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The Treaty of Rome, 60 Years later – A History of Successes and Failures

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Table of Contents

Abbreviations

BIT Bilateral Investment Treaty

CCP Common Commercial Policy

CEO Chief Executive Officer

CETA Comprehensive Economic and Trade Agreement

CFI Court of First Instance

CIP Common investment policy

CJEU Court of Justice of the European Union (composed of Court of Justice, General Court and Civil Service Tribunal)

CRC Convention on the Rights of the Child

ECHR European Convention on Human Rights

ECJ European Court of Justice

ECSC European Coal and Steel Community

ECtHR European Court of Human Rights

EDC European Defense Community

EDF European Development Fund

EEC European Economic Community

EHW Education Health and Welfare

EP European Parliament

EPC European Political Community

EU European Union

EUSFTA EU-Singapore Free Trade Agreement

FTA Free Trade Agreement

GATS General Agreement on Trade in Services

GDP Gross Domestic Product

GI Geographical Indication

GPG Gender Pay Gap

ICS Investment Court System

ICSID International Center for Settlement of Investment Disputes

IIA International Investment Agreement

IPR Intellectual property rights

ISDS Investor-state dispute settlement

NAFTA North American Free Trade Agreement

NCO National Coordination Office

OECD Organization for Economic Co-operation and Development

SME Small and medium-sized enterprises

STEM Science, technology, engineering, and mathematics

TEC Treaty establishing the European Community

TEU Treaty on European Union

TFEU Treaty on the Functioning of the European Union

TTIP Transatlantic Trade and Investment Partnership

UKIP United Kingdom Independence Party

WHO World Health Organization

WTO World Trade Organization

Countries

AT Austria

BE Belgium

BG Bulgaria

HR Croatia

CY Cyprus

CZ Czech Republic

DK Denmark

EE Estonia

FI Finland

FR France

DE Germany

EL Greece

HU Hungary

IE Ireland

IT Italy

LV Latvia

LT Lithuania

LU Luxembourg

MT Malta

NL Netherlands

PL Poland

PT Portugal

RO Romania

SK Slovakia

SI Slovenia

ES Spain

SE Sweden

UK United Kingdom

Abstract

In occasione dei 60 anni dei Trattati di Roma, questa tesi vuole ripercorre sia la storia che ha portato alla loro adozione, sia gli sviluppi di alcune politiche scelte da Roma a oggi. Lo scopo è quello di analizzare se il progetto di un'Unione europea, nato nel 1957, deve essere più correttamente definito come un successo o come un fallimento. Il primo capitolo della tesi è storico mentre gli altri tre analizzano quattro politiche ed eventi che possono essere visti come successi o fallimenti, se comparati alla loro regolamentazione nel Trattato di Roma, ed un'ulteriore politica, quella dei diritti umani, che presenta sia elementi di successo che di fallimento. Ogni capitolo parte dall'analisi delle disposizioni esistenti nel Trattato di Roma e le politiche scelte come successi sono quella commerciale comune e la libera circolazione dei lavoratori. La prima è stata scelta per la sua attualità e per i suoi recenti sviluppi con il Trattato di Lisbona mentre la seconda è analizzata in questa tesi perché è la politica con la quale l'Unione europea viene spesso identificata e che anche i suoi cittadini vedono come uno dei suoi più grandi successi. La politica e l'evento scelti come fallimenti sono l'abolizione del gender pay gap e la Brexit. La prima è stata scelta perché già prevista nel Trattato di Roma ma ancora adesso, 60 anni dopo, non è stata realizzata, rappresentando quindi il fallimento più antico del Trattato di Roma. La Brexit, invece, è stata scelta per la sua attualità e perché rappresenta uno dei fallimenti dell'Unione europea più recenti e più conosciuti. Insieme al caso dei diritti umani, queste politiche offrono, inoltre, una buona panoramica sui diversi ambiti di competenza dell'Unione europea, rappresentando la politica commerciale, quella del mercato comune, la politica sociale, la generale capacità di unificare dell'Unione ed un argomento così fondamentale e delicato come i diritti umani.

Il primo capitolo ripercorre passaggi storici che hanno portato fino all'adozione dei Trattati di Roma il 25 marzo del 1957. Analizza quindi la dichiarazione Schuman, la Comunità europea del carbone e dell'acciaio, la Comunità europea di difesa, il Benelux Memorandum e la conferenza di Messina, lo Spaak Report e, in fine, i Trattati di Roma, con la nascita della Comunità economica europea e di Euratom. Il capitolo analizza i rispettivi documenti e trattati nel loro contesto storico e mostra che già prima del 1957 c'erano stati successi e fallimenti nella storia dell'integrazione europea. Il piano Schuman è stato un successo, come lo è stata la Comunità europea del carbone e dell'acciaio fondata sulle sue idee. Anche le conferenze di

Messina e Venezia, che avrebbero discusso il Benelux Memorandum e deciso di procedere a discutere sia una comunità economica europea che Euratom, possono essere viste come successi. Le negoziazioni che sono seguite e il risultante Spaak Report del 21 aprile 1956 anche rappresentano un successo perché, pur essendo state in molti momenti vicine al fallimento, si sono concluse con successo, così come le negoziazioni a Val Duchesse che superarono vari momenti di crisi grazie ai compromessi fatti da tutte le parti coinvolte. Infine, anche la Comunità economica europea può essere vista come un successo, soddisfacendo gli interessi di tutti gli stati coinvolti e comportando importanti miglioramenti economici. Euratom, dall'altra parte, era stata l'idea di partenza di Monnet ma non ha potuto soddisfare le sue aspettative e può perciò essere considerato solo un successo limitato sulla strada europea per Roma. Il progetto della Comunità europea di difesa invece, che avrebbe dovuta essere accompagnata dalla Comunità politica europea, è un vero e proprio caso di fallimento per ragioni legate alle particolarità del periodo storico.

La tesi analizza successivamente due politiche che possono essere considerate come successi se comparate alle disposizioni contenute nel Trattato di Roma: la politica commerciale comune e la libera circolazione per i lavoratori. La politica commerciale comune viene analizzata attraverso l'esempio del CETA, l'accordo economico e commerciale globale tra l'Unione europea e il Canada, il quale ci illustrerà gli sviluppi della politica commerciale comune dal Trattato di Roma. Tali sviluppi includono l'estensione della portata di questa politica dal solo ambito dei beni fino a quelli dei servizi, degli aspetti commerciali della proprietà intellettuale e degli investimenti diretti esteri e l'inclusione di aspetti non commerciali, come i diritti umani e lo sviluppo sostenibile, tra i suoi obiettivi. L'esempio mostra anche l'incremento d'importanza del ruolo del Parlamento europeo che oggi deve essere informato sulle negoziazioni in ambito commerciale e dare il suo consenso ad accordi così negoziati, incrementando quindi la legittimazione democratica della competenza dell'Unione. Il capitolo mostra, inoltre, l'incredibile successo economico della politica commerciale comune. Infatti, il valore delle esportazioni di beni UE è passato da 954.2 miliardi Euro nel 2004 a 1743.2 miliardi Euro nel 2016, un incremento dell'84.4 percento, mentre quelle di servizi sono incrementate da 366.7 miliardi Euro nel 2004 a 819.8 miliardi Euro nel 2016, un aumento del 123.6 percento. Per quanto riguarda gli investimenti diretti esteri, gli ingressi nell'Unione europea sono passati da 58.3

miliardi Euro nel 2004 a 466.5 miliardi Euro nel 2015, incrementando di un incredibile 700.2 percento, mentre le uscite sono aumentate da 142.3 miliardi Euro nel 2004 a 537.2 miliardi Euro nel 2015, un incremento del 277.5 percento.

Il successo della libera circolazione dei lavoratori è analizzato attraverso tre atti, la Direttiva 2004/38/EC, il Regolamento (EU) 492/11 e il Regolamento (EU) 2016/589, e uno sguardo alle statistiche. Il primo di questi atti rappresenta un elemento di successo di questa politica poiché dimostra che il diritto di libera circolazione dal 1957 è stato esteso dai soli lavoratori fino a includere tutti i cittadini degli Stati Membri che, in seguito alle riforme del Trattato di Maastricht, adesso godono anche della cittadinanza europea. Questo ha certamente favorito, e ancora favorisce, la creazione di una popolazione che si sente e pensa in modo più europeo. I lavoratori, inoltre, continuano a godere un trattamento preferenziale anche all'interno di questa Direttiva che garantisce diritti addirittura a cittadini di Stati terzi. Il Regolamento (EU) 492/11, invece, rappresenta un successo poiché realizza tutte le richieste fatte dagli articoli 48(2) e 49 del Trattato di Roma, garantendo così la parità di trattamento in ogni aspetto dell'impiego, dall'accesso ai mercati di lavoro, ai benefici sociali e fiscali, ai sindacati e l'abitazione e attraverso la creazione dei comitati consultivi e tecnici. Il Regolamento ha, inoltre, aggiunto dei diritti come la non discriminazione dei figli di lavoratori e l'inclusione dei corsi di formazione professionale. Anche il Regolamento (EU) 2016/589 rappresenta il successo della politica analizzata poiché applica la richiesta dell'articolo 49 del Trattato di Roma, cioè che il Consiglio assicuri la stretta collaborazione tra le amministrazioni del lavoro nazionali e crei un apparato appropriato per connettere gli uffici per l'impiego e domande di lavoro, creando una rete europea di servizi per l'impiego, organizzata a livello nazionale ed europeo, che offre ai lavoratori aiuto nell'accesso ai servizi di mobilità e unisce offerte e domande di lavoro, l'EURES. La novità rispetto alle disposizioni del Trattato di Roma è che il Regolamento, in seguito a giudizi della Corte, includa anche apprendisti e tirocinanti nel concetto di 'lavoratore' e, di conseguenza, nella rete. In fine, questa politica è analizzata attraverso le statistiche che mostrano che nel 2014 17 milioni di persone stavano vivendo in uno Stato Membro dell'Unione europea diverso da quello nel quale erano nate, rappresentando poco più del 3.5 percento della popolazione totale ed aumentando dal 3.2 percento del 2009. Nel 2015, inoltre, 11.3 milioni di lavoratori si trovarono nella stessa situazione, crescendo del 5.3 percento rispetto al 2014. A riguardo di quanto sopra descritto, le ricerche sugli Stati Membri evidenziano un

effetto generale non negativo sugli stipendi, dimostrando inoltre che l'immigrazione non causa un incremento nel tasso di disoccupazione, anche se adattamenti locali possono verificarsi.

La tesi analizza successivamente due casi che possono essere descritti come fallimenti se comparati alle disposizioni del Trattato di Roma: l'abolizione del gender pay gap e la Brexit. Il fallimento nell'abolire il gender pay gap è analizzato distinguendo tra la situazione *de jure* e quella *de facto*. Per capire la situazione *de jure* vengono analizzati la Direttiva 2006/54/EC riguardante l'attuazione del principio delle pari opportunità e della parità di trattamento fra uomini e donne in materia di occupazione e impiego (rifusione), la Comunicazione della Commissione "Accrescere l'impegno per la parità tra donne e uomini: una Carta per le donne" del 5 marzo 2010, la pubblicazione della Commissione "Strategy for equality between women and men 2010-2015", la Raccomandazione della Commissione sulla fortificazione del principio della parità retributiva tra donne e uomini attraverso la trasparenza, e lo Staff Working Document della Commissione sull'impegno strategico per l'uguaglianza di genere 2016-2019. Questi atti includono molti elementi nuovi comparandoli alle disposizioni del Trattato di Roma ma la situazione *de facto* dimostra che a tale successo legale non ha fatto seguito un successo pratico nell'abolizione del gender pay gap e nel miglioramento dell'uguaglianza di genere nell'ambito dell'impiego. Questo è dimostrato analizzando documenti ufficiali sull'applicazione del principio di parità retributiva, della Direttiva 2006/54/EC, sulla valutazione della strategia 2010-2015 e l'implementazione della Raccomandazione e attraverso uno sguardo ai dati statistici disponibili. Questi ultimi mostrano che lo sviluppo legale non ha contribuito all'abolizione del gender pay gap, diminuito solo del 0.6 percento tra il 1995 e il 2004 ed attualmente al 16.3 percento. Questa discrepanza è dovuta alla mancanza di consapevolezza nella popolazione (la maggioranza dei cittadini europei non sa che la parità retributiva è un diritto garantito dalla legge!) e ostacoli procedurali nel portare un caso davanti a un tribunale, come costi, mancanza di sanzioni e compensazioni esistenti limitate, ma anche al carattere non vincolante di molti degli atti menzionati che sono semplici dichiarazioni di intento.
Il caso della Brexit è analizzato dando una panoramica sul caso, lo sfondo storico e il contesto in cui si è manifestato. Il capitolo offre anche un'analisi sulla situazione attuale delle relative negoziazioni, spiegando in modo più dettagliato le differenti

posizioni e l'accordo nella questione dei diritti dei cittadini. La Brexit rappresenta un chiaro fallimento per l'Unione europea che perderà in questo modo il 17 percento del suo prodotto interno lordo e il 12 percento della sua popolazione e, con il Regno unito, la potenza militare europea più importante, con una rete diplomatica mondiale e un membro permanente del Consiglio di sicurezza delle Nazioni unite. Da soli, inoltre, il Regno unito e l'Unione europea diventeranno attori più deboli nello scenario europeo e nell'economia mondiale. Il fallimento è dimostrato inoltre dal fatto che, anche se la Brexit era legata a problemi interni spiegati dal capitolo, i cittadini britannici hanno deciso di far pagare l'Unione europea. Il mancante sentimento di appartenenza europea sull'isola è evidenziato dalla partecipazione al voto della parte più giovane della popolazione, estremamente bassa, anche se dimostratasi per lo più a favore dell'Unione europea. Infatti, secondo interviste svolte nel marzo 2016 e quindi un mese prima del referendum, solo il 53 percento dei cittadini britannici partecipanti ha dichiarato di sentirsi anche cittadini europei, mentre la media europea era al 66 percento. Il capitolo riconosce comunque che, anche se la Brexit è il fallimento maggiore dell'Unione europea, essa è inevitabile e la prima fase delle negoziazioni è stata conclusa con successo visto che sono stati trovati accordi sui tre argomenti principali: diritti dei cittadini, Irlanda e accordo finanziario.

La tesi si conclude con un caso contenente sia elementi di successo che elementi di fallimento, quello dei diritti umani. Gli elementi di successo sono rappresentati analizzando la Carta dei diritti fondamentali dell'Unione europea e il giudizio della Corte di giustizia nei casi C-293/12 e C-594/12. L'analisi della Carta fa giungere a due conclusioni: prima, che essa rappresenta un nuovo tipo di documento non esistente al momento dell'adozione del Trattato di Roma e che include principi e diritti vincolanti i quali le istituzione dell'Unione europea e gli Stati Membri devono rispettare nell'adozione o implementazione di atti dell'Unione; seconda, che la maggioranza delle disposizioni della Carta rappresentano una chiara aggiunta rispetto a quelle limitate disposizioni sui diritti umani contenute nel Trattato di Roma e alcune addirittura fanno un passo avanti se comparate a norme più recenti sui diritti umani incluse nel diritto internazionale e quello dell'Unione europea. L'importanza della Carta è dimostrata anche dalla sua applicazione al caso della procedura di infrazione contro la Polonia. Anche il giudizio della Corte nei casi C-293/12 e C-594/12 dimostra tale importanza, al punto di portare alla dichiarazione di invalidità di

un atto dell'Unione europea a causa della sua incompatibilità con la Carta stessa. L'attuale situazione dei diritti umani nell'Unione europea può essere quindi descritta come un successo, se comparata alle limitate disposizioni contenute nel Trattato di Roma.

Dall'altra parte ci sono anche momenti in cui tale successo non è più così evidente a tutti; uno di questi è il caso dell'accordo sui rifugiati tra Unione europea e Turchia che viene analizzato successivamente, attraverso una breve descrizione del caso ed analizzando l'EU-Turkey Joint Action Plan dell'ottobre 2015, l'incontro dei capi di stato o di governo dell'Unione europea con la Turchia nel novembre dello stesso anno e il EU-Turkey statement del 18 marzo 2016, il vero e proprio accordo. Questi documenti sono basati sul principio di condizionalità: per ottenere la liberalizzazione dei visa per i suoi cittadini e un altro tentativo nelle negoziazioni di adesione all'UE, la Turchia ha accettato di riammettere migranti illegali arrivati negli Stati Membri dell'Unione europea attraversando il suo territorio. La tesi analizza le enormi critiche sorte contro tale accordo riguardanti sia la nascita di quest'ultimo che le sue conseguenze in termini di diritti umani. La questione sulle competenze per concludere l'accordo non è per niente chiara e, se tutto andrà bene, sarà chiarita dalla Corte di giustizia alla quale tre ordinanze della Corte generale sono state appellate. Le critiche riguardanti le conseguenze dell'accordo sono basate su innumerevoli violazioni di diritti umani, incluso del diritto di non-refoulement, sia in Grecia che in Turchia. Il capitolo arriva alla conclusione che, mentre le attuali disposizioni sui diritti umani del diritto dell'Unione europea devono essere considerate un successo se comparate a com'era la situazione con il Trattato di Roma, il modo in cui queste disposizioni sono applicate e rispettate, o meglio, non rispettate, deve essere visto come fallimento.

Nelle conclusioni si cerca poi di dare una risposta alla domanda: il progetto di un'Unione europea, nato nel 1957, deve essere più correttamente definito come un successo o un fallimento? La conclusione data è che tale progetto, nel complesso, deve essere visto come un successo ma che rimangono ancora molte cose da fare per far applicare al meglio le disposizioni che pure ci sono e per creare un sentimento di appartenenza europea nei cittadini dell'Unione.

Introduction

"*May this idea of a reconciled, united and strong Europe henceforth be the watchword for young generations wanting to serve a mankind that has finally cast off the yoke of hate and fear, and which, after long being torn apart by strife, is relearning the lesson of Christian brotherhood.*"[1]

The 25 March 2017, with a medium temperature of 19 degrees, was a sunny day in Rome, contrary to what it had been 60 years earlier, in 1957, when rain was pouring and the sky over the Italian capital was grey. However, just like 60 years before, also on this 25 March leaders of certain European States met for a particular purpose. While in 1957 the latter had been the signing of the Treaties of Rome and therefore the birth of the European Economic Community and Euratom, in 2017 it was that of celebrating 60 years of those Treaties and the signing of a Declaration for the occasion and, while in 1957 the leaders had been six, 60 years later they were in 27.

In their declaration they declared that "sixty years ago, recovering from the tragedy of two world wars, [they] decided to bond together and rebuild [the] continent from its ashes. [And that they] have built a unique Union with common institutions and strong values, a community of peace, freedom, democracy, human rights and the rule of law, a major economic power with unparalleled levels of social protection and welfare" (Council 2017). However, they also admitted that "the European Union is facing unprecedented challenges, both global and domestic: regional conflicts, terrorism, growing migratory pressures, protectionism and social and economic inequalities" (ibid.). This situation has led to a lot of questions on the European Union and skepticism towards its benefit. In fact, in the Standard Eurobarometer 87 of spring 2017, 31% of the Member States' citizens declared they did not feel they were citizens of the EU (38), while 47% declared they did not tend to trust the EU (15). However, when asked about the most positive result of the EU, 58% indicated the peace among the Member States of the EU, 56% chose the free movement of people, goods and services within the EU while 25% each opted for the student

[1] Schuman, R. (1963*) Pour l'Europe*. Paris: Edition NagelParis, 45

exchange programs and the euro and 20% indicated the economic power of the EU (39). This percentages show that, while a great part of the European population is skeptical towards the EU, there are nonetheless those well aware of its achievements.

So, what is more founded, the skepticism towards the EU and its effective benefit for each Member State and every single citizen, or the faith in its positive results? Since the adoption of the Treaty of Rome on that rainy day of 25 March 1957, have there been more failures, supporting the first point of view, or more successes, accrediting the second one instead? And, finally, must the project of European integration as a whole be considered as a success or as a failure? This is the key research question of my thesis. I will try to find an answer to this question and also to partly summarize the EU's developments, both positive and negative, in the last 60 years. This will be done by comparing the current situation of five policies and measures with the corresponding provisions in the Treaty of Rome.

At the outset, the thesis will give an overview over the historic steps leading to the signing of the Treaty of Rome and to the birth of the European Economic Community, which would later be succeeded by the European Union, with the entrance into force of the Lisbon Treaty (art.1TEU). The first chapter will, therefore, analyze such important documents as the Schuman Declaration, the Treaty establishing the European Coal and Steel Community, the Treaty establishing the European Defense Community, the Benelux Memorandum and the Messina Conference, the Spaak Report and, finally, the Treaties of Rome establishing the European Economic Community and Euratom. Beyond analyzing the content of those documents, the chapter will also give an overview over the historic contexts, national interests and negotiations leading to their adoption, always having in mind that already the historic journey towards the Treaty of Rome presented elements of success and failure.

The thesis' second chapter will then analyze two policies that can be seen as successes, the common commercial policy and the free movement of workers. The developments of the former with respect to Rome will be shown through CETA, the Comprehensive Economic and Trade Agreement between the European Union and Canada, and an overview over the problem with BITs will also be given. The latter will be analyzed by comparing three Union acts, Directive 2004/38/EC, also called

the “Citizenship Directive”, Regulation (EU) 492/2011 on freedom of movement for workers within the Union, and Regulation 2016/589 on a European network of employment services (EURES), access to mobility services and the further integration of labour markets with the provisions of the Treaty of Rome. Furthermore, statistics will be analyzed in order to assess the policy’s impact on the situation of labor markets and labor migration in the EU.

The thesis will then proceed by analyzing two cases which can be described as failures, the abolition of the gender pay gap and the Brexit. The first policy had already been included at article 119 of the Treaty of Rome and its failure will be shown by distinguishing between the current *de jure* and *de facto* situations which show a clear discrepancy. Also in this case, statistics will be presented in order to sustain the point of the policy being a failure. Brexit, probably the greatest and most known failure of European integration since the Treaty of Rome, will then be analyzed by giving an overview of the case, its historic background and the context in which it manifested itself. The Chapter will also present an analysis of the current point of the Brexit negotiations and explain in a more detailed manner the different positions as well as the agreement on the question of citizens’ rights.

The thesis’ last chapter will regard a case that presents elements of both success and failure, that of human rights. The former elements will be shown by comparing the human rights provisions of the Treaty of Rome with the Charter of Fundamental Rights of the European Union, whose application will then be exemplified by analyzing the European Court of Justice’s judgment in joined cases C-293/12 and C-594/12 on the retention of data. Furthermore, reference will also be made to the infringement procedure against Poland launched by the Commission in July 2017. The elements of failure contained in the Union’s human rights policy since the Treaty of Rome will be illustrated by analyzing the European Union’s Refugee Deal with Turkey. This will be done by taking a quick look at the case through the official documents on the Joint Action Plan of October 2015, the meeting of the EU heads of state or government with Turkey in November 2015 and the EU-Turkey statement of 18 March 2016, the true Refugee Deal. The thesis will then present an overview of the various criticism that has hit the Deal since its conclusion. Two sorts of criticism will be analyzed: that regarding the way in which the Deal has come into being and that regarding its consequences in terms of human rights.

These policies and measures have been chosen because they represent different areas of the Union's competences: international economic relations with the common commercial policy, the Single Market with the free movement of workers, social policies with the abolition of the gender pay gap, the Union's general ability to maintain and improve the unity of its Member States with the Brexit and, last but not least, an area of upmost importance such as fundamental rights.

The conclusion of this thesis will then try to answer the question posed earlier in this introduction: What has prevailed in the process of European integration: success or failure? Or, in other words, should the project of European integration be more appropriately described as a success or as a failure?

Chapter I All Roads lead to Rome: The History of the Treaties of Rome

Table of contents: 1. The Schuman Declaration, 9 May 1950. – 2. The European Coal and Steel Community, 18 April 1951. – 3. The European Defense Community, 27 May 1952. – 4. The Messina Conference, 1 to 3 June 1955. – 5. The Spaak Report, 21 April 1956. – 6. The intergovernmental Conference on the Common Market and Euratom, 26 June 1956 to March 1957. – 7. The European Economic Community and Euratom, 25 March 1957.

Before analyzing failures and successes of the Treaty of Rome, we will take a look at the various steps that led to its birth on 25 March 1957 and one will notice that already the Treaty's history presents elements of both success and failure.

1. The Schuman Declaration, 9 May 1950

Even if the idea of a united Europe had since long been present in the thoughts of important political scientists, it was after World War II that it became concrete (Lauria 1996:3). Precisely, in the afternoon of 9 May 1990, when the French Foreign Minister Robert Schuman made a Declaration in the *salon de l'Horloge* of the *Quai d'Orsay*, the French Foreign Ministry (Brunn 2004: 71).

In this Declaration, he stated that "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity" (p.2). This required that the historical opposition between France and Germany would be resolved and any step towards a united Europe would have to start from these two countries. Therefore, he proposed "to place Franco-German production of coal and steel as a whole under a common higher authority, within the framework of an organization open to the participation of the other countries of Europe" (p.2). This would have represented the basis of common foundations for economic development which would be the first step in the federation of Europe. For Schuman, "this proposal [would have lead] to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace" (p.2). Therefore, he declared that the French Government was willing to open negotiations based on certain elements. The supply of coal and steel should be guaranteed on identical terms to the French and German markets, as well as to

those of other countries deciding to join them. Other elements were a common development of exports to third countries and “the equalization and improvement of the living conditions of workers in these industries” (p.2). The trade in coal and steel between the Member States would immediately be liberalized from all customs duties. According to Schuman, the common higher authority would be composed of “independent persons appointed by the Governments on equal basis” (p.3) and its decisions would have executive force in France, Germany and possible other Member States. This was a big step, since for the first time a supranational body would issue provisions binding for its Member States.

In order to be able to better understand Schuman’s Declaration, it is very useful to take a look at the circumstances and the historical context in which it was pronounced. First of all, it has to be clarified that the ideas exposed in the Declaration had not been Schuman’s but those of Jean Monnet, commissioner of the French “Modernization Plan” for the rearrangement of the French economy. He had seen the failed attempts of European integration following the end of World War II with the Organization for European Economic Cooperation, created in 1948, and the Council of Europe, established on 5 May 1949 (Fontaine 2000: 11). Both showed serious limits, since they allowed each state to pursue singularly the indicated goals but did not reserve themselves the power to coordinate the actions following from this (Lauria 1996: 5). The Council of Europe’s Assembly did only have deliberative powers and all its resolutions required a qualified majority of two thirds to be approved and could be blocked at any time by a veto of the Council of Ministers (Fontaine 2000: 11). Hence, the supranational element in both organizations was minimal, not to say nonexistent, and this was not what Monnet had in mind when talking about the “United States of Europe” (Thody 1997: 2). Monnet’s fundamental persuasion was that Europe would be created by modifying the economic conditions that determined the human behavior, thereby putting economic integration before and in function of political integration (Olivi 1998:37).

It were the peculiar historic circumstances that made the French Parliament’s acceptance of Schuman’s ideas possible. In 1950, the Cold War was already evolving and it was known to everyone that on 11 May 1950 should have started a conference between the Foreign Ministers of the three Western powers during which the American and British Ministers would have asked the elimination of the

delimitation of the West-German steel production of 11.1 million tons per year (Loth 2010: 352). Furthermore, there would have been discussions on a dilution of the restrictions on West-German sovereignty and pressures to use the potential of the newly founded Federal Republic of Germany, existing since 23 May 1949, for the military defense of the Western World. This meant that France was risking to lose control over West-Germany and, more important, over the Ruhr with its essential resources for the French industry. Moreover, an increasing competition in the export markets would cause the French coal and steel industry to be overrun by the cheaper West-German one. The latter facts menaced the bases of French Foreign and Security Policy which is the reason why the Schuman Declaration, just two days before the start of the conference, can be seen as a sort of "French action of self-defense" (Brunn 2004: 77).

Hence, the central motivation of the Schuman Declaration was the solution of the so-called German Question, to avoid at all costs and with all means Germany's return to power and further military attacks against the other European states, mostly France. To achieve this goal, French policy had made use of different instruments during the postwar period (Brunn 2004: 72-73). However, with the beginning of the Cold War, it was not possible anymore to base the security from Germany neither on a common control by the allied powers nor on a unilateral discrimination of the new Federal Republic. The Germans could ask a price for their new role as essential partner of the Western powers or even consider to ally itself with the Soviet Union, the key to German reunification. This is why the creation of supranational structures in Western Europe, at the end of the 1940s, became a question of priority (Loth 2007a: 39). But a European organization of any kind could not be fostered in France as long as the French industry was still afraid of being overwhelmed by the German economic superiority which for French industrialists was based on the fact that Germany was able to produce its steel at prices with which France could not compete. This explains the main points of Schuman's Declaration outlined above. Another, tacit, goal of the latter was to secure France's position as the "Grand Nation" with the purposed organization, since its authors knew all too well that Great Britain, because of its ties with the Commonwealth, would have never accepted a supranational authority, and a ostracism of Great Britain automatically meant the leading position would be that of France. Hence, the Schuman Declaration can be seen as a "continuation of national policy with European means" (Brunn 2004: 75-76). Another reason for France to

make its proposals was a crisis of overproduction in the steel industry in the same years, which destroyed the French plans of becoming the first European heavy industry power during reconstruction and bore the risk of a fast return of German industrial hegemony (Loth 2010: 352-353).

Everything has been said as far as the French motivations are concerned. The following paragraph will explain why Adenauer, the West - German Chancellor, immediately and "wholeheartedly" accepted Schuman's proposal when being informed of it in the morning of 9 May 1950 before its official annunciation in the afternoon (Brunn 2004: 79). "When the Federal Republic emerged in May 1949 […], it was still subject to numerous restrictions and controls. The Occupation Statute prohibited full responsibility for foreign affairs, defense or foreign trade, and ownership and decartelization of Ruhr industries" (Dedman 1996:63). Hence, the main reason for which Adenauer was happy to embrace Schuman's Declaration was the fact that it allowed the Federal Republic of Germany, for the first time since the end of World War II, to return to act as a partner *pari passu* at the international negotiation table and promised to guide it out of isolation. Furthermore, it meant to get finally rid of the International Authority of the Ruhr and its control over the Ruhr industries. This is why the German steel industry also accepted the French proposal (Brunn 2004: 80).

Hence, the history of the Schuman Declaration is first and foremost one of Franco-German relations, the history of a *de facto* peace treaty between France and Germany. However, it would not have been possible without the participation of the other Western European countries, but was also in their own interest. This was the case for Italy and the Benelux, although the former being intended to gain freedom of movement for its workers and a transitional period and Belgium to secure itself the right to subsidize its overage coal industry (Loth 2010: 355). The British answer, however, was negative. France insisted that before further negotiations with Great Britain the latter had to accept the principle of a supranational authority, while Great Britain clarified that it was not willing to go beyond the forms of international cooperation installed with the OEEC (Brunn 2004: 81-82).

In conclusion, Schuman's Declaration offered the solution for a series of problems: the necessity to foster international relaxation by inserting an organized Europe as an equilibrating element between the two blocks; to produce Franco-German reconciliation while at the same time guaranteeing the integration of the Federal

Republic; to organize the basic industries at European level avoiding the risks of cartelization and defining an integration method that was immediately realizable; and to create an organism with powers and able to provide a model for further efforts of European integration (Olivi 1998: 36). It can therefore clearly be seen as a success on the way to Rome and, in fact, after long negotiations, on 18 April 1951, France, Germany, Italy and the Benelux signed the Treaty of Paris, based on Schuman's proposals, establishing the European Coal and Steal Community (ECSC) which entered into force on 23 July 1952 (Thiel 1994 :16).

2. The European Coal and Steel Community, 18 April 1951

In the preamble of the Treaty establishing the ECSC, the participating states declare themselves to be "resolved to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts". Hence, the intention of the founding states was that of achieving political and cultural integration through and starting from economic integration. This is what characterizes the functional approach to integration, which envisaged a gradual integration in sectors or functions, especially of economic or commercial nature, convinced that at a certain point in the integrative process this would have led automatically to the creation of the necessary conditions for the transfer of political powers to a supranational authority (Mammarella, Cacace 2013: 39).

The Treaty is composed of four titles: The European Coal and Steel Community, The Institutions of the Community, Economic and Social Provisions, and General Provisions, containing 100 articles. Furthermore, it contains three annexes: Definition of the expressions "coal" and "steel", Scrap, and Special steels; and three protocols on Privileges and immunities of the Community, Statute of the Court of Justice, and Relations with the Council of Europe. Finally, it also includes a Convention on transitional provisions. Article two proclaims that the European Coal and Steel Community "shall have as its task to contribute, in harmony with the general economy of the Member States and through the establishment of a common market […], to economic expansion, growth of employment and a rising standard of living in the Member States." Article three provides for the tasks of the institutions of the Community, which are overwhelmingly economic or commercial in nature. Article four

gives an enumeration of elements “incompatible with the common market for coal and steel”, which should be “abolished and prohibited”, including the elimination of duties between the member state,s which is the characteristic element of a free trade area, as well as elements referring to common competition rules by prohibiting state intervention and certain restrictive practices. Article seven introduces the four institutions of the Community: High Authority, Common Assembly, Special Council of Ministers, and Court of Justice. It stipulates, moreover, that the High Authority will be assisted by a Consultative Committee.

The following articles, eight to 18, describe powers and composition of the High Authority, having the function of “guardian of the Treaty”. It is composed of nine, completely independent, members. Art.14 introduces the different sources of secondary law the High Authority has the power to issue: decisions, recommendations, and opinions. Decisions are binding in their entirety, while recommendations are binding only with regard to the aims to be achieved leaving free choice of the means to pursue them to their addressees, and opinions are not binding at all. This is a complete novelty, since never before had there been a European supranational institution capable of issuing norms that were binding for Member States, and represents the beginning of the development of a unique assemblage of common norms, the so-called *acquis communautaire,* which has to be integrated in the national laws of the member states and accepted by future ones previously to their accession. Art.18 establishes the Consultative Committee which should have between 30 and 51 members, representing in equal parts workers, producers, and consumers and dealers. Articles 20 to 25 regulate the tasks and composition of the Assembly, which has supervisory powers. Its members should be delegates of the Member States’ national Parliaments designated by the latter once a year between their members or elected directly by universal suffrage. However, there should have never been a direct election of the ECSC Assembly’s members, the first direct election being that of the European Parliament in 1979. Surely, the most important power of the Assembly is the possibility of a motion of censure on the activities of the High Authority which would oblige the members of the High Authority to resign as a body. It seems clear that the kind of institution described above had very limited powers and was not comparable at all with a democratically elected Parliament. The following articles, from 26 to 30, describe the composition and powers of the Council, which should exercise its powers “in particular in order to

harmonize the action of the High Authority and that of the Governments" (art.26). It should be composed of one member of each national Government of the Member States delegated by the latter as their representatives, and its Presidency should be held for three months by each member in turn, following the alphabetical order of the Member States. Article 31 to 45 regard the formation and powers of the Court, whose task it is to ensure that the law is observed when interpreting and applying the Treaty and the rules laid down for its implementation. It should be formed of seven Judges appointed by common accord of the Governments of the Member States. Member States and the Council could address the Court "to have decisions or recommendations of the High Authority declared void" (art.33). Furthermore, on application of an injured party, the Court could order pecuniary reparation from the Community for injuries caused by a wrongful act or omission on the part of the Community or from one of its servants for injuries caused by a personal wrong in the performance of his duties. This introduces the principle of extra – contractual liability of the Community as a supranational body. Art.41 gives the Court the right of sole jurisdiction for "preliminary rulings on the validity of acts of the High Authority and […] the Council". Moreover, "the judgments of the Court [should] be enforceable in the territory of Member States" (art.44). Just like decisions and recommendations, also this Court is a complete legal novelty, since its judgments would have an effect on the national laws of the Member States, a phenomenon which had never existed before.

Starting with art.46, the Title on Economic and Social Provisions begins. Art.49 empowers the High Authority to procure the necessary funds for carrying out its tasks; it would, therefore, be financially independent from contributions of the member states. As far as production is concerned, the High Authority had indirect means of action at its disposal, namely cooperation with Governments to regularize or influence general consumption and an intervention in regard to prices and commercial policy. The following article gives the High Authority the right to fix for "one or more of the products within its jurisdiction" maximum or minimum prices within the common market as well as minimum or maximum export prices. Art.65 prohibits all acts and practices "tending directly or indirectly to prevent, restrict or distort normal competition within the common market". Together with the following article making reference to the prohibition of the abuse of dominant position, and the next article, these articles represent the beginning of the common competition rules.

In fact, article 67 outlines the norms regarding “any action by a Member State which is liable to have appreciable repercussions on conditions of competition in the coal and steel industry”. Failed compliance with these provisions would eventually lead to the imposition of fines and periodic penalty payments by the High Authority. It becomes clear which great powers were attributed to the High Authority, even if limited to the coal and steel industry, and never again would another European supranational institution have these kind of powers. Art.69 invites Member States to “remove any restriction based on nationality upon the employment in the coal and steel industries of workers who are nationals of Member States and have recognized qualifications [in those industries]” and “prohibit any discrimination in remuneration and working conditions”. First steps towards the free movement of workers, one of the four freedoms of the common market that would be created with the Treaty of Rome. The last Chapter of Title Three, from articles 71 to 75, refers to the commercial policy. The first of these articles guarantees that the powers of member states regarding commercial policy should not be influenced by the Treaty. Art.72 provides for “minimum rates below which Member States undertake not to lower their customs duties on coal and steel as against third countries, and maximum rates above which they undertake not to raise them”. Hence, the Treaty did not provide for a common external tariff, the necessary element that distinguishes a customs union from a free trade area. Hence, the competences of the ECSC in terms of commercial policy were still very limited and, in any case, constricted to the coal and steel industry.

Starting with article 76, Title four on General Provisions begins. This article grants the Community in the Member States all privileges and immunities necessary for the performance of its tasks. Article 77 stipulates that the member states’ governments would determine the seat of the institutions of the Community by common accord. At the conference held on 23 July 1952, the founding states of the ECSC would choose Luxembourg as the provisional seat for its institutions, but Strasbourg for the meetings of its Assembly. Art.79 defines the Treaty’s territorial scope as the “European territories of the High Contracting Parties [and] the European territories for whose external relations a signatory State is responsible”. It further introduces the so-called ‘most favored nation clause’ by binding the Member State “to extent to the other Member States the preferential treatment which it enjoys with respect to coal and steel in the non – European territories under its jurisdiction”. Art.88 defines the

procedure in case a Member State fails to fulfil obligations under the Treaty and can clearly be seen as the precursor of the current article 258 TFUE on the infringement procedure. Art.97 specifies that the Treaty "is concluded for a period of fifty years from its entry into force". In fact, the European Coal and Steel Community ceased to exist on 23 July 2002. Art.98 gives the possibility to other states to apply for accession to the Treaty. However, an article that introduces the possibility to recede from the Treaty is missing. After art.100, follow the three annexes defining the different materials compromised under the jurisdiction of the Community.

The first of three protocols is that on the privileges and immunities of the Community, whose premises and buildings should be inviolable and whose property and assets should not be subject "of any administrative or legal measure of constraint without the authorization of the Court" (art.1). It also includes provisions on the immunities of the members of the Assembly (art.9), the members of the Council and their official attendants as well as of the members of the High Authority (art.11). The second protocol is that on the Statute of the Court of Justice and describes in detail its composition and procedure. The Judges enjoy the same immunities like the members of the High Authority (art.4). The protocol also introduces the roles of two Advocates – General and one Registrar by whom the Court should be assisted, and regulates their tasks. Art.38 regulates the terms in which revisions of a judgment are possible and articles 41 and 42 give special rules relating to disputes between Member States, which must be dealt with in plenary session. The last protocol regulates in six articles the relations of the ECSC with the Council of Europe.

The last part of the Treaty consists of a Convention on the Transitional Provisions, composed of three parts referring to the implementation of the Treaty, relations between the Community and third countries, and general safeguards. This protocol states that the Treaty should be implemented in two stages, a preparatory period and a transitional one. The former should last "from the date of entry into force of the Treaty to the date of the establishment of the common market" (art.1). The transitional period, on the other hand, "shall end five years after the establishment of the common market in coal" (art.1). The Convention also defines the establishment of the common market, which would be established "as effect is given to Article 4 of the Treaty", hence, the elimination of measures incompatible with the common market for coal and steel such as customs duties and quantitative restrictions. The first Chapter of Part Two concerns the negotiations with third countries, which should be

conducted by the High Authority for the member states jointly, in the area of "economic and commercial relations concerning coal and steel between the Community and these countries" (art.14).

After this summary of the Treaty establishing the European Coal and Steel Community, it is necessary to look at the single interests and gains of the six founding States in signing it. The biggest obstacle in the negotiations had been Monnet's supranational High Authority because especially the smaller States, particularly sensitive with regard to their sovereignty, opposed that institution which should issue decisions binding for the Member States. Under the leadership of the Netherlands, they insisted on a reduction of its powers and institutional counterbalances, enforcing the creation of the Council of Ministers. Also the Assembly was introduced only during the negotiation phase, in order to give the Community a political-democratic dimension and legitimation (Brunn 2004: 82-84).
Special provisions for the particular needs of every country were introduced. Italy could maintain its customs duties "to protect its small, high-cost steel industry within the Common Market" (Dedman 1992: 62). As far as Belgium was concerned, in order to allow the subsidy of the restructuring costs of Belgium's coal industry mostly from the Netherlands and Germany, with $45m between 1953 and 1958 and another $5m as export subsidy for Belgian coal, prices were set artificially high. Its high bargaining position between 1949 and 1951 allowed France to obtain "equal access to the Ruhr's resources within the Common Market and the end of dual-pricing and discriminatory freight rates" (ibid.). For Germany, the most important reason to sign the Treaty was the same one for which Adenauer had immediately accepted Schuman's Declaration: return to be treated equally and as a sovereign State at international level. Indeed, after the adoption of the Treaty on 18 April 1951, controls on the German steel industry were changed drastically ending most of the economic restrictions imposed by the Potsdam Conference in 1945. Britain did not participate in the negotiations for the reasons outlined in the first part of this chapter and an association agreement between the ECSC and the UK was signed only in December 1954 (Dedman 1996: 63-67). After the signature of the Treaty on 18 April 1951, the ratification phase started. Ratifications went fast and without obstacles in the Netherlands, Luxembourg and Belgium. In Germany and Italy the Treaty was discussed, but it was most heavily opposed in France, its country of origin. However,

the French government obtained a large majority of 377 to 233 votes in the National Assembly and the Treaty entered into force on 23 July 1952 (Mammarella Cacace 2013: 53).

