

## ***NASCHRIFT***

### **To the Report of Van Keulen Commission on the Activities of Prof. Kochenov of 29 April 2020**

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#### **Introduction**

The Report of the Van Keulen Commission comes to a clear conclusion: ‘Prof. Kochenov gave no advice concerning whether some individuals could obtain Maltese passports. The legal advice he gave dealt exclusively with the elements of the Maltese legal system and the Individual Investor Programme in relation to EU law’ (p. 5, 40, 41). Moreover, ‘there is no evidence that Prof. Kochenov’s academic work was influenced by the honorariums he received’ (p. 44). According to the Report, I only gave *strictly legal advice* to the Maltese Government and my academic independence has not been compromised. Therefore, the Report entirely exonerated me from the baseless accusation of ‘passport trade’, which was part of a sustained political and public media attack and was manifestly untrue from the start. These baseless accusations were the *raison d’être* of Van Keulen Commission’s investigation, which resulted in the Report confirming my total academic integrity and independence.

The Report equally finds that I have always honoured and complied with my direct superior’s definition of side-jobs (p. 32); have never used university facilities for outreach activities (p. 7 point 4); have always taken vacation or worked on weekends and evenings on outreach (p. 7 point 2); have always been absolutely transparent about all the academic outreach activities (p. 32, 34); which were all conducted in full knowledge of my superiors (p. 6, bullet point 1; p. 6 point 5(2); 34); were mentioned in annual faculty research reports published by the Faculty Board (e.g. p. 20); on my web-pages (p. 6 point 5(1); 32; 34); and in my books (p. 17). This has been the consistent practice during all the seventeen years of my successful academic career in Groningen.

However, surprisingly, the Report contains three entirely flawed and inconsistent further findings – which are not related at all to the baseless accusation of “passport trade” and contradict the main facts presented in the body of the Report and its main conclusion, threatening to undermine the reputation of the Report’s creators as well as that of the University, if publicized. These findings are the following.

**Firstly:** the Reputation of the University suffered, since Prof. Kochenov ‘by not notifying the side-jobs in accordance with the rules, deprived the University of the possibility to pass a judgment whether these side-jobs undermine the reputation of the employer’ (p. 44), implying in the light of my full compliance with my superior’s definitions regarding rules concerning side-jobs and in the context of total absence of clarity on the issue at the Faculty of Law in Groningen ably described by Van Keulen Commission, that I am the one to blame for the absence of clear rules and procedures. Besides, the finding contradicts the main conclusion of the Report, from which no breach of reputation flows at all;

**Secondly:** ‘Prof. Kochenov undermined the reputation of the University [...] by taking a certain risk with his engagements with Malta on a politically-sensitive subject-matter’ (p. 7, 44), implying that legal scholars should not work on ‘politically sensitive’ subjects, which is in contradiction with the very idea of legal scholarship, as well as the main conclusion of the Report, concerning independence and scholarly nature of my advice; and

**Thirdly:** that ‘Prof. Kochenov undermined the reputation of the University [...] by going to a conference of Henley and Partners notwithstanding the strongest advice of the Faculty Board not to go. Later this trip appeared in the press and led to parliamentary questions [in the Dutch parliament]’ (p. 7, 44), implying that Professors of EU law should be expected to alter their scholarly programme in the face of media attacks by local politicians in one of the Member States and contradicting the findings of the Report concerning the scholarly nature of the conference and the academic work presented.

While I am fully exonerated from the baseless accusations of ‘passport trade’, the Report exposed me and effectively held me wrongly responsible for something that would otherwise never have been looked at all. In the next pages, I will show that this Report represents, in essence, a resounding failure of judgment on the three findings listed above and is mired in internal contradictions. Indeed, even though I am more than willing to be self-critical, the Report has exposed poor practices at all levels above me within the faculty in a crystal clear fashion – while concluding by disproportionately criticising my conduct in full contradiction to its own findings. Besides, as the second and the third findings show, Van Keulen Commission entertained a shockingly wrong, if not ignorant vision of what scholarly work and independence represents in academia, offering the opposite of the true picture and willing to see the Universities succumb to pure political and media pressure. In other words, the Commission treats its findings unfairly and inconsistently to reach contradictory and incomprehensible conclusions in the general frame of a deep misunderstanding of the essential elements of academic work.

While it is not my intention to debunk every absurdity in the Report, which speaks for itself, and because I have only been given a very limited amount of time to comment the Report before it is submitted, I shall focus solely on the most significant flaws of what Van Keulen Commission has produced. These concern

the three flawed findings mentioned above (II, IV, V), Van Keulen Commission's inexplicable and inconsistent ex-post classification of my purported side-jobs (III), and the missing bigger picture of the political attack against my work (VI). Lastly, I briefly mention the flaws of the investigation process itself, to give a broader view of the process of the investigation I fully cooperated with in good faith. The first section presents a summary of my arguments (I) and the Conclusion concludes.

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## I. Summary of the main arguments

The Report comes to a clear conclusion: ‘Prof. Kochenov gave no advice concerning whether some individuals could obtain Maltese passports. The legal advice he gave dealt exclusively with the elements of the Maltese legal system and the Individual Investor Programme in relation to EU law’ (p. 5, 40, 41). Moreover, ‘there is no evidence that Prof. Kochenov’s academic work was influenced by the honorariums he received’ (p. 44).

**The first flawed conclusion** of the Report claims that the Reputation of the University suffered, since Prof. Kochenov ‘by not notifying the side-jobs [i.e. giving legal advice to the Maltese government] in accordance with the rules, deprived the University of the possibility to pass a judgment whether these side-jobs undermine the reputation of the employer’ (p. 44). To begin with, this assertion is obviously not true in the light of what the Report itself found, namely that giving legal advice to the Maltese government was academic work. Indeed, my Maltese advice was of impeccable quality and concerned the core of my academic expertise, while being paid for it did not affect academic independence – as is the case with thousands of leading professors of law around the world. It is unclear how the reputation of the University could have suffered as a result. No-one anywhere in the world would have a slightest reason to believe that anyone would think that as a Professor I would need a permission to explain the core of my academic expertise to a government of one of the states in a Union the law of which I study. The meaning of the word ‘Reputation’ is clearly misunderstood here by the authors of the Report (just like in the context of their second and third flawed findings).

The Report is also clear on the following. Firstly: there is no definition of a side-job at the Faculty of Law that would comply with Van Keulen Commission’s view of the rules. The Report offers no global – or even national – good practice, however, and is itself unable to say, in essence, what is a side-job. Secondly: there are no workable and coherent procedures to notify the side-jobs at the University, however vacant the definition. Thirdly: the rules on payments on private accounts are equally unclear / non-existent. The fact that the conclusions are not spelled-out clearly – although they unquestionably follow from the text – regrettably reconfirms the inabilities of Van Keulen Commission to give an informed and impartial assessment of the facts, what is also confirmed by two more flawed conclusions mentioned below (Sections IV and V).

The Report shows with clarity that I have fully complied with a clear understanding of what is a ‘side-job’, which was enforced by my direct superior and is also the golden standard in the field. My superior’s definition is wrong, however, according to Van Keulen Commission (p. 34) and complying with it does not count, although I did comply (p. 32). Moreover, the Faculty Board’s definition is equally wrong (p. 5). In fact, the definition is so unclear, that it ‘cannot be clear’ (p. 30). In the context of both levels of superiors offering sub-standard definitions, which are in direct conflict with each other, I am to blame, finds the Report, since I complied with the wrong one (out of two both of which are wrong), while I should have had doubts, especially as a person of a standing of a Professor of Law (p. 30) and asked the Faculty Board (whose definition the Report has dismissed) (p. 30).

‘This is what the procedure, precisely is for’ (p. 29, 30) found Van Keulen Commission, claiming that the procedure for notification of side-jobs in fact provides a means to define them in the context of a ‘dialogue’ with the Faculty Board. The Report found that the Faculty Board’s definition is equally flawed, however. Such a dialogue would require overriding a clear understanding of the direct superior, whose vision has been clear and worked well for more than a quarter of a century. All this shows one simple thing, even though Van Keulen preferred a *non-sequitur* to a clear conclusion: no workable definition of a side-job exists at the faculty of law. I cannot be held responsible for such a lack of clarity.

The Report has clearly showed that I strictly observed every single agreement reached with the Faculty Board following the discovery that there was a conflict between the Dean and the Head of my department concerning the meaning of a ‘side-job’ (p. 5, 33). In fact, immediately after I learnt that the Faculty Board could have a different definition compared with the one enforced by my superior, I have discussed all my activities with them in detail (p. 5 point 5(2)) and submitted (twice) an official form signed by my direct superior, notifying the Faculty Board of what was a side job according to their understanding, which the Commission anyway found wrong (p. 5). Both forms were lost (p. 32), I have never been notified of the fact that this has happened (p. 34) and the Faculty Board has never mentioned any issues with the approval of the side-job to me at numerous meetings (p. 34). Moreover, as I learnt from Van Keulen Report, the Faculty Board also thought that giving legal advice within the sphere of my expertise to the Maltese Government taking on average one to two days a year since 2014 as the Report found could also be a side job, but they have never notified me of this view (p. 29). In January 2020 (1.5 years after submission), says the Report, the Faculty Board found the first lost form – and it was unsigned (p. 33), from which Van Keulen concludes that no authorization to engage in the activity has been given (p. 34). Another possible conclusion, which I reached at the time, is that the Faculty Board has no objection: none has ever been notified to me in any case.

