

Proceedings:

Speeches from the XXVI FIDE Congress

The XXVI FIDE Congress in Copenhagen, 2014
Congress Publications Vol. 4

Editors: Ulla Neergaard & Catherine Jacqueson



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1. edition

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Cover: Thea Nisted Svendsen

Jacket illustration: The main building of the University of Copenhagen: gouache from about 1860 by Peder Christian Rosengreen. Owner and photo: University of Copenhagen. The XXVI FIDE Congress in Copenhagen, 2014, was hosted by the Danish Association for European Law in cooperation with the Faculty of Law, University of Copenhagen. One of the social events took place in the main building pictured on the cover.

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Introduction to the Proceedings

Introduction

Ulla Neergaard & Catherine Jacqueson

In the novel, ‘Small World’, by David Lodge, conferences are characterised as follows:

‘... as the poet Geoffrey Chaucer observed many years ago, folk long to go on pilgrimages. Only, these days, professional people call them conferences. The modern conference resembles the pilgrimage of medieval Christendom in that it allows the participants to indulge themselves in all the pleasures and diversions of travel while appearing to be austere bent on self-improvement. To be sure, there are certain penitential exercises to be performed – the presentation of a paper, perhaps, and certainly listening to the papers of others. But with this excuse you journey to new and interesting places, meet new and interesting people, and form new and interesting relationships with them; exchange gossip and confidences (for your well-worn stories are fresh to them, and vice versa); eat, drink and make merry in their company every evening; and yet, at the end of it all, return home with an enhanced reputation for seriousness of mind.’¹

To a certain degree this description somehow constitutes a true, yet far too cynical, picture of conferences, and we hope that the XXVI FIDE Congress, which took place in Copenhagen from 28 May to 31 May 2014 in Copenhagen, constituted something more and better for all the participants. Also, it is our hope that it has laid out some threads for future collaboration, research, policies, *etc.*² The Congresses of FIDE (*la Fédération Internationale pour le Droit Européen/the International Federation for European Law*) are indeed an extraordinary good opportunity for academics and practitioners to meet with judges from the European Courts and officials from the EU and its Member States. President of the Court of Justice of the European Union, Vassilios Skouris, has even referred to them as undoubtedly the

¹ David Lodge: ‘Small World’, Vintage Books, 2011 (first published in 1984), ‘Prologue’.

² See the full programme in the end of this volume.

most important academic events concerning European Law. In addition, the FIDE Congresses are generally perceived as unique in providing a good picture of the reality of EU law as it is understood and applied in the EU and its Member States as well as associated countries on selected topical themes.

The XXVI FIDE Congress in Copenhagen took place in the wake of the elections to the European Parliament and in a stormy time where the financial and economic crisis had only just started to ease off a bit. Its general topics very timely focused on three pertinent areas of EU law, namely: 1) The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU; 2) Union Citizenship: Development, Impact and Challenges; and 3) Public Procurement Law: Limitations, Opportunities and Paradoxes. The selected topics all had in common that they were and still are very central and important for the understanding of the challenges facing Europe these years and for the development of European law. The findings presented in the national and European reports were published in three impressive volumes released before the Congress and were the subject of two intensive days of discussions between experts in parallel workshops.³

However, the FIDE Congress in Copenhagen after all focused on much more than these three general topics and related workshops. In fact, we had the great pleasure and privilege to host a congress where prominent personalities of the legal world kindly accepted to come and share their visions and analyses. The discussions at the Congress – among more than 400 delegates - showed to be extremely captivating and lively with powerful statements and at times conflicting stand points. Indeed, the EU and its law are going through exciting and challenging times.

³ See Ulla Neergaard, Catherine Jacqueson & Jens Hartig Danielsen (eds.): 'The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU. The XXVI FIDE Congress in Copenhagen, 2014. Congress Publications Vol. 1', DJØF Publishing 2014 (662 pp.); Ulla Neergaard, Catherine Jacqueson & Nina Holst-Christensen (eds.): 'Union Citizenship: Development, Impact and Challenges. The XXVI FIDE Congress in Copenhagen, 2014. Congress Publications Vol. 1', DJØF Publishing 2014 (906 pp.); and Ulla Neergaard, Catherine Jacqueson & Grith Skovgaard Ølykke (eds.): 'Public Procurement Law: Limitations, Opportunities and Paradoxes. The XXVI FIDE Congress in Copenhagen, 2014. Congress Publications Vol. 3', DJØF Publishing 2014 (801 pp.).

The present ‘online’ publication contains the speeches of the Opening Ceremony, the Saturday session on legal pluralism and the conclusions of the general rapporteurs on the three general themes mentioned above.⁴ It also includes the speech of the Dean of the Faculty of Law, Professor Jacob Graff Nielsen, held in the Ceremonial Hall of the University of Copenhagen, and the keynote speech of Professor and President of the European University Institute, Joseph Weiler, at the Gala Dinner taking place at the National Museum of Denmark. They both commented on the elections to the European Parliament. While the Dean took a Danish perspective on the time up to the elections, Professor Weiler analysed in detail - what we at the European level in overall terms can learn from the results of the election.

In the first part of the Opening Ceremony, Professor at the University of Copenhagen and President of FIDE 2013-14, Ulla Neergaard, welcomed all by explaining about FIDE as well as giving her point of view on some of the present challenges facing Europe. Then, Martin Lidegaard (the Danish Minister for Foreign Affairs), Børge Dahl (the President of the Danish Supreme Court), Vassilios Skouris (the President of the Court of Justice of the European Union), and Luis Romero Requena (the Director General of the Legal Service of the European Commission) presented their perceptions and thought-provoking views of Europe and the development of EU law. This first part of the Opening Ceremony was finalised by the speech of the Rector of the University of Copenhagen, Ralf Hemmingsen, whom thereby also had the opportunity of welcoming everyone.

The second part of the Opening Ceremony was more specifically dedicated to taking the temperature of Europe and topical issues of EU law by among others asking: Is the European Union and EU law at a crossroad, is it facing major climate changes, or is it not? Professors Paul Craig and Silvana Sciarra, who had reflected on the current situation, presented their analyses and predictions. Paul Craig offered a speech on the season of change concerning the balance of powers, and the issue of Member States’ responsibil-

⁴ As FIDE and its congresses – based on long tradition – function on a trilingual basis, this volume contains contributions in one of the three ‘FIDE languages’: English, French and German. As no publishing house for the present ‘online publication’ has been involved, only a minimum level of editing, layout, *etc.*, has been accomplished. The reason behind this choice is mainly avoidance of a long publication procedure thereby rather giving priority to ensuring a relatively timely ‘publication’ on pertinent issues.

ity beyond the issue of *pacta sunt servanda*. Silvana Sciarra addressed the audience on how social law is an eternal loser following a financial crisis and pleaded for solidarity, and a necessity of recoupling economic governance with the respect of fundamental rights.

Also, the interventions of the Saturday panel on legal pluralism and the dialogue between courts were of a high interest to all. Very fortunately, the session consisted of an extremely distinguished group of Panel Members and Commentators, with a variety of professional experience - a kind of the legal Europe's 'Champions' League'. The present volume contains the speeches of Vassilios Skouris (Professor and President of the European Court of Justice), Julia Laffranque (Judge of the European Court of Human Rights), Andreas Voßkuhle (Professor and President of the German Federal Constitutional Court (*Bundesverfassungsgericht*)), Jean-Marc Sauvé (President of the French Administrative Supreme Court (*Conseil d'Etat*)), and Pauliine Koskelo (President of the Finnish Supreme Court (*Korkein Oikeus*)). They were invited to reflect, with their varying perspectives on various themes related to legal pluralism. One discussion angle was the effects of the conception of legal pluralism, thereby opening the Pandora box of supremacy or not. Another one was to what extent judges, as practitioners, experience the need to develop new ways of thinking about the interactions between the sources of law they interpret and apply in their courts, and new ways of communication between courts. A third perspective suggested was whether there is a coherent system of human rights protection in place within the EU in a context of multiple sources of human rights norms. A key issue from most speakers was dialogue. The presentations prompted reflections from among others Professor Mattias Kumm.

Finally, this volume will not be complete if it did not include the conclusions of the general rapporteurs on the three selected general topics concerning the Economic and Monetary Union, Union Citizenship, and Public Procurement Law. After two days of intense, fruitful and lively debates on the issues in the various workshops, Professors Fabian Amtenbrink, Niamh Nic Shuibhne, Jo Shaw, and Roberto Caranta presented in a nutshell where we are heading and the tender spots in their respective fields.

In sum, again with a reference to the abovementioned novel, FIDE Congresses and EU law do not in every respect give the impression of a *small*

world, but perhaps so much more rather a *large, complicated and challenging* world. This volume is dedicated to all the speakers of FIDE 2014 for ensuring the success of this Congress. We deeply thank them for contributing to a better understanding of topical and essential issues of EU law and the interactions with the national systems.

Opening Ceremony - Addresses

(29 May 2014)

Welcome Address

Ulla Neergaard

1. Introduction

Dear Excellencies,

Dear Ladies and Gentlemen,

Welcome to the XXVI FIDE Congress. It is indeed a very great honour and pleasure for me to open it.¹

Hopefully, you have all received three volumes containing the FIDE proceedings. The covers are based on a rather romantic painting of the main building of the University of Copenhagen, which is co-organising the present congress.² It is in that building we will be this evening. The painting is from the middle of the 19th century. At that time, Copenhagen was a very small town compared with today. However, some of its famous inhabitants from around that time, such as Hans Christian Andersen and Søren Kierkegaard had a grand view out to the rest of Europe, which shaped their intellect and their authorship.

Andersen, the famous author, was in a way more of a true European than most people, as he travelled so much that about ten years accumulated of his

¹ The speech was held on 29 May 2014 at the XXVI FIDE Congress in Copenhagen. Works, which have been consulted for the speech, are in particular: Hans Christian Andersen: 'Samlede Eventyr og Historier', Hans Reitzels Forlag, 1992; Jens Andersen: 'Andersen - En biografi' 1-2', Gyldendal, 2003; Joakim Garff: 'SAK – Søren Aabye Kierkegaard. En biografi', Gads Forlag, 2013; Joakim Garff: Søren Kierkegaard. A Biography, Translated by Bruce H. Kirmmse, Princeton University Press, 2005; and Peter Tudvad: Forbandelsen, Politikens Forlag, 2013.

² More precisely it is a gouache by Peder Christian Rosengreen. Owner and photo: University of Copenhagen. The XXVI FIDE Congress 2014 Copenhagen was hosted by the Danish Association for European Law in cooperation with the Faculty of Law, University of Copenhagen, and one of the social events took place in the main building of the latter.

life were spent abroad. He explored other countries and was inspired by them long before it became common to be so.

Kierkegaard, the great theologian and philosopher, was completely opposite to Andersen. He studied at the University of Copenhagen and lived his entire life in this city. Actually, he did not really travel much abroad, and he claimed that '*Travel is foolishness*'.³ However, he read and was influenced by the greatest European minds of the time as well as – of course - earlier ones. So knowledge flew to him, and his originality and genius of his thoughts have travelled ever since to many people around the world.

Hopefully, the thoughts created in connection with this FIDE Congress will also be original and inspiring, and will travel around the world for many years.

Today I wish to touch upon two subjects: FIDE and the European Union. The two geniuses from the 19th century, Andersen and Kierkegaard, will follow me throughout this speech.

2. FIDE

So, the first topic I would like to touch upon is FIDE itself. As is well-known, Andersen mainly became famous because of his fairy tales. In many ways FIDE and its congresses also have elements of such. In fact, just like in a fairy tale, a certain role is played by a prince this year, as His Royal Highness Crown Prince Frederik of Denmark is its patron, by which we are sincerely honoured.

It has been said that to read Hans Christian Andersen is always like climbing into '*The Flying Trunk*', which one of his stories is called, and seeing problems from above.⁴ FIDE and its congresses are hopefully like being in such a flying suitcase, providing us all with a wider view of the problems,

³ In original: '*at reise er en Taabelighed*'. See Joakim Garff: 'SAK – Søren Aabye Kierkegaard. En biografi', Gads Forlag, 2013, p. 180, and Joakim Garff: Søren Kierkegaard. A Biography, Translated by Bruce H. Kirmmse, Princeton University Press, 2005, p. 206.

⁴ In original: '*Den flyvende kuffert*'. See Johannes Møllehave: 'At læse H.C. Andersen er altid at komme med op i den flyvende kuffert og se problemerne fra oven.' See da.wikiquote.org/wiki/H.C._Andersen. UN's own translation.

and hopefully thereby improving our understanding and our finding of better solutions.

Through the Danish presidency of FIDE, I have – not surprisingly - had the opportunity to understand the organisation and its history much better. Indeed, it is to me quite unusual.

In my view, it seems unusual or even surreal that FIDE is viable despite the fact that there is no permanent secretariat, no permanent website, no archive, and no permanent source of financing. Also, it manages by and large to be impartial, although it has certain traits of being semi-public. In particular, it uniquely coexists and cooperates with the Court(s) in Luxembourg, despite having nothing in writing about this interrelationship. Furthermore, it is very much dependent on voluntary forces in many respects. The three congress books contain altogether 90 chapters and 2400 pages, which thus constitute voluntary work from authors from all over Europe.

In fact, altogether 122 authors have voluntarily contributed to the books. We have also for the first time organised a PhD Course in attachment to the Congress, which the Faculty of Law at the University of Copenhagen voluntarily decided to do. In combination with our distinguished speakers, moderators, participants, etc. for the following days – all this is indeed the result of a collaboration of great minds of European law from all over.

So although in a way so vulnerable and fragile, FIDE and its congresses fascinatingly work in an excellent manner after all, and today we all present here are ready for some hopefully good and beneficial congress days.

3. European Union

The second topic I want to say a little more about is the European Union - again seen from above sitting in the flying suitcase. Like FIDE and its congresses, and perhaps so much more, the European Union also has traits of a fairy tale.

It has become a common story to tell for instance new students in EU law courses, how the European Union is built on an intention of creating peace. In a way, it is as if the world described in Andersen's fairy tale entitled *'The*

Snow Queen’,⁵ which was filled with ‘*Fear and Trembling*’ as well as with ‘*Anxiety*’ – to refer to titles of some of Kierkegaard’s books – fell, and a new world in Europe was created to prevent new ‘Snow Queens’ from taking power again.⁶ A new world, which is luckily based on democracy, fundamental rights, and freedom, is what we now generally have. Thus, when I, just around Christmas time, drafted the introductory chapter for this year’s FIDE books, I wrote that one of the EU’s successes consists in an improved degree of peace and security. At that time most of us thought our greatest challenge was the economic crisis. Since the script has been turned in to the publisher, everything has, as we all know, changed. The Ukrainian/Russian situation has filled many with fear, trembling and anxiety again. Allow me to read aloud a brief so-called three-act play by Kierkegaard:

*‘1st Act. Two dogs have begun to fight. The event causes a great sensation. An incredible number of heads appear at windows to have a look. While it lasts, all work comes to a stop. People drop everything. 2nd Act. Two ladies come out of the doors of the two houses nearest the battle, each from her own door. These two ladies appear to be the owners of the dogs. One lady insists that the other lady’s dog started the fight. The ladies get so vehement about this that they start fighting... 3rd Act. Two men arrive, the husbands of the two ladies. One insists that the other’s wife started it. The two men get so vehement about this that they start fighting. After that one may assume that more men and women join in – and now it is a European war.’*⁷

This little play by Kierkegaard shows very well the present dilemma. In our case, the dogs and the ladies have started fighting. However, let’s hope it

⁵ In original: ‘*Snedronningen*’.

⁶ In original: ‘*Frygt og Bæven*’ and ‘*Begrebet Angst*’. For example, see the edition Søren Kierkegaard: ‘*Frygt og bæven. Udgave i moderne retskrivning og med forklarende noter*’, DET lille FORLAG, 2012; and Søren Kierkegaard: ‘*Begrebet Angst i udvalg og med indledning og noter ved Carl Kähler*’, FilosofiBiblioteket, Hans Reitzels Forlag, 1996.

⁷ In original: ‘1st Akt. To Hunde ere komne op at slaaes. Begivenheden vækker uhyre Sensation; en utrolig Mængde Hoveder komme i Vinduerne for at see; Arbeidet maa hvile saa længe; Alt forlades. 2den Akt. Ud af de tvende ved Slaget nærmest liggende Huses Gadedørre træder tvende Madamer, hver ud af sin. Disse tvende Madamer synes at være Hundenes Eierinder. Den Ene paastaar, at det er den Andens Hund, der begyndte Slagsmaalet. Derover bliver Madamerne saa heftige, att Madamerne komme op at slaaes. Mere saae jeg ikke. Men det vil let kunne fortsættes. Altsaa 3die Akt. Der kommer to Mænd, de respektive Madamers Mænd. Den Ene paastaaer, at det er den Andens Kone der begyndte. Derover blive de to Mænd saa heftige, at de komme op at slaaes. Derpaa kan man saa antage, at der kom flere Mænd og Koner til – og nu er det en europæisk krig.’

may all stop there, and the fairy tale of the European Union will continue without the development envisaged in this little play. The year 2014 after all may make one reflect on the fact that it is exactly one hundred years ago that the First World War was initiated.

Another aspect, which at least viewed from the Danish society, accounts for quite a lot these days is Union citizenship. The ‘traveller’ Andersen would no doubt have understood the ideas behind this construction. One of his famous sayings is: *‘to travel is to live’* - and if that is true, then the European Union by having made it easier to travel and live abroad, makes us all more alive.⁸

However, he was brought up in an extremely poor family and the successful development of his special gifts was only made possible by various Maecenas. As he never forgot the more common people’s difficult conditions, I personally imagine that he would have appreciated the development of the Danish society into the modern welfare state based on principles such as tax-financed welfare services, equality, solidarity and universality, combined with the creation of what is rated as the happiest people of the world.⁹ Also, it is a country with hardly any corruption and with a lot of trust in the state and one another. Nevertheless, he might perhaps also have been worrying about the rumours or claims that EU law and the rights of Union citizens might create a danger to its survival. Kierkegaard – whom an expert has called a Christian socialist¹⁰ - would perhaps have expressed that it should not be a matter of *‘Either – Or’* as one of his famous books discussed, but rather *‘Both - and’*.¹¹ In other words, this could be expressed in the manner that a way should be found for an improved co-existence so that the advantages of welfare states like the Scandinavian ones in combination with the advantages of free movement are made possible.

As many of you may know, here in Denmark we have just had not only an election for the European Parliament four days ago, but also a referen-

⁸ In original: *‘at rejse er at leve’*.

⁹ For example, see Ulla Neergaard & Ruth Nielsen: *Blurring Boundaries: From the Danish Welfare State to the European Social Model?* *European Labour Law Journal*, 2010, pp. 434-488.

¹⁰ Joakim Garff: *‘SAK – Søren Aabye Kierkegaard. En biografi’*, Gads Forlag, 2013, p. 613.

¹¹ In original: *‘Enten – Eller’*. See e.g. the edition Søren Kierkegaard: *‘Enten – Eller’*, Gyl-dendal, 2013.

dum on whether Denmark should take part in the European Patent Court. Such events constantly make it clear that the Danes' perception of the EU to some degree is unsettled or filled with tensions. The same seems to happen in many other Member States.

However, it may be recalled that Andersen wrote about his homeland with a lot of love, for instance in a song which is famous among Danes expressing this love.¹² Some might here – and in other countries – use such writings in a nationalistic manner. Nevertheless, in his writings tolerance towards and interest in the rest of the world is clearly indicated. For instance, in the less well-known story entitled: *'The Jewish Maiden'*, the main character is described as clever and good-in-fact, actually the brightest of them all, and he ends the story by stating that God's sun, which shines over all the graves of the Christians, shines as well upon that of the Jewish girl.¹³ To me, this constitutes an early and convincing statement that we should all be 'united in diversity'!

It should not be impossible to make room for both national and European values and legal orders. Let us hope, that more in Europe can learn from the mentioned two Danish geniuses – to keep making a fairy tale where what is good wins and what is evil is defeated. As in Andersen's *'The Snow Queen'* I hope that the Demon's splinters of glass will fall out of people's eyes or hearts and make it possible to think and see everything more clearly and truthfully.¹⁴

Or as Kierkegaard once expressed it: *'To Have Faith Is Always to Expect the Joyous, the Happy, the Good.'*¹⁵

4. Final Remarks

¹² I.e.: *'I Danmark er jeg født, dér har jeg hjemme, der har jeg rod, derfra min verden går...'* See Joakim Garff: *'SAK – Søren Aabye Kierkegaard. En biografi'*, Gads Forlag, 2013, pp. 431-432; and Joakim Garff: *Søren Kierkegaard. A Biography*, Translated by Bruce H. Kirmmse, Princeton University Press, 2005, p. 492.

¹³ In original: *'Jødepigen'*.

¹⁴ In original: *'Snedronningen'*.

¹⁵ In original: *'At troe er bestandigt, at vente det Glade, det Lykkelige, det Gode.'*

With these words, I thank you all for your attention and wish you all good, fruitful and inspiring days.

Address

Martin Lidegaard

Excellencies, ladies and gentlemen.

Welcome to Copenhagen!

It is a great pleasure and a privilege for me as Minister for Foreign Affairs that the 26th FIDE Congress takes place in Denmark.

It is the ambition of the Danish Government that Denmark should be as close as possible to the core of the EU. With the FIDE congress taking place here, we have managed to get the core of the EU to Denmark. That is even better!

Here, a few days after the elections to the European Parliament took place, one could get the impression that the EU finds itself in a difficult place.

On the one hand, the EU has been an unprecedented success. On the other hand, anti-EU and populist parties have gained seats at the recent European elections.

When granting the Nobel Peace Prize to the EU in 2012, the Norwegian Nobel Committee in its announcement focused on the successful struggle for peace and reconciliation, and democracy and human rights, which it saw as EU's most important results.

I think it is fair to say that the extraordinary post-war economic prosperity has made a considerable contribution to ensuring a peaceful and stabile development in Europe for the past 60 years.

The European economic integration has opened up Europe for workers and companies. Market access and free competition has generated growth and employment. Or to put it differently: One might even say that in the history of the EU, the birth helper for peace and reconciliation has been: trade, growth and employment.

Then why, one might ask, why does there seem to be a rise in the skepticism about the European project?

There are probably many reasons for the current political climate around the EU. I will not attempt to answer this complex question but I guess it is fairly safe to assume that the turmoil after the economic crisis with high unemployment rates and low growth rates plays its part. The difficulties of the Euro Zone, the bailouts of the banks and the difficult but necessary, structural economic and labor market reforms in many Member States have been hard felt in many Member States.

Some claim that EU is part of the reason for the economic and financial crisis. This is a false claim: The EU is part of the solution. In recent years, many important decisions have been made to strengthen the economic cooperation in the EU. We have enhanced the Economic Governance within the EU in order to avoid economic crisis.

This task is exactly as difficult as it sounds. Not least the legal side of it. One challenge is how to keep the Economic Governance for 28 Member States together, when some are in - and some are outside - the Euro Zone?

These months we are drawing up a whole new legal architecture for EU's economic governance. New instruments – both within and outside the EU Treaties – are developed. But we are not there yet and any good advice from academia will be well received. For this reason I am very happy that the FIDE congress has chosen **Constitutional and Institutional Aspects of the Economic Governance within the EU** as its first general topic.

I understand that another general topic at this congress will be **EU regulation of public procurement**. For outsiders, this may sound like a house keeping issue for public bodies and bureaucrats. But the truth is that EU regulation completely has transformed the way public bodies procure. This has been good for public spending, good for transparency and good for companies. Some would add that this has also been good for law firms (!). The rules are not simple and the questions are complex. For this reason, the sub-title of the FIDE topic “*Limitations, Opportunities and Paradoxes*” is most appropriate.

Now, in 2014, it is taken for granted across the EU that all Europeans can move from one Member State to another for work, studies or self-employment. This development has helped to form the concept of Union

Citizenship, which is now firmly established in the treaty and based on the right to move and reside freely within the EU and with a listed catalogue of civilian rights. It is a promising concept and I find it very timely that this FIDE congress this year will study **Union Citizenship** as another general topic.

The Union Citizenship is not only based on values and virtues. It is based on rules and case-law under EU Law. Considering the audience today, I need not dwell too long on the fact that the EU stands out from other forms of international cooperation in being an autonomous legal system in its own right with rights for individuals and an immediate impact in the national jurisdiction of Member States.

At this day and age, the EU law has become a highly advanced, comprehensive and complex legal system. This is not least so regarding the concept of Union Citizenship. It covers a variety of issues and shapes policy areas which at the national level are regarded as very sensitive. This requires that we tread cautiously.

I have already spoken about the success of the Internal Market and the free movement, and to the promise of the Union Citizenship.

But there is another side to the story than the EU perspective which is a national perspective. It has been brought up in the public debate that the EU is not a social union and that certain policy choices belong to the national domain.

Article 1 in the Treaty of the European Union claims to mark “*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.*”

In the process of developing the European Union until now, there may have been a tendency of focusing on the call for an “*ever closer Union*”. This has been a forceful driver for change. We should recall that the other part stating that decisions should be taken as “*close as possible to the citizen*” is equally important.

In the interpretation of EU law one can no longer automatically assume, when in doubt, that the legislator intended “*more EU*”. A “*better EU*” can be to leave certain policy choices to the Member States. I agree with Com-

mission President Barosso, when he famously declared that the “*EU needs to be big on big things and small on small things*”.

This is worth recalling for the legislators of the EU and it is a good time to do so now; before a new European Commission is formed and a newly elected European Parliament will take up its work.

However, it is also worth recalling for the practitioners who interpret EU law every day: The litigators before the European Court of Justice as well as its judges.

The European Court of Justice has played a role of pivotal importance in making the letters of the Treaties and secondary legislation a reality in the everyday life of Europeans, in removing obstacles to the free movement and in assisting national courts in applying and interpreting EU law. Without the Court there would be no Union.

You would know, better than me, how difficult interpretation of EU law can be. This is particularly so, when a certain aspect is not clearly spelled out in the EU legislation. The Court has at times been accused for unjustified judicial activism.

I would not be the one to say that this has never happened but I think that it is far more often the case that an interpretation, which in one Member State would seem obvious and self-explanatory, in another Member State might seem more exotic. And the Court needs to spell out one single European body of law common to 28 Member States. I, for one, would be the first to thank the Court for doing so.

I believe that the legislators and the institutions of the EU have an obligation to ensure that the rules and the policy choices behind them are clearly spelled out in the EU legislation. It is the role of any court to fill out a legal vacuum when needed. But most courts would – and should - be uncomfortable in settling policy choices without clear guidance from the legislator.

Addressing this audience, my last words today will be a praise of the role of EU law. We can all take great pride in the fact that the Union is a legal order based on the rule of law with rights bestowed on its citizens. It is not the will of the strongest or political convenience that decides how to solve matters. So does the law.

Thank you.

Keynote Address

Børge Dahl

Excellencies, Colleagues, Friends.

Some time ago we had a case in the Danish Supreme Court concerning product imitation. In such cases, the Court is typically presented with a vast amount of photographs of the two products in question. That is – on one hand – the original product and – on the other – the competing product which is claimed to imitate the original product in an unlawful way.

Usually it is specified on the photographs which product is the original and which is the claimed imitation. In this particular case, however, the parties had not specified this on the submitted photographs. The attorney for the claimed imitator presented the photographs without telling us which product was which. So naturally, I asked the attorney - for the claimed imitator - which product was which. He answered: “I don’t know. I can’t tell the difference.”

It is not always that difficult to be a judge.

However, it is a rare exception that simple matters are to be decided by courts of high level. Courts of last instance normally have to deal with matters concerning what this congress is really about: The rule of law in the complex interplay between the European Union and Member States, national courts and international courts as well as multiple sources of law.

Denmark is a rather small country but number one on the Rule of Law Index of the World Justice Project – an Index assessing nations’ adherence to the rule of law in practice. In the European Union Denmark is number one on the list of Member States when looking at the confidence of the population in the courts and the judicial system.

We have aimed at this position for centuries. The Danish Supreme Court was founded in 1661. It is a fundamental value stated in the preamble of the first law of the land from 1241 that with law shall the nation be built. Dan-

ish courts serve the law, we are not put on earth to attain more power, and we are not eagerly seeking opportunities to overrule legislation by stretching principles for their own sake. Excessive innovation and adventurism by judges is not something you will find in Denmark. Danish judges hold the view that creative judicial activism may endanger the rule of law.

In the European Union the Court of Justice is the guardian of the rule of law. As you know, the task for the Court of Justice under Article 19 of the Treaty of the European Union is to ensure that in the interpretation and application of the Treaties the law is observed.

The concept of the rule of law implies a number of things. One aspect is the principle of equality before the law. Another aspect is the principle of legal certainty: Without legal certainty there can be no rule of law.

In its strictest sense, legal certainty means the elimination of arbitrariness. This again implies that the courts must act in a way that makes it possible for the citizens to plan their activities and foresee the legal consequences of their actions. In this regard, the principle of legal certainty is synonymous with a minimum degree of clarity and foreseeability in the legal system.

The principle of legal certainty has been expressly recognised by the Court of Justice as a general principle of EU law. The principle played a significant role in the Court's famous *Defrenne* Case from 1976 (Case 43/75).

In its decision *Gondrand Frères*, Case C-169/80, from 1981, the Court defined the principle of legal certainty under EU law as requiring that the rules in question must be clear and precise so that the citizen may know without ambiguity what his rights and obligations are and may take steps accordingly.

Of course, the responsibility for the clarity of the EU-legislation primarily rests with the EU-legislator and not with the Court. But in its application and interpretation of the EU-legislation, the Court has the opportunity – and in my view also a duty - to take into consideration the principle of legal certainty.

How, then, is the Court of Justice in fact ensuring the rule of law? If you look at the basic textbooks used at universities you may find a description of the Court's method of interpretation and application of the Treaties and other legal instruments as being purposeful, dynamic and creative.

If this is true, the interpretative approach of the European Court of Justice is quite different from the non-creative and non-activist style of Danish courts.

I have to admit that over the years the development of law through the practice of the European Court of Justice have gone beyond the limitations drawn by the notion of legal foreseeability and certainty under Danish law. Time and again, we are confronted with European judgments finding European harmonisation to have gone further than our legislator and courts had thought. Time and again, we find ourselves bound by EU law through European judgments beyond our understanding and expectations at the time of our commitment. Time and again, I find it rather difficult to foresee the decisions made by my honourable colleagues in Luxembourg. And I know from talks with fellow justices from various countries that this is a matter of growing concern in the supreme courts of the Member States.

It is on this basis that I cannot refrain from asking: Does the *acquis communautaire* – and more specifically the Court of Justice’s interpretation of it in all cases contribute to an increased legal protection of EU citizens and a strengthening of the rule of law?

Let me illustrate my point of view with just one example that stirred quite the debate in Denmark as well as in other Member States.

According to the so-called Working Time directive Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions under national law for entitlement to, and granting of, such leave. When the Danish government negotiated, accepted and implemented this principle the understanding was that no adjustment of Danish law was necessary since existing Danish legislation already ensured five weeks of annual leave and since the directive left it to national law to determine the conditions for entitlement to, and granting of, such leave. Everything was already as it should be, so to speak. Much to our surprise we were to learn that this was not the case.

In Denmark, it has been the state of the law ever since 1938 when we got our first act on annual leave, that if you become ill before going on holiday you have the right to take your holiday at a later date. But if you become ill during your holiday it is your own risk, you are in bad luck.

In connection with Denmark's implementation of the Working Time Directive, the Danish legislator decided to maintain this principle, as the Directive did not deal with the question of illness during annual leave, but expressly left it to the Member States to set down further regulation in this regard. It was known that the risk of illness during holiday leave in some European countries like Denmark was borne by the employees, in other European countries by the employers.

In 2009 the Court of Justice, in the *Pereda* Case (Case C-277/08), declared that the provision in the directive concerning four weeks paid annual leave is to be interpreted as precluding national legislation which provide that a worker who becomes sick during a period of annual leave does not have the right to take the leave at another time than that originally scheduled, following his or her recovery. In other words, the risk of the illness is placed on the employer.

Now, on the face of it, the result might seem very sympathetic. But it can hardly be described as *foreseeable*.

