

Editorial Note

It was a good year....wasn't it?

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When a calendar year comes to an end, many of us pause to reflect on the previous twelve months. Just like a vigneron who takes the first sip of Beaujolais nouveau to see what the new harvest is like. With it comes a question: was it a good year? As always, the answer is neither a straightforward 'yes' nor a simple 'no'. The same applies to the European Union where 2013 was neither black nor white but rather full of shades of grey. In some respects, it was a good year, in others an *annus horribilis*. But without question it was certainly a year of anniversaries.

Van Gend en Loos, Plaumann and Da Costa turn fifty

The Court of Justice celebrated fifty years since the new legal order was boldly proclaimed in the seminal *Van Gend en Loos* case.¹ It is hard to believe that five decades have already passed since the newly established Court of Justice, at that time based in a little villa in Luxembourg, took a radical step to rule that: 'the European Economic Community [...] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals'. By doing so, the Court of Justice, for the first but certainly not the last time, gambled on its own legitimacy. When declaring that the then Article 12 of the EEC Treaty was capable of producing direct effect, the Court of Justice exposed itself to criticism and a potential backlash from the Member States. As is well known, this does happen every now and then, but the inevitable resentment and trepidation usually stays within reason. The end result is that fifty years after *Van Gend en Loos* the doctrine of direct effect is a well-established tenet of EU law; a doctrine that is taken for granted.² However, as the post *Mangold*³ discussion proves, it is not entirely without controversy.⁴ One

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¹ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1. For a commentary see, *inter alia*, P Pescatore, 'Van Gend en Loos, 3 February 1963 - A View from Within' in MP Maduro and L Azoulay (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 3; B de Witte, 'The Continuous Significance of Van Gend en Loos' in Maduro and Azoulay (n 1) 9.

² For a comprehensive analysis see, *inter alia*, B de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 323; JM Prinssen, A Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (European Law Publishing 2002).

³ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

⁴ See, *inter alia*, A Dashwood, 'From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?' 9 *CYELS* (2006-2007) 81; M Dougan, 'In Defence of Mangold?' in A Ar-

thing is certain: with *Van Gend en Loos* the Court of Justice empowered individuals and invited them to enforce their rights in national courts. By the same token, the judges gave thrust to EU law by paving the way for its enforcement.

The intellectual festivities celebrating 50 years of *Van Gend en Loos*⁵ overshadowed another anniversary. On 15 July 1963 the Court of Justice rendered a judgment in the *Plaumann* case.⁶ This time, for a change, the Court disempowered individuals by interpreting very strictly the admissibility conditions for actions for annulment based on what is now Article 263 TFEU. The judges did not close the door completely, but left it ajar. Truth be told, the Court of Justice simply directed individuals to national courts and restricted to a minimum their access to its own courtrooms. This bifurcated approach to individuals' rights is a paradox, which fifty years later seems to be set in stone. In a recent judgment in *Inuit Tapiriit Kanatami and Others*⁷ the Grand Chamber of the Court of Justice confirmed that Mr *Plaumann* and the customs duties on his clementines are standing strong as far as the *locus standi* of individuals as per Article 263 TFEU is concerned. Looking at these developments through the prism of Article 47 of the Charter of Fundamental Rights makes it really hard to agree with the Court's mantra that the system of remedies established by the Treaties is complete. Furthermore, the Court's consistent claim that a more individuals-friendly interpretation of Article 263 TFEU is not possible without a Treaty change is less and less credible when one looks at the way the judges have already 're-written' Articles 260 TFEU and 267 TFEU in their case law.⁸

null and others (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 219; J Mazák and MK Moser, 'Adjudication by Reference to General Principles of EU Law: A Second Look at the *Mangold* Case Law' in M Adams and others (eds), *Judging Europe's Judges. The Legitimacy of the Case Law of the Court of Justice* (Hart Publishing 2013) 61.

⁵ See A Tizzano, J Kokott, S Prechal (eds), *50ème anniversaire de l'arrêt Van Gend en Loos 1963–2013. Actes du Colloque, Luxembourg, 13 Mai 2013* <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/qd30136442ac_002.pdf> accessed 26 December 2013.

⁶ Case 25/62 *Plaumann & Co v Commission of the European Economic Community* [1963] ECR 95.

⁷ C-583/11P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2013] ECR (nyr).

⁸ In respect of Article 260 TFEU the Court of Justice, quite famously, decided to interpret 'a lump sum or penalty payment' as 'a lump sum and penalty payment' [emphasis added]. In consequence, both types of penalties may be imposed on a Member State in a single case. See Case C-304/02 *Commission of the European Communities v French Republic* [2005] ECR I-6263. When it comes to Article 267 TFEU, Case C-344/04 *The Queen*, on the application of *International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006] I-403 is a good example. The Court of Justice held, *inter alia*, that even courts from which there is further remedy have an obligation to send references for a preliminary ruling if there are grounds to believe that a piece of EU secondary legislation may be invalid.

