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Editorial

Why Does the EU Keep Losing in Referenda, and What to Do about It?

European Union; Referendums

The recent track record of the EU in referenda is a dismal one. From the Danish rejection of the Maastricht Treaty, the various Irish "No" votes and the demise of the Constitutional Treaty to the British referendum, when the EU is put to the voters, they often reject what is on offer. Since 2015, the EU has been turned down in Greece, Denmark, the Netherlands, the UK, and Hungary. Why is that, and what could be done about it?

Two things stand out when assessing the referenda organised in the last decade or so: the first is that the voters are often responding to the insecurities that globalisation entails, for example the opening of markets and increased competition. The EU is blamed for unemployment, stagnant wages and other economic ills in particular by those with less education and low income. The second is the lack of information, or the sheer misinformation, that dominates many campaigns. There is confusion and misrepresentation about the powers, institutions and nature of the EU.[1] It seems clear that these two issues need to be addressed for integration to be able to proceed, or even survive.

The EU has been perceived as an agent of global capitalism, with freely moving Polish plumbers, and rightly so. Its dominant policy field is still the internal market, and its considerable powers in the field of competition law are exercised actively, for example to curb state interventions in the market economy. It has admitted a number of Member States with lower labour costs, adding to the competitive pressures felt by many. More recently, in the context of EMU, it has been preaching austerity and the correction of economic imbalances through structural reforms. In a way, this tendency was built into the DNA of the EU a long time ago. Through the operationalisation of the Treaty articles on free movement and competition by the Court, and the move to qualified majority voting for the internal market, the EU gained the ability to pursue market integration, while the social aspects were left for the Member States. The basic bargain was simple: the EU would help make Europe richer, and the Member States would redistribute the riches. The problem with the bargain was that this redistribution did not necessarily take place. Market opening does create aggregate gains that could in principle be shared equitably, so that those who stand to lose are compensated, but this was not always done, at least to a sufficient degree.[2] Unfortunately for the integration project, the voters have often attributed the failures to the EU rather than to the Member States. Any misperceptions were hard to correct due to the complexity of the EU and the incentive of national politicians to blame the Union for any problems and take credit for any achievements. Furthermore, in some cases the EU may have contributed to the difficulties faced by Member States by creating conditions in which social dumping and tax competition could take place.[3]

This leads to the problem of lack of information. The EU is complex by its nature. It is ultimately a bargain between countries that have very different outlooks: Atlanticists vs those with a continental outlook; liberals vs dirigistes; old Europeans vs new Europeans; the South vs the North. The EU bargain has to contain all of these tensions, and cannot possibly be a simple expression of a clear shared vision. This complexity makes the EU easy to misrepresent. Atrocious examples are easy to find: the British voters were told that Turkey was about to accede, that Turkish citizens would flock to the UK, potentially overwhelming the

[1] See the Flash Eurobarometers concerning the French and Dutch referenda on the Constitutional Treaty in 2005, and the Irish Lisbon referendum in 2008, as well as the UK polling data available at *http://lordashcroftpolls.com/2016/06/how-the-united-kingdom-voted-and-why/* [Accessed 21 November 2016].
[2] See A. Corlett, *Examining an Elephant: Globalisation and the Lower Middle Class of the Rich World* (Resolution Foundation, 2016).
[3] See e.g. F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999) and F. de Witte, "The Architecture of the EU's Social Market Economy" in P. Koutrakos and J. Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar, 2017).

NHS, and that Britain was powerless to stop it,[4] while the Dutch voters cited lack of information as the main reason to reject the Constitutional Treaty, just as the Irish did for the Lisbon Treaty.[5] When this is coupled with the rational tendency of national politicians to shift the blame to the EU, it is not difficult to see why the EU has been a hard sell.

