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## Europe

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## Europe

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## Europe

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This Article updates selected international legal development in 2016 in European Law.

### I. Whose Prerogative is it Anyway? Britain's Referendum to Withdraw from EU Draws Constitutional Legal Challenges

On June 23, 2016, the British people voted to exit the European Union (EU), or simply “Brexit.” The United Kingdom’s EU Referendum, in which a record 72.2 percent of the electorate voted, resulted in 48.1 percent choosing to “remain” and a surprising 51.9 percent opting to “leave.”<sup>1</sup>

Immediately after the plebiscite’s unexpected outcome, a snowball reaction began that caused turmoil in Britain’s political leadership,<sup>2</sup> a weakened pound-sterling, havoc within financial markets<sup>3</sup>, and raised challenges to the royal prerogative power.<sup>4</sup> Following the vote, solicitors at Mishcon de Reya, acting on behalf of an anonymous group of clients, sought assurances the government would not act without Parliament.<sup>5</sup>

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\* Thomas Stanton, James Henry Bergeron (Developments in NATO), Matthew Soper (Whose Prerogative is it Anyway? Britain’s Referendum to Withdraw from EU Draws Constitutional Legal Challenges), Steven Kourtis and Eva Tzavala (Immigration and Refugee Developments in Greece), Roselyn S. Sands (Posting of Workers in Europe), Remy Nerriere (The 2016 Reform of Contract Law in France), Angelique Devaux (New EU Regulations in Matter of Couples’ Properties).

1. *Official Result of the EU Referendum is Declared by Electoral Commission in Manchester*, UK ELECTORAL COMMISSION (June 24, 2016), <http://www.electoralcommission.org.uk/i-am-a-journalist/electoral-commission-media-centre/news-releases-referendums/official-result-of-the-eu-referendum-is-declared-by-electoral-commission-in-manchester>.

2. *PM-in-Waiting Theresa May Promises ‘A Better Britain’*, BBC (July 11, 2016), <http://www.bbc.com/news/uk-politics-36768148>.

3. Stephen Fidler et al., *U.K. Vote Sets Off Shockwaves Across Europe; Britain’s Decision Shifts EU’s Course, Poses Test for Other EU Leaders Grappling with Populist Discontent*, WALL ST. J. (June 24, 2016, 7:37 PM) <https://www.wsj.com/articles/u-k-vote-sets-off-shockwaves-across-europe-1466811442>.

4. Owen Bowcott, *Article 50 Legal Case ‘Is Attempt to Reverse Brexit’, Court Told*, THE GUARDIAN (Oct. 17, 2016) <https://www.theguardian.com/politics/2016/oct/17/article-50-legal-case-is-attempt-to-reverse-brexit-court-told>.

5. Owen Bowcott, *UK Government Faces Pre-Emptive Legal Action Over Brexit Decision: Law Firm Says Article 50 Cannot Be Triggered Without Full Debate and Vote by Parliament*, THE GUARDIAN (Jul. 4, 2016), <https://www.theguardian.com/law/2016/jul/03/parliament-must-decide-whether-or-not-to-leave-the-eu-say-lawyers>.

## A. R (MILLER) v SECRETARY OF STATE FOR EXITING THE EU

In October 2016, the High Court of Justice's three most senior judges—Lord Thomas of Cwmgiedd, Sir Terence Etherton, and Lord Justice Sale—heard oral arguments in London addressing whether the Crown, acting through the government, is entitled to use royal prerogative powers to trigger Article 50 of the Treaty on European Union (TEU).<sup>6</sup> The issue central to this debate is whether the Prime Minister is entitled to use powers of the royal prerogative to commence the two year exiting process without a vote in Parliament.<sup>7</sup> This case is the biggest British constitutional question of the century and pits the royal prerogative powers of the executive branch against the sovereign powers of Parliament to determine the rights and duties of citizens before the law. The government lost in the high court and is currently appealing to the UK Supreme Court.<sup>8</sup> Prime Minister Theresa May, through a spokesperson, “confirmed that the government’s planned timetable for triggering Article 50 is unchanged after the court ruling.”<sup>9</sup>

1. *Royal Prerogative*

The royal prerogative powers were historically exercised by Britain’s monarch acting on his or her own initiative. Today, by constitutional convention, the monarch exercises the prerogative on the advice of the prime minister and the cabinet. It is under the royal prerogative that money is minted, assets allocated for war, pardons granted, and foreign affairs conducted.<sup>10</sup>

2. *Parliamentary Sovereignty*

In the British constitutional system, the doctrine of “parliamentary sovereignty”<sup>11</sup> implies the Parliament of Westminster is the supreme legal authority for the entire United Kingdom. Contrast this principle with the United States’ system of government, where a codified constitution is the

6. R. (Miller) v. Secretary of State for Exiting the European Union [2016] EWHC (Admin) 2768.

7. Steve Castle, *Without a Constitution, ‘Brexit’ Is Guided by a Prerogative. But Whose?*, N.Y. TIMES (Oct. 16, 2016), [http://www.nytimes.com/2016/10/17/world/europe/without-a-constitution-brexit-is-guided-by-a-prerogative-but-whose.html?\\_r=0](http://www.nytimes.com/2016/10/17/world/europe/without-a-constitution-brexit-is-guided-by-a-prerogative-but-whose.html?_r=0).

