

# Editorial

## NOT DEAD YET. REVISITING THE ‘LUXEMBOURG VETO’ AND ITS FOUNDATIONS

A constant political reality throughout the history of the European integration project is the inability of the European Union (and before that the Communities) to impose majority decisions on member states when their fundamental interests are at stake, they are politically unwilling or incapable of implementing them, or both. This reality is the consequence of the limited political and executive authority of the Union. The limited authority of the Union is in fact also the rationale behind the Luxembourg Compromise of 1966 and the veto – the so-called ‘Luxembourg veto’ – that followed it in practice. The ‘Luxembourg veto’ is in essence an informal commitment by a limited number of member states to support each other if one of them invokes a vital or fundamental interest. This commitment of some, including notably France and the United Kingdom, is only seldom triggered, and has always been highly contested.<sup>1</sup> However, no member state can escape the limits to the Union’s ability to impose majority decisions. This has recently been recognised by several EU political and constitutional actors.

### *Recent references to the ‘Luxembourg veto’*

The Luxembourg Compromise of 1966, which is in fact an agreement to disagree, ended French president De Gaulle’s ‘empty chair policy’. That policy had the unspoken aim of blocking majority voting in the Council, which became an option in certain policy fields as of 1 January 1966.<sup>2</sup> In the Compromise, five of the then six delegations to the Council of Ministers declared that if a Commission proposal may be adopted by majority vote and ‘very important interests’ of one or more member states are at stake, they ‘will endeavour, within a reasonable time, to

<sup>1</sup>Thomas Beukers, *Law, Practice and Convention in the Constitution of the European Union* (University of Amsterdam 2011) p. 159-195.

<sup>2</sup>Luuk van Middelaar, ‘Spanning the River: The Constitutional Crisis of 1965–1966 as the Genesis of Europe’s Political Order’, 4 *EuConst* (2008) p. 98-126, at p. 104.

reach solutions which can be adopted by all the members of the Council'. In contrast, the French delegation considered that in such a case 'the discussion must be continued until unanimous agreement is reached'.<sup>3</sup> Adoption of the French position would effectively give every delegation a 'veto' in *some* instances where majority decision-making was legally possible. The practice inaugurated by the Compromise went much further: it led to consensus decision-making in practically *all* instances where a majority decision was possible. That practice only abated after the entry into force in 1987 of the Single European Act, which not only broadened the policy fields in which majority voting was legally possible, but also *de facto* led to majority decision-making. But even now, when a majority vote is legally possible, most decisions are taken by consensus, albeit under the shadow of the possibility of a vote.<sup>4</sup> Moreover, what did remain, as we will see in more detail below, was the 'Luxembourg veto': the commitment by a number of member states to support each other in the event one of them invokes a vital or fundamental interest.

The Luxembourg Compromise, or more precisely the 'Luxembourg veto', was referred to, implicitly or explicitly, in three recent events. The first is a statement by the Belgian prime minister Charles Michel after the informal European Council meeting on 16 September 2016 in Bratislava. The heads of state and government, with the exception of the British prime minister, gathered there to lick their wounds after the Brexit referendum, or, as the Declaration issued after the meeting has it, to discuss and diagnose 'together the present state of the European Union and discuss our common future'.<sup>5</sup> As reported by *Le Monde*, Michel, commenting on the meeting's atmosphere, stated:

I have the impression that we had more eye for each other's interests, that there was this insight that it is impossible to impose a decision on a leader if he is unable to defend it in his parliament.<sup>6</sup>

Michel's statement not only recalls the 'Luxembourg veto', or at least its rationale, but also expresses a lesson learned, seemingly drawn from the history of Council Decision

<sup>3</sup> Council press release on the arrangements for cooperation between the Council and the Commission (29 January 1966) <[http://www.cvce.eu/en/education/unit-content/-/unit/d1cfaf4d-8b5c-4334-ac1d-0438f4a0d617/a9aaa0cd-4401-45ba-867f-50e4e04cf272/Resources#3b2b0875-9cd1-49d9-bc5b-cb9cf9f67fec\\_en&overlay](http://www.cvce.eu/en/education/unit-content/-/unit/d1cfaf4d-8b5c-4334-ac1d-0438f4a0d617/a9aaa0cd-4401-45ba-867f-50e4e04cf272/Resources#3b2b0875-9cd1-49d9-bc5b-cb9cf9f67fec_en&overlay)>, visited 9 January 2017.

