REVIEW OF PUBLIC AFFAIRS

SEPTEMBER / SEPTEMBRE 2020

REVUE D'AFFAIRES PUBLIQUES N°4

THE FUTURE OF EUROPE

REVUE D'AFFAIRES PUBLIQUES | REVIEW OF PUBLIC AFFAIRS

ÉDITORIAL

Chers lecteurs, chères lectrices,

Lorsque le comité éditorial s'est réuni en décembre dernier pour fixer le thème de cette édition de la Revue, nous ne pouvions nous douter des événements historiques à venir. L'avenir de l'Europe était alors une question importante. Aujourd'hui, elle est primordiale.

En effet, les acteurs du Vieux Continent sont confrontés à une myriade de crises. Elles vont de l'épidémie de la COVID-19 à un ordre mondial instable, engendré par des Etats-Unis protectionnistes et peu fiables et une Chine de plus en plus affirmée. De l'enjeu de l'expansion de l'UE à l'Est et de ses relations avec la Russie à la question primordiale de l'autonomie stratégique européenne. De relations transatlantiques bouleversées en matière de commerce et de défense et d'une OTAN fragmentée à l'accélération de la concurrence technologique en matière d'intelligence artificielle, de 5G, d'informatique quantique, appelée à redéfinir l'équilibre mondial des pouvoirs comme la bombe nucléaire l'avait fait quelques 70 ans plus tôt.

Rarement dans l'Histoire un État ou une organisation internationale n'avait eu à faire face à tant d'enjeux primordiaux dans le même temps. Dès lors, la manière dont l'Europe réagira sera un fondatrice pour elle mais aussi pour le monde, quelque soit le succès de ses actions. Ainsi, le thème de cette édition est particulièrement approprié à la période que nous traversons, car les décisions européennes méritent l'attention de toutes et tous.

Afin de vous offrir un regard original sur l'avenir de l'Europe, nous avons sélectionné quatre articles en anglais et trois articles en français. Ils illustrent la pluridisciplinarité de la Revue, ainsi que sa vocation à ne pas se limiter uniquement à des réflexions politico-juridiques mais aussi à proposer des analyses concrètes sur une variété de sujets.

Alors que la Conférence sur le futur de l'Europe s'approche et que les discussions entre les dirigeants de l'Union européenne, dans le contexte de la Covid-19, s'accélèrent, nous espérons que ces articles vous apporteront quelques éclaircissements sur une question primordiale pour le monde actuel: quels horizons pour l'Europe?

Enfin, nous souhaitons exprimer notre profonde gratitude à l'École des affaires publiques, à son Doyen Yann Algan et à sa Directrice exécutive Anne-Solène de Roux pour leur soutien continu à cette initiative. Nous souhaitons également remercier nos prédécesseurs, notamment Galaad Defontaine, Johanna Lancashire et Waël Abdallah pour leur temps et leurs conseils. Enfin, nous remercions l'ensemble du comité scientifique et du comité éditorial pour leur engagement cette année.

Alexandre Schulz
Wojciech Strupczewski

Rédacteurs-en-Chef

LETTER FROM THE EDITOR

Dear Readers,

When the Editorial Committee sat down last December to decide upon the direction of this year's edition of the Review, we didn't have the slightest premonition of what was to come. The future of Europe was an important question then. It is a vital one, today.

In effect, the collective and individual actors of the Old Continent are presently facing myriad crises, from the COVID-19 epidemic to an increasingly unstable world order brought on by a protectionist and unreliable US and a resurgent China; from the issue of EU expansion to the East and the ever-present question of its relations with Russia to the accelerating technological race in AI, 5G, quantum computing and others, which is set to increasingly redefine the global balance of power like the nuclear bomb did some 70 years prior; and from upended transatlantic relations in matters of trade and defence, through a fragmented NATO, to the paramount question of European strategic autonomy.

Seldom has any power faced such a plethora of significant challenges and crises at once, forcing it to answer so many introspective questions about itself, and providing so many opportunities to evolve. Consequently, how Europe answers these challenges will be transformative both for it and the world, irrespective of whether it deals with them successfully or not. In light of this, we believe our choice of theme to be particularly apt, as the scale of Europe's global impact under these conditions merits attention from all.

In order to provide you, our Readers, a balanced and original look at the future of Europe, we have carefully selected four articles in English and three articles in French. These illustrate the multidisciplinarity of the Review, as well as its ambition to not to limit itself solely to politico-legal reflections, but also to propose concrete and original analyses on a variety of specific subjects.

As the Conference on the Future of Europe looms near and discussions between EU leaders, motivated by the COVID-19 crisis, on precisely that topic speed-up, we hope that these articles will shed some much needed light on a question of paramount importance in today's world, both for the citizens of the Continent, as well as for the geopolitical arena: what is the future of Europe?

On a final note, we wish to extend our deepest gratitude to the School of Public Affairs, its Dean Yann Algan and its Executive Director Anne-Solène de Roux for their continued support of this initiative. We also wish to thank our predecessors, notably Galaad Defontaine, Johanna Lancashire and Waël Abdallah for their time and advice. Finally, we want to thank our Scientific Committee and our Editorial Committee for all their investment in the Review of Public Affairs this year.

Alexandre Schulz
Wojciech Strupczewski
Editors-in-Chief

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Yann ALGAN

Doyen de l'École d'Affaires Publiques de Sciences Po, Professeur des universités en économie à Sciences Po

Régis BISMUTH

Professeur des universités, agrégé de droit public, Ecole de Droit de Sciences Po

Ghazala AZMAT

Professeure des université en économie à Sciences Po, Département d'économie

Olivier ROZENBERG

Professeur associé à Sciences Po, Centre d'études européennes et de politique comparée

COMITÉ ÉDITORIAL

Graphic design, layout, and cover by Sallie BESTUL

Les besoins et les pièges de l'identité européenne, ou la possibilité pour l'UE d'entrevoir un horizon

NATHAN MAUREL

« Voilà pourquoi tant d'Européens ont du mal à croire en leur nouvelle institution : comme la Mort ne la domine pas, comme elle ne joue plus le rôle de cause, de fondation, de passion, d'idéal ni de moteur – par un bonheur inconcevable, elle ne fait plus rêver –, l'Europe n'est pas encore politiquement, historiquement reconnaissable. Trop nouvelle ».

(Michel Serres, 2016 : 124)

Le constat établi en ces termes par Michel Serres auquel nous pourrions ajouter que l'Europe, en plus d'être « trop nouvelle », est également trop faible et trop froide, constitue un socle pertinent pour se demander quels horizons s'ouvrent à l'Europe aujourd'hui. Car constater le manque d'identification et de reconnaissance revient questionner le besoin d'une identité, du reconnaissable. Il s'agit moins ici de questionner le champ des horizons possibles pour l'UE que sa propre possibilité d'en entrevoir un : pour entrevoir l'horizon, l'UE doit être clairement identifiée et identifiable par chaque entité qui la compose, comme par chacun de ses observateurs extérieurs.

La présente réflexion est faite de deux mouvements. En effet, cette entité politique européenne, l'Union européenne (UE), est « trop nouvelle », pas encore « reconnaissable », au point où l'existence d'une identité qui lui est propre surgit comme sa condition de vie et de survie, depuis que la guerre n'est plus son moteur. Cependant, cette nouvelle institution, si elle a besoin d'une identité, ne peut en créer une nouvelle *ex nihilo* – même les philosophes libéraux, à

l'instar de John Rawls (1995), les moins attachés à une logique identitaire, estiment qu'on ne peut pas partir de rien pour bâtir l'identité collective d'une institution. Au contraire, je défendrai dans cet article que cette identité doit s'appuyer sur ses deux fondements : les peuples qui la composent et son passé. Malgré le caractère novateur et extraordinaire de la structure politique de l'Union européenne, celle-ci a besoin d'un socle capable de fédérer les nations et les peuples qui la composent dans le nouvel espace politique qu'elle promeut. Oui, l'UE a besoin d'identité, d'abord dans la fonction identificatrice, interne et externe, que la notion d'identité pose.

L'UE, en quête de légitimité et d'ancrage, souhaite entrevoir un horizon de pérennité et de stabilité. Demandons-nous ici si le soutien d'une identité qui lui est propre est un moyen, sinon *le* moyen d'y parvenir, quel que soit l'horizon qu'elle se fixe. Il s'agit davantage de concevoir l'identité comme une condition de possibilité d'avenir que comme un but en soi. Questionnons également le fondement de cette identité – s'il peut y en avoir un –, ses effets, ses implications sur les identités nationales et sur un passé européen tout aussi fort que délicat. Interrogeons également les fonctions de cette identité : vient-elle instiller une ferveur entre Européens ou, au-delà, doit-elle être affirmée et célébrée dans le monde entier ? Vient-elle suppléer les identités nationales ou s'y conformer ?

Dans ce qui suit, je soutiendrai que l'Union européenne ne peut se passer d'une identité si elle compte s'affirmer (I), d'abord pour stimuler l'action politique en son sein (I. A) mais également afin de produire une cohésion entre ses membres vis-à-vis des autres puissances mondiales (I. B). Mais cette Union européenne « trop nouvelle », pour reprendre les mots de Michel Serres, ne peut concevoir son identité sans fondements, comme si elle pouvait être créée *ex nihilo* (II) : elle doit reposer sur une entière reconnaissance et implication des peuples et des divers héritages qui ont permis sa création (II. A) et éviter l'impasse que représente l'oubli de son passé, tombeau de l'Europe, si elle entend, au-delà de son affirmation, se projeter vers l'avenir (II. B).

I. L'identité, substance nécessaire pour l'affirmation de l'objet politique

A. Au-delà des intérêts et des droits : une communauté politique européenne active

Si ce sont davantage des intérêts partagés qui ont poussé les Européens à s'unir dans une nouvelle entité politique (Scharpf : 1999 ; Majone : 1996), il n'empêche qu'ils ne sont guère suffisants pour animer une Union européenne qui, depuis le traité de Maastricht (1992), est aussi une entité politique comportant une citoyenneté européenne (article 9 : « Est citoyen de l'Union toute personne ayant la nationalité d'un Etat-membre »). Cette citoyenneté, qui a logiquement entraîné une forme de politisation de l'UE, y compris une politisation négative, a fait surgir des débats et des critiques, constitutifs d'une communauté politique vivante.

En formulant un nouveau modèle théorique du « commun » à l'échelle européenne, Jonathan White (2010) argue qu'une conception minimaliste (*thin*) du commun, basée sur le partage d'intérêts économiques ou sécuritaires, doit être dépassée – tout comme la conception maximaliste (*thick*), basée sur un patrimoine culturel, au premier rang duquel beaucoup placent des racines chrétiennes. Dans ces deux approches du commun, le citoyen est tenu à distance de toute activité politique, son contrôle sur les représentants étant considéré comme une entrave à l'efficacité de leurs actions. Il y a une citoyenneté statutaire et une citoyenneté effective. Ici, la seconde est inexistante quand la première n'est que vitrine. Jonathan White montre qu'il y a, derrière les conceptions minimaliste et maximaliste, une dépolitisation dangereuse qui guette, au point de mettre en péril l'édifice établi.

Aussi, il est impossible de nier l'actuel essoufflement de la rhétorique des partisans d'une approche minimaliste qui, à l'image de certains mouvements souverainistes, appellent à une simple union d'intérêts et d'intéressés, face à une concurrence mondialisée et toujours plus violente : les positions se crispent du fait même de l'évolution de la nature de l'UE, devenue une communauté à part

entière, dépassant de simples intérêts; il est aujourd'hui question de retrait total ou d'approfondissement, mais pas d'union de simples intérêts, position inaudible que l'UE, par ses mutations, a progressivement étouffée. Quelle que soit la justesse de tels arguments, force est de constater qu'ils n'empêchent pas la remise en question de l'édifice européen et le repli sur des positions nationales qui justement, entendent bien régler ces questions sécuritaires et commerciales à l'échelle nationale.

Au-delà des intérêts, d'autres avancent les droits comme pilier souhaitable à l'affirmation de l'objet politique européen. La position libérale-républicaine du patriotisme constitutionnel est séduisante à bien des égards. D'abord parce qu'elle établit, comme le soutient Jürgen Habermas (1992 : 28), qu'il n'est pas impossible d'envisager une citoyenneté commune et active au niveau européen, puisqu'il « *n'y a qu'un lien contingent et historique et non pas conceptuel entre républicanisme et nationalisme* ». Aussi et ainsi, en faisant de la citoyenneté un statut juridique composé de droits et de devoirs délié de la nationalité mais dont les principes constitutifs sont fortement enracinés dans des histoires nationales particulières, il place cette reconnaissance de la citoyenneté démocratique et de la culture politique de la liberté qui la sous-tend comme ferment fédérateur des citoyens européens, bien le plus précieux qu'ils ont en commun et dont ils sont fiers – d'où le terme de patriotisme constitutionnel.

S'il existait en 1992 pour Habermas des raisons d'être « *prudemment optimistes* » (1992 : 36), j'adopterai ici le point de vue de Richard Bellamy et Dario Castiglione pour affirmer qu'au-delà des intérêts partagés et des droits que les citoyens de l'Union européenne ont en commun, l'UE a besoin d'une identité fondée sur la participation active de ses citoyens pour s'affirmer. Dans leur article éloquemment intitulé « *Beyond Community and Rights : European Citizenship and the Virtues of Participation* », Dario Castiglione et Richard Bellamy renvoient les conceptions communautarienne et libérale dos-à-dos, au motif qu'elles interprètent toutes deux la citoyenneté de façon plus passive

et verticale. Ils développent une autre critique à l'égard de ces deux approches, celle de supporter une conception de la citoyenneté trop consensuelle, voire même « timide » (2008 : 175) : « *both views tend to reduce the role and importance of disagreement as an essential component of politics* ». Cette timidité a trop longtemps été constitutive de l'UE pour qu'elle lui permette aujourd'hui de se diriger vers l'horizon pourtant vital d'une démocratie active, et renouvelée. Se vantant souvent, parfois avec des contresens historiques, d'être le berceau de la démocratie en faisant référence à la Grèce antique, l'UE peut et doit être le laboratoire d'une nouvelle forme de démocratie, inclusive et active.

Notons donc l'idée qu'une identité européenne fondée sur la participation active de ses citoyens, au-delà des intérêts et droits qu'ils ont en commun, mais en-deçà d'une tradition culturelle est la condition *sine qua non* pour l'affirmation de l'UE, la citoyenneté statutaire étant alors complétée d'une citoyenneté effective. Le citoyen européen ne peut être fier de sa citoyenneté s'il ne peut l'exercer réellement. Il a besoin d'une citoyenneté forte et active pour affirmer son identité européenne, ce qui lui manque aujourd'hui, ce dont dépend l'avenir de l'UE.

B. L'identité européenne en renfort de l'identité nationale : souci de cohésion

L'Union européenne, puissance continentale et mondiale, ne peut se passer de cohésion interne pour affirmer à la fois sa légitimité et sa puissance mondiale : elle ne peut y parvenir qu'avec une identité qui lui est propre. L'UE a besoin d'affirmer une spécificité européenne qu'elle n'a cependant pas besoin d'inventer. En effet, comme l'analyse de manière critique Valérie Rosoux (2007) concernant l'enjeu mémoriel, la quête de légitimité interne et la quête de puissance à l'extérieur ont motivé la rédaction d'une trame historique commune. Critique envers un récit unique et homogène, Rosoux rejoint Bellamy et Castiglione sur une identité de désaccords, reposant sur l'expression des divergences, en quelques sorte sortie de la « timidité » que les deux auteurs dénoncent dans leur article.

Je soutiendrai qu'il en va de même au-delà de cas précis concernant l'histoire de l'Europe et sa mémoire : si l'UE veut asseoir sa légitimité et sa puissance, elle doit disposer d'une identité. Une identité qui lui est à la fois propre et partagée par ceux qui la composent.

Car ceux qui la composent ont d'abord une appartenance nationale qu'il s'agit de concilier avec l'appartenance européenne, trop souvent présentée comme nocive et incompatible avec cette première. C'est un défi majeur, car c'est pourtant lorsque l'identité européenne vient en renfort de l'identité nationale que l'UE affirme sa spécificité tout en préservant celle des citoyens qui la composent. L'écrivain espagnol Antonio Muñez Molina décrit ce renfort-là : « *Je me rappelle fort bien lorsque je vivais aux Etats-Unis durant les années de crise en Espagne, la joie avec laquelle de nombreux économistes américains prédisaient l'effondrement immédiat de l'euro. Je me rappelle avoir découvert véritablement aux Etats-Unis ce que je n'aurais peut-être pas su voir si je n'avais été là-bas : la valeur de mon identité européenne. Il ne s'agissait pas là d'une adhésion abstraite, mais d'une attitude radicale, immédiate, fondée sur des éléments aussi tangibles que l'éducation publique, la santé universelle, le rejet de la torture et de la peine de mort* » (2019). Au-delà des valeurs que l'auteur attribue à la spécificité européenne, il est ici intéressant de voir que l'identité européenne qu'il évoque et qu'il ressent se construit par opposition à un monde extérieur dont la globalisation n'empêche pas l'affirmation d'identités particulières, comme le soutient notamment Anthony Appiah dans son modèle du « cosmopolitisme enraciné » (« *rooted cosmopolitanism* ») (2002 ; 2005). Alors oui, l'UE a besoin d'une identité pour s'affirmer dans le monde. Sans identité, sa crédibilité auprès de ses Etats-membres et des autres puissances mondiales, alliées ou non, est entachée. Sans identité, l'attachement de ses citoyens à son égard est inexistant. En effet, seule l'identité lui permettra d'être reconnue, c'est-à-dire clairement identifiée comme un tout, et d'être reconnue comme légitime dans ses actions, que ce soit en son sein comme dans le monde.

Cependant, je rejoins Cathleen Kantner

(2010) lorsqu'elle prend position pour le dépassement d'une définition de l'identité collective européenne fondée sur une identification purement numérique. En effet, l'identification numérique, qui suppose du collectif dans le partage de critères objectifs perceptibles par l'observateur neutre ou externe (unité géographique, tendances démographiques communes, héritages historiques communs, proximité idéologique, etc.), « *n'atteste en rien une adhésion au groupe* » (2010 : 229). L'observateur neutre ou externe ne percevra du commun que dans une identité clairement définie par opposition à d'autres identités – il n'en voit pas dans des critères pourtant objectifs mais incapables de démontrer une quelconque adhésion, tant de la part des citoyens européens à l'égard de l'objet politique qui les unit qu'à l'égard-même de ces critères mobilisés.

L'enjeu pratique pour l'Union européenne est de bâtir une véritable citoyenneté européenne. C'est de son statut et de son contenu dont dépendra l'adhésion des citoyens européens à l'UE ; la promotion de son identité est le seul ciment qui le permette. Voici son défi pour l'UE : faire de sa citoyenneté une composante majeure de son identité.

II. Les écueils d'une nouvelle identité sans fondements ni peuples.

A. Peuples et héritages, socles de l'identité de l'UE

L'Union européenne a beau répéter que ce sont les peuples des nations européennes qui sont à son fondement, la réalité de la prise en compte des peuples européens et de leurs cultures respectives dans les structures et actions de l'UE est bien différente. La fin du « consensus permissif » avec Maastricht (1992) rend le besoin d'une identité encore plus criant pour l'UE. Souvent perçue comme le cheval de Troie de la mondialisation néolibérale, l'UE, constatant le déficit d'appartenance commune vu précédemment, est tentée par la création de toutes pièces d'une identité, d'une culture européenne nouvelle, bref d'une euroculture propre à l'Union, mais détachée de ceux qui la fondent. A cet égard, je rejoins Yves Hersant (2005) : l'écueil principal pour

l'UE est de prendre l'euroculture, née de techniciens, pour ce qu'elle n'est pas, à savoir la culture européenne, et d'en faire le socle de son identité : « *Tantôt enjeu de la compétition entre Etats, tantôt secteur économique dont on escompte le développement, tantôt simple flux d'échanges qu'il suffirait de gérer au mieux : l'euroculture est toujours une réduction de la culture européenne* » (2005 : 105). En effet, cette réduction est un reniement de l'UE envers l'Europe, qui n'assume qu'une part de l'héritage européen étant donné sa technicité et sa nouveauté.

Car le plus grand danger de cette identité dont l'UE a besoin est d'être centrée sur autre chose que ce qui la légitime : les peuples des nations qui la composent. Au-delà d'une assise et d'une utilité purement institutionnelles afin d'appuyer décisions et structures politiques supranationales, l'identité peut et doit se baser sur des pratiques politiques qui permettent l'inclusion de ces peuples, des pratiques politiques nouvelles capables de faire de l'identité européenne un véritable renfort de l'identité nationale. Entendons *peuples* dans deux sens distincts. D'abord l'inclusion dans l'identité de l'UE de l'héritage culturel et historique de chaque nation, sans vouloir l'occulter ou pis, l'homogénéiser. L'UE n'a finalement rien à inventer aux fondements de son identité, tout est là, elle doit seulement considérer cet ensemble d'héritages avec sérieux. Entendons également « peuples » dans un autre sens, hors des cadres nationaux, celui prôné par la théorie demoi-cratique : chacun des demoi (des peuples) n'est pas forcément fixé à un cadre national mais est mouvant, résultant du partage des effets de mêmes politiques européennes pour différents groupes qui se retrouvent dans plusieurs cadres nationaux (Jean-Werner Müller (2011 : 200) évoque une demoi-cratie européenne déterritorialisée : « *not so much as mutual recognition of fixed national demoi* »). Cette seconde acception des *peuples* suppose donc un dépassement du pur cadre national, particulièrement en termes de participation politique : « *To have meaning, participation must apply as much to civil society as to the state* » (Castiglione, Bellamy, 2008 : 182).

B. L'oubli ou l'égarement de l'identité

Mais c'est fondamentalement à l'égard de son passé que l'identité dont a besoin l'UE doit se définir, et ce d'une manière totale et sérieuse, c'est-à-dire ni partielle ni partiale.

Si je rejoins Chantal Delsol et Jean-François Mattei (2010) pour soutenir que l'identité de l'UE ne s'invente pas car elle réside en grande partie dans l'affirmation de son passé, je m'oppose aux auteurs dans la mesure où ils proposent une lecture partielle de ce passé, vantant l'exception européenne et les « mérites qui nous distinguent » (Jacques Dewitte, Jean-François Mattei) pour l'affirmation d'une identité fière, trop fière pour se considérer comme une exception. Entre la fierté et la repentance, l'identité de l'UE doit se baser sur une lecture sérieuse de son passé, davantage historique que politique : il ne s'agit pas là d'une approche intermédiaire entre la fierté et la repentance, mais bien d'une posture spécifique, davantage basée sur la fidélité à l'égard du passé : considérer ce passé comme un tout et l'assumer en bloc, sans s'en vanter ni le cacher ; il est entier.

Plusieurs écueils sont fortement à éviter. Comme l'est une lecture partielle du passé, une mémoire unique est impossible et impensable : « *il n'est ni réaliste ni souhaitable de chercher le fondement de la légitimité politique de l'Union dans un unique « narrative » européen* » (Nicolaïdis, Pélabay, 2007 : 69). Une lecture homogène du passé est évidemment un autre écueil d'autant plus dangereux, comme le souligne Valérie Rosoux (2007 : 228) : « *Le but du discours européen n'est pas d'imposer une seule lecture de l'histoire, mais de penser les conditions d'une cohabitation d'expériences différentes. [...] Le but des responsables officiels ne peut être d'élaborer un récit consensuel* ».

Ainsi, est véritablement européenne l'identité qui saura reconnaître avec objectivité l'ensemble de ses actes, les pires comme les meilleurs, et en faire son identité. Cette force de critique et de mesure à l'égard de son passé autant glorieux que chaotique, l'UE peut en faire une force, sans oublier que ce passé n'est pas le sien, « trop nouvelle »,

mais celui des nations et des peuples qui la composent. Faire un tri dans le passé, c'est s'égarer. Ainsi, l'héritage chrétien de l'Europe ne peut être brandi comme argument politique ou pis, comme critère d'adhésion à l'UE, mais doit être considéré comme une réalité historique mais pas unique (l'Europe a aussi des héritages judaïque, musulman, celte, païen, etc.). Faire un tri dans l'histoire, c'est façonner une mémoire qui ne peut répondre aux défis de cohésion et de respect des différences qui se posent à l'UE aujourd'hui. Pas d'identité sans une certaine éthique de la mémoire, une certaine exigence envers ce qui nous précède et nous construit, nous, Européens : « *Qui de nous n'a jamais vu une personne frappée par la maladie d'Alzheimer : ayant perdu une grande part de sa mémoire, elle a égaré aussi son identité* » (Todorov, 2007 : 335).