Having regard to the principle of legal certainty and foreseeability, the Danish Supreme Court found it impossible to interpret the clear Danish legislation in accordance with the Working Time Directive as interpreted by the Court of Justice. Such an interpretation of Danish law would be *contra legem*.

The Danish legislation has, of course, in the meantime been changed so that the risk of illness during holiday leave for the future is to be borne by the employer. This does not, however, end the matter. Thus, cases on whether the Danish state is responsible towards workers for lost holiday due to illness during holiday leave before the new legislation went into force are now pending.

This case from Luxembourg is of course not in itself that important. Together with others it raises, however, issues that go well beyond the issue of holiday leave protection: Issues that have broader implications for the relationship between EU and the Member States and thereby – ultimately – for the process of European integration.

One issue concerns the democratic legitimacy of the EU: An issue which has been a recurring theme in the ongoing debate about the EU since the very beginning of the Community. A dynamic, creative method of interpre-

tation should not be taken so far as to endanger the democratic legitimacy of the Union.

Another important issue: If the interpretation of the European Court of Justice is taking national courts by surprise one may fear a growing unwillingness of national courts and parties to a legal conflict to present matters before the Court of Justice. Their willingness to do so is crucial for the harmonious interpretation of EU law and thereby for the cohesion and effectiveness of EU law. But their willingness also very much depends on the transparency and foreseeability of the legal procedures in Luxembourg.

I have spoken of these questions from a Danish perspective. The European Court of Justice is of paramount importance in ensuring a European Union based on the rule of law. A dynamic and creative interpretation at international courts is, however, a challenge for all national courts. International developments through court practice should not be so dynamic that the national level cannot see the rule of law, including the principle of foreseeability reflected in what is happening. It is crucial that the population has confidence in the courts as the guardians of the rule of law as fortunately is still the case in Denmark.

Dialogue on these fundamental issues is needed on the road ahead. This congress is a most excellent forum for such a dialogue. The organisers are certainly to be commended for a fascinating program on very important subjects allowing very well for a dialogue also on the issues I have mentioned. I am confident that all the efforts in organising this congress will be rewarded as deserved.

Thank you for your attention.

Keynote Address

Vassilios Skouris

Minister,

Excellencies,

Dear Colleagues

Ladies and Gentlemen,

It has always been a great pleasure for me to participate to the Congresses of the International Federation for the European Law (F.I.D.E.) and I would like to thank the Danish Association for European Law and the Faculty of Law at the University of Copenhagen for inviting me to speak at the opening session of this year's twenty-sixth (26th) biennial Congress.

The FIDE congresses are undoubtedly the most important academic events concerning European Law; therefore it is always an honour and a privilege to address such a distinguished audience. It is for the same reason that the Court of Justice of the European Union stands firmly by its commitment to support the congress and provide the necessary resources for the organisation, traditionally in the form of interpretation services present, which I would thank in advance. Like for all previous congresses, an important delegation of Members of the Court, the General Court and the Civil Service Tribunal, as well as members of staff of the Chambers of our jurisdictions and members of staff of the Court's services are present yet again. I am also particularly happy to see an important number of former Members amongst us.

This year's congress comes briefly after one of the most important elections of the European Parliament and in the making of the new European Commission.

The diverse messages of those elections will certainly be part of the debates that we will hold over the next days; in the same way I would say that

the conclusions of our exchanges of views are certainly going to influence reflexions at the political level and the legal sphere.

There are though reasons not to just remain on the academic ground but to celebrate as well. We are now ten years after the biggest enlargement in the Union's history, seven years after Bulgaria and Romania adhered to the rest of Europe and soon we will complete one year after the accession of Croatia. Those enlargements, contrary to the cassandric prophesies, did not destabilise the Union, all the contrary they added to the "acquis européen" and reinforced the importance of the European cause.

As always the FIDE Congress, having attracted a large audience of lawyers from several countries – not exclusively member states of the European Union - will give us the opportunity to synthesise trends and approaches in several domains of European Law. Such a large forum of experts provides suitable grounds for a comparative dimension during our debates. The structure of the Congress itself with three parallel sessions running through the first two days after having heard the keynote speeches, with active participation from both national and EU institutional rapporteurs, guarantees a thorough examination of all aspects involved and, as FIDE has accustomed us to, voluminous acts of the congress cast in ink and paper in order to cater for a broader circle of interested persons, certainly academics and students who did not have the chance to be with us.

Let me concentrate briefly on the three main axes of our debates.

The first topic focuses on the main concerns and issues during the current and lasting financial crisis. Questions of economic governance are of paramount importance in the current European context. This is an area of acute interest, oscillating from the intergovernmental domain towards the European Union framework.

Since the last Congress, the Court had its say in the matter, in a Judgment of November 27th, 2012, in Case C-370/12 known as *Pringle*. The case was referred to the CJEU by the Supreme Court of Ireland on the 3rd of August 2012. The Supreme Court submitted questions on the validity of European Council Decision 2011/199 and on the compatibility of the European Stability Mechanism (ESM) with EU law. I should mention that, in order to remove as soon as possible the uncertainty on the issues, I decided on the 4th of October – in the light of competences conferred to me by the rules of

procedure – to apply, as requested by the Supreme Court, the accelerated procedure. Further, the Court considered this case to be of exceptional importance and decided to refer the case to the full Court, consisting of all 27 judges.

In its judgment the Court made a number of important statements on the legality of measures adopted by the European Union in order to tackle acute issues related to the crisis. The Court confirmed the validity of Decision 2011/199 and held that the Treaties and the general principle of effective judicial protection do not preclude the conclusion and ratification of the ESM intergovernmental Treaty - outside the traditional structure of EU law - amongst the Member states partaking of the Euro, and that the right of a Member State to conclude and ratify that Treaty is not subject to the entry into force of Decision 2011/199.

Legal theory has acclaimed the Pringle judgment as a landmark case since it avoided political immobility and confirmed that by undertaking concrete actions to preserve the single currency, Member states put forth the necessary institutional adaptation to deal with an existential crisis threatening the being of the EU itself.

On Friday, February 7th, 2014, we witnessed another development that commentators called historic. The Bundesverfassungsgericht - the German Federal Constitutional Court - submitted for the first time ever a request for preliminary ruling at the Court of Justice of the European Union, regarding a decision by the Governing Council of the European Central Bank (ECB) about Outright Monetary Transactions (OMT) and its compatibility with the Treaties. Even if the Bundesverfassungsgericht has in the past dealt with major European issues (e.g. Solange I, Solange II, Maastricht, Lisbon), it had, up to now, abstained from requesting a preliminary ruling. The request, registered as Case C-62/14, is exceptional in that it establishes a long anticipated collaboration between the CJEU and the BVerfG, as it shifts at the European level a national debate that was initially presented as a potential conflict between the German constitution and a decision of ECB, asking whether or not an EU institution has overstepped its mandate. With all due reserve, the least I can say at this stage is that the judgment in the case will be much awaited.

As a second topic, we will be revisiting – after a relatively long break – questions of Citizenship of the Union and rights in residence. Not amazingly, this type of litigation occupies a good proportion of the Court’s activity. Mobility and modern family structure bring up questions that are crucial at the individual level and sensitive in terms of national politics. I will mention as for that just two sets of cases handed down by the CJEU recently, in matters that are certainly going to occupy our debates in this part of our works.

In the first lot of Judgments in Cases C-378/12 and C-400/12 of 16 January 2014, the Court stated that periods in prison cannot be taken into account for the purposes of the acquisition of a permanent residence permit, or with a view of obtaining enhanced protection against expulsion. Similarly, it considered that periods of imprisonment, in principle, interrupt the continuity of the requisite periods for granting those advantages. It reminded though that, the host Member State may not take an expulsion decision against an EU citizen or his family members, irrespective of nationality, who have acquired the right of permanent residence on its territory, except on serious grounds of public policy or public security.

On the occasion of the Judgment in Cases C-456/12 and C-457/12 of 12 March 2014, which were referred by the Raad van State (Council of State) of Netherlands, the Court clarified the rules on the right of residence of third-country nationals who are family members of an EU citizen in the Member State of origin of the latter. The Court ruled that where an EU citizen has created or strengthened a family life with a third-country national during genuine residence in a Member State other than that of which he is a national, the provisions of the Directive 2004/38 apply by analogy where the person returns, with the family member in question, to his Member State of origin. Equally, it was considered that a refusal to grant a right of residence to a third-country national who is the family member of an EU citizen residing in the Member State of which he is national, but regularly traveling to another Member State as a worker, could discourage the worker from effectively exercising his rights under Article 45 TFEU, guaranteeing the freedom of movement.

As far as the third General topic is concerned I would simply remind the recent reformation of the EU Public Procurement legal context through the adoption of new Directives of the European Parliament and of the Council

on 26th February 2014 (Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC – Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC) and the introduction of a directive on concessions.

The new Directives entered into force on the 18th of March 2014 and are expected to be fully implemented within 2 years from that date. They modify the procurement regime as we know it, by shifting to full e-procurement, introducing new procedures, and focusing on strategic use of the procurement rules.

The adoption of the new instruments corresponds to the need to introduce a revised and modernised framework in order to increase the efficiency of public spending. It seems nevertheless that the influence of the Court was substantial in the domain since the preambles to the directives mention several times the CJUE. I cite literally: *“There is also a need ... to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union”*.

Before passing the floor to the next speakers I would like to thank and congratulate again the Danish Association for European Law and the Faculty of Law at the University of Copenhagen for their hospitality and for having undertaken so efficiently the difficult task of organising the 26th FIDE Congress in such a wonderful setting, in the country of Codex Runicus.

I look forward to a series of interesting and productive debates and I am convinced that this 26th F.I.D.E. Congress will match the success of the previous ones, add to the reputation of such an established institution and will enrich the legal doctrine with reports of very high standards.

Thank you very much for your attention.

Keynote Address

Luis Romero Requena

Messieurs les Présidents,

Monsieur le Ministre des Affaires étrangères,

Chers collègues,

Mesdames et Messieurs,

C'est pour moi un grand honneur de participer à l'ouverture du 25^{ème} Congrès de la Fédération Internationale pour le Droit Européen, au côté des illustres intervenants qui ont déjà pris la parole.

Nous sommes réunis à Copenhague pour de longues et, - je n'en doute pas -, fructueuses discussions autour de sujets cruciaux pour l'avenir de l'Union européenne.

Notre rencontre commence alors que viennent à peine de se clôturer les élections pour le renouvellement des membres du Parlement européen, trente-cinq ans après la première élection directe de 1979. Ce grand moment démocratique dans la vie de l'Union est l'occasion de rappeler la spécificité de la construction européenne : contrairement aux autres projets d'intégration entre États nations qui ont fleuri à travers le monde ces dernières décennies, l'Union européenne est fondée sur la participation directe de ses citoyens : ce sont eux qui choisissent leurs représentants appelés à siéger au sein du Parlement européen, lequel est lui-même co-législateur dans l'essentiel des domaines de compétence de l'Union. De cela, et de toutes les autres questions liées à la citoyenneté européenne, les participants au deuxième sujet de discussion auront certainement l'occasion de discuter au cours de ces prochains jours.

Il faut bien admettre que le résultat de ces élections est révélateur d'un certain désenchantement parmi certains vis-à-vis de la construction européenne. Je ne reviendrai pas sur les causes de cette situation. Permettez-moi toutefois d'insister sur le fait que, certes, un tel état d'esprit de nos opinions

publiques doit constituer une source d'attention et même d'inquiétude, - pour les élus, pour les décideurs et pour tous les acteurs de la construction européenne - ; mais l'attention portée à cette situation est aussi le reflet d'un fait positif : l'Union européenne est, de plus en plus, un phénomène politique, soumis au débat entre citoyens, entre partis, et donc aux aléas de la vie politique, tout comme les projets politiques nationaux. Il faut s'en réjouir, car, - sur le long terme -, le projet européen ne peut trouver sa stabilité que sur la base d'un tel débat politique démocratique. Ce débat devrait d'ailleurs conduire les acteurs politiques actifs à leurs niveaux respectifs – local, régional, national, européen – à coopérer positivement, avec une maturité plus grande que dans le passé, comme l'a demandé le Président Barroso lors de son discours "Humboldt" du 8 mai dernier.

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La constitution d'un nouveau Parlement européen emporte des conséquences marquantes pour le déroulement de la vie des Institutions de l'Union. Les présentes élections ne font pas exception à cette règle, et l'année 2014 toute entière est donc rythmée par les péripéties du processus électoral.

Qu'en est-il de la Commission ? Même si la Commission n'est pas impliquée en tant que telle dans les élections, sa vie n'en est pas moins directement influencée par ces dernières et, comme vous pouvez l'imaginer, son service juridique est un des services les plus concernés.

Je souhaiterais donc, pendant le temps qui m'est accordé, partager avec vous quelques réflexions sur les principaux défis auxquelles la Commission a été, est et sera confrontée tout au long de cette année électorale. Il s'agit de réflexions personnelles, qui n'ont pas la prétention de couvrir l'ensemble du sujet mais qui peuvent se réclamer de la position d'observateur privilégié que confère la fonction de directeur général du Service juridique de la Commission.

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C'est une évidence de rappeler que, dans le schéma institutionnel de l'Union, le sort de la Commission est devenu avec le temps étroitement lié à celui du Parlement européen. Au-delà du contrôle politique exercé par le Parlement, ce lien se manifeste également dans les calendriers respectifs des deux institutions. Si la Commission, en tant qu'institution, occupe par définition une place permanente dans le paysage européen, elle n'en est pas moins soumise à un processus de renouvellement régulier, calqué sur la vie démocratique de l'Union. Comme vous le savez, le mandat de la Commission, d'une durée de cinq ans, est équivalent à celui des élus du Parlement européen. Selon le système établi par les traités, c'est donc la tenue des élections au Parlement européen qui enclenche la procédure de nomination d'une nouvelle Commission.

Les conséquences de ce processus électoral sur la vie et l'activité de la Commission se font sentir avant et après la tenue effective des élections.

Avant les élections, tout d'abord. L'approche des élections se caractérise en effet par un ralentissement programmé de l'action de proposition législative par le Collège. Ce dernier évite, en effet, d'envoyer des propositions qui ne pourraient plus être examinées par le Parlement sortant. Ceci est valable également pour les actes délégués. Même si de tels actes sont adoptés par la seule Commission, le Parlement – tout comme le Conseil – dispose en principe du droit de s'opposer, dans un bref délai, à l'entrée en vigueur d'un acte délégué. Pour que ce droit d'opposition du Parlement européen ne soit pas affecté par la période électorale, les Institutions ont convenu que la Commission n'enverrait plus d'actes délégués après le 13 mars 2014.

Cela ne signifie pas pour autant que la Commission s'est retrouvée en chômage technique ces derniers mois, bien au contraire ! Tout d'abord, jusqu'à la dernière plénière en avril la Commission a contribué à ce que de nombreux dossiers législatifs phares puissent encore être adoptés par le législateur (je pense, par exemple, au règlement sur le mécanisme de résolution unique dans le domaine bancaire ou à la directive sur le « private enforcement » en droit de la concurrence). Elle a en outre continué à exercer au quotidien les tâches qui lui sont conférées en propre par les traités et par la législation de l'Union en vigueur ; je pense notamment à la mise en œuvre de la politique de la concurrence, au contrôle des aides publiques, aux procédures d'infraction ou encore à la gestion du budget de l'Union alloué à des

nombreuses politiques tels que l'agriculture, le développement régional, la recherche, ou l'éducation. La Commission a également continué à adopter des mesures d'exécution sur le fondement de l'article 291 du TFUE (avec toutefois une pause pour les actes soumis à l'ancienne procédure de comitologie dite de « réglementation avec contrôle », la PRAC pour les initiés). Enfin, dans l'actualité internationale, la Commission a œuvré, ensemble avec les Etats membres, pour formuler les réponses appropriées de l'Union face aux événements en Ukraine menaçant, de manière inattendue, la paix en Europe et le respect du droit international – une crise qui a des aspects non seulement politiques mais aussi juridiques. La Commission est ainsi restée une Commission de plein exercice pendant cette période et ne s'est pas interdit de prendre les initiatives politiques jugées appropriées. On ne saurait donc en aucune façon parler d'une période d'affaires courantes.

Outre cette influence sur les activités de la Commission, la campagne électorale qui précède les élections européennes peut également avoir un impact sur ses membres. Je pense ici à la situation des commissaires qui souhaitent s'engager dans la campagne électorale pour les élections européennes.

Quelle est la situation juridique ? L'article 17 du Traité sur l'Union Européenne prévoit que – je cite- *« les membres de la Commission [...] s'abstiennent de tout acte incompatible avec leurs fonctions ou l'exécution de leurs tâches »*. L'article 245 du Traité sur le Fonctionnement de l'Union européenne réitère ce principe et interdit aux commissaires d'exercer une autre activité professionnelle, rémunérée ou non. En outre, le code de conduite des commissaires, modifié en 2011, qui est un document non contraignant, a concrétisé ces règles en ce qui concerne les campagnes électorales. Il prévoit, d'une part, que *« Les membres de la Commission informent le président de leur intention de participer à une campagne électorale et du rôle qu'ils entendent y jouer (...) »* – C'est une règle de transparence pleine de bon sens – et, d'autre part, qu' *« ils doivent s'abstenir de participer aux travaux de la Commission pendant toute la période de participation active à la campagne, et au moins pendant toute la durée de celle-ci. »* Un commissaire en campagne électorale est donc placé dans la position statutaire de « congé électoral non rémunéré ». Pendant ce congé il ne peut plus recourir aux « ressources humaines ou matérielles de la Commission ». Ces principes vi-

sent à éviter tout possible conflit entre les prises de position d'un candidat au nom de son parti, d'une part, et les responsabilités d'un commissaire, d'autre part.

S'agissant en particulier des élections européennes, tant le code de conduite que l'accord-cadre sur les relations entre le Parlement européen et la Commission, qui date du 20 octobre 2010, précisent que cette période de congé électoral non rémunéré prend effet au plus tard « *à compter de la dernière période de session précédant les élections* ». L'accord-cadre ajoute que « *le président de la Commission informe en temps utile le Parlement de sa décision d'accorder ce congé en indiquant l'identité du membre de la Commission qui assumera le portefeuille en question durant cette période de congé* ». Par conséquent, pendant la période de congé électoral d'un commissaire, c'est un autre commissaire qui le remplace dans l'exercice de ses tâches..

En 2014, le président a ainsi décidé d'accorder un congé électoral à 6 commissaires, et ce jusqu'au 25 mai. Il a également désigné les membres temporairement responsables, au niveau politique, des portefeuilles des commissaires en congé électoral. Ces membres s'appuient, en principe, sur les cabinets existants des commissaires en congé électoral afin de préserver l'expertise acquise et de garantir la continuité des politiques suivies par la Commission.

Le code de conduite des commissaires prévoit également le cas où un commissaire se présente aux élections sans participer activement à la campagne. Tel a été, en 2014, le cas d'un seul commissaire, à propos duquel le président a estimé que le faible degré de la participation envisagée à la campagne électorale était compatible avec l'exercice des fonctions de commissaire. Toute la difficulté consiste, évidemment, à déterminer ce qu'il faut entendre par « participation active » à une campagne électorale... Nous sommes là dans ce que l'on pourrait appeler une « zone grise » où c'est avant tout l'appréciation politique du président de la Commission qui importe, en fonction des circonstances précises du cas d'espèce.

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Tournons-nous maintenant, si vous le voulez bien, vers la période qui vient de s'ouvrir, **après** les élections, et qui durera jusqu'à la nomination de la nouvelle Commission.

Les commissaires en congé électoral ont repris leurs fonctions au sein de la Commission il y a quelques jours. Toutefois, si des commissaires élus décident d'occuper leur siège au Parlement européen, ils devront démissionner de leur poste au plus tard la veille de la réunion constitutive du Parlement européen. Il y a en effet incompatibilité manifeste, tant en termes d'indépendance que pour des motifs de charge de travail, entre la position de membre du Parlement européen et celle de membre de la Commission.

Se pose alors la question de leur remplacement. L'article 246 du Traité sur le Fonctionnement de l'Union européenne prévoit une procédure simplifiée pour le remplacement d'un commissaire démissionnaire. Selon cette disposition, en principe, un commissaire démissionnaire devrait être remplacé pour la durée du mandat restant à courir par un nouveau commissaire de la même nationalité, nommé par le Conseil d'un commun accord avec le Président de la Commission, après consultation du Parlement européen. Je dis bien "en principe", car cet article dispose aussi que le Conseil, statuant à l'unanimité sur proposition du Président de la Commission, peut décider qu'il n'y a pas lieu à remplacement, notamment lorsque la durée du mandat restant à courir est courte, comme c'est le cas ici, car la nouvelle Commission devrait prendre ses fonctions le 1^{er} novembre. Le traité de Lisbonne a opéré un changement important par rapport à la situation antérieure: Encore en 2009, pendant la dernière période de transition régie par le traité antérieur, le Conseil pouvait nommer un Commissaire de "remplacement" tout seul et instantanément; et le Conseil s'efforçait d'ailleurs de réduire autant que possible le laps de temps entre démission et nomination du successeur car une Commission comptant moins de Commissaires que d'Etats membres était considérée comme irrégulièrement composée. Tel n'est plus le cas: Le Conseil ne peut plus nommer de Commissaires "remplaçants" qu'après consultation du Parlement européen, qui peut prendre son temps; et ceci signifie que le traité tolère désormais une Commission réduite pendant une période intérimaire en attendant que le Conseil puisse statuer. On verra comment les institutions s'adapteront à cette nouvelle situation.

Malgré ces péripéties, la Commission qui reste en place n'est nullement une Commission démissionnaire. Elle n'est pas, non plus, une Commission d'affaires courantes. Elle reprend, au contraire, l'ensemble de ses activités de proposition législative qui avaient été momentanément suspendues.

Tout au plus doit-on sans doute reconnaître qu'une période transitoire s'est ouverte, période qui ne s'achèvera qu'avec la nomination effective d'une nouvelle Commission. Pour reprendre des termes utilisés dans certains droits constitutionnels nationaux, l'on se trouve peut-être dans une situation d'« affaires prudentes » : Compte tenu de l'évolution de la composition du Parlement européen, une certaine réserve politique s'impose sans doute au Collège toujours en place.

La période qui s'est ouverte cette semaine est aussi, - et surtout, dirais-je -, celle qui doit mener à la nomination d'une nouvelle Commission, et ce à travers les étapes décrites en détails à l'article 17, paragraphe 7, du Traité sur l'Union Européenne. C'est d'ailleurs la première fois, cette année, que la procédure telle que modifiée par le traité de Lisbonne trouve à s'appliquer pleinement. Quelles sont les grandes étapes de cette procédure de nomination, qui constituera un véritable « ballet interinstitutionnel » ? Le Conseil européen doit d'abord proposer au Parlement un candidat à la fonction de président de la Commission. Ce candidat doit être élu par le Parlement, ce qui ne sera possible qu'après la constitution du nouveau Parlement. Ce sera ensuite au Conseil d'entrer en piste : d'un commun accord avec le président élu, il devra adopter la liste des autres commissaires envisagés, sur la base des suggestions faites par les Etats membres. Viendra ensuite le vote d'approbation du Parlement qui portera sur l'ensemble des membres « en tant que collègue » et la nomination finale par le Conseil européen.

Que faut-il penser de cette procédure ?

Tout d'abord, que le scénario où les différentes décisions seraient adoptées du premier coup est bien sûr le scénario idéal... mais que l'on ne peut exclure que la réalité soit quelque peu différente. Les traités ne prévoient d'ailleurs pas de calendrier contraignant pour ces différentes étapes. La seule certitude, au jour d'aujourd'hui, est que le mandat de l'actuelle Commission viendra à expiration le 31 octobre 2014 : après cette date, si un

nouveau Collège n'a pas été nommé, s'ouvrira une période d'affaires courantes, comme cela a été le cas lors de la nomination de la Commission actuelle.

Deuxième observation : pour la composition du Collège, il y aura, dans cette procédure complexe, matière à une dialectique subtile entre un président fraîchement élu, désireux de s'entourer d'une équipe forte et engagé pour l'intérêt général européen, des Etats membres qui souhaiteront garder la main, autant que possible, sur le choix de leur candidat national et enfin un Parlement soucieux de montrer, à l'égard de la Commission, l'autorité politique que lui confère le choix des urnes.

Enfin, - *last but not least* -, il y a la nouveauté relative au choix du président de la Commission. La Convention sur l'avenir de l'Europe avait proposé que le Conseil européen désigne son candidat « en tenant compte des résultats des élections ». Le Traité de Lisbonne stipule finalement que la désignation est faite « *en tenant compte des élections au Parlement européen* ». Si la portée juridique de ces quelques mots est faible, leur portée politique s'est d'ores et déjà révélée considérable. Elle a conduit les principaux partis politiques à désigner leurs candidat-présidents et ceux-ci ont participé activement à la campagne électorale. Il reste à voir ce que le Conseil européen et le Parlement vont en faire : le Parlement n'a pas le droit d'initiative, mais il dispose d'un droit de veto, car le Conseil européen propose le candidat, mais si celui-ci ne recueille pas la majorité au Parlement européen, le Conseil européen doit en proposer un autre.. Seul un dialogue de haut niveau peut permettre à l'Union de sortir par le haut de cette situation. Je rappellerai à cet égard que la déclaration N° 11 au traité de Lisbonne stipule que, – je cite –, « *le Parlement européen et le Conseil européen ont une responsabilité commune dans le bon déroulement du processus conduisant à l'élection du président de la Commission européenne* ». Cette déclaration prévoit dès lors expressément des consultations préalables entre les deux institutions, et ce « *dans le cadre juge le plus approprié* ». Ceci est, à mes yeux, le reflet de la coopération loyale qui est exigée des institutions par l'article 13 du Traité sur l'Union Européenne. Notons enfin que certains, comme notamment le président Barroso dans son discours "Humboldt", ont proposé d'utiliser la dynamique interinstitutionnelle post-électorale pour trouver des accords non seulement sur des personnalités, mais aussi sur des

priorités de fond – positives et négatives – de l'action de l'Union dans les 5 années à venir.

Dans les circonstances actuelles, vous me permettrez de ne pas en dire davantage sur ce processus. Donnons-nous rendez-vous dans deux ans pour une analyse plus approfondie !

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Je terminerai mon propos en abordant quelques-uns des défis qui attendent la nouvelle Commission.

Permettez-moi d'abord quelques considérations personnelles sur l'organisation interne de la future Commission, tout d'abord. Comme vous le savez, la nouvelle Commission sera, comme c'est le cas aujourd'hui, composée d'un nombre de membres correspondant au nombre d'États membres. La réduction du nombre de commissaires initialement envisagée a finalement été écartée par décision du Conseil européen et dans la foulée du référendum négatif du 12 juin 2008 en Irlande. Cette situation pourrait justifier des modifications structurelles dans l'organisation interne du Collège. En effet, un nombre toujours plus élevé de membres peut constituer un frein à l'efficacité du travail. Le risque est de transformer progressivement un exécutif soudé autour d'un projet commun en une assemblée délibérative sans vision d'ensemble. Pour éviter une telle dérive, il est parfois envisagé de structurer le futur Collège autour d'un certain nombre de 'clusters', rassemblant un nombre limité de commissaires sous l'autorité d'un vice-président. Le rôle des vice-présidents pourrait s'en trouver accru. Je pense notamment au vice-président responsable pour l'euro, dont le rôle pourrait encore s'accroître à l'avenir, notamment en cas d'évolution du fonctionnement de l'Eurogroupe et de ses instances préparatoires.

Quant à la tâche qui attend cette nouvelle Commission, elle n'est pas mince. Je n'entends pas me lancer dans l'énumération des défis qui se profilent à l'horizon. Je me limiterai à citer, à titre d'exemples, les quelques mesures structurelles qui seront rapidement à l'agenda.

A très court terme, pour permettre au nouveau Collège de fonctionner, de se réunir et de décider, des décisions devront être prises immédiatement après la prise de fonction: attribution des portefeuilles et détermination des

services placés sous la tutelle de chaque Commissaire ; désignation des vice-présidents (autres que le vice-président / haut représentant) ; ordre de préséance des vice-présidents et des membres de la Commission ; et enfin, règles de suppléance. Toutes ces décisions relèvent des prérogatives du Président de la Commission, la Commission étant simplement appelée à en prendre acte. La décision clé de l'attribution de portefeuilles aux commissaires aura déjà été annoncée lorsque le futur Président fera part de ses intentions quant aux Commissaires désignés, avant les auditions au Parlement européen.

Les relations de la Commission avec le Parlement nouvellement élu ainsi qu'avec le Conseil devront également être réexaminées. Vous savez qu'en 2010 la Commission a conclu un accord-cadre avec le Parlement européen. Ses dispositions ont parfois été critiquées, au motif qu'elles s'écartaient, si pas de la lettre, du moins de l'esprit des traités. Il n'en reste pas moins que ce texte a contribué à faciliter les relations entre les deux institutions. Un scénario évoqué par certains déjà la dernière fois, et qui me paraîtrait intéressant, consisterait à ce que le Conseil s'associe cette fois à cet exercice pour qu'ensemble les trois institutions puissent parvenir rapidement à une entente, permettant à l'Union de se tourner résolument vers les véritables défis qui l'attendent, ceux de la croissance économique, de l'inclusion sociale et de la défense des intérêts de l'Europe dans le monde.

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Chers collègues,

Mesdames, Messieurs,

Je ne m'aventurerai pas plus avant dans des considérations de politique fiction. Grands sont les défis qui nous attendent. Et pour que les décisions à venir soient prises en toute connaissance de cause, des événements comme celui qui nous réunit ici à Copenhague sont essentiels. Le congrès FIDE permet aux plus grands experts de débattre de façon approfondie de sujets complexes et constituent la base à partir de laquelle de futures réformes juridiques peuvent mûrir.

J'ai déjà fait allusion au thème de la citoyenneté européenne au début de mon allocution. L'importance de cette problématique est incontestable, à l'heure où les urnes viennent à peine de livrer leur verdict.

Il en va de même de l'Union économique et monétaire. Point n'est besoin de vous dire que c'est un sujet qui a occupé, - parfois même bousculé ! -, l'agenda de la Commission ces dernières années. A l'heure où la zone euro sort doucement de la crise dans laquelle elle avait été précipitée en 2010, le moment est idéal pour faire le point sur les bouleversements institutionnels et constitutionnels que cette crise a générés.

Enfin, si le thème du droit des marchés publics peut paraître plus technique à première vue, il s'agit néanmoins d'un domaine crucial pour le marché intérieur, lequel reste une pierre d'angle de l'Union européenne.

Le congrès FIDE, c'est aussi la possibilité de rencontres nombreuses et stimulantes, dans une ville magnifique. Copenhague a connu deux violentes batailles navales entre armées européennes au début du XIXème siècle, reflet de l'histoire belliqueuse de notre continent à cette époque. Nous nous retrouvons cette semaine pour des échanges, certes animés, mais beaucoup plus pacifiques. Je m'en réjouis.

Je vous remercie de votre attention.

Address

Ralf Hemmingsen

Excellencies,

Ladies and gentlemen.

Let me start with a quote: *'When People are having fun, they do not think about politics.'*

These words are not by a Roman Emperor or a politician of today. Apparently, they were said to the Danish King Christian the 8th. But who said them? It was not his prime minister - or his wife. No, it was Georg Carstensen, who opened Tivoli Gardens in 1843 not far from here – the famous amusement park this venue is associated with.

Before the opening, Carstensen needed permission to go on with the project and had to convince the monarch. And the King was open to Carstensen's point of view. .

As you may know, Tivoli is placed just outside the old ramparts of Copenhagen. A part of the defenses, which were becoming obsolete in the middle of the 19th century due to the development in military technology. Carstensen was granted permission. - But on the condition that the buildings were built so they were easy to tear down, should a military threat rise against the capital.

Since then, Tivoli has been an integral part of Copenhagen and its history. It started as an attraction mostly for Copenhageners, it was sabotaged during World War II. And today, it attracts both Danes and tourists from countries all over the world.

Many of the Tivoli buildings are inspired by Asian architecture. And Hans Christian Andersen - whom Professor Ulla Neergaard referred to in her opening address - was inspired to his description of the emperor's gardens in "The Nightingale".

But the inspiration for Tivoli itself came from other *European* fun fairs which sparked the idea in Georg Carstensen's mind: Jardin de Tivoli in Paris, Vauxhall Gardens in London and of course the original *Tivoli* outside Rome.

