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EDITORIAL COMMENTS

EU law between common values and collective feelings

Over the last decade, the European Court of Justice has breathed new life into the old notion of autonomy of the EC/EU legal order. This was the case in *Kadi*, in *Opinion 2/13* on the accession of the EU to the European Convention on Human Rights, and this was recently reconfirmed in *Achmea*.[1] These decisions convey the message that, in face of adversity, EU law is capable of relying on its own system of principles and values. In contrast, in a line of cases starting with *Dano* and *Alimanovic*, the Court has reacted to a sensitive political and economic environment by making EU law responsive to what was considered to be a pressing societal demand.[2] It is as though, in this particular context, respect was owed to collective feelings prevailing in Member States' societies and also to shifting moods. This raises the question of the extent to which this curious oscillation between common values and collective feelings is capable of becoming one of the defining features of our current Union and its law.

Joseph Weiler's *The Tranformation of Europe* published in 1991 already provided an account of the foundational period of the European construct in terms of an oscillation.[3] It portrayed integration as an equilibrium between law and politics. The legal structure fashioned by the ECJ in a series of landmark decisions, amounting to the emergence of a federal type of legal order, diminished the possibility for Member States to avoid their obligations under the Treaty. This process favoured, and at the same time was enabled by, the possibility for Member States to take control of the processes of decision-making at the European level. In Weiler's lexicon, borrowed from Hirschman, since "exit" was foreclosed for Member States, the "voice" of national governments increased, and this is what made the idea of a structured legal framework, involving rigid procedures and far-reaching obligations, acceptable for Member States. Clearly, many changes in the dynamics of

1. Joined Cases C-402 & 415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council of the EU and Commission*, EU:C:2008:461; Opinion 2/13, *Accession of the European Union to the ECHR*, EU:C:2014:2454; Case C-284/16, *Slovakian Republic* v. *Achmea*, EU:C:2018:158.
2. Case C-333/13, *Dano,* EU:C:2014:2358; Case C-67/14, *Alimanovic*, EU:C:2015:597.
3. Weiler, "The Transformation of Europe", 100 *Yale Law Journal* (1991), 2403–2483.

European integration have occurred since then.[4] It is not just that the institutional practice has deviated from the "intergovernmental" control of the law-making process as a consequence of the increasing powers of the EU institutions and the introduction of majoritarian decision-making. It is not simply that the legitimacy crisis that Weiler anticipated has widened and deepened. It is much more fundamental than that: while the extent of economic, social and cultural interdependence between the Member States is the broadest and highest ever seen in European history, the sense of belonging to a common project has never been so weak among national polities and societies in the last sixty years.[5] On the one hand, this state of interdependence renders "total exit" – a Member State's withdrawal from European Union – very difficult, if not almost impossible, as evidenced by the laborious negotiations over Brexit. On the other hand, the loss of a sense of belonging has brought about growing political heterogeneity, increased social contestation, but also a generalized slackening, a sense of lost community within the Union.

In this context, the two terms of the foundational equilibrium as depicted by Weiler are both thoroughly open to question. On the one hand, law as an instrument of integration is perceived as meaningless. It amounts to a set of extended obligations to which all Member States are uniformly bound, but the meaning of this bond is unstated. The condition of legal integration seems to be "without a final destination."[6] On the other hand, politics as complex processes for making partial compromises is distrusted. It looks like a distant machinery placed above the fray of political and social conflicts, removed from ideological differences and value choices that matter for "real" people. This has brought about two sorts of reaction. First, the legitimacy of Union action has been enhanced through the introduction of a reference to values.[7] Second, different mechanisms of participation and consultation of citizens have been promoted as a way to bring European affairs down to the everyday concerns of ordinary people. As a result, in most cases, Union action is based on a rhetorical mix of references to values and social concerns. This mix is

4. See further Poiares Maduro and Wind (Eds.), *The Transformation of Europe: Twenty-Five Years On* (Cambridge University Press, 2017).

5. These points are obviously difficult to measure. On the latter, the last Eurobarometer survey of Spring 2018 indicates that overall 48% of Europeans trust the EU and 40% have a positive image of the EU. On the other hand, a survey by Reuters of national opinion polls conducted in July 2018 suggests that Eurosceptic parties could expand their strength in the European Parliament by over 60% at elections next May.