De cette position découle l'impossibilité de promouvoir une Europe qui se fait l'incarnation d'un humanisme spécifique. Regarder le passé européen dans son ensemble et avec sérieux, c'est rapidement se rendre compte de l'impossibilité d'une telle posture.

Toutefois, l'UE peut et doit porter une identité qui revêt une autre forme de spiritualité qui évoque une approche éthique unique du passé, celle de mémoires en paix. Quand Jean-Marc Ferry considère que la constitution d'une « *communauté d'histoire* » est « *l'élément le plus profond d'une communauté morale* » (2000 : 160), Tzvetan Todorov complète cette réflexion en montrant que c'est davantage le statut accordé à la mémoire que son contenu qui importe : « *Les Européens seront non ceux qui partagent la même mémoire, mais ceux qui sauront reconnaître (…) que la mémoire du voisin est aussi légitime* » (2007 : 344). En complément substantiel de cette importance accordée au statut de la mémoire commune et à celle de l'autre, l'éthique du pardon portée par Paul Ricoeur (1992) est le point d'orgue de la substance de cette identité dont l'UE a besoin : le pardon n'efface pas la dette, car nous restons héritiers du passé (d'où l'importance de le prendre avec sérieux dans son ensemble), mais permet la délivrance de tout son poids. Quelle meilleure éthique que celle-ci pour un objet politique « trop nouveau », pour reprendre Michel Serres, mais qui peut

dans ce cas, se projeter dans l'unité à la lumière du passé, de ses passés ?

* * * *

Il semble n'y avoir qu'une seule voie pour l'Union européenne de transformer en une force ce qui la caractérise et représente pour elle un étau redoutable : faire de sa position complexe entre unité et diversité le ferment de son identité. En effet, l'Union européenne, comme nous l'avons analysé, est un objet politique qui entend porter une citoyenneté unique et s'affirmer dans le monde en tant que puissance. Elle n'y parviendra que par la mise en valeur d'une identité qui lui est propre, spécifiquement européenne, c'est-à-dire capable de concilier l'unité et la diversité – celle des économies, des droits, des cultures, des mémoires, etc. Pour cela, l'Union européenne n'a pas besoin d'ériger une nouvelle identité *ex nihilo*, comme l'impasse que représente l'euroculture, mais de s'appuyer sur ce qui la constitue : cette force unique d'allier unité et diversité. Le geste fondateur est plein de sens, tout comme l'identité qui en découle est pleine de chaleur – au-delà des intérêts et des droits partagés : il consiste à être en paix avec son passé.

Le passé de l'Union européenne est très récent ; ceux des peuples et des nations qui le composent sont une richesse qu'il faut considérer pleinement.

Maintenant que l'Europe n'a plus la mort à ses trousses, l'Union européenne en paix ne peut renier ce qui fait son identité : l'unité et la diversité de ses fondements, d'abord historiques. Si elle suit cette posture de fidélité envers son passé, et donc envers ce qui la constitue, l'UE pourrait entrevoir un horizon démocratique apaisé, du fait d'une identité forte et exigeante, qui innerve chacune de ses actions, parce qu'enfin constitutive de chacun de ces dernières. Mais c'est seulement par une profonde réflexion sur son identité que l'UE pourra entrevoir l'horizon, quel qu'il soit, au risque de sombrer dans celui de l'inertie et de la défiance.

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Tocquevillian thoughts on the future of Europe

CYRILLE T. AMAND

'A new political science is needed for a world altogether new'

– Tocqueville, Introduction, Democracy in America

At a time when 'instability' has become the watchword of Europe, effecting a sense of paralysis among the institutions of Europe and their future, Tocqueville's reflections on America and on democracy can provide Europe with rich lessons for its development. While Tocqueville applied himself to a better understanding of democracy in the United States, his 'world altogether new,' it was with an eye keenly fixed on the old: in reality he sought to understand the changes he believed would ultimately affect Europe. By keeping Tocqueville in mind as we look at Europe today, we might better understand the mechanisms shaping its future.

Tocqueville, a European thinker and a thinker of Europe

The French statesman was less interested in democracy, the state, or equality, than in the dynamics of how these concepts worked.[1] As *Democracy in America* gathers pace, its focus on America diminishes; the reader finds that Tocqueville's emphasis on structural dynamics belies his true concern: Europe. In contrast to the view popular amongst his contemporaries, that in America a new - separate - European society was being built, Tocqueville argued that developments in America presaged those of Europe. *Democracy in America* becomes the Lessons for Europe.

As the French academic Françoise Mélonio puts it, Tocqueville's writing of history is emancipatory.[2] He endeavoured both to discover and to shed light on the foundations of Europe's political culture and history. His point of departure is a highly political question: how, in France - and Europe more widely, can one explain the virulence of socialist, or revolutionary, passions, and the attraction to an omnipotent state? He believes after 1848 that this European illness is chronic. '*And here is the revolution which starts again, for it is always the same one.*'[3] Tocqueville

seeks, therefore, to explain why Revolution in France and Europe appeared so divergent in emphasis and outcome from the American experience.

His conviction was that a *je-ne-sais-quoi* of common essence existed which, despite its visible diversity, characterised the European continent. Löwith describes the attempts of thinking men and intellectuals - men like Tocqueville - to perceive society's evolution as '*the fundamental quest of the modern historical consciousness*.'[4] Precisely what motivates Tocqueville to such an effort is the conviction that this shared essence of European societies does exist; that, through history, different peoples and different nations eventually converge to experience similar patterns, causal mechanisms, and, fate. This returns to the view that Tocqueville's work must be understood in a European context, rather than a purely French or American one.

In a Tocquevillian perspective, we could conclude that a united Europe – though this could take different forms - is to a certain extent inevitable. Manent writes: '*It is difficult to be the friend of democracy; it is necessary to be the friend of democracy. Here is Tocqueville's teaching*'.[5] Just like with democracy in the revolutionary years, the current European Union might or might not be desirable; but it is there and it could not be otherwise. Tocqueville, as a member of the French parliament and Minister for Foreign Affairs, always believed in a sovereign France and an independent French foreign policy, from the Orient question to Britain's control of maritime commercial shipping. But, he also believed that the only way out of the isolation and mediocrity following the Napoleonic wars and the 1830 revolution, was to reconnect with and reintegrate the European concert. In other words, Tocqueville would tell us today not to brutally oppose or passionately embrace the EU; but, rather, to accept it as a *fait acquis* and attempt to organise it.

Where do the 2016 Brexit Referendum and the, now settled, departure of Britain from the EU fit in this claim? One obvious Tocquevellian thought would be to question the truly democratic character of such a referendum - '*tyranny of the majority*' could well apply to such a move supported by 51% of the electorate, comprising just 37% of the adult population. Instead, the real impact of Britain's withdrawal from the EU should be placed in its wider, European context; Brexit does not mean the end of a united Europe, nor that the UK ceases to be a part of it. Whether through other institutional schemes, such as NATO, or through new partnerships yet to come, the pattern of British relations with

Europe can, to a certain degree, be said still to remain one of continued interdependence.

If we further expand our analogy with democracy, we could then argue that Europe needs to carry out its unification project. Both the EU and democracy share an organising principle, and need to express it to its full extent, or otherwise risk contradicting it. Once the dynamic of equality has been initiated, it is not an option to stop half-way and establish a society where men would be equal before the law but unequal when it comes to politics, like Guizot and the Doctrinaires tried to do in France, says Tocqueville. To avoid risking confusion and anarchy – what the Greeks referred to as *hybris* – the process of European integration needs to be stabilised. But, like any democracy, the EU can be widely discussed in an attempt to reform it; it is here, however, that the Tocquevillian reader would suggest engaging in the discussion rather than exiting it.

Tocqueville's analysis of his own political epoch echoes in many ways the unaccomplished nature of the European Union. 'When I entered life, aristocracy was dead and democracy as yet unborn. My instinct, therefore, could not lead me blindly either to the one or to the other' writes Tocqueville to his English translator Henry Reeve on 22nd March 1837. His observation is very reminiscent of the current state of the European Union: an unfinished house. What is the EU today? Not a confederation, but not a federation either; a single market, but not a fiscal union; states sharing a Common Security and Defence policy, but no common army. And yet, however unaccomplished and unfinished the EU may be, there is no other choice, the French writer would have said, than to deal with it.

What trajectories can emerge for Europe?

Tocqueville had a holistic vision of politics and economics, and believed in the emancipation of the individual through economic freedom and development. However political was the initial project for Europe, its means were economic. The 1951 Treaty of Paris pooled together French, German, Italian, Dutch, Belgian and Luxembourgian steel and coal. The 1957 Treaty of Rome prepared the way for an integrated single market and free movement of people, like the 1986 Single Act and the introduction of the euro in 1999. Liberal economics have thus – and still do – dominated the European scenery. Would Tocqueville have supported it? Perhaps, to 'assure to the poor man complete legal equality and comfort, which are compatible on the whole with individual rights to property and the inequalities arising therefrom'.[6] Tocqueville's

idea in the first book of Democracy in America is that economic possibilities would help emancipate the individual, in opposition to the central planning which characterised both the *Ancien Régime* and the post-revolution State.

Yet, a liberal and functioning economy on its own cannot be sufficient. Romano Prodi, President of the European Commission when the euro was introduced, was concerned about establishing common structures whilst the European economies had not converged yet, and would probably have disagreed with Tocqueville. The latter would have replied to Prodi that this is not the main point. For the sole economic and industrial leaning of a society is not sufficient solely to give it a meaning, a *raison d'être*. This form of society would be nothing more than 'a long routine of petty uniform acts'. The current liberal order of Europe might look dynamic and creative at the first glance, but, 'in the end the sight of this excited community becomes monotonous, and after having watched the moving pageant for a time the spectator is tired of it'.[7] Something is missing here.

The answer that Tocqueville would have provided to fill this gap, I suggest, is deeply political. It is a political essence. Indeed, Tocqueville is less interested in the governing factions or architecture – the form – than in what emerges from them – the content. 'I am free from any feeling of affection or hate for the royal or imperial races, of any kind' he writes to his agent in his electoral district, Paul Clamorgan, in December 1848. He is more direct with H. Reeve: 'My critics insist upon making me out a party-man; but I am not that. Passions are attributed to me where I have only opinions; or rather I have but one opinion, an enthusiasm for liberty and for the dignity of the human race' (24th July 1837). Would Tocqueville have supported a Christian-Democrat Europe with Adenauer and Schuman; a liberal construction with Verhofstadt today; a 'social Europe' in the words of a popular expression in today's EU politics?

Above all, Tocqueville would have supported a *political* Europe. A political Europe, naturally, implies political participation. As Siedentop shows, Tocqueville tries to conceive a State which would join the civil liberties underlying a market economy with the disciplines of political participation.[8] Only in this way could individualism, the narrowest economic rationality, be contained in modern democratic societies and limit the privatising of life. Political participation is thus more than a right, it is a necessity; something that the European elections and their very low turnout since

1979 fail to demonstrate. One danger that Tocqueville foresees is the *institutional* shift from one political arena (the Westphalian nation-state) to an upper level (the European Union), unaccompanied by a corresponding and *substantial* shift of political attention. If political participation is determined by the civic involvement of citizens, what is necessary is to have an accessible arena where this involvement can be fulfilled.

Justly, Tocqueville warned us against the emergence of a highly-centralised and bureaucratic state – hard-line Brexiters would call this 'Brussels'. Tocqueville, a statesman, a writer, was also a rigorous historian, prone to the close analysis of empirical sources; he surely would have pointed out that the European Commission and its 32,000 staff members ,[9] covering 500 million EU citizens, pales in comparison to the 1,3 million people making up the NHS workforce in Britain.[10] Still, the argument remains that 'For long the Government had suffered from an evil, which is like an incurable and natural malady of forces, which had undertaken to command all, to foresee all, and do all. It had become responsible for all'.[11] I would think that Tocqueville would have argued in favour of a dual dynamic within the EU: more decentralisation from and more popular representation at the EU level.

Tocqueville's aristocratic background certainly impacted his views on decentralisation. This background already forms the matrix of his approach to European history: the revolutions across the continent failed to get rid of the embedded aristocratic culture of the continent, but the emergence of post-revolutionary democratic cultures clashed with aristocratic values. What could these values be? Local autonomy, says Tocqueville; the attachment to the land. Hence the attachment to a decentralised political organisation, which would leave as much autonomy as necessary to local structures.

The issue of organising Parliament is also important. As far as representation is concerned, another influence on Tocqueville was Montesquieu's Spirit of the Laws (1748). The Enlightenment philosopher, in his concept of the separation of powers, adopted a horizontal approach to power but failed to tackle the vertical dimension of political institutions; power, whilst being checked, being concentrated in one place. Most importantly, a Tocquevillian analysis of Parliament could conclude in a need for institutional reconfiguration, towards bicameralism. The lower chamber, as of today, would be composed of directly elected members. The upper chamber would, in this

reconfiguration, represent the Member States, on the model of the German *Bundesrat*.

A reform of the European Parliament could lead to a redistribution of powers within the European institutions. It could reasonably lead to a diminished role for the European Council. On this note, Tocqueville sent an interesting letter to his friend – who eventually accompanied him in his trip to America – Gustave de Beaumont, on 5th October 1828: 'In the organisation of a nation one must avoid two disadvantages; either the whole power of society is united at one point, or it is distributed in its parts. When power is distributed, the capability of acting is obviously hindered, but resistance is everywhere'. What we conclude from the letter, is that Tocqueville is in favour of decentralisation indeed; but he is also against the political blockages that too much decentralisation could produce – think of Belgium during the CETA negotiations. The advantage of a reformed European parliament would then be to reduce the potentially damaging effects of veto rights in the Council.

Nonetheless, an increased politicisation and political participation within the European Union could not be conceivable without a changed role for EU citizens. Tocqueville's experience of America led him to believe strongly in the uniqueness of institutions for each society, but also in the singularity and importance of individual and collective customs. 'Nothing is possible without men, but nothing lasts without institutions' famously said Europe's architect Jean Monnet: Tocqueville would rather stress the first part of the quote, in a more Adenauer-like 'Democracy needs democrats'. His conception of society is that of a liberal with Christian ethics; in other words, his vision of citizenship is very much of an active citizenry, based both on freedoms and duties, for the lack of duties would atomise society, fuel a rampant individualism and eventually jeopardise individual liberty. Here is the main problem with EU citizenship, from a Tocquevillian point of view: it creates rights but no duties. EU citizens have for instance the right to convoke EU treaties before a national court to bring a claim (ECJ, Van Gen den Loos, 1963). But, in the absence of direct EU tax, conscription, etc. what obligations are there?

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This, perhaps, is a theme in Tocqueville's work which has received less attention, for it sheds light on an inconvenient truth: in modern society, trade has replaced war as a means of exchange between nations and people, and has led to a general softening of habits and morals. The 'gentleness of heart' means that modern Europeans prove to be incapable of making

History. Tocqueville writes here against the sheer nationalism that eventually tore Europe apart. But he also argues that patriotism is not limited to one's birthland; rather, it can be embodied in a common set of laws and values. 'It is perhaps less generous and less ardent, but it is more fruitful and more lasting'.[12] Moreover, it should be embodied in these common values, as a way of combating the isolation of the individual in modern society. On this point, Tocqueville wonders, in the Old Regime and the Revolution, what could explain a common institutional framework all across Europe, and answers that it was built 'by excluding all others'.[13] It sheds light on a crucial strength of the European Union as we know it today and in the midst of its political difficulties. The 'gentleness of heart' of Europe, to a large extent, has prevented it from delivering any *hard power* in the world's recent crises where it could have proven needed. Yet, when it has been successful in translating its shared values into concrete political action or legislation, it has diffused decisive *soft power*. For example, the General Data Protection Regulation (GDPR), protecting private data in Europe and promoting a very European vision of digital privacy, in contrast with American and Chinese viewpoints, has today become a de facto global reference on the matter. Here is perhaps what Tocqueville would have wished for Europe today: that it be not afraid of building a third, its own way, in a multi-polar world.

Endnotes

1. Tocqueville was a member of Parliament for La Manche between 1839 and 1851, a conseiller général for the same département between 1842 and 1852, and briefly Minister for Foreign Affairs in 1849.

2. Mélonio, Françoise. *Alexis de Tocqueville* (Paris: ADPF, 2006), 71.

3. Souvenirs, in *Œuvres*, t.3, p.780.

4. Löwith, Karl. *Meaning in History* (Chicago: Chicago University Press, 1949), 227.

5. Manent, Pierre. *Tocqueville et la nature de la démocratie* (Paris: Gallimard, 1993), 177.

6. Hereth, Michael. *Tocqueville: Threats to Freedom in Democracy* (Durham: Duke University Press, 1986), 122.

7. *Democracy in America*, Book 3, chapter 17.

8. Siedentop, Larry. *Tocqueville* (Oxford: Oxford Paperbacks, 1994), 140.

9. European Commission, https://ec.europa.eu/info/about-european-commission/organisational-structure/commission-staff_en Last accessed 14 February 2020.

10. NHS, https://digital.nhs.uk/data-and-information/areas-of-interest/workforce Last accessed 14 February 2020.

11. *L'Ancien regime et la revolution*, t. II, p. 2.

12. *Democracy in America*, Book 1, chapter 6.

13. Chapter 4.

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Shaping the future of the EU: reviving the Europeanisation process

DIANA GHERASIM

More than ten years after joining the EU, the Central and Eastern European countries (CEECs) exhibit a puzzle of attitudes and conceptions regarding the EU. The long-awaited convergence of direction between old and new, West and East, core and periphery, which academics of European integration claimed will automatically follow after CEECs gained access to membership, is still a 'work in progress'. Unconditional and sustained engagement with the EU is no longer the norm in the CEE member states, beliefs and norms at the European and national level become to different extents for some member states contradictory to European ones, while some political elites find more inspiration for their policy-making and governance styles abroad than among their EU peers.

Against this patchwork of levels of engagement with the EU, the process of Europeanisation in the CEECs can now be discussed from a new perspective, that of de-Europeanisation. If Europeanisation can be defined as a dynamic transformation of domestic structures because of EU membership, the concept of de-Europeanisation has been approached as a "*departure from the European model*" (Castaldo and Pinna[i]) emerging "*at an informal level*", namely in "*attitudes, values, praxes and ways of doing things*", or as "*an indispensable part of the outcome range*" of the process of Europeanisation (Schimmelfenning, Wozniakowski and Matlak[ii]). This paper regards de-Europeanisation as a possible (though not mandatory and arguably avoidable) stage in the Europeanisation process, implying a manifest disengagement with EU's values, rules, procedures and institutions or openly contesting these. It has a transformative impact both at the domestic and EU level, as it obstructs progress towards advancing European integration, by undermining internal cohesion, mutual trust and collective power of action (including credibility and legitimacy of the EU at home and abroad). It is in order to prevent a process of de-Europeanisation to install itself in Europe that one can argue that a new and more constructive dynamic must be

instilled in the Europeanisation process.

A reset for the Europeanisation process is vital, in a context where the de-Europeanisation stage poses a risk of becoming a problem to the EU. As Professor Weiler argues, the European project was established on three "*founding ideals*" namely peace, prosperity and supranationalism, however it has been increasingly reduced to a "*market inflected scheme of cooperation (...) [where]only prosperity resonates as a still-current value in European public discourse*".[iii] Faced with this dilution of values and instrumental use of membership status, the Europeanisation process seems to quickly lose in capacity of constructively transforming EU actors, in the sense of directing them towards greater convergence. Initiatives such as values-based allocation of structural funds, although reasonable, if segmented and not part from a comprehensive framework of action, are not likely to yield long-term sustainable and positive outcomes for the EU. Hence, an Europeanisation reset must be conceptualised based on three essential preconditions: Europeanisation must be seen as part of a larger project of establishing a new political and legal European order [iv] (n°1); it must be founded on the logic that "*If Europeanization is to produce change, it must precede change*" (C. Radaelli) - thus have a proactive dimension (n°2); it ought to be acknowledged as "*both vision and process*" (Borneman and Fowler) (n°3).

Thus, a reset of the Europeanisation process should be comprehensive, prospective and proactive in order to deliver a long-term valuable change in the current state of EU affairs. To be more specific, this renewed model should be able to strengthen a community of shared values, where legitimacy and cooperation are based on the principles of a level playing field and inclusive governance.

Upgrading Europeanisation: towards an interactive, citizens-oriented and inclusive process

Building a Europeanisation 3.0 model does not involve starting from scratch and rejecting the mechanisms used in the past (e.g. conditionality). On the contrary, we ought to capitalize on what has been achieved and acknowledge the problems currently existing in the Europeanisation process in order to come up with a series of constructive proposals for reform, meant to render it more resilient and pervasive.

Three pillars have been identified as essential for this new phase: interactive economic

Europeanisation (i), building a transnational civil society (ii) and evolving towards an inclusive governance in EU affairs (iii). Because this reset means a 'titanic' work in practice, it is useful to reflect upon these changes as happening over a longer period. To render the concept of Europeanisation 3.0 more operational, a Theory of Change model can be used to trace progress and adapt action depending on changing realities on the ground.

1. Interactive economic Europeanisation

S. Andersen[v] put forward the concept of "*interactive convergence*" which defines a "*mutually reinforcing interaction between EU level pressures and national level interests*", displaying "*low pressures for de-coupling*", given that "*there are local incentives to enact the spirit of EU level decision and rules*". We draw on this concept in order to propose the first pillar of Europeanisation 3.0, namely interactive economic Europeanisation as a mechanism oriented towards achieving economic convergence with due consideration to Member States' needs and peculiarities and via a collaborative loop between the European Commission, the Member States, businesses and civil society. The three main ways to enact interactive economic Europeaniation are detailed below.

1.1 ESIF Assistance

EU funds absorption has been an issue for the CEECs, especially because of insufficient administrative capacity and superficial regionalisation, eventually preventing the neediest EU citizens from benefittng from resources meant to raise their living standards. To remedy this, the EU can create a mechanism via which regions may request technical assistance and training should they face difficulties related to access and use of structural funds. Such a mechanism could be similar to OECD's initiative "Tax Inspectors without Borders", a demand-driven project, whereby participating countries needing support to reform their tax administration submit a request and are eventually provided with support tailored to their needs. An efficient and constructive way to provide assistance would be to attach an assistance branch dedicated to European Structural and Investment Funds (ESIF) to the existing Structural Reform and Support Service (SRSS) and increase its budget. SRSS was launched in 2017, with a budget of €222.8 m for 2017-2020 period, as a mechanism to support member states when they undertake institutional, structural and administrative reforms, being available upon request and totally free of charge. This scheme

has been unexpectedly successful in the eyes of the European Commission: "*demand has far out-stripped expectations*", with already 26 EU countries having appealed to the SRSS for 760 projects; other projects could not be realised due to lack of financing. In 2018, the Commission proposed to make the SRSS evolve towards a Reform Support Program with a budget of €25bn for 2021-2027 period, organised in three streams: Reform Delivery Tool (€22bn), Technical Support System (€1bn), Convergence Facility (€2bn of financing for countries preparing their accession to the euro area). The EU must seize this window of opportunity (reform of SRSS and member states' proven interest for assistance) and create a technical assistance arm of SRSS focused on ESIF, hence encouraging a case-based cooperation on solving the conundrum of low funds absorption.

1.2 Boosting the scope of the Juncker Plan

A second type of interactive economic Europeanisation technique is sharing best practices and scaling up initiatives emerging as part of the Juncker Plan. As of March 2019, EU-wide results showed an impressive performance of CEECs: half of them ranked among the 10 first member states who triggered most of the structural and investment funds in terms of investment per € of GDP (Estonia 2nd, Bulgaria 3rd, Lithuania 6th, Poland 7th, Latvia 8th). This is a great opportunity to, on the one hand, promote them as role-models, and on the other hand, make them responsible for sharing key success factors with their peers (arguably, both Romania 21st and Germany 25th would very much need Bulgaria's advice). In addition, successful projects should be subject to review at the EU level in order to see if there is any opportunity to scale them up either via their implementation across other member states interested or via providing experts from other countries on issues that may have not been solved at the national level.

1.3 Harnessing the transformative potential of the European Semester

The European Semester has been very successful in accelerating economic and social dynamics in EU Member States' policies via the Country Specific Recommendations and the Europe 2020 reference framework, accompanied by the progress reports. Although a lot remains to be done, it is undeniable that at present EU-members focus their economic and social policies on the same objectives, creating a European narrative of what our economic future should be: boosting employment and R&D,

fighting climate change and energy dependency, improving education and ending poverty and social exclusion. However, this framework is not used to its full potential. The European Semester could be useful to address concerns of economic sovereignty in a progressive way: for instance, states should be able to get more manoeuvre space upon presenting a coherent and well-justified budgetary plan that would not fully respect EU budgetary standards but aims at accomplishing a national essential goal. Conversely, if that state does not keep its promise (for instance, increasing its public debt not for investing in technology as argued, but for financing non-productive activities) then it should expect to be punished by its peers because following a tit-for-tat approach.