Just as Tivoli was inspired by many different places in Europe, so are the subjects which the congress is about to discuss some that transcends member states borders *per se*.

Ladies and gentlemen, it is a great pleasure to welcome you here today. European governance and European law are very central themes for the obvious reason that European law has direct influence on the daily lives of the citizens of the EU – as well as many citizens outside the EU. European law is influenced by different legal traditions in the member states. And I can hardly imagine that research and academic dialogue across the member states and between academics can be more important than here.

Therefore this year's congress adds to the long and fruitful tradition of FIDE and its devotion to the study and development of the law and institutions of the European Union.

When looking at the congress programme, I must say that even for a lay man in European law and governance, all of the subjects resonate. They resonate to some of the dilemmas and developments in the European institutional set-up and some of the current debates on European politics. The extent of three congress books is impressive as well.

As far as I know, they exceed the length of the collected fairy tales of Hans Christian Andersen several times. And I probably don't offend anybody by assuming that Andersen's works are more entertaining. But I am equally convinced that the contributions, interventions and debates presented here at the congress will contribute both to the understanding and to the progress of European integration.

The University of Copenhagen has six faculties reaching from the humanities and law to medicine and science. Like other research universities, we are dependent on and are adapting to increasing internationalisation. The Faculty of Law at University of Copenhagen is at the front of this process with a high degree of non-Danish faculty and students. We welcome this development.

Therefore, we are also delighted and happy to co-arrange and welcome international congresses like the 26th FIDE Congress.

I started by quoting the Tivoli founder Carstensen saying that: *'When people are having fun, they do not think about politics.'*

Carstensen founded Tivoli in a Europe still dominated by absolutism. And considering time has passed, it would be wrong and unfair to attribute Carstensen's dictum to the present where we see an increasing degree of apathy and concern towards the EU and European integration.

Europe and the EU faces a range of important challenges, which I am sure also have huge impact on your specific fields of research and occupations. Therefore, I would guess that even though law is also founded on tradition, many new developments and perspectives will have to be taken into account now and in the years ahead.

All the subjects you are about to discuss are indeed important and serious. But with Carstensen's words to the King in mind: I also hope and think you will have a fun time in Copenhagen.

I would like to thank the partners behind the congress and FIDE for the effort as well as for the opportunity to welcome all of you to Copenhagen.

Thank you.

Opening Ceremony – The Temperature of the European Union and Major Trends

(29 May 2014)

Keynote Address – The Financial Crisis, the EU Institutional Order and Constitutional Responsibility

Paul Craig

The financial crisis is arguably the most significant challenge to the EU since the inception of the EEC.¹ It has generated an array of political, legal and institutional responses the complexity of which is daunting in itself. The current paper considers these developments, and places them within a broader frame of institutional concerns, thereby facilitating thought about their impact on issues that have been debated more generally within the EU. The analysis has two principal themes, institutional design and constitutional responsibility for the choices thus made. These twin themes are considered in temporal perspective.

The discussion begins with the foundational institutional architecture for EU decision-making, and the debates that this has generated about democracy deficit. There has been a further resurgence of these concerns in the light of the crisis. While this is unsurprising, there is nonetheless a surprising lack of discourse as to responsibility for the status quo, and an equally surprising lack of serious discussion as to how we should think of the constitutional responsibility of Member States and not just the EU itself for the current institutional ordering.

The analysis then shifts to the institutional architecture of the EMU laid down in the Maastricht Treaty, with the focus once again on the relationship

¹ An earlier version of this paper was given at the FIDE Conference in Copenhagen in 2014. I am grateful for comments received at the Conference and for those from Federico Fabbrini.

between the institutional attribution of power, constitutional responsibility for the shaping of these provisions, and the way in which the schema contributed to the subsequent economic malaise. The relationship between this institutional schema and subsidiarity will also be explored.

The penultimate section of the paper considers the institutional schema that was used to deal with the financial crisis while it unfolded and the extent to which this can be properly portrayed in intergovernmental or supranational terms. The focus in the final section of the paper is on the measures that have been put in place thus far, and the institutional implications that this has had for the balance of power, both vertical and horizontal.

1. EU Institutional Design and Constitutional Responsibility

It is unsurprising that the financial crisis should have brought back to the fore concerns about the very design of the EU's institutional structure and issues of democracy deficit,² on which there is already an extensive literature.³ This is however matched by an equal dearth of literature concerning

² See, eg, D Chalmers, 'Democratic Self-Government in Europe, Domestic Solutions to the EU Legitimacy Crisis', Policy Network Paper, May 2013; K Nicolaïdis, 'European Democracy and Its Crisis' (2013) 51 JCMS 351; S Piattoni (ed), *The European Union: Institutional Architectures and Democratic Principles in Times of Crisis* (Oxford University Press, forthcoming); O Cramme and S Hobolt (eds), *Democratic Politics in a European Union under Stress* (Oxford University Press, forthcoming).

³ See, just in terms of books, S Garcia (ed), *European Identity and the Search for Legitimacy* (Pinter, 1993); J Hayward (ed), *The Crisis of Representation in Europe* (Frank Cass, 1995); A Rosas and E Antola (eds), *A Citizens' Europe, In Search of a New Order* (Sage, 1995); R Bellamy, V Bufacchi and D Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press, 1995); S Andersen and K Eliassen (eds), *The European Union: How Democratic Is It?* (Sage, 1996); R Bellamy and D Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives* (Blackwell, 1996); R Bellamy (ed), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avebury, 1996); F Snyder (ed), *Constitutional Dimensions of European Economic Integration* (Kluwer, 1996); R Dehousse (ed), *Europe: The Impossible Status Quo* (1997); D Curtin, *Postnational Democracy, The European Union in Search of a Political Philosophy* (Kluwer, 1997); P Craig and C Harlow (eds), *Lawmaking in the European Union* (Kluwer, 1998); J Weiler, *The Constitution of Europe* (Cambridge University Press, 1999); C Hoskyns and M Newman (eds), *Democratizing the European Union* (Manchester

constitutional responsibility of Member States for the status quo. Consideration of the causal influences underpinning Treaty reform has not been matched by attendant analysis of what this should be taken to connote in terms of the constitutional responsibility of Member States for the resultant institutional architecture. This is a serious failing.

The fact that far-reaching measures were enacted pursuant to the Lisbon Treaty, and through treaties such as the Fiscal Compact and the European Stability Mechanism, to cope with the financial crisis has led to renewed attention on the democratic credentials of the EU. There is already a very considerable body of literature dealing with such matters, and there is no intent to traverse this ground in detail here again. Suffice it to say that the disjunction between power and electoral accountability is the most potent aspect of the democracy deficit argument.⁴

It is axiomatic within national systems that the voters can express their dislike of the incumbent party through periodic elections. Governments can be changed if they incur electoral displeasure. In the EU, legislative power is divided between the Council, European Parliament, and Commission, with the European Council playing a significant role in shaping the overall legislative agenda. The fact that different modes of representation pertain in these institutions is not itself odd, given that this is a standard feature of

University Press, 2000); B Laffan, R O'Donnell, and M Smith, *Europe's Experimental Union: Rethinking Integration* (Routledge, 2000); F Mancini, *Democracy and Constitutionalism in the European Union* (Hart, 2000); K Neunreither and A Wiener (eds), *European Integration after Amsterdam, Institutional Dynamics and Prospects for Democracy* (OUP, 2000); R Prodi, *Europe As I See It* (Polity, 2000); K Nicolaidis and R Howse (eds), *The Federal Vision, Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001); W van Gerven, *The European Union, A Polity of States and Peoples* (Hart, 2005).

⁴ J Weiler, U Haltern and F Mayer, 'European Democracy and its Critique' in J Hayward (ed), *The Crisis of Representation in Europe* (Frank Cass, 1995); A Follesdal and S Hix, 'Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS 533; K Nicolaïdis, 'The Idea of European Democracy', in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford University Press, 2012); K Nicolaïdis, 'Our European Democracy: Is this Constitution a Third Way for Europe?', in K Nicolaïdis and S Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union* (Oxford University Press, 2003).

many federal-type polities.⁵ The voters have however in the past had no direct way of signifying their desire for change in the legislative agenda. European elections can alter the complexion of the European Parliament, but it is only one part of the legislative process. The Commission, Council and European Council have input into the legislative agenda, but they cannot be voted out by the people. The European Parliament's influence over the choice of the Commission President has increased, as has the electoral accountability of the incumbent to this office, an issue to which we shall return below. Suffice it to say for the present that this alleviates, but does not cure the problem, in part because the other Commissioners remain national government appointees, and in part because the European Parliament's power in this respect does not touch the considerable role played by the Council and European Council in the EU decision-making process.

There have been various attempts to address this concern. For some, such as Moravcsik, the response is to affirm political accountability, notwithstanding the absence of direct electoral accountability analogous to national legal regimes, the argument being that 'constitutional checks and balances, indirect democratic control via national governments, and the increasing powers of the European Parliament are sufficient to ensure that EU policy-making is, in nearly all cases, clean, transparent, effective and politically responsive to the demands of European citizens'.⁶ This in turn has been contested by others who regard electoral accountability as central to conceptions of democracy. Checks and balances are indeed part of the standard fare of democratic politics, but the justification for democracy at its most fundamental is that it allows participatory input to determine the values on which people within that polity should live.⁷

It is noteworthy that the discourse concerning democracy deficit is normally presented as a critique of the EU. It is the EU qua real and reified entity that suffers from this infirmity, the corollary being that blame is cast on it. The EU is of course not blameless in this respect, but nor are the Member

⁵ D Kelemen, *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond* (Harvard University Press, 2004).

⁶ A Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 *JCMS* 603, 621.

⁷ Weiler (see fn above); Follesdal and Hix (see fn above).

States, viewed collectively and individually. The present disposition of EU institutional power is the result of successive Treaties in which the principal players have been the Member States. There may well be debate as to the relative degree of power wielded by Member States and the EU institutions in the shaping and application of EU legislation, but there is greater consensus on the fact that Member States tend to dominate at times of Treaty reform.⁸ The inter-institutional distribution of power is the result of hard fought battles, the results of which are embodied in Treaty amendment. Thus insofar as the present arrangements divide EU policymaking *de facto* and *de jure* between the Commission, Council, European Parliament and European Council, this is reflective of power balances that the Member States shaped and were willing to accept. This is readily apparent when considering the initial Rome Treaty and any of the five major Treaty reforms since then. It is powerfully exemplified by the debates concerning institutional reforms in the Constitutional Treaty, which were then taken over into the Lisbon Treaty.⁹ It was evident most notably in the battle as to whether the EU should have a single President who would be located in the Commission, or whether a reinforced European Council should also have a long-term President.¹⁰ It was apparent in the debates as to Council configurations,

⁸ G Marks, L Hooghe and K Blank, 'European Integration from the 1980s: State-Centric v. Multiple-Level Governance' (1996) 34 JCMS 341, 342; T Risse-Kappen, 'Exploring the Nature of the Beast: International Relations Theory and Comparative policy Analysis Meet the European Union' (1996) 34 JCMS 53; J Golub, 'State Power and Institutional Influence in European Integration: Lessons from the Packaging Waste Directive' (1996) 34 JCMS 313; J Caporaso, 'The European Union and Forms of State: Westphalian, Regulatory or Post-Modern' (1996) 34 JCMS 29, 44-48; F Scharpf, 'The Problem Solving Capacity of Multi-Level Governance' (1997) 4 JEPP 520; G Marks, F Scharpf, P Schmitter and W. Streeck, *Governance in the European Union* (Sage, 1996); A Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 JCMS 473; A Moravcsik, *National Preference Formation and Interstate Bargaining in the European Community, 1955-86* (Harvard University Press, 1992); A Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45 International Organization 19; M Pollack, 'International Relations Theory and European Integration' EUI Working Papers, RSC 2000/55.

⁹ P Norman, *The Accidental Constitution, The Making of Europe's Constitutional Treaty* (EuroComment, 2nd ed, 2005).

¹⁰ P Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford University Press, 2010) Ch 3.

and who would chair them. It was the frame within which the discourse took place concerning the number of Commissioners and the method of choosing them.¹¹

This point can be reinforced by considering the reforms that would be required to alleviate the democratic deficit. The European Parliament has been further empowered by the Lisbon Treaty through extension of what is now the ordinary legislative procedure to new areas, and it has greater control over the appointment of the Commission President than hitherto. Thus, while the European Council retains ultimate power over the choice of Commission President,¹² it will not force a candidate on the European Parliament that is of a radically different persuasion from the dominant party or coalition. A formal linkage between the dominant party/coalition in the European Parliament and the appointment of the Commission President serves to strengthen the connection between policy and party politics, thereby alleviating the disjunction of political power and political responsibility that has underpinned previous critiques of the EU. This link was further strengthened in the 2014 elections for the European Parliament, in which rival candidates for the Commission Presidency campaigned openly as the chosen candidates of the two principal political groupings in the EP. The electoral success of the centre-right European Political Party led to the confirmation of Jean-Claude Juncker as the new Commission President, albeit after opposition from the UK and Hungary. The general consensus is that now that this stronger link between the EP and the Commission President has been forged it will constitute the new status quo going forward, and establish the ground rules for subsequent EP elections. The hope is that it will also increase voter interest in EU elections, since they can perceive a more proximate connection between the casting of their vote, and the policy choices carried forward after the election.

This may well be so in relative terms, but there are nonetheless obstacles that subsist to a closer link between policy and politics in the EU, even after the Lisbon Treaty reforms and changes wrought by the 2014 EP elections. The EU policy agenda is not exclusively in the hands of the European Parliament and/or Commission. The Council and the European Council have

¹¹ Ibid Chs 2 and 3.

¹² Art 17(7) TEU.

input both de jure and de facto. Thus even if the European Parliament and Commission President are closely allied in terms of substantive policy for the EU, the policy that emerges will necessarily also bear the imprint of the political vision of the Council and European Council. Moreover while the President of the Commission may well be *primus inter pares*, he or she is still only one member of the Commission team. The other Commissioners will not necessarily be of the same political persuasion as the President or the dominant party in the European Parliament.

It would be possible in theory to have a regime in which the people voted directly for two constituent parts of the legislature, the European Parliament and Council, and for the President of the Commission and the President of the European Council. It would be possible in theory to have the previous package, but only a single elected President for the EU as whole. The political reality is that radical change of this kind has not happened because the Member States were unwilling to accept such a disposition of power. It is certainly true that the choice between two Presidents and a single President for the EU was debated during the negotiations leading to the Constitutional Treaty. It is equally true that discourse concerning the election of the Commission President began in the 1980s. It should nonetheless be recognized that the broader reforms set out above were not on the political agenda during the extensive negotiations concerning institutional power in 2003-4 during the deliberations that led to the Constitutional Treaty, nor in the subsequent discussions that culminated in the Lisbon Treaty. Even if the broader package of reforms were adopted it could not ensure that the people would exercise electoral control over the direction of EU policy, since the European Council would still be populated by Heads of State, who would continue to have a marked influence over the policy agenda, and members of the Commission, with diverse political views, would still be chosen by the Member States.

There is moreover a Catch 22 lurking here that is both constitutional and political. The constitutional manifestation flows from the realization that the diminution of state power in the Council and European Council that would be entailed by such change would not be constitutionally tolerated in some countries and would lead to the charge that the EU was truly becoming a super-state. It would be regarded as constitutionally unacceptable in some

Member States at least, which would regard such change as undermining the status of the Member States as masters of the Treaty, and installing in its place a federal state that was incompatible with the founding precepts in the constituent documents of those Member States.

The political manifestation of the Catch 22 is equally important. Changes of the kind adumbrated above would be opposed by many national parliaments, as well as national executives, which would not view with equanimity the diminution of their status that flowed from the increased legitimacy of the EU political order. This leads to the further paradox that because such changes that would alleviate the democratic deficit would not prove acceptable to national political orders, the discourse focuses on ever greater ways to involve the national parliaments in decision-making through suggestions of red cards to complement the existing colour set. I am not opposed to involvement of national parliaments in the EU decision-making process. They have a role therein, although its nature and limits are contestable. The implications of proposals for parliamentary red cards would be very problematic, and this is a fortiori so for radical proposals that would give individual Member States the power to opt out of legislation that they felt to be unduly burdensome.¹³ The apposite point for present purposes is however that the very drive for such involvement is premised on the assumption that it will thereby indirectly alleviate the EU's democratic malaise, in circumstances where other ways of attaining this end would be opposed by many national parliamentary institutions.

The political manifestation of the Catch 22 is also apparent in more subtle ways. Thus recent efforts by Martin Schulz and Jean-Claude Juncker to imbue the choice of Commission President with more electoral legitimacy, through direct campaigning combined with televised debate, proved successful in the sense that the candidate of the party that secured most seats in the EP was duly appointed as Commission President. This outcome was however not certain and some responded by reasserting the formal right for Member States to choose another candidate. The truth of this as a matter of formal Treaty law is not open to question. It was rather the almost 'reflexive' reaction in some quarters, whereby shifts towards some greater measure of direct electoral legitimacy provoked a counter reaction reasserting Mem-

¹³ Chalmers (see fn above).

ber State power as exercised through the European Council in the choice of Commission President.

I return then to the inquiry posed earlier, concerning the dearth of consideration of what the current disposition of power means in terms of Member State constitutional responsibility, connoting in this respect both their responsibility qua contracting parties to the EU and the constitutional responsibility they bear in relation to their own constitutional order. I am not referring here to this insofar as it concerns national representatives in the Council, or that of heads of state within the European Council, on which there is indeed considerable discussion. I am referring rather to the way in which we think more generally about the constitutional responsibility of Member States both as contracting parties to the EU, and in terms of their respective constitutional orders. It is the very nature of the obligations that flow from the legal maxim *pacta sunt servanda* that are of interest here. It may be helpful to contrast two perspectives in this regard.

It might be argued that there are no distinctly political obligations that can be cast in terms of Member State constitutional responsibility, and that the legal dimension of *pacta sunt servanda* exhausts the meaning of this precept. It might in this vein be contended that Member States make treaties, and legislation pursuant thereto, out of rational self-interest, maximizing their personal benefit, and minimizing attendant costs, with the consequence that if they can off-load responsibility for EU difficulties ‘elsewhere’ they will. Member State constitutional responsibility is regarded as coterminous with legal accountability narrowly construed. The state accepts the consequences of non-compliance with EU legislation, whether cast in terms of state liability in damages, Commission action for breach of EU law, or direct effect of directives. This is however conceived for what it is, legal accountability when one breaks the rules. It does not undermine the foundational precept that the state will act as a rational actor seeking to maximize the returns and minimize the costs of EU membership. It is integral to this approach that the state will regard it as politically ‘natural’ and normatively ‘uncontroversial’ to offload blame for failures to the EU itself, rather than accept that the states individually or collectively bear responsibility in this regard. The rational state actor as thus conceived describes not only how states behave in

relation to the EU, but also sets the normative boundaries for their constitutional responsibility.

Member State constitutional responsibility might, alternatively, be conceptualized more broadly, to include, but also go beyond the limits of legal accountability. Let us leave aside for the present the issue of how far the picture in the preceding paragraph captures the reality of state behaviour. The salient point for present purposes is that there is no a priori reason why this rationalist version of state action should translate into or dominate thought about the responsibility for state choices conceived in constitutional terms. Indeed there are very good reasons why it should not, since it thereby denudes the concept of responsibility of almost all meaning, with detrimental consequences more generally for how we conceive of political responsibility. A richer conception of constitutional responsibility flows in part from the obligation of sincere cooperation embedded in the Treaty,¹⁴ and in part from more general precepts of taking responsibility for one's action that should as a matter of principle pertain equally to states as to individuals as a matter of domestic constitutional principle.

The principle of sincere cooperation, whereby it is incumbent on the EU and Member States in full mutual respect to assist each other in carrying out tasks that flow from the Treaties, is central to this alternative vision.¹⁵ So too is the remainder of this Treaty provision, which enjoins the Member States to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties, or resulting from acts of the EU institutions, and requires Member States to facilitate achievement of the EU's tasks and refrain from any measure which could jeopardise the attainment of the EU's objectives.¹⁶ This Treaty obligation may provide the foundation for more discrete legal obligations, as exemplified by its deployment in the jurisprudence on state liability in damages.¹⁷ It is, however, integral to this alternative vision that Member State constitutional responsibility is not exhausted by the legal dimension to the principle of sincere cooperation.

¹⁴ Art 4(3) TEU.

¹⁵ Art 4(3) TEU.

¹⁶ Art 4(3) TEU.

¹⁷ Cases C-6 & 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

It also has a distinctly political dimension that is expressive most fundamentally of the positive side of the maxim *pacta sunt servanda*, irrespective of whether it is capable of being embodied in a legally enforceable norm.¹⁸ Thus the principle of sincere cooperation surely provides the basis for an obligation of political good faith engagement by Member States in ensuring that Treaty obligations are fulfilled efficaciously; the injunction on Member States to take any appropriate measure to ensure fulfilment of Treaty obligations should generate responsibility for states to be proactive in thinking about the best way to achieve Treaty imperatives; and the duty to refrain from behaviour that could jeopardize attainment of EU objectives should provide the foundation for constitutional responsibility not to offload blame to the EU when this is unwarranted.

What this means most fundamentally is that Member States bear responsibility for the choices that they have made, individually and collectively, in shaping EU decision-making. Thus insofar as there is a democratic deficit of the kind considered above responsibility cannot simply be ‘offloaded’ by the Member States to the EU. Member States cannot carp about deficiencies of EU decision-making as if they were unconnected with the architecture thus created. They cannot moreover criticize aspects of the existing decision-making process as imperfectly democratic, such as the method of representation in the European Parliament, without at the very least being mindful of the fact that they would reject more far reaching democratic reforms on the ground that they would thereby transform the EU into something more akin to a federal state.

It might be contended by way of response that talk of constitutional responsibility is inapt because individual Member States may disagree with the solutions embodied in the Treaty, but may be pressured to accept them by more powerful states. The legal reality is however that the Treaty establishes 28 veto points, given that unanimity is required for Treaty amendment. It can be accepted that in the EU, as with any other collective grouping, there is never going to be parity judged in terms of substantive influence or power, with the consequence that there may be pressure to accept a

¹⁸ What has been termed here the positive side of *pacta sunt servanda* may have legal implications. The point being made here is that even if this is not so there may still be the foundations for political obligation and constitutional responsibility.

particular solution. To contend that this can be used to deny any or all constitutional responsibility for the Treaty outcome is nonetheless a non-sequitur. It would mean according states some open-ended trump to excuse them from their ratification of the Treaty amendment, without any inquiry as to the nature of the alleged pressure they were subjected to and without inquiry as to whether they should have withstood it and exercised their veto if they felt that strongly about the issue. The same applies a fortiori in relation to legislation made pursuant to the Treaty. A particular state may well disagree with some aspects of EU legislation enacted pursuant to the ordinary legislative procedure. That is inevitable in a collective entity. However all states signed up to the rules of the game, which include commitment to qualified majority decision-making, not unanimity, in the ordinary legislative procedure. It is moreover central to the very idea of collective action that states forego some element of individual choice for the benefit of being part of the club.

Recognition of Member State constitutional responsibility also has broader implications for discourse concerning related issues, such as social legitimacy.¹⁹ Joseph Weiler is surely right that the EU is presently suffering a social legitimacy deficit, manifest in low voter turnout, and the rise of more anti-EU parties.²⁰ The causes of this deficit are complex, but the failure to articulate any developed conception of Member State constitutional responsibility for their actions, whether concerning the EU's overall decision-making architecture or individual decisions made pursuant thereto, is assuredly a factor in this regard. It should come as scant surprise that such a deficit exists if Member States are allowed to avoid constitutional responsibility for the direct effects of their own actions, and offload blame on to the 'other', even more so when they direct critical barbs at the EU, while being cognizant that they would reject most changes that could address some of the root cause of the critique. It should equally come as no surprise that more extreme parties follow the lead of mainstream parties in this respect,

¹⁹ See also P Lindseth, 'Power and Legitimacy in the Eurozone: Can Integration and Democracy be Reconciled?', in M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart, 2014) Ch 18.

²⁰ JHH Weiler, 'Europe in Crisis – on "Political Messianism", "Legitimacy" and the "Rule of Law"' [2012] *Singapore Jnl of Legal Studies* 248.

which should not be forgotten when engaging in the political soul-searching for causes of the recent EP election results.

The blame for failure to acknowledge such a conception of responsibility resides not just with the states themselves, but also with the broader community, including the academic community. We should, to be sure, continue to subject the EU political ordering to critical scrutiny. We should in doing so also reflect on the rationale for the current disposition of power, what alternatives are feasible and which players set the limits in this respect. The accepted critical discourse on the EU's political ordering is in reality only telling half the story, thereby ignoring conceptions of Member State constitutional responsibility that are central to a rounded understanding of the status quo and viable reform options. The nature and scope of this constitutional responsibility requires further elaboration. It is important to stress at this juncture that the preceding analysis concerns only the nature of such responsibility as it attaches to the Member States collectively and individually for the overall institutional architecture of the EU.

2. Economic and Monetary Union, Institutional Design and Constitutional Responsibility

Member State constitutional responsibility is also relevant in relation to the substantive Treaty provisions that frame economic and monetary union. There is little doubt that the EU bears some responsibility for the financial crisis, but so too do the Member States, both collectively and individually. The Treaty provisions on economic and monetary union were crafted in the Maastricht Treaty. Insofar as there was an asymmetry between EU power over monetary as opposed to economic union, this reflected what Member States were willing to accept. This is readily apparent when one considers the architecture of the EMU Treaty provisions and the Stability and Growth Pact.²¹

²¹ Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1; Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6.

Monetary union was all about the single currency and the Treaty articles were powerfully influenced by German ordo-liberal economic thought, which demanded independence of the European Central Bank, governance by experts and the primacy of price stability. These foundational precepts were embodied in the primary Treaty articles.²² It was integral to the Maastricht settlement that monetary policy was Europeanized. This was reinforced by the Lisbon Treaty provisions on competence, which stated that monetary policy for those countries that subscribed to the euro was within the exclusive competence of the EU.²³ This was further strengthened by mandatory Treaty provisions precluding instructions or interference from any outside party, whether that was a nation state or another EU institution.²⁴

The Maastricht settlement in relation to economic policy was markedly different. It was built on two related assumptions, preservation of national authority and preservation of national liability. The former was reflected in the fact that Member States retained fiscal authority for national budgets, subject to limited oversight and coordination from the EU designed to persuade Member States, with the ultimate possibility of sanctions, to balance their budgets and not run excessive deficits. The latter, preservation of national liability, was the quid pro quo for the former, which found its most powerful expression in the no bail-out provision.²⁵ While there was some limited qualification to this precept²⁶ the message was nonetheless that national governments retained authority over national economic policy, subject to the Treaty rules designed to persuade them to balance their budgets, the corollary being that if they did not do so then the consequential liabilities would remain at the door of the nation state.

Oversight of national economic policy was weakened in subsequent years through Member State unwillingness to subscribe to the rules, which led to their modification, the effect of which was to weaken centralized EU con-

²² Arts 127, 130, 282(3) TFEU.

²³ Arts 2(1), 3 TFEU.

²⁴ Art 130 TFEU.

²⁵ Art 125(1) TFEU.

²⁶ Art 122(2) TFEU.

trol.²⁷ The Maastricht ‘deal’ was nonetheless left largely unaltered in the Lisbon Treaty. The Member States recognized the proximate connection between economic and monetary policy. They understood that the economic health of individual Member State economies could have a marked impact on the valuation of the euro, hence the need for some oversight and coordination of national economic policy. They were, however, mindful of the policy decisions made in and through national budgets, including those of a redistributive nature, and were unwilling to accord the EU too much control over such determinations.

It was only when the financial crisis hit the EU that the Member States were willing to accept that greater control over national economic policy was a necessary condition for monetary union. This led to the plethora of measures enacted to tighten centralized control over national budgets and national banks through the six-pack, the two-pack and the Fiscal Compact. While the EU should properly be held accountable for the way in which it dealt with the financial crisis, the Member States cannot escape responsibility in this regard either. They had a major role in shaping the Maastricht architecture on EMU and determined how it was applied in the years thereafter.

There is indeed a certain gentle irony in the fact that the Maastricht Treaty contained the new provisions on EMU and on subsidiarity. The irony does not reside in the fact that the former was legally predicated on the latter. This was of course not so in technical legal terms. The Maastricht Treaty embodied the powers on EMU that the Member States were willing to give to the EU. These were contained in the primary Treaty provisions and thus were not themselves subject to subsidiarity, which was designed to determine whether rules would be made at EU level pursuant to the primary Treaty provisions that existed. Subsidiarity as now expressed in Article 5(3) TEU did not therefore bite on the initial choice of what power Member States should give to the EU in relation to EMU. This should not mask the

²⁷ Case C-27/04 *Commission v Council* [2004] ECR I-6649; I Maher, ‘Economic Policy Coordination and the European Court: Excessive Deficits and ECOFIN Discretion’ (2004) 29 ELRev 831; Council Regulation (EC) 1055/2005 of 27 June 2005 amending Regulation 1466/97 [2005] OJ L174/1; Council Regulation (EC) 1056/2005 of 27 June 2005 amending Regulation 1467/97 [2005] OJ L174/5.

reality that the choice as to what powers Member States were willing to sign over to the EU in relation to economic union was shaped substantively by subsidiarity, in the sense that it was felt right that major decisions concerning fiscal sovereignty should properly remain with the Member States, subject to limited oversight by the EU.

It is here that the irony resides for while subsidiarity may express a powerful and laudable sentiment about the locus of decision-making, the reality is that it can and often does lead to regulatory failure. The EU's financial crisis is testimony to two of the most prominent instances of such regulatory failure, which played out in relation to both the sovereign debt and banking crisis. The sovereign debt crisis was causally related to the very weakness of the EU controls over economic policy, which meant that there was insufficient firepower at EU level to stem the tide of sovereign debt or deal with the problem when the dams broke.

The banking crisis was also indicative of the regulatory failure of schemes that leave too much discretion to Member States. In the case of the financial regulatory regime as it existed prior to recent reforms this was the result of a schema shaped by subsidiarity concerns in the more technical Article 5(3) TEU sense. Subsidiarity can manifest itself in one of three ways: the area may be left to national regulation; part of the area, such as enforcement, may be left to national regulation; the entire area may be subject to EU regulation, but with subsidiarity given voice through discretion left to Member States in relation to various aspects of the policy. The Lamfalussy regime was shot through to varying degrees with subsidiarity in the second and third senses. The post-mortem as to the inadequacy of the EU response to the banking crisis was carried out in the de Larosiere Report.²⁸ The report noted the lack of cohesiveness in EU policy, and concluded that the principal cause stemmed from the options provided to Member States in the enforcement of directives, which was itself the result of the discretion left to Member States by the primary directives that governed the area. The excessive diversity was manifest in, for example, different meanings given to 'core capital', differing degrees of sectoral supervision, diverse reporting

²⁸ J de Larosiere, *The High Level Group on Financial Supervision in the EU* (2009, Brussels), paras 102-105.

obligations, distinct accounting provisions in areas such as pensions, and highly divergent national transposition.

3. The Unfolding Crisis and the Inter-institutional Balance of Power

There is unsurprisingly debate about the institutional consequences of the measures taken pursuant to the financial crisis, more especially because there is both a vertical and a horizontal dimension to this discourse. These concern respectively relations between Member States and the EU, and the inter-institutional balance of power within the EU itself, although the issue is rendered more complex by the fact that there may be inter-state tensions within the fabric of the EU institutions. It is important in approaching this issue to disaggregate between the institutional consequences as the crisis unfolded and the remedial measures were taken, and the inter-institutional balance of power going forward, now that many of the key measures are in place. The failure to distinguish the two can lead to conclusions being made concerning the former, followed by implicit assumptions that these will inform the pattern of the latter, which is a non-sequitur.

We can begin therefore with the implications of the financial crisis for EU decision-making as the crisis unfolded. Sergio Fabbrini has provided an insightful analysis of this phase.²⁹ He contends that since the Maastricht Treaty there have been two modes of decision-making embedded in the Treaties, supranational and intergovernmental. The former was applicable to the single market and other areas, with the hallmark being the centrality of the Commission, the ordinary Community method and an important role for the ECJ. The latter was manifest not only in relation to the Second and Third Pillar, but also, albeit somewhat differently, in relation to areas such as economic union, where the hallmark was greater concentration of power in the Council and European Council, no role or a reduced role for the ECJ and substantive Treaty provisions that were couched in less hard-edged terms, as

²⁹ S Fabbrini, 'Intergovernmentalism and its Limits: Assessing the European Union's Answer to the Euro Crisis' (2013) 46 *Comparative Political Studies* 1.

exemplified by those on economic union, where there was much talk of co-ordination and cooperation.