8. *Brexit Court Ruling Appeal Date Set For 5 December*, BBC (Nov. 8, 2016), <http://www.bbc.com/news/uk-politics-37913911>.

9. *PM Calls with President Tusk and President Hollande: 4 November 2016*, GOV.UK (Nov. 4, 2016), <https://www.gov.uk/government/news/pm-calls-with-president-tusk-and-president-hollande-4-november-2016>.

10. See COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION*, (7th ed., Cambridge Univ. Press 2011); see A. W. BRADLEY & K. D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* (16th ed., Pearson Higher Educ. 2014). (CUP 2011).

11. See A.V. DICEY, *AN INTRODUCTION TO THE LAW OF THE CONSTITUTION* 3–72 (8th ed., Macmillan 1915); see also *Jackson v. Attorney General* [2005] UKHL 56, ¶ 9, [2006] 1 A.C. 262.

highest law and the Supreme Court has the power to judicially review acts of Congress and the executive. In the UK, courts cannot generally overrule legislation and no parliament can pass laws binding a future parliament.<sup>12</sup>

## B. EU REFERENDUM ACT

The legal authority for the EU Referendum came from legislation passed by Parliament in December 2015.<sup>13</sup> The act said nothing whatsoever about the effect of the vote's outcome, and the referendum was persuasive and not binding on the government. In practice, the UK government will likely have to respect the vote's results.

## C. TEU ARTICLE 50: WITHDRAWING FROM EU

Under Article 50 of the TEU, the framework is laid for withdrawing from the EU. A two-part process is required for invoking Article 50. First, a Member State must "decide" to withdraw, and second, a Member State "shall notify" the European Council (Council) of its desire to withdraw.

A "decision," for the purposes of Article 50(1) of the TEU, must be in accordance with the given Member State's own constitutional requirements. This means that a "decision" is made by either the exercise of the prerogative powers (i.e. the Prime Minister acting on behalf of the Crown) or through a piece of primary legislation (i.e. Parliament acting in its role as sovereign).

### 1. *Looking Forward*

The British government announced it planned to "notify" the Council of the withdrawal decision by the end of March 2017. The Queen's 2017 Speech to Parliament will be used to introduce the Great Repeal Bill, which will nullify the 1972 European Communities Act. The anticipated date to make Brexit official would be the end of March 2019, which would be in time for the 2020 General Election.<sup>14</sup>

The government's timetable could be complicated by the Supreme Court upholding the High Court's decision, Scotland pressing for a second Independence Referendum, or the Prime Minister asking the Queen to dissolve Parliament, triggering a shotgun election.

Even if the Supreme Court upholds the claimant's position that Parliament, as supreme constitutional law, must vote to "decide" to withdraw, more likely than not, members of Parliament will uphold the people's determination to leave the EU.

12. Matthew Soper, *Brexit, International Law & The UK Constitution*, 13 A.B.A. SEC. OF INT'L LAW, EUR. UPDATE 1, 711 (Jul. 2016).

13. European Union Referendum Act 2015, c. 36 (UK).

14. See 616 PARL. DEB. H.L. (6th ser.) (2016) col. 125585 (U.K.).

## II. Developments in NATO<sup>15</sup>

The North Atlantic Treaty Organisation has had a busy year with several key decisions and initiatives.

The year began with a continuation of efforts to implement the Response Action Plan (RAP) announced at the Wales Summit of Heads of State and Government in September 2016.<sup>16</sup> Responding to Russian aggression in Ukraine and the spread of ISIL, the RAP called for the stand-up of a reformed, faster, and larger NATO Response Force (NRF). The spearhead of this new NRF would be a Very High Readiness Joint Task Force (VJRF) that could respond to crises within days. Achieving this response would require force commitments from allies. A number of small logistics nodes, called NATO Force Integration Units, are to be established in Eastern Europe to aid reception of NATO forces in a crisis.

At the Defense Ministers Meeting held from February 11-12, 2016, Germany, Greece, and Turkey proposed that NATO support efforts to stem illegal migrant trafficking across the Aegean Sea between the Turkish coast and the nearby Greek Islands.<sup>17</sup> The ministers approved the task, which sent Standing NATO Maritime Group Two into the Aegean to conduct monitoring of migrant crossings and to relay that information to the Greek and Turkish Coast Guards as well as the European Border and Coast Guard Agency (FRONTEX). The activity continued through the end of 2016. By May 2016, migrant flows across the Aegean had largely collapsed due to the EU-Turkey agreement on migrant returns, the closing of the borders of some East European states, and, to some extent, the NATO effort.<sup>18</sup>

One notable aspect of the Aegean tasking was the breakthrough in NATO-EU relations with the establishment of a direct link and information sharing between Allied Maritime Command in the UK and FRONTEX.<sup>19</sup>

Several major decisions were made at the July NATO Warsaw Summit (Summit).<sup>20</sup> The RAP was declared achieved and the stand-up on the VJTF confirmed. In addition, NATO announced plans to establish an “enhanced

15. James Henry Bergeron, Chief Political Advisor, Allied Maritime Command NATO. All comments are made in a private capacity.

16. Press Release, NATO, Wales Summit Declaration (Sept. 5, 2014), [http://www.nato.int/cps/en/natohq/official\\_texts\\_112964.htm](http://www.nato.int/cps/en/natohq/official_texts_112964.htm).