Even more – Van Keulen Commission found, as will be discussed in the next section – that the activity in question was in fact strictly academic and not a side-job at all (p. 29). In my personal experience and as demonstrated with clarity by Van Keulen Report, the faculty of law does not only fail to offer any clear definition of a ‘side-job’. The procedures for registering these are equally unavailable. The fact that I have tried twice (!), however, does not count for Van Keulen Commission: not a single word is said about the exact elements of the procedures the Report aspires to investigate (which are mentioned as a list in p. 10 point 8). The Report is thus much more detailed in its analysis of the employee, rather than the employer.

The same applies to the income from the side-jobs: the Report Finds that the University of Groningen in its rules has not been in compliance with the national guidelines on payments by third parties to the employees private accounts (p. 37). While the Faculty Board policy on this is crystal clear and does not at all prohibit accepting payment for academic work as long as it is not conducted in working time (p. 35, 37) – the reason why the issue of payments for my outreach activities has never even arisen, Van Keulen Commission found that the Faculty Board is not right. The final blame – this time officially for the lack of compliance between University of Groningen rules and the national guidelines, appears as follows: ‘Prof. Kochenov used his function at the University to accept payments on his private bank account’ (p. 44). According to the Report I only acted professionally and strictly in the domain of my expertise and my academic integrity has not been compromised. It is a surprise, in this context, to read that the University that does not know what is a ‘side-job’ and has no workable procedure to have these approved somehow saw its reputation undermined by my scholarly work. This is a *non sequitur* (Section II).

**Inventing undisclosed *ex-post-facto* personal rules.** While reaching the third flawed conclusion, the Report grapples with the fact that the meaning of a ‘side-job’ is not straightforward and comes up with a set of undisclosed rules to this end (instead of setting them clear, the Report only applies, what is implied). These implied rules are then endowed with a strictly personal scope of application (only me) and backfiring force (all what I have done in the past). This self-contradictory exercise is deeply problematic in all its elements and boasts no coherence, logic, or common sense. Precisely since the rules are nowhere disclosed in the Report, they fail to shape any clear idea of a ‘side-job’ on the basis of which the exercise has been conducted. This exercise is filled with truly fascinating contradictions. The Report finds that the core advice on EU law given to the Maltese government is academic (p. 30, note 23), while the rest of my activities on Malta (trips to Malta? Tea on Malta?) are a ‘side-job’ (p. 5); that all my activities for the IMC are academic (p. 29), while being listed as a (non-executive) chair is a ‘side-job’ (p. 5, 29); that being listed on a web-page of Henley and Partners ‘advisory board’, which generated no income or activity (p. 20), and cost zero time (p. 20), was a side-job notwithstanding (p. 5, 29); that all the practitioner conferences, including Henley and Partners’ ones are academic (p. 29), while the same event in Moscow (!) is not (p. 5, 29); that preparing legal advice for the Maltese government is academic (p. 30, note 23), while writing an expert opinion for a Dutch court is not (p. 5, 29) (Section III).

**The second flawed conclusion of The Report** is the following: ‘Prof. Kochenov undermined the reputation of the University [...] by taking a certain risk with his engagements with Malta on a politically-sensitive subject-matter’ (p. 7, 44). This finding is flawed, inconsistent and intolerable, since it is precisely the job of Professors of law to remain faithful to the law in their work, rather than give it up / alter it as a result of political pressure and sensitivities. In a democracy, any matter of grave public concern is politically sensitive. Only such matters are worthy of Professors’ intervention in their government advice. The reputation of the University and academia in general would be significantly damaged if Professors of law were known to follow political fashions in their work / gave up sharing knowledge on any ‘politically sensitive matter’ such as abortions, citizenship, taxation, prostitution, immigration, climate change, product safety, consumer protection, surrogacy etc. Van Keulen Report sees Professors of law as the servants of political sensitivities, which is unacceptable and goes counter the very idea of academic integrity and independence. The Report does it, in total silence of the political attack of Mr Omtzigt and *Nieuwsuur*, which makes the finding even more dubious.

Moreover, this finding clearly contradicts the main conclusion of the Report that ‘The legal advice [Prof. Kochenov] gave dealt exclusively with the elements of the Maltese legal system and the Individual Investor Programme in relation to EU law’ (p. 5, 40, 41). There is nothing political in this at all and presenting this as political would be misunderstanding the nature of EU legal advice. The Report documents my Maltese activities abundantly and mostly correctly. Strictly legal advice is what I have done for the Maltese government over 11 days in the course of 6 years, as the Report finds (p. 18-19). Moreover, the core of the activity is undoubtedly scholarly, and not a side job, as the Report found (note 23, page 30). In the light of the Report’s own clear findings to present this work as potentially harming the University’s reputation or politicized is beyond possible (Section IV).

**The third flawed conclusion** reached by Van Keulen and his colleagues is the following: ‘Prof. Kochenov undermined the reputation of the University [...] by going to a conference of Henley and Partners notwithstanding the strongest advice of the Faculty Board not to go. Later this trip appeared in the press and led to parliamentary questions [in the Dutch parliament]’ (p. 7, 44). The Report also found that the goal of the trip was to announce academic work (p. 25) published by a leading publisher at Oxford and that that particular conference squarely falls *within professorial activities* (p. 29). The conclusion is thus flawed and self-contradictory saying, on the one hand, that going to this conference is academic work and, on the other hand, that this activity undermines the reputation of the university. In fact, the opposite is true: *not* going to a conference to present significant new work as a result of the pressure of some local politicians in one of EU Member States would amount, for a Professor of EU law, to giving up on academic freedom and independence, undermining the very rationale behind the idea of academic work. The finding of the Report amounts to a requirement of politicization of Professorial activities and is thus entirely unacceptable and intolerable. This is particularly so when applied to a Professor of a leading Dutch University known for its academic integrity and making part of top-100 schools in the world. Even more, Van Keulen Commission’s conclusion emerges in a new light given that the ‘press’ it has in mind refers to *Nieuwsuur* and parliamentary questions are asked by the same Mr Omtzigt as part of his political campaign. Moreover, what the Report fails to mention, is that my talk at that same conference led to the coverage of my research by, *inter alia*, *The Financial Times*,<sup>1</sup> *Forbes*,<sup>2</sup> and *Bloomberg*.<sup>3</sup> Silences matter and here they show clear bias, reinforcing the flawed nature of the outright absurd conclusion the Report reaches regarding going to a conference of Henley and Partners to present one of the most important works of my career (Section V).

**Although seemingly clear, the Report entirely misses the bigger picture.** The elephant in the room is the political misinformation campaign against EU citizenship law in general and my work in particular channeled by *Nieuwsuur* in tandem with a Dutch MP, Mr Omtzigt, who attempted to score political points by misrepresenting the totality of the legal practice in the EU regarding investment migration. In his numerous parliamentary questions reported by *Nieuwsuur*, investment migration, practiced by 23 EU Member States –including the Netherlands – became seemingly criminal ‘passport trade’, while investment migration is a legal practice.

A Professor who has actually studied the issue in depth and who told *Nieuwsuur* that investment migration is fully legal under EU law – me – became ‘the Passport Professor’ and was repeatedly scorned and harassed in the media. Working in tandem, Mr Omtzigt and *Nieuwsuur* paid a lot of attention to my person over the Fall and Winter of 2019, publishing several rounds of parliamentary questions (including the ones openly aimed at influencing the investigation behind the Report) and 13 ‘news’ items, including several in prime-time TV. Shooting the messenger does not affect the message however: EU law stands unaltered. Mr Omtzigt’s attack aided by *Nieuwsuur* thus had absolutely no effect on EU citizenship law I study. Indeed, Investment migration flourishes, still fully legal as it was before his attack began.

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<sup>1</sup> <https://www.ft.com/content/f6a3402c-0d32-11ea-b2d6-9bf4d1957a67>

<sup>2</sup> <https://www.forbes.com/sites/alexledsom/2019/11/24/french-nationality-is-the-best-in-the-world-but-a-new-report-says-brex-it-britain-risks-a-dramatic-decline/>

<sup>3</sup> <https://www.bloomberg.com/news/articles/2019-11-21/french-nationality-ranked-no-1-globally-for-eighth-year-map>

Moreover, inventing a ‘passport professor’ did not affect the media landscape either, as only two national newspapers (and *Geen Stijl*<sup>\*</sup>) reported on Mr Omtzigt’s attack at all during more than 6 months of the duration of the sustained *Nieuwsuur* campaign (p. 9).

The news of ‘passport trade’ brought by *Nieuwsuur* and Mr. Omtzigt was obviously a fake. One would expect the Report to be clear on the vitally important context behind all the discussion that underlies its preparation and the investigation behind it. It is not (Section VI). What is worse, the Report actually takes the view that University’s reputation can be undermined as a result of a Professor faithfully doing his job and sticking to the law in ‘politicized circumstances’ as well as not altering research and travel plans in the midst of a sustained media attack, as I shall discuss below. As this *naschrift* will make clear, the Report Van Keulen Commission wrote does not take the side of scholarly work and academic freedom and deeply misconstrues the *raison d’être* of the University and academia (Sections IV and V).