This Treaty architecture was then replicated in the response to the financial crisis, in the sense that intergovernmental solutions came to the forefront to tackle the unfolding drama. Thus Fabbrini argues that the apex of the intergovernmental moment was reached between 2009 and mid-2012, in which the French and German governments ‘converged toward an intergovernmental interpretation of the integration process’,³⁰ in which the EP, Commission and ECJ were sidelined, and decisional power concentrated in the European Council and ECOFIN. This approach was initially championed by President Sarkozy, adopted shortly thereafter by Chancellor Merkel and supported by the UK and Italy. It followed moreover that if operative power was to be conceived in this manner then accountability should be primarily to national parliaments, rather than the EP.

Sergio Fabbrini notes the shortcomings of the intergovernmental approach to crisis resolution. These included the ‘veto dilemma’, connoting in this respect the need to ensure consensus before moving forward, with the consequence that European Council intervention was often too little or too late; the ‘enforcement dilemma’, capturing the difficulty of ensuring that voluntary agreements made outside the strict letter of the Lisbon Treaty would be applied within domestic legal orders; and the ‘compliance dilemma’, speaking to the difficulties of making sure that parties stick to the rules that they have made. There was moreover a ‘legitimacy dilemma’ that pervaded the intergovernmental approach, viz the difficulty of securing the legitimacy of decisions reached by ECOFIN and the European Council that had not been discussed or received the imprimatur of the EP. Fabbrini’s analysis ends with the pulling back from the intergovernmental approach after mid-2012. There is much in this picture of the institutional response to the unfolding crisis that can be accepted. There are, however, two countervailing considerations that qualify this intergovernmental perspective.

There is the fact that a central remedial response to the financial crisis was the six-pack and the two-pack, which were enacted by the normal legislative procedures as formal regulations and directives. The ideas were generated in part by the Special Task on EU Governance, chaired by President

³⁰ Ibid 9.

van Rompuy,³¹ but the Commission was not excluded from this process. To the contrary, it exercised the right of initiative suggesting the necessary amendments to the Stability and Growth Pact, drafting and piloting them through the legislative process. The measures became law in 2010, and the thinking behind them was already done in 2009. This was moreover a legislative process in which the EP was involved. Now to be sure there was time pressure to get the relevant measures on the statute book, which perforce limited room for EP amendment, but this did not prevent input from the EP in shaping the emergent legislation. It can be accepted that the enactment of these measures did not immediately calm the financial markets, but they were nonetheless central to the shaping of a workable economic union to accompany monetary union. The other countervailing consideration to the intergovernmental perspective is the fact that the single intervention that did more than anything else to calm the financial markets was that of the ECB President, with the statement that he would in effect do whatever it took to save the Euro.

Much attention has naturally been focused on the supervisory constraints contained in the Fiscal Compact made outside the confines of the Lisbon Treaty, which exemplified the intergovernmental method. The reality is however that it was significantly watered down over its successive amendments, such that there is now very little difference between the supervisory rules contained in the six-pack and two-pack and those in the Fiscal Compact. It remains to be seen moving forward which provides the principal foundation for oversight of national budgets. The Commission is in the driving seat as far as enforcement goes, and its natural preference is to use norms legitimated through the ordinary Lisbon Treaty process. This is for reasons of principle, given that it dislikes ‘solutions’ crafted outside the formal Treaties, more especially when the results could have been achieved therein; and for more pragmatic reasons, since the modalities of enforcement will normally be clearer in this sphere.

It should in addition be recognized that the intergovernmental location of certain of the remedial measures was in a real sense ‘contingent’ rather than ‘principled’, in the sense that it reflected political practicalities, rather than being reflective of a desire to proceed independently from the Lisbon Trea-

³¹ See U Puetter in this volume.

ty. Thus the Fiscal Compact was not made outside the Lisbon Treaty because the UK had vetoed Treaty amendment. It was made in this way because both Sarkozy and Merkel, albeit for different domestic political reasons, had promised that there would be reform to the primary Treaty, the consequence being that when this was blocked political face had to be saved by making a separate Treaty, notwithstanding that the desired result could have been achieved within the confines of the Lisbon Treaty, and notwithstanding the paradoxical fact that enforcement would have been more secure if this had been done. The ESM took the form of an international treaty outside the confines of the Lisbon Treaty for rather different reasons, these being temporal, viz that it was felt necessary to establish it before the amendment to Article 136 TFEU had come into force.

4. Inter-institutional Balance of Power and the New Legal Measures

The EU enacted plethora of measures to address the financial crisis. They represent a secular triptych, in which the two wing panels consist of measures designed respectively to assist and oversee ailing Member States, while the middle panel is comprised of current and future initiatives that reveal the interconnection between the two wings.³²

The EU put in place a range of measures to give *assistance* to Member States that were in severe economic problems as a result of the Euro crisis. The most important common element is conditionality, connoting the basic precept that funds are given on strict conditions concerning reforms that must be put in place by the recipient state, with the ESM being the principal mechanism through which such assistance is now secured.³³ The ECB has also played a role in provision of assistance, acting pursuant to Article 127(2) TFEU, both in the form of the securities markets programme, which sanctioned ECB intervention in the Euro-area private and public debt mar-

³² P Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in Adams, Fabbrini and Larouche (see fn above) Ch. 2.

³³ www.esm.europa.eu/.

kets,³⁴ and via the Outright Monetary Transactions, OMTs, which concern transactions in secondary sovereign bond markets ‘that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy.’³⁵ The legal status of this scheme will be determined by the CJEU in the light of the challenge raised by the German Federal Constitutional Court.

The other wing of the triptych takes the form of *increased supervision* over national financial institutions. Thus the regulatory apparatus for banking, securities, insurance and occupational pensions has been thoroughly overhauled,³⁶ and new measures have been introduced such as the Single Supervisory Mechanism and the Single Resolution Mechanism, which has increased EU oversight over national banking facilities. There were also major changes designed to increase oversight over national economic policy, because of the proximate connection between economic and monetary union. The driving force behind these changes was to tighten EU control over national economic policy in order to prevent the sovereign debt and banking crises that precipitated the crisis with the Euro. The legislative framework for economic union was amended through the ‘six-pack’ of measures in 2011,³⁷ which were enacted pursuant to Articles 121, 126 and 136 TFEU.³⁸ The measures were designed to render economic union more

³⁴ Decision 2010/281/ of the European Central Bank of 14 May 2010 establishing a securities markets programme [2010] OJ L124/8.

³⁵ www.ecb.int/press/pr/date/2012/html/pr120906_1.en.html.

³⁶ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) [2010] OJ L331/12; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [2010] OJ L331/84; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) [2010] OJ L331/4.

³⁷ www.ec.europa.eu/economy_finance/economic_governance/index_en.htm.

³⁸ Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the exces-

effective by tightening the two parts of the schema, surveillance and excessive deficit, the details of which were contained in the Stability and Growth Pact.³⁹ Further measures, the two-pack, were enacted on May 21 2013.⁴⁰ The rules on oversight over national economic policy analysis were also shaped by the Treaty on Stability, Coordination and Governance,⁴¹ also known as the Fiscal Compact, which was signed by 25 contracting states in March 2012.⁴² The provisions concerning assistance and those concerning oversight are ‘joined at the hip’, in the sense that grant of assistance under the ESM is conditional from 1 March 2013 on ratification by the applicant state of the Fiscal Compact.

sive deficit procedure [2011] OJ L306/33; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct macroeconomic imbalances in the euro area [2011] OJ L306/8; Results of in-depth reviews under Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances, COM(2013) 199 final.

³⁹ Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1; Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6.

⁴⁰ Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area [2013] OJ L140/1; Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11.

⁴¹ P Craig, ‘The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism’ (2012) 37 EL Rev 231; S Peers, ‘The Stability Treaty: Permanent Austerity or Gesture Politics?’ (2012) 8 EuConst 404.

⁴² Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 1-2 March 2012, available at www.european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=en.

The middle panel of the secular triptych comprises the set of measures enacted and proposed that are designed to lay the foundations for *genuine monetary and economic union*. This owes its origins to the Report produced by the President of the European Council in close collaboration with the Presidents of the Commission, ECB and Eurogroup, which may be referred to as the Four Presidents' Report.⁴³ It was produced at the behest of the European Council,⁴⁴ and was endorsed by it in December 2012.⁴⁵ The proposals contained a blend of assistance and supervision. Thus some proposals are principally aimed at provision of assistance that will render it less likely that Member States will need to seek help from the ESM. These proposals seek to address national economic vulnerability through 'limited, temporary, flexible and targeted financial incentives'⁴⁶ made operational through contractual arrangements between Member States and the EU, which would be mandatory for Euro-area Member States and voluntary for other Member States. They also seek to endow the EU with fiscal capacity, the objective being to facilitate adjustment to economic shocks.⁴⁷ There is also an oversight/ supervisory aspect to the proposals, which finds its expression principally in the proposals for an integrated financial framework, including in this respect what has become the Single Supervisory Mechanism, SSM and the Single Resolution Mechanism, SRM.

The EU has readily embraced the new supervisory mechanisms, as attested to by the speed with which the SSM and SRM have been moved forward. Progress toward the new assistance mechanisms has been more halting. This may seem paradoxical, given the natural intuition that Member States would be more willing to accept assistance than supervision. The paradox is however more apparent than real. This is because of the nature of the proposed assistance and the way in which it is to be made operational. The logic be-

⁴³ H Van Rompuy in close collaboration with J M Barroso, J-C Juncker and M Draghi, 'Towards a Genuine Economic and Monetary Union', 5 Dec 2012, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf. See also, A Blue Print for a Deep and Genuine EMU, Launching A European Debate, COM(2012) 777 final.

⁴⁴ www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/133004.pdf.

⁴⁵ European Council, December 13-14 2012.

⁴⁶ 'Towards a Genuine Economic and Monetary Union' (see fn above) 7.

⁴⁷ Ibid 7.

hind the proposal is in many ways impeccable. If some Member States run persistent economic deficits then this must be because of deeper systemic economic problems with their economy, the response to which is limited and targeted financial incentives designed to provide assistance, made operational through mutually agreed contracts or something akin thereto that will tailor receipt of the assistance to conditions designed to alleviate the underlying economic malaise. While the logic of the proposal may be impeccable, the effect is that the EU intervenes ever further back into Member State economies, with financial aid conditioned on tackling the economic malaise in accord with the diagnosis reached by the Commission. Member States may be reluctant to allow this degree of intrusion, since the terms will be largely dictated by the Commission. It is therefore not surprising that Member States have recently resisted efforts to take this type of initiative forward.

The impact on the inter-institutional balance of power of these enacted measures remains to be seen. Political reality can often belie prognostications made in the advance. We can nonetheless make certain conjectures in this respect, two of which are relatively obvious, but important notwithstanding that.

In vertical terms, the EU constraints on national political action whether in relation to fiscal policy, banking or securities regulation have been significantly increased. The imperative to clear draft national budgets with the EU before being finalized, to ensure that they are independently verified, to meet medium term financial targets, to do so within a particular time frame and to comply with the European semester, is the direct result of the new legislative schema. The resulting macro-economic union is unrecognizable from its Maastricht ancestor. These measures to prevent recurrence of sovereign debt crisis go hand in hand with SSM, SRM and the other features of banking union designed to render financial crisis precipitated by bank failure less likely. There is therefore no doubt that in vertical institutional terms the EU restraints on national political choice, whether exercised by national executives or parliaments, has increased. The very fact that Member States have been required to put in place measures to comply with their enhanced EU obligations concerning economic union has however also meant that national parliaments are able to scrutinize national budgets to a greater extent

than hitherto, given that this area has previously been largely regarded as falling within the province of national executives.

In horizontal terms, the duty to ensure enforcement of and compliance with the new raft of measures falls primarily to the Commission and the ECB. It is, *inter alia*, for this reason that it is important to distinguish between the inter-institutional dimension when the measures were being forged, from the power balance now that they are in place. The European Council may well have played a central role during the former period, but viewed from the latter perspective the Commission and ECB occupy centre stage. This is readily apparent if one stands back from the principal measures to deal with the crisis. It is the Commission that has a central role in relation to the six-pack, two-pack, ESM and Fiscal Compact, and its role will be even greater if and when other measures are enacted pursuant to the Four Presidents' Report. The provisions concerning reverse qualified majority voting in the six-pack and the Fiscal Compact are a forceful symbolic and substantive exemplification of this power, but there are numerous other articles in both sets of measures, as well as the ESM, which accord the Commission prominence. Nor should this come as a surprise. The European Council has developed significantly since the Lisbon reforms, as has its support structure. It does not however have the institutional capacity of the Commission to engage in the kind of systematic and detailed scrutiny required by the new rules. It may moreover be perfectly content to let the Commission take centre stage in this respect, with the consequence that the latter takes the 'heat' for decisions that will often not be popular at national level. This is more especially so given that the ratchet-effect of increased EU economic oversight with the Commission in the driving seat carries dangers for the Commission itself. Increased power brings increased responsibility. The hard-pressed Commission will have to deliver on a whole series of fronts, which will bring it face to face with domestic political imperatives. It is one thing to write down obligations, whether in Treaty provisions, legislation, other international Treaties or contracts. It is quite another

to enforce them. The ECB responsibilities have also been significantly enhanced in the financial sector.⁴⁸

In intra-institutional terms, there is more room for disagreement as to the consequences of the new regime. It is tempting to think of the larger creditor nations exercising ever-greater dominance over the debtor states, and those that are smaller, within bodies such as the European Council and the Euro group. There may well be some truth in this. We should nonetheless be cautious in this regard, for two related reasons. It is not clear from a temporal perspective whether the degree of such power is really greater than it was hitherto, given that the reality was always that the larger states wielded more power within these institutions. There are equal difficulties in evaluating precisely how the power balance between creditor and debtor nations plays out. It is of course true that the latter will be subject to conditionality terms set in part by the former. It should however also be borne in mind that the creditor states have foregone for the short term at least funds to aid those states in difficulty, with the opportunity cost consequences that flow from this. The intent is that the assistance assumes the form of loans rather than outright transfers, but whether this reflects reality remains to be seen. To the extent that it does not the opportunity cost of the assistance is all the greater.

5. Conclusion

The financial crisis has, as stated at the outset, shaken the very foundations of the EU and prompted renewed questions about its legitimacy, decision-making and inter-institutional disposition of power. It has however also revealed the EU's institutional resilience, its capacity to survive and its ability to legislate under stress, as testified by the plethora of measures enacted both within and outside the Treaty in order to meet the immediate dangers posed by the crisis and prevent its recurrence. We should however when reflecting on the institutional responsibility for and implications of the crisis do so in a symmetrical and balanced manner. This means thinking hard

⁴⁸ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63.

about the constitutional responsibility of Member States in this regard, rather than working on the explicit or implicit assumption that the fault resides entirely with the EU.

Keynote Address - Social Law in the Wake of the Crisis

Silvana Sciarra

1. Social Law as a Test Case

Current discussions originated by the crisis place social law at the crossroad of other critical evaluations and proposals.¹ This paper looks at how in the wake of the crisis EU legal methods related to employment and social policies are undergoing changes. Following a well-established tradition at the University of Copenhagen, EU legal methods are enriched in interdisciplinary approaches. For this reason, actions and policies in areas wrongly perceived as ancillary to the integration of the market should not be marginalised in a coherent theoretical framework.²

In this paper I select two main areas of reflection, starting from the observation that the economic and financial crisis has shaken the order of legal sources, raising issues of democratic legitimacy and accountability for all institutional actors.

In a first step I look at the current state of EU social dialogue, one of the most original features in the evolution of market integration, according to Jacques Delors' early intuitions, and not extraneous to the construction of a

¹ I wish to thank Einar Del Frate, LL.M. degree at the University of Florence, for his competent help in checking the references and for his valuable comments on the text. Usual disclaimers apply.

² U. Neergaard, R. Nielsen (eds.), *European Legal Method. Towards a New European Legal Realism*, Copenhagen: DJØF Publishing, 2013, in which mention is made of all previous books in a series covering an overarching interdisciplinary research field.

monetary union, as indicated in the Werner Plan.³ I follow this route in order to show that the lack of political consensus, accentuated by the crisis, caused a decline in the law-making process (articles 154-155 TFEU) and limited the quasi-institutional role of the social partners. Other processes were expanded, among all the European Semester, in which the social partners were not involved, as they should have been. I then observe some changes taking place in employment policies, which confirm the decline of the Open Method of Coordination (OMC).

In a second step I look at the impact of austerity measures on fundamental social rights. The European Semester deals with an *ex ante* examination of Member States performances and attempts to rationalise *ex post* consequences. Recommendations sent to national governments follow a path not comparable to the regulatory technique enshrined in Title IX TFEU, despite the fact that they often interact with employment policies. Furthermore, the European Stability Mechanism (ESM), agreed by Euro area Member States, gave rise to a complex procedure, to be initiated by the country experiencing serious economic instability. Memoranda of Understanding (MoUs), signed by the Troika and the Member States concerned to grant financial support (art. 13.3 ESM), reiterated controversial emergency measures. The effects caused by all these manoeuvres are now under the scrutiny of courts and international organisations and reveal a fragmented picture, both in the choice of litigation and in the results to be achieved. Decoupling economic governance from respect of individual and collective social rights can give rise to infringements of art. 2 TEU, art. 9 TFEU, and of relevant articles in the Charter of Fundamental Rights (CFR). New experiments in social law are in need of careful evaluation. The state of emergency cannot justify renouncing the rule of law.

³ Report to the Council and the Commission on the realisation by stages of Economic and Monetary Union in the Community - "Werner Report" - (definitive text) [8 October 1970], Bulletin of the European Communities, Supplement 11/1970.

2. First Step: EU Social Law despite the Crisis

There is urgency to contextualise social law in a theoretical framework, which also reflects a historical appraisal of the space covered by social policies in the EU. Historical reconstructions are controversial and commentators are divided. Wolfgang Streeck, for example, in a recent book in which he draws on arguments previously developed,⁴ puts forward a history of defeats, started in the Nineteen Seventies, when – as he claims – the European post-war settlement fell apart.

A very weak resilience of national states to the reformulation of social policies imposed by EU institutions and a growing rate of unemployment shows, in his view, the lack of centrality of trade unions in representing collective interests. A concrete confirmation of this negative trend is the fading away of centralised bargaining on wages, which runs parallel to the increase in public debt. Hence the transformation of the fiscal state in a debtor state, in which wage policies do not counteract the introduction of a single currency. Social partners are portrayed in Streeck's analysis as actors not well equipped to defend the autonomy of collective bargaining and to strengthen it against recurring interferences of EU institutions.

Jürgen Habermas has criticised Streeck's 'nostalgic' attitude, pointing to the paradox that going back to nation states would imply demolishing all that has been built in terms of democracy and constitutional norms at supra-national level.⁵ His plea for solidarity, passionately circulated through recent writings and expressly addressed as a response to Streeck's latest book, is very close to the voices of those European social lawyers, who are critically considering the devastating impact of the crisis, while attempting to rebuild a system of rights.⁶

⁴ W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism*. New York, London: Verso Books 2014.

⁵ J. Habermas, *Demokratie oder kapitalismus? Vom Elend der nationalstaatlichen Fragmentierung in einer Kapitalistisch integrierten Weltgesellschaft*, *Blätter für deutsche und internationale Politik*, *Blätter für deutsche und internationale Politik* 5 (2013), pp. 59-70. English version available at www.resetdoc.org/story/00000022337.

⁶ N. Countouris, M. Freedland (eds), *Resocialising Europe in a time of crisis*, Cambridge: CUP 2013.

Even before the explosion of the crisis, a CJEU's controversial case law, originated by *Viking* and *Laval*, brought into the public eye the dramatic phenomenon of social dumping. Apart from blaming this practice, the emphasis can retrospectively be placed on short-sighted forecasts by groups representing organised interests and on the lack of a clear-cut social policy orientation in secondary legislation. A partial answer is now in the compromise reached under the Greek Presidency to reinforce the Directive on posting of workers in the free provision of services.⁷ Member States should be able to impose to service providers requirements and control measures, which are deemed strictly necessary. In the construction sector, subcontracting liability will apply for posted workers with regard to pay.⁸ Meanwhile, national legislatures are introducing measures going even further than the new enforcement Directive.⁹ This issue will need to be further discussed at a supranational level and framed within additional measures to overcome the crisis, taking into account the potentialities of EU social dialogue even in this field.

Contemporary discussions related to the crisis pay a lot of attention to wage bargaining. It can be disputed that the Euro Plus Pact interfered with national collective bargaining, when it recommended that increases in wages should be linked to productivity and should be dealt with at a decentralised level.¹⁰ Even more problematic are the circumstances, which brought the ECB to surpass its own competence, addressing letters to national gov-

⁷ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System ('the IMI Regulation'), [2014] OJ L 159/11.

⁸ www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/141319.pdf.

⁹ Most lately cf. for example in France the so-called 'Savary' law, which – at the time I am writing – is under parliament's approval procedure, www.vie-publique.fr/actualite/panorama/texte-discussion/proposition-loi-visant-renforcer-responsabilite-maitres-ouvrage-donneurs-ordre-cadre-sous-traitance-lutter-contre-dumping-social-concurrence-deloyale.html and basedoc.diplomatie.gouv.fr/exl-doc/FranceDiplomatie/PDF/baen2014-03-07.pdf.

¹⁰ The commitments under the Euro Plus Pact are expressed in Annex 1 of the European Council Conclusions of 24/25 March 2011, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf.

ernments affected by serious economic instability, arguing for wage moderation, the decentralisation of collective bargaining and labour market reforms.¹¹

In different ways EU institutions aimed at controlling wage policies and reducing autonomous spaces for national bargaining agents. This is a counterintuitive model for a large part of European labour law scholarship, which built on collective autonomy its own post war identity. Voices of democratic groups representing collective interests were heard as a response to authoritarian regimes,¹² or as a confirmation of ‘countervailing powers’ connected to a well-established practice of collective bargaining, resistant against state interference.¹³

Entering the sphere of wage bargaining is also in potential breach of ‘collective autonomy’, namely the autonomy of the social partners, as it is now enshrined in EU primary law (art. 152 TFEU, art. 28 CFR). These sources indicate very clearly that the exclusion of competences in the Treaty for matters such as pay and freedom of association do not impede the initiative of autonomous collective organisations. In other words, autonomy as an expression of a fundamental right – the right to associate and bargain collectively – prevails as a principle of EU law on the exclusions dealt with in art. 153.5 TFEU. Hence, there is no legal basis in the Treaty to propose secondary law on excluded subject matters, but bargaining on any matter,

¹¹ K. Tuori, K. Tuori, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge: CUP, 2014, p. 102 ff. See also D. Tega, *Welfare rights in Italy*, in C. Kilpatrick, B. De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges*, EUI Department of Law Research Paper No. 2014/05, pp. 51-52, and M.L. Rodríguez, *Labour rights in crisis in the Eurozone: the Spanish case*, in C. Kilpatrick, B. De Witte (eds.), cit., pp. 108-109.

¹² Italy and Spain are two interesting, albeit different, examples. See S. Sciarra, *The ‘Autonomy’ of Private Governments. Building on Italian Labour Law Scholarship in a Transnational Perspective*, in A. Numhauser-Henning, M. Ronnmar (eds), *Normative Patterns and Legal Developments in the Social Dimension of the EU*, Oxford: Hart Publishing; S. Sciarra, G. Cazzetta, *Un ‘puente doctrinal’. Scienza giuridica ed evoluzione del diritto del lavoro. Intervista a Miguel Rodríguez-Piñero y Bravo-Ferrer*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno* 2013, p. 739 ff.

¹³ O. Kahn Freund, *Labour and the Law*, London: Stevens, 1972; Lord Wedderburn, *The worker and the law*, Harmondsworth: Penguin Books, 1986 (III edition).

based as it is on primary law, cannot be the object of interferences by EU institutions.

2.1 European Social Dialogue

Within this critical scenario it is instructive to test how the social partners respond and how collective autonomy in the EU can be considered an essential part of a constitutional theory. When national systems of collective bargaining, badly affected by the crisis, are confronted with low wages and poverty traps, supranational bargaining follows different paths. A few examples of the latest outcomes, within the so-called sector social dialogue,¹⁴ prove that European collective autonomy can take imaginative routes even in the difficult times we are experiencing.

The social partners in air transport have been successful in influencing European institutions on changes to be made in existing Regulations,¹⁵ in order to adopt the ‘home base’ criterion as the only one in determining applicable legislation for flight crew and cabin crewmembers. This measure aims at fighting social dumping and creating legal certainty in a very critical area of transport, in which litigation has been recurring in the last few years.

In the social dialogue committee for Central government administrations a framework agreement was signed. It sets 20 commitments to update Protocol n. 26 on Services of general interest, in compliance with the fundamental right to good administration and in response to budgetary constraints during the crisis.¹⁶

¹⁴ P. Craig, *EU Administrative Law*, Oxford: OUP, 2012 (II edition), pp. 238-241 devotes attention to these autonomous practices. See also A. Jobert (ed), *Les nouveaux cadres du dialogue social*, Brussels: P.I.E. Peter Lange, 2008; S. Clauwaert, I. Schömann, *European social dialogue and transitional framework agreements as a response to the crisis?* Policy Brief – European Social Policy 4, ETUI, Brussels 2011.

¹⁵ Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, OJ L 149, 8.6.2012.

¹⁶ The text of the agreement is accessible at www.epsu.org/r/569; see also www.cesi.org/index.html.

Finally, European social partners in the temporary agency sector have prompted better cooperation between private and public employment agencies, to become pivotal in employment policies and obtained in a very short time the proposal for a Regulation.¹⁷

Measures originated by sector social dialogue are not extraneous to the crisis, as much as they may appear a detour from other more relevant issues. They often refer – as in the examples I selected – to matters of broad institutional relevance.

2.2 A Network of Public Employment Services. From Harmonisation to Co-Operation

Improved labour mobility through EURES, facilitated by sector social dialogue in the temporary agency sector, is complementary to another legal act. A recent Decision,¹⁸ having regard in particular to art. 149 TFEU, creates a network of public employment services (PES) and assigns to this new supranational structure the task to support employment guidelines, referred to in art. 148.4 TFEU, until 31 December 2020. Such a revisited form of co-operation should also facilitate initiatives within the Youth Guarantee scheme,¹⁹ particularly for skills matching, labour mobility and transition from education and training to work.

This mixture of sources deserves some attention. The diminished impact of Title IX on employment policies has shown the weak side of a EU legal method, which took for granted the propensity of national administrations to

¹⁷ In 2012 Eurociett and Unieuropa global union, the social partners in the temporary agency sector carried on a project on labour market transitions in Europe and produced recommendations to EU policy makers. See European Commission, Social Europe, Newsletter n. 5, January 2014, p. 90-92. The Commission has proposed a Regulation, based on art 46 TFEU, which should facilitate labour mobility through EURES. See COM (2014) 6 final 2014/0002 (COD), 17.1.2014.

¹⁸ Decision No 573/2014/EU of the European Parliament and of the Council of 15 May 2014 on enhanced co-operation between Public Employment Services (PES), OJ L 159/32, 28.5.2014.

¹⁹ Council Recommendation of 22 April 2013 on establishing a Youth Guarantee, OJ C 120, 26.04.2013, p. 1–6.

interact and enhance best practices. In the body of Title IX a new binding legal act has now been implanted. The Decision establishing the PES network is addressed to Member States and accompanied by an Annex on benchmarking indicators, which can be amended by delegated acts of the Commission (art. 290 TFEU). The delegation of powers is conferred to the Commission until 31 December 2020, the established ‘expiring date’ of the PES system. Albeit for a limited time, the Commission is once more in the driving seat, if we accept that benchmarking – or ‘bench-learning’, as another neologism suggests – is not a mere statistical exercise.

The enhanced co-operation established under this Decision is different from the employment strategy, which nourished the OMC. This new partially revised method is targeted to provide new strength to employment policies in compliance with the agenda set in Europe 2020,²⁰ hence it expires at the end of 2020 and it concentrates on rather specific issues. Furthermore, projects developed by the network should have access to funding from the European Social Fund (ESF), the European Regional Development Fund (ERDF) and Horizon 2020. It is worth emphasising that this new co-operation requires very technical expertise.

However, that expertise should be finalised towards a political aim, namely to bring to the surface and to privilege employment policies in specific fields, as an answer to the dramatic impact of the crisis. Therefore, the selection of those who will become members of the network should mirror the competence of state administrations politically responsible for actions to be taken. Furthermore, this co-operation should aim at a fair distribution of funding. Employment policies in the wake of the crisis are meaningless without well-targeted financial support. From now to 2020 a new cooperative federalism, based on policies of social inclusion and support for the weakest groups hit by the crisis and marginalised in national labour markets, could emerge from the disillusion of employment policies under OMC.

Rearrangements, taking place in social and employment law sources, reveal a shift from harmonisation to co-operation. The core nature of govern-

²⁰ Communication from the Commission of 3 March 2010, Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020 final.

ance is changing, as a consequence of the crisis.²¹ The creation of an *ad hoc* specialised network of employment services could impoverish the role of the Employment Committee, which should operate in consultation with management and labour (art. 150 TFEU) and could even more contribute to de-politicise the deliberative process. However, if we take a constructive view, this new technical structure could profitably become the emanation of well-defined political decisions, should the Council adopt in the future clear-cut positions on employment and coordinate them within its different configurations. This should be part of reformed economic governance in the EU.

I mentioned before that emergency decisions to be taken during the crisis have increased the difficulty to gather political consensus around legislative proposals and have weakened the harmonisation of social policies. EU institutions are adjusting the legal methods enshrined in Chapters IX and X, exactly at the time when they lack the necessary accountability to do so. Changes should, on the contrary, be brought to the public attention in a more transparent way.

A reduced impact of harmonisation as a regulatory technique leads to the adoption of ‘quality frameworks’. Two recent examples are directly relevant for the discussion on measures to boost employment as a reaction to the crisis. One is the Youth Guarantee, based on art. 292 TFEU, dealing with a ‘good-quality offer of employment, continuous education, an apprenticeship or a traineeship within a period of four months of becoming unemployed or leaving formal education’.²²

The other example is the Recommendation on traineeship, based on art. 153 of TFEU’s Social Policy chapter. Adopted in response to the Annual Growth Survey 2014,²³ this source is characterised by the intent to improve

²¹ K. Armstrong, *Differentiated Economic Governance and the Reshaping of Dominium Law*, in M. Adams, F. Fabbrini, P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, Oxford and Portland, Oregon: Hart Publishing, 2014, p. 65 ff.

²² Council Recommendation of 22 April 2013 on establishing a Youth Guarantee, OJ C 120, 26.4.2013, *whereas* (5).

²³ Council recommendation of 10 March 2014 on Quality Framework for Traineeships, OJ C 88/1, 27.3.2014. Harsh criticism has been expressed by youth organisations www.youthforum.org/pressrelease/joint-letter-condemning-council-recommendation-on-quality-framework-for-traineeships/.

transparency and to encourage the conclusion of written agreements for the definition of educational objectives, working conditions and a reasonable duration of traineeships.

The noteworthy detail in both Recommendations is the encouragement addressed to Member States to make use of European Funds, namely the ESF and the ERDF, and to seek for technical assistance from the EU. Actions to facilitate access to employment, particularly when they enter the dramatic dimension of youth unemployment are meaningless without financial support from the EU. For too long this synergy has been under evaluated, but it cannot be ignored in the current discussion.

2.3 The Tripartite Social Summit for Growth and Employment

The space of deliberative democracy emerging from EU sector social dialogue despite being partial is, nevertheless, supported by criteria of representativeness and legitimacy of the social partners. These criteria, unlike for other deliberative processes, are established in a Decision addressed to the social partners.²⁴ Hence, the point can be made that a binding EU legal act has generated the practice of sector social dialogue, which enforces the fundamental right to collective bargaining. Primary and secondary EU law are supportive to autonomous collective autonomy. While all this takes place in the area of social dialogue, the procedure provided for in articles 154 and 155 TFEU, to pursue legislative initiatives in social policy, suffers from a declining political consensus.²⁵

²⁴ Commission Decision 98/500 CE of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level, OJ L 225/27, 20.05.1998. Empirical research is referred to in E. Léonard, E. Perin, P. Pochet, *The European Sectoral Social Dialogue: Questions of Representation and Membership*, in 42 *Industrial relations Journal* 2011, p. 254 ff.

