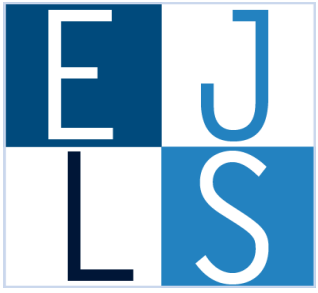
Volume 9
Issue 1
Summer 2016

European Journal of Legal Studies

www.ejls.eu



European University Institute

DEPARTMENT OF LAW

European Journal of Legal Studies
Vol. 9 No. 1 (Summer 2016)

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EDITORIAL

Elias Deutscher

EXIT

For many, the morning of Friday the 24th of June 2016 was one of those mornings where, upon waking up, you feel like immediately going back to bed. Now, months after that morning's results of the 'Brexit' referendum, a general feeling of disbelief and incomprehension still prevails. So far, it appears difficult to make sense of why so many Britons voted to 'leave'. Nobody knows where Britain's and Europe's journey lies – least of all those who campaigned for Britain to 'leave' the European Union (EU). Only one thing is certain: Brexit raises a host of political, economic and legal questions. However, while the current legal debate already focuses on the exegesis of the 262 words of the notorious Art. 50 TEU, the political and legal 'message' that the 'Brexit' vote conveys remains a conundrum.

In seeking to understand the basic mechanics underlying Brexit, the totality of events surrounding the referendum offers us an occasion to rethink Albert O. Hirschman's well-known categories of 'voice' and 'exit' in the context of the European integration process.[1] Hirschman uses these two concepts to describe two alternative modes of reaction towards the deterioration in performance of any kind of social, economic or political organization. Whilst the 'exit' option refers to the possibility of leaving the dysfunctional organization, the 'voice' option implies that the organization's members articulate their dissatisfaction, rather than leaving the organization, in the hope of changing and improving the organization's performance from within.[2] The basic upshot of Brexit is that instead of choosing the 'voice'

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[1] This is not the first time that Hirschman's categories have been used to offer an explanatory model in the context of the European Integration process. See for instance Weiler, Joseph Halevi Horowitz, 'The Transformation of Europe' (1991) 100(8) The Yale Law Journal 2403. Both concepts are, however, applied differently here.

[2] Albert O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Harvard University Press 1970) 4.

option, which constitutes the dominant strategy of articulating discontent within a political system, the majority of British voters expressed their dissatisfaction with the EU by opting for 'exit', thus renouncing any opportunity to express their dissatisfaction, or trigger changes, from within.[3]

Yet the most puzzling feature surrounding many Britons' vote, lies not in their choosing the 'exit' option as such, but in the apparent irrationality of such a choice. Indeed, the outcome of the British EU referendum casts doubt upon the validity of Hirschman's model, which frames the decision between the two alternative strategies, 'voice' and 'exit', as a rational choice based on costs and reasonable expectations about future benefits.[4] By contrast, the United Kingdom ('UK') chose the 'exit' option regardless of its tremendous economic costs.[5] Moreover, the 'exit' option also appears to be inconsistent with the 'leave' campaigners' political goal to 'make Britain great again'. Paradoxically, withdrawing from the EU, while remaining in the internal market, means that the UK will continue to be subject to EU regulation, yet, without having any influence on its future content. It is perhaps this startling irrationality of the 'Brexit' vote that legal research should try to understand, for it may provide interesting insights into the current state of the EU, the UK and the potential shape of their future relationship.

An initial, simple, but nevertheless insightful conclusion that we can draw from the results of the Brexit referendum, would be that democracy does not always go hand in hand with rational decision-making, not to mention the pursuit of the general interest of a political community. Indeed, Brexit perfectly epitomizes Rousseau's differentiation between the two categories of *volonté de tous* and *volonté générale*. While the former constitutes the mere aggregation of private, vested interests, only the latter guarantees the general interest, the *intérêt commun*.[6] Brexit also offers us the opportunity to

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3 ibid 30.

4 ibid 36.

5 The UK HM Treasury analysis on the economic consequences of Brexit (published 3 months before the referendum) estimated the annual (!) economic costs of Brexit to be between £2,600 and £5,200 per household depending on the terms of the free trade agreement (EEA, Canada/Switzerland, or WTO) after the UK leaves the EU.

6 Jean-Jacques Rousseau, *Du contrat social [1762]* (Flammarion 2001) 68.

remember how Rousseau, who is so often invoked as an intellectual pioneer of deliberative democracy, repeatedly stressed that the people must be sufficiently well-informed, so that the results of a direct, deliberative democratic process may adequately reflect the general interest of a polity.[7] Now, one can legitimately question whether the people of the UK were sufficiently well-informed in the case of the Brexit referendum. Arguably, the referendum was not really about 'Europe' and the goals, prospects and challenges of the EU integration process. Instead, internal party power plays, populist scaremongering and deliberate misinformation dominated political discourse and deliberation in the run-up to the referendum.

However, a serious attempt to understand the rationale underlying Brexit should go beyond the finding that it was an uninformed and, consequently, irrational choice. Instead, it would be more interesting to understand what might have caused the shift in the perception and 'frame'[8] of many British politicians and voters; a shift that, to many, made the 'exit' option appear as the better alternative to more than 40 years of choosing 'voice'. While constituting the dominant strategy for articulating discontent within a political system, the choice of the 'voice' option heavily depends on the 'prospects for effective use of voice'.[9] Accordingly, Brexit might be understood as a reaction towards a perceived loss of influence that the UK believes its voice has experienced within the EU. The shift from unanimity to qualified majority in most of the EU policy areas, the multiplication of players as a consequence of the EU enlargement waves and the important role of the 'judge-made' law of the Court of Justice of the European Union ('CJEU'), constitute only some of the factors that might explain the UK's impression that its voice is being disregarded within the EU.

However, it is not only the way in which EU rules are adopted that has shaped the UK's negative perception of the EU during the last years, but also the

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7 ibid 69.

8 'A player's frame is, most simply, the set of variables she uses to conceptualize the game' Michael Bacharach and Michele Bernasconi, 'The Variable Frame Theory of Focal Points: An Experimental Study' (1997) 19 Games and Economic Behaviour 1, 4.

9 Albert O. Hirschman (fn 2) 37.

substantive content of said rules. Contrary to recent popular contestations of EU policies elsewhere in Europe, the political uproar in the UK was not directed against 'austerity'. Rather, the EU policy field that was stigmatised most in the Brexit debate was – alongside banking regulations and 'red tape' in the internal market – the free movement and social rights of EU workers and citizens.[10] Hence, first and foremost, Brexit constitutes a rejection of those rights which lie at the core of the 'European Social Market Economy' in its current form.

Nevertheless, Brexit has also shown us which fields of EU law continue to appeal to the UK. Britain's conviction that it could remain part of the internal market, even after its withdrawal from the EU, albeit without the free movement of workers and persons, might explain how the 'exit' option could have been perceived as a viable alternative to their membership within the EU. Yet, this same conviction shows how flawed Britain's conception of the internal market is, as it ignores how the internal market goes beyond the utilitarian calculus of a free trade area. On the contrary, the internal market also constitutes a political project based on the idea, and promise, that socially constructed categories, such as nationality, should not have a determinant impact on a person's ability to realise its way of life. The current political discourse in Britain, but also in other EU Member States, overlooks the fact that the internal market has its roots in the goal of overcoming nationalism and creating a transnational space for economic, cultural and social exchange, opportunities and interdependence. Therefore, being part of the internal market without the free movement of persons, in the end, means not being part of it at all.

Applying the concepts of 'exit' and 'voice' to the outcome of the British EU referendum also allows us to shift our focus to those individuals whose 'voice' has not been heard during the referendum. What about the 'voice' of the 48.1 percent of the British voters who opted to 'remain'? What about the young generations who will bear the long-term consequences of the UK leaving the EU? Let alone the Britons who have lived within another EU Member State for more than 15 years and those EU Citizens who have lived and worked in

[10] European Council, Conclusions of 18 and 19 February 2016, 13–24.

Britain for years and were not allowed to vote. The fact that those individuals who are most directly concerned by the outcome of the referendum, had no right to make their voice heard, casts doubt on its truly democratic character. Brexit will entail the loss of important and fundamental economic, social and political rights for those individuals in particular. So far, it remains completely uncertain whether said individuals will be able to effectively invoke and protect their rights, for instance, by challenging the Brexit decision before the British or even European courts. The exponential surge in British applications for citizenship of other EU Member States in the aftermath of the Brexit vote, as well as the perspective of a second Scottish referendum, suggest that the UK will sooner or later be confronted with its own issue of a wanted 'exit', raised – perhaps in many ways quite ironically – by those same individuals whose 'voices' have not been heard during the referendum.

Yet, the most worrisome feature of Brexit is not the outcome of the referendum as such, or the consequences that it will entail, but the music that both accompanied and enabled this decision: A cacophony of chauvinistic, intolerant and sometimes even openly xenophobic voices. The message that Brexit conveys goes beyond the simple rejection of a more political, 'ever closer Union'. It also symbolizes the widespread success of voices currently advocating an 'exit' from a value space that encompasses the basic legal and political achievements of liberal democracy. This phenomenon is, however, not confined to the UK. The same Siren calls currently lure popular support all over the continent and also dominate political discourse outside of Europe. From this perspective, Brexit also poses a broader question: How can we explain the disenchantment of an increasing part of the electorate, with some of the most basic fabrics of liberal democracy – which are in the end also genuinely legal? Understanding this broader phenomenon of 'exit' will become one of the most pressing tasks for social scientists and legal scholars in the upcoming years.

VOICE

While the political events of the last months stand for 'exit', this issue of the European Journal of Legal Studies (EJLS) stands, once more, for 'voice'.

First of all, it stands for 'New Voices'. In this issue our 'New Voices' section features two fascinating essays. The first one, by *Simone Marinai*, touches upon what is currently one of the most salient political and legal issues in Italy. It discusses the Italian policy regarding the registration of same-sex couples, in light of the recent Italian law that introduces civil unions for same sex-couples, and the recent development of CJEU and ECHR case law on this matter. The regulation of online platforms, which increasingly affect our daily consumption patterns, is the topic of the second 'New Voices' essay, written by *Pablo Solano Díaz*. His essay, critically reviews the policies of National Competition Authorities and the EU Commission towards price parity clauses in digital markets – one of the hot topics of EU competition law.

The 'New Voices' section, which provides a platform for young scholars to publish critical essays, to question well-accepted legal concepts and to test new ideas, best reflects the commitment of the EJLS to promote young and critical legal scholarship. Therefore, we are very happy to announce that our Journal will reward the authors of the best 'New Voices' essay of the upcoming academic year with the 'EJLS New Voices Prize' amounting to 500 EUR.[11] The entire EJLS team is extremely grateful for the generous and helpful support from the EUI Department of Law, without which this prize would not be possible. We encourage all interested authors to submit their New Voices essays and we are looking forward to receiving and publishing many fascinating pieces.

Second, EJLS also stands for innovative voices. Therefore, we have recently published a call for papers in the field of Empirical Legal Studies in order to provide a new forum for publications relying on this cutting-edge and promising way of conducting legal research. We are very glad that the current issue features the first article to be published by the EJLS in the field of Empirical Legal Research. In their piece, *Michael Hein* and *Stefan Ewert* empirically examine how different types of procedures affect the politicization of European constitutional courts.

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[11] Please find a separate call for papers setting out the detailed procedure and requirements on our website www.EJLS.eu.

Third, EJLS also stands for polyphony, inviting a plurality of submissions in International Law, Comparative Law, European Law and Legal Theory. In this issue, the reader will once again find articles covering a broad spectrum of topics and salient legal issues. While the concern about EU's democratic deficit has dominated academic and political discourse in the last decades, *Michael Rhimes*, in his contribution, tackles the EU's 'judicial deficit'. He takes issue with the CJEU's restrictive interpretation of the rules on standing for direct actions under Art. 263 (4) TFEU, which also continues after the reforms of the Lisbon Treaty hindering private litigants from making their voice effectively heard before the EU courts. *Armin Steinbach*, in his contribution, sheds light on the range of different legal instruments to incentivise the implementation of structural reforms available under the current regime of EU macroeconomic governance. Alongside the measures available under the regime of the Stability and Growth Pact, he analyses in particular the legal questions surrounding the recent proposal to use contractual agreements as alternative means to promote the implementation of structural reforms within the EU. In turn, *Auke Willems*, in his article, unravels the different legal and social meanings and roles of the concept of 'mutual trust' as fundamental principle underlying EU criminal law. The final article, by *Michele Mangini*, tries to achieve something that many might currently consider impossible: identifying a base for transcultural consent between Islamic and Western societies. By exploring Islamic law and ethics, he takes the reader on a fascinating intellectual journey and identifies in the Islamic tradition of virtues a potential foundation of human rights in Islamic societies.

Fourth, the European Journal of Legal Studies also provides a critical review of current developments in academic legal literature. In this issue's book review section, *Jotte Mulder* critically reviews two recent books on EU state aid law. Both, *Francesco de Cecco*'s 'State Aid and the European Economic Constitution' and *Juan Jorge Piernas López*' 'The Concept of State Aid under EU Law' constitute attempts to shed a new, more contextualised light on this highly technical field of EU law. *Graham Butler*, in his review, discusses *Marise Cremona's and Anne Thies'* (eds.) 'The European Court of Justice and External Relations Law: Constitutional Challenges' which constitutes one of the few

publications, so far, to focus exclusively on the CJEU's role as a key player in the development of EU external relations law.

Despite the diversity of voices and topics present in this issue, there is something missing. Unfortunately, the reader will not find a single woman amongst the authors of this issue. This is, of course, by no means a deliberate outcome of our editorial policy, and we would like to seize the opportunity to specifically encourage female legal academics to submit their articles for publication.

Exit

Unfortunately, as an academic journal run entirely by doctoral researchers, EJLS is confronted each year with the 'exit' of its members, due to long-standing editors having to complete their theses or starting their professional careers. After many years of excellent work, Afroditi Marketou and Mikhel Timmerman leave their positions as Heads-of-Section for Comparative and European Law, respectively. Moreover, Marita Szreder, who has been responsible for the editing and layout of the journal, will pass on her position as Executive Editor. On behalf of the entire EJLS editorial board, I would like to thank all three of them for their outstanding work. Moreover, I would like to thank all internal and external reviewers whose critical, thoughtful and timely reviews constitute the heart of the EJLS.

This summer, the EJLS will also face an unusual 'exit'. After 40 years, the EUI law department leaves Villa Schifanoia, where the EJLS has been edited for the last nine years. Moving from Villa Schifanoia means leaving a very special place steeped in century-long history. If we are to believe historical sources, Villa Schifanoia was part of the setting of Giovanni Boccaccio's '*Decamerone*' – one of the masterpieces of Italian Renaissance literature. Leaving Villa Schifanoia offers us the occasion to evoke Boccaccio's voice, as an homage to the unique spirit of this place. As an epilogue, the reader will find the story of *Melchizedek*, which is one of the most beautiful accounts in *Decamerone*. In 1779, this story also stood model for the '*Ring Parable*' in Gotthold Ephraim Lessing's play '*Nathan the Wise*', which went down in the history of literature as a call for religious tolerance. The message of *Melchizedek's* story of the three

rings – an appeal for tolerance that is not necessarily confined to religion, but valid with regard to all sorts of beliefs and truths – has not lost any of its relevance in our turbulent times.

NEW VOICES

RECOGNITION IN ITALY OF SAME-SEX MARRIAGES CELEBRATED ABROAD: THE IMPORTANCE OF A BOTTOM-UP APPROACH

Simone Marinai*

This paper aims to challenge the traditional concept of marriage, as union between persons of opposite-sex, which until now has underlain the Italian policy of registration of same-sex marriages celebrated abroad and that the recent Italian law introducing civil unions for same-sex couples has not set aside completely. To this end, this paper explores the interplay of rules on EU free movement of persons and human rights and the recognition of a legal status created abroad. In a situation where the (national and supranational) legal framework fails to address all the problems, a bottom-up approach fuelled by societal change and its reflection in increasing litigation could be decisive. In fact, this kind of approach could lead to solutions which do not always fall into step with the normative context, but which is equally important in order to raise awareness of the need to eradicate any discrimination against same-sex couples.

Keywords: Marriage, same-sex, free movement of persons, right to respect for private and family law, Italy, recognition.

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I. Challenging the Traditional Concept of Marriage as a Union Between Different-Sex Persons

On May 11th this year, the Italian Parliament passed a law introducing civil unions for same-sex couples (Law 2016, no 76).[1] The adoption of a specific legal framework providing for the recognition and protection of same-sex unions in Italy could no longer be postponed, especially after the Strasbourg Court (ECtHR), in *Oliari and Others v Italy*,[2] had found that the latter had violated article 8 of the European Convention on Human Rights (ECHR) failing to recognize and to protect same-sex unions in its national legal system.

The new law does not extend the right to marry to same-sex couples, but at least provides them with many rights previously reserved to married couples (e.g. rights related to social welfare, to tax law, to labour law, to migration law, etc). The main difference between marriage (for different-sex couples) and civil union (for same-sex couples) remains that a child born during a civil union is not a child of the couple, but only a child of the biological parent. Moreover, the new law explicitly excludes same-sex couples from the possibility of jointly adopting a child, while it does not provide anything with regard to stepchild adoption (i.e, the adoption by one partner of the other same-sex partner's child) which – although with great difficulty – is beginning to be recognized by the Italian courts. Furthermore, the sole fact that the institution of marriage is still reserved to different-sex couples and is not open to same-sex couples might be considered discriminatory in itself and might constitute an obstacle to the free movement of same-sex couples.

It should be clarified, from the outset, that the new Italian law on civil unions does not address in detail the issue of recognition in Italy of same-sex marriages concluded abroad. Rather, it delegates the regulation of this subject to the Italian Government in accordance with the principle that the Italian regulation on civil unions will be applicable to same-sex couples who

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1 Legge 20 Maggio 2016, no 76, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, Italian Official Journal no 118 of 21 May 2016.

2 *Oliari and others v Italy*, Apps nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).

have celebrated a marriage, or a civil union, or a comparable form of partnership abroad. This implies that a same-sex marriage celebrated abroad will only produce the effects of a civil union in Italy with the consequent downgrading of the couple's rights.

The aim of this paper is not to analyse the specific provisions of the Italian law on civil unions. Rather, the paper aims to challenge the traditional concept of marriage, as a union between persons of opposite-sex, which until now has underpinned the Italian policy of registration of same-sex marriages celebrated abroad and still constitutes the rationale of the new Italian law on civil unions.

To this end, I will explore the interplay of rules on freedom of movement of persons and human rights on the recognition of civil status records. First of all, in Section II, I will pay attention to the principle of non-discrimination and to the rules relating to the free movement of persons within the territory of EU Member States as enshrined in articles 18 and 21 of the Treaty on the Functioning of the European Union (TFEU). Thus, I will assess the extent to which those principles represent a real duty on every EU Member to recognize the family status created in another Member State. Secondly, in Section III, I will analyse the ECtHR's case law which established that a status validly created abroad might be entitled to protection under human rights law and, in particular, under the right to respect for private and family life as covered by article 8 ECHR. It is not evident whether this case law might also be applied to ensure an automatic recognition of a same-sex marriage celebrated abroad.

In Section IV, I will examine the evolution of recent Italian case law relating to the Italian policy of registration of same-sex marriages celebrated abroad. I can anticipate that the number of judicial decisions in favour of the recognition of same-sex marriages concluded abroad is limited. However, some openings can be identified in this case law and their importance is shown by the circumstance that they convinced more and more same-sex couples to seek the recognition of their marriage celebrated abroad, and to challenge the refusal to record through legal action.

The increasing litigation certainly reflects the societal evolution and, together with other signals that I will explore in Section V, shows that the way same-sex is perceived in Italy is gradually changing.

In my opinion, even after the adoption of the recent Italian law on civil unions, the (national and supranational) legal framework fails to solve all the problems. Nonetheless, in Section VI, I will conclude that the results achieved through this paper show that in order to eradicate any discrimination against same-sex couples, a bottom-up approach generated by individuals' behaviours and their attempts to seek recognition of their rights, could force the current normative context and push towards the gradual erosion of the traditional concept of marriage as a union between different-sex persons.

II. THE EU AND THE FREE MOVEMENT OF SAME-SEX COUPLES

The development of EU law is the first field that puts pressure on the traditional concept of marriage.

The European Union is not endowed with specific competence in substantive family matters. Indeed, a dedicated legal basis on family matters is only provided in the field of judicial cooperation in civil matters. In particular, EU institutions, operating under article 81(3) TFEU (and previously, on the corresponding article 67 TEC), may establish measures concerning family law with cross-border implications. The main instruments through which those private international law competences have been implemented are represented by the Brussels II Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters,[3] and the Rome III Regulation concerning the law

[3] Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 [2003] OJ L338/1.

applicable to divorce and legal separation.[4] However, the lack of a dedicated legal basis for substantive family law is not contradicted by the regulation concerning family reunification which has been elaborated upon in light of the wider goal of the free movement of persons and has allowed the European Court of Justice (ECJ) to rule on family matters and issues related to same-sex couples.

With particular reference to the rules on the keeping of civil status records, the ECJ has held on several occasions that those rules fall within the competence of the individual Member States. However, the ECJ has also stated that the exercise of that competence by the Member States must comply with EU law and, in particular, should not hinder the principle of non-discrimination and the rules relating to the free movement of persons as enshrined in articles 18 and 21 TFEU.[5]

In accordance with this view, the ECJ considered that the obligation to comply with those objectives may imply that personal status – at least in some cases – should not be questioned by the authorities of another Member State.

In particular, in *Garcia Avello*[6] and in *Grunkin and Paul*[7] the ECJ held that the failure to recognize a surname legally acquired and registered in another Member State is liable to cause serious inconvenience for the Union citizen concerned in so far as it constitutes an obstacle to freedom of movement that

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4 Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10.

5 On the topic, see Heinz-Peter Mansel, 'The Impact of the European Union's Prohibition of Discrimination and the Right of Free Movement of Persons on the Private International Law Rules of Member States – With Comments on the Sayn-Wittgenstein Case before the European Court of Justice' in Katharina Boele-Woelki et al (eds), *Convergence and Divergence in Private International Law, Liber Amicorum Kurt Siehr* (Eleven International Publishing-Schulthess 2010) 291 ff.

6 Case C-148/02, ECLI:EU:C:2003:539, *Carlos Garcia Avello v Belgian State*.

7 Case C-353/06, ECLI:EU:C:2008:559, Stefan Grunkin and Dorothee Regina Paul.

could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued.[8]

The principle of non-discrimination has proven particularly effective with reference to the rights of same-sex couples who have entered into a registered partnership. In particular, in *Tadao Maruko*,[9] in *Jürgen Römer*[10] and in *Frédéric Hay*,[11] the ECJ dealt with the interpretation of Directive 2000/78[12] whose purpose is to combat certain forms of discrimination in the areas of employment and occupation, including that on grounds of sexual orientation, with a view to putting the principle of equal treatment into effect in the Member States.

In all these three cases, according to the ECJ, the assessment of discriminatory treatment was subject to the condition that the person who entered into a same-sex registered partnership in the Member State concerned could be considered in a legal and factual situation comparable to that of a married person. According to the ECJ, the assessment of that comparability must not be carried out in a global and abstract manner and must not consist of examining whether national law generally and comprehensively treats registered partnership as legally equivalent to marriage. Rather, the assessment must be carried out in a specific and concrete manner in the light of the right concerned. It is evident from the

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8 Considerations of public policy such as the prohibition of title of nobility or the need to respect the national identity of a Member State, which includes protection of a State's official national language, have been considered legitimate objectives capable of justifying restriction of the recognition of a surname and, thus, to the freedom of movement and residence enjoyed by citizens of the Union. See Case C-208/09, ECLI:EU:C:2010:806, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*; Case C-391/09, ECLI:EU:C:2011:291, *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn*.

9 Case C-267/06, ECLI:EU:C:2008:179, Tadao Maruko v Versorgungsanstalt der deutschen Bühnen.

10 Case C-147/08, ECLI:EU:C:2011:286, Jürgen Römer v Freie und Hansestadt Hamburg.

11 Case C-267/12, ECLI:EU:C:2013:823, Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres (ECJ 12 December 2013).

12 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

reasoning of the ECJ that the right of every EU Member State to decide whether the registered partnerships have to be treated as equivalent to marriage remains unaffected.

However, the case law concerning the interpretation of Directive 2000/78 that I just mentioned, deals with EU social policy and in particular with situations where the parties did not exercise their right of free movement within the European Union. In contrast, in my view, when the right to freedom of movement is at stake, it is more difficult to admit that EU Member States hold an absolute discretionary power to decide whether (and to what extent) to recognize the effects of a same-sex registered partnership or even of a same-sex marriage celebrated in another EU Member State.

In fact, the refusal to recognize the status created in another Member State could represent an obstacle to the free movement of persons and thus would hinder one of the fundamental goals of EU integration. For this reason, it should be stressed that it is possible to affirm the existence of a real duty on each EU Member to recognize the personal or family status created in another Member State.[13] However, the extent of such a duty requires clarification. In my opinion, it seems reasonable that some authors specify that the requested Member State may refuse to recognize the status created abroad in case the relevant situation has no connection to the State of origin or in the case of a breach of a concerned State's public policy.[14] In fact, I think that this approach is in line with the ECJ's case law on mutual recognition of surnames duly acquired in another Member State to which I referred above. In that context, the ECJ has warned that an obstacle to the freedom of movement of persons might be justified where it is based on objective considerations and is proportionate to the legitimate objective of the

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[13] See, eg, Roberto Baratta, 'Problematic elements of an implicit rule providing for mutual recognition of personal and family status in the EC' [2007] IPRax 4; Laura Tomasi, *La tutela degli* status *familiari nel diritto dell'Unione europea* (CEDAM 2007) 95 ff, 235 ff.

[14] This cautious approach is recommended by Christian Kohler, 'Towards the Recognition of Civil Status in the European Union' (2013-2014) 15 YB Priv Intl L 13, 26-7.

national provisions.[15] In particular, considerations relating to public policy might justify the national restrictive measure and thus the refusal to recognize the status created abroad. However, the ECJ stressed that the concept of public order must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any oversight by the European Union institutions.[16]

The sensitive nature of this issue is confirmed by the cautious approach taken by the EU institutions. In fact, whilst the importance of facilitating mutual recognition of civil status has been repeatedly underlined in various non-binding documents,[17] it has also been specified that an automatic recognition might be better suited to certain civil status situations such as the attribution or change of surnames, and might prove to be more complicated in other civil status situations such as marriage.[18] Moreover, it is significant that when drawing up the proposal for a Regulation concerning the simplification of the circulation of certain public documents, the prospect of introducing a mechanism to automatically recognize civil status certificates issued by other EU Member States was considered too ambitious, and therefore it was decided – at least for now – not to address the issue of the effects of public documents between the Member States.[19]

The EU institutions have not taken – to date – a strong stand in favour of recognition of same-sex couples even when they regulated family reunification.

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[15] *Sayn-Wittgenstein* (fn 8) para 81 and the case law there cited.

[16] ibid, para 86.

[17] Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations {SEC(2004)680 and SEC(2004)693}, COM(2004) 401 final of 2 June 2004, p 11; European Parliament, Resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme (2010/2080(INI)), P7_TA(2010)0426 para 40; Green Paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, COM(2010) 747 final of 14 December 2010, para 4.

[18] Green Paper (fn 17), para 4.3.

[19] COM(2013) 228 final of 24 April 2013, 6.

In particular, Directive 2004/38[20] recognizes the right of the spouse or of the registered partner of an EU citizen, to move with his (or her) family member, or to exercise their right to family reunification within the territory of a Member State. But a problem arises, first of all, because the Directive makes no further specification regarding the applicability of the concept of 'spouse' to same-sex marriage.[21] During the preparatory work that led to the final text of the Directive, political reasons convinced the EU institutions to avoid any further clarification of the concept of spouse and any explicit extension to same-sex couples, as that would be unacceptable to certain Member States.[22] The result of that omission is that certain Member States refused to recognize the free movement rights of a member of a married same-sex couple.[23] Secondly, with regard to the reunification of the non-married couple the Directive specifies that the partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of a Member State, may avail himself (or herself) of the free movement rights under the Directive, if the legislation of the host Member State treats registered partnerships as being equivalent to marriage and in accordance

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[20] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

[21] This issue is dealt with in depth by Scott Titshaw, 'Same-Sex Spouses Lost in Translation? How to Interpret "Spouse" in the E.U. Family Migration Directives' [2016] Boston U Intl LJ 45.

[22] The original broad approach of the European Commission, according to which the term 'spouse' included also same-sex marriages, is evident in the answer that the Commission gave to a specific question of the Italian delegate and that can be read in Council of the European Union, Interinstitutional File 2001/0111 (COD), no 15380/01, 18 December 2001, 7. The changing approach and the decision to intend the term 'spouse' to refer to heterosexual couples only can be observed in Council of the European Union, Interinstitutional File, 2001/0111 (COD), no 10572/02, 10 July 2002, 11.

[23] European Union Agency for Fundamental Rights (FRA), *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis* (2009) <www.fra.europa.eu/sites/default/files/fra_uploads/192-FRA_hdgso_report_Part%201_en.pdf> 66-7, accessed 28 April 2016.

with the conditions laid down in the relevant legislation of the host Member State. This means that the Directive leaves it to each Member State to decide whether to regulate registered partnership and whether to consider it as equivalent to marriage.

Neither of these marriage qualification issues has been addressed by Directive 2003/86 (the so-called Family Reunification Directive)[24] which applies to a third-country national who wants to join his (or her) spouse (also a third-country national) when moving to, or within, EU territory. In respect of the interpretation of the term 'spouse' in the Family Reunification Directive, the arguments I discussed in relation to Directive 2004/38 apply. Moreover, the Family Reunification Directive leaves it to the Member States to decide whether to authorise the entry and residence of the unmarried partner with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership.

With regard to the issue of the qualification of spouse, the ECJ stressed in the past that, according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite-sex.[25] However, in this specific case the ECJ had to decide whether the refusal to grant a household allowance to a same-sex registered partner could be regarded as being discriminatory and did not deal with family reunification issues. Furthermore, the statement of the ECJ was rendered in 2001, when openness to same-sex marriages in the legislation of so many Member States had not yet manifested.

For these reasons, the ECJ would probably not decide in the same way a request for a preliminary ruling on the interpretation of the term 'spouse' in the framework of the free movement of persons in light of the rapid development of the concept of marriage seen in a significant number of Member States over the past few years. It has been noted that, in principle,

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[24] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

[25] Joined Cases C-122/99 P and C-125/99, ECLI:EU:C:2001:304, *D and Kingdom of Sweden v Council of the European Union.*

in such a case, the ECJ could interpret the term 'spouse' according to three alternative solutions:[26] in accordance with the law under which the marriage took place; in accordance with the law of the host State; or adopting an autonomous concept of 'spouse'.

In my opinion, although it would be decisive in solving the problem, this last alternative risks being perceived as too intrusive. Arguments in favour of the first alternative (the application of the law of the country of origin) or in favour of the second alternative (the application of the law of the host State) could be carried out. Without a doubt, the cautious approach shown by the EU institutions in drawing up the Directives 2003/86 and 2004/38 may point to qualifying the term 'spouse' according to the law of the host State, which would be a solution most respectful of the autonomy of each Member State in such a sensitive subject, not delegated to the EU competences.

However, considering that both the Directives tend to ensure the freedom of movement of persons and that an increasing number of Member States allow for same-sex marriage in their legislation, I think that an evolutive interpretation by the ECJ that could favour the free movement of the couple – as would be an interpretation of the term 'spouse' according to the law of the country of origin – should be preferred. The proposed interpretation would make it clear that the choice of a Member State to reserve marriage to different-sex persons does not prevent same-sex couples married abroad from the right to family reunification. Thus, the right to free movement of same-sex couples will be better achieved, with the result that the entry of new family models into more traditional countries will become increasingly frequent. The increased mobility and the diversification in life models will be a catalyst of social change, with the consequence that, at least in the long term, the belief of the uselessness of maintaining the traditional concept of marriage might exert its influence also at a political and normative level.

[26] See Koen Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' [2011] Fordham Intl LJ 1338, 1355 ff.

III. The Right to Respect for Family Life and the Recognition of Same-Sex Marriages Celebrated Abroad

The traditional concept of marriage comes under assault – apart from EU law – also from the Strasbourg Court.

In 2010 the ECtHR, in *Schalk and Kopf*, clearly affirmed for the first time that a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of 'family life' for the purpose of the right to respect for private and family life as enshrined in article 8 ECHR.[27] The Court in Strasbourg observed that a rapid evolution of social attitudes towards same-sex couples has taken place in many European countries – as proven by the fact that a considerable number of them have afforded legal recognition to same-sex couples. For this reason, the Court considered it artificial to uphold its previous case law according to which same-sex couples only fell under the notion of 'private life', and not also under the notion of 'family life' within the meaning of article 8 ECHR. The Strasbourg Court stressed that the notion of family is no longer confined to the traditional marriage-based relationship and may include other *de facto* families, regardless of whether the relationship is established by different-sex or same-sex couples.

In the same judgment, the ECtHR also interpreted the right to marry enshrined in article 12 ECHR in the light of article 9 of the EU Charter of Fundamental Rights: the Court stressed that the latter provision has deliberately dropped the reference to 'men and women' made by article 12 ECHR and does not contain any obstacle to recognising same-sex relationships in the context of marriage. Marriage should no longer be

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[27] *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010), paras 93-94. With regard to the debate on the family life of same-sex couples and their right to marry according to the case law of the European Court of Human Rights, see: Ian Curry-Sumner, 'Same-sex relationships in Europe: Trends Towards Tolerance?' (2011) 3 Amsterdam Law Forum 43, 56 ff; Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013) 93 ff and 146 ff; Pietro Pustorino, 'Same-Sex Couples Before the ECtHR: The Right to Marriage' in Daniele Gallo and Luca Paladini and Pietro Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdiction* (Springer 2014), 399.

considered to be limited, in all circumstance, to opposite-sex partners.[28] With this interpretation the Strasbourg Court challenged the traditional concept of marriage. However, the ECtHR also affirmed that neither article 12 ECHR nor article 14 ECHR taken in conjunction with article 8 ECHR imposes an obligation on the Contracting States to grant same-sex couples access to marriage.[29] In fact, marriage has deep-rooted social and cultural connotations which may differ largely from one society to another and it is up to each country to decide whether or not to allow same-sex marriage.[30]

Whilst the Strasbourg Court reiterated in its subsequent case law that there is no obligation to grant access to marriage to same-sex couples, it also considered that the interest of a same-sex couple in having the option of entering into a form of civil union or registered partnership must be protected. Thus, in *Oliari and others* the Court ruled that a State, like Italy, that did not provide a legal framework allowing same-sex couples to have their relationship recognised and protected under domestic law, failed to comply with the positive obligation to ensure respect for such couples' private and family life.[31] In my view, it is important to underline that the Court arrived to this conclusion after having stressed that from the examination of the Italian legal system it followed 'that there exists a conflict between the social reality of the applicants, who for the most part live their relationship openly in Italy, and the law, which gives them no official recognition on the territory'.[32] This means that *de facto* new models of family might no longer be ignored and have to be recognized at a legal level.

The case law that I have just explored is obviously important because it shows the obligations arising from the ECHR with reference to same-sex couples and clarifies that in the ECtHR's view, marriage shall not necessarly be reserved to different-sex couples.

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[28] *Schalk and Kopf* (fn 27), paras 60-61.

[29] ibid, paras 61 and 101.

[30] ibid, para 62.

[31] *Oliari* (fn 2), para 185.

[32] ibid, para 173.

However, the ECtHR has not yet specifically considered whether the right to private and family life, as enshrined in article 8 ECHR, could lead to affirming the existence of the right to obtain the recognition of same-sex couples created abroad.

Nevertheless, it is worth recalling the case law developed as regards the recognition of the familial status created abroad through adoption or through surrogate motherhood. In particular, in *Wagner*[33] and in *Negropontis*,[34] the Strasbourg Court dealt with the recognition of adoptive status and ruled that respectively Luxemburg and Greece had violated article 8 ECHR by refusing to recognise a foreign order for adoption. In turn, in *Mennesson*,[35] in *Labassés*[36] and in *Paradiso and Campanelli*,[37] the Strasbourg Court dealt with the recognition of the legal parent-child relationship established abroad following a surrogacy arrangement and ruled that France (in the first two cases) and Italy (in the third case) had violated article 8 ECHR. In these particular contexts, the ECtHR established that a status validly created abroad might be entitled to protection under human rights law and, in particular, under the right to respect for private and/or family life, as covered by article 8 ECHR. This protection could not be restricted by the rigid application of the rules on the conflict of laws, which, in any case, might not be considered a sufficient reason adduced by the national authority to justify any interference with the exercise of that right. However, no duty to recognize the status created abroad flows automatically or unconditionally from article 8 ECHR. In particular, it has been argued that the good faith shown by the parties at the moment they acquired the status, and the legitimate expectation of stability for that status are preconditions for recognition. And the legitimacy of this expectation mainly depends upon the strength of the links the position has with the country under which the status has been created.[38]

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[33] *Wagner and J.M.W.L v Luxembourg* App no 76240/01 (ECtHR, 28 June 2007).

[34] *Negrepontis-Giannisis v Greece* App no 56759/08 (ECtHR, 3 May 2011).

[35] *Mennesson v France* App no 65192/11 (ECtHR, 26 June 2014).

[36] *Labassée v France* App no 65941/11 (ECtHR, 26 June 2014).

[37] *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 27 January 2015).

[38] In this view, see Patrick Kinsch, 'Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law', in

However, the considerations about the nature of the status with which the ECtHR has been confronted should not be underestimated: the above-mentioned cases, despite each having their own different peculiarities, all deal with the best interest of the child which the Strasbourg Court considered fundamental in order to prove an infringement of article 8 ECHR. It is significant that when a similar issue about stability of status has been raised with reference to the recognition of a marriage, the Strasbourg Court has followed a more cautious approach. In this respect, in *Mary Green and Ajad Farhat*[39] the ECtHR dealt with Malta's refusal to recognize the validity of a marriage celebrated in Libya by two opposite-sex Maltese citizens who had been living together for twenty years. In this case, in view of the interest of the national community (in that case, Malta's) in ensuring monogamous marriages, and those of the third party directly involved (namely, the first husband of the applicant), the ECtHR found that a fair balance of the conflicting values need not impose the recognition of the status created abroad.

The latter case shows that the stability of the status created abroad is not sought at any cost. The host State could object to this value owing to the existence of other conflicting internal values that could be considered equally important. Deciding the relevance of such conflicting values does not depend solely on the host country's degree of acceptance, but may be ruled upon by the ECtHR. Without a doubt, the aim of avoiding polygamous marriages represents a primary concern on which the ECtHR does not want to interfere. Perhaps, in light of the above mentioned case law relating to same-sex couples and the right to respect for private and family life, the solution would be different where the recognition of the status created abroad is sought by monogamous same-sex couples.