In 2013 we also marked a fiftieth anniversary of another seminal, though frequently forgotten, judgment of the Court of Justice in Joined Cases 28 to 30/62 *Da Costa*.⁹ The questions from a Dutch court were just the same as in *Van Gend en Loos*. This gave the Court of Justice an opportunity to start cementing its position as a supreme and constitutional court of the European Communities. As is well known, in *Da Costa* the Court of Justice asked the national courts to refrain from sending questions that had already been answered, and, by the same token, to treat its jurisprudence the way common law courts rely on jurisprudential law. This recommendation has become one of the tenets of EU law.

Fifty years after the *Van Gend en Loos* and *Da Costa* rulings, nobody questions the role and importance of the case law of the Court of Justice, though that does not stop academics and practitioners from criticising the Court and challenging its legitimacy.¹⁰ This, however, should not be considered a sign of anti-EU sentiment, but rather part of a perfectly fine debate.¹¹ It is unquestionable that the Court of Justice has played a fundamental role in shaping the EU legal order and has been forcefully pushing the integration agenda.¹² In the *Van Gend en Loos* and *Da Costa* judgments whose birthdays we are celebrating, the judges at Kirchberg laid the foundations for the EU legal system. It is as if they wanted to guarantee that when the politics of European integration fails, the law will keep the project together.

The European Union is twenty, where is the champagne?

In November 2013 the European Union celebrated its twentieth birthday. The entry into force of the Treaty of Maastricht on 1 November 1993 was definitely a milestone in the development of European integration.¹³ On the one hand, it laid the foundations for a radical move from purely economic integration, based on the freedoms of the internal market, to a more general framework extending to political cooperation, the Common Foreign and Security Policy (CFSP), as well as the Area of Freedom, Security and Justice (AFSJ). On the other hand, only a few years later, it became rather obvious that the three pillars holding this complex structure were not strong enough and required further enhancements. Since 1993, the European Union, through numerous treaty revisions as

⁹ Joined Cases 28 to 30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration* [1963] ECR 61.

¹⁰ For the most recent account, see M Adams and others (n 4) 61.

¹¹ For interesting comments in this respect, see M Bobek, 'Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts' in Adams and others (n 4) 234.

¹² See, *inter alia*, T Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50 CML Rev 931.

¹³ See, *inter alia*, M de Visser and AP van der Mei (eds), *The Treaty on European Union 1993-2013: Reflections from Maastricht* (Intersentia 2013).

well as changes to secondary legislation and the jurisprudence of the Court of Justice, has evolved beyond recognition. The European Union of 2013 is miles ahead of what it was twenty years ago. Still, it is a historical process, which most likely will never be complete. Following the entry into force of the Treaty of Lisbon, the Common Foreign and Security Policy has moved from infancy to puberty, while the Area of Freedom Security and Justice seems finally to be leaving behind an unfortunate period where security dogma played a leading role. Indeed, in the years leading up to the Treaty of Lisbon, the centre of gravity in EU decision making was on security, while the tandem of freedom and justice was largely locked away in the drawers of EU and national policy makers. Unfortunately, the other grand project based on the Treaty of Maastricht – the common currency – is constantly proving to be not fit for purpose. In 2013 it remained in permanent turmoil, though *prima facie* it was a better year than those before. Even the greatest optimists have to agree that the common currency is continuously fighting for its life in the intensive care ward, though panaceas are slowly being invented by the European Union and its Member States. Still, as provocative as it may sound, one should not underestimate the importance of the common currency and its contribution, albeit sometimes painful, to the advancement of European integration. Latvia seems to have seen this by successfully requesting the adoption of the Euro as its currency as of 1 January 2014.

Twenty years of the European Union also marks twenty years of citizenship of the European Union. Flesh has been put on the skeleton concept provided in the Treaty of Maastricht since the autumn days of 1993. What was meant to be a symbolic gesture and a shop-window decoration is now moving, not without some pain, into something far more tangible for its beneficiaries. Not surprisingly, the main actors pushing this project forward are not the Member States but the Court of Justice of the European Union. Although its case law is by default incremental and frequently far from perfect, there is no doubt that without the judges in Luxembourg EU citizens would be far worse off.¹⁴

From six to twenty-eight: 40 years of EEC/EU enlargements

There are a number of anniversaries in the EU enlargements department that are worth noting. First, 2013 marked 10 years since the Thessaloniki European Council and its conclusions opening the EU doors to the Western Balkan countries.¹⁵ With this in mind, the accession of Croatia to the European Union on 1 July 2013 is a vindication of the

¹⁴ See, *inter alia*, M Dougan, 'Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship' in H-W Micklitz and B de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 113.