<sup>4</sup> Vaughne Miller, 'Voting Behaviour in the EU Council', Commons Briefing papers SN06646 (2013), available at <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06646>>, visited 9 January 2017.

<sup>5</sup> The Bratislava Declaration, p. 1, available at <[www.eu2016.sk/en/press-releases/bratislava-summit-outcome-bratislava-declaration-and-roadmap](http://www.eu2016.sk/en/press-releases/bratislava-summit-outcome-bratislava-declaration-and-roadmap)>, visited 9 January 2017.

<sup>6</sup> *Le Monde*, 18-19 September 2016, p. 3: 'J'eu l'impression que les uns étaient plus à l'écoute des intérêts des autres, qu'il y avait cette compréhension qu'il n'est pas possible d'imposer une décision à un dirigeant incapable de la défendre ensuite devant son Parlement' (our translation).

(EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. The negotiations for the Decision, with its mandatory relocation scheme for 160,000 refugees, revealed a deep and principled difference of opinion<sup>7</sup> about the approach to the refugee crisis. Two member states, Hungary and Slovakia, tried to lift the matter to the level of the European Council. As the Slovak prime minister, Robert Fico, explained: 'In a serious and sensitive matter as dictating to a country how many people it must accept, when it does not have the opportunity to choose these people, it is definitely a summit that should decide'.<sup>8</sup> Their appeal was in vain. To the surprise of many, the Justice and Home Affairs Council adopted the Decision by majority vote on 22 September 2015, with Hungary, the Czech Republic, Slovakia and Romania in the minority and Finland abstaining.<sup>9</sup> After the vote, Luxembourg's foreign minister Jean Asselborn declared he was convinced that the overruled countries would execute the Decision 'fully in line with community law',<sup>10</sup> but in actual fact it was hardly executed by any member state. Fico swore that 'As long as I am prime minister, mandatory quotas will not be implemented on Slovak territory', Czech minister of the interior Milan Chovanec tweeted that 'Soon we will find out that the emperor has no clothes',<sup>11</sup> and Hungarian prime minister Victor Orbán even organised a referendum seeking the blessing of the Hungarians for his refusal to execute the Decision.<sup>12</sup> Moreover, two of the four outvoted countries, Hungary and Slovakia, filed a complaint with the European Court of Justice.<sup>13</sup> In fact, the Decision was clinically dead right from its inception, albeit also

<sup>7</sup> Eric Maurice, 'Refugee quotas "unacceptable" for Visegrad states', *EUobserver*, 4 September 2015, <<https://euobserver.com/migration/130122>>, visited 9 January 2017; for the full statement of the four Visegrad Countries, see <[www.visegradgroup.eu/calendar/2015/joint-statement-of-the-150904](http://www.visegradgroup.eu/calendar/2015/joint-statement-of-the-150904)>, visited 9 January 2017.

<sup>8</sup> Eric Maurice, 'Germany piles on the pressure in refugee talks', *EUobserver*, 16 September 2015, <<https://euobserver.com/migration/130284>>, visited 9 January 2017.

<sup>9</sup> Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

<sup>10</sup> Nikolaj Nielsen and Eszter Zalan, 'EU forces "voluntary" migrant relocation on eastern states', *EUobserver*, 22 September 2014, <<https://euobserver.com/migration/130374>>, visited 9 January 2017.