A confirmation of the pressure on the traditional concept of marriage also derives from recent case law concerning the right to family reunification of

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Katharina Boele-Woelki et al (eds), *Convergence and Divergence in Private International Law, Liber Amicorum Kurt Siehr* (Eleven International Publishing-Schulthess 2010) 259, 273.

[39] *Mary Green and Ajad Farhat v Malta* App no 38797/07 (ECtHR, 6 July 2010).

non-married same-sex couples. In particular, in *Taddeucci and McCall*,[40] the ECtHR held that Italy cannot invoke, in any case, its margin of appreciation in order to protect the concept of traditional family as a legitimate ground capable of justifying a different treatment between different-sex and same-sex couples. In fact, according to the Court, Italy should have considered that same-sex couples are unable to marry in Italy and, consequently, are in a different position if compared to non-married opposite-sex couples who apply for a residence permit for family reunification. Once again, the Strasbourg Court does not impose granting access to marriage to same-sex couples, but undeniably puts pressure on the traditional concept of marriage.

IV. The Evolution of the Italian Case Law Concerning the Registration of Same-Sex Marriages Celebrated Abroad

The evolution of recent Italian case law relating to the Italian policy of registration of same-sex marriages celebrated abroad, can be considered, in my opinion, a further example of the on-going process of erosion of the traditional concept of marriage.[41]

As observed above, the new Italian Law 2016 no 76 provides for the first time a specific legal framework for the recognition and protection of same-sex unions. The intervention of the Italian Parliament could no longer be postponed in light of the Strasbourg Court pressure to regulate the issue with the aim of ensuring respect for such couples' private and family life. At the same time, the Italian Parliament intervened in the context of a growing legal uncertainty arising from the litigation through which the Italian policy against registration of same-sex marriages celebrated abroad had been challenged.

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40 *Taddeucci and McCall v Italy* App no 51362/09 (ECtHR, 30 June 2016).

41 The fundamental role played by national courts in order to increase the acceptability of new models of marriage by public opinion and politics is stressed by Angioletta Sperti, 'Judicial dialogue and evolutionary interpretations of the Constitutions in cases on same-sex marriage and rights of homosexuals couples' (2014) IXth World Congress Constitutional Challenges: Global and Local, <http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws5/w5-sperti%20.pdf> accessed 30 December 2015.

The first argument against the recognition of a same-sex marriage that can be found in Italian case law is based on the lack of an essential element to qualify it as a marriage according the Italian legal system: the opposite sex of the two spouses. If a marriage does not exist under the Italian legal system, therefore, the public Registrar cannot accept the request for registration.[42] The need for different-sex marriage has been derived from the Italian Constitution as well as from other pieces of legislation. Article 29 of the Constitution provides that the Italian Republic recognises the rights of the family as a natural society founded on marriage. This reference to the natural character of the relevant union has been commonly interpreted as implying a choice in favour of the traditional relationship between two spouses of different sex.[43] Although there is no legislative rule that expressly provides that a marriage must be concluded between spouses of different sex, arguments in favour of that solution can be deduced from articles 107 and 108 of the Italian Civil Code: both articles regulate the celebration of the marriage and refer to the will of the spouses to become husband and wife. Moreover, a few other articles of the Italian Civil Code refer – albeit implicitly – to spouses with different sex: to give just one example, article 87 no 3 may be mentioned, according to which an uncle and his niece, as well as an aunt and her nephew, cannot marry each other. If marriage is only possible between opposite-sex

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[42] This argument has been used by, for example, the Italian Supreme Court, no 7877/2000 (albeit only as *obiter dictum*); the Latina Tribunal, Decree of 10 July 2005; Rome's Court of Appeal, 13 July 2006; Venice Tribunal, Order of 3 April 2009.

[43] Regarding the concept of family in the Italian Constitution, see Francesco Dal Canto, 'Matrimonio tra omosessuali e principî della Costituzione italiana' (2005) Foro It 275. The choice in favour of the traditional relationship between two spouses of different sex has been confirmed by the Italian Constitutional Court in its judgment no 138/2010 and, more recently, in its judgment no 170/2014. Regarding these judgments, see Roberto Romboli, 'La sentenza 138/2010 della Corte costituzionale sul matrimonio tra omosessuali e le sue interpretazioni' in B*arbara* Pezzini and Anna Lorenzetti (eds), *Unioni e matrimoni same-sex dopo la sentenza 138 del 2010: quali prospettive?* (Jovene 2011) 3; Fabrizio Marongiu Buonaiuti, "Il riconoscimento dei matrimoni e delle unioni tra persone dello stesso sesso alla luce dei più recenti sviluppi della giurisprudenza costituzionale' [2014] Ordine internazionale e diritti umani 629.

couples, there is no need for an express prohibition of marriage between an uncle and his nephew or between an aunt and her niece.[44]

The second argument used against the recognition in Italy of same-sex marriages concluded abroad avails itself of the typical safeguard of private international law as represented by the clause of public policy. In this view, same-sex marriage could not be recognised because it would be against history, tradition and the cultural fabric of Italian society. This argument was used by the Ministry of Home Affairs in its Circulars of 2001 and 2007,[45] both adopted with the aim of clarifying the rules governing civil status documents, and has often been used by the courts as to bolster the above-mentioned non-existence argument.[46]

The case law based on the non-existence argument has recently been set aside by the Italian Supreme Court. In its Judgment no 4184 of 15 March 2012, taking account of the case law of the ECtHR,[47] the Supreme Court decided that same-sex marriage can no longer be considered non-existent. In fact, as I have already stressed, the ECtHR interpreted the right to marry enshrined in article 12 ECHR also in the light of article 9 of the EU Charter of Fundamental Rights, as no longer limited, in all circumstances, to marriage between two persons of the opposite sex. This breakthrough, in the opinion of the Italian Supreme Court, contrasts with the basic premise of the spouses' different sexes as a minimum requisite for a marriage.[48] The non-existence argument, in the view of the Supreme Court, is no longer adequate in the current legal reality. The Supreme Court, nevertheless, upheld the impossibility of registering a marriage concluded abroad. This outcome is no longer a consequence of the non-existence or of the invalidity of the same-sex

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44 For references also to other articles of Italian Civil Code, see Franco Mosconi, 'Europa, famiglia e diritto internazionale privato' (2008) Rivista di diritto internazionale 347, 364.

45 Circular no 2 of 26 March 2001 and Circular no 55 of 18 October 2007.

46 See, eg, Latina Tribunal, Decree of 10 July 2005.

47 In particular, the Italian Supreme Court made reference to *Schalk and Kopf* (fn 27).

48 Italian Supreme Court para 4.1.

marriage, but of its inability to produce – as a marriage – any legal effect in the Italian legal system.[49]

As has already been pointed out, this judgment introduces 'a very sophisticated (but unexplained) distinction between a non-existent marriage and a marriage that does not produce legal effects'.[50] Although the issue is controversial, I agree with those who stress that the inability to produce any legal effect in the Italian legal system amounts, in substance, to a standard consequence that derives in private international law from its incompatibility with public policy.[51]

The inability of same-sex marriages to produce any legal effect in the Italian legal system has been confirmed and repeated several times by more recent case law.[52] However, the non-existence argument has not yet been completely abandoned. In fact, recently, the Council of State, after having recalled the case law according to which the same-sex marriage is incapable of producing any legal effect in the Italian legal system, further argued that, in its view, the same-sex marriage might be more appropriately classified as non-existent.[53]

The conclusions that the majority of the Italian case law has thus far reached with respect to the registration of same-sex marriages should not be interpreted as meaning that this complex issue is closed. In fact, it should be noted that the case law is not completely settled.

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49 Italian Supreme Court para 4.3.

50 See Giacomo Biagioni, 'On Recognition of Foreign Same-Sex Marriages and Partnerships' in Daniele Gallo and Luca Paladini and Pietro Pustorino (eds) (fn 27) 359, 376.

51 See Fabrizio Marongiu Buonaiuti, 'Il riconoscimento dei matrimoni tra persone dello stesso sesso secondo un provvedimento recente del Tribunale di Grosseto' [2014] Ordine internazionale e diritti umani 403, 408.

52 Italian Supreme Court, Judgment no 2400 of 9 February 2015; Regional Administrative Court of Lazio, Judgment no 3912 of 9 March 2015; Milan Court of Appeal, Decree no 2286 of 6 November 2015; Milan Court of Appeal, Decree no 2543 of 1 December 2015.

53 Council of State, Judgment no 4899 of 26 October 2015.

In particular, an Order of the Grosseto Tribunal of 9 April 2014 has provoked a great deal of discussion.[54] This decision, giving its own interpretation of the above-mentioned judgment no 4184/2012 of the Italian Supreme Court, deduced from it that same-sex marriage can no longer be considered to contrast with the public policy clause and, for the first time in Italy, upheld the claim of an Italian couple married abroad (in New York), and requested that the Registrar record such a marriage.[55]

In at least one other case, the solution provided by the Grosseto Tribunal has been followed and the request for registration accepted by a court. This is the case from the Naples Court of Appeal which, in its decision of 31 March 2015, relied on the principles of free movement of persons in the EU and non-discrimination between EU nationals to recognize the same-sex marriage celebrated in France by two French nationals who had moved to Italy for the purpose of work. It must be stressed that the Naples Court of Appeal pointed out that the same solution would not have been possible, if the request for registration had been presented by an Italian same-sex couple who had celebrated their marriage abroad (as was the case in front of the Grosseto Tribunal). This distinction is clearly intended to prevent abuse of law which could have been perpetrated with the sole purpose of bypassing the restrictions of the Italian legal system which prohibits same-sex marriage. However, in my opinion, such legitimate considerations could not lead to exclude in any case – indeed automatically – the relevance of the above-mentioned principles of the free movement of persons in the EU as well as non-discrimination against EU nationals. In fact, the right to free movement would be unreasonably hindered, at least when Italian same-sex couples are able to demonstrate a real and effective connection to the legal system where the marriage has been celebrated.

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[54] For a scrupulous criticism of the reasoning followed by the Decree of the Grosseto Tribunal, see Giacomo Biagioni, 'La trascrizione dei matrimoni same-sex conclusi all'estero nel recente provvedimento del Tribunale di Grosseto' (2014) 2 *Gen*IUS 195.

[55] The Order of the Grosseto Tribunal has subsequently been declared invalid by the Florence Court of Appeal, Decree of 24 September 2014, because of procedural flaws. However, the trial was continued in front of the same Grosseto Tribunal which, in its Decree of 26 February 2015, requested again that the Registrar record such a marriage.

The gradual evolution of the Italian case law shows how the traditional concept of marriage comes under assault due to the pressure deriving from same-sex married couples in search of recognition of their legal status created abroad.

V. The Signals That Show That the Way Same-Sex Is Perceived in Italy Is Gradually Changing

While it is true that the number of judicial decisions in favour of the recognition of same-sex marriages concluded abroad is limited, there is no doubt that the above-mentioned narrow openings have convinced more and more same-sex couples to seek the recognition of their marriage celebrated abroad and to challenge the refusal to record through legal action.

This kind of bottom-up pressure has been recorded notwithstanding the strong reaction from the Italian Ministry of Home Affairs that, on 7 October 2014, adopted a Circular reaffirming the prohibition on registration of foreign same-sex marriages in the national civil-status register. According to the Ministry, it is up to the national legislator to decide whether to bring same-sex marriages into line with those concluded between persons of opposite-sex and to allow the registration of these marriages in the national civil status register.

It must be stressed that this Circular, by its nature, has no binding force and even its legality has been debated.[56] In my view, regardless of whether the arguments followed by the Circular are well-founded, it is particularly important to underline that, subsequent to its publication, many more municipalities have challenged the ministerial prohibition and have either accepted requests for the registration of same-sex marriages or have announced their willingness to accept them.[57] It is true that the records have

[56] Different views are expressed by the Regional Administrative Court of Friuli Venezia Giulia, Judgment no 228 of 21 May 2015, and by the Council of State, Judgment no 4899 of 26 October 2015.

[57] This is the case in, eg, the Municipalities of Bologna, Fano, Leghorn, Milan, Naples, Pisa, Rome, Treviso.

later been declared null and void by the local representatives of the central administration,[58] but it must be stressed that the respective orders have been challenged in the Italian courts and, at least in some cases, actions brought by same-sex couples have been upheld although solely on the ground of lack of competence of the representatives of the central administration.[59]

Moreover, there is no doubt that the way same-sex marriage is perceived in Italy is gradually changing. Signals of this shift may be found in the case law of Italian courts, in some policy shifts by the Italian administration and also by the Italian legislature which, even before the adoption of Law 2016 no 76, although for specific – and limited – reasons, recognised same-sex unions or at least removed some obstacles which hinder their recognition.

Firstly, the shifts mentioned have been recorded with regard to the issue of family reunification. In particular, a few Italian judgments[60] declared unlawful a refusal to issue a residence permit to a third-country national who had married a same-sex Italian national in another EU Member State, and then applied for family reunification in Italy. The reasoning followed was that, once the creation of a matrimonial union in an EU Member State is proven, the principle of free movement of the EU citizen and of their family member has to be granted irrespective of the national law of the spouses.

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[58] This is the case with the Prefect of Rome (31 October 2004), of the Prefect of Bologna (3 November 2014) and the Prefect of Milan (5 November 2014).

[59] Regional Administrative Court of Lazio, Judgment no 3912 of 9 March 2015; Regional Administrative Court of Friuli Venezia Giulia, Judgment no 228 of 21 May 2015; Regional Administrative Court of Tuscany, Judgment no 1291 of 25 September 2015; Regional Administrative Court of Lombardy, Judgment no 2037 of 29 September 2015. In contrast, more recently, the Council of State ruled that the Prefect has an implied power to declare null and void the unlawful acts adopted by the local administrations. See, Council of State, Judgment no 4899 of 26 October 2015.

[60] Reggio Emilia Tribunal, Order of 13 February 2012, <http://www.meltingpot.org/IMG/pdf/trib-re-coniuge-omosex.pdf> and Pescara Tribunal, Order of 15 January 2013, <http://www.articolo29.it/decisioni/tribunale-di-pescara-ordinanza-del-15-gennaio-2
013/> both accessed 28 May 2016.

It is significant that the Ministry of Home Affairs, with its Circular of 26 October 2012,[61] took note of the solution adopted by this case law and affirmed that it had its logical antecedent in the judgment no 1328/2011 of the Italian Supreme Court. According to this judgment, the concept of 'spouse' for the purpose of a family reunification shall be evaluated according to the foreign legal system of the country where the same-sex marriage has been celebrated. This has the consequence that a person who has celebrated marriage to an EU citizen in an EU Member State, shall be considered a family member for the purpose of the right of residence.

This increase in awareness about the issues concerning same-sex couples has also been confirmed by the reform of the law implementing Directive 2004/38 on the free movement of citizens of the European Union and their family members.[62] In particular, the original provision that the duty of the host Member State to facilitate the entry and residence of the partner with whom the EU citizen has a durable relationship was subordinate to the provision that the said stable relationship would be duly certified by the State of nationality of the EU citizen. Thus, the same-sex partner of an EU national was not included among the beneficiaries of the provision in case the legislation of his (or her) national State does not actually provide for the recognition of same-sex relationships. Bowing to the pressure of an infringement procedure opened by the European Commission,[63] Italy erased the provision whereby certification would be issued by the EU Member State of nationality and now only requests that the stable relationship is sworn to in official documents. The official documents of the State of origin are therefore now admitted as sufficient evidence, with the result that one

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[61] Circular no 8996 of 26 October 2012.

[62] The Directive has been implemented by Legislative Decree no 30/2007. For comment, see Marcello Di Filippo, 'La libera circolazione dei cittadini comunitari e l'ordinamento italiano: (poche) luci e (molte) ombre nell'attuazione della Direttiva 2004/38/CE' (2008) Rivista di diritto internazionale 420. The reform to which I refer in the text has been introduced by Law no 97/2013.

[63] See the infringement procedure no 20112053 commenced by the European Commission by formal notice on 28 October 2011 and closed on 10 December 2013.

obstacle to family reunification for such same-sex partners has been overcome.[64]

Another indication of the slow evolution of the Italian legal position in favour of same-sex couples can be traced from the case law that admits the registration in Italy of the birth certificate of a child born to a same-sex couple married in a State where such a union is allowed,[65] as well as from the recent case law that admits the stepchild adoption by a same-sex partner.[66] These decisions are of course informed by *favor filiationis* and have the goal of providing for the best interests of the child.[67] Nonetheless, in my opinion, through this kind of case law the opposition to same-sex marriage is being progressively eroded.

With the recent Law 2016 no 76, the Italian Parliament has decided to regulate civil unions for same-sex couples, but did not provide these latter with the option to marry. The new law is certainly less ambitious than its

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[64] See Ilaria Queirolo and Lorenzo Schiano Di Pepe, *Lezioni di diritto dell'Unione europea e relazioni familiari* (3rd edn, Giappichelli 2014) 171, 208 ff. For a practical application of the new version of Legislative Decree no 30/2007 as amended by Law no 97/2013, see Verona Tribunal, Order no 152/14 of 10 December 2014.

[65] Turin Court of Appeal, Decree of 29 October 2014, <http://www.questionegiustizia.it/doc/Corte_Appello_Torino_sezione_famiglia_decreto_29.10.2014.pdf>; Milan Court of Appeal, Decree of 16 October 2015, <http://www.ilcaso.it/giurisprudenza/archivio/13842.pdf>; Naples Court of Appeal, Decree of 30 March 2016, <http://www.articolo29.it/corte-dappello-di-napoli-sentenza-del-30-marzo-2016/>, all accessed 28 May 2016.

[66] See, recently, Italian Supreme Court, Judgment no 12962 of 22 June 2016. With this Judgment the Supreme Court dismissed an action brought by the Public Prosecutor against the Rome Court of Appeal, Judgment no 7127 of 23 December 2015, and consequently confirmed the decision of stepchild adoption originally delivered by Rome Juvenile Court, Judgment no 299 of 30 July 2014. For a usefull collection of the Italian case law that admits stepchild adoption by a same-sex partner, see <http://www.articolo29.it/adozione-in-casi-particolari-second-parent-adoptionmerito/> accessed 3 July 2016.

[67] The need to value the best interest of the child as a guideline also for the recognition of adoptions by same-sex couples abroad, is stressed by Giulia Rossolillo, 'Spunti in tema di riconoscimento di adozioni omoparentali nell'ordinamento italiano' (2014) 2 Cuadernos de Derecho Transnacional 245, 252 ff.

original formulation and is the result of a political compromise that has been deemed necessary to convince the more traditional sections of the majority parties to accept the introduction of a legal regime for same-sex couples.

With regard to the issue of recognition of same-sex marriages celebrated abroad, the Law 2016 no 76 – although limiting itself to delegating the regulation of the matter to the Italian Government – establishes the general principle according to which the Italian regulation on civil unions will be applicable to same-sex couples who have celebrated their marriage, or civil union, or some comparable form of partnership abroad. Through such a provision, same-sex marriages celebrated abroad will be subject to a downgrade in so far as they will be considered as only equivalent to civil unions as described in the Italian legal system. Irrespective of any assessment of the legality of such a downgrade,[68] it is undisputable that the new law marks the abandonment of the theory according to which same-sex marriages celebrated abroad are incapable of producing any legal effect in the Italian legal system.

Same-sex marriages can no longer be considered to be in contrast to public policy. This conclusion has already been supported by certain case law,[69] which has at the same time paradoxically affirmed the inability of same-sex marriages to produce any legal effect in Italy. Furthermore, in light of the other signals showing that the way in which such unions are perceived by the Italian legal system is gradually changing, it seems anachronistic to me to maintain the view that same-sex marriage could be considered in contrast to the fundamental values of Italian society and thus to the public policy clause.

VI. Final Remarks: The Missing Piece of the Puzzle

It has not been many years since same-sex marriages celebrated abroad were considered non-existent in the Italian legal system. Such an opinion, however, was no longer defensible, according to the ECtHR case law and the

[68] However, the issue of the legality of such a downgrade will be dealt with in Section VI.

[69] Italian Supreme Court, Judgments no 2400 of 9 February 2015; Regional Administrative Court of Lazio, Judgment no 3912 of 9 March 2015.

EU Charter of Fundamental Rights. For this reason, since the judgment no 4184/2012 of the Italian Supreme Court, the Italian courts started to justify the impossibility of registration of a marriage celebrated abroad as a consequence of its inability to produce any legal effect – as a marriage – in the Italian legal system. Apart from the doubts that arise from such a legal category, the reasoning that might lead to the non-recognition of same-sex marriage essentially entails public policy considerations.

The content of this traditional exception to the operation of conflict of law rules depends on the values that the internal legal system considers to be fundamental in a certain historical period. Although Italy is not obliged to introduce the possibility of celebrating same-sex marriages into its legal system, it may no longer underestimate the increasing relevance – at the European level – of the principle of recognition of the status created abroad. In particular, that principle has been affirmed within the framework of the EU law in order to ensure the free movement of persons within the territory of the Member States. At the same time, any failure to recognize a status validly created abroad (even in a non-European country) could raise concerns about the commitment to the fundamental right of respect for private and family life, as set out in article 8 ECHR.

However, I stressed that the stability of the status created abroad has not yet been specifically affirmed with regard to the recognition of same-sex marriages neither by the ECJ nor by the ECtHR. Thus, in any case, the stability of the status is not an absolute value. In fact, according to the ECJ, public policy considerations might justify national restriction measures and thus a refusal to recognize the status created abroad. Similarly, the ECtHR found that recognition of the status might be excluded following a fair balancing of conflicting values.

With the adoption of the Italian Law 2016 no 76 on civil unions the stability of the status created abroad through same-sex marriages is not granted. In fact, such marriages will be treated as equivalent to a civil union according to the Italian legal system. This outcome certainly represents a step forward compared to the previous affirmation that same-sex marriages could not produce any legal effect in the Italian legal system: it follows from the above

that same-sex marriages are no longer considered in contrast with public policy. Nonetheless, this solution is still not the same as affirming the full recognition of a same-sex marriage celebrated abroad.

One may wonder if the downgrade created by the law on civil unions might be considered in line with the supranational context I discussed above. Despite the fact that Italy was not legally obliged to introduce same-sex marriages into its legal system, there is no doubt that the solution envisaged by the new law implies the creation of a limping status for same-sex couples, having regard to the fact that they are considered married by the State where the marriage was celebrated, yet are only considered bound by a civil union when they move to Italy.

In order to verify if such a limping status, besides being undesirable in itself, contravenes EU free movement rights as well as the right to private and family life, a case-by-case approach should be followed. From this perspective, if EU same-sex couples are able to demonstrate a real and effective connection to the legal system where the marriage has been celebrated, their new status ought not to be perceived as a mere consequence of their will to overcome the actual limits of the Italian legal system and they could affirm that the downgrade of their marriage to a civil union entails an obstacle to their right of free movement (when the marriage has been celebrated in another EU Member State). In certain cases, they could also affirm a violation of their right to respect for their private and family life: while it is true that their relationship would at least produce the effects of a civil union, together with the rights and duties that the Italian legal order attaches to this status, nonetheless these rights and duties are not exactly the same as those which derive from a marriage. For example, the downgrade will represent a hurdle to the recognition in Italy of the rights and duties that a married partner has acquired in the State of origin towards the biological son or daughter of his or her partner.

Otherwise, if Italian same-sex couples (and couples consisting of an Italian partner and a citizen of another country) go abroad only to get married and have no genuine link with the country where the union is formalized, they will then have fewer chances to challenge the downgrade of their marriage to a

civil union by invoking EU free movement rights and/or the right to private and family life. In fact, their behaviour could be perceived as an abuse of the right and for this reason could hardly be considered worthy of protection.

From a normative point of view the issue of recognition of same-sex marriage is not yet completely resolved. Considering that 11 EU countries grant same-sex couples the right to get married,[70] the situation may arise more and more frequently where same-sex couples who celebrate their marriage abroad will submit requests to the Italian authorities to register such marriages. Many of them will not be satisfied that their marriage will qualify as a civil union and new litigation will probably arise with the effect of putting pressure on the Italian authorities. From a purely legal point of view, not all the arguments favour same-sex couples' expectations. However, as the recent Italian case law described within this paper has shown, the effect of a bottom-up dynamic, where the increasing movement of persons boosts the circulation of new models of family, should be in itself a key driver for a (real) new approach by the Italian authorities to the matter, to face up to the demands and expectations of a constantly evolving society. I believe that this bottom-up dynamic will help Italy move forward with more courage towards a complete equalisation of different kinds of couples, which, in my opinion, will only be achieved by granting the right to marry to same-sex couples.

[70] It must be specified that, as of the day of writing, same-sex marriage is possible in the following 10 EU countries: Belgium, Denmark, France, Ireland, Luxembourg, Portugal, Spain, Sweden, the Netherlands and the United Kingdom (excluding Northern Ireland). Furthermore, in Finland, the law on same-sex marriage will enter into force on 1 March 2017.

PRICE PARITY CLAUSES:
HAS THE COMMISSION LET SLIP THE WATCHDOGS OF WAR?

Pablo Solano Díaz*

While the proliferation of online markets has presented competition authorities with a string of challenges of diverse nature, the price parity phenomenon depicts particularly well the Commission's 'fight-chaos-with-chaos' approach to digital economy. Indeed, the EU watchdog's passive attitude towards the multiple enquiries into most-favoured-nation clauses by different national trustbusters across the Old Continent risks going down in universal history of antitrust infamy. With the awareness that rivers of ink have already been poured over the subject, this paper adopts a brand new stance by looking on its opportunity side. In the light of the timid open-mindedness recently shown by the European Court of Justice as regards the object-effect dichotomy in Groupement des Cartes Bancaires *and* Maxima Latvija *judgements (which seem to steer away from* Pierre Fabre*'s sternness), I will discuss different national solutions with a view to vindicating not only a more consistent but also an unprejudiced effects-based approach that should transport analogue EU law enforcement to the digital era.*

Keywords: Degree of harm, most-favoured-nation clauses, national competition authorities, price parity clauses, restrictions by effect and restrictions by object

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I. INTRODUCTION

Only eclipsed by the crusade against Google, the generalised recourse to so-called most-favoured-nation (MFN) clauses by online platforms stands out among other digital-economy anathemas for the implications vis-à-vis EU competition policy of divergent national enforcement reactions. The danger for EU law uniformity that these divergences involve has become particularly serious as far as legal qualification has gained relevance in order to determine the assessment to which the conduct should be subject after recent judgements of the European Court of Justice (ECJ).[1] By redefining the traditionally exorbitant notion of conducts presumed to be restrictive by their own object (without need to analyse their effects), the judges in Luxembourg have paved the way for a bold policy-driven move towards the long-awaited (and never come) 'more economic approach'. Unfortunately, the Commission appears to have given up enforcement in this uncharted domain to national competition authorities (NCAs).

This paper challenges the Commission's passivity towards price parity clauses, insofar as its wait-and-see approach has led to blessings and curses on the side of different NCAs, ranging from the Swedish benevolence to the German ordo-liberal admonition. Moreover, this voyeurism of the European authority is not new nor is it endemic to price parity clauses. On the contrary, it smacks of previous twists and turns to conceal a relegation of the EU interest, already condemned by the General Court in *CEAHR*,[2] which I will evoke in Section II. Furthermore, other recent developments in e-commerce – that fall outside the scope of this paper – have befallen the same fate (e.g. bans on online selling).

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[1] Cases C-67/13 P, ECLI:EU:C:2014:2204, *Groupement des Cartes Bancaires*, and C-345/14, ECLI:EU:C:2015:784, *Maxima Latvija*.

[2] Case T-427/08, ECLI:EU:T:2010:517, *CEAHR v Commission*, paras 157-178.

To provide an insight into the issue, after justifying why EU guidelines are needed on the subject at stake, I will begin with an overview of the different theories of harm that may apply to MFN clauses and the potential efficiencies to which they may give rise. A discussion on the contrasting views taken by the Swedish, Italian, French, German and British competition watchdogs will follow in order to underscore the need for common guidance. Then, I will focus on the legal qualification of price parity clauses, which might have an impact on their consideration as either by-object or by-effect restrictions, now that the ECJ is revisiting this fundamental dichotomy. Finally, I will conclude by pleading in favour of a common facts-based and effects-oriented approach being embraced by the Commission as the best (and possibly the only) fit with digital-world restrictions.

II. NEED FOR EU GUIDANCE

As a preface to the discussion that follows, it is necessary to address the question whether the Commission's shying away from leading enforcement as regards online restrictions is an unequivocally ill-conceived strategy. It is certain that the de-centralised paradigm brought about by Regulation 1/2003[3] has borne fruits over its thirteen years of existence, but the new features of the digital economy have dramatically changed the business and economic assumptions on which its design is based. This evolution has evinced the need for some adjustments, as the Commission acknowledged (at least impliedly) by launching a public consultation on empowering the NCAs to be more effective enforcers.[4] Of course, it does not mean that the de-centralisation process required by the principle of subsidiarity has to be reverted, but the appropriate dose of EU action must be inoculated in order not to err on the side of excessive divergence. After all, the whole system devised by Regulation 1/2003 rests in a fair (and delicate) trade-off between

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[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[4] Commission, 'Empowering the national competition authorities to be more effective enforcers' <http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html> accessed on 10 June 2016.

subsidiarity and proportionality, on the one hand, and uniformity and legal certainty, on the other.

Indeed, the Commission appears to be awakening to this reality, although its latest reaction – in the form of a Communication supplementing the two 2015 legislative proposals on the supply of digital content and on online and other distance sales of goods – is mainly focused on unilateral discrimination (i.e. geo-blocking and geo-filtering).[5] It is true that concerns posed by geo-blocking and geo-filtering may seem to have more evident implications vis-à-vis the single market imperative, thereby calling for closer attention by the EU legislator at first sight. However, as far as Article 101 infringements could equally hamper cross-border e-commerce, certain guidance by the European trustbuster cannot be put off for a number of reasons.

From an economic standpoint, it is certain that different national regulatory treatments of online restrictions run counter the goals of the Digital Single Market, namely better access for consumers and businesses to goods and services offered online across Europe; greater trust for consumers and certainty for businesses with clear, less fragmented rules for online sales of goods; and lower transaction costs and administrative burden for businesses when trading online across borders.[6] In the same vein, concerning online platforms, an EU policy approach is necessary to 'avoid fragmentation and obstacles in the Digital Single Market', insofar as 'different national rules can otherwise create uncertainty for economic operators, make scaling-up more difficult for startups and limit the availability of digital services'.[7]

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5 Commission, 'Commission updates EU audiovisual rules and presents targeted approach to online platforms' (Press release, 25 May 2016) <http://europa.eu/rapid/press-release_IP-16-1873_en.htm> accessed on 10 June 2016.

6 Commission, 'Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' <https://ec.europa.eu/digital-single-market/en/news/communication-online-platforms-and-digital-single-market-opportunities-and-challenges-europe> accessed on 10 June 2016.

7 Commission, 'Digital Single Market – Commission updates EU audiovisual rules and presents targeted approach to online platforms' (Press release, 25 May 2016) <http://europa.eu/rapid/press-release_MEMO-16-1895_en.htm> accessed on 10 June 2016.

A further argument is provided by fiscal federalism, which assumes that the allocation of functions in a multilevel polity should pursue the minimisation of inter-jurisdictional spill-over effects in the provision of public goods.[8] The assignment decision ultimately boils down to a trade-off between the losses derived from failure to internalise inter-jurisdictional spill-over effects and a second element traditionally associated with the failure to identify local preferences and linked by 'second-generation' theories to various centralisation inefficiencies (e.g. misallocations resulting from imperfect information or reduced accountability at central level).[9] Therefore, uniform enforcement across the EU is needed to internalise cross-border externalities inherent to genuinely supranational digital trends. Additionally, assuming that an efficient level of public good output is set by an authority whose jurisdictional scope encompasses the geographic range of the benefits arising from that public good,[10] the Commission should decide (or at least make uniform) the efficient intensity of an enforcement action from which the single market as a whole would derive advantage.

The same reasoning, construed in terms of subsidiarity, militates in favour of the greater effectiveness of EU-level action in an inherently cross-border field as is e-commerce. Subsidiarity and proportionality,[11] enshrined in paragraphs 3 and 4 of Article 5 of the Treaty on the European Union, along with uniformity and legal certainty,[12] preside over the Regulation 1/2003 setting, be it because the national enforcement of EU competition law can be considered a shared competence[13] or simply because 'the institutional arrangements governing competition are specifically designed to be in accordance with the principle of subsidiarity'.[14] Consequently, as online

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8 Albert Breton, Competitive Governments: An Economic Theory of Politics and Public Finance (CUP 1998) 185.

9 Wallace E Oates, 'Toward a Second-Generation Theory of Fiscal Federalism' (2005) 12 International Tax and Public Finance 349, 356-360.

10 ibid, 351.

11 Council (fn 3), Recital 34.

12 Council (fn 3), Recitals 1 and 22.

13 Loïc Azoulai, The Question of Competence in the European Union (OUP 2014) 102.

14 Her Majesty's Government, 'Review of the Balance of Competences between the United Kingdom and the European Union. Competition and Consumer Policy Report' (2014) para 1.11.

phenomena by their own nature go beyond the sphere of national action, the objectives of an enforcement action aiming at them could not be in principle sufficiently achieved by NCAs, and the Commission would be better placed by reason of the action's scale or effects. Nevertheless, under the principle of proportionality, EU action cannot exceed what is necessary 'to allow the Community competition rules to be applied effectively'.[15]

The interplay between those principles relies on the cooperation system provided for in article 11 of Regulation 1/2003. Nonetheless, in the case of MFN clauses, coordination within the European Competition Network (ECN) has led to divergent outcomes in the absence of greater involvement of the EU trustbuster. Consequently, as a first step, the Commission should issue clear guidelines on how to deal with online restrictions by means of soft-law instruments that provide NCAs with a systematic and policy-driven theoretical foundation on which to base constructive dialogue within the ECN. Additionally, the Commission's proactive intervention as amicus curiae in national judicial proceedings under Article 15 of Regulation 1/2003[16] could contribute to steer the debate towards the enforcement approach proposed in Sections III.4 and IV.

A more drastic alternative to be pondered over at this stage would be relieving NCAs of their EU competition law enforcement competence under article 11(6) of Regulation 1/2003, provided that the Commission considers the scenario in which the MFN phenomenon produces its effects – featured by a number of Member States being affected by an essentially cross-border conduct carried out by EU-based actors (e.g. Booking.com), as well as non-EU based players (e.g. Expedia) – similar to the one depicted by the General Court in *CEAHR*:

> The practice complained of exists in at least five Member States, or possibly in all the Member States, and is attributable to undertakings which have their head offices and places of production outside of the European Union, which

[15] Council (fn 3), Recital 34.

[16] Patricia Vidal and Pablo Solano, 'Towards a More EU Consistent Approach To The Analysis of Vertical Restraints in the E-Commerce Sector' (2016) 2(2) Competition Law and Policy Debate 45, 46.

> suggests that action at European Union level could be more effective than various actions at national level.[17]

Finally, from the policy viewpoint, if the Commission were not to lead the way into the unknown domain of online restrictions, a unique opportunity to embrace an effects-based approach – in a field particularly well suited for (and requiring) factual case-by-case analysis – would be foregone. Certainly, when it comes to digital economy, anticompetitive and procompetitive effects are not as univocal as they are in the analogue world and, thus, the room for presumptions is more limited. It is equally true that an unknown issue could benefit from national experimentation under ECN coordination, but only sound EU guidance can ward off the increasing temptation for NCAs to adopt a comfortable 'by-object' approach to online restrictions, against which the outgoing chief economist of the Commission has recently warned.[18]

III. Price Parity Clauses

After justifying the need for an EU approach to online restrictions, I will introduce price parity clauses as a type of restraint that illustrates particularly well the lack of a common frame of reference in the digital economy. At a second stage, I will present the divergent outcomes resulting from the Commission's failure to keep national watchdogs on a leash and discuss the importance of legal qualification as an additional factor calling for the EU common enforcement approach sketched as an epilogue to this Section.

1. Concept, Types and Theories of Harm

A price parity or MFN clause can be broadly defined as 'an agreement whereby a seller agrees that a buyer will benefit from terms that are at least as

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[17] *CEAHR* (fn 2), para 176.

[18] Lewis Crofts and Mari Eccles, 'Enforcers must understand the "rationale" behind online trade restrictions, Motta says' (*MLex*, 3 June 2016) <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=800911&siteid=190&rdir=1> accessed on 7 June 2016.

favourable as those offered by the seller to any other buyer'.[19] In practice, price parity clauses have been extensively used by multi-sided online platforms (which operate as interfaces between different groups of users whose demand is interdependent). The consolidation of business models based on multi-sided platforms gives price parity clauses the potential to affect millions of consumers purchasing all types of goods or services over the internet.

For instance, Booking.com – an online travel agency (OTA) rendering free searching, comparison and booking services for users while charging hotels a proportional fee per reservation – imposed on hotels the obligation for the latter to offer through Booking.com equal or more advantageous prices, as well as at least equal availability of overnight stays, for the same type of accommodation, date, type of bed and number of customers than those offered through the hotels' direct channel or through competing OTAs.[20]

Price parity clauses are only tangentially touched upon in the Guidelines on Vertical Restraints as a 'supportive' measure to make direct or indirect price fixing more effective or to make maximum or recommended prices work as fixed ones.[21] However, since this paper vindicates clearer (or at least any) guidance on MFN clauses, I will embark upon a '*lex ferenda*' exercise in this Section with a view to identifying the factors to be taken into account when analysing such clauses form an EU competition law viewpoint.

Although the effects of price parity clauses also depend on other factors such as likelihood of application and monitoring, position of the parties to the contract in which they are included, or market environment (i.e. degree of rivalry at the different levels of the supply chain, density of the MFN weave or market transparency), the three criteria presented below are particularly

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[19] Francisco E González-Díaz and Matthew Bennett, 'The Law and Economics of Most-Favoured Nation Clauses' (2015) 1(3) Competition Law and Policy Debate 26, 27.

[20] Autorité de la Concurence 21 April 2015 15-D-06, para 56.

[21] Commission, 'Guidelines on Vertical Restraints' (Notice) [2010] OJ C130/01, para 48.

useful to classify such clauses and to identify the associated theory of harm.[22] In any event, a case-by-case analysis is required.[23]

First and foremost, the level of the supply chain at which the clauses operate has to be considered. MFN clauses may be set at the retail level, stipulating that the price and other commercial conditions applied by a retailer to the goods or services of a particular supplier cannot be less favourable than those offered by a competing retailer in relation to the same supplier's goods or services. They can also be in place at the wholesale level, establishing that the conditions offered by a wholesaler to a retailer must be at least equally favourable as those offered to a competing retailer.[24]

Secondly, the business model is to be factored in. Whereas the wholesale model is featured by an agreement on the price that the upstream seller charges the online platform (which operates as a retailer and remains free to quote any final price), the agency model entails that the online platform acts as a agent for the seller by marketing the principal's goods of services in exchange for a commission for each sale made.[25] In this second scenario, the seller sets the retail price without falling foul of Article 101 only to the extent that the online platform qualifies as a genuine agent in the sense of the Guidelines on Vertical Restraints.[26]

The agency model increases the potential for restriction of parity clauses by eliminating the possibility for the principal to use the quotation of lower prices on the platform as a reward for the agent lowering its commission.