Another step towards a more interactive and constructive economic cooperation would be to boost the participation of non-state actors, namely businesses, in accomplishing European objectives. Businesses are at the forefront of making change happen, whether we talk about employment targets or action against climate change, so it must be clear for them how they can contribute to economic convergence in Europe, and therefore making them acknowledge they have a role to play in our shared prosperity. As such, the European Semester framework could include a mechanism for collecting input from businesses on economic realities on the ground (challenges, opportunities and needs to be addressed), as well as a series of indicators for monitoring their contribution to the development of the societies they thrive in. For instance, an Employees' Erasmus scheme, financed jointly by the EU and by businesses as part of their RSE strategy could be designed to include two streams of action: lifelong learning (ex: over a period of X years in the company, all the employees must be given the opportunity to attend language courses and to arrive at a proficiency level in a different EU language than their mother tongue) and work exchange (in the case of multinational companies, making it possible for employees to do once every 2 years an exchange of 2-4 months in a different country where the multinational has an office; in the case of national companies - creating a European platform for connecting businesses that want to offer this type of experience to their employees). In addition, employees should have at their disposal a EU mechanism allowing them to flag up breaches of law by businesses: it should no longer be possible that clothes "made in Romania" be synonym of workers' exploitation[vi] in total inconsideration of EU labour standards.

2. A PAN-EUROPEAN DEMOCRATIC IDENTITY

If Europeanisation is to mean something in the long term, this would be the emergence and consolidation of a European identity going hand in hand with a self-sustained democracy[vii]. The multiple crises the EU has been confronted with over the past years have proven that further EU integration is hardly feasible as long as the Union cannot count on the three main enablers that would make the European identity:[viii] a sense of solidarity (refraining from certain benefits for the sake of fellow citizens), a belief that the system is fair - today's losers can be tomorrow's winners if the situation presents itself, a certain level of trust in lawmakers seen as representing the interests of a "we" beyond borders.

European identity is not synonym of a uniform identity of European citizens as this is a utopia if looked at through the lens of Europeanisation theory. First, different socialisation and learning mechanisms combined with cultural diversity lead to holding different views on the world. Second, not all citizens are subject to the same mechanisms of Europeanisation or their intensity differs from one state to another: some are part of the eurozone (19 Member States) / Schengen area (22 Member States), some are not part yet and aspire to be (like Romania and Bulgaria who wish to join Schengen), some have deliberately opted-out (like Ireland from Schengen).

Arguably, a pragmatic and constructive meaning for the European identity is the one emerging from a self-sustained democracy, defined by K. L. Scheppele as "*a system in which the people can continue over time choosing their leaders, holding them to account, and rotating power when leaders disappoint*". Such an identity will be defined by two dimensions: critical Europeanism and active citizenship. In order to develop these, sustained action in specific areas must be taken.

2.1 CIVIC EDUCATION

In some CEECs, the most blatant attack to EU's values and citizens' rights has been undertaken by a political elite who asserts electoral legitimacy and legal tools in order to consolidate power in few hands and weaken opposition and civil society. Hence, as K. L. Scheppele argues, "*In the days when dictators come to power with law reform as their primary tool, civil defense requires citizens to be empowered with law*". In other words, citizens must understand why it is important to defend liberal democratic values, how they can concretely recognize threats to these, as well as defense tools. It is nothing new that

educating people is a long-term and relentless effort, especially with respect to legal matters, but this is crucial to fight manipulation and vulnerability to populist ideas. This task ought to be accomplished by experts in constitutional law that are capable of decoding legal moves undertaken by authoritarian / corrupt governing elites and explaining these to people either directly, either via civil society organisations, which should reinforce their presence in the education field, providing early occasions for the young generation to engage in the public sphere.

Another aspect of civic education consists of developing a common curriculum on the EU's history, legal and economic set-up, internal challenges, and foreign policy. Currently, one can reach the voting age without having any basic knowledge of what EU is concretely (institutions, procedure, power and projections of power abroad), but is still expected to vote for a representative to the European Parliament. This is one of the greatest of EU's weaknesses: ignorant citizens are a liability (because they are the most susceptible to follow autocratic leaders), in as much as an epitome of our failure to live up to our standards of equality of chances. As one interviewee underlined, we ought to acknowledge that education on EU matters must be equally accessible to all: "*The level of Europeanisation varies among the citizens: those who live or study abroad are Europeanised, those who live in isolated areas have not felt the impact of the EU. In their villages [in Romania] nothing has changed, or things have changed in worse. Privileged people understand the institutions, the others don't.*" (G. Gima). In order to encourage states to adopt such a curriculum (given that education is a national prerogative), the EU could guarantee full funding for textbooks, teachers and activities related to teaching EU Fundamentals. It could also convince businesses to take part, either by financing local educational initiatives as part of their CSR strategy or by funding courses for their employees on this subject.

2.2 Active citizenship: input to policy-making and ensuring accountability

Currently, EU citizens have different ways of contributing to policy-making at the EU level, however, none has proven to be undeniably successful. [ix] The European Citizens Initiative, created in 2011, has led to the submission of 58 initiatives, out of which only four were successful. Only 2 out of the 4 successful initiatives resulted in a legislative response by the Commission.[x] Online consultations are

another method used by the Commission to enhance participatory democracy, yet it is not clear how these contributions impact EU policy-making. Finally, citizens are called to vote for their representatives in the European Parliament, however, participation rate in EU28 has not been a reason to be proud of until the 2019 elections which managed to reach a voter turnout of over 50%.

European elections in 2019 showed there is potential for reigniting citizens' participation. An online campaign has been deployed by the European Parliament encouraging voters to exercise their vote ("This Time I'm Voting"[xi]) and to nudge other fellow citizens towards doing the same. The rise of nationalist parties has, unexpectedly, resulted in a first truly transnational debate about the future of Europe between anti-immigration forces and pro-integration ones. Mediatic attention given to Fidesz' row with the European People's Party (EPP) has arguably instilled more salience to the elections. But these are marginal ways of engaging civil society towards the construction of a real European polity. If Europeanisation 3.0 is to become the constructive and stable foundation of a sustained European integration, then it must be based on active citizenship, which is currently not ensured by any of the above-mentioned mechanisms.

One way of fostering active citizenship, according to R. Youngs,[xii] is to galvanize a combination of local participation and national democracy. Local participation offers the key advantage of informing the EU level about real economic and social trends on the ground, while proactively involving citizens in "*setting political agendas rather than simply and somewhat passively being asked to vote or engage online on set questions related to predetermined issues*". This could be achieved via the creation of citizens' assemblies. A possible model for these is the Romanian civic initiative "Platforma Romania 100" - "*a project to change Romanian politics from inside not from outside*",[xiii] which allows any 4 willing citizens to form a local community and to convince other citizens to join their debate and work on public policy initiatives, awareness-raising campaigns, trainings or participate in political and societal debates. Projects which are considered scalable are directed towards the central management pole, with the objective of extending their reach to other communities that are part of the Platform.

Another essential element to active citizenship is enabling citizens to hold accountable their EU representatives, namely their MEPs. Arguably the most obvious way to do so is to require

all Member States to create constituencies, following the British, Italian or Polish model, where each region elects several MEPs depending on its size. A second aspect to look at is how the candidates are put on the party lists: instead of them being named by their party, voters should be able to select them based on their knowledge / skills / projects in EU and local affairs. In addition to this, MEPs should be accountable for the way they spend the General Expenditure Allowance, in theory directed to office and representation expenses. Failure to reform the General Expenditure Allowance in 2018, as well as multiple scandals related to the misuse of staff allowances for personal or partisan benefits, have lowered public confidence and further deteriorated the EU's image in the eyes of its citizens, thus making it urgent for the EU to boost efforts to enhance MEPs' accountability.

2.3 Building a pan-European civil society

Creating a pan-European political and civic space is also a matter of supporting the emergence of multinational civil society organisations, facilitating their cooperation on projects of common interest and encouraging them to stand up one for another when they face problems in their countries of origin or they need expertise on solving specific issues. One of the professionals interviewed for this paper confessed his disapproval regarding the lack of implication of Western CSOs in the activities of their Eastern fellows which he observed during his professional career: "*I went to Poland to participate to a conference on the rule of law, organized by a Polish NGO. There you had a Czech NGO, a Hungarian one, a Swedish one and then the Americans. So you reach a point where you ask yourself: where are the French, the Germans, the Spanish? Civil society in these countries must also get involved in transnational relationships, since not everything gets done at the national level or in Brussels. There are things that can be solved by means of cooperation between the European civil societies*." (A. Prokopiev). He acknowledged that "*The EU can encourage this cooperation, but cannot create it*", hence it falls to CSOs to grow into being a stronger force of proposal and resistance and make better use of EU tools available to them.

3. Substantive inclusiveness in EU governance

Substantive inclusiveness is understood as going beyond nominal equal rights of Member States foreseen in the treaties, which too often fail to materialize in current EU affairs. The EU must grow up outside its traditional Franco-German narrative for the EU, which does not

mean dismissing it, but evolving towards being more open to opportunities and ideas coming from new member states. If old member states want a strong Union, they must understand that CEECs must be taken seriously, which means both listened to and made aware they have an important role to play in the EU, in order to have them transgress their own national considerations and get involved in the European governance.

The preliminary conditions for inclusive governance to emerge seem to be already in place. First of all, CEECs prove they have constructive initiatives. One such recent example, which took birth in Romania, is "The Quadrilateral Balkan Summit", bringing together the leaders of Romania, Bulgaria, Greece and Serbia. The group was created in 2015 and its objectives are to help Serbia to gain access to EU membership and to boost economic, energy and transport cooperation in the region. The narrative around this cooperation framework is supportive of advancing European integration via concrete action at the level of each member state. Greece's Prime Minister declared at the group's meeting in December 2018 that *"the new summit in this format proves that the Balkans can contribute to the European agenda and is not a second-class region. (...) We want to send a message of optimism and in parallel the message that all the countries of the peninsula should follow the example we are giving today for cooperation and base their vision for their integration in EU on the meeting of their obligations and on the need to comply with the European acquis."*[xiv] Second, there is an increased defiance towards prominent Franco-German initiatives meant to push forward EU integration. For instance, the Treaty of Franco-German Cooperation and Integration signed at the beginning of 2019 was viewed by Eurosceptics as *"A Franco-German axis that goes around other Member States (...) The EU needs to work in the interests of all its Member States, not just the biggest two,"*[xv] while some political analysts considered it as a *"bland, unambitious fudge"*,[xvi] given that the real contentious issues between the two countries have been silenced.

Therefore, in order to boost substantive inclusiveness in EU governance as part of the Europeanisation 3.0 framework, three initiatives look particularly relevant.

3.1 Empowering Member States to be a role model

A first step towards a more inclusive governance is making each country responsible for portfolios on which they have exclusive expertise and strong will to do more on behalf of the EU.

For instance, Romania could be entrusted with actively supporting Moldova towards gaining EU membership, or with leading the consolidation of the Energy Union on the Eastern flank, given its strategic position and low energy dependency. Similarly, Estonia could be made responsible for scaling up its e-government model and spreading know-how at the European level, to accelerate digitalization in the EU. Not only would such approach increase countries' involvement in EU governance and their pride of being role-models and not only mere followers, but it would also allow the Union to capitalize on its members' potential and to thrive, rather than struggle to exist. In additions, citizens would have new standards to hold their governments accountable to when it comes to their contribution at the EU level, as well as potentially new reasons to be proud of their double identity: national and European.

3.2 A PEER REVIEW MECHANISM

Our second proposal is to implement a peer review mechanism for the rule of law, which, if proven to be efficient, should be expanded to other areas. This proposal capitalizes on Belgium's Prime Minister, Charles Michel, initiative of creating a framework where every member country would submit itself to a review of its adhesion to the rule of law, undertaken by its peers[xvii] in order to "*develop good practices and correct deficiencies, in a collegial way*". Such systems exist at the level of OECD (OECD/G20 Inclusive Framework on BEPS) and African Union (African Peer Review Mechanism - APRM) and have been proven efficient towards boosting participation on equal footing to common endeavors. The APRM has been appreciated as a useful "*diagnostic tool for identifying drivers of change and socio-economic developments.*"[xviii] The APRM aims at building "*responsible leadership*" by implementing a progressive review: first the country undertakes a "self-assessment process" with the contribution of the public and submits a report at the Union level; then other countries proceed to the review of their peer and complete a report; finally, a discussion among the heads of state is hold on the reports submitted and a plan of action is agreed to address deficiencies. The key success features of this system are related to its non-adversarial nature (countries are not forced to subject themselves to the peer review, but do so for gaining better governance and boost their international image), its constructive nature (meant to prevent arrival at a point of non-return and to promote exemplary practices), its democratic potential (as civil society has participatory rights in informing the review process). Given that the EU already disposes of coercion instruments in case members refuse to

comply with EU law, a peer review mechanism would be a tamer and more egalitarian way of socialization and learning, presumably able to prevent future conflicts on values and render irrelevant any claims of "Western dominance".

3.3 Making parliaments count

At the EU level, inter-parliamentary cooperation, although existing (e.g. COSAC), is highly ignored by the citizens and it is hard to say to what extent it matters towards influencing EU policy-making. In addition, although the Lisbon Treaty has empowered national parliaments to oppose EU legislation that does not respect the principle of subsidiarity (via the orange and yellow cards), in practice debates on European issues are confined to the Commission on European Affairs and less often discussed in plenary sessions. A more pragmatic and visible role must be placed on the shoulders of the European and national parliaments. For instance, the monitoring of the EU Justice Scoreboard should not be only a European Commission's duty, but ought to involve also the European and the national parliaments. The inter-parliamentary meetings should provide clear input to the European policy-making and citizens should be made aware of this.

Conclusion

"*Restarting the process of Europeanisation is a political fight*" (F. Parmentier), hence a coherent, visionary and inclusive framework will be needed to succeed in this ambitious endeavor. Many tools necessary to deepening the Europeanisation process are already. However, they need to be harnessed in such a way that they nourish the construction of a European identity, while leaving place for a constructive critical Europeanism.

Conceptualizing a Europeanisation 3.0 strategy is a forward-looking task, amounting to shaping the future of the EU. If Europeanisation is to succeed, the time has come fuel the right engines: values, aspirations, beliefs. It is conceivable that the EU will continue to exist as a Single Market without having to consolidate these three pillars, and rather proceed to reinforcing its legal framework. But Europeanisation is not about merely existing, it is about thriving on our way towards achieving a vision of a "we" beyond borders. In resetting Europeanisation, we should pay attention not to leave anyone behind.

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The Civil Justice Union: Fiction or Reality?

How transnational judicial protection will determine the future of economic integration

MARKUS STEMESEDER

The increase in cross-border activities resulting from the establishment of the European single market corresponds to the increased probability for European citizens of being implicated in cross-border civil law proceedings. Due to the lack of a genuine common legal system, cross-border litigation confronts the plaintiff with unfamiliar legal traditions, laws, and languages. This article aims to demonstrate, that such obstacles impede individuals' access to justice and judicial protection, which undermines the legitimacy of the single market and detrimentally affects European citizens' trust in further economic integration. Arguing, that the future of the single market is contingent on transnational judicial protection, it assesses the state of the current civil justice union, embodied by the two existing genuine European civil procedures, that deal with the implications of cross-border trade: the European Small Claims Procedure and the European Order for Payment Procedure. Accordingly, the confidence of individuals in cross-border services and legal proceedings will be contrasted with the success of these two procedures, measured by their decree of utilization and European citizens' awareness of them. The findings indicate that, although the legal framework exists, trust in judicial protection remains low on the factual level, which creates an impediment for further economic integration. A genuine civil justice union, that provides judicial protection with rules common to all Member States, will thus determine the future of the single market.

Built on the four freedoms, the single market has spurred the continuous increase of cross-border activities of consumers and businesses resident in the European Union (EU). An ever-increasing number of Europeans buy goods and services from actors residing in other EU Member States or leave the Member State of their citizenship and travel through Europe for work, study, or holidays. This increase corresponds to the growing probability that

EU citizens are implicated in legal proceedings.[1] After all, providing or receiving transnational services and goods might pose immense problems if contractual services exhibit legal defects, particularly in commercial and civil justice matters.[2] However, litigating cross-border disputes would often require the plaintiff to lodge a claim in another Member State, or to have foreign judgments recognized by another Member State before being able to enforce them. Thus, legal remedies in cross-border cases would confront the plaintiff with differing procedural and substantive laws and an unfamiliar procedural language. All these factors, which are detrimental to individual judicial protection, impede the readiness to engage in cross-border activities.[3]

I contend, that a genuine common economic area, in which EU citizens trust, requires a civil justice union, with rules common to all Member States. The future of the single market and its potential to thrive in transnational endeavors is contingent upon EU citizens' confidence in cross-border activities, which, in turn, requires effective access to justice and individual judicial protection. The legitimacy and future of the single market, therefore, is conditional on legal integration through (1) providing access to justice and judicial protection on the legal level, which (2) promotes trust in the single market on the factual level. Accordingly, this article examines the legitimacy of further economic integration from the perspective of the individual, exemplified by two genuine European civil procedures, which constitute the epitome of judicial protection for EU residents. In this vein, the European Order for Payment Procedure (EOP) and the European Small Claims Procedure (ESCP) embody the legal protection linked to the convergence of national markets to the single market by offering unified rules in cross-border debt collection in one single, simple and rapid procedure. The establishment of these procedures raises the question, whether they have indeed formed a civil justice union – on the abstract, legal level as well as on the factual level of knowledge and usage. European citizens' confidence in cross-border activities and resultant proceedings will be assessed by the decree of the EOP's utilization and EU citizens' knowledge about the ESCP, which will be contrasted with individuals' attitudes towards cross-border proceedings before and after their entry into force.

While public support for European integration was extensively discussed and measured on the basis of economic, political and social considerations, the legal aspect of integration

from the perspective of the individual remains largely unaddressed. Discussions concerning legal integration have focused primarily on the supranational level from a public law perspective, which perceived law primarily as an instrument to achieve integration. On the individual level, however, legal integration is, on the one hand, a fundamental legal basis of legitimacy for the integration process, and on the other an invaluable instrument for fostering trust in the internal market. To demonstrate this, I will, first, analyze the different dimensions of European integration and set its legal aspects into the perspective of the access to justice as the legal basis for the legitimacy of the European integration process, and its role of fostering individuals' trust in cross-border activities. Second, I examine the evolution of the civil justice union and the framework of the two European civil procedures facilitating EU residents' access to justice to cross-border litigation. Finally, I will analyze the impact of these procedures on European integration by measuring the attitudes of EU citizens towards cross-border proceedings.

I. European integration and its legal aspects

The concept of European integration has always been regarded as a multidimensional and interdependent process.[4] Political integration has been described as the enlargement of the EU and consolidating the different interests of Member States.[5] Economic integration, which constituted for the Union's founding fathers the precondition for political, and ultimately, social integration,[6] aims at creating a transnational economic area by converging national markets to the single market.[7] From the sociological perspective, integration has been described, "as a process in which different social systems unite to form a cohesive entity",[8] which was, in turn, regarded as a prerequisite for political integration.[9]

In contrast, legal integration was always primarily perceived as a means for achieving integration[10] and described succinctly as the establishment of a supranational system.[11] The role of law in the integration process was theorized extensively from the institutionalist perspective,[12] focusing particularly on the European Court of Justice either as an instrument of dominant Member States[13] or as an anomaly in supranational authority.[14] The aggregate level of legal integration was measured by transnational dispute resolutions cases decided by the European Court of Justice in preliminary reference procedures,[15] which were found to be particularly used by actors that engage in cross-

border activities to increase their economic endeavors.[16] In legal literature, Roeben examined the increasing institutionalization of judicial protection within the EU judicial architecture, promoted by the judgments of the European Court of Justice and the treaties, shaping "a single code of procedure".[17] Moreover, common civil procedural laws were argued to be vital for a common economic area and a prerequisite for harmonizing private international law.[18]

Law is, however, more than the abstract construction material of a supranational entity, detached from European citizens. It rather is the cause and consequence of economic, social and political integration. Social and economic interaction across borders "drives integration processes, generating social demands for supranational rules".[19] Those who engage in exchanging goods and services in the single market thus require a normative framework that provides "European rules, standards, and dispute resolution mechanisms."[20] Increasing cross-border exchange entails a growing need for supranational legal frameworks, which underlines that also law plays a significant role in the integration process. From the individual's perspective, which has not been addressed so far, legal integration is linked to the legitimacy of European integration on the legal level through providing judicial protection and access to justice, which also promotes trust in the single market on the factual level. Also, the European civil procedures have not yet been discussed within the realms of political science. The paucity of literature is perhaps owed to the lack of comprehensive statistical data, which is limited to two implementation reports. Moreover, finding national statistics concerning the number of annual applications involves immense linguistic difficulties, since these are (if at all) published only in the respective Member State's official language.

A. Access to Justice as the basis of legitimacy of European Integration

Legal integration in the sense of providing access to justice to remedy unintended effects of the single market is an integral basis of legitimacy for European integration itself. This stems from human rights and constitutional considerations of the EU, enshrined in Article 2 of the Treaty on the European Union. According to this provision, the Union "is founded on the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights."[21] The adherence to these values is the ever-present precondition for membership at the EU, and their violation a ground for suspending

Member States' rights. [22]

The concept of access to justice pertains to every single notion, particularly to the rule of law, democracy, and human rights. As a constitutional principle of the EU, every individual has the right to seek remedy before a court if their rights are infringed [23] by Member States or by a private party. [24] The right to a fair trial [25] and the right to an effective remedy [26] are fundamental human rights enshrined in primary law and protect human dignity and personal freedom. The principle of the rule of law aims to prevent arbitrariness. It encompasses the principles of legality, legal certainty, equality before the law, respect for human rights and the access to justice.[27] This fundamental principle binds both Member States and all EU Institutions.[28] For a democratic society, effective access to justice as well as the rule of law are indispensable, interconnected preconditions.[29] They are the fundamental basis of legitimacy for every State, which makes access to justice and the judicial protection of the rights of individuals also a vital requirement for European integration.[30] Due to the rising probability of legal proceedings resulting from increasing cross-border trade, the legitimacy of further economic integration, therefore, depends on increasing legal integration. Consequently, by establishing an internal market, the EU has created its own obligation to provide access to justice and to improve mechanisms to settle disputes raised by internal market dynamics and cross-border activities.

B. Trust in Economic Integration through Legal Integration

Apart from serving as the fundamental basis for European integration, judicial protection also constitutes an important factor in the creation and fostering of trust in the single market.[31] Varying procedural and substantive laws and different procedural languages undermine legal certainty and foreseeability.

Public opinion in judicial proceedings that might arise from cross-border purchases does not depict a picture of trust in individual judicial protection. According to the first Eurobarometer on civil justice conducted in 2008,[32] before the entry into force of the EOP and ESCP, 55% of survey participants considered accessing justice in other Member States as difficult.[33] The main concerns regarding litigation in other Member States were unfamiliarity with the procedural rules in other Member States (52%), language barriers (40%), costs of procedures (27%) and lacking trust in cross-border procedures (20%). Public opinion also showed that these problems

should be solved by uniform procedures on the EU level (57%).

While cross-border distance purchases have continuously increased throughout the past two decades, consumers are still more confident to engage with national retailers than with businesses located in other Member States.[34] Consumers considered accessing justice in another Member State as the primary obstacle for engaging in cross-border trade, naming the resolution of problems after the purchase (59%), and the difficulty to take legal action (51%) as their main concerns.[35] However, a genuine economic area requires that individuals have confidence in mechanisms that rectify unintended detriments. Considering the repercussions of engaging in transnational economic activities, the lack of trust in judicial protection in cross-border proceedings calls for legal integration.

II. Civil Procedure Rules in a Cross-Border Context

Before the establishment of genuine European civil procedures and legal integration in general, the courts of Member States adjudicated the extremely rare cross-border cases solely on national norms.[36] The normal course of a national civil procedure begins with a claim and ends with a verdict, which is the decision on the merits of the asserted claim. After the time limit for appeal has expired, the verdict becomes legally binding and constitutes an execution title for enforcement by using coercive State power to implement the rights and obligations adjudicated in the verdict.

Cross-border cases entail significant obstacles, which relate to the competent jurisdiction and the location where the judgment can be enforced. According to the principle of territoriality, jurisdiction is limited to the territory of a State. Therefore, national courts can only exercise jurisdiction if the actions that gave rise to a procedure have occurred within their territory. Thus, the legal maxim "actor sequitur forum rei" ("the plaintiff follows the matter's forum") [37] prescribes that the claim must be lodged in the country of residence or headquarters of business of the defendant. Thus, the proceedings will be held in the defendant's country, applying national norms, confronting the plaintiff with an unfamiliar language, lack of legal knowledge and the necessity to travel in order to have the case adjudicated.

