, Front National (FN) in France, Syriza in Greece, and the Danish People’s Party (DPP) in Denmark, all of which won the elections in their respective Member State. Also, Germany, a country that never felt great opposition against the EU, saw the rise of a new party, the Alternative für Deutschland (AfD). This party is not anti-EU, but anti-Euro. Though this is not as radical as other anti-establishment parties, it is a fairly new movement in Germany. AfD got 7 percent of the votes in the elections and delivered 7 MEPs. Germany also delivered the first neo-Nazi Member of the EP (MEP). Compared to 2009, just the four parties that won in their country, namely UKIP, FN, Syriza and the DPP, increased their combined percentage of votes by a staggering 250 percent.

Even though these parties grew and produced significant results, the anti-establishment parties did not gain more influence than the established parties. They still hold the majority of the seats in the Parliament, with 588 out of 751, even though this constitutes a slight decrease

48 Ibid.
from 2009, due to the encroachment of anti-EU parties. Post-2014, the pro-EU parties still hold 70 percent of the seats of the Parliament, compared to 80 percent in 2009. The anti-EU parties hold around a third of the Parliament's seats now. Again, just like in 2009, the European People's Party (EPP) was the largest with 29.43 percent and 221 MEPs. It was closely followed by the Socialists & Democrats (S&D) with 25.43 percent and 191 MEPs. Since the EPP ‘won’ the elections, the Spitzenkandidat of the EPP was most likely to be proposed by the European Council under the new election rules under Article 17 (7) TEU. This realized. After the proposal of Jean-Claude Juncker, the European Parliament approved him, and he currently holds the presidency of the European Commission.

4. Possible causes of the lower turnout

There are different causes for a lower turnout. As we have seen above, even though the powers of the EP have been expanded extensively over the years, the turnout has always decreased. There are many factors that have possible implications on this. Below, a selection was made of topics that deserve attention when also taking into account the democratic deficit. There are structural causes, which have been present since the beginning of the elections in 1979, and there are situational causes, influencing the turnout around the moment of the elections.

4.1 Reluctance of Member States

A crucial structural cause can be found in the reluctance of Member States themselves in devotion to direct European elections. The earliest version of the EP, the Common Assembly of the European Coal and Steel Community (ECSC) was introduced in 1951 as a counterbalance to the High Authority and to give the ECSC democratic legitimacy. Article 20 of the ECSC Treaty mentions representatives of the peoples, even though the Member States would appoint its members, instead of having them elected by direct elections. Its powers were very limited from the start.

In answer to this lack of democracy of this body, in the Treaty of Rome of 1958, the Common Assembly was asked to ‘draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States’ (Article 138 (3) of the EEC Treaty). As an answer to this provision, the Assembly approved a proposal for a suffrage system almost identical to the one that is used today already in 1960, but the reason why the first direct election was only held in 1979 can be found when reading Article 138 (4) EEC Treaty. It says that ‘the Council [of Ministers] shall, acting unanimously, lay down the appropriate provisions, which it shall recommend to Member States for adoption in

54 Ibid.
accordance with their respective constitutional requirements.’ This means that the Council could frustrate the actual implementation of direct suffrage. The time between the adoption of the proposal in 1960 until the final enactment of direct elections in 1979, a 19 year period, shows that the Member States’ governments themselves were reluctant to realize European elections. Reasons that can explain this reluctance are that such elections have insinuations to supranationalism, and that the governments of Member States have less influence. In fact, it was feared that it could lead to institutional reform that would favour the EP.\(^{58}\) There might even be a situation of a tug-of-war between the governments and the EP, as has been laid down by some.\(^{59}\) The turnout of European elections could be influenced by this situation. A lower turnout indicates a lower democratic legitimacy of the EP, as it then represents a lower amount of the EU citizens. As was explained, the democratic legitimacy is one of the backbones of the existence of the Parliament, and a great argument for its powers. The other institutions, including the European Commission and the Council of Ministers also have great interest in expanding their powers and keeping the powers of the others confined.\(^{60}\)

### 4.2 The economic situation

The most important situational cause is the economic crisis. In the past 7 years, the European economy has gone through a lot. And it would be faulty to say that the EU got over its issues during these years. The unemployment rate rose dramatically from 2008 until now: the unemployment rate just dropped below 12 percent at the beginning of this year (2014), and hangs at 11.5 percent right now.\(^{61}\) In 2008, the financial crisis in the United States gave the EU a heavy blow, and the European citizens felt it: the euro crisis began as governments were troubled with bailing out European banks and assisting fellow other Member States of the European Union in their fiscal policy, which brought great financial trouble.\(^{62}\) This euro crisis, which is also dubbed ‘Europe's sovereign debt-crisis’, refreshed feelings of doubt about the European project among EU citizens, as can be seen in the move in the polls towards anti-EU parties. The austerity measures required by Germany hurt, and the results, according to the citizens, are not satisfying.\(^{63}\) The citizen required a different leadership, one that promised to change the status quo. Apparently, that is what parties such as FN and UKIP could provide.\(^{64}\)

### 4.3 National issues in European elections

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The European elections are often not about European issues, but national issues. Based on this, citizens vote. Thus, the European elections do not show the political preferences of the citizens, but much more the issues on the national scale. A good example is the high turnout in Lithuania, where 24 percent more people went to the polling station compared to 2009. However, the European election was on the same day as the national presidential elections. Latvia experienced the complete opposite: its turnout dropped with 24 percent. In 2009, Latvia held its local elections on the same day as the European elections. Both examples show very well that national issues and elections weigh heavily in the amount of people that vote.

5. Conclusion

The initial idea of the Parliament to make the elections ‘different this time’ seems not to have succeeded. The turnout was disappointing, with again a lower turnout, now at 42.54 percent, despite the greater role of the EP in the appointment of the Commission president and its further expanded powers under the Lisbon Treaty. Many of these endeavours were pursued precisely for closing the democratic deficit. Still, they did not lead to an EU with a more legitimate democratic representation. In fact, the 2014 elections have shown a great move towards anti-EU parties, connected to the economic turmoil of the past years. The economic crisis caused problems that led to an election outcome that moved further to anti-EU parties, with an incredible increase of 250 percent in voting percent points for the four winning anti-EU parties UKIP, FN, Syriza and the DPP. The established parties EPP and the S&D could maintain the majority, though it slimmed down some in comparison with 2009 due to the influx of the anti-EU voter preferences. The reluctance of Member States and EU institutions other than the Parliament towards the elections could explain the humble campaign and the misinformation of EU citizens. The non-democratic bodies of the EU do not depend on them, whereas the EP does. Making the EP more and more influential, as happened in the past years, will also affect the other EU institutions. The composition of the EP will thus matter more to them, and this could lead to a higher interest from these other bodies in the elections. Maybe, this leads to one European voice for EU citizens, which could bump up the turnout in future elections.

KISSINGER'S PHONE CALL TO A PRESIDENT OF EUROPE: "WHO DO I CALL, IF I WANT TO CALL EUROPE?"

Petros Korelas

1. Introduction

When Kissinger wants to 'Call Europe', then there indeed is an 'infrastructural problem'. Starting from a totally political viewpoint or a competence one, the first question that rises is who represents or stands in the analogous European role counterpart when it comes to compare the positions of the President of the United States or the United States Secretary of the State? The further democratization of Europe in the post - Lisbon era, enabled the direct election of the President of the European Parliament, whereas the European Council would still represent the glory of 'old Europe' and the same time the Commission would be the one to play the most prominent political role in regards to the safeguarding of the Treaties. Leaving the Council of Europe and its strong legislative functions outside of the picture, given its 6-month per Member State rotation, the focus on the important phone number that Kissinger would require in the post - Lisbon era, may interplay between the President of the European Parliament, the President of the European Council, the President of the Commission and the High Commissioner of Foreign Affairs and Security Policy (Hereafter: FASP). The reflections of the legal foundational elements provided by the Treaty on the European Union and the Treaty on the Functioning of the European Union (Hereafter: TEU and TFEU respectively) do provide a 'how-to' and 'who-to' conditionally and 'per subject', but it is always important to note that the personality strength, effect and impact that the specific position holders may have among and upon others are elements that play a great part in the political scene too. Besides, though, the 'political perspective', the legal issues focus on the interrelating ways through which such sensitive matters are allocated within the competences of the analogous Institutions of the Union, as well as the different interpretational prisms through which often Member states follow in regards to rising impediments; which conclude to oblige the highest ranking officials to be very careful in the decisions they are to take and the manner these are to be expressed to public. This paper expands further than staring at the key characteristics and competences of the above mentioned institutions and position holders, aiming to provide an answer that would holistically speak of the Union as is. Given the different Member - States' 'come - together' that the European Union forms as a whole, under the widely-accepted set-umbrella of common values and cultural characteristics of effective multilateralism, it can be realized that this is not a clear - cut case and it would be hard for Kissinger to find that exclusive 'one number'.

2. Who is who

2.1. The president of the European Parliament

The President of the European Parliament is the one that can have the 'first say' in a most democratized process, having his position initially as a Member of the European Parliament

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directly elected from the People, the citizens of the European Union. At this moment, the position of the President of the European Parliament, is held by Martin Schulz.\footnote{The European Union Website, 'EU Presidents - who does what?', The European Union \textcopyright\ 2014, http://europa.eu/about-eu/basic-information/eu-presidents/index_en.htm , (last visited 01/12/2014).} It is important to note that in the pre - Lisbon period the Members of the European Parliament (Hereafter: MePs) were defined as 'representatives of the peoples of Member States' whereas in a post - Lisbon era they are defined as 'representatives of the Union's citizens'.\footnote{Article 20 of The Treaty on the Functioning of the European Union (Consolidated Version), [2008] OJ C 115/47 (Hereafter: TFEU).} The President of the European Parliament is elected among its MePs according to Rule 22 of the Rules of Procedure of the European Parliament.\footnote{The European Parliament Website, 'Rules of Procedure - 8th Parliamentary Term', The European Parliament (2014), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20140701+0+DOC+PDF+V0//EN&language=EN , (last visited 01/12/2014), Rule 22 , p. 23.} He must carry out the tasks of representation of the Parliament in international relations, administrative, financial and legal matters as well as maintain procedural order and ensure proper observance of the Procedural Rules. It is further important to note that the President of the European Parliament, despite chairing the plenary sessions of the Parliament or 'chambers' and reassuring their proper conducting, is the one who signs the budget of the European Union when the time comes after its acceptance by the Parliament at the second reading phase. Also, together with the President - in - Office reflecting the country presiding at the time being in the Council of the European Union, signs the legislative acts\footnote{The European Parliament Website, 'European Parliament - The President - The President of the European Parliament', The European Parliament (2014), http://www.europarl.europa.eu/the-president/en/president/functions.html , (last visited 01/12/2014).} that are proposed by the Commission and jointly adopted by the Parliament and the Council through the Ordinary Legislative Procedure.\footnote{Article 314 TFEU.} Besides that, approaching the issue from a totally different angle, the Parliament may also request the Commission to propose legislation.\footnote{H. Lelieveldt and S. Princen, 'The Politics of the European Union', (Cambridge University Press, New York 2011), p. 67-68.} In order to illuminate the links for the later arguments in regards to the interrelation of power between the position holders and the political 'checks and balances' concept, it is important to note that the European Parliament, as an institution itself is empowered by the Treaties to conclude international agreements,\footnote{Article 218 TFEU.} elect the Commission President, initiate a motion of censure\footnote{Article 230 TFEU.} and establish a Committee of Inquiry.\footnote{Article 226 TFEU.} The last political 'function' of the European Parliament is the election of the European Ombudsman,\footnote{H. Lelieveldt and S. Princen, 'The Politics of the European Union', p.68.} which avails as another division of fairness among the Union. The 'momentum highlights' fall on the Parliament's President's shoulders, who is called to address the European Council prior to its meetings and make crystal - clear the position of the Parliament on the issues falling into the agenda.\footnote{Article 228 TFEU.} From the above, it can be well realized that the President of the European Parliament has in his hands a strong 'administrative authority', chairs plenary sessions and related proceedings and can represent the European Parliament in all legal matters and international relations.\footnote{The European Parliament Website, 'European Parliament - The President - The President of the European Parliament', The European Parliament (2014), Rule 22 (4) p. 23.} However, despite being the one and only directly elected by the people, he cannot speak 'on behalf of whole Europe' or 'create his own
independent line' on issues regarding foreign and parliamentary policy or even issue a directive. In very few words, it could be said that the Parliament and its President have mostly legislative functions, which are quite confined and not so extensive executive ones.

2.2. The president of the European Commission

The President of the Commission is one of the most prominent roles within the framework of the European Union. Until recently the position was occupied by Jose Manuel Barroso, whereas now Jean Claude Juncker holds the steering wheel of the Commission Presidency.\(^\text{15}\) In a post-Lisbon era, many would argue that the role of the European Parliament is indeed strengthened, but the Commission and the European Council are the ones having the most important political standing.\(^\text{16}\) The dominant or most influential, one, however, at first glance can be considered the Commission, as it has legislative powers,\(^\text{17}\) whereas the European Council does not possess any profound legislative competence\(^\text{18}\) but focuses on the strategic and technocratic deployment of the political directions and agenda priorities.\(^\text{19}\) Coming into the tasks and duties of the President of the Commission, it must be acknowledged that he should be responsible for the designation of guidelines upon which the Commission will be called to perform,\(^\text{20}\) he shall decide on the parameters reflecting the internal organization of the Commission itself by safeguarding its most coherent, efficient and effective operation as guardian of the treaties,\(^\text{21}\) and is also empowered to appoint his Vice-President (except of the High Representative of FASP).\(^\text{22, 23}\) The 'kickback' from the checks and balances concept that defines the European Union in its holistic infrastructural terrain is launched spontaneously under the prism of the interventions of the European Parliament and the European Council. According to Article 17(7) TFEU, the President of the Commission has to be proposed by the European Council and subsequently elected by the Parliament. The Parliament, though, votes in regards to the appointment of the Commission as a whole body, whereas the list of its members is concluded by the European Council and the President of the Commission. Besides the Commission and its President being considered as the 'mightiest institution of the EU'\(^\text{24}\) acting as the guardians of the Treaties by further enjoying the 'monopoly' of being able to propose legislation to go in accordance with the ordinary legislative procedure,\(^\text{25}\) the Institution itself can initiate legislation with immediate effect, as an example by the consent of the Council of Europe in regards to Common External Tariff

\(^{15}\) The European Union Website, 'EU Presidents - who does what?', The European Union (2014).


\(^{18}\) Ibid., p. 58-59.


\(^{22}\) Article 17(6) TFEU.

\(^{23}\) Craig P. Craig and G. De Burca, 'EU LAW - Text, Cases and Materials', p. 32.


\(^{25}\) Ibid., p. 63.
and Common Commercial Policy issues. However it is crucial at this point to note that from one side the Commission may also legislate alone in very specific fields, especially in regards to monopolies, competition and market issues falling under Article 106(3) TFEU. Profound examples are the two Commission Directives 80/723/EEC of 25 June 1980 and 88/301/EEC of 16 May 1988 as amended on the transparency of financial relations between Member States and public undertakings and on telecommunications competition respectively. In spite of the above described legislative functions, the Commission possesses a very strong political function as well, as it is responsible for the execution of the budget, the facilitated coordination of its executive and managerial actions and the initiation of the Union's programming agenda towards a further Unified Europe. Last but not least, the strongest political standing of the President of the European Commission is the fact that he has to ensure the Union's external representation. This means that whereas the President of the European Parliament represents the Parliament in its international activities, the President of the Commission represents the Union itself save for the issues of foreign and security policy that fall under the scrutiny and competence of the High Commissioner for FASP. So it may be concluded that the Commission possesses both forms of power and function, speaking of the legislative and the executive one, exactly because the President of the Commission is the one to ensure the Union's external representation, with the companion of the 'checks and balances' linked to the High Commissioner for FASP.

2.3. The high commissioner for Foreign Affairs and Security Policy

In a post-Lisbon era, the positions of the External Relations Commissioner and the High Representative for Common Foreign and Security Policy (Hereafter: CFSP), were merged into the one of the High Representative for Foreign Affairs and Security Policy. In a Pre-Lisbon era, the High Commissioner for CFSP being Javier Solana, had to "share" his office with Benita Ferrero-Waldner who was the last External Relations Commissioner of the Union by the Barroso Commission. By the merge of the two posts under the powers of the High Commissioner for FASP, Catherine Ashton and nowadays Federika Mogherini, possess a phone number that 'Kissingers' around the globe should know and be able to call. Towards understanding the setting upon which the High Commissioner for FASP is called to perform, one needs to clearly comprehend the 'checks and balances' concept that characterizes the Union. By Articles 15(2) and 18 TFEU it can be well understood that the High Commissioner for FASP is bestowed with very important tasks. Can he/she be though called the 'boss of Europe' and the exclusive one Kissinger to call for every matter? It is important to understand that despite the High Commissioner for FASP being the one responsible for the external representation of the European Union in regards to Foreign Affairs and Common Foreign and Security Policy, his/her duties extend to the appointment as Vice-President of the Commission and chairing the Foreign Affairs Council, being the most important 'chamber' of the Council of the European Union that summons for its meetings the Foreign Ministers of the Member States once a month. However, the "two-hat" function of the High Representative, is safeguarded by the checks and balances concept, as in order for him/her to be appointed,

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26 Article 207(3) TFEU.
he / she needs to be proposed by the European Council and then approved by the Commission President. So from one point the High Representative for FASP may stand as the European counterpart of the United States' Secretary of the State, but not at all equal in powers and political standing when the comparison elevates to the President of the United States, as the High Commissioner's powers are quite limited in scope given the more solid roles and political standing of the President of the European Commission.

2.4. The president of the European Council

After 'surpassing' the primus inter partes role possessed between heads of government in the Council of the European Union in the pre - Lisbon era, the President of the European Council nowadays has a highly political standing. Besides its existence since 1961, the European Council was established as a separate institution of the Union by the Treaty of Lisbon. The last President of the European Council was Herman Van Rompuy whereas the new holder is Donald Tusk. Given the fact that he is obliged to leave any national office he may hold, it can be well understood that the President of the European Council is totally devoted to his tasks and duties. Prior to the examination of the presidential powers and duties, it must be clear that the pivotal political role that the European Council plays within the European infrastructure, does not involve any legislative functions. According to Article 15(6) of the TEU, the President of the European Council chairs and drives forwards its work, endeavours to facilitate consensus within the European Council, ensures the preparation and continuity of its work and last but not least, presents a report to the European Parliament after its meeting. It can be understood that the President of the European Council acts more in the eyes of the people as a strategist and technocratic 'coachman' responsible for the agenda of the general political directions and priorities, rather than an inspirational and innovative leader. Diving further into Article 15(6) of the TEU, it can be understood that from one hand the President of the European Council can be the one responsible to represent the Union or 'Europe' - as Kissinger would love to say - regarding issues of Common Foreign and Security Policy but should never act in his potential with a sense of overriding or 'skating - over' the competences and capacity of the High Commissioner for FASP and in further extent the President of the Commission.

2.5. The Council of the European Union and the Presiding Country

The Council of the European Union, often called as 'The Council', represents the main legislator of the European Union mostly deciding by Qualified Majority Voting. The Council is substantiated by representatives of the Member States at a ministerial level and its

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29 P. Craig and G. De Burca, 'EU LAW - Text, Cases and Materials', p. 50-51.
31 Craig P. Craig and G. De Burca, 'EU LAW - Text, Cases and Materials', p. 43.
34 Article 226 TFEU.
36 Ibid., p. 56.
38 Article 16(1) TEU.
39 Article 16(3) TEU.
principal functions further include its ability to delegate powers to the Commission as well as the option to request the Commission to undertake studies on legislative proposals. Furthermore, the Council is expected to coordinate in the most functional manner the shaping of inter-institutional agreements and ensure that both budgetary objectives are fulfilled and policy-making regulations are adopted, especially in regards to Foreign Policy. The Presidency of the Council of the European Union shifts every six months per Member State whereas the 'presiding chair' is held by the Minister of the Member State that holds the 'Presidency - in - Office'. It is of pivotal importance though, to note at this point, that the 'special chamber' of the Council of the European Union described above, being the Foreign Affairs Council, is chaired by the High Representative of FASP and not by the Minister belonging to the country holding the 'Presidency - in - Office'. The checks and balances concept that characterizes the Union, intervenes again and confines the powers of the Council to pure legislative ones without much room left for executive 'interplay'. Given also the fact that the rotation occurs every 6 months, it would be very hard for 'Kissingers' around the globe to be in touch and deploy their political strategies based on the word of a politician that will under no circumstance hold the specific office after a very limited time period.

3. Power and competence in the political perspective
3.1. Comparison summary

Towards getting a more clear view of the picture, it is demanded to understand the foundational links between the above mentioned positions and how they come into existence in regards to the persons that occupy them. The Council of the European Union plays an integral part in regards to the legislative functionalities of the Union. However, it does not express a purely executive character. It is crystal clear that the Commission encompasses both legislative and executive functions, whereas its President needs to be proposed by the European Council and voted in favour as body-collegiate by the European Parliament; whose Members (and thus President as well) are directly elected by the citizens of the Union. The very same time that the President of the European Commission is empowered to appoint his Vice-Presidents, he is disabled from being able to choose the High Commissioner of FASP - who acts as a Vice-President as well. On a parallel line, though, he is called to confirm the appointment of the High Commissioner through his approval after the proposal of the European Council. Synchronously, the obligation for the President of the European Council to leave any national office he holds, deprives him of any 'national influence' as he must be completely devoted on his strategic tasks reflecting the deployment of European directions and priorities. The European Council is empowered to propose the Commission President and appoint the Commission after the vote of the Parliament and simultaneously appoint the High Commissioner for FASP after the confirmation by the Commission President.

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40 Article 290 TFEU.
41 Article 241 TFEU.
42 P. Craig and G. De Burca, 'EU LAW - Text, Cases and Materials', p. 44-45.
45 P. Craig and G. De Burca, 'EU LAW - Text, Cases and Materials', p. 43.
3.2. Interplay

When Kissinger wants to call Europe, he certainly cannot in the spur of the moment think about all the above and try to find under which field and whose competence each and every issue falls. It can be well understood that the President of the European Commission holds a very strong political standing and influence, being able to represent the Union. However in his scope regarding the external representation of the Union, the field of Common Foreign and Security Policy is excluded, as it falls under the duties and competences of the High Commissioner of FASP. The same time, the country and minister holding the 'Presidency - in - Office' of the Council of the European Union do not have executive functions but legislative ones, plus the six month rotation issue may not encourage 'Kissingers' to shape their political deployments on that basis. The President of the European Parliament may have gained power equal to the Council, especially under the deepened democratization and developed transparency in the post - Lisbon era, but he solely represents the Parliament in its external relations and not the Union as a whole. Last but not least, the President of the European Council, besides being totally devoted on his role as a strategist and technocratic orchestrator of the executive agenda, does not possess any legislative competences derived from the body he 'governs' and the same time in regards to the external representation of the Union he has to respect the prospects and angles of both the President of the Commission and the High Representative for FASP.

3.3. The workable invocation

The moment that everybody 'is the President of Europe', the same time none of the above is allowed to act alone and in a totally independent basis. The interdependence of the institutions and the powers of their most high ranking officials is what mainly characterizes the European Union reflecting its checks and balances as its apical characteristic ensuring pro-activeness in this multi-dimensional governance model. Speaking of the external representation of the Union, this could be done in a twofold basis. On the first level, the President of the European Council would be the one having the most prominent political word and standing, being followed by the President of the Commission who should mostly cover issues directly related to the Union's 'birthrights'. In regards to a 'second layer', the two aforementioned Presidents must not overcome nor reduce each other's and the High Commissioner's for FASP competencies and duties, the later being the one responsible to represent the Union in a 'Foreign Affairs Ministerial Level'. However, in order to effectively promote a common foreign affairs and policy these three persons have to work effectively and efficiently together, whereas the 'heaviest workload' in regards to the most efficient cooperation and inter-institutional coordination falls onto the architectural handling of Donald Tusk.

4. One man or woman to rule them all?

It can be well understood that it is quite hard to find the one and only 'President of Europe'. However, there were and still are many voices that speak for the merge of the offices and powers of the President of the Commission and the President of the European Council,\textsuperscript{52, 53} with the holder of the new post being totally accountable to Parliament\textsuperscript{54} or even directly elected.\textsuperscript{55} Despite their radical or even 'Jacobin' views, there is some ground that this could succeed.\textsuperscript{56} The 'socialist movement' almost made it into turning Europe to an Italian - ruled lobby back in 2003 when Romano Prodi was President of the Commission in 2003.\textsuperscript{57} This overpowering illusion though, that the President of the Commission could also be the President of the European Council somehow lost its ground after the Lisbon Treaty. The prerequisite that the 28 Member States must now vote by qualified majority for the President of the European Council\textsuperscript{58} can be hard to achieve as the same time everybody may wonder whether the concentration of so much power to one person would be welcome in the altar of efficiency.\textsuperscript{59} Especially in the light of a 'positional merge',\textsuperscript{60} that could also seriously imply substantive control and incitement over both competence and performance of the High Representative in regards to the external representation of the Union and its Foreign Affairs policy.\textsuperscript{61} The personal qualities of the key position holders among the top hierarchical layers of the European Union definitely play a crucial role in regards to the expression and communication of the attributed roles to the public. After the \textit{Santer Commission scandals}\textsuperscript{62} and the \textit{Edith Cresson fraud affair},\textsuperscript{63, 64} the Commission recently faced the \textit{Lux Leaks}.

\begin{itemize}
\item \textsuperscript{52} S. Gozi (Spinelli Group), For the Election of a "President of the European Union", \textit{CitizensForEurope.eu Online}, 16 March (2011), http://citizensforeurope.eu/prop-609_en.html , (last visited 01/12/2014).
\item \textsuperscript{58} Article 15(5) TEU.
\item \textsuperscript{59} T. Chopin and M. Lefebvre, \textit{Center on the United States and Europe at Brookings Online}, January 06 (2010) , p. 6.
\item \textsuperscript{60} EuroLetters Website, "Barnier: "There can only be one" (EU President), \textit{EuroLetters.com Online}, posted on 11 May 2011, https://euroletters.wordpress.com/2011/05/11/barnier-there-can-only-be-one-eu-president/ , (last visited 01/12/2014).
\item \textsuperscript{62} A. Topan, 'The resignation of the Sander Commission: The impact of "trust" and "reputation", \textit{The European Integration Online Papers (EIOP), 30 September 2002}, http://eiop.or.at/eiop/texte/2002-014.htm , (last visited 01/12/2014).
\item \textsuperscript{63} Case C-432/04 Commission v Edith Cresson.
\end{itemize}
incident, a national - Luxemburgish corporate tax related issue that attempted to undermine the moral legitimacy of the President of the Commission. Thankfully, Jean Claude Juncker and the Commission managed to disengage themselves from the 'eye of the storm' and the Union returned to its normal schedule. The exactly opposite though occurred for the first two cases, whereas the whole Commission resigned in the Santer case (financial irregularities) and Edith Cresson was charged with a breach in regards to her obligations 'arising from her office' (nepotism). In a legislatively sustained viewpoint, the only person to hold a two - hat function is the High Commissioner of the FASP. Federika Mogherini is the one who acts as the link between the Commission and the European Council, as her activities must be deployed in accordance to the intergovernmental foreign policy as strategically designed with the President of the European Council and in a perfect alignment with the external policies of the Union as shaped through the cooperation with the President of the Commission and the Commission members themselves. Last but not least, the role of Mogherini is further enhanced through the assistance of the European Action Service, by which she may reap the benefits of bringing into her knowledge far - reaching information reflecting all issues of the European Union.

5. Recommendations for further research

If the possibility of merging the position of the President of the European Council with the President of the Commission is excluded, then only time will tell whether the High Representative for FASP will conclude to be the one that 'Kissingers' around the globe may directly be required to call when they want to address Europe. This statement is founded on the basis of the Foreign Policy representation and the far - reaching ends towards obtaining information through the facilitated emergence and use of the European Action Service. When the issue elevates higher into the personality aspect, it can be imagined that through a very careful and well - designed proposal deployment strategy, the role of the High Commissioner may become such absolute in quality, that may even surpass the diplomatic expertise that larger nations with strongly prevalent 'politics' history have reached. For the time being, when Kissinger wants to call Europe, he should always have in his 'speed - dial' the phone numbers of the famous "triumvirate", speaking of the President of the European Commission, the President of the European Council and the High Commissioner for Foreign Affairs and Security Policy.

6. Conclusion

Many may support the view that in regards to a 'Foreign Affairs Ministerial Level', the High Commissioner is the counterpart of the United States Secretary of the State. Towards though, defining the most powerful person in the world, in the case of comparing United States and Europe, then no one can speak for sure. From one side the complexity of EU structures defines the interrelation between the President of the European Council and the President of the Commission, having the High Commissioner as their interplaying channel; and from the other side of the Atlantic, United States' President Obama has had many difficulties in regards to closing down the Guantanamo bay, introducing Obama-Care and the new 'salvation package' for the average American Family, initiatives that brought the famous US Government Shutdown and political deadlock in September - October 2013, emerging a huge blackout in the American governmental anatomy, by blocking the Presidential divide et impera. The message that this paper wishes to pass on is that in such difficult times of both political and economical instability around the world, as the ones we currently face, when it comes to decision making, the checks and balances concept as adopted within the European framework, adds great value to the stability and protection of its fundamental character and beliefs. The fact that 'Kissingers' around the globe at this point need possibly three different phone numbers to call in order to effectively reach Europe, furnishes the European Setting and protects its governance from fatal mistakes that doom both national economies and their people.
“DOUBLE HAT” OF THE HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY AND, COHERENCE A CHALLENGE FOR THE EU’S EXTERNAL POLICY?

Davide Argeri

1. Introduction

The European Union (EU) has for the past decades, been aiming to build coherent internal policies in order to shape its external policies to help it emerge as a major player on the world stage. These external policies consist of two main groupings, as illustrated by Art.3 TEU (Treaty of the European Union). The first can be characterized in the form of the Common Foreign Security Policy (CFSP) and the second group, includes those falling in the economic and development field. Regardless of this strict separation, such a view is not fishable as the two evidently interact with each other. This is where the need of coherence comes into the limelight. As a concept, it not only aims at the creation of synergies between different policies, but also looks at the inconsistencies between different polices. The enhancement of coherence may largely depend on the allocation of powers in a systematic body of rules; however there will equally be the need for an increase in cooperation between all institutions and stakeholders. How should the coherence of European foreign policy be enhanced? How is synergy between the High Representative and the competent Commissioner to be reinforced? Such questions were raised at the Laeken Conference of 2001, discussions about the need to establish a double-hat position in order to coordinate the two groupings of external polices emerged. Eventually the position of High Representative for Foreign Affairs and Security Policy (HRVP) was setup by the Treaty of Lisbon in 2009, a concession reached after the position of a Union Minister for Foreign Affairs was rejected together with the dreaded Constitutional Treaty. The double-hat would allow the holder of the position to be in charge of CFSP while sitting in the Council and at the same time also being a Vice President of the Commission for the coordinating of external relations, hence a key player on the Unions external relations. The idea behind the HRVP would be to bridge the Commission and the Council in controlling external policies. This paper will address to what extent the new position HRVP has helped in enhancing coherence of the EUs external policies.