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[22] Ingrid Vandenborre and Michael J Frese, 'Most Favoured Nation Clauses Revisited' (2014) 35(12) ECLR 588, 592.

[23] Lear, 'Can "Fair" Prices Be Unfair? A Review of Price Relationship Agreements' (2012) OFT Report 1438, para 6.75 <http://www.learlab.com/pdf/oft1438_1347291420.pdf> accessed on 8 May 2016.

[24] Justin P Johnson, 'The Agency Model and MFN Clauses' (2014) Cornell University – Samuel Curtis Johnson Graduate School of Management, 1 <http://ssrn.com/abstract=2217849> accessed on 7 May 2016.

[25] Ariel Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (2015) 55 Oxford Legal Studies Research Paper, 2 <http://ssrn.com/abstract=2672541> accessed on 7 May 2016.

[26] Commission (fn 21), paras 12-21.

However, in this setting, MFN clauses may promote competitive pricing on the platform by preventing the seller from charging a 'monopoly price' (i.e. price over the competitive level).[27] Thus, a sufficient degree of inter-brand competition (i.e. among sellers) could make up for the loss of intra-brand competition (i.e. among platforms), as explored further below.

On the contrary, under the wholesale model, price parity clauses do not raise concerns as long as they do not impair the retailer's freedom to set the price.[28] In fact, they contribute to guaranteeing a competitive cost structure for the platform.[29] Nonetheless, by way of example, they might be considered restrictive if they have the effect of reducing the retailer's bargaining power vis-à-vis the wholesaler, which would encroach on the retailer's freedom to set final prices thereby precluding it from obtaining price reductions that could otherwise be passed onto consumers.[30]

Thirdly, the scope of the clause is particularly decisive in ascertaining its anticompetitive effect. Broad MFN clauses (i.e. agreements by virtue of which a seller commits to advertising on an online platform equal or lower prices than listed on competing online marketplaces) present a higher potential for reduction of price competition. In particular, online platforms protected by broad retail MFN clauses under the agency model are incentivised to charge sellers higher (or, at least, not lower) commissions since these higher commissions will not translate into higher advertised prices. Likewise, there are no incentives for platforms to reduce commissions charged on the principal as this reduction will not feed back into lower prices that would otherwise allow them to enhance their market footprint.

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[27] Michael L Weiner and Craig G Falls, 'Counseling on MFNs After E-books' (2014) 28(3) Antitrust Magazine 68, 71.

[28] Oxera, 'Most-favoured-nation clauses: falling out of favour?' (*Agenda*, November 2014) <http://www.oxera.com/Latest-Thinking/Agenda/2014/Most-favoured-nation-clauses-falling-out-of-favour.aspx#_ftn6> accessed on 7 June 2016.

[29] Weiner and Falls (fn 27), 71.

[30] Jonathan B Baker and Judith A Chevalier, 'The Competitive Consequences of Most-Favored-Nation Provisions' (2013) 27(2) Antitrust Magazine 20, 24.

Against this backdrop, the first main theory of harm associated with broad retail MFN clauses is reduced intra-brand rivalry and price uniformity across platforms. This is due to the fact that incentives for platforms to be more cost-efficient and to pass cost savings onto consumers via lower advertised prices are undermined and barriers to entry and expansion are reinforced (since new entrants would be barred from leading a low-price strategy). In this connection, entry foreclosure risks being greater where the entrant attempts to adopt a different business model, and where non-price competition does not make economic sense (e.g. due to network effects that may prevent entry by more efficient platforms than the incumbents).[31] Nevertheless, if the new entrant adopts a business model similar to the incumbents' price parity clauses, it may afford the former certain protection.[32] Ultimately, reduced price competition amongst online platforms translates into higher prices for consumers, insofar as the seller passes higher commissions through in the form of higher listed prices, and the process continues until the seller would be better off de-listing its product from the online platform.[33]

Secondly, broad MFN clauses may reduce inter-brand competition, insofar as a sufficiently dense network of broad MFN clauses discourages sellers from competing vigorously, while, at the same time, collusion among them is easier (as their ability to enforce horizontal agreements is enhanced by the limited price variety).[34] This price effect 'similar to direct collusion'[35] is even more worrisome to trustbusters, as shown by the Commission's *E-Books* case[36] or the *Bundeskartellamt*'s *HRS* decision,[37] the reason being that a sufficient degree of inter-brand competition could compensate for the lack of intra-brand rivalry.[38] *A contrario*, even uniform prices are likely to be

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31 Lear (fn 23), paras 6.49-6.50.

32 Andre Boik and Kenneth S Corts, 'The Effects of Platform MFNs on Competition and Entry' (2016) JL & Econ (forthcoming) 19.

33 Competition and Markets Authority, 'Report on the Private Motor Insurance Market Investigation' (2014) para 8.42.

34 Lear (fn 23), paras 6.44-6.45 and 6.64-6.65.

35 Bundeskartellamt 20 December 2013 B9-66/10, para 157.

36 *E-Books* (Case COMP/39.847) Commission Decision 2013/C 378/14 [2013] OJ C378/25.

37 Bundeskartellamt (fn 35).

38 Commission (fn 21), para 102.

competitive if enough inter-brand competition is guaranteed, which in turn depends on the number and size of platforms benefiting from parity clauses, the number of sellers bound by them, the relative bargaining power of platforms and sellers, or the availability of other price comparison tools (i.e. metasearch engines).[39]

Other admittedly weaker theories of harm are the hindrance of incentives for innovation and investments by their lack of impact on lower final prices, and the conveyance by broad MFN clauses of a credible indication that prices advertised on the platform benefitting from such clauses are the lowest.[40] This second effect is only problematic if buyers are aware of the parity agreements and if they are price-elastic, as well as if other platforms do not lead the same low-cost strategy.[41]

Besides, narrow MFN clauses are potentially less restrictive in that the seller is only bound not to offer through its own online (and sometimes also offline) channel lower prices than listed on the platform's website. Hence, despite the existence of such clauses, the seller may still leverage on its ability to lower prices in order to push commissions down. Nonetheless, a sufficiently thick lattice of narrow parity clauses might also lead to anticompetitive restrictions. For instance, it may incentivise the principal to spread out any increase in the commission charged by the agent among the prices advertised through other platforms in order not to reduce the competitiveness of its own channel. Thus, the effect of higher commissions on the advertised price would decrease and intra-brand competition on commissions would be stifled. Moreover, narrow MFN clauses weaken the competitive constraint imposed by the seller's direct channel on the online marketplaces, although this appears unlikely to be a problem so long as inter-brand competition is fostered by the easing of price comparison.[42]

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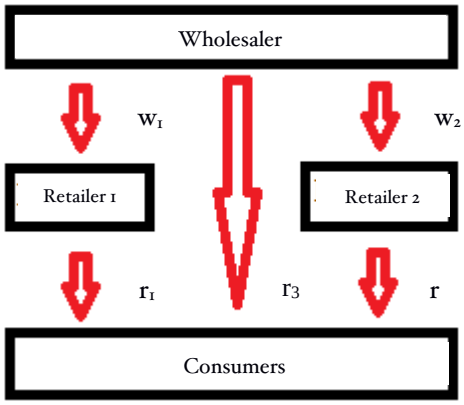
39 Ezrachi (fn 25), 14.

40 ibid, 15.

41 Lear (fn 23), paras. 6.66-6.70.

42 Competition and Markets Authority (fn 33), paras 8.62-8.63.

Wholesale model



Wholesale MFN clause between wholesaler and retailer 1: $w_1 \leq w_2$

Retail MFN clause between wholesaler and retailer 1: $r_1 \leq r_2$

Agency model

Wholesale MFN clause between wholesaler and retailer 1: $c_1 \geq c_2$

Narrow retail MFN clause between wholesaler and retailer 1: $P_1 \leq P_3$

Broad retail MFN clause between wholesaler and retailer 1: $P_1 \leq P_2$ and P_3

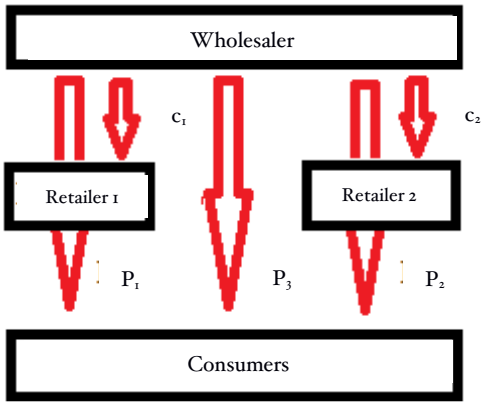


Figure 1: Main types of MFN clauses according to the supply chain level, business model and scope.

Price parity clauses also give rise to remarkable benefits. First of all, they are primarily devised to solve the hold-up issue in vertical relations[43] by preventing the seller from free-riding on the platform's specific demand-enhancing investments in the promotion of the seller's goods or services and brand image (e.g. marketing, advertising, after-sale services or guarantees), which also enhance the attractiveness of the online marketplace vis-à-vis other sale channels.[44] For example, the pay-per-reservation model

43 According to Commission (fn 21), para 107(4), the hold-up problem is defined as the disincentive of the supplier or the buyer to undertake client-specific investments, such as in special equipment or training, before particular supply arrangements are fixed.

44 Ezrachi (fn 25), 3-4.

may incentivise hotels to use the platform to attract the customer and complete the booking through its own webpage.[45] When this parasitism is horizontal, it can only be prevented by means of broad MFN clauses, whilst narrow parity clauses suffice to avoid vertical free-riding.[46]

Other efficiencies resulting from parity clauses are the avoidance of delays in transactions because of the transparency of alternative bargains and the reduction in transaction costs.[47] For instance, when negotiating long-term contracts, buyers can be certain that sellers will not place them at a competitive disadvantage while still bound by the contract by offering better conditions to competitors later on.[48] This, in turn, directly benefits consumers by indicating the lowest prices and by easing switching. The enhancement of other forms of competition (e.g. quality, post-sale services or advertising) brought about by the prevention of the free-riding problem is equally noteworthy.

2. The Perspective of National Competition Authorities

The Commission's wait-and-see strategy has prompted a clash of paradigms as regards MFN clauses. The mirage of the joint (and balanced) position reached by the Swedish, French and Italian NCAs in their respective *Booking.com* decisions,[49] under the aegis of the ECN, has been overtly challenged by the German Federal Cartel Office.[50]

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45 González-Díaz and Bennett (fn 19), 34.

46 By horizontal free-riding we understand online platforms' benefiting from one another's investments by offering better conditions, whereas this phenomenon is of a vertical nature where the seller itself undercuts the prices quoted on the online platform.

47 Martha Samuelson, Nikita Piankov and Brian Ellman 'Assessing the Effects of Most-Favored Nation Clauses' (American Bar Association Section of Antitrust Spring Meeting, March 2012), and Baker and Chevalier (fn 30).

48 González-Díaz and Bennett (fn 19), 35-36.

49 Konkurrensverket 15 April 2015 596/2013, Autorité de la Concurence (fn 20), and Autorità Garante della Concorrenza e del Mercato 21 April 2015 I779.

50 Bundeskartellamt, 'Bundeskartellamt issues statement of objections regarding Booking.com's "best price" clauses' (Press release, 2 April 2015) <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/02_04_2015_Booking.html> accessed on 8 May 2016.

As illustrated by the French example, the concerns over broad MFN clauses under the ECN orthodox approach were as follows: (i) the lessening of competition between Booking.com and the other distribution channels as far as hotels were deprived of their two main bargaining levers to respond to the level of commissions charged by Booking.com (i.e. retail prices and number of overnight stays);[51] (ii) the risk of foreclosure of rival platforms, which were prevented from offering hotels lower commissions and, consequently, from passing the savings onto internet users in the form of lower prices and more availability of overnight stays;[52] and (iii) the cumulative effect of the MFN lattice in place, which exacerbated the potential for restriction by means of increasing the market power of the otherwise atomised ensemble of OTAs.[53]

The theories of harm listed above led to accepting Booking.com's commitments to, among others, (i) removing any parity clause regarding price and conditions vis-à-vis other OTAs and hotels' offline channel; (ii) completely removing any parity clause concerning availability; and (iii) respecting the possibility for hotels to revert to previous customers.[54] Therefore, narrow MFN clauses affecting hotels' online channel were not found to be a problem in principle.

Particularly appealing and minimalist (albeit maybe overly simplistic) is the Scandinavian-design approach adopted by the Swedish authority, which appears to link vertical concerns to narrow parity, on the one hand, and horizontal restrictions to broad MFN clauses, on the other. This double dichotomy led the *Konkurrentsverket* to conclude that horizontally problematic wide party clauses should be considered restrictive in that Booking.com had less incentives to compete by offering hotels low commission rates, thereby pushing hotel room prices up.[55] On the contrary, narrow parity clauses are purely vertical (insofar as hotels' direct channel and

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51 Autorité de la Concurence (fn 20), para 122.

52 ibid, para 123.

53 ibid, paras 127-129.

54 ibid, para 230.

55 Konkurrensverket (fn 49), paras 21.

OTAs do not compete on the same relevant market)[56] and should consequently be blessed to the extent that they do not give rise to restrictions on competition on any neighbouring market. Moreover, narrow MFN clauses foster inter-brand competition via enhanced transparency and reduce the risk that hotels free-ride on investments made by the platform.[57]

This lax stance of the ECN champions towards narrow price parity clauses – later confirmed by Italian and Swedish NCAs' closure of proceedings against Expedia[58] – stands in stark contrast with the German watchdog's position. In this regard, the Düsseldorf High Regional Court's upholding of the *Bundeskartellamt*'s decision to completely ban (broad) MFN clauses as vertical restrictions was interpreted by the latter as a full-fledged 'principle in relation to restrictions of competition in the Internet' (against which the commitments offered by Booking.com would be insufficient).[59] Later on, the Federal Cartel Office confirmed its stern position by rejecting ECN-designed Booking.com's commitments on the grounds that narrow price parity clauses 'also restrict both competition between existing portals and competition between the hotels themselves' (in the words of the authority's president Andreas Mundt).[60] The order to remove price parity clauses was subsequently challenged by Booking.com and upheld by the Düsseldorf High Regional Court.[61]

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[56] ibid, para 25.

[57] ibid, paras 26, 27 and 30.

[58] Konkurrensverket 10 October 2015 595/2015, and Autorità Garante della Concorrenza e del Mercato 11 April 2016 I779.

[59] Bundeskartellamt (fn 50).

[60] Lewis Crofts, 'Booking.com's pricing clauses ruled illegal in Germany (update*)' (*MLex*, 23 December 2016) <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=800911&siteid=190&rdir=1> accessed on 7 June 2016.

[61] Matthew Newman, 'Booking.com loses bid to suspend German antitrust decision at Düsseldorf court' (*MLex*, 9 May 2016) <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=793030&siteid=190&rdir=1> accessed on 10 May 2016.

Nonetheless, a compromise remains possible so far as the *Bundeskartellamt*'s decisions refer to the specific circumstances of the German market[62] and do not conclusively state the hard-core (by-object) nature of price parity schemes (although this has been openly suggested by Andreas Mundt[63]). In *HRS*, the German watchdog highlighted that the platform's market share exceeded 30%,[64] thereby Regulation 330/2010[65] not being applicable regardless of the question whether the MFN clauses at hand amounted to a blacklisted hard-core restriction.[66] Other case-specific circumstances were taken into consideration, e.g. active monitoring and enforcement by HRS and the particular conditions of the market, namely the existence of MFN clauses in agreements between hotels and HRS's two closest rivals (Booking.com and Expedia).[67] This market-specific argument has been reversed by the Italian NCA to drop the probe into Expedia after this OTA accepted to adjust its terms and conditions along the lines of Booking.com's commitments. The Italian trustbuster concluded that market circumstances (that originally posed competition concerns) changed as a result of both major players abandoning the problematic clauses and, thus, the investigation was left without purpose.[68]

Moreover, ECN-led *Booking.com* and German *HRS* decisions seemed to agree on the vertical nature of narrow parity,[69] as well as on the fact that OTAs and hotels' direct channels are not active in the same relevant market,[70] which

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62 Philippe Chappatte and Helen Townley, 'Online Hotel Bookings - A Joint European Approach or a Most Favoured Nation?' (Slaughter and May, Briefing, May 2015), 3 <https://www.slaughterandmay.com/media/2497093/online-hotel-bookings-a-joint-european-approach-or-a-most-favoured-nation.pdf> accessed on 8 May 2016.

63 Crofts and Eccles (fn 18).

64 Bundeskartellamt (fn 35), paras 188-195.

65 Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices [2010] OJ L102/1.

66 Bundeskartellamt (fn 35), para 187.

67 Vandenborre and Frese (fn 22), 591.

68 Autorità Garante della Concorrenza e del Mercato (fn 58), para 57.

69 Konkurrensverket (fn 49), para 20, Autorità Garante della Concorrenza e del Mercato (fn 49) para 7, Autorité de la Concurence (fn 20), para 7, and Bundeskartellamt (fn 35), para 10.

70 For all, Konkurrensverket (fn 49), para 25, and Bundeskartellamt (fn 35), para 87.

entails that restrictions on the prices offered through hotels' own sites must not be in principle anticompetitive. This fact – along with the attention paid to market specificities not only by the *Bundeskartellamt* but also by the Italian and Swedish NCAs in their more recent *Expedia* decisions – appears to provide the Commission with sound arguments to steer towards a common ground between these seemingly opposed paradigms. This task must be orchestrated in Berlaymont for the legal, institutional, economic and policy reasons presented in Section II and given the inability of national watchdogs to reach the uniform response that these reasons demand.

Across the Channel, the limited concern over narrow parity clauses shown by the British Competition and Markets Authority (evinced in the closure of its enquiry into hotels' online discounting restrictions on administrative priority grounds) focused on the vertical aspect.[71] Nonetheless, one year before, the British trustbuster had highlighted the intra-brand concerns over broad MFN clauses in contracts between private motor insurance providers and price comparison websites (PCWs), since the detriment to consumers 'was likely to be significant as wide MFNs effectively prevented price competition between PCWs'.[72]

[71] Competition and Markets Authority 'CMA closes hotel online booking investigation' (Press release, 16 September 2015) <https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation> accessed on 8 May 2016.

[72] Competition and Markets Authority (fn 33), para 8.123.

Points in common between ECN and Federal Cartel Office	Rifts between ECN and Federal Cartel Office	
	ECN	Federal Cartel Office
➢ OTAs and hotels' direct channel belong to different relevant markets. ➢ Broad price parity clauses are prohibited vertical restrictions, although not conclusively classified as hard-core (by-object) restrictions ineligible for block exemption under Regulation 330/2010. ➢ Market-specific circumstances and factual considerations may play a relevant role.	➢ Narrow price parity clauses are in principle not problematic. ➢ Commitments offered by Booking.com remove concerns.	➢ Narrow price parity clauses may restrict competition. ➢ Commitments offered by Booking.com do not sufficiently address concerns.

Figure 2: Main points in common and rifts between the ECN and German positions.

3. Legal Qualification

Although the ECJ rulings in *Intel*[73] and *Post Danmark II*[74] appeared to have smothered the embers of the 'more economic approach' (at least when it comes to Article 102), *Groupement des Cartes Bancaires* and *Maxima Latvija* judgements recently blew on them as regards Article 101. Since discussing these rulings is beyond the scope of this paper, suffice it to say that the Court, albeit cautiously, revisited the expansionist notion of restrictions by object and placed on authorities the charge of conducting a preliminary factual analysis in order to establish that a certain degree of harm is inherent to the conduct at stake for it to be considered a restriction by object.[75]

If this jurisprudential development were to have a resonance in the field of price parity clauses, it is contended in this paper that the preliminary assessment of the degree of harm of MFN clauses should look mainly at the factors presented in Section III.1: (i) business model and level of the supply chain at which the clause operates; (ii) scope of the parity clauses; (iii) relative market power of sellers and platforms; (iv) concentration of the upstream and

[73] Case T-286/09 *Intel v Commission* ECLI:EU:T:2014:547.

[74] Case C-23/14 *Post Danmark A/S v Konkurrencerådet* ECLI:EU:C:2015:651.

[75] *Groupement des Cartes Bancaires* (fn 1), para 58, and *Maxima Latvija* (fn 1), para 17.

downstream markets; (v) number of platforms benefitting from, and sellers bound by, such clauses; (vi) the proportion of the seller's overall sales made through the platform; (vii) or the availability of other price comparison mechanisms (i.e. metasearch sites).

Furthermore, legal qualification of MFN clauses as horizontal or vertical restrictions becomes of the utmost importance. Firstly, vertical restraints are more likely to be subject to a by-effect exam pursuant to the recent narrower interpretation of infringements by-object. In this vein, the *Maxima Latvija* judgement (which ruled out the restrictive object of a commercial lease agreement conferring on the tenant a right to veto the leasing of other premises in the same shopping centre) contrasts with the traditional by-object analysis carried out in the *Eturas* ruling[76] (in which the vertically related platform just played the role of a hub in an alleged horizontal concerted practice).

Secondly, if concerns posed by MFN clauses were limited to the vertical plane, they would be eligible for exemption under Regulation 330/2010, with market definition coming to the forefront in that case. As hard-core restrictions cannot be exempted under Regulation 330/2010, the by-object issue comes full circle. In other words, not being blacklisted in Article 4 of Regulation 330/2010 as hard-core restrictions, there is no reason to consider vertical price parity schemes *prima facie* excluded from block exemption, not even from the *de minimis* safe harbour[77] to the extent that they are not considered restrictions by object.[78] This would be consistent with the Commission's Guidelines on Vertical Restraints not considering MFN clauses as necessarily leading to retail price maintenance.[79] The fact that in the *Booking.com* cases cited above the market share above 30% prevented

[76] Case C-74/14, ECLI:EU:C:2016:42, 'Eturas' UAB v Lietuvos Respublikos konkurencijos taryba.

[77] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) [2001] OJ C368/13, para 11(2).

[78] Case C-226/11, ECLI:EU:C:2012:795, *Expedia*.

[79] Commission (fn 21), para 48.

eligibility for block exemption[80] and the case-by-case approach required by the breadth of the phenomenon at hand militate in favour of the applicability to purely vertical MFN clauses of both the Regulation 330/2010 exemption and the *de minimis* rule.

This proposed distinction between MFN clauses in horizontal agreements – in which a by-object analysis is more deeply engrained – and vertical price parity – more prone to by-effect assessment – mirrors to a certain extent the position taken by the American antitrust authorities. In the United States, the assessment of MFN clauses is usually conducted under the rule of reason (by pondering over direct or indirect proof of likely damages and benefits arising from the clauses) where they are not part of an agreement between competitors.[81] It seems clear that the rule of reason as such has no place in the EU competition legal framework[82] and the balancing of anti-competitive and pro-competitive effects must be conducted exclusively within the framework of Article 101(3).[83] However, the element of appreciability has a role to play in by-effect cases (unlike in by-object settings),[84] in which an appreciable anti-competitive effect cannot be presumed and Article 101(1) does not apply if the likely negative effect is insignificant.[85]

4. Corollary and Proposed Enforcement Approach

By way of corollary, the Commission should make clear that a by-object analysis is only appropriate where the preliminary assessment of the degree of harm reveals that the broad MFN clauses in place are a device for either horizontal coordination amongst sellers (as in the *E-Books* case) or vertical price-fixing at the level of platforms. As explained in Section III.3, the preliminary degree-of-harm appraisal of the economic and legal context

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[80] Konkurrensverket (fn 49), para 18.

[81] Steven C Salop and Fiona S Morton, 'Developing an Administrable MFN Enforcement Policy' (2013) 27(2) Antitrust Magazine 15, 17.

[82] Richard Whish and Brenda Sufrin, 'Article 85 and the Rule of Reason' (1987) 7(1) YBEL 1.

[83] Commission, 'Guidelines on the application of Article 81(3) of the Treaty' (Notice) SEC (2004) OJ C101/97, para 11.

[84] *Expedia* (fn 78).

[85] ibid, para 16.

should focus on, *inter alia*, the business model, the supply chain level and scope of the clause, the relative market power of sellers and platforms, the concentration of the upstream and downstream markets, the density of the MFN lattice, the proportion of the seller's overall sales made through the platform, and the availability of other price comparison mechanisms.

Narrow MFN schemes, in turn, should be subject to a by-effect assessment in view of their limited degree of harm, except where either they are devised to conceal an *Eturas*-like arrangement (tantamount to a concerted practice) or a sufficiently tight weave of narrow MFN clauses produces an effect equivalent to a more subtle hub-and-spoke setting resulting in the fixing of a minimum price.

At any rate, price parity clauses that are not intended (i.e. do not have as their object) to allow for horizontal coordination at the level of sellers – or, in the case of broad MFN clauses, at the level of platforms – should be eligible for exemption under Regulation 330/2010 or even considered of minor importance under the *de minimis* Notice, as asserted in Section III.3.

As an additional remark, while the *Eturas* case seems to hint at a return to *Apple* horizontal suspicions, the national enquiries to which the Commission seems to have relinquished the EU-wide approach appear to gravitate towards vertical concerns. Therefore, one could argue that a first stage in the assessment of parity clauses should revolve around determining whether they represent a stand-alone concern or whether they are only problematic as an instrument for more serious restrictions (i.e. namely collusion or resale price maintenance). After all, the reference to MFN clauses in the Vertical Guidelines is limited to their role as indirect means of achieving price-fixing.[86]

In a nutshell, although the patchwork of national cases provides some useful inputs (e.g. focus on vertical concerns, lax stance towards narrow parity clauses, or consideration of factual and market-specific aspects), EU

[86] Commission (fn 21), para 48.

guidance is required to develop a systematic and coherent methodology based on the elements summarised in this Section.

IV. Conclusions

EU and national trustbusters across the Old Continent have, from the very outset, showed a tendency to shoehorn any market development in the stale original legal framework come hell or high waters. This inveterate propensity has never been so worrisome as it is now in the current landscape of skyrocketing technological development. The reason is that the digital world has brought about a number of new phenomena transcending the physical borders of Member States (as prominently evinced by the MFN cases *HRS*, *Booking.com* and *Expedia*). Therefore, the ever-postponed innovative response required to capture an increasingly complex reality cannot be left to unguided national discretion for the multiple reasons stated in Section II.

Furthermore, the stage seems to have been set by the Court for the Commission to cut the Gordian knot of the worn out object-based supremacy; something that can be done without necessarily breaking away from the fundamental object-effect dichotomy, but using existing legal categories, as explored in Section III.3. Hence, it is time for the Guardian of the Treaties to grasp the nettle and avail of the momentum created by the ECJ case-law to lay the foundations for a new and sound effects-oriented position towards MFN clauses and other genuinely online restrictions.

Indeed, as explained in detail in Section II, the Commission is the best placed to develop a systematic and coherent enforcement approach based on the elements listed in Section III.4, which NCAs have failed to produce so far. Setting forth clear guidelines on e-commerce (that NCAs could subsequently apply in national proceedings) would contribute to the Digital Single Market by creating a more business-friendly environment (that refrains from strangling new business models) and by safeguarding legal certainty.

We live in a brave new world, as Shakespeare poetically remarked more than four centuries ago, that calls for an equally not only brave, but also new

response by the whilom motor of European integration that once again lags behind long-legged (but often short-sighted) national watchdogs.

GENERAL ARTICLES

HOW DO TYPES OF PROCEDURE AFFECT THE DEGREE OF POLITICIZATION OF EUROPEAN CONSTITUTIONAL COURTS? A COMPARATIVE STUDY OF GERMANY, BULGARIA, AND PORTUGAL*

Michael Hein and Stefan Ewert**

Do different types of procedure affect the degree of politicization of constitutional courts in European democracies? We argue that they do and we find evidence that supports this assumption in our analysis of the German, Bulgarian and Portuguese courts. We show that two features of the types of procedure lead to a higher politicization of court decisions: lower legal requirements on the part of the applicants and broader opportunities for them to weaken political opponents. This kind of moderating effect appears equally for all groups of applicants.

Keywords: constitutional courts, constitutional review, politicization, types of procedure

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* Replication data is available at https://www.dropbox.com/s/ecretq55xayyim8/Dataset.sav?dl=0. See instructions at https://www.dropbox.com/s/pofsp47lfdgtkpg/Dataset%20Instructions.pdf?dl=0.

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I. INTRODUCTION

Do the types of procedure affect the politicization of constitutional courts? We argue that they do and we find evidence that supports this assumption with regard to courts in three European democracies: Germany, Bulgaria and Portugal. These cases show that the lower the legal requirements on the part of the applicants, and the greater the opportunities for attacking political opponents within a particular type of procedure, the higher the level of politicization of the constitutional court decisions is. For quite some time, political scientists investigating constitutional courts have focused on political influences on constitutional review. These influences result from the position of constitutional courts on the interface between law and politics.[1] Moreover, they are likely to occur, since constitutional law is highly open to interpretation. In particular, when political actors handle interest-based conflicts before the constitutional court, political influences are virtually inevitable. However, political influences threaten the *adjudicatory* nature of

[1] See Alec Stone Sweet, Governing with Judges. Constitutional Politics in Europe (OUP 2000).

constitutional adjudication.[2] This may cause problems of legitimacy, especially if these influences call the judges' independence – and hence the rule of law – into question. Against this background, many studies have analyzed the politicization of constitutional courts. By *politicization* we mean that a constitutional court decision is not – or not exclusively – taken based on legal criteria. Instead, it is (co-)determined by political influences, especially the judges' political party affiliations and their policy preferences. Moreover, these preferences can mirror ethical or religious beliefs or the judges' socio-cultural backgrounds.[3] The *causes* of politicization can be manifold: direct impacts on judges by political actors, the appointment of judges, the strategies and interests of the parties involved in constitutional disputes (including the judges themselves), and the judges' and the courts' understanding of their roles.

It follows that political and legal culture, the content of the contested legal norms, public attention, and types of procedure exert *moderating effects* in the sense that these variables do not themselves cause politicization but modify its degree.[4] These moderating factors thus 'channel' the political influences on constitutional adjudication.

However, previous political science analyses have mainly focused on politicization with regard to the appointment of judges,[5] the strategies and

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[2] See Dieter Grimm, 'Constitutions, Constitutional Courts and Constitutional Interpretation at the Interface of Law and Politics' in Bogdan Iancu (ed), *The Law/Politics Distinction in Contemporary Adjudication* (Eleven International 2009), 21.

[3] See Michael Hein, Stefan Ewert, 'What is "Politicisation" of Constitutional Courts? Towards a Decision-oriented Concept' in Antonia Geisler, Michael Hein, Siri Hummel (eds), *Law, Politics, and the Constitution. New Perspectives from Legal and Political Theory* (Lang 2014), 31.

[4] See David P. MacKinnon, 'Integrating Mediators and Moderators in Research Design' (2011) Research on Social Work Practice 675, 678.

[5] Chris Hanretty, 'The Bulgarian Constitutional Court as an Additional Legislative Chamber' (2014) East European Politics and Societies, 540; Chris Hanretty, 'Dissent in Iberia: The ideal points of justices on the Spanish and Portuguese Constitutional Tribunals' (2012) European Journal of Political Research, 671; Nuno Garoupa, Marian Gili, Fernando Gómez-Pomar, 'Political Influence and Career Judges: An Empirical Analysis of Administrative Review by the Spanish Supreme Court' (2012) Journal of Empirical Legal Studies, 795; Royce Carroll, Lydia Tiede, 'Judicial

interests of the parties involved,[6] and political actors' attempts to directly control the courts.[7] By contrast, studies of other factors are largely missing. This also holds true for types of procedure. They can be understood as regulating the *access* to constitutional courts, the possible *contents* of constitutional review, and the *consequences* of the court decisions.[8] They thus define who may bring what kind of legal problems under which circumstances before the constitutional court, and which judicial consequences a judgment will have. Consequently, the types of procedure substantially configure the constitutional court's case law. Since politicization may impair the adjudicatory nature of constitutional review, the concrete configuration of the types of procedure is of vital importance for the legitimacy of a constitutional court. Procedures that potentially facilitate politicization play a rather problematic role. In contrast, procedures that potentially mitigate politicization would be preferable from a rule of law perspective. Therefore, substantial knowledge on how the types of procedure influence politicization is not only desirable for the scientific analysis of constitutional courts, but also for political and legal practitioners who deal with the establishment or reform of constitutional courts.

Behavior on the Chilean Constitutional Tribunal' (2011) Journal of Empirical Legal Studies, 856; Nuno Garoupa, 'The Politicization of the Kelsenian Constitutional Courts: Empirical Evidence' in Kuo-Chang Huang (ed), *Empirical Studies of Judicial Systems* (Academia Sinica 2009), 149; Christoph Hönnige, 'The Electoral Connection. How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts' (2009) West European Politics, 963.

6 Hönnige (fn 5); Stone Sweet (fn 1); Georg Vanberg, 'Abstract Judicial Review, Legislative Bargaining, and Policy Compromise' (1998) Journal of Theoretical Politics, 299.

7 Maria Popova, *Politicized Justice in Emerging Democracies. A Study of Courts in Russia and Ukraine* (CUP 2012); Pilar Domingo, 'Judicialization of Politics or Politicization of the Judiciary: Recent Trends in Latin America' (2004) Democratization, 104.

8 See Victor Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective* (Yale UP 2009), 5–8. Using this definition, we examine only the aforementioned three aspects of the constitutional courts' procedural rules. Other procedural elements such as the formation of panels, chambers, or senates, the rules regulating the intra-court negotiations, the execution of oral and/or written proceedings, and the voting rules within the court are left out of consideration.

Nevertheless, political science has very rarely taken different types of procedure into account so far, at least with regard to courts following the European model of concentrated judicial review. Silvia von Steinsdorff analyzes the types of procedure concerning the political consequences of court decisions in eight post-socialist constitutional courts in Central and Eastern Europe.[9] Steven Schäller examines the impact that types of procedure have on the occurrence of prejudices in the decisions of the German Federal Constitutional Court.[10] Apart from these examples, however, the relevant literature provides only a few scattered arguments on the impact certain types of procedure have,[11] an overview of 'ancillary powers' of constitutional courts,[12] and a descriptive typology of types of procedure.[13] Aside from those, many comparative political science studies focus only on selected types of procedure, most commonly abstract review procedures or disputes between state bodies.[14]

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[9] Silvia von Steinsdorff, 'Verfassungsgerichte als Demokratie-Versicherung? Ursachen und Grenzen der wachsenden Bedeutung juristischer Politikkontrolle' in Klemens H. Schrenk, Markus Soldner (eds), *Die Analyse demokratischer Regierungssysteme. Festschrift für Wolfgang Ismayr zum 65. Geburtstag* (VS Verlag für Sozialwissenschaften 2010), 479.

[10] Steven Schäller, 'Präjudizien als selbstreferenzielle Geltungsressource des Bundesverfassungsgerichts' in Hans Vorländer (ed) *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (VS Verlag für Sozialwissenschaften 2006), 205.

[11] See e.g. Nuno Garoupa, Tom Ginsburg, 'Building Reputation in Constitutional Courts: Party and Judicial Politics' (2011) Arizona Journal of International and Comparative Law 539; Wojciech Sadurski, 'Rights-Based Constitutional Review in Central and Eastern Europe' in Tom Campbell, K. D. Ewing, Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001), 315; Helmut Simon, 'Verfassungsgerichtsbarkeit' in Ernst Benda, Werner Maihofer, Hans-Jochen Vogel (eds), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland* (2nd edn, de Gruyter 1994), 1637.

[12] Tom Ginsburg, Zachary Elkins, 'Ancillary Powers of Constitutional Courts' (2009) Texas Law Review 1431; see also Tom Ginsburg, 'Ancillary Powers of Constitutional Courts' in Tom Ginsburg, Robert A. Kagan (eds), *Institutions and Public Law: Comparative Approaches* (Lang 2004), 225.

[13] Sascha Kneip, 'Verfassungsgerichtsbarkeit im Vergleich' in Oscar W. Gabriel, Sabine Kropp (eds), *Die EU-Staaten im Vergleich. Strukturen, Prozesse, Politikinhalte* (VS Verlag für Sozialwissenschaften 2008), 631, 643–647.

[14] See e.g. Sascha Kneip, 'Constitutional courts as democratic actors and promoters of the rule of law: institutional prerequisites and normative foundations', (2011)

Therefore, this article examines whether and in what manner the different types of procedure influence the politicization of constitutional court decisions. As outlined above, we consider the types of procedure as a *moderating variable* that channels politicization: we assume that the level of politicization varies among different types of procedure. We conduct our analysis using a *Most Different Systems Design*. From all concentrated constitutional courts in European democracies as of 2010, we selected the German *Bundesverfassungsgericht* (Federal Constitutional Court), the Bulgarian *Konstitucionnen săd* (Constitutional Court) and the Portuguese *Tribunal Constitucional* (Constitutional Tribunal). We analyzed all decisions of these constitutional courts from 1991 to 2010 for Germany and Bulgaria, and from 2005 to 2010 for Portugal. On the basis of two theory-driven hypotheses, we divided all types of procedure into four groups, which we expect to have different levels of politicization.

In the following, we first present our concept of politicization and discuss the challenges of distinguishing between politics and law (II.). We then proceed to develop our two hypotheses and describe the different types of procedure that can be found across European constitutional courts (III.). We then operationalize politicization (IV.) and explain our case selection (V.). Subsequently, we illustrate the empirical data and present our results (VI.). Finally, we interpret our results in the light of our hypotheses, discuss the validity of our findings beyond the countries analyzed, and provide an outlook on further research (VII.).

II. THE CONCEPT OF POLITICIZATION

'Politicization' is one of the most frequently used terms in scientific research on constitutional adjudication. It can be found in numerous studies that deal

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Zeitschrift für Vergleichende Politikwissenschaft 131; Hönnige (fn 5). Ali S. Masood, Donald R. Songer, 'Reevaluating the Implications of Decision-Making Models: The Role of Summary Decisions in U.S. Supreme Court Analysis' (2013) Journal of Law and Courts 363, level a similar critique with regard to the state of the art in U.S. Supreme Court studies, which mainly focus on the 'plenary decisions' but leave out the 'summary decisions'. According to that analysis, this narrowing of perspective had created the widespread impression of a conservative court.

with political influences on constitutional courts and supreme courts (and also on lower-level ordinary courts) in practically all regions of the world.[15] Due to the tradition of conceptualizing judges as 'politicians in robes',[16] i.e. as politically interested actors that do not systematically differ from other political actors, the concept played a rather minor role in US American political science for quite a long time. However, even there the concept of politicization has gained in importance in recent years.[17]

In general, politicization describes the process of 'making previously non-political persons or issues political', i.e. 'the expansion of politics, especially of the power to take socially binding decisions and to penetrate previously

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[15] Instead of others, see for the US Supreme Court: Benjamin Woodson, 'Politicization and the Two Modes of Evaluating Judicial Decisions' (2015) Journal of Law and Courts 193; Brandon L. Bartels, Christopher D. Johnston, 'Political Justice. Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process' (2012) Public Opinion Quarterly 105; Stephen M. Engel, *American Politicians Confront the Court. Opposition Politics and Changing Responses to Judicial Power* (CUP 2011); for Latin America: Diana Kapiszewski, *High Courts and Economic Governance in Argentina and Brazil* (CUP 2012); Raul A. Sanchez Urribarri, 'Politicization of the Latin American Judiciary via Informal Connections' in David K. Linnan (ed), *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (Ashgate 2012), 307; Carroll and Tiede (fn 5); Domingo (fn 7); for Western Europe: Hönnige (fn 5); Stone Sweet (fn 1); Vanberg (fn 6); Nicos C. Alivizatos, 'Judges as Veto Players' in Herbert Döring (ed), *Parliaments and Majority Rule in Western Europe* (Campus 1995), 566; for post-socialist Central and Eastern Europe: Popova (fn 7); Michael Hein, 'Constitutional Conflicts between Politics and Law in Transition Societies: A Systems-Theoretical Approach' (2011) Studies of Transition States and Societies 3; for Asia: Jiunn-rong Yeh, Wen-Chen Chang (eds.), *Asian Courts in Context* (CUP 2014); Björn Dressel, 'Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand' (2010) The Pacific Review 671; and for Africa: Kierin O'Malley, 'The Constitutional Court' in Murray Faure, Jan-Erik Lane (eds), *South Africa: Designing New Political Institutions* (Sage 1996), 75.

