

EDITORIAL COMMENTS

Reflections on the state of the Union 50 years after Van Gend en Loos

On 5 February 2013, it was 50 years to the day that the Court of Justice of the European Communities rendered judgment in *Van Gend en Loos*,¹ one of the most important, if not the most important, decisions of the Court of Justice in the development of EU law.² In response to a request for a preliminary ruling from a Netherlands tribunal, the Court famously declared that the “Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only Member States but also their nationals.”³

This 50th anniversary provides an excellent occasion to reflect upon the current state of this *sui generis* legal and political order. In the last couple of months, a number of events have occurred that are particularly notable in this respect.

A Franco-German compromise for peace

Firstly, on 12 October 2012, the Norwegian Nobel Committee decided to award the Nobel Peace Prize to the European Union for its contribution to “the advancement of peace and reconciliation, democracy and human rights in Europe”.⁴ The Nobel Prize constitutes a forceful reminder of the fact that Europe has undeniably come a long way in the last six decades. The history books on the old continent are filled with episodes of war and armed conflict. In the words of the President of the European Council, Mr Van Rompuy, Europe “bears the scars of spears and swords, canons and guns, trenches and

1. Case 26/62, *Van Gend en Loos v. Administratie der Belastingen*, [1963] ECR 1.

2. See e.g. the contributions by Pescatore, De Witte, Mayer and Halberstam in M. Poiares Maduro and L. Azoulai (Eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010).

3. Further in this *Review*, Julie Bailleux argues that this decision must be “fully understood as the result of a mobilization strategy led by the Legal Department of the European Executives to secure the advent of the future United States of Europe.” See Bailleux, “Michel Gaudet, a law entrepreneur: The role of the legal service of the European executives in the invention of EC Law and the birth of the Common Market Law Review”.

4. <www.nobelprize.org/nobel_prizes/peace/laureates/2012/press.html>.

tanks, and more.”⁵ But that picture has drastically changed now. When World War Two ended, Europe was in ruins. In the aftermath of the war, the French Minister of Foreign Affairs Robert Schuman proposed to pool the Franco-German coal and steel resources, in an attempt to stabilize relations between the former enemies. The Schuman plan started out from the premise that it is possible to deter States from warfare by fusing their destinies through functional cooperation.⁶ This was the golden rule of Jean Monnet, the mastermind behind the plan: “It is better to fight around a table than on a battle-field”.⁷

The rest is history. Ultimately, the Schuman plan resulted in the signing of the Paris Treaty in 1951 and the establishment of the European Coal and Steel Community, the first significant successful attempt towards supranational cooperation in Europe. Since then, the European integration process has further widened and deepened. In all these years, the continued adherence to sustained peace within the EU has never been seriously questioned. It is thus fair to say that the plan has worked. The Union’s *sui generis* legal order has achieved its initial main objective: war has become virtually unthinkable in the European Union.

Be that as it may, and all the joy and contentment notwithstanding, it should not be overlooked that the award of the Nobel Peace Prize to the EU also generated considerable controversy and criticism. The Union may have succeeded in ruling out war inside its borders, at the same time it stood by, helpless, in the face of the disintegration of former Yugoslavia, one of its neighbouring countries. Even when it became flagrantly obvious that the civil unrest was degenerating into an atrocious civil war, the Union failed to intervene decisively. At the very least, it is to be hoped that the Balkan war made the EU aware of the dangers: war is perhaps inconceivable now, it has by no means become impossible. Moreover, there was frowning at the timing of the award for other reasons. The chairman of the Nobel Committee, Mr Jagland, may have praised the EU for helping to bring about “fraternity between nations”,⁸ but precisely this fraternity between EU Member States – and even between euro area members – has come under increasing strain since

5. Van Rompuy, “From War to Peace” (Nobel Lecture), Oslo, 10 Dec. 2012, available at: <www.nobelprize.org/nobel_prizes/peace/laureates/2012/eu-lecture_en.html>

6. Lodge (Ed.), *The European Community and the Challenge for the Future* (Pinter, 1993), introduction.

7. It did not matter that France and Germany remained rivals at first. Friendship could develop later. The seal on the reconciliation between France and Germany would only be set more than ten years later, in the Treaty of Friendship, concluded by French president de Gaulle and German chancellor Adenauer in the French Elysée on 22 Jan. 1963, also exactly 50 years ago.