According to a scholar, in 1958 the limits of the ECSC's powers were shown by the start of the first coal crisis. In fact, it did not have enough weight to pursue a supranational crisis management against the policies of the Member States which were still nationally oriented. Facing the growing overproduction of coal, some of the latter introduced import prohibitions in order to protect the national industries, also against member states and thereby contrary to the Treaty. However, even if limited in its policies of crisis management, the ECSC's existence has led to structural adaptations taking place in a European context and prevented the member states from returning into national foreclosure (Brunn 2004: 86-87). In fact, according to another scholar, "the ECSC proved as successful in its immediate economic objectives as it was to be in its long-term political aims" (Thody 1997: 3). Indeed, it guaranteed French access to the German coal deposits of the Ruhr and it put an end to the dual pricing system. Moreover, thanks to the elimination of all customs barriers between the six member states in the coal and steel industry, by 1958, the end of the transitional period, the trade in steel between them had increased by 151 per cent, in coal by 21 per cent and that in iron ore by 25 per cent. What was more important, in the context of European integration, was the model the ECSC offered and the way it enabled the solution or circumvention of other problems. In fact, politically it represented the starting point for the European Economic Community of 1958, since the single member states agreed to yield the management of important areas of what had until then be seen as their national economy to a supranational institution, the High Authority. (Thody 1997:3). The ECSC can therefore clearly be seen as a success on the way to Rome and from 1 January 1958 the ECSC's Assembly and Court became also those of the European Economic Community and the European Atomic Energy Community. This was true until 1967 when, with the Merger Treaty, all institutions of the three European Communities were merged (Brunn 2004: 87).

3. The European Defense Community, 27 May 1952

In June 1950, in the midst of the negotiations on the Schuman Plan, the Korean War broke out, making those negotiations more complicated. In fact, Germany saw its opportunity to arise in the European context without any supranational organization because German troops had become necessary for the defense of the West and, hence, its negotiating position hardened. To safe Schuman's idea, the French government, searching a solution, presented the proposal for a European army. A European Army presupposed a democratically legitimized political authority which could decide over its missions. Hence, an organization of that kind would represent another step towards a European federation. However, from a psychological point of view, the project was problematic because to renounce national sovereignty in the military area only to supply the Germans with weapons again was more than one could expect of the majority of the West Europeans only five years after the horrors of Nazism. Moreover, a great part of the latter did not even want a European autonomy in the defense area because for the protection from the Soviet Union they preferred as much American presence in Europe as possible (Loth 2007a: 40-41).

However, on 24 October 1950, René Pleven, then President of the French Council of Ministers, proposed to the French National Assembly the establishment of a European army. In his statement, he warned of the creation of a German army which would very probably lead to a renewed German militarism as well as distrust and suspicion. Therefore, he proposed a "European army tied to the political institutions for a united Europe" (p.3). He envisaged a European army built up of forces from the different European states that would put their human and material resources under a single political and military European authority, which should have a sole Minister of Defense appointed by the member Governments. Furthermore, that army would pool its resources from a common budget and Member States that already had a national army would retain their authority of the parts of the latter not incorporated into the European one. This also meant that the Federal Republic of Germany would not command any other troops beyond those integrated in the European army. On the basis of these proposals, the French Government invited Great Britain and the countries of continental Europe to join the creation of a European army in Paris, as soon as the ECSC Treaty would be signed.

To understand the French motivation behind the Pleven Plan, it is useful to take another quick look at the historical context in which it was presented. What made the Korean War the decisive element was the fear that the Elbe, the river dividing East and West Germany, could become another '38th Parallel', the Parallel dividing North and South Korea, with the worst possible scenario being that of a Soviet-East German invasion of West Germany (Dedman 1996: 71). In fact, the expansionist policy of Stalin in Central and Eastern Europe and the communist attack against South Korea convinced the main representatives of the Truman administration that it was necessary to proceed rapidly towards an inclusion of West Germany in the Atlantic military structure. For the United States, the easiest way to do so was to liberate Germany from the restrictions and limitations linked to the status of defeated and occupied country and to integrate it in the newly founded military organization of the NATO. However, in Europe the memories of the war were still vivid and the public opinion was divided; in favor of the American plans in Britain, against them in France. The French feared that the return of a strong German presence on the continent would have deprived France of the political and territorial advantages gained and assured through the German defeat (Mammarella Cacace 2013: 56-57). Another problem for France regarding German rearmament was that it jeopardized the Schuman Plan. In fact, through a defense contribution to NATO, West Germany would regain full sovereignty, be under American control and "less motivated to proceed with the Schuman Plan on the agreed French terms" (Dedman 1996: 73). Also in the case of the Pleven Plan the ideas of Jean Monnet played a significant role because he feared not only the Germans abandoning the idea of the ECSC, for the reasons mentioned above, but also the failure of the whole French master plan of granting Germany gradual admission, under French conditions, to a strong united Europe and thereby banning the German danger forever. In fact, with the positioning of German troops under NATO, West Germany would escape French control and end up under the influence of the United States. This is why Monnet passed his ideas on to Pleven who presented them to the French National Assembly on 24 October 1950 (Brunn 2004: 90). Starting from January 1951 there were parallel negotiations, on the Pleven Plan on the one hand, and the American model of a NATO integration on the other. For Germany, the American solution was of upmost priority because only that solution would have guaranteed immediate voice and equal treatment. The French tried tireless to convince the United States of the great value of their model,

and in July 1951 Monnet was able to convince Eisenhower, Supreme Commander of the NATO, that a overhasty creation of German troops was achievable only against the price of hostility between the populations and, anyway, not enforceable against Paris. This is when the Americans accepted that it should be negotiated only on a European Army and in September they obliged the Federal Republic of Germany to give in. In fact, German troops would not be built before the creation of a European army and Germany would regain its full sovereignty only after the signing of the Treaty (Brunn 2004: 93-94). The latter was signed on 27 May 1952 in Paris and composed of 132 articles and 12 protocols (Dedman 1996: 76).

Article one of this Treaty establishes a "European Defense Community, supranational in character, consisting of common institutions, common armed Forces and a common budget". Article two declares the objectives of the Community to be "exclusively defensive" and that "any armed aggression directed against any one of the member States in Europe or against the European Defense Forces shall be considered as an attack directed against all of the member States". This article resembles article five of the NATO Treaty, with the difference that in the latter each member state should assists the attacked member "by taking forthwith […] such action as it deems necessary […]" while the former obliges the member states to "furnish to the State or Forces thus attacked all military and other aid and assistance in their power". Article eight introduces the institutions of the Community: a Council of Ministers, a Common Assembly, a Commissariat and a Court of Justice. Articles nine to 18 regulate the European Defense Forces which should be built up of contingents placed at the disposal of the Community by the member States. Art.16 even stipulates that also the internal defense of the member states' territories would be the task of homogenous formations of European status. Art.18 is important because it states that the European Defense Forces should receive technical directives from the appropriate bodies of the NATO and that, during wartime, the full powers and responsibilities with regard to the Forces should be exercised by the competent Supreme Commander of the NATO.

Articles 19 to 67 describe the composition and powers of the Community's institutions. The first institution described is the Commissariat, which should have executive and supervisory powers and consist of nine members. Just like the ECSC's High Authority, the Commissariat had the power to issue decisions,

recommendations and opinions which had the same effects as those of the High Authority on their addressees. The second institution of the Community should be the Assembly which should be that of the ECSC, integrated by three members for both the Federal Republic of Germany and France, as well as for Italy. Beyond the motion of censure concerning the operations of the High Authority of the ECSC, the Assembly could also vote a motion of censure with regard to those of the Commissariat. Another important article, if not the most important with regard to European integration, is article 38. It states that, within six months of the date in which it has assumed its functions, the Assembly should submit a proposal to the Council regarding: "the creation of an Assembly of the EDC elected on a democratic basis; the powers which it might be granted; and the modifications which should be made in the provisions of the Treaty relating to the other institutions of the Community, especially with a view to safeguarding an appropriate representation of the States". The proposal should then be forwarded to the Governments of the Member States, which should then call a conference for the purpose of examining the proposals. The third institution was to be the Council, whose general task it was to "harmonize the actions of the Commissariat with the policies of the Governments of the member States" (art.39), just like the Council of the ECSC. However, the Council of the EDC had greater powers since it would be able to issue directives for the action of the Commissariat as well as decisions and concurrences "which the Commissariat should be bound to obtain before making decisions or issuing recommendations" (art.39). These last facts make it clear that the powers of the Council of the EDC, as an intergovernmental organ, would have been greater than those of the Council described in the ECSC Treaty. Hence, the degree of supranationality had already been reduced. The Council should be composed of one representative for each of the member states and its Presidency exercised "for a term of three months by each member […] in rotation in the alphabetical order of the member States" (art.40). The last institution regulated is that of the Court, whose function it was to ensure the respect of law in the interpretation and application of the Treaty and implementing regulations. The Court was meant to be that of the European Coal and Steel Community and its jurisdiction should regard appeals from decisions or recommendations of the Commissariat coming from a member state, the Council or the Assembly. The Court should also have jurisdiction with regard to appeals from decisions of the Council made by a member state, the Commissariat or

by the Assembly. Art.66 states that judgments of the Court should be enforceable on the territories of the member states but the execution of these judgments should be in accordance with the national laws of each state.

From article 68 to 82, the Treaty regulates the Military Provisions. Art.68 describes the organization of the Defense Forces in “basic units”, made up of men of the same national origins, and “Army Corps”, composed of basic units of different national origins. The Treaty also envisaged the creation of an Air Force and European Naval Forces. Articles 83 to 100 state the Financial Provisions. The Council should fix he contributions of the Member States as soon as the Treaty enters into effect and in accordance with the procedure adopted by the NATO. From article 101 to article 111, the Treaty describes the Economic Provisions. The first of these articles introduces common armament, equipment, supply, and infrastructure programs of the European Defense Forces which should be prepared by the Commissariat in consultation with the Member States’ governments. Article 106 also regulates a common program for scientific and technical research in military fields to be prepared by the Commissariat. Under article 107, the Treaty prohibits, inter alia, the production of war materiel and its import and export from or to third countries, but the Commissariat could authorize them under special terms. Articles 112 to 132 regulate the General Provisions, the last part of the Treaty. Art.116 grants the Community, on the territories of the member states, the privileges and immunities necessary to the accomplishment of its mission. Art.120 defines the territory of application of the Treaty as the European territories of the Member States. However, its Forces could be stationed, with the agreement of the NATO’s Supreme Commander, also in other territories, if included in the area defined in article six of the North Atlantic Treaty. Just like the ECSC Treaty, also the EDC Treaty would be concluded for a period of fifty years from the date of its entry into effect. Furthermore, art.129 gives any European state the possibility to accede to the Treaty. Like the ECSC Treaty, also this Treaty does not include a clause on a country’s eventual recession from it.

The first protocol added to the Treaty is the Military Protocol. As far as recruitment is concerned, the Protocol regulates that all male citizens of the member states should be subject to military service, the only exceptions being physical, mental or moral

weaknesses and those provided for by the Member States' Constitutions[2] (Brunn 2009: 94). The second protocol is the Financial Protocol, whose titles regulate the preparation, content and execution of the common budget. Annexed to the Treaty there is also a second Treaty between the United Kingdom and the member states of the European Defense Community in which the former extends the guarantees of assistance against aggression provided in Article IV of the Brussels Treaty of 17 March 1948 to the relations between the United Kingdom and the Member States of the EDC. The Brussels Treaty established a collaboration in economic, social and cultural matters and a collective self-defense between Belgium, France, Luxembourg, the Netherlands and Great Britain. This Treaty is followed by an Additional Protocol regulating that any armed attack on a NATO member in the area defined in article six of the North Atlantic Treaty, or on the forces of any of its Parties when in the latter, should be considered an armed attack against the member states of the EDC. The opposite would be true for an attack on an EDC member or its Forces. An interesting provision is that contained in the Convention relative to the status of European Defense Forces and the tax and commercial regime of the EDC. In fact, it exempts the members of the European Defense Forces from all passport and visa formalities. The only documents required of them should be two documents issued by the authorities of the European Defense Forces: a personal identity card and an individual or collective permit, whose headings should be printed in German, French, Italian, and Dutch. This could have been an important step towards the unification of the European populations giving them one single type of document, even if limited to those part of the European Defense Forces.

It is important to go back to article 38, which attributes to the Assembly the power to submit a proposal to the Council regarding: the creation of an Assembly of the EDC elected on a democratic basis; the powers which it might be granted; and the modifications which should be made in the provisions of the Treaty relating to the other institutions of the Community, especially with a view to safeguarding an appropriate representation of the States. It had been proposed by Alice De Gasperi, then Italian Prime Minister and convinced European federalist, at the Council of Europe in Strasbourg on 10 December 1951. Some weeks later, the ministers of the six negotiating countries, added another note to the "EDC dossier" by approving a

[2] See art.12(1) "All male citizens of the member States shall be subject to military service unless physically, mentally or morally unfit, and except as provided in the Constitutions or laws of the member States."

document in Paris, which included that: The ministers, developing the suggestions of the Italian Prime Minister during the reunion of Strasbourg, have decided to attribute to the Assembly of the EDC the responsibility to study a European organization, of a federal or confederal character, which should substitute the organization at the right moment defined by the Treaty (Mammarella, Cacace 2013: 66-67). After the signing of the Treaty on 27 May 1952, it became clear that in France there would be no ratification before the clarification on a future European statute or supranational political structures. This is why the Foreign Ministers attributed the working out of a draft for a European Political Community to the Assembly of the ECSC, on the basis of a proposal by De Gasperi and Schuman. This meant that a central provision of the Treaty should be implemented even before the ratification of the latter. Hence, the ECSC's Assembly constituted itself as an Assembly ad hoc of the European Defense Community, adding nine further members, and started working in order to present a proposal within March 1953 (Brunn 2004: 95). On 25 February 1953, the Assembly presented its statute for a European Political Community. The latter would have had competences for the general problems relating to international relations and defense, and would have provided for a coordination of the economic and financial policies of the Member States. In foreign policies, an executive Council would have acted as a common agent for the Member States, carrying out the functions of a true "European government", even if with the assistance of a Council of Ministers of the Member States. The European Parliament would have been composed of a Chamber of deputies, 268 elected through direct universal suffrage for five years, and a Senate, with 87 senators elected for five years by the national Parliaments. The laws would have been voted by a simple majority (Mammarella, Cacace 2013: 70). The draft also included a Court of Justice and an Economic and Social advisory Council. Furthermore, the institutions were intended to launch the realization of a European Common Market once the national policies would have been coordinated (Olivi 1998: 43). The EPC project was approved by the Assembly ad hoc with 50 votes in favor and 5 abstentions, and, on 10 March 1953, passed on to the governments of the Six by its President Paul-Henri Spaak, so each could proceed to its ratification (Mammarella, Cacace 2013: 70). However, that Treaty would never be ratified, being rejected by the French Parliament on 30 August 1954, and condemn to failure also the most ambitious project of European political integration until then.

There are different interpretations of the causes for the failure of the EDC and with it of the EPC. According to a scholar, there are two main reasons to which a third can be added. The first reason is that those French politicians, who would have wanted Great Britain to be part of the Communities, especially the Socialists, often were not able to prioritize in time. The thoughtfulness for Great Britain, still hoping to be able to convince the latter, with a dilatory policy consciously postponing the supranational question, for the project of a Community, had already played a great role during the time of concentration on the Council of Europe. The second obstacle originated from the fact that the government of the Netherlands insisted on linking the European Political Community to a Common Market (Loth 1995: 197). However, the French would not accept a Common Market because of the dramatic deficit in its balance of trade. They did not retain the French industry was ready for a competition with the industries of the other member states (Brunn 2004: 96). The third reason, according to the same scholar, was a development on the outside of Europe, the “New Look” in the American Defense policy. The latter consisted in the inclusion of nuclear weapons in the strategic planning of the United States for Europe, more openly discussed from autumn 1953. On the one hand, the tendency of the United States to reduce their presence in Europe, let the French shrink from accelerating the feared disengagement with the creation of a European army. On the other hand, the increasing fallback to nuclear weapons by the American ally created in the French the need to become a nuclear power themselves. Since nobody could imagine to share the responsibility for nuclear weapons with the Germans, these thoughts necessarily led to the wish for a national nuclear force; and in this perspective the EDC seemed the instrument of American hegemony. Furthermore, if France would become a nuclear power but Germany would remain limited by the restrictions imposed by the Treaty of 26 May 1952 , then France would have a military advantage which made a supranational orientation of the defense system, at least in this regard, superfluous. As a consequence, the integration of Germany into the NATO seemed to the French military the lesser evil (Loth 1995: 199-200).

According to other scholars, the reasons for the failure were slightly different. According to them, the first reasons had been the death of Stalin on 5 March 1953, only five days before the project of the EPC was approved by the Assembly ad hoc. His successor became Malenkov and Khrushchev was secretary of the Communist Party of the Soviet Union. The general perception was that of a relaxation of the

international tensions and this reduced the interest in a European Community. The return to power of the Republicans in the United States, at the end of 1952, after 20 years, is what they see as another element of complication. The problem was the complex and grouchy character of the new Secretary of State John Foster Dulles, far from the diplomatic flexibility of his predecessor, Dean Acheson. However, the real and insuperable obstacle for the ratification of the EDC Treaty were the uncertainties, ambiguities and oppositions in those countries which had supported it the most, Italy and France. In Italy the ratification of the Treaty was linked to other hot arguments of Italian foreign policy, in particular the question of Trieste and the colonies. At the end of January 1953, the attention of the Parliament and the parties had passed on to the reform of the electoral law with the elections planned for June 1953. This reform made De Gasperi's government fall and he disappeared from the scene. His successors Pella and Scelba, however, adopted a more coherent orientation: attending the French verdict (Mammarella, Cacace 2013: 69-72).

Some reasons for the failed ratification of the Treaty by France have already been outlined above. Furthermore, there was a strong argument used by the EDC's opponents, namely that it was not very reasonable for France to deprive itself of military autonomy in a moment in which the colonies most far away were insurrecting and the closer ones were not safe anymore. Hence, the reason for the EDC's failure could also be seen in the historical impossibility in realizing a European political unity, of which a France still at the beginning of the process of decolonization and the new democratic Germany should have been protagonists, while the memories of war were still too recent to make a "fraternal army" possible (Olivi 1998: 44). Other problems for the French directly regarded the provisions of the Treaty itself. It was article 43 that the French disliked the most because it distributed members' votes on the basis of their contribution to the EDC and, therefore, more men meant more votes. Unanimity was required only for key matters, instead simple or qualified majorities defined by the article applied to day-to-day business. Due to the demand on French troops because of its colonial war in Indo-China, France decided to reduce the number of units to ten in February 1952. This would have caused France to have an inferior number of votes than Italy and Germany with 12 units each and would have meant that West Germany would have dominated the EDC, given its military expertise and the restoration of its economic strength from 1950 on (Dedman 1996: 81-82). Then, in June 1954, government passed in the hands of the radical socialist

Pierre Mendès-France who in August 1954, went to Brussels to obtain new modifications of the EDC Treaty. The European partners remained astonished and disconcerted by the amplitude of the demands which regarded nearly all points of the agreement. In particular, Mendès-France asked for a postponement of eight years for the entry into function of the supranational institutions, a period in which every member state would have maintained the right to veto, and a limitation of the integration of the European Forces to the German territory only. Americans and British exercised heavy pressures on the European allies in order to make them reject these requests and this is what they did. Finally, on 30 August 1954, the last act of the EDC's history took place in the French National Assembly. Instead of debating and voting the Treaty article by article, the French Parliament rejected the Treaty on the basis of a procedural question. The opponents, answering to a motion of the supporters to postpone the discussion, presented a point of order (question préalable) to an independent deputy from Algiers. If that would be approved, the debate would have been updated and the Treaty rejected. It was approved with 319 votes in favor and 264 contrary (Mammarella Cacace 2013: 75-76).

It is useful to take a quick look at the British position because, as with the ECSC, the British decided not to participate in a European Defense Community. This was, first and foremost, due to the British fear of a withdrawal of the American forces from Western Europe once the latter would be capable of self-defense. Britain's policy, after World War II, had been based on achieving and keeping a permanent presence of the US military in Western Europe and it would, therefore, not support anything that could reduce this essential US commitment in any way (Dedman 1996: 78-79). However, the proposal for an alternative to the failed EDC came from the British Foreign Minister, Anthony Eden. On a conference in London, from 28 September to 8 October 1954, between the Six, Great Britain, the United States and Canada, he presented his alternative plan that would have solved Europe's security problems. Eden proposed to extend the Brussels Pact of 1948, mentioned above, to the participation of Italy and Germany. In this way, German sovereignty would be recognized and the conditions for its admission to NATO would be created. The reaction of the European partners to Eden's proposal was positive and during the next conference in Paris, from 21 October to 23 October 1954 , the new agreement was drawn up. This is how the Western European Union was born, originating from

the extension of the Brussels Pact. It included the creation of a unitary military structure as well as the establishment of a Council of Foreign Ministers, representing the governments, acting unanimously. Germany regained its sovereignty in toto but had to commit to create an army of twelve divisions, an air force of 75.000 men and a naval force of 25.000. Furthermore, because of being a strategically exposed region, it accepted to fabricate neither nuclear nor chemical or bacteriological weapons. What was new about the Western European Union was the return of Great Britain on the continental scene, becoming author and guarantor of an agreement, that, at least in the part, should calm the French public opinion against the risks of the German rearmament (Mammarella, Cacace 2013: 81-82). “By 5 May 1955 the ratification process was completed […]. West Germany attained full sovereignty, with the termination of the last vestiges of the allied occupation regime, and the new Bundeswehr entered NATO” (Dedman 1996: 90).

In conclusion, the end of the project of a European Defense Community can clearly be seen as the biggest failure in the history towards the Treaty of Rome. However, it might simply have been too ambitious only five years after the end of World War II, since its consequences were still too vivid in the minds of the European peoples. The same might be true for the European Political Community linked to it, given its strong supranational character and the reluctance of many countries to give up sovereignty. However, their elaboration also showed that the will for a European unification existed and the European solution to their failure, the Western European Union, represented a consolidation of the European alliance on the basis of which the project of European unification could be carried on.

4. The Messina Conference, 1 to 3 June 1955

However, who had thought that, with the failure of the EDC, a new Europe of Seven could rise, less ambitious regarding its objectives but strengthened by the presence of Great Britain, was disappointed. Jean Monnet was one of the first to notice due to the useless attempts of convincing the British to develop closer relations in the sector of coal and steel going beyond the simple agreement of association with the ECSC, signed in December 1954, and he started to think about relaunching the structure of a Europe of the Six (Mammarella, Cacace 2013: 84). His idea of a European

collective commercial development of atomic energy followed his functional or sectorial orientation, like the ideas for the ECSC and the EDC, and therefore envisaged further European integration, but limited to the field of atomic energy. Anyway, in the mid-1950s, such an idea was an attractive prospect since it would enable Europe to reduce its dependence on Middle East oil and American coal. (Dedman 1996: 98). Moreover, in a world where the memory of the nuclear apocalypse in Hiroshima and Nagasaki was still dramatically vivid, a common action for the pacific use of nuclear energy could have had a big psychological impact. It would also have been a means to prevent the development of a German atomic industry, which would have been possible despite the constraints imposed by the WEU Treaty since they concerned only the military and not the civil use of nuclear energy (Mammarella, Cacace 2013:85).

Just like with the Schuman and the Pleven Plan, Monnet needed an esteemed and strategically placed politician who would be willing to adopt his ideas and to put them into practice. Due to the EDC's failure, he did not search him in France and instead decided to present his ideas to Paul-Henri Spaak, the Belgian Foreign Minister. The latter followed Monnet's instructions and at the beginning of April wrote 1955 a letter to his colleagues in which he suggested to continue fostering the European unification by extending the competences of the ECSC to other sources of energy, mainly atomic energy, and to transportation (Brunn 2004: 101). However, other European politicians did not support the sectorial/functional theory anymore and Jacques Beyen, the Dutch Foreign Minister, already in 1952 had proposed the formation of a common market (Dedman 1996: 98). Hence, Beyen welcomed Spaak's initiative but opposed the sectorial integration. He, therefore, succeeded in convincing his Luxembourgish colleague, Joseph Bech, and also Paul-Henri Spaak to take a common initiative, and on 18 May 1955 they adopted a joint memorandum which was sent to the Federal Republic of Germany, France and Italy two days later (Brunn 2004: 102).

In the memorandum, Benelux declared that the creation of a united Europe had to be pursued through the development of common institutions, the gradual melting of the national economies, the creation of an extensive Common Market and the gradual harmonization of their social policies. Their first proposal was to extend the expansion of their common basis for the economic development to transportation and the peaceful use of atomic energy. Moreover, they declared the allocation of greater

amounts of energy at reduced costs for the European economy as an essential element of economic progress and invoked taking all necessary measures for the development of an exchange of gas and electric energy. The development of atomic energy for a peaceful use, would, in their opinion, open up the prospect of a new industrial revolution. Therefore, the Benelux were in favor of creating a common organization which should obtain the power and the means necessary for the development of atomic energy for a peaceful use. Their second proposal was the realization of an Economic Community based on a common market which was to be realized through a gradual elimination of customs duties and quantitative restrictions. This presupposed the creation of a common authority which would be assigned with the necessary powers for the achievement of this goal. Their third proposal regarded the social area in which they retained it to be imperative to gradually synchronize the existing national regulations.

The reaction of the three addressees to the Memorandum was restrained. The Italian government was exclusively interested in a political integration and also the German chancellor Adenauer was afraid that economic interests, that would paralyze each other, would destroy the project of political unification that was of significantly greater importance to him. Nor could the economies and economic politicians in France and Germany warm to the European Economic Community. As far as atomic energy is concerned, the French government was in favor of a European Community in order to open up the access to the German potential for its own industry. However, it would support such a project only if it guaranteed exclusive national responsibility for future French nuclear weapons. Franz Josef Strauß, on the contrary, German Special Minister and from October 1955 Minister for Nuclear Energy, did not want a European Community but instead preferred to develop the German nuclear industry in collaboration with the Americans and British, who were technically very advanced compared to the European states. However, for Adenauer, Germany could get rid of its demons of the past only through a deepened link to the Community of Western European States and he was convinced that this was essential also for security reasons. He was still hunted by the thought the Americans could search an agreement with the Soviet Union and withdraw their troops from Europe. For the other European states, a strengthened European Community would integrate the newly powerful German state further and protect them from a possible return to

nationalism and consequent conflicts. Hence, the political argumentations prevailed over the economic doubts in France as well as in Germany and the governments decided to discuss the Benelux' proposals at a joint conference (Brunn 2004: 102-104).

This conference took place in Messina from 1 to 3 June 1955, on a request of the Italian Foreign Minister Marino. The delegations were accommodated in Taormina, and beyond Marino participated the French representative Pinay, the Belgian Spaak, the Dutch Beyen, the Luxembourgish Bech and the German representative Hallstein. Two were the tendencies that immediately emerged during the conference: one was represented by Pinay, who was in favor of a gradual sectorial integration of the economy of the Six, and the other supported by the Benelux and Hallstein, in favor of a horizontal, global integration of the European economies. The Italian delegation immediately decided to support the horizontal integration. The Resolution adopted by the participants was based on the Benelux Memorandum but included some other elements (Mammarella, Cacace 2013 85-86).

In fact, it added the necessity for: measures for the gradual unification of customs systems in regard to third countries, the gradual introduction of freedom of movement for workers, rules ensuring the full play of competition in the common market and the appropriate institutional means for the realization and operation of the common market. This last point explains the absence of the nomination of a Community earlier in the text while the first point represents the step towards a customs union. Furthermore, the Resolution included the examination of the creation of a European investment fund used "for the common development of Europe's inherent economic potentialities and […] the development of the less favored regions of the participating countries"(p.3). Just like the Memorandum, the Resolution stated that the governments have decided to convene a conference or conferences "for the purpose of drafting the relevant treaties or arrangements" but what was new was that "these conferences will be prepared by a Committee of government delegates assisted by experts under the chairmanship of a leading political figure whose task it will be to coordinate the work to be undertaken" and that the Resolution did not mention the participation of other states beyond Great Britain (p.3).

“Messina in ‘Euro-mythology’ is regarded as the starting point for ‘la relance européenne’ after the EDC’s collapse and the birthplace of the Common Market” (Dedman 1996:99). This means that Messina clearly has to be seen as a success on the way to Rome. In fact, between the proposals made, all countries had put their ideas and interests: the Benelux and Germany the Common Market, France the harmonization of social policies and Italy the common institutions. The proposed committee was put under the chairmanship of Paul-Henri Spaak and started its work in Brussels on 9 July 1955 (Brunn 2004: 106-107).

5. The Spaak Report, 21 April 1956

On 29 November 1955, the government of Faure lost its majority in the French National Assembly and Spaak took the opportunity to postpone the negotiations within the committee because of the contrasts between the French and German representatives that seemed insurmountable. The French were extremely worried to expose their economy to the unlimited competition of a common market. At the same time, during the modernization, important social benefits had been achieved which those who profited from them did not want to sacrifice for the return to liberal principles. This was why the French representatives opposed the request of Germans and Dutch for a binding timetable for the complete elimination of trade barriers and the development of a common customs and trade policy. To the contrary, the French insisted on a flexible reaction to the cyclical development, the harmonization of social costs and a common investment fund, which would facilitate the catching up of backward branches and regions. However, these were ideas that German economists regarded as sins against economic rationality. The German representatives, on the other hand, showed little tendency to approach the Atomic Community demanded by the leader of the French delegation Félix Gaillard (Loth 2007b: 313-314). Even when the German delegation accepted the proposal of an investment fund, the French continued to oppose the introduction of a binding schedule for the creation of the common market in three stages of four years each. The breakthrough in the negotiations was reached only when, on 19 January 1956, Adenauer had instructed his Ministers, with reference to his guideline setting competence, not to let the negotiations fail, and the French President Coty, on 31

January, had nominated Guy Mollet as Faure's successor, a politician who was interested in the success of the Messina project (Loth 1997: 2). The fact that Mollet became the new Prime Minister in France also had to do with the crisis in the negotiations. Mollet knew that overcoming the European crisis was the most important task of his government and did his best to be prepared. The strategy, which his team developed in the situation, was to insists on the conclusion of the Euratom Treaty to achieve, then, based on this success, a change in the French public opinion in favor of the Common Market. However, this strategy could not be implemented without making concessions. The German negotiators insisted on a package deal: if the Atomic Community should be established, then the same should be true of the Economic Community. Hence, on the conference of Foreign Ministers of the Six, in Brussels on 11/12 February 1956, Pineau had to accept the preparation of a recommendation for the Common Market. However, he was able to successfully convince his German colleague, Heinrich von Brentano, to accept the preparation of a recommendation for the Atomic Community and on 21 April 1956 the report of the Spaak Committee could be submitted to the governments of the ECSC Member States (Loth 2007b: 314-316).

The report was 112 pages long and divided into three parts: The Common Market, Euratom and Sectors calling for urgent action. In the introduction to the first part, the delegates explained that Article XXIV of the GATT "allows exceptions to the application of the most-favored-nation clause for countries proposing to form among themselves a free trade area or a customs union". However, they were convinced that the creation of a free trade area between countries with common frontiers would be faced with nearly insurmountable practical difficulties, and this was the case on the European mainland. The delegates, therefore, proposed the establishment of the common market in the form of a customs union. In that case, the GATT required that three conditions were satisfied: the removal of customs barriers should apply to the greater part of all trade between the member states of the union; the customs union should be set up within a reasonable space of time; and, "the overall incidence of the common tariff should not be greater than that of the separate tariffs it replaces" (p.15). The delegates proposed that the establishment of the common market should be completed in three stages, each lasting four years. Furthermore, in the last part of the introduction, the delegates suggested the establishment of four separate

institutions. The first institutions would be a Council of Ministers, through which consultation between the governments with a view to coordination of general policy between themselves and with the Community would take place and through which the Governments would take joint decisions. A European Commission, whose chairman and members would be appointed by common agreement between the Governments, should be the second institution. It should be responsible "for ensuring implementation of the treaty and the operation and development of the common market" (p.18). The third institution was to be the Court, which would be that of the ECSC and would have jurisdiction over "complaints concerning infringement of the treaty by Member States or individual firms and over appeals against the decisions of the European Commission" (p.18), which it could annul but did not have the power to issue a different decision. The Common Assembly of the ECSC, which should exercise parliamentary control, was the last institution proposed. The Commission should be responsible to the Assembly and the latter should have the power to pass a vote of censure. The Assembly should also have the function of approving the general decisions of the Commission. Beyond these institutions, the delegations proposed the creation of an independent investment fund.

Following this dense introduction, the first Part consisted of three Sections: Merging the Markets, A policy for the Common Market and Development and full utilization of European resources. The first Section's first Chapter concerned the customs union and started with the abolition of customs duties. This abolition should have proceeded simultaneously over the whole range of production and the initial reduction of the current duties in each country would be done at regular intervals by an equal percentage. In the later stages more flexibility would be allowed by making the amount of reduction apply as an average over groups of products, which should be composed by classifying products in each country by reference to the rate of duty they bear. The second part of this first chapter regarded common external duties and explained that the requirement of the GATT regarding common tariffs in customs unions mentioned above meant that "the overall total of duties payable under a common tariff shall not represent a higher percentage of the value of imports into the union than the total of the duties formerly imposed by the member states compared with their total imports", but did not prescribe any particular method of calculation (p.23). In order to respect this requirement, the method proposed by the delegates

was to take the arithmetical mean between the existing duties, to fix maximum rates at different levels for raw materials, semi – finished and finished goods, and to substitute, “in the calculation of the average, these maximum figures for any duties which exceed them” (p.24). The delegates asserted that it would be essential that negotiations with third countries be conducted in common. The European Commission would assume the responsibility for them, receiving its instructions from the Council. The second Chapter of the first Section regarded quotas and started with disciplining import restrictions. The delegates explained that the OEEC’s system “is to remove quotas on one product after another, the project being gradually to reach a certain percentage of imports from the other member countries of the OEEC” (p.28). As far as the European Economic Community is concerned, it should adopt this system for the abolition of quotas during the first reduction of customs duties and afterwards quotas should be raised each year on the whole range of products. Export restrictions should also be eliminated. At the end of the transitional period, “export restrictions imposed in conformity with international agreements should apply only to the community as a whole in its relations with third countries” (p.31).

The first Section’s third Chapter concerned services, for which, after the end of the transition period, common regulations should prevail (p.33). The fourth Chapter of the first Section regarded agriculture, an argument not included in the resolution of the Messina conference. However, the delegates of the Spaak Committee decided to include it into their report because they were convinced that “it is impossible to conceive a general common market in Europe that does not include agriculture” (p.35). Hence, all the provisions made for the other sectors should apply also to the agricultural sector. Furthermore, the delegates proposed a common agricultural policy. As far as the common agricultural market is concerned, isolated regulations which vary from country to country, by the end of the transition period, should not exist anymore, neither within in the market nor in its external relations. However, the final system established for agriculture would not be the same for all products. For example, it should be possible to introduce subsidies to overcome the difference between the prices of raw materials in the common market and world prices.

Section II regarded a policy for the common market and its first Chapter concerned competition. By the end of the transition period, anti-dumping legislation should be uniform “for the whole of the countries of the common market in their relations with

non-member countries" (p.44). The delegates suggested that the Treaty should include measure to prevent: any distribution of markets by agreement among enterprises, agreements to restrict production or limit technical progress, monopoly or partial domination of the market for a product by a single enterprise. As far as government assistance is concerned, it would be incompatible with a common market in specific cases and it would be the task of the Commission to decide on the compatibility of a particular government assistance with the common market. Chapter two of Section II regarded the correction of distortions and harmonization of legislation. In order to guarantee a smooth working of the common market, deliberate and concerted action should be directed towards "correcting or eliminating the effect of specific distortions which militate for or against certain branches of economy" (p.50). As far as the unification of systems of taxation or social security systems is concerned, it is not regarded by the delegates as an absolute condition for the establishment of the common market. However, such unification would dispose of serious obstacles to the free movement of goods and persons and decisions in this sphere would have to be taken unanimously. The second Section's third Chapter proclaimed the delegates' proposals for the regulation of transport. Here, they suggest changes in freight charges and conditions for international traffic, necessary for the function of a common market; the elaboration of a common general transport policy; as well as the development and financing of investments of European interest. Furthermore, an extension of the infrastructure would also become necessary, given the increase of commercial traffic. The fourth Chapter concerned the balance of payments, and for the delegates, closer cooperation between the central banks of Member States would facilitate the maintenance of equilibrium in the balance of payment of each Member State, ensuring which would be most important for the efficient working of the common market. In this Chapter, the delegates also propose that with the firm establishment of the common market, the Community should pursue a common trade policy and conclude common trade agreements. Furthermore, "short-term action […] will also have to be undertaken in common" (p.62). Finally, a common trade policy would inevitably lead to converging attitudes in international monetary relations.

The first Part's last Section regarded the development and utilization of European resources and its first Chapter contained the delegates' proposals for an investment fund. The latter should have assured capital of its own and be "capable of operating

on European and international markets as a borrower of the highest standing" (p.64). Chapter two of Section III concerned the retraining of workers, whose purpose was to facilitate conversion of industry made necessary by economic progress, and it could also help to raise the standard of living of workers and increase productivity in Europe. The delegates proposed to establish a retraining fund which would be financed by contributions from member states. The third Section's third Chapter outlined the delegates' suggestions for the realization of the free circulation of manpower. For this aim, three general economic conditions should be sought: the conversion or creation of new opportunities of employment and the common development of underdeveloped territories; a clear understanding of what is meant by free circulation; and the realization of a situation where "on the one hand, any discrimination between national and immigrant workers is forbidden and, on the other hand, legislative measures or trade union activities fundamentally preclude any lowering of wages" (p.75). Chapter four contains the delegates' proposals for the regulation of the free movement of capital. The principle to be adopted was that of ensuring completely free movement of capital within the Community by the end of the transition period at the latest.

After this, Part two on Euratom started with an introduction, in which the power of the atom is described as a "vital source" that would be at the basis of a new technical revolution. Therefore, delegates declared that it was indispensable to concentrate the entire effort of the European partners on the peaceful use of atomic energy. Furthermore, safety measures protecting the workers and the general public should be introduced and the use of nuclear materials for other than the purposes intended precluded. A pooling of resources and knowledge through a common Organization was necessary. Moreover, the delegates retained it necessary to create a purely European nuclear industry, in order not to be relegated to a subordinated status in relation to the leading atomic powers. This organization would make use of the Council of Ministers, the Assembly and the Court of the Economic Community and would obtain a European Atomic Energy Commission, established on similar lines to the European Common Market Commission.

The first Chapter on Euratom regarded research and the exchange of information. The delegates proposed the creation of a research center and various training centers for specialists. The second Chapter contained the delegates' proposals on security standards and controls and suggested that basic principles should be laid

down in an annex to the Treaty. On this basis, the Commission should then work out binding minimum standards covering requirements for plant as well as for the storage, transport, and treatment of nuclear materials and fuels. Chapter three of the Part on Euratom regarded investments and common installations. The fourth Chapter on Euratom concerned the supplies of ores and atomic fuels and proposed that uranium 235 would either be produced in a jointly-owned isotope separation plant or imported from other countries. Prices would be subject to an objective authority and commercial negotiations through producers should be supplemented by political negotiations through Euratom. A Supply Agency would be established, in order to carry out its supply work; it would be financially independent but directly responsible to the Commission. In Chapter five the delegates declared it to be a *sine qua non* of the extension of nuclear activities in Europe that there should be a common market for nuclear materials which would then eventually be integrated in the general common market. The sixth Chapter regarded institutional aspects: the delegates' proposed that the day-to-day management of Euratom be entrusted to a permanent body, a European Commission. The Council, on the other hand, would "have a say in all problems of general policy as well as in certain decisions" (p.100).

With this, the Part on Euratom ended and Part three on "Sectors calling for urgent action" began. Its first Chapter regarded energy and stated that, beyond the production of coal and steel pooled with the creation of the ECSC, member states should extend the economic integration to the remaining forms of energy, especially the transport and distribution of gas and electricity. Chapter two concerned air transportation, while the last Chapter contained the delegates' proposals on postal and telecommunication services.

In all this Great Britain did not play a role – again. Its representatives had been invited by the Resolution of the Messina Conference to participate in the intergovernmental committee but the British Government only sent an observer, who left Brussels in November 1955 after Spaak had communicated him that he would not have much to stay in the drafting of the final report. The reason why Great Britain did not participate was that, in 1955, for the British government a greater engagement in Europe was not seen as appropriate for the world power it still believed to be. However, at the time of his return, the warnings of the British observer started to be heard in London and the officials of the British Ministry of Economics did

not completely exclude anymore that a customs union could form between the Six. Therefore, they started to worry about an exclusion of the British products from the common market, while the officials of the Ministry of Foreign Affairs feared a degradation of the OEEC and the British leading role institutionally granted therein. Hence, in November 1955, the British government passed to the open attack sending two communications to Bonn and Washington, in which Foreign Minister McMillan argued that the project of the Common Market went against free global trade and would, in case of its realization, divide Western Europe economically and politically. Therefore, the British government proposed to transfer the negotiations between the Six into the framework of the OEEC in order to negotiate the steps towards the global liberalization of trade in a bigger context. The tacit goal behind this move was to let the initiative, born in Messina, die in the OEEC. In Germany, the Ministries of Economics and Atomic Energy welcomed the communication from London but, as illustrated above, in January 1956, Adenauer would instruct his Ministers, with reference to his guideline setting competence, not to let the negotiations fail and to foster integration, initially between the Six, with all possible methods. Nor did the British government find support for its attempt in preventing the customs union and the Common Market between the Six in Washington, where it was rejected by Foreign Minister Foster Dulles, who thought the integration of the Federal Republic in the West to be extremely important (Brunn 2004: 108-110).

The reactions to the final report of the Spaak Committee were different. The governments of Italy and the Benelux accepted is as the basis for intergovernmental negotiations, while in the German Parliament it caused another debate on principles and in France it encountered reserves. However, in Germany, Adenauer and Foreign Minister von Brentano were able to stand up to the Ministers of Economics and Atomic Energy and the Government declared itself to be willing to engage in negotiations. Nevertheless, this was made possible only by the fact that the Americans had informed Strauß that the USA would supply nuclear fuel assemblies to the Federal Republic only if it accepted Euratom. Together with its acceptance of intergovernmental negotiations, the German Government clarified that its aim was the Economic Community and that it would tolerate Euratom only if linked to a Treaty on the Common Market. The French government, on the other hand, had proclaimed again that it preferred Euratom but, despite the German rejection to give priority to

the Atomic Community, it decided to accept intergovernmental negotiations on the basis of the Spaak Report. Hence, on their conference in Venice from 29 to 31 May 1956, the Foreign Ministers were able to accept the Spaak Report and start the official negotiations (Brunn 2004: 110-11). The fact that, as in Messina, despite the differing national interests, the States were able to agree on a basis for discussion can clearly be seen as a success on the way to Rome. In Venice, it was agreed that another intergovernmental committee, chaired by Paul-Henri Spaak, should be established to elaborate the Treaties on the basis of the report. In fact, the opinion had prevailed to keep the Treaties establishing Euratom and the Economic Community separated. Hence, in June 1956, this Committee started working in the castle of Val Duchesse near Brussels (Mammarella, Cacace 2013: 87).