[16] Charles H. Sheldon, *The Supreme Court. Politicians in Robes* (Glencoe Press 1970).

[17] See Woodson (fn 15); Bartels and Johnston (fn 15); Engel (fn 15); Garoupa (fn 5); Stone Sweet (fn 1); Vanberg (fn 6).

non-political fields such as private life or private economic activity'.[18] We assume that constitutional adjudication is basically a legal and not a political process. However, it is subject to political influences for at least two reasons. First, constitutions regularly contain politically controversial issues such as the normative foundations of the constitutional order or the basic rules of the political process. In particular, when political actors handle interest-based conflicts before a court, political influences are virtually inevitable.

Second, constitutional law is often quite general in its formulation and therefore highly open to interpretation. Admittedly, this openness differs depending on the kind of constitutional norm. For instance, rules are generally considered less disputable than standards – and these in turn are both deemed less disputable than principles.[19] Nevertheless, even if 'provisions are formulated as clearly and as coherently as possible, they can raise questions when it comes to solving a concrete case.'[20] Therefore, constitutional judges frequently have a broad scope for decision-making and they do not necessarily need to base their decisions solely on legal criteria. Quite often, constitutional courts are even required to decide on matters for which they cannot find clear answers in the constitutional text. As Robert A. Dahl put it with regard to the US Supreme Court, 'it is an essential characteristic of the institution that from time to time its members decide cases where legal criteria are not in any realistic sense adequate to the task

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[18] Manfred G. Schmidt, 'Politisierung' in Manfred G. Schmidt (ed), *Wörterbuch zur Politik* (3rd ed, Kröner 2010), 630, 630. All German quotes were translated by the authors.

[19] Instead of others see Pierre J. Schlag, 'Rules and Standards' (1985) UCLA Law Review 379.

[20] Grimm (fn 2), 27. A recent example of such an only seemingly clear case is a dispute before the Polish Constitutional Tribunal in 2011 concerning the meaning of Article 98, paragraph 2 of the Polish Constitution, according to which parliamentary elections have to take place on 'a non-working day.' To improve their chances in the upcoming elections, the then governing coalition had tried to extend the ballot to two days. This seemingly unequivocal breach of the constitution caused one of the most controversial decisions of the Tribunal, in which no less than eleven (!) of the 15 judges issued dissenting opinions. Judgment of the Polish Constitutional Tribunal, K 9/11, OTK ZU No. 61/6/A/2011.

[...]; that is, the setting of the case is "political".'[21] Therefore, the judges may be (and sometimes inevitably are) politically influenced, most notably by individual political party affiliations and policy preferences. These influences can also reflect ethical and religious ties, ideological beliefs, and the socio-cultural backgrounds of the judges.

In sum, politicization of constitutional adjudication means that a court decision is not or not exclusively made on the basis of legal criteria, but is (co-)determined by political influences. Politicization thus refers to the instances in which judges either are (consciously or unconsciously) influenced in their search for the most convincing legal solution to the constitutional matter before them by their political preferences or considerations regarding political appropriateness, or even decide a case on the basis of political criteria and then prepare a legal reasoning to support this.[22]

However, distinguishing between political and legal criteria is the main challenge in the study of politicization – both theoretically and empirically.[23] Theoretically, even precise definitions as provided e.g. by sociological systems theory[24] are highly disputed. Empirically, it is impossible to identify political influences in single court decisions since the real motives of the judges cannot be discovered unequivocally. These difficulties notwithstanding, it seems reasonable to assume that if political influences did not play any role in the work of a court, there should be no long-term correlations between any causes of politicization and the court's

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[21] Robert A. Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) Journal of Public Law 279, 280.

[22] For a more comprehensive discussion of this concept of politicization, see Hein, Ewert (fn 3).

[23] See Bogdan Iancu (ed), *The Law/Politics Distinction in Contemporary Public Law Adjudication* (Eleven International 2009); Robert C. Post, Neil S. Siegel, 'Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin' (2007) California Law Review 1473.

[24] Instead of others see Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1991) Cardozo Law Review 1419; Michael Hein, 'Constitutional Conflicts between Politics and Law in Transition Societies: A Systems-Theoretical Approach' (2011) Studies of Transition States and Societies 3.

adjudication. Under a number of restrictions, it is therefore possible to approach politicization by observing certain characteristics of constitutional court decisions such as the probability of success of oppositional claims[25] or the distribution of dissenting votes.[26] Since the former would be restricted to a few types of procedure only, we have opted for the latter (see section IV.).

III. Types of Procedure as 'Channels of Politicization': Two Hypotheses

As mentioned in the introduction, the types of procedure regulate the *access* to constitutional courts, the possible *contents* of constitutional review, and the *consequences* of the court decisions. Access may be given to state bodies, natural and legal persons, organizations (e.g. political parties), and the constitutional court *ex officio*. The contents of constitutional adjudication are manifold (see table 1 below). The consequences of the decisions can be classified into three legal categories: non-binding, binding only for the parties involved in the proceedings (*inter partes*), or generally binding for the constitutional order in total (*erga omnes*). Additionally, the implementation of a decision in practice may differ substantially from the legal provisions, seeing as constitutional courts do not have their own executive capacities and are dependent on other state bodies' willingness to comply.

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[25] Martina Flick, Organstreitverfahren vor den Landesverfassungsgerichten. Eine politikwissenschaftliche Untersuchung (Lang 2011); Hönnige (fn 5).

[26] See e.g. Chris Hanretty, 'Judicial Disagreement need not be Political: Dissent on the Estonian Supreme Court' (2015) Europe-Asia Studies 970; Hanretty, Court (fn 5); Hanretty, Dissent (fn 5); Susumu Shikano, Verena Mack, 'Judges' Behaviour and Relationship with Political Parties in a Non-Common-Law Country: the Case of the German Federal Constitutional Court' (2014) Working Paper, Graduate School of Decision Sciences, University of Konstanz <https://dx.doi.org/10.13140/2.1.3703.8088> accessed 10 December 2015; Santiago Basabe-Serrano, 'Judges without Robes and Judicial Voting in Contexts of Institutional Instability: The Case of Ecuador's Constitutional Court, 1999–2007' (2012) Journal of Latin American Studies 127; Daniel Smilov, *The Hybridity of Constitutional Courts – Arbiters in the Absence of Rules* (CAS 2009).

1. Hypothesis 1: Legal Requirements

Our first hypothesis refers mainly to the access to and the content of constitutional adjudication. It takes the legal requirements that the different types of procedure impose on the applicants into account. The hypothesis follows an argument that has been present in the literature for a long time, but has until now not been proven empirically. It goes back to Alexis de Tocqueville's seminal study on 'Democracy in America'. Tocqueville develops his argument based on the two characteristics of judicial power: the obligation to decide on individual cases and the requirement of a claim:

> As long, therefore, as the law is uncontested, the judicial authority is not called upon to discuss it, and it may exist without being perceived. [...] If a judge in deciding a particular point destroys a general principle, by passing a judgement which tends to reject all the inferences from that principle, and consequently to annul it, he remains within the ordinary limits of his functions. But if he directly attacks a general principle without having a particular case in view, he leaves the circle in which all nations have agreed to confine his authority, [...] he ceases to be a representative of the judicial power.[27]

Also with regard to the US Supreme Court, John Stuart Mill reaffirmed this argument. Referring directly to Tocqueville, Mill stated that the Supreme Court

> decides only as much of the question at a time as is required by the case before it, and its decision, instead of being volunteered for political purposes, is drawn from it by the duty which it can not refuse to fulfill, of dispensing justice impartially between adverse litigants.[28]

Transferred to modern constitutional adjudication, this means that types of procedure, such as the individual constitutional complaint or the concrete review, in most cases remain in the legal field since they are bound to individual legal disputes. Hence, these types of procedure should lead to a rather low level of politicization. By contrast, types of procedure such as the

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[27] Alexis de Tocqueville, *Democracy in America* (Regnery 2002 [1835]), 74.

[28] John Stuart Mill, *Considerations on Representative Government* (Prometheus 1999 [1861]), 327.

constitutional interpretation or the abstract review more likely protrude into the political sphere due to their lack of case specificity and thus function as channels for a comparatively high level of politicization.

Recent research on constitutional courts has repeatedly been reconsidering this argument. As Nuno Garoupa and Tom Ginsburg put it: 'Whereas concrete review 'judicializes' constitutional courts, preventive review has the opposite effect. Preventive review makes a constitutional court less judicial and more political'.[29] This argument can be generalized as follows: the likelihood that the decision-making process will be politicized depends on whether or not the applicant has to assert a violation of, or a threat to, their constitutional rights or competencies. If this is the case, the proceedings can only be opened in order to decide a concrete judicial dispute. In that context, the claimants' opportunities to pursue political interests are rather limited. Consequently, the judges' discretion is also clearly defined and limited. Thus, our first hypothesis regarding the *legal requirements* of the different types of procedure reads as follows:

> **(H1)** If a type of procedure does not require the claimant to assert a violation of or a threat to their constitutional rights or competencies, the politicization level will be higher than if the claimant does have to make such an assertion.

2. Hypothesis 2: Political Opportunities

Our second hypothesis considers the political opportunities of different types of procedure. Thus, it refers primarily to the consequences of the court's decision. Tocqueville already pointed out that constitutional judges are 'invested with immense political power'. Their power to examine the constitutionality of a law 'gives rise to immense political influence'.[30] This influence can be exerted in line with or in contradiction to the interests of political actors. In contrast, those actors might try to use constitutional court proceedings for political goals, i.e. for purposes other than those intended by the constitution. Instead of the repeal of an unconstitutional situation, the

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[29] Garoupa, Ginsburg (fn 11), 550. See also Garoupa (fn 5), 158; Sadurski (fn 11), 318; Simon (fn 11), 1651.

[30] Tocqueville (fn 27), 75 f.

settling of a legal dispute, or the protection of the constitutional order from its enemies, claimants might go to court primarily in order to reduce their political opponents' powers, to unseat political opponents, or even to eliminate them *as* political opponents.

We assume that the different types of procedures channel these political intentions – the causes of politicization – in different ways. Types of procedure that are commonly considered 'political' seem to be particularly suitable for these purposes, such as the removal from office, impeachment procedures, the party ban, or the dispute between state bodies. For instance, the failed impeachment proceedings against the previous Romanian President Traian Băsescu (2007 and 2012) showed a remarkably high degree of politicization.[31] In particular, this became evident when the parliament initiated these procedures. The voting behavior of the deputies and senators ran almost exactly along party lines, even though on paper the procedure is not a political recall, as it deals with infringements of the constitution. Similarly, the presidential impeachment proceedings conducted in US history – in particular those of Andrew Johnson (1868) and Bill Clinton (1998/1999)[32] – were heavily dominated by the conflicting political interests of the two 'blocs' in the Congress.[33] Since in both countries only the parliament can initiate an impeachment procedure, it provides political actors with an opportunity to struggle for power by legal means, even though those means were designed to protect the constitution.[34] In general, we assume for all above-mentioned 'political' types of procedure that there is a

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[31] Sergiu Gherghina, Sergiu Miscoiu, 'The Failure of Cohabitation: Explaining the 2007 and 2012 Institutional Crises in Romania' (2013) East European Politics and Societies 668.

[32] Although the impeachment of Richard Nixon (1974) was also politicized, severe violations of the constitution and of the law played a much more important role in that case than in the other two.

[33] Arnold H. Leibowitz, An Historical-Legal Analysis of the Impeachments of Presidents Andrew Johnson, Richard Nixon, and William Clinton: why the Process Went Wrong (Mellen 2012).

[34] Upon completing this article, a similar pattern was observable with the ongoing impeachment of Brazil's president Dilma Rousseff, which had begun in late 2015; see 'Brazil's Dilma Rousseff to face impeachment trial' (*BBC News*, 12 May 2016) <http://www.bbc.com/news/world-latin-america-36273916> accessed 19 May 2016.

high probability of political interests being slipped in the cases and that this cannot be easily neutralized by the judges.[35]

In contrast, types of procedure such as the constitutional interpretation, the *actio popularis*, the concrete review, or the individual constitutional complaint seem to be more 'judicial'. In these types of procedure, political opponents cannot *directly* be threatened in their position by the judgment. Therefore, it is much less likely that claimants try to transfer their political controversies to the constitutional court. Admittedly, decisions in these types of procedure can have *indirect* political consequences for political opponents (see the next subsection). Nevertheless, 'individual judges might be prone to political reasoning in a dispute between state bodies, while concrete review proceedings might evoke more legal reasoning.'[36]

Again, we can generalize this argument for all types of procedure: Regarding the probability of a politicized decision by the constitutional court, the types of procedure have a moderating effect according to the opportunities they provide for the claimants to directly weaken the position of their political opponents. Thus, our second hypothesis regarding the *political opportunities* of the types of procedure reads as follows:

> **(H2)** If a type of procedure provides the opportunity to weaken political opponents directly, the politicization level will be higher than if such an opportunity is not provided.

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[35] Admittedly, the US Supreme Court is only involved marginally in the procedure, and the parliament not only has the right to initiate but also to decide. Nevertheless, this case offers an illustration of the relevant logic: Even if the final decision would be made by the court (as in many other, particularly European, states), the problem of *politicizing a legal matter* would remain.

[36] Uwe Kranenpohl, Hinter dem Schleier des Beratungsgeheimnisses. Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts (VS Verlag für Sozialwissenschaften 2010), 47.

3. The Expected Degrees of Politicization of the Different Types of Procedure

Combining both hypotheses, we can cross-tabulate all types of procedure requiring a claim.[37] The types of procedure in field (a) meet both hypothesized conditions. Accordingly, we expect the highest level of politicization in this group. The fields (b) and (c) meet one of the conditions each. Thus, we expect a middle-range degree of politicization in these two groups. However, while hypothesis 1 defines an absolute difference, hypothesis 2 defines only a relative distinction: The requirement to assert a violation of, or a threat to, one's constitutional rights or competencies (H1) exists or does not. Yet, while the possibility to weaken political opponents *directly* also exists only in certain types of procedure, it is almost always possible to weaken political opponents in an *indirect* fashion. This is particularly the case for the abstract review and the constitutional interpretation. These types of procedure are not only usable to decide conflicts of jurisdiction. In fact, the political opposition might restrict the legislative scope of the parliamentary majority by means of a successful lawsuit, thereby weakening the governing actors.

In sum, we expect hypothesis 1 to have a stronger impact on politicization than hypothesis 2. Consequently, we assume a higher degree of politicization in group (b) than in group (c). Finally, the types of procedure in group (d) meet none of the conditions favoring politicization. Therefore, we expect the lowest degree of politicization here. Taken as a whole, we expect that the degrees of politicization will rank from high to low as follows: (a) → (b) → (c) → (d). Across the European constitutional courts we can find 15 different types of procedure requiring a claim.[38] They are presented in table 1 and will be described in the following more closely.

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[37] *Ex-officio* types of procedure are not included since there are no applicants whose legal requirements and political opportunities could be described according to the hypotheses. *Non-judicial* types of procedure such as the observation of elections and referendums and the confirmation of their results, or the registration of political parties (but not: appeals against their non-registration), are not included either, because they are supposed to be not politicized due to their formal character.

[38] See Allan R. Brewer-Carías (ed), *Constitutional Courts as Positive Legislators. A Comparative Law Study* (CUP 2013); Ginsburg, Elkins (fn 12); Wojciech Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd edn, Springer 2008); Ginsburg (fn 12); Georg Brunner, 'Der

Table 1: Expected degrees of politicization through types of procedure

		Legal Requirements	
		no violation of/threat to applicant's constitutional rights or competencies necessary	*violation of/threat to applicant's constitutional rights or competencies necessary*
Political Opportunities	*direct weakening of political opponents possible*	**a: high** • ban or non-registration of a political party • ban or non-registration of an organization • removal from office/ impeachment/ withdrawal of a parliamentary mandate due to offenses against criminal or constitutional law • appeals against the financial audit of political parties or election campaigns • forfeiture of basic rights	**c: medium-low** • dispute between state bodies • scrutiny of elections/withdrawal of a parliamentary mandate due to offenses against the election law • appeals against elections to or deliberations of the governing bodies of political parties
	direct weakening of political opponents impossible	**b: medium-high** • constitutional interpretation • abstract review • *actio popularis* • (quasi-*actio popularis*)	**d: low** • concrete review • individual constitutional complaint • (quasi-*actio popularis*)

Source: Authors' own compilation.

a. Applicant's Constitutional Rights or Competencies Not Affected/Direct Weakening of Political Opponents Possible:

We expect the highest degree of politicization in group (a). This group consists of procedures where the claimants do not have to assert a violation of, or a threat to, their own constitutional rights. However, these types of

Zugang des Einzelnen zur Verfassungsgerichtsbarkeit im europäischen Raum' (2002) Jahrbuch des öffentlichen Rechts der Gegenwart 191.

procedure are very appropriate as tools in political disputes. The threat to apply them alone can be used to weaken political opponents. Moreover, instead of clear statutory violations, constitutional judges mostly only have to identify an abstract 'unconstitutional behavior'. Thus, a decision based on judicial criteria alone is often impossible. Instead, the judges are left with a large scope for interpretation that is susceptible to political influences.[39] A special case in this group is the uncommon type of procedure 'financial audit of political parties and election campaigns'. This type of procedure can be found in Portugal, where the constitutional court *ex officio* reviews the finances of parties and election campaigns, and the parties involved can appeal against these decisions. The latter procedure is part of our empirical analysis, since our hypotheses are applicable here.

b. Applicant's Constitutional Rights or Competencies Not Affected/Direct Weakening of Political Opponents Impossible:

We expect a medium-high degree of politicization for the constitutional interpretation, the abstract review, the *actio popularis*, and – under specific conditions – what some scholars call the 'quasi-*actio popularis*'.[40] The constitutional interpretation is a peculiarity of some post-socialist constitutional courts. In this type of procedure, state authorities are entitled to request the interpretation of any constitutional norm without any specific prerequisite. On the one hand, several post-socialist constitutions introduced this type of procedure with regard to the legal uncertainty during the transition to democracy and the rule of law. On the other hand, its potential politicization contradicts the intention of this type of procedure, because no concrete legal dispute is required. Additionally, the court can be forced to work legislatively and to declare *one* possible elaboration of a constitutional norm as the *only* possible option.

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[39] Another question is, whether these types of procedure are functional and (normatively) desirable in a democratic constitutional state; see Gur Bligh, 'Defending Democracy: A New Understanding of the Party Banning Phenomenon' (2013) Vanderbilt Journal of Transnational Law 1321; Peter Niesen, 'Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties. Parts I and II' (2002) 3(7) German Law Journal <http://www.germanlawjournal.com/volume-03-no-07> accessed 19 May 2016.

[40] Brunner (fn 38), 230.

The abstract review is a common type of procedure among almost all concentrated constitutional courts. Apart from obligatory (*ex officio*) abstract review, there are two forms requiring a claim: preventive (*a priori*) and repressive (*a posteriori*) review. In both cases, only state bodies can initiate the procedure. The court then has to decide on the constitutionality of an act (be it an ordinance, a law or even a constitutional amendment) or an international treaty. We expect a medium-high degree of politicization since the claimant's constitutional rights or competencies do not have to be affected. Instead of an application of legal norms to concrete circumstances, the court is forced to review the challenged provision in an abstract manner. Moreover, typically the parliamentary opposition (or affiliated actors) bring politically controversial acts before the court. Hence, as the former German constitutional judge Helmut Simon pointed out, it is

> sometimes difficult to see, who actually needs help. The parties primarily reiterate their positions from the legislative process and continue their dispute before the court. The court easily takes on the role of arbitrator between opposing value judgments and prognoses, without being better equipped or qualified for this purpose than the parliament.[41]

Government and opposition simply continue their controversy before the constitutional court. Thus, it seems obvious that the claimants in such abstract review procedures are mainly politically motivated.[42]

The *actio popularis* is a special type of abstract review where *everybody* (or at least every citizen of the respective country) can assert the unconstitutionality of a legal norm without being affected personally. The so-called 'quasi-*actio popularis*' differs from the genuine *actio popularis* insofar as this type of procedure imposes certain legal requirements on the applicant, in particular a substantiated 'legal interest'.

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[41] Simon (fn 11), 1651.

[42] See Klaus Stüwe, Die Opposition im Bundestag und das Bundesverfassungsgericht. Das verfassungsgerichtliche Verfahren als Kontrollinstrument der parlamentarischen Minderheit (Nomos 1997), 183. Nevertheless, it is again another question whether the abstract review is a functional and (normatively) desirable type of procedure; see ibid, 180.

c. Applicant's Constitutional Rights or Competencies Affected/Direct Weakening of Political Opponents Possible:

This group consists of three rather different types of procedure: the dispute between state bodies, the scrutiny of elections including the withdrawal of a parliamentary mandate due to offenses against the election law, and appeals against elections or deliberations of the governing bodies of political parties. The last mentioned type of procedure only applies to the Portuguese case. We expect a medium-low degree of politicization in this group, but lower than in group (b). On the one hand, claimants can initiate these procedures only if they assert a violation of, or threat to, their constitutional rights or competencies. On the other hand, the proceedings can be used primarily to negatively affect political opponents, e.g. to weaken other political parties or rivals within one's own party.[43] Even if the constitutional judges have distinct judicial criteria for their decision in such cases, they often become entangled in these political controversies and can hardly escape their dynamics.

d. Applicant's Constitutional Rights or Competencies Affected/Direct Weakening of Political Opponents Impossible:

Finally, we expect the lowest degree of politicization for the types of procedure that meet none of the two conditions favoring politicization. This applies to the concrete review, the individual constitutional complaint and – under certain circumstances – the 'quasi-*actio popularis*'. Depending on its particular configuration, the latter procedure could belong to group (d) instead of group (b) (see above). This is the case if the legal requirements are shaped in such a manner that the applicant (at least *de facto*) has to be affected in their constitutional rights or competencies. Thus, the judges have to decide particular judicial disputes in these types of procedure. Therefore, they are

> triggered by the application of the disputed legal provisions to concrete circumstances and thus require the claimant to have been impaired in his own rights. Such a review, which can take into account the effect and scope of the provisions in legal reality, most closely corresponds to the function of a court.[44]

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43 See ibid., 170

44 Simon (fn 11), 1651.

Generally, it can be assumed that judicial interests motivate the claimants in these types of procedure,[45] not least since 'political' state bodies usually do not have the right of petition here. Furthermore, the constitutional court decides within a clearly defined legal frame due to the case specificity.

IV. The Operationalization of Politicization

As outlined in section II, we use the judges' published *dissenting opinions* to analyze political influences on the court empirically. The majority of European constitutional courts enable the judges to publish their individual dissenting votes and/or the voting result nowadays.[46] Hence, each judge is allowed to take a position that differs from the judges' majority publicly visible.[47] Of course, the reasons for such a divergence can be manifold. Nevertheless, a political motivation or (unconscious) orientation is a likely reason for many cases:

> The practice of allowing dissent in constitutional courts signals that they are not entirely judicial but at least partly political in character. Allowing separate opinions and dispensing with unanimous voting sends a costly signal, because it means the ideologically important goal of having a single correct answer is being sacrificed. Consensus in a constitutional court thus expresses 'legal' decision-making rather than 'political' decision-making.[48]

Even if dissent naturally appears in all collegiate courts, the majority of European legal systems permit their publication only for constitutional courts.[49] Some states such as France or Italy even prohibit the publication of dissenting opinions for their constitutional judges. In these countries,

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45 See Stüwe (fn 42), 197.

46 Katalin Kelemen, 'Dissenting Opinions in Constitutional Courts' (2013) German Law Journal 1345.

47 Apart from dissenting opinions, judges are also often allowed to publish *concurring opinions*. Here, the judge agrees with the decision, but not with the legal reasoning of the judges' majority. Therefore, concurring opinions usually do not indicate political influences.

48 Garoupa, Ginsburg (fn 11), 547.

49 See Kelemen (fn 46), 1346.

> practitioners have argued that dissenting opinions, by demonstrating that judicial outcomes are not automatic, create the perception that judicial decisions are motivated by [...] political considerations rather than [...] legal or jurisprudential considerations, thereby undermining judicial independence.[50]

Thus, dissenting opinions can indicate the partly political character of constitutional adjudication. For our measurement, we calculate the *dissenting ratio* (DR) as the share of publicly dissenting judges among all judges taking part in the decision. The DR theoretically ranges from 0.0 to 1.0. Cases with a DR > 0.5 may occur when an absolute or qualified majority of all judges is required or when more than half of the participating judges express dissenting opinions, but related to different aspects of the decision.[51] We calculate the DR mean for each type of procedure and for each of the groups (a) to (d) in order to be able to describe differences in politicization. Using a relative measurement prevents a bias that might result from the absence of certain judges. In addition, it makes a comparison of different constitutional courts and especially the identification of consensus-orientated and conflict-orientated courts possible. However, a *direct* comparison of the DR values of different courts is not valid in our study design, as we cannot consider all

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[50] Hanretty, Dissent (fn 5), 671.

[51] One example for the first scenario is the decision of the German Federal Constitutional Court concerning the ban of the National Democratic Party in 2003 (BVerfGE 107, 339). In this case, a 3-to-4 minority of the seven judges on the bench decided against the motion (DR=0.57) since for a party ban a two-thirds majority of all eight judges (= 6; one judge was missing) is required. Concerning the second scenario, there are three extreme cases in Bulgaria during the period under investigation (Decisions No. 9/1994, 4/1995 and 10/1997; all decisions of the Bulgarian Constitutional Court are available at <http://constcourt.bg/acts> accessed 19 May 2016). In these cases, there had been majorities for every part of the decision, but not a single judge agreed on the complete judgment. As a result, the DR reached the maximum value of DR=1.0. In Portugal, we have also observed some judgments with very high DR values in the framework of the second scenario (Judgments No. 423/2008 with DR=0.769, and Judgment No. 338/2010 with DR= 0.833; all decisions of the Portuguese Constitutional Tribunal are available at <http://www.tribunal constitucional.pt/tc/acordaos> accessed 19 May 2016). All mentioned decisions in Bulgaria and Portugal were taken in abstract review procedures.

different causes and moderators of politicization. Nevertheless, the direction of the effect of the types of procedure should be similar in very different settings. Thus, we provide an *indirect* comparison: We compare the ranks of the types of procedure and of the different groups concerning the dissenting ratio. If, for example, the concrete review procedures in all countries have a distinctly lower DR than the abstract review procedures, this would clearly indicate a systematic relation – i.e. a higher degree of politicization of the latter type of procedure.

However, as Chris Hanretty has recently shown for the Estonian Supreme Court, 'judicial disagreement need not to be political'.[52] Instead, there is one crucial empirical precondition and one methodological limitation for using the dissenting opinions in order to analyze the moderating effects of the types of procedure. Empirically, the validity of the indicator DR is given only in cases for which it correlates with the main causes of politicization. With regard to the appointment of judges, previous studies have shown that in Germany,[53] Bulgaria,[54] and Portugal[55] the decision-making behavior of the judges indeed correlates with their individual party affiliations and the positions of the political parties that appointed them.[56]

To test the validity of our indicator, we furthermore examined the relation between different applicants and the dissenting ratio. Concerning the

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[52] Hanretty (fn 26), 970.

[53] Shikano, Mack (fn 26); Hönnige (fn 5).

[54] Hanretty, Court (fn 5); Smilov (fn 26).

[55] Hanretty, Dissent (fn 5); Pedro C. Magalhães, 'The Limits to Judicialization: Legislative Politics and Constitutional Review in the Iberian Democracies' (DPhil thesis, Ohio State University 2003) <http://rave.ohiolink.edu/etdc/view?acc_num=osu1046117531> accessed 19 May 2016.

[56] Against the background of this knowledge, including these variables in our dataset would not only have been an unreasonably tremendous task of information procurement and coding. In fact, it would have been impossible for more than 99 percent of the decisions of the German Federal Constitutional Court, since they were not taken by one of the two senates (consisting of eight judges each), but by one of the smaller six chambers (three judges). The chambers' decisions are not publicized but only accessible through the official court statistics, which do not provide information on the individual judges' behavior.

strategies and interests of the parties involved in constitutional disputes, one would expect a high degree of politicization with parliamentary claims because in most cases they are lodged by the opposition following (or expecting) political defeats against the governing majority. In contrast, lawsuits initiated by ordinary courts, prosecutors, or natural and legal persons should have a rather low level of politicization, since these actors normally do not primarily pursue political goals when going to the constitutional court. In the cases of Germany, Bulgaria, and Portugal the dissenting ratios fulfill the outlined expectations. According to our dataset, constitutional court decisions initiated by the parliaments show noticeably higher dissenting ratios than judgments stemming from ordinary courts, prosecutors, or natural and legal persons (see table 2).[57] In sum, we can assume the outlined empirical precondition for using the dissenting ratio as measurement for politicization to be fulfilled in the three countries under investigation.

Table 2: Comparison of the dissenting ratios of the different types of claimants

	Germany	Bulgaria	Portugal
parliament	0.1002 [46] (0.185)	0.171 [181] (0.209)	0.215 [13] (0.257)
prosecutors	n.e.	0.147 [62] (0.155)	0.050 [453] (0.119)
courts	0.0157 [333] (0.064)	0.130 [23] (0.143)	n.e.
natural and legal persons	0.0002 [96,093] (0.007)	n.e.	0.014 [3,137] (0.065)

Source: Authors' own compilation. Means of the claimants, number of cases per claimant [in square brackets], standard deviation (in brackets). N.e. = not eligible to apply.

[57] The standard deviation (in brackets) shows that the variability of the DR is rather low in most of the different groups of applicants. The relatively small differences between the applicants in Bulgaria can be explained by the fact that the appointment of the General Prosecutor as well as the judges at the Supreme Court of Cassation and the Supreme Administrative Court (the judicial institutions that are eligible to apply before the constitutional court) is heavily influenced by the parliament. Therefore, the 'highest magistrates' are not as politically independent as their German and Portuguese counterparts.

The second condition is a *methodological* limitation. As mentioned in section II, the dissenting ratio – or any other measuring instrument one might use – cannot measure the extent of politicization in individual cases, but only reflect the *differences in the degrees of politicization in long-term observations*. In a single constitutional court decision, politicization can never be proven beyond doubt. It is simply not possible to discover the judges' real motives (whatever the contents of the judgment and the dissenting opinions might be). Even in cases where politicization seems obvious, the possibility remains that the distribution of votes only accidentally complies with the expected degree of politicization according to the composition of the bench.[58]

In contrast, the court's caseload as such does not restrict the validity of the indicator with regard to our research question. Of course, a high caseload leads *ceteris paribus* to a lower percentage of published dissenting opinions (see below). The more cases judges have to deal with, the less time they have to formulate dissenting opinions. Yet, there is no reason to assume that the caseload has an impact on the *distribution* of the dissenting opinions across the different types of procedure. Instead, an equal distribution would just prove the null hypothesis, that is, show that the types of procedure do not modify the politicization of constitutional court decisions.

Nevertheless, there might be a distorting effect on our measurement stemming from 'follow-up' or 'photocopy' judgments. If a court has once decided on a key matter (e.g. the interpretation of a certain constitutional provision), all cases coming before that court relating to this matter later on will be decided in line with the initial judgment (as long as the court does not change its view).[59] If the precedent decision was accompanied by dissenting opinions, and the dissenting judges also take part in the follow-up judgments, two (mutually non-exclusive) possibilities exist: Either these judges repeat their dissents, or they 'give up' and bow to the majority's opinion. Either of

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[58] Martin Höpner, 'Warum betreibt der Europäische Gerichtshof Rechtsfortbildung? Die Politisierungshypothese' (2010) Sozialer Fortschritt 141, 144.

[59] German legal scholars therefore speak of 'lines of adjudication' ('Linien der Rechtsprechung'); see Hartmut Rensen, Stefan Brink (eds), *Linien der Rechtsprechung des Bundesverfassungsgerichts – erörtert von den wissenschaftlichen Mitarbeitern* (De Gruyter 2009).

those possibilities might distort the measurement of politicization. If dissent is repeated in a different type of procedure, one might say that this *repeated dissent should not be counted* since in this unique constellation, the latter type of procedure is obviously not moderating the degree of politicization. If judges keep their dissenting opinion but do not repeat it publicly, while the type of procedure remains the same, one might contrarily say that this *covert dissent should be counted* because causes and moderators of politicization recur as well.

However, the information necessary for coding the data as outlined is either not accessible at all or only available by means of a thorough content analysis of all court decisions. Nevertheless, we can control for the possible distortion of the follow-up judgments on the dissenting behavior by selecting cases with different caseloads. A problematic effect of the follow-up judgments can only be relevant in courts with high caseload since in case of low caseload, the number of such judgments will also be quite low. If we find our hypothesized dissent pattern according to the types of procedure in cases with low, medium, and high caseloads, we can therefore reasonably interpret the differences in the dissenting ratio per type of procedure as differences in the degree of politicization.

V. Research Design and Case Selection

In order to answer our research question we use a *Most Different Systems Design*. As is common in this kind of research, we use simple comparisons of the means to analyze the relationship between the types of procedure as *moderating variables* and politicization.[60] Our complete[61] survey of all court decisions during the 20 (Bulgaria and Germany) and six years (Portugal) under

[60] For the methodological concept of a moderating variable, see MacKinnon (fn 4). Typical examples for means comparisons in constitutional court research can be found among others in Lawrence Baum, 'Linking Issues to Ideology in the Supreme Court. The Takings Clause' (2013) Journal of Law and Courts 89; Masood, Songer (fn 14) and Schäller (fn 10).

[61] Excluded from the survey are only decisions in non-judicial and *ex officio* types of procedure (see n 37), procedural decisions (like on challenges of a judge for the fear of bias), and corrections of previous decisions.

investigation allows for valid empirical conclusions on the relationship of types of procedure and the probability of dissenting opinions.

We selected our cases from the universe of a total of 19 concentrated constitutional courts in democratic territorial states in Europe as of 2010.[62] The period under our investigation is 1991 to 2010, in order to be able to include post-socialist countries and their specific paths of transition. We excluded hybrid regimes and autocracies, since the judges' autonomy of decision has to be regarded as limited in these states. Finally, we included only courts that allow the publication of dissenting opinions during the whole period under investigation. Following the logic of the Most Different Systems Design, we selected three courts according to the following three criteria:

1. The courts should represent different European regions in order to vary possible historical, political-cultural and legal-cultural influences.
2. The countries should be of different ages concerning democracy, the rule of law, and the constitutional courts, since we expect a strong influence of these ages both on the judges' and courts' understanding of their roles, and the contents of the claims.
3. The caseload should vary distinctly in order to validate the operationalization of politicization and to confirm our assumption that even courts with high caseloads show an unequal DR distribution among the different types of procedure.

Additionally, the selected courts should represent as many different types of procedure as possible, at least one of each group (a) to (d).

As a result of applying these criteria, we selected the German Federal Constitutional Court, the Bulgarian Constitutional Court, and the Portuguese Constitutional Tribunal for our study. The German court has a very high caseload and is one of the oldest constitutional courts among the consolidated democracies of Central Europe. Bulgaria represents the case

[62] All countries measured as 'free' according to the Freedom House Index; 'Freedom in the World 2011' (*Freedom House*) <https://freedomhouse.org/report/freedom-world/freedom-world-2011> accessed 9 February 2015.

most different from Germany with a young court in a consolidating post-socialist democracy in Eastern Europe with an exceptionally low caseload. Very different from these two cases according to all above-mentioned selection criteria is Portugal, which represents another group of constitutional courts: The Constitutional Tribunal has a median caseload and is a middle-aged court in a consolidated, but younger democracy in Southern Europe. However, we had to reduce the period under investigation in this case to the years 2005–2010. Portugal reformed the appointment of judges and several types of procedure in 1998 and again in 2004/05.[63] Therefore, aggregating and comparing the DR before 2004 is impossible. This is especially true for the financial audit of political parties and election campaigns since the rules of this type of procedure were changed substantially. Nevertheless, the number of cases in the period shortened to the six years from 2005 to 2010 (altogether 3,858 decisions) still allows for the inclusion of the Portuguese case in our study.

Table 3 lists the types of procedure common to the three constitutional courts under investigation. However, two of these types of procedure have not been applied in the analyzed period (ban or non-registration of an organization, and removal from office/impeachment/withdrawal of a parliamentary mandate due to offenses against criminal or constitutional law). Hence, we analyzed ten different types of procedure from all the four groups (a) to (d). With regard to the concrete review, some explanatory remarks seem necessary here since this type of procedure is shaped quite differently in the three countries: While in Germany every ordinary court can refer any question of constitutionality of a certain legal norm to the constitutional court, only the two highest ordinary courts are allowed to do so in Bulgaria. In Portugal, traditionally every court can adjudicate a legal norm as unconstitutional, but only with *inter partes* effect for the case at hand. After the rejection of a complaint against such a decision, the parties to the dispute as well as the prosecution office can raise an objection before the Constitutional Tribunal. Hence, unlike in the other two countries, concrete

[63] 'Brief History of the Constitutional Court' (*Portuguese Constitutional Court*) <http://www.tribunalconstitucional.pt/tc/en/tribunal-historiaen.html> accessed 14 July 2015; see also Joaquim de Sousa Ribeiro, Esperança Mealha, 'Portugal' in Brewer-Carías (fn 38), 721.

review procedures take the lion's share in Portugal (2005–2010: 3.412 cases/93.2 percent). However, the first-instance judgments of the Constitutional Tribunal also run *inter partes* only. Only if the Tribunal declared a norm unconstitutional in at least three cases, the prosecution office or a constitutional judge can initiate an abstract review in order to reject it with *erga omnes* effect.[64] These procedures thus somewhat mix elements from abstract and concrete review. Therefore, although we coded them as concrete review procedures in a first step, we consider them in detail later on (see below).