What to do? First, it seems to me that if the EU is in any event going to be blamed for the inequalities that market openings create, it needs to become more active in correcting them. If the citizens hold the Union accountable for failures in distributing the proceeds of market integration, it cannot just sit back and leave the matter entirely in the hands of the Member States. It needs to take a more active role and the basic bargain of the EU as the wealth creator and Member States as the wealth distributors may need to be revisited. At the very least, the EU cannot wash its hands of questions of social justice within its Member States. Some tentative steps have been taken, but more far reaching initiatives, such as a common unemployment insurance at least for the euro area, need to be taken seriously.[6]

Secondly, the information problems are not easy to overcome. There was an attempt to simplify in the context of the Constitutional Treaty, but it did not amount to much. Any well-meaning information campaigns, leaflets, FAQs and so on seem insufficient, especially if the citizenry has little idea of what the EU is and what it does in general. Research suggests that EU referendum campaigns may do a bad job in informing citizens about the issues.[7] Anecdotally, it is the experience of many who have taught undergraduate law students that they often come to the EU law course with very little grasp of the integration project. This suggests that the EU may need to follow the route taken by nation states and seek to inform its citizens when they are at school. Children are educated to become members of the national community—perhaps this should also be extended to the European one.[8] In some Member States this may already be taking place, but not in others. Yet it seems that asking citizens to shift through competing claims and vote on matters European when they may not have been provided with basic information about the history of integration and its system of governance is unwise.

[4] See e.g. Vote Leave, "'Paving the road from Ankara': the EU, immigration and the NHS", available at *https://d3n8a8pro7vhmx.cloudfront.net/voteleave/pages/24/attachments/original/1463745000/Vote_Leave_-_'Paving_the_road_from_Ankara'_the_EU__immigration_and_the_NHS.pdf* and claims by Defence Minister Penny Mordaunt at *http://www.bbc.com/news/uk-politics-eu-referendum-36352676* [Both accessed 21 November 2016].

[5] See fn.1 above.

[6] See e.g. M. Draghi, "Reviving the spirit of De Gasperi: working together for an effective and inclusive Union", *https://www.ecb.europa.eu/press/key/date/2016/html/sp160913.en.html* [Accessed 21 November 2016].

[7] W. Brett, "It's Good to Talk: Doing Referendums differently after the EU Vote" (Electoral Reform Society, 2016), *https://www.electoral-reform.org.uk/sites/default/files/files/publication/Its-good-to-talk-2016-EU-Referendum-Report.pdf* [Accessed 21 November 2016].

[8] See K. Grimonprez, "The European Dimension in Citizenship Education: Unused Potential of Article 165 TFEU" (2014) 39 E.L. Rev. 3.

Articles

The European Central Bank's Public Sector Purchase Programme (PSPP), the Prohibition of Monetary Financing and Sovereign Debt Restructuring Scenarios
Sebastian Grund and Filip Grle
While many central banks around the world have pursued quantitative easing programmes in recent years responding to the weak inflation outlook, the European Central Bank (ECB) faces unique legal constraints with respect to its Public Sector Purchase Programme (PSPP) launched in 2015. Most importantly, owing to the prohibition of monetary financing enshrined in art.123 of the Treaty of the Functioning of the European Union (TFEU), the ECB may find itself in the—for the ECB—unprecedented position of a creditor participating in a sovereign debt restructuring and facing legal constraints in accepting any debt cut on its sovereign bond holdings. Against this backdrop, this article sheds some light on the potential legal options available to the ECB, should another debt crisis in the euro area materialise. For this purpose, we will also take a closer look at two seminal judgments by European Courts, delineating the legal boundaries within which the ECB may conduct its non-standard monetary policy.

The Influence of EU Law on Strasbourg Doctrines
Tobias Lock
This article identifies four distinct areas of EU law influence on the ECtHR's doctrines: references for informational purposes; references to support an autonomous interpretation; legal transplants; and references in the context of evolutive interpretation. EU law is relevant for both the determination of the scope of Convention rights and for the ECtHR's proportionality analysis, but EU law influence is not confined to the case law of the CJEU. It includes the full spectrum of EU legal materials. While it welcomes the ECtHR's engagement with developments at EU level, the article expresses a normative critique that is underpinned by a concern that the ECtHR's reasoning is often lacking in clarity and exposition of argument.