<sup>11</sup> Duncan Robinson and Peter Spiegel, 'EU ministers force through refugee quota plan', *Financial Times*, 22 September 2015; Felicity Capon, 'Slovakian PM Refuses to Implement EU Refugee Quota Plan', *Newsweek*, 23 September 2015, <[europe.newsweek.com/slovakian-pm-refuses-implement-eu-refugee-quota-plan-333473](http://europe.newsweek.com/slovakian-pm-refuses-implement-eu-refugee-quota-plan-333473)>, visited 9 January 2016, giving slightly different quotations.

<sup>12</sup> The question asked was: 'Do you want the European Union to be able to mandate the obligatory resettlement of non-Hungarian citizens into Hungary even without the approval of the National Assembly?'; <[https://en.wikipedia.org/wiki/Hungarian\\_migrant\\_quota\\_referendum,\\_2016](https://en.wikipedia.org/wiki/Hungarian_migrant_quota_referendum,_2016)>, visited 9 January 2017.

<sup>13</sup> Not surprisingly then, the first plea of the Slovak government in the complaint with the ECJ against the Decision is that the Council by adopting the decision exceeded the guidelines of the European Council and thereby violated Art. 68 TFEU, as well as Art. 13(2) TEU and the principle of institutional balance (pending case C-643/15).

due to other factors, such as failure of the so-called hotspots.<sup>14</sup> Interpretation of Michel's statement as referring to Council Decision 2015/1601 is corroborated by remarks made by Angela Merkel, who, directly after the same summit, seemed to back down from the idea of mandatory relocation schemes.<sup>15</sup>

What, then, is the lesson learned from the history of Decision 2015/1601? It is that when decisions fundamentally opposed by some member states are adopted by majority vote in the Council, they may in the end not be carried. Although none of the opposing states in this case sought to trigger the 'Luxembourg veto' commitment,<sup>16</sup> it is clear that, in substance, they did refer to its rationale by declaring the mandatory migrant relocation decision unacceptable and by trying to lift the matter to the level of the European Council.

The second event during which the 'Luxembourg veto' was referred to involves the United Kingdom and France. During the investiture of the Commission in June 2014, the UK strongly opposed the nomination of Juncker as its President. The President may be nominated by a qualified majority decision in the European Council (Article 17(7) TEU), so there was formally no possibility for the British Prime Minister David Cameron to block the decision-making on his own. When Cameron realised he was about to be outvoted, he informally explored whether the invocation of a vital interest could successfully block Juncker's candidacy. His attempt failed. While explicitly referring to the original French position in the Luxembourg Compromise, French President Hollande's reaction was that no vital UK interest was involved in this case:

Here, it concerns the designation of a presidency for the European Commission. This is not a choice which, for a country, determines its future. That would justify a veto, the one inherited from the 'Luxembourg Compromise', which France imposed during the General de Gaulle era. Here, we are not in such a situation. We are simply discussing the next president.<sup>17</sup>

<sup>14</sup>The vote on the Decision and its follow-up are one element in a bigger picture of limited success of integration through law in the politically-sensitive area of asylum, migration and borders confronted with the migration crisis situation. It is an area of law experiencing a systemic compliance deficit, with the Commission not acting as a true guardian of the treaty in the face of fundamental lack of support for policies; see on this Maarten den Heijer et al., 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System', 53 *CMLR* (2016) p. 607; Daniel Thym, 'The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy', 53 *CMLR* (2016) p. 1545-1547.

<sup>15</sup>Eszter Zalan, 'EU migrant quota idea is finished, Fico says', *EUobserver*, 27 September 2016, <<https://euobserver.com/migration/135245>>, visited 9 January 2017

<sup>16</sup>Why was the commitment not triggered? An explanation may be that the eastern European member states have not participated in the high days of the 'Luxembourg veto', and that it therefore is simply not part of their political mind-set.

<sup>17</sup>*Interview du président de la République à Ypres*, Ypres, Jeudi 26 Juin 2014, <[discours.vie-publique.fr/notices/147001529.html](http://discours.vie-publique.fr/notices/147001529.html)>, visited 9 January 2016: 'Là, il s'agit de désigner une

This event directly involves the two member states that have historically been central to the 'Luxembourg veto' – and it is an open question what Brexit may mean for the commitment. Other states involved include Denmark, Ireland, Spain and Greece. These member states normally muster enough votes to constitute a blocking minority and thus to block a qualified majority vote. Of course, we are not dealing with a legal veto here, but with a veto nonetheless, as the blocking minority emerges even though only one member state is opposed to the substance of the decision.