17. See *NATO Defence Ministers Agree on NATO Support to Assist with the Refugee and Migrant Crisis*, NATO (Feb. 11, 2016), [http://www.nato.int/cps/en/natohq/news\\_127981.htm](http://www.nato.int/cps/en/natohq/news_127981.htm).

18. See *Migrant Flows into Greece Fall in 2016, But Change Little into Italy*, PEW RES. CTR. (Sept. 6, 2016), [http://www.pewresearch.org/fact-tank/2016/09/06/fewer-refugees-entering-europe-than-in-2015-but-asylum-backlog-still-growing/ft\\_16-08-24\\_migrants\\_greeceitalymonthly/](http://www.pewresearch.org/fact-tank/2016/09/06/fewer-refugees-entering-europe-than-in-2015-but-asylum-backlog-still-growing/ft_16-08-24_migrants_greeceitalymonthly/).

19. See *Assistance For the Refugee and Migrant Crisis in the Aegean Sea*, NATO (Jun. 27, 2016), [http://www.nato.int/cps/en/natohq/topics\\_128746.htm](http://www.nato.int/cps/en/natohq/topics_128746.htm); see also *FRONTEX and NATO to Cooperate in the Aegean Sea*, FRONTEX (May 6, 2016), <http://frontex.europa.eu/news/frontex-and-nato-to-cooperate-in-the-aegean-sea-nZMSYr>.

20. Press Release, NATO, WARSAW SUMMIT COMMUNIQUÉ, ¶ 100 (Jul. 9, 2016), [http://www.nato.int/cps/en/natohq/official\\_texts\\_133169.htm?selectedLocale=EN](http://www.nato.int/cps/en/natohq/official_texts_133169.htm?selectedLocale=EN).

forward presence” (EFP) of four brigades into North Eastern Europe to act as a deterrent against Russian aggression, one each in Estonia, Latvia, Lithuania and Poland, with the United States providing the framework for the Polish brigade.<sup>21</sup> EFP goes beyond the NRF/VJTF posture in having a permanent forward presence on the Baltic Region of rotationally deployed forces, as against a force on call to deploy rapidly from elsewhere. The implementation of EFP will occur through 2017.

A number of major decisions were made in the maritime domain. The Summit confirmed that Operation Ocean Shield, NATO’s counter-piracy operation, Operation Ocean Shield would end in December 2016.<sup>22</sup> The last pirating of a vessel occurred in May 2012, and there were new demands on NATO naval forces. But a new mission was stood up in the Mediterranean where Operation Sea Guardian (OSG) replaced Operation Active Endeavour (OAE). OAE was an Article V collective defense operation aimed at supporting counter-terrorism efforts. The new, evolved OSG mission is a broad, non-Article V maritime security operation that adds mandates for freedom of navigation protection, and maritime interdiction operations, such as arms embargoes, energy security, and critical infrastructure protection. OSG was declared active at the October Defense Ministerial.<sup>23</sup>

The Summit also decided to explore NATO’s role in the Mediterranean migrant crisis and in responding to the crisis in Libya to support and complement the EU’s Operation Sophia.<sup>24</sup> At the Defense Ministerial in October, in order to stem migrant trafficking, NATO announced maritime support to Operation Sophia that will take the form of logistic support and information sharing.<sup>25</sup> The potential NATO roles in capacity building of the Libyan coast guard and implementation of the UNSCR 2292 arms embargo on Libya have yet to be decided.

Regarding Russia, the Warsaw Summit communique stressed alliance solidarity against intimidation or aggression, and reasserted the role of nuclear deterrence.<sup>26</sup> Special attention was paid to the importance of the Atlantic and the need to protect sea lines of communication between North America and Europe—the first time in decades this has been a concern.<sup>27</sup> The need for effective strategic anticipation was highlighted, supporting NATO monitoring and tracking of Russian naval and air deployments.<sup>28</sup>

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21. *Id.* at ¶ 40.

22. *Id.* at ¶ 90.

23. *Id.* at ¶ 91; see *Operation Sea Guardian*, NATO (Oct. 27, 2016), [http://www.nato.int/cps/en/natohq/topics\\_136233.htm](http://www.nato.int/cps/en/natohq/topics_136233.htm).

24. WARSAW SUMMIT COMMUNIQUE, *supra* note 20, at ¶ 924.

25. See Jens Stoltenberg, Secretary General of NATO, Remarks During Press Conference Following a Meeting of the North Atlantic Council (Oct. 27, 2016), [http://www.nato.int/cps/en/natohq/opinions\\_136837.htm?selectedLocale=EN](http://www.nato.int/cps/en/natohq/opinions_136837.htm?selectedLocale=EN).

26. WARSAW SUMMIT COMMUNIQUE, *supra* note 20, at ¶ 514.

27. *Id.* at ¶ 23.

28. *Id.* at ¶ 47.

The next Summit was announced to take place in Brussels in mid-2017, which aligns with the opening of the new NATO Headquarters building.