6. The intergovernmental Conference on the Common Market and Euratom, 26 June 1956 to March 1957

Already during the conference in Venice had Pineau stated three conditions his Government asked for in order to conclude the Treaty on the Common Market. The first was that the French overseas territories be included in the Common Market, in order to share the costs for their modernization rather than forcing their secession from the mother country through the creation of a tariff wall. Secondly, and this was very important to Mollet and his Socialists, the social benefits and taxes should be harmonized already by the end of the first integration phase. Finally, the passage from the first to the second integration stage should not be automatic; instead, the governments should fix the regulations for further stages only after the end of the first one (Loth 1997: 4).

In the beginning of July 1956, in order to create the necessary parliamentary backing for the undertaking, Mollet's Government organized a parliamentary debate on the project of Euratom. During this debate the Government clarified that it clearly intended to keep the option of developing its own nuclear weapon open. With regard to those opposing nuclear weapons and the Germans, who were not willing to foster the French special position also with their own resources, the Government only granted a moratorium of four or five years in which there should not have been any French nuclear weapons. Furthermore, the Government insisted on a French representation at the International Atomic Energy Agency, rather than a common

representation through the common organization and, contrary to the Spaak Report, that there should not be any common organs of Euratom and the European Coal and Steel Community. With these concessions, the Government assured itself the majority of 332 against 181 votes for the continuation of the negotiations on Euratom. In Germany, however, the economists found the French request for a harmonization of the labor costs to be unrealistic and, generally, in the Federal Republic there was no tendency to allow France to have a special position as nuclear and colonial power. Hence, it was not possible to achieve more than an exchange of the differing positions and so the leaders of the delegations decided, on 24 July 1956, to take a summer pause (Loth 1997: 4).

After restarting the negotiations, the French Government slightly modified its position. It did not insist anymore on leaving the market integration open after the first integration stage but instead stated that the passage to the second stage should take place only after the Governments would have unanimously found that the aim of the first stage had been achieved. In change it requested to maintain the system of export subsidies and import duties until the French deficit in the balance of payments would be settled, and to be able to return to the relative protectionist methods in case of new difficulties in payments. These requests were easier acceptable for the German delegation which, in internal papers, saw import duties and export subsidies as bearable and not unjustified. However, in the question of social benefits and the inclusion of the overseas territories the contrasts remained insurmountable (Loth 1997: 4-5). This is why the negotiations, in October 1956, were bound towards a crisis, just as that of the Spaak Committee one year earlier. In another meeting of the Foreign Ministers in Paris on 20/21 October there had been an approach in the question of transitional measures. The other partners conceded France the basic possibility to employ peculiar protection measures in case of difficulties in payments. On the other hand, Pineau stated that after six years a qualified majority should be enough to decide the passage to the second integration stage. However, when the German delegation strictly opposed agreeing on the reduction, during the first stage, of the weekly working hours from 48 to 40, Pineau withdrew his concession on the transition period and, after another unsuccessful negotiation round, declared the conference to be failed. This was even more dangerous for the undertaking since, meanwhile, on 3 October 1956, the British government had officially appropriated the proposal of a free trade zone, even if with the exclusion of agricultural products for

which the system of preferences of the Commonwealth should continue to apply. Erhard used the situation to require the interruption of the negotiations at Val Duchesse and to talk instead with the British about the political and economic initiative on European integration. With this, Paul-Henri Spaak and other supporters of the Messina project saw its failure as nearly sealed (Loth 1997: 5).

That this did not turn out to be true and the negotiations were able to survive also this crisis was due to three circumstances. Firstly, the intervention of Adenauer, who by all means wanted a success; secondly, a courageous decision by Mollet; and, thirdly, a lucky coincidence, from the European point of view, which facilitated the change in the French public opinion. As far as Adenauer is concerned, not only did he not want to allow any setback in the efforts for a further integration of the Federal Republic in the Western Community, but he also believed that now he had to establish the Economic Community to foster a Community in security policy as well. In fact, the Radford Plan, aimed at the reduction of American troops in Europe, in the summer 1956, had shown him the danger of an American-Soviet agreement at the costs of the Europeans. Therefore, on 6 November 1956, Adenauer travelled to Paris in order to find a way out of the crisis through bilateral talks. Mollet's role was that on this 6 November he accepted a compromise, which transformed the obligation to harmonize social benefits into a vague declaration of intent. The national legislations should work towards this aim but after six years, at the latest, the passage to the second integration stage could be decided with a qualified majority even if the harmonization of living and working conditions would not yet be reached. In this case, the Commission could issue saving clauses for the disadvantaged industries but it did not have to. Import duties and export subsidies should generally be possible but gradually reduced. Mollet accepted it because the nationalization of the Suez Canal by Egypt in July 1956 and the super powers' intervention against the Franco-British expedition had shown him the urgency of a European atomic industry which, as the negotiations had shown, would not be possible without the contemporary and irrevocable acceptance of the Common Market. Furthermore, he saw that the humiliation of France in the Suez crisis provided an opportunity to reactivate the hopes for an independent Europe, autonomous with respect to the United States. This was the third factor, the lucky coincidence that Mollet knew to take advantage of, starting to prepare the parliament and the public systematically for the necessity of both Treaties by presenting them as means of avoiding such humiliations as

France had had to acquiesce through the nationalization by Nasser and the intervention of the super powers in the Suez Crisis. In the face of the dramatic dependence on Arabic oil and Adenauer's open dissociation from the United States, for the first time since the EDC crisis, Europe returned to seem a refuge of independence. This impression was strengthened through Mollet's propaganda initiative, in such a way that the public opinion finally accepted also the Common Market (Loth 2007b: 317-318). This episode shows the importance, also in this case, of the international context, the two most significant events surely being the Suez Crisis of July 1956 and the Hungarian Uprising of November 1956. These reminded the convinced Europeans that the European Coal and Steel Community alone did not have enough weight when confronted with threats deriving from international events. Hence, building a stronger Europe seemed to be the only way to guarantee prosperity and peace (CVCE 2016: 6-7).

However, in February 1957, another crisis manifested itself due to the question of the inclusion of overseas territories of France, Belgium and the Netherlands. France requested a guarantee of sale and prices for the products originating from its overseas territories on the Common Market. All member states should put at disposal means of investment, but without obtaining free access to the overseas territories' markets or a say in the matter. The Germans opposed the expected distortions of world trade conditions and objected to sales obligations at guaranteed prices. Furthermore, they did not want to finance the colonial powers with community funds and leave to them the right to decide on the means; instead, they were in favor of making the populations of the concerned territories participate. Again, it were bilateral talks between Adenauer and Mollet on 19/20 February that brought the solution. The overseas territories obtained free access to the Common Market but without guaranteed prices or sales obligations, and the investments in the territories should be realized with the means of an investment fund of the Community in accordance with the affected populations (Brunn 2004: 114-115). It might be added that the investment fund should consist of 581 EPU units of account for the first five years, less than half of what the French side had originally seen as the necessary sum. The continuation of the fund beyond the period agreed upon was made dependent on a vote of the Council (Loth 1997:9).

According to a scholar, the persuasive efforts of Adenauer and Mollet could be successful only because the Treaty contained a compromise between French and

German interests, not only in details but also in principle. He declares it to be no exaggeration to call the Treaties of Rome the second act of the Franco-German peace after World War II (Loth 2007b: 319). According to another scholar, the Treaty on the European Economic Community was then seen as the greatest French diplomatic success since the Congress of Vienna by being able to include, at least theoretically, agricultural products in the Common Market, obtain a long transitional period for the abolition of obstacles to trade accompanied by important saving clauses, and to make the other states participate, even if partially and only financially, to the liquidation of the colonial empire. However, afterwards it can be said that the Franco-German duel did not have winners nor losers because, during the transitional period, the Germans were able to obtain a common external tariff that was lower than their national tariff of 1957. In other words, the victory of the countries favoring liberal trade, Germany and the Benelux, against the protectionist countries, France and Italy, became clear (Olivi 1998: 48-49). The fact that the negotiators were able to find an agreement despite the many moments close to failing, clearly speaks for the importance of these negotiations and makes them a success on the way to Rome.

However, before all this and after the negotiations in Val Duchesse, on 25 March 1957 the signatories of the member states would unite on the Capitol Hill in Rome to sign the Treaties establishing the European Economic Community and Euratom (Brunn 2004: 116).

7. The European Economic Community and Euratom, 25 March 1957

The Treaty establishing the European Economic Community contained 248 articles and was composed of six parts: principles, foundations of the Community, policy of the Community, association of the overseas territories, the institutions of the Community and general and final provisions. In its preamble, the signatories declared themselves to be determined to create the foundations of an “ever closer union” between the European populations. Furthermore, they proclaimed their main aim to be the constant improvement of living and working conditions of their populations.

The principles are outlined from article one to eight. The overall task of the Community was that of creating a common market and the gradual approach of national economic policies. Its necessary means were, *inter alia*, the abolition between the member states of customs duties and quantitative restrictions on

imports and exports; the establishment of a common external tariff and a common commercial policy; the elimination between the member states of all obstacles to the free movement of persons, services and capital; and a common policy in agriculture, transport and competition. Article four outlines the four institutions of the Community: an Assembly, a Council, a Commission and a Court of Justice. Furthermore, it introduces the Economic and Social Committee. Article eight regulates the transitional period divided in three stages, each of which should last four years. The passage from the first to the second stage could be realized only after the Council unanimously decided that the essential part of the aims the Treaty prescribed for the first stage had been reached.

The second Part of the Treaty contains four Titles regarding the free movement of goods; agriculture; the free movement of persons, services and capital; and transport. Articles twelve to 17 regulate the abolition of customs duties between the Member States. Furthermore, export duties between the Member States should also be abolished by the end of the first stage. Articles 18 to 29 determine the scheduling of a common external tariff, which should be calculated at the arithmetical mean between the existing duties in the four custom areas included in the Community. Articles 30 to 37 regulate the abolition of quantitative restrictions between the member states by prohibiting quantitative restrictions on imports and exports or measures heaving equal effect for all member states. Import quotas should be gradually increased by 20 per cent every year, with respect to their total value in the precedent year, until they would be totally erased. Quantitative restrictions on export and measures having equivalent effect should be abolished by the end of the first stage. Finally, the Member States declared that they would proceed faster than the rhythm determined by the Treaty if this was possible according to their general economic situation and that of the concerned sector. In fact, the customs union was already established on 1 July 1968 instead of the 31 December 1969 as required by the Treaty. The second Part's second Title, from articles 38 to 47, regards agriculture, including its products in the Common Market and underlining the need for a common agricultural policy. The latter should be created gradually during the transition period and there would be a common organization of the agricultural markets. In order to elaborate the lines of a common agricultural policy, the Commission should convoke an intergovernmental conference of the member states as soon as the Treaty entered into force.

Title III on the free movement of persons, services and capital is divided into four Chapters regarding workers; the right of establishment; services; and capitals. The first Chapter, from article 48 to 51, regulates that the free movement of workers should be assured by the end of the transition period, at the latest. In fact, it was already created in October 1968 through a regulation of the Council (Thiel 1998:122). It meant the abolition of any discrimination based on nationality between workers of the member states regarding employment, retribution and other working conditions[3]. The Council would adopt unanimously the measures in the sector of social security necessary for the instauration of the free movement of workers. The second Chapter, from articles 52 to 58 regulates the right of establishment, which included the access to non-salaried activities and their exercise as well as the establishment and management of businesses and companies. The Council should issue directives for the reciprocal acknowledgment of degrees, certificates and other titles and for the coordination of the provisions of the Member States regarding the access to non-salaried activities and their exercise. Chapter three, from articles 59 to 66, outlines the provisions for services. The restrictions to the free performance of services within the Community should be gradually abolished during the transition period. The performer should be able to exercise, temporarily, his activity in the country in which the performance is supplied, according to the same conditions imposed by the country on its own nationals. The third Title's last Chapter, from article 67 to 73, regards capitals and regulates that the Member States should gradually abolish the restrictions existing between them with regard to the movement of capitals belonging to their residents, as well as discriminations based on nationality or residence of the parts or on the place of the capitals' collocation. Furthermore, the Commission should propose to the Council measures intended to progressively coordinate the Member States' policies regarding exchange rates. The fourth Title, from article 74 to 84 concerns transportation and proclaims the need for a common transportation policy.

The third Part of the Treaty, regarding the policy of the Community, is composed of four Titles concerned with common norms, economic policy, social policy and the European Investment Bank. Its first Title contains three Chapters disciplining

[3] Furthermore, it included the right to answer to effective job offers, to move freely within in the territories of the Member States for this aim, to take abode in one of the Member States for the aim of carrying out an occupation and to remain on the territory of a Member State after having carried out an occupation.

competition rules, fiscal provisions and the harmonization of legislations. Chapter I's first section prohibits all agreements which could compromise trade between Member States and have the aim or effect of impeding, limiting, or falsifying the competition game within the Common Market. The Chapter's second section, article 91, regards practices of dumping which should be put to an end. The last section, from article 92 to 94, concerns state aid, prohibited if incompatible with the Common Market. The second Chapter of Title I, from article 95 to 99, regards fiscal provisions and prohibits the application, by Member States, of direct or indirect internal taxations to the products of other Member States higher than those applied directly or indirectly to similar national products. Furthermore, no Member State should apply internal taxations to the products of other Member States, intended to indirectly protect other productions. The third Chapter, from article 100 to article 102, contains the provisions on the approaching of legislations and proclaims that the Council would issue the directives intended to approach the provisions of the Member States which had a direct effect on the instauration and the functioning of the Common Market.

Title II of the Treaty's third Part regulates the economic policy and is divided into three Chapters on the policy of conjuncture, the balance of payments and the commercial policy. In the first Chapter, or art.103, the States declare that they consider their policy of conjuncture as a question of common interest. Chapter 2, from articles 104 to 109, regulates the balance of payments. The Member States should coordinate their economic policies and establish a collaboration between the competent services of their administrations and between their central banks. Its last Chapter, from article 110 to 116, contains the provisions on the commercial policy. At the end of the transitional period, there should be the necessary conditions for the realization of a common policy in external trade and afterwards, the common commercial policy should be based on uniform principles. It would be the Commission to conduct necessary negotiations with third countries presenting recommendations to the Council which, acting by qualified majority, would authorize it to open the negotiations. The latter would be concluded, in the name of the Community, by the Council. Finally, at the end of the transitional period, the Member States would conduct exclusively a common action in the framework of international organizations of economic character. The third Title regulates the social policy and its first Chapter, from article 117 to article 122, contains the social provisions. In this sector, the Commission had the task to promote a tight collaboration between the

Member States, especially regarding, *inter alia*, occupation, the right to work and working conditions, professional education and social security. Furthermore, in article 119, the States commit to guarantee the application of the principle of equal pay for masculine and feminine workers for the same job. Its second Chapter, from article 123 to article 128, establishes the European Social Fund, in order to improve the possibilities of occupation of workers within the Common Market and thereby to contribute to the improvement of the standard of living. Finally, the Council should fix the general principles for the realization of a common policy of professional education. Title IV, or articles 129 and 130, establishes the European Investment Bank which would have legal personality and the task of contributing to a development, which should be balanced and without shocks to the Common Market in the interest of the Community.

The fourth Part of the Treaty, from articles 131 to 136, regards the association of overseas territories and countries. It was decided to associate to the Community the non-European countries and territories that maintained special relations with Belgium, France, Italy and the Netherlands. The Member States would apply the same regime to their trade with these countries and territories as the one applied between them under the Treaty. However, also these countries and territories would have to gradually abolish the customs duties charged on the imports coming from the Community's Member Countries.

The fifth Part of the Treaty regulates the institutions of the Community and contains two Titles on institutional provisions and financial provisions. Its first Title is divided into three Chapters on the institutions, provisions common to several institutions and the Economic and Social Committee. The first Section of Chapter I, from articles 137 to 144, regulates the Assembly which would be composed of representatives of the Member States and have deliberative power and power of control. The members would be delegates chosen by the national Parliaments among their members. However, the Assembly should elaborate projects intended to allow an election by universal suffrage according to a uniform procedure in all Member States. The Assembly could oblige the Commission to resign as a body through a motion of censure. The second section, from article 145 to article 154, outlines the provisions on the Council which would coordinate the general economic policies of the Member States and have a decisional power. The Council would be composed of the

representatives of the Member States appointed by the national governments between their members. The Presidency would be exercised in turn by each member for a duration of six months following the alphabetical order of the Member States. Section three, from articles 155 to 163, regulates the Commission which should monitor the application of the Treaty's provision and of the provisions enacted by the institutions of the Community in pursuance thereof, formulate recommendations or opinions when required by the Treaty or the Commission itself and participate in the formation of the acts of the Council and the Assembly. The Commission should be composed of nine members which should perform their duties in in the general interest of the Community and with complete independence and be appointed by common agreement of the Member States' governments. The fourth section, from articles 164 to 188, contains the provisions on the Court of Justice, which should ensure the observance of law in the interpretation and application of the Treaty. It would be composed of seven judges and assisted by two advocates-general appointed, as the judges themselves, by common agreement between the Member States' governments. Articles 169 and 170 replicate article 88 of the ECSC Treaty and precede article 258 TFUE on the infringement procedure, by giving the Commission the power to take legal action against a Member State that fails to implement the provisions of the Treaty. The Court should have jurisdiction for appeals by Member States, the Council or the Commission, against acts other than recommendations or opinions of the Council and the Commission. This is also true for any natural or legal person in specific cases[4]. The fact that also natural persons could address the Court was a novelty. Appeals could be made also in the event of the Council or the Commission failing to act in violation of the Treaty. Furthermore, the Court should be competent to make preliminary decisions concerning, *inter alia*, the interpretation of the Treaty and of acts of the institutions of the Community. Finally, the judgments of the Court should be enforceable in the territories of the Member States.

Chapter 2, from articles 189 to 192, regards the provisions common to several institutions and its first article represents the basis for the power of the Council and the Commission to issue regulations, directives, decisions, recommendations and

[4] Namely, when appealing against a decision addressed to him or against a decision which, also in the form of a regulation or a decision addressed to another person, is of direct and specific concern to him. The Court could then declare such acts to be null and void.

opinions. Regulations should have general application, be binding in every aspect and directly applicable in each Member State. Directives, on the other hand, should bind any Member State to which they are addressed, as to the result to be achieved, leaving the competence as to form and means to domestic agencies. Decisions should be binding in every respect for their addressees while recommendations and opinions should have no binding force. These were slightly different if compared to the sources of secondary law that could be issued by the High Authority of the ECSC, whose decisions were binding in their entirety, while recommendations were binding only with regard to the aims to be achieved. Furthermore, in the EEC also the intergovernmental body, the Council, would have the right to issue such provisions.

The last Chapter, from article 193 to article 198, regulates the Economic and Social Committee, which should have consultative status and be composed of representatives of the various categories of economic and social life.

Title II, from article 199 to article 209, regards the financial dispositions and regulates that, for each financial year, estimates should be drawn up for all revenues and expenditures of the Community and should be shown in the budget, which should be in balance as to revenues and expenditures. The budget's revenues should comprise the financial contributions of Member States. However, the Commission should study at which conditions it would be possible to substitute the financial contributions of Member States with resources of the Community itself.

The last Part of the Treaty, from articles 210 to 248, concerns general and final provisions containing parts on the setting up of the institutions and on final provisions. Article 210 attributes legal personality to the Community which gave it the right to acquire or transfer movable and immovable property and of being sued. For this purpose, it would be represented by the Commission. With regard to non-contractual liability, the Community should make reparation for any damage caused by its institutions or by its employees in the performance of their duties. In art.216, the States agree that the seat of the Community's institutions would be fixed by the Governments of the Member States acting in common agreement. The following article grants the Community, in the territories of the Member States, the immunities and privileges necessary for the achievement of its aims. Article 227 regulates the territorial application of the Treaty including European territories for whose external relations a Member State was responsible. Art.228 proclaims that where the Treaty provided for the conclusion of agreements between the Community and one or more

States or an international organization, such agreements should be negotiated by the Commission and concluded by the Council after consulting the Assembly in the cases determined by the Treaty. These agreements would then be binding for the institutions of the Community and the Member States. Art.234 determines that the provisions of the Treaty did not modify those of conventions concluded prior to the Treaty between one or more Member States and one or more third countries. However, in so far as such conventions are not compatible with this Treaty, the Member State or States concerned should take all appropriate steps to eliminate any incompatibility found to exist. Art.237 gives the opportunity to every European State to require to become a member of the Community. However, just like the Treaty establishing the ECSC and the EDC, the EEC Treaty does not include the possibility of recession from the Treaty.

After the last article follow the annexes to the Treaty which consist in four lists, nine Protocols and one Convention with two further Protocols. The four lists regard different products, invisible transactions and the overseas countries and territories. The Protocols concern the statute of the European Investment Bank, the inner German trade, provisions regarding France, Italy, and Luxembourg, goods originating from some countries benefitting from a special regime for the imports in one Member State, the regime to be applied to the goods under the competence of the ECSC regarding Algeria and the French overseas territories, mineral oils and some of their derivatives, and the application of the Treaty to the non-European parts of the Netherlands. The Convention regards the realization of the association of the overseas territories and countries to the Community and contains two further protocols on the tariff quota for the imports of bananas and those of green coffee. The only element worth mentioning here is that article one of the Convention establishes a Fund for the development of the overseas countries and territories to which the Member States would pay annual contributions for five years and which would be administered by the Commission.

On 25 March, together with the Treaty, the Member States' representatives also signed a Convention on institutions common to the European Communities. This Convention regulates that the Assembly of the Euratom and the EEC Treaty should be one single Assembly composed according to the provisions of both Treaties. This Assembly should also substitute the ECSC's Assembly. The same should be true for

the Court of Justice and the Economic and Social Committee, which would be common to all three Communities.

The four broad principles of the EEC Treaty were progressiveness, irreversibility, the prohibition of discrimination and the open nature of the Community (CVCE 2016: 9) and, according to a scholar, the EEC Treaty included two main thoughts. Firstly, an economic intention, aimed at realizing an institutionally agreed abolition of existing obstacles to trade between the Member States. The other, political, intention saw the Treaty as a functional text which would be followed by further constitutive acts (Küsters 2007: 322).

However, according to a scholar, the Treaty was a mare “statement of intent, a program, a timetable” and not a “detailed comprehensive blueprint of regulations” because its actual provisions “often consisted of general statements concerning objectives and intentions where the details would have to be worked on and agreed in the future” (Dedman 1996: 94). According to him, the reason for this was that there had simply not been enough time to work on the details between June 1955 and March 1957. Similar is the opinion of Olivi in saying that the Treaty was a masterpiece of functionalism, since the progressive and gradual transfer of the necessary portions of sovereignty had to be realized in the framework of a “permanent negotiation” constituted by the system of institutions (1998: 51). Also Mammarella and Cacace come to the conclusion that the objectives to be reached by the parties were indicated by the EEC Treaty as well as some intermediate stages, but it would have been the task of the institutions to realize the legislative measures necessary in order to reach those objectives, through the practice defined as “permanent negotiation” (2013: 90).

The institutions of the European Economic Community were created following the example of the ECSC, with the significant difference that in the former the decision-making authority was attributed to the Council while in the latter it had been of the High Authority. The system of institutions had to be such to balance the necessity to guarantee the application of the Treaties and the continuation of integration and at the same time to take into account the interests of the Member States. This is why a dual decision-making system was introduced, with the Commission representing the Community’s interests and the Council representing those of the Member States. The former obtained the monopoly of initiative while the later was equipped with the

legislative monopoly (Brunn 2004: 120-121). Also according to a scholar, “the nine-man Commission to run the EEC with Professor Walter Hallstein as its first President, was different from the ECSC’s High Authority in a number of aspects” (Dedman 1996:95). According to him, the Member States wanted to give up as little power as possible and therefore to take all major decisions on proposals of the Commission through the Council. The Schuman Plan had not even included a Council of Ministers and the Commission of the EEC exercised less power than Monnet’s High Authority because “by 1957 [the latter] was considered too powerful by France and Belgium” (Dedman 1996:95). Hence, according to the Convention signed and annexed to the Treaty, the institutions of the three European Communities should be a Council with different functions for the EEC, Euratom and the ECSC; three executive institutions in the form of a Commission for the EEC, another for Euratom and the High Authority for the ECSC. Furthermore, there would be a common Assembly elected by the national Parliaments and a common Court of Justice composed. Numerous consultative bodies were also created: the Economic and Social Committee, the European Investment Bank, the European Social Fund, a Monetary Committee and, for Euratom, a Supply Agency (Mammarella Cacace 2013: 89-90).

The Treaties of Rome opened up new perspectives for all Member States. The fourth French Republic, troubled with a chronic shortage of foreign exchange because of its colonial duties, was compelled to give up its protectionist thinking and the rigid system of *planification* in order to modernize the own economy and achieve international competitiveness. The young Federal Republic of Germany, just released from the occupation statute, had to integrate ten million displaced persons and refugees and was therefore dependent on imports of raw materials and foodstuff. Furthermore, it had to gain the necessary capital for reconstruction through export surpluses, and this, together with the first reason, caused the German government to support the liberalization of trade and a free convertibility of currencies. Italy, where wide regions were closer to the levels of a well-advanced developing country rather than corresponding to an efficient industrialized country, could only benefit from the new Economic Community. Similar interests moved the small predominantly exporters of agricultural products Belgium, Luxembourg and the Netherlands (Küsters 2007: 321). However, other European countries, under the leadership of Great Britain, supported the creation of a free trade area between the OEEC Member States and refused the participation to the EEC on principle. For the British, another

reason was decisive, namely, their close economic relations with the States of the Commonwealth. The imports from the latter were subject to low tariffs which could be maintained in a free trade area, but would have to be adapted to the common external tariff in a customs union (Thiel 1998: 23). Thody gives three other reasons for which Great Britain refused joining both the ECSC in 1951 and the EEC in 1957. The first reason was that the Laubor Government declined to be involved in an organization which it saw based on the principle of private ownership, essentially capitalist. Another reason was that the British were well aware of the incompatibility of their traditional way of organizing agriculture with the common agricultural policy included in the EEC Treaty. A last reason was the British fear of losing national independence linked to the view that any kind of unified Europe "would be one governed by an unelected bureaucracy" (1997: 24).

The ratification of the Treaty by the signatory States went relatively smooth and surveys in all Member States showed an approval of the European integration by two-thirds of the population (Brunn 2004: 116-117). In France, on 9 July 1957, "the National Assembly ratified the EEC Treaty by 324 votes to 234 and the Euratom Treaty by 332 votes to 240. On 24 July, the Council of the Republic adopted both Treaties by 219 votes to 68" (CVCE 2016: 11). According to a scholar, the Italians were little enthusiastic about the Treaties but the economic benefit for the country was such (Brunn 2004: 117) that the Italian Chamber of Deputies approved the ratification of the Treaties also the Senate ratified them (CVCE 2016: 11-12). In the Netherlands the public opinion and the major parties were disappointed of the Treaties with their protectionist rules and criticized that the Community turned out to be so little supranational (Brunn 2004: 118). However, the Second Chamber of the States-General adopted the Treaties and so did its First Chamber (CVCE 2016: 12).

According to art.216 of the EEC Treaty, the seat of the Community's institutions would be fixed by the Governments of the Member States acting in common agreement. However, this common agreement could not be reached by the Foreign Ministers of the Member States and they decided to distribute the Community's institutions on three cities. Strasbourg remained the seat of the Council of Europe and became the venue for the meetings of the Assembly while the ECSC remained with its institutions in Luxembourg. The Commissions of the EEC and Euratom were established in Brussels, as was the Economic and Social Committee. This solution,

found in January 1958, was meant to be provisional but still today those are the seats of the institutions of the European Union (Brunn 2004:129-130).

Some words have to be dedicated to the other Treaty signed at Rome on 25 March 1957, that establishing Euratom. Composed of 225 articles, it was divided into seven Titles. Its annexes contained definitions of the fields of research concerning nuclear energy, industrial activities and the advantages which may be conferred on joint undertakings, as well as a list of goods and products subject to the provisions on the nuclear common market and provisions on initial research and training programs. Lastly, the Treaty included a Protocol on the application of the Treaty establishing Euratom to the non-European parts of the Netherlands. The Treaty imposed on the Community tasks being*, inter alia*: the creation of a nuclear common market with a common property right; to guarantee the participation of all Member States in the pacific benefit from the development of nuclear energy; to prevent that nuclear material intended for pacific use be branched off for military purposes; and the elaboration and application of uniform safety standards in the health protection of workers and populations. The Treaty also provided for funds for research and investment plans and created the European Supply Agency already mentioned above (Küsters 2007: 331). “Euratom’s mission was to contribute to the rapid formation and development of Europe’s nuclear industries, to help improve the standard of living in the Member States and to further the development of trade with other countries. Its responsibilities were strictly limited to civil applications of nuclear energy” (CVCE 2016: 10-11).

The hopes that Euratom could become the engine of the European industrial integration and the use of nuclear energy would lead to a third industrial revolution were disappointed. Starting from France, all Member States returned to national nuclear programs and invested higher sums than those they were disposed to contribute to Euratom. Furthermore, the mentality developed that each State should receive Euratom funding for national programs of the same quantity as their contributions to it. Hence, after ten years Euratom had to make a disappointing summary in a White Paper: there were no common industrial programs nor could Euratom coordinate the national ones. Not even the disposal of nuclear waste was regulated by the Community but remained under national responsibility. However, Euratom gained some influence in the supply with nuclear raw material and the research and developing of safety standards. Through its Supply Agency, it assured

the supply of nuclear fuels from the USA, Canada, Australia and, since 1992, also from the CIS States to Europe. Furthermore, several times did the Community determine improved and binding provisions for radioprotection and the monitoring of the security of nuclear power plants. Their compliance is controlled by the Commission in consultation with the International Atomic Energy Agency (Brunn 2004: 125-128). The overall influence of the European Atomic Energy Community was, however, limited and so was its success. This is why Euratom can be considered, if not a failure, at least a limited success of the European integration.
Contrary to Euratom, the European Economic Community was quite successful and in the first ten years after its entrance into force, the export to other Member States increased to between three and a half to four times of its precedent amount, in the case of Italy even six times. In 1969, the year after the completion of the customs union, it reached between four and a half to five times its original value, in Italy eight times (Loth 2007a:43).

After this detailed historic summary, it should be clear that the idea of a united Europe has always been based on political considerations but could be successfully realized only with economic means. Monnet's motivation of the Schuman Plan had been that of a French control over Germany and, first and foremost, over those resources that had represented the basis for its rearmament after World War I. Also in the preamble of the ECSC Treaty, the Member States declared themselves to be resolved "to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts". Monnet's motivation behind the Pleven Plan had also been political: to control German rearmament, which had become necessary for the defense against the Soviet Union, to prevent an American control over the latter, and to safe the negotiations on the Schuman Plan, threatened by the stronger position Germany had acquired due to its role in the Cold War. The Treaty establishing the EDC also contained the provisions for the creation of a Political Community for which a draft would be presented by the ECSC's Assembly reunited as an Assembly *ad hoc* on 10 March 1953. However, these two projects failed since they were not based on economic interests and would have represented the transfer of sovereignty to supranational bodies in such a quantity and in such sectors that States were not willing to accept. Therefore, Monnet's third initiative for Euratom was again economic in nature and also based on

political considerations; precisely, to create a French nuclear force and thereby becoming independent form the United States as well as preventing the creation of a German nuclear force and keeping its atomic industry under control. Then, both in the Benelux Memorandum and the Resolution of the Messina Conference, the States declared that “they consider that the further progress must be towards the setting up of a united Europe by […] the gradual merging of national economies [and] the creation of a common market […]”, thereby repeating the idea that had been at the basis of the Schuman Declaration: political integration through economic integration. The aims that prevailed in the end, in the decisions whether to start negotiations on such bases, were political in nature; namely, for Germany, the overcoming of its demons of the past through a deeper integration in the Western Community and, for the other countries, its further integration into Europe, since it was becoming strong again. Finally, the establishment of Euratom and especially of the European Economic Community continued on this way of integration, extending the Common Market from coal and steel to all other products. Hence, the projects of integration based on economic considerations, such as the Schuman Plan, the ECSC, the EEC and, in part, Euratom, even if preceded by difficult and long discussions, in the end succeeded and can be seen as big successes of the European integration. On the contrary, the one European project based overwhelmingly on political elements, the EDC, to be accompanied by the EPC, was destined to fail and certainly represents one of the biggest failures in the history of European integration. Starting from the provisions of the Treaty of Rome, we will now analyze five current Union policies and events that can be seen as successes and failures when compared to the latter.

Chapter II Rome's Successes

Table of content: 1. The Common Commercial Policy. – 1.1. In the Treaty of Rome… . – 1.2. …and 60 years later. – 1.2.1. CETA. – 1.2.1. The Problem with BITs. – 2. The Free Movement of Workers. – 2.1. In the Treaty of Rome. – 2.2. …and 60 years later. – 2.2.1. Directive 2004/38/EC. – 2.2.2. Regulation (EU) 492/2011. – 2.2.3. Regulation (EU) 2016/589. – 2.2.4. Statistics.

We will begin the analysis of Rome's successes and failures starting from two policies which since Rome have clearly evolved into successes and therefore deserve to be analyzed as such in the following, namely, the common commercial policy and the free movement of workers. Among the other successful policies of the EU, the first of these policies was chosen because of its topicality and its recent developments with the Treaty of Lisbon, while the second was chosen because it is this policy the Union is often identified with and one of its greatest achievements according to its citizens, as we have also seen in the introduction.

1. The Common Commercial Policy

1.1. In the Treaty of Rome…

There are different parts of the Treaty of Rome in which we can find references to a common commercial policy of the European Economic Community. Already in the preamble, the signatory States declare themselves to be "desirous of contributing by means of a common commercial policy to the progressive abolition of restrictions on international trade", and among the activities of the Community listed in article three we find "the establishment of a common customs tariff and a common commercial policy towards third countries". From these two mentions, at important parts of the Treaty, it should be clear that the common commercial policy was one of the essential elements of the latter, as well as of the European Economic Community itself. Further on, articles 18 to 29 then describe in detail how a common customs tariff should be established by the end of the transitional period.

Between article 110 and article 116 we find the Treaty's Chapter on the Common Commercial Policy. In the former, the Member States declared themselves intended to contribute "to the harmonious development of world trade, the progressive abolition of restrictions on international exchanges and the lowering of customs barriers". It is article 113 which is the most important one for the regulation of the common commercial policy by prescribing that, after the transitional period, "the common commercial policy shall be based on uniform principles, particularly in regard to tariff amendments, the conclusion of tariff or trade agreements, the alignment of measures of liberalisation, export policy and protective commercial measures including measures to be taken in cases of dumping or subsidies". The Commission had the right of initiative for the acts implementing the common commercial policy, which would be approved by the Council acting by means of a qualified majority. In its third paragraph the same article gives the Commission also the power to negotiate necessary agreements with third countries, after having obtained the authorization of the Council, and in consultation with a special Committee appointed by the Council. According to article 114, the latter would then conclude the agreements acting by means of a qualified majority vote after the first two stages. It is important to note that the role of the European Parliament, at that time still Assembly, was inexistent both for the issuing of implementing acts as well as for the conclusion of international agreements. Finally, article 116 stated that after the transitional period "Member States shall in respect of all matters of particular interest in regard to the Common Market, within the framework of any international organisations of an economic character, only proceed by way of common action".

1.2. …and 60 years later

1.2.1. CETA

We will analyze the success of the common commercial policy by starting from an example of current common commercial policy namely, the CETA, the Comprehensive Economic and Trade Agreement between Canada and the European Union. On 21 September 2017 the latter entered into force provisionally, after its approval by the European Parliament on 15 February and of the Council on 28 October and its signing by the Council and Canada on 30 October 2016.[5] Already in

[5] See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1723> [accessed 6 November 2017]

this second sentence we can find two changes in the procedure for international agreements in the area of the common commercial policy: the provisional application and the participation of the European Parliament. The former is provided in the fifth paragraph of article 218 TFEU, while the latter results form a combination of article 207 and article 218 TFEU. The sixth paragraph of the latter states the cases in which "the Council shall adopt the decision concluding the agreement after obtaining the consent of the European Parliament" and one of those regards "agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required". Since article 217 at paragraph 2 provides that "the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy", it follows that the consent of the European Parliament is necessary for the conclusion of international agreements regarding the field of the common commercial policy[6]. Parts of CETA entered into force provisionally while attending the approval of the national Parliaments for the parts which are either of shared competence between the Member States and the European Union or of exclusive Member State competence. These include portfolio investments, the resolution of investment disputes between investors and States, taxation measures, and other more specific provisions (Council Decision 2016)[7]. Let us now take a closer look at the provisions of the agreement.

The Comprehensive Economic and Trade Agreement is 1598 pages long and consists of 30 Chapters, as well as 59 annexes and three protocols, regarding: general definitions and initial provisions; national treatment and market access for goods; trade remedies; technical barriers to trade; sanitary and phytosanitary measures; customs and trade facilitation; subsidies; investment; cross-border trade

[6] For a detailed look at the EP's enhanced role in CCP matters after Lisbon see Krajewski, M. (2013) 'New Functions and New Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy'. In *European Yearbook of International Economic Law: Common Commercial Policy after Lisbon.* ed. by Bungenberg, M. and Herrmann, C. Berlin: Springer, 67-85; Brok, E. (2010) 'Die neue Macht des Europäischen Parlaments nach ‚Lissabon' im Bereich der gemeinsamen Handelspolitik [The new power of the European Parliament after 'Lisbon' in CCP matters]'. *Integration* 3/10, 209-223; Kleinmann, D. (2011) 'Taking Stock: EU Common Commercial Policy in the Lisbon Era'. *Aussenwirtschaft* 2/11, 211-257

[7] For the EU competences see Opinion 2/15 of the EUCJ, in which it interpreted the Union's competence to conclude the different parts of the EU-Singapore Free Trade Agreement (EUSFTA). available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CV0002(01))> [accessed 5 February 2018]

in services; temporary entry and stay of natural persons for business purposes; mutual recognition of professional qualification; domestic regulation; financial services; international maritime transport services; telecommunications; electronic commerce; competition policy; state enterprises, monopolies, and enterprises granted special rights or privileges; government procurement; intellectual property; regulatory cooperation; trade and sustainable development; trade and labour; trade and environment; bilateral dialogues and cooperation; administrative and institutional provisions; transparency; exceptions; dispute settlement; and final provisions. Given the limited length of this thesis we will only see the most innovative chapters of the agreement, introducing the greatest changes in respect of the common commercial policy according to the Treaty of Rome.

Some words have to be dedicated to the 'traditional' provisions of Free Trade Agreements, which can be find in the early chapters of the Agreement, such as article 1.4 that establishes a free trade area between the EU and Canada thereby eliminating customs duties between the two parties. Furthermore, in article 2.3 the parties guarantee national treatment to each other's goods and in article 2.11 they commit to eliminating import and export restrictions. These measures can be seen as a clear success of the liberalization aim contained in the various provisions of the Treaty of Rome.

However, Chapter eight on investments is a special one, since investments were not included under art.113 of the Treaty of Rome. It is article 217 TFEU that includes 'foreign direct investment' between the elements of the Union's common commercial policy, being an exclusive competence according to art.3(1)(e) TFEU. Hence, the TFEU has conferred an expressed and exclusive competence in the area of foreign direct investments on the EU (Marrella, De Vido 2014: 17). The reasons for the competence's extension are numerous: the EU has long since assumed the role of first actor in the world economy both in terms of destination and source of foreign direct investments. Furthermore, it has become clear that the disciplines of international trade and foreign direct investments are linked, both in the doctrine and in practice. A last reason is geopolitical in nature and explained by the increasing global competition and the diminishing negotiating power of the single Member States (Marrella 2013: 108). Nevertheless, the scope of this competence has been subject of discussions of various authors ended by Opinion 2/15 of the ECJ of 16

May 2017.[8] Before taking a closer look at the latter we will now briefly analyze the provisions of CETA's investment Chapter. Article 8.1 defines 'investment' "as every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk" and gives a list of its possible forms. 'Investor' is defined as "a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party" and 'an enterprise of a Party' as "(a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or (b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a)".[9] Articles 8.4 and 8.5 regulate market access of investments and performance requirements by listing measures incompatible with the Agreement. Section C regulates non-discriminatory treatment including articles 8.6 and 8.7 on national treatment and most-favoured-nation treatment respectively. Section D is revolutionary, since it makes CETA "the first EU agreement signed by the EU containing investment protection provisions" (Puccio, Harte 2017: 1). In article 8.9 the parties "reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity" and clarify that "the mere fact that a Party regulates, including

[8] For the discussion on the competence's scope see Krajewski, M. (2012) 'The Reform of the Common Commercial Policy'. In *EU Law after Lisbon*. ed. by Biondi, A., Eeckhout, P. and Ripley, S. Oxford: Oxford University Press, 292- 311; Ortino, F. and Eeckhout, P. (2012) 'Towards an EU Policy on Foreign Direct Investment'. In *EU Law after Lisbon*. ed. by Biondi, A., Eeckhout, P. and Ripley, S. Oxford: Oxford University Press, 312-327; Bungenberg, M. (2011) 'The Division of Competences Between the EU and Its Member States in the Area of Investment Politics'. In *European Yearbook of International Economic Law: International Investment Law and EU Law*. ed. by Bungenberg, M., Griebel, J. and Hindelang, S. Berlin: Springer, 29-42; Burgstgaller, M. (2011) 'The Future of Bilateral Investment Treaties of EU Member States'. In *European Yearbook of International Economic Law: International Investment Law and EU Law*. ed. by Bungenberg, M., Griebel, J. and Hindelang, S. Berlin: Springer, 55-78; Shan, W. and Zhang, S. (2011) 'The Treaty of Lisbon: Half Way toward a Common Investment Policy'. *The European Journal of International Law* 21(4), 1049-1073; Bings, S. L. (2014) *Neuordnung der Außenhandelskompetenzen der Europäischen Union durch den Reformvertrag von Lissabon : mit Fokus auf ausländische Direktinvestitionen und Handelsaspekte des geistigen Eigentums [Reorganization of the EU's foreign trade competences through the reform treaty of Lisbon: with a focus on foreign direct investments and trade related aspects of intellectual property]*. Baden-Baden: Nomos, 57-140

[9] "The requirement for substantial business activity was introduced to avoid letter-box companies, owned by third nationals […] obtaining legal claims under the treaty" (Puccio, Harter 2017: 24)

through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section". This provision clearly protects the States' right to regulate. Article 8.10 defines the concepts of fair and equitable treatment and full protection and security applicable to the agreement by listing the consequences of measures representing a breach of fair and equitable treatment[10] and defining "full protection and security" as referring to "the physical security of investors and covered investments"[11]. Usually, the principle of "fair and equitable treatment" is a general clause including the prohibition of an unjustified and arbitrary treatment, contrary to good faith or the legitimate expectation of the investor, and legal certainty, intended as predictability of the normative system of the host State and the transparency of its judicial proceedings (Galgano, Marrella 2011: 836/837). According to paragraph three, the list should be regularly reviewed by the parties and paragraph four includes the concept of legitimate expectation, which may be taken into account in case of a dispute and anyway only refers to the case in which a "specific representation made by the state" induced the investor to make the investment (Puccio 2017: 2). In the following article we can find the provisions relating to the compensation for losses, while article 8.12 regulates expropriation. It includes the 'traditional' elements of a legitimate expropriation, namely: public purpose, due process of law, non-discriminatory manner and prompt, adequate and effective compensation. In Annex 8-A, the parties define direct and indirect expropriation and specify that "except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations", thereby introducing the requirement to take into account the 'object, context and intent' of the measure and incorporating an element of proportionality (Titi 2015: 655). According to Titi "this new

[10] Including: denial of justice in criminal, civil or administrative proceedings; fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; abusive treatment of investors, such as coercion, duress and harassment; or a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of [Article 8.10].