The layout of this paper will be first to provide a theoretical definition of the concept of coherence within the EU while analyzing the challenges in a historical context and the reforms brought in the Treaty of Lisbon. This will be followed by identifying the powers allocated to the HRVP in fulfilling the coherence mandate. Next, close attention will be taken of the political tensions and administrative factors which have been associated around the position of HRVP. Some of the successes and shortcomings of the only and outgoing HRVP Catherine Ashton will be taken into account. Followed by, a brief look at the new Commission and HRVP.

2Ibid, p. 18.
3Ibid, p. 27-29.
4Presidency Conclusions-Laeken SN 300/1/01 REV 1.
Coherence defined a challenge for the EU

Coherence is not a concern only for the EU. The ideal situation based on the principle of coherence is that a state must follow a unitary foreign policy lead by the executive; however this is not the case in the EU due to the fact that it is made up of numerous actors, contradictions between EU bodies and member states on external relations is a common occurrence. This section will outline the different dimensions of the coherence issue analyzed in this paper. Coherence can be defined as the perceived absence of contradictions between policies, instruments and decision-making levels. As a concept it presents multiple dimensions. Horizontal coherence refers to the coherence between different policies that are formulated across the EUs policy making machine. Institutional coherence is a challenge is two situations. First, when there is one policy area which is pursued by two different EU bodies, this is known as inter-institutional coherence. Secondly, intra-institutional coherence is where actors within the same EU body have different approaches or perspectives towards a draft policy. Vertical coherence arises when national polices of member states hamper the execution of EU polices, this can prove to be a huge political hurdle. Lastly, external coherence refers to the an actor’s external representation and the view held by outsiders, in this case the alleged view that other international actors have towards the EU.

In an historical context, the EUs external polices have all developed at different paces. Prior to the 1970s, economic external polices were the only ones present, subsequently the setting up of the European Political Cooperation (EPC) opened the doors for foreign policy to be raised to the European level. The Maastricht Treaty of 1992 setup the separate pillar structure, it brought economic policy into the first pillar while EPC became CFSP and was cemented into the second pillar. Coherence of external polices may have become legally binding; however the finite separation of CFSP and economic policies would prove to be rather unsustainable and created several degrees of incoherence. Horizontal coherence demonstrated to be a huge obstacle. First, external polices were managed by different actors and decision procedures, a clear example of this was that the pillar structure had a clear divide between the Council controlling CFSP and the Commission controlling the various economic policies. It would prove almost impossible to reconcile the different polices and interests. Second, tension within EU institutions with regards to external policy was also a challenge, looking at the Commission as an example, the different Commissioners each in charge of their specific portfolios would have a different approach towards a given issue.

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7 Ibid.


9 Ibid, p. 108.


vertical coherence by its very nature has been a challenge for the EU. The national policies of Member States would affect the EU’s external policies regardless of the fact that they all sit on the European Council; conciliation between member states is a challenge in itself. A prime example were the diverging opinions of member states on how to deal with the developing crisis in Yugoslavia during the 1990s, the EUs action was far too slow due to the lack of coherence as a whole. Next to this, the EUs external coherence has been viewed as lacking effectiveness; again this can be seen from the slow reaction in dealing with Yugoslavia. The apparent shortcoming of the EUs coherence was addressed upon the signing of the Treaty of Amsterdam in 1997, by creating the new position of High Representative for CFSP. This however, only addressed the EUs coherence with regards to CFSP and not towards economic policies. The coherence of external polices would require much more work, as the divide between the first and second pillar remained in place.

The historical challenges of coherence in the EU are reflected by the questions raised at the Laeken Declaration of 2001, which illustrates the efforts of further reform in this area. The first question was ‘How should the coherence of European foreign policy be enhanced?’ this aimed at making the decision making process more efficient between the different EU bodies. The next question was pivotal and looked at ‘How is synergy between the High Representative and the competent Commissioner to be reinforced?’ This question was of fundamental importance; it referred to how the HRVP and Commission could work closer together. It sent out a strong political declaration about the need of a more coherent external policy. In essence, the Laeken Declaration recommended a merge of the two positions into a double-hat.

3. The new hat of the HRVP after Lisbon

The IGC (Inter-governmental Conference) meeting in Lisbon 2007 recognized that the reforming of the treaties would have to be taken ‘with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union as well as the coherence of its external action’. This mandate eventually meant that the Treaty of Lisbon introduced new mechanisms to improve the coherence of the EUs external policies, notably enhancing the role of the High Representative of the CFSP. The position was renamed, although the Constitutional Treaty proposals called for a foreign minister of the Union, its rejection resulted in the position being named HRVP, this seemed to be more appropriate. Some of the general changes include Art.18(4) TEU which provides a general guide to the role of the HRVP, in relation Art.27(3) TEU gives an outline of how the HRVP can improve coherence by working with the different

03.pdf&ei=HdNwVMYG_LcXkatGygOAP&usg=AFQjCNcAHEk4eA9KJU1w (last visited 28 November 2014), p. 17-18.
18Ibid.
20Ibid.
22Presidency Conclusions-Brussels 11177/1/07 REV 1.
EU bodies. This section will explore the new elements introduced to improve all the different dimensions of coherence. Inter-institutional coherence has been embodied in Art.15 (2) and 18(4) TEU. This is done by letting the HRVP act as a bridge between the Council and the Commission by participating in the meetings in both institutions. Intra-institutional coherence is also enhanced to a great extent. Within the Commission, under Art.18 (4) TEU the HRVP will sit as one of the Vice Presidents of the commission and shall coordinate all the different portfolios of the commissioners in relation to Unions external action. In relation, the HRVP will also bring greater horizontal coherence by incorporating the CFSP into the Commission. With regards to more intra-institutional coherence in the other institutions, the HRVP was made the chair of the Foreign Affairs Council (FAC) in accordance with Art.16(6) and 18(3) TEU, this would entail working closely with the European Council as well. Furthermore, Art. 30 TEU empowers the HRVP to call upon member states to convene an extra-ordinary Council meeting; this brings fourth greater vertical and horizontal coherence.

The Treaty of Lisbon provided the HRVP with a seat in all the most important EU institutions, some literature has gone as far as claiming that the new role is really is not double-hatted, but rather triple-hatted, this can be seen by the fact that HRVP has a voice even in the European Council through the chairing of FAC. For the purpose of this paper, her role will continue to be referred to as double-hatted. Nonetheless, the Treaty of Lisbon has also played a role in the enhancing of vertical coherence. This is reflected by the fact that the HRVP attends all Council meetings and shall have the power to coordinate the meetings according to Art.34 (1) TEU, thus, the HRVP will be able to discuss matters directly with member state representatives. However, the success in this area will largely depend on the personal interests of member states. Lastly, external coherence has also been taken into account. The introduction of Art.27 (2) means that the HRVP will now be in charge of representing the EU with regards to political dialog with third parties and matters concerning CFSP on the international stage. There is no doubt the HRVP will be representing the Union as one voice and, to a certain extent addresses the external coherence of the Union and what is perceived of it by outsiders.

4. Coherence Challenged.

The reforms introduced by the Treaty of Lisbon were clearly formulated with the aim of enhancing coherence by creating the new position HRVP. However the concrete result will largely depend on the political support the HRVP would be afforded. Similar to the proposals made by the Siedenburg Report of 1979, the Treaty of Lisbon aimed to provide both political and administrative coherence, to what extent will be assessed in the following section.

26Ibid.
28Ibid.
4.1. Political discourse and friction

The need for reform was evident from the political commitment expressed in the creating of the HRVP position and its double-hatted role. However, in practice making the position function proved much more difficult as tensions and conflicting interests arose. The HRVPs position by its very nature showed that numerous difficulties would be encountered; the ability to sit in both the Commission and Council compelled with having to work with two presidents would require a serious balancing act. Despite the fact that, having two seats in two different bodies would enhance coherence. In truth, any miss calculations could easily build political tensions affecting inter-institutional coherence. Taking the example of outgoing HRVP Lady Catherine Ashton, there is no doubt that she recognized the need for coherence in order to have an effective foreign policy. However her period in office would prove to be rather turbulent. Many difficulties arose, the duty to coordinate the different portfolios created tension within the Commission, especially with the Relex Commissioners. A pertinent example was when former Commission President Barroso shifted control of the European Neighbourhood Policy Instrument (ENPI) to the portfolio of former Commissioner Füle. From the foregoing, it was clear that both intra-institutional and inter-institutional coherence was a challenge associated with the position of HRVP, as such coherence is not guaranteed. In principle, the role of the HRVP is only to coordinate and not to control external coherence; therefore the needs of external coherence are not met within the Commission. The absence of Ashton in numerous Commission meetings did not help in pushing for more coherence. Between January and September 2012, Ashton missed 21 out a total of 32 Commission meetings; this caused a lot of bitterness among other Commissioners. Her absence was not only felt in the Commission, but also within the Council meetings. Notably her absence from the 2010 Council meeting of defence ministers in Mallorca, subsequently this lead to the Dutch Defence Minister famously tweeting that ‘Madame Ashton was notable in her absence’ in contrast to the former High Representative of CFSP Javier Solana. Such statements by member state officials would create more hurdles in improving vertical coherence, politically speaking. An absence which had greater implications, especially on the coherence of the EUs external relations, was Ashton’s failure to fly to Haiti after the horrendous earthquake of 2010, in comparison to Hilary who was on site providing a voice of concern on behalf of the United States, the EU on the other hand was not able to. These examples question whether Ashton’s commitment to coherence was limited only to a few declarations and statements made.

As a whole, the challenge of horizontal coherence flows from the shortcomings of both inter-institutional and intra-institutional coherence at the political level. However, horizontal coherence has largely been enhanced as a result of the HRVP chairing the FAC meetings; here the HRVP has been able to interact with the member states directly. Vertical coherence on the other hand, as already mentioned in this paper would largely depend on the political will and polices of member states. The Libyan crisis that unfolded in 2011 can serve as a

33 Ibid.
36 Ibid, p. 158.
prudent example of the difficulties of vertical coherence with regards to the Unions external action. From the onset, it seemed that the EU was ready to deal with Colonel Gaddafi and his regime. This is evident from Ashton’s declaration that the EU was concerned with the events in Libya followed by the Council meeting that denounced Colonel Gaddafi as a legitimate leader. These events brought about some initial success, most notably sanctions were imposed on all the regimes foreign assets and aid was also cut off.

The early days of the crisis showed that the EU stood has a coherent actor with a common policy towards Libya, however this honeymoon period was short lived. As the crisis progressed, it became clear that military intervention was an option for some member states; the increasing influx of refugees warranted a quicker solution to the problem. Ultimately, it also became apparent that many member states remained divided on the use of military force. As a result, a EUFOR (European Union Force) lead intervention was out of the question, thus, military intervention was left to the individual states and NATO (North Atlantic Treaty). The Libyan crisis demonstrates the role of member states with regards to the vertical incoherence being ever present and that the achievement of a coherent external policy would depend on their will. On the other hand, the HRVP has proved to be a vital link between the two principle EU institutions in times of crisis. In sum, the Libyan crisis did bring forth some success in its early stages, although to date, Libya remains a country torn by civil war right on the EU’s doorstep. This view was recently confirmed by the EP (European parliament) in a parliamentary resolution, it recognized ‘that the EU failed to develop and implement a sound and comprehensive strategy for assisting in the post-Gaddafi transition’.

The question remains, on what external policy the EU will now hold towards Libya, in this area the EU must show that is still has a plan. Another aspect must be mentioned in relation to the challenges of the external coherence of the EU, although the HRVP is in theory the voice of the EU, this has not stopped member states from openly stating their position on international matters independently from the sphere of the EU and the HRVP. In relation, member state divisions still remain and the HRVP alone will not be able to insure external coherence without their support. The perception of the EU as an international actor will still be in doubt in the world of international relations, as a result of underling political tensions.

4.2. Administrative coherence: a critical review

The Lisbon Treaty brought about a new innovative step in the enhancing of the coherence framework at the administrative level. This is illustrated by the creation of the EEAS (European External Action Service) under Art.27 (3) TEU and the Council decision on the EEAS, which specifically states that the role of the EEAS is to support the HRVP with regards to CFSP. Therefore the EEAS would work under the HRVP in creating greater coherence of the EUs external action. The following section of the paper will focus on examining the role of the EEAS in enhancing all the dimensions of coherence within the EU.

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40 Ibid.
41 Ibid.
This will be done by using a critical approach by first considering a general overview followed by a more in-depth analysis of the Council decision. The changes brought by the creation of the EEAS, caused some intra-institutional tension in the initial phases. The EEAS brought together a whole range of different officials from different bodies of the EU and national diplomats into one body.\textsuperscript{45} This mixing would bring together different management styles and cultures into one cooking pot\textsuperscript{46} being a perfect recipe for intra-institutional incoherence in the adaptation period of the EEAS. Over time this would gradually be overcome. From the perspective of horizontal coherence, the EEAS is very limited. Art.27 (3) TEU makes it clear that its role as an organization can only be to support the HRVP with regards to the external coherence, but only in the field of CFSP. The HRVP will not receive any assistance with any other policies, namely those dealing with development and enlargement which were left under the competence of the Commission.\textsuperscript{47} The task of coordinating all these polices was left to the HRVP alone, without any administrative support.\textsuperscript{38} There is an apparent gap that was created, the HRVP may be able to fulfill the designated tasks much better in the area of CFSP thanks to the EEAS support in comparison to other areas of external polices. This view is supported by the fact that the EEAS in supporting the HRVP with CFSP, can do so this in its capacity as an autonomous body.\textsuperscript{49}

The Treaty of Lisbon remained rather vague on how the EEAS would act in enhancing the coherence of the EU’s external polices, therefore it allowed for the Council decision to determine how it would achieve this and to what extent. Art.3 (1) of the Council decision on the EEAS sets out the obligation of the EEAS to work with the Commission and the Secretariat of the Council towards a coherent external policy. Here the obligation to pursue the principle of coherence is made explicitly. Furthermore, Art.3 (2) of the same decision stipulates that the EEAS shall consult the Commission on matters of CFSP in regards to external policy. From the foregoing, it is clear that consultation will enhance coherence in matters of CFSP, however it is unclear what procedures will ensure coherence in relation to the external polices in other areas.\textsuperscript{50} This may raise a question of what are the competences of the EEAS. Art.1 (2) of the Council decision on the EEAS sets it up an independent body. Undeniably, this will allow it to carry out its tasks more freely and enhance external coherence on a general level. Although the question of competences may create tension with the Commission and the Council as the EEAS transgresses its competences, inevitably this could create institutional incoherence.\textsuperscript{51} Another problem of competences that came into limelight was that it remained unclear which external policies were the sole responsibility of the Commission and which ones would require coordination. This issue was addressed in an informal manner by former Commission President Barroso, he achieved this by instructing that several Commission portfolios (International cooperation and crisis response; and development) to work closely with the HRVP development.\textsuperscript{52} In the end, all these policies interact with each other and their boundaries are often unclear.


\textsuperscript{47}Nicole Koenig, 47 \textit{The International Spectator: Italian Journal of International Affairs} (2012), p. 24-25.

\textsuperscript{48}Ibid.

\textsuperscript{49}Ibid. p. 26.

\textsuperscript{50}Dr. Simon Duke, \textit{European Institute of Public Administration Maastricht} (2011), p. 6-7.

\textsuperscript{51}Ibid.

\textsuperscript{52}Ibid.
The level to which the EEAS will enhance vertical coherence is a question which cannot be answered in the affirmative. The EEAS and its role will largely depend on the political will of the member states. As already mentioned the Treaty of Lisbon remained rather vague and the scope of powers of the EEAS would depend on the decisions that can be reached. Moreover, vertical coherence will also rely on how far the member states will cooperate with the EEAS through their diplomats in the exchange of relevant information with regards to external policies. The differences in external policies pursued by each member state has made the work of the EEAS difficult, diverging views have made it impossible for the EEAS to have much success, mostly notably with the ongoing civil war in Syria and the individual military action taken by France in Mali recently. The successes however must not go unnoticed, the approach to Kosovo and the nuclear talks with Iran, just to name a few. In relation, the biggest success recently could be seen in the numerous sanctions that have been imposed on Russia, in order to deter its involvement in Ukraine. On a side note, the delegations of the EEAS which are made up of member state diplomats will help in improving the external coherence of the EU, as opposed to being made up of people from the Commission.

5. Glimmer of hope, a new Commissioner and Mogherini.

The shortcomings of coherence with regards to both the internal and external workings within the EU have been discussed. The Treaty of Lisbon was a major limp in the reform process for improving the EU’s external coherence, however evidently the term in office for the first ever HRVP was a mix of successes and failures. The question remains, what can be expected in the near future. This will be done briefly in the following section by assessing the promises and declarations made by the incumbent President of the Commission Jean-Claude Junker and, new HRVP Fedrica Mogherini.

Junker has made numerous declarations on what can be expected from the new Commission in the next five years. The new structure within the Commission had put greater emphasis on collaboration and coordination between all the seven Vice-Presidents of the Commission. Each individual Commissioner will have to work closely with different Vice-Presidents based on the applicability of their portfolios. The new format within the Commission aims at improving intra-institutional coherence and will hopefully help alleviate any tensions within the Commission. Junker has also acknowledged the need for the HRVP to work closer with the college of Commissioners. He hopes to do this by entrusting ‘other external relations Commissioners with the task of deputizing for the High Representative both within the work of the College and on the international stage’. Clearly Junker hopes that by giving the HRVP more space to her job, she will be able to work closely with the Commission setting up a more coherent external policy. Moreover, Junkers plan sets out more of a hierarchical structure between the HRVP and the Commissioners, this should help reduce tensions and setup more synergies in the external policies. In relation, newly appointed HRVP Fedrica Mogherini recognizes a ‘need to coordinate all actions and all polices that have an external

55 Ibid.
59 Ibid.
impact. She made it clear that the instruments are in place, notably the EEAS, but accepts that much of her success will depend on the building of political ties with all the EU institutions. From the foregoing, is clear that Mogherini will enter her office with the hope of enhancing a coherent external plan, although she accepts that this can only be achieved by reducing political tensions at all levels, something Ashton may have failed to address. How Mogherini will address these hurdles is not yet clear, but in the following months her efforts will be watch closely.

6. Conclusion

Former U.S. Secretary of State Henry Kissinger once stated, “Who do I call if I want to call Europe?” These days are long gone; the setting up of High Representative followed by the enhancement of the position to HRVP and the creation of the EEAS has given the EU as a bloc an external representation. Although to a great extent the Treaty of Lisbon address the internal and external aspects of the coherence polices in the EU namely the setting up of the double-hatted position, it also left many gaps. Reforms alone will not help the EU in having a coherent external policy as vertical coherence remains a challenge. This will greatly depend on the political will of the member states in providing more concessions that will allow the HRVP to play a greater role. While with regards to both intra-institutional and inter-institutional coherence, the HRVP does not fully address all the challenges, albeit, major steps have been taken to overcome the initial challenges. The new positions of HRVP also created several degrees of incoherence as was evident from the political tensions between the different actors in the EU. In truth the position of HRVP is very demanding, the person who will hold this position will not be able to act alone, to a great extent Ashton’s failures can be understood from this perspective. In relation, the new Junker Commission seems to be on the right track based on the preliminary statements that have been made recently; the same can be said of Mogherini although only time will tell.

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62Ibid.
WHAT IS THE IMPORTANCE OF THE DOUBLE HAT FUNCTION OF THE HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY?

Manasa Yoganarasimhan

1. Introduction

When looking in retrospect one can easily confer the considerable growth of the European Union (EU). It has crawled its way out of a mere Coal and Steel Community in 1951, into the full-fledged European Union as we know it since 2009. Its journey however started with the aims of furthering economic integration heading towards a common market.¹ This is why the Maastricht Treaty in 1993 proved to be a game changer. Not only did it create the European Union under a pillar structure, it also created the Common Foreign and Security Policy (CFSP).² As opposed to previous goals, in 1993 the EU successfully directed its aims towards integration, which was not wholly economic in nature. Interestingly, the second pillar was made up of Common Foreign and Security Policy. This showed one of the first concrete steps towards the EU’s interest in external relations and a common foreign policy. Ever since the Maastricht Treaty the European Union has been keen on granting competences to individuals and institutions to ensure coherence in the EU’s external foreign policies. Along with this the EU has looked for a representative of the Union in external relations and conferences. In today’s European Union the High Representative of the Union for Foreign Affairs and Security fulfils this role. It must be understood however that competences in ensuring the EU’s external relations and policies have not only been granted to the High Representative but also to certain EU institutions. The High Representative and certain EU institutions must therefore work together. This cooperation is of core importance as it leads to the revolutionary double hat function of the High Representative. The double-hat implies that the High Representative sits in the European Commission and simultaneously also in the Council of the EU. Therefore the High Representative essentially wears two hats. This will be further examined and discussed. By exemplifying who the High Representative is, what function they hold within the EU, and what role they play outside the EU, the importance of the double hat function will be shown.

2. Who is the High Representative of the Union for Foreign Affairs and Security Policy?

First and foremost it is important to understand who the High Representative is before delving into the significance of the double hat function. Since November 1st 2014, the High Representative of the European Union is Federica Mogherini.³ She is also one of the Vice-Presidents of the Commission under art.18 (4) TEU. Hence it can be inferred that she is a part of the Commission. This is why the High Representative’s mandate lasts five years, much like that of the Commission’s according to art.17 (3) TEU.⁴ Although the High Representative is part of an official EU institution, she herself is not. According to art.13 (1) TEU the High

Representative is not an official institution. Moreover, the High Representative is appointed by the European Council with agreement of the Commission President. The European Council then votes on the candidate by qualified majority voting\(^5\). The European Council is a body made up of Heads of State or Government.\(^6\) This implies that the nature of the body itself seems intergovernmental. Therefore issues discussed in the European Council are politically sensitive such as external relations and CFSP.\(^7\) Interestingly the European Council needs agreement of the Commission President for their candidate. However, the commission is supranational in nature\(^8\). Hence, the Commission President acts for the Union’s interest. This shows that Federica Mogherini’s appointment is by nature a representative of a highly sensitive issue bridging the divide between intergovernmental and supranational sentiments within the EU.

From this it is inferred that the High Representative is a person, not an official institution, appointed by the European Council subject to the Commission’s agreement for a five year mandate. The High Representative is also a person who represents the EU in a sensitive area. This brings us to the issue of what exactly this area is.

3. History of the High Representative of the Union for Foreign Affairs and Security Policy’s mandate

Before continuing onto the core issue of the double hat function, it must be understood what exactly the High Representative is representative of. To understand this, certain historical events must be brought to attention. This will give a deeper perspective of who the High Representative is in addition to what has previously been mentioned.

In the 1993 Treaty of Maastricht, the concrete concept of a common foreign and security policy arose. This was a brave step. In order to enforce this, the position of the High Representative of Common Foreign and Security Policy (CFSP) was created at the Amsterdam Treaty in 1999.\(^9\) The Commissioner of External Affairs had also been created.\(^10\) The High Representative of CFSP would work with the Council of the EU.\(^11\) The External Affairs Commissioner would work with the Commission. Hereby, the High Representative of CFSP would be in charge of the EU’s Common Foreign Security Policy, as well as its Common Security and Defence Policy. The External Affairs Commissioner would be responsible for conducting EU external economic relations. In 2009 however, the Lisbon Treaty merged these two posts into what is now known as the High Representative of the Union for Foreign Affairs and Security Policy. Since the merging, the post Lisbon High Representative is now responsible to the Council and the Commission. Important to know is that the pillar structure of the EU created in Maastricht was also abolished in Lisbon. However the remains of the CFSP pillar survived. This was due to member states’ reluctance to let it slip out of their control.

The High Representative is therefore representative of both the EU’s CFSP and its external economic relations. Now we can affirm who the High Representative really is. This is the

\(^5\) Article 18(1) TEU

\(^6\) Article 15(2) TEU


\(^10\) Ibid.

\(^11\) Ibid.
person at the forefront of conducting the EU’s Common Foreign and Security Policy as well as its external economic relations.

4. The Importance of the Double Hat for the High Representative’s function within the EU

Now that it has been established who the High Representative is, it must be understood what the importance of her role and function is in today’s EU. Given that the key element to the High Representative is her double hat function, this concept must be elucidated.

The double hat function refers to the High Representative’s position in both the Council of the EU and the European Commission, as previously seen. According to art.18 (3) TEU the ‘High Representative shall preside over the Foreign Affairs Council’. He shall also ‘be one of the Vice-Presidents of the Commission...’ as per art.18 (4) TEU. This suggests that the High Representative must meet its Council once a month and the Commission once a week. This already sounds ambitious. In addition, the Commission and Council deal with two different aspects even today. The Commission still deals with external representation of the union ‘with the exception of common foreign and security policy’. CFSP is therefore left to the Foreign Affairs Council which also manages the EU’s common security and defence policy. This shows the reality of the High Representative’s hat as Vice President of the Commission. It also shows the other hat which the High Representative wears as the Chair of the Foreign Affairs Council. Hence, the double hat function of the High Representative points at her role as both a Council and a Commission member. Now that the concept of the double hat has been elaborated upon, an assessment can be made towards the importance of it for the High Representative’s role within the EU.

5. The function as an inter-institutional co-ordinator within the EU

This brings us to the function of the High Representative within the EU as a person who coordinates between several EU institutions. According to art.30 (1) TEU, the High Representative can submit proposals to the Council in matters of CFSP. However, these proposals usually need support from the Commission. In order for the Commission to agree to the High Representative’s proposal, the Commission must be aware of the contents of it. Hence, the High Representative has a motive to keep the Commission informed of the progress on CFSP within the Council. Similarly, the Council must also be aware of the Commission’s agenda. In this respect the double hat function of the High Representative forces the Council and the Commission to work closely. This improves inter institutional cooperation within the EU. However, the High Representative does not only improve cooperation between the Council and the Commission. This is because the High Representative’s participation within the Commission also extends to the European Parliament. The Commission is accountable to the European Parliament. As a member of the Commission the High Representative is subsequently included in this. This implies that she, along with the other Commissioners can be forced to step down by the European Parliament. This gives the High Representative more incentive to coordinate closer with the European Parliament. This is why Mogherini’s predecessor ‘Catherine Ashton’ presented the

12 Ibid.
13 Article 17(1) TEU
15 Article 30(1) TEU
16 Article 17(8) TEU
progress of the EU’s CFSP to the European Parliament on April 2014.\textsuperscript{17} The High Representative’s double hat function therefore enables the Council, Commission and the European Parliament to coordinate with one another. It does not end here however. The European Council is also included. The Foreign Affairs Council must ‘elaborate the Union’s external action on the basis of strategic guidelines laid down by the European Council…’\textsuperscript{18} This article shows that the European Council determines the guidelines and objectives of the CFSP. Hence, the Foreign Affairs Council discusses on matters set out by the European Council. As the Chair of the Foreign Affairs Council this suggests that the High Representative must keep the Council discussions focused on the guidelines set by the European Council. As aforementioned however, it is in her best interest to communicate this progress with the Commission and European Parliament. Hence she must communicate the European Council guidelines to the Commission and the European Parliament, showing her double hat function once again. This shows how her double function also draws the European Council into the gambit of CFSP and external relations. Through the double hat function the High Representative thereby links the European Council, the Council, the European Parliament and the Commission together. This is of importance for the level of unity, coordination and communication within the EU institutions. This shows that the double hat function is of importance for the High Representative’s role as an inter-institutional coordinator within the EU.

6. The function to ensure coherence of EU common foreign and external policies

Other than the High Representative’s function as an inter-institutional coordinator, she also serves another role within the EU. Due to the sensitivity of EU external policies and CFSP, member states within the EU have tried to preserve their competence over it. Essentially the EU is struck by the dichotomy of member state action on the one hand and EU action on the other.\textsuperscript{19} More specifically, it is struck by the Council on the one hand and the Commission on the other.\textsuperscript{20} With the generally intergovernmental sentiments within the Council and the more supranational one in the Commission, ensuring coherence in this sensitive issue has proven to be difficult in the past.\textsuperscript{21} This is where the High Representative’s double hat function plays a role. By working in the Commission and the Council, the High Representative acts as a bridge between supranational and intergovernmental sentiments. It is believed that this is the key to more coherence within EU external policies.\textsuperscript{22} This is because it allows member states’ views and Union views to work together towards policies which both can agree on. This leads to coherence within EU policies. Using examples this can be shown.

According to art.21 (3) TEU the High Representative with the help of the ‘Council and the Commission…shall ensure that consistency [in the areas of external Union action]’. This shows that the High Representative must work together with the Council and the Commission. Here her double function helps in ensuring coherence or ‘consistency’ in external Union action. Another example can be shown in art. 26(2) TEU which regards

\textsuperscript{18} Article 16(6) TEU; K.Smith, \textit{European Union Foreign Policy in a changing world} (2\textsuperscript{nd} edition, Polity Press, Cambridge 2008), p.3.
\textsuperscript{20} Ibid.
\textsuperscript{22} M.Peter, ‘Double-Hatting in EU External Engagements’, 46\textit{ German Institute for International and security affairs (SWP)} (2012), p.3.
common foreign and security policy. It asks the ‘Council and the High Representative… to ensure the unity, consistency and effectiveness of action by the Union’. This once again asks the High Representative to work with the Council and Commission. The legislation calls on her to ensure that the Union (Commission) acts in consistence with the Council’s CFSP. The legislation essentially asks for coherence (‘unity, consistency and effectiveness’) in the way that the Union acts with the CFSP set by the Council. Subsequently, the High Representative must ensure that the Union does not act contrary to the CFSP set out by the Council. This is in order to ensure coherence within the EU’s policies. It allows the EU to think and act with one mind. So far two articles have been mentioned. However it must be known that a call for the High Representative to ensure coherence of EU external policies is mentioned numerous throughout the EU legislation. Acting with one mind and hence, coherently is an essential element which the EU legislation demands the High Representative to coordinate. Although in theory the double hat function can work as a way to ensure coherence within Union policies, in reality this proves to be rather difficult.