²⁵ For example, failure to adopt legislation on restructuring, after lengthy investigations into this area caused a complaint by ETUC to the European Ombudsman, following a previous initiative of the European Parliament, as for Art. 225 TFEU, namely the formal request to ‘submit any appropriate proposal’ on matters relevant for the implementation of the Treaty, petition.etuc.org/IMG/pdf/ETUC_complaint_to_EU_Ombudsman_on_European_Commission.pdf.

One further contradiction to highlight is the imperfect composition of the Tripartite Social Summit for Growth and Employment, which includes representatives of employers and labour. The specific composition of this Council²⁶ can be considered an anomaly, when compared with other Council's 'configurations' indicated in art. 16.6 TEU. The Commission seems now aware of this and is proposing a more visible role of the tripartite summit within the overall architecture of economic governance.²⁷ It is, in fact, hard to deny that employment and growth constitute essential elements of macroeconomic strategies.

In the attempt to facilitate coordination of policies and set targets within specific deadlines, the European Semester has progressively ignored the involvement of social partners. The strengthened economic governance program, part of the Stability and Growth Pact, incorporates the so-called Macroeconomic Imbalance Procedure, in order to detect problems at an early stage. The instrument adopted by the Commission is the Alert Mechanism Report, which, at the beginning of the fourth European Semester in November 2013, brought the Commission to the screening of all Member States, on the basis of a scoreboard of indicators.²⁸ But social rights were not part of that assessment, despite the Commission's declared intention to strengthen the social dimension of economic governance.

In a Resolution, followed by specific Recommendations to the Council,²⁹ the EP acknowledges critically its own limited involvement and develops a

²⁶ Council Decision 2003/174/CE of 6 March 2003 establishing a Tripartite Social Summit for Growth and Employment, OJ L 70/31, 14.3.2003. It can be worth to recall that in European Council Decision 2010/594 EU of 16 September 2010, OJ L 263/12, 6.10.2010, amending the configuration of the Council to reflect changes provided for in the Lisbon Treaty, no mention is made of the Tripartite Social Summit.

²⁷ Communication from the Commission to the European Parliament and the Council, Strengthening the Social Dimension of the economic and monetary union, of 2 October 2013, 690 (2013) final, 14. The EP Committee on Employment and Social Affairs, in its Motion for a Resolution of 6 January 2014, 2013/0361 (APP) suggested to expand even further the competences of the Summit.

²⁸ ec.europa.eu/economy_finance/economic_governance/documents/2014-03-05_in_depth_reviews_communication_en.pdf.

²⁹ European Parliament resolution of 25 February 2014 on the European Semester for economic policy coordination: Employment and Social Aspects in the Annual Growth Survey 2014

detailed critique of the European Semester. Social indicators, unlike in the Macroeconomic imbalance procedure scoreboard, are not binding. They are inadequate, in particular with regard to inequalities due to lowering wages and in-job poverty. Wage increases are not sufficiently encouraged, despite the beneficial impact they could have in increasing propensity to spending.³⁰ The EP also underlines a critical unbalance and lack of coordination among Ecofin, on the one hand, and Employment and social affairs council meetings, on the other.

The EP stigmatises institutional imbalances – for example the lack of coordination among different configurations of the Council – as a consequence of the exceedingly strong position assigned to the Commission, seen as the leading actor in running the show of the European semester. The criticism raised by ETUC runs along similar lines.³¹ Furthermore, a recent study³² shows the contradictions emerging from the implementation of austerity measures. The largest cuts in social spending took place in countries with a high risk of poverty and social exclusion. Limitations put on public spending prevailed on measures for social inclusion and no attention was paid to the increasing level of poverty among working people. All these missed opportunities in further enhancing social law demonstrate that inequalities among weak groups in the labour market are the prevailing outcomes of current economic governance.

There is enough evidence to prove that the European Semester does not interact in a constructive way with social dialogue and in some cases puts severe limits to it. However, if we look at the implantation of social dialogue in EU primary law and in the practice of EU social partners, the indication is that there are ways to pursue democratic forms of collective interests representation. The auspice for the future is to expand social dialogue even further, with a view to creating a legal framework for transnational

(www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/2158 (INI)).

³⁰ See, for instance, Building growth: Country-specific recommendations 2014, Commission Press Release, IP/14/623, 6.2.2014.

³¹ www.etuc.org/documents/etuc-position-european-commission-communication-strengthening-social-dimension-economic#.U2-wFyidSbk.

³² ETUI, *Benchmarking Working Europe 2014*, Brussels: ETUI aisbl., 2014.

agreements signed by large multinationals operating within the EU and by European sector and cross-sector federations. This practice, yet another imaginative expression of collective autonomy, is increasingly expanding inside and outside the EU.³³

3. Second Step: the Role of International and EU Law

In taking the first step, I started from the legal preconditions allowing some expansion of social law despite the crisis. In social law I have included social dialogue, a clear manifestation of the fundamental right to collective bargaining. I now turn to austerity measures affecting social law, both at national and supranational levels.

The negative impact of the crisis has been visible in all countries of the EU, albeit with varying degrees of infiltration within welfare and labour law systems.³⁴ Austerity measures dealing with fundamental social rights also affect institutional balances, whenever they come into collision with EU law. The route chosen by different actors to challenge austerity measures, relying on ILO³⁵ and Council of Europe sources, while at the same time sending preliminary references to the CJEU, is an indisputable sign of the widespread fear that democracy and the rule of law are being threatened.

It has been suggested that a ‘legitimacy dilemma’ lies behind fiscal and economic policies adopted in the EU.³⁶ The option to de-politicise choices

³³ S. Sciarra, M. Fuchs, A. Sobczak, *Towards a legal framework for transnational company agreements*, Report to the ETUC, with the support of the European Commission DG Employment, Brussels 2013, www.etuc.org/documents/etuc-resolution-proposal-optional-legal-framework-transnational-negotiations-multinational#.U4IM1SidSbk, I. Schömann et al., *Transnational collective bargaining at company level*, ETUI, Brussels 2012.

³⁴ M.-C. Escande Varniol, S. Laulom, E. Mazuyer (eds.), *Quel droit social dans une Europe en crise?*, Brussels: Larcier, 2012; Z. Darvas, G. B. Wolff, *Europe’s social problem and its implications for economic growth*, Bruegel Policy Brief 2014/3, April 2014, www.bruegel.org/publications/publication-detail/publication/823-europes-social-problem-and-its-implications-for-economic-growth/.

³⁵ On austerity measures and ILO sources see for example A. Koukiadaki, L. Kretsos, *The case of Greece*, in M.-C. Escande Varniol, S. Laulom, E. Mazuyer (eds.), cit., fn above, pp. 199-200.

³⁶ K. Tuori, cit., fn above, p. 211.

and solutions to be taken as a response to the crisis can go into the direction of applying specialised and technical expertise, instead of strengthening political deliberations. The state of emergency ends up justifying the abandonment of a European legal method. This analysis is confirmed by the examples I gave above.

In this process social law is the ‘eternal loser’.³⁷ The voice of the Commission, in the attempt to offer answers, is fragmentary and not too coherent. Proposals, such as the ones discussed before dealing with the reform of the European Semester and of economic governance, do not seem to reach the core problems. The lack of political consensus in the Council jeopardises legislative initiatives in the social field and gives rise to all sorts of weak experimental solutions. Social law should instead offer valid countermeasures in the wake of the crisis and at least limit concerns among those who see their entitlements to fundamental rights shaken if not diminished.

In a recent study the evocative figure of a ‘triangular prism’ is suggested to connect the rule of law with democracy and fundamental rights in the EU.³⁸ The study develops a critique of instruments, such as monitoring and benchmarking, used in the assessment of country performances, within the overall architecture of the European Semester. The marginal role of the EP is also stigmatised and seen as yet another sign of weak democratic legitimacy. A way of controlling the enforcement of art. 2 TEU by Member States – it is suggested – is in art. 7 TEU.

Art. 7, added in 1997 by the Amsterdam Treaty to the TEU to provide a monitoring mechanism for countries of enlargement, is situated by the authors at the centre of a discussion on austerity measures, which have affected in different ways a large number of Member States. That Treaty amendment has not coincided with reinvigorated human rights policies within the EU, notwithstanding the establishment of the Fundamental Rights Agency. Nevertheless, it could still play a significant role in a new and perhaps stronger strategy.

³⁷ Ibid., p. 231.

³⁸ S. Carrera, E. Guild, N. Hernanz, *The triangular relationship between fundamental rights, democracy and the rule of law in the EU. Towards an EU Copenhagen mechanism*, Study commissioned by the EP Committee on Civil liberties, Justice and Home affairs, CEPS 2013.

Issues related to the breach of social rights are not specifically addressed in this study, but the critique of surveillance mechanisms within the scheme of the European Semester developed by the authors is applicable to social policies, which are an integral part of economic manoeuvres. However, actions for the prevention of violations in the national textures of fundamental rights were not put in place by means of existing EU instruments in the bailout countries, nor in other countries coming under the scrutiny of EU institutions. The point to make clear, in fact, is that all different sources adopted in the aftermath of the crisis generate parallel discussions on breaches of fundamental rights.

A survey focused on MoUs, which, as already mentioned are negotiated by the Troika and the countries required to adopt austerity measures, is developed in a 'legal opinion' commissioned to the Bremen centre of European law and Politics (ZERP).³⁹ References in this study are to infringements of EU law and to responses found in a systematic interpretation of international law sources, with an aim to expanding the scope of protection of fundamental rights and establishing responsibilities. The underlying allegation is that a state of emergency cannot lead to suspending the rule of law, nor can affect the foundations of democracy. Troika is not accountable in international law, but the ECB and the Commission are. The latter have acted as EU institutions in the crisis and must be considered responsible for breaches of fundamental rights ex art. 6 TEU. Their obligation is at the same time towards Member States and citizens.⁴⁰

Proposals put forward in this legal opinion try to respond back to the disillusion generated by austerity measures among EU citizens and to the serious attacks perpetrated to States' sovereignty. A systematic interpretation of all EU and international law sources, with a view to creating a safety net around fundamental rights, must, nonetheless, take into account the very weak position of individuals affected by MoUs and the uneven capacity of organised groups to pursue strategic litigations.

³⁹ A. Fisher Lescano, *Human Rights in Times of Austerity Policy. The EU institutions and the conclusion of Memoranda of Understanding*, Bremen 17 February 2014. The opinion was commissioned by the Vienna chamber of labour, in cooperation with the Austrian trade union federation, ETUC, ETUI.

⁴⁰ Ibid., pp. 5-7.

Results can be very fragmented, as it appears from the analysis of national cases.⁴¹ In a preliminary reference, which is still pending, the *Tribunal do Trabalho do Porto* in Portugal asks the CJEU to evaluate whether the right to equal treatment has been breached, following wage cuts in the public sector, required by the 2012 budget law. It is argued, with reference to art 31.1 CFR, which guarantees fair working conditions, that fair wages should also be protected, to avoid the undermining of families' stability.⁴² The CJEU had declined a similar reference, coming from the same court, since it 'did not contain any concrete element allowing to infer that the Portuguese law was aiming to apply Union law'.⁴³ The interaction among courts is further complicated by the views of the Portuguese Constitutional Court. Ruling on a complaint filed by some members of Parliament, the Court decided that the 2011 budget law was not in violation of the right to equal treatment, since measures addressed to the public sector were in line with the agreements signed with the Commission and the IMF, which assigned more sacrifices to civil servants. The latter are regarded as citizens more observant than others towards the public common good. In 2012 the Court ruled differently on wage cuts – holidays and Christmas allowances – highlighting the increased hardship imposed on citizens and the unfairness in sharing sacrifices.⁴⁴ In 2013 the Constitutional Court was asked to evaluate the constitutionality of the 2013 budget law, this time on a complaint filed by the President of the Republic, Members of Parliament and the Ombudsman. Despite the fact that the economic conditions had not drastically changed from the previous budget law, the Court found that the equality principle had been breached, in assigning more sacrifices to civil servants.⁴⁵ In 2014 once more the Court ruled unconstitutional articles in the budget

⁴¹ A wide-ranging and deep analysis of national cases in C. Kilpatrick e B. De Witte (eds), cit., fn above.

⁴² CJEU, Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros*, pending.

⁴³ CJEU, Case C-128/12 *Sindicato dos Bancarios do Norte*, [2013] ECR nyr.

⁴⁴ J. Gomes, *Social rights in crisis in the Eurozone. Work rights in Portugal*, in C. Kilpatrick, B. De Witte (eds.), cit., fn above, p. 81.

⁴⁵ G. Coelho, P. Caro de Sousa, 'La morte dei mille tagli'. *Nota sulla decisione della Corte Costituzionale portoghese in merito alla legittimità del bilancio annuale 2013*, in *Giornale di diritto del lavoro e di relazioni industriali* 2013, p. 527 ff. See also R. Cisotta e D. Gallo in C. Kilpatrick, B. De Witte (eds.), cit., fn above, pp. 90-94.

law introducing cuts to state sector workers who earned over a certain ceiling and reducing pensions and welfare benefits.⁴⁶

It is impossible to enter the technicalities of these decisions, which have attracted a lot of attention and will continue to do so, waiting for the CJEU's ruling, still to be delivered. They prove, once more, how difficult it is to establish equilibrium between the judiciary and the lawmakers in the wake of the crisis. Despite all these uncertainties in the judicial arena, Portugal is a success story for the Troika, since in the last three years the country regained both international credibility and financial stability, ending the bailout program.⁴⁷ However, there are a few clouds in this sky, if one considers that, despite welfare and wage cuts so unevenly distributed, unemployment remains very high. If Portugal was to be taken as a paradigm, the EU institutions should now enter a post emergency phase and activate supportive social measures. A different dialogue should start with the same actors – be they judges or members of parliament or civil society organisations – which fought back austerity measures, trying to keep alive democracy and the rule of law.

In the Greek case other contradictions emerge. The European Committee of Social Rights (ECSR), following a collective complaint filed by Greek unions, decided for the discriminatory nature of lower wages paid to workers under 25 years and invited national courts not to apply national law. The same was suggested for measures degrading living conditions. The Committee had to adopt a proportionality criterion and clearly stated that 'measures taken to encourage greater employment flexibility with a view to combating unemployment should not deprive broad categories of employees of their fundamental rights in the field of labour law, which protect them against arbitrary decisions by their employers or the worst effects of economic fluctuations'. It also referred to the position taken by the Greek national commission for human rights, which had expressed 'the imperative need to reverse the sharp decline in civil liberties and social rights'.⁴⁸ This

⁴⁶ Tribunal Constitucional de Portugal, Acórdão nº 413/2014 of 30.5.2014; euobserver.com/news/124434.

⁴⁷ *Il Sole 24 ore*, 6 May 2014.

⁴⁸ ECSR, General federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v.

citation shows that the domestic alert mechanism, assigned to a body in charge of guaranteeing compliance with human rights, was not taken into consideration by the legislature, constrained within the scheme of the MoU, which took precedence as an emergency measure.⁴⁹

The language of the ECSR in another case filed by Greek trade unions is even more specific, when it addresses the cumulative impact of austerity measures as a criterion to evaluate the breach of social security rights. The arguments brought by the Committee are once more illuminating as for the role that should be assigned to *ex ante* empirical examinations of the overall impact of emergency decisions. The point made is that ‘the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures, that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society.’ And ‘(n)either has it discussed the available studies with the organisations concerned, despite the fact that they represent the interests of many of the groups most affected by the measures at issue’.⁵⁰

The results of judicial activism and social mobilisation in countries badly hit by austerity measures deserve careful evaluation. The ECSR in particular has developed very relevant legal analysis, which should be now considered by the EU institutions as a starting point for a new strategy in social law. The non-binding nature of this Committee’s decisions does not obscure the moral value that should be attached to them. Labour standards should be restated as a clear response to the detrimental effects of the crisis.

4. An Institutional Disorder - Some Concluding Remarks

A plea for solidarity, in response to sceptic and nostalgic views on the future of the EU, entails the construction of stronger supranational institu-

Greece, Complaint n. 66/2011, Decision on the merits of 23.5.2012. Comments in K. Tuori, K. Tuori, cit., fn above, p. 239.

⁴⁹ See M. Yannakourou and C. Tsimpoukis, *Flexibility without security and deconstruction of collective bargaining. The new paradigm of labour law in Greece*, in 35 Comparative Labour Law and Policy Journal 2014, p. 339 ff.

⁵⁰ ECSR, Federation of employed pensioners of Greece (IKA- ETAM) v. Greece, Complaint n. 76/2012, Decision on the merits of 7.12.2012.

tions, transparently empowered in redistributing resources and in reconstructing clear links of representation. Measures dictated by the crisis have, on the contrary, changed the nature of states' competences in recognising specific entitlements both to individuals and collective organisations and have not fully clarified under which conditions weaker groups in the labour market will be the addressees of supportive measures.

The examples offered in this paper show an institutional disorder, which has been provoked by recourse to emergency measures of different nature and weight. Social law has been taken as a test case, with special regard to the functions traditionally assigned to the social partners, re-invented despite the crisis. One point to make is that attempts to regain social emancipation in the countries most affected by austerity measures have been made by trade unions and other collective organisations. In such a way new inequalities and serious exclusions from basic welfare services have emerged and now are being discussed in the public sphere.

The crucial point is how to recover from the institutional disorder, disclosed by these new forms of judicial activism and social protest. 'The shift from legislation to contract'⁵¹ clearly underlined with references to present institutional circumstances, shows the many risks inherent in negotiations undertaken in a state of emergency. Hence, there is an urgent need to regain space for legislation inspired by the fundamental values of the EU. We should recall that solidarity is a source of social integration, besides money and administrative power. In this perspective EU legislation should re-assign entitlements to individuals and to groups representing collective interests and should do so with full respect for democracy and the rule of law.⁵²

⁵¹ P. Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, in M. Adams, F. Fabbrini, P. Larouche (eds.), cit., fn above, p. 29.

⁵² J. Habermas, cit., fn. above. See also J. Habermas, *Between facts and norms, Postscript (1994)*, Cambridge: Polity Press, 1997, p. 449 ff.

Reception
at the University of Copenhagen
(29 May 2014)

Welcome Address

Jacob Graff Nielsen

Excellences, ladies and gentlemen,

My name is Jacob Graff Nielsen, and as Dean of the Faculty of Law, University of Copenhagen, it is with pleasure that I welcome you all to this reception in the beautiful ceremonial hall of the University of Copenhagen.

It is probably safe to assume that you after an interesting and fruitful yet long day at the XXVI FIDE Congress do not long for a lengthy welcome speech by me. I have even noticed a few of you nibbling at your congress programs and I shall not keep you from the important sustenance and socialising of this reception for long.

The dates of the FIDE Congress are well-chosen indeed. The EU Parliament elections have just been held in the EU Member States and such an election always gives us an impression of the current temperature of the EU citizens' view on the EU right now.

In Denmark, the number of 465.758 has filled the headlines in the national newspapers. Mr. Morten Messerschmidt from the Danish Folk Party – representing a very EU sceptical position – received the largest number of personal votes in an EU Parliament election in Denmark ever – even surpassing the previous record held by former Prime Minister Poul Nyrup Rasmussen. On Mr. Messerschmidt's election posters, he gives the slogan “more Denmark” the thumbs up, while the EU receives the thumbs down. The Danish Folk Party received 26.4 per cent of all votes cast in the Danish EU Parliament election. However, the instrument of euro-scepticism is not only playing in Denmark. We can clearly hear similar notes in a number of EU Member States, not least in France and in the UK.

Speculations about the reason for this widespread EU scepticism are dominant in the media and are no doubt also the topic for hallway discussions at the EU institutions. It is natural to assume that the financial crisis and un-

popular austerity measures play a role, and some also speculate, that the election results reflect a more general discontent with the traditional political parties in a number of EU Member States. Probably, such deliberations are also present at the coffee tables of this congress.

To me, another question is more vital: Why is it that the purpose and value of the EU for each individual EU citizen is so difficult to disseminate? To some extent the numbers behind the EU Parliament elections are important: Only 43 per cent of the European citizens actually cast their vote at this election meaning that 57 per cent did not. In fact, we do not know the opinion of the majority of EU citizens and this is to me the real challenge for the EU.

Some would state that attention to the European idea is required. Others would probably say, that attention in the media concerning the EU is in general not to the benefit of the EU. In Denmark, EU legislation does find its way into the Danish media often focusing on the following question: Is it reasonable that other EU citizens have the right to enjoy the same tax funded social benefits as Danish citizens? It is not difficult to convince many Danes, that the answer to this question should be negative.

On the other hand, Europe faces serious competition from for instance Asia and South America in the race for economic growth, innovation and the creation of new jobs which clearly calls for cooperation. And the disconcerting gunfire echoing from the eastern borders of the EU and the instability of Ukraine rekindling the old East-West conflict should also remind us, that peace and stability are never to be taken for granted.

In Denmark, we have recently commemorated the Battle at Dybbøl 150 years ago against Prussian and Austrian troops, which led to a catastrophic defeat for Denmark and the loss of a third of Denmark's population and two fifths of the state's territory. On a painting in this very ceremonial hall, you can witness the celebration of Danish students from this university, who took up arms against the invading Swedes in 1659, fought valiantly and thus earned the right to carry a light sword. Some of our present students might even miss this right to carry arms after the Danish Governments' recent Study Progress Reform.

Any Germans, Austrians and Swedes present in this room. Please, do not fear that students armed with light swords will enter the room in order to

usher you to the tiny and damp university prison cell, which is quite close at hand.

Armed conflict is no longer the tool for interstate relations in Europe. Diplomacy and law are, and within the EU in particular EU law.

This congress deals with many important aspects of European law. Law is not only the instrument of politics but also the very fabric of relation between humans. Whatever challenges Europe faces, research and debate about the legal aspects of the EU cooperation play a vital role. The FIDE congresses are important contributors to the ongoing study of and research into the legal developments of Europe. The purpose of research is to create new knowledge, and the EU Parliament elections clearly illustrate, that new knowledge about EU law is in continuous demand.

Before the elections to the EU parliament, the Danish Parliament issued a cartoon video about “Voteman” in order to catch the interest of young voters in particular. “Voteman” was a hard-hitting and brutal man, who threw armchair voters out of their windows, beat them up and pulled them into the polling booth. This very colourful, graphic cartoon hit the newspaper headlines and the Parliament had to withdraw it the day after the launch. As a public service, I can inform you, that the cartoon is still available on Youtube.

The European debate needs more than cartoons and muscle men. We need academic debate and discussions about Europe in order to tackle the European challenges.

As Dean of the Faculty of Law, I am very proud of hosting this congress in close cooperation with the Danish Association of European Law. I would like to extend my sincere gratitude to the former Dean, Mr. Henrik Dam, who so enthusiastically supported the idea of hosting this congress.

As Dean, it is essential to recognise, that impressive performances by the Faculty are never created by yourself alone. Such landmark performances are created by the researchers and administrative staff members, who work together tirelessly to create the organisation and academic content of a huge endeavour such as this congress. It is therefore very important for me to direct my warmest gratitude to Professor Ulla Neergaard, Associate Professor Catherine Jacqueson and Tina Futtrup Borg along with her administrative

colleagues. You make me proud to the very core of my heart and it is indeed your efforts which make the Faculty shine.

Before anybody among the participants of this reception of a similar stature to “Voteman” removes me forcibly from this rostrum, I wish you all a pleasant reception and a continued fruitful congress in Copenhagen.

Thank you for listening.

Gala Dinner at
the National Museum of Denmark
(30 May 2014)

Keynote Speech - Observations on the Recent EP Elections

Joseph Weiler

Fateful Elections? Investing in the Future of Europe

I will address the three most conspicuous features of the recent elections – the Anti-European vote, the continued phenomenon of absenteeism, and the innovation of the Spitzenkandidaten.

The Anti-European Vote and the I-don't-Care-About-Europe Vote

The fathers have eaten sour grapes and the children's teeth shall be set on edge.

In trying to explain the large Anti-European Vote (winners in France and the UK as well as some smaller Member States of the Union) much has been made of the effect of the Economic crisis. Sure it has been an important factor but it should not be used as an excuse for Europe once more Ostrich like to stick its head in the sand. The writing has been on the wall for a while.

In 2005 the constitutional project came to a screeching halt with when it was rejected in a French referendum by a margin of 55% to 45% on a turnout of 69%. The Dutch rejected the Constitution by a margin of 61% to 39% on a turnout of 62%. (The Spanish referendum which approved the Constitution by 76% to 24% had a turnout of a mere 43% way below normal elec-

toral practice in Spain, hardly a sign of great enthusiasm.) I think it is widely accepted that had there been more referenda (rather than Ceausescian majority votes in national Parliaments) there would have been more rejections, especially if had the French and Dutch peoples spoken at the beginning of the process.

It is also widely accepted that the French and Dutch rejections and the more widespread sentiment for which they were merely the clamorous expression were ‘a-specific.’ They did not reflect dissatisfaction with any concrete feature of the “Constitution” but expressed a more generic, inchoate, inarticulate unease, lack of enthusiasm not only for ‘more Europe’ but for Europe as it had become.

This early and less pathological ‘Anti-European’ manifestation could not be explained away as a reaction to “the crisis” – it occurred at a moment of prosperity and reasonably high employment. Europe was also riding high in the world, a promising contrast with America at its Post Iraq worst. Xenophobia was less *a la mode* and the immigrant issue less galvanising – the supposed ‘invasion from the East’ not a real issue. Europe was not ‘blamed’ for anything in particular, but it was clear that it had largely lost its mobilising force.

Political legitimacy typically rests on three pillars: Process (input – what we call democracy), Results (output) and Narrative (identity, myth, dream – what some political historians call political Messianism). Process and Narrative are the deep political resources to which polities turn in times of crisis. Europe suffered and continues to suffer, unless you are happy to stick your head in the sand, from a persistent democracy deficit so that its input legitimacy was always very weak. The potent narrative of the early decades had dissipated (in part as a result of its very success, in part because of the aging of the founding generation) Its legitimacy rested on the most precarious pillar of the three: Results. And those were impressive. But precarious. It is one of the most profound features of the current European circumstance that the ontological position of Europe as part of the polity has been replaced by a utilitarian rationale – a project in need of constant justification even in major Member States.

That was the true lesson to be taken out of the constitutional debacle. It could not be business as usual.

Instead, the reaction of the powers-that-be, *la classe politique*, [us] ranged from the willfully blind (a French and Dutch accident rooted in local conditions), to the dishonorable, and shocking. Dishonorable? The immediate reaction of the Commission when the Constitution tanked was to explain that ‘we [meaning us] failed to explain Europe well enough’ – a manifestation in all but name of the odious Marxist theory of false consciousness. We are right, they – the people – simply do not understand. Brecht famously ironised: The People have disappointed, lets change the people.

That’s not easy, but what we did was a close second best: The “Constitution” was repackaged as the Treaty of Lisbon, of course with no referenda, and it was back to business as usual. What was bronchitis in times of prosperity becomes pneumonia in times of crisis – but the bacillus is the same.

[In passing, I note in these very days similar reactions: One Prime Minister – We have to simplify Europe (too complicated for the people to understand.) Or ‘jobs jobs jobs’ – back to a Bread and Circus view of politics and European Citizens, as if all that citizens cared about were bread and butter issues. It would really be a profound mistake to explain away the combination of active Anti Europeanism and passive apathy simply by reference to the economic crisis and Europe’s inability or way of solving it. Sure that is a catalyst but the malaise is far deeper.]

I do not find alarming at all, having 15% of the European Parliament composed of Anti-Europeans. Democracy thrives on contestation. Far more worrying is the triangulating impact that some of these parties have on mainstream politics and what they tell us about the depth or otherwise, of liberal pluralistic ideals in broad swaths of society.

Absenteeism: A Proxy for the Community Deficit

It used to be denied, in both political and academic circles, that Europe still suffered from a democracy deficit. The usual trope trotted out to defend the democratic credentials of the Union was the historic increase in the powers of the European Parliament, which even before the Lisbon Treaty could credibly be called a veritable co-legislator with the Council. But here is the classic and embarrassing paradox: The more powers the European Parlia-

ment has gained, the greater popular indifference toward it seems to have developed. The turn-out rate has declined persistently from election to election ever since the first direct elections in 1979, and reached historical lows in many Member States as well as for the Union as a whole in 2009. There was an expectation that the elections this year would reverse the trend: The early campaign start, the Spitzenkandidaten, the fact that Europe had become a central question for national politics. And yet the most generous thing one can say is that there was not a further decline. If we exclude Belgium and Luxembourg in which voting is legally obligatory, the turn out drop below 40% i.e. it is still the case that less than 4 out of 10 Europeans bothered to vote.

The persistent low turn out is alarming not only as a sign of apathy but as compromising the ability of the European Parliament to speak authoritatively as the European vox populi. It is a true problem for a polity when a branch of government powers – and the EP has very considerable powers – are not matched by its political authority. And that, I fear is the current condition of the European Parliament.

How to explain this decline. Are “the people” stupid? Quite the contrary. At the heart of democracy there is choice. The people get to choose. And reduced to its most primitive they get to choose a “who” and a “how”. Who will govern? He from the Left or, perhaps She from the right? And How will one be governed. Austerity or Growth? Its basic, is it not?

And yet that is precisely what did not happen in EP elections. Because of the very design of Europe, governance without government, you did not get, as a voter, the possibility “to throw the scoundrels out” – a basic feature of democracy in all our Member States. What’s more, there was only a very weak connection between voter preference as expressed in EP elections and the Union’s political orientation and legislative program.

The large absenteeism is, in my view, a proxy for another phenomenon – the visible proof of the collapse of the much taunted of what today might only be called the ‘solidary myth’. There are many reasons for this – but the world of law bears its responsibility too. The continuous enthrallment to the culture of rights, the continuous self-satisfied affirmations in one way or another of who wonderful we are in ‘putting the individual in the center’ comes with a price: an erosion of Europe as community or rather a commu-

nity of self-centered individuals. This is most notable in the discourse (and the Jurisprudence) of European citizenship in which the discourse of responsibility, duty, social nexus, loyalty – the hall marks of political citizenship are either absent or weak.

The Spitzenkandidaten – An Investment in the Future

Credit goes to the President of Parliament and his colleagues for trying to change this by in the 2014 elections.

Has the exercise been a success? It is easy to trash the experiment. Overall turnout did not rise (but did not decline either); few voters, it seems, outside Benelux and Germany were aware that they were voting for a President of the Commission, the selection of the candidates could perhaps been more public. The elections remained national even the European issue became part of national politics. The list goes on.

But all that is understandable and predictable. The measure of success will only be known at the n e x t elections in five years. This needs some explaining.

First, of course, Parliament will have to get its act together and have an agreed candidate which enjoys the required majority. Junker has been given the first shot, but even in Parliament the outcome is not certain. The real problem is far deeper – even fundamental and contradictory. If, as is likely, whoever emerges as the choice of Parliament will require the support of both the EPP and S&D – it will complicate the ability of the President elect to offer a clear political – ideological identity to the Presidency, one of the main objectives of the whole exercise, at least as described by the candidates themselves.

It brings into sharp relief possibly the most profound issue to which the Spitzkandidaten gives rise: Should the President of the Commission be ‘Political but not Partisan’ (the Barroso thesis) or should voter preference in choosing not only this or that President but this or that party (with an ideological line) be translated into the policies espoused by the President of the Commission and indeed the Commission. Strange as it may seem, it appears

that this issue was not addressed with real seriousness even within Parliament itself.

Second, for the exercise to succeed, the European Council will have to follow the choice of Parliament.

I think the argument based on Article 17 that the European Council is *obligated* to follow the Parliamentary choice is overstated both as a matter of law and as a matter of politics.