[11] However, nowadays, "it is not only a matter of physical security; the stability afforded by a secure investment is as important from an investor's point of view" (Galgano, Marrella 2011: 837).

provision aims, *inter alia*, to ensure that investors shall not be compensated 'just because their profits have been reduced through the effects of regulations enacted for a public policy objective' [and] aligns the EU position with the police powers doctrine" (ibidem: 655-656). Article 8.13 regulates the transfers relating to covered investments by listing them as well as the laws that can anyway be applied by the parties "in an equitable and non-discriminatory manner". Article 8.14 contains the denial of benefits clause which allows the parties to exclude from the provisions of the Chapter "an investor of the other Party that is an enterprise of that Party and […] investments of that investor if (a) an investor of a third country owns or controls the enterprise; and (b) the denying Party adopts or maintains a measure with respect to the third country that: (i) relates to the maintenance of international peace and security; and (ii) prohibits transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments."

Before continuing with the next Section of the Chapter regarding the Resolution of investment disputes between investors and states, we will now take a look at Opinion 2/15 of the European Court of Justice[12], since it regards the Union's competences in the sector of investments. The Commission had submitted a request for an opinion, pursuant to article 218(11) TFEU, to the Court asking it to define the provisions of EUSFTA falling within the Union's exclusive or shared competence and the exclusive competence of the Member States. For the purpose of this section, we will only take into consideration the Court's opinion referring to the competences in the sector of investments. According to the Court, following from article 207 (1) TFEU's reference to 'foreign direct investment', "the European Union has exclusive competence, pursuant to Article 3(1)(e) TFEU, to approve any commitment vis-à-vis a third State relating to investments made by natural or legal persons of that third State in the European Union and vice versa which enable effective participation in the management or control of a company carrying out an economic activity" (par 82), while "commitments vis-à-vis a third State relating to other foreign investment do not fall within the exclusive competence of the European Union pursuant to Article 3(1)(e) TFEU" (par 83). Furthermore, the Court opines that "the establishment of […] a legal framework [on investment protection] is intended to promote, facilitate and

[12] Opinion 2/15 of the Court (Full Court) of 16 May 2017, ECLI:EU:C:2017:376

govern trade between the EU and Singapore" (par 94) and "insofar as the provisions [on investment protection] relate to direct investment, they are such as to have direct and immediate effects on that trade, since they concern the treatment of the participation of entrepreneurs of one Party in the management or control of companies carrying out economic activities in the territory of the other Party" (par 95) making article 207 TFEU the legal basis for this provisions (par 36). Hence, the provisions on investment protection "fall within the common commercial policy in so far as they relate to foreign direct investment" (par 109). In paragraph 227 the Court gives its definition of non-direct foreign investment and in paragraphs 230 to 237 refuses the Commission's request for the application of article 3(2) TFUE on implied exclusive external competences concluding that the commitments on investment protection "fall within a competence shared between the European Union and the Member States pursuant to Article 4(1) and (2)(a) TFEU in so far as they concern [non-direct] investment" (par 243). Hence, the Court attributes the Union full exclusive competence for the regulation of the access as well as the protection of foreign direct investment and a shared competence as far as portfolio investment is concerned, which means that the agreement has to be concluded as a mixed agreement (par 244). Finally, in paragraphs 285 to 293 the Court outlines that the investor-state dispute settlement (ISDS) cannot be established by the Union alone because it removes disputes from the jurisdiction of the courts of the Member States and therefore falls within the shared competence. It follows that the same is true for CETA's provisions on investment protection analyzed above and those on ISDS which we will look at now.

CETA "is the first agreement signed by the EU that also includes […] a dispute settlement procedure to enforce [investment] protection rights" (Puccio, Harte 2017: 4). The Agreement's ISDS provisions initially included elements of a procedure similar to ICSID's[13] as well as various innovations resulting from the new practices introduced in different IIAs or following UNICTRAL rules such as a code of conduct for arbitrators or the submission of 'amicus curiae' (ibidem: 11). However, after much criticism in the public and the latter's consultation on investment protection during the TTIP negotiations, the proposal for a new investment court system (ICS) was

[13] For more information on ICSID's procedure see Galgano, F. and Marrella, F. (2011) Diritto del commercio internazionale. Milano: CEDAM, 953-959

submitted by the Commission in September 2015, followed by the Parliament's request to include it also in other FTAs and IIAs under negotiation, thereby causing the renegotiation of CETA and the replacement of its ISDS with an ICS (ibidem 12-13). The latter is regulated by Section F of Chapter 8, from articles 8.18 to 8.45. According to the former, investors might submit a claim that the other party has breached an obligation under the Section on non-discriminatory treatment or investment protection when they claim to have suffered loss or damage as a consequence. The first element of the dispute resolution is consultation, regulated in article 8.19, which should be held within 60 days of the submission of the request for consultations, the elements of which are listed in paragraph four. Furthermore, if the investor does not submit a claim within 18 months of submitting the request for consultations, it is deemed to have withdrawn its request for consultation and shall not submit a claim regarding the same measure. In any case, "the disputing parties may at any time agree to have recourse to mediation" (art. 8.20(1)), the mediator can be appointed by their agreement or, on their request, by the Secretary General of ICSID and resolution should be reached within 60 days from his appointment. Article 8.21 regulates the request for the determination of the respondent for disputes with the EU or its Member States, and according to article 8.22, an investor can submit a claim only after a minimum of 180 days from the submission of the request for consultation and, in case, 90 days from the submission of the notice requesting a determination of the respondent. Furthermore, the investor has to, *inter alia*, withdraw or discontinue any existing proceeding before a tribunal or court under domestic or international law with respect to a breach referred to in its claim and wave its right to initiate any such claim or proceeding. "A claim may be submitted under the following rules: the ICSID Convention Rules of procedure for Arbitration Proceedings; the ICSID Additional Facility Rules if the conditions for proceedings pursuant to [the former] do not apply; the UNICTRAL Arbitration Rules; or any other rules on agreement of the disputing parties" (art. 8.23(2)). According to article 8.25 for the settlement of the dispute to be started by the Tribunal, the respondent has to consent to it and article 8.27 describes the real innovation of CETA's ICS namely, the Tribunal. The CETA Joint Committee shall appoint 15 Members of the Tribunal, of which five nationals of the EU, five nationals of Canada and five nationals of third countries, for a once renewable term of five years. The Tribunal shall hear cases in divisions of three Members of the Tribunal, of whom one shall be a national of a

Member States of the EU, one a national of Canada and one a national of a third country who shall also chair the division. The division shall be appointed by the President of the Tribunal within 90 days of the submission of a claim on a rotation basis. However, the parties can also agree that the case be heard by a sole Member of the Tribunal "to be appointed at random form the third country nationals" (art. 8.27(9)). The Members of the Tribunal shall receive a monthly retainer fee and other expenses when called to hear a claim. These fees can be transformed by the CETA Joint Committee into a regular salary. Finally, the ICSID Secretariat shall act as Secretariat for the Tribunal. Article 8.28 establishes the Appellate Tribunal, whose organization and number of members will be subject of a decision of the CETA Joint Committee. Also in this case, the division constituted to hear the appeal shall consist of three Members. "The proposals for both tribunals (First Instance and Appeal) are […] very similar to the WTO AB. […] In contrast, selection of judges under CETA's ICS is quite different from arbitration fora or WTO panel methods" for which arbitrators are chosen, respectively, by the parties or the secretariat from lists of individuals (Puccio, Harter 2017: 15). A disputing party may appeal an award within 90 days after its issuance on the grounds listed in paragraph two, which include the ICSID Convention's article 52(1) on appeal[14], but add further elements, namely: errors in the application or interpretation of applicable law and manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law. In article 8.29, the parties commit to "pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes". CETA is the first Agreement that includes a code of conduct for arbitrators in its article 8.30 to avoid conflicts of interest, following the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, and allows disputing parties to invite the President of the International Court of Justice to issue a decision on the challenge to the appointment of a Member of the Tribunal it considers to have a conflict of interest. A problem with CETA's ICS could be that it could violate the principle of autonomy of the EU legal order[15] but

[14] The grounds for annulment included are: the tribunal was not properly consituted, a fundamental procedural rule was not followed, the tribunal exceeded its powers, the tribunal did not state the reasons for its award, corruption of one of the tribunal's members

[15] According to which, "the CJEU has the exclusive power to give definitive interpretations of EU law so as to ensure its uniform application across the EU" (Puccio, Harter 2017: 26). However, arbitral tribunals might interpret Union law.

article 8.31 regulates that the Tribunal may consider, in determining the consistency of a measure with the Agreement, the domestic law of a Party as a matter of fact and "follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party". Furthermore, "any meaning given to domestic law by the Tribunal shall not be binding upon the courts of the authorities of that Party" (art. 8.31(2)). Articles 8.32 and 8.33 regulate claims manifestly without legal merit and claims unfounded as a matter of law respectively and article 8.36 contains the provisions on transparency, including and integrating the UNICTRAL Transparency Rules. Article 8.38 introduces the submission of 'amicus curiae' by allowing non-disputing parties to be heard, in oral or written form, by the Tribunal regarding the interpretation of the Agreement. Article 8.39 regulates the final award which can consists, separately or in combination, in monetary damages and any applicable interest and the restitution of property[16]. Monetary damages shall not be greater than the loss suffered by the investor and the Tribunal shall not award punitive damages. The costs of the proceedings must be borne by the unsuccessful party, unless such decision is unreasonable in which case adjustment is made proportionately. "This is presumably in order to facilitate the access to remedy for SME's" (Puccio, Harter 2017: 19), just as paragraph six which obliges the Joint Committee to "consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises". Finally, article 8.41 attributes binding force to the awards issued by the Tribunal.

Also Chapter Nine on trade in services could not have existed in a FTA under the Rome Treaty, at least not as a part falling under exclusive Union competence. It is, also in this case, art. 207 TFEU that includes all kinds of trade in services in the common commercial policy. "The Union is therefore exclusively competent to agree and implement trade agreements with provisions on services [thereby abandoning] the 'shared competence' concerning agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services which was contained in Article 133(6) subparagraph 2 TEC" (Krajewski 2012 : 300). However, article 207(4) TFEU provides for certain cases regarding agreements

[16] "in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution, determined in a manner consistent with Article 8.12" (art. 8.39(1) (b)).

containing provisions on services, commercial aspects of intellectual property and foreign investment in which the Council shall act unanimously.[17] According to Bungenberg, "the intention of the drafters [was] to bring the WTO agreements and negotiations within the exclusive competence of the Union" (2010: 132). Article 9.1 defines 'cross-border trade in services' as the supply of a service "from the territory of a Party into the territory of the other Party or in the territory of a Party to the service consumer of the other Party", thereby including only two of the four forms of trade in services identified by the GATS.[18] Article 9.2 regulates the scope of the Chapter, which applies to "a measure adopted or maintained by a Party affecting cross-border trade in services by a service supplier of the other Party"[19] and lists the measures to which it does not apply, in particular audio-visual services for the EU and cultural industries for Canada. Article 9.3 contains the national treatment clause which should be accorded reciprocally to service suppliers of both parties, while article 9.4 excludes certain formal requirements from representing a breach of the former and article 9.5 regulates the most-favored-nation treatment. Article 9.6 regulates the market access of service providers by listing measures that shall not be adopted or maintained by the parties because of limiting such access. In article 9.7 the parties list their reservations by declaring that the precedent provisions do neither apply to an existing non-conforming measure that is maintained by a Party as set out in Annex I nor to those measures set out in Annex II, which a party adopts or maintains. According to a scholar, this is new, since the most frequent solution in FTAs is to establish a positive list, containing the compromises in the area of services, together with a negative list containing the parties' reservations, while CETA contains two lists of explicit negative compromises (Segura Serrano 2015: 13). The last article of CETA's Chapter on trade in services, article 9.8, contains the denial of benefits clause which is the same as the one for investments only substituting 'investor' with

[17] Namely, "where such agreements include provisions for which unanimity is required for the adoption of internal rules" and "in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity" as well as "in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them."

[18] Excluding "supply by a service supplier of one Member, through commercial presence in the territory of any other Member" and "by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member" (Article 1(2) GATS). However, CETA's Chapter ten on "Temporary entry and stay of natural persons for business purposes" regards the forth form.

[19] And further specifies: "including measuers affecting: the production, distribution, marketing, sale, and delivery of a service; the purchase of, use of, or payment for, a service; and, the access to and use of, in connection with the supply of a service, services which are required to be offered to the public generally"

'service supplier' and 'investment' with 'services'. CETA also contains Chapters dedicated specifically to financial and international maritime transport services, as well as telecommunications but for reasons of space they cannot be analyzed further.

Another chapter that could not have been part of an FTA under Rome's provisions is Chapter 20 on intellectual property. In art.113 of the EEC Treaty intellectual property had not been included and it is only with Lisbon's art. 207 that it became part of the common commercial policy. However, the article's reference is to 'commercial aspects of intellectual property', a term which cannot be find elsewhere in international trade law. Anyway, there is a general agreement that "the term […] refers to the WTO's TRIPS agreement" (Krajewski 2012: 301). Furthermore, the article excluded the possibility, contained in art. 133(7) TEC, for the Council to extend the application of the CCP to non-commercial aspects of intellectual property. Therefore, according to a scholar, it is "appropriate to assume that Article 207 TFEU contains a dynamic reference to the TRIPS agreement" (ibidem). Art. 20.2 of CETA declares that the Chapter's provisions "complement the rights and obligations between the Parties under the TRIPS Agreement" and in art. 20.3 the parties commit to act in consistency with the *Doha Declaration on the TRIPS Agreement and Public Health*. Articles 20.7 to 20.12 regulate copyright and related rights listing the international agreements the parties shall comply with[20] and containing provisions on broadcasting and communication to the public, protection of technological measures and rights management information and liability of intermediary service providers. Articles 20.13 to 20.15 regulate trademarks including a list of the relevant international agreements[21] and provisions on the registration procedure and the exceptions to the rights conferred by a trademark. From articles 20.16 to 20.23, we can find the provisions on geographical indications defined as "an indication which identifies an agricultural product or foodstuff as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation or other characteristic of the product is essentially attributable to its geographical origin" and listed in Annex 20-A. According to art. 20.22, the latter can be amended by the CETA Joint Committee acting by consensus. The Sub-Section contains provisions on the

[20] Including the *Berne Convention for the Protection of Literary and Artistic Works*, the *WIPO Copyright Treaty*, the *WIPO Performances and Phonograms Treaty* and the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*

[21] Including the *Singapore Treaty on the Law of Trademarks* and *the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*

protection of geographical indications, homonymous GIs and exceptions. As a consequence of CETA's provisions, Canada will guarantee the protection of geographical indications with a regime that is very similar to the one applied in the EU (Segura Serrano 2015: 18) and "some prominent EU GIs such as *Prosciutto di Parma* and *Prosciutto di San Daniele* will finally be authorised to use their name when sold in Canada, which [has] not [been] the case for more than 20 years" (Borta 2014: 28). Articles 20.24 and 20.25 regulate design, including the accession to the *Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs* and articles 20.26 to 20.28 contain the provisions on patents under which the parties should comply with the *Patent Law Treaty*. Furthermore, the chapter provides for a sui generis protection for pharmaceuticals which takes effect at the end of the lawful term of a basic patent. Articles 20.29 and 20.30 regulate data protection related to pharmaceutical and plant protection products. Articles 20.32 to 20.42 contain the provisions on the enforcement of intellectual property rights disciplining entitled applicants, evidence, right of information, provisional and precautionary measures, remedies, and damages. The Chapter's last part, from article 20.43 to article 20.49 regards border measures regulating the infringement of IPR through counterfeit trademark goods, pirated copyright goods and counterfeit geographical indication goods. However, CETA does not include provisions on criminal enforcement such as those included in the Free Trade Agreement with South-Korea[22]. According to a scholar, CETA's provisions on IPR in large part reflect the corresponding ones of the EU regulating IPR in the internal market (Segura Serrano 2015: 18).

Also CETA's preamble contains references to areas an FTA under the provisions of the EEC Treaty would not have included. In fact, the parties reaffirm "their strong attachment to democracy and to fundamental rights as laid down in The Universal Declaration of Human Rights, done at Paris on 10 December 1948, and [share] the view that the proliferation of weapons of mass destruction poses a major threat to international security", recognize "the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation" and reaffirm "their commitment to promote sustainable development and the development of international trade in such a way as

[22] From articles 10.54 to 10.61 of the latter

to contribute to sustainable development in its economic, social and environmental dimensions". Chapter 22, then, regulates trade and sustainable development. Under the Treaty of Rome, "the purpose of the CCP was to ensure the functioning of the customs union, common market and later the internal market by ensuring the uniformity of external trade rules for all Member States" (Cremona 2017: 30). Today, the TFEU includes the common commercial policy among the EU external action and therefore obliges it to comply with the principles guiding the latter (artt. 205 and 207(1) TFEU)[23]. Those principles are contained in art. 3(5) as well as in article 21 of the TEU. The former prescribes that, in its relations with the wider world, the Union "shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter", while the latter states that "the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law". According to a scholar, "the binding linkage of the CCP to these principles and objectives points out that the EU does not only have a liberalization agenda [like it was the case with the Treaty of Rome], but that other objectives must also be taken into account in the negotiation of bilateral investment agreements" (Bungenberg 2010: 128). This is just what has happened with CETA's preamble and its Chapter 22 on sustainable development. In article 22.1 the parties recall a series of international agreements[24] and "reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development […]". Furthermore, the parties consider trade-

[23] For a detailed analysis of the effects of these provisions see Dimopoulos, A. 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy'. *European Foreign Affairs Review* 15(2), 153-170

[24] The *Rio Declaration on Environment and Development* of 1992, *the Agenda 21 on Environment and Development* of 1992, the *Johannesburg Declaration on Sustainable Development* of 2002 and the *Plan of Implementation of the World Summit on Sustainable Development* of 2002, *the Ministerial Declaration of the United Nations Economic and Social Council on Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development* of 2006, and the *ILO Declaration on Social Justice for a Fair Globalisation* of 2008

related labor and environmental issues as part of a global approach to trade and sustainable development and therefore include Chapters 23 (Trade and Labour) and 24 (Trade and Environment) in order to, *inter alia*, “promote sustainable development through the enhanced coordination and integration of their respective labour, environmental and trade policies and measures” and to “promote the full use of instruments, such as impact assessment and stakeholder consultations, in the regulation of trade, labour and environmental issues”. Given the limited length of this section, these two chapters cannot be analyzed in detail but will shortly be looked at below. Article 22.3(2) states that “each Party shall strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection” giving a list of possible actions such as encouraging the use of eco-labelling and fair trade schemes, of voluntary best practices of corporate social responsibility by enterprises like the OECD Guidelines for Multinational Enterprises and promoting the development, establishment, maintenance or improvement of environmental performance goals and standards. Article 22.4 regulates the Committee on Trade and Sustainable Development established, among other specialized committees, under article 26.2(1)(g), which shall oversee the implementation of Chapters 22,23 and 24, “including cooperative activities and the review of the impact of [the] agreement on sustainable development”. Furthermore, following art. 22.5, “the Parties shall facilitate a joint Civil Society Forum composed of representatives of civil society organisations established in their territories […] in order to conduct a dialogue on the sustainable development aspects of [the] Agreement”. As far as the Chapter on Trade and Labour is concerned, the parties commit to respect the “ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 adopted by the International Labour Conference at its 86th Session” (art. 23.3) as well as the ILO Decent Work Agenda and the ILO Declaration on Social Justice for a Fair Globalization of 2008. In article 23.10, the Chapter establishes a particular dispute settlement mechanisms to be exclusively applied to disputes arising under the Chapter which is based on the action of a Panel of Experts. With regard to the Chapter on Trade and Environment, the parties reaffirm their commitment “to effectively implement in [their] law and practices, in its whole territory, the multilateral environmental agreements to which [they are] party” (art. 24.4) without however specifying these agreements. The Chapter further contains provisions on the access to remedies and procedural guarantees in the

case of violations of environmental law. Moreover, in article 24.9, the parties declare themselves "resolved to make efforts to facilitate and promote trade and investment in environmental goods and services" and articles on trade in forest and fisheries and aquaculture products are included. Also for this Chapter, article 24.15 establishes a specific dispute settlement mechanism based on a Panel of Experts.

In conclusion, there are many economic reasons for which CETA can be seen as an example of success of the common commercial policy as compared to the Treaty of Rome. Firstly, because "it represents the largest free trade agreement in the wealthy industrialized world to date, [referring] to the sizes of the combined Canadian market and EU Single Market, as well as the scope of the areas under agreement. The estimated value of combined international trade [in goods in 2012 was] approximately 61.6 billion [Euro]" (D'Erman 2016: 90) while "the value of bilateral trade [in] services amounted to approximately 26 billion" (Borta 2014: 19). Secondly, Canada is the most developed country with which the EU has concluded a Free Trade Agreement of the new generation[25], with the declared objective of guaranteeing the equality of conditions for European operators compared to those guaranteed to NAFTA members' since 1994 (Segura Serrano 2015: 22). Finally, CETA will probably raise the trade volume in goods and services by 22.9 per cent, meaning 25.7 billion Euro, and could lead to an increase in the EU's gross domestic product of 11.6 billion Euro a year (Hummer 2015: 17). According to a scholar, "CETA represents a watershed in international trade agreements […] for the breadth and width of areas subject to barrier removal and deregulation [and] for the precedent set in transatlantic cooperation" (D'Erman 2016: 97). For the two countries, the agreement is important because, in 2012, for Canada the EU was the second most important trading partner accounting for approximately 9.5 per cent of Canada's total external trade, while for the EU, Canada "was the 12th most important trading partner […], with 1,8 per cent of the EU's total external trade" (Borta 2014: 19) and, more important, "the EU is the second largest source of foreign direct investment in Canada and the second largest destination for Canadian investment abroad" (ibidem: 26).

CETA also illustrates the enormous development of the common commercial policy since the Treaty of Rome by demonstrating the extension of its scope from the sole

[25] For other examples of FTAs of the new generation see Marrella, F. and De Vido, S. (2014) 'Sugli investimenti diretti esteri regolati dai nuovi accordi commerciali dell'Unione europea'. *Ricerche giuridiche* 3(1), 17-26

field of goods to those of services, commercial aspects of intellectual property and foreign direct investment and the inclusion of non-commercial aspects, such as human rights and sustainable development, within its objectives. Also the enhanced role of the European Parliament in common commercial policy matters, increasing the democratic legitimization of the Union's competence, can be seen as a true success.

Anyway, it seems useful to take a quick look at the statistics as well, in order to better illustrate the policy's success. Unfortunately, only data referring to recent years are available[26] but this is only confirming that the CCP's success continues until today. The value of the Union's exports in goods passed from 945.2 billion Euro in 2004 to 1743.2 billion in 2016, a plus of 84.4 per cent, while that of services increased from 366.7 billion Euro in 2004 to 819.8 billion Euro in 2016, 123.6 per cent more. The share of trade in goods and services of the Union's GDP passed from 24.8 per cent in 2004 to 33.5 per cent in 2016 while that of its current account balance increased from 0.5 per cent in 2004 to 2.4 per cent in 2016. As far as foreign direct investment is concerned, the inflows in the European Union passed from 58.3 billion Euro in 2004 to 466.5 billion Euro in 2015, increasing by an incredible 700.2 per cent, while the outflows grew from 142.3 billion Euro in 2004 to 537.2 billion in 2015, a plus of 277.5 per cent. From this brief glance at the recent development of EU's trade and the aforementioned facts, it should be clear that its common commercial policy has clearly been and continues to be a success. However, the extension of the policy's scope did not go without complications, one of them is analyzed bellow.

However, what also has to be mentioned here is the fact that Free Trade Agreements like CETA are often and highly criticized. This is especially the case for TTIP, the negotiations for which are currently on hold, the last negotiation round having been held in October 2016.[27] The latter is criticized by consumers, environmentalists and trade unions because of its provisions on the dispute solution in the area of investments, intellectual property, food safety and climate; as well as by US producers, especially of chemical products and pesticides, which see a threat for their markets in the Commission's action (Marrella, De Vido 2014: 23). Furthermore,

[26] For all following data see European Commission (2015) *DG Trade Statistical Pocket Guide*. Luxembourg: Publications Office of the European Union for the data of 2004 and European Commission (2017) *DG Trade Statistical Guide*. Luxembourg: Publications Office of the European Union for the data of 2015/2016

[27] See <http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#negotiation-rounds> [accessed 5 February 2018]

a report published by the Seattle to Brussels Network describes TTIP as a project that "will attempt to reverse social and environmental regulatory protections, redirect legal rights from citizens to corporations, and consolidate US and European global leadership in a changing world order" (Bizzarri 2017: 4)

1.2.2. The Problem with BITs

Article 30.8 CETA on the 'termination, suspension or incorporation of other existing agreements' provides for the termination of all bilateral investment treaties existing between the EU Member States and Canada. The problem of the incompatibility of Member States' BITs with Union law arose with the entering into force of the Lisbon Treaty, since, as already mentioned above, the latter transferred the external competence for foreign direct investments from Member States to the EU. The question of incompatibility arises with regard to third-country or extra-EU BITs, intra-EU BITs (those concluded between two Member States)[28] and BITs by the EU with third countries[29], but for the purpose of this section we will concentrate on the former. "The total number of BITs between EU Member States and a non-EU state […] is believed to have exceeded 1.300, nearly half of the total number of BITs in the world" (Shan and Zhang 2011: 1068). This data alone should be enough to illustrate the dimension of the problem. The relevant provision regarding this argument is art. 351 TFEU which states that "the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties". However, "to the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude". The first paragraph of this provision is "commonly seen as an expression of the fundamental principle of *commitment to international law* […] that the Union has to adhere to" and

[28] For examples see Marrella, F. (2013) 'Unione europea ed investimenti diretti esteri'. In *L'Unione europea a vent'anni da Maastricht: verso nuove regole*. ed. by Carbone, S. M. Napoli: Editoriale Scientifica, 107-140

[29] For an analysis of those concluded by the EU with Latin American countries see Marrella, F. and De Vido, S. (2016) 'On the Possible (Re-)Negotiation of BITs by the European Union and Its Potential Impact on Latin America'. In *International Investment Law in Latin America/Derecho Internacional de las Inversiones en América Latina: Problems and Prospects/Problemas y Perspectivas*. ed. by Tanzi, A., Asteriti, A., Polanco Lazo, R. and Turrini, P. Leiden: Koninklijke Brill KV, 497-523

it guarantees that “Union law is in accordance with the public international law principle *pacta sunt servanda*” (Terhechte 2011:84). The second paragraph of article 351 TFEU, on the other hand, “entails and obligation of the Member States to reach amendments of their agreements-in cases of extreme incompatibility with Union law this can mean terminating the agreement in accordance with the Vienna Convention on the Law of the Treaties” (ibidem: 86). However, when Member States later transfer powers to the Union, as is the case with foreign direct investment, the provision’s wording makes a direct application impossible. Nevertheless, “it has been generally agreed upon among scholars […] that the provision remains applicable even if older national treaties come into conflict with newer primary Union law” (ibidem: 85), applying article 351 TFEU analogically. This is true also because “the obligation under Article 251 TFEU is an expression of the duty of loyal cooperation formulated in Article 4(3) TEU [and] it is that duty which explains why Member States are obliged to amend agreements that are incompatible with the Treaty” (Bungenberg 2010: 145/146). According to a scholar, the Treaty of Lisbon does not provide for the right of Member States to maintain their existing agreements and “neither does [it] contain a transitional period” (Burgstaller 2011: 67). Therefore, many authors discussed the possible future of national BITs, until EU Regulation No 1219/2012 put a, temporary, end to speculations.[30]

The latter established transitional agreements for bilateral investment agreements between Member States and third countries. According to this regulation, Member States should “notify the Commission of all bilateral investment agreements with third countries signed before 1 December 2009 or before the date of their accession […] that they either wish to maintain in force or permit to enter into force under this Chapter” by 8 February 2013 or within 30 days of the date of their accession to the Union (art.2). Such agreements could then be maintained or enter into force until a bilateral investment agreement between the Union and the same third country would

[30] For said discussions see better Burgstaller, M. (2011) ‘The Future of Bilateral Investment Treaties of EU Member States’. In *European Yearbook of International Economic Law: International Investment Law and EU Law*. ed. by Bungenberg, M., Griebel, J. and Hindelang, S. Berlin: Springer, 55-78; Eilmansberger, T. (2009) ‘Bilateral investment treaties and EU law’. *Common Market Law Review* 46(2), 383-429; Ghouri, A. A. (2010) ‘Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options’. *European Law Journal* 16(6), 806-830; Terhechte, J. P. (2011) ‘Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member States’ Bilateral Investment Treaties’. In *European Yearbook of International Economic Law: International Investment Law and EU Law*. ed. by Bungenberg, M., Griebel, J. and Hindelang, S. Berlin: Springer, 79-94

enter into force (art.3). According to a scholar, this provision's legitimacy is doubtful because the correct solution in such cases would not be the automatic extinction of the former BIT but a coordination between the provisions of the two Treaties until the first extinguishes *proprio vigore*, meaning through the decision of its parties (Marrella 2013:135). The Commission will evaluate whether provisions of the notified agreements "constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries" (art.5) and if this is the case, the Commission should consult with the Member State concerned in order to resolve the incompatibilities (art.6). The regulation also contains provisions for the case a Member State intends amending an existing or concluding a new bilateral investment agreement. The latter should then notify the Commission of its intentions (art.8) and the Commission should authorize it to open formal negotiations with a third country under four conditions: first, such negotiations must not "be in conflict with Union law other than the incompatibilities arising from the allocation of competences between the Union and its Member States"; secondly, they should not be 'superfluous', having the Commission either submitted or decided to submit a recommendation to open negotiations with the same country; thirdly, such negotiations must not "be inconsistent with the Union's principles and objectives for external action" nor, lastly, "constitute a serious obstacle to the negotiation or conclusion of bilateral investment agreements with third countries by the Union" (art.9(1)). The Member State concerned might also be asked by the Commission to include or remove any clauses in order to ensure consistency with the Union's investment policy or compatibility with Union law (art.9(2)). Moreover, the Member State concerned must keep the Commission informed of the negotiations and the latter may even request to take part therein (art.10). However, here, the position of the Commission appears similar to that of an observer, since the contracting parties cannot but remain the Member State and the third State (Marrella 2013: 137). Once the Member State successfully concludes its negotiations it shall notify the Commission thereof, and the latter may then give its authorization to sign and conclude the agreement (art.11). A special case are agreements signed by the Member States between 1 December 2009 and 9 January 2013 which can be maintained in force or permitted to enter into force if the Member State concerned notifies the Commission of such intentions and "the Commission finds that [the agreement] fulfils the requirements of Article 9(1) and (2)" (art.12). In any case,

bilateral agreements maintained in force, amended or concluded according to the Regulation will remain in force only until being substituted by an agreement of the EU with the third state. However, following Opinion 2/15, such latter agreements would have to be concluded as mixed agreements as soon as they contained provisions on portfolio investments and ISDS. According to a scholar, this approach of a gradual realization of the TFEU through an interim solution represents a 'golden bridge' between the Member States' obligations under international law and the Union's legal competence. The regulation, therefore, lies within what is legally possible, considers all interests and realizes the best balance between different positions (Bings 2014: 29).

Another problem relating to BITs is the fact that the majority contain provisions on ISDS, which entail the problem of the autonomy of the EU legal order mentioned in the precedent section. Furthermore, there are also external limits to the EU being respondent in an ISDS case, such as the fact that "investor-state arbitration under the ICSID Convention is open only to states that are parties to the ICSID Convention" and, since the EU is not a state, for it to accede to the ICSID dispute settlement, a revision of the Convention would be necessary which is very unlikely to happen (Reinisch 2011: 53). According to a scholar, "an investor-to-state arbitration system is only possible in a significantly modified, "communitarized" form, which means that it has to be fully integrated into the preliminary ruling system" (Lavranos 2013: 218). This is to say that arbitral tribunals should be considered to satisfy the conditions of a 'domestic court' and have the right to ask for a preliminary ruling pursuant to art.267 TFEU. Hence, according to him, an ISDS system would be possible only "under the auspices of the ECJ with the precondition that [it] retains ultimate, full control over the interpretation and application of EU law" (ibidem). However, another author is of the contrary opinion stating that "if one wants to establish a proper and well-functioning investment arbitration mechanism the latter has to be divorced from any procedural and juridical link with EU law and, more importantly, with the Court of Justice of the EU", in order to maintain the independent character that represents the advantage of arbitral tribunals under BITs and guarantees legal certainty to investors (Rovetta 2013: 231). However, whether such a proposal would be accepted by the ECJ remains at least disputable. Maybe CETA's ICS can function as an example for a possible multilateral solution to this problem, envisioned also in art.8.29 of the latter.

Another uncertainty regarding ISDS in cases of an IIA concluded by the EU, is the determination of the respondent and its financial responsibility: EU or Member State? This question was resolved by the European Parliament and the Council through EU Regulation No 912/2014 'establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party'.

The Regulation applies to ISDS "conducted pursuant to an agreement to which the Union is party, or the Union and its Member States are parties, and initiated by a claimant of a third country" (art.1). The Regulation distinguishes between financial responsibility and acting as the respondent in an ISDS. According to article three, "the Union shall bear the financial responsibility arising from treatment afforded by the institutions, bodies, offices or agencies of the Union" while "the Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State" (art.3(1)(a)(b)). However, "the Union shall bear financial responsibility arising from treatment afforded by a Member State where such treatment was required by Union law" (art.3(1)(c)). The Member State concerned shall further bear the financial responsibility when it has accepted potential financial responsibility, "where the Union acts as the respondent in any disputes in which a Member State would be liable to bear all or part of the potential financial responsibility" (art.12) or enters into a settlement "where the Union is the respondent in a dispute exclusively concerning treatment afforded by a Member State" (art.15). "The Union shall act as the respondent where the dispute concerns treatment afforded by the institutions, bodies, offices or agencies of the Union" (art.4), while the Member State shall act as the respondent in "disputes concerning, fully or partially, treatment afforded by [itself]" (art.5). However, the Member State may decide not to act as the respondent (art.9(1)(a)), in which case the Union would act as the respondent, or the Commission may decide "that the Union is to act as the respondent where […] the Union would bear all or at least part of the potential financial responsibility arising from the dispute […] or the dispute also concerns treatment afforded by the institutions, bodies, offices or agencies of the Union" (art.9(2)). Furthermore, "the Commission may decide […] that the Union is to act as the respondent where similar treatment is being challenged in a related claim against the Union in the WTO, where a panel has been established and the claim concerns

the same specific legal issue, and where it is necessary to ensure a consistent argumentation in the WTO case" (art.9(3)). Either party, Member State or Commission, conducting arbitration proceedings, must act in collaboration with the other and keep it informed of the steps of the proceedings (art. 10 and 11). A final award decided against the Union shall be paid by the Commission, "except where the Member State concerned has accepted financial responsibility" (art.18). "Where the Union acts as the respondent […] and the Commission considers that the award or the settlement or costs arising from the arbitration should be paid, in part or fully by the Member States concerned", it should enter into negotiations with the Member State concerned "to seek agreement on the financial responsibility" (art.19(1),(2)). "Within three months of receipt by the Commission of the request for payment [of the above mentioned], the Commission shall adopt a decision addressed to the Member State concerned, determining the amount to be paid by that Member State" (art.19(3)). However, "if the Member State concerned objects and the Commission disagrees […], the Commission shall adopt a decision […] requiring the Member State concerned to reimburse the amount paid by the Commission, together with interest" (art.19(4)). The money paid by the Member State concerned "shall be considered as internal assigned revenue […] [and] may be used to cover expenditure resulting from agreements concluded pursuant to Article 218 TFEU providing for [ISDS] or to replenish appropriations initially provided to cover the payment of an award or a settlement or costs arising from the arbitration" (art.21). This procedure is relevant also for art.8.21 CETA mentioned above.

Hence, the European Union needs to develop a common investment policy in order to be able to negotiate new investment agreements with third countries substituting the existing BITs of its Member States. As early as November 2006, the Commission proposed a "Minimum Platform on Investment"[31] sending a signal "that it wants to acquire all the competences needed to negotiate investment agreements" (Bungenberg 2010: 140). This Platform is comparable to a national Model BIT and serves "as a standardized negotiation proposal for ongoing and future [FTA] negotiations with third countries. Its purpose is to prevent the Commission and Member States from having to agree on an investment chapter every time a potential PTA is under negotiation" (ibidem: 145). However, "the Lisbon Treaty has achieved

[31] Never made public by the Commission

only half a success for a common investment policy (CIP)" because the Union has exclusive competence only for the conclusion of investment agreements solely regarding foreign direct investment, since provisions on portfolio investment require mixed agreements to be concluded by both the Union and its Member States (Shan and Zhang 2011: 1071). According to an author, "if the EU wants to become a global player in investment politics, it will need the capacity to conclude international investment agreements of a high quality" meaning without differentiating between foreign direct and indirect investment and thereby "being able to conclude pure BITs without its Member States being able to veto […]" (Bungenberg 2010: 150). Nevertheless, for Burgstaller, "an enhanced EU competence [in investment] is to be welcomed because the negotiating power of the Commission is likely to be stronger than that of individual Member States" and, in fact, "the rationale for including investment into the CCP was to strengthen the EU as an actor in multilateral negotiations on foreign investment" (2011: 69). Furthermore, the CCP's extension to investment certainly represents efficiency gains for third states, since the investment treaties they conclude will cover 28, soon 27, Member States at once, and it will reduce distortions between EU investors in third states by substituting the different national BITs with single EU BITs. Moreover, a CIP will increase the EU's attractiveness as a destination for FDI from third states by creating "an equal playing field for foreign investors in the EU" (ibidem: 69-70).

In conclusion, the inclusion of investment into the CCP surely represents a success of that policy, since it strengthens the EU's international position in a world economy in which investments play an ever more important role[32]. Furthermore, the centralization of the competence in the hands of the EU is of fundamental importance, in order to promote the interests of the single States more efficiently (Marrella, De Vido 2014: 18). However, its limitation to foreign direct investments represents an element of weakness if compared to other global actors, such as the United States (Bungenberg 2010: 148). In the future indirect investments should either be included within the EU's exclusive competence as well or a solution has to be found, in order to make the negotiation of IIAs fast and easy, even if it involves the

[32] As can also be deduced from the data illustrated in the precedent section

conclusion of mixed agreements, maybe by improving the Commission's "Minimum Platform on Investment"[33].

2. The Free Movement of Workers

2.1. In the Treaty of Rome…

The first mention of the free movement of workers in the Treaty of Rome can be found in article three which includes between the activities of the Community, *inter alia*, "the abolition, as between Member States, of the obstacles to the free movement of persons, services and capital". The latter constitutes also the third Title of Part two, whose first Chapter refers to workers. Within this Chapter, article 48 regulates that "the free movement of workers shall be ensured within the Community not later than at the date of the expiry of the transitional period", which in article eight of the Treaty is established for a duration of twelve years. According to art.48, such free movement should imply the abolition of discriminations based on nationality between the Member States' workers "as regards employment, remuneration and other working conditions" and includes the right to: "accept offers of employment actually made, move about freely for this purpose within the territory of Member States, stay in any Member State in order to carry on an employment […], and to live […] in the territory of the Member State after having been employed there", but excludes the application of its provisions to employment in the public administration. Already the Treaty on the ECSC included a provision which invited the Member States to "remove any restriction based on nationality upon the employment in the coal and steel industries of workers who are nationals of Member States and have recognized qualifications [in those industries]" and "prohibit any discrimination in remuneration and working conditions between nationals and migrant workers" (art.69). The Treaty of Rome, however, extends this right to all types of workers independently of their sector of occupation. Furthermore, article 49 provides that the Council should, *inter alia*, ensure "close collaboration between national labor

[33] Also see the Commission's Communication of 7 July 2010 'Towards a comprehensive European international investment policy', available at <http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf> (accessed 14 November 2017)

administrations" and set up "appropriate machinery for connecting offers of employment and requests for employment".

2.2. …and 60 years later

60 years later, according to the Spring 2017 Standard Eurobarometer, the free movement of persons is one of the most widely supported policies of the EU and seen as an achievement, 81% of the interviewed declared to support free movement. Since, on the other hand, only 42% declared to have trust in the European Union in general, such a policy has necessarily to be seen as a success. In the following, free movement will be analyzed through the European provisions currently in force in order to explain how they make it a success if compared to the provisions of Rome.

2.2.1. Directive 2004/38/EC

Directive 2004/38/CE on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, also called "the Citizenship Directive", has simplified and rationalized the precedent EU acts, which treated the various figures of worker, self-employed, student and inactive migrants separately, by disciplining the right of the Union's citizens and their families to move and reside freely in the territory of the Member States in a single legislative text (Tesauro 2012: 446). According to some scholars "the basic idea behind the proposal for a directive was to equate movement within the Union with merely changing one's residence within a Member State" (Condinanzi *et al*.2008: 34).