Civil proceedings may also be held in one Member State while the decision has to be enforced in another. This requires the recognition of the foreign judgment before it

can be enforced. The principle of territoriality entails that Sates are under no obligation under public international law to recognize foreign judgments.[38] The enforcement of foreign judgments functioned only through the exequatur procedure, which determined whether a foreign judgment should be accorded extraterritorial effect and enforceability. States' obligations to do so were subject to bilateral and multilateral conventions[39] establishing reciprocal recognition of foreign judgments. Apart from the uncertainty raised for individuals, the exequatur also increased the workload of the courts of Member States significantly.

To deal with the developments of creating the single market, the European Council concluded in a special meeting in Tampere in 1999 that it was necessary to establish a "genuine European area of Justice" by enhancing the access to justice, providing for the "mutual recognition of judicial decisions" and by establishing "greater convergence in civil law".[40] As a result, the Lisbon treaty makes reference to the Union's "area of freedom, security and justice",[41] which "shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters." [42] Cooperation in the judicial branch is now based on the principle of mutual trust, that is to say, the premise that all Member States' judicial and legal orders are equally competent and have equal value.[43] The principle of mutual recognition of judgments, which is now enshrined in primary law,[44] is thus vital for ensuring "mutual trust in the administration of justice in the Member States."[45]

Moreover, three regulations established legal institutions to "simplify, speed up and reduce the costs of litigation in cross-border cases," [46] which underline the process of increasing legal integration. As a first step, the European Enforcement Order (EEO) was created.[47] This certificate, which accompanied a judgment issued in a national procedure, confirmed the adherence to certain procedural guarantees, which made the judgment enforceable throughout the Union.[48] Thus, it abolishes the intermediate exequatur necessary to enforce judgments rendered by a court of another Member State and allowed the free circulation of judgments.[49] It did not, however, provide for a uniform procedure common to all Member States, which was finally introduced by the European Order for Payment Procedure and the European Small Claims Procedure.[50]

A. European Order for Payment Procedure[51]

The European Order for Payment Procedure (EOP) was established by Regulation 1896/2006 and entered into force on 12 December 2008. It constitutes the first genuine transnational procedure in civil matters within the Union and imitates to a large extent the Austrian payment order procedure on the EU level.[52] It applies territorially to all Member States except Denmark,[53] and materially to civil and commercial matters concerning monetary claims[54] with a cross-border aspect, that is to say, "in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seized."[55] As an optional procedure, it is used in addition to prevailing national payment procedures. The EOP uses standard forms provided by the Regulation as a means of communication[56] and does not require legal representation by a lawyer.[57] Jurisdiction is governed by Regulation (EC) No 44/2001[58] and Regulation (EU) No 1215/2012[59] which stipulates that claims against and from a consumer can only be lodged in the State of residence of the consumer. [60]

All a consumer must do to recover debt from a debtor resident in another Member State, is filling in the Form A (most importantly name and address of the parties, amount of the claim, subject matter of the dispute and description of the facts and evidence)[61] and submit it in paper or electronic form to the competent court.[62] After its examination, within 30 days[63], the court issues the European Order for Payment and a copy of Form B, which can be used by the debtor to oppose the claim. If opposed and sent within 30 days, normal court proceedings are held to decide the dispute. In the case of an opposition, the creditor can also decide to terminate the proceedings or transfer the proceedings to the ESCP.[64] If no statement of opposition is lodged within 30 days, the court of origin declares the EOP as enforceable, which must be recognized and enforced by all Member States without an additional exequatur.[65]

B. European Small Claims Procedure[66]

A similar procedure provides the European Small Claims Procedure (ESCP), which was established by Regulation 861/2007 and entered into force on 1 January 2009. Also, the ESCP is applicable to civil and commercial matters with a cross-border element.[67] In contrast to the EOP, which has no value limit, the ESCP should simplify and facilitate the recovery of small claims,[68] which were initially set to a maximum of EUR 2000[69] and subsequently

amended to EUR 5000.[70] It should particularly protect consumers from repercussions of cross-border online shopping since they benefit from the legal forum of their residency.[71] It equally facilitates debt recovery of small and medium-sized businesses.[72] In order to facilitate citizens' access to this procedure,[73] the procedure is a written procedure, without mandatory legal representation,[74] open to the usage of modern communications technology to provide for a hearing[75] (e.g. video- or telephone conference) and low-cost in proportion to the value of the claim.[76]

In contrast to the EOP, the competent court sends the defendant the claim within 14 days and the defendant must then fill out an answer form within 30 days.[77] After doing so, the court sends a copy of the reply to the plaintiff. Within 30 days of receiving the answer, the court adjudicates the cases based on the written claims, or may also request additional details in writing or arrange an oral hearing if it considers it necessary.[78] If the deadline expires without an answer, the court issues a judgment.[79] The judgment is enforceable in all Member States even before becoming final.[80] The creditor only has to submit the judgment and the translated "judgment confirmation."[81]

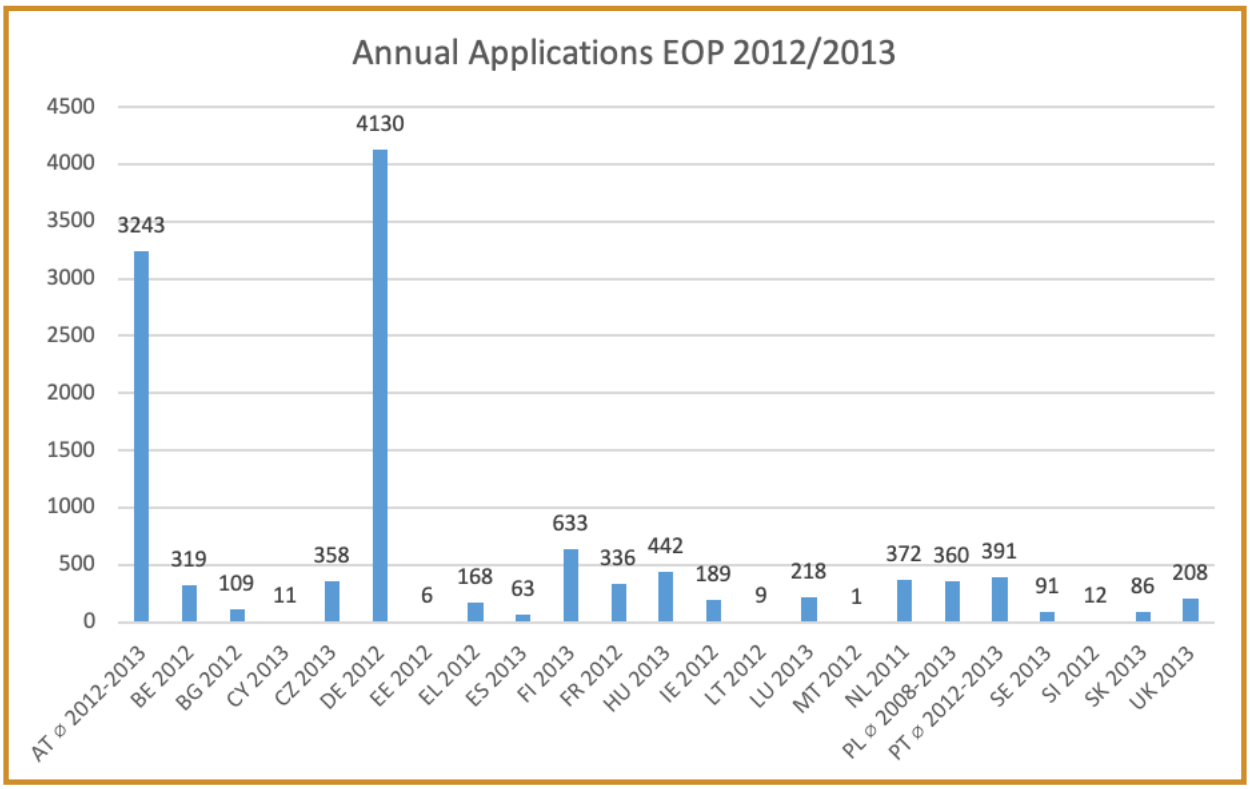
In 2013, EU citizens were asked which measures would encourage them to go to court in another Member State. 33% stated that written proceedings would do so, 26% if legal representation is not necessary, 24% if the proceedings are carried out in one's own language and 20% if the proceedings are online.[82] The EOP and ESCP indeed meet these requirements, except for the common language. Both procedures particularly empower consumers in debt recovery,[83] in allowing them to lodge claims from their country of residence[84] and facilitate the access to justice by creating standardized forms which are the primary means of communication.[85] Moreover, the EU established online guides and toolkits to help to identify the competent court.[86] In theory, these procedures have, thus, facilitated access to justice in cross-border disputes significantly.

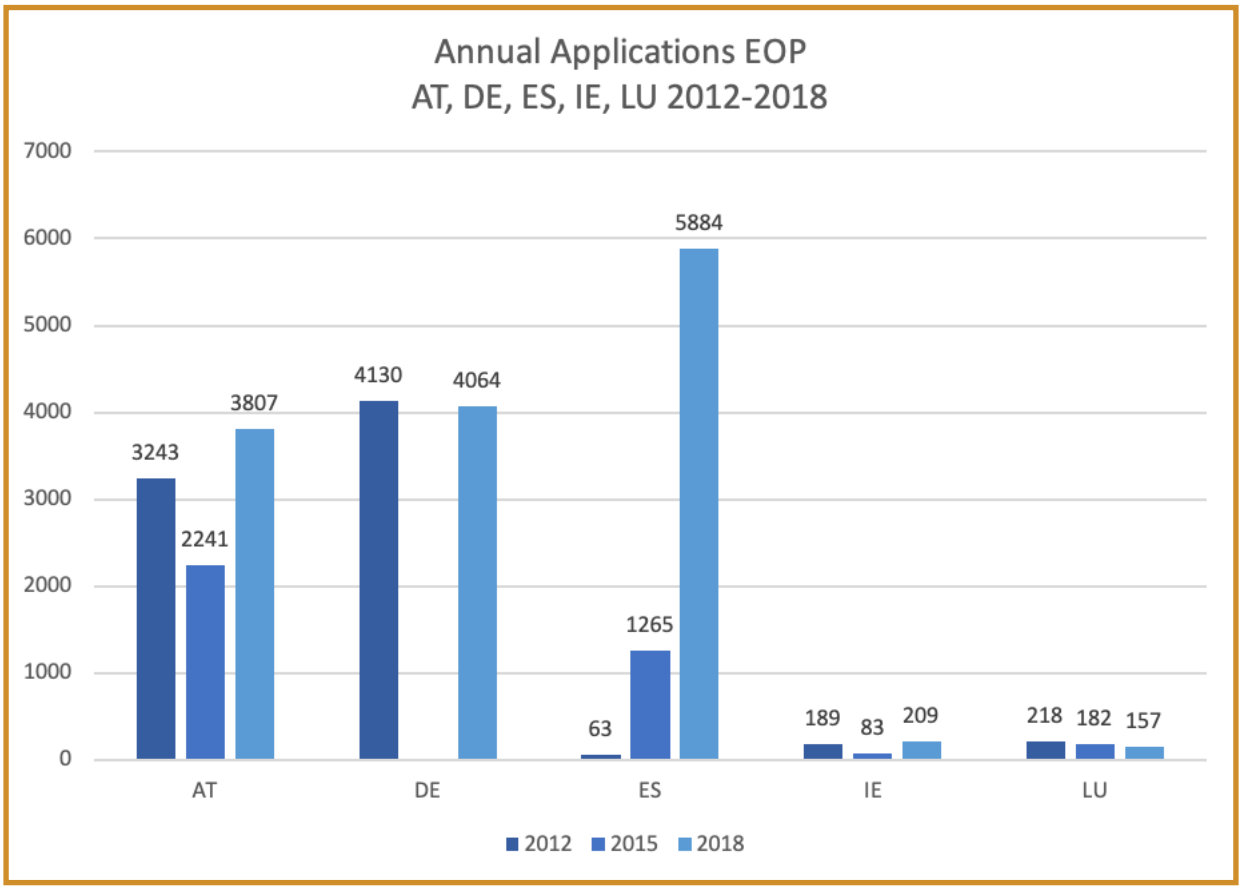
III. Assessing the European Civil Procedures by Knowledge and Annual Applications

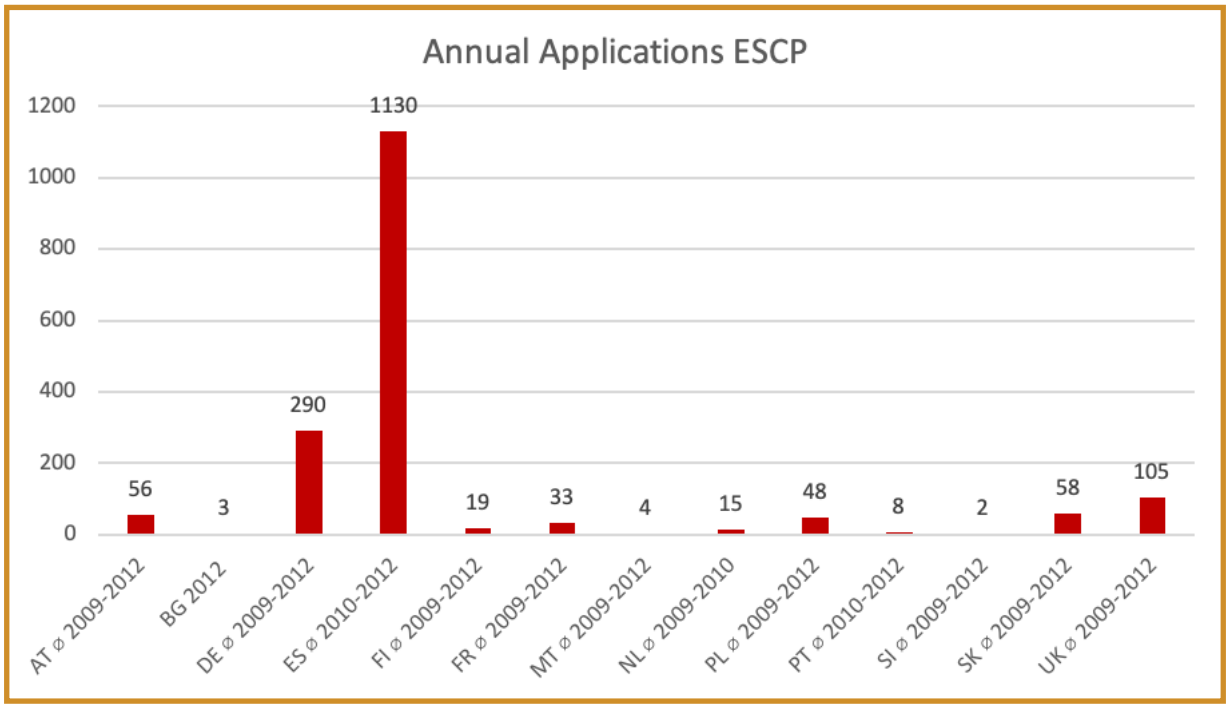
The genuine European civil procedures EOP and ESCP have contributed to the formation of a civil justice union on the legal level. The question now is, if this resulted in the increased perception of converging legal rights and obligations in a common economic space. In this regard, I will compare the amount of lodged applications for the EOP in 2012 with the statistics of Austria,

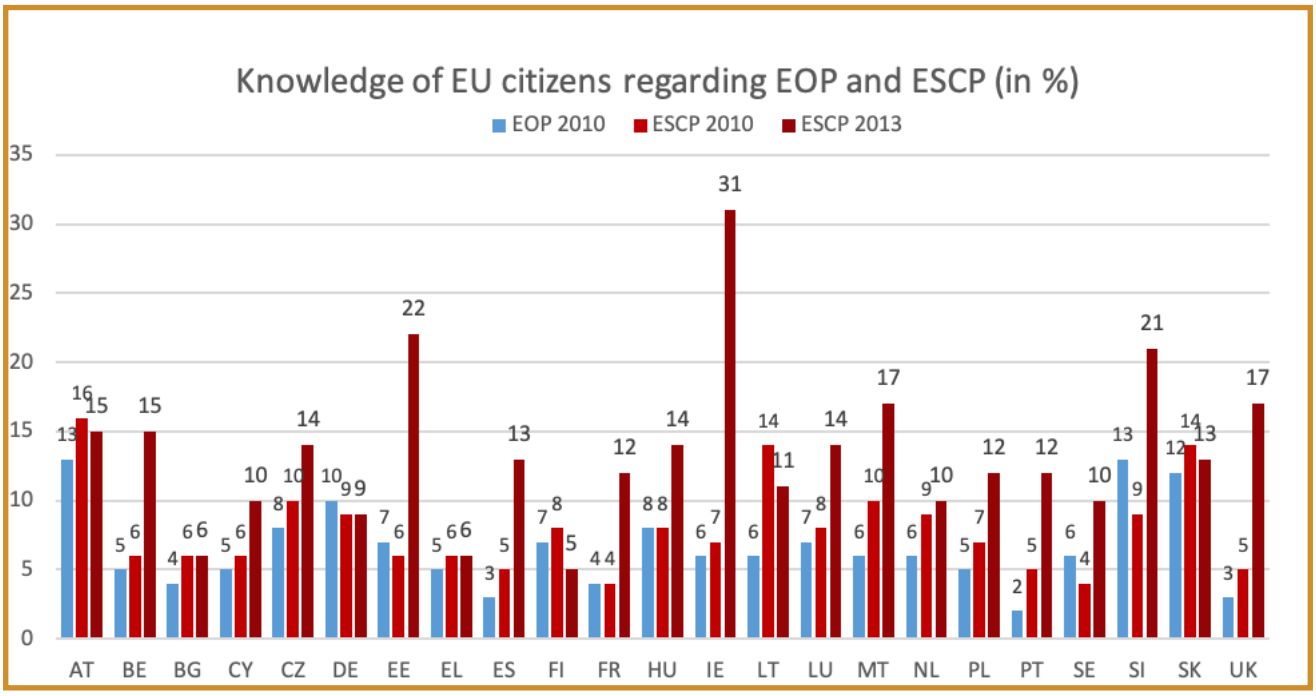
Germany, Ireland, Luxembourg, and Spain from 2015 and 2018. Regarding the ESCP, I will compare EU citizens' knowledge of the ESCP examined by Eurobarometer surveys from 2010 and 2013. The success of these two instruments, as well as a general trend of EU residents' attitudes towards converging legal institutions in civil matters, will be measured by increasing annual claims lodged for the EOP and increasing knowledge of the ESCP. A rise in cases and knowledge indicates a growing awareness of and trust in judicial protection within the single market. I will set the results in comparison to EU citizens' perceived difficulties in cross-border disputes from the years 2008 and 2010.

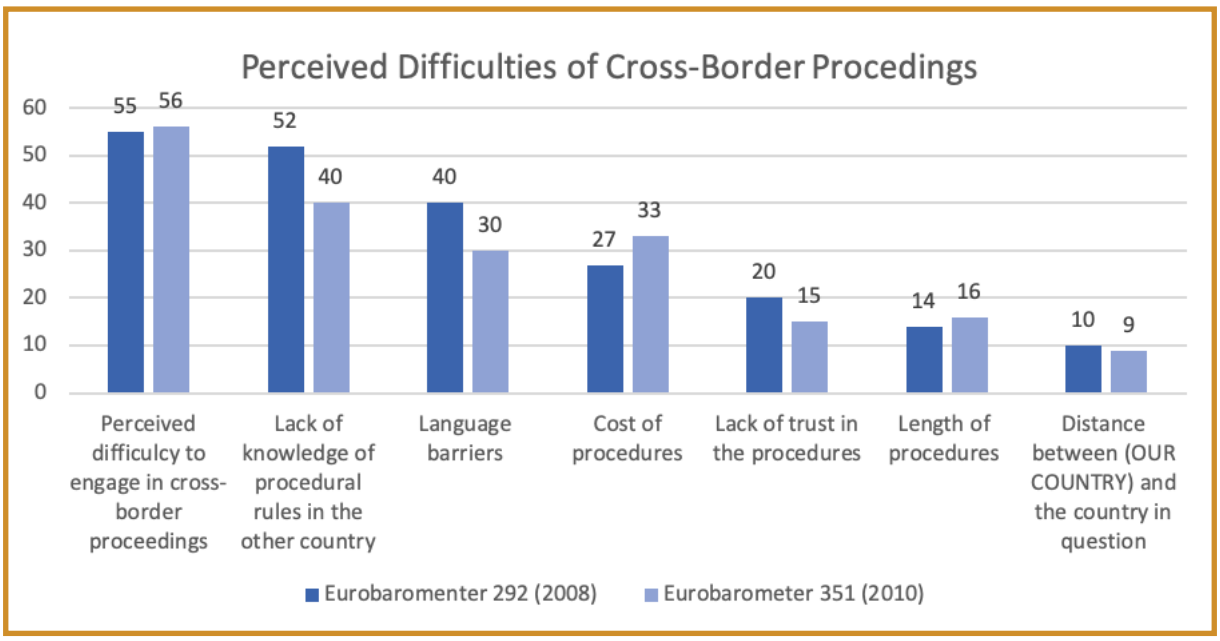
Respective data is drawn from the Special Eurobarometer surveys on Civil Justice from 2008[87] and 2010,[88] the Special Eurobarometer on the Small Claims Procedure from 2013,[89] the European Commission's report on the implementation of the EOP from 2015[90] and studies from 2013 and 2014 commissioned by the Union concerning the ESCP,[91] which provide the average amount of cases of most Member States during the years 2009-2012. The only statistics concerning the annual EOP applications from 2015 and 2018 are provided by Austria,[92] Germany,[93] Ireland,[94] Luxembourg, [95] and Spain. The way and period of assessment is chosen for practical reasons. Three to five years after the entry into force of the respective procedures is sufficient time for citizens to become familiar with the procedures and assessing the annual amount of cases every three years is a timeframe that allows gaining a representative picture. The reason why the EOP is measured by annual applications and the ESCP by EU citizens' knowledge is owed to two reasons. First, contrasting knowledge of the ESCP and the caseload between 2009 and 2012 allows making inferences about the cause low annual application numbers. Moreover, since a high level of awareness of the legal framework corresponds to the higher confidence of EU citizens in their national justice system,[96] the same applies to the EU. The second reason is practical and owed to the fundamental lack of available statistical data.[97] Data concerning the annual amount of ESCP cases is almost inexistent, the only Eurobarometer on civil justice assessing the awareness of both transnational procedures was published in 2010 and the 2013 Eurobarometer survey on the ESCP only offers data on the ESCP, not the EOP. Unfortunately, no other Eurobarometer providing more comprehensive and recent data was conducted to date.


Annual Applications EOP 2012/2013
4500
4000
3500
3000
2500
2000
1500
1000
500
0
3243
319
109
11
358
4130
6
168
63
633
336
442
189
9
218
1
372
360
391
91
12
86
208
AT ⌀ 2012-2013
BE 2012
BG 2012
CY 2013
CZ 2013
DE 2012
EE 2012
EL 2012
ES 2013
FI 2013
FR 2012
HU 2013
IE 2012
LT 2012
LU 2013
MT 2012
NL 2011
PL ⌀ 2008-2013
PT ⌀ 2012-2013
SE 2013
SI 2012
SK 2013
UK 2013


Annual Applications EOP
AT, DE, ES, IE, LU 2012-2018
7000
6000
5000
4000
3000
2000
1000
0
3243
2241
3807
4130
4064
63
1265
5884
189
83
209
218
182
157
AT
DE
ES
IE
LU
2012
2015
2018


Annual Applications ESCP
1200
1000
800
600
400
200
0
56
3
290
1130
19
33
4
15
48
8
2
58
105
AT ⌀ 2009-2012
BG 2012
DE ⌀ 2009-2012
ES ⌀ 2010-2012
FI ⌀ 2009-2012
FR ⌀ 2009-2012
MT ⌀ 2009-2012
NL ⌀ 2009-2010
PL ⌀ 2009-2012
PT ⌀ 2010-2012
SI ⌀ 2009-2012
SK ⌀ 2009-2012
UK ⌀ 2009-2012


Knowledge of EU citizens regarding EOP and ESCP (in %)
EOP 2010
ESCP 2010
ESCP 2013
35
30
25
20
15
10
5
0
AT
BE
BG
CY
CZ
DE
EE
EL
ES
FI
FR
HU
IE
LT
LU
MT
NL
PL
PT
SE
SI
SK
UK



The amount of cases after the implementation of the two procedures varies significantly between Member States. The annual amount of EOP applications reached between 12.000 and 13.000 in 2012, constituting 24,7 applications per 1 million citizens.[98] Applications in Austria and Germany overshadow other countries, accounting for approximately 60% of total applications throughout the EU. The annual amount of applications lodged in 2015 and 2018 remained largely constant, with a fundamentally increase in Spain. Austria remains with 42,9 applications per 100.000 inhabitants the country with the most EOP applications in 2018, followed by Luxembourg (25,5), Spain (12,5), Germany (4,9) and Ireland (4,2).[99] The overall consistency of EOP applications and their rise in Spain indicate, that this procedure is still used as an instrument for cross-border debt recovery, with a trend upwards.