### III. Immigration and Refugee Developments in Greece<sup>29</sup>

Since World War II, Greece has traditionally been a country of origin for migrants to the United States, Australia, and Northern Europe. However, since the early 1990s, Greece has steadily developed into a host country for immigrants originating from the Balkan states, ex-Soviet Union states, Africa, Asia, and the Middle East. For many decades, Greece lacked a consistent immigration and asylum policy, leading to a long-standing practice of government tolerance towards foreigners residing and working illegally in Greece. Refugee status determination procedures fell under the competency of the Ministry of Public Order. Recognition rates were very low—close to zero.<sup>30</sup> Greek police authorities lacked both resources (human and infrastructure) and adequate training to properly and timely examine asylum claims. Even basic human rights, such as the right to be informed in a language that a refugee applicant understands, accommodation in adequate living conditions, and access to asylum procedures had been, in practice, denied. The European Court of Human Rights, in its leading case *M.S.S. v. Belgium and Greece*, condemned Greece on “major structural deficiencies” of the asylum procedure.<sup>31</sup> Finally, in 2013, Greece implemented Law 3907/2011,<sup>32</sup> creating an autonomous specialized asylum service, staffed by civil servants competent to adjudicate on applications for international protection. Statistics from the first year of its operation showed a remarkable improvement in recognition rates.<sup>33</sup>

However, in 2015, Greece witnessed an unprecedented mass influx of mixed flows (migrants and refugees), mainly from Syria, Afghanistan, Pakistan, Iraq, and some African countries. According to the United Nations High Commissioner for Refugees (UNHCR), a total of 856,723

29. Steven Kourtis is counsel to Fortsakis Diakopoulos Mylonogiannis & Associates Law Firm, Athens, Greece, and Eva Tzavala is a human rights lawyer and teaching assistant at the school of law, University of Athens.

30. In 2009, 0.04 percent of international protection claims were granted asylum, whereas in 2010, the corresponding rate was 0.5 percent. Amnesty Int'l, *Greece: Briefing To Committee Against Torture*, AI Index EUR 25/002/2010 (Jul. 27, 2010). <https://www.amnesty.org/en/documents/EUR25/002/2010/en/>.

31. *M.S.S. v. Belgium and Greece*, 2011 Eur. Ct. H.R. 108.

32. Nomos (2016: 4375), Gov. Gazette 2016, (Greece) (amending N. 3907/2011 (Greece)); Nomos (2016: 4399), Gov. Gazette A:51 (Greece) (amending N. 3907/2011 (Greece)).

33. *Statistics of the New Greek Asylum Service (June 2013 – May 2014)*, HELLENIC REPUBLIC: MIN. OF PUBLIC ORDER AND CITIZEN PROTECTION, [http://asylo.gov.gr/en/wp-content/uploads/2014/06/1406\\_oneyearstats\\_en.pdf](http://asylo.gov.gr/en/wp-content/uploads/2014/06/1406_oneyearstats_en.pdf) (stating that for the period from June 2013 to May 2014, there has been a 20.1 percent recognition of refugee status and subsidiary protection at first instance and an additional 13.9 percent recognition at second instance).

refugees and migrants arrived at Greek shores.<sup>34</sup> Greek police data indicates 872,519 arrests of irregular migrants at the sea borders arriving from Turkey in 2015.<sup>35</sup> Local police authorities on the Aegean islands, with the assistance of FRONTEX and the European Asylum Support Office (EASO), struggled to comply with EU law requirements for registration, identification, and fingerprinting of all new arrivals.<sup>36</sup> As soon as the first reception process was completed, newcomers were able to freely move within Greek territory and reach the Greek-FYROM borders in order to move onto their destination country further north.<sup>37</sup>

In March 2015, in the aftermath of this sudden influx, certain European countries (FYROM, Croatia, Slovenia, Hungary, and Austria) closed their borders or severely restricted access to their territory, even to people in clear need of international protection. In May 2015, the European Commission (EC) took the initiative to propose that the Council trigger Article 78, paragraph 3 of the Treaty on the Functioning of the European Union Mechanism and introduce a temporary relocation scheme, requiring a fair distribution of third country nationals among Member States with an average recognition rate (refugee status and subsidiary protection) equal or higher than 75 percent.<sup>38</sup> The allocation of asylum seekers was determined based on factors related to host countries (population, GDP, unemployment, and pending asylum applications).<sup>39</sup> The European Council adopted the

34. *Most Common Nationalities of Mediterranean Sea Arrivals from January 2016*, OPERATION PORTAL: REFUGEES SITUATIONS, <http://data2.unhcr.org/en/situations/mediterranean?id=83> (last visited Apr. 23, 2017).

35. *Statistics Illegal Immigration Figures 2015*, HELLENIC POLICE (2015), [http://www.astynomia.gr/index.php?option=OZo\\_content&lang=%27..%27&perform=view&id=50610&Itemid=1240&lang](http://www.astynomia.gr/index.php?option=OZo_content&lang=%27..%27&perform=view&id=50610&Itemid=1240&lang) (last visited Apr. 23, 2017).

36. See *European Agenda on Migration – Factsheets*, EURO. COMM'N: MIGRATION & HOME AFFAIRS, [https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information_en) (last visited Apr. 23, 2017); see Council Regulation No. 603/2013, 2013 O.J. (L 180) 1 (EU).

37. FYROM stands for the Former Yugoslav Republic of Macedonia. A dispute currently exists between states that recognize the country as the Republic of Macedonia and those that recognize it as FYROM. Greece uses the former term while the United States uses the latter.