Article 17 allows the Parliament to block all proposals by the Council but not to impose its candidate. It allows, likewise, the Council to propose but not to impose. In effect it recognises that the European Council and the European Parliament represent, as is common in many federal states, two different forms of democratic legitimation and creates a design which requires the consent of both Institutions in the choice of the President. Either Institution has the legal power to block the process, but not to impose its choice. It is not a flawless formulation. One could imagine a composition of Parliament in which no candidate proposed by the Council receives the necessary majority. There is no express 'fall back position'. But on the whole one can see a certain political wisdom in the procedure of Article 17: The President of the Commission needs to enjoy legitimation and authority deriving from both 'houses of democracy' which make up the Union.

In exercising its role of submitting a name to the Parliament, the European Council must take into account the results of the elections. 'must take into account' cannot plausibly be interpreted as 'must follow.' It is clear that by speaking of consultations, and providing for majority voting, the Council is meant to be a deliberative body and not a mere rubber stamp. Taking into account is a soft term. It could, for example, be credibly claimed that by nominating someone from the winning party due account has been taken of the elections.

There is, thus, certainly, no legal duty on the European Council to follow the choice of Parliament – indeed, to suggest such would be to run, what is in my view, the letter and spirit of the law. Neither Institution is meant to be a rubber stamp to the other.

If there is an imperative of the Council to accept the choice of Parliament it must be a political imperative rather than a legal one.

But here, too, the issue is not straightforward.

- I think the argument that in the current circumstance of European politics, the Heads of State and Government speak with no less democratic legitimacy than the European Parliament is not a specious argument. Given that the Leading Candidate had an outright victory in only 12 of the Member States and in two others shared the podium with his rival adds poignancy to this point.
- I think, equally, it is a stretch to claim that other than in a highly formal sense, the European peoples have really chosen any one of the five candidates as their choice for the Presidency of the Commission. The polls we have at the time these observations are being written are sketchy, but I think the common observation that in most jurisdictions the elections remained ‘national’ and that few electors were casting their vote with a view to who will emerge as President of the Commission must hold a lot of truth. It does not detract from the legally binding result but compromises the ability in a political sense for this or that candidate to say with authority I was elected by the Peoples of Europe.
- I think that there will be many who might think that right now Europe needs a different profile of person for the job.

I do not necessarily endorse any of the above arguments, but they are not irrational or unprincipled or specious.

There is, thus, in my view not only no legal imperative but the reality of the electoral results – a clear victory in less than half the Member States, a low turnout in all but the ones where voting is obligatory and a sense that the electors had not really turned their mind to the Presidential issue all suggest that no compelling political imperative is dictated by these results.

So what is the European Parliament to do? I think that the principled and correct approach is as follows. The European Council has the constitutional right and the duty to consult, take into account the results of the elections and propose a candidate that enjoys the support of at least a majority of Council Members. The selection of the President of the Commission should

be the result of the voice of the peoples speaking through their two channels as provided by the Treaty. It is a wise choice.

Having said that, I think that in exercising its political discretion, it would be the wisest and most prudential choice (understanding prudence in its deepest meaning) for the Council to follow the outcome of the elections and propose the winning candidate as agreed by Parliament. Not as is argued stridently these days because to do otherwise would be to thwart the will of the people. That is a weak case.

But because on the one hand to do otherwise would inflict huge damage on the European Parliament – something clearly not in the interest of Europe, particularly not at this moment. Parliament is a body with important powers but weak political authority. This is not good for democracy. What is more, such a choice might precipitate a constitutional crisis in which it is not clear who will be the winner, Council or Parliament but it is clear who will be the loser: the credibility of the Union.

But even more importantly, to follow the Spitzkandidaten exercise logic would be a most important investment in the future of European democracy. Establishing this precedent, will have the potential of transforming the **next** elections. It will help galvanise moves towards truer pan European parties; it will create a new dynamic for the choice of future candidates, it will above all help Parliament match its formidable legislative powers with appropriate political authority since the lesson of this outcome will most likely have an important impact on voter behaviour in five years. It is wise to invest in the economic future and promise of Europe. It is likewise wise to invest in its democratic future and promise.

Panel Discussion: In the Era of Legal
Pluralism – The Relationship between
the EU, National and International
Courts, and the Interplay of the
Multiple Sources of Law

(31 May 2014)

Speech

Vassilios Skouris

L'occasion m'est donnée, dans le cadre de ce panel, de pointer plus particulièrement les formes que revêt le dialogue entre la Cour de justice de l'Union européenne et les plus hautes juridictions nationales.

Il est un fait que nous entretenons un contact informel avec celles-ci, que nous participons autant que possible aux manifestations qu'elles organisent, que nous recevons souvent des délégations à Luxembourg et que nous attachons une grande importance à ces rencontres, parce qu'elles nous permettent de discuter librement avec nos collègues et d'aborder en toute franchise des évolutions problématiques. Nous ne manquons certes pas d'occasions de réunions bilatérales ou multilatérales, qui sont utiles à tous pour communiquer des informations, des idées, mais aussi des inquiétudes. La composition du panel d'aujourd'hui, qui comprend M^{me} Koskelo, M. Sauvé et M. Voßkuhle, est une illustration de ce dialogue. Grâce à cet échange d'informations sur les questions qui nous occupent, nous savons tous très exactement ce que nous faisons et le droit que nous disons.

Pour concrétiser mon propos, j'évoquerai un bref exemple en matière procédurale: c'est à l'occasion d'une rencontre avec des représentants de hautes juridictions nationales que nous avons été rendus attentifs au potentiel dissuasif – pour procéder à un renvoi préjudiciel – de notre pratique considérée comme restrictive en termes d'application de la procédure accélérée. Nous avons ainsi infléchi récemment cette pratique dans des circonstances de contentieux de masse accompagné du risque d'expulsion du domicile principal¹.

¹ Voir, à cet égard, l'ordonnance du président de la Cour du 5 juin 2014, Sánchez Morcillo et Abril García, C-169/14, EU:C:2014:1388, et l'arrêt de la Cour du 17 juillet 2014, Sánchez Morcillo et Abril García, C-169/14, EU:C:2014:2099.

L'interaction informelle est parfois doublée d'une interpénétration sur le plan personnel qu'il ne convient ni de sous-estimer ni de méconnaître: la Cour comprend notamment d'anciens membres de hautes juridictions nationales, qui apportent à son travail l'expérience notable obtenue dans leurs fonctions antérieures. Il arrive également que des membres de la Cour la quittent en intégrant une haute juridiction nationale et puissent ainsi utilement se prévaloir dans leurs nouvelles fonctions des connaissances acquises à Luxembourg.

Ajoutons à ceci que depuis la mise en place du Comité de l'article 255 TFUE, des représentants de hautes juridictions nationales participent à l'évaluation des candidats au poste de juge ou d'avocat général à la Cour. Ils contribuent, par ce biais, à garantir la qualité du dialogue formel entre la Cour et les juridictions nationales.

Car la coopération entre la Cour et les juridictions nationales suprêmes repose, tout comme celle avec les juridictions nationales de rang inférieur, avant tout sur les traités fondateurs, qui l'ont institutionnalisée sous la forme du renvoi préjudiciel. Dans un contexte où, comme l'a souligné la présidente de notre panel, la complexité, la diversité et l'imprévisibilité seraient croissantes, il peut être utile de se raccrocher aux méthodes qui ont fait leur preuve et aux concepts simples; or le renvoi préjudiciel reste à tous égards le canal de dialogue le plus efficace.

C'est, d'abord, un instrument avantageux pour les deux parties au dialogue car il repose sur une division claire des tâches. L'interprétation et l'application du droit national, même si ce dernier trouve son origine dans le droit de l'Union, restent de la compétence exclusive du juge national. La Cour doit interpréter le droit de l'Union ou en vérifier la validité, en laissant à la juridiction de renvoi le soin de trancher le litige dont elle est saisie sur la base des indications qu'elle lui a fournies. Le droit national reste donc le domaine réservé des juridictions nationales et la Cour se concentre sur le droit de l'Union, pour que celui-ci soit interprété et appliqué de façon uniforme dans tous les États membres.

C'est, ensuite, un instrument qui permet aux juridictions nationales d'exercer une véritable influence sur le développement du droit de l'Union. Parfois malheureusement aussi en l'empêchant quand elles s'abstiennent

d'interroger la Cour là où, pourtant, une réponse de cette dernière serait nécessaire. Mais heureusement beaucoup plus souvent en la saisissant des bonnes questions, et en y indiquant le cas échéant leur interprétation du droit de l'Union en cause et les éventuelles conséquences de la réponse de la Cour sur l'ordre juridique national.

Certes, le renvoi préjudiciel opère une distinction entre les juridictions de rang inférieur et les juridictions suprêmes des États membres en ce que ces dernières, appelées évidemment à statuer en dernier recours, sont soumises par le traité à *l'obligation* – et non la *faculté* – de procéder à un renvoi préjudiciel sauf si l'interprétation du droit de l'Union est certaine. Mais cette obligation ne crée pas de hiérarchie et reflète plutôt l'importance de la tâche qu'assument les juridictions suprêmes dans leur pays.

Nous ne disposons pas d'indices fiables qui nous conduiraient à penser que les juridictions nationales ne remplissent pas les fonctions qui leur sont attribuées par l'article 267 TFUE. Nous avons plutôt l'impression que, tôt ou tard, les questions importantes sont soulevées devant notre Cour et nous permettent de nous exprimer sur l'interprétation du droit de l'Union ou sur la validité des mesures prises par les institutions.

À cet égard, il importe de souligner que cette constatation vaut tant pour les cours suprêmes que pour les juridictions inférieures des États membres, tout en rappelant que les problématiques que ces dernières soumettent à la Cour ne sont pas de moindre importance pour le développement du droit de l'Union.

Speech

Julia Laffranque

Ce qu'il y a de moins simple, de moins naturel, de plus artificiel, c'est-à-dire de moins fatal, de plus humain et de plus libre dans le monde, c'est l'Europe.

Jules Michelet. (Introduction à l'histoire universelle, 1834).

Introduction

Two years ago while opening the XXV FIDE Congress in my hometown Tallinn I emphasised the importance of protection of individuals and their rights as a common denominator in all FIDE topics and expressed my wish to live in a Europe governed by the rule of law instead of asking which legal order has the supremacy over another. While at that time European Union (EU) was concentrating on economic and monetary crises, today we are unfortunately facing additional social problems leading to political crises. Furthermore, in a much larger Europe tragic events of continuous political nature with serious impacts on human rights and security take place.

Therefore, it is growingly important in Europe to put more emphasis on the protection of people who are the real and genuine cornerstones of European construction and the holders of fundamental rights and guarantee their access to justice. A noble calling should be to choose the highest protection of human rights irrespective of its source.

Moreover, here, in Copenhagen it is appropriate to remember the so-called Copenhagen criteria which include respect of rule of law, the principle of democracy and fundamental rights. It is essential that these criteria are endorsed not only upon accession, but also during the EU membership,

that it is applicable to the EU institutions as well and exportable outside the borders of the Union to a wider European legal area.

Dialogue between Courts in Pluralistic Context: Common Denominator

The question is not so much about who has the last word or even the first word (who initiates the dialogue), or about which formal legal rule as such, international, European or national prevails mechanically over another, but foremost about the legal rules in substance, in which the concept of justice adopted in a certain community could be mirrored and about the effective implementation of these legal rules in practice.

The Inter-American Court of Human Rights has said that justice cannot be sacrificed for the sake of mere formalities, as long as a suitable balance between justice and legal certainty is preserved.¹

When speaking about the relationship between the courts in pluralistic context one should start with looking for common denominators that will bring us closer and enhance our mutual understanding. The independence, quality and enforceability of justice are key elements for all the courts.

I see the human rights conscience: shared values and uniform interpretation of at least common minimum standards of human rights protection – as a potential element of becoming increasingly the common denominator in European legal area. This human rights conscience needs to be developed and it will help us to overcome the issues of potential conflicts in the relationship and interplay between multiple sources of law and their interpreters/implementers.

I dare to provide a following non-exhaustive list of these denominators:

- Sharing of values, such as fidelity to rule of law and democracy and a common aim: enduring commitment to respect and protect human rights;

¹ Inter-American Court of Human Rights, case of *Cayara v. Peru*, judgment of February 3, 1993, § 42.

- Assuming its role within the division of powers with important emphasise on assuring the independence of courts;
- Facing the common outside threats, such as austerity, terrorism, populism, extremist political tendencies, and crisis in society, threat of human rights violations by powerful private entities, problems in the field of data protection. It is also the common task of the courts to ensure that the rule of law is upheld in the creation and application of the mechanisms to fight against such threats;
- Challenges to work constantly with living instruments: ability to adapt, and if necessary expand the law and its interpretation to new developments in society, science and environment at the same time upholding the fundamental values;
- Coping with constant workload, balancing between quality, quantity and reasonable time requirements, dealing with problems of repetitive nature, elaborating the methods how to organise its work more effectively and set priorities;
- Importance of the implementation/enforcement of court judgments;
- One common denominator could also be the use of corresponding interpretative tools and methods how to solve cases, for example similarities in the proportionality test between national courts and the Pan-European courts (European Court of Human Rights, ECtHR and Court of Justice of the EU, CJEU). Furthermore, both, the ECtHR and the CJEU use autonomous concepts of rights, they also rely from time to time on comparative research to determine how certain rights are protected in different states and internationally and display rather evolutionary and dynamic court practices.

Scope and Conditions for Dialogue

The interchange should be seen in a **broader context**, not just between judges including between national judges themselves, but also in the interaction with legislature and executive, society in general, civil society, lawyers, government agents, NGO-s, bodies of different international organisa-

tions, media and academia. It is vital to talk about the burning issues and look for the division of competences, distribution of workload.

The dialogue between different jurisdictions at least in European level is undoubtedly of great essence towards a more coherent judicial protection for the benefit of whole people living in the legal area of Europe. Communication, openness and compromises are essential elements in this respect. This dialogue proceeds to a large extent through judgements. Coping with constructive critics is one important aspect of a successful interaction. Dialogue does not mean automatically to agree with one another, but it is important for the development of the case law and improves the quality of judgments. One vital element of the dialogue which sometimes is underestimated is the ability to listen. It is also important that the shared responsibility will not be blurred among multiple players and that people know which jurisdiction is responsible.

The dialogue between the courts depends upon what is the position of international law in a particular national law and on both the substantial and procedural level and possibilities for applying human rights and European law.

Essential conditions for an effective dialogue are: good will and “interaction mentality” of judges; understanding of each other’s tasks; mutual respect and the readiness to accept that different functions and different dimensions (national/transnational) might inevitably lead to outcomes with differences.

Methods to Avoid/Solve Potential Conflicts

There are various examples of good interaction and also of some methods how to avoid/overcome potential conflicts. They can be both procedural through special institutions (preliminary rulings, advisory opinions) and also substantial *via* case law, e.g. through the judgments of Pan-European courts that have developed *de facto erga omnes* case law.

The European Court of Human Rights has endorsed the preliminary ruling system of the CJEU by holding that national courts whose decisions are not open to appeal under domestic law are required to give reasons, based

on the applicable law and the exceptions laid down by the CJEU case law for their refusal to refer preliminary question on the interpretation of EU law.²

Furthermore various legal doctrines have been created and applied by the courts such as that of direct applicability and supremacy of application of supranational law, harmonious interpretation of national law with European law, concept of European consensus and exceptions of uniform application of European law for the sake of national identity or due to margin of appreciation of national authorities and lastly the doctrine of equivalent protection of fundamental rights.

Another doctrine developed by both the ECtHR and CJEU in a similar way is trying to solve the complexity of relationship between international and European law by permitting the review of lawfulness of European acts implementing international law.³

On the other hand the Strasbourg and Luxembourg courts have also avoided to interfere each other's terrain: for example the ECtHR has said that it is for national courts to resolve issues of interpretation of domestic law, including to decide the conformity of national law with the EU law, and therefore it does not fall into the competence of the ECtHR.⁴ The CJEU has in turn stated that the EU law does not govern the relationship between the Convention and the legal systems of the Member States and it does not lay down the consequences to be drawn by national courts in the event of conflict between the rights guaranteed by the Convention and a provision of national law.⁵

Naturally the case-law of both the ECtHR and CJEU are intertwined, especially on the domain of protection of fundamental rights where they do have different competences and different background, sometimes even diverse "ideologies", but they do pay attention at each other's case law.

² Most recently in *Dhahbi v. Italy*, no. 17120/09, April 8, 2014.

³ CJEU judgment of September 3, 2008, joined cases C-402/05 P and C-415/05 P (*Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*); ECtHR judgment of September 12, 2012, *Nada v. Switzerland* [GC], no. 10593/08.

⁴ *Ullens de Schooten et Rezabek v. Belgium*, nos 3989/07 and 38353/07, September 20, 2011, § 54.

⁵ *Åklagaren v. Hans Åkerberg Fransson*, C-617/10, 26 February 2013, § 49.

It is to be regretted that the internal obligations of the EU in respect of fundamental rights – the Charter becoming binding, did not coincide with the external obligations – access of the EU to the Convention which has not yet been completed. Nevertheless, the accession is on its way now and we are all looking with great interest for the opinion of the CJEU.

It is not always easy to strike a fair balance between *effet utile* (be it of the EU law, be it of the Convention system) and subsidiarity; as well as between examining individual cases and fulfilling the role of a Pan-European court with constitutional approach – these are common problems for both the CJEU and the ECtHR.

Central Supernatural Role of National Judges

But I would say that it is even much more difficult for a national judge to find his/her way in the European landscape and to try to decode the guidelines given by the Pan-European courts and predict their possible reaction. The judgments of Pan-European courts have increased the responsibility of national courts in applying European law.⁶ Thus, dealing with supranational issues might require from a national judge supernatural abilities. National judge needs to think also that its decisions might have impact in other Member States.

It is interesting to observe how in 2006 in an opinion expressed about the interpretation of the Estonian Constitution in order to prepare Estonia's accession to euro the Supreme Court of Estonia was favourable in defining the issue of supremacy rather than leaving it open and stated that the European Union law shall apply in the case of a conflict between Estonian legislation, including the Constitution, with the EU law.⁷

However six years later, in 2012 while analysing the Treaty establishing the European Stability Mechanism, the Estonian Supreme Court *en banc* held *obiter dicta* that the constitutional amendments made in the framework

⁶ E.g. judgments of the CJEU in cases *Köbler*, C-224/01, September 30, 2003 and *Traghetti*, C-173/03, June 13, 2006 and various pilot judgments of the ECtHR.

⁷ Opinion of the Constitutional review Chamber of the Supreme Court on the interpretation of the Constitution, no. 3-4-1-3-06, May 11, 2006.

of the EU accession do not authorise the integration process of the EU to be legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent and more extensive interference by the EU primary law with the principles of the Constitution might necessitate to seek the approval of the holder of supreme power, i.e. the people, and presumably amend the Constitution once again.⁸

In my opinion it is imperative to stress that national courts/judges are not only ordinary courts/judges within the European Union legal order to implement the EU law, but they are human rights courts/judges as well.

The CJEU finds it important to preserve uniform application of EU law, to endorse the facilitation of legal co-operation and construction of an area of freedom, security and justice. This often involves sensitive matters and it is not only about mutual recognition of systems and legal policies, it is about rights of concrete individuals and their destinies. Advocate general Pedro Cruz Villalón has pointed out that although mutual recognition is an instrument for strengthening the area of security, freedom and justice, it is equally true that the protection of fundamental rights and freedoms is a precondition which gives legitimacy to the existence and development of this area.⁹

No judge should become fundamental rights blind because the judges are bound by the Charter and Convention.¹⁰

This is also why, last but not least, many informal mechanisms of dialogue and contacts: regular meetings, exchange of information and experiences in the framework of reciprocal visits, conferences, such as ECtHR annual seminars in Strasbourg and training sessions should be encouraged in

⁸ Supreme Court en banc (Grand Chamber) no. 3-4-1-6-12, July 12, 2012.

⁹ Opinion of Advocate general *Cruz Villalón* in *I.B. v. Conseil des ministres*, C-306/09, July 6, 2010, § 43. See also the concerns expressed in the European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), which underlines that the EU has set itself the aim of offering its citizens an area of freedom security and justice and pursuant to Article 6 of the Treaty on European Union (TEU), it respects human rights and fundamental freedoms, thereby taking on positive obligations which it must meet in order to honour that commitment.

¹⁰ See also *Callewaert, Johan*, Grundrechtsschutz und gegenseitige Anerkennung im Raum der Freiheit, der Sicherheit und des Rechts, ZEuS 1/2014, pp. 79-90, p. 90.

the new era of legal pluralism. It is important to further cultivate a European judicial culture based on ethics and respect for human rights.

Conclusions

My conclusions as to the improvement of the relationship are the following:

- Continues development of clear, coherent and well-reasoned case law and mutual respect;
- Open-mind for international and European law and developments;
- Continuous training and informal meetings;
- Uniform interpretation of minimum standards of human rights protection;
- Transparency, accountability, independence and quality which increase authority also towards outside;
- Relations respecting respective roles with other state powers and players in European legal area;
- Focal points in national courts and Member States on European law and in Pan-European courts on international and national law and case law;
- Joint research and theoretical studies also on comparative law between different courts in areas of common interest;
- Increase of visibility, access and dissemination of case law including summaries of most important judgments;
- Effective implementation once entered into force of the Protocol No 16 of the Convention on advisory opinions and of the accession treaty of the EU to the Convention;
- National judges should feel themselves as part of European process, as insiders not outsiders.

Finally, I would like to express how pleased I am that the organisers of XXVI FIDE Congress have realised the prominence of this topic and have concentrated an important panel to these issues which certainly will help to

a better mutual understanding *via* “Copenhagen criteria for the interplay between different courts.” I congratulate the organisers, in particular the president of FIDE, Professor Ulla Neergaard for high-level congress and all the tremendous work they have put in it.

Thank you!

Speech

Andreas Voßkuhle

Wenn wir die Entwicklung des Zusammenspiels der nationalen mit den europäischen Verfassungsgerichten, also dem Gerichtshof der Europäischen Union und dem Europäischen Gerichtshof für Menschenrechte, im europäischen Verfassungsgerichtsverbund betrachten, können wir drei Phasen erkennen. Die erste Phase war die der Selbstvergewisserung und Abgrenzung der Gerichte im europäischen Institutionengefüge. Es folgt die Phase des Ausbaus und der Festigung des vertikalen Dialogs der Verfassungsgerichte. Derzeit intensiviert sich auch der horizontale Dialog der Gerichte – dies ist die dritte Phase.

Phase 1: Selbstvergewisserung und Abgrenzung der europäischen Verfassungsgerichte

In der ersten Phase stand die gegenseitige Abgrenzung der europäischen Verfassungsgerichte durch die Zuordnung von Zuständigkeiten und Prüfungsmaßstäben in dem neu entstandenen Mehrebenensystem im Vordergrund. Exemplarisch ist hier das Verhältnis der nationalen Verfassungsgerichte zum Gerichtshof der Europäischen Union. Dessen Anliegen war es, Prinzipien zu entwickeln, um die eigene Aufgabe im Institutionengefüge, also die Sicherung der einheitlichen Anwendung des Gemeinschaftsrechts in den Mitgliedstaaten, effektiv wahrnehmen zu können. Ausgangspunkt war die Entscheidung van Gend/Loos über die Eigenständigkeit des Gemeinschaftsrechts und dessen unmittelbare Geltung in den Mitgliedstaaten. Ein nächster Schritt des Gerichtshofs zur Festigung der eigenen Position war seine Rechtsprechung zum Anwendungsvorrang des Gemeinschaftsrechts

gegenüber dem nationalen (Verfassungs-) Recht. Der fragmentarische Charakter des Gemeinschaftsrechts begünstigte es zudem, dass der Gerichtshof etwa mit seinen Urteilen zur unmittelbaren Wirkung von Richtlinien oder der gemeinschaftsrechtlichen Staatshaftung rechtsergänzend beziehungsweise rechtsfortbildend tätig werden und sich als „Motor der Integration“ profilieren konnte. Ein Beispiel für die Abgrenzung der „Rechtsprechungssphären“ von Seiten der nationalen Gerichte ist die Grundrechtsjudikatur. So behielt sich das Bundesverfassungsgericht zunächst vor, Gemeinschaftsrecht an den Vorgaben des Grundgesetzes zu messen, solange die Europäische Gemeinschaft nicht über einen dem Grundgesetz adäquaten Grundrechtskatalog verfügt. Inzwischen hat der Gerichtshof seinen Grundrechtsschutz konsequent ausgebaut und das Bundesverfassungsgericht nimmt nur noch eine Reservekompetenz wahr.

Phase 2: Ausbau und Festigung des vertikalen Dialogs der europäischen Verfassungsgerichte

Mittlerweile sind die Fragen der Abgrenzung nicht vollständig, aber im Wesentlichen geklärt. Wir befinden wir uns nach meiner Einschätzung nun in der zweiten Phase. Im Mittelpunkt stehen der Ausbau und die Festigung des Dialogs zwischen den europäischen Verfassungsgerichten einerseits und den nationalen Verfassungsgerichten andererseits durch die Entwicklung von Techniken, die den Gedanken Eigenständigkeit, Rücksichtnahme und Fähigkeit zu gemeinsamem Handeln gleichermaßen Rechnung tragen (sogenannte Verbundtechniken). Dieser vertikal ausgerichtete Dialog ist die erste Dimension der Verantwortungsteilung der Gerichte.

Wichtigstes prozessuales Instrument des Austausches im Unionsrecht ist das Vorabentscheidungsverfahren. Dass Fragen zur Auslegung des Primärrechts oder der Gültigkeit des Sekundärrechts dem Gerichtshof der Europäischen Union vorgelegt werden, ist Ausdruck der Verantwortungsteilung in einem Verbund, in dem die Ebenen des Unionsrechts und des nationalen Rechts zusammenhängen.

Auch der EGMR und die nationalen Verfassungsgerichte, die über eng verwandte – teils parallele, teils komplementäre – Grundrechts-Kataloge ju-

dizieren, haben Verbundtechniken entwickelt. So zieht das Bundesverfassungsgericht die Konvention und die Rechtsprechung des EGMR bei der Bestimmung von Inhalt und Reichweite der Grundrechte und Verfassungsprinzipien des Grundgesetzes als Auslegungshilfe heran, um Kollisionen bereits im Vorfeld zu vermeiden. Der EGMR konzentriert sich seinerseits darauf, einen Mindeststandard des Grundrechtsschutzes zu definieren und belässt den nationalen Gerichten einen Einschätzungsspielraum beim Umgang mit über lange Zeit gewachsenen Grundrechtstraditionen der betroffenen Rechtsordnung.

Dass dieser Rechtsprechungsdialog in einem Spannungsverhältnis stattfindet und Abgrenzungsmomente fortbestehen, wurde zuletzt bei der Diskussion über die Åkerberg-Fransson-Entscheidung des Gerichtshofs erkennbar. Die großzügige Auslegung des Tatbestandsmerkmals der „Durchführung des Unionsrechts“ in Art. 51 Abs. 1 Satz 1 GrCh birgt die Gefahr, dass durch eine generelle Verlagerung des Grundrechtsschutzes von der nationalen auf die supranationale Ebene ein vermeintlich höherer Grundrechtsschutz zum Preis der Zielgenauigkeit und Sachnähe erkaufte wird. Aus institutioneller Sicht ist eine Zentralisierung des Grundrechtsschutzes beim Gerichtshof ohne Einbindung der nationalen Verfassungsgerichte und des für den Menschenrechtsschutz auf überstaatlicher Ebene vorrangig zuständigen EGMR bedenklich.

In welche Richtung sich die Grundrechtsjudikatur des Gerichtshofs in diesem Punkt bewegt, bleibt abzuwarten.

In der Siragusa-Entscheidung vom 6. März dieses Jahres deutete der Gerichtshof noch einen eher restriktiven Umgang mit der Åkerberg-Rechtsprechung an. Unanwendbar sei die Charta, wenn die unionsrechtlichen Vorschriften in dem betreffenden Sachbereich keine Verpflichtungen der Mitgliedstaaten im Hinblick auf den im Ausgangsverfahren fraglichen Sachverhalt schaffen. Lediglich mittelbare Auswirkungen nationaler Regelungen auf einen unionsrechtlich geregelten Sachbereich seien nicht ausreichend.

Demgegenüber führt das Ende April ergangene Urteil in der Rechtssache Pfleger vermutlich zu einer Erweiterung der Reichweite der Grundrechtecharta. Danach soll ein Fall der „Durchführung“ von Unionsrechts auch vorliegen, wenn ein Mitgliedstaat eine im Unionsrecht vorgesehene

Ausnahme als Rechtfertigung für die Beschränkung einer Grundfreiheit in Anspruch nimmt. Dabei verknüpft der Gerichtshof offenbar die Åkerberg-Fransson-Entscheidung mit der ERT-Rechtsprechung. Dieses Verständnis des Anwendungsbereichs der Charta legt jedenfalls der Wortlaut etwa der deutschen, französischen oder englischen Sprachfassung des Art. 51 Abs. 1 Satz 1 GrCh nicht nahe.

Phase 3: Ausbau und Festigung des horizontalen Dialogs der europäischen Verfassungsgerichte

Parallel zur zweiten Phase hat die dritte Phase begonnen. Mit der Vertiefung des horizontalen Dialogs der nationalen Verfassungsgerichte tritt eine zweite Dimension der Verantwortungsteilung hinzu.

Die Gerichte gehen dazu über, sich gegenseitig bei der Sicherung der Herrschaft des Rechts zu unterstützen. Dies führt zu einer institutionellen Stärkung der Gerichte, wenn sie das Recht gegenüber der Politik beziehungsweise den Organen der Mitgliedstaaten und der Europäischen Union durchsetzen. Die Entscheidungen etwa des portugiesischen Verfassungsgerichts zu den Sparvorhaben der Regierung oder des türkischen Verfassungsgerichts zur sogenannten Twitter-Sperre beziehungsweise der Justizreform sind vielleicht bereits auch ein Indiz dieser „neuen Stärke“ der Verfassungsgerichte. Hier dürfen wir aber nicht stehen bleiben, sondern müssen in Zukunft noch intensiver darauf schauen, was die anderen Verfassungsgerichte des europäischen Gerichtsverbundes machen. Durch die Einbettung unserer Tätigkeit in ein internationales und europäisches Bezugsfeld wird auch eine rechtsvergleichende Analyse noch stärker an Bedeutung gewinnen. Die ausdrückliche Bezugnahme auf Verfassungsgerichtsentscheidungen anderer EU-Mitgliedstaaten durch entsprechende Zitierungen stärkt die Position des rezipierten Gerichts und leistet darüber hinaus einen wichtigen Beitrag bei der Entstehung einer gemeineuropäischen Rechtsordnung.

Ein Miteinander der europäischen Verfassungsgerichte findet seinen Ausdruck aber nicht nur in der wechselseitigen Rezeption der Judikatur, der Übersetzung und Verbreitung der eigenen Entscheidungen, sondern auch in dem Erfahrungsaustausch der Richterinnen und Richter. Für die befruchten-

de Fortentwicklung der europäischen Verfassungskultur bietet auch der diesjährige FIDE-Kongress eine hervorragende Plattform.

Speech

Jean-Marc Sauvé

En Europe, nous vivons dans une pluralité d'ordres juridiques – les ordres juridiques nationaux, celui de l'Union européenne et celui de la convention européenne des droits de l'homme – qui doivent être articulés entre eux, sans qu'ils soient clairement subordonnés ou hiérarchisés. Les sujets de droit s'inscrivent par conséquent dans des réseaux de normes et de juges qui comportent des risques de perturbations ou de contradictions. Ces risques se sont accrus ces dernières années (I). Ils peuvent en partie être résolus grâce à des instruments de stabilisation (II). Mais ils appellent plus que jamais une coopération loyale et active entre les juges nationaux et européens (III).

I. Le contexte actuel: des risques de turbulence élevés qui résultent d'une intégration juridique accrue

L'enchevêtrement des ordres juridiques nationaux et européens s'est accentué en étendue et en profondeur. En étendue : le droit européen innerve des pans de plus en plus larges et diversifiés de nos législations nationales, comme les travaux de ce congrès l'ont encore illustré, notamment dans le domaine de la commande publique. L'extension du droit de l'Union, par exemple en matière d'union économique, monétaire et bancaire, de droit pénal –avec, notamment, le mandat d'arrêt européen-, ou d'asile et d'immigration, sont des facteurs de plus grande efficacité des politiques publiques et de renforcement de la garantie des droits. Mais ils peuvent aussi être sources de tensions avec les droits nationaux.