Of Types and Tests: Towards a Unitary Doctrinal Framework for Article 34 TFEU?
Robert Schütze
What market model should determine the boundaries of negative integration, and in particular: what test should the Court apply to art.34 TFEU? After Keck*, there is no single answer to this question. Having expressly acknowledged the existence of different tests for different types of measures, the post-*Keck *Court develops three jurisprudential lines that follow three different market models. While confining measures regulating selling arrangements to an international model, the Court also confirms the parameters of the* Cassis *model for product requirements; and, with* Italian Trailers*, it cultivates a third jurisprudential line on consumer-use restrictions that comes close to a national market model. It is in the context of this third line that the Court elevates the market access principle to centre stage; and it is this development that has prompted the question how the three jurisprudential lines relate to each other. Have they remained separate—parallel—lines; or have they converged in a single doctrinal framework that generally applies to all measures falling within art.34? In* Ker-Optika *and its progeny, the Court appears to rhetorically combine all three lines in a unitary framework; yet various ambivalences within this doctrinal solution have remained. This article explores the possibilities for a doctrinal framework and charts the unstable post-*Keck *jurisprudence on art.34 TFEU in light of such an unitary framework.*

The Over-Indebted European Consumers: *Quo Vadis* Personal Insolvency Law?
Federico Ferretti
In the wake of the financial turmoil that has characterised recent years, this article examines the state and adequacy of EU law in dealing with the large scale of over-indebted consumers and their insolvency. Legal responses taken within the context of the overall goal of the integration of the EU retail financial market will be examined, while the potential for EU personal insolvency law to stem the "dark side" of such a market in the future will be evaluated. At EU level, the policy and legal measures adopted so far concentrate on the prevention of behavioural causes of over-indebtedness, but the intertwined situation of consumer defaults and insolvencies has been left to the uncoordinated competence of national legislators. The fragmented EU legal framework, insofar as it attempts to deal with over-indebtedness and personal insolvency legislation, is addressed in the context of the

legal instrument of mutual recognition that aims to promote clarity of the procedural and jurisdictional rules in cross-border matters. The most recent case law of the European Courts and its limitations are considered, together with the increasing drive towards further integration of EU markets and the economy that creates a mounting pressure for substantive harmonisation. In the promotion of consumer protection, the challenge will lie in addressing the current and profound diversity of national laws and the impact that harmonisation may have on exclusive national competences over social policies.

Analysis and Reflections

A Good Chess Opening: Luxembourg's First Roma Case Consolidates its Role as a Fundamental Rights Court
Álvaro Oliveira and Sarah-Jane King
In its first judgment on discrimination against Roma people, the EU Court of Justice sheds new light on how to interpret the concepts of direct and indirect discrimination based on ethnic origin under Directive 2000/43. The Court accepts that, under certain conditions, indirect discrimination can exist by association. Moreover, it affirms that, in order to make a finding of direct discrimination based on ethnic origin, it is enough to establish that ethnic origin has determined the decision to impose less favourable treatment, even where the measure also affects people who are not of that ethnic origin. In addition, the EU Court requires that when a national court examines the objective justification of indirect discrimination, it should take into account whether or not the measure in question has an offensive or stigmatising nature. This contribution argues that the Court makes a well-founded interpretation of the Directive, one that fully protects its objective and duly protects the rights of all victims of discrimination. At the same time, its interpretation is also rather balanced, and it is left for national courts to carry out the examination of complex facts. In this manner, the Court shows that it is ready to take on its role as the human rights court of the EU.

Exclusionary Rebates: Where Are We after Post Danmark II and How Did We Get There?
Krzysztof Rokita
Unilateral conduct of dominant firms is a highly controversial area of competition law in legal systems all around the world. This is especially true in respect of rebate schemes, a business practice that is in widespread use, but whose legal and economic evaluation causes numerous problems. Recently, the Court of Justice delivered its judgment in the Post Danmark II *case, in which it focused on the legal assessment of standardised rebates, including the role of the as-efficient-competitor test and the de minimis threshold. Unfortunately, in many aspects the judgment is confusing. Some parts of it, such as the one concerning the as-efficient-competitor test, seem to take the law into a new dimension; other parts, however, indicate that we are still stuck in the same orthodox approach. The future developments of the law may now depend on the actions of EU competition law enforcers at the national level.*