As regards the ESCP, an estimated 3.500 applications were lodged in 2012 in the entire EU, which only constitutes 6,6 applications per 1 million citizens.[100] Between 2010 and 2013, the knowledge of citizens concerning the ESCP has increased by 4% (2010: 8%, 2013: 12%) throughout the Union. Estonia and Ireland are the countries with the highest citizens' awareness of the ESCP. In Ireland, this may have resulted also in an increase of applications (2015: 129; 2018: 293).[101] The fact that only 12% of EU citizens know about the ESCP shows that we are far from a genuine civil justice union, especially with regard to small claims. Only in

Spain have a significant number of applications been lodged.

Comparing the perceived difficulties of cross-border cases from 2008 and 2010, no trend towards being more ready to engage in legal proceedings can be ascertained. In 2010, more than 56% of EU citizens stated that they believe it "'very' or 'fairly' difficult to access civil justice in another EU Member State."[102] Compared with the Eurobarometer survey from 2008, this indicator augmented by 1%. The main concerns of survey participants according to the 2010 Eurobarometer regarding litigation in other Member States were unfamiliarity which substantive (42%) and procedural (38%) provisions.[103] Compared to the survey participants in Eurobarometer 2008, the lack of knowledge of procedural laws decreased by 12%, language barriers by 10% and lacking trust in cross-border procedures by 5%.

Considering this data, the ESCP and EOP seem to only have a marginal impact on fostering trust by enhancing individual judicial protection. Although these procedures increase access to justice significantly on the legal level, citizens' usage and knowledge of the procedures remain generally low. However, the EOP seems to have a promising future, while the results of the ESCP are disappointing. The fundamental lack of awareness regarding the two procedures constitutes the biggest obstacle for their success. Thus, at the legal level, the procedures are in place and ready to contribute to citizen legal empowerment. As the lack individual judicial protection undermines the potential of the single market, it is now up to the EU and its Member States to raise awareness of cross-border procedures. This would ensure that the civil justice union does not remain a fiction but become a reality, and boost cross-border exchange.

Conclusion

In this paper, I have argued that the future of economic integration is contingent on individual judicial protection and access to justice in cross-border procedures. Legal integration matters to EU citizens, since a genuine common economic area increases cross-border activities and thus, the need to establish transnational judicial protection. The concept of access to justice, which is imperative for a democratic society and the basis of legitimacy for European integration, is a vital component for fostering the trust of EU residents in judicial protection within the single market. Throughout the integration process, the EU has increased access to justice at the legal level, notably through the two genuine European civil procedures ESCP and EOP. The decree

of their factual utilization indicates that EU citizens increasingly use the EOP. Knowledge of the ESCP, however, remains low. Cross-border proceedings are still perceived as an obstacle, since settling disputes in another EU Member State, whose procedural and material laws and procedural language differ significantly, undermine legal certainty and foreseeability. Considering EU citizens' perceptions of judicial protection in cross-border cases, we find ourselves still far from a genuine civil justice union. The strengthening of transnational European procedures will, thus, determine the future of the economic integration.

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Les frontières européennes externalisées[1]: à la recherche de couloirs sûrs

HASSAN SHIBAN

Au cours des cinq dernières années, j'ai travaillé à International Refugee Assistance Project (IRAP), [2] *une organisation américaine spécialisée en droit américain de réinstallation et en droit international des réfugiés. IRAP et d'autres organisations se trouvant dans une situation analogue, telles que Asylum Access,*[3] *RefugePoint*[4] *et Saint Andrew's Refugee Services (StARS),*[5] *furent durement touchées par la décision prise par l'administration américaine au début de 2017 de limiter de manière drastique le nombre de réfugiés pouvant être réinstallés aux États-Unis. En effet, elles se trouvèrent démunies face aux milliers de leurs bénéficiaires vivant dans des conditions tragiques qui se tournèrent vers elles dans l'attente d'une voie de réinstallation légale et sûre. Ces organisations ont répondu en s'appuyant davantage sur des « voies complémentaires » dont plusieurs mènent à l'Europe.*[6] *Notre point de départ est l'hypothèse selon laquelle ces organisations spécialisées en droit américain et international bénéficieraient d'un plus grand nombre d'informations sur les défis et les opportunités inhérents dans le système européen de contrôle migratoire, afin d'établir des voies de réinstallation pour leurs bénéficiaires. Dans l'espoir de donner les moyens d'agir aux « défenseurs des couloirs sûrs », nous essayons de comprendre un élément principal du système européen de contrôle migratoire : les frontières externalisées.*

Les frontières européennes sont en général de deux types : les frontières *intérieures*, à savoir les frontières entre les États membres comme la frontière entre la France et l'Espagne, et les frontières *extérieures*, à savoir les frontières qui séparent un État membre d'un État non-membre de l'Union européenne comme la frontière entre la Bulgarie et la Turquie. Le cadre juridique qui régit les frontières intérieures et extérieures est exposé dans de nombreux règlements et directives européens, et les droits des personnes lorsqu'elles franchissent ces frontières y sont énumérés. En revanche, les frontières européennes *externalisées* sont des obstacles ou des barrières qui empêchent les voyageurs de gagner les frontières *extérieures* de

l'Union européenne ; elles se trouvent en dehors du territoire européen et sont mises en œuvre par des acteurs européen ou non européens. Les frontières externalisées européennes peuvent être définies comme la portée des processus à travers lesquels les acteurs européens et les États membres complètent des politiques de contrôle de la migration traversant leurs frontières territoriales avec des initiatives qui réalisent un tel contrôle de manière extraterritoriale et par le biais d'autres pays et d'autres organes plutôt que les leurs.[7]

Par exemple, une frontière *externalisée* est présente lorsque, à la demande du gouvernement italien, un navire libyen intercepte une embarcation de fortune en haute mer transportant des Somaliens et des Érythréens afin de les empêcher de gagner les côtes italiennes. Un autre exemple serait lorsqu'un agent d'une compagnie aérienne, pour ne pas encourir une amende imposée par l'État de destination, empêche une voyageuse syrienne à Beyrouth d'embarquer sur un avion pour une destination située dans l'Union européenne.

La notion de « frontières externalisées » ne se trouve pas dans les règlements européens, mais est néanmoins la pierre angulaire du système européen de contrôle migratoire. Si une personne a un droit bien établi de demander l'asile sur le territoire de l'Union européenne ou à ses frontières extérieures, elle ne bénéficie cependant pas d'un tel droit aux frontières externalisées. Des espaces de non-droit sont ainsi créés dans la mesure où l'Union européenne exerce un contrôle tout en ne reconnaissant aucun droit. Les conséquences de cette pratique sont particulièrement graves en Libye où les autorités militaires et répressives libyennes arrêtent et placent en détention indéfinie ou renvoient les personnes qui tentent d'atteindre les côtes européennes.[8] Une situation similaire se matérialise au Maroc[9] et au Niger[10] mais ces exemples particulièrement médiatisés ne sont que les manifestations les plus visibles d'un système à portée globale qui s'appuie plus que tout sur les compagnies aériennes. Le rôle central des compagnies aériennes est peu reconnu dans les études qui abordent cette question, mais leur fonction en tant que frontière externalisée et leur rôle dans le refoulement des personnes ayant besoin d'une protection internationale apparaissent majeurs dès que l'on tient compte du fait que des voyageurs pouvant embarquer de Dakar ou d'Addis Ababa sur un avion pour une destination européenne n'auraient pas besoin de braver le passage par les pays de l'Afrique du Nord et la mer.[11]

Dans cette optique et compte tenu du rôle central des frontières externalisées dans le système de contrôle migratoire de l'Union européenne, nous essayons de comprendre les bases juridiques sur lesquelles s'appuie la mise en œuvre de ces frontières externalisées au travers d'un examen du droit en matière de frontières, de contrôle migratoire et de sanctions à l'égard des transporteurs. Nous examinons aussi la jurisprudence et l'état actuel des contentieux qui remettent en cause ce système dans le but d'en tirer des enseignements. De notre analyse découlent trois conclusions : des frontières européennes externalisées sur lesquelles s'appliquent un cadre juridique différent ou moins respectueux des droits qu'aux frontières européennes extérieures n'ont pas de fondement dans le droit selon la jurisprudence ; la stratégie contentieuse employée pour remettre en cause ce système d'externalisation de contrôle migratoire a manqué l'essentiel en n'invoquant qu'une *obligation positive* d'octroyer un laissez-passer afin de franchir ces contrôles externalisés et en tenant pour acquis qu'une *obligation négative* de non-refoulement ne s'y applique pas ; le caractère central des droits fondamentaux dans le cadre juridique de l'Union européenne pour les sanctions aux transporteurs devrait conduire les défenseurs des couloirs sûrs à examiner la possibilité d'établir des partenariats avec les compagnies aériennes afin de contourner ces contrôles externalisés et de débloquer les routes pour les personnes ayant besoin d'une protection internationale.

Le cadre juridique

Que dit la loi européenne sur le sujet des frontières externalisées ? Le pouvoir de mettre en œuvre des contrôles sur les frontières extérieures de l'Union européenne et de coopérer avec les États tiers en matière d'asile est bien prévu dans les textes européens constitutionnels,[12] mais ceux-ci ne parlent jamais des frontières externalisées sur lesquelles s'applique un cadre juridique différent ou moins respectueux des droits fondamentaux. Ces textes se déclarent[13] respectueux des droits fondamentaux qui figurent dans la Charte des droits fondamentaux de l'Union européenne (la « Charte »), par exemple le droit d'asile.[14] Le même postulat présent au sein des dispositions du TCE, du TUE, du TFUE et du protocole TFUE figure dans les règlements et directives européens qui régissent les frontières et le système de contrôle migratoire en termes du pouvoir d'établir des contrôles[15] et en termes de la protection pour les droits fondamentaux.[16] Si la coopération avec des tierces parties est envisagée dans ces règlements, la portée de cette coopération n'est

pas bien expliquée.[17] Le seul exemple concret que l'on puisse trouver est la coopération « en matière de retour, y compris en ce qui concerne l'acquisition de documents de voyage ». [18] Enfin, des accords bilatéraux comme l'accord de 2017 entre l'Italie et la Libye et l'accord de 2016 entre la Turquie et l'Union européenne se déclarent eux aussi « en totale conformité avec le droit de l'UE et le droit international »[19] et « dans le respect des obligations internationales et des accords de droits de l'homme ».[20] Cependant, ces accords ne diminuent pas les obligations découlant des directives, des règlements et des dispositions constitutionnelles de respecter les droits fondamentaux.[21]

Le cadre juridique de l'externalisation comprend aussi les sanctions aux transporteurs qui sont la raison pour laquelle les compagnies aériennes refoulent les personnes ayant besoin d'une protection internationale.[22] Ces sanctions sont prévues dans l'article 26 de la Convention d'application de l'accord de Schengen (Convention Schengen)[23] et rédigées plus en détail dans la Directive 2001/51/CE [24] en ses articles 3 et 4 qui ajoutent des exigences en ce qui concerne les montants minimums et maximums. Cependant, tant la Convention Schengen que la directive 2001/51/CE soulignent que leurs dispositions sont « sous réserve des engagements qui découlent de leur adhésion à la Convention de Genève [...] »[25] et « s'applique[nt] sans préjudice des obligations des États membres lorsqu'un ressortissant de pays tiers demande à bénéficier d'une protection internationale ».[26] Le respect du droit de demander l'asile dans le cadre de sanctions aux transporteurs a également été souligné par les États eux-mêmes dans une interrogation spécifique de la Commission européenne selon laquelle la France, l'Autriche et la Lituanie auraient explicitement soutenu qu'elles n'imposeraient pas une amende si la personne demandait l'asile.[27]

Jurisprudence

Comment ce système de contrôle migratoire externalisé a-t-il été contesté ? Une des affaires les plus importantes qui a remis en cause l'externalisation de contrôles migratoires devant un tribunal est *Hirsi Jamaa et autres c. Italie* (Hirsi),[28] une affaire introduite devant la Cour européenne des droits de l'homme (CtEDH) par un groupe de Somaliens et Érythréens qui ont été interceptés en haute mer par un navire italien et renvoyés vers la Libye le 6 mai 2009. Dans *Hirsi*, la CtEDH n'a eu aucun mal, malgré le fait que les événements se soient déroulés en dehors du territoire italien, à conclure que le refoulement vers la Libye des demandeurs

d'asile somaliens et érythréens par un navire italien s'est fait en violation de l'article 3 de la Convention européenne des droits de l'homme (CEDH),[29] étant donné qu'ils encouraient le risque d'être maltraités en Libye[30] et qu'ils pouvaient être rapatriés dans leurs pays d'origine où ils encouraient le même risque.[31] Cependant, même si les conclusions de Hirsi se lisent comme une affirmation nette de l'obligation négative de non-refoulement, la décision de la Cour de ne pas faire revenir les requérants et de se contenter d'inviter les autorités italiennes à « entreprendre toutes les démarches possibles pour obtenir des autorités libyennes l'assurance que les requérants ne seront ni soumis à des traitements contraires à l'article 3 [...] »[32] a été trouvée décevante selon certains qui considèrent qu'ainsi « les conséquences de la conclusion qu'il y a eu plusieurs violations étaient plus ou moins annulées »,[33] et qu'en termes réels, l'impact de la décision est seulement que les États doivent désormais « fonder leur [refoulement de demandeurs d'asile] sur une appréciation prudente – en termes pratiques – du système de l'asile dans [un] pays »[34] et pas seulement sur une appréciation théorique ne tenant compte que de la ratification des instruments du droit international des réfugiés et de l'adoption des lois nationales sur l'asile.

Une autre affaire, *M.N. et autres c. Belgique (M.N.)*[35] concernant une famille de ressortissants syriens provenant d'Alep[36] qui se sont vu refuser leur demande de visas humanitaires auprès du consulat belge à Beyrouth, a été introduite plus récemment devant la CtEDH en janvier 2018. Les requérants allèguent que l'État belge, en ne leur octroyant pas de visas malgré leur situation humanitaire, a violé ses obligations sous l'article 3 de la CEDH. Ils maintiennent que la Belgique a juridiction parce que ses services les empêchent de prendre un avion et de se rendre sur le territoire belge en imposant l'obligation d'avoir un visa.[37] La Cour de justice de l'Union européenne (CJUE) a, malgré des conclusions de l'avocat général Paolo Mengozzi allant très fortement dans le sens de l'obligation positive d'octroyer des visas humanitaires, refusé[38] d'examiner les questions posé par le Conseil des étrangers belge[39] en se fondant sur sa conclusion que l'affaire ne relève pas du droit de l'Union européenne.[40]

S'il ressort d'une analyse de la jurisprudence sur la matière d'externalisation des contrôles migratoires que les cours sont assez hostiles « à la consécration d'un espace de non-droit au sein duquel les individus ne relèveraient d'aucun régime juridique susceptible de leur accorder la jouissance des droits et garanties prévus

par la Convention »[41] et qu'elles considèrent que l'article 3 de la CEDH a un « caractère absolu » même face à une lourde pression des flux migratoires sur des pays qui font face à une crise économique,[42] le Juge Paulo Pinto de Albuquerque dans son opinion séparée va plus loin en évoquant plusieurs sources dont certaines académiques et juridiques pour soutenir que « toutes les formes de contrôle de l'immigration et des frontières d'un État [...] sont soumises aux normes en matière de droits de l'homme [...] *quels que soient le personnel chargé de ces opérations et le lieu où elles se déroulent* »[43] (l'italique est ajouté). Cependant, face à cette hostilité aux zones de non-droits créées par les frontières externalisées et à une volonté judiciaire claire d'affirmer l'obligation négative de non-refoulement, la stratégie contentieuse des requérants dans *M.N.*, un cas actuel qui pourrait remettre en cause le système de contrôle migratoire externalisé, est de faire valoir qu'il y a une obligation positive de donner une permission préalable de traverser ces contrôles et pas qu'il y a une obligation négative de non-refoulement.

En visant l'obligation positive d'octroyer un visa, les requérants rendent leur tâche plus ardue tout en facilitant celle du gouvernement défendeur. Eu égard aux protections théoriques figurant dans le droit, un tel argument pourrait paraître moins cohérent parce qu'il tient pour acquis un système de frontières externalisées qui n'est pas soutenu par la jurisprudence. Comment justifier une obligation positive d'octroyer un visa pour franchir des frontières qui permettent— théoriquement —leur franchissement par les demandeurs d'asile ? Le gouvernement défendeur n'est pas obligé de se justifier et peut simplement faire valoir qu'« une obligation positive doit avoir un fondement légal [et] aucune disposition en droit national et communautaire n'impose la délivrance d'un visa court séjour en vue de demander l'asile »[44] tout en ignorant sa pratique systématique de refoulement par le biais des compagnies aériennes. Une meilleure approche pourrait être d'essayer d'embarquer sur un avion vers le territoire belge en demandant l'asile, puis de contester devant un tribunal le fait que la compagnie aérienne refoule les requérants.

Par ailleurs, ne pas viser l'obligation négative de non-refoulement directement est une opportunité manquée de se présenter devant la CJUE. Dans l'affaire *X et X*, la CJUE a refusé de trancher sur le fond parce qu'elle a conclu que le cas ne relève pas du droit de l'Union européenne, le règlement 810/2009 (code des visas), duquel l'obligation positive découlerait,

étant applicable seulement sur les visas de court séjour. L'importance de l'introduction d'un recours devant la CJUE ne peut être sous-estimée. Puisque l'Union européenne n'a pas adhéré à la CEDH,[45] les recours devant la CtEDH ne peuvent remettre en cause des lois ou des actes de l'Union européenne mais uniquement mettre en œuvre des contentieux contre les États. En revanche, un recours devant la CJUE permettrait de contester le droit de l'Union européenne, une décision favorable ayant un impact plus direct sur tous les États membres de l'Union européenne. En introduisant des recours qui visent l'obligation de non-refoulement, les défenseurs des couloirs sûrs peuvent plus facilement fonder leurs griefs sur les dispositions européennes comme l'article 4 du règlement 2016/399 (code frontières Schengen) et d'autres qui garantissent le respect des droits fondamentaux et ne reconnaissent pas les frontières externalisées sur lesquelles s'applique un cadre juridique moins respectueux des droits.

Partenariats avec les compagnies aériennes

Le fait que la Convention Schengen et la directive 2001/51/EC (sanctions aux transporteurs) ainsi que d'autres textes comme l'interrogation spécifique de la Commission révèlent un très haut degré de protection des droits fondamentaux devrait inciter les défenseurs des couloirs sûrs à songer à établir des partenariats avec les compagnies aériennes. Ces partenariats peuvent prendre la forme suivante : une organisation de réinstallation ayant identifié des personnes ayant besoin d'une protection internationale ou qui ont déjà obtenu une reconnaissance du statut de réfugié du HCR entre dans un partenariat avec une compagnie aérienne. Celle-ci, convaincue qu'elle ne viole aucune loi, transporte les personnes vers une destination dans l'Union européenne où elles exercent leur droit de demander l'asile.[46] Si le gouvernement de l'État de destination inflige une amende ou une autre sanction contre la compagnie aérienne, cette dernière peut se prévaloir de l'article 4 § 2 du règlement 2001/51/EC et des dispositions citées ci-dessus devant un tribunal. Une telle affaire pourrait s'inscrire dans une stratégie contentieuse qui viserait à rendre l'aviation commerciale disponible aux demandeurs d'asile.

Les perceptions de la question migratoire

Peut-être la plus importante faiblesse de cette étude est qu'elle envisage des stratégies juridiques sans rendre compte des perceptions de la question migratoire. Paolo Mengozzi a

indiqué dans ses conclusions relatives à l'affaire *X et X* que le gouvernement tchèque a signalé qu'une décision qui obligerait les États à délivrer des visas humanitaires aurait des conséquences « fatales ». Cette perception peut rendre les juges plus réticents à prendre une décision dont ils craignent qu'elle puisse, au mieux, attiser la colère envers leur institution ou, au pire, avoir pour résultat l'effondrement de la communauté européenne. Dans l'hypothèse d'une décision favorable, une telle perception pourrait aussi entraîner le non-respect de la décision par les parties concernées. Savoir si les éléments politiques sont alignés de telle sorte qu'une action juridique entraînera le résultat demandé outrepasse nettement la portée de cette étude et est la tâche des intervenants qui ont une très forte connaissance de la cour devant laquelle l'action va être présentée, de ses juges et du niveau de volonté politique de se conformer à la décision. Néanmoins, certaines stratégies permettant de faciliter l'alignement de ces éléments paraissent sous-utilisées.

Jacques Englebert, un des avocats représentant les requérants dans l'affaire *M.N.*, a abordé la perception de la question migratoire dans l'audience publique en encourageant les juges de « ne [pas] se laisse[r] guider par la peur du chaos » dans leur traitement de l'affaire parce que « ce chaos n'existe pas ».[47] Cependant, Maître Englebert n'a pas défendu cette position en avançant des arguments étayés et convaincants. Une meilleure approche pourrait être d'investir autant de ressources dans les arguments qui contredisent les perceptions fausses que dans les arguments strictement « juridiques » pour que les juges et les gouvernements ne sentent pas qu'une décision de respecter les droits pleinement énumérés dans la Charte et la CEDH pourrait aboutir à l'effondrement de l'Union européenne. Dans cet esprit, il convient de profiter des nombreuses études empiriques qui remettent en cause l'idée que les réfugiés sont responsables pour des crimes[48] et qu'ils sont un inévitable fardeau économique.[49]

Conclusion

À la recherche de couloirs sûrs, cette étude examine un élément central du système européen de contrôle migratoire pour donner des termes concrets aux défis et aux opportunités qui y sont inhérents. Une analyse des textes légaux montre que le cadre légal théorique des frontières européennes respecte les droits fondamentaux, au contraire de leur cadre pratique dans la mesure où un cadre juridique beaucoup moins respectueux des droits s'applique aux frontières *externalisées*. Ces dernières, mises en œuvre

notamment en Afrique du Nord, se manifestent aussi dans le refoulement systématique pratiqué par les agents des compagnies aériennes, ce qui leur permet d'éviter les sanctions imposées aux transporteurs par l'État de destination.

L'externalisation de contrôles migratoires a été remise en cause devant les tribunaux et notamment dans *Hirsi Jamaa et autres c. Italie* (2012) et d'autres affaires pendantes devant la CtEDH. Cependant, si dans *Hirsi* l'obligation de l'État italien de non-refoulement des demandeurs d'asile en haute mer a été soulignée par la Cour, dans d'autres affaires c'est une obligation positive d'octroyer un visa qui est visée plutôt qu'une obligation *négative* de non-refoulement. Dans *M.N. et autres c. Belgique*, une affaire pendante devant la CtEDH, plutôt que de remettre en cause le refoulement illégal pratiqué par les compagnies aériennes, la stratégie contentieuse semble tenir pour acquis que le comptoir d'une compagnie aérienne est une frontière externalisée où l'on ne jouit pas d'un droit de demander l'asile. En effet, les requérants soutiennent que la juridiction de la Belgique provient de ce fait même.

Ces observations peuvent être d'un intérêt pour ceux que nous avons appelé « les défenseurs de couloirs sûrs » en ce sens qu'elles suggèrent une voie d'action légale plus efficace devant les tribunaux et qu'elles révèlent, éventuellement, une nouvelle voie pour des personnes ayant besoin d'une protection internationale. Et dans ces deux cas, il ne faut pas manquer l'opportunité de créer des synergies entre les organisations de réinstallation—dont plusieurs sont américaines—qui cherchent des couloirs sûrs pour leurs milliers des bénéficiaires vivant dans une précarité extrême, et les acteurs européens ayant une très grande connaissance du cadre juridique européen.

Dans cet esprit, notre lecture de la jurisprudence pertinente et surtout de *Hirsi* suggère que les conseillers juridiques, en formulant une stratégie contentieuse qui remettrait en cause les frontières européennes externalisées devant les tribunaux, devraient songer à mettre davantage l'accent sur l'obligation négative de non-refoulement. Un tel accent se traduirait par un argument juridique plus cohérent qui ne tiendrait pas pour acquis la légitimité d'un système de frontières externalisées qui n'a pas de base dans le droit. Autrement dit, en inversant la stratégie et en soutenant que les États doivent arrêter d'empêcher les demandeurs d'asile d'exercer leur droit, l'argument juridique pourrait être plus convaincant. En outre, un tel argument pourrait se fonder sur les lois européennes devant la CJUE.

