

EDITORIAL COMMENTS

Presiding the Union in times of crisis: The unenviable task of the Netherlands

In the first half of 2016, the Netherlands is at the helm of the EU. This Founding Member State has held the EU presidency on eleven previous occasions. Each of the last three times has been highlighted by a significant development in the history of the European integration process. In 1991, the Treaty on European Union was drafted in Maastricht. In 1997, the Treaty on European Union was already amended for the first time in Amsterdam. And in December 2004, the Heads of State and Government of the EU Member States gathered in the European Council finally agreed to start EU accession negotiations with Turkey.¹

This time, expectations do not run that high. This is more or less inevitable, for a number of reasons. First, with the creation of the two new functions of the semi-permanent President of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy by the Lisbon Treaty,² the role of the rotating presidency has become less prominent. It now primarily means that the competent Dutch minister chairs the Council meetings, held with their 27 counterparts.³ Second, within this more modest role, the Dutch Government has set a rather “down to earth” agenda for the next six months, eschewing grand objectives and preferring to focus instead on more pragmatic, yet still important and ambitious goals.⁴ The Netherlands has outlined three priorities for its Presidency. The first is that of a Union that concentrates on the essentials, on what is important for citizens and businesses. Secondly, the Dutch Presidency intends to focus on sufficient jobs and innovative and sustainable economic growth. The final Dutch priority is on making connections, between Member States, and between the Union and its citizens. The Dutch Programme stresses that Member States must collectively assume responsibility for European cooperation, and that the Union must become more decisive, but also ensure that citizens recognize and acknowledge its approach.

1. Turkey filed a formal application to accede to the then EEC already in 1987. The Ankara Agreement, which created an association between Turkey and the EEC and goes back to as early as 1963, already expressly contained the ambition of Turkey’s membership of the EEC.

2. Arts. 15 and 18 TEU respectively.

3. In addition, the presidency chairs many Council working groups, COREPER, etc.

4. The Programme of the Netherlands Presidency of the Council of the EU can be found through the webpage: <english.eu2016.nl/documents>.

The third reason for expecting only modest achievements is that, undeniably, political reality is dictated by the intricacies of the moment. Important and intrinsically valuable as the Dutch priorities may be, they seem to have already been overtaken by other events. For the better part of the last decade, the EU has found itself in a semi-permanent state of crisis. What is more, several crises have followed each other in quick succession. The first storm of the financial crisis had barely been weathered in the EU before it was “all hands on deck” again, especially in the euro area countries, to face the hurricane of the government debt crisis. The sovereign debt crisis may finally appear to be under control, at least for now, with the conclusion of the agreement on the terms for the third financial assistance package for Greece in summer 2015,⁵ but it has been all too rapidly succeeded by the exacerbated refugee crisis. This new crisis presents the Union and its Member States yet again with a set of arduous tasks. And as if this does not suffice for now, the political doom scenario of a “Brexit” looms large, with the referendum on the UK’s membership of the Union scheduled for June 2016. Evidently, there is a lot at stake in the EU at the moment. Difficult circumstances for the Netherlands to assume the Presidency of the Council

The refugee crisis: Something is rotten in the States of Syria, Afghanistan

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Millions of people have fled war and persecution in countries such as Syria, Afghanistan or Iraq, and many of them currently wander around Europe, desperately searching for a better life in the promised land that the EU still represents to all too many. No ocean too deep, no wall too high to stop them. The mass migration towards the Union is primarily a humanitarian test for the EU. Every day, people drown in the Mediterranean on their quest to go to the European mainland. Can a Union which claims to be founded on values such as respect for human dignity, freedom or human rights let this happen?⁶ “Wir schaffen das”, Germany’s Chancellor Merkel and indisputably the Union’s most influential national leader, notoriously declared. “If 80 people are comfortably sitting on a bus, entry cannot reasonably be denied to the 81st” is one way of putting it. In the euro crisis, Germany did effectively lead the way, primarily focusing on budgetary discipline, stringent austerity measures and economic reform, with the other Member States – albeit perhaps grudgingly – following suit. This time, however, the Chancellor has encountered fierce opposition. In Germany, her approach was harshly