L'approfondissement des droits européens engendre aussi de tels risques, avec l'opposabilité de la Charte des droits fondamentaux, l'évolution de la

jurisprudence de la Cour européenne des droits de l'Homme et le développement de la portée des principes de primauté, d'unité et d'effectivité du droit de l'Union.

Les progrès du droit européen créent donc, entre les ordres juridiques nationaux et européens, des tensions accrues qui se concentrent pour l'essentiel sur :

- 1) le respect des identités constitutionnelles nationales ;
- 2) l'étendue et la portée exactes des transferts de souveraineté consentis par les Etats au bénéfice de l'Union ;
- 3) les offices respectifs des juges, qu'ils soient nationaux ou européens ;
- 4) les contradictions entre des droits fondamentaux consacrés au niveau national et des normes européennes ;
- 5) et les questions d'interprétation et de conciliation de certains droits fondamentaux aux niveaux national et européen.

Soyons clairs : les risques de divergences sérieuses entre juridictions européennes et juridictions nationales suprêmes, qui existent depuis les origines de la construction européenne, n'ont pas diminué dans la période récente. Il est à redouter qu'ils n'augmentent à l'avenir.

II. Pour résoudre ces tensions, des instruments de stabilisation et de conciliation ont été mis en œuvre

Le premier instrument de résolution des tensions réside au cœur des contradictions identifiées, c'est-à-dire dans les Constitutions nationales. La plupart d'entre elles consacrent, selon des méthodes variées, les principes garantis par la convention européenne des droits de l'Homme et l'intégration européenne dans le cadre de l'Union. Beaucoup ont d'ailleurs été révisées pour prendre en compte cette intégration dans les ordres juridiques européens et permettre d'adhérer, selon le cas, à l'Union ou aux traités modificatifs successifs, le plus souvent à l'issue d'un contrôle national de constitutionnali-

té¹. Si le texte même des Constitutions nationales ne peut sans doute pas permettre de toujours régler préventivement les difficultés, il invite clairement à la confiance et à l'ouverture, selon le concept allemand d'*Europarechtsfreundlichkeit*.

Le second instrument de résolution des tensions réside dans des formes de dialogue et des techniques de contrôle juridictionnel, adaptées au contexte de pluralisme juridique dans lequel les juridictions s'inscrivent.

Certains mécanismes sont formalisés, comme celui des questions préjudicielles qui permet un dialogue fructueux entre les juridictions nationales et la Cour de justice de l'Union et dont les cours constitutionnelles se saisissent de plus en plus souvent à bon droit². La procédure de demande d'avis consultatif à la Cour européenne des droits de l'Homme, que prévoit le protocole n°16³ à la convention européenne des droits de l'Homme, va *mutatis mutandis* dans le même sens.

¹ En France, du traité de Maastricht à celui de Lisbonne, quatre révisions constitutionnelles ont été entreprises (voir, en ce qui concerne le Traité de Maastricht : décision n°92-308 DC du 9 avril 1992 et loi constitutionnelle n° 92-554 du 25 juin 1992 ; en ce qui concerne le Traité d'Amsterdam : décision n° 97-394 DC du 31 décembre 1997 et loi constitutionnelle n° 99-49 du 25 janvier 1999 ; en ce qui concerne le Traité établissant une Constitution pour l'Europe : décision n° 2004-505 DC du 19 novembre 2004 et loi constitutionnelle n° 2005-204 du 1er mars 2005 ; en ce qui concerne le traité de Lisbonne : décision n° 2007-560 DC du 20 décembre 2007 et loi constitutionnelle n° 2008-103 du 4 février 2008. Le rejet, suite au référendum du 29 mai 2005, du projet de loi de ratification du Traité établissant une Constitution pour l'Europe a privé d'effet utile la plus grande partie de la révision constitutionnelle entreprise en 2005). Deux autres révisions ont été nécessaires pour l'adoption du dispositif de traitement des demandes d'asile et du mandat d'arrêt européen (voir, en ce qui concerne le dispositif de traitement des demandes d'asile : la décision n° 93-325 DC du 13 août 1993, Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France et la loi constitutionnelle n° 93-1256 du 25 novembre 1993 relative aux accords internationaux en matière de droit d'asile ; en ce qui concerne le mandat d'arrêt européen : l'avis de l'Assemblée générale du Conseil d'Etat - avis n° 368.282 du 26 septembre 2002 - ainsi que la loi constitutionnelle n° 2003-267 du 25 mars 2003 relative au mandat d'arrêt européen).

² CC, QPC, 4 avril 2013, *Jeremy F*, n°2013-314 P ; CJUE 30 mai 2013, *Jeremy F*, C-168/13 PPU.

³ Art. 1 du protocole n°16 : « 1 Les plus hautes juridictions d'une Haute Partie contractante, telles que désignées conformément à l'article 10, peuvent adresser à la Cour des demandes d'avis consultatifs sur des questions de principe relatives à l'interprétation ou à

D'autres mécanismes reposent sur la mise en œuvre, souple et évolutive, d'outils jurisprudentiels élaborés de concert par les juges nationaux et européens, tels que « l'interprétation conforme » pour conjuguer la diversité des systèmes juridiques avec l'unité et la primauté du droit européen ou « l'équivalence de protection » pour prévenir ou résoudre des contradictions éventuelles entre la garantie nationale et la garantie européenne des droits. La « marge d'appréciation », qui est l'expression jurisprudentielle du principe de subsidiarité, peut également donner de la flexibilité à l'articulation des systèmes juridiques. Cette marge d'appréciation peut être consentie entre juges, du juge européen au juge national, comme elle peut être reconnue par les juges aux autres pouvoirs publics. Dans un régime de séparation des pouvoirs, le juge n'est pas le souverain et ne se substitue pas aux autres pouvoirs. Les Cours Suprêmes les plus anciennes du monde nous le rappellent régulièrement.

Quoi qu'il en soit, des arrêts *Solange*⁴ et *Bosphorus*⁵ des Cours de Karlsruhe et de Strasbourg, aux arrêts *Arcelor*⁶ et *Conseil national des Barreaux*⁷ du Conseil d'Etat de France ou *Melki et Abdeli*⁸ de la Cour de justice de l'Union, un long chemin a été parcouru dans la voie du dialogue et de la concertation entre juges. Les juges en Europe veillent à la cohérence de l'interprétation qu'ils donnent de droits consacrés dans différents ordres juridiques, sans les opposer les uns aux autres, sans réduire la protection acquise⁹ et sans perdre de vue la primauté du droit de l'Union. Ils ont pour ce

l'application des droits et libertés définis par la Convention ou ses protocoles. / 2 La juridiction qui procède à la demande ne peut solliciter un avis consultatif que dans le cadre d'une affaire pendante devant elle. / 3 La juridiction qui procède à la demande motive sa demande d'avis et produit les éléments pertinents du contexte juridique et factuel de l'affaire pendante. » ; art. 5 dudit protocole : « Les avis consultatifs ne sont pas contraignants ».

⁴ Arrêts *Solange I* (29 mai 1974), *Solange II* (22 octobre 1986) et *Solange III* (7 juin 2000) de la Cour constitutionnelle fédérale

⁵ CEDH, Gr.ch., 30 juin 2005, *Bosphorus c. Irlande*, n° 45036/98.

⁶ CE, Ass., 8 février 2007, *Société Arcelor Atlantique et Lorraine*, n°287110.

⁷ CE, Sect., 10 avril 2008, *Conseil national des barreaux*, n° 296845.

⁸ CJUE, 22 juin 2010, *Melki et Abdeli*, aff. jointes C-188/10 et C-189/10.

⁹ Voir pour cet effet cliquet, art. 53 de la charte des droits fondamentaux de l'Union européenne : « Aucune disposition de la présente Charte ne doit être interprétée comme limitant ou portant atteinte aux droits de l'homme et libertés fondamentales reconnus, dans leur

faire diversifié leurs techniques de contrôle : soit que le juge national suspende son contrôle, dans la mesure où une protection équivalente est déjà assurée dans l'ordre de l'Union européenne, soit qu'il réserve son contrôle aux cas d'atteinte aux principes inhérents à l'identité constitutionnelle nationale¹⁰, soit qu'il concentre son contrôle sur l'utilisation par l'Etat de sa marge d'appréciation.

Pour autant, de tels instruments doivent encore être perfectionnés afin de pleinement concilier la primauté du droit de l'Union avec le respect des Constitutions nationales et la promotion la plus large des droits fondamentaux.

III. Le perfectionnement de ces instruments de stabilisation ne se réalisera que par l'approfondissement d'une coopération sincère et loyale entre juges nationaux et européens

Plus l'intégration européenne progresse, plus les sources du droit se superposent, s'enchevêtrent ou s'hybrident et plus le travail de clarification, de hiérarchisation ou de conciliation de ces sources doit s'intensifier. Ce travail concerne, notamment mais pas uniquement, la question du respect des droits fondamentaux¹¹ : lorsqu'est en cause le droit de l'Union, celui-ci doit s'appliquer de manière homogène dans l'ensemble des Etats membres ; nous ne pouvons par conséquent nous engager dans une lecture du champ d'application de la Charte des droits fondamentaux¹² qui, en limitant sa por-

champ d'application respectif, par le droit de l'Union, le droit international et les conventions internationales auxquelles sont parties l'Union, ou tous les États membres, et notamment la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales, ainsi que par les constitutions des États membres. »

¹⁰ CC 10 juin 2004, *Loi pour la confiance dans l'économie numérique*, DC n°2004-496 ; CC 27 juillet 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, DC n°2006-540.

¹¹ Voir sur ce point, l'équilibre retenu entre protections nationales et garanties européennes par la Cour de justice : CJUE 26 février 2013, *Stefano Melloni*, C-399/11.

¹² Si elle ne modifie pas par elle-même le champ des compétences de l'Union (comme l'indique expressément l'article 51 § 2), elle a en revanche vocation à soumettre au respect des droits fondamentaux qu'elle proclame non seulement les actes pris par les institutions,

tée, réduirait l'homogénéité des garanties offertes aux citoyens lorsqu'est appliqué le droit de l'Union.

Il paraît aussi essentiel, pour prévenir et résoudre les difficultés, de se souvenir de l'ancrage du droit européen dans les Constitutions nationales : on ne saurait, sans artifice, trop opposer celles-ci au droit européen.

Pour mener à bien les tâches qui nous attendent, doit prévaloir entre juges nationaux et européens une coopération sincère et loyale qui est l'un des principes cardinaux de l'organisation des pouvoirs publics en Europe. Ce principe véritablement constitutionnel implique un dialogue, horizontal et vertical, des juges et des cours elles-mêmes, l'écoute et la pédagogie réciproque des jurisprudences, l'anticipation et la prévention des divergences, mais aussi le respect des solutions définitivement adoptées par les formations solennelles des cours européennes.

Peut et doit contribuer à cet esprit de coopération le fait que les juges des cours européennes sont désormais, avant leur nomination, auditionnés et évalués par un comité composé pour l'essentiel de juges des juridictions suprêmes nationales. Je fais, bien sûr, en particulier référence au comité institué par l'article 255 TFUE. Il s'agit là d'une évidente marque de confiance faite par la Cour de justice aux juridictions nationales. Il serait sans doute souhaitable, dans le prolongement de cette heureuse initiative, d'associer plus encore les juridictions nationales suprêmes à la phase de sélection des candidats dans les Etats membres.

*

Il est aisé de concevoir ou de provoquer des chocs frontaux entre les droits constitutionnels nationaux et les ordres juridiques européens, voire entre les ordres européens eux-mêmes. Ces chocs ont pu jusqu'à présent être évités ou amortis grâce à la sagesse des juges, de tous les juges, et à leur créativité, au sens non d'activisme, mais de retenue dans l'exercice de leurs fonctions.

organes et organismes de l'Union mais aussi les actes pris par les Etats membres « lorsqu'ils mettent en œuvre le droit de l'Union », comme l'indique l'article 51 § 1, ce qui recouvre, selon la grande chambre de la Cour de justice (CJUE 26 février 2013, *Åkerberg Fransson*, C-617/10, § 17 à 23 ; aux conclusions contraires de l'avocat général, M. Pedro Cruz Villalon, voir en particulier § 56 à 65 des conclusions), l'ensemble du champ d'application du droit de l'Union européenne.

Il est de notre responsabilité de poursuivre dans cette voie, pour faire face aux défis futurs. La tâche qui nous attend est assurément complexe, car il s'agit de faire en sorte que la figure du « Mobile », qui est l'image des relations entre nos systèmes juridiques, pour reprendre la comparaison du président Voßkuhle, puisse évoluer vers une forme de « Stable ». Calder l'a fait. Cette tâche est aussi la nôtre et elle est, je crois, à notre portée. Je ne doute pas que les apports des travaux de la FIDE, et d'abord de son XXVIème congrès de Copenhague, nous aident à l'assumer.

Speech

Pauliine Koskelo

Same Rights, Separate Sources, Different Courts – Which Outcomes?

Characteristic features for European legal integration are that it is founded on agreement by and between states, but the agreement on basic texts rests on broad and vague formulations, whereas the process for determining what the commitments actually mean is a separate one, and largely subject to adjudication by competent courts. At this latter level, integration is no longer about agreement but about loyalty and following. Sustaining these will ultimately depend on the outcomes, and on the quality of the analysis, discourse and reasoning that informs them.

In the field of fundamental rights, the situation is particular because in most Member States we have three sets of basic norms governing the field, one national and two European ones, which in broad terms are largely concurrent but subject to separate processes by which the actual substance of the rights are determined. This gives rise to complexities and tensions to be managed. In an interlinked domain, real interaction, institutionalised as well as informal, is crucial, both in order to tackle and overcome the hard issues and in order to share and make most of the available intellectual capital.

ECHR – National Constitutions

These two sets of norms basically share the same scope of application. Their status in the national system may differ in terms of norm hierarchy. Apart from that, the relationship between these sets of norms would usually be characterised by attributing to the ECHR a quality of minimum norms.

While this is plausible in theory, the reality is rather different. As a matter of practice, the profile of the Strasbourg court and its case-law is not quite consistent with such an approach. There is no doubt that the contracting states do remain free to provide a superior standard of rights. At the same time, many observers do not perceive the Strasbourg court as an institution content with establishing minimum standards. Rather, there is a dynamic ambition illustrated by many examples of the Court's case-law, and the Court has allowed itself considerable freedom in giving substance to Convention rights. Especially the doctrine of positive obligations and its applications reflect a mindset that is expansive rather than minimalist. The dynamic evolution is also a source of controversies. It is well-known that even loyalty and following have lately come under strain here and there.

Moreover, the idea of a freedom to grant better rights than those required under the Convention is in itself rather inappropriate in situations that involve a conflict of opposing rights, where improving the position of one party means weakening the position of another. Undoubtedly, there are circumstances where the national context requires a protection going beyond the Convention standard, but as a general proposition the notion of Convention rights as a minimum standard is not very helpful in conceptualising or ordering the relationship between the ECHR and national fundamental rights.

ECHR – Charter

The Charter makes a formal link between Charter rights and the ECHR through the harmonising clause in Article 52(3), according to which Charter rights shall have the same meaning and scope as corresponding Convention rights. While this does not prevent Union law providing more extensive protection (a point already covered), the clause is remarkable as a binding part of EU primary law.

With this, Convention rights are imported and lifted to primary law level, the claim of primacy is attached to them within the scope of the Charter, and the autonomy of Union law is forgone as ECHR interpretations become “incorporated” into Union law through a formally binding provision.

This may become a source of some difficulties.¹ The process through which Convention case-law develops is not only external to the Union but also quite different from the process through which Union case-law normally develops. First, while the preliminary rulings of the ECJ are interpretative rulings specifically addressing and clarifying questions of interpretation on identified points of law (or the validity of secondary law norms), the judgments of the Strasbourg court are of a different nature. They are findings of violation or non-violation in individual cases, where the interpretative elements are often not clearly distinct from considerations linked to the concrete factual situation as presented to the Court. Second, the judgments focus on the specific complaints made and ECHR articles invoked by the complainant, which narrows down the context of interpretation and the point of view. Third, the procedural setting in which the case-law is generated is narrow and even lopsided because in horizontal situations the opposing party, whose rights have also been at stake, is neither a party nor (usually) a participant in the Strasbourg proceedings. Such a procedural constellation is not always an optimal basis for determining complex issues with potentially wide-ranging implications. Fourth, concerns about quality and coherence are real, especially under a huge case overload. Fifth, answers cannot be obtained when they are needed, although this may in part change with Protocol 16.

Importing major legal elements from such processes into primary Union law may be problematic – similarly as at a national level, but the normative weight of Article 52(3) seems to underline the issue.

Charter – National Constitutions

Unlike the ECHR and national constitutional rights, which basically have a shared scope of application, the Charter has a more limited scope. The ECJ has endorsed a wide interpretation (Åkerberg Fransson, Pfleger), but the scope of the Charter nevertheless cuts through the domestic legal order and

¹ Some foretaste has been given by the Strasbourg case-law on child abduction, which has risked undermining the legal framework for a quick return of abducted children to the jurisdiction with competence to settle custody issues.

divides it into areas where either both overlap or only the national rights apply – together with the ECHR.

In many contexts the issues that arise cannot, however, be resolved by sticking to a formal dividing line between the respective scopes of application. EU law and national law are so intertwined, and subject to common procedures, that a clean separation is often not feasible. Many factual situations will not accord with differentiation by reference to such criteria. Example: for tax fraud, it is irrelevant whether VAT is involved or not, and it would make no reasonable sense to apply the *ne bis in idem* –principle differently depending on which sort of tax is concerned in the proceedings. Whichever variant of *ne bis in idem* gives most extensive protection will have to govern. At the national level, there are many contexts and situations where a differentiated treatment cannot reasonably be envisaged depending on whether or not a concrete case falls within or outside the scope of EU law.

Thus, separating or limiting scopes of application alone is not an answer. Focus must also be put on efforts to tackle and settle disagreements about the substance, conflicts and balancing of rights. Here, too, we move from issues of following into questions about how to deal with differences of opinion regarding rights in various contexts – either by settling them or by tolerating them.

Commentary - Constitutional Pluralism and Red Lines: What are Constitutional Conflicts in Europe about?

Mattias Kumm

Legal pluralism, in the constitutional form it takes in Europe, does not denote absence of legal hierarchy.¹ Half a century after *Costa v. ENEL*, Member States have generally accepted the claim that EU law has primacy over the law of Member States. Constitutions of most Member States have been amended to facilitate European integration and national highest courts have found the interpretative space to generally accept EU law's claim to primacy. To the extent the panelists present here universally endorse mutual deliberative engagement, deference and comity between European and national constitutional courts, they are not describing a practice of diplomatic negotiations among equals and certainly not a Habermasian "herrschaftsfreier Diskurs". They are describing forms of mutual engagement that take place within a doctrinally circumscribed structure, which has presumptions of authority built into it.

What justifies calling this practice *pluralist* is the fact that the authority of EU law as interpreted by the CJEU has only been recognised by Member States' highest courts to have *presumptive, but not conclusive authority*. The general acceptance of the primacy of EU law has been subject to *national constitutional qualifications*. Some Member States highest courts' have, over time, defined *red lines* which EU law must not cross, if it is to be en-

¹ This text was produced on the basis of oral remarks given at the FIDE 2014 Congress and makes do without the usual scholarly apparatus. The following will focus on the relationship between the EU and its Member States and will leave questions relating to the ECHR aside.

forced by national courts. These red lines mark out residual concerns over which disagreement between European and Member States courts is possible. It is in this narrow domain that genuine constitutional conflict becomes a possibility.

Obviously this is not the place to provide a full treatment of the diverse doctrines developed by different MS courts in this respect. In the following I will briefly describe three of these red lines, analyse the arguments marshalled in their support and assess the doctrinally structured forms of engagement they are connected to. These red lines concern human rights, *ultra vires* acts and Member States constitutional identity respectively.

1. Human Rights: From “Solange I & II” to “Reverse Solange”?

A first generation issue concerned the question whether constitutional rights contained in national constitutions as interpreted by national highest courts could be a ground on which, at the behest of an effected complainant, a national court might deny the application of a European law domestically. Here the concern was that for so long as there was no European human rights catalogue and no judicial enforcement of human rights by European courts there was a real concern that rights of individuals might be offered up on the altar of European integration. The German Constitutional Court’s “Solange” decisions are among the best known jurisprudence grappling with these issues. With the development and maturation of the CJEU’s own human rights jurisprudence and then the entry into force of the European Charter of Human Rights, this concern has been largely addressed. Neglecting extreme hypotheticals, it is today unlikely that any Member State court will claim jurisdiction to substantively review an EU act on national constitutional rights grounds.

Today national courts are more concerned about the CJEU’s expansive interpretation of its jurisdiction to subject acts by Member States to European fundamental rights review.

Even though it is undisputed that the CJEU is not a general European human rights court (that is the specific function of the ECHR), it is much

less clear how the limits of its jurisdiction are to be defined. Art. 51 I of the EU Charter limits the jurisdiction of the CJEU to acts of EU institutions and their implementation by Member States, but it is less than clear at this point, how that requirement should be understood (see Akkerberg Fransson, Siragusa).

On the other hand there is the question whether the CJEU should play a more general supervisory role in situations where a Member State's internal structure is no longer compatible with the EU's foundational values listed in Art. 2 TFEU. According to an original and plausibly reasoned proposal developed by Armin v. Bogdandy's team in Heidelberg, the autonomy of Member State's fundamental rights protection outside of the scope of the EU Charter of fundamental rights exists only, if and for so long as it can be presumed that Member States ensure the essence of fundamental rights enshrined in Art. 2 TEU. When that presumption is rebutted – say because of authoritarian backsliding in a Member State – Union citizens can seek redress before national courts and the CJEU.

2. Ultra Vires Acts

A second set of questions raised by some national courts concerns the issue whether there are circumstances in which a European act deemed to be ultra vires by a national constitutional court, may not be enforced nationally. The basic idea appears to be simple. The legal grounds for the legal validity of the EU's acts within Member States is the fact that states have signed and ratified the Treaties, which authorise and limit the powers of EU institutions. Of course it is first and foremost the CJEU's role to assess whether acts of the EU are within its competencies or not. But the CJEU is like any other EU institution and could, in principle, act ultra vires, effectively seeking to amend the Treaties under the guise of interpreting it. Furthermore there is a perception that the European court has not historically played much of a role in cabinining in EU institutions, meaningfully policing its jurisdictional boundaries. Instead it has first and foremost seen itself as a motor of integration. For that reason some courts have asserted that it is necessary to establish additional checks in the form of subsidiary and qualified

national constitutional review of whether the EU has in fact acted *ultra vires*. Here it must suffice to make two observations concerning this practice.

First, even if the perception of the CJEU as a motor of integration and its lackluster performance as a guardian of the jurisdictional boundaries of the EU is not implausible as far as the first decades of EU integration are concerned, it is questionable whether that assessment is still valid today. Not only are there additional political possibilities to check the EU legislative process in the form of the yellow card procedure which involves national parliaments, there are also indications that the CJEU itself has less scruples than in the past to strike down a piece of EU legislation on the grounds that it is not authorised under the EU's competencies.

Second, even if that were too optimistic an assessment and a structural deficit justifying an additional subsidiary role for national constitutional courts remained, the exercise of such a subsidiary role would have to be procedurally and substantively circumscribed. Here the jurisprudence of the German FCC is not unhelpful. It established that procedurally it would be necessary for national courts to provide the CJEU with the opportunity to pronounce itself on the issue before a national court intervenes decisively. If a national court deems an EU act to be *ultra vires*, it has to first make a reference to the CJEU. And even when it disagrees with the CJEU's interpretation, it must accord considerable deference to the CJEU's views, given the importance of effective and uniform resolution of legal disputes relating to EU law in a community of 28 Member States. Only if the national court holds that the CJEU's interpretation itself is manifestly wrong and it concerns an issue of structural relevance, is there a possibility for a national court to deny the applicability of the EU act within its jurisdiction. In practice it is to be expected that such instances are highly unlikely to occur.

3. Constitutional Identity

Finally there are red lines with regard to "constitutional identity" that national highest courts might invoke. The duty to respect "national identities of Member States... inherent in their constitutional fundamental structures" is also explicitly required as a matter of EU law (Art. 4 TEU). In practice it

might be helpful to distinguish between two types of cases that have arisen or might arise in this context.

First, a court might deem a concrete and specific constitutional rule – e.g. a constitutional rule prohibiting the extradition of citizens, a rule prohibiting foreigners from voting in local elections, a rule preventing women from serving in the armed forces etc. - to fall in this category. Such specific constitutional rules have sometimes been invoked by courts as a ground not to enforce countervailing EU legal norms. Courts insist that compliance with EU requirements here can only mean that the constitutional legislator has to amend the constitution. Implicitly constitutional courts claim that it is not up to them to enforce EU law over specific rules entrenched by the constitutional legislator.

It may appear forced and inappropriately formalist to insist that constitutional identity is triggered anytime a concrete constitutional rule stands in the way of EU law enforcement. Would it have been plausible for the German constitutional court to hold that the bar against women serving in the German military was part of German constitutional identity? Perhaps the more plausible claim - leading to identical results - would be that it violates a Member States constitutional identity to have courts, rather than the constitutional legislator, effectively set aside specific constitutional norms of this kind. Not the substantive rules themselves, but the constitutional role of national courts and their subjection to national constitutional rules - that is a particular institutional arrangement relating to the separation of courts and constitutional legislators - would be claimed as part of the national constitutional identity.

Second, a court might interpret other structural principles of the constitution as precluding the enforcement of EU law. A French court might claim, for example, that a particular EU norm is incompatible with the French constitutional principle of *laïcité*. The German Constitutional Court has raised the issue whether perhaps Draghi's interpretation of the ECB's mandate to engage in OMT's, potentially leading to significant financial burdens on national taxpayers, violates the unamendable principle of democracy, interpreted as requiring parliamentary authorisation for imposing any such burdens on German taxpayers.

Whether invoking concrete and specific constitutional rules or more abstract principles, the plausible invocation of constitutional identity as a ground to resist the enforcement of EU law is best interpreted as circumscribed by procedural and substantive requirements.

Procedurally it is required that a national court makes a preliminary reference to the CJEU, providing that court with the possibility to provide its view on the understanding of Art. 4 TEU as it relates to the case at hand. Even if the issue is national constitutional identity, that identity is being invoked in a context that implicates European legal requirements. Furthermore if the principle invoked as part of national identity is identical to one of the foundational values of Art. 2 TEU – think of the German court invoking democracy against certain ECB policies - there are additional grounds for the CJEU to weigh in. Given the shared nature of these commitments a further hermeneutical requirement to impose on national courts would be to require them to engage in comparative analysis. How is that shared universal principle understood in other jurisdictions? How would they approach the issue? Neither the position of the CJEU or the views of other constitutional courts would be conclusive for the national court. The final say on issues of national constitutional identity would plausibly remain with national courts, even when the CJEU disagrees with the position adopted and holds a Member State to be in violations of its obligations under EU law. But without this kind of vertical and horizontal engagement the decision of the national court would be procedurally and hermeneutically deficient.

Substantively the invocation of national constitutional identity is firstly limited by the EU's foundational values (Art. 2 TEU). To take an easy case: if a Member State were to defend slavery as “a peculiar institution central to our tradition” and reflecting a distinctive “southern way of life”, as the Confederate States did against the North in the US in the 19th century, that would of course be unacceptable. In practice the issue may occasionally be more complicated: What if the claim is that a particular interpretation of the principle of *laïcité* invoked by France is in fact incompatible with the free exercise of religion? Probably the idea of protecting national constitutional identity would require granting a certain margin of appreciation to Member States. But that leaves room for disagreement about how wide in a particular

case that margin should be and whether the particular case falls within that margin.

A further substantive constraint is the principle of proportionality as it relates to the opt-out effectively claimed by the state invoking constitutional identity: The opt-out is justified under EU law only if the consequences of such an identity-based opt-out are not unduly burdensome for European interests. Even the invocation of identity is thus circumscribed by the duty of sincere cooperation.

What if the invocation of constitutional identity is genuine and important, but it could not be justified under the circumstances because of the disproportionate burdens a national opt-out imposes on others? That opens the door to what might be called “irreducible identitarian constitutional conflict”: a situation structurally equivalent to the invocation of conscience by private persons when public authorities cannot accept the refusal to obey the law because of the burden it imposes on others and the individual can’t accept to comply with legal obligations. Member States, like individuals, remain the final arbiters of their constitutional identity/conscience, but they cannot expect to escape legal sanction, when their disobedience imposes disproportionate burdens on others.

Final Sessions – Conclusions by the
General Rapporteurs

(31 May 2014)

Conclusions – Theme 1

Fabian Amtenbrink

1. Introduction

Discussing the constitutional and institutional aspects of economic governance in the European Union (EU) in the tight timeframe set for the 2014 XXVI FIDE Congress in Copenhagen was an ambitious project from the start, in particular when considering the high level of expertise and first-hand experience of the participants. In order to structure the discussions, General Topic 1 was divided in six distinctive, yet highly interrelated themes, including: European economic policy coordination in economic and Monetary Union (EMU) from a (1) European, as well as a (2) national perspective, (3) monetary policy in the euro area and the role of the European Central Bank (ECB) in economic governance, (4) the democratic legitimacy and accountability of economic governance, (5) new financial market supervision in the EU, and finally (6) the future of economic governance. For each of these six themes Jean-Paul Keppenne, the Institutional Rapporteur for General Topic 1, and the author of the present account identified and presented main legal and policy issues as a means of introduction and in order to stimulate the debate.

It goes without saying that it is not possible in this short account to do justice to the rich and at times highly technical debates that took places during the working group sessions. Thus what can be offered hereafter is a taste of the types of issues that were discussed and the main characteristics of the constitutional and institutional framework that governs EMU after the European financial and sovereign debt crisis as it emerged from the debates.

2. On the Juridification of Economic Governance in Europe

Possibly the most important insights that emerged from the debates during the FIDE conference is that it is difficult to exaggerate the impact of the measures that have been taken in response to the crisis that surely exceed the functioning of the EMU. The near-structural utilisation of intergovernmental instruments, which the Institutional Rapporteur labeled as ‘semi-intergovernmentalism’, that are essentially geared towards achieving Union objectives, the allocation of tasks to Union institutions outside the Union legal framework, the tightening of fiscal discipline *inter alia* through the introduction of a balanced-budget rule, the obligation of automatic correction mechanisms in case of excessive deficits, as well as the budgetary surveillance cycle in the shape of the European Semester, are all developments that raise fundamental legal questions.

To what extent can the choice of legal bases for structural reform measures that have been taken within the Union framework be defended given the far-reaching scope of some measures that – at least in the view of some – surpasses what primary Union law and namely Articles 121 and 126 TFEU provide for? What are the limits of these legal bases and what alternatives – if any – does primary Union law offer, such as enhanced cooperation? As to the limits of the legal bases, it has in particular been noted that Article 136 TFEU, which allows euro area Member States to adopt measures specific to them, cannot be interpreted to constitute a general legal basis for harmonisation. In the area of financial market regulation a similar debate arose on the scope of Article 114 TFEU.

Overall there was consensus that the face of economic governance has changed considerably compared to the original Maastricht system. In this context one of the reoccurring observations was that since the breakout of the crisis a juridification of economic governance could be observed that – at least in the view of some commentators – is unmatched at the level of the Member States. This juridification does not only result from the adoption of supranational and intergovernmental instruments at an unprecedented scale and speed, but also from the increased involvement of courts in this policy field both at the European and national level. The preliminary ruling of the Court of Justice of the European Union (ECJ) in *Pringle* and the various

judgments by national highest (constitutional) courts and tribunals bear witness to this development, arguably adding a new chapter to the judicial dialogue between the ECJ and the (highest) national courts and tribunals.

3. On the Dwindling National Policy Space and Its Consequences

This juridification of economic governance is nowhere felt more than in the Member States themselves. Indeed, from the discussions in the various working group sessions it has become clear - at least in the opinion of the majority of commentators - that the national policy space is shrinking as a consequence of the reform measures, challenging not only the freedom of national executive governments to determine economic policy free from any European interference, but possibly more importantly, testing the constitutional role of national parliaments. The impact of the economic scoreboard as part of the new macroeconomic imbalances procedure and the country-specific recommendations are just two examples of the types of measures that were discussed in this context.