6. Augenstein and Hendry, "The 'Fertile dilemma of law': Legal integration and legal cultures in the European Union", Tilburg Institute of Comparative and Transnational Law Working Paper No. 2009/06.

7. See recently Foret and Calligaro, *European Values. Challenges and Opportunities for EU Governance* (Routledge, 2018).

reflected to some extent in the current evolution of EU law. An alternation is evident in the ECJ's case law, between exhibition of self-standing principles and attention to the changing economic, political and societal environment.

The autonomy of EU law as justice

Perhaps the most obvious case of apparent "indifference" towards the current environment in the recent case law is *Achmea,*[8] which concerned the investor-state dispute settlement mechanism in the Bilateral Investment Treaty concluded between the Netherlands and the Slovak Republic. This Treaty contained a clause entitling an investor to bring proceedings against one of those two Member States before an arbitral tribunal chosen by the parties. The ECJ reasoned that this tribunal may be called upon to interpret or to apply EU law, "particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital," and yet it is not part of any domestic judicial system. In the absence of any clear connection to the EU system of judicial remedies, the Court ruled that such a mechanism is liable to undermine the full effectiveness of EU law. Especially striking is the Court's apparent indifference towards the reasons for the use of arbitration in the European and global investment context, as well as towards the impact of its ruling on "economic reality".[9] Its only concern is the protection of the autonomy of EU law.

The notion of autonomy used in this ruling is a juxtaposition of two homonymous references. First, it refers to autonomy as classically defined in the external relations field. In this field, the main issue is to preserve the Union's "independence of action". Union action may be affected by the external context and political realities. But what is decisive is that this "does not alter the essential character of the powers conferred on the Union institutions."[10] Autonomy amounts to a vision of the Union as an international actor enjoying its own capacity to act. This focus on power can clearly be read in the sequence of the formula that says: "an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the

8. Case C-284/16, *Achmea*, EU:C:2018:158.

9. A reference to "economic reality" is to be found in Opinion of A.G Wathelet in Case C-284/16, *Achmea*, EU:C:2017:699, para 36.

10. See Opinion 1/76, *Draft agreement establishing a European laying-up fund for inland waterway wessels*, EU:C:1977:63, para 12 and Opinion 1/00, *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area*, EU:C:2002:231, para 20.

autonomy of the EU legal system."[11] Autonomy as originally developed in the internal sphere is different: it refers to the classic notion that EU law is an "independent source of law."[12] This means that the EU is a legal order distinct from international law and the laws of the Member States, endowed with its own basis of validity, capable of developing its own concepts and interpretations, and calling for specific modes of enforcement. Such are "the essential characteristics of the EU and its law."[13] In *Achmea*, the Court makes the link between the notion of Union power prevalent in the external sphere and the notion of the Union's legal order applied in the internal realm.[14]

This is because a special institutional arrangement is concerned. The requirement that "the essential character of the powers conferred on the Union institutions" may not be altered and the requirement that "the essential characteristics of the EU and its law" may not be adversely affected meet when it comes to protecting the special "communicating link" that exists between the ECJ and Member States' courts. This link consists in a sharing of powers whereby national courts are empowered to act as "European judges" for the safeguarding of the unity and effectiveness of EU law, under the authority of the Court.[15] This gives rise to what was coined "a European judicial power."[16] But why is it so essential to protect this power? What does effectiveness of EU law refer to beyond its purely instrumental meaning? Two sorts of answers are enshrined in this decision.

The first and most conspicuous answer relates to the objective of protecting the unity and the integrity of the Internal Market. By creating an alternative to the system of ordinary courts of the Member States in the field of investment protection, the arbitration mechanism in question in this case might interfere with the regimes of freedom of establishment and free movement of capital as established in the case law of the ECJ. However, behind this looms another

11. Case C-284/16, *Achmea*, para 32, quoting Opinion 2/13, para 201. See already Opinion 1/91, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, EU:C:1991:490, para 35. See further Contartese, "The autonomy of the EU legal order in the ECJ's external relations case law: From the 'essential' to the 'specific characteristics' of the Union and back again", 54 CML Rev. (2017), 1627–1671.

12. Case 6/64, *Costa* v. *ENEL*, EU:C:1964:66. See further Barents, *The Autonomy of Community Law* (Kluwer Law International, 2004).