During Ashton’s mandate there had been a general EU (Commission) external economic relations policy to keep EU-Pakistan bilateral trade alive.\(^\text{23}\) Ensuring the coherence of this policy proved difficult when certain Council Ministers were hesitant at this agreement in light of the armed terror conflict.\(^\text{24}\) This was reflected in UK Prime Minister David Cameron’s accusation that Islamabad was ‘exporting terrorism’.\(^\text{25}\) In response to this, Lady Ashton spoke of creating ‘a coherent, long-term strategy to deal with EU-Pakistan relations’. This was an attempt at ensuring that the Council and the Commission could both agree to the EU’s external economic policy and act coherently.\(^\text{26}\) Hence rebuilding coherence of the Union’s EU-Pakistan trade policy within the Council has been attempted since 2010.\(^\text{27}\) This example shows the difficulties of ensuring coherence within the Commission and the Council. As can be seen, in theory the double hat function is of importance within the EU for helping the High Representative ensure coherence of EU external and foreign policies. Although in reality, this proves to be far more complicated.

7. The function as a checks-and-balances mechanism within the EU

This brings us to the final point of importance of the High Representative’s double function within the EU. This is the fact that her double hat functions as a ‘checks and balances’ system within the EU. This term stems from Montesquieu’s separation of powers between the executive, legislative and judiciary branches.\(^\text{28}\) The Commission has competence to exercise ‘executive and management function[s]’ according to art.17(1) TEU. It also has the competence to ‘promote the general interest of the Union’. From this it can be inferred that the Commission has the competence of general governance of the EU’s policies and actions, similar to a national government. Although the Commission can not be said to be the

government of the EU, it is nevertheless the most executive body by nature. Hence the Commission can be seen as the executive mechanism of the EU. Similarly the Council can be seen as the main legislative body of the EU along with the European Parliament. Here the double hat function can already be seen as the High Representative wears one hat in the executive body and the other hat in the legislative. Additionally, the judiciary body within the EU is the Court of Justice of the EU (CJEU). However, the CJEU has no jurisdiction over matters of CFSP. Hence, the High Representative must acts as a checks and balances mechanism herself, by overseeing Council and Commission actions. This is also where her team plays a role.

According to art.27 (3) TEU ‘the High Representative shall be assisted by a European External Action Service [EEAS]’. The EEAS is comprised of members ‘of the Council and of the Commission’. This means the High Representative’s double hat function is aided by the EEAS. So when conducting the CFSP, or meeting the Commission, the High Representative will be guided by her team. The checks and balances function can be illustrated in an example. In issues related to CFSP, the European Parliament hardly plays a role. The Council votes with unanimity. Theoretically speaking, this would suggest that the Council could vote on a decision related to CFSP contrary to the general principles of the Union. Without the European Parliament or the CJEU to regulate this, a form of checks and balances goes missing within the Union. Hence, to overcompensate for the Court’s absence the High Representative’s double function kicks in. Given that the High Representative also wears a Commission hat, she can stop the Council from adopting a decision contrary to Union (Commission) values. This is because the Commission has a slight judicial function of promoting ‘the general interest of the Union and take appropriate initiatives to that end’. As an ‘appropriate initiative’, the Vice President of the Commission who also sits in the Foreign Affairs Council can warn her Ministers of the CFSP being contrary to Union principles. Additionally the EEAS warns the High Representative if the Council acts out of its competence in drawing up a CFSP. It also warns the High Representative if the Commission does not act within its competence to ensure the Union’s ‘external representation… of the common foreign and security policy’. The EEAS helps ensure that the Council keeps to its legislative functions and the Commission to its executive function. Since the EEAS is made up of both Council and Commission members, it keeps the High Representative’s double function role as a checks and balance mechanism alive. Without this mechanism there is no guarantee of the protection of the EU’s fundamental principles. Hence, the High Representative’s double-hat role functions as a checks and balances mechanism which is of importance to compensate for the absence of the Court’s jurisdiction over CFSP within the EU.

Thus, the double hat function of the High Representative serves a significant importance within the EU. Her function is of importance for inter-institutional co-ordination within the EU, the desire for coherent EU foreign external policies and the protection of checks and balances.

31 Ibid, p.58.
32 Article 275 TFEU
35 Article 31(1) TEU
36 Article 17(1) TEU
38 Article 17(1) TEU
balances within the Union. As can already be detected however, the double-hat function seems to overload the High Representative’s role within the EU. In reality it looks as though it creates complications for the High Representative’s job description as she seems to have too many functions to play within the EU.

8. The Importance of the Double Hat for the role of the High Representative outside the EU

Now that it has been established what the importance of the High Representative’s function is within the EU, her role outside the EU must also be exemplified. Firstly, the double-hat feature helps the High Representative in her role as the representative of EU common foreign and security policy when abroad. Her role as the EU’s CFSP representative is of core importance in dealing with third countries for the establishment of EU foreign alliances. Under her role to represent the EU in matters of CFSP she has the competence to propose initiatives and decisions in relation to CFSP to the Council as per art.30 (1) TEU. Additionally, the system of rotational presidency within Foreign Affairs Council has been replaced for the long-term Chair. This implies that the High Representative chairs the Council throughout her mandate. This gives her dominance over the Foreign Affairs Council’s agenda and subsequently the progress of the CFSP. Hence representing the EU’s CFSP is made easy for the High Representative as she conducts the mains issues of the Foreign Affairs Council (FAC). This is where her double hat also plays a role. As aforementioned, in order to create coherence within EU external policies the High Representative can adjust the FAC agenda as per what the Commission’s focus is on. This is easy to do as the High Representative is also the Vice-President of the Commission. Hence, the FAC agenda can be in accordance to the commission’s programme to create coherence in CFSP. This double hat function is of great importance to her representative role outside of the EU. This is because she can represent and speak for the EU with coherence and clarity. She will not need to tread lightly in fear of representing EU CFSP which may be contrary to the EU’s more general external relations policies. She can represent the EU in a straightforward, coherent manner. The double function allows her to have clarity of what the EU’s position is in international conferences as she herself is part of both the CFSP talks (Council) and external relation policy talks (Commission). Furthermore, it is of importance to know that the Common Security and Defence Policy (CSDP) ‘shall be an integral part of the common foreign and security policy’. This means that the High Representative can work together with organs such as NATO and the UN as a part of the EU’s CSDP. For instance, Federica Mogherini has already spoken to NATO’s Secretary General on strengthening co-operation between the EU and NATO. During this meeting she represented the EU in CFSP and expressed the view that the EU and NATO have similar common foreign and defence policies. She could do this without fear of her actions being contrary to the external policies of the Union as she herself is part of the Commission responsible for drawing up such policies. Therefore she knows what both the Council and the Commission work on. Hence the double hat function is essential in helping the High Representative’s role as the spokesperson for the EU in CFSP when abroad.

The active involvement of Mogherini with NATO brings us to the second issue of importance for the High Representative’s role outside the EU. The double-hat feature not only helps the

39 Article 27(2) TEU
High Representative in her role as the representative of EU common foreign and security policy but also in her role as an active participant in EU’s external relations. This means that she does not only represent the EU’s CFSP. She also represents the EU’s other external policies by communicating with third countries. Her role as an active member in external relations on the EU’s behalf is crucial. According to art.27 (2) TEU the High Representative ‘shall conduct political dialogue with third parties on the Union’s behalf and shall express the Union’s position in international organisations and at international conferences’ This means that the High Representative has certain responsibilities to actively engage (‘conduct political dialogue’) with third countries. Usually when engaging in political dialogue, matters of CFSP and external relations are discussed simultaneously. Hence due to the nature of the double hat function, the High Representative can discuss both CFSP and external relations when conducting political dialogue. This can be seen with the dialogue between Mogherini and Israeli Prime Minister Benjamin Netanyahu. Issues of CFSP and external policies were discussed in conjunction with one other. Hence the double hat function of the High Representative allows more unity of EU policies to be presented to third countries. In addition to this, Art. 28 (1) TEU mentions that ‘where international situations require operational action by the Union the Council shall adopt necessary decision[s]’. Given that the High Representative presides over the Foreign Affairs Council, she is the one who initiates this ‘necessary decision’. This again shows that EU legislation demands her to be an active player for the EU on an international platform. Whilst adopting this decision the legislation requires ‘the means to be made available to the Union’. Hence the Commission acting on behalf of the Union must know of this decision. This calls on the High Representative’s double-hat function to ensure that the Commission knows of the Council’s decision. Hence her role as an active player is aided by her double hat function. The fact that active political dialogue is such an important aspect of the High Representative’s job shows why certain critique has befallen Catherine Ashton. Ashton failed to properly represent the EU and take action during the Haiti earthquake in 2010. This shows the importance of the role of the High Representative as an active member in the EU’s international relations. Thus, the High Representative not only plays the role as an EU representative of CFSP, but also plays the role of being an active participant in international relations to represent EU External policies. Hence, in helping her with these roles, the double hat of the High Representative is of key importance.

9. Conclusion

When looking at the European Union it is startling to know that it started as a mere Coal and Steel Community. Even more astounding is that the Union has developed into more than just an economic project. With mandates such as the High Representative of the Union for Foreign Affairs and Security Policy it is indeed easy to confer the growth of the EU. The High Representative is someone who represents the EU’s CFSP and the EU’s external economic relations; an unimaginable thought for the 1951 Coal and Steel Community. In light of historical events it was seen that the High Representative is a person who merges the position

44 Article 28(1)TEU
46 Ibid.
of the High Representative of CFSP and the Foreign Affairs Commissioner. This shows the double hat function of the High Representative as a person who now works in the Commission and the Council. After examining the function of the High Representative for the EU it can be seen that the double-hat function is of importance for inter-institutional coordination, ensuring coherence in the EU external foreign policies and for the checks and balances mechanism within the EU. The High Representative does not only play a role within the EU but also outside it. She has the role to represent the EU on a global platform with regard to the CFSP as well as the role to be an active participant for EU external relations. Here too the double-hat function was seen to aid the High Representative in the important role of representing the EU and actively engaging in dialogues with third countries. Although the double hat function seems to be of pivotal importance for the EU, there are certain critiques to it as mentioned. Due to this double-hat, the High Representative must Chair the Foreign Affairs Council and be present during Commission meetings. She must keep inter-institutional cooperation alive, ensure coherence in the EU external policies and continually act as a checks and balances mechanism. Additionally she must also be the EU’s spokesperson on CFSP and actively engage in political dialogue with third countries to represent EU’s external relations. As can be seen, the double hat function shows signs of an incredibly complicated and perhaps overly-ambitious job description. Nevertheless, in theory the double hat function of the High Representative is of great importance to the EU.
NEW JUDGES FOR EUROPE? THE INSTITUTIONAL REFORM OF THE COURT OF JUSTICE OF THE EU

Gina Baumgärtel

1. Introduction

The European Union has come a long way from the European Coal and Steel Community established by the Treaty of Paris in 1951.\(^1\) Over the time, several enlargements lead to a Union with 28 Member States.\(^2\) A constant increase in competences conferred to the European Union by the Member States leaves the Union with considerable powers in an immense number of policy areas. Amongst others, the growing amount of European legislation passed in the form of binding regulations, directives and decisions resulted in an increase in actions and proceedings brought before the Union courts and thus to the need of a functioning judiciary that is able to cope with all the incoming cases in a timely manner.

In the following this paper will firstly address the history of the Court of Justice of the European Union. Secondly, the existing backlog of cases pending before the General Court will be discussed. Thirdly, the failed attempt to increase the number of General Court members with 12 additional judges will be analyzed. Fourthly, this paper will examine the recent proposal to double the number of judges of this court and lastly, alternative suggestions of how to deal with the existing backlog of cases will be provided.

2. History of the Court of Justice of the European Union (CJEU)

The original version of the Court of Justice of the European Union was established by the Treaty of Paris in 1951 as part of the European Coal and Steel Community\(^3\).\(^4\) The possibility to bring an action against the High Authority, the executive body of the ECSC, was seen as a legal guarantee against arbitrary decision-making. The Court was constructed based on the model of the Conseil d’État in France which also provided for the office of Advocate-General working as an independent legal advisor for the judges. Based in Luxembourg the Court began its activities in December 1952.\(^5\) The Treaties of Rome in 1957 did not lead to any significant changes in the position of the court. The two new communities, the European Economic Community and EURATOM, adopted the existing court of the ECSC. The court was supposed to act as an arbitrator between the institutions with a right to annul their acts if they acted outside their competence. From the first half of the 1960s onwards it was possible for national courts to refer a question regarding the application of EU law to the court. In 1989 the Court of First Instance\(^6\) was created as part of the European Court of Justice. It was mainly established to lighten the case load of the Court of Justice.\(^7\) An important step was

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3 Subsequently referred to as ECSC.
4 D. Tamm, The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law, p.16.
5 Ibid., p. 17.
6 Subsequently referred to as CFI.
taken in the year 2004 when 20 additional judges were appointed at the two EU courts due to enlargements. Starting with seven judges in the original Court, the Court of Justice has, after the accession of Croatia, grown to 28 judges due to the principle kept in the Treaty of Nice that each state has the right to appoint one member of both the Court of Justice and the CFI. In 2005 a third court was created, namely the Civil Service Tribunal. The Lisbon Treaty introduced new terminology into the judiciary of the European Union. The judicial institution of the European Union is since then called Court of Justice of the European Union¹⁰ and comprises the Court of Justice¹¹, the General Court (the former Court of First Instance) and specialized courts.¹² This new terminology contributed to the reduction of confusion regarding the use of the term Court of Justice for both, the judicial institution and the supreme body therein.¹³ The primary task of these bodies is to ensure the uniform interpretation and application of Union law as well as to review the legality of Union measures.¹⁴ To date there is still only one specialized court within the European Union, namely the above mentioned Civil Service Tribunal, dealing with disputes between civil servants and institutions.¹⁵

3. Backlog of the General Court

For several years now the General Court is facing an immense backlog of cases. The number of cases disposed of each year is lower than the number of new incoming cases. Thus, the number of pending cases is constantly rising. This has also an impact on the average duration of proceedings.¹⁶ In a case¹⁷ in 2009 the CoJ held that competition proceedings lasting more than five years and ten months resembled an infringement of the principle that cases are to be dealt with within a reasonable time. This principle is stated in Article 47 of the Charter of Fundamental Rights of the European Union as well as in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The latter could pose a problem in the case of the Union’s accession to the ECHR.¹⁸

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¹⁷ D. Tamm, The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law, p.19-20.
This increase in the workload of the General Court can be explained by several events. The transfer of jurisdiction to the General Court in 2004 allows it to rule on certain classes of action brought by Member States.\textsuperscript{19} Moreover, the enlargements in 2004 and 2007 resulted in an increase in litigation before the court.\textsuperscript{20} Another factor increasing the workload of the General Court is the Lisbon Treaty which provided for eased conditions regarding Article 263 TFEU governing the admissibility of actions for annulment against regulatory acts.\textsuperscript{21} Additionally, the elevation of the Charter of Fundamental Rights of the European Union to the status of primary law in the Lisbon Treaty offers applicants new opportunities to challenge Union law.\textsuperscript{22} Further litigation is also generated by the numerous regulations establishing European Union agencies.\textsuperscript{23}

4. Attempt to increase the number of General Court judges

4.1 Options for an institutional reform of the CJEU provided for by the Treaties

The Treaties\textsuperscript{24} offer two different possibilities to reform the current situation and to try to tackle the significant backlog of cases pending before the General Court. A first possibility is provided for by Article 257 TFEU which states that the ‘European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialized courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.’ The second possibility is made available by Article 19(2) TEU providing that at least one judge per Member State shall be included in the General Court, in combination with Article 254(1) TFEU which states that the number of judges of the General Court shall be determined by the Statute of the Court of Justice of the European Union. The latter Article furthermore mentions the possibility of Advocates-General assisting the General Court if the Statute so provides. Thus, an increase in the number of judges of the General Court can be achieved by amending Article 48 of the Statute, which sets the number of judges, before Croatia’s accession to the EU on 1 July 2013\textsuperscript{25}, to 27, in accordance with Article 281 TFEU. In line with Article 281 TFEU, the Council and the European Parliament\textsuperscript{26} acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute of the Court of Justice.\textsuperscript{27} The Council and the EP shall act either on the request of the Court of Justice and after consultation of the Commission or on proposal of the Commission and after consultation of the Court of Justice.

\textsuperscript{22} Treaty on the European Union (Consolidated Version), [2010] OJ C 83/01, Art. 6(1).
\textsuperscript{24} Treaty on the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU).
\textsuperscript{26} Subsequently referred to as EP.
\textsuperscript{27} With exception of Title I and Article 64.
4.2 The CJEU’s proposal to increase the number of General Court members with 12 additional judges

The CJEU decided to make use of the second solution due to several considerations. Just to mention a few of them, the Court stressed the urgency of the situation due to the immense backlog existing before the General Court. It considers an increase of the number of judges having an immediate effect on the handling of cases and that the establishment of a new specialized court, including the appointment of judges and the adoption of its rules of procedure, on the contrary would be a lengthy process slowing down the handling of cases for the first years. Another argument put forward by the CJEU in favour of an increase of the number of judges is the flexibility of the proposed solution. Additional human resources can be used according to the current need and an increase in judges could even be easily reversible.28

Therefore, in April 2011 Mr. Vassilios Skouris, President of the CJEU, presented to the Commission the draft amendments to the Statute of the Court of Justice. This text contains separate proposals for each of the three courts. This paper will examine the proposals made regarding the General Court. The CJEU proposes to increase the number of judges of the General Court by 12, from 27 to a total of 39 judges.29 It must be emphasized at this point that this proposal was made before the accession of Croatia to the European Union. Croatia only became a member of the Union on 1 July 2013. Thus, the number of judges at the time of the proposal was 27, not as currently, 28.30

4.3 Commission Opinion on the CJEU’s proposal to increase the number of judges by 12

The Commission subsequently presented an opinion on the request made by the CJEU. It agrees with the CJEU’s view that an urgent solution is needed to deal with the significant number of cases that are currently pending before the General Court. The Commission assents that only by increasing the number of judges it will be possible to effectively deal with new incoming cases as well as to cope with the backlog of pending cases.31 It moreover stresses that amendments have to be made to Articles 47 and 48 of the Statute of the Court of Justice.32

The Commission further highlights that a change in the number of judges raises two additional issues to be resolved. Firstly, in regard to the organization of a General Court consisting of 39 judges and secondly, in regard to the system of appointing judges. To tackle the first issue, the Commission suggests the establishment of the office of Vice-President of the General Court as proposed for the Court of Justice.33 The rules dealing with the second issue, namely the appointment of judges, are laid down in the Treaties. The number of judges of the General Court is not determined in the TEU or TFEU. Article 19(2) TEU states

31 Commission Opinion on the requests for the amendment of the Statute of the Court of Justice of the European Union, presented by the Court, COM (2011) 596 final, para.28-29, p.5.
32 Ibid., para. 31, p.6.
33 Ibid., para. 32, 39, p.6-7.
however, that the General Court must have at least one judge per Member State. The final number shall be determined by the Statute of the Court of Justice of the European Union. The members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the qualifications necessary for an appointment to a high judicial office in their respective country. They shall be appointed ‘by common accord of the Governments of the Member States’, after consultation with a panel responsible for a report on the suitability of the person to perform the tasks of a General Court judge. The term served is six years. Half of the members are replaced every three years. Retiring members can be reappointed.

The Member States must informally agree on the arrangements for the nomination of judges. With the proposal of increasing the number of judges from 27 to 39, this number does not anymore correspond to the number of Member States and it is therefore of great importance that the Member States make such arrangements so that no conflicts arise regarding the appointments. The Commission is willing to find a balanced solution and thus submits two alternative systems to the Member States to tackle this issue. The first suggestion resembles a system of strict equality between the Member States by way of an egalitarian rotation system. It would contain two principles. Firstly, that every Member State shall have a minimum of one but a maximum of two judges of its nationality in the General Court and secondly, where two judges have the same nationality their terms must be staggered over the three-year period. The second system proposed by the Commission is designed to strike a balance between the best possible representation of the Member States and the need to respond to requirements of a General Court. To achieve this, six of the new judges would be appointed in line with a procedure that would meet this requirement. The principle that every Member State shall have at least one but a maximum of two members in the court would apply here as well. Regardless of the system preferred by the Member States, the Commission highlights the need of specification of the first-time appointment of the new judges and recommends an alignment of their terms with the current judges in office.

Despite all of the above mentioned evaluations and recommendations made, the Commission nevertheless issued a favourable opinion on the amendment of the Statute proposed by the CJEU provided that arrangements for nominating the judges to the General Court are adopted concomitantly by the Member States. This opinion was then forwarded to the EP and the Council.

4.4 Report of the Committee on Legal Affairs

The subsequent legislative proposal, a regulation of the EP and the Council, amending the Protocol of the Statute of the Court of Justice of the European Union, was then referred to the Committee on Legal Affairs for a report. This Committee stated that it became apparent in spring of the year 2012 that there would be no agreement in the Council as to the increase of the number of judges and more specifically, their method of appointment. Even though there

35 Ibid., Art. 254(2).
36 Ibid., Art. 254(2).
37 Ibid., Art. 255(1).
38 Ibid., Art. 254(2).
39 Commission Opinion on the requests for the amendment of the Statute of the Court of Justice of the European Union, presented by the Court, COM (2011) 596 final, para.43, p.8.
40 Ibid., para.47-48, p.8-9.
41 Ibid., para. 49-50, p.9-10.
42 Ibid., para. 51, p.10.
43 Ibid., p.13.
is in principle an agreement that the number of judges has to be increased, the criteria for selecting those is disputed among the Member States due to the fact that not all of them will be able to appoint an additional judge. Therefore, the Committee on Legal Affairs decided to divide the proposal for a regulation into two distinct parts. The undisputed part regarding amendments to the Statute was voted on before summer 2012 and has subsequently become law. For the second part, which includes the increase of the number of judges, there was still to be found a solution as regards the selection criteria for the additional judges at the General Court.\textsuperscript{44}

4.5 Failure of the attempt

The Committee on Legal Affairs then tried to revive the debate on the second part. Amendments were made to the proposed new content of Article 48 of the Statute which not only sets the increased number of judges but also their method of appointment. The Article states that ‘the additional judges shall be appointed regardless of nominees' Member States of origin.’ All Member State governments can submit nominations. Moreover, judges ‘retiring from the General Court may nominate themselves in a written submission to the chair of the panel referred to in Article 255 of the Treaty on the Functioning of the European Union. During a procedure to appoint one or more of the 12 additional Judges, the panel referred to in Article 255 of the Treaty on the Functioning of the European Union shall give an opinion on nominees' suitability to perform the duties of Judge of the General Court. The panel shall append to its opinion on candidates' suitability a list of candidates having the most suitable high-level experience, by order of merit. That list shall contain the names of at least twice as many nominees as there are Judges to be appointed by common accord of the governments of the Member States, provided that there is a sufficient number of suitable nominees.’\textsuperscript{45}

On 15 April 2014 the EP adopted by 590 votes to 79 with 7 abstentions a legislative resolution on the draft regulation of the EP and the Council amending the Protocol on the Statute of the Court of Justice of the European Union by increasing the number of judges at the General Court by 12 additional judges.\textsuperscript{46} The UK, along with other Member States however, were skeptical that the General Court really needed 12 additional judges and concerned about too high costs related with that measure.\textsuperscript{47} They reached consensus by deciding that the number of General Court members should be increased by 9 judges instead of 12 as proposed by the CJEU. Nonetheless, they did not agree on the method of


\textsuperscript{45} Ibid., p.8-9.


appointment of those 9 additional judges. Consequently, no agreement was reached in the Council and therefore this proposal was unsuccessful.

5. Recent proposal to double the number of judges of the General Court

After this failed attempt, the Court of Justice of the European Union now, in 2014, instead proposes to double the number of judges at the General Court, bringing it to 56 judges in total; two per Member State. A legislative proposal thereto is to be tabled shortly. This proposal would eliminate the difficulties the earlier attempted solution was facing in relation to the system of appointment of judges. With an increase of another 28 judges, each Member State would have two judges of its respective nationality. The equality of the Member States would therefore be guaranteed. Nonetheless, it is not imaginable that such a proposal can be easily realised. The involvement of very high costs in such a measure is inevitable. It is then questionable whether the Member States would really be pleased by such a radical proposal. Nonetheless this proposal, if adopted, would present an immediately effective tool to tackle the backlog currently existing before the General Court. With doubling the workforce of the court the number of cases that can be disposed of in one year can be expected to be much higher than it is currently.

This proposal however could also have an inverse effect on the workload of the CJEU as a whole. Even if the General Court is working with 56 judges and manages to reduce its backlog of cases this could have an impact on the Court of Justice which hears the appeals of the General Court. As the Court of Justice itself is currently working with 28 judges and nine Advocates-General, it is very likely that the CoJ will not be able to keep up with the speed of the General Court. Thus, the backlog of the General Court can be reduced by this proposal of doubling the number of judges, but this could create a higher backlog of appeal cases pending before the CoJ. This certainly depends on the number of appeals that will result from the cases currently pending before the General Court.

6. Alternative suggestions

Due to the difficulties resulting from the proposals to increase the number of judges of the General Court, it is inevitable to consider other possible alternative measures.

The General Court can rule on cases in chambers of three and of five judges as well as in a Grand Chamber of thirteen judges. Moreover, cases may be heard under specific conditions by one single judge if they are delegated or assigned to him. If a case of limited importance, with a lack of difficulty of the questions of law or fact raised and the absence of any special circumstances is assigned to a chamber composed of three judges, it can be heard and determined by the Judge-Rapporteur sitting as a single judge. This rule can only be applied to cases brought (a) pursuant to Article 270 TFEU or (b) cases brought pursuant to Articles

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53 Ibid., Art. 11(1).
263(4) TFEU, 265(3) TFEU and 268 TFEU that raise only questions that have already been clarified by existing case-law or that form part of a series of cases or (c) cases brought pursuant to Article 272 TFEU. However, delegation to one single judge is not possible, firstly, in cases that raise issues related to the legality of an act of general application, secondly, in cases concerning the implementation of (a) the rules on competition and control of concentrations, (b) rules relating to aid granted by states (c) rules concerning measures to protect trade and (d) rules relating to the common organisation of the agricultural market with the exception of cases forming part of a series of cases, and thirdly, cases referred to in Article 130(1) of the Rules of Procedure of the General Court. Article 130(1) of the Rules of Procedure of the General Court mentions proceedings brought against the Office for Harmonisation in the Internal Market, dealing with trademarks and designs, and proceedings brought against the Community Plant Variety Office as well as proceedings concerning the application of the rules relating to an intellectual property regime. The decision to delegate a case to one single judge in the situations mentioned above, shall be taken, after the parties have been heard, unanimously by the chamber composed of three judges before which the case is pending.

Taking the above stated considerations into account, one could tackle the backlog of cases pending before the General Court by amending these rules, specifically by reducing the limitations regarding the possibility of cases being decided by a single judge. If more cases could be heard by single judges instead of a chamber of judges, more cases could be dealt with simultaneously and this could therefore represent an alternative solution to the increase in the number of judges. However, it is uncertain whether Member States would be pleased by this proposal. Taking into account that in any chamber composition of three or five or even 13 judges there is the possibility that one Member State does not have a judge of its own nationality sitting in the panel, the system of decisions taken by a single judge should not pose a problem in that regard.

Another possible suggestion would be the introduction of the office of Advocate-General into the General Court as already existing in the Court of Justice. So far, the Rules of Procedure of the General Court provide only for the possibility that every judge, with the exception of the President, may perform the function of an Advocate-General in a specific case. This Advocate-General then assists the General Court sitting in a plenary session or a chamber. In the latter case assistance shall only be provided in cases of legal difficulty or factual complexity. However, judges called upon to perform the task of an Advocate-General in a case may not take part in the judgment of the case.

Article 254(1) TFEU states that the Statute of the Court of Justice may provide for the General Court to be assisted by Advocates-General. It is thus possible to imagine the introduction of a separate office of Advocate-General who may assist not only the court sitting in a plenary session or chamber but also the single judges. Introducing independent Advocates-General as additional members of the court could therefore relieve the judges of a certain amount of work and would not deprive the General Court of the availability of its judges. These additional court members could then contribute to the reduction of the existing backlog before the General Court.

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54 Ibid., Article 14(2)(1).
55 Ibid., Article 14(2)(2).
56 Ibid., Art. 51(2).
59 Ibid., Arts. 17-18.
6. Conclusion

All in all it can be established that the immense backlog of cases pending before the Union’s General Court poses a serious problem. The attempt to increase the number of General Court members with 12 additional judges failed mainly due to the disagreement of Member States regarding the system of appointment of the additional judges. This shows that a solution must be found which is acceptable to the Member States. Thus, doubling the number of judges of the General Court could be a suitable solution due to the equal number of judges per Member State. An increase of 28 court members might however lead to an immense growth in costs. Other alternative solutions could be the reduction of the limitations regarding the possibility of cases being decided by a single judge as well as the introduction of the office of independent Advocates-General. Regardless of which option is more suitable to the court itself or the Member States, it is most certainly clear that a solution must be chosen rapidly. The ruling in Der Grüne Punkt\textsuperscript{61} showed that the prolonged times of proceedings can infringe the principle that cases are to be dealt with within a reasonable time. Thus, a further increase in the backlog of cases of the General Court might have serious consequences for the European Union as a whole.

