

# Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations – An Introduction

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The European Union's legal order is traditionally perceived as largely autonomous, not only *internally* (vis-à-vis the Union's own member States), but also *externally* (in relation to third states and other international organisations).<sup>1</sup> The source of this perception is to be found in early case law, which focused on the 'autonomy' of a 'new legal order'.<sup>2</sup> Stressing its autonomy was believed to be necessary to establish an independent identity and could perhaps be seen as a disguised claim to sovereignty (something international organisations – unlike states – have to fight for). These days, 'autonomy' has been given a strong constitutional meaning. It is believed to be part of "the very foundations" of the Union legal order, and unity and uniform application of rules are part and parcel of that order.<sup>3</sup> It is well-accepted to argue that "the well-functioning of the European Union ultimately depends on the protection of the principle of supremacy from law outside the EU legal order."<sup>4</sup> After all, supremacy of EU law is necessary for the functioning of the European constitutional order and Member States, nor the EU itself, should be forced into a position in which international obligations negatively affect the *effet utile* of European law.

In short, preservation of the autonomy of the EU has been said to require two things: "First, that the essential character of the powers of the [EU] and its institutions remains unaltered by an international agreement. Secondly, that procedures for ensuring uniform interpretation of treaties, specifically procedures that involve an external judicial body, do not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law."<sup>5</sup> The principle of autonomy has thus been established as one of the fundamental principles of EU law. Even in more recent case law, the Court did not shy away from phrases like: "an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC [now to be found in Article 19 TEU]".<sup>6</sup> Or, "the validity of any Community measure [...] must be considered to be the expression [...] of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system".<sup>7</sup>

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<sup>1</sup> Cf. De Witte 1999.

<sup>2</sup> In particular, of course, in ECJ, Case C-26/62 *NV Algemene Transport en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, and ECJ, Case 6/64 *Costa v. ENEL* [1964] ECR 585. Later references may be found in ECJ, Opinion 1/91 (*EEA Agreement*) [1991] ECR I-6079; Opinion 1/00 (*ECAA Agreement*) [2002] ECR I-3493; Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635 (*Mox Plant*); Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351. Cf. also R. Barents, *The Autonomy of Community Law*.

<sup>3</sup> Van Rossem, Chapter 2 in this volume.

<sup>4</sup> Eckes 2012, 230.

<sup>5</sup> Van Rossem 2011. The requirements can also be found in Opinion 1/91, paras 12-13.

<sup>6</sup> Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635 (*Mox Plant*), para. 123.

<sup>7</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351, para. 282. Cf. also Lavranos 2010, who sees the new line of jurisprudence as an indication of a protect of the autonomy of European law from international law interferences by excluding as much as possible any conflicts between European and international law.

Yet – and perhaps even paradoxical – the EU displays a certain ‘openness’ and does not seem to have a problem with allowing binding international norms to become part of its legal order, either through accepting international obligations or by referring to international agreements in its own Treaties (i.e. the UN Charter, the ECHR or the Geneva Conventions). With the gradual development of its external relations and the increase of external competences (on the basis of both primary law and case law<sup>8</sup>), the EU even revealed its ‘dependence’ as it had no choice but to accept that in order to be able to play along at the global level, it had to follow the rules of the game (i.e. in accepting global (product or process) standards or UN Security Council resolutions). This has consequences for the effects of international obligations of the Union within its own legal order and, indeed, these days Article 216 (2) TFEU provides that international agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.<sup>9</sup> Indeed, after an initial period in which the Courts’ emphasis was laid on a strengthening of the autonomous nature of the Community legal order, beginning in the early 1970’s, international treaties were considered to form “an integral part of Community law”,<sup>10</sup> and it was argued that international law ranked between primary and secondary law,<sup>11</sup> implying that conflicts between EU decisions and international law should be solved in the advantage of the latter. This status of international law is not restricted to international agreements (including mixed agreements<sup>12</sup>), but also holds true for customary law,<sup>13</sup> and secondary international law deriving from international agreements such as Association Council decisions.<sup>14</sup> And, finally, the interplay between international and European law also may be important to understand the reverse effect: the influence of EU law on the international legal order,<sup>15</sup> and the position the EU occupies in international organizations.<sup>16</sup>