Disputed Property Rights: Article 1 Protocol No.1 of the European Convention on Human Rights and the Land Reform (Scotland) Act 2016
Douglas Maxwell
The right to property contained within art.1 Protocol No.1 of the European Convention on Human Rights has proved to be one of the most controversial and persistently disputed rights within the Convention. As land law reform has grown to become one of the most provocative issues in contemporary Scotland, it is helping to serve as a useful normative lens to highlight the limits of the right to property and the inherent difficulties that become apparent when grappling with the jurisprudence emanating from Strasbourg. This article will outline and question the recently passed Land Reform (Scotland) Act 2016. In doing so, this article examines the limits of property as a "right" and the theoretical basis of such disputes. This article will emphasise the often irreconcilable disputes that arise when considering property rights, notably between public and private interest in relation to land—in particular, the difficulties inherent in defining principles such as "property", "public interest" and "just compensation". It will conclude by highlighting the problems inherent in applying art.1 Protocol

No.1 and ask whether recent land law reforms comply with the Scottish Government's obligation to respect Convention rights.

Brexit and the Free Movement of Workers: A Plea for National Legal Assertiveness
Gareth Davies
National judges and Member State governments have an obligation to be assertive about national interests threatened by EU policies, even to the extent of challenging existing doctrines of law, proposing new interpretations, and insisting on the proper division of judicial functions, for they have particular knowledge and understanding of the consequences of EU law. An unquestioning obedience to the Court of Justice and to established doctrine is not loyalty, but subversion of an essential legal dialogue, and a failure to play an active and constructive role in building a legal system which serves the goals and wellbeing of Europeans. The Brexit debate is a case study in this: despite claiming publicly that mass migration was threatening essential and legitimate public interests, the UK did not attempt to use the available doctrines or derogations to defend these, behaving as if legal orthodoxy was fixed in stone, and the only options were leave or accept. It would have been more loyal, more European, more helpful to Europe, to impose unilateral restrictions and defend them vigorously with evidence and good arguments.

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The European Central Bank's Duty of Care for the Unity and Integrity of the Internal Market
Pierre Schammo
As a result of the establishment of the Single Supervisory Mechanism, the ECB was vested with significant supervisory tasks in the prudential field. The ECB exercises these tasks with a view to contribute to the safety and soundness of credit institutions and the stability of the financial system. Besides its objectives, the ECB is, when exercising its tasks, also subject to a specific duty of care for the unity and integrity of the internal market. The fact that the ECB was vested with this duty is noteworthy. It is neither at first obvious why the ECB ought to be subject to such a special duty; nor is it clear what this duty precisely entails. The aim of this article is to examine the ECB's duty of care and its raison d'être. In this process, it will offer suggestions on how the ECB ought to discharge it.

The Legality of "Sleepwalking" in Negotiations? The Missing Coherence in EU Trade Talks with Ukraine
Chris Downes
Trade talks underpinning the European Union (EU)—Ukraine Association Agreement soured relations with Russia and contributed to a conflict inconsonant with EU goals of stability and prosperity in its neighbourhood. While the Lisbon Treaty seeks to ensure coherent EU external policy making, events in the Ukraine suggest a European Commission trade strategy poorly attuned to regional security needs. This raises questions as to the nature and justiciability of treaty obligations on trade negotiators and whether they were respected in the case of Ukraine. This article traces the substantive and procedural constraints on negotiators post-Lisbon. It finds that while they have considerable scope to determine and balance EU interests, the Court may scrutinise the "manifest appropriateness" of their actions. It identifies aspects of the Commission's current approach, most notably an ideological blind spot to the detrimental impacts of bilateral deals, that strain EU coherence norms.

"Open Sesame!": Improving Access to the ECJ by Obliging National Courts to Reason their Refusals to Refer
The ECtHR considered the failure of the highest Italian court to provide a statement of reasons for its refusal to request a preliminary ruling from the ECJ to constitute a violation of art.6 ECHR in Dhahbi *and* Schipani*. These judgments have been criticised for changing the nature of the preliminary reference procedure from a mechanism of inter-judicial cooperation to a mechanism safeguarding the individual right to a fair trial. This article argues that these fears are slightly exaggerated since the ECJ and national courts have also scrutinised the preliminary reference procedure under an individual fundamental rights-based approach. What is more problematic, however, is the inconsistent approach of the ECtHR. The ECJ should therefore provide guidance to national courts as to what their obligations are if they refuse to refer. This all the more given that the preliminary reference procedure shows significant shortcomings from the point of view of effective judicial protection.*