¹⁵ E Fouéré, 'Thessaloniki Ten Years On: Injecting Momentum into the Enlargement Process for the Western Balkans' (2013) CEPS Commentary <<http://www.ceps.be/book/thessaloniki-ten-years-injecting-momentum-enlargement-process-western-balkans>> accessed 26 December 2013.

policy pursued by the European Union during the past decade. After a lengthy and sometimes rocky *rapprochement*, Croatia became the twenty-eighth Member State of the European Union. On the one hand, this may be read as proof that the enlargement policy is serving its purpose; it still remains a magic wand capable of changing countries which not that long ago were either part of the Soviet Union or one of its satellites or even engaged in war. To this end, the membership of Croatia gives solid reasons to uncork the champagne. On the other hand, a quick look at the other countries currently aspiring for membership forces one to reflect on the future of the EU's flagship external policy. With Iceland pulling out of accession negotiations in mid 2013, the countries remaining on the list of candidates and potential candidates are anything but easy to handle.¹⁶ In fact, all should be handled with care. The question is how to guarantee robust compliance with pre-accession conditionality without losing the dynamics of *rapprochement*.

To start with, Turkey's bid for EU membership has run out of steam on both sides of the Bosphorus. It is abundantly clear that a number of Member States are against the membership of Turkey in the European Union. At the same time, Turkey and its political elite do not seem to perceive EU membership as a viable option. The paradox is that for strategic reasons both sides need one another, but, at the same time, neither of them is brave enough to call the negotiations off and to start discussions on alternative forms of integration. Quite symbolically, 2013 also marks 50 years since the signing of the Association Agreement between the then EEC and Turkey.¹⁷ Bearing in mind that it envisaged the future membership of Turkey in the EEC, one has no choice but to conclude that it has been a very long engagement and the wedding bells are nowhere near. Even a marriage of convenience seems to be off the agenda.¹⁸

The other countries willing to join the European Union include Albania and a number of states established in the ashes of Yugoslavia. Each of these countries was at different stages of *rapprochement* when 2013 was coming to an end; however, one thing seemed certain: any further EU enlargement is unlikely to materialise before the end of this decade.¹⁹ There are no more 'easy' enlargements on the horizon; not only because of the profound issues of statehood that the aspiring states are

¹⁶ Turkey, Montenegro, Serbia and the Former Yugoslav Republic of Macedonia are candidate countries, while Albania, Kosovo and Bosnia and Herzegovina remain potential candidates for membership.

¹⁷ Agreement establishing an Association between the European Economic Community and Turkey [1973] OJ C113/1.

¹⁸ See, *inter alia*, C Arvanitopoulos (ed), *Turkey's Accession to the European Union: An Unusual Candidacy* (Springer Verlag 2009).

¹⁹ Council conclusions on Enlargement and Stabilisation and Association Process, 17 December 2013 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/140142.pdf> accessed 26 December 2013.

suffering from, but also due to the dwindling appetite for future accessions among the current Member States.²⁰

Further, 2013 marked the 40th anniversary of the first enlargement of the then European Communities.²¹ The United Kingdom, which acceded during that wave of accession alongside Denmark and Ireland, decided to commemorate the anniversary by starting to sleepwalk towards the EU exit.²² The non-existing celebrations coincided with the Prime Minister trumpeting on a regular basis the desire to renegotiate the terms of membership and by promising a referendum on withdrawal from the European Union. Alas, no specifics of this grand plan were provided. Together with well-organised anti-EU propaganda in the media, the citizens of the United Kingdom are faced with a negative campaign so full of absurdities that a proper and merit-based debate on membership is as likely as fishing salmon in the Yemen. The rhetoric of contemporary discourse is very symbolic indeed. The discussion, or rather countless monologues, focuses on relations with the European Union, not the position in the European Union. This gives the impression that the United Kingdom is already outside the European project. The style and depth of this discourse reflect a general trend in European politics – constantly downhill towards mediocrity, whereby kings of dreams or second-hand heroes are becoming an authority. This sleepwalking is likely to lead the United Kingdom into a cul-de-sac from which it will be extremely difficult to escape.

Ten years of the European Neighbourhood Policy

Twenty years of the Common Foreign and Security Policy coincide with ten years of the European Neighbourhood Policy.²³ In 2003 the European Commission, in anticipation of the imminent enlargement to a large group of Central and Eastern European countries, launched a proactive policy that, in the ideal world, would provide a bridge between the EU of 25+ and the Mediterranean and Eastern European neighbours.²⁴ Alas, in 2013 this patient, too, remained in critical condition on life support. To make things worse, the chances of survival were shrinking by the minute. To start with, the grouping of countries that have little in common – the Euro-Med as well as the states established on the ruins of the Soviet Union – was not the most fortunate of available options. This policy choice led to bifurcation of the European Neighbourhood Policy into the Union for the Mediterranean and the Eastern Partnership. The efforts related to the first burned in the rubble of the Arab Spring (which has

²⁰ See House of Lords, Report: The Future of EU Enlargement, 2013.

