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Is the European Union Fit to Carry out Community Interests? An Assessment of the EU Legal Framework of Interests Promotion

Introduction

National or Community interest are definitely polysemic notions. Therefore, they are difficult to define in a way that can receive broad acceptance. Yet, it is obvious that they refer to something which is "national" or "Community", i.e., to two distinctive but interwoven levels of representations and realizations of collective interests. The terms "national interest" and "Community interest" are about "interests" which obviously denote relations – literally, the space in between (or among) two or more points of reference (from Latin *inter esse*, i.e., "to be between/amongst").

As a theoretical and pragmatic notion, national interest has attracted a lot of scholarly attention, mostly in political science circles. In this theoretical setting, national interest is uniformly considered to be a social (relational) and political construct. Yet there is some disagreement about its content and character. For example, Hans J. Morgenthau construed national interest as an operationalized form of political action itself being a product of power. In his view, power (at least in international relations) is relational and is about the control or impact one state can have with regard to another. In the theory proposed by Alexander Wendt, national interest is a product of states' identity and is highly dependent on the social context in which its decision-making takes place. As a product of identity, national interest is constituted by culture and social ideas. It reflects convictions and "structures of knowledge" about the world that those who formulate national interest have (Wendt 1999: 199, 225–234). The basic national interest serves the essential needs states have in international relations: the need of continuity, autonomy, economic well-being, and collective self-esteem (Wendt 1999: 199).

As a theoretical and practical (pragmatic) notion, Community interest has naturally been acknowledged in the academic literature, especially that pertaining to international relations. This acknowledgement has extended onto the European Community (later becoming the EU), as both have claimed to aspire to contribute to the realization of both Community interest and national interest. Quite importantly for this discussion, Bruno Simma normatively defined Community interest

(conceived to be a generic notion, i.e., a notion with no specific reference to the EU) as "consensus according to which respect for certain fundamental values is not be left to the free disposition of states individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all states" (Simma 1994: 233). Community Interest analysed from many theoretical and practical angles was also subject to extensive investigations by Eyal Benvenisti and Georg Nolte (Benvenisti and Nolte 2018: 3–18). All of them respected Simma's stance.

At the Community level, the interests-realization motives transpire throughout the entire integration process. In both theoretical and practical contexts, this process has been represented to be an effort to reverse the odds of long-term political, social, and economic processes (not at all favourable for European states) in order to make it possible for them to retain their global positions (e.g., Eichengreen and Boltho 2010: 267–295; Leboutte 2008: 107–197). Importantly, it has been argued that the pre-requisite for the process of European integration was the development of some European identity (Pagden 2002: 20–32) or a set of multiple identities with "the European component" (Passerini 2002: 191–208). Another formulation of this requirement was that Community interest invoked the formation of imagined Community able to produce a hyphenated link with itself (Anderson 2006: 24–25) and that the European Union was able to produce such a link (Bellier 2000: 55). The most extensive line of argumentation focused on the legitimacy of the EU, thus shedding significant light on the question whether the EU is able "to deliver what it has promised", i.a., at least some collective interests of its member states or their national interest which can be reconciled with the EU collective interests. In this view, the reconciliation was badly needed under globalization which has allegedly obliterated the traditional notion of national sovereignty or gave it a new meaning (Sheehan 2006: 1–15). This has accounted for the fact that national sovereignty could be more effectively realized in the integrated context for which the EU provided the institutional framework.

Some research can serve to explain the EU as a platform which is meant to realize political "Messianism" (Weiler 2012: 144–149), itself being an idea promoted by liberal pacifism. According to this idea, European integration was to produce a set of common goods all arising from harmonious, peaceful cooperation among the European states. Thus, it is one of the most important mechanisms for achieving Kantian type long-lasting peace in Europe where, under similar types of democratic government, trade relationships (and economic competition) effectively substitute for military conflict (McCormick 2010: 17–36).