5. See ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm.

6. Art. 2 TEU.

criticized even by her own coalition partner in the federal government, branding it as “Herrschaft des Unrechts”.⁷ Outside Germany, several Member States have also openly distanced themselves from the German *Willkommenskultur*. France has declared that its intake capacity is limited to 30 000 refugees; the UK has stated that it is willing to accept 20 000 people, spread over a period of five years, and Austria has recently begun imposing a new policy of accepting only 80 refugees a day. The September 2015 Council decision on the relocation and resettlement of 160 000 refugees from Italy and Greece is hardly complied with up until now.⁸ Tellingly, the Decision was only adopted after a vote by qualified majority had effectively taken place, with four Member States being formally outvoted. In the aftermath, Poland threatened to initiate annulment proceedings, and Slovakia and Hungary actually did do so.⁹

Clearly, besides being a humanitarian crisis, this is also a crisis in which solidarity between Member States, be it of a financial, physical or operational kind, is severely tested. Controlling the external borders of the Member States is and remains primarily their individual responsibility, but the geographical reality of countries like Greece or Italy on one or more of the migration routes cannot simply be “their problem”. Greece has a coastline of 13 676km! Moreover, borders are currently being closed – even physically — in an attempt to prevent people from entering the EU. But by closing its borders with Serbia, for example, Hungary has de facto redirected refugee flows to Croatia – a non-Schengen country – and Slovenia, thereby perhaps conveniently but certainly not collegially passing the hot potato onto two neighbouring fellow Member States.

Importantly, this crisis also raises issues about compliance with European and international and legal standards. To mention but some, firstly, it painfully exposes the massive non-compliance with the recast Dublin Regulation on asylum applications, the mechanism on the allocation of responsibility to the

7. See <www.spiegel.de/politik/deutschland/fluechtlinge-horst-seehofer-unterstellt-angela-merkel-herrschaft-des-unrechts-a-1076528.html>. Notably, this term is usually used to refer to dictatorships such as the former GDR.

8. Council Decision (EU) 2015/1523 of 14 Sept. 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, O.J. 2015, L 239/146. See more generally “Editorial comments: From eurocrisis to asylum and migration crisis: Some legal and institutional considerations about the EU’s current existential struggles”, 52 CML Rev. 1437–1450.

9. Case C-643/15, *Slovakia v. Council* and Case C-647/15, *Hungary v. Council*, both pending. For an initial analysis, see Vikarska, “The Slovak challenge to the asylum-seekers’ relocation decision: A balancing act”, available at <eulawanalysis.blogspot.nl/2015/12/the-slovak-challenge-to-asylum-seekers.html>.

Member State through which first entry into the EU occurred.¹⁰ The mechanism never really functioned in recent years, with many refugees preferring to travel through to Austria, Sweden or Germany rather than being registered as an asylum seeker in the country of first entry, and many countries of first entry being reluctant to register asylum seekers, as this triggered their responsibility under the Dublin system.¹¹ Secondly, as an immediate consequence of the failure of the Dublin system, coupled with some high profile terrorist threats and attacks, also the Schengen arrangements concerning the abolition of internal border controls have come under increasing strain. Currently, five EU Member States in the Schengen zone – Austria, Belgium, Denmark, Germany and Sweden – have temporarily reinstated border controls for reasons related to irregular migration. They all invoked the exception in the Schengen Borders Code concerning serious threats to internal security and public policy.¹² Crucially, these controls may only be put in place as a measure of last resort, for a strictly limited scope and period of time. By invoking this exception, the Member States, implicitly and at least for now, pledged allegiance to the Schengen system, arguably one of the major achievements of the integration process. But the question of course remains whether this – even if merely temporary – reintroduction of border controls can be considered legitimate and proportionate.