The ‘openness’ of the EU legal order towards international norms implies the acceptance of an influence of these norms on the EU legal order. This, in turn, obviously puts the autonomy of the EU legal order into perspective. Indeed, over the years the EU has even accepted its ‘dependence’ on international normative processes.<sup>17</sup> And, increasingly, these normative processes take place within international organisations and other norm-generating bodies.<sup>18</sup> The position of the EU as an important player in the global governance network was strengthened by the Lisbon Treaty. Article 21(1) TEU *inter alia* provides that the EU “shall seek to develop relations and build partnerships with [...] international, regional or global organisations” and that it “shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.”<sup>19</sup>

The strong and explicit link between the EU and a large number of other international organizations raises questions concerning the impact of decisions taken by other international organizations and of international agreements concluded with those organizations (either by the EU itself or by its Member States) on the autonomy of the EU and its Member States. To a certain extent this impact is shaped by the decisions of international (quasi-) judicial bodies, the two most influential ones being the dispute settlement mechanism of the World Trade Organization and that of the

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<sup>8</sup> See ECJ, Case 22/70 *Commission v. Council* [1971] ECR 263 (*AETR*); Joined Cases 21-24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219; Opinion 1/75 (*Understanding on a Local Cost Standard*) [1975] ECR 1355.

<sup>9</sup> See further also Eckes 2011; as well as Jacobs 2008.

<sup>10</sup> ECJ, Case 181/73 *Haegeman v. Belgium* [1974] ECR 449.

<sup>11</sup> See for instance: ECJ, Case C-179/97 *Spain v. Commission* [1999] ECR I-1251; ECJ, Case C-162/96 *Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I-3655, para. 45.

<sup>12</sup> See on this issue Van Rossem 2011.

<sup>13</sup> ECJ, Case C-162/96 *Racke*, *supra*, para.45; CFI, Case T-115/94 *Opel Austria GmbH v. Council* [1997] ECR II-39; as well as ECJ, Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications and Others* [1996] ECR I-3953. See Kuijper 2008; as well as Wouters and Van Eeckhoutte 2004.

<sup>14</sup> See for instance: ECJ, Case C-192/89 *Sevince v. Staatssecretaris van Justitie* [1990] ECR I-3461.

<sup>15</sup> See Hoffmeister 2008; Wouters, Nollkaemper and De Wet 2008.

<sup>16</sup> Jørgensen and Wessel 2011; Van Vooren, Blockmans and Wouters (2013).

<sup>17</sup> See Føllesdal, Wessel and Wouters 2008.

<sup>18</sup> Cf. Jørgensen 2008, 188, who argues that over the last twenty years, the relationship between the European Union and international institutions has become “more sustained and consistent”. See also Van Vooren, Blockmans and Wouters 2013; and Blockmans and Wessel 2012.

<sup>19</sup> Wouters and Odermatt, Chapter 3 in this volume.

European Court of Human Rights. It is up to the Court of Justice of the EU to square these decisions with its longstanding and on-going concern for the autonomy of the EU legal order and its own jurisdiction.<sup>20</sup> The question is to which extent the Court of Justice has accepted to be bound by the decisions of any external (quasi-) judicial body, although the influence of the ECtHR's case law is settled by the EU Treaty itself (Article 6(3) TEU). In a similar vein, the WTO continues to have a considerable influence on the EU legal order. Both primary and secondary EU law is highly inspired by the GATT 1947, the WTO 1994 and many pieces of EU secondary legislation are either transposing WTO norms or were modified to bring them in line with world trade standards after adverse WTO judicial decisions.<sup>21</sup>