A third event, the German Federal Constitutional Court's final decision of 21 June 2016 in the *Gauweiler* case, illustrates that references to the 'Luxembourg veto' can be found in quite unexpected places. The most surprising reasoning in that decision is contained in one of the paragraphs that dwell upon the duties of the German Government and the Bundestag to spare German citizens subjection to *ultra vires* and German-constitutional-identity-encroaching-acts by EU institutions. To prevent this, the Bundestag should, for instance, put pressure on the government to incite it, if need be under the threat of a motion of no-confidence, to oppose the adoption of a draft-decision. In turn, the German government should make use of, and now we quote,

the voting mechanisms available in the decision-making institutions of the European Union, including the use of veto rights and an appeal to the Luxembourg Compromise (see Streinz, *The Luxembourg Agreement*, 1984).<sup>18</sup>

That the Bundesverfassungsgericht, of all institutions, refers to the Luxembourg Compromise is remarkable for several reasons. First, it is surprising to see a court steeped in the German legalistic tradition refer to the authority of informal rules or agreements. Second, the German government has always been a principled opponent of the 'Luxembourg veto'.<sup>19</sup> Now the German Court seems to be obliging the government to invoke it in certain circumstances in an attempt to block a majority decision.<sup>20</sup>

présidence pour la Commission européenne. Il ne s'agit pas d'un choix qui va déterminer, pour un pays, son avenir. Ceci justifierait un veto, celui hérité du "compromis de Luxembourg" - que la France avait imposé, au temps du Général de GAULLE. Là, on n'est pas dans ce cas de figure. On n'est simplement sur une discussion sur le prochain Président' (our translation).

<sup>18</sup> 2 BVerfG 21 June 2016, 2 BvR 2730/13, para. 171: das Stimmverhalten in den Entscheidungsgremien der Europäischen Union einschließlich der Ausübung von Vetorechten und der Berufung auf den Luxemburger Kompromiss (vgl. Streinz, *Die Luxemburger Vereinbarung*, 1984) (our translation).

<sup>19</sup> Although it once, in 1985, exceptionally invoked para. 2 of the Luxembourg Compromise itself, thereby asking for discussion to continue until unanimous agreement was reached: see Beukers, *supra* n. 1, p. 187-189.

<sup>20</sup> We have little doubt that the BVerfG is effectively referring to the French position in the Compromise, and not to the commitment to extend the negotiations to reach a solution acceptable

*Still alive*

More generally, all the narrated references to the ‘Luxembourg veto’ are striking because several authors have declared the Luxembourg Compromise dead including, notably, Rudolf Streinz, the author of the 1984 book to which the highest German Court refers. In the 2016 edition of his *Europarecht*, he writes that the dissolution of the Compromise in primary law via *inter alia* Declaration nr. 7 on the Ioannina Compromise (also called *Ioannina-bis*)<sup>21</sup> and the emergency brake procedures of Articles 48, 82 and 83 TFEU has made the Compromise as such obsolete.<sup>22</sup> A similar conclusion was reached by Luuk van Middelaar in his fascinating history of the Compromise. In his analysis, all member states as of 1987 started to accept that ‘they were embedded in a constitutional order where they could be outvoted on certain important issues’.<sup>23</sup> Also in his view, *Luxembourg* is succeeded by *Ioannina* and the emergency brakes. To these he adds the emergence of the European Council, the institution that defines the Union’s general political directions and priorities, and generally does so by consensus

to all within a reasonable time. Where a draft is *ultra vires* or violates German constitutional identity, there is, from the German constitutional perspective, only one acceptable decision: revoking the draft or amending it so that it becomes *intra vires* or is cleansed from its constitutional identity threat. That is non-negotiable and a mere extension of the time allotted to negotiations will therefore not do the trick. However, where a draft as aforementioned is on the table, the German government will probably not have to invoke the ‘Luxembourg veto’ explicitly. Arguably, it will suffice to state that its constitutional court will not allow it to execute the decision to have the draft repealed or amended.