Par ailleurs, le respect substantiel accordé aux droits fondamentaux dans les textes juridiques qui régissent les sanctions aux transporteurs devraient amener les défenseurs des couloirs sûrs à examiner la possibilité de créer des partenariats avec les compagnies aériennes. Des tels partenariats pourraient faire de l'aviation commerciale une voie sûre et légale pour les personnes cherchant la sécurité. En outre, l'imposition d'une amende sur une compagnie aérienne qui transporte un demandeur d'asile constituerait une opportunité d'introduire un contentieux qui servirait à remettre en cause le rôle des compagnies aériennes dans le refoulement des personnes ayant besoin d'une protection internationale.

Enfin, nous soutenons qu'une argumentation juridique solide, certes importante, ne peut cependant pas fonctionner en vase clos. À la recherche de couloirs sûrs, il faut également tenir compte des perceptions de la question migratoire, et il faut investir autant de ressources à lutter contre les mythes et les stéréotypes qu'à répéter que les droits fondamentaux doivent être respectés. La gestion des perceptions de la migration est importante tant pour soutenir les arguments juridiques devant les tribunaux que pour la probabilité de mise en œuvre par les États d'une décision judiciaire hypothétique d'ouverture de couloirs sûrs pour les demandeurs d'asile.

End Notes

1. Cet article se concentre sur les frontières externalisées européennes. Pour une introduction aux frontières externalisées aux États-Unis et à l'Australie, voir Frelick, Bill, Ian M. Kysel, and Jennifer Podkul. 2016. "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants." https://www.hrw.org/news/2016/12/06/impact-externalization-migration-controls-rights-asylum-seekers-and-other-migrants.

2. En français : Projet international d'aide aux réfugiés. Voir https://refugeerights.org/. IRAP a des bureaux en Jordanie et au Liban mais elle fournit des services juridiques aux réfugiés demandant la réinstallation où ils se trouvent dans le monde.

3. Voir https://asylumaccess.org/. Asylum Access a des programmes importants en Mexique, Thaïlande, Malaisie, Tanzanie et Équateur.

4. Voir https://www.refugepoint.org/. RefugePoint travaille surtout en Afrique subsaharienne.

5. Voir http://stars-egypt.org/. StARS travaille en Egypte.

6. Par exemple : le visa au titre de l'asile français et le visa humanitaire suisse ; les « couloirs humanitaires » notamment en Italie, en France et en Belgique ; Réseau international des villes refuges (en anglais : International Cities of Refuge Network (ICORN)).

7. Moreno Lax, Violeta and Martin Lemberg-Pederson. 2019. "Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation through Externalization." *Questions of International Law.* http://www.qil-qdi.org/border-induced-displacement-

the-ethical-and-legal-implications-of-distance-creation-through-externalization/#targetText=The externalization of European border,organs rather than their own. (traduction faite par moi)

8. Chastand, Jean-Baptiste. 2017. « Comment l'Europe sous-traite sa politique migratoire. » *Le Monde.fr*. https://www.lemonde.fr/international/article/2017/11/28/comment-l-europe-sous-traite-sa-politique-migratoire_5221256_3210.html. Consultez aussi Birchem, Nathalie. 2019. « L'Europe accusée de cécité sur le sort des migrants en Libye. » La Croix. https://www.la-croix.com/Monde/Europe/LEurope-accusee-cecite-sort-migrants-Libye-2019-05-02-1201019229.

9. franceinfo. 2019. « Méditerranée : choyé par l'Espagne, le Maroc a mis un frein aux départs de migrants. » *franceinfo*. https://www.francetvinfo.fr/monde/afrique/politique-africaine/mediterranee-choye-par-l-espagne-le-maroc-a-mis-un-frein-aux-departs-de-migrants_3607221.html.

10. Manzo Diallo, Ibrahim. 2017 « La stratégie de l'UE freine le flux migratoire au Niger, mais à quel prix ? » IRIN. https://www.thenewhumanitarian.org/fr/special-report/2017/02/02/la-strategie-de-l-ue-freine-le-flux-migratoire-au-niger-mais-quel-prix.

11. Il convient aussi de préciser que la préférence de la route terrestre n'est pas due à un manque d'argent. Payer un passeur pour gagner l'Europe peut coûter beaucoup plus cher qu'un billet d'avion. Consultez UNODC. 2018. *Global Study on Smuggling of Migrants 2018* (United Nations publication, Sales No. E.18.IV.9), https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM_2018_web_small.pdf.

12. L'article 62, point 2) a) TCE (Version consolidée du traité instituant la Communauté européenne [traité de Nice], *Journal officiel des Communautés européennes* C 325/33, 24 décembre 2002) charge le Conseil de l'Union européenne de légiférer « les normes et les modalités [...] pour effectuer les contrôles des personnes aux frontières extérieures ».

L'article 3, point 2) TUE (Version consolidée du traité sur l'Union européenne, *Journal officiel des Communautés européennes* C 326/13, 26 octobre 2012) prévoit que la libre circulation à l'intérieur de l'Union européenne soit mise en place « en liaison avec des mesures appropriées en matière de contrôle des frontières extérieures [...] »

L'article 77, point 1) b) TFUE (Version consolidée du traité sur le fonctionnement de l'Union européenne, *Journal officiel des Communautés européennes* C 326/47, 26 octobre 2012) fournit lui aussi l'autorité d'effectuer « le contrôle des personnes et la surveillance efficace du franchissement des frontières extérieures » et dans son article 77 point 1) b) de « mettre en place progressivement un système intégré de gestion des frontières extérieures » et dans son article 77 point 2) b) de fixer « les contrôles auxquels sont soumises les personnes franchissant les frontières extérieures ». Le protocole 23 concernant l'article 77, point 2) b) TFUE prévoit que cette disposition « ne préjug[e] pas la compétence des États membres de négocier ou de conclure des accords avec des pays tiers [...] »

13. Consultez par exemple l'article 6 TUE : « L'Union reconnaît les droits, les libertés et les principes énoncés dans la Charte des droits fondamentaux de l'Union européenne [...] »

14. Le droit d'asile figure dans l'article 18 de la Charte (Charte des droits fondamentaux de l'Union européenne, *Journal officiel des Communautés européennes* C 325/391, 26 octobre 2012)

15. Le règlement 2016/399 (Règlement (UE) 2016/399 du Parlement européen et du Conseil du 9 mars 2016 concernant un code de l'Union relatif au régime de franchissement des frontières par les personnes (code frontières Schengen), *Journal officiel des Communautés européennes* L 77/1, 23 mars 2016) prévoit dans son article premier qu'il « établit les règles applicables au contrôle aux frontières des personnes franchissant les frontières extérieures des États membres de l'Union ».

Le règlement 810/2009 (Règlement (CE) no 810/2009 du Parlement européen et du Conseil du 13 juillet 2009 établissant un code communautaire des visas (code des visas), *Journal officiel des Communautés européennes* L 243/1, 15 septembre 2009) prévoit dans son article premier qu'il « s'applique à tout ressortissant de pays tiers, qui doit être muni d'un visa lors du franchissement des frontières extérieures [...] » et dans son considérant 1 que « la création d'un espace de libre circulation des personnes devrait s'accompagner de mesures concernant les contrôles aux frontières extérieures [...] ».

Le règlement 2016/1624 (Règlement (UE) 2016/1624 du Parlement européen et du Conseil du 14 septembre 2016 relatif au corps européen de garde-frontières et de garde-côtes, modifiant le règlement (UE) 2016/399 du Parlement européen et du Conseil et abrogeant le règlement (CE) n° 863/2007 du Parlement européen et du Conseil, le règlement (CE) n° 2007/2004 du Conseil et la décision 2005/267/CE du Conseil, *Journal officiel des Communautés européennes* L 251, 16 septembre 2016) considère dans son considérant 2 que « la gestion des frontières extérieures » est un « corollaire indispensable » de la libre circulation à l'intérieur de l'Union européenne et dans son considérant 3 que la gestion des frontières extérieures comprend « des mesures dans les pays tiers ».

Le règlement 656/2014 (Règlement (UE) n ° 656/2014 du Parlement européen et du Conseil du 15 mai 2014 établissant des règles pour la surveillance des frontières maritimes extérieures dans le cadre de la coopération opérationnelle coordonnée par l'Agence européenne pour la gestion de la coopération opérationnelle aux frontières extérieures des États membres de l'Union européenne, *Journal officiel des Communautés européennes* L 189, 27 juin 2014) prévoit dans son considérant 5 que « [l]a coopération avec les pays tiers voisins est essentielle pour empêcher le franchissement non autorisé des frontières ».

16. L'article 4 du règlement 2016/399 (code frontières Schengen) : « les États membres agissent dans le plein respect [...] [de] la convention relative au statut des réfugiés [...] en particulier le principe de non-refoulement, et des droits fondamentaux. »

Règlement 810/2009 (code des visas) dans son considérant 29 : « Le présent règlement respecte les droits fondamentaux et observe les principes reconnus notamment par la convention de sauvegarde des droits de l'homme et des libertés fondamentales du Conseil de l'Europe et par la charte des droits fondamentaux de l'Union européenne. »

Règlement 2016/1624 dans son considérant 36 : « L'existence éventuelle d'un accord entre un État membre et un pays tiers n'exempte pas l'Agence ou les États membres des obligations que leur impose le droit de l'Union ou le droit international, notamment en ce qui concerne le respect du principe de non-refoulement. »

Règlement 656/2014 dans son considérant 13 : « L'existence éventuelle d'un accord entre un État membre et un pays tiers n'exempte pas les États membres des obligations qui leur incombent au titre du droit de l'Union et du droit international, eu égard en particulier au respect du principe de non-refoulement. »

17. L'article 8 point 1) u) du règlement 2016/399 (code frontières Schengen) prévoit que l'Agence a pour missions d'« aider [...] les pays tiers dans le contexte de la coopération technique et opérationnelle entre [les États membres et les pays tiers] dans les domaines couverts par le présent règlement ».

18. Règlement 2016/399 (code frontières Schengen), considérant 46.

19. Conseil européen. 2016. « Déclaration UE-Turquie, 18 mars 2016. » Conseil européen. https://www.consilium.europa.eu/fr/press/press-releases/2016/03/18/eu-turkey-statement/.

20. La Libye et l'Italie. 2017. "Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic." Disponible sur Odysseus Network ici : http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf. (traduction faite par auteur)

21. Pour une discussion plus profonde sur la responsabilité de l'État italien pour des crimes commis par la Libye dans le cadre de l'accord bilatéral de 2017, consultez : Pascale, Giuseppe. 2019. "Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?" Questions of International Law. http://www.qil-qdi.org/is-italy-internationally-responsible-for-the-gross-human-rights-violations-against-migrants-in-libya/.

22. Pour une brève explication des raisons pour lesquelles les personnes ayant besoin d'une protection internationale ne peuvent pas prendre l'avion, consultez : Galaski, Jascha. 2019. « Pourquoi les réfugié·e·s ne prennent pas l'avion ? Une réponse à la fois simple et complexe. » Liberties. https://www.liberties.eu/fr/news/why-refugees-do-not-take-the-plane/16529. Pour une analyse plus profonde, consultez Moreno Lax, Violeta. 2008. "Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carrier Sanctions with EU Member States' Obligations to Provide International Protection to Refugees." *European Journal of Migration and Law* 10: 315–364.

https://www.academia.edu/4572560/Must_EU_Borders_have_Doors_for_Refugees_On_the_Compatibility_of_Schengen_Visas_and_Carrier_Sanctions_with_EU_Member_States_Obligations_to_Provide_International_Protection_to_Refugees_EJML_2008_ ; Bloom, Tendayi and Verena Risse. 2014. "Examining hidden coercion at state borders: why carrier sanctions cannot be justified." *Ethics & Global Politics* 7 (2): 65-82.

https://www.tandfonline.com/doi/pdf/10.3402/egp.v7.24736?needAccess=true ; Peers, Steve, Elspeth Guild, Diego Acosta Arcarazo, Kees Groenendijk, and Violeta Moreno Lax. 2012. EU Immigration and Asylum Law, 2nd Ed., Vol. 2 (Immigration). Leiden/Boston: Brill. Chapter 12 ; Kritzman-Amir, Tally. 2011. "Privatization and Delegation of State Authority in Asylum Systems." Law and Ethics of Human Rights 5: 194–215. (Obtenu de l'auteur à tamir@fas.harvard.edu)

One of the most significant consequences of the carriers' sanctions is that asylum seekers, who normally enter in an undocumented manner, will not be allowed to enter by the carriers. While carriers are threatened with sanctions if they err and allow entry to

undocumented migrants, they are not subject to any sanctions if they effectively deny entry and admission of asylum seekers. There are thus incentives to err on the side of caution which in this case means to refuse to transport asylum seekers who wish to enter clandestinely. (Kritzman-Amir, "Privatization," 203)

23. Acquis de Schengen - Convention d'application de l'Accord de Schengen du 14 juin 1985 entre les gouvernements des États de l'Union économique Benelux, de la République fédérale d'Allemagne et de la République française relatif à la suppression graduelle des contrôles aux frontières communes, *Journal officiel des Communautés européennes* L 239/19, 22 septembre 2000.

L'article 26 prévoit que les Parties Contractantes s'engagent « à instaurer des sanctions à l'encontre des transporteurs qui acheminent par voie aérienne ou maritime d'un État tiers vers leur territoire, des étrangers qui ne sont pas en possession des documents de voyage requis. »

24. Directive 2001/51/CE du Conseil du 28 juin 2001 visant à compléter les dispositions de l'article 26 de la convention d'application de l'accord de Schengen du 14 juin 1985, *Journal officiel des Communautés européennes* L 187 du 10.7.2001.

25. Convention Schengen, article 26, point 2).

26. Règlement 2001/51/CE (sanctions aux transporteurs), article 4, point 2).

27. Commission européenne. 2012. « Ad-Hoc Query on implementing Council Directive 2001/51/EC: Requested by HU EMN NCP on 5th November 2012. » Commission européenne. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/eu-acquis/436_emn_ad-hoc_query_on_implementing_council_directive_20015lec_5november2012_wider_dissemination_en.pdf.

28. CtEDH, 23 février 2012, *Hirsi Jamaa et autres c. Italie*, requête n° 27765/09. Disponible ici (français) : https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-109230%22]}.

29. Convention de Sauvegarde des droits de l'Homme et des libertés fondamentales, Rome, 4.XI.1950, telle qu'amendée par les protocoles n°11 et 14.

Son article 3 : « Nul ne peut être soumis à la torture ni à des peines ou traitements inhumains ou dégradants. »

30. *Hirsi* (2012), § 137.

31. Ibid. § 158.

32. Ibid. § 211.

33. Dembour, Marie-Bénédicte. 2015. "Why the European Court of Human Rights is no friend to migrants." The Conversation. https://theconversation.com/why-the-european-court-of-human-rights-is-no-friend-to-migrants-42129.

34. Tondini, Matteo. 2012. "The legality of intercepting boat people under search and rescue and border control operations." *The Journal of International Maritime Law* 18 (1): 59–74. 67 (et consultez aussi 73–74). https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2119839_code1664310.pdf?abstractid=2096156&mirid=1.

35. CtEDH, *M.N. et autres c. Belgique*, requête no 3599/18 introduite le 10 janvier 2018 (affaire pendante).

36. Dans le contexte de la guerre en Syrie, Alep est une des villes les plus impactée, assiégée par les forces gouvernementales et l'opposition. Elle subissait régulièrement des bombardements pendant la période de 2012 à 2016. Consultez : *Libération*. 2012. « Syrie : les bombardements s'intensifient sur Alep et d'autres villes. » *Libération*.

https://www.liberation.fr/planete/2012/07/24/les-helicopteres-syriens-mitraillent-la-ville-d-alep_835217. Et consultez aussi *France 24*. 2016. « Après d'intenses bombardements, l'armée syrienne progresse dans Alep. » France 24. https://www.france24.com/fr/20160927-syrie-alep-armee-syrienne-reprend-quartier-rebelle-russie-barbarie-siege-droits-homme.

37. « C'est parce que l'État belge dit le droit, fait œuvre de juridiction pour dire qui, quand et comment peut accéder à son territoire. » (*M.N.* (audience publique), 39:11.)

38. L'affaire *M.N.* a déjà été devant la Cour de justice de l'Union européenne (CJUE) comme CJUE, *X et X contre État belge*, affaire

C-638/16 PPU (7 mars 2017) (X et X).

39. Conseil du contentieux des étrangers, *X et X contre l'État belge*, Arrêt 179 108 de 8 décembre 2016, https://www.rvv-cce.be/sites/default/files/arr/a179108.an_.pdf.

40. *X et X*, § 51.

41. *Hirsi* (décision du 23 février 2012), § 178. Une formulation similaire figure dans CEDH, 29 mars 2010, *Medvedyev et autres c. France*, requête n° 3394/03, § 81.

42. Ibid. 36–37.

43. *Hirsi* (opinion séparée du Juge Paulo Pinto de Albuquerque du 23 février 2012), 79.

44. *M.N.* (audience publique), 17:08.

45. « La Convention et la Cour Européennes des droits de l'Homme (CEDH). » *Toute L'Europe.eu*, https://www.touteleurope.eu/actualite/la-convention-et-la-cour-europeennes-des-droits-de-l-homme-cedh.html.

46. Il faut rappeler aussi que beaucoup de réfugiés font face à des interdictions de sortir imposées par leurs propres gouvernements ou le gouvernement du pays dans lequel ils sont présents.

47. *M.N.* (audience publique), 2:10:33.

48. Fasani, Francesco, Giovanni Mastrobuoni, Emily G. Owens, and Paolo Pinotti. 2019. "Refugee Waves and Crime: Evidence from EU Countries." *Does Immigration Increase Crime?: Migration Policy and the Creation of the Criminal Immigrant*. 129–155. Cambridge: Cambridge University Press.

49. Poddar, Shubham. 2016. "European Migrant Crisis: Financial Burden or Economic Opportunity?" *Social Impact Research Experience (SIRE)*. 43. http://repository.upenn.edu/sire/43 ; Bovard, Mary K. 2017. "The Economics of Refugees: How Refugees Influence the Economies of Spain and England." Student Publications. 546. https://cupola.gettysburg.edu/student_scholarship/546?utm_source=cupola.gettysburg.edu%2Fstudent_scholarship%2F546&utm_medium=PDF&utm_campaign=PDFCoverPages

Vers une réforme fondamentale du régime européen d'asile commun ?

MAÏLYS VIGNOUD

La crise migratoire de 2015 a mis en évidence les limites du régime européen d'asile commun. En effet, en 2015, près de un million de migrants et réfugiés ont rejoint le territoire de l'Union Européenne (ci-après « UE ») selon le UNHCR.[1] Ce nombre est tombé à 360 000 en 2016 et se maintient aux alentours de 300 000 depuis.[2] Face à cette arrivée massive de migrants sur son territoire, l'UE a été témoin des dysfonctionnements de son régime d'asile et notamment du système Dublin mis en place par la réglementation (UE) 604/2013 dite Dublin III. Celle-ci précise les critères permettant de déterminer l'État membre responsable du traitement de la demande d'asile introduite par un ressortissant d'un pays tiers. Le système repose sur le postulat initial suivant : les demandeurs d'asile n'ont pas le choix du pays qui les accueille. En effet, le système Dublin ne laisse aucune place aux préférences des demandeurs d'asile et impose l'application de critères objectifs pour désigner l'État membre en charge de chaque demandeur. En pratique, ce système a fait peser une charge extrêmement lourde sur les pays situés aux frontières extérieures de l'UE. Ces pays se sont trouvés dans l'incapacité de traiter les demandes et le système Dublin s'est effondré. Les transferts vers la Grèce ont été suspendus pour « défaillances systémiques » en raison de la situation dramatique des demandeurs d'asile sur place.[3] Le HCR a également appelé dès 2017 à suspendre les transferts vers la Hongrie pour des motifs similaires[4] et certains doutes ont été émis quant aux capacités de l'Italie à traiter les demandes d'asile.

Pour répondre à cette crise, il a été décidé de réformer le système Dublin afin d'assurer une meilleure répartition de la prise en charge des demandeurs d'asile entre les États membres et pour « *éviter la désagrégation du mécanisme de Dublin en raison d'abus et de la course à l'asile* ».[5] La Commission européenne a soumis une première proposition de révision du règlement Dublin III en mai 2016. Cette proposition,

nommée Dublin IV, repose sur le même postulat que Dublin III : il n'y aucune place laissée au choix des demandeurs d'asile dans ce régime. Dublin IV a été fortement critiqué pour son incapacité à prendre en compte les enjeux mis en avant par la crise[6] et à réformer fondamentalement un système qui ne fonctionne plus.

La commission LIBE du Parlement européen sous la direction de Cécilia Wikström a émis, en novembre 2017, un rapport critique sur la proposition de la Commission européenne. Ce « rapport Wikström » propose une réforme ambitieuse du système Dublin (ci-après « proposition du Parlement européen »). L'un des points majeurs de cette proposition est la prise en compte des préférences exprimées par les demandeurs d'asile quant au pays qu'ils souhaitent voir traiter leur demande. Le critère par défaut d'état d'entrée est supprimé et remplacé par la possibilité de choisir un état d'attribution. Il est ainsi prévu que si aucun autre critère n'est applicable, le demandeur devra choisir « *un état membre d'attribution parmi les quatre états membres inscrits sur la liste restreinte.* » [7] On constate pour la première fois, la prise en compte des préférences des demandeurs d'asile quant à un pays d'accueil. Ainsi, le système glisserait d'un régime de critères objectifs prenant en charge des demandeurs passifs à un régime intégrant les préférences exprimées par les demandeurs qui deviennent des sujets actifs dans le processus d'asile. C'est le fondement même du système Dublin actuel qui est remis en cause. La proposition du Parlement européen ouvre ainsi la porte à une refonte totale du régime européen d'asile commun.

L'Europe semble être en train de considérer un changement de paradigme quant à la question migratoire. Il apparaît ici l'un des enjeux majeurs auxquels devra faire face l'Union Européenne dans les années à venir afin d'apporter une réponse durable à la question migratoire.

Nous allons voir en quoi la place faites aux préférences des demandeurs d'asile dans la proposition du Parlement européen suppose une réforme fondamentale du régime européen d'asile commun, Dans un premier temps, nous allons étudier la place faite au choix des demandeurs d'asile dans la proposition du rapport Wikström (I), puis les effets réels de cette proposition (II) et enfin si une réforme fondamentale du régime d'asile basée sur le libre choix des demandeurs d'asile est souhaitable (III).

I. La prise en compte des préférences des demandeurs d'asile dans le système Dublin

Le rapport Wikström soumet un amendement à la proposition de règlement de la Commission européenne visant à intégrer dans le système Dublin une forme de prise en compte des préférences des demandeurs d'asile quant au pays qui sera en charge de leur demande. Le mécanisme détaillé à l'article 36 de la proposition du Parlement européen[8] prévoit que le demandeur pourra, si aucun autre critère n'est applicable, choisir un « Etat membre d'attribution » parmi une liste restreinte de pays. Ce mécanisme permet de transformer le demandeur d'asile en un sujet actif dans le processus d'asile (a) et pourrait faire ressurgir le concept, controversé, de droit au choix du pays d'accueil des demandeurs d'asile (b).

A. Le demandeur d'asile : d'un sujet passif à un acteur de la procédure d'asile

Depuis son entrée en vigueur en 1997[9], le système Dublin, visant à identifier l'État membre responsable de la demande d'asile et à s'assurer qu'un seul Etat membre est désigné,[10] repose sur le postulat suivant : le demandeur d'asile n'a pas le choix. En effet, qu'il s'agisse de Dublin II ou III, aucune mention n'est faite quant au « choix » ou aux « préférences » des demandeurs d'asile. Ces derniers sont des sujets passifs[11] dans le processus d'asile. La Cour de justice de l'UE a, quant à elle, rappelé à plusieurs reprises ce postulat.[12] Le système consiste donc simplement en l'application de critères objectifs permettant de désigner un État membre responsable. L'application par défaut du critère de première entrée[13] s'appuie sur cette logique. En effet, en principe, le demandeur d'asile ne peut pas se déplacer au sein du territoire de l'UE pour déposer une demande dans l'Etat de son choix. L'application stricte du règlement Dublin entraînera le transfert du demandeur dans l'Etat de première entrée sur le territoire européen sauf si un autre critère est applicable.[14] Ainsi, le demandeur se voit imposer un pays d'accueil. Ce refus de prendre en compte le choix des demandeurs d'asile s'exprime également dans l'application de la clause discrétionnaire prévue à l'article 17 du règlement Dublin III. Le consentement du demandeur d'asile n'est pas requis pour l'application de cette clause,[15] l'Etat membre est seul maître.