The Requirement for a "New Public" in EU Copyright Law
Stavroula Karapapa
This article is concerned with a doctrinal shift in the understanding of what amounts to an actionable communication of copyright works to the public. Recent rulings of the European Court of Justice hold that infringement takes place where a communication is addressed to a "new public", i.e. a public that copyright holders had not taken into account when authorising the initial communication of the work. This newly developed doctrine develops a sui generis legal fiction that fundamentally changes the communication right; it both restricts and expands its scope in ways that were not foreseen when the right was first introduced in international law, European copyright law and the national laws of Member States. In its unnecessary complexity, the concept of the new public indicates that the extremely broad scope of the communication right is unworkable and counterproductive, thereby inviting a principle-based approach, according to which lawful and strictly private use ought to be exempt from infringement.

Analysis and Reflections

Collective Redundancies: Judicial Fine-Tuning of a Classic Concept of EU Labour Law
Anne Pieter van der Mei
This contribution analyses five recent rulings of the Court of Justice on one of the classic and most important pieces of EU legislation in the field of labour law: the Collective Redundancies Directive. The Directive instructs employers who are contemplating collective redundancies to consult workers' representatives and other relevant stakeholders with a view to finding ways to possibly avoid mass dismissals or to mitigate their social consequences. The Court offers important clarification on when this process must be initiated by clarifying the precise meaning of the concept of "collective redundancies".

Newspaper Websites as Audiovisual Media Services: The *New Media Online GmbH* Preliminary Ruling
Irini Katsirea
In the preliminary reference in New Media Online GmbH*, the Austrian Supreme Administrative Court asked the Court of Justice for its interpretation of the material scope of the Audiovisual Media Services Directive. In its balanced and pragmatic ruling, the Court rejected Advocate General Szpunar's Opinion, and held that compilations of short videos provided by newspaper websites may fall within the Directive's scope. This judgment constitutes a first step towards a levelling of the playing field online against the backdrop of the increased technological convergence between broadcasting and the press. It sends a strong message that a substantive, public interest driven approach should guide the interpretation and forthcoming revision of the Audiovisual Media Services Directive, not formalistic criteria or entrenched regulatory divides between different sectors.*

Minimum Wage between Public Procurement and Posted Workers: Anything New after the *RegioPost* Case?
Francesco Costamagna
The article deals with the tension among market freedoms, workers' protection, and regulatory competition in the context of public procurement. It does so by looking at the RegioPost *judgment and by comparing it with the restrictive stance adopted by the Court in previous decisions, such as* Rüffert *and* Bundesdruckerei. *The case concerned the imposition of a minimum wage requirement in a contract relating to the collection, carriage and delivery of letters, parcels and packages in the German city of Landau in Palatinate. The Court held that the requirement was compatible with EU law and, in particular, with EU public procurement law, read in conjunction with the Posted Workers Directive and Treaty provisions on the free circulation of services. The line of reasoning followed by the Court can be taken as an attempt to achieve a better balance between market freedoms and social considerations in the context of public procurement by doing away with some of the excesses that characterised previous decisions.*

Brexit and EU Financial Governance: Business as Usual or Institutional Change?
Niamh Moloney
This article considers the implications of Brexit for EU financial governance. It first examines the implications for regulation. Drawing on the political economy of EU financial regulation and considering the UK's generally facilitative and liberal approach, it predicts that a more interventionist period might follow Brexit. Major change in EU regulatory style is unlikely, however, not least given the influence of international financial governance on the EU. The article also considers the likely consequences for institutional governance and for the current uneasy arrangement, based on distinct euro area (Banking Union) and single market structures. It suggests that a strengthening of the European Supervisory Authorities is the most likely outcome and that functionally this involves the lowest risk. This strengthening is likely to be a function of a number of factors, including the greater prominence which the Authorities will have in relation to third country "equivalence" assessments. The article also considers the conditions which may lead to a more radical re-organization of institutional governance and suggests that other environmental conditions, beyond Brexit, are likely to shape future developments.