This article investigates whether the EU is apt to promote certain common interests. For the sake of this investigation the EU is construed in legal terms, as a *sui generis* international organization invested with its powers by its member states and acting within the framework of the relevant legal instruments, most importantly the Treaty on the European Union (TEU) and the Treaty on the functioning of the European Union (TFUE). In the said framework, the EU is competent to adopt its own sources of law (enjoying multi-faceted priority and supremacy over the laws of its member states, (e.g., Reich 2003: 35–50); it is also fully capable to appear as a participant of international relations – albeit on the basis of con-

ferred powers invested to it by its member states (e.g., Chalmers and Tomkins 2007: 209–219). This "conferral principle" implies that the EU, conceived as a model of national interest or any collective interests promotion mechanism, does not mimic any state. States are universal when it comes to their powers as they enjoy, at least from the point of view of international law, full and complete competence to pursue their national interest; in contrast, the EU has a limited scope of manoeuvre in pursuing and national interest, as it is bound by the conferred powers principle.

Notwithstanding, this seemingly straightforward observation is subject to many significant caveats. One is that the "universality" of states' powers is highly dependent on their geopolitical strategic stance, this being a result of their relative economic, military, and diplomatic power. Another is that the EU, within its own limits, can be quite a successful pursuer of national interest, as it may potentially represent a joint position of all its member states and enjoy their concerted support.

Basic questions about the EU's title and fitness to achieve common objectives

Posing the question of whether an international organization, such as the EU, is fit to ensure that some collective or individual interests can be realized – this itself represents a very peculiar situation. As has already been said, the EU is not as universal a structure as a state. It is an international organization acting on the basis of conferred powers, i.e., the powers invested to it by its member states. The very fundamental provision of Article 1 of the Treaty on European Union (TEU), holds, *inter alia*, that the EU is: "the Union" on which the member states confer competences to attain objectives they have in common."

Thus, it is quite legitimate to construe the European Union as a platform for the achievement of common objectives and, presumably, also goals (i.e., open-ended, general achievements, which – in legal terms – very often can be associated with values pursued by this international organization). It is quite important to note that the already quoted Article 1 is "reductionist" when it comes to the identification of the EU as an objective/achieving entity: it refers not as much to "common objectives" as to national objectives which the EU member states find suitable for attainment within the EU because of the fact that there is no divergence of those interests among them.

Yet, the conclusion about the very reductionist sense of Article 1, although essentially well-grounded, should be significantly modified to account for those numerous objectives which the member states have decided to include in the Treaties: TEU and the Treaty on the functioning of the European Union (TFUE). The effect of such an inclusion is making the objectives and – as a matter of fact – goals not only declared as "common" for the member states, but also reciprocally guaranteed by these States in a rather stable (i.e., not subject to frequent modifications or to unilateral interpretation) form. Thus, "the objectives" that the member states "have in common" under Article 1 are set forth in an outspoken form

throughout the TEU and TFEU, thus forming a declaration of the EU common objectives and goals. This arrangement implies that the TEU and TFEU's goals and objectives are subjected to the discourse of a very limited scope. In the context of this discourse the member states (acting collectively) and the European Union Court of Justice are arbitrators. The former are, in fact, "owners of the Treaties" able to amend them – upon their unambiguous consent – at any moment. The EUCJ operating under Article 267 TFUE essentially as the "constitutional court of the Union" (Sweet 2011: 121–153) is able to produce unbiased and authoritative interpretations of EU law; its activities in this realm are found to bring about judicially sanctioned spill-over effects (Lindseth 2010: 137–166). Thus the EUCJ has an important bearing on the recognition of Community interest and on the mode of their realizations.

Since Community interests and national interests are essentially categories of power, it is argued that the most important decisions in the EU or with regard to the EU (such as, especially, decisions pertaining to EU enlargements) are results of the relative power of influential groups of stakeholders who, in the process, bargain for acceptable to them trade-offs between the cost of their participation in the EU and the benefits arising from this participation (Moravcsik and Vachudova 2002/2003: 21–31).

Understanding the EU as a discourse platform appears to be very productive as it describes not only its decision-making process, but also the interpretation of its outcomes as a product of communicative actions which member states undertake with respect to each other and their (and therefore the EU's) external environment. In other words, in such a setting, the EU can be construed as a representation (in the philosophical sense) of respective national interests *vis-à-vis* other EU member states and third entities of international public law (most importantly, *vis-à-vis,* non-EU states and international organizations). In such a setting, regardless of its apparently strong potential for the realization of ambitious political agenda, the outcomes of the discourse are believed to represent the lowest common denominator, i.e., the outcome which usually (which means "not always") represents the lowest level of common taste for collective action prevalent among the member states.