What emerged both from the national written reports and the debates during the sessions was a large consensus that democratic legitimacy of the post-crisis economic governance regime is at least not self-evident and that a strengthening may be required as a result of the reforms. The question in this context is obviously at what level of the European multilayered constitutional order such a consolidation is required and by what means? Should and can the European Parliament be the main source of democratic legitimacy of public power or should national parliaments be given a more substantive role? In this context Paul Craig's hypothesis on the constitutional responsibility of Member States, which he presented in the congress's opening panel discussion on 'The Temperature of the European Union and Major Trends' was revisited during the working group discussions. The question is whether at the current stage of integration there is really any viable alternatives to the preserving of national democratic structures and with it a substantive role for national parliaments that forces the latter to accept co-ownership also for European (economic) policies and decisions. Referring

national parliaments to the national legislative process and ministerial responsibility is arguably but a pale imitation of the real thing that leaves national politicians with every opportunity to offload responsibilities and blame onto Brussels.

4. On the Delineation of Economic from Monetary Policy

As has become clear at the latest from the much-noted first ever preliminary reference by the German Federal Constitutional Court to the ECJ in February 2014, not only new economic governance, but also monetary policy, as it has developed since the breakout of the crisis in the shape of the so-called non-standard monetary policy measures by the ECB, poses challenges to the national and European constitutional orders.

Primary Union law postulates a clear separation of economic and monetary policy, as the Union is exclusively competent for monetary policy in the euro area, whereas it only has a coordinating competence for economic policy. Given this asymmetry in the level of integration, separating and defining these two policy fields becomes necessary against the background of one of the most fundamental principles of the European legal order, the principle of conferral. How, and namely based on what criteria, monetary policy can be delineated from economic policy has been extensively discussed in the working group sessions, whereby *inter alia* reference was made to experience in other European policy areas, as well as in the national context. Arguably the roots of the problem lay in the fact that the ECB has been introduced into a complex constitutional structure that is governed by the principle of conferral, whereas in terms of its position vis-à-vis other Union institutions and the Member States, its objective(s) and tasks, the ECB shares many of the characteristics of a national central bank. This now gives rise to tensions, whereby one strong view shared in the discussions was that the ECB has stepped in where politics and politicians have failed prior to and during the crisis. Interestingly, a similar problem arises with regard to the separation of monetary policy and financial stability.

5. Towards a European Financial Supervisory System

Indeed, the link between economic, monetary and financial stability was extensively debated in the working group session dealing with the Banking Union and namely the Single Supervisory Mechanism (SSM), the Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF). Here the application of Article 127(6) TFEU as a legal basis for the SSM, the scope of Article 114 TFEU as a legal basis for the establishment of the SRM, as well as the recourse to an intergovernmental agreement for the SRF were discussed. One of the more general issues that was noted in this context was what has been described as the uneasy liaison between supranational and intergovernmental instruments, making the working of Union law effectively subject to the working of an intergovernmental agreement.

6. On the Future of EMU

The final working session focused on the future of EMU. The group discussed some major elements of the proposals found in the 2012 reports by the various Union institutions on this issue. What elements are still missing – if any – to complete the reform of economic governance in EMU? Suggestions were made to increase the Union budget and to extend European financial market oversight to securities and insurances. On a more fundamental level it was suggested that a new Union competence for financial stability should be established so to draw the proper lessons from the crisis. On a more fundamental level the question, was raised what the role of law is in EMU and whether law is actually capable of shaping economic and monetary policy in the first place.

Overall there was some agreement that a Treaty change would be required at some stage to provide for a more coherent and transparent legal framework for economic governance and maybe moreover also to better reflect the extent to which economic policy is no longer a matter for Member States alone to decide. At the same time there was consensus that given recent experience with the substance of the Fiscal Compact, such a Treaty

amendment will not only be extremely difficult to achieve in the best of (political) circumstances, but also not be opportune at this point of time.

7. Final observation

Concluding this brief account, it is hardly an exaggeration to state that new economic governance has changed the face of European integration. This requires a profound dialogue between academics, policy-makers and judges on the implications of the recent developments and the desired way forward. In this regard the debates during the XXVI FIDE Congress can only be the beginning.

Conclusions – Theme 2

Niamh Nic Shuibhne & Jo Shaw

In our General Report, we referred to a statement made by the European Ombudsman at the closing conference for the 2013 Year of European Citizens: we must confront the reality, she stated, that European citizenship is in crisis.

The stimulating and varied discussions that we were privileged to steer over the duration of the FIDE Congress would perhaps leave us just short of reaching the same conclusion – for now. In many ways, Union citizenship has become an accurate barometer for predicting the weather affecting the European Union more generally. What we would emphasise is that the debates in which we participated reflect a timely concern for the fragility of the European Union generally and its concept of citizenship more specifically – a fragility that has been illuminated very strikingly by the FIDE method of reflecting in depth on how national practices and cultures shape the reality of Union citizenship too. If crisis ensues, it may well be driven by complacency about the capacity for these national practices and cultures – often belying formal legislative compliance – to undermine many aspects of Union citizenship not just for mobile, but also for static citizens.

Four key themes can be drawn from our discussions to develop that point further.

First, while not being the centrepiece of any single session, the connection between Union citizenship and national citizenship – with the latter being a condition for the former – was explored on several occasions during the Congress. There were negative comments on the willingness of some Member States to commoditise their citizenship status – and thus Union citizenship – by making it available for sale to high net worth individuals and their families. And yet the persistent focus on the part of politicians, civil society organisations, and scholars alike on EU citizenship as a complement

to national citizenship, as a result of the socio-economic and civil rights of mobility and residence that it grants, in many ways incentivises Member States to open citizenship to those whom it wants to attract, such as investors. In fact, of course, as with open external citizenship regimes that are in place in many Member States, the consequences of such approaches are felt right across the territory of the Union. While national citizenship remains a national competence, Member States are none the less under an obligation to have due regard to the requirements of EU law when designing and implementing their national citizenship regimes.

Second, we are clearly in a phase of recalibration or shifting dynamics in the trajectory of Union citizenship law. On the free movement dimension of Union citizenship, the initially dominant emphasis on the *rights* of citizenship has been replaced by more complex reflections on the other terms expressed in Articles 20 and 21 TFEU – *conditions, limits, and duties*. For example, while our discussions expectedly addressed protection of the fundamental rights of Union citizens, a discourse of the rights of *States* in this context was heard too. Similarly, ideas about the *emancipation* of Union citizenship – from its free movement roots, for example; or from the requirements of economic self-sufficiency – were balanced against the constitutional requirements of the conferral principle. The regulation of Union citizenship through the balancing of its different dimensions rests on competence that is shared between the Union and the Member States. But, reflecting ideas presented by Paul Craig in his opening Congress keynote, shared competence also rests on *shared responsibility*. This point will be picked up again below.

Third, many aspects of our discussions led back to the fundamental theme of enforcing the rights of citizenship. There was some concern about over-reliance on judicial processes – whether at national or Union level – in order to realise *effective* Union citizenship. The Commission infringement proceeding mechanism was acknowledged as a necessary enforcement tool, but it was also considered not to be sufficient. Consideration of a wider spectrum of enforcement processes was the clear recommendation – from education and other incentive measures, to more stringent practices, perhaps drawing inspiration from other areas of EU law. The unifying message here is, however, a call for *action*.

As regards political rights of mobile Union citizens, the same dimensions of implementation at national level (including the dimension of ‘practice’, which threw up a number of questions during the course of the 2014 European Parliament Elections held just before the Congress) and enforcement at the European level come into play. But these political rights are only part of the story of the political dimension of Union citizenship. European Citizens’ Initiatives – not covered in our Questionnaire – are clearly an important element of this. But with the assistance of the national reports, we were able to explore the possible emergence of an ‘EU voter’. Evidence from a reference pending before the Court of Justice on voting restrictions placed on a person serving a prison sentence demonstrates that there is space for the courts – national and EU – to look further at restrictions on the right of universal suffrage as guaranteed in the Treaty and the Charter in relation to European Parliament elections. For this to happen, the Court of Justice would, however, have to hold clearly that there is a right to vote in European Parliament elections contained within the framework of the Treaties, and this might suggest also a degree of interference within national (electoral) competences that could bring about a similar ‘blowback’ to that seen with regard to the increased politicisation of free movement rights that we have seen in recent years.

Finally, fourth, and linking back to the notion of shared responsibility, the absence of an overarching policy or vision of Union citizenship – especially in the face of political ‘blowback’ in many Member States just now – was keenly missed. Developments occur at present in a rather disconnected way, with the development of fundamental rights protection, for example, becoming atomised from Union citizenship. The shared responsibility that should prevail here demands joint leadership: for a *shared* vision of Union citizenship, not the disappointingly stubborn “States ‘against’ Union” dynamic that has long persisted and is, if anything, intensifying in the present political climate. At the opening of the Congress, the Danish Foreign Minister characterised Union citizenship as a ‘promising concept’. Articulating and implementing an *appropriate* balance between the rights and the duties of citizenship is a challenge that will test the fragility of Union citizenship much further in the months and years ahead.

And it should never be forgotten, above all, that the promise of citizenship rests in *primary rights* conferred by the Treaty.

Conclusions – Theme 3

Roberto Caranta

1.

The choice to have public procurement as one of the topics for the FIDE conference could have hardly been happier. Early this year the reform package was finally approved. Three new instruments were enacted: Directive 2014/23/EU on concession contracts, Directive 2014/24/EU on public sector procurement and Directive 2014/25/EU on procurements in the utilities sectors.

Inevitably the discussion in the panels often focused on the new directives, even if much attention was paid to the (older) remedies directives as amended by Directive 2007/66/EC, and on some cross-cutting issues on the relations between public contract law and other areas of EU economic law, such as competition and State aids law.

Given the time constraints this report will too focus on the very recent reform of EU public contracts. The point of view chosen is the one of the institutional dynamics of EU law making. The reform process highlighted the different preferences and possibly tensions among the makers of EU law. In doing so, some of the most relevant novelties brought about by the new directives will also be highlighted. The new package makes up an interesting mix of light and some shadows and both owe much to the institutional dynamics at play in its approval.

2.

The reform process obviously involved the Commission, the Council and the Parliament. The Court of Justice is not formally part of law making. In many ways it however plays the role of *primum movens*. As it is customary, Recital 2 of Directive 2014/24/EU acknowledges the need to incorporate certain aspects of well-established case-law of the Court of Justice of the European Union.

However, this formula looks like very much as an understatement. In the past years the case law has both overturned some basic assumptions – or understandings – lying behind the old public procurement directives and regulated new institutions.

Against the proposals of the Commission the consensus among the Member States in the Council always left service concessions outside the scope of application of the EU directives. In *Telaustria* the Court of Justice held – and reaffirmed – that, while falling outside the scope of the directives, the award of these contracts must still comply with the Treaty, and more notably with the principles of non-discrimination and transparency.

The Court of Justice resisted the push from the Commission to read secondary law creatively. However, basing itself firmly on what has become the TFEU it ended weakening the resolve of the Member States thus opening the way to a wider coverage of the new rules. The Member States are the *Herren des Vertages*. However, they are subject to the Treaties when contributing to the adoption of EU secondary law in the Council. And the Court of Justice is the *Herr des EU Vertrages*.

When given again the chance to legislate, the Member States were finally ready to accept the Commission's proposal for a EU directive on concessions, encompassing service concessions. Thus both limiting the uncertainties inherent in a case law based regime and clarifying some key aspects of the concept of concession, such as the idea of 'risk'.¹

It would be unfair to claim that the Court of Justice has constantly sought to widen the scope of application of EU rules. The case law on both in house providing and public-public cooperation attests otherwise, since ex-

¹ See Recitals 4 and 18 of Directive 2014/23/EU.

ceptions to the applicability of the old directives were recognised. The new directives have again codified the case law, marginally changing its scope to somewhat widen the exceptions.

Nor it can be said that the Court of Justice is constantly siding with the Commission. Quite on the contrary, the *Max Havelaar* judgment and the forceful conclusions which prepared it were instrumental in breaking the Commission's resistance to taking into account production processes in award criteria, thus strengthening in a very significant way sustainable public procurement.

Basically, the Court of Justice deeply influenced the new directives, at times nudging the law makers to toe with the Treaty, including going beyond internal market concerns to embrace sustainability ones, other times simply clarifying the scope of application of the existing rules. As it will be said again in the conclusions, the case law will be very much needed in understanding many provisions in the new directives.

The Court of Justice is not however beyond reproach. The *Lianakis* judgment holding that past experience and performances could not be taken into consideration at the award stage flied in the face of procurement common sense. The mistake had to be rectified by legislation (Article 67 of the Directive 2014/24/EU).

Incidentally this shows that the 'political institutions' may well correct the Court of Justice when it is interpreting secondary law rather than the Treaties.

It is also submitted that on some occasion the Court of Justice not just failed to clarify the case law but rather muddled notions up. This is thought to be the case with the fundamental notion of public procurement. In *Müller* the Court of Justice introduced a requirement of 'direct economic benefit' in the notion of public procurement which taken seriously will put outside the province of EU law all the cases in which contracting authorities are procuring to the advantage of the general public or sections thereof. Other judgments, like *Libert* and the one concerning the *Valencia* development plan are hard to reconcile with the previous case law but the Court of Justice makes no effort to do this.

Recital 2 of Directive 2014/24/EU also stresses the “need to clarify basic notions and concepts to ensure legal certainty”. This is also because of a case law which at times has been less than fully coherent.

It is however doubtful whether the directives really achieve the aim of clarity. The proposal from the Commission – possibly out of excessive deference to the case law – does not advance the situation much. What we have is the ‘acquisition’ requirement, which seems rather a limited improvement in terms of clarity. We also have distinct definitions for ‘public contracts’ and ‘public procurements’, which one could already consider not very helpful, but then the different terminology evaporates for instance in the Spanish version (it is *contratos públicos* in both cases). It is submitted that the Commission should have been much bolder, and especially so since the case law was weak because it did not provide the degree of clarity which is expected from the law.

Moreover, the proposal from the Commission was very conservative under many respects – including many aspects of ‘strategic procurement’. The combined push of the case law and the European Parliament were needed to take sustainability seriously.

True some innovative proposals, such as the European Procurement Passport, were simply shot down by the ‘political institutions’ afraid of more Brussels bureaucracy. It is also to be lamented that the provisions on governance in the Commission’s proposal have been much watered down in the process leading to the adoption of the new directives.

As already remarked in passing this time the Parliament has obviously been a fundamental player in reforming EU law. The role of the Member States in organising services of general economic interest – SGEIs has been very much stressed in the new directives at the initiative of the Parliament. The special regime for social and other special contracts very much bears the hallmark of the European Parliament. Strategic procurement has indeed benefited by politicians who not necessarily share what some critics could dismiss as the Commission’s internal market bigotry.

One could hardly underestimate the role played by the European Parliament, and confronting the proposal with the different texts leading to the dialogue between it, the Commission and the Council would provide many

and possibly more dramatic instances of the role played by our preeminent political institution.

It is however fair to say that the inputs from the Parliament have started a process turning the final draft of the directives into a legal quagmire. As a matter of principle the European Parliament objected to the lowest price as an award criterion. The end result is only one award criterion, the most economically advantageous tender, which is defined by Article 67(2) of Directive 2014/24/EU providing: “The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question”.

Beside the fact that the lowest price is still obviously an option, we have a provision collapsing together price, cost, cost-effectiveness and price-quality ratio in a way that will require much ingenuity from the practitioners and the courts to understand.

The rules on public service contracts found themselves in even worse situation. Directive 2014/14/EU distinguished between priority and non-priority services, the latter being only marginally regulated under the same directive. The case law had made the distinction obsolete. The European Parliament was the first to propose to exclude civil defence, civil protection services and danger prevention services from the scope of application of the directive. And lobbying must have played its role, with the European Parliament having been the first to propose to exclude altogether some legal services from the scope of application of the new Public Sector Directive.

It would be unfair to lay all the blame for the poor quality of the drafting of the new public contracts directives on the doors of the European Parliament. The all area of public service contracts seems to have been stamped upon by the (Member States in the) Council. We have numerous excluded services, we have social and special services under a light regime, we have services which may be reserved to NGOs. The difference depends on various lists of CPV numbers; emergency services are either excluded or special depending on their characteristics. CPV 50116510-9 [Tyre-remoulding ser-

vices], 71550000-8 [Blacksmith services] are both special services courtesy of the Council.

The free for all must have gone out of hand if again courtesy of the Council therein we find Recital 78 of Directive 2014/24/EU claiming that “The contracting authority should have a duty to consider the appropriateness of dividing contracts into lots while remaining free to decide autonomously on the basis of any reason it deems relevant, without being subject to administrative or judicial supervision”.

Besides the inopportunity to have recitals masquerading as provisions, the safeguards of the general principle of effective judicial protection cannot be simply swept under the carpet by secondary legislation by the whims of some Member State.

Coming finally to the Member States in their individual or domestic capacity rather than as components of the Council, an important innovation of the new directives is the room for choice they are often left with. For instance Member States “shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions” (Article 18(2)). They may reserve the award of some contracts to sheltered workshops and other specific economic operators (Article 20). They “shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators” (Article 24).

The Member States will thus be called to make a number of choices appropriate to their social situations and political preferences. One can expect deeply different approaches. In these days it clearly emerged from our discussions that public procurement law and practice in the Member States are still very different (albeit less so when compared to say twenty years ago). The domestic traditions are still strong in this area, and path dependency is deemed to perpetuate some measure of difference. The issue will be whether the choice made in this or that Member State will be sufficient to make sure

that the aims of the directives – and more generally of EU public contract law – are achieved.

3.

This leads to the conclusions. One could have gotten the impression that the reform has partaken many more problems than solutions. It is not like this. Indeed important results in terms of flexibility, modernisation, sustainability have been achieved.

However, the new rules are very complex. This is partly due to what seems to me – and my academic bias is hereby acknowledged – a still somewhat weak intellectual structure of EU public procurement – and more generally public contract – law. Some key concepts have not yet been properly clarified. In this situation EU law can hardly be expected to supersede diverging domestic legal traditions. Misunderstandings can easily follow from this situation.

Clear and simple rules will always be an elusive if not utopian target. Finding partners in the internal market for the ‘Contracting State’ is a complex business, and this even more so if sustainability is to progress on the same go. Increased litigation is expected to follow the implementation of the directives.

This should be mitigated with strong guidance to and formation of procurement officials.

This conference, which was incredibly well organised by Ulla Neergaard, Catherine Jacqueson and a wonderful équipe has given a major contribution in making us all understand the many problems involved.

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Congress Programme

Wednesday 28 May 2014

09:00 - 17:00 **PhD Course on European Union Law (PhD course for young researchers in EU law in connection with the FIDE 2014 congress)**

13:00 - 14:30 Lunch for the FIDE Executive Committee (Comité Directeur)

15:00 - 17:15 **Meeting of the FIDE Executive Committee (Comité Directeur)**

19:00 - 21:00 **Welcome Reception at the City Hall of Copenhagen**

- 19:10 - Welcome by a representative of the City of Copenhagen and by Ms Ulla Neergaard, Professor at the University of Copenhagen and President of FIDE

Thursday 29 May 2014

08:30 - 10:00 Registration

10:00 - 11:30 **Opening Ceremony**

- Welcome by Ms Ulla Neergaard, Professor at the University of Copenhagen and President of FIDE
- Address by Mr Martin Lidegaard, Minister for Foreign Affairs, Denmark
- Keynote address by Mr Børge Dahl, President of the Supreme Court of Denmark (Højesteret)

- Keynote address by Mr Vassilios Skouris, Professor and President of the Court of Justice of the European Union
- Keynote address by Mr Luis Romero Requena, Director General of the Legal Service of the European Commission
- Address by Mr Ralf Hemmingsen, Rector of the University of Copenhagen

11:30 - 12:00 Coffee Break

12:00 - 13:30 Panel Discussion: The Temperature of the European Union and Major Trends

Moderator:

- Ms Catherine Jacqueson, Associate Professor at the University of Copenhagen and Secretary General of FIDE

Keynote speeches by:

- Mr Paul Craig, Professor at the University of Oxford: The Financial Crisis and the Changing EU Institutional Order
- Ms Silvana Sciarra, Professor at the University of Florence School of Law: Social Law in the Wake of the Crisis

13:30 - 15:00 Lunch

15:00 - 16:15 Parallel Working Group Sessions

General Topic 1

Subtopic: Economic Policy (Coordination) in EMU – the European Dimension

- Moderator: Mr Koen Lenaerts, Professor and Vice-President of the Court of Justice of the European Union
- General Rapporteur: Mr Fabian Amtenbrink, Professor at the Erasmus University of Rotterdam
- Institutional Rapporteur: Mr Jean-Paul Keppenne, Legal Adviser, Legal Service of the European Commission

General Topic 2

Subtopic: Stability of Residence: From Welfare Dependence to Permanent Residence

- Moderator: Ms Eleanor Spaventa, Professor at the University of Durham
- Joint General Rapporteurs: Ms Niamh Nic Shuibhne, Professor at the University of Edinburgh, and Ms Jo Shaw, Professor at the University of Edinburgh
- Institutional Rapporteur: Mr Michal Meduna, DG Justice of the European Commission

General Topic 3

Subtopic: The Reform of EU Public Procurement Law

- Moderator: Mr Francois Lichère, Professor at the University of Aix Marseille
- General Rapporteur: Mr Roberto Caranta, Professor at the University of Turin
- Institutional Rapporteur: Mr Adrián Tokár, Member of the Legal Service of the European Commission

16:15 - 16:45 Coffee Break

16:45 - 18:00 Parallel Working Group Sessions

General Topic 1

Subtopic: Economic Policy (Coordination) in EMU – the Member State's Dimension

- Moderator: Mr Koen Lenaerts, Professor and Vice-President of the Court of Justice of the European Union
- General Rapporteur: Mr Fabian Amtenbrink, Professor at the Erasmus University of Rotterdam
- Institutional Rapporteur: Mr Jean-Paul Keppenne, Legal Adviser, Legal Service of the European Commission

General Topic 2

Subtopic: Stability of Residence: The Rights of Family Members

- Moderator: Mr Loïc Azoulay, Professor at the European University Institute
- Joint General Rapporteurs: Ms Niamh Nic Shuibhne, Professor at the University of Edinburgh, and Ms Jo Shaw, Professor at the University of Edinburgh
- Institutional Rapporteur: Mr Michal Meduna, DG Justice of the European Commission

General Topic 3

Subtopic: Contracts outside EU Public Contracts Law (Including In-house and Public-Public Co-operation)

- Moderator: Mr Vassilis Hatzopoulos, Professor at the Democritus University of Thrace
- General Rapporteur: Mr Roberto Caranta, Professor at the University of Turin
- Institutional Rapporteur: Mr Adrián Tokár, Member of the Legal Service of the European Commission

19:00 - 21:00 Reception at the University of Copenhagen

- 19:30 – Welcome by Mr Jacob Graff Nielsen, Dean of the Faculty of Law, University of Copenhagen

Friday 30 May 2014

09:00 - 10:30 Parallel Working Group Sessions

General Topic 1

Subtopic: Monetary Policy in the Euro Area and the Role of the European Central Bank in EU Economic Governance

- Moderator: Mr Takis Tridimas, Professor at King's College London
- General Rapporteur: Mr Fabian Amtenbrink, Professor at the Erasmus University of Rotterdam

- Institutional Rapporteur: Mr Jean-Paul Keppenne, Legal Adviser, Legal Service of the European Commission

General Topic 2

Subtopic: Stability of Residence: Deportation

- Moderator: Mr Lars Bay Larsen, Judge of the Court of Justice of the European Union
- Joint General Rapporteurs: Ms Niamh Nic Shuibhne, Professor at the University of Edinburgh, and Ms Jo Shaw, Professor at the University of Edinburgh
- Institutional Rapporteur: Mr Michal Meduna, DG Justice of the European Commission

General Topic 3

Subtopic: General Principles Applicable to Contracts not Covered by the EU Directives

- Moderator: Ms Sacha Prechal, Professor and Judge of the Court of Justice of the European Union
- General Rapporteur: Mr Roberto Caranta, Professor at the University of Turin
- Institutional Rapporteur: Mr Adrián Tokár, Member of the Legal Service of the European Commission

10:30 - 11:00 Coffee Break

11:00 - 12:30 Parallel Working Group Sessions

General Topic 1

Subtopic: Democratic Legitimacy and Accountability of EU Economic Governance

- Moderator: Ms Dagmar Schiek, Professor at the University of Leeds
- General Rapporteur: Mr Fabian Amtenbrink, Professor at the Erasmus University of Rotterdam
- Institutional Rapporteur: Mr Jean-Paul Keppenne, Legal Adviser, Legal Service of the European Commission

General Topic 2

Subtopic: Cultures of EU Citizenship: The Impact of National Procedures

- Moderator: Mr Lars Bay Larsen, Judge of the Court of Justice of the European Union
- Joint General Rapporteurs: Ms Niamh Nic Shuibhne, Professor at the University of Edinburgh, and Ms Jo Shaw, Professor at the University of Edinburgh
- Institutional Rapporteur: Mr Michal Meduna, DG Justice of the European Commission

General Topic 3

Subtopic: Public Procurement and General EU Law (Including Competition and State Aid Law)

- Moderator: Mr Anthony Michael Collins, Judge of the General Court of the European Union
- General Rapporteur: Mr Roberto Caranta, Professor at the University of Turin
- Institutional Rapporteur: Mr Adrián Tokár, Member of the Legal Service of the European Commission

12:30 - 13:30 Lunch

13:30 - 15:00 Parallel Working Group Sessions

General Topic 1

Subtopic: European Supervisory Authorities, Single Supervisory Mechanism and Single Resolution Mechanism – Towards Integrated Financial Market Supervision in the Internal Market?

- Moderator: Mr Hubert Legal, Legal Adviser of the European Council and of the Council of the European Union, Director General of the Legal Service of the Council
- General Rapporteur: Mr. Fabian Amtenbrink, Professor at the Erasmus University of Rotterdam

- Institutional Rapporteur: Mr Jean-Paul Keppenne, Legal Adviser, Legal Service of the European Commission

General Topic 2

Subtopic: Cultures of EU Citizenship: The Effects of EU Political Rights

- Moderator: Mr Freddy Drexler, Jurisconsult of the European Parliament, Director General of the Legal Service of the European Parliament
- Joint General Rapporteurs: Ms Niamh Nic Shuibhne, Professor at the University of Edinburgh, and Ms Jo Shaw, Professor at the University of Edinburgh
- Institutional Rapporteur: Mr Michal Meduna, DG Justice of the European Commission

General Topic 3

Subtopic: Strategic Procurement

- Moderator: Mr Laurence Gormley, Professor at the University of Groningen
- General Rapporteur: Mr Roberto Caranta, Professor at the University of Turin
- Institutional Rapporteur: Mr Adrián Tokár, Member of the Legal Service of the European Commission

15:00 - 15:30 Coffee Break

15:30 - 17:00 Parallel Working Group Sessions

General Topic 1

Subtopic: The Future of Economic Governance in the EU

- Moderator: Mr Hubert Legal, Legal Adviser of the European Council and of the Council of the European Union, Director General of the Legal Service of the Council
- General Rapporteur: Mr Fabian Amtenbrink, Professor at the Erasmus University of Rotterdam
- Institutional Rapporteur: Mr Jean-Paul Keppenne, Legal Adviser, Legal Service of the European Commission

General Topic 2

Subtopic: EU Citizenship: The Challenges Ahead

- Moderator: Mr Freddy Drexler, Jurisconsult of the European Parliament, Director General of the Legal Service of the European Parliament
- Joint General Rapporteurs: Ms Niamh Nic Shuibhne, Professor at the University of Edinburgh, and Ms Jo Shaw, Professor at the University of Edinburgh
- Institutional Rapporteur: Mr Michal Meduna, DG Justice of the European Commission

General Topic 3

Subtopic: Remedies

- Moderator: Mr Friedl Weiss, Professor at the University of Vienna
- General Rapporteur: Mr Roberto Caranta, Professor at the University of Turin
- Institutional Rapporteur: Mr Adrián Tokár, Member of the Legal Service of the European Commission

17:45 - 19:00 Harbour Tour to the Gala Dinner

19:00 - 23:00 Gala Dinner at the National Museum of Denmark

- Mr Joseph Weiler, Professor and President of the European University Institute: What to Make of the Election Results to the European Parliament?

Saturday 31 May 2014

09:30 - 11:30 Panel Discussion: In the Era of Legal Pluralism - The Relationship between the EU, National and International Courts, and the Interplay of the Multiple Sources of Law

Moderator:

- Ms Marise Cremona, Professor at the European University Institute

Panel Members:

- Mr Vassilios Skouris, Professor and President of the Court of Justice of the European Union
- Ms Julia Laffranque, Judge of the European Court of Human Rights
- Mr Andreas Voßkuhle, Professor and President of the German Federal Constitutional Court (Bundesverfassungsgericht)
- Mr Jean-Marc Sauvé, President of the French Supreme Administrative Court (Conseil d'État)
- Ms Pauliine Koskelo, President of the Finnish Supreme Court (Korkein Oikeus)

Commentators:

- Mr Mattias Kumm, Professor at the New York University School of Law and the WZB Social Science Research Center, Berlin
- Mr Giuseppe Tesauro, Professor and Judge of the Italian Constitutional Court (Corte costituzionale della Repubblica Italiana)

11:30 - 12:00 Coffee Break

12:00 - 12:30 Reports by the General Rapporteurs regarding the Results of the Three Working Groups

Moderator:

- Mr Koen Lenaerts, Professor and Vice-President of the Court of Justice of the European Union

Rapporteurs:

- General Rapporteur: Mr Fabian Amtenbrink, Professor at the Erasmus University of Rotterdam
- Joint General Rapporteurs: Ms Niamh Nic Shuibhne, Professor at the University of Edinburgh, and Ms Jo Shaw, Professor at the University of Edinburgh
- General Rapporteur: Mr Roberto Caranta, Professor at the University of Turin

12:30 - 12:45 Presentation of the XXVII FIDE Congress 2016 in Budapest

- Mr Péter Darák, President of the Curia of Hungary and President of the FIDE Hungarian Association

12:45 - 13:00 Closing of the Congress

- Ms Ulla Neergaard, Professor at the University of Copenhagen and President of FIDE



The proceedings of XXVI FIDE Congress in Copenhagen in 2014 were published in three printed volumes before the Congress took place. The more formal speeches delivered at the Congress are subsequently published in the present “online” version. The two editors, Professor and President of FIDE 2013-2014, Ulla Neergaard, and Associate Professor and Secretary General of FIDE 2013-2014, Catherine Jacqueson, are both distinguished scholars within EU law. They have in different ways been the driving force behind the organization of the Congress including the related research management.

The speeches from the Opening Ceremony (29 May 2014) contained in the volume were delivered by the following: Ulla Neergaard (Professor and President of FIDE 2013-14); Martin Lidegaard (Danish Minister for Foreign Affairs); Børge Dahl (President of the Danish Supreme Court); Vassilios Skouris (President of the Court of Justice of the European Union); Luis Romero Requena (Director General of the Legal Service of the European Commission); Ralf Hemmingsen (Rector of the University of Copenhagen); Paul Craig (Professor); and Silvana Sciarra (Professor).

The welcome speech from the Reception at the University of Copenhagen (29 May 2014) was delivered by Jacob Graff Nielsen (Dean of the Faculty of Law). The keynote speech at the Gala Dinner at the National Museum of Copenhagen (30 May 2014) was held by Joseph Weiler (Professor and President of the University of Copenhagen).

The following speakers intervened in the Panel Discussion on “The Era of Legal Pluralism – The Relationship between the EU, National and International Courts, and the Interplay of the Multiple Sources of Law” (31 May 2014): Vassilios Skouris (President of the Court of Justice of the European Union); Julia Laffranque (Judge of the European Court of Human Rights); Andreas Voßkuhle (Professor and President of the German Federal Constitutional Court); Jean-Marc Sauvé (President of the French Administrative Court); and Pauliine Koskela (President of the Finnish Supreme Court). The comments by Professor Mattias Kumm are included as well.

Finally, the conclusions of the General Rapporteurs Professors Fabian Amtenbrink, Niamh Nic Shuibhne, Jo Shaw and Roberto Caranta also figure in this volume.

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