\textsuperscript{61} Case C-385/07 P Der Grüne Punkt [2009] ECR I-6155, para. 177.
IMPACT OF ADVOCATE GENERAL JÄÄSKINEN’S OPINION IN ‘SCHÖNBERGER v PARLIAMENT’ ON EU CITIZEN’S RIGHT TO PETITION

Magdalena Kučko

1. Introduction

Etymologically, the word ‘petition’ means ‘request’ (Latin ‘petere’ - ‘to request’).¹ The right to petition has been incorporated in the Treaty on the Functioning of the European Union (TFEU) under Articles 20 TFEU, 24 TFEU and 227 TFEU, and it has also been recognized as one of the fundamental rights under Article 44 of the Charter of Fundamental Rights of the European Union (‘Charter’). Even though there is no official meaning of the word ‘petition’ in the light of the aforementioned Articles, there have been various attempts to define this action. In the 90s, the European Parliament (‘Parliament’) tried to define petition as ‘every complaint, every request to take a position or to take steps, and the reactions to resolutions of the Parliament or to decisions of other Community institutions or organs that reach the Parliament through persons or groups of persons.’² Nowadays, petitions are referred to as ‘requests submitted to the Parliament for taking steps or action, for the amendment of policy, or for taking of position.’³ They form a direct connection between democratically elected Members of the European Parliament (MEPs) and citizens whose interests MEPs protect.⁴ The right to petition has known great success: in 2013, more than 3000 petitions were registered, which marks a 45 per cent increase in comparison to 2012 and a duplication of the number of petitions filed in 2011.⁵ So far, it has been possible for petitioners to bring actions for annulment against Parliamentary decisions on inadmissible petitions, but not against decisions concerning petitions that had been declared admissible. In his Opinion on the case Schönberger v Parliament, Advocate General Jääskinen proposes that Parliamentary decisions on petitions should not be subject to review by EU Courts at all. In this paper, an attempt will be made to determine whether such an Opinion will significantly impede European Union citizens in the exercise of their right to petition. In order to answer this question, the right to petition will first be approached from a historical, purposive and procedural perspective, and then previous case-law and Advocate General Jääskinen’s Opinion will be analyzed.

2. History of the EU Right to Petition

Even though the Treaty establishing the European Coal and Steel Community (ECSC) did not contain any mention of the right to petition, the Common Assembly Rules of Procedure provided citizens with the possibility to file a petition to the Common Assembly.⁶ At the Parisian summit of 1977, the Parliament adopted the Resolution on Special Rights for the Citizens of the Community, and called upon the Commission of the European Communities to urgently consider granting citizens the right to petition.⁷ However, this right would not be officially acknowledged until 1984, when the European Council approved of the proposals

³ Opinion of the Advocate General in Case 261/13 P Schönberger v Parliament [2014].
made by the Committee for a People’s Europe. The right to petition was further strengthened by an inter-institutional agreement of 1989, which resulted from the European Parliament’s urging that every European citizen should have the right to petition the Parliament. It gained its current Treaty and constitutional status with the entry into force of the Treaty of Maastricht and the Charter respectively. Even though there was an attempt to strengthen the right to petition in 2001, this action proved to be unsuccessful, and therefore it retained its Maastricht status in the most recent Treaty of Lisbon.

3. Right to Petition as an Instrument of European Citizenship

It can thus be derived from the aforementioned that the right to petition developed as an instrument related to the concept of European citizenship. The Treaty of Maastricht introduced the right to petition as one of the four European citizenship rights together with the right to free movement, right to chose and be chosen, right to diplomatic protection in third countries where the own country is not represented and the right to apply to the European Ombudsman. The right to petition and the right to file a complaint with the European Ombudsman are considered to be a means through which European citizens can exercise their direct democratic citizen’s rights. The right to citizen’s initiative introduced with the Treaty of Lisbon forms a similar democratic instrument. The possibility given to citizens of the European Union (EU) to participate in the EU’s decision-making process by means of petitioning gives citizens the opportunity to express themselves about Union policy, and is therefore pivotal for combatting the democratic deficit within the Union, as. The right to petition provides European citizens with a voice and thus strengthens the notion of European citizenship as stated in Article 20 of the current TFEU. With this open, democratic and transparent mechanism, citizens are given the power to exercise democratic control over the Parliament by filing their complaints extra-judicially. As the right to petition enhances democratic participation of citizens in the European legislative process, this contributes to better communication between Brussels and the rest of Europe, which promotes Union stability.

4. Rules of procedure

As mentioned earlier, the right to petition to the European Parliament is inter alia recognized under Articles 20 TFEU and 227 TFEU, which form the official legal basis for the right to

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petition. Apart from this, Rules 201 to 203 of Parliament’s Rules of Procedure lay down the procedure for dealing with petitions. They confer responsibility of handling petitions on a Parliamentary committee, currently the Committee on Petitions (‘Committee’).

4.1 Formal admissibility

In order for a petition to be formally admissible, it must mention the name, nationality and permanent address of each petitioner. If these requirements are satisfied, the petition will be entered in a register and then forwarded to the Committee, which will then first decide on its admissibility in accordance with Article 227 TFEU. It must be noted that the legal issue discussed in this paper is concerned with this latter, material admissibility.

4.2 Material admissibility

Article 227 TFEU states that a petition needs to be submitted by a citizen of the EU or ‘any natural or legal person residing or having its registered office in a Member State’. However, the Rules of Procedure nowadays also allow persons who are neither citizens of the EU nor reside in a Member State nor have their registered office in a Member State to file petition, but the Committee is not obliged to consider these. Furthermore, the petition needs to concern matters ‘which fall within the EU’s fields of activity and which affect the petitioners directly’. The official website of the European Parliament provides certain examples of issues of Union responsibility, such as:

- Rights that Treaties confer on European citizens;
- Environmental issues;
- Free movement concerns;
- Protection of consumers;
- Employment issues;
- Social policy;
- Recognition of professional qualifications.

Should the Committee decide that a petition does not satisfy these criteria, it will be declared inadmissible. The petitioner will be informed of the decision and the reasons behind it. In most cases, the Committee will suggest that the petitioner contacts another national (e.g. the national ombudsman or petitions committees in national parliament) or international body (e.g. the European Court of Human Rights). However, it is well-known that the Committee on Petitions is strongly in favour of a generous interpretation on petition admissibility. According to the Committee, ‘There is no reason to exclude matters of general interest on which the petitioner feels strongly, even where he is not personally affected.’ If the petition turns out to be admissible however, the Committee will examine it on its substance. It will decide what type of action needs to be taken according to Rule 202 of the Parliament’s Rules of Procedure. What the outcome of the examination will vary from case to

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17 Ibid, Articles 6 and 7.
case. In the case of a petition requiring individual attention, the permanent representation of the Member State in question or some other instances may get involved in the matter, and in certain situations, the President of the European Parliament may be asked to contact national authorities concerned. If the petition is about a matter of general interest (e.g. breach of EU law), infringement proceedings can be opened. The petition in question could also trigger political action taken by the Parliament or the Commission. Unless the petition is sent to other instances for analysis, opinion or information, the Committee will reply to the petitioner directly. The petitioner will be informed of the nature of its decision and the reasons justifying it as soon as possible.

5. Schönberger v Parliament

5.1 Judgment of the General Court

In the case Schönberger v Parliament, Mr. Schönberger (hereafter: ‘the appellant’) is seeking annulment of the decision of the General Court of the European Union, in which the appellant’s action for annulment of the decision of the Committee on Petitions of 25 January 2011, which concluded the examination of the appellant’s petition submitted on 2 October 2010, was declared inadmissible. The appellant had filed an action for annulment of the Committee on Petitions’s decision on the basis of Article 263 TFEU because even though his petition was declared admissible, the Committee on Petitions had concluded the examination of the petition without having had addressed its content.

5.2 Article 263 TFEU

Article 263(1) TFEU confers power on the Court of Justice of the European Union to review the legality of acts, other than recommendations and opinions, taken by the institutions listed in Article 263(1). According to 263(1) as well as various case-law, actions for annulment can be brought against all institutional acts that produce legal effects vis-à-vis third parties. Acts having binding legal consequences that can affect the interests of an applicant because they significantly influence his legal position are particularly suitable for annulment actions. On the other hand, actions of annulment against measures ‘internal to the administration’ having no external effect are considered to be inadmissible.

5.3 Tegebauer v Parliament

In order to establish whether according to current case-law, decisions of the European Parliament’s Committee on Petitions constitute acts that can be reviewed by the Courts of the European Union, the decision of the General Court in Tegebauer needs to be examined. In the case of Mr Tegebauer, the General Court held that the action that the Parliament takes pursuant to a petition declared admissible cannot be subject to review by Union judges because in that case, the Parliament still exercises its full political discretion. However, the

23 Case 261/13 P Schönberger v Parliament, still pending.
24 Case T-186/11 Schönberger v Parliament [2013].
27 Opinion of the Advocate General in Case 261/13 P Schönberger v Parliament [2014], para. 47; Case 60/81 IBM v Commission [1981], para. 9; Case 521/06 P Athinaiki Techniki v Commission [2008], para. 29; Case 362/08 P Internationaler Hilfsfonds v Commission [2010], para. 51.
Committee’s evaluation on the (material) admissibility of a petition needs to be subject to judicial review, since this review is the only guarantee of the effectiveness of the right to petition as described in Article 227 TFEU. According to the General Court, when the Committee decides that a certain petition is inadmissible and sets it aside, this decision affects the very essence of the right to petition, and therefore an action for annulment may be brought against such a decision. Thus, in Tegebauer v Parliament, the General Court applied the principle that only decisions of the Committee on Petitions declaring a petition inadmissible can be subject to an action for annulment pursuant to Article 263 TFEU.  

5.4 Opinion of Advocate General Jääskinen in ‘Schönberger v Parliament’

It is evident that in Mr Schönberger’s case, the General Court followed the reasoning of Tegebauer when declaring that an admissible petition could not be subject to judicial review. As Mr Schönberger decided to file an appeal against this decision, the Court of Justice is called upon, for the first time, to determine whether decisions of the Committee on Petitions can be subject to review by EU Courts. At the moment, the case Schönberger v Parliament is still pending, but Advocate General Niilo Jääskinen has recently delivered his Opinion on this matter. He suggests that, instead of applying case-law of the General Court, the Court of Justice should find that Mr Schönberger’s appeal should be dismissed on the ground that decisions of the Committee on Petitions cannot be challenged before a Court at all, as they do not form challengeable acts in the sense of Article 263 TFEU. He proposes therefore, that the grounds of the General Court’s judgment should be substituted under appeal.

When addressing the appellant’s argument that should the decisions of the Committee on Petitions be regarded as non-challengeable, this would constitute a breach of a fundamental right of the European Union, the Advocate General first acknowledges that the right to petition has, indeed, been incorporated in the Charter as one of the fundamental rights. However, by referring to Article 52(5) of the Charter that distinguishes between ‘rights’ and ‘principles’ and certain case-law that established that certain ‘rights’ mentioned in the Charter should actually be regarded as ‘principles’, he implies that the ‘right’ to petition could also be regarded as a principle instead of a right.

The Advocate General nevertheless proceeds by adding that when the Committee declares the petition inadmissible, sets it aside, refers it to another instance or when the procedure of answering the petition is terminated, no Union ‘right’ is limited or breached, and therefore there is no need for legal protection. On the contrary, in such situations the right to petition is fully respected because the petitioner was able to file his request, he was informed about the different Parliamentary procedural phases and he had received an answer to his request. He notes that in the case of an unsuccessful admissible petition, it is possible for the petitioner to file a petition to the Parliament again, which could then make a different decision if it decides to base its opinion on a different political ground. Advocate General Jääskinen emphasizes that the Parliament has expanded the number of cases in which petitions are declared admissible. It is now possible to file petitions in more situations than mentioned in the Treaty and the petitioner is free to turn to the Ombudsman and the Commission.

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31 Opinion of the Advocate General in Case 261/13 P Schönberger v Parliament [2014].
32 Charter of Fundamental Rights of the European Union, Article 44.
33 The Advocate General mentions Case 176/12 Association de mediation sociale [2014].
34 Opinion of the Advocate General in Case 261/13 P Schönberger v Parliament [2014], para. 58.
The Advocate General then goes on to state that decisions of the European Commission on complaints regarding competition law, which can be subject to judicial review, cannot form a point of reference for decisions of the Committee. Namely, the Commission is in this case capable of detecting breaches and determining sanctions, and individuals are allowed to file complaints regarding its decisions. When the Commission sets aside such a complaint, this necessarily forms an act that produces legal effect. The distinction between these decisions and the decisions of the Committee lies according to the Advocate General in the fact that, unlike the Committee’s acts, the Commission’s acts serve an economic purpose. The role that the Commission plays is substantially different. Reports of the Ombudsman establishing instances of maladministration form an opposite example in this respect, as it has been ruled that they, by definition, do not produce legal effects vis-à-vis third parties in the sense of Article 263 TFEU, nor do they bind the Parliament. The same is true for the Ombudsman’s yearly reports and decisions to close examinations of complaints by setting them aside. In his conclusion, the Advocate General does not exclude the analogous application of the principle the Court has developed in cases concerning decisions of the Ombudsman, as neither the Ombudsman nor the Committee have an obligation to produce results. According to this principle, petitioners would be allowed to ask for compensation on the basis of Article 340 TFEU in very exceptional circumstances where they can prove that the Committee is guilty of a serious breach of Union law.

According to Advocate General Jääskinen, the right to petition should be regarded as an autonomous concept within the area of Union law. In principle, it falls under the exclusive responsibility of the Parliament as guardian of the citizen’s interests. The Parliament does not deal with petitions as an administrative organ, but as a political one. This means that citizens can control and sanction decisions the Parliament has taken at the European elections. The core of the right to petition lies in the possibility of formally bringing certain questions under the attention of the Parliament without conferring on the petitioner the right to request legal protection directly. It is not an individual right that seeks to produce legal effects with regard to the applicant’s position, but a political tool for participation in democratic life. The corollary of the right to petition is therefore the fact that the Parliament has the duty to provide applicants with mechanisms that enable them to access the Parliament through efficient and transparent procedures. Only the establishment of these mechanisms can therefore be subject to review by Union judges by means of an action for failure to act in accordance with Article 265 TFEU. Review by the Courts should only be allowed when the Parliament’s actions constitute a serious and persistent infringement of the right to petition, calling into question the exercise of the right to petition itself. That would particularly be the case should it refuse to receive petitions or fail to respond to them.

It must be noted that the opinion of the Advocate General is not binding on the Court of Justice. The role of the Advocate General is to make reasoned submissions to the case that the Court then may or may not follow. Currently, the judges have started deliberations on the case and will give their judgment on a later date.
6. Analysis of the Advocate General’s Opinion—does it affect the right to petition?

First of all, it needs to be noted that, when the Advocate General is implying that the fact that the right to petition has been incorporated in the Charter does not mean that it actually constitutes a fundamental right, he does not provide any case law that would support his opinion. EU Courts have so far never ruled that the right to petition should in fact barely be regarded as a principle. As the Advocate General correctly points out, there is only one case where the Court has ruled that a right incorporated in the Treaty should actually be regarded as a principle, and that case concerns the right to information mentioned in Article 27 of the Charter.43 The fact that next to having been incorporated as a fundamental right in the Charter, it has also been recognized as one of four European citizenship rights, only speaks in favor of its status as an essential right that the Union has conferred upon its citizens.

As to the Advocate General’s allegations concerning situations in which petitions are declared inadmissible, it can be derived from the Committee’s statements as well as from statistics that the Committee is truly in favor of a generous interpretation on petition admissibility. Over the past decade, the number of admissible petitions has significantly increased, which means that nowadays, chances of getting a petition declared admissible are quite big.44 In the case of inadmissibility, it can be derived from Rule 202(8) that the petitioner will in any case be informed about the Committee’s decision and the reasons therefore. The Committee will most likely suggest alternative means of redress (international and national bodies), which supports the view that petitioners are well-informed of their position in the procedure and ways in which they can still reach their aims in a different way upon inadmissibility of their petition. Thus, if in this phase the petitioner does not get any legal protection, he still has many other options left.

When it comes to unsuccessful admissible petitions, Advocate General Jääskinen’s argument that it is possible for the petitioner to file a petition again needs to be regarded with suspicion. As the Parliament is elected for a term of five years,45 it is unlikely that it will change its political position on a certain petition when it is still composed of the same members. Thus, if a person’s petition turns out to be unsuccessful at the beginning of the Parliament’s term, he will have to wait with filing a petition again for at least another four years before he can realistically expect that the Parliament will reconsider its previous decision. Nevertheless, the fact that the Rules of Procedure enable the Committee to refer certain petitions to the Commission or the Council,46 and that according to Advocate General Jääskinen, the petitioner is free to refer his petition to the Ombudsman as well as the Commission himself, balances the situation of the petitioner out.

Furthermore, the Advocate General correctly points out that Commission decisions on competition law cannot be compared to acts of the Committee on Petitions, as obviously, the Committee is not competent to impose any sanctions, and according to previous case-law, its decisions to set a complaint aside necessarily produce legal effects. While the Commission’s acts are economical, the Committee’s decisions play a role in the political dialogue between the citizens and the Parliament, and therefore it can be said that these two acts fundamentally differ from one another.

On the other hand, as the competences of the Ombudsman and the Committee are similar, and as petitions can be referred to the Ombudsman, the Advocate General’s view that the Court ought not to exclude the possibility of treating decisions of these two instances in the same

43 Case 176/12 Association de mediation sociale [2014].
way should not be disregarded as such. If the Court decides that decisions of the Committee indeed do not produce any legal effects, this will only bring decisions of the Ombudsman and the Committee on an equal footing. A judgment that would then allow an analogous approach to these two non-challengeable Union acts would seem like a logical step of the Court. Citizens would be able to file actions for damages founded on non-contractual liability of the Committee if they can prove sufficiently serious mishandling of a complaint, which means that the right to petition would retain a form of legal protection.

However, Advocate General Jääskinen’s main line of reasoning is that the right to petition, as a tool for democratic interaction between citizens and elected representatives, should remain shielded from intervention by EU Courts. This view could in principle be reconciled with the historical idea of the right to petition as an instrument related to European citizenship. As mentioned earlier, the main idea behind giving citizens the right to petition the Parliament was the enhancement of citizen’s democratic participation in the EU’s legislative process. By definition, the right to petition is therefore a political instrument, and the Parliament’s decisions on petitions must be regarded as political decisions based entirely on the MEPs’ policy preferences. In essence, the Advocate General is then right to state that when citizens bring certain issues under the Parliament’s attention, the Parliament should be free to decide whether it wishes to act upon them or not. If discretion is, then, conferred upon the Parliament, applicants should respect its decisions, and another EU institution should not be given the power to review them.

Yet, the right to petition given to citizens will not reduce the EU’s democratic deficit if citizens are unable to actually exercise it. In the event that the Parliament refuses to receive a petition or simply fails to respond to it, it cannot be said that a petitioner has in fact participated in the Union’s democratic process, as his voice has not even reached the Parliament. Therefore, in extreme circumstances, a solution such as the allowance of judicial intervention under Article 265 TFEU seems very plausible. Action under Article 265 would then not only serve as a form of protection of the purpose of the right to petition itself, but also as a guarantee for petitioners that the Parliament will seriously consider every petition they submit.

7. Conclusion

At first glance, it seems that Advocate General Jääskinen’s proposal to make it impossible for petitioners to have their petitions judicially reviewed will have a very negative impact on the citizen’s right to petition. To support his opinion, Advocate General Jääskinen has undoubtedly included some unfounded assertions, such as his implied reference to the fact that the right to petition may not be a ‘right’ after all, and his argument that the Parliament may change its opinion on an unsuccessful admissible petition if the petitioner files his petition again.

Nevertheless, the main conclusion must be, that the Advocate General has delivered convincing evidence that the prohibition of filing an action for annulment against acts of the Committee will not impede the citizen’s right to petition in a significant way. While it is true that, if the Court decides to follow Advocate General Jääskinen, citizens will not be able to subject the Committee’s decisions to review by the Courts, it must not be forgotten that they will still have a number of other, alternative means of redress available in case they do not agree with the Parliament’s decisions. For example, they will still have the possibility to apply to various international and national bodies such as the ECtHR and national parliaments, as well EU instances such as the Ombudsman and the Commission. The fact that most petitions are declared admissible also speaks in favor of the petitioner’s ability to exercise their citizenship rights despite not being able to challenge the Parliament’s decisions judicially.
Furthermore, despite proposing that petitioners should not be given any legal protection in the form of Article 263 TFEU, the Advocate General does not ban intervention by the EU Courts completely. He holds that the possibility of allowing claims for damages in accordance with Article 340 should not be excluded, and that in case of serious procedural failures, application of Article 265 should be allowed.

It has been established in this paper that the sole purpose of the right to petition is to give citizens the opportunity to make a contribution to the legislative process of the Union while respecting Parliamentary discretion. Hence, the Advocate General’s Opinion more than adequately fits in this idea of the right to petition. While clearly respecting the citizens’ rights by providing them with numerous alternative opportunities to enforce their petitions, the Advocate General is seeking to safeguard Parliamentary discretion by preventing petitions to be reviewed by the EU judiciary. What the Court’s final judgment will be still remains to be seen, but it seems that if it, just like Advocate General Jääskinen, decides to look at the primary purpose of the right to petition, it is very likely to follow the Advocate General’ Opinion.
EUROPA NOVA THROUGH ENHANCED COOPERATION: TOWARDS A TWO-SPEED OR A MULTI-SPEED EUROPE?

Gloria Bozyigit

1. Introduction

‘Est Europa nunc unita et unita maneat’.¹ This is the first sentence of the European Anthem. And despite the fact that the European Union has united a formerly war torn continent, the question remains what form this unity should take in the future. As integration is not a static concept, but rather an ongoing process, in a Europe of 28 Member States one has to wonder what form such integration shall take in the years to come. In order to pursue the idea of an “ever closer Union”² the Member States must prove willingness to cooperate more closely. Clearly, such unanimous and close decision-making seems to be a rather utopian idea in the light of the current state of affairs of the European project. Arguably, integration needs more flexibility and creativity or to put it in the words of one of the founding fathers of Europe, Robert Schuman: ‘Europe will not be made all at once, or according to a single plan’.³ Will 21st century Europe be made in small steps of enhanced cooperation? Presuming that integration requires creativity and flexibility this paper aims at establishing whether such flexibility and creativity based on the concept of enhanced cooperation is best realised through a two-speed or a multi-speed Europe.

2. Enhanced Cooperation

2.1 From Maastricht to Lisbon

Enhanced cooperation denotes a procedure by which certain Member States agree to cooperate more closely in a specific area. Originally, this possibility did not form part of the acquis communautaire, but was only introduced through the Treaty of Amsterdam in 1997.⁴ Yet, the foundation was laid in the Treaty of Maastricht. The Treaty of Maastricht was a turning point for the EU in many aspects. Firstly, the European Economic Community was renamed to European Community. Secondly, a three-pillar structure was introduced, which incorporated the EC, CFSP and JHA⁵, and should be referred to as the European Union. Thirdly, agreement was reached on strengthening the European project through a monetary Union.⁶ Moreover, the notion of European Citizenship was introduced and the powers of the European Parliament were emphasized.⁷ In addition to that, the Treaty of Maastricht called for a new Intergovernmental Conference.⁸ This Intergovernmental Conference pursued the drafting of a new Treaty – the Treaty of Amsterdam – and drew up provisions regulating a

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² The Treaty on the European Union (Consolidated version), [2012] OJ C 326. From now on referred to as TEU. Preamble “determined to lay the foundations of an ever closer union among the peoples of Europe”.
³ Schuman Declaration of 9th May 1950.
⁵ EC=European Community, CFSP=Common Foreign and Security Policy, JHA=Justice and Home Affairs.
new method of cooperation, the so-called ‘enhanced cooperation’. The drafting of these provisions was fuelled by the notion of a ‘flexible Europe’. This idea was equally supported by Kohl and Chirac, who called for ‘a general clause in the Treaties enabling those Member States with the will and the capacity to do so to develop closer cooperation among themselves within the single institutional framework of the Union’. And such provisions were indeed incorporated into the institutional framework of the Union: Arts. 11, 43 and 45 EC Treaty. The Treaty of Nice subsequently broadened the scope of enhanced cooperation as its use was extended to the CFSP, the number of MS required to launch enhanced cooperation was fixed at 8 and the veto procedure was abolished. Again, in 2007, through the signing of the Lisbon Treaty changes were made to the provisions of enhanced cooperation. Currently, the following provisions deal with enhanced cooperation: Arts. 20, 44, 45, 46 TEU and Arts. 82, 83, 86, 87, 326-334 Treaty on the Functioning of the European Union.

Before analysing the success and use of enhanced cooperation so far it is crucial to draw attention to the basic definition of enhanced cooperation as laid down in Art. 20(1) TEU: ‘Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the TFEU. Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.’

2.2 Rome III – The first enhanced cooperation legislation

Despite the fact that the principle of enhanced cooperation can be traced back to the Treaty of Amsterdam in 1999, there has only been one successful implementation of such cooperation, namely in the field of the law applicable to divorce and legal separation. The first attempt to unify laws in this area was made already in 1999 and an initial compromise was achieved through Council Regulation (EC) 1347/00 of 29 May 2000 on the jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children.

As Rome III is the first attempt of enhanced cooperation it is necessary to understand how the applicability of enhanced cooperation was established. Initially, enhanced cooperation can

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14 The Treaty on the Functioning of the European Union (Consolidated version), [2012] OJ C 326. From now on referred to as TFEU.
only be used as a measure of last resort. As no agreement could be reached in the Council, European decision makers for the first time resorted to the tool of enhanced cooperation.\(^{18}\) The legal perquisites for enhanced cooperation are that it must deal with a field of law that is regulated in the Treaties (Art. 329 TFEU) and that this field of law must not fall within the exclusive competence of the Union (Art. 20,1 TEU). Additionally, at least nine Member States must submit such a proposal (Art. 20,2 TEU). Respecting all these criteria, Austria, France, Greece, Hungary, Italy, Luxemburg, Romania, Slovenia and Spain in 2008 submitted a proposal for enhanced cooperation in the field of the law applicable to divorce and legal separation to the Commission.\(^{19}\) Rome III was adopted in July 2010 and has until now 15 participants.\(^{20}\) Despite the critical debate on whether or not enhanced cooperation in this matter was actually the last resort and its conformity with Art. 326 TFEU, ROME III may be considered a success for the tool of enhanced cooperation. Interestingly, this success story should not continue.

2.3 Limits of enhanced cooperation: The unitary patent

The second attempt of enhanced cooperation was made in the area of unitary patent. As early as 1975 did the Commission imitate proposals establishing such a unitary patent. In 2011 enhanced cooperation was authorized as a method to pursue the realisation of a unitary patent. However, this time the approval of the use of enhanced cooperation was contested and brought before the Court of Justice of the European Union.\(^{21}\) The action was brought by Spain and Italy fearing that their national interests were at stake if enhanced cooperation would materialize.\(^{22}\) In principle Spain and Italy sought the annulment of Council Decision 2011/167/EU authorising enhanced cooperation in the area of the creation of unitary patent protection.\(^{23}\) It is of great importance to study this judgment in more detail as the Court of Justice of the European Union defined not only the scope of enhanced cooperation but also the interpretation of the relevant Treaty provisions. The main arguments put forward by Italy and Spain were the ‘misuse of powers and failure to have due regard for the judicial system of the Union’, the fact that the legal basis referred to (Art. 118 TFEU) did not fall under shared competences of the Union and the infringement of the requirements of Art. 20(1) TEU.\(^{24}\) Especially, the competence argument was important, as enhanced cooperation may not extend to areas of exclusive competence of the Union (Art. 20(1) TEU). It was argued that ‘competences conferred by Art. 118 TFEU fall within the ambit of the competition rules necessary for the functioning of the internal market referred to in Art. 3(1)(b) TFEU and, therefore, of the Union’s exclusive competence.’ The Court responded: ‘Although it is true that rules on intellectual property are essential in order to maintain competition undistorted on the internal market, they do not, for all that, as noted by the Advocate General, constitute


\(^{23}\) Joined Cases C-274/11 and C-295/11 Kingdom of Spain and Italian Republic v Council of the European Union [2013].

\(^{24}\) Joined Cases C-274/11 and C-395/11 Kingdom of Spain and Italian Republic v Council of the European Union [2013], para 9-14.
‘competition rules’ for the purpose of Art. 3(1)(b) TFEU.’ Following this line of argumentation the Court found that ‘the competences conferred by Art. 118 TFEU fall within an area of shared competences for the purpose of Art. 4(2) TFEU and are, in consequence, non-exclusive.’ Thus, the Council did not act contrary to the requirements of enhanced cooperation. Regarding the argument of misuse of power on the side of the Council, as it supposedly attempted to circumvent the requirement of unanimity laid down in Art. 118 (2) TFEU the Court came to the conclusion that ‘nothing in Art. 20 TEU or in Arts. 326 to 334 TFEU forbids the Member States to establish between themselves enhanced cooperation within the ambit of those competences that must, according to the Treaties, be exercised unanimously (...) the same articles do also not circumscribe the right to resort to enhanced cooperation solely to the case in which at least one Member State declares that it is not yet ready to take part in a legislative action of the Union in its entirety’. Consequently the Court equally rejected the argument of misuse of power. For a better understanding of the Court’s view on enhanced cooperation further findings of the Court shall be quoted:

i) ‘the expression “as a last resort” highlights the fact that only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision of enhanced cooperation’ (para 50)

ii) ‘to the expressions “throughout the Union” and “Union-wide” used in Art. 118 TFEU, it must be held that it is inherent in the fact that the competence conferred by that article is exercised not in the Union in its entirety, but only in the territory of the participating Member States’ (para 68)

(iii) ‘While it is, admittedly, essential for enhanced cooperation not to lead to the adoption of measures that might prevent the non-participating Member States from exercising their competences and rights, it is, in contrast, permissible for those taking part in this cooperation to prescribe rules with which those non-participating States would not agree if they did take part in it’ (para 82)

The Court has thus made a fairly positive statement regarding enhanced cooperation and flexible integration. Yet, a recent case depicted that like most legal matters of the Union also enhanced cooperation cannot be measured on a black-white scale.

2.4 Future of enhanced cooperation: The financial transaction tax

In 2011 the Commission issued a proposal on discussing a financial transaction tax in the Council. As the required unanimity could not be reached, eleven Member States decided to put forward a proposal of enhanced cooperation in the area of Financial Transaction Tax. Also in this case an action of annulment was brought before the Court of Justice of the European Union. In this specific case, C-209/13, the United Kingdom called for the annulment of the Decision authorising enhanced cooperation in the area of financial

transaction tax based on two grounds: Firstly, an infringement of Art. 327 TFEU as the tax would have effect outside the European Union. Secondly, an infringement of Art. 332 TFEU since the tax would also impose costs on non-participating Member States.\(^{30}\) The Court specified: ‘It is clear that the objective of the contested decision is to authorise eleven Member States to establish enhanced cooperation between themselves in the area of the establishment of a common system of FTT with due regard to the relevant provisions of the Treaties. The principles of taxation challenged by the United Kingdom are, however, not in any way constituent elements of that decision (…) As regards the second argument, whereby the United Kingdom claims, in essence, that the future FTT will give rise to costs for the non-participating Member States because of the obligations of mutual assistance and administrative cooperation, which, according to the United Kingdom, is contrary to Art. 332 TFEU, it must be observed that the contested decision contains no provision related to the issue of expenditure linked to the implementation of enhanced cooperation authorised by that decision.’\(^{31}\) The Court affirmed that in principal the Council Decision to enter into negotiations about enhanced cooperation was in accordance with European primary law. However, this does not entail that a drafted proposal on such enhanced cooperation in the sector of Financial Transaction Tax would also be in conformity with the law. The Financial Transaction Tax remains a mere proposal and doubts have rightfully been pronounced in the light of a possible two-speed internal market, which would be clearly against the core objectives of the Union.\(^{32}\) Seemingly, integration through enhanced cooperation and the idea of an internal market are highly contradictory for any closer cooperation between several Member States creates an imbalance within the freedoms of the internal market. This notion will undoubtedly influence future developments in the field of enhanced cooperation.