²¹ See further AF Tatham, *Enlargement of the European Union* (Wolters Kluwer 2009).

²² See further A Geddes, *Britain and the European Union* (Palgrave 2013).

²³ See, inter alia, RG Whitman and S Wolff (eds), *The European Neighbourhood Policy in Perspective. Context, Implementation and Impact* (Palgrave 2010).

²⁴ *Wider Europe — Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM(2003) 104 final.

now undergone a few full cycles of all four seasons),²⁵ while the second suffered a major blow in the autumn of 2013. Russian persuasion à la hammer and sickle proved to be far more effective than the language of trade and diplomacy employed by the European Union. The ‘nice talk’ method involving a lot of gentle persuasion once again proved to be of little effect compared with Khrushchev’s shoe-banging methods. For the European Neighbourhood Policy, Anno Domini 2013 was certainly *annus horribilis*, leaving one to hope that next year will not be *annus terminus*.

Beyond anniversaries

Was 2013 a good year or an *annus horribilis*? Most probably neither. As always, the truth is somewhere in between. Against all the whining of the preceding paragraphs, things do seem to be moving forward. A lot of new legislation has gone through the meanders of EU decision making, including long awaited reforms of the Common Agriculture Policy²⁶ and the Common Fisheries Policy.²⁷ The European Union also has a budgetary perspective for the next seven years²⁸ and enhancements to the ailing

²⁵ For a commentary see, inter alia, G Fernandez Arribas, K Pieters and T Takács (eds), ‘The European Union’s Relations with the Southern-Mediterranean in the Aftermath of the Arab Spring’ (2013) CLEER Working Paper No 2013/3.

²⁶ Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy (repealing Council Regulations (EEC) No 352/78 (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008) [2013] OJ L347/549; Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products (repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007) [2013] OJ L347/671; Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy (repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009) [2013] OJ L347/608.

²⁷ Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000 [2013] OJ L354/1; Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC [2013] OJ L354/22; Commission Implementing Regulation (EU) No 1420/2013 of 17 December 2013 repealing Regulations (EC) No 347/96, (EC) No 1924/2000, (EC) No 1925/2000, (EC) No 2508/2000, (EC) No 2509/2000, (EC) No 2813/2000, (EC) No 2814/2000, (EC) No 150/2001, (EC) No 939/2001, (EC) No 1813/2001, (EC) No 2065/2001, (EC) No 2183/2001, (EC) No 2318/2001, (EC) No 2493/2001, (EC) No 2306/2002, (EC) No 802/2006, (EC) No 2003/2006, (EC) No 696/2008 and (EC) No 248/2009 following the adoption of Regulation (EU) No 1379/2013 of the European Parliament and of the Council on the common organisation of the markets in fishery and aquaculture products [2013] OJ L353/48.

²⁸ Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020 [2013] OJ L347/884.

Eurozone have been made (though not always through EU law proper). The Court of Justice rendered countless judgments and, as always, managed to stir controversy with rulings such as Melloni²⁹ or Fransson.³⁰ At the same time, a large majority of the Courts' decisions were, in academic terms, mere footnote cases but in practice assisted national courts in fulfilling their EU law mandate. Externally, the European Union was cementing its position as a trade power with a number of high profile free-trade negotiations under way (for instance, with Japan and with the USA). The EU was also heavily involved in nuclear talks with Iran, as well as peace building/keeping in many volatile corners of the world.

For Croatia, 2013 was arguably a good year. As already mentioned, on 1 July 2013 Republika Hrvatska became the twenty-eighth Member State of the European Union. For many it was a dream come true, a result of joint efforts, years of dedication and hard work. In the EU itself the latest enlargement round triggered again the well-established debate about the absorption capacity of the Union and enlargement fatigue. Some EU citizens still have to be persuaded about the benefits that come with the new member of the European family. This quest for acceptance may be successful if conducted through eyes and stomachs. When it comes to the first, the beauty of Croatian landscapes is well-known and needs no explanation. For the second, let us hope that the Croatian soil was fertile in 2013 and EU citizens will be given the opportunity to enjoy, alongside excellent Bajadera chocolates, also the most pleasant Croatian wine. Čaša vina anyone?

London, December 2013

²⁹ Case C-399/11 Stefano Melloni v Ministerio Fiscal [2013] ECR (nyr).

³⁰ Case C-617/10 Åklagaren v Hans Åkerberg Fransson [2013] ECR (nyr). For a commentary see, inter alia, D Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 CML Rev 1267; B van Bockel and P Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson' (2013) 38 EL Rev 866.