38. Based on Eurostat data, updated on a quarterly basis. Iraqi recognition rate dropped in 2016, in comparison with high recognition rates in 2015. Afghani recognition is steadily increasing and is now close to seventy-two percent. *Asylum Quarterly Report*, EUROSTAT (Mar. 15 2017), [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_quarterly\\_report;Question\\_&Answers](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report;Question_&Answers), HELLENIC REPUBLIC: MIN. OF INTERIOR AND ADMIN. REFORM (Jul. 2016), <http://asylo.gov.gr/en/wp-content/uploads/2016/07/Qandanswers.pdf> (noting that in July 2016, eligible countries of origin were Bahrain, Central African Republic, Dominica, Eritrea, Laos, Saudi Arabia, Seychelles and Syria); *File: First Instance Decisions in the EU-28 By Outcome, Selected Citizenships, 2nd Quarter 2016*, EURO. COMM'N (Sep. 22, 2016), [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First\\_instance\\_decisions\\_in\\_the\\_EU-28\\_by\\_outcome,\\_selected\\_citizenships,\\_2nd\\_quarter\\_2016.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First_instance_decisions_in_the_EU-28_by_outcome,_selected_citizenships,_2nd_quarter_2016.png).

39. For more details, see European Commission Press Release, *Refugee Crisis: European Commission Takes Decisive Action - Questions and Answers* (Sept. 9, 2015), [http://europa.eu/rapid/press-release\\_MEMO-15-5597\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5597_en.htm).

above proposal, allocating 40,000 places for relocation in July 2015<sup>40</sup> and another 120,000 places in September 2015.<sup>41</sup> Specifically, in two years' time, 63,302 people would be relocated from Greece. However, in 2015 only eighty-two people were relocated due to the limited number of open pledges from receiving countries and the slow registration pace of asylum and relocation claims from the Greek authorities. As the EU relocation scheme is on a voluntary basis, Member States seem reluctant to follow EC decisions, while considering other types of assistance, such as financial aid.<sup>42</sup>

As of November 2016, 170,373 Syrians, Afghans, Iraqis, Pakistanis, Iranians, and other nationalities arrived in Greece by sea. Greek police data through the end of August 2016 report 166,335 people arrested for illegal entry and stay in Greece. Due to the closing of the Western Balkan route, thousands of refugees and migrants were stranded in different locations in Greece (on the islands, mainland, along the Greece-FYROM borders, and the Port of Piraeus). The increase of its reception capacity (accommodation places) became a top priority for the Greek state. To this end, old military camps and ex-Olympic complexes in Attica, Northern Greece, and elsewhere became operational to host the different nationalities arriving from the islands, the controversial Idomeni camp on the Greek-FYROM border, and the Piraeus Port. At present, up to fifty-two camps are operating in Greece (both permanent and temporary facilities, on the islands and mainland).

Greece eventually became a host country for refugees rather than a transit country. Today, refugees in Greece have three options: (1) seeking asylum in Greece; (2) relocation to another EU country, if they fulfill the criteria; and (3) reunification with a close family relative (as specified in the Dublin III Regulation).<sup>43</sup> However, the capacity of the Asylum Service to register and process all applications was limited due to the financial constraints imposed on Greece by the EU and the International Monetary Fund, in place since 2009 as a result of the Greek debt crisis. This led to the frustration of refugees as their basic right of access to asylum was *de facto*

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40. European Commission Press Release, Outcome of the Council Meeting: 3405th Council Meeting (July 2015), <http://www.consilium.europa.eu/en/press/press-releases/2015/09/14-jha-relocation-refugees/> (outlining the adoption, by consensus, of a resolution of the representatives of the governments of the Member States, meeting within the council, on relocating forty thousand persons in clear need of international protection from Italy and from Greece).

41. Council Decision 2015/1523, 2015 O.J. (L 239) 146 (EU); Council Decision 2015/1601, 2106 O.J. (L 248) 80 (EU).

42. The United Kingdom and Denmark opted out of the Council's decisions. Based on recent data (as of Oct. 11, 2016), Austria and Hungary have not yet opened any pledges, while the Czech Republic, France, Germany, Poland, Slovakia, Spain, and Sweden have offered limited places. On the contrary, figures from Cyprus, Estonia, Finland, Ireland, Latvia, Lithuania, Luxembourg, Malta, and Portugal reveal a positive stance towards the relocation program.

43. Council Regulation 604/2014, 2014 O.J. (L 180) 31 (EU). The European Commission submitted a proposal of a recast regulation last April. See *Proposal for a Regulation of the European Parliament and of the Council*, COM (2016) 270 final (Apr. 5, 2016).

denied.<sup>44</sup> In order to alleviate this problem, from May to July 2016, mobile units of the Asylum Service, in cooperation with UNHCR and EASO personnel, implemented a pre-registration of refugee's claims inside their place of temporary residence (camps). A total of 27,592 people were pre-registered. The pace of relocation procedures increased, and by November 8, 2016, 5,376 persons in total were effectively relocated from Greece.<sup>45</sup>

At the external relations level, an EU-Turkey Statement was signed on March 18, 2016 in order to mitigate mixed migratory flows trespassing across EU borders from Turkey.<sup>46</sup> According to the agreement, all irregular migrants or rejected asylum seekers who entered into Greek territory from Turkey from March 20, 2016 onwards will be returned to Turkey. As of September 28, 2016, only 578 returns were completed. Legal concerns were raised concerning the characterization of Turkey as the "first country of asylum" and the "safe third country" under refugee and human rights law.<sup>47</sup> Asylum experts from other EU countries came to assist in the process, whereas new independent appeal committees went into effect August 2016.<sup>48</sup> The EU-Turkey joint operation plan also comprises a resettlement scheme for Syrians from Turkey directly to EU countries on a one-for-one basis, with an aim to combat human smuggling networks. According to the same source, 1,614 Syrian refugees have been resettled from Turkey to Europe. In addition, on September 28, 2016, a council decision was adopted to officially allow Member States to use the unallocated 54,000 places (which were initially reserved for Hungary) for relocation or resettlement of Syrians from Turkey.<sup>49</sup>

Irrespective of the implementation progress of the EU-Turkey Statement, Greek immigration policy is now focused on the integration of the asylum seekers by enabling them to exercise their rights to accommodation,

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44. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948); Charter of Fundamental Rights of the European Union, art. 18, 2102 OJ (C 326) 391 (EU).