8. Award Ceremony Speech by T. Jagland, Oslo, 10 Dec. 2012, available at: <www.nobelprize.org/nobel_prizes/peace/laureates/2012/presentation-speech.html>

the outbreak of the sovereign debt crisis. This most prestigious award, apart from being a grand achievement in itself, should therefore also be regarded as an invitation or an encouragement for the EU to continue to preserve and promote its promise of peace and hope, also, and perhaps even more so, in difficult times such as these.

Another Franco-German compromise for a single currency

Secondly, on 27 November 2012, the Court of Justice delivered its judgment in *Pringle*, a case which essentially turned on two issues: firstly, the possibility to amend the Treaty according to the simplified Treaty revision procedure of Article 48(6) TEU in the given circumstances; and secondly, the entitlement of euro area Member States to conclude and ratify the Treaty establishing the European Stability Mechanism in the light of the existing Treaty framework on Economic and Monetary Union.⁹

While it was a desire to rule out warfare that brought the Founding Fathers of the Union's legal order together in the first place, the introduction of the single currency must undoubtedly be considered another crown jewel of European integration. The introduction of the euro is also based on a Franco-German compromise. After the fall of the Berlin wall, the exchange of the Deutschmark for the euro was the price Germany had to pay for German reunification. This way, concerns about a renewed German domination of Europe could be put to rest. Due to a fear of inflation, Germany also demanded guarantees about price stability, which were incorporated in the no-bailout clause of Article 125 TFEU.¹⁰

In its initial years, the euro was a success story. Early warnings about possible adverse consequences of the asymmetric division between economic and monetary policy competences in the Maastricht Treaty – monetary policy becoming an exclusive EU competence, while economic policy essentially remained a Member State competence – were disregarded.¹¹ But when the economic engine sputtered, a combination of unsound national budgetary policies, lack of European control and supervision and a high degree of market pressure resulted in Greece being unable to refinance itself on the markets in the beginning of 2010.¹² Faced with the risk of contagion, the euro area countries came to the rescue in May 2010. First a set of pooled bilateral loans

9. Case C-370/12, *Pringle v. Ireland*, judgment of 27 Nov. 2012, nyr.

10. Szasz, *De euro. Politieke achtergronden van de wording van een munt* (Mets & Schilt, 2001).

11. Louis, "The Economic and Monetary Union: Law and institutions", 41 CML Rev. (2004), 575–608; De Grauwe, *Economics of Monetary Union*, 7th ed. (OUP, 2007).

12. That is not to say that the stability of the euro area has been put in jeopardy only by Greece. Besides Greece, other countries, such as Portugal, Ireland, Spain or Italy, have also

(the Greek Loan Facility) were concluded, and shortly thereafter, together with the Union, two emergency funds were created: the European Financial Stability Mechanism (EFSM), created by Regulation 407/2010; and the European Financial Stability Facility, a Special Purpose Vehicle outside the Treaty legal framework.¹³

While the need for some sort of rescue facility is uncontested, it was equally undisputed that a more structural and permanent solution was necessary in order to safeguard the financial stability of the Union as a whole. Chancellor Merkel in particular insisted on the fact that Germany wanted to avoid the Union becoming a *transfer union*. For that purpose, on 2 February 2011, the euro area Member States signed an international treaty on a European Stability Mechanism (ESM). Similar to its predecessor, the EFSF, this permanent mechanism is placed outside the formal EU Treaty structure. To ensure the compatibility of the ESM with EU law, the European Council had launched, in December 2010, a simplified Treaty revision procedure on the basis of Article 48(6) TEU to insert a new third paragraph into Article 136 TFEU, in order to permit euro area Member States to activate a stability mechanism if this is indispensable to safeguard the stability of the euro area as a whole.¹⁴ On 25 March 2011, the European Council adopted Decision 2011/199, adding this paragraph to Article 136 TFEU.¹⁵

Mr Thomas Pringle, a member of the Irish Parliament, brought proceedings against the Irish Government, seeking a declaration, first, that the amendment of Article 136 TFEU by Decision 2011/199 constitutes an unlawful Treaty change, and second, that by ratifying the ESM Treaty, Ireland would undertake obligations incompatible with the Union Treaties. After the Irish Supreme Court had referred the matter to Luxembourg for a preliminary ruling, the Court of Justice had to deal with this controversial matter. The Full Court was placed between the devil and the deep blue sea. Painfully aware of the acute political sensitivity of the issue at stake, it did what it was widely expected to do: that is, to reject the Irish MP's complaints and approve the ESM Treaty.¹⁶ Had the Court reached a different verdict, this would almost certainly have led to the doom scenario of a Greek exit and seriously jeopardized the future of the

contributed to this instability. More generally, the vicious circle linking sovereign debt to banks throughout the EU is a major cause of instability, which explains the consensus to create a banking union; see *infra*.