**Lastly**, as I have already notified President de Vries by the letter of 31 March 2020, several days before I was shown a draft of the Report, the conduct of Van Keulen Commission preparing the Report did not appear to be quite professional. The investigators tempered with evidence in potential breach of the law and showing clear signs of bias. They spread falsehoods directly attributed to me to the most senior figures in the investment migration world, directly undermining my reputation. Most disturbingly, Van Keulen Commission engaged in ethnic profiling. To my surprise they went as far as to suggest that translations of my work into Russian – ‘a non-academic language’ according to the authors of the Report – could throw a shade on my academic reputation. For the first time in my whole career in the Netherlands I have been subjected to outright harassment based on my origin and mother tongue. This came months after I signed a contract to have my work released in Russian by *Eksmo*, one of the most prestigious and definitely the biggest publisher in the Russian language. The three key flawed conclusions found in the Report can be easily rebated, but harassment, bias and the lack of professionalism that marked its creation will take a long time to heal (Section VI).

## **II. The first flawed conclusion: Blaming the employees for the lack of clear definitions and procedures**

The Report claims that the Reputation of the University suffered, since Prof. Kochenov ‘by not notifying the side-jobs in accordance with the rules, deprived the University of the possibility to pass a judgment whether these side-jobs undermine the reputation of the employer’ (p. 44). This claim is absolutely unfounded from the point of view of substantive rules – as well as procedures. The first do not exist, the Report itself shows. The second are not easily available, as also clearly follows from the Report. To come to the conclusion above, Van Keulen Commission has produced a *non-sequitur*, failing to provide honest, consistent and clear assessment of all the facts it reported on.

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\* ‘Extreem mooie lul van een professor RUG verdacht van omstreden handel EU-paspoorten’ (27 September 2019): <https://www.geenstijl.nl/5149776/extreem-mooie-lul-van-een-professor-rug-verdacht-van-omstreden-handel-eu-paspoorten/>



The Report rightly finds that I have always honoured and complied with my direct superior's definition of side-jobs (p. 32); have never used university facilities for outreach activities (p. 7 point 4); have always taken vacation or worked on weekends and evenings on outreach (p. 7 point 2); have always been absolutely transparent about all the academic outreach activities (p. 32, 34); which were all conducted in full knowledge of my superiors (p. 6, bullet point 1; p. 6 point 5(2); 34); were mentioned in annual faculty research reports published by the Faculty Board (e.g. p. 20); on my web-pages (p. 6 point 5(1); 32; 34); and in my books (p. 17). This has been the consistent practice during all the seventeen years of my successful career in Groningen.

Below I look first at the non-existent rules (A.), then at the Kafkaesque procedures (B.), to end with a brief analysis of the relationship between outreach and payments present in the Report (C.).

#### A. *Non-existent rules*

The Report establishes beyond any reasonable doubt that there are no clear rules on side-jobs at the Faculty of Law in Groningen. Indeed, it found that *both* levels of my superiors – the Department head (p. 5) and the Faculty Board (p. 5) – employ the definitions of side jobs incompatible with the rules in force. By finding – without giving any reason for this statement – that the rules on side-jobs ‘can never be really clear’ (p. 5), one would expect at least some guidance from the Commission. It comes in the form of a recognition however, that ‘all the criteria available are not clearly explained by the University’ (p. 5). The Commission even cites a letter of the *College van Bestuur* of 11 February 2019 (p. 32), which is extremely broad and totally unclear on drawing the line between academic outreach activities and side-jobs, thus helping little. Moreover, what stands in the letter does not actually apply to my activities, since by the time it was sent I had none, besides the IMC, which has by then been notified to the Faculty Board and discussed with it in detail twice (even if both forms were lost and nothing was signed, although I have never been notified of any problem – see below). The statements of how difficult it is to define a side-job are accompanied by Van Keulen Commission by a set of negative starting points. So it is clear that whether or not payment is received – it does not matter, just as whether the activity is executed in free time or not does not matter (bullet point 1, p. 5). ‘The Commission definitely establishes on the basis of the regulations that in determining whether activities are side-jobs or not an eventual payment or the issue whether the activities are performed in the University time or outside of work time, are not the criteria’ (p. 29). Indeed, the Report, just as all the regulation it has analysed never offers *any* clear criteria, repeating that the criteria ‘are not clearly determined’ (p. 29). It is thus a fact that comprehensible rules are not available, not clear, and thus by definition not easy to follow. The Report is absolutely accurate in documenting the grey area and huge difficulties surrounding the meaning of side-jobs: a clear definition effectively does not exist.

The Report makes clear, also, that no reliable and transparent policy on side-jobs is available. It equally demonstrates that in the absence of clear rules and policy, the visions applied by different superiors at the University can be absolutely incompatible with each other (e.g. p. 5). Despite these findings, which are undisputable, the Report proceeds to affirm that it is my responsibility as an employee to make sure that the rules are applied correctly, which is incomprehensible and totally misleading given the crystal clear demonstration that rules are not clear, their interpretations enforced by superiors are incompatible with

each other and any policy filling the abundant lacunae is evidently and obviously non-existent. How could I have made sure to apply “correct” rules which do not exist?

The Report documents correctly the huge divergences that exist between different key colleagues at the Faculty of Law in terms of what a side-job is, showing that the visions offered by the Dean and by the (former) head of my department, who was employed in Groningen for almost 30 years in this leading role (until the Fall 2019 and as my direct superior until April 2019), are radically different, thus stating the absolute incompatibility of the understanding of side-jobs among my two superiors (p. 28).

What the Report ignores throughout – and what is undoubtedly one its weakest features – is its total failure to engage with good practice. In the absence of rules, practice makes perfect. Moreover, the academic profession has very clear and generally understood norms of good conduct, ethics and professional standards (explained below), which are not necessarily found in the rules. How to deal with side-jobs – in the absence of the rules documented by Van Keulen Commission so well – is thus definitely a field where global good practice has clearly emerged. This is due to the fact that valorization and outreach are of overwhelming importance for the academic legal profession: this is how careers are made and undone.

The department of EU law, which has consistently been at the forefront of its discipline and is renowned among colleagues in its sphere of expertise, has consistently followed international good practice. It is clear from all the facts presented in the Report that I faithfully complied with the understanding of the side-jobs at my department, treating only structural roles as side-jobs. This is exactly how the distinction between side-jobs and outreach activities runs in my field. Advising governments and international organisations, giving key-notes at the most significant academic and practitioner conferences all around the world, writing *amicus briefs* and legal opinions for the courts world-wide on the matters of one’s academic interest is crucial for success in legal academia. One cannot emerge as an international leading Professor of law without abundantly engaging in such activities. What marks them all is that they are not performed on a structural basis: writing an *amicus* is outreach – joining a law firm is a side-job; advising a government on a concrete legal issue is outreach – joining a legal service of a ministry part time is a side-job. This distinction is more meaningful than what might appear at the first glance, since an active Professor at the peak of his or her career is naturally sought after: every day brings countless activities – all of them strictly related to the chosen academic path – pre-authorizing each step in this circumstances is not only impractical: it is also quite silly, given that the majority of these engagements will not amount to more than one or two hours of one’s time.

It is thus no surprise that a definition of a side-job enforced by the Head of the Department was very clear, according to the Report: ‘The conditions were clearly set by the Head of the Department: a ‘side-job’ must be essentially structural, not a one-off activity, and must not be directly connected to University work’ (p. 23). The Report finds this vision, which is the mainstream practice applied to outreach in the leading schools in my field – including Cambridge, Oxford, Bristol, Hong Kong and numerous other Universities – ‘wrong’, as it is not rooted in the applicable rules (p. 29). Moreover, in making this finding, the Report adds an unexpected statement: ‘The commission finds that in the communication between Prof. Kochenov and his direct superior an unjustified criterion of structural / non-structural engagement is used to define a side-job’ (p. 29, see also 34). While the criterion for defining a ‘side-job’ used at the department of European law since I joined it in 2003 is rendered correctly, it is entirely incorrect to

present it as ‘emerging in communication’: a criterion enforced by an employee’s direct superior is the rule, not a point of discussion, even in the context when two great colleagues spent 17 years at the same department. More importantly, however, its voluminous nature notwithstanding, Van Keulen Report *has not offered any other criterion for defining a side-job*. None.

It is clear from the facts reported that I have been strictly and consistently following the definition of ‘side-jobs’ endorsed by my direct superior (p. 23). Moreover, in any event when any permission was officially required for travel to engage in any outreach activities ‘this permission has always been given’ (p. 23). The annual progress meetings with the head of the department, where all the academic activities were discussed, included discussions of all the work and outreach activities in the field of citizenship and nationality law (p. 23). Yet, finds the Report, the annual progress reports contain ‘no passages about side-jobs’ (p. 23). This is not surprising, of course, given that as the Report has itself found and underlined on numerous occasions, all the outreach activities I engaged with would not qualify as a ‘side-job’ under a rigorously followed definition at the department, enforced by my direct superiors. This is exactly what we read in p. 24 of the Report: ‘both Prof. Kochenov and [the Head of his Department] considered [...] outreach activities not as ‘side-jobs’, but as normal activity of a scholar’ (p. 24 see also 34). It goes without a saying that a scholar engaging in scholarly work would not need any permission from his University to do precisely that.