Recital three of the Directive's Preamble states that "Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence". The concept of 'Union citizenship' is new if compared to the Treaty of Rome and was introduced with the Treaty of Maastricht. Currently, it can be found in article 9 TEU which provides that "every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship", and article 21 TFEU states that "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect". Hence, even if subject to limitations and conditions, today every person citizen of a Member State

has the right to circulate and reside freely in the territory of the European Union. This is a big step forward with respect to the Treaty of Rome which had included only the free movement of workers, the right of establishment and the free movement of services thereby limiting such rights to those persons exercising an economic activity. In fact, according to article one, the Directive governs the right of free movement and residence and the right of permanent residence in the territory of the Member States of Union citizens and their family members as well as the limits placed on these rights. What is also new is that the definition of 'family member' relevant for the Directive includes, in addition to the spouse, the direct descendants under the age of 21 or dependents and the dependent direct relatives in the ascending line, also the "partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage […]" (art.2(2)). Furthermore, according to article 3(2), the host Member States shall also facilitate entry and residence of any other family members with special characteristics[34] and "the partner with whom the Union citizen has a durable relationship, duly attested". Article four and five regulate the right of exit and entry from and to the territory of a Member State, which depends only on a valid identity card or password held by Union citizens and a valid passport held by their family members who are not nationals of a Member State. According to some scholars, "it is not the physical presentation of the document but citizenship that is the sole condition of entry [and] the mere fact [that a person] is not in possession of an identity document cannot amount to sufficient reason to deny him or her entry" (Condinanzi *et al.* 2008: 80). This is exactly what article 5(4) regulates.[35]

Article six provides that all Union citizens, as well as their family members accompanying them, shall have the right of residence on the territory of another Member State for a period of up to three months subject only to the holding of a valid document. In order to reside beyond those three months, Union citizens have to: be

[34] Irrespective of their nationality, they do not fall under the definition in point 2 of Article 2 and "in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen".

[35] By providing that "where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence"

workers or self-employed persons in the host Member State; or have sufficient resources for themselves and their family members to not become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance; or be enrolled at an establishment, accredited or financed by the host Member State following a course of study and have comprehensive sickness insurance as well as sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State; or be family members accompanying or joining a Union citizen who satisfies the precedent conditions. This right also extends to family members accompanying an Union citizen who are third country nationals (art. 7). According to article eight, Member States cannot define a fixed amount which they regard as 'sufficient resources' but must take into account the personal situation. If a Union citizen intends to reside in another Member State for periods longer than three months, "the host Member State may require Union citizens to register with the relevant authorities" (art. 8(1)). For third country nationals who are family members of a Union citizen, article ten introduces the "Residence card of a family member of a Union citizen" they need to apply for if they intend to reside in a Member State together with the Union citizen for more than three months.

According to article 12, in the case of death or departure from the host Member States of the Union citizen, his or her family members who are Union citizens themselves maintain the right to reside in the latter; however, in order to obtain the right of permanent residence, they have to satisfy the conditions of article seven illustrated above. If the Union citizen dies, also his or her family members without Union citizenship maintain the right of residence if, at the moment of the death, they had been residing for at least one year as family members in the host Member State and before acquiring the right of permanent residence they have to fulfil various requirements.[36] Article 13 regulates the same rights in the case of divorce, annulment of marriage or termination of registered partnership with the Union citizen. The provision for Union citizens is the same as in the case of departure or death, while third country nationals can maintain their right of residence only in specific cases

[36] They should be "able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements".

listed in the second paragraph. According to article 14, the right of residence shall be retained by Union citizens and their family members "as long as they do not become an unreasonable burden on the social assistance system of the host Member State". However, "an expulsion measure shall not be the automatic consequence of [their] recourse to the social assistance system of the host Member State" (art.14(3)). In any case, it might be difficult to define 'an unreasonable burden on the social assistance system'[37]. Furthermore, Union citizens and their families may in no case be expelled if the former are workers or self-employed persons or entered the territory of the host Member State in order to seek employment as long as they "can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged" (art. 14(4)). This provision shows that, even if the right to circulate and reside in the Member States has been extended to all EU citizens, workers nevertheless enjoy a special position.

Article 16 introduces the right of permanent residence which Union citizens acquire after residing legally for a continuous period of five years in the host Member State without being subject to any self-sufficiency conditions anymore. Moreover, this right also extends to family members "who are not nationals of a Member State" legally residing with the Union citizen for the same period. According to an author, by establishing the right of permanent residence, "article 16 of the Directive created a significant new status in EU law" (Shuibhne 2013:77). Furthermore, "Directive 2004/38 generates quasi-autonomous rights for third country national family members in certain circumstances", because, while the rights of entry, residence, and movement are dependent on the family ties with a Union citizen, those regulated in the cases of articles 12 and 13 are independent rights of residence and after having acquired the right of permanent residence, they are not in need of the family connection anymore (ibid.: 68). Hence, a right that was intended to support the formation of the Single Market by facilitating the movement of workers, has not only led to the extension of that right to all citizens of the Member States, now Union citizens, but also to third country nationals. This should clearly be seen as a success of the policy of free movement. If article 16 regulates the general rules for the right of

[37] For the Directive's relation with the welfare systems of the Member States see Halbronner, K. (2006) 'The EU Directive on Free Movement and Access to Social Benefits'. *CESifo DICE Report* 4, 8 -13; El-Cherkeh, T., Steinhardt, M. and Straubhaar, T. (2006) 'Did the European Free Movement of Persons and Residence Directive change migration patterns within the EU? A first glance'. *CESifo DICE Report* 4, 14-20; Ochel, W. (2006) 'The EU Directive on Free Movement-a Challenge for the European Welfare State?'. *CESifo DICE Report* 4, 21-29

permanent residence, article 17 provides for a preferential treatment for workers, in derogation of the existing general rules. In fact, workers and self-employed persons shall obtain the right of permanent residence also before the completion of a continuous period of five years of residence in the case of achievement of retirement age or early retirement subject to specific conditions[38], incapacity to work or border-worker conditions. The family members of a Union citizen satisfying the precedent conditions acquire themselves the right or permanent residence if residing with him or her. Article 17(4) regulates the cases in which the worker or self-employed person dies while still working but before acquiring permanent residence status. Recital 17 of the Directive's preamble describes the reasons behind the right of permanent residence by saying that "enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union". According to an author, "implicit in this statement is the claim that mobile Europeans are a population crucial for tempering nationalisms and embodying the vision of a united Europe as the forerunner of a cosmopolitan society" (Recchi 2015: 45). In fact, free movement across Member States, associated with the status of European citizen, makes individuals more aware of "the role of the European institutions and of the potentially ampler life chances created by EU policies, thus strengthening the sense for belonging to Europe" (ibid.) and representing a "powerful driver of European integration 'from below'" (ibid.: 44).

Article 24 contains the Directive's only article referring to equal treatment by providing that "all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty" and extends such benefit also to their family members. However, paragraph two specifies that "the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence" or the longer period needed by job seekers.

Article 27 provides that the Member States are allowed to restrict the right of movement and residence on grounds of public policy, public security or public health. However, such ground must not be invoked to serve economic ends, such as the

[38] Namely, having worked in that Member State for at least the preceding 12 months and having resided there continously for more than three years

labor market policy applied by the Member State to decrease unemployment or measures intended to improve a demographic situation (Junevičius, Daugėlienė 2016: 60). Furthermore, such measures "shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures" (art.27(2)). Therefore, "the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" (ibid.). Recital 23 of the Directive's preamble further defines the principle of proportionality, which means that one should take account of "the degree of integration of the persons concerned, the length of their residence in the host Member States, their age, state of health, family and economic situation and the links with their country of origin" but, according to two scholars, also of "the level of social danger due to the presence of the person concerned in the territory of that Member State, the nature of the violence, its frequency, the common danger and harm made and the time elapsed since the actions performed by the person concerned." (Junevičius and Daugėlienė 2016:63). While the Court defined the principle as meaning that "the measure must be appropriate for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it" (Ristea 2011: 730). Article 27(4) regulates that "the Member State which issued the passport or identity card shall allow the holder of the document who has been expelled […] from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute" thereby constituting "the Community expression of the principle of international law, under which a state cannot refuse its own citizens the right to access and the right of residence on its territory" (Ristea 2011: 735).

Article 28 provides for the protection against expulsion, at the same time representing another innovation of Directive 2004/38/EC, introducing three levels of protection against expulsion: "a general level of protection for all individuals covered by EU law, an enhanced level of protection for individuals who have already gained the right of permanent residence on the territory of a Member State, and a super-enhanced level of protection for minors or for those who have resided for ten years in a host state" (Ristea 2011: 731). This reflects recital 24 of the Directive's preamble which provides that "the greater the degree of integration of Union citizens and their

family members in the host Member State, the greater the degree of protection against expulsion should be" and is "based on the assumption that the level of integration depends on the amount of time already spent living in the country" (Junevičius, Daugėlienė 2016: 62). While to the first level of protection apply the general rules illustrated above, individuals with the right of permanent residence may be expelled only on serious grounds of public policy or public security. An expulsion of the third category of persons, those residing in the Member State for ten years and minors, can be decided only on imperative grounds of public security, except if the expulsion is necessary for the best interests of the child. It is important to note that the concept of public security differs from that of public policy "in that it is more restrictive and most likely confined to the protection of the local community from subversive, destabilizing behavior" (Condinanzi et al. 2008: 98). Also the distinction between 'serious' and 'imperative grounds' has to be made because the latter "supposes not only the presence of danger to public security but also the fact that the level of this threat is extremely high" (Junevičius, Daugėlienė 2016: 62). Article 29 specifies that the diseases included in the concept of public health shall be those "with epidemic potential as defined by the relevant instruments of the [WHO] and other infectious diseases or contagious parasitic diseases" if subject of protection provisions applying to the host Member State's nationals. Furthermore, if a disease occurs after three months from the arrival, it cannot be used as ground for expulsion.

Individuals concerned of expulsive measures shall be notified thereof in writing and such notification shall also specify "the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, […] the time allowed for the person to leave the territory of the Member State" (art. 30). The latter must be not less than one month after the date of the notification, save duly substantiated cases of urgency. Article 31 grants the persons concerned access to judicial and, where appropriate, administrative procedures in the host Member State for reasons of appeal or review of decisions taken against them. Paragraph four guarantees the right to a fair trial by disciplining that Member States are not allowed to prevent the individual from submitting his or her defense in person.[39] According to art.32, by putting forward arguments to establish that there has been a material

[39] "except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory"

change in the circumstance which justified the decision ordering an exclusion, persons concerned may submit an application for lifting the exclusion after a reasonable period and in any case after three years from enforcement of the final exclusion order. Finally, article 35 regulates that “Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience”. According to Ziegler, cited by an author, “fraud refers to a deception about a condition of a right being met, where the condition is not formally fulfilled whereas abuse might be taken to refer to the situation where *pro forma* requirements are met, giving otherwise rise to a right, but there is a flaw in the motive or purpose”, the former represented by the example of forgery of a marriage certificate, the latter by the example of marriages of convenience (Shuibhne 2013: 96).

After this detailed analysis of Directive 2004/38/EC, it should be clear why its provisions represent the success of the EU’s policy of free movement if compared to the Treaty of Rome. The most important aspect is surely that the right of movement and residence has, since 1957, been extended to every citizen of the Member States, now having also Union citizenship following the modifications of the Treaty of Maastricht. This surely fostered and is fostering the creation of a population that feels and thinks more European. In fact, according to a project cited by Recchi, “EU movers show stronger attachment to the EU, have a decidedly more positive image of it and perceive themselves as better informed about European policies and institutions than people who continue to live in their home country” (2015: 47). At this point it has to be mentioned that the movement of EU citizens has obviously been facilitated by the Schengen Agreement signed in 1985 between Germany, France, and the Benelux and followed in 1990 by the Schengen Convention, which became part of the *acquis communautaire* with the Treaty of Amsterdam. “The Schengen Convention was the first agreement to abolish controls on people at the internal borders of the signatories, to harmonize controls at the external frontiers of the 'Schengen area' and to introduce a common policy on visas and other accompanying measures like police and judicial cooperation” (Răvaş 2009: 238). However, returning to the Directive, workers continue to enjoy a preferential treatment also within its framework and it even confers rights to third country nationals – further elements of the success of this policy. As far as numerical and economic success of the latter is

concerned, I relegate to the Chapter's section on statistics. We will continue to analyze the policy of free movement by taking a look at a Regulation which regards workers more specifically.

2.2.2. Regulation (EU) 492/2011

Regulation (EU) No 492/2011 on freedom of movement for workers within the Union has its legal basis in art.46 TFEU, which contains the provisions for the ordinary legislative procedure in order to realize freedom of movement for workers, as defined in article 45 TFEU. The latter includes the same provisions as article 48 TEEC except for, obviously, not nominating the transitional period anymore but providing that "freedom of movement for workers shall be secured within the Union".

The first Chapter of the Regulation regulates "employment, equal treatment and workers' families" and article one grants every national of a Member State, irrespective of his place of residence, the same right to take up an activity within the territory of another Member State, in particular, with the same priority as nationals of that State. Furthermore, any employer and any national of a Member State are granted the right to exchange job applications and offers and perform contracts without any discrimination resulting therefrom (art.2). Article three declares inapplicable such provisions and actions of Member States which discriminate Member States' nationals in their access to employment if compared to the treatment of their own nationals, including indirect discrimination. Moreover, Member States' provisions which restrict by number or percentage the employment of foreign nationals at any level shall not apply to Union citizens (art.4). Also articles five and six contain further provisions expression of the principle of non-discrimination on the grounds of nationality introduced by article seven of the Treaty of Rome. This principle applies to the conditions of employment and work as well, "in particular as regards remuneration, dismissal, and should [the foreign Union citizen] become unemployed, reinstatement or re-employment" (art.7). The worker shall also enjoy the same social and tax advantages as national workers (art.7(2))[40] and equal treatment shall apply also to the access to training in vocational schools and

[40] See in this respect Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, in OJ L 166, 30 April 2004, 1 and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, in OJ L 284, 30 October 2009, 1, which cannot be treated here given the limited length of this thesis

retraining centers (art.7(3)), the membership of trade unions (art.8) and housing (art.9). The Regulation also guarantees equal treatment for the children of workers with regard to access to the Member State's general educational, apprenticeship and vocational training courses (art.10).

The Regulation's second Chapter regulates the clearance of vacancies and applications for employment, but articles 11,12, 13(2), 14 to 20 and 38 have later been deleted by Regulation (EU) 2016/589, which will be analyzed in the following section, and will therefore not be included in this description. Also art.13(1), according to Regulation (EU) 2016/589, will be deleted with effect from 13 May 2018, but since it is still in force, it will be described briefly. It provides that the special services of each Member State engaged in the clearing of vacancies and applications for employment within the Union and the placing of workers in employment, established by article eleven, shall regularly exchange between each other and send to the Coordination Office, established at art.18, details of vacancies which could be filled by nationals of other Member States, of vacancies addressed to third countries, of applications for employment by those who have formally expressed a wish to work in another Member State and information on applicants who have declared themselves actually willing to accept employment in another country.

Then, Chapter three "regulates the Committees for ensuring close cooperation between the Member States in matters concerning the freedom of movement of workers and their employment". Article 21 establishes an Advisory Committee responsible for "assisting the Commission in the examination of any questions arising from the application of the Treaty on the Functioning of the European Union and measures taken in pursuance thereof, in matters concerning the freedom of movement of workers and their employment" and article 22 describes its responsibilities in detail, in particular, it should deliver opinions on "developments in the labor market, the movement of workers between Member States, programs or measures to develop vocational guidance and vocational training which are likely to increase the possibilities of freedom of movement and employment, and on all forms of assistance to workers and their families[…]". The Committee shall be composed of six members for each Member State, two representing the Government, two the trade unions and two the employers' associations (art.23), appointed by the Council (art.24). Opinions of the Committee "shall not be valid unless two thirds of the members are present [and] be delivered by an absolute majority of the votes […]"

(art.27), which guarantees a fair representation of all levels. Article 29, then, establishes the Technical Committee, which "shall be responsible for assisting the Commission in the preparation, promotion and follow-up of all technical work and measures for giving effect to [the] Regulation and any supplementary measures". Its members shall consists in representatives of the Member States' governments and the latter "shall appoint as member of the Technical Committee one of the members who represent it on the Advisory Committee" (art.31).

Hence, when compared to the provisions of the Treaty of Rome, it is clear that the Regulation's provisions aim at "the abolition of any discrimination based on nationality between workers of the Member States, as regards employment, remuneration and other working conditions" as required by art.48(2) TEEC by guaranteeing equal treatment in any aspect of employment, from the access to labor markets, over social and tax benefits, to trade unions and housing. The regulation also includes a provision on non-discrimination for the children of workers not contained in Rome's provisions and representing a step forward. Furthermore, by establishing the Advisory and the Technical Committees, the regulation ensures the collaboration between national labor administrations, as required by art.49 TEEC, but also between trade unions and employers' associations. Also the Regulation mentioning vocational training in articles 7 and 22 and underlining its importance for the movement of workers, is a step forward with respect to the Treaty of Rome which did not include such references. Overall, the Regulation can clearly be seen as a success of the policy of free movement for workers established with the Treaty of Rome by realizing all requirements made by the latter's provisions and adding new rights.

2.2.3. Regulation (EU) 2016/589

This third and last Regulation regards a European network of employment services (EURES), workers' access to mobility services and the further integration of labor markets. Recital six of the Regulation's Preamble contains the CJEU's definition of 'worker', meaning a person who pursues "an activity which is genuine and effective, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary". Furthermore, the Court has considered the essential feature of an employment relationship to be that ", for a certain period of time, a person performs services for and under the direction of another person in return for which

remuneration is received"[41]. In certain circumstances, the concept of 'worker' has also been considered to include persons undertaking apprenticeship[42] or a traineeship[43]. Furthermore, the Court also entailed certain rights for jobseekers[44] and, therefore, for the purpose of the Regulation, the latter should be included within the concept of 'worker'(rec.7). Recital ten of the Preamble explains that EURES has already been launched in 1994 but the network should be re-established and reorganized because "a more coherent application of clearance, support services and exchange information on labor mobility within the Union is needed". Recital 54 defines the Regulation's objective as the establishment of "a common framework for cooperation between Member States to bring together job vacancies and the possibility of applying for those job vacancies and to facilitate the achievement of a balance between supply and demand in the employment market". We should note that this objective regards the requirements made by art.49 TEEC namely, the "close cooperation between national labor administrations" and the setting up of "appropriate machinery for connecting offers of employment and requests for employment".

Article one provides that the Regulation "establishes a framework for cooperation to facilitate the exercise of the freedom of movement for workers within the Union" and article four guarantees the availability of the services under the Regulation to all workers and employers across the Union in respect of the principle of equal treatment. The latter is explained in detail in recital 37 of the preamble meaning that "comparable situations should not be treated differently and different situations should not be treated in the same way unless such treatment is objectively justified". Article five re-establishes the EURES network and article six lists the objectives to which it contributes including, *inter alia*, implementing a coordinated strategy for employment, improving the functioning, cohesion and integration of the labor markets in the Union, promoting voluntary geographical occupational mobility in the Union on

[41] See, in particular, judgments of the Court of Justice of 3 July 1986, Deborah Lawrie-Blum v Land Baden Württemberg, C-66/85, ECLI:EU: C:1986:284, paragraphs 16 and 17; of 21 June 1988, Steven Malcolm Brown v The Secretary of State for Scotland, C-197/86, ECLI:EU: C:1988:323, paragraph 21; and of 31 May 1989, I. Bettray v Staatssecretaris van Justitie, C-344/87, ECLI:EU:C:1989:226, paragraphs 15 and 16.

[42] Judgment of the Court of Justice of 19 November 2002, Bülent Kurz, né Yüce v Land Baden-Württemberg, C-188/00, ECLI:EU:C:2002:694.

[43] Judgments of the Court of Justice of 26 February 1992, M. J. E. Bernini v Minister van Onderwijs en Wetenschappe, C-3/90, ECLI:EU: C:1992:89; and of 17 March 2005, Karl Robert Kranemann v Land Nordrhein-Westfalen, C-109/04, ECLI:EU:C:2005:187.

[44] Judgment of the Court of Justice of 26 February 1991, The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen, C-292/89, ECLI:EU:C:1991:80.

a fair basis and facilitating the exercise of the rights conferred by article 45 TFEU and Regulation (EU) No 492/2011.

According to article seven, the network is composed of four different types of organizations: a European Coordination Office established within the Commission and "responsible for assisting the EURES network in carrying out its activities"; "national coordination offices (NCOs) responsible for the application of [the] Regulation in the respective Member State", designated by the Member State; EURES Members, namely Public Employment Services (PES), appointed by the Member States, and organizations admitted "to provide at national, regional or local level, including on a cross-border basis, support with clearance and support services to workers and employers"; and EURES Partners, "organizations admitted to provide at national, regional or local level, including on a cross-border basis, [either] support with clearance or support services to workers and employers". Article eight regulates the responsibilities of the European Coordination Office, namely: "the formulation of a coherent framework and the provision of horizontal support activities for the benefit of the EURES network" such as "the operation and development of the EURES portal, and related IT services", "information and communication activities", "a common training programme and continuing professional development for the staff of the EURES Members and Partners and of the NCOs", "a helpdesk function supporting the staff of the EURES Members and Partners and NCOs" and "the facilitation of networking, exchange of best practices and mutual learning within the EURES network"; "the analysis of geographic and occupational mobility"; and "the development of an appropriate cooperation and clearance structure within the Union for apprenticeships and traineeships". The responsibilities of NCOs are regulated by article nine, which attributes them the responsibility for "the organization of work relating to the EURES network in the Member State", "cooperation with the Commission and the Member States on the clearance" and "the coordination of actions within the Member State concerned and together with other Member States". Furthermore, "each NCO shall organize the implementation at national level of the horizontal support activities provided by the European Coordination Office" as described above. Each NCO shall, moreover, "make available, regularly update and disseminate […] information […] relating to the situation in the Member State concerning": living and working conditions, "relevant administrative procedures regarding employment and the rules applicable to workers upon taking up

employment", the "national regulatory framework for apprenticeships and traineeships and existing Union rules and instruments", "access to vocational education and training" , "the situation of frontier workers", and post-recruitment assistance. Article eleven obliges the Member State to set up, at the latest by 13 May 2018, a system for the admission of organizations to become EURES Members and Partners, monitoring their activities and compliance with the applicable law and revoking their admission, where necessary. Article twelve regulates the responsibilities of the EURES Members and Partners. The former shall contribute to the pool of job vacancies, contribute to that of job applications and CVs, and provide support services to workers and employers, while the latter shall fulfil at least one of those tasks. Article 14 introduces the Coordination Group which should be composed of representatives of the European Coordination Office and the NCOs and support the implementation of the Regulation.

The organization of the common IT platform is regulated by article 17 which obliges every Member State to make available to the EURES portal all job vacancies, job applications and CVs "made publicly available through PES as well as those provided by the EURES Members and […] Partners". For the latter, workers have to give their consent to making the information available to the EURES portal, and this consent "shall be explicit, unambiguous, freely given, specific and informed" (art.17(3)). Furthermore, EURES Members and Partners "shall ensure that the EURES portal is clearly visible and easily searchable through all the job-search portals that they manage, [at any level], and that those portals are linked to the EURES portal" (art.18). Workers and employers in need shall be assisted by the EURES Members and Partners in their registration on the portal, free of charge (art.20). Support in the access to basic information (art.22), information on post-recruitment assistance (art.25), information on taxation, issues relating to work contracts, pension entitlement, health insurance, social security and active labor market issues (art.26) as well as information relating to the specific situation of frontier workers (art.27) to workers and employers shall also be granted free of charge. The same is true for the support services for workers referred to in art.23[45],

[45] Including providing or referring to the information listed in art.9, assistance with the drawing up of job applications and CVs and with the uploading on the EURES portal, considering a possible placement within the Union as part of an individual action plan or supporting the drafting of an individual mobility plan, and referring workers to another EURES Member or Partner

while support services for employers, listed in art.24[46], may be subject to a fee. Articles 29 to 33 regulate the gathering and exchange of information between the different levels of the network and the elaboration of annual national work programs by NCOs.

Finally, the Annex to the Regulation contains the minimum criteria Member States must ensure PES and organizations as EURES Members and Partners do fulfil in order to take part in the EURES network. For the service delivery, such entities have to demonstrate "commitment to have in place adequate mechanisms and procedures to verify and ensure full compliance with applicable labor standards and legal requirements"; they must have the "ability and demonstrated capacity to offer services on clearance, support services or both", "to provide services through one or more easily accessible channels" and to "refer workers and employers to other EURES Members and Partners and/or other bodies"; and they have to give the "confirmation to adhere to the principle of free support services for workers". As far as the participation in the EURES network is concerned, such organizations have to commit to ensure the delivery of data, to "comply with the technical standards and formats for clearance and exchange of information", to "contribute to the programming and reporting to the NCO", "to ensuring the allocation of appropriate human resources" and "the quality standards on staff" and "to use the EURES trade mark only for services and activities relating to the EURES network".

In conclusion, what makes this Regulation a representation of the success of the EU's policy of free movement for workers is the fact that it implements the requirements of art.49 TEEC for the Council to ensure "close collaboration between national labor administrations" and set up "appropriate machinery for connecting offers of employment and requests for employment" by establishing a European network of employment services offering workers support in the access to mobility services and bringing together job offers and applications, organized on national and European level. What is new with respect to Rome's provisions is that the Regulation, following the judgments of the Court also includes apprentices and trainees within the concept of 'worker' and includes them in the network by attributing the European Coordination office the responsibility of developing "an appropriate

[46] Including providing information on specific rules relating to recruitment from another Member State and on factors which can facilitate such recruitment and providing information on and assistance with the formulation of individual job requirements in a job vacancy and with ensuring its conformity with the European technical standards and formats

cooperation and clearance structure within the Union for apprenticeships and traineeships" (art.8) - thereby taking another step forward.

In order to give an impression of the success of EURES, we will take a quick look at its statistical performance. According to the Commission's 2016 Annual Report on intra-EU Labour Mobility[47], 500,000 visitors connect to the portal every month and at 31.12.2015 more than 1.5 million job vacancies were available online. At the end of 2015, more than 200,000 jobseekers and 5,600 employers were registered on EURES. In 2014, the country registering most job offers was Germany with 796,000, followed by Malta with 530,000 and Lithuania with 293,000. However, job vacancies registered on EURES represented 100 per cent of available vacancies (according to Eurostat) only in Belgium, Finland and the Czech Republic. In the three countries nominated above, they represented 85 per cent for Germany, and only 1 per cent for Lithuania, while the data for Malta is not available. This means that many employers still need to be informed of the possibilities and services offered by EURES. On the other hand, the highest shares of jobseekers registered on the EURES platform in 2014 were represented by Italians (22,5%) and Spanish (19%) followed by Romanians and Croatians (6% each). The other countries all represent a share of under 5 per cent. Obviously, there remains a lot of work to do and many more people should be involved in EURES, but who, in 1957, would have thought such a vast network even possible?

2.2.4. Statistics

Last but not least, we will take a quick glance at the statistics of intra-EU labor mobility in the last years. According to two scholars, in 2014, 17 million people were living in another EU Member State than the one they were born in, this is a bit more than the 3.5 per cent of the total population, growing from less than 3.2 per cent in 2009 (Barslund, Busse 2016: 3). Between 2006 and 2012, this stock of EU movers grew by a factor of 1.57 in Spain, 1.61 in the UK and even 2.69 in Italy (Recchi 2015: 76). We will now continue considering EU-28 movers of working age[48], meaning between 20 and 64 years, 11.3 million of whom were living in another EU country than the one they were born in in 2015, representing 3.7 per cent of the total working-

[47] For the following data see pages 143-145 and 147
[48] For the following data see European Commission (2017) *2016 Annual Report on intra-EU Mobility*

age population. This is an increase of 5.3 per cent on 2014. Of these, 8.5 million were active movers, even if this number comes from EU-LFS and not from Eurostat and is underestimated. However, if compared to 2014, the number of active movers in the Member States increased by around four per cent. Furthermore, there were 1.3 cross-border workers between 20 and 64 years in the EU in 2015, an increase of 8 per cent on 2014, two million posted workers and 1.4 million retired EU movers of all ages. Between 2013 and 2014 the inflows from other EU countries to Germany increased from 291,000 to 335,000, an increase of 15 per cent, to the UK they grew even more, from 164,000 to 218,000, a plus of 33 per cent. If one looks at the duration of residence, of the total 8.5 million active movers currently residing in the EU Member States, a majority of 4.4 million (53%) moved to their current country of residence within the past ten years. In 2015, 74 per cent of the EU movers were employed while 10.3 per cent were unemployed. The shares for the nationals of the host Member States were of 70.5 and 8.8 per cent respectively. This results from the fact that among the movers there are more unemployed but fewer inactive persons (unemployed and not searching for employment) than among nationals, showing that intra-EU mobility is mainly triggered by real or expected employment opportunities. After giving a general overview of the phenomenon, some words will now be dedicated to the consequences of such intra-EU labor migration by taking a look at that of nationals of the Member States that joined the EU in 2004 and 2007 to the old Member States. Their number grew from two million in 2004 to almost five million in 2009 (Kahanec *et al.* 2016:2). What studies about EU Member States document is a generally non-negative effect on wages and that immigration does not increase the overall unemployment rate, although local adjustment may occur. Furthermore, "outmigration reduced excess supply of labor, lowered unemployment, and increased wages in [new Member States] and led to additional positive effects through remittances and possibly brain gain" (ibidem). Furthermore, according to some scholars, 63 per cent of the EU2 movers[49] and 74 per cent of the EU10 movers[50] were employed in 2012, excluding active but unemployed, compared to 65 per cent of the nationals, and "population inflows from EU8[51] correspond to a long run

[49] Those nationals of the countries that joined the EU in 2007: Romania and Bulgaria
[50] Those nationals of the countries that joined the EU in 2004: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia
[51] The EU10 without Malta and Cyprus

increase in EU15[52] GDP by about 0.34 per cent" while they do not expect any long-run impact on the unemployment rate in any country due to the population shifts (Fic *et al*. 2016: 39, 42-43). Most importantly, two scholars retain that "labor mobility has the potential to absorb economic shocks, which is even more important in economic blocks such as the EU, which has little capacity to address asymmetric economic shocks across its member states using fiscal or monetary stabilization tools" (Kahanec, Zimmermann 2016: 420). Also as far as the often cited 'welfare' mobility to Member States with vaster welfare systems is concerned, "the prevailing evidence [...] is one of no systematic welfare abuse or shopping" (Ritzen *et al*. 2017: 9).

After looking at the EU acts currently in force, which implemented all requirements made by the Rome Treaty and took steps forward by extending the freedom of movement to all EU citizens and including the workers' families, vocational training, traineeships and apprenticeships into the provisions and even creating rights for third country nationals, it should already have been clear what a great success this policy represents for the European Union. However, this last section was useful in order to underline this success also in economic and numerical terms. Labor migration between the EU Member States has increased steadily without however leading to the negative effects many expected and "there is widespread agreement that it has been a win-win for the country of origin and the migrants themselves, with potential benefits for the country of destination" (Ritzen et al. 2017: 8). During the analysis of Directive 38/2004, we have also seen how EU mobility contributed and continues to contribute to the creation of a population that feels more and more European, thereby increasing the EU's legitimacy, and can therefore agree with Kahanec and Zimmermann when they say that "the freedom of movement of workers within the European Union is a first-best policy and a cornerstone of the EU's economic, social and political success" (2016: 436).

[52] Member countries that joined the EU before 2004

Chapter III Rome's Failures

Table of contents: 1. Abolition of the Gender Pay Gap. – 1.1. In the Treaty of Rome… . – 1.2. …and 60 years later. – 1.2.1. *De jure*. – 1.2.2. *De facto*. – 2. Brexit. – 2.1. In the Treaty of Rome… . – 2.2. …and 60 years later. – 2.2.1. The Case. – 2.2.2. The Negotiations.

After having analyzed two policies which can clearly be seen as successes when comparing the current legal and practical situation to the provisions of Rome, we will now turn to look at one policy and one event which are better described as failures namely, the abolition of the gender pay gap and the Brexit. The former has been chosen because its abolition had clearly been included already in the Treaty of Rome but has not been realized until today and therefore represents one of the oldest failures of the latter. Brexit, on the other hand, has been chosen, similarly to the common commercial policy, because of its topicality and because of being one of the most recent and most well-known failures of the European Union.

1. Abolition of the Gender Pay Gap

The gender pay gap (GPG) is defined as "the difference between the average gross hourly earnings of men and women expressed as a percentage of the average gross hourly earnings of men" (Eurostat 2017: 2) and its abolition was stipulated already in the Treaty of Rome.

1.1. In the Treaty of Rome…

Article 119 of the Treaty of Rome obliged the Member States to "ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers" within the first stage, meaning by 1 January 1962. The article also gives a definition of 'remuneration' being "the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment". Furthermore, it defines 'equal remuneration without discrimination on grounds of gender' as the fact "that remuneration for the same work at piece-rates shall be calculated on the basis of the

same unit of measurement" and "that remuneration for work at time-rates shall be the same for the same job". According to a scholar, "this very first introduction of the principle of equal pay […] was not necessarily included in the treaty to improve the social plight of women, but more as part of the economic agenda of the European Community at the time, to ensure fair and equal competition between member states". However, she states that "it can be argued that this was a step forward in incorporating women's rights within mainstream politics" (Bego 2015: 20). According to another scholar, the prohibition of discrimination was motivated by feared disadvantages in competition for France, which in comparison to the other signatory States presented a well-developed welfare system and had already included the principle of equal pay in national law. Therefore, it was interested in a common social policy and in the approximation of welfare systems and made the adoption of the principle of equal pay a precondition for the creation of the Common Market (Klein 2013: 70-71). In 1976, the CJEU would recognize the direct effect of this norm which could therefore, from then on, be invoked by any citizen in front of national jurisdictions[53].

1.2. …and 60 years later

60 years after the entering into force of the Treaty of Rome, there is a vast array of binding and non-binding acts of the Union's institutions, which aim at guaranteeing the principle of equal pay between women and men but *de facto* a gender pay gap still exists as well as other types of discrimination on grounds of gender. In the following, both sides of the current situation will be analyzed.

1.2.1. *De jure*

The most important secondary law currently in force is Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), also called "the Recast Directive". This Directive was based on art. 141(3) TEC which is now substituted by art. 157 TFEU obliging each Member State to "ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied". The article introduces the concept of "work of equal value" which

[53] See Case C-43/75 Defrenne II, ECR [1976] p.455

was not included in the Treaty of Rome. Furthermore, the principle of equality between women and men can be found at other points of the Treaty, precisely in articles eight and ten, as well as in articles two and three of the Treaty on the European Union, the former making the equality between men and women one of the common values on which the EU is founded. The Charter of Fundamental Rights of the European Union, analyzed in the last Chapter, also includes provisions on non-discrimination and equal treatment of women and men in articles 20, 21 and 23. According to an author, the Recast Directive was intended to facilitate the European Gender Equality Law by repealing Directives 75/117/EEC[54], 76/207/EEC[55], 86/378/EEC[56] and 97/80/EC[57] from 15 August 2009 (Klein 2013: 93).

First of all, recital three of the Directive's preamble states that, following the case law of the Court, the Directive also applies to "discrimination arising from the gender reassignment of a person". Then, article one defines its purpose as ensuring "the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation" through provisions aimed at implementing the principle in relation to working conditions, including pay, occupational social security systems, and access to employment and to vocational training. Article two includes the relevant definitions for the Directive: direct discrimination, indirect discrimination, harassment, sexual harassment, pay, and occupational security schemes. The definition of 'pay' contains the same elements like the one of remuneration in art. 119 of the Treaty of Rome, but recitals 13 and 14 of the Directive's preamble state that the Court included all forms of occupational pension[58] and pension schemes for public servants[59], if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer, fall within the scope of the principle of equal pay. Article three

[54] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, in OJ L 045, 19 February 1975, 19

[55] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, in OJ L 39, 14 February 1976, 40

[56] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, in OJ L 225, 12 August 1986, 40

[57] Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, in OJ L 14, 20 January 1998, 6

[58] See Case C-262/88: *Barber v Guardian Royal Exchange Assurance Group,* [1990] ECR I-1889

[59] See Case C-7/93: *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune,* ECR [1994] I-4471 and Case 351/00: *Pirkko Niemi,* [2002] ECR I-7007

contains the provision on 'positive action' meaning that any Member State "may maintain or adopt measures […] with a view to ensuring full equality in practice between men and women in working life". The provision on equal pay, and thereby on the abolition of the GPG, can be found in article four, which obliges all Member States to eliminate direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration for the same work or for work of equal value. There is no definition of work of equal value on EU level but in its case law, the Court has stated several times that in order to determine equal value, effort, responsibility and skill required, or the nature of the tasks involved in the work and the work undertaken are to be taken into account and to be compared[60]. Furthermore, "where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex". This second indent does not oblige Member States to introduce job classification systems, but if they are used by private or public employers in order to determine pay rates, such systems have to be gender neutral.

Article five establishes the prohibition of direct and indirect discrimination on grounds of sex in occupational social security schemes, in particular regarding the scope of such schemes and the conditions of access to them, the obligation to contribute and the calculation of contributions as well as the calculation of benefits and the duration and retention of entitlement to them. Articles six and seven define the personal and material scope of the provisions on occupational social security schemes, while article eight lists the situations to which the latter do not apply and article nine contains an account of examples of discrimination. Article 12 awards those provisions retroactive effect by making them applicable to "all benefits under occupational social security schemes derived from periods of employment subsequent to 17 May 1990". Article 14 establishes the prohibition of discrimination on grounds of sex regarding access to employment, vocational training and promotion and working conditions such as dismissals and pay. The following two articles grant women and men, at the end of maternity or paternity and adoption leave, if the latter are recognized by Member States, the right to return to their "job or

[60] See for example Case C-400/*93 Royal Copenhagen*, [1995] ECR, p.1275; Case 237/85, *Gisela Rummler v Dato-Druck GmbH* [1986] ECR, p.2101; Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889; Case C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-4961, paragraph 35

to an equivalent post on terms and conditions which are no less favourable to [them] and to benefit from any improvement in working conditions to which [they] would have been entitled during [their] absence".

Article 17 obliges Member States to ensure that "judicial procedure for the enforcement of obligations under [the] Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them" and this "even after the relationship in which the discrimination is alleged to have occurred has ended". According to the following article, Member States must furthermore introduce measures ensuring compensation or reparation "for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex", which should be "dissuasive and proportionate to the damage suffered". Article 19 defines the burden of proof by determining that the claimant must establish facts from which it can be presumed that there has been either direct or indirect discrimination. Then, the defendant, i.e. the employer, needs to show that no discrimination has taken place either because there was no different treatment of men and women or because the unequal treatment was justified. According to article 20, Member States shall create equality bodies "for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex". Member States shall, furthermore, promote social dialogue between social partners and with non-governmental organizations in order to foster equal treatment, and encourage employers to promote equal treatment in the workplace and to provide employees "with appropriate information on equal treatment for men and women in the undertaking" (art.21). Moreover, they shall introduce national provisions in order to protect employees against "dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment" (art.24) and adopt rules on "penalties applicable to infringements of [the latter] and "take all measures necessary to ensure that they are applied" (art.25). Member States need also encourage employers and those responsible for vocational training to effectively prevent all types of discrimination on grounds of sex (art.26) and they shall "actively take into account the objective of equality between men and women" in the formulation and implementation of legislative measures in the areas covered by the Directive (art.29). This last strategy is called 'gender mainstreaming' and is not meant to substitute specific gender equality policies but rather to

complement them (Klein 2013: 97-98). Article 33, on the implementation of the Directive, limits the obligation to transpose the Directive into national law "to those provisions which represent a substantive change as compared with the earlier Directives". According to two scholars, the 'novelties' of the Recast Directive compared to the earlier ones are: the inclusion of the principle of equal opportunities in its purpose (art.1) and the application's extension to gender reassignment (rec.3), a broadening of the concept of positive action (art.3) through the broad scope of the Directive, an extension of the scope of the horizontal provisions to the area of occupational security schemes, the inclusion of pension schemes for public servants under precise conditions (rec.14, art.7) and the availability of judicial procedures for the enforcement of obligations imposed by the Directive (art.17(1)) (Burri, Prechal 2009: 2-3). All these provisions at the same time obviously also represent 'novelties' if compared to art.119 of the Rome Treaty but it is nearly the whole Directive which represents new elements. The extension of the principle of equal treatment from remuneration, motivated by simple economic reasons, over occupational social security schemes to access to employment, vocational training and promotion and working conditions seems a great success. However, the implementation and application of these new provisions is somehow problematic as will be shown in the following Section.

The principle of equal pay can also be found, *inter alia*, in another official document, the Commission's Communication "A Strengthened Commitment to Equality between Women and Men: A Women's Charter" of 5 March 2010. This Communication was made on the occasion of the 2010 International Women's Day and in commemoration of the 15th anniversary of the adoption of a Declaration and Platform for Action at the Beijing UN World Conference on Women[61] and of the 30th anniversary of the UN Convention on the Elimination of All Forms of Discrimination against Women[62]. The Communication does obviously not have any binding power

[61] The Platform for Action covers 12 critical areas of concern: poverty; education and training; health; violence; armed conflict; economy; power and decision-making; institutional mechanisms; human rights; media; environment; and the girl child. Strategic objectives are identified for each critical area of concern, as well as a detailed catalogue of related actions to be taken by Governments and other stakeholders, at international, national and regional level. It is available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> [accessed 12 December 2017]

[62] The Convention, often described as an international bill for rights of women, contains 30 articles defining the elements constituting discrimination against women and setting up an agenda for national action to put an end

but anyway declares the principles of equality between men and women the Commission intended to follow during its term of office. The first principle is that of economic independence and the Commission reaffirms its commitment "to ensure the full realization of women's potential and the full use of their skills, to facilitate a better gender distribution on the labour market and more quality jobs for women" (p.3). The following principle is that of equal pay for equal work and work of equal value, which we already found in the Recast Directive, and the Commission commits to "a forceful mobilization of all instruments, both legislative and non-legislative, to close the gender pay gap"(p.4). The third principle included in the Communication is that of equality in decision-making and in order to guarantee it, the Commission reaffirms its Commitment "to pursue the fairer representation of women and men in positions of power in public life and the economy" (p.4). Another principle the Commission commits to follow is that of dignity, integrity and an end to gender-based violence for which it "will undertake efforts to eliminate gender inequalities in access to healthcare and in health outcomes[,] step up efforts to eradicate all forms of violence and to provide support for those affected [and] put in place a comprehensive and effective policy framework to combat gender-based violence"(p.4). Last but not least, the Commission commits itself to the principle of gender equality beyond the Union meaning that it will vigorously pursue "gender equality in [its] relations with third countries, raise awareness of the rights of women, and push for the implementation of existing international instruments" (p.5).
If compared to article 119 of the Rome Treaty, also this Communication clearly represents an extension of the principle of gender equality from pay over decision-making, violence and general economic independence to the relations with third countries. However, it has to be seen as what it is, that is, a simple declaration of commitment and intent of the European Commission which has to be measured by its results, discussed in the next Section.