13. Case C-284/16, *Achmea*, para 33.

14. Interestingly, this link also emerges in the guidelines adopted by the European Council in the context of Brexit. In this context, the autonomy of the EU is concerned "as regards its decision-making". See e.g. European Council, Special meeting (Art. 50), 29 April 2017, EUCO XT 20004/17.

15. Opinion 1/09, *Creation of a unified patent litigation system*, EU:C:2011:123, paras. 82–85.

16. Pescatore, *The Law of Integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities* (Sijthoff, 1974), p. 100.

concern: that of protecting a core Union value. It is settled case law that the Court does not oppose arbitration proceedings as such. Although commercial arbitration may be a way of avoiding the national system of courts, hence of impairing the free movement regimes, it could be justified by the requirements of efficient arbitration proceedings.[17] Why, then, does investment protection arbitration deserve special attention? The Court offers a remarkable explanation: whereas commercial arbitration is based on the freely expressed wishes of the parties, investment protection arbitration is based on two Member States agreeing "to remove from the jurisdiction of their own courts … disputes which may concern the application or interpretation of EU law."[18] Thus, the issue is not just about establishing a system of judicial remedies in the fields covered by EU law; it is about ensuring the integrity of the existing national system of courts and tribunals. Public administration of justice is an "essential State function" guaranteed by Union law.

Justice as a value

The value of justice had been upheld in the *Associação Sindical dos Juízes Portugueses* ruling issued a few days prior to *Achmea*.[19] In this case, the effectiveness of EU law was not at issue; it was really about the protection of "the set of shared values upon which the Union is founded."[20] The Court establishes a self-standing obligation for Member States to maintain the independence of their national courts in the fields covered by EU law on the basis of Article 19(1), second subparagraph, TEU linked with Article 2 TEU.

The second subparagraph of Article 19(1) TEU reads: "Member States shall provide remedies to ensure effective legal protection in the fields covered by Union law." This provision might originally look minimalist and oriented solely towards the functional aim of ensuring the full effect of EU law in the territories of the Member States. It does not even mention national courts. [21] It then developed in the interpretation of the Court as a powerful reference, acknowledging the role of the national court, in collaboration with the Court of Justice, to ensure not only the full application of EU law but also the

17. The Court cites Case C-126/97, *Eco Swiss*, EU:C:1999:269, paras. 35, 36 and 40, and Case C-168/05, *Mostaza Claro*, EU:C:2006:675, paras. 34 to 39.

18. Case C-284/16, *Achmea*, para 55.

19. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

20. Ibid., para 30, quoting Opinion 2/13, para 168.

21. Ziller, "The Value of Justice in the European Constitution", EUI Working Paper No. 2006/68, 11.

effective judicial protection of the rights of individuals under that law.[22] This is where Article 19(1) TEU is read in combination with Article 47 of the Charter.[23] Now, by combining Article 19(1) TEU and Article 2 TEU, the Court goes one step further: it puts itself in a position to review a core aspect of the structure of the judiciary in the Member States, i.e. judicial independence.

This shift from a functional reading to a structural reading of Article 19 TEU is achieved in the name of "the rule of law". However, there is a kind of dissonance in the part of the judgment that says: "the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law."[24] How can the mundane objective of "compliance with EU law" be constitutive of "the essence of the rule of law"? The French original version sounds a little better: what is at stake is *le respect du droit de l'Union*. This comes closer to "*le respect du droit"* referred to in Article 19(1), first subparagraph – "the observance of the law" in the English version. Indeed, the only way to make sense of this ground-breaking judgment is to consider that independent courts are not just the most efficient arm of EU law; they are the main vectors of a "Union of law."[25]

Interestingly, this focus on the rule of law emerges in the context of domestic measures adopted in response to the EU programme of financial assistance to Portugal. Among the wide range of drastic measures introduced by the Portuguese Government was the temporary reduction in the amount of public sector remuneration, including the judges of the Court of Auditors. According to the ECJ, the latter measure is not precluded by EU law. But this is on condition that it does not impair the independence of those judges. The rule of law emerges as a sort of safety value, which could survive in a difficult time for EU integration and for its ideal of prosperity.[26] It may well be a shorthand expression for the remnants of European supranationalism in the context of discrediting of the ideals of the original integration project.

22. Case C-284/16, *Achmea*, para 36 referring to Opinion 1/09, para 68, but see already Case C-432/05, *Unibet,* EU:C:2007:163.