The same definition has not been shared by the Faculty Board, who focused on the criteria of pay and vacation days, equally dismissed by Van Keulen Commission as non-decisive as mentioned above. After I learnt that there was a disagreement about the definitions among my superiors, I immediately complied with the alternative definition (equally flawed in accordance with Van Keulen Commission) as soon as it has been communicated to me. To achieve maximum clarity, I submitted the list of *all* my activities to the Faculty Board. Following a detailed discussion of all my activities with the Board of the faculty I submitted a ‘side-jobs’ form mentioning the IMC – I did not have any other side-jobs in September 2018, as per my understanding of the definitions applied by the Dean. This is why the University spokesperson confirmed to *Nieuwsuur*, as the Report found, that ‘the conclusion of *Nieuwsuur* that Kochenov has not asked for a permission for all his side-jobs and activities is incorrect’ (p. 25).

The way the Report builds on its own findings of fact, however, is most surprising. Van Keulen Commission found that complying with clear guidance from one’s direct superior has never been enough. ‘Precisely because rules on determining what is a side-job are not well worked-out and cannot be worked out well, it is important that all those concerned carefully engage in a process to come to a decision as to which activity is a side-job and what to be done in this regard’ (p.5, bullet point 5; 30). By not discussing with the Faculty board what could be a ‘side-job’, ‘Prof. Kochenov and his head of department have themselves decided whether activities were side-jobs or not, what in the rule is reserved for the Faculty Board’ (page 6, point 2). In other words, the Report blames me for following clear and precise guidance from my direct superior in the context where the rules provided by the employer are unclear, guidelines are not available, and the definitions enforced by different superiors diverge from each other.

Instead of explicitly stating based on the facts already enumerated in the Report itself, that I was doing my best to comply with the rules known to me (so first with the definition of the head of the department, then with the incompatible Faculty Board’s idea, which was equally oblivious of the rules in force, according to Van Keulen Report), the Report suggests that it was my responsibility to be in constant

contact with the Faculty Board about all possible activities, which the head of my department did not consider side-jobs, thus ignoring the explanations and coherent vision of my direct superior and questioning his leadership and 30 years of experience. Even more, the Report clarifies that as an activity is notified to the superiors ‘it is important that a common accord emerges for example through working with examples, through internal meetings and progress report discussions’ (p. 30). In fact – and this directly flows from the fact reported by Van Keulen – this is exactly what has emerged in the department practice over 17 years of my employment in Groningen.

The most surprising finding of Van Keulen Commission, next to the one that the ‘rules can never be clear’, is that precisely due to the lack of clarity it is fundamental, before any activity is performed, to discuss it with the Faculty Board in order to determine if it is a side-job (p. 29). And even more: ‘This is what the procedure is precisely for’ (p. 29 see also 30). It is thus clear that the Report suggests the use of a procedure designed to notify something to the administration also in order to define that “something”. The irony of the Report is immense, given that Van Keulen Commission found that the definition of the Faculty Board is recognized as *not in compliance with the rules*, just as the one consistently applied by the head of EU law department. What is the point, then, to start the procedure of notifying an activity to the Faculty Board in order to have that activity classified if we already know that the rules of classification are, if not flawed, not better than the one which the department has been applying all along?

The Report does not engage with such questions. The presumption that the lack of rules should generate a huge paper flow, rather than push the powers that be to come up with minimally clear rules, is omnipresent, however. Having found that my head of department had full knowledge of my activities and offered a clear consistent vision of what is a side-job, the Report concludes that I should have been more assertive in contradicting my direct superior in the absence of any rules or a slightest indication that any other definitions / approaches were desirable: ‘From someone at the level and standing of Prof. Kochenov (Professor of Law) one can expect, according to the Commission, that he discusses his activities which could be side-jobs with his superior and asks for permission from the Faculty Board’ (p. 30).

This view, with all respect, does not withstand even the lightest scrutiny, since the course of action proposed would, in direct contradiction to what the Report implies, lead to arbitrariness and the lack of predictability, as well as possible conflicts in the work place, since the rules, as the Report itself has found, are not clear and there are no guidelines at the Faculty level either. The suggestion comes down to entering into conflict with the direct superior by dismissing a coherent vision applied for 30 years in favour of a simple lack of rules. To suggest contacting Faculty Board over the head of the head of the department who offers a clear and consistent idea of side-jobs in the context of the absence of rules is logically flawed: if no rules are made available and no rules are clear, it is impossible to know that a rule actually exists and to understand which rules Faculty Board would eventually apply reacting to each individual request.

Even more, in the absence of a definition of a side-job it is impossible to know what such requests should be about. It is not the responsibility of an employee to constantly inquire about the existence of rules, yet to the University to clearly communicate them in such a manner that no conflicting interpretations would be easily possible. Instead of blaming the employees for the failures of the employer flowing directly from the proven lack of clear definitions and policy, as well as the conflicts of understanding between their superiors, the Report, to be coherent and convincing, should have stated the obvious: it is the

responsibility of the employer to make sure that the rules are clear, predictable and easy to follow. Moreover, it is the responsibility of the employer that the rules applied to the employees by different superiors are not incompatible with each other.

### *B. Kafkaesque procedures*

Turning to the procedural side of things, the Report is accurate in documenting constant failures of procedures around side-jobs at the Faculty of Law. Besides the suggestion to use notification procedures in order to define what exactly should be notified, made by Van Keulen Commission, which helpfully connects procedures with substantive rules, the main flaws of procedure documented by the Commission are the following:

- Problems with procedures include unclear and undisclosed grounds of assessment; unclear and undisclosed timelines;
- loss of documents – two out of two in my case, as documented by the Report; reports of the meetings made three months after the said meetings take place;
- failure to share the reports of the meetings with those involved;
- lack of a clear division of competences and responsibilities between different senior colleagues, which leads to the lack of clarity in terms of roles.

This well-documented state of affairs results in a situation when following the procedures is practically impossible, while the attempts to do this lead to entirely unpredictable results due to the Kafkaesque procedural set-up itself, not merely due to the fact that the rules which the procedures are put in place to safeguard are not clear, not worked out and often not available.

Examples of this in the Report are aplenty and very clear. The Faculty Board informed Van Keulen Commission, for instance, that they do not think that giving government advice on the core topic of one's professorial expertise is part of academic activities, using my Malta work as an example (p. 29). Besides the fact that this view contradicts the good practice in my field, where careers are made and lost around outreach, the Report finds, correctly, that 'the Faculty Board has never informed Prof. Kochenov of its view' (p. 29). All my outreach activities were discussed with the Faculty Board in detail immediately after I discovered, in August of 2018, that in the apparent absence of rules my superiors had conflicting visions of what is a side-job. To be expected to comply with non-disclosed view of one's superiors in the context of the absence of rules, as the Report has abundantly established is a nightmare. It is a clear illustration of how problematic Van Keulen Commission's thinking about the formation of rules through constant dialogue is in the context where such dialogue is procedurally corrupted. The cherry on the pie is that the Commission, as opposed to the position secretly taken by the Faculty Board, actually found that my advice to the Maltese Government was academic work (p. 30, note 23). To give another example from the Report: out of the two (!) side-job forms I submitted to the Faculty Board, both signed by my direct superior, none returned to me signed, although both were discussed in detail and no problems in relation to them have ever been communicated to me. Countless other examples are available in the text of the Report.

All this richness in terms of clear examples notwithstanding, the Report however fails to draw proper conclusions from the findings above by interpreting all the procedural deficiencies squarely and uniformly against the employee, ultimately coming to blaming those subject to the untenable procedure for the fact that the procedural set up applied to them is a total failure.

So having found that the Faculty Board lost the form I submitted in August 2018 (p. 32) and that they never notified me or the head of my department about this (p. 34) only to find the form again in January 2020, one and a half years later, unsigned, while several meetings have taken place between me and the Faculty Board in the meanwhile concerning the activities mentioned in the lost and then found form, the Report concludes: ‘The fact that the form has not been signed by the Faculty Board means, according to the Commission, that in the strictly formal sense no permission has been given for any activities for the IMC’ (p. 34). One wonders what the ‘strictly formal legal sense’ means in the context when the unsigned form would have never been found, clearly, if not this investigation.

The Report is not clear on the fact that the procedural situation was actually worse; that *another* form was submitted in January 2019, upon the request, just as the first one, of the Faculty Board which was, just like the first one, signed by the head of my department and never received back at my own office. Just as was the case with the first form, I have never been notified by the Faculty Board whether it was signed or not; whether it was lost or not; whether any of these forms was found. Since the Faculty Board asked me in January 2019 to forward the new – identical – form stating that its approval was a necessary step in my appointment as Professor 2, the form has to have been approved and probably only *then* lost, since the appointment has been accomplished successfully and I have been Professor 2 since February 1, 2019. Given that the form concerned my activities for the IMC and that this Report found this work to be an example of an academic engagement (p. 29) – the position which the Faculty Board has consistently shared in its published Annual Reports (p. 20) – the form was obviously not necessary *per se*.

Speaking about the mysterious loss of two out of two notification forms I submitted to the Faculty Board, both of which were signed by the head of my department and one of which miraculously found by the Dean one and a half years later, Van Keulen Report has this to say: ‘Only IMC was notified, 4 years after the activity started’ (p. 34). This is both incorrect and unfair, since ‘only’ implies that there was anything else to notify, while this was not at all the case, since the Report itself found that I was engaged in no other activities after the appointment as Professor 2, since there was no Malta advice (p. 33) and all the other activities have stopped. Moreover, the Report itself states that I was in full compliance with one of the two definitions of a ‘side-job’ until August 2018, since I had no way to predict that there would be a conflict between the understandings of the matter between my two superiors. Moreover, both of them adopted wrong understandings, find the Report. The conclusion is, quite counterintuitively, that I am to blame for this. The Report does not even pretend to be fair.