Table 3: Types of procedure at the constitutional courts in Germany, Bulgaria (both 1991–2010) and Portugal (2005–2010)

Types of procedure		Courts		
group	*Individual*	*GER*	*BG*	*PT*
a	ban or non-registration of a political party	x	x	(x)
	ban or non-registration of an organization		(x)	(x)
	removal from office/impeachment/withdrawal of a parliamentary mandate due to offenses against criminal or constitutional law	(x)	(x)	(x)
	appeals against the financial audit of political parties or election campaigns			x
	forfeiture of basic rights	x		
b	constitutional interpretation		x	
	abstract review	x	x	x
	actio popularis			
	(quasi-*actio popularis*)			
c	dispute between state bodies	x	x	
	scrutiny of elections/withdrawal of a parliamentary mandate due to offenses against the election law	x	x	x
	appeals against elections or deliberations of the governing bodies of political parties			x
d	concrete review	x	x	x
	individual constitutional complaint	x		
	(quasi-*actio popularis*)			

Source: Authors' own compilation. Types of procedure in brackets were not applied during the period under investigation.

[64] See ibid, 728.

VI. Data and Results

1. Caseload and Dissenting Ratio

As mentioned in the previous section, the caseload of the three courts varies substantially. While the German Federal Constitutional Court took 96,853 decisions in 1991–2010 (mean 4,843 per year), of which 96,614 are included in our analysis, the Bulgarian Constitutional Court issued only 297 judgments in the same period (15 on average per year), of which 289 are usable for testing our hypotheses. The Portuguese Constitutional Tribunal holds a median position with 3,858 decisions in the period under investigation (2005–2010, mean 643 per year). We included 3,659 of these decisions in our analysis.[65] As we assumed, the caseload is inversely proportional to the share of published dissenting opinions. In Germany, the dissenting ratio is only 0.00032 for the whole period of analysis, but 0.15838 in Bulgaria and – again on a median position – 0.02159 in Portugal. However, there is no correlation between caseload and dissenting ratio over time, i.e., in all three countries, increasing numbers of decisions do not lead to decreasing dissenting ratios (and vice versa).[66]

Even if these figures do not reflect the different reasons for politicization and the contextual (moderating) factors, they seem to confirm the general knowledge of the respective courts. The German Federal Constitutional Court is generally acknowledged as highly consensus-oriented,[67] while the Bulgarian Constitutional Court is widely seen as characterized by strong and public conflicts.[68] The Portuguese Constitutional Tribunal appears again as a median case. Although it features a party political polarization, it has

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[65] For the reasons of exclusion of decisions, see n 61. However, the decisions we did not analyze remain relevant with regard to the caseload. When different types of procedure and/or different types of applicants are present in one court decision, this decision and its DR appears several times in our dataset – one data point for each type of procedure and each type of applicant.

[66] Decisions per year/DR; Germany: Pearsons r=0.109/Significance t=0.649; Bulgaria: r=-0.023/t=0.923; [Portugal: r=0.117/t=0.825]).

[67] See Donald P. Kommers, Russel A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke UP 2012), 65 f.

[68] See Smilov (fn 26).

developed a noticeable consensus-orientation among the judges since the mid-1990s.[69]

2. The Degrees of Politicization of Different Types of Procedure

Table 4 shows the means of the four groups of the three constitutional courts' types of procedure. Even if the number of observations varies substantially between the different types of procedure and the countries (in square brackets in table 4)[70], the dissenting ratios – interpreted as an indicator for different degrees of politicization – differ as hypothesized in our theoretical assumptions in the cases of Germany and Bulgaria. Procedures of group (a), which allow for a direct weakening of political opponents and do not oblige the applicant to assert a violation of or threat to their constitutional rights or competencies, feature the highest degree of politicization in both countries. Types of procedure of groups (b) and (c), which fulfill only one condition of our hypotheses each, have a medium DR, with distinctly higher scores for group (b). The types of procedure of group (d), which do not allow for a direct weakening of political opponents and oblige the applicant to assert a violation of or a threat to their constitutional rights or competencies, feature the lowest degree of politicization.

[69] See Magalhães (fn 55), 295.

[70] The standard deviation (in brackets in table 4) shows that the variability of the DR is rather low in most of the different types of procedure.

Table 4: Comparison of the dissenting ratios of the different groups of types of procedure

	Germany	Bulgaria	Portugal
Group a applicant's constitutional rights or competencies not affected / direct weakening of political opponents possible	0.245 [7] (0.305)	0.398 [2] (0.209)	0.000 [19] (0.000)
Group b applicant's constitutional rights or competencies not affected / direct weakening of political opponents impossible	0.080 [47] (0.153)	0.163 [284] (0.196)	0.190 [59] (0.213)
Group c applicant's constitutional rights or competencies affected / direct weakening of political opponents possible	0.015 [202] (0.078)	0.097 [13] (0.101)	0.025 [169] (0.075)
Group d applicant's constitutional rights or competencies affected / direct weakening of political opponents impossible	0.0003 [96,358] (0.008)	0.075 [9] (0.114)	0.018 [3,412] (0.075)

Source: Authors' own compilation. Means of the four groups, number of cases per group [in square brackets], standard deviation (in brackets).

In the case of the Portuguese Constitutional Tribunal, we also see a declining DR from group (b) to (c) and (d). However, group (a) differs from the other two countries and our theoretical assumptions. In this group, the overall dissenting ratio (and the ratio of every single decision in this group) is DR=0.0. Apart from this exception, though, the comparison of the means of the four groups in the three countries confirms a moderating influence of the types of procedure in accordance with our expectations. Since this pattern is by and large observable in all three cases with their broad differences in caseload, it can be interpreted as showing differences in the degree of politicization.

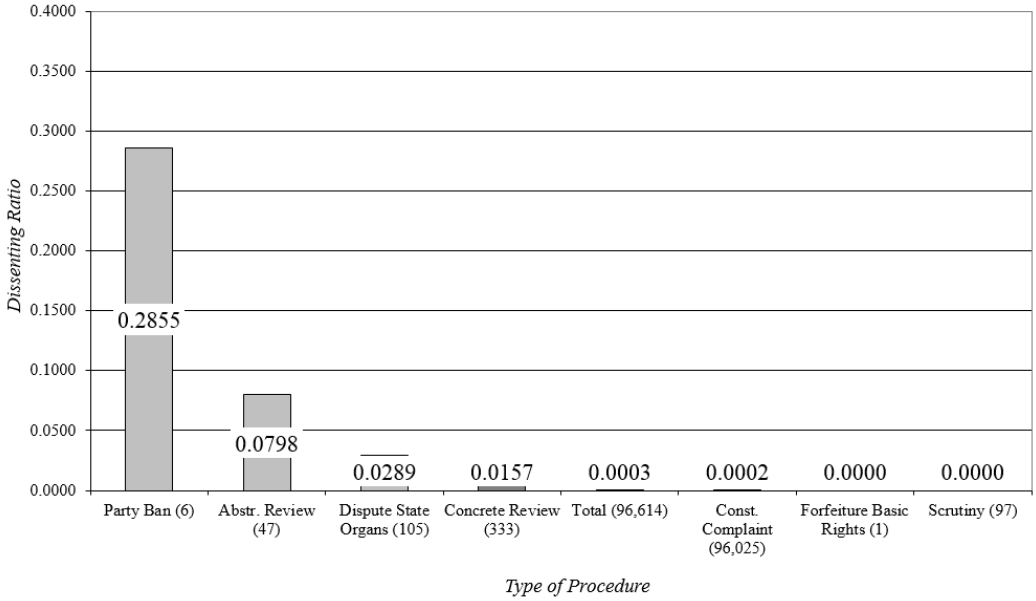
In the following, we look into the three cases and the different types of procedure separately. This detailed analysis offers additional information to our overall results. In the case of the German court, two types of procedure do not fit our theoretical assumptions (see figure 1). The forfeiture of basic rights (in group a) and the scrutiny of elections (group c) feature the lowest possible degree of politicization with a DR of 0.0. With regard to the former type of procedure, however, only one decision was taken in the period under investigation. The court rejected an application of the federal government against two extreme right-wing politicians unanimously with the plausible (and genuine judicial) argument,

> that prison sentences, to which both defendants were convicted in the context of their right-wing extremist activities, have been suspended after the application. After considering all circumstances, the criminal courts have predicted that the defendants will no longer militantly pursue their right-wing extremist convictions.[71]

Considering the singularity of this case, however, it cannot be interpreted as an empirical rebuttal of our hypotheses.

[71] Bundesverfassungsgericht, 'Die Anträge der Bundesregierung, die Verwirkung von Grundrechten auszusprechen, sind nicht hinreichend begründet.' (*Lexetius.com*, 30 July 1996) <http://www.lexetius.com/1996,517> accessed 19 May. See BVerfG 2 BvA 1/92, 2 BvA 2/92.

Figure 1: Germany: Aggregated dissenting ratio per type of procedure



Source: Authors' own collection. In brackets: number of decisions observed.

All 97 scrutiny decisions of the German Federal Constitutional Court between 1991 and 2010 were also taken without any public dissent. This unexpected result can partly be explained by the rejection of many complaints against election results for an obvious formal reason: they were not supported by at least 100 registered voters, as was required by the Law on the Federal Constitutional Court (§ 48, para. 1) up until 2012.[72] Still, it remains remarkable that among these 97 unanimous decisions a number of highly politically controversial cases can be found, such as the decisions on the negative voting weight, which forced the parliament to reform the election law,[73] or the decision on the use of electronic voting machines.[74]

In the case of the Bulgarian Constitutional Court, all types of procedure confirm our hypotheses without exception (see figure 2). The two party ban procedures during the period of investigation were highly politicized. The mean of DR=0.398 is the highest aggregated dissenting ratio of all types

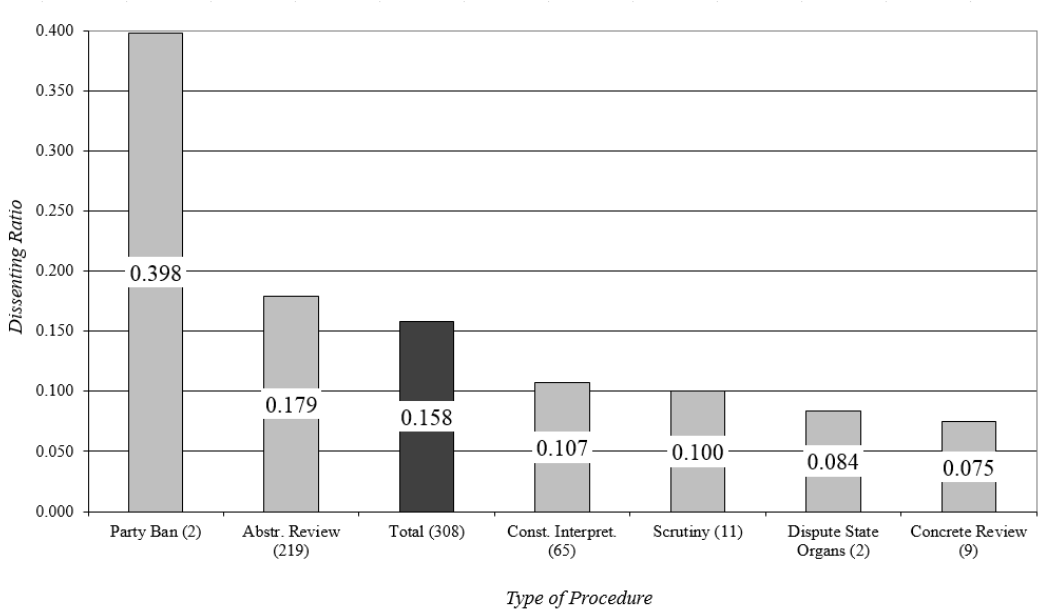
[72] Law on the Federal Constitutional Court (1951) as published on August 11, 1993 <http://www.iuscomp.org/gla/statutes/BVerfGG.htm> accessed 17 June 2015.

[73] BVerfGE 121, 266.

[74] BVerfGE 123, 39.

of procedure in the three countries.[75] In 1992, a minority of five against six judges refused a party ban application against the *Movement for Rights and Liberties*, a party which primarily represents the Turkish minority in Bulgaria. In 2000, the Constitutional Court banned the splinter party *OMO Ilinden-PIRIN*, which represents the Macedonian minority in Bulgaria, with a 9-to-3 vote. Both litigations were clearly politically motivated.[76]

Figure 2: Bulgaria: Aggregated dissenting ratio per type of procedure



Source: Authors' own collection. In brackets: number of procedures observed.

With regard to the disputes between state bodies, it might be surprising that only two decisions were taken in this type of procedure during the whole period under investigation. In contrast, there were no less than 66 decisions in constitutional interpretation procedures. This can be explained by the high requirements for the former type of procedure. Therefore, applicants prefer – whenever it is possible – to ask for a general constitutional

[75] However, in several cases of other types of procedure we have observed even higher non-aggregated dissenting ratios (see n 51).

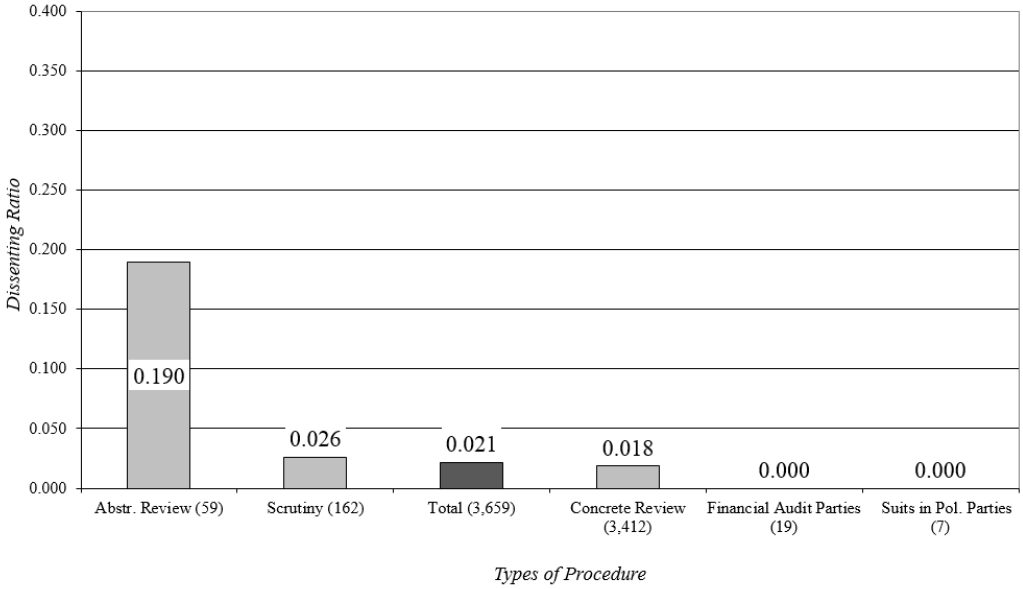
[76] Decisions No. 4/1992 and 1/2000; see Daniel Smilov, 'Constitutionalism of Shallow Foundations: the Case of Bulgaria' in Denis J. Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (CUP 2013), 611, 631–633.

interpretation, although they *de facto* aim at resolving a concrete conflict.[77] Thus, these cases are often 'hidden' disputes between state bodies.

Contrary to the German and Bulgarian cases, no party ban procedure took place before the Portuguese Constitutional Tribunal in the period under investigation (see figure 3). However, there were 19 decisions on appeals against the financial audit of political parties or election campaigns – the most frequent type of procedure in group (a) in all three countries. Against our expectations, all of these decisions were taken unanimously. Two arguments might explain these findings. First, contrary to all other group (a) types of procedure, no political opponents face each other as appellant and defendant before the court in this case. Instead, the affected political actor faces the constitutional court itself. Furthermore, the court is *obligated* to start the financial audit *ex officio*, before the negatively affected parties or candidates may raise objections. Thus, political strategies and interests of opposing parties as a reason for politicization are lacking to a large extent.

[77] See Venelin I. Ganev, 'The Rise of Constitutional Adjudication in Bulgaria' in Wojciech Sadurski (ed), Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective (Springer 2002), 247, 253.

Figure 3: Portugal: Aggregated dissenting ratio per type of procedure



Source: Authors' own collection. In brackets: number of procedures observed.

Second, the judges do not have to interpret fairly open constitutional norms. They rather have to review whether clear-cut provisions of the financing of the Political Parties Act has been observed. Unlike in the case of the party ban procedure, the judges' role is thus similar to the one of judges in ordinary courts, who have relatively little scope for interpretation. This second argument might also explain the fact that the Constitutional Tribunal took all decisions on appeals against elections or deliberations of the governing bodies of political parties (group [c]) unanimously, even if the number of observations is rather low (seven decisions).

The other three types of procedure that appeared in the Portuguese case confirm our hypotheses. As outlined in the previous section, there is a special case of abstract review procedures: these proceedings could be initiated by the prosecution office or a constitutional judge when a legal norm was declared unconstitutional *inter partes* in at least three concrete reviews in order to achieve a general rejection of this particular norm. In the period under our investigation, 20 such proceedings took place. As mentioned above, we coded these cases as concrete reviews in a first step since they are based on concrete disputes. If we analyze the cases as a separate type of procedure, however, the dissenting ratio (DR=0.098) is clearly higher than in

the rest of the concrete reviews (DR=0.018/3,392 cases), but distinctly lower than for the abstract reviews (DR=0.190). This result reflects the fact that this type of procedure combines elements of concrete and abstract review. It also indicates the usefulness of dissenting opinions for analyzing politicization.

When we compare the three cases on the level of the individual types of procedure, two more results stand out. First, in all three countries the abstract reviews (group [b]) are politicized to a much higher degree than all types of procedure of group (c), i.e. disputes between state bodies, scrutiny of elections, and appeals against elections or deliberations of the governing bodies of political parties. This result even persists if we include the Bulgarian constitutional interpretation procedure as 'hidden' disputes between state bodies into group (c). This confirms our assumption of a systematically stronger influence of the legal requirements hypothesis (H1) compared to the political opportunities hypothesis (H2). Second, we can confirm the prominent assumption outlined above that political motives and influences play a much stronger role in abstract than in concrete reviews. The dissenting ratios of abstract reviews are distinctly higher than those of concrete reviews in all three countries.

3. Do the Types of Procedure Only Mirror the Claimants' Strategies and Interests?

Before we conclude our results, we would like to discuss one obvious objection against our findings. One could argue that the different dissenting ratios for the types of procedure only mirror different strategies of the claimants. On the one hand, this effect could result from the fact that certain types of procedure can *de jure* only be initiated by certain claimants. Additionally, the appellants could *de facto* use the different types of procedure to a varying extent. Thus, our findings would only confirm the moderating effect of the types of procedure concerning the different strategies and interests of the parties involved.

Table 5: Ranking of dissenting ratios per type of procedure and appellant

Country/Appellant	Rank 1	Rank 2	Rank 3	Rank 4
Germany				
Individuals/Organizations	Dispute between state bodies 0.0096 [13]	Const. complaint 0.0002 [96,025]	Scrutiny of elections 0.0000 [55]	
Parliament	Party ban 0.5710 [1]	Abstract review 0.1406 [8]	Dispute between state bodies 0.079 [37]	
Federal Government	Party ban 0.2855 [2]	Dispute between state bodies 0.0000 [2]	Forfeiture of basic rights 0.0000 [1]	
State Government	Party ban 0.1903 [3]	Abstract review 0.0750 [35]	Dispute between state bodies 0.000 [10]	
Bulgaria				
Parliament	Party ban 0.398 [2]	Abstract review 0.191 [134]	Const. Interpret. 0.104 [37]	Scrutiny of elections 0.095 [8]
Government	Const. Interpret. 0.079 [8]	Abstract review 0.000 [1]	Dispute between state bodies 0.000 [1]	
President	Abstract review 0.180 [15]	Const. Interpret. 0.108 [7]		
Courts	Abstract review 0.181 [11]	Const. Interpret. 0.111 [3]	Concrete review 0.075 [9]	
Prosecution Office	Abstract review 0.152 [49]	Const. Interpret. 0.135 [10]	Scrutiny of elections 0.114 [3]	
Portugal				
Individuals/Organizations/ Party members	Scrutiny of elections 0.025 [161]	Concrete review 0.013 [2,950]	Financial audit of parties and campaigns 0.000 [19]	Appeals against elections in political parties 0.000 [7]
Municipalities	Scrutiny of elections 0.077 [1]	Concrete review 0.067 [9]		

Source: Authors' own collection. Comparison of the means. In square brackets: number of procedures observed.

However, we argue that the types of procedure also have a moderating effect on the politicization of the constitutional adjudication that *equally affects all appellants*. In order to prove this assumption, we control the influence of the appellants by analyzing the rank order of the degrees of politicization of each type of procedure for the different appellants. If these rank orders correspond with the rank orders of all appellants (see Figures 1-3), this would confirm a moderating effect of the types of procedure on the contents of the claims and the judges' work independent from the strategies and interests of the claimants. This additional test is possible for all groups of claimants that have access to (and actually used) at least two different types of procedure. This is in fact the case for eleven actors in the three countries during the period under our investigation.

Even if the number of observations per claimant is rather low in a couple of cases, the results clearly confirm that the effect of the types of procedure is independent from the claimants (see table 5). In ten of the eleven cases, the rank order of the dissenting ratios corresponds exactly with the overall picture for the respective country. Only in the case of the Bulgarian government, it does not. Thus, our data do not only show that the claimants influence the degree of politicization of constitutional jurisdiction by their strategic use of certain types of procedure. They also demonstrate that the types of procedure modify the claims and the following court decisions *for all appellants in the same way*.

VII. Conclusion and Outlook

Constitutional adjudication can be politicized by manifold factors, such as direct impacts on judges by political actors, the appointment of judges, the strategies and interests of the parties involved in constitutional disputes, and the judges' and the courts' understanding of their roles. Against this background, we have conceptualized the types of procedure as a moderating variable 'channeling' those political influences. Indeed, our analysis has shown that the types of procedure have a substantial moderating effect on the politicization of constitutional court decisions. Although there have been manifold theoretical and methodological challenges in distinguishing between law and politics, and bearing in mind the preconditions and

restrictions outlined in section IV, our operationalization of politicization by means of the dissenting ratio, i.e. the share of publicly dissenting judges among all judges taking part in the decision, allows us to draw this conclusion. Thus, our theoretical hypotheses can largely be considered confirmed: the lower the legal requirements of a type of procedure are, and the more opportunities to attack political opponents a type of procedure provides, the higher is *ceteris paribus* the politicization of the respective judicial decision. Additionally, the absence of the legal requirement to assert a violation of, or a threat to, the claimant's constitutional rights or competencies has a stronger impact on politicization than the direct possibilities to weaken the political opponents. Thus, types of procedure such as the concrete review, the individual constitutional complaint, or the dispute between state bodies seem to be preferable to procedures like the abstract review, the constitutional interpretation, or the party ban when it comes to the legitimacy of constitutional courts.

Since we used a Most Different Systems Design, it furthermore seems reasonable to expect similar politicization patterns at other concentrated constitutional courts in democratic states in Europe as well. The analysis of three very different courts from this universe of cases enabled us to prove our theoretical assumptions on a solid empirical basis. All the three cases show similar results. To test our findings in a broader setting, future research should integrate other world regions, other regime types and other periods. Additionally, qualitative case studies seem to be reasonable in order to analyze why four individual types of procedure do not confirm our hypotheses (i.e. the scrutiny of elections, and the forfeiture of basic rights in Germany; the appeals against elections and deliberations in political parties, and appeals against the financial audit of political parties or election campaigns in Portugal).

More generally, future scholarship should look into the relations between the types of procedure and the other variables mentioned at the outset of this article, i.e. the reasons for politicization (independent variables) and the possible contextual factors (moderating variables). In our study, we have shown that the types of procedure have a moderating effect *independently* from the strategies and interests of the claimants. For at least two more

variables, such interaction effects can also be assumed: First, the types of procedure might reflect a certain pattern of legal norms litigated before the court, i.e. depending on the kinds of norms (e.g. rules, standards, or principles) and/or the various contents of those norms (e.g. the different legal fields regulated by constitutional provisions). This would mean that the degrees of politicization vary as a function of the norms or group of norms at hand, which appear systematically different in the different types of procedure. Second, the types of procedure might reflect differing degrees of publicity, which in turn might be co-determined by the appellants. For instance, types of procedure used by political appellants might have a higher publicity than concrete review procedures.[78] Thus, for the analysis of the impact that types of procedures have on the politicization of constitutional court decisions this study is a first step only.

[78] See for these factors, but with a different leading question, Ulrich Sieberer, 'Strategische Zurückhaltung von Verfassungsgerichten. Gewaltenteilungsvorstellungen und die Grenzen der Justizialisierung' (2006) Zeitschrift für Politikwissenschaft 1299; Georg Vanberg, *The Politics of Constitutional Review in Germany* (CUP 2005).

THE EU COURTS STAND THEIR GROUND: WHY ARE THE STANDING RULES FOR DIRECT ACTIONS STILL SO RESTRICTIVE?

Michael Rhimes*

The restrictive nature of EU standing rules has long been controversial. They were reformed in Art 263(4) of the Treaty on the Functioning of the European Union, which added another head of standing to the existing two heads. Despite this addition, standing continues to be a considerable hurdle to direct challenges. This article seeks to explain why. It does so on two levels. First, it explains how the courts' interpretation of the third head makes it very difficult for most claimants to satisfy. In so doing, it highlights both the flaws in this interpretation, as well as the possibility of adopting more liberal interpretations fully consistent with the text of Art 263(4). Second, it examines, more fundamentally, why the courts support narrow admissibility criteria, even after the opportunity they were given in the Lisbon Treaty to potentially relax those criteria. These justifications in favour of the present approach are exposed as unsatisfactory, and falling short of the court's own promises of effective judicial protection.

Keywords: Standing, Direct Challenges, Art 263(4) TFEU, Art 230(4) EC, Implementing Measures, Regulatory Act, Direct Concern, Individual Concern, Effective Judicial Protection, Lisbon Treaty, Lisbon Reforms.

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* St Peter's College, University of Oxford, Bachelor of Civil Law (2015). This article was written before I received a formal offer to be the fourth référendaire in the Cabinet of Judge C. Vajda at the Court of Justice of the European Union in September 2016. This article reflects strictly personal views. I am very grateful for the benefit of the anonymous reviews, as well as the continuing support I received from peers during the writing of this article. Particular thanks are due to Professor Caroline Morris. Any errors and infelicities of expression that may unfortunately remain are my own.

I. INTRODUCTION

> Here's a knocking indeed! If a man were porter of hell-gate, he should have old turning the key.[1]

The porter in Macbeth would have feared less for his age if he were at the gates of the EU courts. Virtually all private litigants who come knocking at its doors to challenge EU norms directly are turned away for lack of standing.

Under Article 230(4) of the Treaty Establishing the European Community ('EC Treaty'), the porter would have only had to turn the key for those parties that were *addressed in the measure* they were contesting, and those *directly concerned* and *individually concerned* by it. Few parties satisfied either head of standing, and the restrictiveness of these rules was almost universally criticised in the literature.[2]

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[1] William Shakespeare, *Macbeth* (1605), Act 2 Scene 3.

[2] See, for example, Grainne De Burca, 'Fundamental Rights and Citizenship', in Bruno De Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe* (EUI, 2003); Anthony Arnull, 'Private Applicants and the Action for Annulment Under Art 173 of

Enter Article 263(4) Treaty on the Functioning of the European Union ('TFEU' or 'Lisbon Treaty'), which retained the two pre-Lisbon heads of standing, but added a third. Under this new head, the porter must now open the doors to substantive challenge for litigants who are *directly concerned* by a *regulatory act* that *does not entail implementing measures.* The porter, however, is not perceptibly busier. Only four cases have been admissible under the third head as of yet.[3] Most cases remain locked out as inadmissible direct challenges.

This article seeks to do two things. First, it explains why it is still so difficult to have standing. Second, it criticizes this restrictive position. In that vein, the purpose of this article is *diagnostic* as well as *critical.* It is worth setting out the structure of the article at the same time that the substance of the article is explained.

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the EEC Treaty' (1995) CMLR 32; Paul Craig, 'Standing, Rights and the Structure of Legal Argument' (2003) European Public Law 493; Ewa Biernat, 'The *Locus Standi* of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community' Jean Monnet Working Paper 12/03; Cornelia Koch, 'Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individual's right to an effective remedy' (2005) European Law Review 511.

[3] Case T-262/10, ECLI:EU:T:2011:623, Microban and another v Commission; Case T-296/12, ECLI:EU:T:2015:375, Health Food Manufacturers Association and Others v Commission; Case T-367/10, ECLI:EU:T:2013:97, Bloufin Touna Ellas Naftiki Etaireia and Others v Commission; Case T-93/10, ECLI:EU:T:2013:106, Bilbaína de Alquitranes and Others v ECHA.
I note *Bilbaína* deals with the challenge to a tar derivative as a substance of 'very high concern'. Other cases either deal with other tar derivatives (Case T-96/10, ECLI:EU:2013:109, *Rütgers and Others*; Case T-94/10, ECLI:EU:2013:107, *Rütgers and Others*; Case T-95/10, ECLI:EU:2013:108, *Cindu and Others*) or other chemicals (T-268/10, ECLI:EU:T:2015:698, *PPG and SNF*; T-135/13, ECLI:EU:2015:253, *Hitachi and Others*; T-134/13, ECLI:EU:2015:254, *Polynt and Sintre*.). Their factual and legal situation, however, was identical to that in *Bilbaína,* to which the cases make extensive reference. Given these similarities, reference is made to *Bilbaína* only and I consider only four cases to have succeeded on the third head. See discussion in Part III) 1) b), fn 38-45. This is, to the best of my research, accurate as of 24th July 2016.

It starts, in part II, with a very brief section that sketches out the pre-Lisbon position standing jurisprudence, and then offers a more detailed section that introduces the third head in Art 263(4) TFEU.

Part III and part IV are *diagnostic*. They attempt to find and explain the reasons why, even after the addition of the third head, standing remains such a considerable hurdle to bringing direct challenges. Two reasons are explored here, one textual the other doctrinal. For clarity, the textual explanations are examined in part III, and the latter explanations are found in Part IV. Textually, standing remains restrictive because the EU courts have foisted narrow meanings on the criteria in the third head. Simply put, few direct challenges are admissible because the third head is a high hurdle to clear. However, the interpretation of the third head is highly unsatisfactory – and, in some cases, the third head is even more difficult to satisfy than the pre-Lisbon heads. Moreover, as is pointed out, the courts could easily have seized upon the Lisbon reforms to chart a new and more liberal course for the standing jurisprudence. Why the courts refused to do so is explored in part IV, which traces and explains the doctrinal justifications in favour of the courts' restrictive interpretation despite the existence of other more liberal ones. It shows how they have consistently repudiated arguments in favour of relaxing the standing rules and unfailingly explained away the negative consequences flowing from this position. The courts, it shall be seen, thus start from a fundamentally restrictive view of the standing rules, a position which naturally fetters the prospects of greater admissibility for direct challenges.

In short, the textual explanation gives us immediate reasons why so many direct actions fail – namely, the narrow meanings conferred on the standing criteria – and the doctrinal explanation brings the broader reasons why this is so into focus – namely, the courts' fundamentally restrictive interpretation of the standing rules. There are, of course, other reasons for this restrictive approach, but considerations of space preclude engaging to any satisfactory level of detail with the interesting social, political and historical factors that might be behind it.

The article takes a critical turn in part V where it points out the flaws of this restrictive approach. It recognises that the standing rules can serve legitimate

ends as a filter on the disputes that are considered by the EU courts, but stresses that these ends are only attained if the standing rules are calibrated to maintain the right balance between admitting some direct actions and rejecting others for lack of standing. It argues that the present approach is far removed from this balanced scheme, and that the courts' justifications that prop up this problematic position are flawed. In so doing, it dispels the fundamentally restrictive starting point of the courts, and demonstrates that the arguments offered, time and time again, by the courts in favour of this approach should be rejected. They are mutually inconsistent, internally contradictory and undesirable as a matter of principle. A range of arguments in favour of broader standing rules is then briefly offered.

The final part concludes with a reflective summary of the argument explored in the preceding parts.

II. The Three Heads of Standing

1. Pre-Lisbon: The First and Second Heads

Only a brief discussion is offered here in the interests of space and of avoiding repetition of existing literature. The interested reader is directed to the wealth of academic comment that deals with the pre-Lisbon situation, especially in relation to the interpretation of 'individual concern'.[4]

Prior to the Lisbon Treaty, natural or legal persons could only have standing to challenge a measure directly on two heads. The first head was satisfied if the applicant was addressed in the contested provision, and the second required the applicant to be directly and individually concerned by the same. To that effect, Article 230(4) EC provided:

> Any natural or legal person may (...) institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

[4] See fn 2.

A. First Head: Addressed by the Contested Measure

The first head would be satisfied, for example, where a party was found guilty of anti-competitive practices.[5] In such a situation, the Commission Decision would specifically list the offending parties, and, possibly, fine them. This head was, however, of limited relevance. Third party competitors, who might otherwise have had an interest in the (non)-imposition of the fine, would not be able to rely on it. Nor would it be of use to a party affected by a Commission Decision addressed to Member States. This was often the case in State aid Decisions. Beneficiaries of the aid and other parties seeking to challenge the Decision would have to satisfy the second head of standing instead.[6] It is thus only in a small number of cases that a party will actually be addressed by a contested act.

B. Second Head: Directly and Individually Concerned by the Contested Measure

The second head contains two criteria.

Direct concern requires two cumulative sub-criteria to be met.[7] First, the measure must directly affect the legal situation of the person concerned. This means that the measure in question must have some legal effect on the person seeking to contest it. Overall, this is not particularly difficult to satisfy. Second, the implementation of that measure must be purely automatic, resulting from Union norms without the application of other intermediate rules.[8] Anti-dumping duties are a good example. These duties are imposed on the imports designated in the Commission or Council Regulation and at the rate specified therein. There is no scope for discretion on behalf of domestic

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5 Koen Lenaerts, Ignace Maselis, and Kathleen Gutman*, EU Procedural Law,* (OUP, 2014), 7.86.

6 ibid*,* 7.86 and 7.118; See also K. Jurimäë, 'Standing in State Aid Cases: What's the State of Play?' (2010) European State Aid Law Quarterly 303.

7 Case C-142/15, ECLI:EU:C:2016:163, Solar World v Commission, [22]; Northern Ireland Department of Agriculture and Rural Development v Commission, C-248/12 P, EU:C:2014:137, [21].

8 Joined Cases C-445/07 and C-455/07, ECLI:EU:C:2009:529, *Commission v Ente per le Ville Vesuviane,* [45]; Case C-404/96 P, ECLI:EU:C:1998:196, *GlencoreGrain v Commission*, [41]; Case C-486/01 P, ECLI:EU:C:2004:394, *National Front v Parliament*, [34].

authorities or the need for domestic rules to enforce the duty.[9] Their application – automatic and in pursuance of EU norms alone – is thus of direct concern to those importers seeking to challenge those duties.[10]

Individual concern means, since the seminal *Plaumann* case, that a party must be affected by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[11]

Although decided in 1963, this case is still cited, verbatim, today.[12] The essence of the test is that a party needs to show that it has features or characteristics such that the contested measure affects them as if they were addressed by it. Thus, Plaumann were not able to directly challenge the hike in customs duties on clementines imported from third countries, as they could not show that they were affected in a way that distinguished them from all other undertakings that also imported such fruits. The term took on different meanings in different contexts, with individual concern being generally easier to satisfy in relation to State aid, for example.[13] However, overall, the formulation was a high hurdle. Although some examples can be

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9 T-155/94, ECLI:EU:T:1996:118, *Climax Paper Converters v Council,* [53]; C-118/77, ECLI:EU:C:1979:92, *ISO v Council*, [26]; Case 121/77 ECLI:EU:C:1979:95 *Fujikoshi and Others v Council,* [11]; Opinion of Advocate General Jacobs in Case C-239/99, ECLI:EU:C:2000:639*, Nachi v Council,* [73].

10 See, in particular, *ISO,* ibid, [26].

11 Case C-25/62, ECLI:EU:C:1963:17, *Plaumann v Commission.*

12 Case C-456/13 P, ECLI:EU:C:2015:284, T & L Sugars Ltd and Others v Commission, [63]; C-583/11 P, EU:C:2013:625, Inuit Tapiriit Kanatami and Others v Parliament and Council, [72]; C-274/12 P, Telefónica v Commission, EU:C:2013:852, [46].

13 See fn 2; Lenaerts and Others, fn 5; Michael Rhimes, 'Nothing ado about much? Challenges to Anti-Dumping Measures After the Lisbon Reforms to Art 263(4) TFEU' (2016) European Journal of Risk Regulation 374.

found where this criterion was satisfied,[14] it was notoriously difficult to show individual concern.[15]

Together, these highly restrictive criteria made it very difficult for an individual to directly challenge provisions of EU law – a point almost universally criticised in the academic literature.[16]

2. Post-Lisbon: The Third Head

A third head of standing was included in Art 263(4) of the Lisbon Treaty, with the overall aim of relaxing the restrictive standing provisions and facilitating direct challenges to EU law.[17] The relevant provision now reads as follows:

> Any natural or legal person may, (...) institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

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[14] Case C-309/89, ECLI:EU:C:1994:197 *Codorníu v Commission,* see fn 141; See Ewa Biernat, 'The *Locus Standi* of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community' Jean Monnet Working Paper 12/03, p. 15 (Describing these rare exceptions as 'few and casuistic')

[15] See Paul Craig, 'Standing, Rights and the Structure of Legal Argument' (2003) European Public Law 493 (describing the test of individual concern as rendering it 'literally impossible' for an applicant to succeed, at 494); See also Albertina Albors-Lorens, 'Sealing the fate of private parties in annulment proceedings? The General Court and the New Standing test in Article 263(4)', (2012) CLJ 52, 53, individual concern as a 'formidable standing barrier that very few private applicants could surmount'; See also fn 141 – 143.

[16] See fn 2. For post-Lisbon critiques, see Steve Peers and Marios Costa, 'Judicial Review of EU Acts after the Treaty of Lisbon' (2012) European Constitutional Law Review 82; Pieter-Augustijn Van Malleghem and Nils Baeten, 'Before the law stands a gatekeeper – or what is a 'regulatory act' in Article 263(4)' (2014) CMLR 1187, especially at fn 6; Albertina Albors-Lorens, 'Remedies against the EU institutions after Lisbon: an era of opportunity?' (2012) CLJ 507, 513.

[17] *Inuit* fn 12, at [57]; See Cornelia Koch, 'Locus Standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy' (2005) ELR 511. See fuller discussion below.

A party may now bring a direct challenge where they are directly concerned by a regulatory act without implementing measures. Naturally, the extent to which it expands the scope for bringing direct challenges hinges on how those three criteria are defined. It is worth briefly fleshing out these definitions, by reference to *Microban*[18]*,* to give an overall understanding of the third head and the gap in the standing rules that gave rise to the reforms.