Dans ce contexte, la proposition du Parlement européen semble incongrue. Elle revient directement sur l'un des fondements du système de Dublin. En effet, elle consacre à l'article 36

du règlement Dublin IV[16] la possibilité pour le demandeur d'asile de choisir un Etat membre d'attribution qui sera en charge de sa demande d'asile. Le choix est restreint à une liste de quatre Etats membres. La proposition du Parlement offre donc une possibilité, certes modeste mais réelle, aux demandeurs de choisir et cela est « *tout simplement révolutionnaire.* » [17] Ce glissement est particulièrement intéressant puisqu'il donne une nouvelle place aux demandeurs d'asile au sein du régime d'asile européen. En effet, avec ce mécanisme, le ressortissant devient un acteur au sein du processus. Il suffit de s'intéresser au vocabulaire employé dans la proposition : « *le demandeur a la possibilité de choisir* ». Il n'est plus simplement un individu à placer en fonction de critères. Il a une voix et la possibilité de s'exprimer dans la procédure d'asile. Le demandeur d'asile n'est plus un simple « *pion* »[18] à déplacer à travers l'Europe. Il s'agit de ce point de vue-là, de « *la proposition officielle la plus audacieuse jamais présentée concernant la réforme du système de Dublin.* »[19]

B. La reconnaissance d'un droit au choix du pays d'accueil ou la prise en compte limitée des préférences des demandeurs d'asile

La question de l'existence d'un droit au choix du pays d'asile n'est pas nouvelle. Elle mêle des considérations de souveraineté nationale au principe de non-refoulement.[20] Jusqu'à récemment, le consensus était le suivant : les demandeurs d'asile ne choisissent pas leur pays d'accueil. Ce raisonnement repose sur l'idée suivante : les demandeurs d'asile fuient une situation spécifique dans leur pays d'origine et dès lors qu'ils ont atteint un lieu sûr, où ils ne risquent plus de voir leurs droits fondamentaux menacés, ils doivent s'y installer/y être accueillis.[21] Ainsi, une « vraie » démarche de réfugiés ne laisse aucune place aux préférences ou aux choix individuels. Supposer l'inverse remettrait en cause la philosophie même de la démarche d'asile et risquerait de donner la possibilité aux demandeurs d'asile d'abuser de la procédure pour choisir l'État le plus accueillant économiquement.[22] Ce raisonnement est à la base du système Dublin actuel. La Commission européenne a par ailleurs réitéré dans sa proposition de 2016 son adhésion à cette approche : « *les demandeurs sollicitent une protection internationale/fuient les persécutions et qu'il ne convient donc pas de leur laisser une trop grande liberté quant au choix du pays d'asile final.* »[23]

Cependant, cette négation totale du droit au choix du pays d'accueil est contestable. En effet,

si l'on se réfère directement à la convention de 1951 relative au statut de réfugié,[24] celle-ci n'impose aucune obligation aux réfugiés de demander l'asile dans le pays le plus proche ou dans le premier pays où il pose le pied. De plus, le comité exécutif du HCR a indiqué dans une communication de 1979 la nécessité de prendre en compte au mieux les intentions du demandeur d'asile quant au pays où il souhaite déposer sa demande.[25] James Hathaway développe cette théorie du droit au choix des demandeurs d'asile[26] et affirme la nécessité d'intégrer cette dimension au régime européen d'asile commun.

S'il faut noter que la proposition du Parlement européen s'inspire de cette logique en intègrant à son article 36 la possibilité pour les demandeurs d'asile de choisir, en partie, le pays qui sera en charge de leur demande, il ne faut pas surestimé l'effet de cette proposition. En effet, au vu du mécanisme prévu à l'article 36 et de l'équilibre général de la proposition, le droit au choix des demandeurs d'asile est en réalité extrêmement limité. Il serait probablement plus juste d'affirmer que la proposition leur permet d'exprimer des préférences plutôt qu'elle ne consacre un véritable droit au choix. En effet, un choix suppose une action effective, il faut sélectionner une possibilité, alors qu'une préférence suppose simplement une comparaison entre plusieurs possibilités, il faut établir un classement. Ici, le demandeur d'asile peut désormais, si aucun autre critère ne s'applique, exprimer sa préférence parmi quatre pays préalablement définis. Ces derniers ne sont sous aucune obligation de l'accepter. En cas de refus, l'Etat membre devra verser une somme forfaitaire au fonds prévu à cet effet.[27] Cela constitue cependant une première étape vers la reconnaissance d'un droit.

II. Les effets réels d'une réforme modeste vouée à l'échec

Si la proposition du rapport Wikström intègre la prise en compte des préférences exprimées, celle-ci ne remet aucunement en cause la logique du système Dublin (a) et restreint en réalité davantage la place laissée au choix des demandeurs d'asile (b).

A. Une proposition ancrée dans la logique du système Dublin

La proposition du rapport Wikström s'inscrit dans la logique déployée par le système Dublin depuis sa mise en place : logique anti mouvements secondaires et anti « asylum-shopping ». Les mouvements secondaires correspondent aux déplacements irréguliers

des ressortissants de pays tiers, ayant déjà reçu ou non une protection internationale, au sein de l'Union afin de s'installer dans un autre pays ou déposer une nouvelle demande d'asile. Ce phénomène présente de nombreux enjeux pour les pays d'accueil[28] qui essaient de les limiter au maximum. Cette lutte s'inscrit dans la dichotomie qui existe au sein de l'UE entre les ressortissants des Etats membres qui bénéficient du régime de libre circulation et les ressortissants des Etats tiers qui en sont exclus. Le phénomène d' "asylum shopping" décrit quant à lui le fait pour un demandeur d'asile de déposer des demandes d'asile dans plusieurs pays en fonction des conditions d'accueil et des programmes sociaux. Ces deux phénomènes sont fortement combattus au niveau européen.

La proposition de règlement du Parlement européen ne remet pas en cause cette logique. Au contraire, elle l'adopte. Le rapport Wikström fait référence à de nombreuses reprises à l'objectif de lutte contre les mouvements secondaires[29] et le cite même comme l'un des motifs de la réforme.[30] De manière générale, il ne revient pas sur l'aversion du système Dublin pour les mouvements secondaires et pour l'« asylum-shopping ». En s'inscrivant dans cette logique, la proposition du Parlement apparaît sous une autre lumière. En effet, en réalité, la proposition soi-disant « *audacieuse* »[31] n'offre aux demandeurs d'asile qu'une possibilité limitée d'exprimer une préférence parmi une liste restreinte. Rien de plus. L'influence directe de la logique anti « asylum-shopping » reste tout à fait évidente puisque le demandeur ne peut ni choisir son pays d'accueil en fonction de ses préférences personnelles, ni déposer plusieurs demandes. La logique anti mouvements secondaires est également très présente puisqu'il est prévu que si un demandeur ne dépose pas sa demande dans l'État par lequel il est entré ou celui où il réside légalement, il pourra se voir sanctionné.

La proposition du Parlement européen de règlement Dublin IV s'inscrit donc pleinement dans la logique du système Dublin. Il semble même que l'équilibre général de la proposition mène en pratique à réduire la marge de choix laissée aux demandeurs.

B. Un mépris total des préférences des demandeurs d'asile

Le Parlement européen a repris la proposition de la Commission européenne consistant à supprimer le critère de séjour qui permettait jusque-là à un demandeur qui avait séjourné sur une période continue de cinq mois sur le territoire d'un Etat membre avant d'introduire

sa demande, d'être pris en charge par cet Etat membre.[32] La proposition du Parlement entend également supprimer la cession de responsabilité d'un Etat membre dans les cas où le transfert du demandeur d'asile n'est pas effectivement réalisé dans une période d'un maximum de dix-huit mois.[33] Ces deux dispositions permettaient, en pratique, aux demandeurs d'asile d'effectuer un choix quant à leur pays d'accueil. En effet, un demandeur d'asile pouvait se rendre dans l'Etat membre de son choix et voir sa demande d'asile traitée dans cet État par le jeu des deux dispositions précédemment citées. S'il ne faut pas négliger cette conséquence pratique du règlement Dublin III, il ne faut pas oublier qu'il s'agit d'une conséquence inattendue, issue principalement des défaillances du système. Néanmoins, cela permettait aux demandeurs d'asile de faire valoir, dans les faits, leurs préférences. En supprimant tout bonnement ces mécanismes, et en faisant du choix restreint de l'article 36 le mécanisme par défaut, la proposition du Parlement réduit à zéro la marge de maneuvre laissée aux demandeurs. Cela met en avant un mépris total des institutions européennes quant aux préférences des demandeurs d'asile. Ce constat est d'autant plus vrai que les demandeurs d'asile se retrouvent à sélectionner un État d'attribution parmi une liste regroupant en réalité les Etat ayant les politiques migratoires les plus restrictives et ayant exprimé à maintes reprises leur refus de les accueillir.

La proposition du Parlement européen présentée dans le rapport Wikström réaffirme en réalité la négation du droit des demandeurs d'asile à choisir un pays d'accueil telle que soutenue par le système Dublin depuis son origine.

III. Une réforme fondamentale du régime d'asile basée sur le libre choix des demandeurs d'asile comme alternative souhaitable

La réforme du régime de Dublin n'intègre donc pas, en réalité, une quelconque prise en compte du choix des demandeurs d'asile. Cependant, il semble qu'une telle prise en compte pourrait permettre la reconnaissance d'un droit à choisir un pays d'accueil pour les demandeurs tout en limitant les mouvements secondaires et autres « abus » dans la procédure d'asile.

Il serait possible d'imaginer la procédure européenne d'asile suivante : le premier pays où la demande d'asile est déposée devient le pays d'accueil. Ainsi, les demandeurs d'asile pourraient choisir le pays de leur souhait puis y déposer une demande d'accueil. Ils n'auraient ensuite que peu d'intérêt à se déplacer sur le

territoire de l'UE de manière illégale.[34] Certains Etats membres, notamment ceux d'Europe de l'ouest, exprimeraient probablement leur crainte de se voir submerger par les demandes du fait de leurs régimes sociaux particulièrement généreux. Cependant, actuellement, ce sont les États membres situés aux frontières extérieures de l'UE qui sont submergés. Une telle réforme pourrait donc rééquilibrer le système d'accueil en Europe. Il convient également de rappeler que les craintes de ces Etats membres sont exagérées. En effet, de nombreuses études ont montré que le choix des demandeurs d'asile pour un pays d'accueil ne repose pas uniquement sur la générosité du système social en place dans l'Etat d'accueil. Il y a aussi des considérations liées à la proximité de la langue, de la culture, à la présence de proches ou connaissances, etc.[35] Une telle réforme du système Dublin est cependant peu probable puisqu'elle serait opposée par une majorité des Etats membres. Elle aurait néanmoins l'avantage de proposer une approche plus humaine de l'accueil des demandeurs d'asile.

Une seconde alternative pourrait être envisageable. Sans revenir sur les critères et la logique du système Dublin, l'UE pourrait proposer d'étendre aux réfugiés et demandeurs d'asile un droit, limité ou non, à la libre circulation sur le territoire de l'UE. En effet, si ceux- ci sont libres de se déplacer, alors le choix du pays d'accueil devient moins important. Une telle alternative est cependant peu probable puisqu'elle remettrait en cause un autre principe fondamental de la construction européenne: la dichotomie entre citoyens européens et ressortissants des Etats tiers.

Conclusion

La proposition du Parlement européen sur la réforme du système Dublin offre pour la première fois une place aux préférences des demandeurs d'asile dans la procédure d'asile. Il s'agit d'une petite révolution qui revient sur les bases même du régime d'asile européen. Il faut cependant noter que la proposition de réforme est en réalité bien plus modeste qu'il n'y paraît. En effet, le Parlement ne propose pas de reconnaître un droit au choix du pays d'accueil des réfugiés. Il intègre simplement une possibilité extrêmement restreinte pour les demandeurs d'asile d'exprimer leurs préférences. Il apparaît même, lorsque l'on observe l'équilibre général de la proposition du Parlement européen, que la marge de maneuvre laissée aux réfugiés est en réalité extrêmement réduite. La réforme n'est en définitive pas si audacieuse que cela. Elle s'intègre en réalité totalement dans la logique traditionnelle du système Dublin. S'il est

possible d'identifier des alternatives au système actuel prenant réellement en compte le choix des demandeurs d'asile, celles-ci ont peu de chances de voir le jour compte tenu de l'actuel consensus au niveau communautaire sur ce point spécifique de la politique migratoire.

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8. Ibid 7, page 96.

9. La Convention de Dublin est signée le 17 juin 1990 mais entre en vigueur le 1er septembre 1997. Elle est remplacée en 2003 par le règlement 343/2003 dit Dublin II puis en 2013 par le règlement 604/2013 dit Dublin III.

10. Article 3, Règlement 604/2013

11. Schuster, Liza. 2011. « Turning refugees into 'illegal migrants': Afghan asylum seekers in Europe ». *Ethnic and Racial Studies* 34(8). 1392-1407. 2011. page 1404.

12. Sur ce voir CJUE, Aff C-360/16, Bundesrepublik Deutschland c/ Hassan, 7 décembre 2017, considérant 102 ; CJUE Aff C-63/15, Ghezelbash, 17 mars 2016, considérant 39.

13. Article 13, Règlement 604/2013

14. Critères définis aux article 7 à 15 du règlement 604/2013 (Dublin III).

15. Cafiero, Camilla. 2019. « The Dublin III regulation: critiques and latest attempts of reform ». *Law Review*, 9(1). janvier-juin 2019. 2-22.

16. Article 36 1 bis, « *Lorsque l'État membre responsable ne peut être déterminé sur la base des critères énoncés aux chapitres III et IV, l'État membre procédant à la détermination indique au demandeur que sa demande de protection internationale sera examinée par un État membre d'attribution » ; article 36 1 ter, « une liste restreinte de quatre États membres ayant le nombre de demandeurs le moins élevé par rapport à leur part conformément à ladite clé de référence est établie » ; et article 36 1 quater, « Dans un délai de cinq jours à compter de cette communication, le demandeur a la possibilité de choisir un État membre d'attribution parmi les quatre États.»*

17. Maiani, Franceso. 2018. « Le rapport du Parlement européen sur la réforme du système Dublin : une proposition audacieuse mais pragmatique? ». *GDR-ELSJ*. 12 janvier 2018.

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18. ibid 15, page 18.

19. ibid 17.

20. Vedsted-Hansen, Jean. 2000. « Non-admission policies and the right to protection: refugee's choice versus states' exclusion »., Dans *Refugee Rights and Realities* sous la direction de Patrick Twomey. Cambridge University Press.

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23. Ibid 5, page 14.

24. Convention relative au statut des réfugiés, 1951.

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27. Ibid 7, page 151.

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29. Ibid 7, considérants 21, 22 et 29.

30. Ibid 7, page 119.

31. Ibid 17.

32. Article 13 para 2, règlement 604/2013.

33. Article 29 para 2, règlement 604/2013 ; et Parlement Européen, Commission LIBE, Document de séance sur la proposition de règlement du Parlement Européen et du Conseil établissant les critères et mécanismes de détermination de l'État membre responsable de l'examen d'une demande de protection internationale introduite dans l'un des États membres par un ressortissant de pays tiers ou un apatride (refonte) (COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)), 6 novembre 2017.

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An assessment of the Three Seas Initiative: pushing for more convergence of EU Member States or further fragmenting the destabilised union?

JULIEN ABRATIS

The Three Seas Initiative (TSI) was launched in 2015 as a project bringing together twelve Central and Eastern European countries in order to close the gap between Western and Eastern Europe through cooperation in energy, infrastructure and digitalisation. While these projects formally contribute to one of the EU's most important goals, namely the cohesion between its Member States, others consider the TSI as a potential source for European fragmentation. This is mostly due to the U.S.'s strong endorsement of the initiative, which repeatedly underlined the Russian influence in the region as a threat to the TSI members' security. This paper will review the nature of the initiative by assessing its goals against the reasons for cleavages between East and West. In addition, the reaction of both the EU and the U.S. will be analysed, i.e. applying the Securitization theory framework before attempting an outlook on the TSI's future development and challenges.

1. Introduction

The Three Seas Initiative (TSI) is a recently established project bringing together twelve Central and Eastern European (CEE) countries, most of which joined the EU in or after 2004. After having been launched following an initiative of the Polish and Croatian presidents in 2015, the project has recently gained increased attention, exemplified by U.S. President Donald Trump's attendance at the initiative's 2017 summit in Warsaw. The TSI describes itself as "a flexible political platform" whose ultimate goal is to increase convergence between EU Member States by enhancing economic growth in CEE countries through cooperation in the fields of infrastructure, energy and digitalisation. This shall be achieved by financing inter alia the construction of highways and railways as well as through the installation of gas and electricity interconnectors across the participating countries. The funding for these projects is to be generated via the TSI Investment Fund, seeking

to bring together private and public investors from the TSI members as well as the EU and the United States. While some analysts portray the TSI as a potential remedy to the cleavages between Eastern and Western Europe, others consider the cooperation as a geopolitical instrument through which especially the United States seek to exert influence in the region to decrease the CEE countries' dependence on Russia.

This paper will assess the nature of the TSI, analysing whether the project should be considered beneficial for the EU-27 as a whole or whether is to be seen as a potential source of fragmentation. To this end, the paper analyse to what extent the TSI's goals respond to challenges particular to CEE countries, as well as what the reactions of third countries reveal about their strategic motives in engaging with the TSI. The hypothesis that will be followed is that the initiative's official intention with a focus on economic growth could have a favourable effect on the European integration process. Nevertheless, certain remarks, notably by the U.S. administration, suggest the potential for a securitisation and politicisation of the project. This finding combined with the heterogeneity of the TSI's member countries could pose significant challenges to the success of the initiative and, above all, to European unity.

2. Methodology

The thematic input for the paper will be based on several sources. The official perspective of the TSI shall be considered, e.g. by looking at TSI summit statements and the initiative's website. To get a clearer understanding of the different TSI countries' intentions, selected declarations of some of the participating countries will be analysed. Furthermore, as the research question is whether the TSI could contribute to bridging the divide between Western and Eastern Europe, the official EU communications line in this matter will be assessed. Lastly, statements by U.S. representatives will also be considered in order to work out the country's interest in the cooperation with the region. The latter shall be performed by applying the *Securitization theory*, a theoretical framework originating from the academic sphere of International Relations studies.

This paper will start with an introduction to the topic by providing a brief overview on the creation of the TSI and its main goals. These objectives will be assessed against some of the most prevalent divergences between Western Europe and CEE countries. The following section will be devoted to the engagement and reaction

of some of the most important actors, notably the EU and the United States, allowing for a better evaluation of the TSI's nature. The paper then attempts a short prospect – regarding possible future fields and actors for cooperation – before concluding by presenting challenges to the TSI.

3. Background: examples of past CEE cooperation and the creation of the TSI

In the course of their long history, the countries of CEE have often been torn by the conflictual relationship between the East and the West. To counter their geopolitically sensitive location and maintain their independence, the countries of the region have initiated several projects to resist external pressure. Examples of these intentions are the *Rzeczpospolita* which existed until the late 18th century and the *Intermarium* ("Miedzymorze") project introduced by Chief of State Piłsudski, both of which were advanced particularly by Poland (Ištok, Kozárová, & Polacková, 2018).

While the *Intermarium* was primarily aiming at creating a federation of countries to promote the independence of Central Europe and needs to be seen in the interwar context with a focus on security issues, the TSI as topic of this paper focuses on the development of infrastructures to find "synergies through cooperation" (Zurawski vel Grajewski & Baeva Motusic, 2017). This is also a result of the changed political framework, including the membership of all TSI countries in NATO (except Austria) as well as in the EU and the altered global balance of power.

As the name "Three Seas Initiative" suggests, the platform seeks to interconnect twelve EU Member States in Central and Eastern European countries from the Baltic Sea to the Black and the Adriatic Sea (*Figure 1*). All participating countries share some general characteristics, as many of them used to belong to the former Soviet Union and most member countries were part of NATO before joining the EU (Kurecic, 2018, p. 99). Together, the TSI countries make up for 28 percent of the EU's territory as well as 22 percent of its population, but only account for approx. 10 percent of its GDP (European Commission, 2018).

Figure 1: Three Seas Initiative countries (Shotter, 2018)

The lower economic performance in CEE countries was the subject of numerous analyses

and led to increased calls for change. In 2014, the U.S. think tank American Council issued a study urging an "accelerated construction of a North-South Corridor of energy, transportation and communication links stretching from the Baltic Sea to the Adriatic and Black Seas" (Atlantic Council & CEEP, 2014). Croatian president Grabar-Kitarovic and Polish president Duda took up this proposal on the margins of a UN General Assembly meeting in 2015, before the first official summit in August 2016 laid the foundation stone for a subsequent institutionalisation of the project. With the incremental duration of the TSI's existence, it garnered the public's interest. This was particularly the case in the aftermath of the 2017 Warsaw Summit, not least due to the presence of U.S. president Trump, who endorsed the initiative (cf. quote in *Figure 2*).

> "The Three Seas Initiative will transform and rebuild the entire region and ensure that your infrastructure, like your commitment to freedom and rule of law, binds you to all of Europe and, indeed, to the West."
>
> *Donald Trump, July 6, 2017*

Figure 2: quote by D. Trump at the TSI summit in Warsaw (Farber, 2017)

4. Goals of the TSI

According to its self-conception, the TSI seeks to facilitate "real convergence among EU Member States", which shall latterly lead to increased EU unity, cohesion and integration. These goals shall be attained by improving cross-border connectivity particularly in the fields of infrastructure, energy and digitalisation, which where concretised into 48 projects at the 2018 Bucharest Summit (Three Seas Initiative, 2018).

4.1. Infrastructure

Out of these 48 selected projects, 23 are related to transportation, demonstrating the importance of infrastructure to the TSI (Jacobson, 2019). The most important projects in this sector are the construction of highways and trainways, filling the existing infrastructural gap in the region. One of the best-known examples is the Via Carpathia, a highway network that is supposed to link Thessaloniki to Klaipeda in Lithuania and whose opening date is scheduled for 2025. Similarly, the railway systems in CEE countries are to be enhanced and interconnected. Here, the focus lies e.g. on the Rail Baltica project, which will establish a highspeed train connection between Estonia, Latvia, Lithuania and Poland (European Commission, 2018). Rail Baltica is scheduled to open by 2026 and could be extended through an underwater tunnel, linking the Baltic States to Helsinki (Citrinot, 2019). However, Estonian prime minister Ratas recently announced that the inauguration of the project could be delayed due to the many obstacles the project is facing, most notably the lack of financing (Baltic News

Network, 2019). Lastly, water routes between the countries shall also be extended, improving e.g. the water transport system from the Baltic Sea via the Oder, Elbe and Danube to the Black Sea to eliminate current bottlenecks (European Commission, 2018).

4.2. Energy

Concerning the second dimension of the TSI, the cooperation in the energy sector, the greatest attention is paid to establishing interconnectors of electricity and gas pipelines as well as to enabling reverse flows. The most important project in this regard is the North-South Corridor, which aims to connect the LNG terminals in Swinoujscie, Poland to the yet to be constructed terminal in Krk, Croatia. Between both countries, a large number of interconnectors will be installed. A key example of this is the Gas Interconnector between Poland and Lithuania, which is set to connect the Baltic states to the rest of Europe and thus potentially constitutes a remedy to the Baltic's current level of dependence on Russian gas. In this regard, the North-South Corridor could be understood as a response to Nord Stream 2, a project which many CEE countries view with large scepticism, precieving it as undermining their energy security (Kireev, 2017).

4.3. Digitalisation

The TSI's third pillar is the cooperation in digitalisation matters, a sector in which investments are usually much smaller in financial terms compared to the other projects, but whose improvements can significantly contribute to economic growth. Cooperation in digitalisation refers inter alia to the installation of a common 5G network and joint efforts in research collaboration on fibre optic technology (European Commission, 2018).

In order to assess the possible positive impact the initiative's projects could have on convergence between EU Member States, light shall be shed on some of the current sources for divergence between Eastern and Western European countries, before turning to a more political evaluation of the platform.

5. The TSI as potential remedy to divergences between East and West

The TSI's official communication is centred on the idea that the platform will represent a factor leading to greater convergence between EU Member States and will therefore push forward the European integration process. For instance, the inaugural Dubrovnik Statement expresses that connecting CEE economies and

infrastructure will help "complete the single European market" and contribute "to making the EU more resilient as a whole" (Three Seas Initiative, 2016). To analyse whether these promises might hold true, a brief analysis of the region's characteristics could prove helpful.