The Report repeatedly blames the employee for the grave failures in good administration. Such an interpretation does not flow from the facts amply documented in the Report and reinforces the biased attitude adopted by Van Keulen Commission. Having discovered an absolute chaos at the faculty in terms of rules and procedures on side-jobs, the Report blames me for ‘not notifying the faculty of my side-jobs in accordance with the rules’. One thing emerging from this is clear: looking at the formal soft-rules, rather than the established good practice with a sole aim to justify the conduct of the employer no matter

what, while putting almost grotesque blame on the employee is both unfair and counter-productive: formal rules have led Van Keulen nowhere – or can it be that *everyone* got this simple issue wrong?

### *C. Income from outreach activities*

The key finding of the Report concerning the fees received for outreach activities is the following: ‘there is no evidence that Prof. Kochenov’s academic work was influenced by the honorariums he received’ (p. 44). The Report rightly underlines that the notion of the conflict of interest is not worked out in detail in the rules (p. 38) and proceeds to explain that it concerns, in essence, the problems stemming from the fact that someone would simultaneously engage in several activities/ occupy several functions (p. 38). To my mind it would be difficult to apply this to academic advice given by a Professor of Law on a non-structured basis for maximum of three days a year on average. In any way, it is clear that given that my work has not been influenced by the honorariums received (p. 44), it would be difficult to find a problem here, but the Report does, in a self-contradictory fashion. Developing the issue of honorariums, the Report states the following: ‘Prof. Kochenov used his function at the University to accept payments on his private bank account’ (p. 44). And states that my superiors – who had full knowledge of all the fact, according to the Report – should have been ‘more alert’. This finding is pregnant with numerous assumptions and seems to misrepresent my work, for which the honorariums were due, as well as the applicable University rules.

Not a single superior I have in Groningen has ever raised an issue of any problems that could relate to the honorariums I receive – just as many colleagues do. The employer had the full knowledge of the facts: a large share of my honorariums went to the Department Foundation, as the Report found (p. 18). The employer thus had a clear idea not only about the outreach activities, but also about the honorariums. To claim otherwise is impossible, since only my direct superior has access to the Department Foundation bank accounts, as the Report has also found (p. 36).

Since I advised Malta also after the University’s tacit attack against the Foundations like that one, and the Faculty Board continued praising me for outreach in the field of citizenship by investment in its Annual Reports, it is impossible for the University to claim no knowledge of it. The Report found that I have always been absolutely transparent concerning all my outreach activities (p. 32, 34) – and the issue of payments is not an exception. It is absolutely certain in this context that payment for Malta advice was obviously not an issue for the faculty and has never been perceived by anyone as happening in breach of any rules. Indeed, during the numerous instances when it was formally discussed with my superiors, including the Faculty Board, no procedure has ever been pointed out to me that should have been applied. It is most logical to conclude, in this context, that should there have been any clarity on this issue – substantive or procedural – at the Faculty of Law, I would be asked to comply with the rules and procedures. This has never happened in my 17 years of employment in Groningen.

### *Honoraria for academic work*

This is not a surprise, since the work was in fact conducted in full compliance with all the rules known to me. The rules concerning fees from academic work at the Faculty of Law are uncontestedly clear. The Report is right, presenting the Faculty Board’s policy in this regard: ‘the employee can keep the fees as a

private person if he or she as a guest speaker at a conference or academic activity, receives a fee on top of the reimbursement of travel and lodging' (p. 37). The Report finds that the core of Malta work, which I conducted is academic work and *not* a side-job (note 23 p. 30) and confirms that this work has not been conducted in University time (p. 18, 19). The same applies to *all* the other activities for which I received honoraria. Indeed, the Report finds that for all the activities it sets out to analyse I have taken vacation or worked on weekends and evenings (p. 7 point 2). That I have not used University facilities (p. 7 point 4). That I acted strictly professionally only giving legal advice to the Maltese government (p. 5). I was thus clearly in full compliance with the Faculty Board's understanding, shared by the head of my department. It is illogical to find any issue with payments which are received in full knowledge of the employer and comply in full with what is the policy of the employer, as the Report itself found.

However, the Report takes an issue with the Faculty Board's policy. The Report's disagreement with the Faculty Board's policy is an issue, which is totally unrelated to the rules applied to my particular case. Any criticism of the Faculty Board by the Report cannot in any way be interpreted against one of the employees, one would expect. The Report, however, does precisely that.

#### *Honoraria from side-jobs*

The picture is slightly different with side-jobs. As the Report found, however, I had none of those, should a consistent interpretation enforced by my direct superiors apply and in the absence of other rules (see A. above). Concerning side-jobs, Van Keulen Report finds that in accordance with the relevant University rules in force until October 2017 the income from activities conducted outside working hours goes to the employee (p. 35). From November 2017 – agreement of the University is necessary. This change of rules has never been clearly notified to the employees of the University and I learnt about it from the Report. While I shall of course stick to this rule in the future, a much better notification of what is expected of the employees is the responsibility of the University. This being said and more importantly, the Report has established with clarity that the absolute majority of outreach work for which honorariums were received was conducted *before* the change of rules (p. 36) and resulted from activities strictly conducted outside of working hours (p. 37). It would thus be difficult to find lack of compliance, even for those who believe that outreach activities are side-jobs, in direct contradiction to the definitions enforced by my direct superior.

The Report finds, however, that the University of Groningen rules in force before November 2017 were not fully in line with national guidelines (p. 37). It is clear, moreover, that *Sectorale regeling* in force from November 2017 only covers the income from side-jobs, not eventual remuneration for outreach activities which are not side-jobs (p. 35). The objectives of informing the employer of any additional income are also clear: to prevent any conflict of interest (p. 35). It is clear that any eventual payments directly flowing from the academic activity as such, such as royalties for academic books, or speaking fees for academic events, summer schools and advice making part of the job cannot cause any conflict of interest.

Having established the lack of compliance of the University with the national rules, the Report proceeds *to blame me for this*, saying that, while I fully complied with the University rules as explained to me by the head of my department and as also understood by the Faculty Board (p. 37, para. 5), my actions were not in line with the national guidelines, since these were not correctly implemented by the University of Groningen (p. 37). This finding does not withstand any criticism, since an employee complying with the



rules established by the employer is not responsible for the employer's compliance with the national standards. The Report is thus unfortunately deeply inconsistent on this point.

*Deeply inconsistent conclusions*

The Report has thus established that the University of Groningen did not comply with the national rules on payments for side-jobs, that the Faculty Board has different rules for payments for academic outreach and side-job activities, that the employer had full knowledge of my activities and payments for them and has never found an issue with this. The Report shows why: my activities were in full compliance with my superiors' understanding.

It draws strange conclusions from this, which is not at all based on the rules applied to my case by the head of the department and the Faculty Board: 'The Commission finds that accepting payments on the private bank account next to the salary for regular work and without the knowledge of the University of Groningen is not legitimate, particularly so, given that Prof. Kochenov claims to have no side-jobs' (p. 38, see also 39). Van Keulen Commission thus disagrees with the Faculty Board that as long as academic activity is conducted in free time, the fees should be kept by the employee (p. 35) and with the head of my department, who believed that none of my activities were side-jobs, as well as its own finding that the core of my Malta work was strictly academic (note 23, p. 30). Moreover, it also contradicts its own finding that all my activities were conducted in absolute transparency and with full knowledge of my direct superior (e.g. p. 32, 34), who, moreover, was the sole person with access to the bank account to which roughly 1/3 of all the honorariums went (p. 6 point 6, 35). Clearly, it is quite difficult to be receiving money on the account of the Department foundation for the activities, which are thoroughly discussed with superiors and, moreover, praised in the annual scientific reports of the Faculty and have no knowledge of my activities.

It is thus not correct to claim as the Report does, firstly, that the money was received 'without the knowledge of the University'. Moreover, secondly, it is also clearly impossible to claim that being paid, while in full compliance with the rules known and applicable at the relevant time is 'illegitimate'. Thirdly, to state 'particularly so, given that Prof. Kochenov claims to have no side-jobs' is equally incorrect, given that ordinary academic activities do generate additional remuneration on numerous occasions and such remuneration is covered by a clear policy of the Faculty Board as the Report itself found (p. 35). The fact that the Commission finds the policy wanting does not change the rules applicable to my case at the time the Commission discussed.

The Report puts the blame in the wrong place. Indeed, accepting honorariums in full compliance with standing rules and when it is clear that the honorariums do not affect one's academic independence – the facts established by the Report – cannot be reproached to the employee. The Report's stance is all the more counter-intuitive, since in replying to the question whether my academic work was in any way influenced by the honorariums received, the Report's answer is crystal clear: 'the Commission has no reasons to believe that this has been the case' (p. 39).