<sup>21</sup>The Ioannina Compromise and *Ioannina-bis* are essentially arrangements to prolong the discussion on a draft decision that may be taken by qualified majority in case a substantial number of members of the Council, not amounting to but nearing a blocking minority, is opposed to the draft. The original arrangement, embedded in the Council Decision of 29 March 1994 (OJ No. C105, 13 April 1994), was the result of an attempt by certain member states, in particular the UK and Spain, to consolidate their aggregated blocking minority position as much as possible after the 1995 enlargement with Austria, Finland and Sweden in 1995. *Ioannina-bis* was agreed to upon Polish insistence in 2009, and laid down in Declaration nr. 7 to the Lisbon Treaty, which incorporates the text of a Council Decision that entered into force together with that treaty. Art. 4 of that Decision states that if, as of 1 April 2017, members of the Council representing at least 55% of the population or at least 55% of the number of Member States necessary to constitute a blocking minority indicate their opposition to the Council adopting an act by qualified majority, ‘the Council shall discuss the issue’.

<sup>22</sup>Rudolf Streinz, *Europarecht*, 10<sup>th</sup> edn (C.F. Müller 2016) p. 123-125; see also Matthias Ruffert’s comment on the BVerfG’s reference to the Compromise: ‘Den Hinweis auf den Luxemburger Kompromiss in diesem Kontext (Rn. 171), ein euroskeptisches Fossil aus den Zeiten eines renitenten Général de Gaulle (1966!), das jedenfalls heute keinerlei rechtliche Bedeutung mehr hat, wäre besser ein Aufreger in der Kaffeepause zwischen den Senatsberatungen geblieben. Mon Dieu!’; <<http://verfassungsblog.de/ruffert-omt-bverfg/>>, visited 9 January 2017.

<sup>23</sup>van Middelaar, *supra* n. 2, p. 122-123.

(Article 15(4) TEU). Of course, van Middelaar continues, in several instances the Treaties still require unanimity, but

(t)hese 'legal' vetoes (...) as such should be clearly distinguished from the Luxembourg veto (...) the crux is that on the issues for which and to the extent that the Treaty prescribes it – and that was what Paris refused on 1 January 1966 – the transition to majority voting would seem to be complete. The world of De Gaulle is no more...<sup>24</sup>

However, the events that we discuss here indicate that the 'Luxembourg veto', or at least the driving force behind it, is still alive.

We think that the recent references to the 'Luxembourg veto' are due to two developments. The first is the advancement of EU integration into very sensitive areas, those that are perceived to be at the core of national self-determination or sovereignty. This development accounts for the Bundesverfassungsgericht's reference to the 'Luxembourg veto' in its final *Gauweiler* decision. The second development is the EU's populist challenge, as evinced for example by the rise of 'populist' governments that make no bones about defying the EU. In the history of Council Decision 2015/1601 both developments converge.

But even aside from these developments, the 'Luxembourg veto' has never been far from sight. In fact, since the Single European Act decision-making in the Council has taken place not only under the shadow of a vote, when legally possible, but also under the shadow of a possible veto,<sup>25</sup> in those cases where a majority vote is actually being contemplated. Even after the Single European Act, the 'Luxembourg veto' has remained as an informal commitment between member states constituting what could be called the 'Luxembourg Compromise group'<sup>26</sup> to support each other if one of them invokes a vital or fundamental interest to block a majority decision. Several times, this commitment has led to a blocking minority against a decision to which in reality only one member of the European Council or Council had fundamental substantive objections. Its activation, or a threat to do so, is no doubt a rarity, and it is limited to vital interests, as the 2014 Commission investiture episode illustrates.<sup>27</sup> But that same episode also confirms the continued existence of the famous commitment, at least as far as France and the UK are concerned.