"Common" about what? Substantive and procedural aspects of interest-mediation in the EU

It has already been identified that, in the EU, Community interest denoted interests which are, in fact, the outcome of a bottom-up negotiation process. This process is a discourse involving the most influential groups of national stakeholders in which national interests are eventually decided to be represented at the Union level. Yet this discourse is strongly differentiated with regard to the level to which its distinctive elements relate to different points on the political agenda. Some of these points are quite open to discussion, whereas some are significantly rigid. The latter ones are those points which have the form of Treaty provisions or secondary

law format. Among them, the most rigid are those which provide the axiological foundation of the European Union. An important example of such a provision is Article 2 of the TEU which provides that:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rules of law and the respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Interestingly, with respect to "rigid" EU rules, especially those setting forth the common axiological foundation of the Union, the member states do not negotiate the very wording of respective provisions, but rather their interpretation. This means that the logical content of these legal provisions are subject to some mediation among the member states and the given EU institution (most importantly the European Commission). Thus, for example with respect to the rule of law enshrined as an important value in Article 2 TEU, some member states have recently attempted to undermine the content value of the rule of law it enshrines rather than the provision pertaining to the rule of law itself. In other words, such member states have declared their general respect for the relevant provision of the Treaty, though they have (unsuccessfully) attempted to promote their own stance about what the provision at stake means and how it should be enforced. The ultimate arbitration mechanism of the emerging dispute over the very meaning of the "(un)common values" and hence, the "(un)common interests" to protect them can, therefore, involve either the amendment of the relevant provision of the Treaty (which requires calling up the Intergovernmental Conference and winning the consent of all the member states to it) or the judgment of the EU Court of Justice, in this case operating as the last-recourse, final arbitrator able to end the discourse involving major EU stakeholders with the final settlement of divergent opinions.

The features of this discourse-handling mechanism are indicative that, in the EU, both procedural and substantive legal rules determine the content of Community interest. Their determining power is commensurate to their position in the hierarchy of legal sources because this position is correlated with rigidity (i.e., the higher status the legal provision has, the more difficult it is to amend it). This implies that member states are likely to be rather reluctant to expand the EU's realm of power, because only beyond it can they still enjoy considerable freedom to arbitrate rules and values concerning their national interest – and (non-Union-ized) Community interest – and to mediate Community interest with actors who do not promote anything else but national interest (which obviously is not the case where the EU institutions are involved). With regard to the member states, any Community interest enshrined in an EU Treaty mechanism serves as a constraining factor delineating the area in which no arbitrary intervention of a member state not subject to EU procedural rules of provision arbitration can take place. Thus states' arbitrariness has been ousted from this realm.

The EU Treaty's rules distribute Community interest-defining authority among various EU institutions. These institutions include above all the European Commission (which is meant to identify and promote the common interests of the Union considered as an autonomous, in this regard, authority), the European Central Bank, the EU Court of Justice, and EU regulatory agencies. It is quite important, however, to note that the distribution of the EU Community interest-defining authority is a much more complicated mechanism, as even its inter-governmental stakeholders, such as the European Council or the EU Council or decision-making gremials partaking in EU legislation-preparation procedures (originally conceived to promote national interest in the EU) are subject to a significant process of "Europeanization" (or, more accurately, "EU-Europeanization" (Olson 2002: 924). Europeanization/EU-Europeanization is an asymmetric process of "structural change, variously affecting actors and institutions, ideas and interests" (Featherstone 2003: 3) which – by targeted adaptation of national institutional arrangements and even behavioural adaptation of national public officers to the EU general framework – make the member states' participation in EU decision-making process effective and efficient. The processes of adaptation make the differences between Community interest and national interest less pronounced as the whole process involves frequent recourse to the rigid elements of the EU legal framework (and to what it substantially and procedurally represents); national arguments, in order to be effective, should expose "common ground", i.e., they should be formulated in a way which is to be effective cross-culturally and which can find support of other member states. As Irène Bellier (Bellier 2000: 62) put it:

> Despite their commitment to defending the national interests, member states' representatives often suggested (…) that a European position cannot be achieved by people held to a strict national line, to a selfish interest, or simply following orders.