2.5 Critical analysis of enhanced cooperation and multi-speed Europe

At first sight it appears, enhanced cooperation is only a measure of last resort, thus serving as a valuable solution against deadlock. Yet, taking into account the foregoing one cannot deny the possibly impeding influence on the structure and functioning of the internal market. Equally evident is the fact that from such enhanced cooperation different European countries will integrate on different levels, which could also be viewed as being contrary to the initial idea of a ‘europa unita’. It can even be suggested, that there is a chance of abuse of enhanced cooperation in order circumvent ordinary European legislation.\(^{33}\) Another critical aspect arises from the inherent dichotomy of the value of such a multi-speed Europe: progress or regression?\(^{34}\) Notwithstanding the critique, the idea of a multi-speed Europe is relatively old and continuously reappears in debates dealing with European integration. Already Willy Brandt suggested a multi-speed Europe: ‘The Union would divide into two groups, those more advanced and those less advanced, in order to enable the former to achieve their common objective more quickly and easily, while the latter would follow when ready or willing to do

\(^{30}\) C-209/13 United Kingdom of Great Britain and Northern Ireland v Council of the European Union [2014], para 16.


so. Furthermore, the legal requirements for enhanced cooperation are relatively strict and little discretionary power seems to be left to the Member States. Seemingly, more flexible integration mechanisms might create a multi-speed Europe, however, due to a Europe of 28 Member States it will be problematic to completely disregard them. If we acknowledge enhanced cooperation as a necessary tool to promote European integration, the question remains: is enhanced cooperation stirring us in the direction of a multi-speed or a two-speed Europe?

3. Two-speed Europe

3.1 The difference between a two-speed and a multi-speed Europe

The idea of a two-speed Europe is especially forwarded by the academic and Director General of the Legal Service of the EU: Jean-Claude Piris. The idea is supported by various politicians, like Nicolas Sarkozy and Herman van Rompuy. In a speech at the University of Strasbourg in 2011 Nicolas Sarkozy emphasized: ‘There will not be a single currency without greater economic integration and convergence. That is certain. And that is where we are going. Must one have the same rules for the 27? No. Absolutely not […] In the end, clearly, there will be two European gears: one gear towards more integration in the euro zone and a gear that is more confederal in the European Union’. In a recent speech also Herman von Rompuy reiterated the possibility of a two-speed Europe.

The main difference between a multi-speed and a two-speed Europe is that proponents of a two-speed Europe wish to create a separate Union of around 15-17 Member States which would develop in a totally different direction but parallel to the Union of 28. The reasons behind this stream of thought are perfectly summarised by Piris himself: ‘I believe that the Treaty of Lisbon has not put an end to the major imbalances that affect the Union. These imbalances, some of which are due to the fact that the EU remains a classic international organisation in some areas, whereas it works in a federal way in other areas, go to the very core of the European project. They create uncertainty and may be a cause of instability; in any case, they make it difficult for the EU to continue to work effectively in a durable way’. Despite acknowledging the fact that Europe is currently operating on a multi-speed level, Piris strongly advocates to ‘legally build a two-speed Europe’. This would entail an additional Treaty to which this closed group of Member States would adhere to and separate institutions, which would regulate the functioning of this elite group of Europeans. ‘The primary principle of an “avant-garde group” would be that all participating states should be fully committed to participate in all areas of cooperation, no areas being optional’. Piris bases his

42 ibid.
concept of a two-speed Europe on the current crisis of the Union, which according to him stems from various sources: Firstly, the monetary union is based on loose rules. Secondly, the modern interpretation of the internal market. Thirdly, the imbalance of free movement of persons. Fourthly, the issue of European military interventions. Finally, and most importantly the imbalance between the EU legislator and the national parliaments seems to grow. 43

3.2 Critical reflection of the proposed system

The main criticism to be put forward in respect of the establishment of a two-speed Europe is the financial and political hurdle in respect of drafting new Treaties and setting up new institutions. Equally alarming is the role and status of the current Treaties, and thus the legal order of the European Union as a whole. Moreover, chances are quite low that this ‘avant garde’ group will indeed find agreement in all necessary areas. As a result an attempt to build a two-speed Europe could easily result in a fragmentation back to a multi-speed Europe. Furthermore, having identified the causes for the current crisis it seems unlikely that two-speed Europe is a solution to these issues. In fact, through pertaining a multi-speed Europe Member States will be given the opportunity to find common solutions to common problems instead of watching certain states solving the issues independently. Additionally, the establishment of new institutional bodies may trigger unforeseen friction between the old and the new institutions – the same holds true for the treaties. There is also a legal aspect to the idea of a two-speed Europe: Not only will it be challenging to ensure that legislation produced by the ‘avant garde’ group will comply with ‘normal’ EU legislation, but it also remains unclear whether such new legislation will have direct effect and enjoy supremacy over national law. 44

3.3 Synopsis: Two-speed and multi-speed Europe

Even though the approaches of a multi-speed and a two-speed Europe are rather different, they somewhat complement each other. On the one hand, the current multi-speed Europe might slowly develop into a two-speed Europe while on the other hand a desired two-speed Europe might disintegrate to the state of a multi-speed Europe. Undoubtedly, both approaches bear risks, especially in the light of political and legal legitimatization of the European project. New treaties and new institutions seem just as unlikely as a sudden boom of areas in which enhanced cooperation is used. However, it seems plausible that the provisions regarding enhanced cooperation will be revised and adopted to current needs. Since the time for a two-speed Europe has not come yet, the current state of affairs will remain at a ‘multi-speed-Europe’. Arguably, after resolving current pressing issues, Europe might return to pursuing integration at the same speed.

4. Conclusion

Enhanced cooperation is a tool that cannot be disregarded in a Europe of 28 Member States. Despite the fact that the possibility of integration through enhanced cooperation has existed for over 15 years now, it has only been successfully applied twice. Intelligent, efficient and sustainable integration lies at the heart of the European Union and its treaties. The current

crisis should be perceived as an opportunity to grow closer and grow together. Surely, enhanced cooperation will play an essential role in this process. In conclusion it can be stated that enhanced cooperation will positively affect the notion of a multi-speed Europe rather than a two-speed Europe. Yet, the current provisions covering enhanced cooperation may have to be adapted once again to meet the ever-changing realities of the Union.
ENHANCED COOPERATION: NEGATIVE "MULTI-SPEED EUROPE" OR REALITY WITHIN AN EU OF 28 MEMBER STATES?

Julien Robert

1. Introduction

Introduced by the Treaty of Amsterdam in 1999, the concept of enhanced cooperation has elicited strong criticism since its creation.1 It could be defined as a special procedure by means of which several Member States can decide to further integrate within the EU in a specific area, while other Members States might not necessarily be involved in the process, or might follow anytime thereafter.2 The rationale behind it is very straightforward: the desire of some Member States for deeper integration should not be impeded by other Member States' political matters.3 This system of “multi-speed Europe” was proposed as an adequate solution to deal with the widening of the European Union and potential future enlargements by promoting further integration.4 While this might be the vision shared by most of the proponents, others argue that enhanced cooperation might just be a means of flexibility to overcome Treaty rules and might eventually lead to a case of asymmetry with a patchy legislation throughout the European Union. Consequently, this might undermine the whole purpose of having common European policies and therefore weaken the cohesion of the Union.5 Hence, the central issue at stake is the following: does the mechanism of enhanced cooperation lead to a multi-speed Europe, having a negative impact on its development, or is it just a reality within an EU of 28 Member States that constitutes an essential tool to achieve the objectives of European integration?

In order to provide a clear picture on this topic, the following essay will first focus on the historical background of the mechanism of enhanced cooperation. The second section will address the main Treaty provisions and highlight the procedure to be followed. Finally, the last section will be wholly dedicated to the issues and concerns about enhanced cooperation in light of recent case law.

2. Historical background

In the seventies, the period of “stagnation” and economic turbulence, characterised by a paradox between high inflation and low growth, led to a significant slowdown in the process of EU integration.6 Within the following decades, a couple of concepts aiming at proposing ideas for further integration emerged. For instance, the “core Europe” theory, put forward by Schäuble and

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2. C. M. Cantore, ‘We’re one, but we’re not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU’, 3 Perspectives on Federalism 3 (2011), para. E-4.
Lamers or the “Europe of concentric circles” theory of Mertes and Prill. Both theories basically dealt with flexible integration by supporting the idea of a hard core of Member States willing to further integrate while other Members States might not want to follow.

In 1999, the Treaty of Amsterdam introduced the idea of “closer cooperation” to solve the issue of deepening and widening of the European Union by way of secondary legislation. Indeed, it did not yet apply to the Common Foreign and Security Policy (CFSP; second pillar). Moreover, there were specific conditions to initiate cooperation, such as the requirement of a majority of Member States and the respect of the *aquis communautaire*. However, each Member State retained a veto right.

The Treaty of Nice (2001) renamed the procedure “enhanced cooperation”. It also extended it to the CFSP and the veto right was lifted. Indeed, eight Member States out of fifteen were then needed to launch the procedure. Furthermore, the European Parliament gained co-decision powers.

With the entry into force of the Treaty of Lisbon in 2009, the minimum number of Member States required for enhanced cooperation increased to nine. Moreover, it brought more structure within the Treaties by gathering together all scattered provisions on the matter.

Finally, the European Parliament was given the power of consent to the authorisation of enhanced cooperation.

3. Legislation and procedure

Article 20 TEU is the legal starting point for the establishment of enhanced cooperation. It includes several requirements that will be examined within the next paragraphs. Firstly, it needs to deal with one of “the Union's non-exclusive competences”. Therefore, it includes both shared competences (Art. 4 TFEU) and supporting, coordinating or supplementary actions in the meaning of Article 6 TFEU. As it is very sector specific, it

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11 Article 11 EC cc. Arts. 40,43 et seqq. TEU-Amsterdam.
16 Article 43(1) TEU-Amsterdam.
18 Article 27 TEU-Amsterdam.
21 Article 329(1) TFEU.
22 Article 20(1) TEU.
should not, in principle, undermine non-participating Member States' interests. This issue was at stake in joined Cases C-274/11 and C-295/11, *Spain and Italy v Council*, which will be discussed in the next section.

Secondly, it should be “subject to the limits laid down in Articles 326 to 334 TFEU”. According to Article 326 TFEU, it should not impede the internal market and trade between Member States and Article 327 TFEU underlines the fact that it should respect the rights, competences and obligations of the non-participating Member States. These issues were also dealt with within the case mentioned previously and in C-209/13 *United Kingdom v Council*.

Thirdly, Articles 328 and 331 spell out the principle of openness, according to which accession to enhanced cooperation is open to all Member States at any time.

Fourthly, the general procedure is laid down in Article 329 TFEU. The use of “may” in the wording of the first paragraph implies that the Commission holds a certain power of discretion. Indeed, it does not include any obligation for the Commission to submit a proposal to the Council, but the Commission “may” submit or otherwise state reasons for not doing so. It also particularly emphasises the need for the European Parliament's consent before the Council can grant authorisation for enhanced cooperation. It is important to note that a special procedure is contained in Article 329(2) for matters related to the Common Foreign and Security Policy (CFSP). Nevertheless, it has never been used so far and many experts hold that it is very unlikely to be used in practice, as it would most probably undermine the whole purpose of Union joint policies. The alternative of constructive abstention is usually better preferred.

Fifthly, transparency is guaranteed by Article 330. Indeed, it allows non-participating Member States to take part in all debates and negotiations in the Council and they are only excluded from the voting. Moreover, non-participating States can also influence decisions through their representatives in the European Parliament or Commission.

Sixthly, enhanced cooperation should only be used “as a last resort” when its objectives cannot be achieved “within a reasonable time by the Union as a whole”. This issue was one of the main concerns in joined Cases C-274/11 and C-295/11, *Spain and Italy v Council* (see section 4.2.a.).

Finally, at least nine Member States must show their support when wishing to establish

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24 Joined Cases C-274/11 and C-295/11 *Spain and Italy v Council* [2013] ECR I-0000, para. 10.
25 Article 20(1) TEU.
26 Joined Cases C-274/11 and C-295/11 *Spain and Italy v Council* [2013] ECR I-0000, para. 82-83.
27 Ibid, para. 18-22.
29 Article 328(1) TFEU cc. Art. 331(1) TFEU.
31 Article 329(1)(2) TFEU.
33 Article 31(1) TUE.
36 Article 20(3) TEU.
37 Ibid 20(2) TEU.
enhanced cooperation.\(^39\)

4. Issues and concerns through case law

The following section is entirely dedicated to the main debated issues on enhanced cooperation through a careful analysis of the relevant case law.

4.1 Council Regulation (EU) No 1259/2010 on the law applicable to divorce and legal separation: first successful enhanced cooperation

Entered into force in July 2012, this Regulation deals with the law applicable to trans-national couples in case of divorce. Until then, this issue had opened the floodgates to an increasing number of cases to the Court of Justice of the European Union (CJEU). It was therefore necessary to find a quick and efficient solution to solve this ever-growing issue of cross border divorce. Thereby, the Commission submitted a proposal in 2006 however several countries, such as Sweden, Denmark, UK and Ireland, strongly opposed the project, as they feared the possibility that it would complicate their divorce procedures even further.\(^40\) Consequently, on 28 July 2008, eight proponent countries (Austria, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain) officially requested the Commission for the establishment of an enhanced cooperation on the matter, as the Council declared it impossible to reach an agreement within a reasonable timeframe. The Commission did not give a response for almost two years.\(^41\)

The idea of a common divorce law was, however, brought back onto the agenda by the new Commission in March 2010 and the authorisation for enhanced cooperation was given by the Commission after assent of the European Parliament in July 2010. Fourteen Member States were willing to take part in this cooperation on divorce law: Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain. As prescribed by Article 331 TFEU, Lithuania and Greece joined at a later date. This Regulation 1259/2010 considerably improved the rules on cross border divorce by allowing the couple to choose which law to apply at the time of marriage or otherwise, thus providing clear automatic mechanisms leading to more legal certainty.\(^42\) In conclusion, one could say that this is a positive example of enhanced cooperation that clearly shows its functional purpose, namely, enabling several willing Member States willing to further integrate, allowing other Member States may join the system thereafter, when ready.


Originally, private companies and investors had to obtain a different patent in every European country. Therefore, the whole idea of a unitary patent sought to solve this issue by providing for a “European patent” applicable in all European countries at the same time. In 2010, twelve Member States supported enhanced cooperation for the creation of this uniform protection. By 2011, twenty-five Member States were willing to participate in this cooperation. However, Spain and Italy were fundamentally opposed to this proposal for a number of reasons. On 10 March 2011, the Commission authorised enhanced cooperation and a proposal was adopted

\(^{39}\) Article 20(2) TEU.
\(^{40}\) C. M. Cantore, 3 Perspectives on Federalism 3 (2011), para. E-10.
\(^{41}\) Ibid para. E-11.
\(^{42}\) Ibid, E. 12.
by the Commission on 13 April 2011. Following the legal procedure laid down in Article 329 TFEU, Regulation 1257/2012 was passed in June 2012 and entered into force on 11 December 2012. Consequently, Spain and Italy undertook several legal proceedings before the Court of Justice of the European Union (CJEU). Italy's opposition was considered particularly astounding and strongly criticised, as Italy is one the founders of the European Union and usually pro-Europeanist. The following section is devoted to the numerous cases brought by Italy and Spain before the CJEU.

4.2.a Joined Cases C-274/11 and C-295/11, Spain and Italy v Council

Spain and Italy filed an action for annulment of the Council Decision 2011/167/EU of 10 March 2011, authorising the use of enhanced cooperation for the creation of a unitary patent. It constitutes the first judgment on the post-Lisbon mechanism of enhanced cooperation and it is very important to further understand the requirements and limits for the establishment of enhanced cooperation set out in Article 20 TEU. There were essentially five main arguments raised by the defendants, namely Italy and the Kingdom of Spain.

First of all, they stated that the Council lacked the competence to establish enhanced cooperation. Indeed, Spain argued that the legal basis used by the Council, namely Article 118 TFEU, did not fall under the competences shared by the Member States and the Union (Article 4 TFEU) but instead under the exclusive competences of the Union, although "a non-exclusive competence" is a prerequisite for the establishment of enhanced cooperation. The defendants added that the Commission lacked the competence to create such a patent as the issue at stake dealt more with preservation of distortion of competition, in the meaning of Article 3(1)(b) TFEU, as it determines the limits and extent of patent and does not deal with the approximation of laws but rather with the creation of a right. The Court concluded that Article 118 constituted a shared competence related to the internal market and therefore fell under Article 4(2)(a) TFEU.

Secondly, the defendants claimed that there was a misuse of powers related to the requirement of reinforcement of the integration process mentioned in Article 20(1) TEU. In fact, they see the use of enhanced cooperation solely as a means to circumvent the unanimity requirement, exclude them from the negotiations and hence overcome the blocking minority. The Court stated that nothing forbade the adoption of enhanced cooperation in areas in which unanimity is required. Hence, unanimity should be constituted of the participating Member States only. The Court also established that the unitary patent and the language arrangements could not have been established within a reasonable timeframe. Therefore, the adoption of

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48 Ibid para. 10.
49 Article 20(1) TEU.
51 Ibid, para. 25.
52 Ibid, para. 27.
53 Ibid, para. 35.
54 Joined Cases C-274/11 and C-295/11 Spain and Italy v Council [2013] ECR I-0000, para. 35.
55 Article 330 TFEU.
enhanced cooperation did not aim at excluding Spain and Italy but instead furthering European integration. 56
Thirdly, the defendants also acknowledged a violation of the condition that enhanced cooperation should only be adopted as a last resort. 57 58 They mainly underlined the fact that the Commission enjoys discretion in determining whether the state of negotiations is advanced enough. 59 The Court essentially took into consideration the fact that the proposal had gone through several stages and the proceedings started in 2010. Moreover, numerous language arrangements were unsuccessfully proposed since then. 60 It concluded that although enhanced cooperation should not be hastily accepted in all instances where an agreement could still be reached, the threshold of "last resort" had been reached in this case. 61
Fourthly, the defendants argued that the Decision violated Articles 20(1) TEU and 118, 326, 327 TFEU. 62 In a nutshell, the alleged violation of Article 20(1) TEU as well as 118 TFEU was mainly based on the fact that the use of enhanced cooperation did not, according to Spain and Italy, further integrate and facilitate the functioning of the internal market. They believed that the creation of a unitary patent was not more advantageous than the pre-existing European Patent Convention (EPC). 63 The Court found that it did provide for "uniform protection" in all participating Member States whereas the EPC only provided for protection in each contracting State with limits defined by the various national laws. 64 Regarding the alleged violation of Articles 326-327 TFEU, the defendants found that the Decision negatively affected the internal market as well as the rights and interests of non-participating Member States as it would have bad economic consequences for Spanish and Italian companies. 65 In brief, the Court stated that it did not impede the rights and interests of the two countries as their position on the matter was respected and there would always be a possibility for them to join the cooperation in the future as guaranteed by the principle of openness. 66 67
Fifthly, the last argument advanced by the defendants concerned the fact that the Commission did not specify the relevant judicial procedures to be followed when authorising the use of enhanced cooperation, hence violating one of the core requirements of Article 329(1) TFEU, namely “specifying the scope and objectives of the enhanced cooperation proposed”. 68 The Court concluded that the Commission was not compelled to give this information when giving its authorisation and it was up to the participating Member States to set up the procedure that they want to follow. 69 As all arguments were rejected, the actions brought by Spain and Italy were dismissed by the CJEU. 70
In conclusion, one could say that this case was a very important step in the development of enhanced cooperation as it enabled clarification of the objectives and requirements of enhanced cooperation within the meaning of Article 20 TEU. Indeed, this judgment of the CJEU provided for a better understanding of the wording of the articles related to enhanced cooperation.

57 Article 20(2) TEU.
59 Joined Cases C-274/11 and C-295/11 Spain and Italy v Council [2013] ECR I-0000, para. 43.
60 Ibid, para. 55-56.
61 Ibid, para. 59.
63 Ibid, para. 60-69.
64 Ibid, para. 62-63.
65 Ibid, para. 70-73.
66 Joined Cases C-274/11 and C-295/11 Spain and Italy v Council [2013] ECR I-0000, para. 82-83.
67 C. M. Cantore, 3 Perspectives on Federalism 3 (2011), E-16.
69 Ibid, para. 92.
70 Ibid, para. 94.
cooperation and its components.

4.2.b C-146/13 Spain v Parliament and Council and C-147/13 Spain v Council

The Kingdom of Spain brought an action against Regulation 1257/2012 on 22 March 2013. This action for annulment of Articles 9(1), 9(2) and 18(2) was brought before the CJEU according to the procedure laid down in Articles 263-264 TFEU. The main arguments raised by Spain were the following. Firstly, the regulation was essentially based on a right granted by the European Patent Office (EPO) and judicial review of those acts is not possible. Hence, there was a clear violation of the Rule of Law.71 Secondly, the Regulation lacked legal basis, as the chosen one, namely Article 118 TFEU, which deals with the creation of intellectual property rights, only includes “measures providing uniform protection of intellectual property rights throughout the Union” which is not the case with Regulation 1257/2012 according to the Kingdom of Spain.72 Thirdly, there was an alleged misuse of power since enhanced cooperation had been used for other purposes than the ones laid down in the Treaties.73 Fourthly, there was an infringement of Article 291(2) TFEU for the setting of renewal fees.74 Fifthly, there was a misapplication of the Meroni case in relation to the delegation of administrative tasks to the European Patent Office (EPO).75 Finally, there was an alleged breach of the principles of autonomy and uniformity regarding the entry into force of the Regulation that depended on the enactment of the Agreement on a Unified Patent Court (UPC Agreement).76

A second action for annulment was filed in court by Spain against Regulation 1260/2012 on 22 March 2013. This Regulation dealt with the applicable translation agreements. Five arguments were this time invoked before the Court. Firstly, there was an alleged breach of the principle of non-discrimination due to the disproportionate use of German, English and French as official languages.77 Secondly, the legal basis of Article 4 of the Regulation, namely Article 118(2) TFEU, was declared unsuitable by Spain.78 Thirdly, there was an alleged violation of the principle of legal certainty.79 Fourthly, a misapplication of the Meroni case was found by Spain in the delegation of the compensation scheme and the publication of the translations.80 Finally, Spain acknowledged that there was once again a violation of the principle of autonomy, as the entry into force of Regulation 1260/2012 was made dependent on the Court Agreement as well.81

On 1 July 2014, the oral hearing was held for both cases. The violation of the Rule of Law was further discussed and it is currently still doubtful whether judicial review of acts of the

72 Ibid, para. 22.
73 Ibid, para. 23.
74 Ibid, para. 24.
76 Ibid, para. 25. See also Regulation 1257/12, [2012] O.J. L361/1, Art. 18(2).
77 Case C-147/13 Spain v Council [2013] OJ C171/16, para. 15.
78 Ibid, para. 80.
EPO is authorised. The misapplication of the Meroni case and the alleged violation of Article 291 TFEU were also largely debated. The Council argued that both this article and the case law were not applicable in this case and the competences granted by the European Patent Convention (EPC) were still applicable and rested on the Member States. The lack of legal basis was counter-argued by the representative of the European Parliament as Regulation 1257/12 created “uniform protection and equal effect in all Member States” and could therefore be based on Article 118 TFEU. The alleged misuse of power was objected by the fact that enhanced cooperation did not go beyond the objectives laid down in Article 20 TEU. The vital link between the Regulations and the Court Agreement was justified by the fact it provided necessary legal protection. Regarding the alleged violation of the principle of non-discrimination, it was explained by the necessity to reduce translation costs and it was not intended to lead to any discrimination. In conclusion, the future of these Regulations is still unclear, as neither Spain nor Italy has made a request to the Commission to join the enhanced cooperation. Moreover, Poland has still not signed the UPC Agreement and numerous Member States have not ratified it yet. Furthermore, the accession of Croatia to the EU is a factor that needs to be taken into account. The only positive sign is that Italy has now started a parliamentary process likely to elicit a request for participation.

4.3 C-209/13 United Kingdom v Council

On 18 April 2013, the United Kingdom brought an action of annulment pursuant to Article 263 TFEU, against the Council's Decision 2013/52/EU that authorised enhanced cooperation for the establishment of a common system of financial transaction tax (FTT). This authorisation was given by the Commission on 22 January 2013, following the request of eleven Member States supporting enhanced cooperation in this area: Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain. The United Kingdom essentially raised two arguments to support its actions but acknowledged the fact that it should have waited to challenge the implementing measure instead of challenging the Decision for authorisation but it did so as a precautionary measure in order to keep its right to challenge later on. Firstly, the defendant stated that the Decision produced extraterritorial effects and was therefore in breach of Article 327 TFEU and hence impeded the interests of non-participating Member States. Secondly, due to the application of Council Directive 2010/24/EU (16 March 2010) on mutual assistance for the recovery of claims relating to taxes, duties and other measures and Council Directive 2011/16/EU (15 February 2011) on administrative cooperation in the field of taxation, non-participating Member States would have to bear extra costs. The Court concluded that the Decision 2013/52/EU did not contain any substantial element objected by the United Kingdom in its pleas but those issues will solely be contained in a
potential future Regulation in the area of financial transaction tax\textsuperscript{89}, therefore this premature action for annulment must be dismissed.\textsuperscript{90} In July 2013, the European Parliament approved a revised proposal and the eleven Member States must now approve it unanimously.\textsuperscript{91}

5. Conclusion

Throughout the years, the concept of enhanced cooperation has often been the subject of intense debate at the European level. Introduced with the prime intention to further European integration, it is difficult at this stage to predict the conclusions that will be drawn within the next few years. Indeed, its application has both positive and negative outcomes, as shown by the various recent cases. Therefore, both visions of a negative “multi-speed Europe” and a necessary and progressive reality in an ever-growing Union could be argued. On the one hand, the Treaty of Amsterdam has established a number of safeguards, including, amongst others, the principles of openness and transparency. It has set clear conditions for the adoption of enhanced cooperation and provided an efficient and faster procedure when no other agreement could be reached. A positive example of this can be found in the adoption of cross border divorce law which could undeniably be seen as an argument in favour of workable “two-speed Europe” in which non-participating States could join later. On the other hand, this process must remain an exception to the general legislative procedure and negotiations, because its overuse may lead to cases of misuse and might constitute a pressure tactic against non-participating Member States. Several issues were much debated, such as the discretionary power of the Commission regarding the granting of authorisation for enhanced cooperation and the unique use of this mechanism as “a last resort”, or whether used competences are exclusive or not. In joined Cases C-274/11 and C-295/11, \textit{Spain and Italy v Council}, the CJEU clarified the requirements for the establishment of enhanced cooperation and provided a uniform interpretation of the relevant provisions. Nevertheless, the strong opposition of Spain and Italy clearly underlined the downside of enhanced cooperation and the fact that its use could in practice lead to discrepancy between all the Member States and therefore undermine the unity of Europe. Moreover, the annulment action brought by the United Kingdom against Decision 2013/52/EU emphasises that some Member States might be reluctant about the use of enhanced cooperation and that there is always a struggle between sovereignty and full integration. Will Italy and Spain join the Regulation on the unitary patent? What about the situation of Croatia, the youngest Member State? How will the situation of the Regulation for the creation of a financial transaction tax evolve? All these issues remain unanswered and only time will tell how the situation will develop and whether agreements will be reached.

\textsuperscript{89}Case 209/13 \textit{United Kingdom v Council} [2013], para 24.
\textsuperscript{90}\textit{Ibid}, para 40.
THE PARADOX OF ENHANCED COOPERATION: UNITING THROUGH DIVISION

Emma Ramière

1. Introduction

Nowadays, with an enlarged EU of twenty-eight Member States, the road towards unanimity in the legislative process becomes every time narrower. Unity within the EU’s legal and socio-economic order is constantly weakened by conflicting forces and enhanced cooperation, as introduced by the Lisbon Treaty, offers an alternative to Member States that are eager to further the construction of European integration which would otherwise be slowed down by those that are not yet willing or capable of committing themselves to that step.\(^1\) The provisions contained in the Lisbon Treaty regarding enhanced cooperation have been used three times successfully: the first in relation to divorce and legal separation procedures, the second regarding the creation of a unitary patent protection and the most recent dealt with the financial transaction tax. Interestingly, the last two cases have been the subject of legal challenges in front of the European Court of Justice (ECJ) by non-participating States who argued their situations have been affected subsequently. The first part of this paper will focus on the mechanism of enhanced cooperation, its origins and the provisions regulating it. Then we will look at the challenges to reach consensus at twenty-eight and finally we will analyse the achievements of enhanced cooperation in particular in the areas of divorce, patent and financial transaction tax (FTT).

2. Enhanced Cooperation as an alternative mechanism to the legislative process

After first describing how the need for better synergies within the EU evolved towards the ‘enhanced cooperation’ mechanism, this section will go through its procedure as contained in the Treaties. The need for an acceleration mechanism within the legislative process arose when the number of Member States began to increase. Indeed the continuous enlargement of the Union highlighted the disparities between the old and the new states to engage collectively in all EEC policy areas.\(^2\) This can be observed in the outcome of the Luxembourg Compromise after which states became able to hamper the legislative process if their national interests were affected, therefore hindering any move towards deeper integration. The period of Eurosclerosis that followed was marked by stagnation in the decision-making process as trying to get the unanimous agreement of all States proved to be simply impossible.\(^3\) Hence, an agreement whereby a new system would not impose the same obligations to all Member States became essential so that differentiation would not result in the obliteration of national differences.\(^4\)

\(^4\) T. Konstadinides, Division of powers in European Union Law: the delimitation of internal competence between the EU and the member states, p. 251.
Enhanced cooperation was formally introduced by the Treaty of Amsterdam in 1997 under the term ‘closer cooperation’ which was later reformulated into ‘enhanced cooperation’ by the Treaty of Nice in 2000. This treaty slightly relaxed the rules by, for example, raising the threshold of the Member States initiating enhanced cooperation at eight – compared to ‘at least a majority of States’ in the Treaty of Amsterdam – and extended their scope to the Common Foreign and Security Policy. A third and last amendment was added by the Treaty of Lisbon which modified the provisions on enhanced cooperation so as to render them easier to use in an enlarged Union; they were also made less onerous. The treaty has raised the number of states required to launch the mechanism from eight to ‘at least nine’ and it became possible for the core group to change procedural requirements according to their needs.