<sup>24</sup> van Middelaar, *supra* n. 2, *idem*.

<sup>25</sup> Terms coined by Weiler in: J.H.H. Weiler, 'The Transformation of Europe' [orig. 1991], in *idem*, *The Constitution of Europe* (Cambridge Cambridge University Press 1999) p. 59 and 71-72.

<sup>26</sup> Beukers, *supra* n. 1, p. 176-186.

<sup>27</sup> That the commitment is not absolute was already demonstrated in 1982, when France and Ireland decided not to support a British invocation because the interest in vetoing the decision did not relate to the substance of the decision at stake. *See* Beukers, *supra* n. 1, p. 177-178.

In short, the ‘Luxembourg veto’ is not, and never has been, a ‘right’ that can be unilaterally imposed by a member state: its effectiveness has always been dependent on acceptance by other member states. Similarly, the existence of the ‘Luxembourg veto’ is not, and never has been, dependent on the commitment of *all* member states. The ‘veto’ will be with us as long as a number of member states able to constitute a blocking minority stay committed to supporting an invocation almost automatically. This commitment has neither ever been formally established, nor has it ever been abolished. It exists at the mercy of the relevant players, and its impact may vary over time. Certainly, it cannot be invoked lightly. But several post-Single European Act events, such as the success of the United Kingdom in blocking the artists’ resale rights directive in 1999,<sup>28</sup> the French and British support for Spain in opposing the air safety directive in 1999,<sup>29</sup> and the dynamics of the strong Polish opposition to the 2005 sugar market reform<sup>30</sup> all show that the conclusion that the ‘Luxembourg veto’ died with the Single European Act is too simplistic.<sup>31</sup> In fact, a culture of consensus decision-making combined with an acceptance that qualified majority voting may be applied can very well coexist with an exceptional use of, or threat to use, the veto in cases of vital national interest. In light of Belgian prime minister Michel’s statement after the Bratislava summit and the Bundesverfassungsgericht’s reference in *Gauweiler*, there seems to be ample support for the ‘Luxembourg veto’ these days, even in quarters where one would least expect to find it.

### *The EU’s limited political and executive authority*

So, the ‘Luxembourg veto’ is not dead just yet, despite the efforts of the Single European Act and the Maastricht, Amsterdam, Nice and Lisbon Treaties to improve the EU’s democratic life, its constitutional credentials and the efficiency of its decision-making. How can this be explained? Let us look closer at what is, in our opinion, the rationale behind the ‘veto’.

A constitutional order cannot thrive on legal authority alone. The simple fact that a decision is taken lawfully, according to the applicable rules, is not sufficient to make it acceptable to the members of the political community to which the decision is addressed. That, additionally, requires political and executive authority. Political authority is intimately linked to an institution’s representative quality: even a barely-palatable decision may be respected if it is taken by an institution which is perceived by the members of the relevant polity to represent them. And if not accepted voluntarily, the decision may be enforced with the help of the judiciary and, as an

<sup>28</sup> See Beukers, *supra* n. 1, p. 165-169.

<sup>29</sup> *Ibid.*, p. 178-181.

<sup>30</sup> *Ibid.*, p. 181-182.

<sup>31</sup> *Ibid.*, p. 171.



*ultimum remedium*, by the police and the military (the use of force and coercion as elements of executive authority is conspicuously absent in much modern constitutionalist thinking). It is no secret that the EU institutions' political and executive authority is limited. The 'Luxembourg veto' is related to both.