In this book we address the reasons for the EU's openness in some areas and the relation with the fact that the EU itself is one of the most influential actors when the international norms are created. Obviously, we do not strive for completeness. Over the last decade scholars drew attention to both the proliferation of international bodies and to their normative (and at times 'legislative') activities.<sup>22</sup> The complex 'normative web' that is the result of the fact the globalisation increasingly demands cooperation between rule-makers obviously affects the EU as well. While in our limited study the examples may appear to have been chosen randomly, we have nevertheless attempted to select a representative variety of very different international organisations, with different relations to the EU. As such, this volume covers the influence of organisations referred to by the EU Treaties (such as the United Nations and the Council of Europe), organisations and bodies of which the EU itself is a member (WTO, FAO, G20), UN Specialised Agencies (WIPO, FAO, WHO), economic organisations (WTO, OECD), financial organisations and bodies (IMF, G20, FSB) as well as organisations of which the activities are related to the (former) 'non-Community' areas of the Union (NATO, UN, Council of Europe). The volume does not pretend to be exhaustive. There are many other organisations and areas that could have been included in this volume (such as environment, technical standards, or transport). Yet, we feel that the selection of case studies does offer a representative pool for empirical data gathering and analysis so as to be able to draw general conclusions on the tension between autonomy and dependence that is the focus of this book.

Indeed, it is in certain areas in particular where the EU does not seem to be in a position to ignore international norms. Thus, the impact of standards of its sister organisation, the Council of Europe, can be studied at different levels and in different degrees, from the participation of the EU in Council of Europe conventions to the indirect influence of Council of Europe conventions on the EU legal order. Yet, as a non-member (for the moment) the EU still has a free choice whether or not to accede to the Conventions and it frequently chooses not to commit itself.<sup>23</sup> Similar situations are to be found in relation to the International Monetary Fund (IMF). The EU is not a member of the IMF but all EU Member States are, which raises the question to which extent IMF law interacts with and impacts EU law indirectly.<sup>24</sup> A similar question may be raised in relation to the World Intellectual Property Organisation (WIPO) where the EU is among the most active international organisations. What is the impact of the WIPO as the standard-bearer for intellectual property norm-making on the EU legal order?<sup>25</sup>

Whereas the influence of these international organisations may flow from a substantive link with EU policy areas, the impact may even be more profound when the EU is a formal member of an international organisation. This is the case in, for instance, the Food and Agricultural Organisation (FAO) and the Codex Alimentarius Commission in the area of food security and food law. Similar to the situation in the WTO, the EU's membership defines the relationship with the other organisation and the question emerges whether one may note a hierarchical subordination of the EU to those international bodies.<sup>26</sup>

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<sup>20</sup> Eckes, Chapter 5 in this volume.

<sup>21</sup> Kuijper and Hoffmeister, Chapter 7 in this volume.

<sup>22</sup> Alvarez 2005; Føllesdal, Wessel and Wouters 2008; Pauwelyn, Wessel and Wouters 2012.

<sup>23</sup> Cornu, Chapter 6 in this volume.

<sup>24</sup> Bergthaler, Chapter 8 in this volume.

<sup>25</sup> Kwakwa and Talbott, Chapter 9 in this volume.

<sup>26</sup> Schild, Chapter 10 in this volume.

The question of the autonomy of the EU came up in relation to the former European Community in particular as it was related to principles of direct effect and supremacy. With the entry into force of the Lisbon Treaty at the end of 2009, the former ‘non-Community’ parts of the European Union have been integrated into the same legal order. The sensitive area of police and judicial cooperation in criminal matters is now part of the Area of Freedom, Security and Justice (AFSJ) and unlike the continuing special position of the Common Foreign, Security and Defence Policy (CFSP and CSDP), this policy field can no longer be said not to form part of the same legal order as the other policies. While one may argue that one of the reasons for the Court to underline the autonomy of the EU legal order (the preservation of its own exclusive jurisdiction<sup>27</sup>) is less valid in relation to CFSP and CSDP because of the limited role of the Court in that area, it is interesting to assess whether we can indeed witness differences. Thus, it is interesting to assess NATO’s impact on the European Union’s legal and institutional design, policy-making and operational experience gathering in the field of the security and defence.<sup>28</sup> Also in the other, relatively young, policy field on the Union, the AFSJ, it would not make sense to turn one’s back on the international developments. While in the field of criminal law the EU develops its role as a global security actor and makes use of its international engagements in order to develop deeper, autonomous measures in specific fields, cooperation in the field of private international law is characterised by a dichotomous approach, where the thorough participation of the Union in the negotiation of multilateral conventions may lead the Union to avoid external interference in the internal *acquis*.<sup>29</sup>