A. General Definitions, *Microban* and the Dilemma

The notion of *direct concern* remains the same after the Lisbon amendments.[19] The definition of a *regulatory act* was first addressed by the General Court in *Inuit*[20] The General Court held that a regulatory act should be understood as encompassing 'all acts of general application' that are not 'legislative acts'.[21] This imports two sub-criteria. First, the act in question must be one that applies to 'objectively determined situations and produces legal effects in regard to categories of persons envisaged generally and in the abstract'. Second, it must not be adopted in accordance with either the ordinary legislative procedure or the special legislative procedure within the meaning of paragraphs 1 to 3 of Art. 289 TFEU. This two-part definition was approved on appeal.[22]

The requirement that the challenged provision may *not entail implementing measures,* in short, requires that the contested measure have legal effects *vis-à-vis* the complainant as a matter of automaticity, without the need for action at national level. In other words, the contested provision must in and of itself give rise to the legal effects that the applicant seeks to challenge.

A good, brief, example of a case that satisfies all these criteria is *Microban.*[23] The applicants sought to challenge a Commission Decision that refused to

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[18] Case T-262/10, ECLI:EU:T:2011:623, *Microban and another v Commission.*

[19] See case law and discussion in the first section of part III. 2.

[20] Case T-18/10, ECLI:EU:T:2011:419 Inuit Tapiriit Kanatami and Others v European Parliament and Council,

[21] ibid, [45], [56]

[22] *Inuit,* fn 12, [51] – [61]

[23] Microban fn 18.

include triclosan in the harmonised list of permissible chemicals that could come into contact with foodstuffs.

The criterion of *direct concern* was satisfied. First, their legal situation was affected in that Microban used the chemical in products designed to come into contact with foodstuffs, and, second, no discretion was left to the Member States as to banning triclosan. The Decision was a *regulatory act*, the legal basis being Art 11(3) of Regulation No 1935/2004, on materials and articles intended to come into contact with food. It was not a legislative measure, and, given that the court found that it was of general application, it was therefore a regulatory measure within the third head.[24]

The final criterion of *not entailing implementing measures* was also satisfied. This was because the non-inclusion of the substance in the relevant list had the immediate consequence that it was no longer permissible to put the substance into materials that would come into contact with foodstuffs. The non-inclusion was thus automatic, with immediate effect, and no action was required on behalf of the Member States. The applicants' action was admissible, and the General Court struck down the ban as having been adopted *ultra vires*.

It is useful to introduce what shall be referred to as the 'dilemma' at this juncture. Under Art 230(4) EC, it is very unlikely that Microban would have been able to show individual concern, that is, that they, in particular, out of all the other undertakings who used triclosan in products intended to come into contact with food, were affected by the ban as if it addressed them. Their challenge would have mostly likely been inadmissible.[25] However, as it has been seen, the legal effects of the ban arose automatically from the non-inclusion of triclosan in the relevant list. There would have been no norms at the national level that could be challenged, and no possibility of challenging the measure directly at EU level for lack of standing. Microban would have been put in an invidious position; they would have either had to comply with

[24] ibid, at [22].

[25] Compare with, for example, the pre-Lisbon cases: Joined Cases T-236/04 and T-241/04, ECLI:EU:T:2005:426, *European Environmental Bureau*; Case T-45/02, ECLI:EU:T:2003:127, *Dow AgroScience*.

the unlawful norm, with potentially ruinous consequences, or flout it in the hopes that it would be invalidated some years later if the domestic enforcement proceedings were referred to the CJEU under Art 267. This dilemma, which arose in respect of so-called 'self-executing measures' [26], was a clear 'gap' in the EU standing rules. It played, and continues to play for reasons that shall be seen, a crucial part in the standing jurisprudence.

B. The Purpose of the Third Head

Beyond the overall aim of facilitating direct challenges, the exact intended scope of the third head is not all that easy to identify.[27] This is not the place to revisit the copious literature on the adoption of the Lisbon Treaty. Three sources of uncertainty, however, are worthy of note. First, textually, the extension of standing is predicated on two terms – regulatory act and implementing measures – that were left entirely undefined. Second, historically, the third head was lifted verbatim from the failed Constitution for Europe. This document had a bold project of restructuring the sources of Community law, most notably by creating a new hierarchy of secondary norms.[28] The Constitution was abandoned after the French and Dutch voters rejected it, and the Lisbon Treaty proceeds on a different basis to the Constitution for Europe.[29] The somewhat farraginous source of the text adds another layer of complexity to the interpretation of the third head. Finally, it seems probable that the third head was more the product of political compromise rather than considered reflection on the exact extent to which

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[26] See Koen Lenaerts and Nathan Cambien 'Regions and the European Court: Giving Shape to the Regional Dimension of the Member States' (2010) EL Rev 609 for a short overview. See also discussion in part IV and V.

[27] See the discussion and the sources cited in Jürgen Bast, 'Legal Instruments and Judicial Protection' in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law,* 2nd Ed (2009, Hart Publishing), 396.

[28] See, generally, Jean-Claude Piris, *The Constitution for Europe: A Legal Analysis,* (2006, CUP). See also Pieter-Augustijn Van Malleghem and Nils Baeten, 'Before the law stands a gatekeeper – or what is a 'regulatory act' in Article 263(4)' (2014) Common Market Law Review 1187, 1204 – 1212; Cornelia Koch, 'Locus Standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy' (2005) ELR 511, 516-527.

[29] See Van Malleghem and Baeten, ibid; Bast, ibid.

the standing rules should be liberalised.[30] Taken together, the intentions being Art 263(4) are rather foggy, and its interpretation far from self-evident.

That said, it is possible to exaggerate the extent to which this is a setback.

At a general level, it left the courts ample room to chart their own course through the murky waters of Art 263(4). In effect, the Lisbon reform gave the courts a *carte blanche* to liberalise the standing provisions. The courts could have seized on the ambiguity shrouding Art 263(4) to break from their notoriously problematic interpretations[31] and relax the admissibility criteria for direct challenge. Yet, as shall be seen, they did not. It is thus even more pressing to explain why, despite a clear opportunity to do so, the courts have remained ensconced in their restrictive interpretation.

On a more specific level, while difficult to pinpoint the exact intentions of the framers of the Treaty, at the very least, the third head intended to remedy the dilemma whereby a party would have to break a provision of EU law in order to challenge it. It does so by dispensing with the need to show individual concern in relation to regulatory acts that do not entail implementing measures.[32] It should, however, be borne in mind that it was not the *only* argument in favour of the reforms. So much can be gleaned from the working papers of the Constitution for Europe, a key passage of which reads:

> Members of the circle who were in favour of amending the fourth paragraph of Article 230 stressed *in particular* the fact that, in certain exceptional cases, an individual could be directly concerned by an act of general application without it entailing an internal implementing measure. In such cases, the individual concerned would currently have to infringe the law to have access to the court.[33]

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[30] See Bast, ibid, 905.

[31] See fn 2.

[32] Case C-132/12 P, ECLI:EU:C:2014:100, *Stichting Woonpunt and Others v European Commission*, [43]; *Inuit,* fn 12, [57]; Case C-456/13, ECLI:EU:C:2014:2283, *T and L Sugars and Another v Commission,* Opinion of Advocate General Cruz Villalón, [24].

[33] Cover note from the Praesidium to the Convention on the Court of Justice and the High Court, CONV 734/03, at p. 20.

As shall be seen in part V, there was a wide range of arguments put in favour of the relaxation of standing rules – both from sources within the courts and in academic writings. It may well have been that, whilst particularly concerned about parties caught on the horns of dilemma, the third head was intended to achieve an overall liberalisation of the standing rules in order to address the wide-ranging concerns. Indeed, as shall been seen, in and of itself, there is nothing in the text of the third head that confines it to solving the dilemma presented above. This, again, adds greater importance to identifying why the courts chose to maintain their restrictive approach.

III. Why Are So Few Direct Challenges Admissible Under the Third Head?

1. Implementing Measures

The courts have given this criterion a formalistic meaning. The mere fact that such measures exist renders a claim inadmissible under the third head (section A). This, in itself, goes some way in explaining why the third head of standing is difficult to satisfy. However, the formalistic interpretation has broader consequences which create nearly insuperable barriers to satisfying the third head (section B). Nonetheless, it is entirely possible, and indeed plausible, to adopt a more liberal approach by considering the substance – and not just the existence – of those measures (section C).

A. The Formalistic Interpretation of Implementing Measures

A case demonstrating the formalism that pervades the interpretation of this criterion is *T and L,* involving a challenge to exceptional import tariffs on sugar.[34] Under this scheme, national authorities received applications for import licences, ensured that the conditions of admissibility were satisfied, and notified the Commission of any quantities allowed to be imported. Crucially, this scheme left no discretion to the national authorities. Even though the parties were required to submit import license applications to the national authorities, the latter's involvement was limited to a supervisory function. In the words of Advocate General Cruz Villalón, actions carried

[34] T and L, fn 12.

out by the national authorities were 'taken strictly in the exercise of circumscribed powers'.[35]

As such, the claimants maintained that the actions the national authorities were required to carry out under the scheme were not sufficient to amount to implementing measures. The national authorities' role as administrators of the licensing scheme was vestigial; they simply acted as 'mailboxes' for the scheme that was, down to minute detail, the exclusive design of the Commission.

The CJEU rejected these submissions. It held that the legal effects of the scheme arose only through acts taken by national authorities after the undertakings had submitted applications for import licenses. Critically, it was irrelevant that these implementing measures were of a 'mechanical' nature, or that the national authorities were robotically carrying out the detail of the Commission's scheme.[36] On the CJEU's analysis, the *nature* of the implementing measures – however technical, ancillary, vestigial, minimal or of whatever desired epithet – is irrelevant. This is a mercilessly formalistic interpretation, the mere fact they *exist* precludes reliance on the third head.

Thus, in order to rely on the third head, it is necessary to show that the contested measure *in and of itself* gives rise to the legal effects that are complained of. The italicised phrase is key.[37] If these effects arise only through the medium of national actions – regardless of the extent to which national authorities are bound to carry out such actions – then a measure does not qualify as one which does not entail implementing measures. This gives

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[35] Opinion of Advocate General Cruz Villalón, fn 32 [46].

[36] ibid, [41].

[37] Case C-552/14 P, ECLI:EU:C:2015:804, *Canon Europa v Commission* [48] 'in order to determine whether the contested regulation entails implementing measures, it is necessary to ascertain whether that regulation, in particular the part of its annex concerned by the appellant's imports, *determines itself* the tariff classification of the [printers] imported by Canon Europa' (emphasis added).
Case T-312/14, ECLI:EU:T:2015:472, *Federcoopesca and Others v Commission,* [28] 'the third limb of the fourth paragraph of Article 263 TFEU is designed to apply only when the disputed act, *in itself*, in other words irrespective of any implementing measures, *alters the legal situation of the applicant*.'

rise to a range of consequences that drastically restrict the scope of the third head. Three may be explored in the following section, namely, the limited kinds of acts that can be challenged under the third head; the exclusion of certain large swathes of EU norms from challenge under the third head; and the fact that standing under the third head, in some cases, is even more difficult to satisfy than the pre-Lisbon position.

B. The Consequences of Adopting a Formalistic Interpretation

First, this interpretation *drastically restricts the kind of acts that can be challenged under the third head*. This does not only refer to the fact that almost all contested acts will entail implementing measures, as defined by the courts. It also refers to the fact that the very kind of measures that can be challenged under the third head are of a very limited nature. In practice, so far, only two kinds of acts can be found. Naturally, these are not closed categories; they may well overlap, and they most likely will be subject to refinement in future jurisprudence. At present, however, the two categories presented here best capture the existing jurisprudence.

The first are prohibitions. The contested measure says 'Do not do X', and, as a result, undertakings in the Member states cannot do X. A good example is *Bloufin,* where the Commission Regulation prohibited the fishing of Bluefin tuna in a given geographical area.[38] That Regulation gave rise automatically to the prohibition of such fishing, without the need for national authorities to raise a finger. The claim was admissible.

The second kind are lists, where the very inclusion or non-inclusion on that list gives rise to the legal effects complained of. *Microban* is one example. *Health Foods,* on the marketing of food supplements, provides another.[39] The Commission established a list of health claims that the European Food and Safety Authority had determined were scientifically sound and could be used

[38] Case T-367/10 ECLI:EU:T:2013:97, *Bloufin and Others v Commission.*

[39] Case T-296/12, ECLI:EU:T:2015:375, Health Food Manufacturers Association and Others v Commission.

in adverts to market food supplements.[40] The mere fact that a given health claim was included, or not included, in this list had the automatic consequence of determining whether it could be used for marketing purposes. As such, the provision did not entail implementing measures, and the claim was admissible.

It is unlikely that the Greek and French purse seiners in *Bloufin,* or that the vitamin manufacturers in *Health Foods,* would satisfy the requirement of individual concern. Prior to Lisbon, under Art 230(4) EC, their claims would have been inadmissible. To that extent, it is tempting to see these cases as post-Lisbon success stories. This would be misleading. A closer examination of the first kind of act reveals that only relatively simple acts can be challenged, and the second kind of act involves an element of fortuity as to whether it entails implementing measures.

The measures at issue in the first category, must, by their very nature, be simple. The contested measure in *Bloufin* consisted of no more than two articles. The measure in *Microban* was a straightforward declaration that triclosan was to be immediately removed from a list of chemicals, coupled with a transitional measure to end marketing of triclosan products before a given date. Anything beyond such straightforward prohibitions dictated and enforced at the EU level alone will most likely entail implementing measures of some form. If the measure at issue, for example, envisages a more complex scheme rather than a mere prohibition, it will most likely require action to be carried out at the national level. As in *T and L,* it will be insulated from challenge on the third head.[41] It is therefore only in limited cases that the third head will be of practical use.

As to the second category of measures, it is to be borne in mind that the list must in and of itself give rise to legal effects complained of. However, it may well be fortuitous that the inclusion on a list gives rise to a legal effect without

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[40] See Regulation No 432/2012, establishing a list of permitted health claims made on foods other than those referring to the reduction of disease risk and to children's development and health, OJ L 136, 25.5.2012, p. 1–40.

[41] See also, in the next section, the impossibility of challenging customs duties and State aid Decisions, both of which have been held to entail implementing measures.

implementing measures. *Bilbaína,* the fourth and final case that succeeded under the third head, is a good example. It requires some presentation.

Bilbaína deals with the so-called REACH Regulation.[42] REACH lays out a comprehensive classification scheme for chemicals, and created the European Chemicals Agency (ECHA) to administer it. A crucial part of this scheme is to ensure that actors in the chemical supply chains are aware of the hazards that certain chemicals may pose. Therefore, producers must provide certain information to those actors. The scope of those duties, and the information to be provided, depends on the classification of the chemical in question. On the facts of *Bilbaína,* the ECHA held that a tar derivative, CTPHT, was a substance of very high concern within the definition of Art 57 of REACH.[43] Following Art 59 of the Regulation, provision was made for all substances of very high concern within Art 57, like CTPHT, to be included in a list ('Art 59 list').

The claimants sought to challenge the inclusion of CTPHT on this list. Following Art 31, the inclusion in the Art 59 list required them to update the information in the safety data sheets provided to actors in the supply chain. This updating obligation arose out of the mere fact that the chemical was a substance of very high concern. As stipulated in Art 31 (1)(c):

> The supplier of a substance or a preparation shall provide the recipient of the substance or preparation with a safety data sheet compiled in accordance with Annex II (...) where a substance is included in the list established *in accordance with Article 59(1)*[44]

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[42] Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396, 30.12.2006, p.1 – 520

[43] Case T-93/10, ECLI:EU:T:2012:106, *Bilbaína and Others v ECHA*.

[44] See also Art 31(3)(b) and Art 33(1) and (2) which also refer to Art 59.

In other words, the updating obligation in Art 31 was in and of itself triggered by the mere fact of being included in the Art 59 list. As such, the contested ECHA decision produced legal effects in the form of updating obligations without the need for implementing measures.

In reality, the litigants' challenge had nothing to do with the updating obligations. They sought, rather, to challenge the classification of CTPHT substance of very high concern. The updating obligations were simply convenient springboards that allowed for direct challenge. It was to some extent fortuitous that they could be separated from subsequent stages in the authorisation procedure, and as such, entailed no implementing measures.[45] In this light, the litigants were simply fortunate that the idiosyncrasies of the Regulation allowed them to 'sever' these obligations from the rest of the REACH framework.[46]

Second, the formalistic reasoning in this area means that *entire areas of EU law are sealed off from the potential liberalising effects of the third head*. Two good examples are challenges to customs duties and State aid Decisions.

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[45] See, for example, *Bilbaína,* fn 43, [64] 'the next stage of the authorisation procedure, which consists of the inclusion in order of priority of the candidate substances in Annex XIV to Regulation No 1907/2006, that is to say, in the list of substances subject to authorisation, is not a measure implementing the contested decision. The conclusion of the identification procedure triggers its own information obligations which do not depend on the subsequent stages of the authorisation procedure.'

[46] Contrast, for example, T-310/15, ECLI:EU:T:2016:265, *European Union Copper Task Force v Commission,* [57]. The facts are too complex to visit in entirety. In essence, the claimant sought the inclusion of copper-based chemicals on a list that would have allowed them to be used in plant protection products. The contested norm, which placed such chemicals on a list of chemicals for substitution, entailed implementing measures because its inclusion on this list, for reasons explained at [57] and elsewhere in the judgment, had no bearing on the conduct of the approval renewal procedure which lead to the adoption of a regulation by the Commission. The challenge was inadmissible. One cannot but note that this turns on the idiosyncrasies of the complex web of Regulations, Council Directives, Commission Directives, and Commission Implementing Directives in this area.

In *Canon,* the litigants sought to challenge certain changes to the Common Customs Tariff bearing on customs duties on multi-purpose printers.[47] The CJEU stressed that, as far as Canon was concerned, the obligation to pay the duties in question arose only after national customs authorities had calculated and communicated the sums due. The Common Customs Tariff – the contested measure – did not in and of itself give rise to the legal consequences complained of. Canon's challenge, as a result, was inadmissible. Identical analyses can be found in the context of anti-dumping duties.[48]
Canon is representative of most of the other decisions in this area, which have also failed for lack of standing.[49] Indeed, it now seems a foregone conclusion that direct challenges to customs duties on the third head will be inadmissible. A number of decisions hold that implementing measures are *always* necessary for a tariff classification to produce legal effects.[50] A good example is the following extract from the CJEU in *Canon*:[51]

> The customs system, as instituted by the Customs Code and of which the contested regulation forms part, provides that the receipt of duties fixed by the latter regulation is carried out, *in all cases,* on the basis of measures adopted by the national authorities.

Similar consequences can be seen in the context of State aid. In *Telefónica,* the claimants were the beneficiaries of a scheme that offered Spanish companies certain tax benefits when they acquired foreign shareholdings. The claimant sought to contest Commission's finding that found the scheme was unlawful.[52] The challenge was inadmissible. The Decision was addressed to

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47 Case C-552/14 P, ECLI:EU:C:2015:804, *Canon Europa v Commission.*

48 Case T-596/11, ECLI:EU:T:2014:53, *Bricmate AB v Council*, [68] – [71].

49 Anti-dumping: Case T-596/11, ECLI:EU:T:2014:53, *Bricmate AB v Council*; Case T-134/10, ECLI:EU:T:2014:143, *FESI v Council*; Case T-551/11, ECLI:EU:T:2013:60, *Brugola Service International v Council*; Case T-507/13, ECLI:EU:T:2015:23, *SolarWorld AG and Others v Commission.*
Customs challenges: Case C-553/14 P, *Kyocera,* ECLI:EU:C:2015:805; Case T-380/11, ECLI:EU:T:2013:420; Case T-380/11, ECLI:EU:T:2013:420, *Anonymi Viotechniki*; Case C-84/14 P, ECLI:EU:C:2015:517*, Forgital.*

50 *Anonymi Viotechniki,* ibid, [32]; Case T-34/11*,* ECLI:EU:T:2014:797, *Canon Europa,* [38].

51 *Canon Europa,* fn 47, [50].

52 Telefónica, fn 12.

Spain, and imposed no obligation on the claimant beneficiaries. The actual effect on a given beneficiary would be determined by a tax notice issued by the relevant fiscal authorities. This notice was held to constitute an implementing measure within Art 263(4).

So much is confirmed by *Altadis*, where the parties sought to challenge the obligation to recover the unlawful State aid. [53] Again, it was found that the Decision did not spell out the amounts of aid to be recovered from a given undertaking; these would rather be fleshed out in domestic measures tailored to individual beneficiaries. Given the plight of others in this area,[54] and the statement in *Iberdrola* that 'all the measures for implementing the incompatibility decision' constitute implementing measures,[55] it is seems that challenges to State aid Decisions on the third head are inadmissible. As a result, two entire areas of EU law are isolated from challenge on the third head.

Third, the criteria implementing measures has been interpreted so restrictively that it is often more difficult to satisfy than individual concern. In this light, the third head is sometimes a step back from the position under Art 230(4) EC. For example, in *Crown Equipment*, the claimants sought to challenge anti-dumping measures in respect of truck parts manufactured in China and Thailand.[56] As we saw in Canon, the calculation and communication of the amounts owed by the national authorities in *Crown*

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[53] Case T-400/11, ECLI:EU:T:2013:490, *Altadis, SA*.

[54] See Case T-221/10, ECLI:EU:T:2012:112, *Iberdrola*; Case T-601/11, ECLI:EU:T:2014:839, *Dansk Automat Brancheforening*; Case T-287/11, ECLI:EU:T:2016:60, *Heitkamp BauHolding GmbH*; Case T-620/11, ECLI:EU:T:2016:59, *GFKL Financial Services AG*; Case T-694/14, ECLI:EU:T:2015:915, *European Renewable Energies Federation*; Case T-670/14, ECLI:EU:T:2015:906, *Milchindustrie-Verband*; Case T-174/11, ECLI:EU:T:2012:143, *Modelo Continente Hipermercados*; Case T-488/11, ECLI:EU:T:2014:497, *Scheepsbouwkundig Advies- en Rekencentrum* (Note, this party had standing on the basis of procedural rights and could challenge the decision only to the extent that it infringed those rights. It did not succeed in showing standing within the heads of Art 263(4), allowing it to challenge the merits of that decision); Case T-118/13, ECLI:EU:T:2016:365, *Whirlpool Europe v Commission.*

[55] Case T-221/10, ECLI:EU:T:2012:112, *Iberdrola v Commission,* [46] – [47].

[56] Case T-643/11, ECLI:EU:T:2014:1076, *Crown Equipment.*

Equipment would constitute implementing measures. As such, the claimants would not have been able to rely on the third head.

Although they did not satisfy the third head, the General Court found that the second head was satisfied. They were directly concerned, first, given that the contested regulation affected their legal situation by imposing duties on the products they sought to import, and, second, given that the Member States had no discretion as regards the imposition and extent of the duty.[57] They were also individually concerned in that they were identified in the contested measure and were involved in the preliminary investigations.

It is noteworthy that, as in other cases[58], the General Court did not even consider the third head. It is, surely, indicative of the restrictiveness of the third head that the notoriously narrow second head is used as the courts' first port of call.

This is not an isolated case that turned on the quirks of the challenge in *Crown Equipment*. It is a widespread phenomenon, with many litigants satisfying the second head of standing but not the third.[59] Lest it be objected that individual

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[57] See fn 9 and 10.

[58] Case T-287/11, ECLI:EU:T:2016:60, *Heitkamp BauHolding v Commission,* [59] ('Since the applicant's direct concern is established, it is appropriate to check whether the applicant is also individually concerned by the contested decision, without it being necessary, if so, to check whether the contested decision is a regulatory act that does not entail implementing measures.'); Case T-620/11, ECLI:EU:T:2016:59, *GFKL Financial Services AG*, [53]; Case T-483/11 , ECLI:EU:T:2013:407, *Sepro v Commission,* [31].

[59] See also Case T-614/13, ECLI:EU:T:2014:835, *Romonta v Commission*; Case T-512/12, ECLI:EU:T:2015:953, *Front Polisario v Council*; Case T-643/11, ECLI:EU:T:2014:1076, *Crown Equipment*; Case T-17/12, ECLI:EU:T:2014:234, *Hagenmeyer and Hahn v Commission*; Case T-385/11, ECLI:EU:T:2014:7, *BP Products v Commission*; Case T-57/11, ECLI:EU:T:2014:1021, *Castelnou v Commission*; Case T-620/11, ECLI:EU:T:2016:59, *GFKL Financial Services AG*; Case T-287/11, ECLI:EU:T:2016:60, *Heitkamp BauHolding*; Case T-462/13, ECLI:EU:T:2015:902, *Comunidad Autónoma del País Vasco*; T-276/13, ECLI:EU:T:2016:340, *Growth Energy, and Renewable Fuels Association v Council*; Case T-277/13, ECLI:EU:T:2016:343, *Marquis Energy v Council*; Case C-132/12 P, ECLI:EU:C:2014:100, *Stichting Woonpunt*

concern is generally taken as being generally easier to satisfy in the context of anti-dumping, other examples can readily be found ranging from challenges to the greenhouse gas emissions allocation system[60] to challenges to liberalisation measures on agricultural products with third party countries.[61] As a result, despite the seeming success of *Microban* and its lucky sisters *Bloufin, Bilbaína* and *Health Foods,* the third head is to some extent even more restrictive than the pre-Lisbon position.

C. The Substantive Interpretation of Implementing Measures

However, 'implementing measures' does not need to be given such a restrictive interpretation. The courts could easily engage in a more substantive analysis to determine whether a contested norm entails implementing measures.

The text of Art 263(4), in some linguistic versions, seems to imply a higher threshold than there merely 'being' implementing measures. The notion of a norm 'entailing' implementing measures imports a logical or causal link between the contested norm and the implementing measures. Simply pointing to the fact that such norms exist would not necessarily satisfy this requirement. Other language versions, like the German and Hungarian, seem to also require this superadded element.[62] Granted, other linguistic versions simply require the contested norm to 'include' implementing measures.[63] That said, the ambiguity between these two versions could be used as a springboard toward a more substantive inquiry.

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and Others v European Commission for examples of satisfying the second head but not the third.

60 Romonta, fn 59.

61 Polisario, fn 59.

62 See, in German, 'Rechtsakte mit Verordnungscharakter, die sie unmittelbar betreffen und keine Durchführungsmaßnahmen *nach sich ziehen*, Klage erheben', and, in Hungarian 'közvetlenül érintő olyan rendeleti jellegű jogi aktusok ellen, *amelyek nem vonnak maguk* után végrehajtási intézkedéseket'. I am grateful to Julia Bihary, Julia Weber and Katharina Zwins for discussion on this matter.

63 See, in Spanish, 'los actos reglamentarios que la afecten directamente y que no incluyan medidas de ejecución', or in French, 'les actes réglementaires qui la concernent directement et qui ne comportent pas de mesures d'exécution.'.

Advocate General Cruz Villalón in *T and L* offered a framework for such a substantive inquiry. He opined that 'non-substantive or ancillary measures'[64] should not constitute implementing measures. The courts should rather consider whether the contested norm is 'fully and autonomously *operational*' in light of its purpose, content and effects on the applicant's legal situation.[65] If so, the criterion of implementing measures is satisfied.

Thus, on the facts of *T and L,* the Advocate General concluded that the contested measure did not entail implementing measures. His argument can be best understood as turning on a separation between a 'high level' or 'general' challenge to the scheme itself and a 'low level' or 'specific' challenge to its administration. The claimants argued that the scheme itself placed them at a competitive disadvantage as compared with national sugar beet producers, and was contrary to the principles of non-discrimination, legitimate expectations and proportionality. From this perspective, the fact that the *administration* of the scheme required the exercise of implementing powers was immaterial. Functionally, the challenged measure – the scheme *itself* – was autonomous and operational without the need for further State measures.

I note finally that this analysis seems entirely consistent, if not required, by the courts' frequent assertions that 'reference should be made exclusively to the subject-matter of the action' when determining whether the contested norm entails implementing measures.[66]

This analysis can usefully be applied to the two areas examined above that are, at present, excluded from the liberalising effects of the third head.

In the field of custom duties, it would be entirely possible to consider that the calculation and the communication of the duties are purely ancillary or accessory measures to the contested norm. They are the immediate consequences of the change to the Common Customs Tariff. Member States

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[64] Advocate General Cruz Villalón, fn 32, at [32].

[65] ibid, at [32].

[66] Telefónica, fn 12, [31]; DanskAutomat, fn 54, [57]; Woonpunt, fn 31, [38]; European Union Copper Task Force, fn 46, [37].

have no discretion in the calculation or imposition of those duties; their national customs authorities act, in effect, as agents of the EU. The national measures are not implementing measures of substance. They are formal measures that simply give effect to the Common Customs Tariff designed by the EU institutions.

Similar conclusions can be reached in respect of State aid Decisions.[67] As has been observed, the actions carried out by the Member States to recover the unlawful aid amount to implementing measures. Yet these actions – the recovery of the aid – are the logical consequences of the finding that the aid is unlawful.[68] Short of absolute impossibility, the Member State must imperatively recover the full value of the aid. In that sense, the Commission's decision is autonomous; the natural legal corollary of the finding that the aid is unlawful is its recovery by national authorities. In this light, the actions carried out by the national authorities are ancillary to the declaration that the aid was unlawful. They are formal acts guided entirely by the terms of the contested Decision, not substantive measures necessary to implement some broader design of the EU institutions.

2. Direct Concern

Direct concern means what it did prior to the Lisbon reforms.[69] This seems correct as a matter of interpretation. The framers kept the notion of 'direct concern', even though they would have been aware of other, more liberal, formulations.[70] As above, the intention seems to have been to liberalise

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[67] Case C-132/12 P, ECLI:EU:C:2013:335*, Stichting Woonpunt and Others v Commission,* Opinion of Advocate General Wathelet, [77].

[68] For example, Case C-331/09, ECLI:EU:C:2011:250, *Commission* v *Poland,* [54].

[69] Case T-694/14, ECLI:EU:T:2015:915, *EREF v Commission,* [17]**;** Case T-312/14, ECLI:EU:T:2015:472, *Federcoopesca*; *Microban,* fn 18 at [32]; *T and L,* fn 12 [37]; Case T-673/13, ECR, EU:T:2015:167, *European Coalition to End Animal Experiments* v *ECHA*, [67]. Case C-583/11 P, ECLI:EU:C:2013:21, *Inuit Tapiriit Kanatami v Parliament and Council*, Opinion of Advocate General Kokott [68] – [69] and Case C-274/12 P, ECLI:EU:C:2013:204, *Telefónica SA v European Commission* at [59]; Advocate General Wathelet in *Woonpunt,* fn 67, [66].

[70] See, for example, Case C-50/00, ECLI:EU:C:2002:197*, Unión de Pequeños Agricoltres v Council,* Opinion of Advocate General Jacobs; Case T-177/01, *Jégo-Quéré v Commission.*

standing rules by dispensing with the need to show individual concern rather than diluting the notion of direct concern.[71]

As far as the scope of the third head goes, the issue with direct concern is not that the courts have failed to depart from their pre-Lisbon definitions. Rather, the issue is that they have insisted on a watertight separation between the second sub-criterion of direct concern[72] and the criterion of 'not entailing implementing measures'. As shall be explained, the courts adamantly maintain that the contested measure must produce effects without the need for *intermediate rules* – part of the second sub-criterion for direct concern – and must also be free of *implementing measures*. They refuse to engage, on any meaningful level, with the possibility of there being some interplay, let alone some overlap, between these two notions.

This accounts for the ineffectiveness of the third head in two ways. First, the courts, in fleshing out the factors that distinguish the two notions, confirm its literal interpretation of 'implementing measures'. Second, the distinction forces parties to overcome two separate obstacles – both the second sub-criterion of direct concern and the criterion of not 'entailing implementing measures'. However, this distinction is less convincing than it initially might appear. It is not a given that they represent two separate standing hurdles. When examined closer, they shade into each other on a number of levels: practical, analytical and conceptual. The courts' refusal to engage with this interplay reduces the possibility of direct challenges under the third head.

A. The Rigid Distinction Between 'Not Entailing Implementing Measures' and 'Direct Concern'

The courts' hermetic separation between the two notions is readily demonstrated by the CJEU's decision in *Forgital*.[73] At issue was a challenge to customs duties on titanium-based products. The claim failed in the General

[71] See Advocate General Cruz Villalón, fn 32, [26]; *Federcoopesca*, fn 37, [26]; *Inuit,* fn 12 [57]; see fn 32.

[72] I recall that this means that the implementation of that measure must be purely automatic, resulting from Union norms without the application of other intermediate rules, see part II.

[73] Forgital, fn 49.

Court because, as above, the calculation and communication of those duties by the national authorities amounted to implementing measures.[74]

On appeal, it was argued that the General Court erred in finding that 'not entailing implementing measures' was a separate criterion to that of 'direct concern'.[75] The CJEU tersely dismissed the argument and simply asserted that the two criteria are indeed distinct and separate questions. The sole differentiating factor given in that case was that the absence of discretion is 'not relevant to the question of whether the measure entails implementing acts or not'[76] This enigmatic statement fails to address the substance of the distinction between the two notions, or the relationship between the two admissibility criteria.

Some digging reveals four arguments that the courts use on a routine basis in order to delineate direct concern from implementing measures, including the justification offered in *Forgital*.

First, perhaps most obviously, the courts rely on the wording. The framers introduced two different phrases. The framers of Art 263(4) would not have used the term 'implementing measures' if it were not an additional criterion to the need to show direct concern.[77] However, the semantic difference between the two concepts is misleading. Linguistically, the formulations of the second sub-criterion (in terms of absence of 'intermediate measures') and the requirement that the contested norm not entail implementing measures

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74 T- 438/10, ECLI:EU:T:2013:648*, Forgital v Commission*.

75 *Forgital,* fn 49, [39].

76 ibid, [43] and [44] (In French only, but the author's translation would be as follows) 'Contrary to the applicant's submissions, the condition pertaining to the absence of implementing measures is separate to that of direct concern. (...) the question of whether the contested measure confers an element of discretion on national authorities responsible for the implementing measures it not relevant to the question of whether the measure entails implementing measures or not'; see also Case T-381/11, ECLI:EU:T:2012:273, *Eurofer v Commission*, [59]; Case T-551/11, ECLI:EU:T:2013:60, *BSI v Council*; Case T-400/11, ECLI:EU:T:2013:490, *Altadis v Commission*, [50].

77 See, for example, *Bricmate* fn 49, [74]; *Federcoopesca,* fn 37, [31].

bear striking similarity.[78] Moreover, as shall be seen, the textual difference between the two notions is far less convincing in light of the practical, analytical and conceptual proximity between the two.

Beyond the wording itself, the courts insist on the rigid separation between the two notions by stating that what is relevant to the question of direct concern is irrelevant to the question of whether the contested norm entails implementing measures. Thus,

1. 'The allegedly *mechanical nature* [emphasis added] of the measures taken at national level ... is irrelevant in ascertaining whether those regulations entail implementing measures' [79]
2. 'The question of whether or not the addressee of the contested decision has *discretion* [emphasis added] in implementing the disputed act has no bearing on .... the existence of implementing measures, such existence being sufficient to render the third limb of the fourth paragraph of Article 263 TFEU inapplicable'[80]
3. '[The fact that the contested measure] is *directly applicable* [emphasis added] in the Member States and that, as a consequence, it directly affects [the claimant's] legal position in that it alters it without the need for national implementing measures or measures adopted by the EU institutions (...) is relevant only as regards the circumstances in which an applicant can be said to be directly concerned, and must therefore be disregarded [in relation to the consideration of implementing measures]'[81]

Thus, the *mechanical nature* of the implementing measures, the margin of *discretion* left to national authorities, the *direct applicability* of the contested measure are all irrelevant to whether a norm entails implementing measures. These questions of mechanics, discretion and direct applicability rather bear

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[78] See other language versions. German 'ohne dass weitere *Durchführungsvorschriften* angewandt werden' and 'keine *Durchführungsmaßnahmen* nach sich ziehen'; Maltese 'mingħajr applikazzjoni ta' *regoli oħra intermedjarji*' and 'li ma jinvolvix *miżuri ta' implimentazzjoni*'.

[79] *T & L Sugars*, fn 12, [41] – [42]; *Canon,* fn 47, [47]; *Kyocera,* fn 49, [46]; Case T-507/13, ECLI:EU:T:2015:23, *SolarWorld AG*, [36] and [60]. See section three of this Part.

[80] Federcoopesca, fn 37, [41].

[81] *Kyocera,* fn 49, [49]; Case T-134/10, ECLI:EU:T:2014:143*, FESI,* fn 49, [28] – [29]; Case T-380/11, ECLI:EU:T:2013:420*, Anonymi Viotechniki,* [44].

on whether the contested norm is of direct concern to the applicant. The listing of such factors which are relevant to direct concern but not to implementing measures provides the basis for the courts' repeated assertions that the two notions are distinct, cumulative standing criteria. [82]

This reasoning does not just facilitate formalistic interpretation of implementing measures; it positively requires such an interpretation. It precludes any substantive analysis of whether the measures in question are mechanical, or constitute actions over which the national authorities had no discretion. The inquiry is thus limited to the purely formal question of whether such measures exist. 'Implementing measures' is given an overly broad interpretation, which not only reinforces the reasoning examined in the previous section, but, more broadly, contributes to the limited effectiveness of the third head.

In and of itself, this is not an impermissible interpretation. I do not cavil, from a purely textual point of view, the possibility of endorsing such reasoning. But it must be recognised that this is not the only interpretation. Nor is it necessarily a desirable. Indeed, it is entirely coherent to adopt a more nuanced understanding of the relationship between direct concern and implementing measures. So much is evidenced by considering the *practical*, *analytical* and *conceptual* overlap between the two notions, as shall be demonstrated in the following section.

B. The Questionable Distinction Between 'Not Entailing Implementing Measures' and 'Direct Concern'

The *practical similarity* is best demonstrated by reference to the *Woonpunt* case.[83] Here, the litigants were able to satisfy the second head of standing, but not the third. At issue was an existing aid scheme for 'Wocos' – Dutch non-profit property organisations carrying out a mix of commercial activities and social housing programmes. The Commission recommended a number of appropriate measures to the Netherlands in order for to bring the scheme

[82] See, for example, *SolarWorld,* fn 79, [36]; *Eurofer*, fn 76, [59]; *Altadis,* fn 76, [47]; *BSI* v *Council*, fn 49, [56].

[83] Case C-132/12 P, ECLI:EU:C:2014:100, Stichting Woonpunt and Others v Commission.

into line with the prohibition on unlawful State aid. In response, the Netherlands made a commitment to promulgate an updated scheme – in the form of a ministerial decree and a new Housing Law – that would address the Commission's concerns. The Commission accepted the proposed amendments in a Decision which the applicants sought to contest. This contested Decision, it should be noted, had the effect of requiring the Dutch state to bring the said amendments into being.[84]

As to the third head, the contested Decision noted that the updated scheme would be implemented by way of a new ministerial decree and a new Housing Law.[85] The CJEU understood this to mean that the legal consequences complained of would materialize not through the contested Decision itself, but through these Dutch measures. Accordingly, the contested Decision entailed implementing measures.

However, the applicants could avail themselves of the second head.[86] The court reiterated that the second sub-criterion of direct concern requires the legal effects complained of to be 'purely automatic' and 'without the application of other intermediate rules'. They were satisfied. Once the Commission accepted the Dutch proposals for the updated scheme, they were bound to bring it into force. The fact that they had no discretion in this regard meant the applicant Wocos were directly concerned.