Last, but certainly not least, Member States must ensure compliance with the principle of *non-refoulement*. This principle, laid down in Article 33 of the 1951 Geneva Convention on the Status of Refugees, to which all EU Member States are Contracting Parties, prohibits States from returning a refugee to territories where there is a risk that his or her life or freedom would be threatened.¹³ With the numbers of asylum seekers allegedly exceeding the capacity of the EU Member States and the difficulty in clearly distinguishing between economic migrants and refugees under the Geneva Convention,

10. Regulation (EU) 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), O.J. 2013, L 180/31.

11. See further e.g. Rijpma, “It’s my party and I cry if I want to: ‘Celebrating’ thirty years of Schengen”, in Steunenberg, Voermans and Van den Bogaert (Eds.), *Fit for the Future? Reflections from Leiden on the Functioning of the EU* (Eleven International Publishing, The Hague, 2016), Ch. 9.

12. Arts. 23–25 Regulation (EC) 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) O.J. 2006, L 105/1. France also reintroduced border controls, but for reasons other than irregular migration (in particular as a result of the state of emergency following the Paris terrorist attacks of 13 Nov. 2015); these controls must also comply with the provisions of the Schengen Borders Code.

13. The text of the 1951 Convention is available at <www.unhcr.org/3b66c2aa10.html>.

Member States must still be very cautious before rejecting a request for asylum and returning an asylum seeker.

When trying to solve a problem, the best way generally is to address its root causes. In this case, any attempt would inevitably mean interfering, in one way or another, in politically highly complex conflict areas such as Syria, Afghanistan or Iraq. In view of the limited likelihood of success, certainly in the short term, attention must be devoted to feasible alternatives. Insofar as the crisis affects the internal functioning of the Union, the Commission has attempted to identify a number of steps to be taken to return to a fully functioning Schengen area:¹⁴ firstly, the external borders of the Union must be efficiently managed, for which responsibility should be shared between all EU Member States. The Commission proposes, *inter alia*, the immediate creation of a European Border and Coast Guard.¹⁵ Secondly, the “wave-through approach” should be stopped and Member States should resume applying the Dublin rules, granting access to the asylum procedure to persons requesting asylum and refusing entry at the border to persons who do not meet the entry conditions. In order to stop the inflow of irregular migrants to the Union and tackle traffickers and smugglers networks, in October 2015 a Joint Action Plan was made with Turkey, in return for the promise of a new impetus to the accession negotiations and the prospect of accelerated visa-free travel to the EU.¹⁶ The full and speedy implementation of the Action Plan remains a priority. Thirdly, unilateral decisions to reintroduce internal border controls should be replaced by coordinated action, and these temporary controls should be lifted as soon as possible. The Communication from the European Commission is full of good intentions. It remains to be seen, however, whether this will ultimately do the trick. The European Border and Coast Guard still has to be set up. The Dublin rules have failed to be effective in the past. And the Union should be careful about relying too much on Turkey, whose political interests do not necessarily coincide with those of the Union.

14. Communication of the European Commission to the European Parliament, the European Council and the Council – *Roadmap back to Schengen*, 4 March 2016, COM(2016)120 final, Press release available at <europa.eu/rapid/press-release_IP-16-585_en.htm>.

15. Proposal for a Regulation on the European Border and Coast Guard, Strasbourg, 15 Dec. 2015, COM(2015)671 final, available at <ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/regulation_on_the_european_border_and_coast_guard_en.pdf>.

16. EU-Turkey Joint Action Plan of 15 Oct. 2015, available at <europa.eu/rapid/press-release_MEMO-15-5860_en.htm>. The plan was adopted at the EU-Turkey summit, held on 29 Nov. 2015. The agreements with Turkey are being specified and confirmed at the time of drafting this editorial.

Brexit: To be or not to be?