In order to mediate enhanced cooperation, procedures were established within the TEU and the TFEU, which are the two principal sources of law for the Union. It is also important to bear in mind that the incorporation of enhanced cooperation into the Union’s legal order entails that it is placed under the competences of the European Institutions, which ultimately means that any action taken through it would be subject to judicial control by the ECJ.

The provisions suggest six substantive constraints to initiate enhanced cooperation: there must be nine Member States; it must not be in a field where the Union has exclusive competence (hence, areas falling under the Union’s exclusive competences listed in Article 3 TFEU cannot be the subject of enhanced cooperation); the measure must only be adopted as a matter of last resort when it has been found that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole; enhanced cooperation must comply with other EU law; it must not undermine the internal market or economic or social cohesion, in particular, it must not constitute a barrier to or discrimination in trade between Member States or distort competition between them; and it must respect the rights, competences and obligations of other Member States.

Openness and transparency are characteristics of enhanced cooperation. Any Member States can choose to join this cooperation at any time and even though the vote is reserved to the members of the Council representing the Member States participating in enhanced cooperation, all members of the Council may participate in its deliberation. Furthermore, acts that are adopted through enhanced cooperation binds only the participating States and

they do not constitute part of the *acquis communautaire* that has to be accepted by candidate States for accession to the EU.\(^{19}\)

Additionally, the TFEU provides for procedural constraints which require the enhanced cooperation to secure the consent of the three main institutions of the EU: the Parliament, the Commission and the Council. The procedure that applies to the CFSP is slightly different: the role of the Parliament is less extensive as its consent is not required here and the Council grants an authorisation to proceed with enhanced cooperation by acting unanimously. The Lisbon Treaty also extended the scope of EU competence to parts of the Third Pillar (Justice and Home Affairs).\(^ {20}\) In areas where unanimity in the Council is not reached, the authorisation for a group of nine Member States to establish enhanced cooperation is deemed to be granted.\(^ {21}\)

3. **Difficulties to reach consensus at twenty-eight**

When six European states decided to establish the EEC in 1957, they started to cooperate step by step in certain domains. With the decision to add every time new members and expand the EEC’s areas of cooperation, it could have become obvious that there was a limit beyond which states eventually could not go either by lack of will or because certain sovereignties could not be shared in a short or even medium term.

The EU has reached that limit in domains such as foreign affairs, defence issues and certain areas of the Third Pillar, in particular the fight against illegal immigration and this was acknowledged in Lisbon when they signed the new treaty. Enhanced cooperation is the direct result of a failure to reach agreement in the Union. In that sense, it reveals the inability for the Union to act unanimously tricky domains.

For example, this can be observed in particular in the field of defence. Within this area, the spirit which animated the European states after the Second World War in order to avoid another major crisis, rapidly reached its limits when national armament industries and national interests were involved. Still nowadays most of the major European states which have powerful weapons companies are not ready to give them up yet on the altar of the European integration. Likewise, when European defence’s interests are at stake, some nations rely on NATO and not on the Union. A proof of that is the failure of EDC in 1954\(^ {22}\) and since then, the absence of a European army and an EU permanent military headquarters in spite of the establishment of an EU Military Staff in Brussels in 2000 just over 200 people.\(^ {23}\)

The reason for this is that defence is a very sensitive area where Member States differ as to their strategic and doctrinal thinking.\(^ {24}\) Therefore a unanimous move towards deeper security and defence integration would prove to be more than challenging. As matter of fact, whenever a crisis arises in the world which requires military means, the Member States rarely agree (in 2004 in Indonesia for the tsunami and in 2010 in Haiti for the earthquake) on a common


\(^{21}\) Treaty on the Functioning of the European Union (Consolidated Version), [2007] OJ C 115/47, Article 82 (3), Article 83 (3), Article 86 (1) and Article 87 (3).


action and if and when they do, very few member states commit themselves and rather slowly (EUFOR Central African Republic Operation launched in 2014). A similar attitude can be observed within the area of foreign policy. Obviously this is an area where the nations will always refuse to release their sovereignty to a supranational body or at least will always be reluctant to do so. Moreover, the nomination of a High Representative (HR) heading the European External Action Service (EEAS), and Vice President of the EU Commission at the same time introduced by the Lisbon Treaty has not allowed EU to speak with one voice. For instance, regarding the situation in Kosovo, there is nothing that EU can do when five EU member states still refuse to recognise its independence proclaimed in 2008, because EU foreign and enlargement policies both require unanimity within the member states. Because of this, Kosovo had difficulties in entering into contractual relations with the EU. The list of failed EU common policy seems to be endless (Libya, Syria, Israel/Palestine, Ukraine, Iraq, Lebanon, etc.).

Another very good and striking current example of EU inertia is the issue of illegal immigration in the Mediterranean. For the moment, the southern countries such as Italy, Malta, Spain and Greece are in the frontline of this crisis and it looks like the other European countries want to leave them deal with it alone. They refuse to see that eventually the great majority of illegal immigrants will end up in northern and richer countries. These examples show how much internal discrepancies can affect the efficacy of EU action within and abroad. However even though enhanced cooperation may benefit integrationist states, this mechanism also bears some inner defects. Indeed according to Jean-Claude Piris: The Lisbon Treaty was supposed to give to the EU the means to speak with a more united and powerful voice in the world, and to act with more cohesion and more determination [...] the crisis has increased the natural tendency of Member State governments not to put efforts into strengthening the solidarity between them.

From this statement, one may look at enhanced cooperation with a less optimistic eye. One problem related to the use of this mechanism is that it leads to the fragmentation of the Union which in the long turn might jeopardise the European integration as a whole. Indeed with enhanced cooperation, the Union no longer acts as a united community but rather like a flexible structure where Member States group themselves differently according to the issue at stake. This reinforces the fact that the Union must be seen as a patchwork of states each having different values and ideologies and that it must be recognised that it is difficult to combine their interests. This view was supported by Jose Manuel Barroso who suggested that member states “either swim together or sink separately”: according to him, a strong Europe bound by cohesion and solidarity can achieve great progress and in the contrary, a divided

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Europe where each state follows its own path would be detrimental to EU’s action and would lead to stagnation and eventually to collapse. In addition, this idea of enhanced cooperation fragmenting the Union goes against the founding ideals of the Union. Indeed, the preamble of the TFEU emphasises on an “ever closer union” and “common action”, however enhanced cooperation tends to lead to a divided Union rather than a united one. Furthermore, if one looks at the status of non-participating states, one may arrive at the conclusion that they might in the future find themselves marginalised, rather than being able to hold up policy-making. They would be left behind and the gap would only widen between them and the core, reducing the chances that the Union finally speaks with one voice.

Ms Klaniete believes that in order to preserve the unity of the Union, access to the enhanced cooperation should be made harder by increasing the threshold of the Member States needed to initiate one. However, another problem might arise if the threshold for enhanced cooperation is increased. The Schengen Agreement and the Treaty of Prüm showed that member states chose to establish a cooperation outside the Union’s framework in order to bypass the difficult triggering mechanism for enhanced cooperation. If States start to cooperate outside EU framework, the Union will lack relevance.

4. Enhanced cooperation: one way to go forward

Faced with difficulty to agree and with deadlocks in the legislative process in a Union of twenty-eight, enhanced cooperation provides a solution but inevitably leads to less coherent Europe. Indeed, as some states move forward and others stay behind, we are de facto in a multi-speed process. This development is not necessarily negative: it offers flexibility so that all Member States can chose a policy option sufficiently close to their ideal without being slowed down by other states. Nevertheless, acceptance of enhanced cooperation is based on the premise that it is to be understood “as a factor of integration, not segregation”. Indeed the three cases mentioned in the introduction proves that enhanced cooperation is a only practical tool, a temporary step and not an end per se.

The Regulation 1259/2010 on the law applicable and legal separation was the first piece of legislation adopted through the use of enhanced cooperation. It allowed international couples to select which country’s law would apply to their divorce. Even though it proved challenging to reconcile the position of States whose legal tradition in the area of divorce substantially diverged, the procedural steps to launch an enhanced cooperation were finally met after two years. Five other Member States joined the cooperation, confirm partially

33 Juha Jokela, Multi-speed Europe? Differentiated Integration in the external relations of the European Union, The Finnish Institute of International Affairs, p. 34.
34 T. Konstandinide, Division of powers in European Union law: the delimitation of internal competence between the EU and the member states, p. 257.
40 Treaty on the Functioning of the European Union (Consolidated Version), [2007] OJ C 115/47, Title III.
what Viviane Reding had hoped, namely that: “a strong proposal from the Commission, supported by many Member States, would soon attract all Member States to join”.

In June 2010, the Council of Justice and Home Affairs agreed on a Decision authorising the first enhanced cooperation in the history of the EU after the EP gave its consent. Such a successful enhanced cooperation shows that for the sake of meeting the needs of a modern society, it is sometimes inevitable for Member States that their divergent values converge; indeed, though divorce was only legalised in 2011, Malta was one of the countries that eventually joined the cooperation.

The second instance in which a legal act was adopted through enhanced cooperation was in the area of unitary patent protection. After many failed attempts to regulate this area at Union level, the Council adopted in 2009 a general approach on the proposal for a Regulation on the EU patent. As the new legal basis established by the Lisbon Treaty provides that translation arrangements for any unitary patent system in the EU must be established by a separate regulation, an accompanying proposal for a Council Regulation on the translation arrangements for the EU patent was adopted by the Commission in 2010. However, the opposition of Spain and Italy towards the official languages of the unitary patent being limited to French, English and German made the legislative negotiations reach a stalemate. Twenty-five Member States decided to circumvent the deadlock and to proceed with the proposal through enhanced cooperation after the Council issued the authorising Decision. Spain and Italy used their status of privileged applicants under Art. 263 TFEU to seek its annulment in front of the ECJ on 30 and 31 May 2011. The main arguments put forward was that the subject of the enhanced cooperation fell within the exclusive competence of the Union and therefore the Council lacked competence to establish enhanced cooperation, that there was a misuse of powers as they were both excluded from the enhanced cooperation about the issue of the language requirements, that there was a breach of the ‘last resort’ clause as the possibilities among all the Member States on the language arrangements have not been fully explored, that the Decision infringed provision of the Union and that it disregarded its judicial system. In its judgement of 16 April 2013, the Court dismissed the actions of the two countries, which is not surprising given that Advocate General Bot in an earlier Opinion has advised the Court to reject them. The position of AG Bot and the Court was that any allegations that the substantive measure on language requirements conflicted with the Treaty was both premature and inadmissible as the legislative negotiations had not been concluded yet. Indeed Spain and Italy filed their action after the authorising decision by the Council.

42 Council of the European Union, 3018th Council Meeting Justice and Home Affairs, 3-4 June 2010, 10630/10 REV 1, p. 16.
43 Addendum to the Note, 16113/09 ADD 1.
50 Subsequently referred to as AG.
had been given but before the Regulation was adopted in December 2012. It must be recalled that enhanced cooperation entails the adoption of two acts: an authorising decision and a substantive legislative act binding the participating parties. Therefore if a litigating state challenges the use of enhanced cooperation in situations where the authorising decision has been adopted but the legislative act is still under negotiations, it will be most likely that the action be declared premature. In response to the Regulations adopted on 17 December 2012, Spain has launched two further complaints arguing what it has argued in its previous challenge.

The third instance where enhanced cooperation was used is more recent and deals with the creation of a common system of financial transaction tax (FTT). After eleven Member States requested the Commission that they wished to establish enhanced cooperation, an authorising decision to proceed was given by the Council. On 18 April 2013, the UK filed an action for annulment of the authorising Decision on the grounds that it infringed provisions of the TFEU. More specifically the UK argued that the FTT will have a substantial impact on non-participating Member States, which the UK says is against EU law and international tax norms. Indeed according to the TFEU, enhanced cooperation can only be used if the proposal does not incur costs on those choosing not to participate or distort the single market. The UK believed that the Decision is illegal as it authorised the adoption of an FTT that would have extraterritorial effects. However and as expected since the patent judgement, the action of the UK was dismissed by the ECJ on the basis that it was premature. Indeed the action for annulment only challenged the decision to authorise enhanced cooperation but not a legislative act itself.

5. Conclusion

The controversy around enhanced cooperation lies in its ability to speed-up the legislative process. On the one hand, the mechanism allows some states to move forward in a certain policy area without being slowed down by those states who do not; as opposing voices are silenced within the decision-making process, the adoption of legislation is made easier, more responsive and efficient. On the other hand, not taking account of other states’ reluctance and leaving them behind might undermine the Union’s call for unity, solidarity and cohesion. However the current Union of twenty-eight States cannot escape the problem of unanimity within the Council; I believe that a multi-speed Europe is a reality today and that in order to improve and protect the general interest of their population, every group of states which endeavours to move forward at their own pace should be given the chance to do so. Whereas it is true that enhanced cooperation has to respect limits by not affecting interests of non-participating states, its use may show the way to more unadventurous states. Indeed one can notice that yet, the only areas where enhanced cooperation was used were divorce, patent and finance; it might appear as a poor achievement, but it might be the only way to introduce new legislation that would have never been adopted otherwise at twenty-eight. If one day this mechanism is used in the fields which affects a larger portion of EU citizens, its effects will be more likely to be noticed by a greater number of people. Hence, whether enhanced cooperation is a positive development for the Union will be observed in the long-term future.

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58 Case C-209/13 United Kingdom v Council [2013], para. 17-29.
ENHANCED COOPERATION: TOWARDS A MULTI-SPEED EUROPE

Benjamin Benda

1. Introduction

Enhanced cooperation is a process inscribed in the long history of member state diversification. Its importance is derived from an always more active and complex European Union. It can be defined as a process allowing a group of member states to further integrate in a given sector despite the refusal of others to do so.¹ This mechanism reflects a certain difficulty in integration and a drastic mind change. In fact integration was seen as a unified progression of member states towards European construction and has now evolved into a flexible and differentiated integration. This change is mainly the cause of an increasingly heterogeneous Europe, in search of identity.²

The Maastricht Treaty started to intensely think about diversity with the introduction of opt-in and opt-out mechanisms. The Amsterdam and Niece Treaties followed opening the doors to what is now enhanced cooperation under the Lisbon Treaty.³ These developments aim to overcome deadlocks in the Council and lead to possible differentiated integration. The result is an opportunity to resolve potential tensions and to proceed with integration without having to revise the Treaties.⁴

2. History

After the Second World War Europe had the aim to integrate its members on equal criteria. With accessions of more members comprising varied cultural, legal, and economical traditions, however, it soon became clear that equality had to stand in respect of diversity and not on institutional sclerosis. Specific structures had therefore to be implemented in order to allow member states to integrate in different speeds.⁵

To this end the Treaty of Amsterdam established closer cooperation clauses aiming to involve a majority of members to diverge on specific integration. This diversion had to respect the basic values of the Union and be open to all potentially interested members. Consultation of the European Parliament as well as authorization of the Council by qualified majority voting was required. Closer cooperation, however, could be opposed by a member fearing for its national policy and could thereafter only take place with the unanimity of all heads of government. These complicated requirements certainly explain the lack of success of the closer cooperation mechanism.⁶

With the Treaty of Nice enhanced cooperation replaced closer cooperation and important simplifications took place. A single member state could not oppose the mechanism anymore and a majority of members was no longer required, eight states were sufficient. Moreover the

⁴ Ibid., p. 291.
⁵ C. M. Cantore, ‘We’re one, but we’re not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU’, 3 Perspectives on Federalism 3 (2011), p. 5.
European Parliament was given co-decision powers and cooperation extended to the field of foreign policy. These important steps laid the fundamental basis for the enhanced cooperation known today as established by the Lisbon Treaty. This last treaty provided article 20 TEU as the basis of enhanced cooperation and articles 326 to 335 of the TFEU for its further specificities. Enhanced cooperation applies today to all sectors outside exclusive competences that have been transferred to the sole power of the EU, and can take place with a minimum of nine members as provided by article 20 TEU. Article 328 TFEU, at the heart of enhanced cooperation, states that all members are allowed to join as well as third parties complying with the acts already adopted. Article 329 TFEU provides for the requirements of the mechanism: a request is to be addressed to the Commission that may submit the proposal to the Council. The latter can grant authorization by qualified majority voting following the consent of the European Parliament. Cooperation in the field of common foreign and security policy is to be addressed by the Council voting unanimously after having forwarded the proposal to the High Representative of the Union for Foreign Affairs and Security Policy and to the Commission for opinions, as well as to the European Parliament for information. It is important to note that only participating member states are to vote in the Council as provided by article 330 TFEU. Moreover the whole enhanced cooperation can be blocked by the Commission since, as stated in the first paragraph of article 329 TFEU, the latter is not required to forward the proposal to the Council. This is a fundamental power as it ensures the coherent development of the Union. Other important safeguards are provided such as transparency that is ensured since non-participating Council members are allowed to take part in the deliberations as stated in article 330 TFEU. Article 331 TFEU, on the other hand, ensures that no monopoly can take place since it provides the conditions for third parties to join. This possibility is extremely important so that the original group of member states does not integrate on the basis of exclusionary principles. Finally article 334 TFEU states that the Council and the Commission have to ensure the consistency of the cooperation with the policies of the Union, further protecting a coherent development of European integration. Enhanced cooperation has therefore been improved throughout history with the Lisbon Treaty providing for an accessible and well-established mechanism. Solid structural grounds have been created such as a minimal participation of nine members and co-decision with the European Parliament in most proposals, thereby increasing democratic legitimacy and consistency in integration. The next sections of this paper will analyze enhanced cooperation in practice, including recent case law. The mechanism remained purely theoretical until 2010 when it was first used in the field of divorce.

3. Divorce law

Harmonization of divorce law is the very first case of enhanced cooperation, after more than 10 years of uncertainties in the field. The Commission had first tried to propose a regulation on the matter establishing inter alia a right for international spouses to choose the applicable law for their divorce. Ireland and the UK however immediately opposed the regulation due to substantial differences with their ways to approach the issue and Sweden categorically refused to apply foreign rules to their very liberal system. Reconciliation and compromises found to be impossible.

7 Europa. Enhanced cooperation

A small group of states therefore decided to propose enhanced cooperation, with a palpable general interest of other states. Austria, Hungary, Slovenia, Greece, Romania, Luxembourg, Italy, and Spain were the initiators of the demand and soon received the support of France and Bulgaria. These events took place in 2008 and it is only in 2010 that the Commission decided to draft a proposal for the Council. Given the fact this was the first time using enhanced cooperation initial scepticism was present but with the Commission’s approval these tensions faded away. In fact more states decided to join although Greece withdrew: Germany, Belgium, Portugal, Malta, and Latvia. The Council and the European Parliament approved enhanced cooperation in the field and the regulation implementing the divorce laws, which entered into force in 2012. Lithuania and Greece both joined after the regulation’s entrance into force, which applied and will apply respectively in May 2014 and July 2015. The regulation gives international couples the possibility to choose the applicable law at the moment of their marriage or in the absence of such a choice determines on other criteria (e.g. place of residence, nationality, law of the court seized) the law to be applied.

As stated above enhanced cooperation is available in the areas provided by the Treaties, except exclusive competences. Divorce falls within Freedom, Security, and Justice that is a shared competence as provided by article 4(2)(j) TFEU and is therefore an acceptable field for the mechanism. The legal basis of the regulation is article 81(3) TFEU that states cross-border measures in the field of family law.

The initial hesitation of the Commission to use the mechanism wasn’t therefore caused by a lack of legal basis. It might be due to a fear in accepting further diversification, especially in a Europe suffering disintegration in important sectors. This fear however had to fade away given the heterogeneous character of the Union, requiring always more flexibility. Nowadays this choice towards flexible integration proves to be always more relevant in a Union of 28 members facing an increase in euro-scepticism. Despite such positive aspects of enhanced cooperation, the mechanism has the potential to threaten the unity of the European Union. An increase of political pressure upon the Commission could weaken the very foundations of the continent. It is therefore of primary importance to limit cooperation in order to protect the internal market and European identity.

4. Unitary patent

The Unitary Patent is the second case of enhanced cooperation and reflects an ambitious advance in integration. In fact the project embodies more than cross-border issues since it aims to create a supranational protection for patents. Such intention understandably awakened controversies and oppositions to implementation.

A European Union patent was first intended to take place at communitarian level but after long struggles in its creation enhanced cooperation arose in the field. Twelve states decided in 2010 to engage in the mechanism and to further integrate despite the opposition of Italy and Spain, unsatisfied by the languages chosen for translation (English, French, and German). Thirteen more states had decided to join after the Commission’s approval and both Council

17 Ibid.
and Parliament confirmed cooperation of the now twenty-five participants.\textsuperscript{18} Italy and Spain were the only two states outside of the scheme. The Commission therefore decided to propose a regulation implementing cooperation\textsuperscript{19} that was approved and entered into force in 2013.\textsuperscript{20} This regulation will apply when the Agreement on a Unified Patent Court will enter into force for the interested state. With the accession of Croatia non-participating states amount to three. As stated above article 20 TFEU allows cooperation only for non-exclusive Union competences. The internal market is a shared competence as stated in article 4(2)(a) TFEU and article 118 TFEU more specifically states power of the Union in the creation of intellectual property rights aiming to protect the field throughout the Union. This is precisely the legal basis that enabled enhanced cooperation and the subsequent regulation to take place. Another important aspect of enhanced cooperation is that it shouldn’t undermine the internal market, trade, and competition as stated in article 326 TFEU. This is equally fulfilled since non-participating states will have access to unitary patent protection in those member states part of the cooperation and the latter will be able to receive patent protection in the former. Uncertainties however still remain since the unitary patent could bring important fragmentations between the cooperation and the three outsider states. In fact different patent protection systems could result in segregation and competition distortions within the internal market.\textsuperscript{21} These issues have been raised by Italy and Spain and are worth being analyzed given the important clarifications of the Court of Justice of the European Union. Both countries decided to challenge enhanced co-operation for the Unitary Patent in 2011 arguing for misuse of powers and infringement of the Treaties (Joined Cases C-274/11 and C-295/11, \textit{Spain and Italy v Council}). It was alleged that article 118 TFEU on the creation of intellectual property rights was an exclusive competence and that the Unitary Patent would give rise to distorted competition. Besides both Italy and Spain argued that the aim of the cooperation wasn’t integration but the exclusion of their respective countries in the language arrangements provided by this same article. The applicants also found a violation of article 20(2) TEU that states enhanced cooperation is to be used as a last resort. In fact they argued negotiations on language arrangements had not been exhausted. Finally the parties argued for a violation of articles 20(1) TEU, 118 TFEU, 326 TFEU, and 327 TFEU. In relation to 20(1) TEU it was argued that the Unitary Patent would not be advantageous for integration since all members were already parties to the European Patent Convention and that enhanced cooperation would damage such uniformity. Article 118 TFEU was considered breached since enhanced cooperation did not provide a Union-wide protection of intellectual property and 326 TFEU violated given the detrimental impact of the cooperation seen as discriminatory and undermining the internal market. Both appellants saw their right to future participation infringed under 327 TFEU given the languages chosen. The Court, however, confirmed the non-exclusive character of article 118 TFEU and underlined the non-competitive nature of the cooperation. It also stated the right to establish enhanced cooperation where arrangements could not be found within a reasonable time and therefore refused the claim for exclusion. In assessing last resort the Court took into account the fact that negotiations had began in the year 2000 and were followed by several stages. Moreover it indicated the extensive discussions that had taken place within the Council on the matter and the fact none of these had been capable of leading towards an adoption of legislation at the Union level. In relation to article 118 TFEU the Court noted that the Union wide requirement was to be interpreted in light of the participating states and that therefore uniformity was fulfilled and considered the claim under 326 TFEU unfounded given that the

\begin{footnotes}
\footnotetext{18}{Decision 2011/167/EU, [2011] O.J. L76/53.}
\footnotetext{19}{COM(2011) 0215 final.}
\footnotetext{20}{Regulation (EU) 1257/2012, [2012] O.J. L361/1.}
\end{footnotes}
language requirements are not the essential part of the regulation and that extensive arrangements were made before recurring to enhanced cooperation. Article 327 TFEU was equally seen as fulfilled given that language cannot be considered as prejudicial to the rights of non-participating states that are legally allowed to join cooperation. In fact states taking part in enhanced cooperation are permitted to take decisions non-participating states would not agree with. The only limitation, not violated in this case, is that no rules may be taken aiming to limit third parties in their rights and competences.

Given these claims and observations it can be concluded that enhanced cooperation in the field of unitary patents presents complex and multi layered characteristics. The ruling of the Court of Justice of the European Union is reassuring although the practical application of the regulation remains open for debate. Tensions in relation to integration remain palpable and a source of concern. Spain, in fact, decided to file two more complaints in cases C-146/13, Spain v Parliament and Council, and C-147/13, Spain v Council. In the former it once more opposed the very base of the regulation arguing for a misuse of power, and for a violation of the principle of autonomy of EU law given the dependency of the regulation on the adoption of the Agreement on a Unified Patent Court. In the latter it inter alia newly argued for a violation of non-discrimination in relation to language, violation of Union legal autonomy, and for a violation of the principle of legal certainty. Both cases are still pending.

5. Financial Transaction Tax

Given the unshakable objections of the United Kingdom and Sweden to a European Financial Tax, enhanced cooperation was proposed by those interested states to the Commission. The latter realized the dead end of discussions and therefore agreed to create a proposal for the Council, which focused on the fulfilments of all necessary requirements.

The last resort criterion was easily established since the Council was clearly unable to reach any agreement. The requirement of nine states was also fulfilled given the support of Germany, Austria, France, Belgium, Italy, Spain, Portugal, Greece, and Finland. The non-exclusive legal base was found in article 113 TFEU on taxation harmonisation within the internal market. The respect of non-participating members under article 327 TFEU was established arguing that third parties would maintain their sovereign powers in the field of financial transaction taxation. Moreover the three fundamental requirements of the mechanism were achieved: the furthering of integration in the interest of the Union was clearly present since harmonisation of indirect taxation is necessary for the functioning of the internal market as stated in article 113 TFEU, EU law was complied with given the explicit provision present in the Treaties, and the internal market was not undermined given the scope of the financial transaction tax to increase integration in the field and to include as many member states as possible.

The aims of the proposal were to raise revenues given the difficult economical situation of the continent, to incite responsible behaviour in financial institutions, and to avoid distorted competition due to uncoordinated taxation between member states. The crucial needs for refocusing the economical sector have outweighed most of the doubts present as to the actual effect of controlling global economical movements through taxation. It was in fact argued that such restrictions could potentially harm consumers. These fears have encouraged the Commission to propose wide financial transaction taxations in order not to excessively affect financial flows.

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24 Gonzalez-Barreda, 41 Intertax 4 (2013), 211.
Given the importance of the aims of a financial transaction tax, the reasoned proposal, and the support of now eleven states (Germany, Austria, France, Belgium, Italy, Spain, Portugal, Greece, Slovenia, and Slovakia) both the Council and the European Parliament approved cooperation. A revised proposal was subsequently issued by the Commission and confirmed by the European Parliament. It was however decided by most participants to postpone the application of the financial transaction tax to 2016 given the findings of the Council’s legal service of incompatibility with the Treaties and violations of international customary law. An important case to be mentioned in relation to this cooperation is C-209/13, United Kingdom v Council, filed by the United Kingdom in order to ask the Court of Justice of the European Union to annul the acceptance of enhanced cooperation by the Council. It claimed an infringement of article 327 TFEU given the extraterritorial effect of the financial transaction tax and an infringement of article 332 TFEU given the costs that would burden non-participating members. The Court dismissed the case since the Council rightly authorized enhanced cooperation and that the legality of the financial transaction tax itself could eventually be challenged when adopted. The United Kingdom has therefore potential claims for future infringements arising from the application of the financial transaction tax.

6. Towards a multi-speed Europe: assessment

Enhanced cooperation in the fields of divorce, patents, and tax law clearly reflects the difficulty encountered in furthering integration. In fact, all proposals were created due to opposing and unshakable interests. This powerful mechanism gives an opportunity for multi-speed in that it offers the possibility for some members to proceed with integration while others maintain their autonomy. In a period of European scepticism enhanced cooperation embodies a powerful tool for those motivated states to proceed in the areas of their interest. One could therefore say that, given the political context, Europe is likely to integrate more through multi-speed. This assessment is naturally dependant upon the future historical development of the continent and of the world. The writer’s opinion is that another global economical crisis could very well push Europe towards federalism and therefore away from multi-speed.

But is multi-speed desirable? This question can reach very different conclusions depending on the standpoint. An idealist of federalism would certainly say that the existence of multi-speed reflects the sad reality of a disintegrated continent, providing incentive for even further disintegration instead of a body that harmoniously evolves. A realist on the other hand would realize that without such a mechanism no integration at all would take place in certain fields. Given the reality of enhanced cooperation it is of extreme importance to evaluate its qualities and defects in order to establish potential transformations. The writer is of the opinion that the autonomy of the mechanism is a very positive factor in that other members do not have the power to stop the voluntary integrative steps of some. This ensures a spontaneous evolution of member state relations and avoids political tensions that could arise from veto powers. Enhanced cooperation is therefore a constructive mechanism. Another positive characteristic of the mechanism is the oversight of the Commission and the Parliament that ensures the coherent development of integration since both institutions can refuse cooperation. Moreover

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the participation of all member states in enhanced cooperation deliberations gives transparency to the whole process and therefore democratic legitimacy. Also, enhanced cooperation does not discourage common integration since the mechanism is to be used only where cooperation could not be attained by the Union as a whole in a reasonable time. Besides, enhanced cooperation is extremely inclusive since third party member states are allowed to join cooperation in later stages. Defects on the other hand include the potential abuse of the mechanism that would create a lack of unity on the continent. A danger is in fact clearly present that European integration becomes a pure fight of interests instead of a healthy communitarian development. Another issue is the so called “Europe à la carte” that stands for a cherry-picking integration. Many fiercely oppose such a development since Europe should win and loose together in order to be strong and peaceful. Furthermore managing diversity can present a real challenge in preserving the core legal order of the Union. These issues are hard to develop in all clarity given the few cases of enhanced cooperation. In general terms, however, it can be said that enhanced cooperation represents a healthy development and is surrounded by strong and valuable safeguards. The mechanism in fact allows for a configuration of pioneer groups that can have positive impacts on other members, encouraging integration and growth. This is of particular relevance on a continent sharpened with important political and economical tensions among its nations.