Thus, the CJEU accepted, in the same case, that the enactment of the housing policy resulted from Union rules without the need for intermediate

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[84] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1–9, Art 19(1) on 'legal consequences of a proposal for appropriate measures', reads 'The Member State shall be bound by its acceptance to implement the appropriate measures'.

[85] Art 41 of the contested Decision read 'The Netherlands authorities have made commitments to amend the functioning of wocos and the measures favouring them (...) The new rules will be *implemented by way of a new ministerial decree from 1 January 2010 and a new housing Law from 1 January 2011*. (...)'.

[86] They were also individually concerned because they were part of a closed and countable class of Wocos, established by Royal Decree, in contradistinction to the many future Wocos that might come into existence in the future and not enjoy the more liberal former scheme. See fn 213.

rules[87], and that very same housing policy amounted to an implementing measure. In other words, it was satisfied that there were no 'intermediate rules' but that there were nonetheless 'implementing measures'. This seems illogical. By the same token, it would have been entirely possible to consider that the contested Decision, in accepting the Dutch undertakings, required no implementing measures to produce the legal effects complained of given that the Dutch state was obliged to bring the updated scheme into force. Practically, therefore, it is difficult to see a rigid distinction between implementing measures and direct concern.[88]

The two notions also shade into each other on an *analytical level.* In short, the analysis that the courts perform in relation to the question of whether a measure entails implementing measures is virtually identical as to whether a party satisfies the second sub-criterion of direct concern.

In *Microban,* the General Court reasoned that direct concern was satisfied because the prohibition was 'automatic and mandatory'. Moreover, the fact that there was a transitional period for the Member States to require the cessation of marketing triclosan did not alter this. Although the Member States were free to choose when to prohibit the marketing of triclosan within that period, they nonetheless had no discretion as to bringing that ban into effect. To that extent, reasons the court, this transitional period was 'ancillary' to the contested prohibition, and direct concern was satisfied.[89] It then repeats a near-identical analysis in relation to the whether the provision entailed implementing measures. The court holds, first, that the ban had the 'immediate consequence' of not being able to use triclosan in products coming into contact with foodstuffs and, second, that the transitional period provided for the contested measure was introduced as an 'ancillary measure'

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[87] See fn 8.

[88] Indeed, see also Case C-142/15 P, ECLI:EU:C:2016:163, *SolarWorld,* [35] where the CJEU was unable to ascertain whether the appellant was criticizing the General Court's consideration of implementing measures or direct concern. ' (...) it is difficult to determine with certainty whether, by the first limb of the single ground of appeal, the appellant wishes to contest the General Court's assessment of the criterion of lack of discretion or its assessment of the lack of implementing measures'.

[89] *Microban,* fn 18, [29].

to the ban. The key considerations in relation to both criteria – 'automatic'/'immediate' and 'ancillary' – are very similar.

Many other examples could be given, one of which is *Les Verts.*[90] This case was decided in 1986, well before the advent of the third head in the Lisbon Treaty. A fuller presentation of the facts is given subsequently, and, for now, we may limit ourselves to the court's analysis of whether the claimant French Green Party was directly concerned. The court stated that the contested norms were 'a complete set of rules which are sufficient in themselves and which require no implementing provisions'. It also stressed that the rules were 'automatic and leave no room for any discretion'.[91] As such, the claimants were directly concerned by the contested norms.

How, one might ask, is this 'direct concern' analysis different from the analysis that the courts would now perform in relation to whether a measure entails implementing measures? The reference to 'implementing provisions' harks forward to the post-Lisbon criterion of 'implementing measures'. Moreover, the fact that *Les Verts* the references to the 'automatic' nature of the contested provisions and that they were 'sufficient in themselves' to give rise to legal effects is also an indication that, in post-Lisbon parlance, the provisions did not entail implementing measures. These are conspicuous indications that the analysis of what constitutes direct concern is very similar to the analysis of whether a contested norm entails implementing measures. If we compare the pre-Lisbon and post-Lisbon consideration of whether a party is directly concerned, it is nearly identical to the consideration of whether the contested norm entails implementing measures – the analysis of whether a contested norm directly concerns a given claimant can very easily pass as an 'implementing measures' analysis. Analytically, therefore, the rigid distinction between the two is more difficult accept than initially appears.

Finally, on a *conceptual level,* it is entirely possible to accept that there is some degree of overlap between the two notions. The exact scope of this overlap is a question of degree.

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[90] Case C-294/83, ECLI:EU:C:1986:166, *Les Verts v Parliament.*

[91] ibid, [31].

On the one hand, it is possible to consider the two notions as identical. Advocate General Wathelet was of this opinion in the *Woonpunt* case. He considered that not entailing implementing measures was not a separate condition but an explanation of direct concern.[92] He was concerned that the very purpose of relaxing the standing rules would be frustrated if 'simple formalities' like publications, notifications and confirmations could preclude a party's reliance on the third head of standing.[93] Thus, measures adopted by national authorities in the absence of discretion should not constitute implementing measures, but that the very notion of absence State discretion satisfies both the second criteria of direct concern and means that there are no implementing measures.[94]

On the other, it is possible to endorse a more modest view of the overlap between the two notions. Thus, Advocate General Kokott in *Telefónica* was of the opinion that the two are distinct criteria, but, it seems, also of the opinion that direct concern would be satisfied as a matter of principle when a measure did not entail implementing measures. Her reasoning was that acts that fulfil the second criteria of direct concern 'always operate automatically and their legal effect ensues from EU rules only'.[95] The reasoning was not endorsed in *Telefónica,* which did not address the question of whether the claimants were directly concerned. However, parts of *Federcoopesca* follow a line of reasoning similar to Kokott's Opinion. The General Court stated that where the contested norm gave rise in and of itself to the legal effects, which means that it entails no implementing measures, the criterion of direct concern would necessarily be satisfied.[96] The case does not seem to have been followed further on this point, and, to that extent, seems to be somewhat of an outlier in the post-Lisbon jurisprudence.

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[92] Opinion of Advocate General Wathelet, fn 67, [69].

[93] ibid, [72].

[94] ibid, [75].

[95] Case C-274/12 P, ECLI:EU:C:2013:204, *Telefónica v Commission,* Opinion of Advocate General Kokott, [60] 'The second condition is based on the assumption that the contested legal act still requires implementation. However, that is specifically not so in the case of an act which does not entail implementing measures. Such acts always operate automatically and their legal effects ensue from EU rules only'.

[96] *Federcoopesca,* fn 37, [34] and [37].

Again, as was the case in relation to the interpretation of 'implementing measures', the courts could easily have adopted a more fluid understanding of the relationship between direct concern and implementing measures. Yet they chose not to. Rather than insisting on a rigid separation between the two they could have embraced the possibility of the two criteria overlapping. Their refusal to do so forces them to adopt a purely formal conception of implementing measures. The courts' zealous attempts to distinguish the two requires them to insist that considerations of mechanics, discretion and direct applicability are solely relevant to direct concern and not implementing measures. This cements their view that the mere existence of implementing measures – regardless of their purpose effect or content – precludes reliance on the third head. In turn, this limits the extent to which the third head has facilitated direct challenges.

3. Regulatory Act

As above, there are two elements to the notion of a regulatory act: the measure must be non-legislative, and it must be of general application. As the criteria raise different issues, it is worth separating the analysis along those lines.

A. General Application

It is not clear what 'general application' means. The case law often disposes of the third head of standing on other grounds.[97] As a result, we do not have a wide range of cases that consider and apply this criterion and it is difficult, at present, to ascertain exactly what it might mean. On a broader level, the cases that do address the matter do not offer much guidance. So much can be seen in the jurisprudence on challenges in the field of anti-dumping duties. The Regulations that impose such duties have been held to constitute regulatory

[97] Case C-274/12 P, ECLI:EU:C:2013:852, Telefónica v Commission, [38]; Case T-24/11, ECLI:EU:T:2013:403, Bank Refah Kargaran v Council, [41]; Iberdrola, fn 54, [48] 'It follows that the contested decision entails implementing measures and that therefore, without it being necessary to rule on whether that decision is a regulatory act, the Court must reject the applicant's argument submitted in the alternative, based on the last part of the fourth paragraph of Article 263 TFEU'

acts.[98] The reasoning is scant. The courts simply reiterate the *Inuit* definition to the effect that an act is of general application 'in that it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in general and in the abstract', and state that the Regulation in question meets this definition.[99]

It is a shame that the courts do not address the matter in greater detail. The classification of such Regulations is, in fact, more complex than the courts seem to admit. For example, anti-dumping duties impose both broad duties on a given type of products manufactured in a non-EU country, as well as, possibly, more tailored duties on individual exporters. As a result, it is not given that every obligation under the Regulation necessarily partakes of this 'general' character.[100] Indeed, the Commission's acceptance of undertakings from exporters, which confers an exemption from the duties, has been found to represent a series of dealings with individual operators, and, by that token, does not qualify as an act of general application.[101] A fuller discussion of what exactly, qualifies a measure as general is thus awaited.

That said, some guidance on the meaning of 'general application' can be scoured from the case law, mostly in the field of State aid.[102] In *Mory,* the applicant sought to contest the Commission's finding that France did not

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[98] Case T-596/11, EU:T:2014:53, *Bricmate v Council*, [65]; Case T-134/10, EU:T:2014:143, *FESI v Council*, [24]. Note both failed to satisfy the third head because of the presence of implementing measures.

[99] *Bricmate,* fn 49, [65]; *BSI,* fn 49, [43]; *FESI,* fn 49, [24]; *SolarWorld AG,* fn 79, [64].

[100] Michael Rhimes, 'Nothing ado about much? Challenges to Anti-Dumping Measures After the Lisbon Reforms to Art 263(4) TFEU' (2016) European Journal of Risk Regulation 374; Alexander Kornezov, 'Shaping the new architecture of the EU system of judicial remedies; comment on Inuit', (2014) European Law Review 251, 256-7; Albertina Albors-Lorens, 'Remedies against the EU institutions after Lisbon: an era of opportunity?' (2012) CLJ 507, 525-526; Ivo Van Bael and Jean-François Bellis, *EU Anti-dumping and Other Trade Defence Instruments,* 5th Ed., (Kluwer, 2011), 606.

[101] *SolarWorld AG,* fn 79, [64]. Upheld on appeal in C-142/15 P, ECLI:EU:C:2016:163.

[102] There are also some interesting insights to be garnered from the case law on challenges to the inclusion in various blacklists relating to the financing of terrorism and nuclear proliferation. However, space precludes the discussion of these factually and technically complicated cases. The reader is directed to Case T-67/12, ECLI:EU:T:2014:348, *Sina Bank* and the case law cited there.

need to recover State aid granted to its competitor, Sernam, after Sernam was purchased, in administration, by third company.[103] The pertinent reasoning is contained in this short passage:

> As the decision at issue, which was addressed to the French Republic, does not constitute a regulatory act under the fourth paragraph of Article 263 TFEU, since it is not an act of general application, it is necessary to determine whether the appellants are directly and individually concerned by that decision, within the meaning of that provision.[104]

The natural reading of the paragraph suggests that the measure was not of general application because it was only addressed to the French Republic. This defines very tightly the notion of 'regulatory act', as it seems to imply that a measure cannot be 'general' if addressed to only one Member State. This would be an alarming result, and the reasoning should not be followed.

There are indications that it will not be. Advocate General Mengozzi in his Opinion simply states that 'the decision at issue is not a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU because it is not of general application'.[105] His Opinion makes no reference to the Decision being addressed to the French Republic alone. As such, his Opinion does not support the narrowness of the CJEU's approach. It allows us to explain the result in *Mory* on the basis that the Decision in issue was confined to two individual companies. That Decision was limited to a finding that there was insufficient economic continuity between Sernam and the third company that purchased it to require the recovery of aid granted to Sernam. This is a

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[103] Case C-33/14 P, ECLI:EU:C:2015:609, *Mory v Commission.*

[104] ibid, [92] There is a citation in this paragraph to *Inuit* fn 12, [56] which has been omitted for readability. This reference is baffling. Paragraph 56 of *Inuit* stated that the concept of acts in Art 263 TFEU, in general, refers to 'any European Union act which produces binding legal effects', and that this term 'covers acts of general application, legislative or otherwise, and individual acts.'. This is of very limited, if any, relevance to interpretation of *regulatory* act in Art 263(4). The Opinion of Advocate General Mengozzi makes reference to [51], [60], [61] of *Inuit,* which correctly identifies the parts of the judgment that hold that legislative acts are excluded from regulatory acts.

[105] Case C-33/14 P, ECLI:EU:C:2015:409*, Mory,* Opinion of Advocate General Mengozzi, [167].

much more satisfactory explanation of the case. It coherently explains why the Decision was not of general application. More importantly, it does not preclude reliance on the third head simply because only one State is addressed in a contested Decision.

Moving beyond the facts of *Mory,* it is possible to consider the 'standard' State aid Decisions which require a Member State to reclaim aid unlawfully granted as being of general application. Advocate General Kokott in her Opinion for *Telefónica* drew a distinction between an act being *binding* on one Member State alone, and an act having *general application.*[106] On this basis, the fact that the contested Decision bound only one Member State did not mean that it was not a regulatory act. On the contrary, it was binding on all organs of that State and had the effect of shaping the national legal order.[107] It was therefore capable of being of general application, and she concluded that the Commission Decision constituted a regulatory act.

It is difficult to see whether the courts have adopted this approach. The cases do not speak with one voice. On the one hand, *Castelnou*[108] seems to suggest that a regulatory act must refer to a class defined by general characteristics. On the other, *EGBA*[109] offers a more indulgent approach.

In *Castelnou*, the Spanish state facilitated the consumption of Spanish coal by designating ten companies in a Royal Decree to produce energy from such fuels. The Commission issued a Decision confirming the lawfulness of this scheme. The challenge, brought by a company who was not designated in that Royal Decree, was inadmissible because that Decision was not of general application. The beneficiaries of the aid were those designated by the Decree, and not defined generally (e.g. all energy plants of certain specifications). This suggests a rigid approach whereby any act that does not refer to a class defined by general characteristics cannot be a regulatory act.

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[106] Opinion of Advocate General Kokott, fn 95, [23].

[107] ibid, [25].

[108] Case T-57/11, ECLI:EU:T:2014:1021, *Castelnou Energía v Commission*; see also *Whirlpool,* fn 54, [41].

[109] Case T- 238/14, ECLI:EU:T:2016:259, *EGBA and RGA v Commission.*

By contrast, in *EGBA,* the French State imposed a parafiscal levy on the revenue from online horse-race betting, which the Commission found was justified in light of its benefit for the equine industry. The beneficiaries of this levy were the 51 companies that formed part of the economic interest group PMU. The General Court accepted that the beneficiaries of the aid were not defined generally and in the abstract; it was limited to the 51 specific companies that constituted PMU. However, the General Court stressed that the challenge was to the method of financing the aid, the parafiscal levy. It also accepted that because the levy could affect all online horse-race betting operators in France, and the levy was raised on each online horse race betting stake, it produced both general effects and applied to objectively determined situations.[110] In short, the fact that the class of beneficiaries is not envisaged in general and in the abstract did not preclude the measure being regulatory.

The tension can be better appreciated by applying the *EGBA* reasoning to *Castelnou.* One might argue that, despite the fact that ten beneficiaries were limited by the Royal Decree, the effects of the Decision were of general application. One might point to the fact that the contested scheme affected a class of energy producers envisaged in the abstract – those fuel-oil, coal-fired plants and gas plants whose energy production was disadvantaged in comparison with energy produced from Spanish coal.[111] The detailed rules laid down in the subject of the Decision, like the parafiscal levy at issue in *EGBA,* could also mean that it applies to situations which are determined objectively.[112] The mere fact that the beneficiaries were defined by Royal Decree does not affect this conclusion. An act can have legal effects on a class of persons defined in general and in abstract, even though the beneficiaries of the aid are no so defined.

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[110] ibid [34] - [35].

[111] See Decision C (2010) 4499, State aid No N 178/2010 'Public service compensation linked to a preferential dispatch mechanism for indigenous coal power plants', [35] – [42] for a detailed description of the scheme: http://ec.europa.eu/competition/state_aid/cases/236267/236267_1150043_151_1.pdf

[112] See *Real Decreto* 1221/2010, Boletíin Oficial del Estado, Number 239, Section I, page 83983.

In short, one reaches different conclusions as to the general nature of the act depending on whether one considers the *beneficiaries* of the aid or the *effects* of that aid. *Castelnou* confines itself to the former, and it concludes that the act in question is not regulatory. *EGBA* goes beyond the definition of the beneficiaries, and considers the effects themselves. Classifying a given act as 'general' or 'individual' is not as easy as it might initially seem. There seems to be a spectrum of generality, and not a binary opposition of 'general' and 'individual'. What, one might ask, is sufficiently general to constitute a regulatory act? To what extent must a norm 'shape a national legal order' in order to be of general application?[113]

Overall, the courts' standard reference to 'of general application' thus requires further refinement. At present, it does not explain what actually is of general application, and it fails to appreciate that the scope of application of a given norm cannot always be readily classified as 'general' or 'individual'. What may be considered individual – specific aid granted to 10 energy companies or 51 horse-betting companies – may well be general when seen in another light. Perhaps the notion of what is sufficiently general may be given different meanings in different contexts – rather like the varying shades of meaning attributed to individual concern in different areas of EU law.[114] It is premature to make any firm conclusions at present, but one hopes that the courts will recognise the complexity of this notion, and will flesh out more helpful guidelines to determine whether a given act is general or not.

B. Non-legislative

Only non-legislative acts can be regulatory. It is not possible to offer full accounts of all the intricacies of what constitutes a non-legislative act, or all the possible interpretations of the term regulatory.[115] However, an overall

[113] See fn 107.

[114] See Lenaerts and Others, fn 5.

[115] The reader is referred to Jürgen Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law' (2012) CMLR 885; Carl Bergstrom, 'Defending restricted standing for individual to bring direct actions against 'legislative' measures', (2014) European Constitutional law Review 481; Christoph Werkmeister and others, 'Regulatory Acts within Art 263(4) TFEU: A Dissonant Extension of *Locus Standi* for Private Applicants' (2011) CYELS 311; Koen Lenaerts and Nathan Cambien 'Regions and the European Court: Giving Shape to

examination of the bases of the courts' reasoning confirms a trend that has been observed before. The courts could adopt an interpretation that would allow for broader standing rules, but choose not to.

The CJEU provided three strands of reasoning in *Inuit* to support the contention that 'regulatory act' excludes legislative measures. *Teleologically,* the insertion of an additional paragraph in Art 19(1) TEU requiring Member States to provide access to the courts for indirect challenges *at national level* indicates that the third head of standing for challenges *at EU level* does not necessarily have to be given a wide meaning.[116] *Contextually,* Art 263(1) refers to acts in general, of both legislative and non-legislative character. This suggests that the reference to 'regulatory acts' of Art 263(4) has a more narrow scope, and, therefore cannot refer to both legislative and non-legislative acts.[117] As noted in the Opinion of Advocate General Kokott, so much would also be supported by the fact that legislative provisions should be more difficult to challenge than non-legislative provisions, given the democratic imprimatur associated with the former.[118] *Historically*, the third head is lifted word for word from the Constitution for Europe. This document drew a categorical distinction between legislative and non-legislative acts, and, moreover, the mandate of the Intergovernmental Conference that negotiated the Treaty expressly sought to preserve this separation.[119]

However, all three strands of reasoning are less convincing than they may initially seem. A couple of arguments may be briefly sketched. It is just as plausible to suggest that, for example, *teleologically*, the purpose of relaxing standing rules could be achieved through both a widening of Art 263(4) TFEU

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the Regional Dimension of the Member States' (2010) EL Rev 609; Sthephan Balthasar, '*Locus Standi* Rules for Challenges to Regulatory Acts by Private Applicants: the new Article 263(4) TFEU' (2010) EL Rev 542; Pieter-Augustijn Van Malleghem and Nils Baeten, 'Before the law stands a gatekeeper – or what is a 'regulatory act' in Article 263(4)' (2014) Common Market Law Review 1187, René Barents, 'The Court of Justice after the Treaty of Lisbon' (2010) CMLR 709; See also the extensive references In Advocate General Kokott's *Inuit* Opinion, fn 69.

[116] *Inuit,* fn 12, [89] – [107].

[117] ibid, [58].

[118] ibid, [38].

[119] ibid, [59].

and the insertion of Art 19(1) TEU. Indeed, why bother reforming Art 263(4) at all if Art 19(1) TEU was the solution to the standing dilemma? The teleological interpretation of the third head, murky as its purpose is, is inconclusive. It certainly does not inexorably lead to the interpretation adopted by the courts.[120] Similarly, *contextually*, if the framers meant to exclude legislative acts from the third head they could have used the term 'non-legislative act' which was already established in the Treaty[121]. It is thus not a foregone conclusion that there can be no overlap in the acts referred to in Art 263(1) and Art 263(4).[122] Finally, *historically* the reasoning of the court is questionable given that the textual source of the wording was the Constitution for Europe, which had an entirely different context, and given their selective readings of the *travaux préparatoires.*[123]

It is not a given that legislative acts cannot be regulatory. That said, one should be cautious in one's critique in this area. In many national jurisdictions, legislative acts are more difficult, or even impossible, to challenge.[124] One cannot censure the courts for the *mere fact* of having excluded legislative measures from the third head. Nonetheless, anchoring the notion of 'regulatory' in whether the act was legislative or not is questionable in its own terms, and gives rise to some unpalatable consequences.

First, one must question why the distinction is relevant. Why should the legislative basis of the act require the litigant to pursue their challenge indirectly, in the nearly universal situation where they cannot satisfy individual concern? It is tempting to point to the 'qualitative difference'

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[120] Alexander Kornezov, 'Shaping the new architecture of the EU system of judicial remedies; comment on Inuit' (2014) ELR 251, 261; Bast, fn 115, 907; Balthasar, fn 115, 545-546.

[121] Lenaerts and Cambien, fn 115, 616-619; Berg, fn 115, 494; Kornezov, fn 120, 257.

[122] Opinion of Advocate General Kokott, fn 69, [37]; Bast, fn 115, 990; Van Malleghem and Baeten, fn 115, 1205.

[123] Lenaerts and Cambien, fn 115, 617; Balthsar, fn 115, 544; Bergstrom, fn 115, 498, Van Malleghem and Baeten, fn 115, 1204-1213.

[124] Brian Libgober, 'Can the EU be a Constitutional System Without Universal Access to Judicial Review?' 2015 Michigan Journal of International Law 353; Kornezov, fn 120, 258; Albors-Lorens, fn 16, 519.

between the two in terms of democratic legitimacy.[125] This is not a satisfactory response. *It proves too little* because it is doubtful whether legislative process does indeed confer such a difference in the first place. It is not difficult to find legislative procedures that closely resemble those used to promulgate non-legislative acts.[126] Moreover, the Council, whose members are not democratically elected, carries as much weight as the Parliament in the ordinary legislative procedure.[127] But, more fundamentally, *it also proves too much*. If the 'qualitative difference' holds true, why is it just as easy to challenge a legislative provision of EU law indirectly under the Art 267 procedure as it would be in respect of a non-legislative measure?[128] Appeals to the democratic credentials of the act seem both questionable in their own terms, and illogical in relation to indirect enforcement. In any case, from a broader perspective, it is questionable to what extent one can transpose domestic constitutional justifications for the insulation of legislative acts from judicial challenge to the supranational EU order. Laws passed by national legislatures cannot necessarily be equated with the products of what the EU dubs a 'legislative' process in terms of form, procedure, or democratic legitimacy.[129]

Second, it brings a distinctly formalistic touch to the third head, given that it relies on the purely formal criterion of whether a given measure was legislative or not.[130] A given policy change could easily be enacted on a legislative *or* a non-legislative basis. One might take an example from the area of Common Fisheries Policy, namely rules that govern the mesh sizes of fishing nets. In *Jégo-Quéré,* the size restriction was implemented on the basis of a Council Regulation that authorised the Commission to take emergency measures to safeguard the population of hake.[131] This act was clearly not a legislative act, and, as such, it could now be challenged under the third head

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[125] Opinion of Advocate General Kokott, fn 69, [38].

[126] Alan Dashwood and others, *Wyatt and Dashwood's European Union Law* (6th Ed, OUP, 2011), 85.

[127] Albors-Lorens, fn 223, 524; Bast, fn 115, 897.

[128] Dougan, fn 115, 678-9.

[129] Dougan fn 115; Koch, fn 17, 526; Bast, fn 115, 897 'Not all legislative acts benefit from a high level of parliamentary involvement in the making of the act'.

[130] Barents, fn 115, 725; Albors-Lorens, fn 223, 524; Bast, fn 115, 925.

[131] Case C-262/03 P ECLI:EU:C:2004:210 *Commission v Jégo-Quéré.*

as long the claimants could show that the measure did not entail implementing measures.[132] However, it would have been possible to implement similar restrictions on a legislative basis. Art 37(2) EC required acts in the field of the Common Agricultural Policy, which includes the Common Fisheries Policy[133], to be adopted on a legislative basis. Read together with the relevant provision in the Basic Regulation No 2371/2002, so-called 'measures regarding the structure of fishing gear' would have to be enacted on a legislative basis.[134] For example, Council Regulation No 1342/2008,[135] in Annex One, imposed a range of restrictions on the mesh sizes of fishing nets used to catch cod. This was a legislative act[136] and, as such, could not have been challenged under the third head. Given the difficulty of any undertaking showing that they were individually concerned by the measure, it is likely that any direct challenge would have been rejected as inadmissible. Whether an act is legislative or non-legislative has an element of fortuity; it does not necessarily have any bearing on the substance of what is challenged. This perpetuates the element of lottery in EU standing provisions, with the ability to bring direct challenges contingent on this seemingly arbitrary criterion.

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[132] See, Advocate General Kokott, fn 69, [59].

[133] See Art 32 EC.

[134] See Council Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358, 31.12.2002, p. 59–80, Art 4(2)(g)(i).

[135] Council Regulation (EC) No 1342/2008 of 18 December 2008 establishing a long-term plan for cod stocks and the fisheries exploiting those stocks and repealing Regulation (EC) No 423/2004, OJ L 348, 24.12.2008, p. 20–33.

[136] Joined Cases C-124/13 and C-125/13, ECLI:EU:C:2015:790*, Parliament and Commission v Council,* [21] 'The Commission considers that Regulation [No] 1342/2008 ... *which was adopted as a legislative act* ...' (emphasis added). Note this comparison has been deliberately confined to two pre-Lisbon measures as the inter-institutional responsibility for the Common Fisheries Policy was subject to considerable change in the Lisbon Treaty, with a preference for normative changes having to be adopted under legislative process as contemplated in Art 43(2) and not Art 42(3). For context, see Opinion of Advocate General Wahl in Cases C-124/13 and C-125/13, ECLI:EU:C:2015:337*, Parliament and Commission v Council.*

Third, the requirement that a regulatory act be non-legislative means that legislative acts are still as difficult to challenge. Two post-Lisbon cases, *Beul*[137] and *ABZ*[138], are good examples of this. For context, *Beul* concerned a measure designed to guarantee the independence of auditors with the effect that the claimant could no longer supervise the auditing of public-interest undertakings, and *ABZ* dealt with the sharing of genetic information by plant breeders.

Both of the contested provisions were legislative acts. As a result, the claimants could not rely on the third head.[139] As to the second head, the court noted that the contested acts produced legal effects in the abstract with respect to a general class of persons.[140] As is known, it is nearly impossible to show individual concern in relation to such an act. The notable exception to this would be *Codorníu,* where a regulation limiting the terms 'crémant' to sparkling wines of French and Luxemburgish origins was of individual concern to a Spanish producer who enjoyed a trademark in respect of their 'Gran Cremant'.[141] However, this judgment was readily distinguished. In *Beul,* the court recalled that the trademark in *Codorníu* was an individualised entitlement and thus of a different nature to a general right to carry out a profession[142], and in *ABZ* the applicant failed to show prejudice that other plant breeders in a similar situation would not also suffer[143].

Both *Beul* and *ABZ* are on appeal, and it may well be that the CJEU takes a more benign view.[144] However, even if they are successful, it is clear standing still turns on technical distinctions in the application of individual concern.

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[137] Case T-640/14, ECLI:EU:T:2015:907, *Carsten Beul v Parliament and Council*.

[138] Case T-560/14, ECLI:EU:T:2015:314, *ABZ Aardbeien Uit Zaad v Parliament and Council.* Note that Case T-559/14, ECLI:EU:T:2015:315 *Ackermann Saatzucht GmbH & Co. KG* deals with an almost identical challenge, and reaches the same conclusion.

[139] *Beul,* fn 137, [18] – [20]; *ABZ,* fn 138, [24] – [26].

[140] *Beul,* fn 137, [32] – [37]; *ABZ,* fn 138, [33].

[141] *Codorníu*, fn 14.

[142] *Beul,* fn 137, [48].

[143] *ABZ,* fn 138, [39].

[144] Case C-53/16 P, *Carsten Beul v Parliament and Council* (not yet reported as of 28/06/2016); Case C-409/15 P, *ABZ Aardbeien Uit Zaad and Others v Parliament and Council* (not yet reported as of 28/06/2016).

Even if one accepts that legislative EU measures should be more difficult to challenge, it is difficult to justify the tombola of making standing contingent on whether it is possible to shoehorn one's case into a *Codorníu*-type situation.

IV. WHY DO THE COURTS INTERPRET STANDING RULES RESTRICTIVELY?

As has been stressed throughout Part III, it is entirely possible to conceive of a broader scope for the third head. Interpretations that are both textually faithful and teleologically coherent can readily be provided. The CJEU *could* easily endorse such interpretations. Yet it does not. In spite of a madrigal of dissent – from academia[145], Advocates General[146], and even within the courts[147] – it remains unflinching in its restrictive approach.

To fully appreciate why this is so, it is necessary to turn to the doctrinal justifications of the restrictive approach. It shall be seen that this doctrine rests on a fundamental assumption, supported by three buttressing justifications. Moreover, the analysis reveals that the pre-Lisbon doctrine has been carried over in its entirety to the post-Lisbon interpretation of the standing rules. The jurisprudence is thus tainted by its restrictive pre-Lisbon approach, and, as a result, the courts' approach to standing has not changed, to any perceptible level, after the Lisbon reforms.

1. The Pre-Lisbon Explanations

The fundamental assumption in the courts' restrictive approach lay in the architecture of the Treaties. At its heart was the interplay between the standing rules for direct challenge in Art 230(4) EC, on the one hand, and the possibility for a national court to refer a dispute to the CJEU under Art 234

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[145] See fn 2 and fn 115.

[146] Advocate General Jacobs in Case C-50/00 P, ECLI:EU:C:2002:197 *Unión de Pequeños Agricultores v Council,* and in Case C-358/89, ECLI:EU:C:1991:144 *Extramet v Council;* Advocate General Geelhoed in Case C-491/01, ECLI:EU:C:2002:476, *British American Tobacco*; Advocate General Wathelet in *Woonpunt* fn 67; Advocate General Cruz Villalón in *T and L*, fn 32.

[147] Fuller explanation is given in this text at fn 153 and 154. See Case T-177/01, *Jégo-Quéré v Commission,* Case C-262/03 P ECLI:EU:C:2004:210 *Commission v Jégo-Quéré*, Christopher Brown and John Morijn, 'Case C-262/03 P Commission v Jégo-Quéré' (2004) Common Market Law Review 1639

EC, on the other. This allowed the EU courts to argue that the inability to bring direct actions before the EU courts was adequately compensated by the possibility of indirect challenge. On this view, the fact that a party did not have standing for direct challenge was not really a 'gap' in effective judicial protection. That party was free to challenge national measures taken in pursuance of the contested EU norm, and, in so doing, provoke a reference to the CJEU. Indeed, such indirect enforcement was found to represent the 'very essence' of judicial protection.[148]

Unión de Pequeños Agricultores is an excellent pre-Lisbon example.[149] The litigants argued that the inability to challenge measures reorganising the olive oil market amounted to a violation of their right to effective judicial protection. The CJEU, recalling the admissibility criteria in Art 230(4) EC and the preliminary reference procedure under Art 234 EC, noted that where a complainant could not bring himself within the admissibility criteria of the former article, they were able to indirectly plead the invalidity of the contested norm before the national courts based on the latter article. Thus, concluded the CJEU, the Treaty provided a 'complete system of legal remedies'.[150] This time-honoured phrase was repeated, again and again, in the jurisprudence.[151]

This assumption, however, was not perfect. It assumed – and herein laid its Achilles' heel – that there were indeed domestic measures that could be contested in national courts. This was not the case in respect of 'self-executing measures', measures which in and of themselves gave rise to the legal effects complained of. As we have seen in our discussion of *Microban* in part II, such measures could only be challenged by contravening the EU norm in question, and then challenging the sanctions, first in national courts, and after in the CJEU if they were referred under the preliminary reference

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[148] Case C-301/99 P, ECLI:EU:C:2001:72, *Area Cova SA*, [46].

[149] Case C-50/00, ECLI:EU:C:2002:197, Unión de Pequeños Agricoltres v Council.

[150] ibid, [40].

[151] *Les Verts,* fn 90, [23]; *Unión de Pequeños Agricoltres,* fn 148, [40]; *Jégo-Quéré,* fn 131, [30]; Joined Cases T-236/04 and T-241/04, ECLI:EU:T:2005:426, *European Environmental Bureau*, [66]; Case T-108/03, ECLIEU:T:2005:68, *Von Pezold*, [51] – [52]; Case T-167/02, ECLI:EU:2003:81, *Établissements Toulorge*, [65]

procedure. The dilemma arose in *Unión de Pequeños Agricultores* where the claimants noted that 'neither the Spanish State nor the autonomous communities of which it is composed have adopted measures to implement the contested regulation'.[152]

The dilemma also arose in *Jégo-Quéré,* where the restriction on the fishnet mesh sizes required no implementing measures.[153] The natural response, one might think, would have been to expand the interpretation of the admissibility criteria in Art 230(4) in order to reduce the incidence of the dilemma. The Court of First Instance ('CFI', now the General Court) did exactly that. It 'reconsidered' the strict interpretation of individual concern, and found it satisfied where 'the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him'.[154]

The CJEU was of a different view, and quashed the CFI's interpretation on appeal.[155] The logical approach of the CFI was stoutly resisted by the CJEU, on three grounds. These served as distinct buttressing arguments that, at least in the eyes of the courts, validated the restrictive approach to standing.

First, the courts *denied that the dilemma existed.* It was explained that the litigants in *Jégo-Quéré* could have contacted the relevant national authorities and sought a measure which could have itself been contested before the national courts, so that the individual could challenge the measure indirectly. Although the court simply referred to a 'measure', it seems that they were referring to some sort declaration from the national authorities that the contested regulation applied to the claimants, which, in turn, could be contested in the national courts.[156]

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[152] T-173/98 ECLI:EU:T:1999:296*, Unión de Pequeños Agricultores,* [25].

[153] Compare with *Bloufin,* where a similar measure did not entail implementing measures, fn 38.

[154] Jégo-Quéré, fn 146.

[155] Jégo Quéré, fn 146.

[156] *Jégo-Quéré* fn 146, [35]; Compare with Opinion of Advocate General Kokott in *Inuit* at [120].

Second, the courts *disclaimed that they had the power to solve the dilemma*. There were two aspects to this. The first can be considered institutional in nature, the second jurisdictional. First, the courts maintained that they could not allow direct challenges where it was impossible for a claimant to mount an indirect challenge. This would require the courts to assess, in each case, whether the litigant in question would otherwise have had no choice but to contravene the contested provision. The courts, it was argued, were not competent to carry out such an assessment of the national procedural law of individual Member States.[157] Second, although the courts did recognise that having to flout the law in order to contest it fell foul of the principle of effective judicial protection,[158] fashioning a remedy in these situations would have ignored the admissibility criteria in Art 230(4) EC. This provision required a claimant to be directly and individually concerned; it did not contain a residual head of standing where effective judicial protection would be denied due to the impossibility of indirect challenge. Any contrary interpretation would have forced the courts out of the bounds of their jurisdiction.[159]

Finally, the courts *deflected the responsibility for solving the dilemma.* It argued that the solution to the dilemma was not to facilitate access to the EU courts by expanding the heads of standing. Rather, it was to ensure that national courts interpreted and applied domestic procedural rules so as to allow the litigant to challenge the norm at the national level, and that Member States, in accordance with the principle of sincere cooperation under Art 10 EC, adopted measures guaranteed such access.[160] Responsibility, therefore, lay at the national level and not the EU level. Alternatively, it was up to the Member States to amend Art 230(4) EC in subsequent Treaties.[161]

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[157] *Unión de Pequeños Agricultores*, fn 148, [43]; *Commission v Jégo-Quéré*, fn 146, [34]. Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores,* fn 148, [102(3)].

[158] See C-432/05, ECLI:EU:C:2007:163, *Unibet* [64] 'If, on the contrary, as mentioned at paragraph 62 above, it was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law, that would not be sufficient to secure for it such effective judicial protection.'.

[159] Unión de Pequeños Agricultores, fn 148, [63].

[160] Unión de Pequeños Agricultores, fn 148, [42]; Jégo-Quéré, fn 146, [32].

[161] Unión de Pequeños Agricultores, fn 148, [45].

The courts' response to the dilemma is wide-ranging, to put it mildly. They simultaneously maintain that the dilemma is not really a problem (buttressing argument 1), and that the courts cannot solve it in any case (buttressing argument 2); the courts recognise both that they cannot remedy the dilemma (buttressing argument 2), and that it is not the courts' problem to solve anyway (buttressing argument 3). The dilemma is attacked on all fronts, which, to some extent, confirms its status as a thorn in the completeness of the Treaties touted by the courts.

2. The Post-Lisbon Explanations

The courts have seized on the Lisbon reforms to strengthen this restrictive interpretation.

First, *the pre-Lisbon fundamental assumption prevails*. The courts have stoutly defended the notion that indirect challenges are adequate substitutes for direct challenges Reiterating its time-honoured approach, the courts note, again and again, that Art 263(4) and Art 267 provide a 'complete system of legal remedies'.[162] In the absence of implementing measures, contested norms could be challenged directly under the third head. If not, the litigants were free to bring proceedings in national courts, and, if well founded, have them referred to the CJEU.[163] To gainsay this, in the eyes of the court, amounts to a claim for an 'unconditional entitlement' – a hyperbole which is flatly rejected.[164]

Thus, when *Telefónica* could not challenge the Commission's finding that the tax scheme they benefitted from was unlawful, the CJEU reminded them that they were free to challenge the implementing measures (in the form of tax notices issued by the relevant national authorities) in national courts.[165] The Treaties created a Union based on the rule of law, boasting a complete system

[162] *T and L,* fn 11, [45]; *Inuit,* fn 12, [92]; *Telefónica,* fn 12, [57]; *European Union Copper Task Force,* fn 46, [54]; *Beul,* fn 136, [54]; Case T-541/10, ECLI:EU:T:2012:626, *ADEDY,* [89].

[163] *Inuit,* fn 11, [93] and [96].

[164] ibid [105].