### III. Van Keulen Commission's attempt to apply non-disclosed *ex-post-facto* rules to my activities

The Report demonstrates with clarity that there are no clear rules on side-jobs at the University of Groningen; that, procedurally, the non-existent rules are not easy to follow; that there is no reliable and transparent policy on side-jobs, including payment for side-jobs; that the visions applied by different superiors at the University can be absolutely incompatible with each other on all elements of dealing with side-jobs: substance, procedure, payments. Instead of offering any clarity on any of these points, the Report states that the rules 'cannot be clear' (see A. above) and then nevertheless lists a large number of my outreach activities as side-jobs, although these activities were not considered side-jobs neither by the head of my department nor by the Faculty Board. In other words, while the Van Keulen Commission considers that these rules 'cannot be clear', it takes the liberty of defining which of my activities are side-jobs or not without specifying any clear rules which would define what is side-jobs or not. In its assessment of all activities following strictly *ex post* reasoning, which contradicts both levels of my superiors, the Report comes to the conclusion that: 'giving lectures to colleagues and broader public falls, in the eyes of the Commission, within the term valorization and is thus not a side-job' (p. 29), while conducting 'concrete (*inhoudelijke*) activities that are not by definition purely academic for the third parties and which at the core of it does not belong to the function of an academic' (p. 29) would be side jobs. Inspired by such basic considerations, Van Keulen Commission then proceeds to apply non-disclosed *ex-post facto* rules to my activities, which appears as quite surrealistic – to a Professor of law, at least.

This activity is deprived of any sense or coherence, shedding absolutely no new light on the subject-matter of side-jobs in the context of the rules and procedures at the University of Groningen.

As a consequence of this, the Report first creates – although without ever disclosing with clarity – and then applies – although without explaining the mechanisms of such application – strictly personal *ex-post facto* 'rules' on side-jobs. These 'rules' are specified nowhere in the Report; These 'rules' only apply to me; These 'rules' apply to past activities predating their creation by Van Keulen Commission; These rules do not comply with any of the visions of a 'side-job' enforced at the Faculty of Law following both the interpretation of my supervisor and this of the Faculty Board. Complying with them, in short, is *absolutely impossible* by definition, as is clear from the outset. This opens the question as to the added value of the exercise, the Report engages in.

Moreover, there are several important problems with this exercise. First, it contradicts the Report's own findings that there are no rules and if there are, they are not clear and 'cannot be clear'. Second it does not introduce any consistent or clear criteria to explain the actual contents of the *new* non-disclosed rules, which the Report suggests that it is applying. Third, the never-disclosed rules apply to the facts and activities *predating* the purported creation of these new non-disclosed rules by the writers of the Report. Fourth, the non-disclosed rules are made in the context of the investigation concerning my activities and are thus strictly personal in their application.

Besides obviously contradicting the Report's own findings, one does not need to be a legal theorist to see that such an approach breaches all the most basic elements of the very notion of a 'rule': rules should be openly available, rules should be clear, adopted by the proper authority, publicly available, they should have general application, they should not have back-firing force, and they should not be self-

contradictory. What the Report proposes by way of sorting my past academic outreach activities clearly fails on all these counts: it does not meet any of these basic criteria.

It is worth looking in detail at what Van Keulen Commission actually does, rereading my academic record. The Report finds that both my superiors are wrong in their vision of what is a side job. The head of my department is wrong, since it does not matter, whether an activity is structural or not (p. 5). The Faculty Board is wrong, since it does not matter whether there is payment received for the activity and whether it is exercised in University time or not (p. 5 point 1). It does not offer own definition.

The Report states that the following activities are academic and not side-jobs: ‘activities of Prof. Kochenov for the academic programme of the IMC, his activities in the context of the QNI, his lectures at Henley and Partners conferences at the European University Institute and Romanian Centre for European Policies and Clingendael Institute’ (p. 29), as well as the research conducted for the Maltese government: ‘the research report written for Malta concerning the relation between legal residence and presence in a country from the standpoint of European law and law and practice of EU Member States is an exception to [side-jobs]’ (note 23 at page 30). Following the logic applied by the Report, this actually covers *all* the activities the Report analyses, as I show below.

More particularly, in the other category – the category of side-jobs, the Report lists the following:

1. ‘The majority of work for Malta’ (p. 5) is thus found to be a ‘side-job’. This finding is baseless and self-contradictory.

Van Keulen Commission found to be academic, rather than a ‘side job’ the analysis of the law and the preparation of the study on ‘the relation between legal residence and presence in a country from the standpoint of European law and law and practice of EU Member States’, which I co-authored with a colleague from Germany, and which was based on an earlier note I have written for the Maltese government (note 23 at page 30). In the light of this finding it is unclear, which other activities exactly are left: the proclaimed side-job is deprived of its essence since there are no other ones.

Academic experts are invited to state the law with clarity and defend their position / explain the law, should any questions regarding the initial advice arise. The same happens at conferences, seminars and workshops: you prepare research and defend it at a meeting. This is exactly what I have done. Preparing the standpoint on EU law is thus the essential core of the whole engagement and cannot be separated from answering possible questions about the same restatement in the course of eventual meetings in Brussels or in Valetta. Answering questions is inseparable – and certainly not least academic – than preparing, precisely, the legal standpoint. Indeed, an academic advisor has no other input to generate / knowledge to share, than academic expertise presented in the overview of the law he or she prepares.

This is exactly what I have done for the Maltese government over 11 days in the course of 6 years, as the Report finds (p. 18-19). I was paid for this activity, but payment, as the Report finds is not crucial for determining a side-job (p. 5). I did not conduct this work in University time, finds the Report (p. 18, 19), but this is not relevant for determining whether it is a side-job or not

either (p. 5). Moreover, the core of the activity is undoubtedly scholarly, and not a side job, as the Report found (note 23, page 30).

Given these facts, it seems that Van Keulen Commission classified the statement of the law as academic, while answering questions about it as not. This finding is self-contradictory and does not help to understand the unwritten ex-post-facto rule it is supposed to illustrate.

2. Chairmanship of the IMC, including directorship of IMC Services Ltd. (p. 5, 29) is said to be a side-job. This finding is baseless and self-contradictory.

Van Keulen Report finds that the ‘academic programme of the IMC’ is not a side-job, but an academic activity (p. 29) and that ‘Prof. Kochenov is responsible for [this] academic programme’ (p. 19). It further finds that ‘The functions of Prof. Kochenov are non-executive, given that all the [executive] work is done by a CEO appointed for this purpose on a full-time basis. *The activities of Prof. Kochenov related to IMC (and IMC Services Limited) appear to be related to the organization of the annual academic day before the annual Investment Migration Forum and the coordination of the Academic Working Papers*’ (p. 20, emphasis added). The fact that my position at the IMC was strictly about the guidance of the academic programme is further proven by the finding of the Report that a full-time CEO, not me, was responsible for all the executive tasks ‘as is clear from the statute’ (p. 19). Moreover, IMC Services Ltd., finds the Report, has effectively no life of its own as it ‘consists of the secretariat, is wholly owned by and existing to support the IMC based on the documents studied by the investigators’ (p. 19).

Van Keulen Commission further finds that all the academic IMC activities are mentioned in the annual research reports published by the Faculty Board as ‘research results’ of the faculty (p. 20). The same finding is made with relation to the *IMC Working Papers*, which I co-edit (p. 20). These activities are not side-jobs, but academic work, according to Van Keulen Report (p. 29).

Given that it is clear from the above findings of the Report, that the academic programme of the IMC, which is not a ‘side-job’ as per the Report, was my *sole responsibility*, indeed, the reason behind my co-founding of the IMC, while I have never exercised any executive tasks, as the Report itself found, the finding of the Report that IMC is a ‘side job’ is obviously self-contradictory and does not help to understand the unwritten ex-post-facto rule it is supposed to illustrate.

At the moment when I was promoted to Professor 2 in February 2019 the IMC was the only academic side-activity I engaged in, so to be fully formally correct – while being clear about my purely academic and non-executive function at the IMC, as the Report itself found (p. 19, 20), I have (twice) submitted a form informing the University of this engagement. The forms got lost in the castles of Kafkaesque procedures (see B. above).

In essence, I agree with Van Keulen Commission’s analysis: there is nothing to report as a side-job, when all what is done is academic work, for which the University takes full credit. The conclusions reached in the Report that such an activity is still somehow a ‘side-job’ is entirely self-contradictory, however, given how clear are the facts.

3. Membership of the advisory board of Henley and Partners (p. 5, 29) is said to be a side-job. This finding is flawed, since it is not based on facts.

The Report is abundantly clear that what is called an ‘advisory board’ is an on-line list of individuals, which has never had any function to fulfil. The Report states that the board ‘has never formally met’ (p. 20) and that I therefore ‘never any time spent on this function’ (p. 20). I have always been transparent about this (p. 21, 32), just like numerous other nominal boards, usually related to journals, which list individuals, but have no function. The Report is clear that the board in question has never fulfilled any function whatsoever and has not been an ‘activity’, properly understood, has never taken any time and has not generated any income, being listed online is a ‘side job’.

Van Keulen Commission finds, however, that ‘That the board has never met does not play any role here’ (p. 29 note 24). No explanation is given as to why this statement would make any sense. The Report has found itself that any ‘side job’ should be a ‘concrete (*inhoudelijke*) activity for the third parties’ (p. 29). The purported Henley and Partners board is not ‘concrete’ and is not an ‘activity’. It is thus unclear how this can be a ‘side job’.

4. Work for Henley Estates Russia CIS (p. 5, 29) is said to be a side-job. This finding is deprived of any logical foundation.