23. Case C-72/15, *Rosneft*, EU:C:2017:236.

24. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, para 36.

25. This expression refers back to *Les Verts* issued in 1986: "The European Economic Community is a Community based on the rule of law", or more suggestively in the French version: "la Communauté économique européenne est une communauté de droit" (Case C-294/83, *Parti écologiste 'Les Verts'* v. *European Parliament*, EU:C:1986:166, para 23). This judgment and the following cases referred to "a Union based on the rule of law/*une Union de droit*"; this meant that EU law amounts to a complete and coherent system of judicial review.

26. On prosperity as European ideal, see Weiler, "Fin-de-Siècle Europe: On Ideals and Ideology in Post-Maastricht Europe", in Curtin and Heukels (Eds.), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers* (Nijhoff Publishers, 1994), pp. 23–41.

How far might the ECJ go with the notion of a freestanding Union obligation to protect the rule of law in a context of crisis? Is this limited to the value of justice? There is no doubt that democratic institutions are as essential to the proper functioning of a Union based on liberal values as an independent judiciary. We may identify a number of reasons for the current focus on justice. First, it is admittedly about the fact that national courts are the privileged interlocutors of the ECJ within the system of preliminary rulings. Second, it may be speculated that the Court considers that democracy is not tantamount to domination of the majority and requires non-majoritarian safeguards. Last but not least, critical Union mechanisms based on mutual trust, circulation of judgments and exchange of information, in the context of the Internal Market and the Area of Freedom, Security and Justice, cannot function without independent national judiciaries.

This is what was clearly reaffirmed in the recent *Celmer* case.[27] The Irish High Court, as the referring court, considered that the rule of law, and in particular the independence of the judiciary, had been breached in Poland and, as a consequence, that the surrender of a person on the basis of a European arrest warrant issued by a Polish court should be refused. Now, mutual trust between the judiciaries is traditionally considered to be a pre-condition for the proper working of the mechanisms of judicial cooperation with the Union. Accordingly, the ECJ states that "the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal … is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant."[28] The decision does not stop here, however. An important caveat applies. Before refraining from giving effect to the European arrest warrant, the executing judicial authority must, as a first step, assess, on the basis of objective and reliable material, whether there is a real lack of independence of the courts in Poland, and it must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantive grounds for believing that the right to a fair trial for the requested person would be breached before the judicial authorities of the issuing Member State.

This caveat bears witness to a certain restraint on the part of the Court. Two factors may have played a role in this respect. One of them is the consideration that the judiciary is not a monolithic sector: as argued by the Commission, it

27. Case C-216/18 PPU, *LM*, EU:C:2018:586 (the national case was called *Celmer*).
28. Ibid., para 59.

cannot be ruled out that some courts of that Member State are capable of hearing a case with the required independence.[29] The other factor relates perhaps to a certain awareness of the negative impact that a definitive ruling may have on collective feelings about the EU. An abstract and unnuanced defence of European values may well result in people feeling threatened or banned, excluded from the community of Europeans, a sentiment that in turn may reinforce separatist movements in the targeted society.

Where EU law cares how (the Court thinks) people feel

There are cases where the Court's social awareness is more transparent. Not by chance, these cases mainly involve movements of persons. This is because these movements are deemed to affect traditional modes of economic organization and entrenched patterns of socialization. In Europe in particular, free movement between Member States has come to be seen by part of the public as threatening the national welfare systems and habitual way of life. A strand of the Court's recent case law reflects these public sentiments against supposedly economically and culturally destabilizing immigration – thereby perhaps reinforcing them. In the *Dano* case, the Court took seriously the risk alleged by certain social groups of being overexposed to "a certain form of benefit tourism."[30] This led it to "put the brakes on a liberal interpretation of free movement rights."[31] The restrictive move has consisted of two main interpretive changes in cases relating to access to social benefits. First, by means of an "argumentative U-turn",[32] the Court reads EU citizenship in light of the aim to prevent Union citizens from becoming an unreasonable burden on the host Member State, losing sight of the – until then – privileged aim of facilitating mobility and promoting the integration of Union citizens into the host society. Second, abandoning its approach based on an individual assessment of the connection between the Union citizen and the host Member State, it adopts a more formalistic approach based on the general conditions for access to residence status as laid down in Directive 2004/38. The Court's

29. As reported in the Opinion of A.G. Tanchev in Case C-216/18 PPU, *LM*, EU:C:2018:517, para 103.

30. Opinion of A.G. Wathelet in Case C-333/13, *Dano,* EU:C:2014:341, para 131.

31. Sarmiento and Sharpston, "European Citizenship and its New Union: Time to move on?" in Kochenov (Ed.), *EU Citizenship and Federalism – The Role of Rights* (Cambridge University Press, 2017), p. 229.