The main question raised in this book is to which extent we witness a normative influence of international organisations on the EU legal order and what this tells us about the cherished ‘autonomy’ of that order. This question highlights the tension between the principles of ‘autonomy’ and ‘reception’ that together form the cornerstones of the relation between European and international law. Indeed – as the contributions to this volume demonstrate – the influence of international norms varies considerably and reflects the constant struggle between an openness to international law and norms developed at the international level and the idea of an autonomous legal order that is there for the Court to preserve.<sup>30</sup>

Obviously, ‘influence’ is a matter of degree. In this book we use it to denote *the effect of norms created in or by international organisations on EU norms*. Although to realist political scientists asking how international organisations influence the European Union may come “close to über-silly” (since if organisations matter at all, it is only because they reflect the preferences of great powers),<sup>31</sup> we approach the issue from two sides: the international organisation in question should have the capacity or power to exercise its influence (there has to be an institutional and substantive link), and the EU must be willing or compelled to ‘receive’ the influence. Influence is not a legal concept and lawyers are not used to work with it (perhaps because it would imply the actual ‘measuring’ of effects – something that is also beyond the scope of the present book). We therefore rely on insights offered by political science and International Relations (IR) theory. In their recent book, Oriol Costa and Knud Erik Jørgensen reveal that “under certain circumstances international institutions [indeed] shape both policies and policy-making processes, even in ways sometimes unintended by the EU, or undesired by some member states”.<sup>32</sup> They point to the fact that in IR-theory different ‘mechanisms’ to exert influence have been noticed, which may (1) provide opportunities or constraints to actors, (2) change their ability to influence decision-making by changing the distribution of power, (3) establishing or spreading norms and rules, or (4) creating path dependencies. The emerging picture is a complex set of formal and (sometimes very subtle) informal ways in which international organizations (and other multilateral fora) influence the EU. The degree of influence may then also depend on the ‘institutional strength’ of the international organization. Some research showed that “international institutions embodied in toothless non-binding agreements should have less

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<sup>27</sup> Cf. Opinion 1/00, para 24.

<sup>28</sup> Blockmans, Chapter 11 in this volume.

<sup>29</sup> Matera, Chapter 12 in this volume.

<sup>30</sup> Wouters and Odermatt, Chapter 3 in this volume.

<sup>31</sup> Costa and Jørgensen, Chapter 4 in this volume.

<sup>32</sup> Costa and Jørgensen 2012.

influence on the EU then fully-fledged international institutions including binding treaties and meetings of regular fora.”<sup>33</sup> At the same time, it is well-known that ‘domestic conditions’ are an important factor for the degree of influence.<sup>34</sup>

In the end, IR-theory teaches us that the different mechanisms and degrees of influence may have different consequences. While the current book focuses on ‘normative influence’, it is equally possible to find elements of ‘institutional consequences’, including the role EU and Member State actors can play in international institutions and the way in which formal decision-making processes are used in practice. There is indeed an interaction between the EU and many international organizations and the contributions to this book underline the coming of age of the European Union as a polity. Whereas for an international organisation as the EU stressing its autonomy is necessary to establish its position both vis-à-vis its own Member states and in the global legal order, its further development sets the limits to that autonomy. In many policy areas the EU has become a global player and everything it does cannot be disconnected for normative processes that take place in other international organisations. This process does come with the same tension that sovereign states face, i.e. how to square the preservation of one’s institutional and constitutional values with accepting a certain dependence of the outside world.

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<sup>33</sup> As paraphrased by Costa and Jørgensen 2012

<sup>34</sup> *Ibid.*

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