The first act following this Communication was the Commission's "Strategy for equality between women and men 2010-2015" decided on 21 September 2010 and based on the five priority areas identified in the Women's Charter adding also a part on horizontal issues. "The Strategy represents the work programme of the European

to such discrimination. It is available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> [accessed 12 December 2017]

Commission on gender equality, aiming additionally to stimulate developments at national level and to provide the basis for cooperation with the other European institutions and with stakeholders" (p.4).

In the part on equal economic independence, the Commission recognizes that "getting more women on the labour-market helps counterbalance the effects of shrinking working-age population, thereby reducing the strain on public finances and social protection systems, widening the human capital base and raising awareness" (ibid.) and in order to achieve this, a better work/life balance for women has to be guaranteed, an area in which, according to the Commission, the EU had made recent progress.[63] For every priority area the Commission gives a list of key actions its intends to take in order to guarantee equality. For this first area, they include: supporting "the promotion of gender equality in the implementation of all aspects and flagship initiatives of the Europe 2020 strategy"[64], promoting female self-employment and entrepreneurship, assessing "remaining gaps in entitlement to family-related leave […] and the options for addressing them", reporting on the Member States' performance with regard to child facilities and promoting "gender equality in all initiatives on immigration and integration of migrants" (p.5-6). In the second priority area, equal pay for equal work and work of equal value, the Commission identifies the causes of the gender pay gap as going beyond the question of equal pay for equal work and including a gap between women's educational attainment and professional development as well as horizontal and vertical occupational segregation and other inequalities on the labor market mainly affecting women. Therefore, the Commission commits to exploring ways "to improve the transparency of pay as well as the impact on equal pay of arrangements such as part-time work and fixed-term contracts", supporting equal pay initiatives at the workplace, instituting a European

[63] See Directive 2010/18/EU implementing the revised Framework Agreement on parental leave (OJ L 68, 18.3.2010, p. 13) and Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ L 180, 15.7.2010), which cannot be treated here given the limited space.

[64] See <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/framework/europe-2020-strategy_en> [accessed 12 December 2017]

Equal Pay Day[65] and seeking to encourage women to enter non-traditional professions (p.6-7).

As far as the area of equality in decision-making is concerned, the Commission admits that women, in most Member States, continue to be under-represented in decision-making positions and processes and therefore commits to "consider targeted initiatives to improve the gender balance in decision making", "monitor the 25% target for women in top level decision-making positions in research" decided in 2005, "monitor progress towards the aim of 40% of members of one sex in committees and expert groups established by the Commission" in 2000 and "support efforts to promote greater participation by women in European Parliament elections" (p.7-8). According to the Commission 20% to 25% of women in Europe have suffered physical violence at least once during their lives, while "there are estimates that up to half a million women living in Europe have been subjected to genital mutilation" and gender-based inequalities subsist also "in healthcare and long-term care as well as in health outcomes" (p.8). The Commission therefore declares that it will "adopt an EU-wide strategy on combating violence against women", "ensure that the EU asylum legislation takes into account gender equality considerations" and "draw up a Men's Health report"(p.8-9).

With regard to gender equality in external actions, the Commission is aware that the EU, through all relevant policies under its external action, "can exercise significant influence in fostering gender equality and women's empowerment worldwide" and commits to monitoring and supporting the candidate states' adherence to the Copenhagen criteria in the field of gender equality, implementing the "EU Plan of Action on Gender Equality and Women's Empowerment in Development (2010-2015)", continuing to encourage European Neighborhood Policy partner countries to promote gender equality and "further [integrating] gender considerations into EU humanitarian aid" (p.9-10). The last part of the Strategy contains horizontal issues on gender roles, legislation, and the governance and tools of gender equality for which the Commission commits to the following key actions: addressing the role of men in gender equality and promoting good practice on gender roles in sport, youth, culture and education; monitoring "the correct implementation of EU equal treatment laws

[65] The first European Equal Pay Day was proclaimed on 5 March 2011, this date was chosen because it is until this day that women have to work on average in order to gain the annual pay of men. In the Member States the Equal Pay Days are instituted on different dates due to the different average pay (Klein 2013: 165).

with particular focus on Directive 2004/113/EC[66] and 2006/54/EC"; promoting full implementation of the Beijing Platform of Action; and presenting an Annual Report on progress on gender equality (p.12).

This Strategy restates the gender equality principles introduced with the Commission's Communication and establishes key actions for each of them thereby, formally, representing another step forward if compared to the Treaty of Rome, since it introduces concrete practices to reach the aims under the priority areas. However, according to two scholars, "in the absence of any binding means, these aims remain general and are not achieved" (Milewski, Sénac 2014: 192) as will be shown in the following Section.

An act which specifically regards the principle of equal pay is the Commission Recommendation C(2014) 1405 final on strengthening the principle of equal pay between men and women through transparency. However, according to article 288 TFEU, recommendations do not have binding force and therefore also this act does not have direct consequences for the situation of gender equality in the Member States. Recital eight of the Recommendation's preamble states that "the existing legal framework has been [little] effective in ensuring implementation of the principle of equal pay for work of equal value" because in order to require the enforcement of this principle, victims of pay discrimination have to establish the facts giving rise to a presumed discrimination to be able to shift the burden of prove to the employer as regulated by the Recast Directive. However, it is very difficult to obtain the information necessary to establish such facts and potential victims might even not be aware of the discrimination itself. The Commission recommends Member States to "encourage public and private employers and social partners to adopt transparency policies on wage composition and structures" (s.2), which should include one or more of the following actions: "measures to ensure that employees can request information on pay levels, broken down by gender, for categories of employees doing the same work or work of equal value" (s.3), "measures that ensure that employers in undertakings and organisations with at least 50 employees regularly inform employees, workers' representatives and social partners of the average remuneration by category of employee or position, broken down by gender" (s.4),

[66] Council Directive 2004/133/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, in OJ L 373, 21 December 2004, 37

“measures to ensure that pay audits are conducted in undertakings and organisations with at least 250 employees [and] made available to workers’ representatives and social partners on request” (s.5) and measures to ensure “that the issue of equal pay, including pay audits, is discussed at the appropriate level of collective bargaining” (s.6). However, undertakings and organizations with less than 50 employees remain excluded from the scope of the Recommendation, which might be due to the costs associated to similar obligations. According to section seven, Member States should also “improve the availability of up-to-date gender pay gap data by providing Eurostat with statistics annually and in a timely manner”. In the absence of an EU-wide definition of ‘work of equal value’, as mentioned above, the Commission recommends Member States to clarify its meaning in their legislation (s.10). Furthermore, Member States are encouraged to “promote the development and use of gender-neutral job evaluation and classification systems”, mentioned also in article four of the Recast Directive (s.11). With regard to equality bodies, Member States should enable them to represent individuals in cases of pay discrimination in order to reduce procedural obstacles to the bringing of equal pay cases to court (s.14). Moreover, Member States are also recommended to “ensure the consistent monitoring of the implementation of the principle of equal pay and the enforcement of all available remedies for pay discrimination” (s.16) and to raise a general awareness “to promote equal pay, the principle of work of equal value and wage transparency [and] to tackle the causes of the gender pay gap”.

If applied, the measures contained in this Recommendation could certainly reduce many difficulties linked to the enforcement of the principle of equal pay. However, as was said before, Recommendations are not binding and therefore their application depends on the will and interest of the Member States, and a potential failure in doing so does not have any consequences.

The last, and most current, act that this Section will analyze is the Commission Staff Working Document on Strategic Engagement for gender equality 2016-2019 of 3 December 2015. Also this document is based on the priority areas identified in the Women’s Charter and admits that “inequality in occupations is taking new forms rather than diminishing”, that “in terms of access to financial resources over a lifetime, gender equality remains elusive”, that “gender-based violence is still widespread and can take many forms”, and that “worldwide, women’s fundamental

rights continue to be violated" (p.4). This does not sound as if the gender equality policy of the European Union until December 2015 had been a success. As in the preceding Strategy, the Commission enounces its overall priorities for 2016-2019 namely, "increasing female labour-market participation and the equal economic independence of women and men; reducing the gender pay, earnings and pension gaps and thus fighting poverty among women; promoting equality between women and men in decision-making; combating gender-based violence and protecting and supporting victims; and promoting gender equality and women's rights across the world" (p.5). Since this second Strategy contains more, and more detailed, key actions and the length of this thesis is limited, only some of those key actions will be mentioned here. Hence, for the first priority, the key actions include, *inter alia*, modernizing the current EU legal framework in order to "ensure better enforcement and where appropriate adapt legislation in the areas of leave and flexible working arrangements", "setting out a broad policy framework supporting parents' participation in the labour market", "continued monitoring and support for Member States in attaining the Barcelona targets on childcare[67]", as well as supporting Member States and companies in their efforts to increase female labour-market participation. Furthermore, the Commission intends to evaluate the Social Security Directive[68], to draft a report on implementation of the Self-Employed Directive[69] and to integrate a gender perspective into the implementation of the European Migration Agenda[70](p.6-7). The most relevant key actions for the second priority, reducing gender pay, earnings and pension gaps, are to further improve "the implementation and enforcement of the equal pay principle by carrying out an assessment of Directive 2005/54/EC", while also considering to strengthen the pay transparency, to introduce sanctions to improve the deterrent effect of the prohibition of pay discrimination and "the efficient and effective functioning of equality bodies to facilitate access to justice for victims of discrimination", as well as to promote gender

[67] Provision of childcare for 33% of children under 3 and 90% of children between 3 and mandatory school age, contained in the Presidency Conclusions of the Barcelona European Council of 15 and 16 March 2002; available from <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/71025.pdf> [accessed 12 December 2017]

[68] Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, in OJ L 6, 10 January 1979, 24

[69] Directive 2010/41/EU on the application of the principle of equal treatment between women and men engaged in an activity in a self-employed and repealing Council Directive 86/613/EEC, in OJ L 180, 15 July 2010, 1

[70] COM(2015) 240 final

equality in all levels and types of education (p.8). Moreover, in order to promote equality in decision-making, the Commission is committed to continue supporting the adoption of its 2012 proposal for a "Directive on improving the gender balance among non-executive directors of companies listed on stock exchange"[71] by 2016, to "consider measures to improve the gender balance in political decision-making" and, by 2019, to "reach the target of 40% women in the Commission's senior and middle management" (p.9). In the area of gender based-violence, the key actions of the Commission include the EU's accession to the Council of Europe convention on preventing and combating violence against women and domestic violence (Istanbul Convention)[72] as far as its competences permit and to "implement subsequently its provisions and continue to encourage Member States' progress on ratification", improving the "availability, quality and reliability of data on gender-based violence", the continuation of focused actions aimed at ending all forms of gender-based violence and raising awareness, and to "continue to enforce the Victim's Rights Directive[73] and laws on European protection orders" (p.10). Finally, on the international level, the Commission commits itself, *inter alia*, to implement the action plan contained in the "Joint staff working document on Gender equality and women's empowerment: transforming the lives of girls and women through EU external relations 2016-2020"[74], to "continue to fund and monitor action promoting gender equality in development and neighborhood cooperation and humanitarian aid", and to "closely monitor and support candidate and potential candidate countries' compliance with the Copenhagen criteria […] as regards human rights including equality between women and men" (p.11). Furthermore, the Commission declares that in addition to the key actions, some of which have been illustrated above, it will continue to

[71] Commission 2016 work programme, Annex III, item 3.

[72] The EU Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, signed the Istanbul Convention on behalf of the European Union on 13 June 2017. The signing is the first step in the process of the EU joining the Convention. Accession now requires the adoption of Council decisions on the conclusion of the Convention, which will need the consent of the European Parliament. (http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-accession-to-the-istanbul-convention [accessed 13 December 2017])

[73] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, in OJ L 315, 14 November 2012, 57

[74] SWD(2015) 182 final, 21.9.2015; endorsed by the Council on 26 October 2015, available from <https://ec.europa.eu/europeaid/sites/devco/files/staff-working-document-gender-2016-2020-20150922_en.pdf> [accessed 12 December 2017]

promote gender equality "through the integration of a gender equality perspective into every aspect of EU intervention, […] i.e. gender mainstreaming" (p.12).
If compared to the previous Strategy, the Strategic Engagement 2016-2019 is much broader and includes new elements such as the explicit nomination of the pensions gap, the facilitation of access to justice through equality bodies, the review and modernization of the existing legal framework, and the EU's accession to the Istanbul Convention[75]. However, also this last document remains a declaration of intend of the European Commission and it remains to be seen which of the many key actions will actually have been fulfilled in 2019. In any case, the fact that a phenomenon which should have been abolished by 1 January 1962, the gender pay gap, is still an essential part of all the analyzed documents should give us pause.

1.2.2. *De facto*

After this overview over current EU legislation and intentions, we will now look at the actual situation of gender equality, focusing on the GPG, in the European Union. This will be done by firstly analyzing official documents on the application of the principle of equal pay, of Directive 2006/54/EC, on the evaluation of the Strategy 2010-2015 and the implementation of the Recommendation and, secondly, by taking a glance at the statistical data available.

The first documents analyzed are three Resolutions of the European Parliament on the application of the principle of equal pay for men and women from 2008, 2012 and 2013. In its first Resolution, of 18 November 2008, the Parliament complains that the gender pay gap still persists and progress is extremely slow, as evidenced by a very small reduction from 17% in 1995 to 15% in 2005, "in spite of the significant body of legislation in force for more than 30 years […]" (rec. D). The Parliament then requests "the Commission to submit to [it] by 31 December 2009 […] a legislative proposal on the revision of the existing legislation relating to the application of the principle of equal pay […]" (s.1) based on the recommendations given, analyzed below. Furthermore, according to the Parliament it is "essential to ensure better and

[75] For the recent developments in the EU and possible consequences of its accession see De Vido, S. (2017) 'La violenza di genere contro le donne nel contesto della famiglia: sviluppi nell'Unione Europea alla luce della Convenzione di Istanbul'. *federalismi.it: Focus Human Rights* 3/17, 1-25. available from <http://www.federalismi.it/ApplOpenFilePDF.cfm?artid=35476&dpath=document&dfile=28122017144443.pdf&content=La+violenza+di+genere+alla+luce+della+Convenzione+di+Istanbul+-+stato+-+dottrina+-+> [accessed 9 February 2018]

earlier implementation of the provisions of Directive 2006/54/EC, relating to equality organisations and social dialogue with a view to redressing differences in pay" (s.4). In the annex to the resolution, the Parliament then gives detailed recommendations with regard to the revision of the existing legislation. Firstly, it retains that it is important to define certain concepts more precisely namely, GPG, direct and indirect pay discrimination, remuneration and pension gap (s.1). Furthermore, it requires that regular pay audits and the publication of their results are made compulsory within companies as well as the publication of information on remuneration in addition to pay (s.2.3). In the same regard, "employers should provide employees and their representatives with results in the form of wage statistics, broken down by gender" (s.2.4). As far as work evaluation and job classification are concerned, the Parliament deems it necessary that sectors and companies be asked to examine "whether their job classification systems reflect the gender dimension in the required manner and to make the necessary corrections" (s.3.1). Furthermore, Member States should be invited by the Commission to introduce job classifications complying with the principle of equality between women and men (s.3.2). With regard to the equality bodies established by art.20 of the Recast Directive, the Parliament requires the latter to be revised in order to broaden the bodies' mandate by including: "supporting and advising victims of pay discrimination, providing independent surveys concerning the pay gap, publishing independent reports and making recommendations on any issue relating to pay discrimination, legal powers to bring wage discrimination cases to court and providing special training for the social partners and for lawyers, judges and ombudsmen" (s.4). As far as the prevention of discrimination, contained in art.26 of the Directive, is concerned, the Parliament deems it necessary to ensure that Member States adopt concrete affirmative actions[76] to redress the pay gap and gender segregation, specific measures relating to training and job classification, a clause in public contracts requiring respect for gender equality and equal pay and specific policies to make it possible to reconcile work with family and personal life (s.6). Furthermore, the Parliament requires that in art.29 of the Recast Directive "precise guidelines for the Member States concerning the principle of equal pay and closing the gender pay gap" be included, in order to enhance gender mainstreaming (s.7). According to the Parliament, the provisions on compensation or reparation

[76] Provided in art.157(4) TFEU

(art.18) and penalties (art.25) in case of discrimination included in the Directive are not sufficient to avoid infringement of the equal pay principle (s.8.3). Therefore, "the Commission and Member States should reinforce the existing legislation with appropriate types of sanctions" (s.8.1). Finally, since "wage penalty appears to be linked to working part-time", the Parliament also requires an evaluation and possible revision of Council Directive 97/81/EC[77] (s.9.1).

The Parliament's second Resolution, of 24 May 2012, replicates the exact same requirements as those made in the 2008 Resolution, adding some elements that will be looked at now. According to recital A, the gender pay gap in 2011 had even increased with respect to 2005, from 15% to 16,4%. The Parliament admits that "the Directive 2006/54/EC has contributed to the improvement of women's situation in the labour market". However, it "has not profoundly changed the legislation on closing the gender pay gap" (rec.F). It then precisely requests the Commission to review the Recast Directive by 15 February 2013 at the latest and propose amendments based on its recommendations. As already explained above, those recommendations are essentially the same as the ones made four years before. Nevertheless, in this new Resolution, the Parliament also requires more precise definitions of the concepts of work treated as 'equal', work of the same value, employer and professions and collective agreements. As far as transparency requirements are concerned, the Resolution also includes a requirement on employers "to adopt transparency policy in relation to wage composition and structures" (s.2.5) and "when wage statistics show group or individual differences in pay on grounds of sex, they should be obliged to analyze these differences further and react to eliminate them" (s.2.6). Within the broadening of the equality bodies' mandate, the Parliament adds "legal powers to initiate their own investigation" and "to impose sanctions in cases of breaching the principle of equal pay for equal work" (s.4).

The last Resolution, of 12 September 2013, does not include any recommendations but contains the same requirements as the precedent ones. The Parliament "reiterates that Directive 2006/54/EC, in its current form, is not sufficiently effective to tackle the gender pay gap and achieve the objective of gender equality in employment and occupation" (s.3) and "requests the Commission to support Member

[77] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work, in OJ L 14, 20 January 1998, 9

States in reducing the gender pay gap by at least five percentage points annually with the aim of eliminating the gender pay gap by 2020" (s.4). Finally, it "urges the Commission to revise Directive 2006/54/EC without delay and to propose amendments to it […] following the detailed recommendations set out in the annex to the Parliament's resolution of 24 May 2012" (s.6).

Until today, the Recast Directive has neither been revised nor amended and only some of the Parliament's requirements were included in the Commission's Recommendation analyzed above. These include pay audits and the access to information, the request for Member States to clarify the concept of work of equal value and to promote gender-neutral job evaluation and classification systems, as well as a minimal extension of the equality bodies' mandate to being able to represent individuals in cases of pay discrimination. However, all these measures are voluntary, meaning that States are not obliged to adopt them, and all the other requirements made by the Parliament have simply been ignored. This alone could be enough to call the Union's policy for the abolition of the gender pay gap a failure.

The next act we will look at is the Commission's Report on the application of Directive 2006/54/EC of 6 December 2013. As far as the transposition of the Directive's 'novelties' is concerned, in the majority of Member States the provision including pension schemes for public servants has been implemented[78] while in a significant number of Member States, transposition is lacking or unclear[79] (p.4). Also the extension of horizontal provisions to occupational security schemes has been transposed in the majority of Member States[80]. However, in four Member States, this does not apply to all horizontal provisions[81] (p.5). Very few Member States have explicitly transposed the fact that the principle of equal treatment for men and women also applies to discrimination arising from a person's gender reassignment[82], while two States included 'sexual identification'[83] and 'gender identity'[84] in their grounds of discrimination and other two Member States' national legislation already provided for

[78] BE, BG, CZ, DE, EE, IE, EL, FR, CY, LT, LU, NL, AT, FI, UK. In HU, legislation does not distinguish between categories of workers, but there are no specific pension schemes for public servants.
[79] DK, EL, ES, HR, IT, LV, MT, PL, PT, RO, SI, SK, SE.
[80] BE, BG, CZ, EE, IE, EL, ES, FR, IT, CY, LV, LT, LU, HU, MT, NL, AT, SE, UK (with doubts remaining for Northern Ireland).
[81] DE, SI, SK, FI.
[82] BE (with what appears to be the exception of the Brussels region), CZ, EL, UK.
[83] SK
[84] MT

grounds of discrimination to include 'sexual identity'[85] (p.5). As regards the equal pay principle, it is largely implemented by Member States through equality legislation and labor codes (p.6) and pay discrimination is explicitly prohibited in most Member States' legislation[86] (p.7). However, according to the Commission, "the effective application of the [equal pay] provisions […] in practice may be hindered by three factors: the lack of clarity and legal certainty on the concept of work of equal value; the lack of transparency in pay systems; and procedural obstacles" (p.7). As far as the first factor is concerned, only twelve Member States[87] have introduced a definition of this concept in their legislation (p.8). Using gender neutral job evaluation and classification systems is one way of determining work of equal value but only some Member States' legislation explicitly ensures that such systems are gender neutral[88], while others do not.[89] With regard to transparency, only in some Member States the employer is obliged to provide the employee with information on pay in cases of alleged pay discrimination[90]. "However, information on pay is often considered confidential under national data protection and privacy legislation [and], therefore, in many Member States such information cannot be released by employers" (p.9). Furthermore, in some Member States the application of the shift of the burden of proof rule remains problematic[91] and, while the costs of legal assistance and judicial proceedings are usually high, "the compensation and reparation that can be obtained is often limited"[92] (p.10). However, only in some Member States the role of equality bodies includes representing individuals in cases of pay discrimination[93]. The Commission concludes its Report by admitting that "the practical application of equal pay provisions in Member States seems to be one of the Directive's most problematic areas" (p.10).

Hence, it should be clear that the application of the Recast Directive, as regards the 'novelties' it introduced, has been successful since the majority of the Member States

[85] DE,HU.

[86] Several Member States (e.g. BE, DE, PL, SE) do not have such an explicit ban, but a general prohibition of sex discrimination also seems to cover pay discrimination

[87] CZ, IE, FR, HR, CY, HU, PL, PT, RO, SK, SE, UK.

[88] E.g. EL, FR, IT, CY, LT, AT, SI.

[89] E.g. BE, DE, EE, IE, HR, LV, LU, HU, PL, FI.

[90] E.g. BG, EE, IE, SK, FI.

[91] E.g. CY, MT, BG.

[92] In most cases compensation is equal to lost earnings based on the wage difference between claimant and comparator. In some Member States immaterial damage suffered is also included. The national legal framework on sanctions differs significantly between Member States.

[93] E.g. BE, BG, EE, IE, IT, HU, MT, AT, SK, FI, SE, UK.

have transposed the provisions, except for the case of gender reassignment. However, the Directive has not contributed to the elimination of the gender pay gap because the factors hindering the effective application of the principle of equal pay are not addressed by it nor by any other binding act and were only later included in the Commission's non-binding Recommendation analyzed above.

This is the same conclusion reached by the European Parliament in its Resolution on the application of Directive 2006/54/EC of 8 October 2015, when it points out that "simply transposing correctly the provisions of the 'recast Directive' into national law has proved insufficient for achieving the full application and effective enforcement thereof, and that differences in pay for women and men persist" (s.1). The Parliament, therefore, calls on the Commission to prepare, after having identified the weak points of the Directive, "the legislative proposal that would replace it, providing […] for more effective means of supervising the implementation and enforcement of the directive in Member States" (s.4). With regard to the application of the equal pay provisions, the Parliament recognizes that the differences between the employment rates and pay levels of men and women have been reduced slightly in the recent years. However, "this is not the result of an improvement in the position of women, but of the fact that men's employment rates and pay levels have fallen during the economic crisis" (s.6). Furthermore, the Parliament "reiterates the need for clear harmonized definitions, for comparison at EU level, of terms such as gender pay gap, gender pension gap, remuneration, direct and indirect pay discrimination, and […] work treated as 'equal' and work of the same value" (s.8). The Parliament also "takes note of the 2014 Commission recommendations on wage transparency, although regretting their non-binging nature" and "calls on the Commission to include in its new legislative proposal the measures mentioned [in the latter] on pay transparency, the gender pay gap, and equality bodies' powers" (s.11). As far as the application of the equal treatment provisions is concerned, the Parliament defines as "regrettable" the fact that many Member States did not introduce explicit protection from discrimination related to gender reassignment and "calls on the Commission to hold the Member States accountable" (s.18). In its recommendations, the Parliament calls, for the fourth time, on the Commission to revise Directive 2006/54/EC and to include measures on gender-neutral job classification and evaluation systems in its proposal for a new directive (ss.33-34). Furthermore, it should introduce mandatory pay audits

for companies listed on the stock exchange market in EU Member States as well as "sanctions at EU level that would exclude companies failing to meet their responsibilities with regards to gender equality from the public procurement of goods and services financed form the EU budget" (s.37). Finally, the Parliament also underlines the importance of positive measures fostering the involvement of women in political and economic decision-making pointing out "that binding quotas have proved to be one of the best ways of achieving this aim" (s.45) and "calls on the Commission to look into the factors leading to the pension gaps and to assess the need for specific measures to reduce this gap" (s.47).
Seven years from its first Resolution, the European Parliament still reiterates nearly the same requirements: a legislative proposal to replace Directive 2006/54/EC including clear definitions, the Commission's recommendations on pay transparency, the GPG and the equality bodies' powers, measures on gender-neutral job evaluation and classification systems as well as mandatory pay audits and sanctions. Hence, between the Parliament's first Resolution in 2008 and this last one in 2015 nothing seems to have changed, another clear reason for which this policy can be seen as a failure.

Another interesting act to be looked at here is the Parliament's Evaluation of the Strategy for equality between women and men 2010-2015 of November 2014. It fist analyzes how the priorities set by the Strategy respond to the main gender problems, as identified by the Strategy itself and concludes that "their ability to produce a relevant and visible impact […] is reduced by the lack of identification of specific targets to be reached for each Strategy priority and, in some cases, by a limited focus on legislative measures, accompanied by appropriate sanctions" (p.39). Furthermore, "actions are also very general and no precise timeline and responsibilities are fixed" (ibid.). The Evaluation then analyzes whether the actions included in the Strategy are adequately designed for contributing to the achievement of its objectives stating that "while theoretically all the envisaged actions could greatly contribute to the achievement of the Strategy's priorities, it is difficult to assess their relevance for each priority, as the Strategy does not include any detail on the financial resources allocated to each action or priority and there are no specific targets identified" (p.42). Moreover, actions are often only generically identified "and they do not indicate specific outputs or results, timelines and responsibilities [which]

could result in the actual contribution to the Strategy objectives being less than expected" (ibid.). Another fact that the Evaluation mentions at different points is the missing inclusion of men's and stakeholders' involvement in the different actions. Finally, the outputs achieved by the Strategy are presented and, according to the Evaluation, many achievements have been made through gender mainstreaming, funding and legislative measures and policy documents in all priority areas identified by the Strategy, especially as the fight against gender-based violence and gender equality in external actions are concerned[94]. However, for the other three areas the Evaluation is not only positive. In fact, despite the achievements made, it recognizes that "while the target of 75% of persons in employment set by the EU 2020 Strategy has almost been reached for men, it will take almost 30 years for women to reach it" (p.65), that "it will take more than 70 years to achieve equal pay, assuming continuous decrease at the same rate" (p.67) and that "men still outnumber women in senior positions both in politics and in business" (p.68).

Hence, while the Strategy has led to the adoption of legislative measures and policy documents and promoted gender mainstreaming in various policies, some important problems, including the gender pay gap, do not seem to have been resolved. This is also due to the fact that specific targets, timelines and responsibilities as well as precisely defined results and outputs are missing in the priorities as well as in the actions themselves. It remains to be seen if the recent Strategic Engagement for 2016-2019 will be able to address those problems more appropriately.

On 20 November 2017, the Commission adopted its Report on the implementation of the Commission Recommendation on strengthening the principle of equal pay between men and women through transparency, it will be the last document analyzed here. According to Section 18 of the Recommendation, Member States were invited to notify the Commission of measures taken to implement the Recommendation by 31 December 2015. However, only eleven Member States have legislation on pay transparency in place[95], only five of which[96] have included more than one of the core measures and only one Member State[97] has enshrined all four measures in its national legal framework. Three Member States are preparing new measures on pay

[94] For more details see pp.63-71 of the Evaluation, the limited length of this thesis does not permit a detailed analysis.
[95] AT, BE, DE, DK, FI, FR, IE, IT, LT, SE and UK.
[96] AT, BE, FI, FR, SE.
[97] Sweden.

transparency[98] (p.3). Individual employees are entitled to receive pay information in cases of alleged discrimination only in three Member States[99], while this is the case for employee representatives and trade unions in some Member States'[100] and equality bodies in several Member States'[101] legislations (p.4). Furthermore, only in some Member States "employers are obliged to regularly provide a written report on the gender equality situation in their company or organization, including details on pay"[102] (ibid.). However, "several Member States have a more extensive obligation for employers to regularly assess pay practices and pay difference in the wider context of their compliance with an obligation to draw up an action plan for equal pay"[103] and in two Member States such measures are under discussion[104](p.5). Pay audits are compulsory only in France, Sweden, Finland and Germany, while in Denmark employers can voluntarily do so and in the UK they can be ordered to do so by employment tribunals (p.6). Only five Member States[105] provide for legislative measures to ensure that the issue of equal pay is part of collective bargaining, while three other Member States[106] provide for voluntary measures (p.6-7). Furthermore several Member States[107] already include a definition of the concept of 'work of equal value' in their legislation, while only in some the latter explicitly provides for a requirement that job evaluation and classification systems have to be gender neutral[108] (p.7-8). Only France and the Netherlands have reported the introduction of specific sanctions to discourage discrimination and only in some Member States "the role of equality bodies includes representing/assisting individuals in [pay discrimination] claims"[109] (p.8). However, in others, they have a further-reaching competence to hear and decide on gender discrimination complaints[110] (p.9).

Hence, it should be clear that this Recommendation can be seen as a failure, since only a minority of Member States already had included the envisaged provisions in

[98] IE, IT, NL
[99] FI, IR, DE.
[100] E.g. in FI or SE following an equal pay complaint by an employee
[101] E.g. AT, EE, FI, NL, SE.
[102] E.g. AT, BE, DE, DK, FR, IT, UK.
[103] AT, BE, ES, FI, FR, SE.
[104] IE, IT.
[105] BE, DE, FI, FR, SE.
[106] AT, CY, PT.
[107] E.g. CY CZ, DE, FR, HR, HU, IE, PL, PT, RO, SK, SE and UK.
[108] E.g. AT, BE, CY, IT, LT, PT, SI.
[109] E.g. AT, FI, SE.
[110] E.g. BE, FR, NL.

their legislations or introduced them as a result. Therefore, “the lack of visible progress in combating pay discrimination, as well as the persisting gender pay gap and the limited follow-up to the Recommendation suggest a possible need for further targeted measures at EU level” (p.11).

After this overview over the application and effectiveness of the EU’s binding and non-binding measures, we will now take a look at the statistical data on gender equality, with a focus on the gender pay gap. In the annexes to its report on the application of Directive 2006/54/EC, the Commission lists five causes of the gender pay gap. The first is a true violation of the equal pay principle in practice. However, also the undervaluation of women’s work and skills and horizontal segregation, influenced by tradition and stereotypes, play an important role. In fact, according to the Gender Equality Index 2017, the majority of employers in the STEM[111] fields is still represented by men with over eight in ten workers, while nearly three quarters of workers in EHW[112] occupations are women (p.2). Furthermore, there is also a vertical segregation and a gender imbalance in decision-making positions. According to the Commission’s 2017 Report on Equality between women and men, in October 2016, only 5.7% of CEOs, 7.7% of board chairs and 23.9% of board members of large listed companies in the EU were women (p.28) while women on average represented only 28.7% of the members of national parliaments in November 2016 (p.32). Furthermore, women also suffer an unequal burden of family and domestic responsibilities and therefore tend to work often shorter, more flexible hours, or part time. In fact, according to the European Semester Thematic Factsheet on Women in the Labour Market, 31.4% of women in employment in the EU worked on a part-time basis in 2016, while the same was true for only 8.2% of men (p.3). The last reason behind the GPG found by the Commission are workplace practices and pay systems such as career development and training or methods of rewarding employees. According to some scholars, the gender pay gap has certain characteristics: it is considerably lower in the public than in the private sector and highest for the 30-49 age bracket; it is largest for people with lower education on the one hand, and for those with postgraduate education on the other and wider for immigrants than for nationals (Foubert *et al.* 2010: 5-7).

[111] Science, technology, engineering and mathematics.
[112] Education, health and welfare.

We will now take a look at the data provided by the Commission's 2017 Report on equality. While women's average employment rate in the EU slightly increased from 62.3% in 2010 to 65.5% in 2016, the gender gap in employment remained stable at 11.9%[113] (p.9). As far as the working hours are concerned, in 2015, in the European Union, men and women spent on average 39 and 33 hours per week in paid work, respectively (p.12). However, women spent another 22 hours per week in unpaid work, such as caring and housework, while men spent fewer than ten hours. With regard to the Barcelona targets, in 2014, only ten Member States[114] met the targets of 33% of formal childcare for children under three years and only nine[115] met the target of 90% for that of children between three and school-age (p.14-15). If we take into account that these targets had already been decided upon in 2002, this is a very disappointing result, especially with a view to the importance of the realization of these targets for women's participation in the labor market and the consequent reduction of the GPG. In 2014, the latter stood at 16.3% in the EU, while in 2010 it was at 16.4%, decreasing only by 0.1% in four years (p.20). According to the Parliament's first Resolution, analyzed above, in 1995 the average GPG stood at 17% (rec.D), meaning that in 19 years it did diminish only by 0.6%. This percentage clearly illustrates the ineffectiveness and failure of the EU's policies in this field. It has to be clarified that the GPG ranges from under 10% in some Member States[116] to over 20% in others[117] (p.20). However, in those countries with a low GPG, also women's employment rates are below 66% (p.10). Another indicator to be taken into account is the gender gap in earnings which compiles inequalities for women resulting from the gaps in pay, working hours and employment and stood at 39.8% in 2014 in the EU, reducing by a slight 1.3% with respect to 2010 (p.25). According to the Commission, "at this rate of change it would take another century to close the overall gender earnings gap" (ibid.). A consequence of the gender earnings gap is the gender gap in pensions, defined "as the gap between the average pre-tax income received as a pension by women and that received by men", which stood at 37.6% in the 65 and over age group in the EU in 2015 (p.26). Contributing to the gender gap in

[113] For the 2010 gender gap see Eurostat Labour market statistics 2011, p.24
[114] FI, SI, ES, FR, NL, PT, LU, BE, SE, DK.
[115] SI, IT, ES, EE, SE, DK, FR, BE, MT.
[116] RO, LU, IT, BE, SI and PL.
[117] UK, AT, DE, CZ and EE.

pensions, the GPG contributes to a higher probability of poverty for women than for men.

Interesting data is also provided by the Special Eurobarometer 465 on the Gender Pay Gap published in November 2017, which shows that while 69% of the interviewed thought women are paid less than men per hour of work (p.2), only 26% thought equal pay for equal work is guaranteed by law in their country (p.4). This last percentage should give rise to discussions on how to better promote knowledge of the right to equal pay. Furthermore, only 22% of the interviewed were fully aware of the salary of their immediate colleagues (p.8), which gives an impression of the existence and effectiveness of the transparency policies in force in the Member States.

Another form of discrimination of women in the labor market that still persists is mentioned by two authors talking about the "relatively silent but nevertheless common" phenomenon of discrimination on grounds of pregnancy and maternity in the EU (Caracciolo di Torella, Masselot 2013: p.7). They report that only in the UK up to 50,000 women taking maternity leave each year are unable to return to their jobs due to workplace discrimination, which might include fewer hours, less chance of promotion, changed job title, or outright dismissal (ibid.). Beyond the fact of being totally inacceptable, this does not only represent an infringement of art.15 of the Recast Directive, but does also contribute to increase the GPG.

In conclusion, it should be clear that EU legislative measures to fight gender-based discrimination in the labor market in general, and the GPG in particular, do exist but are ineffective and, as far as certain elements such as definitions, transparency and equality bodies' powers are concerned, also insufficient. Their ineffectiveness is due to the lack of awareness in the population (the majority of European citizens does not know that equal pay is guaranteed by law!) and procedural obstacles in bringing a case to court, such as costs, the lack of sanctions and limited existing compensations. Furthermore, legislative measures might not be enough in order to realize full gender equality but also a change in attitudes is needed: as long as stereotypes and the traditional view of women as the ones responsible for caring and housework persist, legislative measures will not be able to bring about any change. Nevertheless, according to two scholars, "the EU is in a position to provide the necessary leadership for shifting cultural and legal changes" (Caracciolo di Torella,

Masselot 2013: 14). Beyond the moral and cultural achievement, realizing gender equality would also have great economic benefits for the EU. In fact, according to the European Institute for Gender Equality's study on the economic benefits of gender equality in the European Union, improvements in gender equality would lead to an additional 10.5 million jobs by 2050, 70% of which would be taken by women, reaching an employment rate of almost 80% for men and women (p.2). It would furthermore lead to an increase in EU GDP per capita of 6.1-9.6% by 2050, amounting to Euro 1.95-3.15 trillion (ibid.). Hence, there seems to be absolutely no reason why the EU should not try to finally make gender equality work.

2. Brexit

After having taken a look at a policy of the European Union which it has failed to realize in the last 60 years, this Chapter will now concern a recent event which can clearly be seen as a failure: the Brexit.

2.1. In the Treaty of Rome…

In the preamble of the Treaty of Rome, the signatory States declare themselves to be "determined to establish the foundations of an ever closer union among the European peoples" and article 237 gives every European State the possibility to apply as a member of the Community by addressing its application to the Council which should have acted by means of unanimous vote, after having obtained the opinion of the Commission. An agreement should then have contained the conditions of admission and the necessary amendments to the Treaty and be submitted to all Member States for ratification. However, the Treaty did not contain any article permitting the withdrawal of a Member State from the EEC.

2.2. …and 60 years later

Nearly exactly 60 years after the entry into force of the Treaty of Rome, on 29 March 2017, Theresa May, the British Prime Minister, wrote a letter to the President of the European Council, Donald Tusk, in which she notifies "the European Council in accordance with Article 50(2) of the Treaty on the European Union of the United Kingdom's intention to withdraw from the European Union". This means that

something must have changed in the last 60 years, something that permits Member States to withdraw from the European Union, and something that made the United Kingdom use this opportunity, thereby putting an end to the “ever closer union”.

2.2.1. The case

As far as the first point is concerned, it is article 50 TEU that for the first time in the history of the European integration contains the possibility of withdrawal. It states that “any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”. In case a Member State should decide to withdraw it must notify the European Council of this intention and the latter will provide guidelines in the light of which the Union will negotiate and conclude an agreement with that State, “setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union”. This agreement, negotiated in accordance with article 218(3) TFEU[118], will then be concluded by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. The Treaties will cease to apply to the withdrawing State with the entry into force of the agreement or, if no agreement is reached, two years after the notification. In the current case, this date would be 29 March 2019. However, the European Council and the Member State concerned can, unanimously, decide to extend this period. In all this decisions, the member of the European Council or of the Council representing the withdrawing Member State will obviously not participate.

However, what has happened to push the United Kingdom to trigger article 50 TEU? In order to understand this, we will take a quick glance at the history of EU-British relations and the background of the withdrawal decision. As we have seen in the first chapter, Britain’s relationship with the European integration has never been one of deeply felt conviction. In fact, it had not been part of the ECSC, nor did it participate in the project for a European Defense Community and also when the European Economic Community was founded, it preferred to remain outside. However, after two failed attempts in 1961 and 1967, due to De Gaulle’s veto, Britain acceded the European Communities on 1 January 1973, after 1.5 years of negotiations.

[118] It states: “The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.”

Nevertheless, the Labour Party had been a fierce opponent of the British accession and, as a consequence of the economic crisis of the 1970s, won the elections in 1973. The new government asked for a renegotiation of the conditions of the British EEC accession which was accepted by the other Member States and lasted for eleven months. Everything it obtained were concessions on its imports of sugar from the Caribbean and butter from New Zealand and the commitment of the Member States to allow the United Kingdom a refund from the Community budget of until 915 million DM annually according to its economic situation. However, on 9 April 1974, the House of Commons voted for remaining in the EEC, with a majority of 398 votes against 172. Following this approval, a referendum was conducted in 1975, in which 67.2% of the British population voted in favor of the EEC (Brunn 2009: 149-160, 184-192). However, according to an author, the referendum had had the aim of solving a particular internal problem for Labour because it would help "to overcome the divisions within the Labour movement and the unfavourable parliamentary arithmetic for the Left, who were in a small minority in the Commons" and "the [latter] could be accommodated whilst at the same time the leadership could secure their goal of unenthusiastic commitment to the EEC" (Williamson 2015: 2). This is an important point as we will encounter a similar element also for the background of the current British situation which we will look at now.

While in 1975 the successful EEC with its Common Market seemed a helpful and welcomed solution for the problems of the British economy, the European Union was now seen as a danger for the booming national economy, which was the fastest growing G7-economy in 2014. Furthermore, the British felt their payments to the EU were excessive, while the real contribution of each citizen was of only 37 Pence per day, and when the Commission asked the United Kingdom, in total conformity with the Treaties, to pay another 2.1 billion Euro in the common budget, given its outstanding economic performance, many saw their argument as definitely confirmed. That the United Kingdom should have obtained 11 billion Euro from the EU in the period from 2014 to 2020 was simply overlooked. Another problem felt by the British population was that of immigration to their country. In fact, in a survey of 2015, 51% expressed themselves against the right of residence and work of EU citizens in the UK. The massive immigration to the EU in 2015, with the set of problems linked to the situation in the harbor of Calais reinforced the British opinion against immigration and nearly 60% of the British citizens were convinced that

immigration to the UK would be lower without its membership in the EU (Niedermeier, Ridder 2017: 15-18). Also according to another author, immigration played a decisive role in the British decision to withdraw from the EU, since it was used as a "scapegoat" for the consequences of six years of austerity which left "a legacy of increased inequality by region and income class", especially in the national health care system (Clark 2017). Another reason for the Brexit, according to two scholars, lies in the British party system, in which parts of both Conservatives and Labour supported an euro-skeptical position, and the British majority election system also did its part. In fact it has been shown that, governments acting in a *de facto* two-party-system have to give higher attention to the euro-skeptical backbenchers than those elected in proportional election systems. It was in this situation that it became possible for UKIP to emerge as the third most important party in the United Kingdom with a winning formula mixing immigration and British EU membership, which also made it obtain most votes in the 2014 British European Parliament elections (Niedermeier, Ridder 2017: 18-20).