Thus, these very arguments expose those elements of Community interest, which at the conclusion of negotiation process, in fact represent the EU's Community interest. In other words, from this perspective, the EU decision-making process should be understood not as a negotiation aimed directly at the realization of national interests, but rather as the indirect realization of national interests by taking into consideration important elements of Community interest and by gradual convergence of national interest and emerging Community interest in the process which should be referred to as "mediation" rather than just "negotiation". This only supports the opinion formulated by Thomas M. Wilson that the EU is not a collection of institutions, not a platform for articulation of member states' policies, but – instead – an arena of cultural relations (Wilson 1993: 48); it is an organization with its own culture and its own *topoi* which should be mustered by the member states if they want to achieve their goals and objectives in the EU.

From the point of view of researchers of the EU law, there is a great deal of Community interest in what has been referred to here as the "most rigid form" of expression of these interests, i.e., the expression *via* not so easily amendable

Treat provisions. Yet from this point of view, the most important feature of the EU mechanism exposing and realizing Community interest is the very system of EU law which should dovetail with the national legal systems. The system of law, as such, can be defined as all legal norms originating from one institutional source and applicable to subjects on a specific territory. The importance of law as a constructive element of the European Union transpires in the often repeated statement that the EU is "the Community of law" (e.g., Hallstein 1979: 341; Wincott 2000: 3–4). This term is meant to expose a somewhat unique feature of the EU, which is its ability to develop, on the basis of the Treaties, and within the limits of conferred powers, its own secondary law, autonomous of the legal systems of its member states, and enjoying priority and supremacy over them. Indeed, the emerging legal system of norms has its own mechanisms of enforcement which is to be invoked by the EU institutions (most importantly, by the European Commission, acting as "a guardian of Treaties") and the EU Court of Justice, as well as by national courts of EU member states and respective national administrations.

The EU law so construed represents a complex social institution being simultaneously a subject of Community interest, as well as the conveyor of Community interest. As a subject of Community interest, the EU law provides for a uniform common reference framework on which both the EU member states (and their authorities), the EU institutions and bodies, as well as entities enjoying EU rights, can rely in various discourses they become involved in. The EU law in this format provides a basis for uniform execution of rights and for mutual trust between relevant authorities in the EU member states. It ensures member states' reciprocity to each other with respect to rights conferred to them and their citizens. As such it is in the Community interest of all these stakeholders that the EU law operates in the intended (and multilaterally agreed) manner.

As a conveyor of Community interest, the EU law sets forth substantive rules which form relevant social institutions or other arrangements for which the EU has been created and through which the EU is legitimized. Thus, the EU law grants worthwhile content to the EU conceived as a vehicle for the realization of respective stakeholders' rights. In such a format, the EU law also provides for a basis and content of Community interest realized in the EU external environment, i.e., *vis-à-vis* third countries and other international organizations. In the latter function, the EU law makes it possible for the Union to be – whenever this is possible and convenient for the member states – a platform used to expose or, on the contrary, hide their national interest with respect to their global partners.

There is an obvious operational link between the two functional constructs of the EU law conceived as a subject of Community interest or a conveyor of Community interest. Without conferring rights which could be effectively enforced, the EU law would not have had any significant value for considering it Community interest; without a common axiological content and a common framework of procedural reference, the EU law would not represent any value as a mechanism for the enforcement of rights, as its mechanisms would simply be empty.

The value of EU law as a Community interest is especially high because of its (already discussed) rigidity. Rigidity determines the relative stability of

this law construed as a framework of reference. Moreover, it contains important substantive (also axiological) and procedural anchors which pre-determine any future EU arrangements. This is not to say that significant and broad changes to the EU law are impossible; rather, it is to argue that the existing legal arrangements have strong, intended spill-over effects and that they are subject to path dependence. Being subject to path dependence means that the EU law could be changed by its stakeholders whenever departure from the existing trajectory guarantees a sufficiently beneficial trade-off between the cost of departure and the benefits of its expected product. This implies that the EU is unlikely to change its axiological foundations, these being the source of its legitimacy. Path dependence logic indicates that such a departure from the existing arrangement would involve a major redesign and rearrangement of the entire legal system. As such, a significant remodelling of the EU involves significant legitimacy and legal systemic consistency costs (as to this argument, see e.g., Pierson 2000: 251–253; Levi 1997: 28). Thus, this redesign and rearrangement is very likely unacceptable for either the EU member states and the EU institutions. In other words, the social system relevant for the EU law would stand to protect the *status quo*, under the flagship of the protection of Community interest the EU law epitomizes or produces.