45. See *Annex to the Communication from the Commission to the European Parliament, the European Council and the Council: Seventh Report on Relocation and Resettlement*, COM (2016) 720 final (Sep. 11, 2016).

46. European Council Press Release 144/16, EU-Turkey Statement, 18 March 2016 (Mar. 18, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

47. See *The Situation of Refugees and Migrants Under the EU-Turkey Agreement of 18 March 2016*, COUNS. OF EUROPE-PARLIAMENTARY ASSEMBLY (2016), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22738&lang=en> (last visited Apr. 23, 2017).

48. *Public Statement*, GREEK REPUBLIC: NAT'L HUMAN RIGHTS INSTITUTIONS, [http://www.nchr.gr/images/pdf/apofaseis/prosfuges\\_metanastes/Dimosia%20dilwsi%20EEDA.pdf](http://www.nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/Dimosia%20dilwsi%20EEDA.pdf) (last visited Apr. 23, 2017) (showing how 4375/2016 as amended by L. 4399/2016 regulates, among others, the functioning of Reception and Identification Centers (hotspots), and institutes the newly established Independent Appeal Committees with the participation of administrative judges, which raises, according to the National Commission for Human Rights, issues of constitutionality).

49. European Commission Press Release, *Managing the Refugee Crisis*, EU-Turkey Statement, European Commission (Oct. 4, 2016), [http://europa.eu/rapid/press-release\\_MEMO-16-3218\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-3218_en.htm).

employment, and education. Priority is given to unaccompanied minors and other vulnerable asylum seekers. In conclusion, based on two years of accumulated experience, Greek authorities, as well as its population, rose to the challenge and met all expectations, in spite of the unprecedented character of the refugee crisis and the deep-rooted financial crisis that Greece continues to experience.

#### IV. Posting of Workers in Europe<sup>50</sup>

The freedom of movement of persons and services is one of the fundamental principles of the European Union and a cornerstone of the EU's single market. Article 56 of the Treaty on the Functioning of the European Union organizes the rules for temporarily assigning workers to supply those services in other Member States. However, due to the divergence of employment laws in European countries and the differing levels of protection that these laws provide, the free movement of workers throughout Europe raises issues.

To protect the rights of these workers, the EU set forth mandatory rules of minimum protection in the host country for employees posted to perform temporary work in another Member State. The basis for these protections is Directive 96/71/EC (1996 Directive), which concerns the posting of workers in the framework of the provision of services.<sup>51</sup>

Since 1996, the world has changed at an accelerated rate—particularly in the globalization of the world economy. After 20 years of experience, it became apparent that social dumping and abuse of these rules mandated a reform. This resulted in the EU reinforcing the rules on posting of workers by a new directive, Directive 2014/67/EU (2014 Directive), on the enforcement of the 1996 Directive.<sup>52</sup> The 2014 Directive should be effective throughout the EU by June 18, 2016, which is the deadline for the Member States to transpose the new Directive.

##### A. DIRECTIVE 96/71/EC ON THE POSTING OF WORKERS

The 1996 Directive sets up a broad framework for the posting of workers within the EU; Member States transposed this into their own legislation in order to ensure the protections provided to workers.

Article 2 of the 1996 Directive defines a “posted worker” as “a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.”<sup>53</sup> As the posting is temporary, the employee is expected to resume working in the country of

50. Roselyn S. Sands, EY Société d'Avocats, Paris, France. The author wishes to thank Anissa Yefene, as well as the employment lawyers of the EY Labor and Employment Law network, for their generous contributions to this paper.

51. Council Directive 96/71, 1997 O.J. (L 18) 1 (EC).

52. Council Directive 2014/67, 2014 O.J. (L 159) 11 (EU).

53. Council Directive 96/71, *supra* note 51, at art. 2.

origin after carrying out his or her task abroad. The home country employer is in charge of ensuring the return and the cost relating to the return of the posted worker to the home country.

To ensure a minimum level of protection, Article 3 of the 1996 Directive creates an obligation for the employer.<sup>54</sup> The employer guarantees that the terms and conditions of employment of posted workers are not less favorable than those provided by law, regulation, or administrative provision, and/or by collective agreements from the hosting Member States regarding notably maximum work periods, minimum rates of pay, equality of treatment, and safety and hygiene.

### 1. *New Directive 2014/67/EU On the Enforcement of Directive 96/71/EC*

On May 15, 2014, Directive 2014/67/EU was implemented, modifying the 1996 Posting of Workers Directive. The deadline for Member States' transposition of this new directive was June 18, 2016.<sup>55</sup>

The 2014 Directive is intended to help fight abuse and circumvention of the applicable rules, in particular via the use of "fake" companies, and assure that specific situations qualify as genuine postings. The 2014 Directive also provides for additional rights to posted employers in order to increase their rights in the subcontracting chain. Indeed, following the 2014 Directive, Member States must now ensure that posted workers in the subcontracting sector can hold their direct subcontractor, in addition to or instead of the employer, liable for all wages owed. Thus, the business relationship may be at risk if violations occur and customers are held liable.