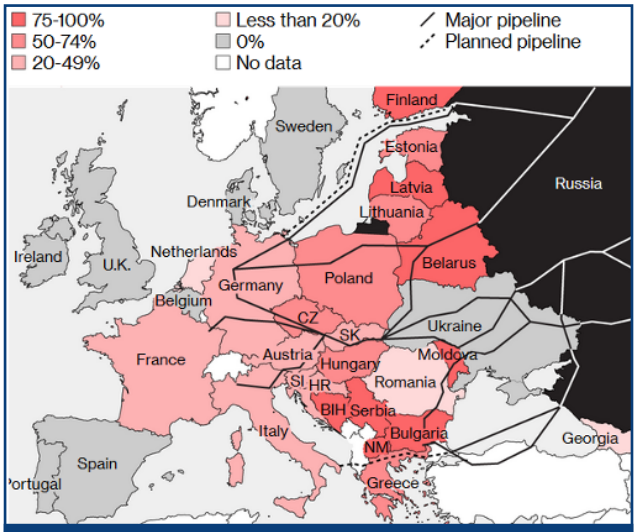

Figure 3: dependence on Russian gas in 2017 (Shiryaevskaya & Khrennikova, 2019)

According to the latest available data from 2018, 10 out of the 12 TSI countries ranked at the bottom of the EU in terms of real GDP per capita, the only two exceptions being Slovenia and Austria (Eurostat, 2019). Yet, the purchasing power in most Eastern European countries has grown significantly over the last decades. In particular in very recent years, with the economies of large Western European countries like Germany and Italy growing at a slow rate, the CEE can be perceived as "the bloc's star performers" in economic terms (Bayer, 2018). Despite this amelioration, there is still a lot of room for improvement to equalise living standards across the EU, which confirms the TSI's *raison d'être*.

Another aspect closely linked to the TSI and whose proposals could reduce the cleavages between East and West is the question of energy dependency. Chiefly after the 2006 and 2009 incidents between Ukraine and Russia, the European energy security has (re)gained traction in the political discourse. In a study on the electricity infrastructure developments in Central and South Eastern Europe, the European Commission (2016) concludes that there is "major need" for electricity grid improvements to enhance supply security and avoid bottlenecks for the internal energy market. Some members of the TSI have set up or are in the process of constructing LNG terminals to diversify their energy imports and to become less dependent on Russia. To ensure that all CEE countries, including those which do not dispose of sea access, benefit from LNG imports as well as from other energy sources, it is crucial to improve interconnections between the countries. In this context, the TSI could be a central component. As mentioned above, the TSI could also be considered a reaction to the plans of Western EU countries to diversify their energy supply *with* Russia by creating new pipelines, illustrated by the Nord Stream

2 project between Russia and Germany. The latter was met with fierce opposition in CEE countries, who fear that increased direct flows to Germany might circumvent Eastern Europe and make the region even more vulnerable to Russian decisions (Kireev, 2017).

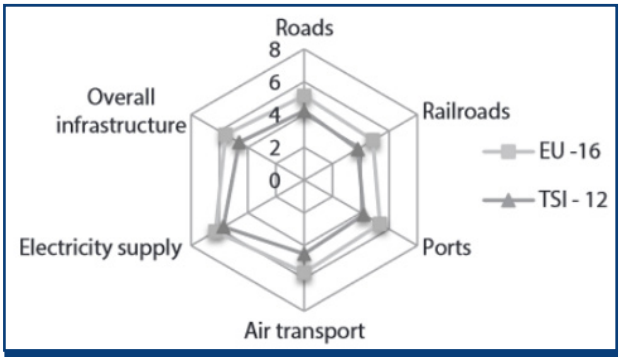

Figure 4: quality of EU-16 vs. TSI countries' infrastructure (Zbinkowski, 2019)

Lastly, the current state of infrastructure development in CEE still lacks behind. The European Commission estimates that "travelling in Central and Eastern Europe still takes on average between two and four times as long as for comparable distances and terrain in the other 16 Member States in Western and Northern Europe" (European Commission, 2018). A paper on the potential economic effects of the TSI substantiates the concerns of the EU report, showing that especially roads and railroads are underdeveloped in the region (Zbinkowski, 2019; *Figure 4*). This is partly due to the fact that most of the currently existing infrastructure follows an East-West pattern, a finding that can be traced back in parts to the strong economic position of Germany (Górka, 2018). Therefore, it would be desirable that the TSI could contribute to fostering infrastructure development in the region.

The third dimension of the TSI, focusing on achieving synergies in digitalisation, emerged not as core issue of the initiative, but rather as a side concern which will be of key relevance not only for economic growth, but also to prepare the member countries against possible cyberattacks on the common infrastructure. In fact, digitalisation is already an area in which many CEE countries excel in comparison to their Western neighbours (Patricolo, 2019).

To conclude this section, it seems that - at least on paper - the CEE countries have identified some of the most urgent problem areas preventing their economies from converging to the Western European standards. The proposals by the TSI as outlined in their joint statements appear positive, as infrastructural and energy-related matters can best be achieved through transboundary cooperation. Yet, the initiative is not uncontroversial, and the reactions of some Western EU countries turned out to be very modest. In the following, this paper will analyse why some observers argue that the TSI could prove to be an anti-EU project further fragmenting the Union instead of strengthening its cohesion.

6.The TSI - an anti-EU project? Shedding light on the EU's and Western Member States' reactions

Early on the question arose whether the TSI should be seen as a counterpart to the Brussels-driven integration process and could harm the EU solidarity. This argument is fuelled by the fact that many of the Member States participating in the TSI are led by conservative, conceivably EU-sceptic heads of state and government. Some observers suggest that the initiative could be a reaction against the Western approach of a "multi-speed" Europe, presumably leading to several CEE countries feeling downgraded to second-class EU countries (Zurawski vel Grajewski & Baeva Motusic, 2017). This assumption is sustained as the TSI brings together numerous countries that criticised the EU e.g. in the aftermath of the 'refugee crisis', including the four countries voting against the refugee distribution quota during the notorious Council session in September 2015 (Birnbaum, 2015).

Hence, some Western Member States initially expressed their scepticism of the idea, fearing a further fragmentation of the European integration process. However, the case of Germany shows how the "Western" attitude towards the project has changed. Considering the policy shift after Donald Trump assumed office in January 2017 and attended the 2017 Summit, the U.S. involvement in the TSI added a new dimension to the initiative. In the light of the new U.S. president's increasingly competitive instead of cooperative approach to Europe, the German government started to worry that the TSI might turn into a tool to increase U.S. influence in Eastern Europe, e.g. in the form of a sales market for its gas exports (Janulewicz & Zornaczuk, 2019). As a consequence, Germany voiced its desire to eventually join or partner with the TSI as a "bridgebuilder and moderator in the spirit of European unity" to prevent any drifting apart within the EU (Remix, n.d.). Foreign Minister Maas participated in the 2018 Bucharest Summit, underlining the priorities of his "*Neue Ostpolitik*" in allusion to former Chancellor Brandt. Furthermore, he used the opportunity to stress his view that the TSI first and foremost is to be considered rather an economic than a political project (Tagesschau, 2018). While Germany's wish to join the TSI as a full member was welcomed by Romanian president Iohannis, it failed in the face of resistance of other TSI countries, owing to the unanimity principle. However, these developments, combined with the fact that the rank of the German delegation was even raised at the 2019 summit due to

the presence of Federal President Steinmeier, illustrate in an exemplary way the dynamics around the perception of the TSI in Western Europe.

It must be highlighted that the TSI in its current state and according to its self-conception is a "flexible platform". Consequently, it does not represent an interstate organisation seeking to replace the EU, rather it can be perceived as tool to "improve multilateral sub-regional relations at EU level" (Milewski, 2017). In its constitutive statement issued in August 2016 in Dubrovnik, the TSI countries emphasise repeatedly that their joint initiative is meant to contribute to "making the EU more resilient as a whole", a phrase used in every of the following summit statements. Also, the TSI countries explicitly acknowledge the advancement achieved through the Connecting Europe Facility (CEF) as well as through the European Structural and Investment Funds (Three Seas Initiative, 2016). And indeed, it can be stated that many of the TSI projects overlap with EU priorities under the CEF financing programme of the EU. For instance, the European Commission declared that more than 90% of the overall funding for CEF natural gas projects as well as large sums by the European Investment Bank and the Fund for Strategic Investment as part of the 'Juncker Plan' go to the TSI countries. Examples are the Baltic Energy Market Interconnection Plan, the BRUA gas pipeline connecting Bulgaria to Austria via Romania and Hungary and the Central and South-Eastern European Energy Connectivity (European Commission, 2018).

In summary, it can be assumed that if the TSI projects lead to greater economic growth, this will ultimately lead to more cohesion within the EU and hence is in line with EU priorities. In its official communication on the TSI, the European Commission thus argues that the TSI is well aligned with the programmes and funds of the EU and points out how the entire Union could benefit from the project. Then Commission president Juncker attending the Warsaw Summit in 2018 can be seen as an expression of the initiative's conceived alignment with EU priorities.

However, it must be said that this brief analysis was limited to public communication available on the topic, which is bound to certain diplomatic rules and codes of conduct. It remains to be seen how the TSI concretely develops over the next years to better assess the nature, intention and impact direction of the project. Dynamics within the EU are complex and could be analysed on a deeper layer, considering e.g. the critique on EU cohesion funds as presumably not being

very effective and the point raised by some that the TSI countries "are connected by the fact that they stand to lose the most from the two-speed Europe idea that some Western politicians have imposed" (Górka, 2018).

7. A politicisation and securitisation of the region by the United States?

As mentioned, the support of the U.S. plays a crucial role in the assessment of the TSI. I argue that the U.S. engagement in the project could be explained as a reaction to a potential securitisation and politicisation of the CEE and, notably, their dependence on Russia. To prove this hypothesis, a brief introduction to the *securitisation theory* will be given, before applying it to the present analysis.

As the classical schools of IR theory (Realism, Liberalism and Marxism) failed to describe the post-Cold War world order, new theoretical frameworks emerged. One of them, the *Copenhagen School*, is particularly known for providing an approach that accounts for the rising importance of new topics such as environmental issues, digitalisation and the occurrence of new actors (Buzan & Wæver, 2003, p. 70). The core aspect of the Copenhagen School is its *securitisation* theory, whose main assumption is that there are no thematic fields which are "securitised" (= representing a security threat) by nature (Balzacq, Guzzini, Williams, Wæver, & Patomäki, 2014). Rather, it is a society's task to define security problems, which subsequently will be treated outside the normal political framework. A key element in securitisation is the speech act theory, a constitutive element of IR theory's *constructivism*, under which the Copenhagen School can be classified. Arguing that language is not to be seen as neutral, but, alluding to John Austin, "by speaking, we do" (Austin, 1962, p. 6). Thus, "it is by labelling something a security issue that it becomes one" (Wæver, 2004, p. 9).

Regarding the TSI, it can be argued that the U.S. undertake an attempt to securitise the Eastern European dependence on Russian energy imports. During his visit to Poland in 2017, Donald Trump described the TSI as a measure to "make sure that Poland and its neighbours are never again held hostage to a single supplier of energy" (Trump, 2017), using a very clear language at hinting at a securitisation of energy supply. The Atlantic Council described the TSI as a "strategic priority for the U.S. administration [...] in light of Russia's use of energy as a weapon in Europe" (Atlantic Council, 2017). This framing suggests that the U.S.'s major aspiration for the

initiative, rather than pushing CEE countries to achieve economic growth and convergence with Western Europe, is to reduce Russia's role in the region.

Other statements by U.S. officials seem to confirm this assumption. During the third TSI summit in Bucharest in 2018, U.S. Energy Secretary Perry expressed that Europe should decrease its dependence on Russian gas and diversify its energy sources, which would in turn improve the ties between Eastern Europe, the EU, and the U.S. He went on by highlighting the importance of energy diversity for national security: "There is great security in energy diversity. Energy security is tantamount to national security" (Emerging Europe, 2018). Similarly, the remarks of U.S. General Jones give insightful hints about the U.S. priorities in their support for the initiative. In his remarks at the forum, Jones starts by highlighting how the TSI "will strengthen the security and resilience of Northern, Central and Eastern Europe", before going on by describing how the Russian government uses a "divide and conquer" strategy in Europe to advance its geopolitical objectives (Jones Jr., 2016). Some commentaries went as far to say that the U.S. supports the TSI to slow down the emergence of a multipolar world and the weakening of its predominant position coming along with these developments (Thomann, 2018). As has been noted inter alia by Wisniewski (2017), the discourse shifted particularly after the Warsaw Summit 2017 which was attended by U.S. president Trump. In June 2017, the first experimental U.S. gas shipping to the LNG port in Swinoujscie took place (PGNiG, 2017). Two years later, the first U.S. LNG tankers landed in Poland with gas for redelivery via pipeline to Ukraine, demonstrating again the geopolitical dimension of the project (Bor, 2019). It is this (geo)political component that could perhaps lead to a fragmentation between EU Member States, for instance regarding the (already difficult) harmonisation of foreign policy.

The communication of the TSI itself and EU representatives stands in relatively strong rhetorical contrast to the U.S. announcements. At the Bucharest summit, former European Commission president Juncker pointed out the necessity of regional energy projects and the importance to comply with the rule of law to establish a positive business environment for investments (Emerging Europe, 2018). In addition, the official statements published after each summit focus mostly on the complementarity with EU programmes and the TSI's potential for the Union as a whole. However, while the role of the U.S. was not

even mentioned for instance in the first summit statement in 2016, a positive reference to the economic presence of the U.S. in the TSI region is made in the conclusion of the latest summit in 2019, illustrating the increasingly important role of the country (Three Seas Initiative, 2019).

In summary, one can see the divergent communication on the TSI comparing the statements by U.S. and European representatives. While the EU and the TSI countries primarily point to the importance of the project for the EU and economic growth in CEE, the U.S. highlights its geopolitical potential and emphasizes its engagement in the region to safeguard economic interests. Having said that, in a continuative study, each TSI member's bilateral relations both with the U.S. and Russia would have to be assessed to get a better understanding of the prevalent dynamics. This is particularly true given that all countries must be seen against their individual economic, political and historical background and accounting for the fact that some countries have e.g. closer ties to the U.S. while other also are more worried about a worsening of their relations with Russia.

8. What next? Prospects for the TSI

It will be interesting to see how the TSI evolves over the next years, as the initiative for now still is a rather loose platform that needs to prove its relevance through concrete measures. This evolution could also perhaps provide greater clarity regarding the nature and priorities of the project. For future developments, an extension could be possible both in thematic as well as in geographical terms.

8.1. Future thematic cooperation

As is outlined in all official statements, the TSI in its current form focuses on the development of infrastructure projects. Some observers expect the regional integration to extent its influence to other fields, such as more political cooperation and potentially even collaboration in military and security-related fields (Zurawski vel Grajewski & Baeva Motusic, 2017). However, these developments are speculative and depend on the outcome of the – comparatively low-level – infrastructural cooperation. One foretaste of what the development into a more high-politics platform could look like is the *Bucharest 9* format started in 2015. The latter consists of reinforced military cooperation to "strengthen the resilience on the Baltic Sea – Black Sea – Adriatic Sea axis" against possible threats from the East (Gheorghe, 2018). In addition, there have been numerous bilateral initiatives between several countries taking part in the

TSI, as well as the close political coordination between the Visegrad countries. One can assume that an evolution into more political topics could again be highly relevant for the U.S. and another reason for them to support the TSI. Nevertheless, it must be stated again at this point that the platform is still in its infancy and its long-term success is still in the stars.

The closer and more political a future cooperation would turn out to be, the more difficult it would be to forge consensus between the participating countries. Thus, the TSI could be met with the same fate of other international partnership (like, ironically, the EU itself), namely an increased distribution of competences, sub-groups and the emergence of a variable geometry.

8.2. A geographic extension of the TSI? The role of Ukraine, Scandinavia and the U.S.

During the second TSI summit in Warsaw, an issue discussed among the representatives was the question whether other EU members or non-EU countries could and should be included in the initiative, as some speakers argued that such a step could strengthen economic relations and lead to political stabilisation (Górka, 2018).

In its current form, the TSI only includes Member States of the EU and does not comprise external players. However, the newly elected Ukrainian president Zelensky expressed in September 2019 that his country would be interested in joining the TSI (PortSEurope, 2019) and repeated this intention in November (Istrate, 2019). Some commentaries remark that the infrastructure that is to be set up through the TSI, notably the Via Carpathia, would offer the possibility to link the TSI countries to Ukraine both via Poland and Slovakia (Zurawski vel Grajewski & Baeva Motusic, 2017). The question of cooperation with Ukraine in infrastructural matters is posed especially in connection with the visa liberalisation for Ukrainian citizens adopted in 2017 (European Council, 2017). Yet, the accession of the country could be a controversial topic for numerous reasons. Firstly, given the fact that the conflict in Eastern Ukraine has not yet been resolved, let alone Crimea, the accession of the country could cause further tensions with Russia. Also, it is questionable whether Ukraine in its current state represents a safe environment for investments, which play a key role in contributing to the success of the initiative.

Zurawski vel Grajewski (2017) also brings up the question whether Scandinavian countries might be interested in acceding to the TSI. Such move

could be relevant, as e.g. Rail Baltica is supposed to link Estonia to Finland prospectively. In addition, some voices argue that new ways of cooperation, such as in the outlined potential for security-related cooperation, could be a reason for Scandinavian countries to cooperate with the TSI, given that there already is some interworking as e.g. Finland supplies military equipment to Poland and other countries of the initiative. However, when talking about such ideas, some doubts arise as to the complementarity of the TSI, since cooperation already exists in other fora such as NATO (keeping in mind that Finland is not a member of NATO) and the EU. Hence, a too broad geographical and thematic deepening of the initiative could fuel the discussion about the TSI's potential in fragmentising the EU integration.

Lastly, the current engagement of the U.S. leaves room for speculation with regards to possibly even closer TSI-U.S. ties in the future and the consequences for the EU. It does not seem far-fetched that such an involvement could lead to a more tense relationship with both Russia and China. For instance, a stronger role for the U.S. within the TSI could increase the competition with China and "import" the ongoing trade conflict into the EU, e.g. in the digital infrastructure sector (5G technologies etc.), further hampering the already complex decision-making among EU Member States. In addition, further integrating the U.S. could entail the risk of deteriorating EU relations with Russia. This is particularly delicate given that several long-term Gazprom energy contracts with TSI countries will expire around 2022 (Zeöld, 2019). For the EU, enhancing energy relations between the U.S. and the TSI could harbour considerable conflict potential, such as the LNG supply across the Atlantic, which could thwart e.g. the objectives of the new Commission's *European Green Deal*. Also, it remains unclear whether the TSI countries have enough capacities to build the envisaged infrastructure and which role U.S. companies could play in this regard.

8.3. And what about China?

As is well known, the Chinese engagement in CEE has increased significantly over the last years, most notably in the context of its Belt and Road Initiative. This engagement is not only limited to Greece and some Balkan countries, which do not form part of the TSI, but also affects some of the TSI member countries. One example is a high-speed rail system aiming to link Serbia to Hungary, which was blocked by the EU for infringing European law as the requirement for a public tender was not met. The Hungarian Prime Minister Viktor Orbán

stated in 2018 that "Central Europe will turn to China if the EU cannot provide financial support" (Nikkei Asian Review, 2018). A key grouping in this regard is the "16+1" (since the accession of Greece: 17+1) constellation, gathering CEE countries and China. Within the framework of the 8th 16+1 summit in Dubrovnik in 2019, the Chinese engagement e.g. in Croatia was extensively discussed. According to the latest figures, the largest amount of Chinese money was invested in non-TSI member Serbia, followed by Hungary and Poland (Jung-Grimm, 2019). Therefrom, it will be interesting the monitor potential cooperation between the TSI members bilaterally or even the TSI as a platform with the Chinese government.

9. Challenges arising for the TSI

For the TSI to succeed, it will be crucial that its members share a sense of common destiny and that the things they have in common are more numerous than their differences. The historic example of *Intermarium* showed that political tensions between the participating countries eventually led to the failure of the interwar project, as Lithuania saw the project as threatening its national independence and political conflicts between Poland, Hungary, Romania and Czechoslovakia made the cooperation difficult (Górka, 2018). Yet, once again, the comparison between *Intermarium* and the TSI is far from being flawless, considering their different scope of action.

It must however be remembered that the TSI members are by no means a homogenous bloc of countries, but that each country faces particular domestic issues and certain specificities in its international relations. Some authors argue that the TSI countries can be clustered into different groups of countries. For instance, the Baltic states are relatively prone to external shocks due to their open economic structure and are in a special relation with Russia, considering their geographic proximity and Russian minorities in their countries (ibid.). On the other hand, the Visegrad countries are characterised by their polarised political landscape with very conservative, sometimes nationalist parties exerting major influence. In other countries like Romania and Bulgaria, corruption plays a more important role than in other TSI countries, which might also entail consequences for the TSI projects (Transparency International, 2018).

In addition to these factors, it can be expected that the TSI as an intergovernmental forum will face similar challenges that all international fora encounter, notably diverging priorities and political orientation of member states

and paralysation of decision-making after the election of new governments (Milewski, 2017). An example of domestic politics directly affecting the TSI is the fact that Serbia was not invited to the initiative due to its conflict with Croatia, which in turn complicates the interconnections between Romania, Bulgaria and Croatia, considering the geographic location of Serbia (Górka, 2018). In a similar manner, some TSI members put more emphasis on having a close relation with Western EU countries than others, and the willingness and interest in cooperating with the U.S. also varies from state to state. The same can be said about the relation with Russia, as e.g. Viktor Orbán recently discussed future gas deliveries and the role of nuclear energy with Putin, saying that he rejects "all Western European criticism regarding our cooperation with Russia in the field of energy" and repeatedly calling for the ending of EU sanctions on Russia (Than & Soldatkin, 2019).

Moreover, establishing a cross-border network in the fields of energy and digitalisation creates new risks which must be mitigated through appropriate measures, notably due to the threat of cyberattacks and hacking. This challenge exemplifies how the TSI could interact with existing structures, such as the Cooperative Cyber Defence Centre of Excellence, located in Tallinn and serving as base for NATO experts in cyber security.

10. Conclusion

This paper has tried to assess the nature, potential and challenges of the Three Seas Initiative as a platform for cooperation between twelve Central and Eastern European countries. The analysis showed that the focus of the TSI on cooperation in infrastructure, energy and digitalisation could indeed lead to increased convergence within the EU. This finding explains the reaction of EU institutions to the project, such as Commission President Juncker participating in the 2018 summit, and their interest in supporting concrete projects through EU funding. This is all the more the case as the EU recognises the need for better infrastructure in Eastern Europe in numerous analyses.

In the second part of the paper, the role of the U.S. in the initiative was discussed, showing that the Trump administration has repeatedly focused on the assumed threat to the national security resulting from the significant dependence of CEE on Russia in energy imports. It could be argued that an excessive engagement of the U.S. could in fact lead to an increased fragmentation of the EU, for instance by further complicating a joint EU position in foreign policy. Also, the mere role

of TSI countries as a sales market for U.S. LNG must be scrutinised.

The diverging approach between EU and U.S. could be seen as highlighting the different impact direction of both entities, the EU focusing primarily on economic aspects and infrastructure in this matter, whereas the U.S. (through NATO) exerts influence in security issues. A main question over the next years will be the complementarity of the TSI with both existing structures. For now, it seems that the TSI infrastructure projects are well aligned with the priorities laid out inter alia in the Connecting Europe Facility and the European Fund for Strategic Investment. The concrete implementation will be dependent on the further evolution of goals, projects and priorities. To put it into other words: as the project develops in practice, its conceptualisation will evolve accordingly (Zurawski vel Grajewski & Baeva Motusic, 2017).

It can be expected that the platform will encounter several challenges, some of which on a more conceptual level (like the question of cooperation with non-TSI countries) and some others on a more operational level. For instance, access to capital will be key to carry out envisioned projects. The recent announcement that the planned date for the inauguration of Rail Baltica most likely cannot be met serves as an example for what might happen if an only an insufficient amount of private investment can be mobilised. A deeper analysis of the TSI would also have to look more closely at the different sources of finance. Many of the 48 outlined priorities require huge investments, since e.g. regasification capacities will have to be enhanced so that interconnectors between the TSI countries can function flawlessly. The establishment of the TSI Business Forum as well as of the Three Seas Investment Fund are a welcome step to guarantee the involvement of the private sector and to attract investors (CEEP, 2019).

For the platform to work, political compromises with regards to its priorities and goals are key. Hence, a more in-depth analysis of the topic would have to scrutinise greater in detail the role and position of every member country to work out similarities and differences between the participants. Regarding the initial research hypothesis, it can be concluded that the project with its current focus on regional economic development has the potential to push for more convergence within the EU, whereas a shift towards a more political project could, in certain circumstances, reinforce the current fragmentation. The TSI still is in *statu nascendi*

and only the future will show whether the coalition can enhance the CEE countries' role in actively shaping the process of European integration and, accordingly, foster greater European cohesion.

Energy and Transport Corridor Projects in the Three Seas Region

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