In the Lisbon Treaty, the possibility for a Member State to withdraw from the Union was explicitly provided for the first time.¹⁷ It did not really come as a surprise that the UK was the first Member State to hint at a possible voluntary departure from the Union. Most UK governments have been primarily interested in participating in the Union's internal market, and much less in other policy areas, as epitomized by the famous vow of former Prime Minister Margaret Thatcher to fiercely oppose "a European superstate exercising a new dominance from Brussels".¹⁸

In his own January 2013 speech on Europe, David Cameron pledged to hold an in/out referendum during the early part of the next parliament if the Conservative Party were to win the next general election, which it did. He declared it would be a decision on the destiny of the UK and added that, if he secured a new UK/EU relationship he was happy with, he would campaign "heart and soul" to stay within the EU.¹⁹ In a letter of 2 February 2016, European Council President Tusk proposed a "new deal" for the UK within the EU. During the February 2016 European Council, agreement was reached on a "New Settlement for the United Kingdom".²⁰ A binding Decision of the Heads of State or Government lays down the terms of the agreement, which should take effect as soon as the UK informs the Council that it has decided to remain in the EU. The agreement contains four main "baskets". Firstly, it sets out principles to ensure mutual respect between the Member States participating in further deepening of EMU and the Member States that do not. When non-euro area Member States express concerns about further integration within the euro area, these will be taken into consideration; euro area Member States must endeavour to do all that is possible to remove the concerns, but they cannot amount to a veto or delay of urgent decisions.²¹ Secondly, the Decision emphasizes that to secure the establishment of the internal market and to generate growth and jobs, the EU must increase its efforts towards enhancing competitiveness and pursue an active and ambitious policy of trade.

17. Art. 50 TEU.

18. Speech given in 1988 in bruges, available at <www.margaretthatcher.org/document/107332>.

19. Available at <www.theguardian.com/politics/2013/jan/23/david-cameron-eu-speech-referendum>.

20. European Council conclusions 18–19 Feb. 2016, Annex I, available at <www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions/>.

21. See generally, Dashwood, "Guest editorial: Living with the eurozone", 53 CML Rev., 3–9.

Thirdly, and importantly, on sovereignty, the Decision recognizes that the references in the Treaties and their preambles to the “process of creating an ever closer union among the peoples of Europe” do not commit the UK – or any other Member State, for that matter – to further political integration into the Union. By the same token, it also acknowledges that the Treaties allow an evolution towards a deeper degree of integration among Member States that do share such a vision of a common future. The Decision also includes a so-called “red card” procedure with regard to subsidiarity: if more than 55 percent of the votes allocated to the national parliaments point at a non-compliance of a draft Union legislative act with the principle of subsidiarity, the consideration of the draft legislative act in question in the Council will be discontinued, unless it is amended to accommodate the concerns expressed.

Finally, on social benefits and free movement, the Decision stresses the need to fully respect the Treaties, while also clarifying the interpretation of current rules and addressing some of the UK concerns. It notes that the Commission will submit a number of proposals to amend EU secondary legislation: first, an option to be included in Regulation 883/2004 to index child benefits exported to Member States other than that where the worker resides, to the standard of living of the Member State where the child resides; second, an amendment to Regulation 492/2011 so as to provide for an “alert and safeguard mechanism” authorizing Member States to limit access of EU workers to welfare benefits for a total period of up to four years from the start of employment. The limitation would be graduated, from an initial complete exclusion but gradually increasing access to benefits to take account of the growing connection of the worker with the labour market of the host State. The implementing act would have a limited duration of seven years, which is not extendable. The safeguard mechanism could be invoked by a Member State confronted with an inflow of workers from other Member States of an exceptional magnitude over an extended period of time. The Commission would examine whether such an exceptional situation exists on a scale that affects essential aspects of the State’s social security system or leads to serious difficulties which are liable to persist in its employment market or put excessive pressure on its public services. On a proposal from the Commission, the Council could then authorize the Member State to restrict access to in-work welfare benefits to the extent necessary. The arrangements set out in the European Council Conclusions include a declaration by the Commission that the safeguard mechanism is intended to cover precisely the type of exceptional situation that seems to exist in the UK today, so the UK would be justified in triggering the mechanism.