Another main part of the new 2014 Directive is focused on increasing cooperation between national authorities and administrations in charge of compliance. These changes include time limits for the supply of information between national authorities as well as the implementation of fines for companies that fail to comply with the applicable regulations. Posted workers can also bring legal action either in the home or host jurisdiction.

France was the first country to transpose the 1996 and 2014 Directives. As France is very protective of employees' rights and provides a high level of social security protections, employing workers in France represents a significant cost for companies. Thus, it was fundamental for France's business and social model to quickly fight against social dumping.

As of November 2016, the following countries have not yet implemented the 2014 Directive in their national legislation: Bulgaria, Croatia, Czech Republic, Estonia, Luxembourg, Slovenia, and Portugal. Belgium is currently debating the conditions under which the 2014 Directive will be implemented in the country. Some countries, like Germany, found that

54. *Id.* at art. 3.

55. Council Directive 2014/67, *supra* note 52.

local law already takes the 2014 Directive into account and that no transposition is required.

On March 8, 2016, the EC proposed another revision of the rules on posting of workers within the EU, aiming to strengthen the fight against social dumping. Most notably it creates an obligation for posted workers to receive the same remuneration as local workers, and not only the minimum hourly rate.<sup>56</sup>

Given the increasingly burdensome EU directives on posting of workers, companies must be prudent in ensuring compliance with European and national rules. Employment law and social security risks, as well as civil and criminal sanctions, can damage the reputations of companies posting its workers. Home and host companies, and in certain circumstances the client user company, can be held jointly and severally liable for the unauthorized use of posted employees in EU Member States. As a result, strategic workforce planning has become a key challenge for multinational companies.

## V. The 2016 Reform of the Contract Law in France<sup>57</sup>

On October 1, 2016, an important reform of contract law entered into force in France.<sup>58</sup> The clear objective of the reform is to modernize the substance of contracts in order to contribute to contractual accessibility and readability while keeping to the spirit of the French civil code. In a globalized economy, France was penalized for not updating the law of contracts and obligations, particularly since the number of European and international projects has increased, such as the European Contract Code of the Gandolfi Group (2000),<sup>59</sup> the Principles of European Contract Law drawn up by the Lando Commission (2003),<sup>60</sup> and the Draft Common Frame of Reference.<sup>61</sup>

At the international level, the French contract law reform issue is also economic, particularly because such “Doing Business” reports published by

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56. *EU Commission Proposal for a Directive of the European Parliament and the Council Amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services*, COM (2016) 128 final (Aug. 8, 2016).

57. Remy Nerrière, *Cheuvreux Notaires*, Paris, France.

58. *Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations* [Ordonnance No. 2016-131 of 10 February 2016 to reform the law of contracts, the general regime and the proof of obligations], *Journal Officiel de la République Française [J.O.] [Official Gazette of France]*, Feb 11, 2016.

59. GIUSEPPE GANDOLFI, *CODE EUROPEEN DES CONTRATS : AVANT-PROJET* (Gandolfi ed., Milan, Giuffrè 2007).

60. OLE LANDO ET AL., *PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II* (Kluwer Law International 2000).

61. *PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR)* (Christian von Bar et al. ed., European Law Publishers 2009).

the World Bank regularly emphasize the common law systems. French law has suffered from a complex, unforeseeable, and unpopular image. Therefore, in this context, by adopting a clearer style and a more didactic presentation, the reform of contract law constitutes a positive factor for attracting foreign investors in France.<sup>62</sup>

The French contract law reform is an aspect of substantive French law; however, the reform includes numerous innovations inspired by these European and international norms; as a consequence, all economic actors must update their contract and commercial practices accordingly. The main features relate to each step of contract law, from the genesis of the contract to its execution and termination.

In the pre-contractual phase, among other things, the reform provides the following points:

- A duty to inform which is of decisive importance for the consent of the other contracting party. The parties may neither limit nor exclude this duty, otherwise the contract is void;<sup>63</sup>
- A duty to respect business confidentiality;<sup>64</sup> and
- That the breaking-off of pre-contractual negotiations are free from control.

The pre-contractual phase gives a definition of the preliminary contracts' legal system, including pre-emption contracts and unilateral promises, by reinforcing the legal security of contract.

Going a step further, the reform is audacious, providing in particular with the nullity of unfair provisions including standard form contracts<sup>65</sup> signed between companies.<sup>66</sup> The new rules tend to protect the weaker party by accounting for social and economic disparities between contracting parties.

Another important element of this reform is the consecration of the notion of economic violence: a contract may be void if one contracting party exploits the other's state of dependence and obtains an undertaking to which the latter would not have agreed in the absence of such constraint, gaining from it a manifestly excessive advantage.<sup>67</sup> For example, this would concern relations between franchisor and franchisee or supplier and distributor.

With regard to the execution of contracts, the reform also states that a party may have the unilateral right to reduce the price proportionally after the contract is signed when the other party has performed its obligations

62. JOHN CARTWRIGHT ET AL., THE LAW OF CONTRACT, THE GENERAL REGIME OF OBLIGATIONS, AND PROOF OF OBLIGATIONS (République Française: Ministère de la Justice) (ebook), [http://www.textes.justice.gouv.fr/art\\_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf](http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf).