It was in this political and social climate that, in January 2013, the British Prime Minister David Cameron announced he would hold a referendum on the membership of his country in a potentially reformed EU within 2017 at the latest, if he was reelected. The fundamental reason for this announcement is seen in the inner conflict of his party on the European issue. The traditional EU-skepticism between the Conservatives had been reinforced in the precedent period, also due to UKIP's success, and threatened to split the party (Schünemann 2017: 142). Other authors are of the same opinion stating that Cameron decided to schedule a referendum on the British future in- or outside the EU also and primarily to retain his power and unify his party (Niedermeier, Ridder 2017: 24). This is confirmed by the fact that the Conservatives included the referendum as a core component of their electoral program for the parliamentary elections in 2015, which they won clearly in May of that year, with 36.9% against 30.4% of the Labour Party[119]. This meant that there was no getting around the referendum anymore, and in December 2015 the European Union Referendum Act[120] was approved (Schünemann 2017: 144). And here is the element already seen above: while in 1974 it was the Labour Party that

[119] Percentages from <http://www.bbc.com/news/election/2015/results> [accessed 18 December 2017]
[120] Text available at <http://www.legislation.gov.uk/ukpga/2015/36/contents/enacted> [accessed 18 December 2017]

decided to hold a referendum on the British permanence in the EU also, and primarily, for internal reasons, in 2013 this was the case for the Conservatives. In November 2015, Cameron sent a concrete list of his reform demands to Brussels. It contained requests in the so-called “four areas”: politico-economic regulation, in which he asked for a non-discrimination of the non-Euro-States; competitiveness, requiring a reduction of bureaucracy; sovereignty, including the request for a stipulated dispensation from the aim of a “ever closer union among the European peoples”, an improvement of the control of subsidiarity, a broadening of the position of the national parliaments and a guarantee for the opt-out in the area of justice and home affairs; and immigration, where Cameron asked for the stipulation of a transitional period for the free movement of persons so it would be recognized to new Member States only after they had economically approximated the EU and for the requirement of a four-year-phase of employment and payments in order to be able to claim social benefits in another EU country. On a special summit on 18 and 19 February 2016, the European Council offered a wide range of concessions to the United Kingdom, including the satisfaction of the requirements in the area of politico-economic regulation and competitiveness. Furthermore, it guaranteed to include the United Kingdom’s dispensation from the “ever closer union” in the next amendment of the Treaties but confirmed its commitment to the Treaty’s provisions in the area of control of subsidiarity. As far as the free movement was concerned, the European Council admitted an adaptation of the social benefits for children to the level of their respective homeland and a graduation of in-work benefits until four years of residence would be reached. All these concessions would enter into force only the day after a positive referendum for the EU had taken place. Cameron accepted these results and conducted his campaign on their basis, and on 20 February communicated the date for the referendum: the 23 June 2016 (Schünemann 2017: 145-147).

In the early morning of 24 June it was clear that 51.9% of the British voters had voted for Brexit, while 48.1% had voted against and the turnout had been of 72.21%. It has to be mentioned that Brexit had been voted for by the English, with the exception of London, and the Welsh, while the Scots, the Northern Irishmen and the Gibraltarians had rejected it. Differences can also be found in the age groups: 75% of those between the age of 18 and 24 voted against the Brexit, while of those aged 65 and older only 39% did so. However, it is important to say that while 83% of the latter

participated in the referendum, only 36% of the former had voted. Also the level of education seems to have played a role since only 34% of those having a High School diploma voted to keep the UK in the EU, while 77% of those with an university degree did so (Niedermeier, Ridder 2017: 33-35). According to a scholar, the argument that the UK would regain its sovereignty counted most for those voting in favor of Brexit, while a better control over immigration and frontier-defense ranged second (Schünemann 2017: 149-150). However, when asked which were the most important arguments for their family, 50% mentioned the health care system, indirectly (and wrongfully, see Clark above) linked to immigration, over 20% nominated economy, low wages and immigration, while others mentioned GB's relations with the EU, the housing market, the educational system and poverty/inequality. It is clear that none of the last three arguments mentioned, as well as low wages, do enter within the competences of the EU and are instead of national or regional responsibility. It is these reasons Welfens gives to support his thesis that the negative result of the referendum cannot so much be seen as a vote against the EU but rather as a protest against Cameron's government. In fact, on the day after the referendum, the latter announced his demission and on 13 July 2016 the new Prime Minister Theresa May took his place (2017: 30).

According to an author, it will not be until 2025 that the political consequences of the Brexit for Europe will be clear and the economic adjustment processes will take until 2030 (Welfens 2017: 27). However, what can already be said is that the EU will lose 17% of its GDP and 12% of its population and, with the UK, the most important European military power with a worldwide diplomatic network and a permanent member of the UN Security Council. Furthermore, without each other, both the UK and the EU will become weaker actors in Europe and in the world economy and, from a global perspective, the true winners will be Russia, the USA and China (ibid.: 36-40). These significant losses can clearly be seen as defining a failure of the EU. There are different scenarios which could follow Brexit. According to another author, a "complete Brexit" with the UK exiting the Single Market and the Customs Union, a decision that has become definitive with the European Council Meeting of 14 and 15 December 2017[121], would mean that, following the WTO's most-favored-nation rule, it would have to pay tariffs on 90% of exports by value in its trade with the EU (Grey

[121] See the guidelines adopted by the European Council during this meeting and mentioned below

2016: 3). However, according to the former, the most probable scenario is a FTA concluded between the UK and the EU which, after 15 years, would mean a loss between 4.6 and 7.8% for the UK's GDP and between £ 1,300 and 2,200 in the GDP per capita (Welfens 2017: 62-64).

To conclude this first Section, it seems clear that the Brexit represents a failure of the European Union because, even if it was linked to internal problems, the British citizens decided to make the EU pay. Also the fact that only a minority of the population's youngest part did vote, even if overwhelmingly in favor of the EU, says a lot about the missing European conviction on the island. In fact, according to the Standard Eurobarometer 85 of Spring 2016, the fieldwork for which was made in May 2016 and therefore one month before the referendum, only 53% of the British citizens interviewed declared they felt like EU citizens, while the EU average was at 66% (38). Furthermore, 59% did not feel their voice counted in the Union, while on average 55% felt the same (18). Also the part of the British interviewed with a negative opinion on the EU was higher than the average value, with 36% against 27% (16). However, according to an author, if the information policy of Cameron's government had been better, there is a good probability that the referendum's result would have been 52% to 48% in favor of the UK remaining in the EU (Welfens 2017: 79).

2.2.2. The negotiations

After the analysis of Brexit's history and background, we will now look at the negotiations on the UK's withdrawal from the EU which started on 19 June 2017. "In EU Brussels itself the referendum result came as a real shock. Few people in the Commission and the Council Secretariat had actually expected this outcome" (McGowan 2018: 68). Already in December 2016, the Commission's President Juncker appointed Michel Barnier as the latter's chief negotiator for Brexit. "With over 20 years of extensive experience of working in Brussels and knowledge of the EU machinery, few were better equipped than Barnier" (ibid. 77). The latter's team made it clear repeatedly that "it never set out to punish the UK but rather aimed to make it clear that leaving the EU (for any state) carried consequences as there would be for [a] country which is no longer an EU member state" (ibid. 78). Then, as required by art. 50 TEU, on 29 April 2017, one month after the British notification, the European

Council published its guidelines for Brexit negotiations. In these, it declares that the Union's overall objective in the negotiations is that of preserving its interests, those of its citizens, its businesses and its Member States, setting out the overall positions and principles the Union should pursue during the negotiations. According to a scholar, "the European Council was certainly keen to avoid any contagion from the UK result and from the outset was determined to ensure that whatever deal was struck with the UK, it could not be as good as actual EU membership" (ibid. 68). In fact, the guidelines contain two core principles: the preservation of the integrity of the Single Market excluding participation based on a sector-by-sector approach, and the conduction of the negotiations in transparency and as a single package, according to the principle that nothing is agreed until everything is agreed. Furthermore, the guidelines divide the negotiations in two phases, the first phase aiming at providing clarity and legal certainty to citizens, businesses, stakeholders and international partners on the effects of Brexit and at settling the disentanglement of the UK from the EU and all its rights and commitments as a Member State. The European Council would monitor the progress and determine when sufficient progress has been made to allow the negotiations to proceed to the second phase, in which an overall understanding on the framework for the future relationship between the EU and the United Kingdom should be identified, even if a final agreement can be concluded only once the UK has become a third country. The guidelines also contain the possibility to determine transitional arrangements, which are in the interest of the Union and should be clearly defined, limited in time, and subject to effective enforcement mechanisms, and specify that the two year timeframe set out in art.50 TEU ends on 29 March 2019. However, Michel Barnier, "has suggested a time frame that envisages 18 months to secure a deal and further 6 months to allow time for ratification", which would mean to conclude negotiations already in autumn 2018 (ibid. 51).

As far as the arrangements for an orderly withdrawal are concerned, the first priority for the negotiations should be to agree reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by Brexit, including the right to acquire permanent residence after a continuous period of five years of legal residence. In fact, according to an author, it had since long been clear that citizen's rights would be an EU priority, since "the prospects of the UK's departure from the EU [had] brought a number of issues

concerning residency, employment entitlement rights and free movement for both EU citizens in the UK and UK citizens in the EU very much to the fore" (ibid. 75). Another important task of the negotiations is that of preventing a legal vacuum once the Treaties cease to apply to the UK and address uncertainties regarding business. There should furthermore be agreement on a single financial settlement ensuring that both parties respect the obligations resulting from the whole period of the UK's membership in the Union. A third important argument to necessary agree upon is the question of Ireland, possibly avoiding a hard border and recognizing bilateral agreements and arrangements between the UK and Ireland compatible with EU law. This last point is mentioned also with regard to the UK's Sovereign Base Areas in Cyprus. For Ireland, the question of its future relations with the UK is crucial, since most of its exports travel to the UK "and the return of a customs border poses real issues for Dublin" (ibid. 81).

Other points mentioned on which the parties need to find agreement are a possible common approach towards third countries as well as international organizations and conventions; judicial cooperation, law enforcement an security; the transfer of the seats of EU agencies and facilities located in the UK; arrangements ensuring legal certainty and equal treatment for all court and administrative procedures pending before the CJEU and the European Commission and Union agencies, respectively, upon the date of withdrawal. Finally, the withdrawal agreement should also include dispute settlement and enforcement mechanisms regarding its application and interpretation. The guidelines also contain some points on the future relationship between the UK and the EU and declare that the European Council stands ready to initiate work towards an agreement on trade to be concluded once the UK will have withdrawn, as well as partnerships in other areas such as the fight against terrorism and international crime, as well as security, defense and foreign policy.

Following these guidelines, the Commission, in accordance with art.218(3) TFEU, published its recommendation for a Council decision authorizing "the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union" on 3 May 2017, which was promptly followed by the Council's decision on 15 May 2017. In its first article the latter authorizes the Commission to open negotiations and nominates it as the Union negotiator. Article two determines that these

negotiations should be “conducted in the light of the guidelines adopted by the European Council and in line with the negotiating directives set out in the Annex”. Those directives will be analyzed below.

However, before, we will take a look at the British Prime Minister’s speech to analyze the British objectives for the negotiations. Already in her 17 January 2017 speech Theresa May outlined the latter, starting with the principle of certainty and clarity just as the one contained in the European Council’s guidelines. She guarantees that the existing EU law will be converted into British law once the UK leaves the EU. The second principle nominated by May is a stronger Britain, which should be achieved by taking back the control of British laws and bringing an end to the CJEU’s jurisdiction in the UK, strengthening the union between the four nations of the kingdom and maintaining the Common Travel Area[122] with Ireland. Thirdly, May is determined to create a fairer Britain by guaranteeing the control of immigration to the UK as well as the rights of EU citizens living in the UK and those of British nationals in other member states. This last point is compatible with the European Council’s guidelines’ affirmation on citizens’ rights. Furthermore, this third principle is to be achieved also through the protection of workers’ rights building on those set out in European legislation. The last principle is that of establishing a truly global Britain through a free trade agreement with the EU as well as with other countries. In its guidelines also the European Council declares itself ready for a trade partnership with the UK, as well as for cooperation in the fight against crime and terrorism. This last point is also mentioned by May as one way to realize the last principle. Moreover, she declares herself intended to reach an agreement about the future partnership with the EU by the time the 2-year Article 50 process has concluded. This, however, is not compatible with the declarations made in the European Council’s guidelines determining that such an agreement will be concluded only with the UK as a third country.

After this short excursus on the British position before the negotiations, we will now analyze the negotiating directives given by the Council in its decision of 15 May 2017. It specifies that these directives are intended for the first phase of the

[122] It is a special travel zone between Ireland, the UK, Isle of Man and Channel Islands and permits the nationals of Common Travel Area countries to travel freely within it without being subject to passport controls. see <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7661> [accessed 12 January 2018]

negotiations, as identified by the European Council's guidelines, and reiterates the first priority as being that of safeguarding the status and rights of the EU and UK citizens living in the UK or a member state, respectively, on the date of the withdrawal. Furthermore, the directives repeat that the agreement should contain a financial settlement as well as clarify the situation of goods placed on the market before the withdrawal date. The first of these points was already included in the guidelines, while the second point is new. The directives also include the guidelines' points on Ireland and Cyprus, as well as those on the overall governance of the agreement, including effective enforcement and dispute settlement mechanisms. They then include detailed directives on the single points to be discussed, starting with citizens' rights.

In fact, the agreement should guarantee the status and rights derived from EU law at the withdrawal date, including those the enjoyment of which will intervene at a later date as well as those in process of being obtained. Those rights should be protected as directly enforceable vested rights for the life time of those concerned. According to the directives, the agreement should cover at least two elements: the definition of the persons to be covered and the definition of the rights to be protected. As far as the first point is concerned, the personal scope should be the same as that of Directive 2004/38, analyzed in the previous chapter, but also include frontier workers and family members irrespective of their place of residence, according to Regulation 883/2004[123]. Regarding the second point, the rights protected should be those of residence and free movement, the ones connected to the coordination of social security systems, the rights set out in Regulation 492/2011 on freedom of movement for workers within the Union, as analyzed in the previous chapter of this thesis, as well as the right to take up and pursue self-employment derived from art.49 TFEU.

As far as the single financial settlement is concerned, the negotiating directives want it to be related to the Union budget, the termination of the membership of the UK of all bodies or institutions established by the Treaties and the participation of the UK in specific funds and facilities related to Union policies. This includes obligations resulting from the MFFs, liabilities including pensions and contingent liabilities, and any other obligations deriving from a basic act within the meaning of art.54 of the

[123] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

Financial Regulation[124]. The UK should, in addition, also cover the specific costs related to the withdrawal process and the agreement should contain a calculation of all UK obligations as well as a schedule of payments to be made by the UK and the practical modalities thereof.

The directives then give indications on the situation of goods placed on the market under Union law before the withdrawal date, for which it should be possible to continue to be available on the market or put into service after that date both in the UK and the EU, under the latter's law as applicable before the withdrawal date. More detailed directives are also given on ongoing judicial cooperation in civil, commercial and criminal matters between Member States under Union law. Proceedings in this area should remain governed until their completion by the relevant provisions of Union law applicable before the withdrawal date. The same should be true for ongoing administrative and law enforcement cooperation procedures under Union law. As far as ongoing Union judicial and administrative procedures are concerned, the agreement should guarantee that the CJEU remains competent in judicial proceedings pending before it on the withdrawal date involving the UK as well as UK natural and/or legal persons. Moreover, it should ensure the possibility to commence administrative procedures and judicial proceedings before the Union institutions and the CJEU, respectively, after the withdrawal date for facts that have occurred before the latter. As far as the governance of the agreement is concerned, it should set up an institutional structure to ensure an effective enforcement of the commitments under the agreement, bearing in mind the role of the CJEU, and include provisions ensuring the settlement of disputes and the enforcement of the agreement. According to the directives, in these matters the jurisdiction of the CJEU should be maintained. These repeated references to the Court of Justice of the European Union are critical, since one of the UK's aims is to eliminate the latter's influence on its territory.

To be able to take a closer look at the negotiations, we will concentrate on one, the most important, argument: citizens' rights. After the second round, on 19 July 2017, a table comparing the EU/UK positions was published, and the same was done on 8 December 2017, after the sixth, and last, round of negotiations. These documents

[124] Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ L 298, 26.10.2012, p. 1–96

will be used in the following in order to analyze what has changed during the negotiations. Given the limited length of this paper, only the points of conflict will be taken into account. At the beginning of the negotiations, there was disagreement of the two parties on the definition of the "specified date", the date used for the determination of the citizens' rights. For the EU it should have been the date of the UK's withdrawal while for the UK it could have been any date between the date of the triggering of art.50 TFEU and the date of exit. Hence, in the latter's position, the specified date could also have been before its exit from the EU. Four negotiation rounds later, the parties agreed on fixing the specified date on the one of the UK's withdrawal, as required by the EU. Furthermore, while after the second negotiation round the UK still insisted on specifying details of implementation, such as lack of Comprehensive Sickness Insurance (CSI) or not testing 'genuine and effective work', after the last round of negotiations, it accepted the rights to be regulated by EU rules only. The same was true for the regulation of permanent residence rights, which the parties agreed to be regulated by the provisions of Directive 2004/38/EC analyzed above. Frontier workers were not included in the UK's position on the personal scope of the citizens' rights, but after four negotiation rounds the latter have been included as benefitting from the agreement as long as they retain the status of frontier worker in the State of work.

An important point of discussion was whether future family members of UK/EU citizens maintaining their rights should also benefit from the rights of residence. According to the EU's position the answer should be affirmative, as defined in Directive 2004/38/EC analyzed in the previous chapter of this thesis. However, the British position insisted that future family members should be subject to the same rules that apply to non-EU nationals joining British citizens, or to the post-exit immigration arrangements for the EU citizens who arrive after the specified date. After another four negotiation rounds, the parties agreed that 'family members' was to include also those related to the right holder on the specified date but residing outside the host State, and joining the latter after the specified date, as well as those becoming related to the right holder after the specified date. This last point regards children born, or legally adopted, after the specified date in certain conditions. Another important point regarded the direct enforceability of the agreement's provisions. For the EU, the latter should have direct effect and be therefore enforceable through the domestic courts of EU and UK. However, in the UK's view,

the rights included in the withdrawal agreement would be granted through UK law and enforceable through its domestic judicial system, but without the agreement's provisions having direct effect. However, after the sixth negotiation round, the parties agreed on attributing direct effect to the agreement's provisions.

The role of the CJEU was also a very critical point, as already mentioned above, and was declared for discussion in Governance Group after the second negotiation round. Nevertheless, the parties were able to find an agreement also on this part. In fact, since the rights established in the withdrawal agreement follow from those established in Union law and the CJEU is the ultimate arbiter of the latter's interpretation, when applying or interpreting those rights, the UK courts shall have due regard to relevant decisions of the CJEU after the specified date. Furthermore, the agreement should establish a mechanism which enables UK courts or tribunals to decide to ask the CJEU questions of interpretation on those rights, for litigation brought within eight ears from the date of application of the citizens' rights part. In the same area, also the question of monitoring and oversight seemed problematic after the second negotiation round. In fact, the EU insisted on the Commission being the body monitoring compliance, while the UK saw it only as the monitoring body for the EU and considered establishing an independent monitoring arrangement for the UK. In the end, it was this last position the two parties agreed upon in the sixth negotiation round.

Other, less important, disagreement existed on the question of criminality committed post exit, for which the EU envisaged an expulsion due to public security, policy or health following Directive 2004/38, while the UK intended this expulsion to be assessed under UK immigration rules. In fact, after the sixth negotiation round, the parties agreed that "any restrictions of rights on grounds of public policy or security related to conduct after the specified date will be in accordance with national law" thereby following the British position. Another, more important, point on which the parties disagreed was the value of documents of residence: only declaratory for the EU, constitutive for the UK. The agreement found after the sixth negotiation round consists in a compromise enabling States to use both a declaratory or a constitutive system. In the first case, the possession of a residence document cannot be made a precondition for the exercise of the entitlement of the residence rights, since the latter is conferred directly on beneficiaries by the agreement. On the contrary, in the second case, persons concerned can be required to apply to obtain a status

conferring the rights of residence and be issued with a residence document which attests to the existence of that right. A similar problem regarded the situation of current holders of permanent residence certificates which, according to the EU, should have been considered legally resident even without holding a residence document, while, in the British view, they should have needed to reapply. After the sixth negotiation round, the parties agreed that those already holding a valid permanent residence document issued under EU law on the specified date will have the latter converted into a new document free of charge. This conversion will be subject to a criminality and security check, confirmation of ongoing residence and verification of identity. This first point was not shared in the EU's position at the beginning of the negotiations, when it strictly rejected systematic criminality checks. However, the parties then agreed that such checks could be made systematically in the context of acquiring status under the agreement.

As far as the social security coordination is concerned, disagreement existed over the aggregation of contributions, as referred to in Regulation 883/2004, where the UK after the second negotiation round still had to consider its position with regard to recognizing also those made after exit. However, after the sixth negotiation round, the parties agreed that contributions both before and after the specified date in the EU and the UK will be covered by the withdrawal agreement. Also for the exports of benefits other than pensions the two positions differed. While the EU was in favor of guaranteeing lifetime export under conditions in Regulation 883/2004, the UK was willing to guarantee such only if that benefit was being exported on the specified date. In other cases, it would guarantee parity with UK nationals. Nevertheless, the EU's position prevailed in the end. In the second negotiation round no positions had been made on the rules for healthcare, but in the sixth round the parties agreed that the latter would follow Regulations (EC) No 883/2004 and 987/2009, mentioned in the previous chapter of this thesis. To conclude on this point, it has to be said that the EU was able to impose its position on most, and also the most important, points subject to disagreement. This is the case for the rights of future family members, the individual enforcement of rights, the role of the CJEU and the rights regarding social security.

On 8 December 2017, the negotiators of the EU and the UK published their joint report on progress during the first phase of negotiations[125]. In the following the main results will be presented, not repeating those on citizens' rights already illustrated above. The overall objective of the withdrawal agreement with respect to the latter is that of providing reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law. This applies to EU and UK citizens legally residing in the UK and the EU, respectively, by the specified date, as well as their family members residing with them following Directive 2004/38/EC. The joint report also contains some points on the administrative procedures for applications for status, which will be "transparent, smooth and streamlined" (pt. 17). Precisely, the host State cannot require anything more than is strictly proportionate and necessary to determine whether the criteria have been met, adequate time of at least two years should be allowed to persons concerned to submit their applications, and documents should be issued free of charge or for a charge not exceeding the one imposed on nationals for the issuing of similar documents. The conditions for acquiring the rights of residence and permanent residence will be those set out in Directive 2004/38/EC as illustrated in the previous chapter of this thesis. Furthermore, decisions on recognition of qualifications granted to persons covered by the scope of the withdrawal agreement before the specified date in the host State and the State of work, for frontier workers, will be grandfathered. The provisions of the citizen's rights part of the agreement will have effect in UK primary legislation once the British Government's Withdrawal Agreement & Implementation Bill has been adopted, while the withdrawal agreement will be binding upon the institutions of the Union and on its Member States from its entry into force. Finally, a consistent interpretation of the citizens' rights part should be supported and facilitated by an exchange of case law between the courts.

As far as Ireland and Northern Ireland are concerned, the parties agreed that the Good Friday or Belfast Agreement[126] reached on 10 April 1998 by the UK

[125] On the same day, the Commission published its Communication on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union, which is available from <https://ec.europa.eu/commission/sites/beta-political/files/1_en_act_communication.pdf> [accessed 8 December 2017]

[126] The agreement contained proposals for a Northern Ireland Assembly with a power-sharing executive, a body linking devolved assemblies across the UK with Westminster and Dublin and new cross-border institutions with the Republic of Ireland. The latter also agreed to withdraw its constitutional claim to the six counties forming Northern Ireland. Its text is available from

government, the Irish government and the other participants must be protected in all its parts. Furthermore, the UK declares its respect for the ongoing Irish EU membership and the corresponding rights and obligations, in particular with regard to the Internal Market and the Customs Union. For the UK, any further arrangements must be compatible with its overarching requirements of protecting North-South cooperation and of avoiding a hard border. Its intention is to achieve the latter through the overall future relationship with the EU or, alternatively, through specific solutions. An interesting point is that the Belfast Agreement guaranteed the birth right of all people of Northern Ireland to choose to be British or Irish or both. In the future, those people of Northern Ireland choosing to be Irish citizens will continue to enjoy rights as EU citizens, even if residing in Northern Ireland. Finally, the Common Travel Area between the UK and Ireland will be maintained.

Another important point on which agreement has been reached is the financial settlement. The agreement consists in a methodology for the financial settlement including a list of components; a set of principles for calculating the value of the financial settlement and payment modalities; arrangements for continued participation of the UK in programs of the current Multiannual Financial Framework (MFF) until their closure; and financial and related arrangements for the European Investment Bank, the European Central Bank, European Union trust funds, the Facility for Refugees in Turkey, Council agencies and the European Development Fund. As far as the components are concerned, it has been decided that the UK should contribute to the implementation of the Union annual budgets for the years 2019 and 2020 as if it had remained in the EU. Furthermore, the UK will contribute its share of the financing of the budgetary commitments outstanding at 31 December 2020 as well as its share of the financing of the EU's liabilities incurred before December 2020[127]. The UK will also remain liable for its share of the Union's contingent liabilities as established at the date of withdrawal and, in the event of triggering of the latter, it will receive its share of any subsequent recoveries. There are three principles for calculating the value of the financial settlement: payments arising from the financial settlement will become due as if the UK had remained a Member State; the UK will not finance any commitments that do not require funding

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf> [accessed 12 January 2018]

[127] Excluding liabilities with corresponding assets and any assets and liabilities which are related to the operation of the budget and the Own Resources Decision.

from Member States, and receive a share of any financial benefits that it would have received had it remained a Member State; and the UK share in relation with the Union budget will be a percentage calculated as the ratio between the own resources made available by the UK from the year 2014 to 2020 and the own resources made available by all Member States during the same period, except for the UK payments relating to UK participation to Union annual budgets to 2020. The parties postponed the decision on practical modalities for implementing the agreed methodology and the schedule of payments to the second phase of the negotiations. As far as the European Investment Bank is concerned, the UK share of the paid-in capital will be reimbursed in twelve annual instalments starting at the end of 2019, the first eleven being € 300 000 000 each and the final one € 195 903 950. Also the paid-in capital of the UK in the European Central Bank will be reimbursed to the Bank of England after the withdrawal date. Moreover, the UK will maintain its existing modalities of payment with regard to the Facility for Refugees in Turkey and the European Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa. Finally, the UK will also remain party to the European Development Fund (EDF) until the closure of the 11th EDF.

Beyond the three big themes of citizens' rights, Ireland and financial settlement, also some smaller arrangements have been made. Those include Euratom-related issues because according to art.106(a) of the Treaty establishing the latter, art.50 TEU applies also to that Treaty and thereby a withdrawal from the European Union means a withdrawal from Euratom as well. Therefore, the parties agreed on principles of ownership for special fissile material and responsibility for spent fuel and radioactive waste as well as that the UK will be responsible for international nuclear safeguards in the UK. These smaller issues also include that of ensuring continuity in the availability of goods placed on the market under Union law before the withdrawal which was decided according to the EU's position contained in the Council's directives seen above. Finally, the parties agreed that the CJEU should remain competent for UK judicial procedures registered at the CJEU on the date of withdrawal, which should continue through to a binding judgment.

After this summary of the first phase of the negotiations, it should be clear that even if the Brexit can and must be seen as one of the European Union's biggest failures, the negotiations until now can be seen as a success. The Union's positions and the

application of Union law prevailed in nearly all, and in the most important, points such as citizens' rights, the role of the CJEU and the financial settlement. Since the positions on Ireland were very similar from the beginning there have not been many points of disagreement in this regard. However, beyond the cultural and ideological loss Brexit represents for the EU, also a significant financial loss has emerged from the provisions on the financial settlement.

In any case, the European Council, on its meeting on 15 December 2017, decided that the progress achieved during the first phase of negotiations is sufficient to move to the second phase, which should be related to transition and the framework for the future relationship. The guidelines given for this second phase will be analyzed below. As far as the transition is concerned, the UK proposed a transition period of two years which, for the EU, should cover the whole of the EU acquis, while the UK would no longer participate in or nominate or elect members of the EU institutions, nor participate in the decision-making of the Union agencies, offices and bodies. Changes adopted by EU institutions, bodies, offices and agencies during this period will have to apply both in the UK and the EU. Furthermore, all existing Union supervisory, regulatory, budgetary, judiciary and enforcement instruments and structures, including the competence of the CJEU, will also apply. During the transition period, the UK would continue to participate in the Customs Union and the Single Market, including all of its four freedoms, and would therefore have to comply with EU trade policy, apply and collect EU customs tariff and customs duties and ensure all EU checks are being performed on the border with third countries. The European Council reiterates that an agreement on a future relationship can only be finalized and concluded once the UK has become a third country. However, the Union declares itself ready to engage in preliminary and preparatory discussions in order to identify an overall understanding of the framework for the future relationship, only after additional guidelines have been adopted to this effect. Furthermore, the UK has stated its intention to no longer participate in the Customs Union and the Single Market, once the transition period expires, and the European Council declares its intend to calibrate its approach as regards trade and economic cooperation in the light of this position. Moreover, the European Council's readiness to establish partnerships in areas unrelated to trade and economic cooperation is reiterated. This regards in particular the fight against terrorism and international crime, as well as

defense, security and foreign policy. Finally, the European Council declares that it will continue to follow the negotiations closely and adopt additional guidelines in March 2018, regarding the framework for the future relationship in particular.

Hence, even if Brexit is the EU's greatest failure since the Treaty of Rome, it is inevitable and the first phase of negotiations has been concluded successfully, since agreement has been found on the three main arguments: citizens' rights, Ireland and financial settlement. However, this did take six negotiation rounds and, to cite Donald Tusk, President of the European Council, "since the Brexit referendum, a year and a half has passed. So much time has been devoted to the easier part of the task. And now, to negotiate a transition arrangement and the framework for our future relationship, we have *de facto* less than a year" (2017).

Chapter IV In between – Human Rights

Table of contents: 1. In the Treaty of Rome. – 2. Success… . – 2.1. The Charter of Fundamental Rights of the European Union. – 2.2. Judgment of the Court in Joined Cases C-293/12 and C-594/12. – 3. …and Failure. – 3.1. The EU's Refugee Deal with Turkey. – 3.1.1. The Factual Background. – 3.1.2. Criticism. – 4. Conclusion.

After having considered four cases of clear success or clear failure of the Treaty of Rome, we will now take a look at an intermediate case presenting elements both of success and of failure: the EU's human rights policy. The latter was chosen for the analysis in this thesis due to its twofold character; success due to the adoption of the Charter of Fundamental Rights of the European Union, failure because of the Union's Refugee Deal with Turkey and its highly criticized consequences on human rights.

1. In the Treaty of Rome

In order to be able to find human rights provisions in the Treaty of Rome, one has to look very closely. Rome's provisions contain human rights mostly in the area of economic rights, such as workers' rights at art.48, the right of establishment at art.52, the freedom to supply services at art.59 and the equal pay principle at art.119. Furthermore, art.118 stated that one of the Commission's aims should be the promotion of a close collaboration between Member States in the social field relating to social security, labor legislation and working conditions, occupational and continuation training, employment, industrial hygiene, protection against occupational accidents and diseases, and the law regarding trade unions and collective bargaining. Hence, the latter indirectly included also social and civil rights, limited, however, to the area of employment and to the close collaboration between Member States. Finally, article seven included a more general provision, namely the prohibition of any discrimination on the grounds of nationality within the field of the Treaty's application. Rome's human rights provisions were therefore limited both in number and in scope, and by no way universal.

In order to compare the latter to the current situation, we will firstly look at what makes the Union's human rights policy a success by analyzing the Charter of fundamental rights of the European Union, as well as a case of the ECJ. Secondly,

we will take a glance at an event that can be described as a failure of the Union's human rights policy: its Refugee Deal with Turkey.

2. Success…

2.1. The Charter of Fundamental Rights of the European Union

Before analyzing the Charter in detail, we will take a look at its legal basis that can be found in article six TEU, which states that "the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." According to a scholar, this means "that the Charter becomes an integral part of the EU legal order, as opposed to an external source relied upon to affirm autonomous general principles of law" (Di Federico 2011: 38) and, according another scholar, "it becomes a (formal) parameter of legality of EU acts" (Coppola 2011: 210). Article six also states that "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms", a situation which is currently on hold, but due to the limited length of this paper cannot be treated here[128].

Another thing to do before analyzing the Charter's provisions, is taking a look at its history and characteristics. The drafting of the Charter was proposed at the Cologne European Council in June 1999 and approved by the Biarritz European Council in October 2000 as well as by the European Parliament, the Council and the Commission subsequently. It was then solemnly proclaimed at the meeting of the European Council in Nice on 7 December 2000 but kept an uncertain legal value until the Treaty of Lisbon, containing article six mentioned above, entered into force on 1 December 2009 (Kerikmäe 2014: 7). According to two scholars, the Charter "does not stand alone but has to be seen in the context of not only the human rights that are guaranteed by national constitutions but also the European Convention on

[128] However, for more information see <http://www.echr.coe.int/Pages/home.aspx?p=basictexts/accessionEU&c=> [accessed 22 January 2018] and <http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-completion-of-eu-accession-to-the-echr> [accessed 22 January 2018].

Human Rights[129]" and has to be interpreted in an identical way with the latter, following a joint declaration signed by the presidents of the ECtHR and the EUCJ in early 2011 (Gruodyté, Kirchner 2014: 73). However, "the Charter covers a number of guarantees which find no correspondence in the ECHR, namely social and economic rights, as well as "third generation rights"" (Di Federico 2011: 40) and for another scholar the Charter's content can be seen as "a mixture of fundamental rights, principles and values, and ideas" including "traditional" civil and political rights and freedoms, as well as social and cultural rights (Kerikmäe 2014: 8). A scholar, quoting T.H. Marshall, defines civil rights as "the rights necessary for individual freedom-liberty of the person", political rights as embodying "the right to participate in the exercise of political power" and social rights as "the whole range, from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of civilized being according to the standards prevailing in the society" (Coppola 2011: 199)., while third generation rights concern data protection, guarantees on bioethics and transparent administration[130]. Some words have to be dedicated to the newly included social rights, which had occupied a secondary position in the Union's human rights policies in contrast with the values of economic freedom being promoted by market integration. However, in the context of the Charter, social rights are attributed an important role "and they are systematically placed in an equivalent position to other economic rights" (Poiares Maduro 2003: 284-286). In fact, according to another scholar, "one of the most distinctive features of the Charter is that it postulates the indivisibility of fundamental rights" by regarding civil, political and social rights as equivalent. "Another characteristic is that […] rights are generally referred to all persons present on the EU territory, regardless of their nationality [and] this undoubtedly strengthens the idea that fundamental rights are perceived as universal" (Coppola 2011: 210). Hence, even before looking at the Charter's provisions in detail, its importance and value for the Union's human rights regime should already be determinable. However, also its cultural value should not be underestimated as, according to a scholar quoting McCrudden, "recognizing a common set of rights in a document that all can commit to, at least in part, is seen as an important element in building a new political society, providing the possibility of

[129] The Convention is available from <http://www.echr.coe.int/Documents/Convention_ENG.pdf> [accessed 22 January 2018]
[130] See <http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm> [accessed 22 January 2018]

common identification by all with a basic set of values if not with the institutions of the [then] Community" (Poiares Maduro 2003: 292).

After this short *excursus* on the Charter's history and characteristics, let us now proceed to the analysis of its provisions. The Charter is composed of eight parts: the Preamble and seven Chapters on dignity, freedoms, equality, solidarity, citizens' rights, justice and general provisions governing the interpretation and application of the Charter, and contains 54 articles. The Preamble states that the Charter reaffirms" the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights". The first Chapter on dignity includes five articles guaranteeing that human dignity is inviolable and must be "respected and protected" (art.1); the right to life, including the prohibition of the death penalty (art.2); the right to respect for the physical and mental integrity of the person, including particular rights in the fields of medicine and biology such as the prohibition of the reproductive cloning of human beings (art.3); the prohibition of torture or degrading treatment or punishment (art.4); as well as the prohibition of slavery, forced labor and trafficking in human beings (art.5).
The following Chapter is entitled "Freedoms" and article six includes the right to liberty and security of person. Articles seven and eight grant the right to respect for private and family life, home and communications and to the protection of personal data, respectively. According to a scholar, the former "reflects and updated version of the content of Art.8 ECHR[, while] Art.8 instead is based on the European Convention No. 108/1981[131] and the following Directive 95/46/EC on data protection[132]". The scope of article eight is, however, wider than that of the Directive, the latter being limited to internal market situations only (Bazzocchi 2011: 190). Hence, beyond representing a clear addition to Rome's provisions, these articles can also be seen as innovative with respect to more recent European and international

[131] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, available from <https://rm.coe.int/1680078b37> [accessed 22 January 2018]
[132] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in OJ L 281, 23 November 1995, 31

acts[133]. Article nine grants the right to marry and the right to found a family in accordance with the national laws governing the exercise of these rights. Since the reference to "men and women" of art.12 of the ECHR is not present here, according to an author, "there are disputes on the meaning of this provision today". Some scholars see its scope in extending "to compromise other forms of marriage than the traditional, if these are established by the national legislation", while others argue that art.9 must be interpreted in the light of art.12 ECHR as "guaranteeing the access to a marriage of two persons of different sex". However, even the ECtHR has interpreted art.12 ECHR in the light of art.9 of the Charter[134] (Joamets 2014: 97-98). Article ten then recognizes the right to freedom of thought, conscience and religion, while article eleven includes the right to freedom of expression and information, as well as the respect for the freedom and pluralism of the media. Articles twelve and 13 guarantee the right to freedom of peaceful assembly and of association at all levels and the freedom of the arts and the sciences, respectively. Article 14 guarantees the right to education and to have access to vocational and continuing training and, according to two scholars, it "has its source in the constitutional traditions of the Member States and Article 2 of the First Protocol of the ECHR" and improves on the latter by explicitly laying down the principle of free compulsory education in its second paragraph (Wallace, Shaw 2003: 235-236). The right to engage in work and to pursue a freely chosen or accepted occupation is guaranteed by art.15, which also grants Union citizens, in particular, "the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State". Articles 16 and 17 recognize, respectively, the freedom to conduct a business in accordance with Union law and national laws and practices and the right to property, including the protection of intellectual property. Article 18 grants the right to asylum "with due respect for the rules of the Geneva Convention of 28 July 1951[135] and the Protocol of 31 January 1967 relating to the status of refugees[136] and in accordance with the [Treaties]". The following article prohibits collective expulsions and declares that "no one may be removed, expelled or extradited to a State where there is a

[133] The ECHR is here regarded as "recent" because of its amendments, the most recent one that of 2010 (Protocol No.14)
[134] See Case *Schalk and Kopf v. Austria* (Appl. No. 3014104 24) (June 2010), para. 60. available from <https://www.juridice.ro/wp-content/uploads/2017/06/001-99605.pdf> [accessed 22 January 2018]
[135] The Refugee Convention, available from <http://www.unhcr.org/4ca34be29.pdf> [accessed 22 January 2018]
[136] Available from <http://www.unhcr.org/4dac37d79.pdf> [accessed 22 January 2018]

serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

Chapter III on equality contains seven articles and, according to an author, "the Charter purports to reflect a key feature of the equality *acquis*, namely that equality […] is not captured by any one of its several legal embodiments, be it non-discrimination, equal treatment or equal opportunity. Rather each of these is an aspect of equality, the latter being a broad multi-faceted guarantee" (Costello 2003: 116). The first of the Chapter's articles guarantees equality before the law (art.20). Article 21 prohibits any discrimination "based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation". It also prohibits any discrimination on grounds of nationality within the scope of application of the Treaties. The following article obliges the Union to respect cultural, religious and linguistic diversity. Since, in the Community's *acquis,* the protection of diversity had referred essentially to national or regional diversity and the article in question does not refer "to national or regional diversity, but to rather cultural, religious and linguistic difference[, it] is one of the first acknowledgements that diversity matters within, as well as between Member States, are of EU concern" (Costello 2003: 128-129). Article 23 has already been mentioned above and states that "equality between men and women must be ensured in all areas, including employment, work and pay" granting, however, the right to positive action in its second paragraph. According to the same author, by placing gender equality into the broader equality context the Charter contextualizes a policy which had long been isolated from other issues of diversity, equality and fundamental rights (ibid. 113). Article 24 guarantees the right of children "to such protection and care as is necessary for their well-being" and that "in all actions relating to children […] the child's best interest must be a primary consideration". According to the same scholar, this latter provision mirrors "those of Article 3 [of the UN Convention on the Rights of the Child][137], enshrining the 'best interest of the child' as a 'primary consideration'", while having an all-encompassing scope by covering action 'relating to' children thereby indicating "that a broad range of policy decisions is at issue". The CRC, on the other hand, applies to actions 'concerning' children (ibid. 126). The last two

[137] Available from <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [accessed 22 January 2018]

articles of this Chapter guarantee the Union's recognition and respect for the rights of the elderly and those of persons with disabilities.

The forth Chapter of the Charter includes the provisions on solidarity and art.27 states that "workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time […]". Article 28 grants workers the right to negotiate and conclude collective agreements and to take collective action to defend their interests, in accordance with Union and national laws and practices, while art.29 grants everyone the right of access to a free placement service. According to a scholar, the former is a guiding principle, meaning that it is not justiciable, because "its practical specification is left to national legislation", while the latter is considered as a justiciable right (Coppola 2011: 210). The following article establishes the right of every worker to protection against unjustified dismissal, "in accordance with Union law and national laws and practices". Article 31, then, guarantees every worker the right to working conditions respecting his safety, health and dignity. The prohibition of child labor as well as particular provisions for the protection of young people at work are included in art.32, while article 33 grants the family legal, economic and social protection, including maternity and paternity leave. Article 34 states the Union's recognition and respect of "the entitlement to social security benefit and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices", as well as of the right so social and housing assistance in its third paragraph. According to the same scholar, this provision "is considered as a mere objective" (ibid.). The following article recognizes "the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national law and practices", while, in art.36, the Union recognizes and respects access to services of general economic interest, and art.37 grants the inclusion of "a high level of environmental protection and the improvement of the quality of the environment" into the policies of the EU. Finally, art.38 obliges Union policies to ensure a high level of consumer protection.

Chapter V, instead, includes eight provisions on citizens' rights. Articles 39 and 40 respectively grant the right to every citizens of the Union to vote and to stand as a candidate in the elections to the European Parliament and the municipal ones in the Member State in which he or she resides. Article 41, then, guarantees the right of

every person to a good administration, meaning "to have his or her affairs handed impartially, fairly and within a reasonable time by the institutions and bodies of the Union". Article 42 grants every Union citizen, as well as natural or legal persons with residence or registered office in a Member State, the right of access to the documents of the institutions, bodies, offices and agencies of the Union, while art.43 guarantees the same persons the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, excluding the ECJ acting in its judicial role. Article 44 grants the same persons the right to petition the European Parliament. The right to move and reside freely within the territory of the Member States is granted to Union citizens by article 45, and art.46 grants them the right to diplomatic and consular protection by the authorities of any Member State "in the territory of a third country in which the Member State of which he or she is a national is not represented".