Cameron has expressed his satisfaction with the agreement. He heralded it as a Better Deal for Britain, and stated that Britain would be “safer, stronger

and better off by remaining in a reformed EU”; he also announced that the referendum will be held on 23 June 2016.²² The outcome of the referendum is highly uncertain. It is not obvious that this “new settlement” will convince the British people to opt for a prolonged stay in the EU. The UK has received reassurance that it does not have to politically integrate further against its will, but it cannot prevent the other Member States from doing so if they wish. The red card procedure looks impressive, but it remains to be seen whether it will be effective in practice: so far, the already existing “yellow” and “orange” card procedures have rarely been used. Besides, the blocking minority in the Council is lower than the threshold for the “red card” procedure. The ambition to focus on growth and jobs is widely shared. The UK has been guaranteed that the position of non-euro area Member States will be respected, but it cannot veto further integration of euro area Member States on EMU matters. Last, but certainly not least, on free movement and benefits, Cameron possibly got the big fish he was looking for. For the next seven years, EU migrant workers will potentially have limited access to welfare benefits during the first four years of their stay in the UK. This aspect of the agreement could be far-reaching. The precise details must still be elaborated, so it is too early to assess its impact. But clearly it flirts with a breach of the sacrosanct principle of non-discrimination on grounds of nationality in connection with free movement. At the same time, it cannot be denied that the idea of granting migrant workers only gradual access to the welfare system of the host Member State is not entirely devoid of logic. An “assimilation” period of four years is quite long, though, certainly if the “permanent residence” status under Directive 2004/38 is granted after a stay of five years. It is moreover perhaps somewhat peculiar that the Commission has already declared that the UK does apparently meet the criteria to trigger this alert and safeguard mechanism;²³ but, if data suggesting that 4 out of 10 migrant workers receive welfare benefits is correct, this may even seem legitimate.²⁴

Evidently the new settlement for the UK left the EU stuck between a rock and a hard place. If it wanted to keep the UK on board, the European Council had to meet the UK demands somewhere. At the same time, it could not give

22. <www.bbc.com/news/uk-politics-35621079>.

23. The Commission “considers that the kind of information provided to it by the United Kingdom . . . shows the type of exceptional situation that the proposed safeguard mechanism is intended to cover exists in the United Kingdom today. Accordingly, the United Kingdom would be justified in triggering the mechanism in the full expectation of obtaining approval.” Declaration of the European Commission on the Safeguard Mechanism referred to in paragraph 2(b) of Section D of the Decision cited *supra* note 19.

24. See <www.theguardian.com/politics/2015/nov/10/fallon-half-eu-migrants-claiming-benefits>.

in too much, so as not to create precedents for other Eurosceptic Member States. Conspicuously, the Decision is drafted so as to apply generally, and not only to the UK, despite making references to the UK situation. In the end, the implications of this settlement may thus go beyond the specific case of the UK. Principle met pragmatism in the agreement, perhaps most clearly in the alert and safeguard mechanism, which sits uncomfortably with the essence of non-discrimination in the context of free movement, but can only be granted under exceptional circumstances, and is furthermore restricted to a limited duration. The final result does reaffirm the special position of the UK in the EU, a position which was, of course, already special. As the Decision itself recalled: under the Treaties, the UK is entitled (i) not to adopt the euro; (ii) not to participate in the Schengen area as regards internal and external borders; (iii) to choose whether or not to participate in measures in the area of freedom, security and justice; or (iv) to cease to apply, as from 1 December 2014, a large majority of Union acts and provisions in the field of police and judicial cooperation in criminal matters adopted before the entry into force of the Lisbon Treaty.²⁵ At the same time, this new settlement inevitably further positions the UK in the outer margins of the EU integration project. In any event, the ball is firmly in the hands of the British people now. *Rendez-vous* on 23 June...