Certainly, the political authority of the EU institutions, and especially that of the European Council, is growing,<sup>32</sup> but it remains sparse: it is not enough to declare that the EU is based on representative democracy (Article 10(1) TEU) to give substance to it and make it a lived reality. This may change over time, but for now 'the public perception of factual issues and of political leaders remains connected to a considerable extent to patterns of identification related to the nation-state, language, history and culture', as the Bundesverfassungsgericht argued in its Lisbon-decision.<sup>33</sup> This entails *inter alia* that the EU institutions' authority is essentially mediated or indirect, and to a great extent dependent on the capacity and will of national politicians to defend EU decisions in the national political arenas. This fact explains the importance of the 'Luxembourg veto' from a political perspective, and at the same time that of the European Council defining the Union's general political directions and priorities by consensus: they provide the Union, in the words of Weiler, with the means to 'legitimate its program and legislation' by ensuring the national electorates 'that nothing could pass without the electorate Voice having a say',<sup>34</sup> by requiring that when very important national interests are at stake the consent of the relevant national governments is needed. This political wisdom was wilfully overlooked in the adoption of Council Decision 2015/1601.

The European Union's limited political authority sometimes even forces the constitutional actors to venture outside the formal EU framework to serve EU ambitions, as we have seen in the euro area crisis. The authority to take important financial decisions with potentially great redistributive consequences was found not within the Union,<sup>35</sup> but in the external, intergovernmental vehicles of the European Financial Stability Facility and the European Stability Mechanism. It would have perhaps been legally possible to establish these financial instruments through secondary EU law,<sup>36</sup> but the Union's political authority was clearly

<sup>32</sup> See, for instance, DN, JHR, TVD, 'Editorial: The European Council and the national executives: segmentation, consolidation and legitimation', 8 *EuConst* (2012) p. 165.

<sup>33</sup> BVerfG, 2 BvE 2/08 of 30 June 2009, para. 251.

<sup>34</sup> J.H.H. Weiler, 'The Transformation of Europe', in *The Constitution of Europe* (Cambridge University Press 1999) p. 85.

<sup>35</sup> Compared to the external European Financial Stability Facility and European Stability Mechanism, the EU's European Financial Stabilisation Mechanism – in which decisions on financial assistance can be taken by qualified majority voting – is of a very limited size.

<sup>36</sup> The ECJ in *Pringle* did not exclude that Art. 352 TFEU could be used to establish a stability mechanism like the European Stability Mechanism, see ECJ 27 November 2012, Case C-370/12 *Pringle v Ireland*, para. 67.

insufficient to force the national parliaments, and thereby the national taxpayers, to act as guarantors of the potentially enormous financial liabilities. That required a treaty ratified in accordance with national constitutional requirements, and thus the national parliaments' or peoples' consent.

As to executive authority and the power to enforce decisions: to the extent that it is the member states that have to execute those decisions, it is poorly apportioned to the Union. Certainly, non-executing member states may be summoned before the European Court of Justice and convicted. But if they are obstinate and insensitive to financial sanctions, the road ends there. The EU is, generally, lacking in means of subrogation, and the use of force is, understandably, entirely excluded: the essence of EU integration is precisely to rule out the use of force in settling disputes. Now it is true that the Union's limited executive authority should be put into perspective. Limited means of executive authority is, to a certain extent, a characteristic of many federal systems. And although the national authorities in, for instance, Belgium, Germany and Spain have the competence to ensure the execution of international or national obligations by forcing the authorities of a non-abiding state to take the necessary measures, or to take them themselves,<sup>37</sup> these competences are heavily conditioned and seldom – if ever – used. Still, in comparison with the Union, the political authority of those national governments is, generally speaking, larger, and the need to force unwilling state authorities to execute majority decisions is consequently more limited.

The EU system works well as long as the governments of the member states are capable and willing to defend, in their own national political arenas, even decisions in which they have been outvoted. However, a chain is only as strong as its weakest link. If, for whatever reason, a government is unable to defend such a majority decision, or is unwilling to do so and digs in its heels, defying Brussels, the system breaks down.