63. *Id.*, at § 1, art. 1112-1.

64. *Id.*, at § 1, art. 1112-2.

65. CARTWRIGHT, *supra* note 62, at § 1, art. 1110, n.5 (explaining that "standard form contract" translates into *contrat d'adhésion*, "more literally 'a contract to which one adheres' and whose conclusion therefore involves no or little choice.")

66. Provisions creating a significant imbalance in terms of rights and obligations between the parties.

67. *Id.*, at § 2, art. 1143.

imperfectly, and that one party may ask the other contracting party to renegotiate the contract if a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance that is excessively onerous for a party who had not accepted the risk of such a change.

The concept of good faith is generalized to the whole process of contracting. A new section of the Civil Code reminds that contracts must be negotiated, formed, and performed in good faith.<sup>68</sup> This provision is a matter of public policy. The mechanisms of the transfer of contracts and obligations are now defined in the Civil Code, which should facilitate fluidity and business security.

Furthermore, innovative solutions have been introduced to allow contractual parties to terminate when there is uncertainty in the French contract. As such, one contracting party may question the other about some identified issues so that no significant threat may thereafter void the contract. The ability to question contractual parties would prevent third parties or contracting parties from contesting the contract thereafter. This should include representation of one of the contracting parties at the time the agreement is signed. Therefore, new prerogatives are offered to contracting parties in order to prevent litigation or to resolve any litigation without a judge.

## VI. New EU Regulations in Matter of Couples' Properties<sup>69</sup>

The EU long ago set an objective to maintain and develop an area of freedom, security, and justice in which the free movement of persons is ensured. Once again, couples have a place of honor within the objective this year. On June 24, 2016, the EU published two new regulations in order to ensure legal certainty for couples as regards to their assets and thus guarantee a certain legal predictability.<sup>70</sup>

Hence, after successions, cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes and in matters of the property consequences of registered partnerships are subject to regulations.<sup>71</sup>

None of the regulations provide a definition of marriage or registered partnership because these definitions belong to the national law of the Member States and, unlike the United States, no uniform definition has been achieved in Europe. Nevertheless, both EU regulations focus on the property consequences of marriage and registered partnerships due to more

68. *Id.*, at § 1, art. 1104.

69. Angélique Devaux, *Diplômée Notaire, LL.M., Cheuvreux Notaires, Paris, France.*

70. Council Regulation 2016/1103, 2016 O.J. (L 183) 1(EU); Council Regulation 2016/1104, 2016 O.J. (L 183) 30 (EU). Council regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

71. Council Regulation 650/2012, 2012 O.J. (L 201) 107 (EU).

and more international couples living with cross border elements as a result of the opening of borders and the multiplication of exchanges in Europe.<sup>72</sup>

The two regulations aim to unify conflicts of laws in matters of partners' and married couples' properties, and to put an end to fragmentation of applicable law to matrimonial property regimes and the property consequences of registered partnerships.

Determining the applicable law is essential because it governs *inter alia* the classification of property of either or both spouses or partners into different categories during and after marriage or partnership, the transfer of property from one category to the other, the responsibility of spouses or partners for liabilities and debts between them, the powers, rights, and obligations of either or both spouses or partners with regard to property, the dissolution of the matrimonial property regime and the partition, the distribution or liquidation of the property upon dissolution of the registered partnership, the effects of the matrimonial property regime or the property consequences of registered partnerships on a legal relationship between a spouse or a partner with third parties, and the material validity of a matrimonial property regime or a partnership property agreement.<sup>73</sup>

Both new EU regulations position couples at the center of these decisions by encouraging party autonomy. In other words, couples may now elect, before or during marriage and/or registered partnership, the applicable law to their matrimonial property regime or the consequences of their registered partnership. This can be either the law of the state where the spouses, future spouses, partners, or future partner is habitually a resident at the time the agreement is concluded; the law of the state where one of them is a national; or the law of the state where the partnership was created, provided the choice is expressed in writing, dated, and signed—by hand or electronically—by both parties.<sup>74</sup>

At the European level, although the two regulations have been adopted by only 18 Member States, the main extent is the recognition and enforcement of any matrimonial property regime and property consequences of registered partnership decisions in other member states without the need for a particular procedure, unless such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought.<sup>75</sup>

At the international level, the most important part of the regulations remains their universal scope, meaning that the EU regulations apply even if the governing law is the law of a third state (like the United States). Moreover, no *renvoi* to a European member state is allowed, so the substance of the law of the third state may automatically apply in any European

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72. DCFR, *supra* note, at 61.

73. *Id.*

74. *Id.*

75. Belgium, Bulgaria, The Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, The Netherlands, Austria, Portugal, Slovenia, Finland, Sweden, and Cyprus.

Member State unless the content of the third state's law is manifestly incompatible with the public policy (*ordre public*) of the forum.<sup>76</sup>

As a consequence, the two new regulations allow for the unity of the governing law regardless of where the assets are located. This avoids any conflict of laws, both in Europe and when a third state is involved. The new regulations also provide recognition of the foreign law in order to ensure the mobility of international couples. Therefore, the two new regulations create a bridge between European Member States and other countries in matters of couples' property.

The two EU regulations will globally enter into force on January 29, 2019.

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76. *Renvoi* means "to send back."