7. Conclusion

Europe is diverse and embraces the most varied cultures, economies, and legal orders. Such diversity is also to be reflected within the institutional framework of the European Union in order for tensions to be gently canalized. Enhanced cooperation is the ideal device to address disparities and disproportions among member states and has the potential to positively face the future asymmetries of the Union. The functionality of the European Union is in fact extremely important to safeguard given the difficulties in integration. A multi-speed development allowing motivated states to pave the road for slower members is therefore likely to increase in the future. This fundamental possibility has outdated the classical view on integration consisting of a compact group that uniformly advances together. Transformation has evolved throughout the years from Amsterdam to Niece and finally Lisbon. With an increase in euro-scepticism the Union is now equipped in case of important deadlocks and can opt for segmented integration if needed. Such an approach will hopefully push the reluctant members to accelerate, giving rise to a balanced and stable integration in the field at issue. Enhanced cooperation has therefore the potential to introduce dynamism in the Union, preventing stagnation on the continent. It can therefore be concluded that multi-speed, although being a process of fragmentation, is capable of playing a fundamental role in the future of integration and therefore of the European Union as a whole.

29 Ibid., p. 204.
30 Ibid., p. 201.

Luca Bucken

1. Introduction

‘It is absolutely clear that we have an opt-out from both the charter and judicial and home affairs.’ 31 This statement of the then Prime Minister of the United Kingdom (UK) Tony Blair to the House of Commons on 25 June 2007 after his return from the European Council Summit, could be described as the ultimate cause of the current state of confusion concerning Protocol No. 30, commonly referred to as the UK and Polish opt-out from the Charter of Fundamental Rights of the European Union (CFR). Subsequent case law of the Court of Justice of the European Union (CJEU) strongly challenged this view and led the current Secretary of State for Justice Chris Grayling to the statement that the previous Labour government who negotiated Protocol No. 30 had ‘duped’ the people of the UK. Starting off from this legal and political state of play, this paper addresses the question ‘What is the future of the relationship between the United Kingdom and the Charter of Fundamental Rights of the European Union?’ This question will be in particular discussed against the backdrop of the announced plans of the UK government to renegotiate the UK membership in the European Union, which had been concretized by Prime Minister David Cameron in a keynote speech on 28 November 2014. In addressing the research question, a brief analysis of the political origins of the Charter of Fundamental Rights of the European Union, hereinafter referred to as the Charter, and Protocol No. 30 will be made (I), and the legal framework of the Charter will be analyzed (II). In an examination of the case law of the CJEU, the legal effect of Protocol No. 30 will be studied (III). Furthermore, a pending Employment Appeal Tribunal case and the plans of the UK government to renegotiate the UK membership in the European Union will be examined in context of the political and legal controversies in relation to the Charter (IV).

2. History of the Charter and political framework

In order to better understand the legal and political implications of Protocol No. 30 today, it is important to consider the political motivation of the UK upon negotiation of the Protocol. During the initial negotiations of the Charter in 2000, no Member State sought for an opt-out. To the contrary, the Charter was praised, most notably by the UK Minister for Europe Keith Vaz, as ‘one of the most important things that we have seen come out of the European Union in the last decade.’ 32 Arguably, the reason for the absence of larger concerns was the lack of legally binding effect. 33 In 2006 the CJEU, starting with the case of EP v Council, began to make reference to the Charter as basis for human rights principles to be invoked alongside of the concept of general principles of law. 34 In consequence, the political and public awareness for the significance of the Charter increased. 35 Although fundamental rights had early been recognized by the CJEU as forming part of the general principles of EU law in the cases of

Stauder (1969)\textsuperscript{36} and more notably in *Internationale Handelsgesellschaft* (1974),\textsuperscript{37} the visibility of the Charter and its legal structure brought significant changes. Yet, when the Constitutional Treaty for the European Union was negotiated in 2004 with the plan to make the Charter an integral and, therefore, binding part of the Treaty, none of the Member States expressed intentions for an opt-out.\textsuperscript{38} Instead, concerned Member States negotiated amendments to restrict the scope of application by means of Article 51 and Article 52 of the Charter.\textsuperscript{39} It was only after the rejection of the Constitutional Treaty, that UK and Poland pursued an opt-out from the Charter in course of the negotiations of the Lisbon Treaty.\textsuperscript{40} Poland’s motivation was very distinct from the British one as they were not concerned about possible effects of Title IV of the Charter on their labour law. Declaration No. 62 to the Lisbon Treaty states to that end: ‘Poland declares that […] it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.’

Instead, as it becomes clear from Declaration No. 61 to the Lisbon Treaty, Poland primarily intended to safeguard that the parts of their legislation that were based on strict conservative catholic values in the context of what is referred to as ‘public morality’ in the Declaration, would not be affected by the rights contained in the Charter.\textsuperscript{41} UK’s political motivation sharply contrasts with the Polish Declaration No. 62 to the Lisbon Treaty, as the main concerns in the negotiations were the possible impact of the Charter on the country’s labor law.\textsuperscript{42} Arguably, this explains the comparatively more heated debate in public opinion and legal literature in the UK compared to Poland, as the years since Lisbon have generated both EU law and subsequent domestic case law regarding the ever-changing rights of laborers conflicting with longstanding policies and legislation in the UK.

3. Legal framework of the Charter

The cornerstones of human rights law in the legal framework of the European Union are Article 6 (1) of the Treaty on the Functioning of the European Union (TEU), stipulating that the Charter ‘shall have the same legal value as the Treaties’, and Article 6 (3) TEU generally recognizing fundamental rights as forming part of the general principles of EU law. The legal scope of the Charter is, however, limited. Whereas the European Union and its institutions are always bound by the Charter, the Member States are only subject to its scrutiny when implementing Union law (Article 51 (1) CFR). It was pointed out by Advocate-General Sharpston in the case of *Zambrano* that there is no entirely clear definition of the term ‘implementing Union law’.\textsuperscript{43} Consequently the determination of what falls within the scope of the Charter often appears arbitrary.\textsuperscript{44} However, the explanations to the Charter, and the case law of the CJEU that has evolved since *Zambrano* allow for assertions as to when the Charter does apply. The case of *Wachauf* is cited in the explanations to confirm that the scope of

\textsuperscript{36} Case C-29/69 Stauder v. City of Ulm [1969] ECR 419.
\textsuperscript{44} Ibid.
Article 51 CFR extends to the implementation of Regulations. Correspondingly, the case of *Booker Aquaculture Ltd at al v Scottish Ministers* confirmed that Directives constitute an implementation of Union law within the meaning of Article 51 CFR. Furthermore, the explanations extend the application of the Charter, making reference to the CJEU rulings in the case of *ERT* and *Annibaldi*, to the obligations that Member States have to comply with when derogating from EU law.

In the controversial case of Åkerberg Fransson, Swedish law criminalizing tax evasion was considered to be an implementation of EU law in reference to Article 325 TFEU and VAT Directive 2006/112/EC, although the relevant Swedish legislation had been enacted before Sweden accessed the European Union. With this judgment the Court clearly defined the applicability of the Charter as extending to any case falling within the scope of EU law, rejecting a restrictive interpretation of the term ‘implementation of EU law’. Åkerberg Fransson caused a shockwave to resound through Europe, as it was described to be the destruction of the ‘illusion of unilateral supremacy’ between the CJEU and national supreme courts. In what was described as an ‘absolutist’ ruling, the CJEU had decided not to follow the proposal of Advocate-General Villalón, who had suggested that the presence of EU law at the origin of the exercise of public authority should be the determining test for the application scope of the Charter. In further elaboration on this test, he argued, contrary to what the Court later ruled, that this test should require sufficient proximity to EU law, excluding cases of exercised public authority which only have its ultimate origin in Union law. The ruling, not surprisingly, found strong criticism in the national Supreme Courts, most significantly the German Federal Court of Justice and the UK Supreme Court. Notably, the reactions of the two Courts significantly differed. The Federal Court of Justice, with reference to its primacy in domestic matters, almost generously presumed that the CJEU in its decision did not intend to make the ‘Fransson test’ a general one, but specifically based on the ‘distinctive features of the law on value-added tax’. Lord Neuberger, President of the UK Supreme Court, approved the position of the Federal Court Justice, but noted that in absence of a constitution in the UK, the UK Supreme Court would have ultimately no comparable tools to argue a primacy of domestic law.

Next to the discussions concerning the scope of application of the Charter, the substantive rights conferred by the Charter are not entirely clear from the outset and subject to ongoing interpretation by the CJEU. The disjunction between the legal effect that is given to civil and political rights in the Charter in comparison to economic and social rights leaves a wide

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46 Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd at al v Scottish Ministers* [2003] ECR I-7411.
49 Case C-617/10 Åkerberg Fransson [2013] ECR I-0000.
52 Opinion of Advocate-General Cruz Villalón in Case C-617/10 Åkerberg Fransson [2013] ECR I-0000.
53 Ibid.
54 BGH Judgment of 24 April 2013, 1 BvR 1215/07.
56 Case C-176/12 Association de Médiation Sociale [2014] ECR I-0000.
margin of discretion to the Court.\textsuperscript{57} Whereas civil and political rights are drafted in the language of rights, for example Article 2 CFR: ‘Everyone has the right to life’, economic and social rights tend to be drafted in the language of principles, as for example Article 25 CFR: ‘The Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.’\textsuperscript{58} This distinction is, as it was pointed out in the Opinion of the Advocate General in the Association de Médiation Sociale case, crucial, as principles are generally not intended to be justiciable.\textsuperscript{59} Although, this distinction was addressed in the explanations to the Charter, it remains unclear with respect to some Articles in the Charter whether they are indeed intended to confer rights and which ones only constitute principles.\textsuperscript{60}

4. Protocol No. 30 and its legal effect

4.1 The legal effect of Protocol No. 30

Unlike the impression created by public media and several inaccurate statements of politicians, Protocol No. 30 was on the highest level never intended to be an opt-out. In this regard, the third recital of the preamble of the Protocol states that the courts of UK are required to apply and interpret the Charter in strict accordance with the explanations referred to in Article 6, Protocol No. 30. The use of the words ‘apply’ and interpret’ was also observed by the House of Lords’ European Committee. In its report The Treaty of Lisbon: an impact assessment the House noted that it had been confirmed by the Lord Chancellor and Secretary of Justice that Protocol No. 30 was intended to clarify the legal effect of the Charter’s horizontal Articles and to ‘put beyond doubt what should have been obvious from other provisions.’\textsuperscript{61} Remarkable in this context are the quoted views of Professor Dashwood and Dr Sariyianidou in the report. Accordingly the legal expert witnesses considered the Protocol to be an ‘interpretative protocol’ not affecting the Charter’s bindingness on the UK.\textsuperscript{62} It is concluded by the Committee that the ultimate interpretation of the applicability of the Charter would be a matter for the courts to be decided on a case-by-case basis. It can be stated at this point that the disagreement of the CJEU, the UK courts, and the UK government about the applicability of the Charter in the legal system of the UK, is today less a disagreement on the legal framework than on the precise limits of the scope of application of the Charter. This conclusion is strongly supported by the legal reasoning of the UK government in NS v. Secretary of State for the Home Department which will be analyzed in detail in the following section.

4.2 The case of NS v. Secretary of State for the Home Department

The case that caused to date the greatest controversy with regards to the application of the Charter and the legal effect of Protocol No. 30 is the case of NS v. Secretary of State for the

\textsuperscript{58} Ibid.
\textsuperscript{59} Ibid.
\textsuperscript{60} Opinion of Advocate-General Villalón in Case C-617/10 Åkerberg Fransson [2013] ECR I- 0000, paras. 43-80.
\textsuperscript{62} Ibid.
home Department. Although the Home Office won the case, the conclusions of the CJEU in its analysis of Protocol No. 30 sparked increasing concerns on the side of the UK government. NS v Secretary of State for the Home Department concerned the preliminary reference to the UK domestic proceedings of The Queen on the application of Saeedi v. Secretary of State for the Home Department. The legal arguments discussed dealt both with the applicability of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (ECHR), with particular focus on the judgment of the European Court of Human Rights (ECtHR) in MSS v. Belgium and Greece. The case received significant public attention already before the preliminary reference to the CJEU, when Collins J ordered in October 2009 that the Saeedi case should be designated as the test case to determine whether asylum seekers could still be lawfully returned to Greece after the MSS v. Belgium and Greece ruling of the ECtHR. Amnesty International Ltd/The Aire Centre and the United Nations High Commissioner For Refugees were subsequently allowed to intervene in the case. The Saeedi case concerned an Afghan asylum seeker who had entered the European Union via Greece. Upon his arrival he was arrested and registered by the Greek authorities, making him subject to the procedure under the Dublin Regulation. He, however, never claimed asylum in Greece, and tried to leave the country through the Bulgarian border. The claimant was arrested by Greek police forces in course of this attempt and alleged that he was subsequently pushed back to Turkey. After two months in a Turkish detention center, the claimant managed to escape and was brought by a paid agent to the United Kingdom by lorry. Upon his asylum claim in the UK, the Secretary of state initiated proceedings to request the Greek authorities to take back the claimant pursuant to the procedure prescribed by the Dublin Regulation. The claimant, thereafter, issued judicial review proceedings which ultimately lead to the reference to the CJEU. For this analysis only the second reference of preliminary ruling is of relevance, which requests interpretations with regards to ‘Protocol (No 30) on the application of the Charter to Poland and to the United Kingdom (OJ 2010 C 83, p. 313; ‘Protocol (No 30)’).’ The CJEU addressed this question in paras. 116-122 of the judgment. Accordingly, the Court noted that Article 1 (1) of the Protocol provides that the Charter is not to extend the ability of the CJEU to find violations of fundamental rights, freedoms and principles contained in the Charter (para. 118). Quoting the third and the sixth recital of the preamble of Protocol No. 30, the Court affirmed that the applicability of the Charter in the UK or in Poland is not called in question but merely emphasizes that the Charter does not create new rights or principles (para. 119). The UK government concurred in its submission with the applicability of the Charter, but sought, unsuccessfully for a clear statement from the Court as to the fact that no new rights can evolve from the Charter. The Court, however, simply concluded that in the case at hand, no qualification would be required ‘in any respect

65 The Queen on the application of Saeedi v. Secretary of State for the Home Department [2010] EWHC 705.
so as to take account of Protocol (No 30). In casu, however, the Court found no violation of the Charter.

4.3 Reactions of the UK government and judiciary

Although, the UK government would have desired a more clear statement with regards to the effect of Protocol No. 30, no appeal against the decision of the Court was possible. The ruling in NS v Secretary of State for the Home Department along with the arguably misleading label of Protocol No. 30 as ‘opt-out’, gained renewed attention in the domestic proceedings of The Queen on the application of AB v Secretary of State for the Home Department. In the obiter (meaning the non-binding part of reasoning) Mostyn J stated, that ‘Notwithstanding the endeavours of our political representatives at Lisbon it would seem that the much wider Charter of Rights is now part of our [the UK] domestic law.’ This comment found a strong echo in public media and urged Secretary of State for Justice Chris Grayling to directly respond to the said analysis of Mostyn J, agreeing that the Charter constituted indeed a part of UK domestic law as well as to promise a soon clarification of the scope of the Charter by means of litigation. The statement of Mostyn J and the response of Secretary of State for Justice Grayling were, thereafter, subject to a debate in the European Scrutiny Committee. The Committee report states that there appears to be both public and judicial confusion over the effect of Protocol No. 30. In review of the hearings of the preceding European Scrutiny Committee, the Report states that the previous government did truthfully state the fact that Protocol No. 30 was not an opt-out. However, the Committee criticizes, making reference to statements of the then Prime Minister Tony Blair, that the general public including parts of the judiciary was knowingly left in the belief that Protocol No. 30 constituted an opt-out.

The report concludes that today there is ‘no doubt’ about the direct applicability of the Charter in the UK, and urges the governmental action to first, clarify the precise Charter’s application in the UK, and second, to introduce primary legislation by way of amendment to the European Communities Act 1972. In reaction to these calls, Justice Secretary Grayling repeatedly announced that he, on behalf of the current conservative UK government, is prepared to clarify the Charter’s application by a targeted intervention in a suitable case, which would then lead to another reference for preliminary ruling to the CJEU.

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72 House of Commons European Scrutiny Committee, 43th Report of Session 2013-14, para. 10.
76 House of Commons European Scrutiny Committee, 43th Report of Session 2013-14, para. 16.
78 House of Commons European Scrutiny Committee, 43th Report of Session 2013-14, paras. 13-16.
79 Ibid., para. 171.
80 Ibid., para. 172.
5. The future of the relationship between UK and the Charter

5.1 Benkharbouche v Embassy of the Republic of Sudan and Janah v Libya

In pursuance of a clarification of the precise implications of *NS v Secretary of State for the Home Department*, Justice Secretary Grayling publicly, and in communication with the Committee for European Scrutiny, identified a case, which the Department for Justice deems suitable to bring in front of the CJEU. The identified case is the Employment Appeal Tribunal joined case of *Benkharbouche v Embassy of the Republic of Sudan and Janah v Libya* which concerns domestic staff members of the Sudanese and Libyan embassy. Their claims were dismissed by the Employment Tribunal in the first instance with reference to the State Immunity Act. Langstaff J, presiding the appeal proceedings, concluded in his judgment that the claims, a discrimination claim and working time claim, fell within the material scope of EU law. Consequently, arguing on basis of Åkerberg Fransson and *NS v Secretary of State for the Home Office*, the rights from the Charter would be superior, disapplying the relevant provisions of the State Immunity Act. Langstaff J, therefore, ruled in favor of the claimants. The case is being closely followed by the European Scrutiny Committee and Justice Secretary Grayling and is currently pending in front of the Court of Appeal. Whereas the decision in this particular case, including a possible intervention of the UK government and a ruling of preliminary reference by the CJEU, has yet to be reached, it appears unlikely that the CJEU will do anything but to confirm its position that the Charter applies to the UK in a wide scope. Presumably, it would be contrary to the modus operandi of the Court if it would directly or indirectly address the concern of Mostyn J, the European Scrutiny Committee, and Justice Secretary Grayling that the Charter creates new rights despite Protocol No. 30. Instead it seems probable that in line with its longstanding case law in *Wachauf, Annibaldi* and *Åkerberg Fransson*, the CJEU will focus on discussing the scope of the Charter and will not outline clear rules as to when a case falls within the scope of EU law, but will instead strictly follow its case-by-case approach. Conversely, the *Benkharbouche* case would not significantly affect the current position and concerns of the conservative UK government. In case of an intervention of the UK government into this case, it is, however, likely to give the controversy of Protocol No. 30 newly increased public attention in an election year 2015 that is expected to be dominated by the debate of a possible withdrawal of the UK from the EU.

5.2 The renegotiation of the United Kingdom membership status in the European Union

The second, more radical-styled, recommendation of the European Scrutiny Committee suggested the introduction of primary legislation to amend the European Communities Act in order to change Protocol No. 30 into a ‘true’ opt-out. However, Justice Secretary Grayling

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84 *Benkharbouche v Embassy of the Republic of Sudan and Janah v Libya* UKEAT/0401/12/GE.
85 Ibid., paras. 43-65.
87 House of Commons European Scrutiny Committee, 43th Report of Session 2013-14, para. 171.
90 Case C-617/10 Åkerberg Fransson [2013] ECR I- 0000.
91 House of Commons European Scrutiny Committee, 43th Report of Session 2013-14, para. 172.
had made it clear that the UK government would not unilaterally amend the European Communities Act by introducing primary legislation, and the European Scrutiny Committee had, with reference to the statements of legal experts, concluded that a legislative act of such nature would lead to a direct conflict with EU law. Yet, the Minister in the Committee hearing on 29 January 2014 implicitly left the possibility open to address the discontent about Protocol No. 30 in a larger negotiation package concerning the future of the EU-UK future relationship. In this respect the Report of the European Scrutiny Committee states that according to the Minister a renegotiation of the UK membership in the EU could not just deal solely with the Charter, but ‘needed to be comprehensive in addressing the wider problems the UK faced in its relationship with the EU […]’. The reference of the Minister to the renegotiation of UK’s relationship with the EU, refers to Prime Minister Cameron’s Bloomberg speech of 23 January 2013, announcing the plans for an EU ‘in/out’ referendum to be held in 2017. Since the hearing of the Secretary of State for Justice, Prime Minister Cameron has more precisely stated his agenda for the renegotiation. Thereby, he arguably denoted gradually decreasing attention to the combined issue of human rights law under the regime of the ECHR and the Charter of Fundamental rights. In the Bloomberg speech, the Prime Minister abstractly described the anger that ‘some legal judgements made in Europe that impact on life in Britain’, and criticized the general power imbalance between the Member States and the European institutions. In an article for The Telegraph in March 2014, he demanded changes to make ‘police forces and justice systems able to protect British citizens, unencumbered by unnecessary interference from the European institutions […]’. In the most recent keynote speech delivered on 28 November 2014, Prime Minister David Cameron outlined the restriction to the entitlement of migrants for social benefits as ‘the central issue in the negotiations for a stay of the UK in the European Union.’ He did not address the power conflict with European institutions or the problematic relationship to the Charter of Fundamental rights at all, leading to the conclusion that the UK’s discontent with the legal status of Protocol No. 30 has arguably moved down on the political agenda. However, in the light of the speech, it is noteworthy that the two to date most controversial cases of application of the Charter both concerned migration cases. Although the keynote speech addressed the issue of EU-migrants, whereas the cited cases concerned non-EU migrants, the political sensitivity of the entire field of migration policy is apparent. An intervention of the UK government into the Benkharbouche case on European level, could consequently lead to a renewed high public profile of the controversy of Protocol No. 30, which, as the past has shown, can be conveniently blamed on the political competitor, the then

92 Ibid., para. 107.
93 Ibid., para. 123.
94 Ibid., para. 123.
96 Ibid.
99 Joined Cases C-411/10 and C-493/10 NS v. Secretary of State for the Home Department and ME and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform [2011] ECR 1-13905; Mostyn J. (on the application of) R (AB) v. Secretary of State for the Home Department; Benkharbouche v Embassy of the Republic of Sudan and Janah v Libya UKEAT/0401/12/GE.
100 Benkharbouche v Embassy of the Republic of Sudan and Janah v Libya UKEAT/0401/12/GE.
governing Labour Party. Since the Prime minister admits that his plans would in any case require changes to the Treaties of the European Union, the political will and public pressure could in this scenario be present to change Protocol No. 30 from an interpretative instrument to a fully effective opt-out from the Charter in the framework of the renegotiations of the EU-UK relationship.

6. Conclusion

The political and historical review of the origins of the Charter of Fundamental Rights of the European Union revealed that the UK opposition against the Charter was ultimately motivated by the desire to restrict the possible impact on domestic labour law (I). In respect of the application scope of the Charter, a study of the case law of the CJEU indicated that the Court’s position appears to suggest an application of the Charter in all cases where the material issue falls within the scope of Union law (II). Furthermore, an analysis of case law of the CJEU and the subsequent reactions of the government and judiciary of the UK clearly demonstrated that the Charter is applicable to the UK (III). In an examination of the pending case of Benkharbouche the conclusion was drawn that a possible intervention of the government of the UK, including a potential new reference for preliminary ruling of the Court of Justice, would neither lead to a change of the legal status quo, nor is it likely to produce clearer rules as to when the Charter applies. Against the backdrop of these legal considerations, the current statements of Prime Minister Cameron suggest that the Charter of Fundamental Rights will not be in the focus of the renegotiations. An intervention in the Benkharbouche case and shifted public attention in course of the May 2015 elections could, however, move the controversy of Protocol No. 30 and the status of the Charter up on the political agenda. In consequence, the government could seek to make Protocol No. 30 finally to what the general public for a long time believed it to be: an opt-out from the Charter of Fundamental Rights of the European Union (IV).

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WHO IS THE FINAL ARBITER ON FUNDAMENTAL RIGHTS IN EUROPE?

Marie Gérardy

1. Introduction

The European Union has long been seen as a role model concerning Human rights in the World. However, the EU since its beginning has tended to focus more on economic integration and the future accession to the ECHR is likely to be a historical event and the ultimate step towards further enhancement of protection of human rights across Europe. This accession provoked lively debates especially concerning the relationship between the Courts (European Court of Human Right and European Court of Justice) and the relationship between the EU and the Member States. This paper will seek to briefly explain the accession of the EU to the ECHR and then will address the relationship between the two Courts and answer the question of who should be the final arbiter of Human Rights in Europe more extensively.

2. The ECHR

Before talking about the relationship of the CJEU and the ECtHR, it is important to have a general understanding of what the ECHR is. The ECHR is an international convention aiming at protecting fundamental rights and freedoms across Europe. It was drafted in 1950 by the Council of Europe which had just been formed after WWII and entered into force in 1953. The accession to the Convention is a prerequisite to join the EU and the Council of Europe. It also established the ECtHR which is the Court of the Convention in Strasbourg. The judgments of the Court are binding on the States. The ECtHR is responsible for overseeing the correct application and implementation of the Convention on Human Rights in the Member States. Every individual who is a citizen of one of the High Contracting Parties can file a complaint to the Court if he/she feels that one of his/her fundamental or human rights has been infringed after having exhausted all of the domestic remedies available to them at national level (articles 34-35 of the Convention).

3. EU accession to the ECHR

3.1 Reasons for accession

The European Union has always been seen as a role model concerning human rights in the international community. The European Union was created after the Second World War with the main goal of protecting human rights and preventing the atrocities of the past decades to ever take place in the future. Robert Schuman therefore proposed to pool the resources of cool and steel (ESCS Treaty) of both

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647 Ibid.
649 Ibid.
France and German to maintain peace over Europe.\textsuperscript{651} However, the EEC started to focus more on the establishment of an internal market and on economic integration rather than on the protection and development of Human Right over the world. However, there was growing and pressing demands from the Member States, especially from France and Germany, to attach greater importance to fundamental right protection and development at EU level.\textsuperscript{652} Consequently, the EU institutions drafted the Charter of Fundamental Rights in December 2000 which comprises almost all ECHR rights but was not yet binding.\textsuperscript{653} The status of the Charter was a bit ambiguous as it did not provide any legal effect. However, it became binding under the Lisbon Treaty in 2009. Legally speaking, it implies that the European Union courts now have their own binding catalogue of human rights and will have to rule according to this charter and strike down every EU act which is contrary to one of the fundamental rights contained therein.\textsuperscript{654} It also means that the Member States have to abide by those rights when implementing EU law (this is even an \textit{acquis communautaire} required to become a member of the European Union). Even though the two sets of fundamental rights are mostly alike, there is a risk of divergent opinions between the two Courts supervising the implementation and application of those rights (the CJEU and the ECHR).\textsuperscript{655} A classic illustration of this is the Niemitz case where the ECHR held that business premises are in fact considered as home and therefore fall under article 8 (right to privacy), whereas the ECJ later ruled that business premises should not fall under home and should not be protected by that article (art.8 ECHR). Consequently, it would be very much desirable to have some form of close cooperation between the two courts in order to ensure a coherent application of the fundamental rights.\textsuperscript{656} The close cooperation between the two courts would fill the gaps that might exist in the system of human rights protection in Europe.\textsuperscript{657} A second reason for accession would be that as long as the EU is not a party to the Convention but the member states of the EU are parties, a breach of the Convention by an EU act would hardly be challenged and it would be highly unfair to blame the member states for it.\textsuperscript{658} In the very well-known Bosphorus case, the ECtHR ruled that as long as the EU is not part of part of the Convention and as long as its courts rule in accordance with their Charter of Fundamental Rights (i.e. almost equivalent to the ECHR level), EU law would not be subject to a review by the ECtHR nor would the member states implementing EU law be held responsible for breach of the Convention.\textsuperscript{659} Therefore, the accession of the EU to the ECHR would enforce the protection of human and fundamental right across Europe in a more coherent manner.

\textsuperscript{651} Ibid.
\textsuperscript{653} P. Craig, ‘EU Accession to the ECHR; Competences, Procedure and Substance’, 36 \textit{Fordham International Law} 3( 2013), p.1114-1150.
\textsuperscript{654} Ibid.
\textsuperscript{656} Niemietz v. Germany, no 13710/88, ECHR 1992-III.
\textsuperscript{658} Ibid.
\textsuperscript{659} \textit{Bosphorus v. Ireland} [GC], no.45036/98, ECHR 2005-IV.
and the EU would be put under an independent external scrutiny just as its member states are.\textsuperscript{660}

Thirdly, the accession of the EU to the ECHR would permit individual EU citizens to file a complaint against the EU for breach of the Convention at the ECHR level after having exhausted all possible domestic remedies.\textsuperscript{661}

3.2 Constitutional Hurdles

The accession of the EU to the ECHR is a very long and complicated legal and political process which requires negotiations and changes on both sides. If the EU becomes a member to the Convention, which is very likely to happen, it will be a very atypical and extraordinary party for two main reasons: first, it is the first non-sovereign nation-state to accede the Convention and secondly it is one of the first times in history that such a supranational organisation will become a party to a very sophisticated Convention with a well-developed Court system.\textsuperscript{662} However, the possible accession of the EU to the ECHR has brought about several burdensome constitutional issues and hurdles which had to be tackled during the negotiation process. Indeed, the idea of the EU membership to the Convention has been debated for decades. The European Commission already discussed this possibility in 1979\textsuperscript{663} and there has been a concrete attempt of accession in 1994 but this attempt was rejected by the ECJ (ECJ Opinion2/94,[1996] ECR I-1759) because it found not legal basis in the European treaties for such an accession.\textsuperscript{664} However, the entry into force of the Lisbon Treaty brought a significant turning point. First of all, the Charter of Fundamental rights became binding on the EU courts.\textsuperscript{665} Second of all, this Charter was given a very high status and the fundamental rights became the basic and unconditional values which the Union should never derive from.\textsuperscript{666} Thirdly, the Treaty on the European Union explicitly provides for the EU accession to the ECHR and even makes it a legal obligation.\textsuperscript{667} Amendment on the side of the Council Europe and on the Convention was equally needed. The next paragraphs will analyse in turn the constitutional changes needed on the side of the EU and on the side of the Council of Europe.

\begin{thebibliography}{99}
\bibitem{A.W. Heringa & P. Kiiver} A.W. Heringa & P. Kiiver, \emph{Constitutions Compared, An introduction to comparative Constitutional law} (3\textsuperscript{rd} edition, Intersentia, Cambridge 2012).
\bibitem{Opinion 2/94} Opinion 2/94, \emph{Accession to the ECHR} [1996] ECR I-1759.
\bibitem{Ibid.} Ibid.
\end{thebibliography}
3.3 Amendments needed on the side of the EU

As already mentioned, the idea of the accession of the EU to the ECHR is not new and discussion has been going out for decades. However, it became a binding obligation in 2009 with the entry into force of the Lisbon Treaty.\(^{668}\) Indeed, article 6(2) TFEU stipulates that the EU “shall accede to the ECHR”. It is important to note however that article 6(2) and protocol No.8 of the treaties require that the Union’s internal division of competences or powers should not be affected by this accession and that article 344 TFEU (“Member states undertake to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for therein”) should not be impaired either.