13. De Gregorio Merino, "Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance", 49 CML Rev. (2012), 1613–1646.

14. European Council Conclusions, No. 30/1 REV 1 of 16–17 Dec. 2010, para 2.

15. European Council Decision 2011/199, O.J. 2011, L 91/1.

16. Borger, "The ESM and the European Court's Predicament in Pringle" 14 *German Law Journal* (2013), 113–140. A case note on *Pringle* will be published in the near future in this *Review*.

euro area in its entirety. Conversely, by opting for the – realistically speaking – only viable course of action, just like the German Constitutional Court had done two months previously,¹⁷ the Court secured the granting of financial assistance to euro area States in financial distress for the future.

In order to reach this outcome, however, the Court was forced to engage in highly complex and sensitive arguments and rhetoric, especially with regard to the Treaty's economic policy provisions. Almost inevitably, this impacted on its reasoning, which is not always fully convincing or crystal clear. For instance, the Court ruled – in a very “matter of fact” way – that it ensues from the preparatory work relating to the Treaty of Maastricht that Article 125 TFEU, despite its seemingly rather unequivocal terms, was never “intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State.”¹⁸ From this it follows that besides price stability, financial stability appears also to be encompassed in Article 125 TFEU. This does not correspond to the conventional reading of this provision, however.

Importantly, the Court has elaborated the conditions under which the activation of financial assistance by means of a stability mechanism such as the ESM is compatible with Article 125 TFEU: assistance must be 1) indispensable for the safeguarding of the financial stability of the euro area as a whole, and 2) subject to strict conditionality; and 3) the Member State remains responsible for its commitments to its creditors. While all three conditions raise further questions, the first one is particularly unclear. Cyprus is in financial distress and could very well become the next State in need of financial assistance. According to the terms the Court set out in *Pringle*, Cyprus will only be eligible for help from the ESM if its financial problems endanger the stability of the entire euro area. But it is submitted it could be questioned to what extent this is actually the case with Cyprus. If this condition is maintained, it could yield the unwarranted and, frankly speaking, untenable situation that certain euro area members are obliged to financially contribute to the ESM, but are not entitled to receive any assistance from it, because they are viewed as not threatening the financial stability of the euro area. To make matters worse, these Member States will then not be able to turn to the ECB for help either, as the latter has linked the activation of its bond-buying programme to that of the ESM. Only Article 122(2) TFEU, which confers on the Union the power to grant *ad hoc* financial assistance to a Member State in difficulties or seriously threatened with severe difficulties caused by exceptional occurrences beyond its control, would seem to offer a

17. Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), Case No. 2 BvR 1390/12, 12 Sept. 2012, NJW (2012) 3145.

18. *Pringle*, cited *supra* note 9, para 130.

way out of this conundrum. This provision can, however, only be triggered if its own conditions are fulfilled; moreover, it has been interpreted restrictively by the Court.¹⁹

It is too early to tell whether *Pringle* will be admitted to the pantheon of the Court's great judgments. The Court was certainly walking a tightrope in *Pringle*: a ruling that Article 125 TFEU had been modified would have meant that the conclusion and ratification of the ESM Treaty would have been possible only after the entry into force of Decision 2011/199. From one perspective, the contrast between *Van Gend & Loos* and *Pringle* is great: whereas in the former judgment, the Court assumed the role of the motor of the integration process, in the latter, its role consisted of judicially defending new developments created in the intergovernmental process. Looking at its concrete outcome, however, the lasting importance of *Pringle* is arguably that financial assistance to euro area Member States in distress through the ESM has been secured for the future. In doing so, the Court has sanctioned the determination of the Euro-17 to continue along the route of the single currency.

Need for an Anglo-German compromise?

"O tempora, o mores." In the EU, conflicts or crises are no longer resolved as they might have been in previous times. Greece is still a sovereign State, even though its citizens may feel reserves about this at the moment, and it has not been invaded by foreign powers. What is more, it is apparent that, throughout the government debt crisis, a sense of solidarity between the Member States is slowly but steadily developing, albeit often still reluctantly.