A difficult Netherlands Presidency

One rotating EU presidency, two major crises. For the sake of simplicity, the consultative referendum in the Netherlands on the EU Association Agreement with Ukraine, to be held on 6 April 2016, was left out of the equation so far. The Netherlands Parliament approved the 2014 Association Agreement on 7 July 2015. GeenPeil, a political anti-establishment platform with a Eurosceptic agenda, rallied and collected 427,939 signatures of eligible voters, which was above the threshold of 300,000 required by the Consultative Referendum Act of 1 July 2015 in order to organize a referendum on the Approval Act.²⁶ For the referendum to be valid a turnout of at least 30 percent of eligible voters is required. The outcome is decided by simple majority. Basically, the Approval Act is suspended until the referendum. As long as the Approval Act has not entered into force, the instrument of ratification cannot be deposited and the Association Agreement is prevented from entering into force as a whole.

25. See the Preamble to the Decision.

26. For the text of the Consultative Referendum Act, see <wetten.overheid.nl/BWBR0036443/2015-07-01>.

While the bulk of the attention may be focused on that other referendum in June, the Dutch Government would be well-advised not to take this referendum too lightly; if it has learned any lessons from the previous Dutch experience relating to the Constitutional Treaty, it should clearly explain to the Dutch people why it decided to sign this Association Agreement.²⁷ Poroshenko, President of Ukraine, let there be no doubt about it during his visit to the Netherlands in November 2015: the Agreement is about furthering economic cooperation between the Netherlands and the EU and Ukraine, not about EU accession, contrary to what critics of the Agreement often assert.²⁸

In any case, the referendum is a legal novum: it is the first time the ratification of an EU association agreement is jeopardized this way. If the Dutch reject the Association Agreement, the practical consequences might arguably remain limited: alternative scenarios foresee in the adoption of the Agreement as a trade agreement, removing the need for unanimity,²⁹ or even under the provisions of enhanced cooperation. Conversely, the political damage to the image of the Netherlands in the EU – and beyond – in the event of a “no” would be greater. More generally, this recent trend of holding national referendums on European affairs – with the announcement of a plebiscite in Hungary on the compulsory intake of refugees under EU quota schemes as the latest expression – jeopardizes effective cooperation and decision-making at EU level.

Because of the quick succession of major crises in the EU lately, and the growing EU scepticism that ensues, the Foreign Ministers of the six Founding Member States met in Rome in early February 2016, to reflect on the future of the EU, one year before the 60th anniversary of the EEC Treaty.³⁰ The refugee crisis and the crisis around the position of the UK in the Union may be of an entirely different nature, but one invaluable lesson can in any event be drawn from both of them: cooperation is a great good. Or in the words of Benjamin Franklin: “We must, indeed, all hang together or, most assuredly, we shall all hang separately.” If the Member States do not manage to share responsibility for the outer EU borders, Schengen will not be able to persist. On a global level, the EU is infinitely more valuable including the UK. At the same time,

27. Van Middelaar, “Ja-campagne, regering kan hier niet onderuit”, *NRC Handelsblad*, 29 Jan. 2016.

28. See e.g. Poroshenko, “Ukraine – The Netherlands: European stability via European values”, Leiden Europa Lecture, delivered on 27 Nov. 2015, available at <media.leidenuniv.nl/legacy/rede-poroshenko.pdf>.

29. With Art. 207 TFEU as a possible legal basis.

30. “EU’s founding members seek ‘more Europe’, even if it is smaller”, 10 Feb. 2016, available at <www.euractiv.com/section/central-europe/news/eu-s-founding-members-seek-more-europe-even-if-it-is-smaller/>. The six Founding Member States of the EU reiterated their commitment to “an ever closer Union”.

the crises also demonstrate that in a Union of 28 Members, it is no longer realistic to “hang together all of the time”. The Union is bound to proceed with different speeds in the future, be it in the guise of the euro area or a “coalition of the willing”. That does not have to be a bad thing. In this respect, however, it is submitted that there must be “an inviolable core of rules and principles”, which is respected by all. Free movement belongs to that core. For that reason, departures from that principle, such as the “alert and safeguard mechanism” or reinstating border controls, should indeed remain limited to truly exceptional circumstances...