32. On this "turn", see Thym, "The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens", 52 CML Rev. (2015), 25.

way of responding to allegedly widely shared social concerns was to stick textually close to the EU legislature.[33]

In the field of immigration, the Court does not even seek to hide behind the EU legislature; it makes clear that "the removal of any illegally staying third-country national is a matter of priority for the Member States, in accordance with the scheme of Directive 2008/115."[34] This bold reference may well be informed by the notion that respecting Member States' choices means being responsive to the perceptions and sensibilities of a large part of the Europeans. There is no doubt that immigration is a field where today's Europeans have strong feelings. These feelings largely express fears, insecurity and distress (if surveys, polls and reports are to be believed). EU law reflects this. Restating the conclusions of the European Council Tampere Summit, held twenty years ago, would be impossible today. It was stated then that the right to move freely throughout the Union "acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's tradition to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory."[35] Clearly the context has changed. The mood has shifted from hospitality to control. In its last meeting on 28 June 2018, the European Council concluded that it "is determined to continue and reinforce this policy to prevent a return of the uncontrolled flows of 2015 and to further stem illegal migration on all existing and emerging routes."[36]

This is not to say that values are absent in this field. As an illustration, one needs only think how the Court addressed the ethnicity-based argument put forward by the Polish Government in the relocation case.[37] Poland argued that in order to meet its relocation obligations, it would "have to make far greater efforts and bear far heavier burdens than other host Member States", on the grounds that Poland is "virtually ethnically homogeneous", so its population is "different, from a cultural and linguistic point of view, from the migrants to be relocated on their territory."[38] The Court firmly rejected this argument, stating that "considerations relating to the ethnic origin of applicants for international protection cannot be taken into account since they are clearly contrary to EU

33. See further Nic Shuibhne, "Limits rising, duties ascending: The changing legal shape of Union citizenship", 52 CML Rev. (2015), 17–50.

34. Case C-383/13 PPU, *M.G & N.R.*, EU:C:2013:533, para 43. See annotation by De Bruycker and Mananashvili, "Audi alteram partem in immigration detention procedures, between the ECJ, the ECtHR and Member States: G & R", 52 CML Rev. (2015), 569–590.

35. European Council, Presidency Conclusions of the Meeting on 15/16 Oct. 1999 in Tampere, pt 3.

36. European Council Conclusions, 28 June 2018, pt 2.

37. Joined Cases C-643 & 646/15, *Slovak Republic and Hungary* v. *Council of the EU*, EU:C:2017:631.

38. Ibid., para 302.

law and, in particular, to Article 21 of the Charter of Fundamental Rights of the European Union", prohibiting discrimination on grounds of ethnic or social origins.[39] True, EU migration law is subject, as are all EU law fields, to EU constitutional requirements. Yet the development of this field can hardly be presented as flowing from "the fundamental premiss that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common [liberal] values on which the EU is founded …".[40] Rather, it might be seen more as a series of compromises between conflicting national ideological forces, where policy makers strain to accommodate what they believe to be people's views and feelings about immigration. Arguably, the Court is not free from this tension.[41]

The extent to which it is difficult to ignore the perceptions and sensibilities of the people in today's Europe, even if they do not correspond to objective views of the situation, is perhaps best exemplified by the changes in the position assumed by Chancellor Merkel over the last years.[42] It is noteworthy that her decision to suspend Dublin procedures for Syrian citizens in August 2015 was largely motivated by the will to maintain the "European dream" of allowing an area without internal borders.[43] The prevailing mood in Germany was then one of enthusiasm. Three years later, the mood has changed.[44] A renewed anxiety about immigration has emerged in the German population. Coming under intense political pressure at home, the Chancellor agreed to new rules on immigration, and searches for possibilities to stop or send back migrants currently arriving in Greece and Spain.