That is not to say life is free of problems in the EU. The crisis is not yet over. The financial markets appeared to have calmed down somewhat lately, but the February 2013 election results in Italy, seriously complicating the formation of a stable new government in that country, were sufficient to bring them into turmoil again. Moreover, the crisis has hit the real economy. Most countries of the euro area and the Union face a deep recession. President Draghi of the ECB has recently issued a warning that there is no room for complacency and that national governments should not relax their efforts on budgetary discipline. In this climate, a struggle is ongoing to find a consensus on the new 2014–2020 EU budget. At the beginning of February 2013, the heads of government in the European Council reached an agreement on a budget of € 960 billion, about € 90 billion less than the Commission had initially proposed. If approved by the European Parliament, which still remains to be seen, this will be the first budget that is lower than the previous one. Clearly

19. *Pringle*, cited *supra* note 9, para 65.

the Member States did not want to be the only ones to have to tighten their belt, and felt also the EU could not lag behind. While it is perhaps an understandable standpoint to curb EU spending when national investments are also low, that does not necessarily make it a wise one, certainly in times of recession when the focus is not only on trying to cut expenditure, but also on trying to stimulate the economy. Barely two weeks before the budget agreement, in a highly mediatized speech, supposedly directed primarily at his Eurosceptic conservative party members, British Prime Minister Cameron insisted that the UK wants to remain an EU Member State.²⁰ At the same time, he announced that the UK wants to negotiate a new settlement for the entire EU.²¹ He stated that the single market must remain at the core of the Union; but the Union needs to become more open, flexible, and democratic. In default of such a new settlement, Mr Cameron indicated that he would seek to renegotiate the UK's position with its European partners. Moreover, if re-elected, he promised to hold a referendum on British EU membership in 2017. If he could hear it, the former French President de Gaulle would turn in his grave: in the 1960s, de Gaulle strenuously opposed the UK's accession to the then EEC. Several British concerns about the EU find echo in the Netherlands, where the Rutte II administration also displays an ambivalent attitude towards Europe and the debate also focuses on "repatriating competences from the EU".²²

Contemporaneously, at EU level, a path has been devised towards a banking union with increased supervisory powers for the ECB, a blueprint for a deep and genuine EMU has been issued by the European Commission, and concrete proposals towards a genuine EMU have been presented by Mr Van Rompuy at the European Council in 2012.²³ Many of the discussions in Brussels now focus on options related to mutualization of debts. The *leitmotiv* of all these plans and developments is to put an end to the crisis. Everything is geared towards more responsibility and discipline, coupled with solidarity and

20. <www.telegraph.co.uk/news/worldnews/europe/eu/9820230/David-Camersons-EU-speech-in-full.html>

21. Art. 48(2) TEU allows Member States to submit proposals for the amendment of the Treaties. These proposals may, *inter alia*, serve to reduce the competences conferred on the Union.

22. Van den Bogaert, *The Netherlands and EU Law*, supplement to Craig and de Burca, *EU Law. Text, Cases and Materials*, 5th ed. (OUP, 2012).

23. Report by the president of the European Council, "Towards a Genuine Economic and Monetary Union", 26 June 2012, EUCO 120/12; European Commission, "A blueprint for a deep and genuine economic and monetary union. Launching a European debate", 30 Nov. 2012, COM(2012)777 final/2. The four main pillars of a "deeper and genuine EMU" are 1) a banking union; 2) a fiscal union; 3) an economic union; and 4) a political union. Only on the first, is there more or less consensus.

support. Inevitably, all this will lead to further political and economic integration.

Two observations must be made in this respect. Firstly, it remains to be seen whether the Member States welcome “more Europe” at the moment. Secondly, there can be no doubt about the fact that, if these plans for a true EMU are to materialize, a Treaty change will be necessary. The current Treaty is a straitjacket for further reforms for this purpose. *Pringle* has made it clear there are limits to creative Treaty interpretation. But will this Treaty change happen? This could be the *million euro question* for the immediate future of the EU. On the one hand, Treaty amendment appears unavoidable in order to provide structural solutions to overcome the crisis; on the other hand, there is the risk of opening Pandora’s box: the UK will almost certainly seize this opportunity to revise drastically its relationship with the EU, with possibly the Netherlands and other Member States in its wake. At the same time, Germany, as the Member State that can bear the heaviest burdens, will surely make heavy demands for additional commitments to budgetary discipline and fiscal governance in exchange for its acceptance of debt mutualization and the principle of joint and several liability. A grand Anglo-German compromise might thus be in the making for the European project...