In the context of the EU law, path dependence transpires as a factor explaining the development of all the major EU arrangements such as the EU internal market, the Economic and Monetary Union, or non-economic regulation of fundamental rights (with its most important element of the Charter of Fundamental Rights) and the regulation pertaining to the Common Foreign and Security Policy, the latter designed to realize Community interest in the external relations of both the EU and its member states.

It is obvious that the EU law determines the scope to which EU-originated arrangements contributing to the realization of Community interest can be enforced. However, in order to evaluate whether Community interest and national interest at large are effectively realized in the European Union, it is essential to go beyond the EU legal system and extend the examination to the entire legal system of member states, i.e., the system which comprises two elements: the Union component and the national components. The system in its entirety can be referred to as "EU law order" (e.g., Culver and Giudice 2010: 54–76), as it is based on a formula where two regulatory levels are expected to be somewhat synchronized. The EU law order works properly and in a complete fashion whenever the EU and the respective national component cover all regulatory areas essential for the realization of both national interest and Community interest. Moreover, the mechanisms provided to realize national interest and Community interest should warrant that subsidiarity and proportionality principles be observed, i.e., that the EU intervention is properly interwoven or dovetails (if that is needed) with the national intervention. Since the national components of the broadly conceived legal systems differ, it is likely that the subsidiarity and proportionality assessment of each of the systems (operating in different EU member states) would be different, as well. Consequently, the scope for the realization of national interests in respective

member states (and, thus, the extent to which Community interests are realized) would likely be significantly differentiated, too. In other words, the EU member states are bound to achieve uneven pay-offs (also measured in terms of the scope to which they are able to realize their national interest) from their membership in the EU depending also on the quality of their own legal system and on the level of their own aspirations (internal and external), as well as on their means to effectively represent their national interest in the EU decision-making system. This ability is to a great extent a substitute of traditionally conceived power. This ability can, therefore, be considered a proxy for the extend of national interest realization within the EU.

Conclusions

The European Union is fit to promote and realize Community interest and national interest. Yet its ability to achieve this goal, one so important for the member states, is limited by the conferral of powers principle, which requires the EU to undertake only those tasks which fall within the framework of powers invested with the EU by the member states.

In the EU context, Community interest and national interest do not lose their generic character of relational, power-produced result of mediation of values which could become goals and/or objectives of respective public interventions initiated and/or implemented at the EU or national level. Yet in the EU decision-making context, Community interest and national interest tend to converge, producing a map of interwoven and dovetailing elements which often reinforce, or determine, or depend on each other. This process of convergence is strongly differentiated because EU Community interests are given legal framework consisting of provisions set at different hierarchical levels. The transactional costs of amendment of Community interest stipulated at higher systemic level are higher than costs associated with lower-hierarchical level provisions. Thus, member states usually do not attempt to undermine the higher hierarchy provisions that are fundamental for setting forth the EU's axiological basis (thus forming a catalogue of normative, Simmasque Community interest the member states are bound to realize to achieve a system of reciprocal guarantees of rights). Instead, sometimes they attempt to mediate upon the interpretation of such provisions. In such a setting, both national interest and community interest are realized in the EU legal order, i.e., the order in which a proper match between the EU and national legal orders is essential to produce legitimized interests. Since the national legal orders of the EU's member states differ not only with regard to their substantive content, but also to their procedural features, the emerging EU legal order is far from being uniform; instead, it is rather asymmetric. This feature of the system is mitigated by the very member states, which attempt to negotiate out symmetric legal and political solutions in the EU decision-making process, as well as by the EU institutions which strive to achieve balanced solutions to make the emerging Community interest widely acceptable (and therefore sustainable) within the EU

polity. The final, last-resort corrective mechanism rests with the member states who are the "owners of the Treaties" and can amend dysfunctional (from their perspective) legal provisions, and also with the EU Court of Justice, which performs the role of the EU constitutional court able to produce important systemic spill-over effects.

It is important to note that, in the EU, the law is not only an instrument meant to make it possible to realize Community interest, but also the Community interest itself. As a Community interest, the now relatively well-developed EU law represents a set of rules of significant axiological value (either substantive or procedural) which produces worthwhile effects in guaranteeing the reciprocity of legal order performance in the EU, important not only for Community interest, but also for national interest – and not only at the collective level, but also for individuals.

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