Should EU law care about how people feel?

EU law has traditionally been conceived as a means to protect the fragile supranational structure and order from the power relationships of high politics, explosive social conflicts, and sensitive moral and cultural struggles. As a result, "the everyday mass of European society" has been pushed out of

39. Ibid., para 305.

40. Opinion 2/13, *ECHR*, para 168.

41. On the impact of ideology on judicial reasoning, see Ćapeta, "Ideology and Legal Reasoning at the European Court of Justice", in Perišin and Rodin (Eds.), *The Transformation or Reconstitution of Europe* (Hart, 2018), pp. 89–119.

42. See more broadly Waldron, "What respect is owed to illusions about immigration and culture?", NYU School of Law, Public Law Research Paper No. 16-49, October 2016.

43. Spiegel Staff, "The Makings of Merkel's Decision to Accept Refugees", *Der Spiegel Online* (24 Aug. 2016).

44. Borneman and Ghassem-Fachandi, "The concept of *Stimmung.* From indifference to xenophobia in Germany's refugee crisis", HAU: *Journal of Ethnographic Theory* (2017), 105–135.

the EU and its law.[45] The main ambition of EU lawyers was to establish the set of rules and structural principles on which the whole construction could be based. From this follows the notion that EU law is "a structured network of principles, rules, and mutually interdependent legal relations."[46] This stable and resilient structure may be helpful in times of turmoil. The EU finds refuge in the order of principles and values enshrined in its law. However, now that the permissive consensus about European integration has eroded, in times of fierce political and cultural battles, it could also lead to the impression that EU law is ideological in nature, stuck to its value choices, and not concerned with "real" society.

This may prompt the EU and its law to reconnect with society – what it imagines to be the concerns, sentiments and ideas of the mass of Europeans. As Durkheim famously put it, "there can be no society which does not feel the need of upholding and reaffirming at regular intervals the collective sentiments and the collective ideas which makes its unity and its personality."[47] For this purpose, it is important that public sentiments are based on objective views, on accurate information and on the true state of affairs. This justifies the Commission's new initiative to combat fake news in the EU.[48] However, it should be clear that deference to public beliefs and sentiments comes with a major risk – the risk of instrumentalization: public sentiments are easily made subservient to partisan interests by political leaders. In that case, the willingness to stick closer to reality may well crystallize into proposals that are contrary to EU common values or simply unrealistic.

The latest development on the management of the migration crisis is a case in point. At the June European Council, the EU leaders, who felt under pressure from public opinion in their respective countries, called for a new approach. They made two suggestions: setting up, on a voluntary basis, "controlled centres" in Member States for migrants who disembark in the EU, and exploring the concept of "regional disembarkation platforms" in neighbouring countries for migrants who are rescued at sea and disembark outside the EU. The Commission followed suit with the publication of a series of non-papers on 24 July 2018.[49] However, immediately after they were

45. See to that effect Favell, "European Union Versus European Society: Sociologists on 'Brexit' and the 'Failure' of Europeanization", in Outhwaite (Ed.), *Brexit: Sociological Responses* (Anthem Press, 2017), pp. 193–199.

46. Opinion 2/13, para 167.

47. Durkheim, *Elementary Forms of the Religious Life* (1912) (Free Press, 1965), p. 475.

48. European Commission, Tackling online disinformation: A European Approach, COM(2018)236 final.

49. European Commission, "Managing Migration: Commission expands on disembarkation and controlled centre concepts", 24 July 2018.

articulated, these ideas proved highly problematic and divisive. Can we make sense of these structures without creating "closed" centres or detention camps, contrary to international law and human rights?[50] Can we convince Member States and third countries to provide such structures without facing again the problem of hotspots concentrated in unsafe countries? Whether these fairly ambiguous ideas will ever become concrete and, if so, what these structures might really look like, remains far from clear. In the current divided Union, relying on common values may not be enough to give European citizens a "common sense of justice throughout the Union";[51] but acting against the background of perceived societal feelings might not always be desirable.

50. As illustrations of the ambiguities prevalent in this domain: some national leaders quickly declared support for the establishment of "closed" reception centres rather than "controlled" centres, whereas others considered that disembarkation platforms can be understood to refer to "expulsion centres for rejected asylum seekers."

51. Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, 3 Dec. 1998, O.J. 1999, C 19/1.