And here is where the 'Luxembourg veto' once again comes into play. It is merely the expression of a political imperative deeply embedded in the Union's constitutional structure and part of the Union's constitutional DNA: if the institutions want to avoid damage to their authority and to the Union's constitutional order (see Chovanec's 'the emperor has no clothes'), they cannot but take into account the declared or potential unwillingness or incapability of a member state to execute decisions taken or proposed. This political imperative is in fact the opposite of Weiler's principle of constitutional tolerance (or perhaps the other side of that principle's medallion). Weiler's principle entails that, in certain

<sup>37</sup> In Belgium, this is limited to international and supranational obligations (Art. 169 Belgian Constitution), in Spain to 'obligations imposed upon it by the Constitution or other laws' and acting 'in a way seriously prejudicing the general interests of Spain' (Art. 155 Spanish Constitution) and in Germany to 'obligations under this Basic Law or other federal laws' (Art. 47 German Basic Law).

policy fields, national constitutional actors in the EU voluntarily accept being bound 'to a norm which is the aggregate expression of other wills, other political identities, other political communities'.<sup>38</sup> The political imperative that fathered the 'Luxembourg veto' entails that a qualified majority of member states renounces its right to impose its 'aggregate expression of wills' on member states that fundamentally oppose it and who are politically unable or unwilling to execute it.

In some areas, the limited authority of the Union is still reflected by legal realities such as decision-making by unanimity (the 'legal vetoes' in van Middelaar's terms) and the emergency brakes enshrined in the Treaties. However, even in areas where all states accept qualified majority voting as political reality,<sup>39</sup> the authority of the Union is nonetheless limited. The fact that qualified majority voting is now fully accepted in these areas does not mean *any* decision can be imposed. All member states are perfectly aware that qualified majority decision-making in the Council has its political limits. The Luxembourg compromise group's informal commitment to support the invocation of the 'Luxembourg veto' in certain instances is but one, albeit the most extreme, expression of this awareness. Even those who disapprove of it will agree, however, that one should always take into account the interests of a member state particularly affected by a decision.<sup>40</sup> Much less extreme is the commitment by all members of the Council to allow a member to request that discussion be continued for a reasonable period in cases where there is nearly a blocking minority. This *Ioannina(-bis)* commitment<sup>41</sup> is less controversial, but also of little relevance in decision-making practice. Finally, as any member of *Coreper* will tell you, what you do when fulfilling the Presidency is to try to accommodate all members of the Council. The reasons for this may vary, but include prudence (there is no structural majority and minority in the Council, meaning that any member can always end up in the minority) and institutional strategy (negotiating with the European Parliament on the basis of a consensus gives the Council a stronger position).<sup>42</sup>

It is intellectually attractive to view the true acceptance of qualified majority voting after the Single European Act as the end of the 'Luxembourg veto'.<sup>43</sup> But it is more accurate to see it as a reduction to the scope assigned to it in the

<sup>38</sup> J.H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, available at <[www.jeanmonnetprogram.org/archive/papers/00/001001.html](http://www.jeanmonnetprogram.org/archive/papers/00/001001.html)>, p. 12, visited 9 January 2017.

<sup>39</sup> van Middelaar, *supra* n. 2, p. 126.

<sup>40</sup> Beukers, *supra* n. 1, p. 124.

<sup>41</sup> See *supra* n. 21.

<sup>42</sup> Beukers, *supra* n. 1, p. 118-124.

<sup>43</sup> Anthony Teasdale, 'The Life and Death of the Luxembourg Compromise', 31 *Journal of Common Market Studies* (1993) p. 567 at p. 575.

Luxembourg Compromise: ‘very important interests’, however ambiguous that notion may be. As the most fundamental decisions will normally be taken by consensus by the European Council, an invocation of the ‘Luxembourg veto’ will remain very rare. It is similarly appealing to view the arduous negotiations over voting weights and the powers of large minorities (leading to the *Ioannina* and *Ioannina-bis* settlements) as full acceptance of majority decision making and thus the end of the ‘veto’.<sup>44</sup> But a Union with limited political and executive authority simply cannot afford to outvote a member state that fundamentally opposes a draft-decision and that is politically unwilling or unable to execute it. From this perspective, we are still living in the same world as that of De Gaulle.

JHR and TB



<sup>44</sup> van Middelaar, *supra* n. 2, p. 125–126.