The Charter's sixth Chapter contains its provisions in the area of justice and article 47 grants everyone the right to an effective remedy and to a fair trial. More specifically, this includes an effective remedy before a tribunal, in the case of violations of rights guaranteed by Union law, a fair and public hearing within a reasonable time by an independent and impartial tribunal and the availability of legal aid to those lacking sufficient resources. According to a scholar, "the fundamental rights enshrined in this Article find their origin in the traditional "right to a judge [and the article] issues directly from Arts 6[138] […] and 13[139] […] ECHR" while presenting distinctive features. In fact, the protection provided by art.47 is more extensive if compared to art.13 ECHR in that it "expressly guarantees an effective remedy before "a tribunal", [while] the scope of the latter is restricted to "a national authority"". Article 47, furthermore, applies to all contentious matters, contrary to art.6(1) ECHR limiting the right to a fair trial to civil and criminal cases (Sanna 2011: 163-164). Moreover, when comparing art.6 ECHR to art.47 of the Charter, one will see that the latter goes one step further by including "a right to legal aid *expressis verbis*" (Gruodyté and Kirchner 2014: 82). Article 48 states that "everyone who has been charged shall be presumed innocent until proved guilty according to law", while article 49 contains the principles of legality and proportionality of criminal offences and penalties and article 50 enounces the right not to be tried or punished twice in criminal proceedings for the

[138] Right to a fair trial
[139] Right to an effective remedy

same criminal office. Here, some words have to be dedicated to the langue of the Charter; in fact, a great number of rights shall be "recognized" and "respected" but not necessarily "protected". This is a demonstration of a passive approach to human rights, meaning that the Union's policies shall not interfere with the latter but do not necessarily have to protect them actively.

The Charter's last Chapter contains the general provisions such as its scope defined by article 51. The latter addresses the provisions of the Charter "to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law" and states that the Charter "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties". "This means that the member states are only bound by the Charter when they act as agents for the Union", executing an EU decision, applying an EU Regulation at national level or implementing an EU Directive. When acting on their own initiative, instead, "there is no need to bind them to the Charter, as in these cases, they are subject to their national law" (Joamets 2014: 96). This formulation was the result of Member States' reluctance to accord binding legal value to the Charter, which, according to a scholar could be explained by the following reasons: "the empowerment that the Charter [could] give over to the judiciary control of acts of the political process, […] to preserve the development and the application of the Charter in the dominion of the political process, and […] the fear on the part of some Member States that the Charter [could] be used to promote a further political and constitutional growth of the EU" (Poiares Maduro 2003: 283-284). This is also why, through a specific Protocol annexed to the Treaties[140], the UK and Poland obtained a sort of 'opting out' on the Charter for reasons linked to the Charter's impact on business and family law, respectively, and why they were soon joined by the Czech Republic (Di Federico 2011: 42-43). However, "it appears that the Protocol leaves the situation […] substantially unaffected since, on the one side the British and Polish courts are in any case obliged to respect the primacy of EU law and, on the other, it merely reasserts what is already clear from Arts. 51 and 52" of the Charter (Coppola 2011: 214). Article 52, then, defines the scope and interpretation of rights and principles by

[140] Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom

providing that “any limitation on the exercise of the rights and freedoms recognized by [the] Charter must be provided for by law and respect the essence of those rights and freedoms”. Furthermore, such limitations must be subject to the principle of proportionality meaning that they can be made “only of they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”. The article also specifies that the rights included in the Charter based on the Treaties are to be exercised under the conditions and limits defined by the latter, and the meaning and scope of rights included which are also guaranteed by the ECHR is to be the same as those laid down by the latter. Furthermore, “in so far as [the] Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions” (par.4). Finally, the article states that the Charter’s provisions containing principles “may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law […].” However, they shall be judicially cognizable only in the interpretation of such acts and in the ruling of their legality (par.5)”, meaning that those principles do not confer subjective rights on the individual. Articles 53 and 54, then, contain provisions on the Charter’s level of protection and the prohibition of the abuse of rights.

To conclude on the provisions of the Charter, two things should be clear. Firstly, the Charter represents a new kind of document, which did not exist at the time of the Treaty of Rome and includes binding principles and rights with which the Union’s institutions and Member States have to comply when issuing or implementing Union acts. Secondly, most of the provisions represent a clear addition with respect to those limited human rights provisions contained in the Treaty of Rome and some do even go a step further with respect to more recent fundamental rights norms contained in international or Union law. This must clearly be seen as a success of the Union’s human rights policies of the last 60 years. Furthermore, “the fact that the Charter has become effective prior to [the EU’s] accession [to the ECHR] is believed to prevent national courts from erroneously viewing Strasbourg as the primary guarantor of fundamental rights. On the contrary, the Union will progressively become the reference point in this domain” (Di Federico 2011: 53).

In fact, the Commission's 2016 Annual Report on the application of the EU Charter of Fundamental Rights, shows that the CJEU has increasingly referred to the Charter in its case law. The number of decisions citing the Charter rose from 43 in 2011 to 221 in 2016, meaning an increase of 514%. Most decisions quoting the Charter in their reasoning in 2016 referred to the provisions of its Chapter on justice (92), followed by those referring to provisions on citizens' rights (55) and freedoms (40). Also the national courts often refer to the Charter when requiring preliminary rulings from the CJEU: 60 of those requests for preliminary rulings committed in 2016 contained a reference to the Charter, as compared with 36 in 2015. Of the latter, in 2016, most made reference to the Charter's provisions on justice (29), followed by those referring to the Chapters on freedoms (18) and solidarity (9) (pp. 25-25). The specific articles mostly nominated in 2016 were art.47 on the right to an effective remedy and to a fair trial (20%), art.41 on the right to good administration (17%) and art.52 on the scope and interpretation of rights and principles (9%) for the decisions of the CJEU; and art.47 (11), art.51 on the field of application (10) and art.52 (9) for the decisions of national courts (p.27-28). Hence, the binding force of the Charter is showing its effects also in the case law with reference to both decision of the CJEU and requests for preliminary rulings.

Another current case in which the Charter shows its effects is the one of the infringement procedure launched against Poland by the Commission on 29 July 2017[141]. This was decided following the publication of the Law on the Ordinary Courts Organization in the Polish Official Journal the day before, since it contrasts with several Union provisions. The first identified by the Commission is the discrimination on the basis of gender due to the introduction of a different retirement age for female (60 years) and male (65 years) judges which is contrary both to article 157 TFEU and Directive 2006/54, analyzed earlier in this thesis. Other provisions violated by the law are art.19(1) TEU and art.47 of the Charter because it gives the Minister of Justice the discretionary power to dismiss and appoint Court Presidents, as well as to prolong the mandate of judges who have reached retirement age, for up to ten years for female judges and five years for male judges, thereby undermining the independence of the Polish courts. Moreover, for this latter decision, the law does

[141] For all following information see Press release 'European Commission launches infringement against Poland over measures affecting the judiciary' available from <http://europa.eu/rapid/press-release_IP-17-2205_en.htm> [accessed 20 January 2018]

not include any time-frame which means that the Minister of Justice retains influence over the judges concerned for the remaining time of their judicial mandate thereby undermining the principle of irremovability of judges. Hence, as provided for by art.285 TFEU, on 29 July, the Commission sent its Letter of Formal Notice requiring the Polish Government to reply within one month.

However, on 12 September 2017, the Commission decided to send a Reasoned Opinion to Poland thereby entering the second stage of the infringement procedure[142]. This decision was taken following the analysis of the Polish response to its Letter of Formal Notice which was deemed insufficient. The Commission reiterated its opinion on the incompatibility of the Polish Law with EU law and added to the previous points that the discretionary power to dismiss and appoint Court Presidents gives the Minister of Justice the power to exert influence over these judges while they are adjudicating cases involving the application of EU law. Therefore, the Commission decided to take the next step in the infringement procedure and to send a Reasoned Opinion to Poland giving the Polish authorities one month to take the necessary measures to comply with the latter. All this was done in parallel to the Rule of Law Dialogue between the Commission and Poland launched in January 2016[143].

Finally, on its weekly meeting of 20 December 2017[144], the Commission decided to refer Poland to the Court of Justice of the European Union thereby taking the third and last step in its infringement procedure. Furthermore, the Commission proposed to the Council to adopt a decision under art.7 TEU due to a clear risk of a serious breach of the rule of law in Poland. The latter is explained with the Polish judicial reforms, of which the law mentioned above is part, which have put the country's judiciary under the political control of the ruling party thereby raising serious questions about the effective application of EU law. This is the first time in the EU's history that the Commission resorts to art.7 TEU. It is clear that this could have significant consequences both for Poland and the EU's relations with the latter and for the EU in general, since it could represent a precedent for future cases.

[142] For all following information see Press release 'Independence of the judiciary: European Commission takes second step in infringement procedure against Poland' available from <http://europa.eu/rapid/press-release_IP-17-3186_en.htm> [accessed on 20 January 2018]

[143] For more information see <http://europa.eu/rapid/press-release_MEMO-16-62_en.htm> [accessed 23 January 2018]

[144] For all following information see <https://ec.europa.eu/commission/news/poland-brexit-negotiating-directives-and-investment-firms-2017-dec-20_en> [accessed 20 January 2018]

In conclusion, the legal as well as the cultural value of the Charter of Fundamental Rights of the European Union should be clear. It clearly represents a big step forward if compared to the provisions of the Treaty of Rome and embodies the guarantee for the respect for human rights by the Union's institutions as well as by the Member States when implementing Union law. By now, its provisions are important points of reference for both the CJEU and the national courts and are at the basis of various infringement procedures, such as the one seen above, and decisions of the CJEU. One of the latter will be analyzed in the following Section.

2.2. Judgment of the Court in Joined Cases C-293/12 and C-594/12

Given the limited length of this thesis, this Section will only briefly analyze the ECJ's Judgment in Joined Cases C-293/12 and C-594/12 of 8 April 2004[145]. In the case, the Irish High Court and the Austrian Verfassungsgerichtshof had made requests for a preliminary ruling under art.267 TFEU concerning the validity of Directive 2006/24/EC[146]. According to art.1 of the latter, its aim was to harmonize "the Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processes by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law". Furthermore, the Directive should apply "to traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registered user". However, it was not to apply to the content of electronic communications. Articles 3 and 4 of the Directive obliged Member States to adopt measures to ensure both that the data specified in art.5 are retained in accordance with the provisions thereof and that data retained in accordance with the Directive are provided only to the competent national authorities in specific cases and in accordance with national law. The mentioned art.5, then, gives the list of the categories of data to be retained, which includes 24 concrete types of data such as

[145] Judgment of the Court of 8 April 2014, Joined Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238. available from <http://curia.europa.eu/juris/document/document.jsf?docid=150642&doclang=EN> [accessed 10 January 2018]

[146] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC in OJ L 105, 13 April 2006, 54

the name and address of a subscriber or registered user, the user ID(s), the number(s) dialed, the date and time of the start and the end of the communication, etc. According to art.6, Member States should have ensured that the data mentioned above be retained for periods of not less than six months and not more than two years from the date of the communication. Under art.7, the Directive also obliged Member States to ensure that providers of publicly available electronic communications services or of a public communications network respect some particular data security principles.

In Case C-293/12, Digital Rights brought an action before the High Court challenging the legality of national legislative and administrative measures concerning the retention of data relating to electronic communications and asked the national court, *inter alia*, to declare the invalidity of Directive 2006/24. The High Court decided to stay proceedings and to ask the ECJ, *inter alia*, if the Directive as a whole was incompatible with art.21 TFEU, art.7 of the Charter of Fundamental Rights of the EU and art.8 ECHR, art.8 of the Charter and art.10 ECHR, as well as with art.41 of the Charter. In the second case, C-594/12, several actions were brought before the Verfassungsgerichtshof seeking the annulment of Paragraph 102a of the 2003 Law on telecommunications inserted by the federal law amending the latter for the purpose of transposing Directive 2006/24 into Austrian national law because of taking the view that that article infringed the fundamental right of individuals to the protection of their data. The Verfassungsgerichtshof therefore decided to refer to the Court asking, *inter alia*, whether the articles 3 to 9 of the Directive were compatible with articles 7,8, and 11 of the Charter.

The two cases were joined for the purpose of the oral procedure and the judgment, and the Court decided to firstly examine the validity of the Directive in the light of articles 7, 8, and 11 of the Charter. According to the Court, the obligation under art.3 of the Directive raises questions relating to the respect of articles 7, 8, and 11 of the Charter. As far as art.11 is concerned, the wide scope of art.5 may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained thereby possibly having an effect on the use of the means of communication in question and, consequently, on their exercise of the freedom of expression. However, the effect of the Directive's provisions on articles 7, guaranteeing the respect for private life and communications, and 8, guaranteeing the protection of personal data, of the Charter is more evident and was therefore

more profoundly examined by the Court. The latter found that the obligation imposed by articles 3 and 6 of the Directive constituted in itself an interference with the rights guaranteed by art.7 of the Charter (par 34). So did articles 4 and 8 laying down rules relating to the access of the competent national authorities to the data (par 35). Furthermore, since it provided for the processing of data, the Directive also interfered with art.8 of the Charter (par 36). Therefore, the Court stated "that the interference caused by [the] Directive […] with the fundamental rights laid down in Articles 7 and 8 of the Charter is […] wide-ranging, and it must be considered to be particularly serious" (par 37).

The Court then proceeded to assess whether such interference could be justified under art.52(1) of the Charter in that it respected the essence of the rights it interfered with and, according to the principle of proportionality, was necessary and genuinely met objectives of general interest recognized as such by the Union or the need to protect the rights and freedoms of others. As far as the first point is concerned, the Court concluded that the Directive's provisions respected the essence of the rights enshrined in articles 7 and 8 of the Charter, since they excluded the acquisition of knowledge of the content of the electronic communications and included the respect of certain principles of data protection and data security (paras 39-40). When considering whether the interference satisfied an objective of general interest, the Court observed that the material objective of the Directive was to contribute to the fight against serious crime and, thus, ultimately to public security (par 41) thereby giving the question an affirmative answer (par 44) and passing on to verify the proportionality of the interference. In the Court's case law, the latter condition is satisfied if acts of the EU institutions are appropriate for attaining the legitimate objectives pursued and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives (par 46). As far as the first point is concerned, the Court held that the retention of data is appropriate for attaining the objective pursued by the Directive of contributing to crime investigations (par 49). However, while it considered the Directive's objective of contributing to the fight against serious crime of the utmost importance in order to ensure public security, such an objective of general interest does not, in itself, justify a retention measure such as that established by the Directive (par 51). Furthermore, in order to respect art.8 of the Charter, the EU legislation in question must lay down clear and precise

rules governing the scope and application of the measure in question and imposing minimum safeguards (par 54).

The Court therefore proceeded to assess whether the interference caused by the Directive was limited to what is strictly necessary and found that the Directive affected, in a comprehensive manner, all persons using electronic communication services, neither distinguishing between those in a situation liable to give rise to criminal prosecutions and those not nor requiring any relationship between the data and a threat to public security (paras 57-58). Furthermore, the Directive failed to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use (par 60). Lastly, the period for the retention set by art.6 of the Directive was defined between a minimum of 6 months and a maximum of 24 months, but the Directive did not provide for any provision stating that that period must be based on objective criteria in order to ensure that it was limited to the strictly necessary (par 64). Therefore, the Court concluded that the Directive entailed a wide-ranging and particularly serious interference with articles 7 and 8 of the Charter, without such interference being precisely circumscribed by provisions to ensure it was actually limited to what is strictly necessary (par 65). In fact, the Directive did not provide for sufficient safeguard, as required by art.8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of that data (par 66), nor did it require the data to be retained within the European Union thereby being unable to fully ensure the control by an independent authority of compliance with the requirements of protection and security, explicitly required by art.8(3) of the Charter (par 68). Hence, the Court concluded its judgment by stating that “by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter” and, therefore, found no need to examine its validity in the light of art.11 of the Charter and declared Directive 2006/24/EC invalid (paras 69-70).

In conclusion, also this judgment shows the importance of the Charter, which in the case at hand lead to a Union act being declared invalid because of its incompatibility with the latter. After the analysis of the Charter’s history, characteristics and provisions, the infringement case against Poland and the Court’s judgment, it should be clear that the current human rights situation in the EU can be described as a

success if compared to the provisions of the Treaty of Rome limited only to the fundamental rights linked to the Single Market. However, there are moments in which this wide-ranged guarantee of human rights now contained in EU law, not only in the Charter but also in the Treaties[147], seems to vanish, seems not to count anymore. One of these will be analyzed in the following Section: the EU's Refugee Deal with Turkey.

3. …and Failure

3.1. The EU's Refugee Deal with Turkey

3.1.1. The Factual Background

Before looking at the EU's Refugee Deal with Turkey in detail, we first have to take a look at the background of the latter. The Union's relations with Turkey regarding migration date back until the 16 December 2013, day on which the Readmission Agreement (RA)[148] between the two parties was signed and the "EU-Turkey Visa Liberalisation Dialogue" was launched. These two documents were interlinked, since "while Turkey undertook the obligation to readmit its own nationals (Art.3 RA), third-country nationals and stateless persons (Art.4) who stayed or transited through the territory of Turkey to reach EU territories, under the Dialogue, the Commission was to screen Turkish legislation and administrative practices identified in the […] Visa Roadmap[149] with a view to removing the visa requirement applicable to Turkish nationals for short term visits to the Schengen area" (Idriz 2017a:1). However, following the civil war in Syria, "in 2015 alone, more than one million people arrived in the EU, around 885,000 of them through Greece"[150] and the situation urged the EU to act.

[147] See articles 2, 3, 6, and 21 TEU

[148] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, in OJ L 134, 7 May 2014, 3. available from <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0507(01)&from=EN> [accessed 25 January 2018]

[149] The Roadmap addresses four blocks: documents security, migration and border management, public order and security, and fundamental rights, as well as a specific set of requirements in the area of readmission of illegal migrants. available from <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/news/news/docs/20131216-roadmap_towards_the_visa-free_regime_with_turkey_en.pdf> [accessed 20 January 2018]

[150] Commission (2017) *EU-TURKEY STATEMENT: ONE YEAR ON*. available from <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf> [accessed 20 January 2018]

Hence, on 15 October 2015, the EU-Turkey joint action plan was agreed addressing the crisis situation in three ways: by addressing the root causes leading to the massive influx of Syrians, by supporting Syrians under temporary protection and their host communities in Turkey, and by strengthening cooperation to prevent irregular migration flows to the EU. The EU committed to mobilize substantial funds to support Turkey in coping with the challenge and to continue to provide immediate humanitarian assistance through humanitarian organizations in Turkey. Furthermore, in order to weaken the push factors forcing Syrian to move towards Turkey, the EU would continue providing assistance to Syrian refugees hosted in Lebanon, Jordan and Iraq, as well as those displaced within Syria. The EU committed, moreover, to support existing Member State and EU resettlement schemes and programs and to better inform people seeking refuge in Turkey about the risks linked to irregular departures as well as the available possibilities to enter in an orderly manner into the EU. It also declared its intention to further support Turkey to strengthen its capacity to combat migrant smuggling and to support the cooperation between Member States and Turkey in organizing joint return operations. Finally, the EU committed to enhance its capacity to exchange information with Turkey on combating smuggling networks by deploying a FRONTEX liaison officer to Turkey, as well as welcoming the appointment of a Turkish liaison officer to FRONTEX, and to increase the financial assistance offered to support Turkey in meeting the requirement of the Visa Liberalisation Dialogue. Turkey, on the other hand, declared its intention to continue the effective implementation of the law on foreigners and international protection, to ensure that migrants are registered and provided with appropriate documents on a compulsory basis and to continue efforts to adopt and implement acts facilitating for Syrians under temporary protection to have access to public services. Furthermore, Turkey committed to ensure that vulnerable people continue to be identified and taken care of, to further strengthen the interception capacity of its Cost Guard, and to step up cooperation and accelerate procedures in order to smoothly readmit irregular migrants who were intercepted coming from its territory. Turkey, moreover, declared its intention to ensure that the asylum procedures that have been initiated are completed and to continue and further enhance the fight against and dismantling of criminal networks involved in the smuggling of migrants. Finally, Turkey committed to intensify the exchange of information and cooperation with the EU and its Member

States, to further intensify cooperation with FRONTEX, and to deploy a liaison officer to Europol.

It was circa 1,5 month later that the two parties met again and decided to activate this Joint Action Plan, on 29 November 2015. Furthermore, on the same date, the EU and Turkey decided the EU-Turkey readmission agreement, mentioned above, to become fully applicable from June 2016. The Commission had also established a Refugee Facility for Turkey[151] committing to provide an initial 3 billion euro of additional resources. Finally, both parties agreed that Turkey's accession process, ongoing since 2005, needed to be re-energized.

However, what has come to be called "the EU's Refugee Deal with Turkey", is the EU-Turkey statement of 18 March 2016 in which the EU and Turkey declare to have decided to end the irregular migration from Turkey to the EU by agreeing on additional action points. As a first point, the parties decided to return all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016. All migrants arriving on the latter should therefore be registered and any application for asylum would be processed by the Greek authorities. Those not applying or whose application would be rejected would be returned to Turkey. Secondly, for every Syrian returned to Turkey from Greek islands, another Syrian would be resettled from Turkey to the EU. The third additional point agreed upon stated that Turkey would take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU. Fourthly, a Voluntary Humanitarian Admission Scheme would be activated, once irregular crossings between both parties would be ending or would at least have been substantially and sustainably reduced, to which Member States would contribute on a voluntary basis. Point five envisioned the acceleration of the fulfilment of the visa liberalization roadmap in order to lift the visa requirements for Turkish citizens at the latest by the end of June 2016. Sixthly, the Union would speed up the disbursement of the initially allocated 3 billion euros under the Facility for Refugees in Turkey and both parties welcomed the opening of Chapter 17 on 14 December 2015 under the re-energized accession process. Finally, both parties committed to improve humanitarian conditions inside Syria, in particular in certain areas near the Turkish border.

[151] For more information see <https://ec.europa.eu/neighbourhood-enlargement/news_corner/migration_en> [accessed 20 January 2018]

It should be clear that this policy of the Union was based on the principle of conditionality. In order to obtain visa liberalization and another try in the accession negotiations, Turkey had to agree to readmitting illegal migrants arriving in EU Member States by passing through its territory. This last statement has been criticized both for the way in which it was concluded and, first and foremost, for its consequences. The following Section will look at both types of criticism.

3.1.2. Criticism

The first reason for which the so-called "Refugee Deal" was criticized, was the way in which it came into existence raising questions with regard to competences and the appropriate procedure to do so. These questions became even more interesting when, on 28 February 2017, the General Court dismissed three cases brought by Pakistani and Afghan asylum seekers requiring the Deal's annulment[152]. The Court ruled "it had not jurisdiction to review the deal on the ground that the Statement was not an act of Union institutions, but that of Member States" (Idriz 2017b: 1). The Court arrived at this latter conclusion after examining the official documents leading up to the meeting, the 'Working Programme of the Protocol service' as well as the invitations sent to various parties, defining the statement's terms, however, as "regrettably ambigious" (Case T-192/16, par 66) (Idriz 2017a: 4). If one accepts this conclusion of the Court, the question arises whether Member States had the competence to conclude such an act. According to a scholar, in order to identify the appropriate procedure that would have had to be followed in concluding the Deal, one has to take into account the "content and aim" of the statement. The primary aim of the latter can easily be identified as the materialization of the return of "all irregular migrants" to Turkey as of 20 March 2016. It follows from this that the main content of the Deal concerns the area of freedom, security and justice, which, according to art.4(2)(j) TFEU, is a shared competence between the Member States and the Union. The applicable provision is art.79 TFEU on a common immigration policy to which the ordinary legislative procedure applies. Hence, according to art.218(6)(a)(v) TFEU, if an agreement in this area is concluded by the Union, it must be concluded by the Council after obtaining the consent of the European Parliament. Furthermore, in the

[152] Order of the General Court of 28 February 2017, NF, T-192/16, ECLI:EU:T:2017:128; Order of the General Court of 28 February 2017, NG, T-193/16, ECLI:EU:T:2017:129; and Order of the General Court of 28 February 2017, NM, T-257/16, ECLI:EU:T:2017:130.

case of mixed agreements concluded in areas of shared competence, their ratification by national parliaments is also needed. This, however did not happen and, so, if the Court is right, the question is still whether this act could appropriately be concluded by the Member States. According to art.2(2) TFEU, Member States may exercise their competence in areas of shared competence, to the extent that the Union has not exercised its competence or ceased to do so. However, the readmission of third country nationals by Turkey is clearly and precisely covered by the EU-Turkey RA mentioned earlier. Member States' competence to conclude an agreement with Turkey in that area was therefore pre-empted by the Union exercising its competence therein. This is the case also for non-binding acts that might lead to the adoption of acts with legal effects (Idriz 2017b: 2-3). However, according to the ECJEU, the term 'agreement' is "being understood in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation" (Joined Cases C-103/12 and C-165/12, par 83)[153] and "it is easy to point at the laws passed by Greece within a few weeks of [the Deal's] release to provide for the effective implementation of the deal" (Idriz 2017b: 3). Finally, if the Deal is to be understood as an act of the Union instead, according to the same scholar, "it is regrettable that the Parliament did not bring the issue before the CJEU" because of being denied its constitutional role under art.218(6)(a)(v) TFEU. However, "the possible *ex ante* role of the CJEU under Art.218(11) TFEU also became illusory" (Idriz 2017a: 8). Meanwhile, the three orders mentioned above have been appealed to the Court of Justice of the European Union and it is to be seen whether the latter is going to confirm the General Court's view (Idriz 2017b: 3).

After this legal considerations, we will now take a look at the other type of criticism on the Deal, its consequences. In March 2016, Collet wrote that "the deal has also unveiled a paradox for a European Union that has spent several decades preaching its own high asylum standards to neighboring countries. To achieve its self-imposed goal – a significant reduction in arrivals and an increase in returns to Turkey – policymakers will have to drastically cut legal corners, potentially violating EU law on issues such as detention and the right to appeal" (2016: par 3). Whether this

[153] Judgment of the Court of 26 November 2014, European Parliament and European Commission, Joined Cases C-103/12 and C-165/12, ECLI:EU:C:2014:2400

presumption verified itself after nearly two years of the Deal's entering into force will be assessed now. Before looking at the situation of migrants on the Greek islands, we will take a look at that of readmitted migrants to Turkey. Since it stipulates the readmission of irregular migrants to Turkey, the Deal regards the latter as a safe (third) country for refugees and migrants. The Union's requirements for a country to be considered 'safe' are set out in art.38 of the Asylum Procedure Directive[154] including that "life and liberty shall not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion; there shall be no risk of serious harm; the principle of *non-refoulement* shall be respected; and the possibility shall exist for the applicant to claim refugee status and to receive protection in accordance with the 1951 Geneva Convention[155]". There has been great discussion whether Turkey meets these legal requirements and "issues such as Turkey's geographical limitation on the 1951 Geneva Convention, which limits refugee status to European nationals; reports of *non-refoulement* principle violations at the Turkish-Syrian border; and the poor human rights record of Turkey were underlined" (Ulusoy and Battjes 2017: 10). According to two authors, Turkey's geographical restriction on the Convention denies the large Syrian population asylum in Turkey and allows only for temporary protection status, "which on paper gives them basic rights such as access to health care, education and, since 2016, work permits" (Vammen, Lucht 2017: 6). Furthermore, the current protection regime in Turkey differentiates between Syrian nationals, which are treated as described above, and everyone else, "who has a right to international protection based on the Law on Foreigners and International Protection passed in 2014 (though this stops short of full refugee status)" (Collett 2016: par 8). Hence, according to Amnesty International, "Turkey is not a safe country for non-European asylum-seekers as it fails to provide them with effective protection" (2017a: 13). In fact, a research conducted by Ulusoy and Battjes between December 2016 and March 2017 found out that readmitted non-Syrian nationals were transferred to Removal Centers in which they "were kept in cells and were not allowed to communicate with their families, lawyers and often denied access to UNHCR representatives" (2017: 5) Furthermore, they were not informed about their situation and rights in terms of

[154] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, in OJ L 180, 29 June 2013, 60

[155] UN Convention Relating to the Status of Refugees, available at <http://www.unhcr.org/3b66c2aa10> [accessed 25 January 2018]

asylum and “applying for asylum or any international protection within these Removal Centers is practically impossible”. Of the 1.798 non-Syrian migrants readmitted between April 2016 and June 2017 only 56 applied for international protection in Turkey, representing 3% (ibid.: 6). “As of June 2017 only 2 of them [had] been granted a protection status while 38 applications [were] pending, nine persons [had] received a negative decision and a further seven applications were withdrawn” (ibid.: 16). The situation of Syrian refugees is not significantly better. The 178 Syrian nationals readmitted between April 2016 and June 2017 were transferred to Temporary Accommodation Camps which, in practice, are detention facilities the migrants are not allowed to leave (ibid.: 6). The research demonstrates that this situation could lead to violations of the principle of *non-refoulement*. According to Amnesty International, “under international and EU law, *refoulement*, i.e. the transfer of individuals to a place where they would be at real risk of serious human rights violations, is a violation of international, EU and international law” (2017a: 18) and its research in Turkey in 2015 and 2016 “showed that asylum-seekers and refugees were at risk of *refoulement* from Turkey and have been forcibly returned to countries such as Syria, Iraq an Afghanistan” (ibid.: 13). The principle of *non-refoulement* is also contained in art.19 of the Charter of Fundamental Rights of the European Union.
To a deterioration of the situation in Turkey also contributes the fact that a 911-kilometer long wall has been constructed along its borders with Syria. According to two authors, “this fence, together with Turkey’s visa restrictions for Syrians crossing by air or sea, has created a situation in which Syrian refugees fleeing the ongoing war have to rely on human smugglers”. The policy of some EU Member States to close their borders makes it, in fact, difficult to require Turkey to maintain its borders open and respect the principle of *non-refoulement* (Vammen and Lucht 2017: 3). In December 2017, Turkey hosted the world’s largest refugee population with an estimated 3.4 million refugees and asylum-seekers, 70% of which were women and children. Compared to this number, the 2.3 million refugees hosted by the European countries taken together in 2016 seems quite manageable (ibid. 5).
Hence, from the above it should be clear that Turkey can by no means be considered a safe third country to which to return asylum-seekers and refugees. This became even more true after the numerous violations of human rights following the failed

coup attempt on 15 July 2016[156]. To consider a country, in which asylum-seekers and refugees are detained in centers which they are not allowed to leave and where they are kept from contacting their families and, more importantly, lawyers, a country in which they are not appropriately informed about their rights and unable to apply for international protection and which does not respect the principle of *non-refoulement*, a safe place to which they should return, means that the EU is violating its own laws and, more sadly, forgetting the very values it is founded on.[157]

After considering the situation in Turkey, we will now take a look at that of asylum-seekers and refugees in Greece. One year after the Deal's conclusion, the European Commission stated that "one year on, the Statement [continued] to deliver proof of its effectiveness on a daily basis, [that] the first year of the EU-Turkey Statement [had] confirmed a steady delivery of results [and that the latter had] become an important element of the EU's comprehensive approach on migration" (2017a: 1). However, what Amnesty International reported draws another picture: on the Greek islands, reception facilities were transformed into detention centers in the night between 19 and 20 March 2016 and a fast-track procedure was introduced, which in the following months permitted to reject asylum applications at first instance. Even if the strict regime was relaxed because of being in violation of Greece's international obligations, still today asylum-seekers are not allowed to leave the islands, despite the deteriorating conditions, and of the over 27.000 people who had arrived as of January 2017, only 865 had been returned to Turkey. Another 4.500 had been transferred to mainland Greece, while 5.000 people remained unaccountable for and 15.000 migrants remained in limbo (2017a: 6). As far as the conditions in the camps are concerned, it has to be said that on 19 January 15.279 refugees and migrants were staying on the Greek islands. Of those, 5.195 were living on Lesvos in camps with a total capacity of 3.500, 1.633 on Kos in camps with a total capacity of 1.000 and 1.830 in camps with a total capacity of 850 on Samos (ibid.: 22). It should not be difficult to imagine the consequences of this overcrowding. "Beneath the obvious hardships imposed by the poor reception conditions on the islands, many refugees and migrants face another less visible fear: for their own security. The poor

[156] For more information see <https://www.theguardian.com/world/datablog/2016/aug/19/turkeys-post-coup-crackdown-in-figures> and <https://www.theguardian.com/world/2017/jul/14/one-year-after-the-failed-coup-in-turkey-the-crackdown-continues> [accessed 25 January 2018]

[157] Namely, respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (art.2 TEU)

conditions in the camps, the uncertainty residents face about their futures, the uneasy relations with local populations, have all bred significant tensions that have on occasion flared into violence" (ibid.: 23). Furthermore, in addition to these tensions, it is also accidents resulting from camp conditions that pose serious threats to the life and health of residents. Women are, moreover, particularly affected by the lack of security obliged to reside in camps that often lack or only limitedly contain separate facilities for women. Finally, also attacks on refugees and migrants by the supporters of the far-right have been reported (ibid.: 23-25). A particular situation is that of individuals with particular vulnerabilities who, according to Greek legislation[158], are exempt from the fast-track procedures and the provisions of the Deal and, therefore, allowed to leave the islands (ibid.: 25). This is why "everyone claims that they suffer from a serious medical condition in order to get a health certificate that will deem them vulnerable", the manager of an Athenian hospital told two journalists (Karakoulaki, Tosidis 2017: par 9). However, on 31 January 2017, only 2.906 vulnerable individuals had been transferred to mainland Greece, the number including the relatives accompanying them (Amnesty International 2017a: 26). Another fact revealed by Amnesty International is the discrimination on the basis of nationality that takes place on the Greek islands with Syrians being able to have their asylum applications registered within days, while others are left waiting for months (ibid.: 12). Furthermore, as Turkey, also Greece does not respect the principle of *non-refoulement* which is shown by "the case of a group of ten individuals involving at least eight Syrians deported to Turkey on 20 October 2016" in which the right to challenge the lawfulness of the return, part of the principle, was not respected (ibid.: 18). Finally, as of 6 September 2017, 10.029 migrants had returned voluntary to their countries of origin from the Greek islands (Commission 2017b: 5). Obviously, the reasons for this type of decision vary considerably, however, according to Amnesty International, "it is undeniably and extraordinarily the case some families with a compelling claim to international protection have agreed to return back to the very risks they fled because of their treatment in Europe" (2017a: 20).

[158] Under Article 14 para 8 of Law 4375/2016, vulnerable groups are considered:: "a) Unaccompanied minors, b) Persons who have a disability or suffering from an incurable or serious illness, c) The elderly, d) Women in pregnancy or having recently given birth, e) Single parents with minor children, f) Victims of torture, rape or other serious forms of psychological, physical or sexual violence or exploitation, persons with a post-traumatic disorder, in particularly survivors and relatives of victims of ship-wrecks, g) Victims of trafficking in human beings".

In conclusion, not only the situation in Turkey but also that in Greece represent heavy violations of human rights as a consequence of the EU's Refugee Deal. It should therefore be clear that Collet's presumption mentioned earlier in this Section can unfortunately be seen as having been verified and EU law has definitely been and is continuing to be violated through the daily treatment of refugees and migrants in Turkey and Greece. One can therefore only agree with Gauri van Gulik, Amnesty International's Deputy Director for Europe, who, referring to the Commission's view mentioned above, declared it "disingenuous in the extreme that European leaders are touting the EU-Turkey deal as a success, while closing their eyes to the unbearable high cost to those suffering the consequences" (Amnesty International 2017b: par 4).

Before concluding this Chapter, we will take a quick glance at the statistics of the case. As far as the relocation of refugees from Greece to other EU Member States is concerned, as of 14 January 2018, only 21.710 persons had been relocated. France and Germany received nearly half of these persons, accepting 4.394 and 5.371 refugees respectively (Greek Asylum Service 2018a). On the other hand, the total number of Syrians resettled from Turkey to the EU under the 1:1 framework was 8.834, as of 4 September 2017, while 13 Member States had not yet resettled from Turkey (Commission 2017b: 9). The total number of migrants returned from Greece to Turkey, as of 6 September 2017 was 1.896 (ibid.: 5). These numbers are very marginal if one thinks that from 2014 to 2017, 1.100.292 refugees had arrived in Greece[159]. Even if the number of refugees arriving in Greece fell significantly from 856.723 in 2015 to 173.450 in 2016 and 29.718 in 2017[160], this is also due to changes in the refugees' countries of origin and "obviously, these numbers do not represent an end to migration from Turkey, but rather a return to the numbers recorded between 2012 and 2013" (Vammen, Lucht 2017: 4). Furthermore, the Deal also caused a change in the routes refugees and migrants use in order to reach the European Union from the Turkish territory. According to two journalists, "for 5.000-6.000 Euros smugglers now offer to sail from Turkey to Italy […]. After the closure of the western Balkan route, Europol detected more than 160 trips on this route. From June to September 2017, 23 boats with a total of 1.363 migrants arrived in Italy from

[159] UNHCR web portal on the Mediterranean situation. available from <http://data.unhcr.org/mediterranean/country.php?id=83> [accessed 26 January 2018]
[160] Ibid.

Turkey" (Vammen, Lucht 2017:5). In fact, in 2017, 119.369 refugees and migrants arrived in Italy, while 2.856 died or were reported missing[161]. "Furthermore, the long and dangerous Black Sea route from Turkey to Romania has also experienced increased movements […]. Between mid-August to early September 2017, 834 people were caught by the Turkish coast guard on this route" (Vammen, Lucht 2017: 5). Finally, already in the first weeks of 2018, 1.118 migrants had arrived in Greece, while 2.731 had reached the Italian coasts as of 26 January 2018[162].

4. Conclusion

In conclusion, while the first Sections of this last chapter of the thesis showed how far the Union's human rights policies have come since the Treaty of Rome, the case of its Refugee Deal with Turkey shows that the respect for its own principles and values is lacking. Hence, while, *de jure,* there seems to be a significant improvement, the *de facto* situation leads to a different conclusion. Today, for a Union of soon 27 highly developed States, it is not enough to declare itself "founded on the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights […]" (art.2 TEU), but it is its moral duty to ensure the respect of those values by the countries with which it collaborates in such an important manner as with Turkey and, first and foremost, on the territory of its own Member States and in its own acts. Therefore, while the Union's current human rights provisions contained in the Treaties, different acts and, especially, the Charter of Fundamental Rights of the European Union necessarily have to be considered as a success if compared to the situation under the Treaty of Rome, the way those provisions are enacted and respected, or better, not respected, must be seen as a failure.

[161] Ibid.
[162] Ibid.

Conclusion – Success or Failure?

We have started this thesis in Rome, in occasion of the festivities for the 60th anniversary of the Treaties establishing the EEC and Euratom and asked ourselves if what was being celebrated should more appropriately be described as a failure or as a success. In order to answer this question, five different EU policies and measures have been analyzed and it is now time to try to find an answer to the question that started our research. First and foremost, what this thesis has shown is that one should not forget how far this project of European integration has come, what the situation at the beginning was like and how much has changed since then. The first chapter might have helped a bit to remember how much has been achieved in only 60 years, which in history are a short period. Furthermore, "the sacrifice of previous generations should never be forgotten. Human dignity, freedom and democracy were hard-earned […]" (Commission 2017c: 6). So many of the rights now included within those guaranteed by Union law did simply not exist in 1957. Moreover, the thesis has also illustrated that one should be aware of the fact that often national problems, such as unemployment, are attributed to the responsibility of the European Union, first and foremost by populists, while the latter does not even have competences in the matter and those problems are purely national in nature and origin. This was clearly shown by the circumstances that led to the referendum, and to its result, in Great Britain.

Hence, what has emerged from the analysis is that the overall project of a European Union has been a success and that the necessary provisions, also in those cases represented as failures, do exist. What is lacking is their implementation and respect by both the Member States and, in some cases, also the institutions of the Union. This was most circumstantially shown with the cases of the gender pay gap and human rights, which demonstrated that the Union legislation provides for the necessary provisions, even if not always in an exhaustive manner as in the former case, but these provisions are not fully implemented and respected. In fact, also a scholar calls the gender equality policy of the EU a "model of success of the European social policy" and describes it as the "strongest gender equality program worldwide" which, however, remains a "construction site" (Klein 2013: 243). Therefore, this thesis has shown that the Union has to find a way in which to guarantee a better implementation and respect of its norms, also through introducing

heavier sanctions as in the case of the gender pay gap and developing them further. Another necessary action to take, that emerged from the analysis, is that of moving the Union closer to its citizens. The fact that in 2016 only 66% of the Member States' citizens declared to feel also European citizens can clearly not be satisfying and discloses a lack of communication between the Union and its citizens. "Who does what is not well explained enough and the EU's positive role in daily life is not visible if the story is not told locally. Communities are not always aware that their farm nearby, their transport network or universities are partly funded by the EU" (Commission 2017c: 12). Furthermore, in the Standard Eurobarometer 85 of spring 2016, 42% of the interviewed declared they did know what their rights as European citizens were (27). This was also shown in the cases of the gender pay gap and Brexit. If more citizens were aware of their right to equal pay, there would be more cases before the national courts and if the British citizens had been better informed about the real costs and competences of the European Union, they might have voted "remain" instead of "leave". Hence, it is clear that there still remains a lot to do, but, as already Schuman wrote "Europe [, and first and foremost, its citizens,] will not be made all at once […]".

Surely, this thesis could have considered also other Union policies and initiatives such as the Euro, its economic policy, its financial policy, the agricultural policy, Erasmus, the coping with the financial crisis or its common foreign and security policy, in order to gain a broader picture of the situation. However, due to the limited length of the thesis, this was not possible, and the analyzed policies haven been chosen because of precise reasons: topicality and recent developments for the common commercial policy, the EU's identification with and being described as one of the latter's greatest achievements for the free movement of workers, being the EU's oldest failure for the abolition of the gender pay gap, topicality and popularity for Brexit, its twofold character for human rights and, taken together, the fact that they represent a cross section of the EU's different competences. Anyway, taking into consideration other policies as well, could be of inspiration for further research. What has not been analyzed in this thesis were the reasons for the non-implication and/or disrespect of the existing Union provisions, another point that could be treated in further analyses.

In any case, what emerged is that the Union has to act, in order to join the European peoples further in that "ever closer union" invoked at Rome 60 years ago, and because

"*the European Union has changed our lives for the better. We must ensure it keeps doing so for all of those that will follow us*".[163]

[163] Juncker, J. C. in Commission 2017c, 3

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