The Report found that I ‘wrote a short note in Russian on the role of EU law in the protection of EU citizenship statuses acquired via investments based on earlier academic work’ (p. 20). The Department foundation was paid for it and it took less than half a day of non-University time to compile. This kind of outreach writing clarifying the law is in no way different from writing an op-ed about legal developments or explaining the law to a Member State, which the Report finds to be academic (see above). There is thus no clear reason why this ended up on the list of side-jobs and the Report never says. Putting such engagements on a side-jobs list would require professors to clear every 2-pager and makes no sense whatsoever. Worse still, it absolutely does not make it easier to understand the undisclosed rules Van Keulen Commission has in mind, while engaging with the definition of ‘side-jobs’.

5. Writing a 2-page memo for Everaerd Advokaten (p. 5, 29) is said to be a side-job. This finding is deprived of any logical foundation.

It is essential for Professors to share knowledge with colleagues and wider society, as the Report itself found. Spending 1.5 hours on a weekend to provide a legal opinion in the context of a court case in the sphere of one’s academic interest (led by the leading law office on citizenship and immigration matters in the Netherlands) is what Professors of (citizenship) law do all the time – paid or not – this activity belongs to the heart of the academic legal profession. The finding is

deprived of any foundation, since the only difference between this task and preparing the memo for the Maltese government, which *was* academic in the eyes of Van Keulen Commission is the *length* of the report. The shorter the report – the more likely it is to be a side-job is not a finding consistent with the explanations and analysis contained in the Report and is thus deprived of a proper foundation.

6. Writing a memo for Frendo Advisory (p. 5, 29) is said to be a side-job. This finding is deprived of any logical foundation.

The nature and scale of the work conducted here is very similar to Everaerd Advocaten. To prevent Professors of law from having their voice heard in the court cases revolving around the subject-matter of their interest goes against the very idea of the academic legal profession. To be a full-time legal academic and doing a consequential job in terms of outreach is not an ‘extra’ activity.

7. Moderation of a Moscow conference on investment residence in Malta (p. 5, 29) is said to be a side-job. This finding is self-contradictory.

The Report has already found that Henley and Partners conferences – and other practitioner events are obviously not side-jobs, but essential outreach activities. The only difference between this event and a myriad others is the location: Moscow. Their suspicion of the Russian language and culture notwithstanding (see Section VII), such location should not have influenced the judgment of Van Keulen Commission. Moscow practitioners of investment migration are entitled to hearing the same stories as the ones told in Dubai, Hong Kong, Zürich and Valetta, where other very similar conferences have taken place. Payments do not form a relevant criterion to determine whether an activity is a ‘side-job’, the Report found (p. 5). So although I was paid for speaking at this event and leading it, the same is true for Italian, Dutch and Romanian events, which the Report found to be academic, although the audiences were equally fully composed of practitioners (p. 29). This finding is self-contradictory and deprived of any foundation.

Given that no other suggested side-jobs are listed in the Report and given that it is clear that the authors had a very hard time – and ultimately failed – to come up with coherent reasons that would be clear from the classification of activities they provided, the added explanatory value of what Van Keulen Commission wrote is nihil. Should the Report’s own reasoning be honestly, rigorously and consistently applied, the authors would be compelled to conclude – just like the head of my department – but possibly for different reasons, that I have not had any side-jobs at all during the course of my Professorship in Groningen. I have nevertheless launched two side-job forms into the Kafkaesque bureaucracy about the IMC, notwithstanding the fact that my activities there were purely academic, as the Report itself found. I have never heard about these forms from the Faculty Board ever since, but read interesting stories about the twists and turns of their turbulent lives in Van Keulen Commission’s Report.

#### **IV. The second flawed conclusion: Scholars should stay away from ‘politically sensitive’ subjects to protect the reputation of their University**

The first flawed conclusion is the following: ‘Prof. Kochenov undermined the reputation of the University [...] by taking a certain risk with his engagements with Malta on a politically-sensitive subject-matter’ (p. 7, 44). The Report rests on a deeply disturbing assumption: that independent academic work, if engaging with ‘politically sensitive’ subjects, can harm the University’s reputation. Such obscurantist stance goes against the very *raison d’être* of Universities and academia in general.

This finding is based on a flawed assumption that being crystal-clear about the law in force can damage the reputation of a Professor of law and his University. This point is not true to the facts: to know the law and ensure that it is presented with clarity and without political bias, but is backed by cutting-edge legal research, is precisely the task of any professor engaging in outreach, which is the vital part of my profession.

In this context, citing possible political bias that misrepresents the law as a reason *not* to engage in a professorial job and not to remain impartial and professional is absolutely illogical. Political interests change constantly and members of parliament here and there will always, all around the globe, have their petty political interest to befog the issue. This being said the law stays – and the position of the Professor consists, precisely, in paying no attention to political attacks which misrepresent the law for whatever reason. Criticizing academic lawyers for doing their job based on the fear of political attacks and ‘sensitivities’ would make outreach activities absolutely impossible, as legal advice on the issues which are not discussed and which are not politicized – *i.e.* which are deprived of societal relevance – will never be needed.

In an apparent attempt to mitigate the absurdity of the finding, the Report states that ‘the question is whether Prof. Kochenov in 2014 could predict what later, in 2018 and 2019 would happen around this matter in Malta’ (p. 5). This question is entirely irrelevant, of course, given that EU law – the matter of my expertise on which I provide advice – has not changed at all. Moreover, whatever happens on Malta is of little relevance for EU law, since Malta is the smallest Member State in the Union of 27 nations. EU law on the division of competences in the matters of citizenship and residence applicable on Malta, which I clarified, thus applies also in the Netherlands, France, Poland, Germany, and plenty of other places.

Should the standpoint adopted in the Report be true, outreach and sharing of legal knowledge on euthanasia, abortion, immigration, prostitution, election laws, surrogacy, political and military conflict, non-discrimination and plenty of other issues would not be possible. The societal relevance of professors and their ability to play their part in our democracies would be rendered moot, while the idea of academic independence will disappear under political pressure. This is thus definitely not a well-founded and insightful finding. Pleasing the politicians is not – and has never been, one among professors’ tasks. It is necessary, therefore, to conclude that the Report represents a most clear example of a resounding failure of judgment and draws on political assumptions outright incompatible with the very idea of independence of the academic legal profession.

**V. The third flawed conclusion: Scholars should never act in ways, which might displease a local politician in one of the EU Member States to save the reputation of their University**

The Report presumes that independent scholarship, if disapproved by politicians, can harm the University's reputation. Indeed, this is the Report's second flawed conclusion: 'Prof. Kochenov undermined the reputation of the University [...] by going to a conference of Henley and Partners notwithstanding the strongest advice of the Faculty Board not to go. Later this trip appeared in the press and led to parliamentary questions [in the Dutch parliament]' (p. 7, 44). Also this obscurantist stance – just like the assumption of undesirability of sharing legal knowledge on 'politically sensitive subjects' goes against the very *raison d'être* of Universities and academia.

The Report finds that presenting an important piece of scholarly work (the Quality of Nationality Index (QNI)) undermines the reputation of the University, while this work was published by one of the world-leading publishers (Hart Publishing, Oxford), and was presented at a professional conference organized by one of the leading firms in my field of expertise next to the leading professors in my field of legal scholarship. The Report itself finds that these conferences unquestionably fall within the ambit of 'academic activities' (p. 29) just as the QNI (p. 29). Moreover, the work in question was positively covered in *The Financial Times* (twice), *Forbes*, *Bloomberg* and even *The Daily Mail*, among several hundred other news outlets the world over. Can a University's reputation suffer as a result of a presentation of scholarly work published with a top publisher at one of the most influential scholar-practitioner events followed by coverage in top-tier media world-wide? A reasonable answer would be 'highly unlikely'. The conclusion concerning the University's reputation thus contradicts the findings of the Report, is flawed, and is pregnant with dangerous assumptions.

Given that the findings of the QNI, which I presented, have been covered in the leading press all over the world as a follow-up of the London event, the key word behind this particular finding of the Report seems in fact to be 'Parliamentary questions' (p. 7, 44). The finding is thus designed *to accommodate* the political attack, which the Report seemingly failed to notice (Section VI). This intention goes against the very essence of the definition of scholarly work, which should be independent from political pressure. In harmony with the first inconsistent conclusions of the Report discussed above, the finding of the Report about the London conference misrepresents the reality and the essence of scholarly work; whatever questions Members of Parliament decide to ask, it cannot in any way be a trigger of changing a Professor's scholarly programme or behaviour.

By not mentioning the actual gains for the University's reputation, such as *The Financial Times*, *Forbes*, and *Bloomberg* citations of my work following the London presentation, the Report, most surprisingly, gives *Nieuwsuur* a priority above the global leaders of reporting. The Dean was absolutely right when he explained before I went to London that he would never prohibit me from going: such a prohibition would put the University at the service of politicians, making academic work impossible in the face of the political attacks. The Report has rightly found the QNI to be an academic project (p. 29). Defending it from political pressure is crucial. The Report is correct in stating that the Dean inquired whether I could consider stopping the research on the QNI given the political pressure. My answer was clear: 'it is not for Deans to determine Professors' academic programme, certainly not for political reasons' (p. 33).