Amendments needed on the side of the Council of Europe and Convention

A matching provision permitting the EU to accede the Convention was equally needed on the side of the European Council.\(^{669}\) That is the reason why the Council of Europe drafted protocol 14 which amends the Convention on several points, notably article 59 of the Convention.\(^{670}\) Indeed, former article 59 stipulated that only signatories of the Council of Europe could accede to the Convention. As the European Union is not a party to the Council of Europe, this provision had to be amended. New article 59(2) provides that the ‘European Union shall accede to the Convention as a member’. Protocol no.14 entered into force in 2010 after all signatories of the convention ratified it.\(^{671}\) Consequently, The EU now has both the legal basis for acceding the convention (art.6(2) TEU) and the possibility to do so thanks to the newly amended article 59 of the European Convention of Human Rights which allow for such an accession.

3.4 Negotiation process

Once the EU obtained the legal instruments for accession, negotiation could finally start. These negotiations started in July 2010\(^ {672}\) and were not as swift as some people wished they would be. They were carried out by a negotiation committee composed representatives of the European Union and the Council of Europe. The Commissioners were given a mandate by the Justice Ministers of the EU to carry out the negotiation together with the Steering Committee for Human Rights created by the Council of Europe for the occasion. The Steering committee was an ad hoc group composed of fourteen members representing the Council of Europe (seven people from an EU member state and 7 people from a non-EU Member state).\(^ {673}\) The negotiators were charged with drafting the Accession Agreement (AA).\(^ {674}\) The


\(^{670}\) Ibid.

\(^{671}\) Ibid.


\(^{674}\) Ibid.

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Accession Agreement was finalised one year later, in 2011. However, this agreement had to be approved by the 47 members of the Council of Europe, the Council, the ECJ, all EU member states and the European parliaments. Some member states were not keen on all the parts of the AA and proposed amendments. Other member states refused those amendments. As a result, the ministers of the Council of Europe created a working group to seek a compromise. This group finally reached a new agreement in 2013. The negotiators tried to pay attention that EU competences, internal functioning and character would not be prejudiced by the agreement. This is probably the reason why they decided to limit the accession of the EU to only those protocols which have already been ratified by all EU member states (i.e. Protocols 1,6). The Accession Agreement comprises 12 articles which can be divided in 2 categories. The first category deals with the modifications to the Convention itself and the second category deals with the status of the European Union as regards the Convention. The newly amended agreement of 2013 tries to respect as much as possible the autonomy of the EU. However the court of the EU still has to give its opinion on the matter. The ECJ was asked by the Commission in July 2013 to issue an opinion of compatibility of the Accession Agreement with the European Treaties under article 218 of the TFEU which basically sets the procedure for accession to international agreement of the EU. Article 218(11) TFEU stipulates that one of the EU institutions (European Parliament, Council) or one of the Union member states might seek to obtain the opinion of the Court as to whether an agreement is compatible with the EU treaties. Opinion 2-13 is still in process as the moment but the Court will most likely deliver its judgment at the very end of this year. The Court will have to look for the compatibility (probably of protocol 14 and article 6 TEU) of the accession agreement with the treaties. Therefore, the accession of the EU to the ECHR is not completely finalised yet as the approval of the CJEU is essential. However, the final Accession Agreement was a big step towards the accession.

4. Consequences of the accession for the relationship of the two Courts

The negotiations were a very long and complex process for political and legal reasons but also because some issues which would arise as a consequence of accession had to be tackled. The first problem was the relationship between the courts. The second issue was a standing issue: who should go to Strasbourg; the EU or the Member States. The

[675] Ibid.


[677] Ibid.

[678] Ibid.


[680] Ibid.

[681] Ibid.


The solutions to those problems found by the negotiators do have very important consequences for the EU legal order. These two issues, the solutions found and their consequences will each be dealt with in turn.

4.1 Relationship between the Courts

4.1.1. Subsidiarity principle

The convention Court should only act *subsidiarily*. It means that the High Contracting parties should have an opportunity to remedy alleged violations of the Convention before it is sent to the ECtHR. Consequently, this implies that an external review by the ECtHR should be preceded by an internal review of the ECJ. It flows from article 35(1) of the Convention that the jurisdiction of the Strasbourg court can only be called upon after the individual has exhausted all remedies available to him at national or EU level. Moreover, in the *Mox Plant* case, the Luxembourg Court held that article 344 TFEU could not be derived from and that member states of the EU are not allowed to initiate proceedings before another court concerning the interpretation of EU law or for the settlement of a dispute which falls within the ambit of EU law (principle of cooperation art 4(3) TEU) before having consulted the ECJ first.

4.1.2. Exhaustion of domestic remedies

In order for an individual to file a complaint before the ECtHR, he will have to exhaust all domestic remedies (article 35 of the Convention). There are three possible situations here. Firstly, in case an individual wants to file a complaint against the European Union for alleged breach of the Convention of the Convention he will have to access the Union courts via the complaint procedure found in article 263(4) TFEU (action for annulment procedure). However, the requirements of this procedure are not easy to fulfil for a private citizen. Indeed, he will have a short period of time to trigger this procedure and he will need active standing. There are three possibilities for an individual to have active standing under that article. First, if the act is directly addressed to him. Secondly, if the act is of direct and individual concern to him (the Court will apply the *Plaumann* case law test) or thirdly if the act is a regulatory act of general implication which does not require any implementing measure. However, the individual also has the possibility to start proceedings in his domestic courts about a question of EU law which will obliges the domestic Court to ask for a preliminary ruling to the ECJ (art.267). However, not every domestic courts have to ask for a preliminary rulings but only the ones of last instance with the exception where they believe that the question is irrelevant (CILFIT case), or has already been answered by the Court or is so clear that it can act by itself and does not

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688 Ibid.
689 Ibid.
need to seek clarification on the matter (acte clair or éclairé). It is still unclear whether a preliminary ruling is needed or not before a case being admissible in Strasbourg. A second situation would come into being where an individual file a complaint against a member state, he will have to exhaust the domestic remedies of that member state (art 35(1)). A third situation arises when an individual seek to complaint about primary EU law. Some people argue that in those situations, individuals should not be able to exhaust all local remedies as the ECJ cannot annul EU anyway. However, the majority view believes the individual has to abide by the exhaustion rule.

Inter-Party state complaint: who decides?

Another question which arose is who should decide in case of inter-party complaint. The ECHR contains a provision (art.55) which stipulates that the Strasbourg Court has the exclusive power to decide on such cases. However, the EU has an equally exclusive provision concerning such cases; article 344 of the TFEU which implies that the EU member states should bring a case about interpretation of EU law before EU courts. It has been decided that the subsidiarity principle and the prior involvement of the ECJ should be respective in such cases as well. Therefore, the Member states have to settle their disputes before the ECJ before initiate proceedings in Luxembourg, (exclusive jurisdiction under 344 and monopoly of interpretation under article 19 TEU).

4.2 Relationship between the EU and the member states in the proceedings

4.2.1. Attributability of the acts

The accession agreement is clear concerning rule for the attributability of secondary EU law: The EU will be held liable for its own legislation (namely secondary legislation). In a case such as Behrami and Saramati the EU will be responsible. In this case, France and Norway which acted under the UN committed human rights violation however he ECtHR held that they were under the ultimate and direct control of the UN and therefore, the acts should be attributable to the UN. In a nutshell, when the actors are acting under the close scrutiny of the EU and on behalf of the Union, the later would be the one responsible for breach of the Convention. However in an Al-Jedda-like cases (the UK was responsible for breach of human right in Iraq but acted independently from the UN), the member state would be responsible because the EU was not the direct instigator of the wrongful action. It therefore depends on the degree of dependence. Secondary legislation can be annulled by the ECJ if the ECtHR finds it in breach of the Convention. It is however very important to

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690 Ibid.
693 Ibid.
695 Behrami v. France, no 71412/01, ECHR 2007-V.
Saramati v. France, Germany and Norway, no. 78166/01, ECHR 2007.
696 Al-jedda v. United Kingdom, no. 27021/08, ECHR 2011-VII.
keep in mind that the judgments of the ECtHR are purely declaratory, it means that the court cannot annul any domestic provisions but it can establish a breach and award compensation to claimant and plaintiffs. Consequently, it will be for the High Contracting party concerned to decide whether to set aside an act or not. Regarding the European Union for example, if the ECtHR rules that an act (secondary legislation) is in breach with the Convention, it will be for the ECJ to decide whether to invalidate it or not. On the other hand, the ECJ is powerless concerning the modification of primary legislation (art.48). Indeed, it is based on international treaties and can only be modified by unanimous consent of all member states (art.48 TFEU) and there is no provision allowing the ECJ to annul such primary law in the treaties. However, it does not mean that individual cannot bring a complaint about primary legislation to the Strasbourg Court. On the contrary, it might even be the sole specific situation where an individual might be able to file a complaint to the ECtHR even if he has not exhausted all the domestic remedies available to him as there is no remedy against violation by primary EU law at the EU level. However, this is still arguable because the ECtHR’s jurisdiction should only be subsidiary and the ECJ should have its prior involvement as in all other cases. This is a very complex matter which has no definite answer yet. However, those rules on attributability will not preclude both the EU and a member state acting together before the court thanks to the newly created co-respondent mechanism.

4.2.2. Co-respondent mechanism

One important issue that had to be tackled during the negotiations was the fact that an act enacted by the EU which is later implemented by a Member state of the EU might breach the Convention. Consequently, it will be very hard for individuals to known against whom they are supposed to lodge a complaint. Therefore, the negotiators came up with what is called the co-respondent mechanism (art 36(4) of the Accession Agreement) which will permit both the EU and a member state to take act jointly as respondent before the court. Despite criticisms by some politicians such as Badinter who believed that the third party intervention under article 36 of the Convention would be more appropriate, the co-respondent mechanism was enshrined in the Accession agreement. This new mechanism does not represent a privilege for the EU in comparison with the rest of the non-EU contracting parties but rather a good

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700 Ibid.
701 Ibid.
702 Ibid.
way to fill the gap in participation and attributability of the Convention. Secondly, as mentioned above in the subsidiarity principle, individuals have to exhaust all domestic remedies before going to Strasbourg. With the entry into force of that mechanism, the individuals will only be required to either exhaust local remedies of the EU or the domestic remedies of their member state (article 35(1) of the Convention). However, the ECtHR cannot make a judgment concerning the internal division of competences and powers of the EU and its institutions and member states, the ECJ will always keep the monopoly on interpretation of EU law. Moreover, article 3(6) of the Accession Agreement provides for the prior-involvement of the court in cases where the co-respondent mechanism is used. This article stipulates that the ECJ should always be afforded sufficient time to assess the compatibility a case concerned with EU law with the ECHR before it is put under the external scrutiny of the Strasbourg court. The Union Court will always have the first say on EU law matter. The prior-involvement procedure is very much linked to the subsidiarity principle (see section 4.1.1.). Thirdly, the co-respondent mechanism should be entirely voluntary (art 3(5)AA) either by directly requesting it or by accepting the invitation of the Strasbourg’s Court. In case the EU and a member state are acting jointly in a proceeding, they will be considered as a legal unity and will be jointly responsible unless the Court finds that only one of them should be responsible (Al-Jedda-like cases).

5. Conclusion

In Conclusion, the accession of the EU to the ECtHR will be a historical event which will happen in a very near future. This accession has been discussed for decades because some member states felt that the EU was departing from its original goals, namely the protection of fundamental freedom across Europe and the maintenance of peace. In addition to that there was a growing need of cooperation between the ECJ and the ECtHR when the charter of fundamental right became binding (Lisbon Treaty) to avoid discrepancies and ensure the more coherent supervision of Human Rights. In addition to that, it would allow individuals to file complaint against the EU for alleged breach of Convention. However, the main issue was that there was no

705 Ibid.
legal basis in the EU treaties for such an accession and the ECHR itself did not allow for the accession of a High Contracting party which is not a party to the Council of Europe. It all changed with the entry into force of article 6 TEU and protocol 14. Once the legal basis were provided, the negotiations could start. Those negotiations were legally and politically complex because a lot of issues had to be tackled and interests of both parties (EU and Council of Europe) had to be safeguarded. One of the most important questions which was raised; who will become the final arbiter of Human Rights in Europe. Indeed, this is a key issue as the two Courts will now have to work together. An important thing to remember first of all is that post-accession, the two Courts will remain two independent bodies which will have to cooperate together. The first thing worth to be mentioned is the principle of subsidiarity which implies that an individual must exhaust all the domestic remedies available to them before having access to the ECtHR. It means that an external review of an EU act by the ECtHR has to be preceded by an internal review of the ECJ. This is also sometimes referred to as the prior-involvement of the ECJ which implies that the ECJ needs to have the first say about EU interpretation and have the first opportunity to judge on the alleged infringement of the Convention. The same goes for inter-party cases. The ECJ should have the first say on EU disputes (art.344 TFEU) and should have the monopoly of interpretation of EU law (art.19 TEU).

In my opinion however, even though the ECtHR’s judgments are only declaratory and cannot annul any national law, the Strasbourg court remains the final arbiter of Human Rights because it has the final say in a case concerning human rights in Europe and even if the case has to appear before the ECJ first, the ECtHR can still establish a breach of the Convention. The ECJ will work as any other Supreme Court or Constitutional Court and the ECtHR will have the competence to externally scrutinize all EU acts for compatibility with the convention. Therefore, the ECtHR’s judges are the final and absolute supervisors of Human Rights in Europe. Strasbourg can overrule the judgment of the highest court in Luxembourg.
LEGAL CONSEQUENCES OF THE WITHDRAWAL FROM THE EU ACCORDING TO ARTICLE 50(1) TEU, A MEMBER STATE “MAY DECIDE TO WITHDRAW FROM THE UNION IN ACCORDANCE WITH ITS OWN CONSTITUTIONAL REQUIREMENTS”.

Holly Watt

1. Introduction

Can a Member State voluntarily choose to leave the European Union? Are their provisions to make this possible? And if a Member State were to leave what would be the consequences? These are all questions that will be addressed in this paper. As a starting point it is important to establish that withdrawal from the European Union is a right and it is enshrined in Article 50(1) in the Treaty of the European Union. It states that ‘Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.’

In 2007, this amendment to the Lisbon Treaty provided an exit clause for the Member States, this was a controversial option to say the least. To begin with, accession to the European Union was considered to be an option taken very seriously and not a reversible choice. However the situation is not as it was when the European Union was formed, euro scepticism and its associated political parties have been growing in popularity, especially within the UK. This in turn, has led to the use of this official clause becoming a more and more realistic possibility. The UK has even set a year for an in/out referendum under David Cameron’s government. Financial situations, lack of transparency and concern over the excessive centralisation of powers are all reasons for such growing uncertainty with regard to the EU. However it is important to note that the reasons behind such a withdrawal are not relevant for this paper, it is the aftermath that will be discussed. It is unclear exactly what the precise consequences of such a withdrawal would be, as it is unchartered territory. However it is clear that the act of leaving would have both political and legal implications. Although formally the impression may be given that there are only legal consequences, it is practical and obvious to expect that political relationships would suffer after such a commitment had been retracted. This paper is going to focus on two aspects of withdrawal from the EU, firstly what the associated legal consequences would be, and secondly what are the constitutional requirements that member states would have to follow? To prevent too broad an answer, the UK in specific will be looked at, which is especially interesting considering the current fragile state of the UK within the EU.

2. Historical Context

The common view before 2004 was that accession to European Union was a lifetime commitment, there was no option for unilateral withdrawal or even a possibility for negotiations. This was supported by the European Court of Justice in the case of *Costa v Enel* which referred to a permanent limitation of the member states sovereign rights. Obviously it is arguable that due to principles laid out in various articles of the Vienna Convention on the law on Treaties that there is indeed an option for negotiation. This was due to an initial silence on the matter by the European Union, however it was not until the Lisbon Treaty in 2007 that explicit conditions for withdrawal were laid out.

With the main reason for the founding of the European Union being the prevention of war and lifelong peace, the connotations of leaving the Union are counter-productive and suggest a reluctance to maintain this cooperation. The question was never even put forward, because why would a member state want to withdraw? Especially after the destruction caused by both World Wars and the progress which followed after the creation of the Union. However, due to the increasing importance on the principle of subsidiarity and the opposition against excessive centralisation it is becoming more appealing. The possibility was initially broached in the 2002-2003 Convention on the Future of Europe by Badinter, who proposed the right of a Member State to withdraw, subject to mutual agreement found through negotiations with other Member State. (This is what provided a basis for the Lisbon Treaty). It was not until the Lisbon Treaty, however, that the official conditions were laid out in Article 50(1) for withdrawal.

If a Member State decides to withdraw, it must notify the European Council which would be followed by negotiations which would need to be agreed upon by a Qualified Majority of the European Council. The more precise conditions will be discussed in more detail in the following paragraph. With regard to the history of Member States withdrawing, the article has not been used in practise. This can be somewhat regarded as a success of the European Union, that no one has requested to leave. There are some examples, however that can be considered rather similar. Firstly, the independence of Algeria from France and secondly, the situation that occurred with respect to Greenland. Although these are not clear cut examples of Member States departing from the EU, the consequences of their departure from the

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7 The Vienna Convention on the Law on Treaties, 23 May 1969, Article 42 & 59.
EEC may be used as a starting point for comparison. However whether or not they can be considered something to build legal ground on, is debatable.

3. Brief Description of Conditions for Withdrawal

The right of withdrawal is a relatively new instrument given to the member states of the European Union. As fore-mentioned it was not a concept that was considered when setting up the EU. The conditions of such a withdrawal are laid out in Article 50 of the TEU, this paper focuses particularly on subsection one of the fore mentioned article. However, a quick summary of the provision and its conditions will be given to provide clarity how a state may withdraw. A good way to describe the relationship between the Member States and the EU is similarly to a marriage, and if a couple were to initiate divorce proceedings there would attached conditions.15 This is not so different from a member state separating from the EU.16 The opening of Article 50(1) states that ‘any member state shall to decide to withdraw from the Union in accordance with its own constitutional requirements’.17 This indicates a fairly simple exit route, with no set criteria for a member state to withdraw. The phrase ‘in accordance with its own constitutional requirements’ indicates an obligation to be bound by Union values, despite the fact the procedure before notification would be different for each member state in turn.18 Because of this it can be assumed that certain principles would be adhered to, such as democracy.19 Therefore the likely procedure to begin the formal withdrawal from the European Union would begin with a referendum, or with a parliamentary vote.20 With regard to a parliamentary vote, it is only likely that this would be used if the government had been elected with voters being fully aware of their intention to opt out of the EU.21 The more specific provisions attached to the exit clause can be found in the latter subsections of the article. Firstly, the member state must notify the European Council of its intention to withdraw. The European Council’s next step is to lay out the guidelines for negotiations for withdrawal and the concluding agreements. The framework for the future relationship with the union must also be considered. This agreement must be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union.22 The Council must conclude and agree by a qualified majority, and this cannot be done without the consent of the European Parliament.23 This is all contained in subsection two of the article. Subsection three then goes on to say that the treaties will no longer apply to the concerned member state from the date of entry

16 Ibid.
21 Ibid.
23 Ibid.
into force of the withdrawal agreement or from two years after the notification to withdraw. The period of time is not concrete and can be extended. The importance of this time limit of two years is that it places time constraints on the negotiation period so it does not drag on. However it is also possible that if two years pass after the notification and no agreement is made, then the member state can leave anyway. This implies a unilateral withdrawal is in fact possible when studying the article at face value. This would not be a suitable direction to take, however because the level of integration which has increased over the years between member states and the EU. This has occurred on a number of levels, for example; politically, legally and financially. This level of integration would mean it would be very difficult, near to impossible, for a member state to turn its back on the EU without a second thought. The aspect that discusses the future relationship of the member state with aspects of the EU is an integral part to negotiations, and the only realistic option for member states who have already been tied up in institutions such as the European Coal and Steel Community and the European Economic Community. What is interesting here is that the stance this article takes is the polar opposite to article 49 of the TEU which constitutes the legal basis for any accession to the EU. This is noteworthy because it may suggest that the consequences of leaving the union are not desirable, and there is therefore no need to create strict criteria for the withdrawal. Rather it is very easy for a state to withdraw, however the aftermath may have severe consequences politically, financially and legally. Despite this however, it depends on the negotiations of the state, as fore mentioned subsection two creates the possibility to ensure at least some future relationship with the EU for the withdrawing member state.

4. Legal Consequences of withdrawal from the perspective of EU law

Unfortunately, due to a member state never before withdrawing from the European Union under article 50(1) of the TEU, it can only be speculated what the possible legal implications of such a withdrawal would be. Therefore what will follow will be a purely theoretical discussion.

4.1 Inability to partake in Council decisions

The first consequence that would be likely to follow from a withdrawal from the European Union would occur before the official separation. Effects would be initiated before the two year time period had lapsed, it would occur at the point of notification. The most important one worth mentioning would be the inability to partake in discussions of the European Council and the Council. The Council is the main legislator of the EU and also has very important policy making functions. Moreover the European Council has a very strong political influence. This lack of a political influence would be very much noticed by the

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25 Ibid.
29 Ibid.
withdrawing member state. The most frustrating part for a member state with regard to this scenario is that they would continue attending, and following through their daily agenda within the EU, however they would have no say in the decision making process. These discussions of the European Council cannot be underestimated, as Paul Craig stated ‘nothing important happens in the EU without approval of the European Council’.  

To illustrate the importance of the European Council’s discussions, the conclusions that were made concerning Ukraine in March 2014 can be referred to. In the published conclusions of the European Council it was stated that the EU signed the political provisions of the Association Agreement with Ukraine. The European Council is composed of the heads of member states, denying them their right to participate would impact them greatly. Especially when member states hold such high regard for their own sovereignty within the union, in the past referring to themselves as ‘Masters of the Treaty’. It would be a difficult task for them to endure two years of complying with EU law and decisions, whilst having no influence on the direction it takes. Two years, however, can be considered a relatively short period of time, and it is possible for negotiations to be concluded sooner. In some ways this legal consequence may encourage timelier conclusions to said negotiations.

4.2 Possible EEA/EFTA Membership?

Another important legal consequence of withdrawal from the EU would be the arrangements concerning institutions associated and intertwined with the EU. For example, the European Economic Area and the European Free Trade Agreement. For the member state withdrawing, they have the option to still be a part of certain treaties and agreements, including relations with both the EEA and the EFTA. First, a small description of both will be given.

The EEA was established in 1994 and provides for the free movement of goods, persons, services and capital for members of the EFTA and the EU. The EFTA is another free trade organisation which operates in parallel with the EU. It was established in 1960 as an alternative for states who did not want to join the EU. There are four members of the EFTA to date, and they are part of the internal market of the EU achieved through a number of agreements. The significance of this is that any legislation adopted by the EU regarding the internal market, must also be adopted by members of the EFTA who agreed to the EEA. Both of these are important for the future status of a member state, they should seriously consider the relations they may want to develop in order to still benefit from certain aspects of EU principles. Both of these bodies have absolutely no influence on the decision making process of the EU, and as fore mentioned they must still implement the law regarding the internal

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38 The Convention establishing the European Free Trade Association 2013.
39 Ibid.
market. Therefore despite the illusion that perhaps a member state part of these bodies would have more power, it is not in fact the case. In reality, they would be becoming a part of something where they would have less of a voice than before withdrawal. However this is a good way to counterbalance an undesirable result for the EU. If member states negotiated in such a way, they could remain part of all the treaties that benefited them and remove themselves from the ones they didn’t agree with. Thus creating a situation where the member state takes but does not give.

4.3 Gap in the legislature

When a member state withdraws from the European Union, a huge gap is created where the Union used to legislate, any law that was made by the EU would potentially no longer apply to the withdrawing member state. However, there are a number of style of legislation that the EU can create, which in turn would have different legal effects when a state withdraws. Firstly, there are regulations with direct effect, these would immediately cease to apply, which would create a task for the national legislators to create suitable law to fill the gap. Secondly, there are directives. When directives are implemented they are most likely incorporated into national law, they don’t have immediate effect. Instead it is up to the Member State to include the law into its national law in the way it wants to. In this case, obviously the national law will not cease to apply. If the member state disagreed with the implemented union law, then it would have to alter its own national law. This can also be linked to the tasks that the EU would encounter after such a withdrawal, obviously the scale is miniscule compared to the task that would lie ahead for a member state when altering their own national legislation. Thousands and thousands of laws would have to be changed. But it cannot be forgotten, that the EU would also have to alter any laws that referred to a member state specifically. Therefore albeit a small one, another legal consequence would be the amendment of primary EU law that is related to the departing member state.

4.4 Is Greenland a comparable situation?

Although it has been made very clear that withdrawal from the EU has not occurred before and therefore any discussion is purely theoretical, it cannot be forgotten that comparable situations have occurred. The one which is considered to be the most useful is the Greenlandic referendum of the EEC (or the communities). The situation in Greenland was as follows, they were ruled from Copenhagen and were a part of the Kingdom of Denmark until 1979. They gained home rule in 1979 after a series of events involving a referendum for EEC membership. Most of the Greenland electorate had voted against staying in the EEC, this led to a Greenlandic government and parliament being set up. In 1982 Greenland held their own referendum, and the

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41 V.Miller ‘Leaving the EU’ (Research Paper 13/42, House of Commons Library, 2013) p 10
43 Ibid.
45 Ibid.
46 Ibid.
result of which was to leave the EEC.47 After this decision had been confirmed, the Commission suggested that Greenland was offered OCT status and other arrangements should be made.48 These other arrangements are comparable to the negotiations that may follow if a member state was to leave the EU. The negotiations lasted roughly a year. What can be deduced from the result is that a unilateral withdrawal is still an unlikely option, negotiation is necessary in order to obtain an agreement on withdrawal. If all member states come to an agreement on withdrawal then withdrawal will be made a lot easier. And most importantly maintaining some kind of relationship and link with the community was approved and also added to the ease of withdrawal. The question is asked then have we learnt anything that wasn’t indicated in article 50? To some extent yes, it is clear to see that in practise negotiations are workable and practical for maintaining links to the European Community. However these were surely features that fairly easy to predict. More importantly the situation in Greenland was unique, it has an autonomous relationship with Denmark, therefore the negotiations on withdrawal would be very different in comparison to if say the UK were to withdraw. This leads to the conclusion that Greenland does not offer a lot clarity on the matter for future withdrawals.

5. Constitutional Requirements of the UK to withdraw from the EU

The UK is the first member state of the European Union to consider using Article 50, the relationship between the UK and the EU has been complex and strained since its accession. Euro scepticism within the UK has now reached a point where a referendum has been announced for 2017 to let the people decide whether or not they want to remain part of the EU.49 Article 50(1) makes it clear that for a country to leave the EU, it must conform to its constitutional requirements.50 Therefore the UK’s constitutional requirements will be analysed in order to gain a better understanding of how withdrawal is possible.

The most important thing with regard to this is that the UK does not actually have a written constitution, unlike most European countries. Instead the principle of parliamentary sovereignty is adhered to.51 Therefore the intentions of Parliament must be turned to, Lord Triesman said on the matter of withdrawal that Parliament may amend or repeal any existing Act of Parliament.52 This would therefore include the European Communities Act of 1972. The general provision for repealing the act is found in Part 2, Article 4, subsection 1.53 Which states that it is possible for enactments to be repealed. Subsection 2 states that any orders must specify a date from where the Part will be repealed, and it must be made by statutory instrument.54 This act can be considered the legal basis in UK statute to leave the EU. However this would not be a satisfactory option if principles of democracy and legality were to be adhered to. It also must be considered that the national state would still be bound by

47 Ibid.
48 Ibid.
52 Ibid.
53 European Communities Act 1972 (UK), s4.
54 Ibid.
Union values which would include democracy and the rule of law.\textsuperscript{55} Options such as a referendum are suitable in order for a member state to comply with these principles. The UK is a useful reference point because this is the method they have chosen to decide whether or not to stay in the EU. It is important to note that a referendum is not necessary to comply with constitutional requirements, however. An absence of a referendum would not be illegal, for example in 1981 the British Labour Party promised withdrawal from the EEC without a referendum if they were to be elected.\textsuperscript{56} The importance here lies in the fact that the British public were aware of the government’s intentions when they were electing them, it would cause uproar in society if the public were given no element of choice. In January 2013 David Cameron pledged that there would be an in/out referendum on the EU held if the Conservative’s win the next general election, which would be held at the end of 2017 at the latest.\textsuperscript{57} From this point, the UK’s future within the EU has become uncertain. The likeliness of a ‘Brexit’ has become more and more since opinion polls have shown an increasing popularity for the UK to become independent. The British independence political party, UKIP, has gained the most seats in Parliament than ever seen before.\textsuperscript{58}

6. Conclusion

To conclude, it has become obvious that Article 50 of the TEU gives a number of options to a member state. For one, they could withdraw from the EU unilaterally, and not look back. However this would be incredibly detrimental to the relationship built over such a long period of time between the departing member state and the EU. They could also withdraw and come to a number of agreements whereby both parties are satisfied and have the intention of maintaining future relations. These future relations are significant and may shape the legal consequences that follow withdrawal. Clearly, there are consequences that occur automatically. However depending on how the member state negotiates, and the level of integration they want to try and maintain, the legal consequences may be limited. It is these negotiations that will be decisive in deciding conditions of withdrawal. This is what makes it difficult to pre-empt the legal consequences. Except for a few, they would be different for each departing member state. On top of this unpredictability, article 50 has never been used in the past. This unprecedented territory means all legal consequence can only be speculated. It has been possible to look at other bilateral agreements and speculate that relations may be developed with the EEA and the EFTA, which would surely be a likely answer in order to prevent a huge gap being left where Union law used to legislate. The task for the National government to restore these policy gaps would be enormous. The only way to know for sure what will happen if a departing member state leaves the EU is to wait and see if a ‘Brexit’ really does occur.

\textsuperscript{56} Ibid.