Van Keulen Commission appears quite upset about this basic starting point, wondering, in essence, why scholarship should be independent, i.e., why the Faculty Board has not introduced harsher measures following the first acts of the complex political attack against my work, which Mr Omtzigt and *Nieuwsuur* has started (p. 34, 35). The Report states, quite correctly, that ‘It is extremely important for the Universities to prevent damaging the good name of the institution, for instance in the field of academic independence’ (p. 27). The real-life application of this consideration in Van Keulen Report is quite counter-intuitive, to say the least; by asking me not to do my job for political reasons – going to a conference in London qualified by the report as “academic activities” – the University actually attempted to prevent me from carrying out my tasks of an academic in full independence.

## **VI. Failing to take note of the ongoing political attack**

The main findings of the Report are clear and straightforward. ‘Prof. Kochenov gave no advice concerning whether some individuals could obtain Maltese passports. The legal advice he gave dealt exclusively with the elements of the Maltese legal system and the Individual Investor Programme in relation to EU law’ (p. 5, 40, 41). Moreover, ‘there is no evidence that Prof. Kochenov’s academic work was influenced by the honorariums he received’ (p. 44).

What led to these findings, is the fact, according to the Report, that ‘on the basis of the TV programmes and articles an impression was created that Prof. Kochenov was involved in “passport trade on Malta”’ (p. 4). This is not enough to explain the very reason behind the investigation and the preparation of the Report in the first place. The reason is simple: ‘passport trade’ was – and is – nonsense. It does not exist, so in the real world outside of *Nieuwsuur*’s abuse of journalism no one can be involved in ‘passport trade on Malta’. A Dutch MEP found an ally in *Nieuwsuur* to wage a political attack against my work in order to score points around the opposition to the state of the law on citizenship and residence in the EU. It is this attack, which is the reason behind the Report and the investigation. Regrettably, the Report misses the vital context by not spelling this out with clarity.

The Report is absolutely right to quote the 2014 European Parliament Resolution, which clarifies that ‘matters of residence and citizenship are the competence of the Member States’ (p. 16). It equally rightly states that ‘currently according to the European Commission there are investment migration programmes in operation in several EU countries, including the Maltese investment migration programmes’ (p. 16). This important point fails to give a truly complete picture of the full acceptance of investment migration in contemporary European law. Malta is a mainstream example, not an exception. According to the 2019 report of the European Commission, these include direct citizenship by investment in Bulgaria, Cyprus, Malta and, less systematically Austria and potentially other Member States. Besides Bulgaria, Cyprus, the Czech Republic, Estonia, Greece, Spain, France, Croatia, Ireland, Italy, Lithuania, Luxembourg, Latvia, Malta, the Netherlands, Poland, Portugal, Romania and Slovakia offer (permanent) residence statuses for investment, which are often convertible into citizenship of those Member States. The fact that this example is being politicized, does not affect the state of EU law on citizenship and residence all around the Union, which is my core professional expertise, and with which Malta is in full compliance.

The attack against my work and EU law on citizenship, reflected the political aspirations of Mr Omtzigt, a Dutch MP eager to politicize the issue of investment migration by branding it ‘passport trade’, in an attempt to make it sound illegal, if not criminal. The law is crystal clear, however. Investment migration is fully legal and practiced all over the world also outside the EU (including in Canada, Turkey, the UK, the US). Mr Omtzigt’s parliamentary questions about my work allowed him to wage the political attack against the state of the law and its overwhelming acceptance all around the world, which Mr Omtzigt happens to oppose. This was done while using my engagement with the law he dislikes as a media pretext.

Ironically, the law, which Mr Omtzigt is politically alarmed about, is not his to change: a Dutch politician is not enough to alter EU rules and investment migration in Europe is flourishing. The political attack I experienced thus has nothing to do with any substantive expected result: Omtzigt is all fur and no knickers. From the outset he could do nothing besides pure publicity seeking. Mr Omtzigt found an ally with *Nieuwsuur*, ready to report on ‘passport trade’, thus giving preference to particular political aspirations over the law and over the facts. *Nieuwsuur* used my willingness to summarise the law in an interview and my general prominence in the field of EU citizenship as a trigger of public attention. *Nieuwsuur* and Mr Omtzigt created a ‘passport professor’ engaged in mythical and potentially criminal ‘passport trade’. This worked in a very simple way: Mr Omtzigt would ask parliamentary questions about non-existent ‘passport trade’ using the misnomer for the legal approach in force in 23 EU Member States, according to the European Commission, and *Nieuwsuur* would make a report on it, parodying it as news. Answers would come – and *Nieuwsuur* would report on them. New questions trying to put open pressure on the investigation concerning my work would come from Mr Omtzigt – and *Nieuwsuur* would report on them as ‘news’ again. Once answers arrive: *Nieuwsuur* reporting is ready. This is a clear example of a tandem of one journalist and one MP trying to make news and failing, which is probably the reason why they stopped: in response to their 13 acts until now, including 10 *NOS* web-page articles (p. 9), and prime time TV, only two national newspapers reacted, as the Report clearly indicates (p. 9). The reason behind the media silence is quite clear: it takes minimal curiosity to discover that *Nieuwsuur*-Omtzigt tandem is a flop and the national media in the Netherlands, just as the international media outlets possess enough of such minimal curiosity.

## **VII. Flaws of the investigation**

Lastly, as I have already notified President de Vries by a letter of March 31, 2020, a couple of words need to be added about the investigation process itself that Van Keulen Commission conducted. Processes tend to affect results. To be brief, I focus on four points: tampering with evidence; spreading outright falsehoods attributed directly to me among third parties; bias and lack of professionalism; harassment and ethnic profiling. The investigation was not conducted in good faith and the deeply biased and incoherent Report it produced is a direct reflection of the lack of impartiality and professionalism that marked the process of the investigation all along.

Firstly, the investigators tampered with the evidence submitted to them, by scrapping anonymization on the correspondence with the third parties, including government agencies, which I shared with them, thus

showing profound disrespect of the privacy of others and the lack of professionalism on the verge of outright illegal conduct.

Secondly, the investigators were undermining my reputation by sending around questionnaires to the third parties, which contained absurd and untrue statements ascribed to me. For example, they forwarded to Henley and Partners – a world-leading investment migration firm – a number of questions stating that I claimed to be chairman of the board of that organization – a claim I have never made and a position I have never held. The investigators repeated this lie a number of times, significantly harming my reputation.

Thirdly, the investigation involved intimidating questioning about my views on the political situation on Malta, which has nothing to do with any of my activities or my expertise as a Professor of EU law: the investigators openly connected my legal advice on EU citizenship and residence in law and practice in the EU – with political murders in that country. Such ignorant and outright absurd accusations deeply shattered me, especially given that advising a Member State of the EU is the highest honour any Professor in my field can receive. The very assumption that EU law depends on any developments in Malta and that sharing EU law expertise with a Member State government could be something prejudicial and uncommon, which underlined the investigators standpoint throughout is deeply unprofessional and absolutely flawed, raising questions concerning the investigators’ independence and impartiality, even in the absence of any expertise on the subject-matter, which they abundantly demonstrated. The investigators wondered whether I was ashamed, for instance, of receiving a letter from the Maltese Prime Minister, thanking me for providing excellent legal advice to the country on the matters of EU law.

Worst of all, however, was truly unbearable harassment and ethnic profiling that I experienced, throughout this investigation. The investigators informed me, for instance, that my mother tongue – which is Russian, the language of the UN and several dozens of Nobel prize winners – is not an academic language and that the translations of my works into Russian could raise questions concerning the scientific nature of my scholarship. My professional integrity was questioned based on my background and my mother tongue.

The investigators’ treatment of my work, language, and identity is not mere ignorance and carelessness. It is a textbook definition of what should never happen at the work place following the EU Race Directive. Harassment, defined by the Directive, as “when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”. I have never been so humiliated in my life, especially in the circumstances so absurd and unfounded, as the ones surrounding this investigation.

## **Conclusion**

The Report is absolutely unequivocal in its main finding: ‘Prof. Kochenov gave no advice concerning whether some individuals could obtain Maltese passports. The legal advice he gave dealt exclusively with the elements of the Maltese legal system and the Individual Investor Programme in relation to EU law’ (p. 5, 40, 41). Moreover, ‘there is no evidence that Prof. Kochenov’s academic work was influenced by the

honorariums he received' (p. 44). Van Keulen Commission thus provided a much awaited rehabilitation in the face of a political media attack I was subjected to.

Numerous conclusions drawn from the facts the Report presents are absolutely unacceptable, however. This concerns more particularly: consistently blaming employees for the demonstrably proven lack of clear rules, procedures and the missing shared understanding of key notions by their superiors; openly applying *ex-post facto* undisclosed personal rules based on the absence of clear regulation to one randomly chosen member of staff of a University; interpreting Kafkaesque procedures found to be missing clarity, reliability and functionality against the employees trying to comply with contradictory demands. These concern, lastly, and most importantly, the dangerous assumptions underlying the Report's portrayal of the very nature of legal scholarship: Van Keulen Commission takes a stance opposing academic independence and would welcome the politicisation of Professor's work. The finding that Universities risk to lose reputation unless their Professors give in to local political pressures and journalistic bullying is particularly unacceptable.

The Report is thus firmly immune to the very starting points of the ethics and purpose of the academic profession, unsurprisingly coming to a set of flawed, contradictory and outright embarrassing conclusions. The investigation itself was marked by harassment, tampering with evidence, and the spreading of falsehoods in an attempt to prove the political attacks in the news right. Such investigations and Reports as the one I was subjected to are a threat to any University's reputation and a shame of our University community.