[165] ibid [58], [59].

of legal remedies.[166] This is almost word-for-word lifted from the pre-Lisbon approach. The fundamentally restrictive approach of the courts has clearly not shifted.

Second, the three buttressing arguments against more liberal interpretations of the standing rules have been strengthened. The courts have cleverly found further validation in the Lisbon Treaty for the three buttressing arguments in favour of their restrictive approach. The courts now deny the dilemma, disclaim the power to solve it and deflect responsibility for its solution with almost greater force than they did prior to the Lisbon reforms.

The *denial of the dilemma* is facilitated by the insertion of the third head. The courts consider that the dilemma has been laid to rest by the possibility of parties challenging provisions that do not entail implementing measures. The gaps in the standing rules have been plugged, and indirect challenges are paraded as conferring universally effective judicial protection. The dilemma has breathed its last; long live indirect challenges. In the soothing words of Advocate General Kokott, there is 'no reason to fear a gap in the legal remedies available to individuals' due to the possibility of indirect challenge which has now been buttressed by the possibility of challenging provisions that do not entail implementing measures.[167] As shall be seen, this is wrong, yet it forms an important part of the post-Lisbon justifications for the restrictive position.

This is a considerably stronger argument than the pre-Lisbon attempt to dispose of the dilemma. The contention raised in *Jégo-Quéré* to the effect that a party could 'seek a measure' from the national authorities was a weak one.[168] Its formulation in broad and general terms gave little guidance as to how it

[166] ibid [56], [57].

[167] Opinion of Advocate General Kokott in *Inuit,* fn 69, [115]. However, for the avoidance of doubt, this passage is descriptive; I am not of the opinion that the dilemma has indeed been laid to rest. See Part V) 3) a).

[168] See discussion at fn 156.

might apply in practice.[169] It assumed that it was possible to obtain such a measure from the national authorities – whatever that might mean – and also assumed that such measures could indeed be contested in the domestic courts, regardless of the relevant national rules in a given Member State. The woolliness of this argument was readily apparent, and frequently contested.[170] Now, however, it is no longer necessary to resort to these somewhat desperate arguments. It is possible to point to the Treaty text, which now grants the standing to challenge measures that do not entail implementing measures, as the definitive solution to the dilemma.

As such, the courts do not need to *disclaim their ability to solve the dilemma*. The courts nonetheless do so. The CJEU has repeated that Art 263(4) does not grant a party standing to mount a direct challenge when that party cannot challenge the contested provision indirectly. To hold otherwise would flout the text of Art 263(4).[171] In a similar vein, it also maintains that it could not carry out an assessment of national procedural law to verify whether a party is genuinely caught on the horns of dilemma.[172] These arguments, as has been seen, were part and parcel of the pre-Lisbon jurisprudence. Likewise, the claims that this restrictive approach should be reconsidered in light of the principle of effective judicial protection are rejected. The courts' standard response is to assert, on occasion by reference to the Explanation to Art 47 of the Charter, that Art 47 cannot require derogation from the Treaty text. The courts cannot set aside the admissibility criteria in the text of Art 263(4).[173]

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[169] Note that Advocate General Kokott in her Opinion for *Inuit* invoked this argument, see fn 69, [120], with specific reference to *Jégo-Quéré*. It is conspicuous that the CJEU made no mention of it in its judgment.

[170] See, for example, Christopher Brown and John Morijn, 'Case C-262/03 P Commission v Jégo-Quéré' (2004) Common Market Law Review 1639.

[171] See, worryingly, Case T-279/11, ECLI:EU:T:2013:299, *T & L Sugars and Sidul Açúcares v Commission,* [72] and discussion at Part V) 2) a).

[172] *Telefónica,* fn 12, [55]; *European Union Copper Task Force,* fn 46, [53] 'The conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU must be interpreted in the light of the fundamental right to effective judicial protection, but such an interpretation cannot have the effect of setting aside those conditions, which are expressly laid down in the FEU Treaty'.

[173] *T and L,* fn 11, [43]; *Inuit,* fn 12, [97].

This further substantiates the courts' assertions that they are powerless to expand the scope of standing for direct challenges.

In terms of *deflecting responsibility*, the courts have found further validation of the responsibility of Member States for ensuring the effectiveness of indirect challenges in Art 19(1) TEU. The Lisbon Reforms added a second paragraph to this provision, such that the Article now reads as follows:

> The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
> Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

The second half has been seized on as clear textual authority that the responsibility for ensuring that parties can challenge EU law lies at the national level. The intention of the framers was not, therefore, to expand the possibility of direct challenge at the *EU level,* save in respect of the dilemma which was solved through the addition of the third head.[174] Effective judicial protection is preserved as long as Member States discharge their obligations under Art 19(1) of the TEU. This guarantees the availability of indirect enforcement and the erstwhile dilemma, in the courts' reasoning, simply withers away. Thus, the responsibility for the dilemma is deflected from the supra-national sphere to the domestic sphere.

Finally, the courts deny that the third head was designed to secure an overall relaxation of the standing rules. This is a crucial point. As far as the courts are concerned, the objective of the third head was simply to solve the dilemma. As long as it achieves that effect, there is no need to expand the standing rules further.

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[174] The point emerges clearly from Advocate General Kokott Opinion in *Inuit,* fn 69, [35] 'It can be inferred from the co-existence of the fourth paragraph of Article 263 TFEU and the second subparagraph of Article 19(1) TEU that the legal remedies available to individuals against European Union acts of general application do not necessarily always have to consist in a direct remedy before the European Union Courts.'.

FESI, a challenge to anti-dumping duties which failed based on reasoning examined above in Part III, illustrates this particularly well. The General Court noted that the 'objective pursued' by Art 263(4) TFEU was to 'avoid a situation where [a claimant] would have to break the law in order to have justice'.[175] No mention is made of other justifications for liberalising the standing rules – justifications which the court would have been aware of.[176] The third head was intended to remedy the dilemma and, certainly, no more. Thus the fact that it was possible for *FESI* to challenge the implementing measures in national courts, as guaranteed by the Customs Code, meant that there was no need to extend the interpretation of Art 263(4) any further.[177] Other examples can readily be found.[178]

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[175] *FESI,* fn 54, [31].

[176] See, for example, Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores,* fn 69.

[177] ibid [39]

[178] Given the centrality of this point, I hope somewhat excessive citation may be indulged:
Case T-35/11, ECLI:EU:T:2014:795, *Kyocera,* [50] 'Nor is [the inadmissibility of the present action] called in question by the objective sought by the fourth paragraph of Article 263 TFEU. Admittedly, that objective is to avoid a situation in which a natural or legal person would have to break the law in order to have access to justice However, (...) in the present case, the applicant may (...) challenge the national implementing measures of the contested regulation' (See also *Eurofer,* fn 76, [60])
Telefónica, fn 12, [27] – [28] '[the objective of Art 263(4)] consists in preventing an individual from being obliged to infringe the law in order to have access to a court. (...) Natural or legal persons who are unable (...) to challenge a regulatory act of the European Union directly before the European Union judicature are protected against the application to them of such an act by the ability to challenge the implementing measures which the act entails.'
Federcoopesca, fn 37, [28] – [29] '(...) the third limb of the fourth paragraph of Article 263 TFEU is designed to apply only when the disputed act, in itself, in other words irrespective of any implementing measures, alters the legal situation of the applicant (...) when an act does not, in itself, alter the applicant's legal situation, that situation is only altered if measures to implement the act are taken in respect of the applicant. The applicant can then challenge those measures and, in the context of that challenge, plead that the act implemented by them is unlawful, so that he cannot be regarded as having been denied effective judicial protection.'

The dilemma thus plays a crucial role in the courts' reasoning. It is presented as the *sole* reason for reforming the standing rules, rather than an opportunity to move towards a more liberal EU standing regime. This technique of limiting the scope of the third head to solving the dilemma, and then finding that the purpose of the third head has been upheld given the possibility of indirect challenge is a central theme in the post-Lisbon jurisprudence. It is also a highly effective two-pronged assault on the possibility of more liberal standing provisions. It attacks *the need* for a more expansive interpretation of standing rules by limiting the scope of the purpose behind the third head. It also belittles *the desirability* of such an interpretation by stressing that it is possible for the litigant to mount an indirect challenge. This, in turn, validates the courts' long-standing assertion that such indirect challenges are, from the perspective of effective judicial protection, adequate substitutes for direct challenges.

The dilemma – argument in favour of more liberal standing rules – has been cleverly turned on its head. The solution of the dilemma is a ceiling on the interpretation of the standing criteria, and not a floor. Despite the myriad of arguments against the restrictive position of the courts, if there is no dilemma there is no need for expansion. Of course, even if the dilemma did arise, the courts would be powerless to assist, and, naturally, would assert that it is not their responsibility to solve it. The courts attack the dilemma on all fronts. The restrictive interpretation has not shifted – the dilemma notwithstanding.

V. An Assessment: Are the Restrictive Rules Justified?

For balance and context, it is worth separating this final substantive Part in three sections. The first gives a bird's eye view of what legitimate purposes the admissibility criteria for direct actions could serve. This is an important discussion which is to some extent muted in the existing literature. The second dismisses the courts' restrictive position by refuting the fundamental assumption and points out the flaws in the buttressing justifications. The final fleshes out some of the benefits that more relaxed standing rules could bring.

1. A Bird's Eye View of the Justifications of the Admissibility Criteria for Direct Actions

One might get the impression that *any* limit on direct challenges – regardless of merit or the extent to which the claimant is affected by the contested measure – is to be censured as an affront to the principle of effective judicial review. That is not my contention. Critiques of the narrow standing rules, like the present one, cannot be blind to the existence of indirect enforcement provided for in the Treaty. Indirect challenges have been used to challenge, and, ultimately, invalidate unlawful EU norms.[179] The interplay between Art 263(4) and Art 267 is a crucial part of the legal architecture of the Union. The underlying purpose of setting certain thresholds to overcome in order to challenge a provision of EU law direct can, if balanced properly, serve legitimate and wholly commendable ends – both from the perspective of the CJEU and from the perspective of litigants.

From the perspective of the CJEU, standing may act as a useful triage mechanism. If a party is not sufficiently affected by a contested norm they will not be able to challenge it directly. They will, first, have to mount a challenge in domestic courts, and this dispute will only be referred to the CJEU under Art 267 if it sufficiently meritorious. The wheat is referred to the CJEU and the chaff remains on the threshing floors of national courts. Thus, Art 267 and Art 263(4), working together, can provide a guarantee that judicial time is not wasted on fruitless or otherwise meritless challenges. The practical benefits of this are evident, but it must not be forgotten that benefits also connect, more fundamentally, to the proper administration of justice.[180] *From the perspective of litigants* who are not sufficiently affected by a measure to mount a direct challenge, indirect enforcement nonetheless

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[179] See, for example, Case C-362/14, ECLI:EU:C:2015:650, *Schrems v Data Protection Commissioner*; Joined Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238, *Digital Rights Ireland v Minister for Communications*; Case C-333/07, ECLI:EU:C:2008:764, *Société Régie Networks v Direction de contrôle fiscal Rhône-Alpes Bourgogne*.

[180] Efficiency and proportionality have clear roles in the proper administration of justice. One might take the example of England and Wales. The Civil Procedure Rules, Statutory Instrument No. 3132 of 1998, state that dealing with a case justly includes, so far as is practicable, dealing with the case in ways which are proportionate to the importance of the case and to the complexity of the issues (Part 1.1(2)(c)(ii) and (iii)).

allows them to challenge the contested norm. Such parties, not meeting the criteria for direct challenge, are offered a second bite at the cherry in the form of indirect enforcement. The price they pay for this bite, justified by the need to ensure the merit of their challenge, is the need to bring proceedings in domestic courts.

Thus, indirect enforcement *can* ensure that a balance is preserved between, on the one hand, an individual's right of access to justice and, on the other, the proper administration of justice. On the one hand, litigants are not locked out simply because they are not sufficiently affected by a provision of EU law; they are granted a second opportunity in the form of indirect challenge. On the other, the court has the benefit of a guarantee that the issues for their consideration are, indeed, worth their consideration. Its time is not dissipated on unworthy disputes.

That said, this is a delicate system. The admissibility criteria must be calibrated to ensure a fair balance between these two desiderata. Too expansive, and the filtering mechanism in Art 267 may not function properly as a filter, as too many litigants will avoid the reference procedure and instead bring their claims directly. This could well result in an inundation of cases without the guarantees that they are worth the courts' time. This would be to the peril of the proper administration of justice. Too narrow, however, and national proceedings may become unprincipled burdens imposed on almost all of litigants – the argument that they are fair prices given that the litigants are not sufficiently affected by the contested norm no longer holds true. Too many claimants are forced to engage in lengthy and otherwise unjustified national proceedings, and their right to effective judicial protection is left without practical meaning.

Most importantly, it must be shown that the present position maintains this equilibrium. It cannot be assumed that it does. The courts' present approach, however, seems to point, again and again, to notions like the completeness of the system of legal remedies without actually showing how or why it is indeed complete. Most of the conclusions reached by the courts in relation to the right to effective judicial protection are simply expressed by reference to a common mantra, rather than properly reasoned and explained. However, the

completeness of the Treaties must be proved, not supposed; that parties are provided with effective judicial protection is to be substantiated and not simply stated; and the fundamental assumptions and the buttressing justifications are to be reasoned through and not simply reiterated.

On closer inspection, it is, in fact, clear that the admissibility criteria are far too restrictive to even come close to the balanced system fleshed out above. The criteria are overwhelmingly skewed in favour indirect enforcement. They reflect a blasé assumption that indirect enforcement, entangling the vast majority of claimants in wild goose chases before national courts, is an adequate substitute for direct actions. When this assumption – the fabric of the restrictive rules – is examined closer it is clear that it is untenable both in practice and in principle. Indirect challenges pose clear practical disadvantages in relation to direct challenges, and this would be readily perceived if the EU courts applied the same rigour in applying the principle of effectiveness it would expect of national courts. The three arguments that are woven into this are equally thin, and fray on closer inspection. They evade rather than justify the restrictiveness of the admissibility criteria. They are loose ends which, when tugged on, reveal a warped system of legal remedies, not a complete one. The acceptability of the present position, as well as the desirability of narrow standing rules in general, then quickly unravels.

2. Is the Present Position Justified?

For clarity, it is worth dividing this section to first assess the courts' fundamental assumption, and then proceed to comment on the three buttressing justifications.

A. The Fundamental Assumption

Indirect enforcement is not an adequate substitute for direct enforcement, either on a practical level or in terms of the principle of effective judicial protection.

a. Practical Equivalence?

First, there is no guarantee that a national court will refer a challenge to domestic provisions to the CJEU.[181] Although the EU courts maintain that a reference is required whenever the challenge is well founded,[182] this still involves an element of speculation as far as the individual litigant is concerned. Moreover, it is not clear that a party would have any straightforward or acceptable legal recourse should the national authorities fail to make a reference under Art 267.[183]

Second, even if the national court does indeed refer the matter to the CJEU, it is neither guaranteed that *all* the challenges by the litigant will be referred, nor that they will be referred as the claimant framed those challenges.[184] In any case, the CJEU is free to reformulate the questions as it sees fit, and it not bound to answer the questions by reference to the tenor of national proceedings.[185] The overall effect is that the party cannot meaningfully be said to be challenging the provision in question; it surrenders its case to national courts and the vagaries of the Art 267 procedure.

Third, there are considerable drawbacks in both the domestic proceedings and the need to refer the case to the CJEU. Concerning the first, the party cannot achieve the desired result in national proceedings, given that national courts do not have the power to strike down the offending provision of EU

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[181] Morten Broberg and Niels Feuger, *Preliminary References to the European Court of Justice* (OUP, 2010), Chapter 6.

[182] See, for example, *Inuit* fn 12, [96], citing Case C-344/04, ECLI:EU:C:2006:10, *IATA and ELFAA*, [27] - [30]; *T and L,* fn 12, [48]; *European Union Copper Task Force,* fn 46*,* [57].

[183] Roberto Mastroianni and Andrea Pezza, 'Striking the Right Balance: Limits on the Rights to Bring an Action under Article 263(4) of the Treaty on the Functioning of the European Union' (2015) American University International Law Review 743; Broberg and Feuger, fn 181, 265 – 272 (noting that state liability for failure to refer would only realistically be triggered when it could be shown the court acted in bad faith).

[184] Broberg and Feuger, fn 181, 295 ('a national court that contemplates making a preliminary reference is not required to consult the parties to the proceedings on the questions that it considers referring').

[185] Van Malleghem and Baeten, fn 115, 1215.

law.[186] Moreover, the party in question is limited to remedies only in respect of the Member State where they bring proceedings, which may offer insufficient protection in the many cases that involve an EU-wide geographic scope.[187] Concerning the need to refer the case to the CJEU, there are clear procedural disadvantages in referring the matter to the CJEU, and the party has to suffer the length – on average 15 months – and cost associated with such a referral.[188]

Finally, at the level of principle, the reference procedure under Art 267 is radically different from annulment actions before EU courts. The latter offer a forum to hear an individual litigant's claims that a contested norm is unlawful and provides a remedy to address that complaint if it proves to be well founded. The former is, however, a mechanism designed to ensure the uniform application and interpretation of EU law. It is not possible to simply replace a remedial scheme with a co-operative mechanism whose purpose is to ensure the consistent interpretation of EU law.[189]

b. Effective Judicial Protection?

It is difficult to square the EU courts' attitude to effective judicial protection in their own courts in relation to indirect challenges, on the one hand, with its application of the principle in national courts, on the other. The CJEU has masterfully relied on effective judicial protection as a keystone of the EU legal order to ensure the uniform enforcement of EU law. Many domestic

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[186] Case C-314/85, ECLI:EU:C:1987:452, *Foto-Frost v Hauptzollamt Lübeck-Ost*; Van Malleghem and Baeten, ibid, 1214; Cornelia Koch, 'Locus Standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy' 2005 ELR 511, 515.

[187] Mastroianni and Pezza, fn 183.

[188] See CJEU Press Release, 'Statistics concerning judicial activity in 2014' (http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-03/cp150027en.pdf, retrieved 12th April 2016); Van Malleghem and Baeten, fn 115, 1215; Mastroianni and Pezza, fn 183.

[189] Biernat, fn 14, 27-28; Craig, fn 15, 502; Broberg and Feuger, fn 181, 279 ('The preliminary reference procedure does not as such constitute a dispute resolution procedure; rather it is a non-contentious stage in the procedure before the national court. Article [267] does not provide a judicial remedy for the parties to the main proceedings.').

norms have met their end on the EU guillotine of effectiveness, whether they be constitutional understandings on the provision of legal aid[190], or customary limits on the granting of injunctions.[191] But its blade seems far less sharp, and its executioners far more squeamish, when it comes to examining the effectiveness of indirect challenges.

When claimants argue that the restrictive standing provisions are inconsistent with the principle of judicial protection, the claims are tersely dismissed. In *Telefónica,* for example the court dedicates only three substantive paragraphs to the claim that their right to judicial protection was violated. The first notes that the Union is founded on the rule of law, the second states that the Treaties provide a complete system of remedies and the third points disappointed litigants in the direction of the Art 267 preliminary reference procedure.[192] The analysis goes no further. The mere fact that indirect challenges *exist* seems to be in and of itself sufficient to satisfy the principle of effectiveness.

Compare this totemic consideration of effectiveness with the searching inquiry the CJEU would expect of national courts when they examine whether domestic remedies satisfy the requirement of effectiveness. *Levez* provides an excellent contrast.[193] At issue, amongst other things, was the application of a two-year limitation period for sex discrimination claims. The claimant, duped by her employer as to the salary of her male counterparts, fell outside this limitation period. Her right of action in the employment tribunal was thus time-barred, and she was left with the possibility of pursuing an action in fraud at common law in the County Court. The national court referred the issue to the CJEU, asking whether this satisfied the principle of effectiveness.

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[190] Case C-279/09, ECLI:EU:C:2010:811, DEB Deutsche Energiehandels v Bundesrepublik Deutschland.

[191] Case C-213/89, ECLI:EU:C:1990:25, The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others.

[192] *Telefónica,* fn 12, [56], [57], [59].

[193] Case C-326/96, ECLI:EU:C1998:577, *Levez v Jennings*.

The CJEU directed the national courts were required to consider whether the enforcement of her rights in the County Court would incur 'additional costs and delay' in comparison with the simpler procedure before the employment tribunal, and take account of 'special features of the procedure before national courts'.[194] Clearly, the mere fact that an alternative procedure in the County Court *existed* was not sufficient to satisfy the principle of judicial protection.

The CJEU's restrictive approach to standing rules would clearly not survive the scrutiny it required of the domestic courts in *Levez.* According to the CJEU's own standards, simply pointing to the existence of indirect actions is insufficient. It would have to consider the additional costs and delay of such actions. It would have to note their special features, like the inability to quash the contested norm in national courts, or the fact that those national courts could not grant EU-wide interim measures. Trotting out, time and time again, blithe references to the abstract completeness of the Treaties and the rule of law would fall far short of the searching inquiry the CJEU would expect of national courts. Against this background, it is very difficult to accept the courts' conclusion that the principle of effective judicial protection is satisfied by its restrictive interpretation of the standing rules.

B. Denying the Scope of the Dilemma

As has been seen, the courts have limited the purposes of the third head to plugging the dilemma, and has maintained that further extensions beyond this are not required in light of the obligations on domestic bodies. However, that the dilemma has not been laid to rest by the courts' interpretation of the third head. It continues to haunt the jurisprudence.

First, the dilemma still exists in respect of legislative acts, which cannot be challenged under the third head. This is of concern. For example, a measure restricting fish net mesh sizes could be of a legislative nature. It is also unlikely to require implementing measures.[195] In such a case, a litigant would have to breach the restriction to challenge it.

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[194] ibid, [51] and [44].

[195] See, for example, *Jégo-Quéré,* fn 131.

Second, the dilemma still prevails where 'implementing measures' are, in the eyes of national jurisdictions, mere formalities that cannot be challenged in domestic courts. *T and L* is a good illustration. Unlike the field of customs duties where the EU Customs Code provides statutory routes of appeal, there was no EU-wide remedial scheme that would have granted redress in *T and L*. Moreover, it did not seem that the Portuguese legal system would have allowed them to challenge the granting of certificates unless the individual certificate was *ultra vires* the national authority's power. This was not the case.[196] As was accepted by the General Court, and the Commission, the claimants could not challenge any of the implementing measures before the national courts.[197] However, their claim was dismissed as inadmissible – the lack of effective judicial protection notwithstanding.

The courts would have to accept that this falls short of the principle of effective judicial protection.[198] Yet, of course, the courts would be quick to respond that Art 263(4) could not accommodate a residual head of standing in Art 263(4) for those litigants who could not challenge a norm in domestic courts. But this does not change the fact that the courts' interpretation of the third head – designed, according to its own jurisprudence, to plug the dilemma – neither plugs that dilemma nor guarantees effective judicial protection when that dilemma arises. The standing rules thus fall short not only of promises of effective judicial protection, but also assertions that the pre-Lisbon gap in the standing rules has been plugged by the third head.

The dilemma is alive and kicking. It still rears its ugly head. And the CJEU's unwillingness to broaden the standing rules in response is of considerable concern.

C. Disclaiming the Power to Solve the Dilemma

The courts' disclaimer is disingenuous. As to the institutional argument, there is, doubtlessly, force to the contention that the courts cannot conduct

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[196] See also Opinion of Advocate General Cruz Villalón, fn 32 [13].

[197] Case T-279/11, ECLI:EU:T:2013:299, *T & L Sugars and Sidul Açúcares v Commission,* [63] and [65].

[198] See, *Unibet* fn 157; Opinion of Advocate General Kokott in *Inuit* fn 67, [119].

a systematic review of whether a party is caught on the horns of dilemma.[199] But this is not the only way to relax the rigour of the standing rules. As has been shown throughout the article, it would be entirely possible to mitigate the incidence of the dilemma by, for example, finding that regulatory acts could encompass acts of a legislative nature or adopting a more substantive analysis of what constitutes an implementing measure. This would save both litigants who would have fallen prey to the dilemma mentioned in the section above. Namely, Jégo-Quére could challenge the legislative measure as a regulatory act within the meaning of Art 263(4), and T and L could have argued that the contested scheme was sufficiently operational such that it did not entail implementing measures. All this could readily be accomplished without transgressing the bounds of the CJEU's institutional capacity.

The *ultra vires* argument is equally unconvincing. At a general level, this fastidious concern for textual legalism is out of character for the CJEU. The courts' landmark cases are a series of teleological interpretations designed to secure the effective and uniform application of EU law.[200] Yet one does not need to revisit *Costa*[201] and *Francovich*[202] and the other cases in the CJEU's Hall of Fame to highlight this inconsistency. The CJEU has adopted broad readings of the very standing provision it now steadfastly refuses to expand.

In *Les Verts,* the French Green party sought to challenge a Parliament measure that governed claiming back funds expended on political campaigning. Art 173(1) CEE at the time provided for challenges to measures adopted by the Council and Commission, but not those of the Parliament, on a similar basis to Art 230(4) EC. Based on the text, therefore, the Greens did not have standing as the contested measure was adopted by Parliament, and not the Commission or the Council. However, the CJEU held the action

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[199] See, for example, Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores,* fn 70.

[200] See, amongst many sources, Peter Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' (1999) Columbia Law Review 628, 664 who refers to this approach as a 'maximalist interpretation' of the CJEU's powers.

[201] Case C-6/64, ECLI:EU:C:1964:66, Costa v ENEL.

[202] Case C-479/93, ECLI:EU:C:1995:372, *Francovich v Italy*.

admissible. The inability to challenge acts of Parliament was 'contrary both to the spirit of the Treaty (...) and to its system'. Consequently, the CJEU allowed the challenge to the measure adopted by the Parliament, in spite of the Treaty text. The Opinion of Advocate General Mancini, who reached the same conclusion as the CJEU, sheds light on this conclusion.[203] He noted that, interpreted literally, Article 173 would render the action inadmissible, but nonetheless started from the position that interpretation granting the greatest measure of protection should be preferred.

Thus, the court was not constrained by the literal meaning of the text, but endorsed a far-reaching interpretation that assured the concept of legality in the Community system. The objections to admissibility melted away, despite the clear text of the article, in the furnace of teleological interpretation. Against this backdrop, it is difficult to have sympathy for the courts' pleas that they are powerless to expand the admissibility criteria in Art 263(4) – the teleological approach in *Les Verts* could easily allow for expansion of the present approach.

In any case it should be borne in mind that the result in *Les Verts* was even more drastic than what would be required to relax the rigour of the standing rules. In that case, the CJEU read in 'Parliament' into Art 173 EEC. In so doing, it deviated from *the Treaty text itself*. In the present context, all that is required is to adopt a more lenient *interpretation* of the Treaty text. The interpretation of the requirements in Art 263(4) is the product of case-law. It is not ineluctably ordained by the Treaties.[204] It would be entirely possible for the CJEU to re-interpret those provisions in a more lax fashion without straying beyond the confines of the Lisbon Treaty.[205] A lack of jurisdiction does not seem to be the issue – it seems to be rather a lack of will.

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[203] Case 294/83, ECLI:EU:C:1985:483*, Les Verts v Parliament,* Opinion of Advocate General Mancini.

[204] Craig, fn 15, 505; Biernat, fn 14, p. 41; Kornezov, 120. Note that Advocate General Jacobs in his Opinion for the *Unión de Pequeños Agricultores* case, fn 70, did not jettison the text of Art 263(4), he considered that his expansive interpretation of direct and individual concern could be accommodated within its wording.

[205] Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905, Criminal proceedings against Bernard Keck and Daniel Mithouard, [16].

D. Deflecting Responsibility for Solving the Dilemma

The courts deflect responsibility for the dilemma by pointing to Art 19(1) TEU. The argument is perplexing in that it proves too much and too little.

The argument *proves too little* in that it not clear how the humble sentence added to Art 19(1) requires the Member States to shoulder the responsibility to solve the dilemma. First, that provision simply imposes a general obligation on Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. It is not clear how this general obligation on Member States designates them as the primary sources of the solution to the dilemma. Second, it is not clear how Art 19(1) assists national jurisdictions to solve the dilemma. If there are no national procedural rules that can be relied on to bring one's challenge to the national courts, it is unlikely that they could simply conjure up access to the courts on the basis of Art 19(1) alone. As was explained in *Inuit,* that article does not create any new remedies at the national level to ensure the observance of EU law.[206] It could not be used to found a freestanding right of access to the courts. If there are indeed national procedural rules, but they explicitly preclude access to the courts on the facts of a given case, it is also questionable to what extent co-operative obligations in Art 19(1) could require domestic courts to disregard them.[207] This would be supported by the court's approach to the principle of harmonious interpretation descried from Art 4(3) TEU[208], in which national judicatures are required to interpret domestic law in accordance with EU law, but not to the extent of foisting a

[206] See, *Inuit,* fn 12, [103] 'neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law';

[207] Opinion of Advocate General Wathelet in Case C-132/12 P, ECLI:EU:C:2013:335, *Stichting Woonpunt and others v Commission* 'the duty of genuine cooperation cannot extend so far as to require the Member States to create access to national courts where no State measure is at issue'.

[208] Indeed, as can be seen in *Jégo Quéré,* this deflection argument was initially founded on Art 10 EC, the predecessor to Art 4(3) TEU. See *Jégo Quéré,* fn 146, [32].

contra legem interpretation on it.[209] Overall, it is surely a tall order to locate a universal solution, despite the idiosyncrasies of 28 domestic legal systems and the factual permutations of an individual case, in a single line of Art 19(1).

It also proves *too much*. If the solution to the standing conundrum can be found by pointing to access to national courts, there would not have been any need to amend Art 263(4) in the first place. The obligation to provide effective remedies for EU law, now enshrined in Art 19(1) TEU, clearly existed prior to the Lisbon Treaty.[210] Its insertion into the Lisbon Treaty was understood as being a codification of existing case law.[211] If we are to take the courts' reliance on Art 19(1) at face value, we must also accept that there was no problem with the pre-Lisbon position – in blatant contrast to the impetus leading to the Lisbon reforms.

3. The Desirability of Broader Admissibility Criteria

Many arguments can be found in favour of broadening the EU standing rules. Three may be touched on here.

From the perspective of *legal certainty,* the narrowness of the third head means that many claimants must navigate the unpredictable waters of the second head. [212] To wit, the claimants in the *Woonpunt* case failed in the

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[209] Case C-106/89, ECLI:EU:C:1990:395, Marleasing v La Comercial Internacional de Alimentacion; Case C-282/10, ECLI:EU:C:2012:33, Dominguez v Centre informatique du Centre Ouest Atlantique and Others.

[210] See, for example, Case C-222/84, ECLI:EU:C:1986:206, Johnson v Chief Constable of the Royal Ulster Constabulary.

[211] René Barents, 'The Court of Justice after the Treaty of Lisbon' (2010) CMLR 709, 725.

[212] On direct concern, see Case 11/82, ECLI:EU:C:1985:18, *Piraiki-Patraiki and Others v Commission* and Case C-386/96 P, ECLI:EU:C:1998:193, *Dreyfus v Commission* which were distinguished on their facts by the General Court in Case T-453/10, ECLI:EU:T:2012:106, *Northern Ireland Department of Agriculture and Rural Development v European Commission*, [60] to [65], and labelled 'exceptional' on appeal by the CJEU on appeal in Case C-248/12 P, ECLI:EU:C:2014:137, at [26]; compare, also, *Piraiki-Patraiki* (above) with Case C-222/83, ECLI:EU:C:1984:266, *Municipality of Differdange v Commission*; See also Albertina Albors-Lorens, 'Sealing the fate of private parties in annulment proceedings? The General Court and the New Standing

General Court yet succeeded on appeal because of the difference of views between the two courts on whether they fell within a 'closed group' of operators.[213] The claim *BP Products* was admissible because their data was used in the imposition of anti-dumping duties[214]; the challenge in *Bricmate* failed because this was not the case.[215] As evidenced by *Beul* and *ABZ,* standing may still turn on whether one can claim one's position is sufficiently proximate to the lucky claimants in *Codorníu.*[216]

This murky jurisprudence could easily be avoided if the courts were to allow for more liberal standing rules and dispose of cases on their merits. It could offer considerably more certainty than present position, avoid the need for recourse to *ad hoc* sleights-of-hand, and lead to a more coherent standing scheme in EU law.

Institutionally, there are concerns with the approach endorsed by the courts. Direct challenges are heard, first, before the General Court, with the possibility of appeal to the CJEU on a point of law only.[217] Preliminary references, however, are referred directly to the CJEU. Given that the CJEU claims it faces an unmanageable increase in caseload and that the General Court has recently been doubled in size, it makes sense for the standing rules to be liberalised.[218] More preliminarily references which would otherwise

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test in Article 263(4)' (2012) CLJ 52, 53 'the closed category test was not consistently applied... a cluster of satellite interpretations [of individual concern] soon appeared'. On individual concern, compare *Codorníu,* fn 14 and the courts' attempts to distinguish it in subsequent cases e.g. Case T-640/14, ECLI:EU:T:2015:907, *Carsten Beul v Parliament and Council*; Case T-560/14, ECLI:EU:T:2015:314, *ABZ Aardbeien Uit Zaad v Parliament and Council.* Note that Case T-559/14, ECLI:EU:T:2015:315 *Ackermann Saatzucht GmbH & Co. KG,* see fn 142-143.

[213] *Woonpunt* fn 32, [62]; T-203/10, ECLI:EU:T:2011:766, *Woonpunt and Others v Commission,* [38].

[214] BP Products, fn 59.

[215] Bricmate, fn 48.

[216] See fn 144.

[217] Art 256 TFEU; Protocol (No 3) on the Statute of the Court of Justice of The European Union, OJ C 83/210, Art 56.

[218] See, for context, and also criticism, Franklin Dehousse and Benedetta Marsicola, 'The Reform of the EU Courts: Abandoning the Management Approach by

have to be ruled on by the CJEU's consideration will be dealt with as direct challenges in front of the General Court. This avoids the situation where the CJEU is beleaguered by preliminary references, some of which may well be individualised disputes disguised as point of general importance of EU law[219], which would otherwise have been heard as direct challenges in front of the General Court. It would be far preferable for these to be challenged before the General Court, and then, if necessary, make their way to the CJEU for determination on a point of law. This could avoid the bottlenecking of disputes in the CJEU, and ensure that cases are dealt with by the court most appropriate to their importance.

Politically, the present position is unsatisfactory in that it undermines the democratic credentials of the Union.[220] The ability of parties to subject norms to scrutiny by challenging them in the courts is an integral element of any democratic system.[221] The argument has been often traversed in the literature and will not be rehearsed here, but it is clear that these challenges are key to, amongst other values, accountability, by keeping those who promulgate the norms in check, legitimacy, by ensuring the proper application of EU law, and participation, by permitting the citizenry to

Doubling the General Court,' Egmont Paper 83, March 2016 retrieved here http://egmontinstitute.be/wp-content/uploads/2016/03/ep83.pdf.pdf, 28th June 2016.

[219] Craig, fn 15, 503-4; see, for an example of such a trivial case, C-338/95, ECLI:EU:C:1997:552, *Wiener* on whether a given garment intended for use at night, but with a cut such as to allow it to also be used for leisure wear, was a nightdress or a dress of synthetic textile fibres.

[220] See Case T-541/10, ECLI:EU:T:2012:626, *ADEDY,* on challenges to certain aspects of the EU response to the Greek debt crisis where, at [96], the General Court states 'the applicants' allegation that the substance of the action must be examined, since the defects in the contested acts are so serious that they undermine public trust in European Union bodies must be rejected. The European Union courts cannot ignore the rules laid down in Article 263 TFEU for admissibility of actions for annulment.'.

[221] Paul Craig, 'Accountability and Judicial Review in the UK and the EU: Central Precepts' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP, 2013); See also Harry Woolf and Others, *De Smith's Judicial Review,* 7th Ed (2015, Sweet and Maxwell) at 2-005; Opinion of Advocate General Kokott, in *Inuit,* fn 69, [21].

engage with the norms that bind them.[222] Liberalising standing could have positive consequences given the concerns of 'democratic deficit' in the Union.[223]

VI. Conclusion

So why is standing still so difficult to satisfy? On a purely textual level, the answer is that the courts have interpreted the admissibility criteria in the third head very restrictively. The notion of implementing measures is incredibly broad, and it is kept rigidly separate from the criterion of direct concern. This prevents a more substantive interpretation of implementing measures. As a result, it is often more difficult to satisfy this criterion than the notoriously high standard of 'individual concern'. It also limits the kinds of acts that can be challenged, and excludes entire areas from the potentially liberalising effects of the third head. Likewise, the criterion of 'regulatory measures' is given a narrow meaning. This adds yet another element of casuistry to the EU standing rules, and makes legislative acts just as difficult to challenge as they were prior to the Lisbon reforms – if not practically impossible.

On a doctrinal level, the courts assume that indirect challenges provide effective judicial protection such that it is not necessary to expand the standing rules in Art 263(4). When confronted with the plight of litigants who would have to break the law in order to challenge it, the courts deny the scope of this dilemma, disclaim they have the power to solve it, and deflect responsibility for its solution.

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[222] Indeed, the importance of judicial review is recognised within the EU system itself. See, for example, *Les Verts,* fn 90, [25] on the role of standing in ensuring bodies remain within the confines of their powers.

[223] Biernat, fn 14, 16, see also Anthony Arnull, *The European Union and its Court of Justice,* (OUP, 1999), p. 47; Carol Harlow, 'Toward a Theory of Access for the European Court of Justice' (1992) Yearbook of European Law 213, 248; Mariolina Eliantonio and Nelly Stratieva 'From Plaumann, through UPA and Jégo-Quéré, to the Lisbon Treaty: The Locus Standi of Private Applicants under Art 263(4) EC Through a Political Lens' Maastricht Faculty of Law Paper 2009/13; Albertina Albors-Lorens, 'Remedies against the EU institutions after Lisbon: an era of opportunity?' (2012) CLJ 507, 508.

This goes a long way in explaining why, when faced with the possibility of relaxing standing rules, the courts continue to tow a restrictive line. As far they are concerned, the Treaties offer a complete system of legal remedies, any issues with this system are to be directed to the Member State level. It is up to national bodies to provide access to domestic courts to challenge EU norms. If they do so, the dilemma is to their mind solved and claimants would enjoy full vindication of their right to effective judicial protection.

Ultimately, however, the courts' fundamental assumption is flawed and its three supporting arguments are meagre. Indirect challenges are manifestly inadequate substitutes for direct challenges. There is no point *denying* the dilemma. It has not been plugged by the courts' interpretation of the third head. It continues to rear its ugly head in cases like *T and L.* It is a beast that still plagues this area, and one to which effective judicial protection continues to fall prey. It is disingenuous to *disclaim* responsibility for the dilemma. The courts' institutional arguments show an intransigent refusal to consider the ways in which they could permissibly relax the standing rules, and the jurisdictional arguments are smokescreens for lack of will to do so. It is inappropriate to *deflect* responsibility. It assumes, contrary to common sense and principle, that the solution to the deficiencies in this area lies at the national level. The courts simply pass the buck to Member States, and, in so doing, show contumelious disregard of the exclusive role they play in the interpretation of admissibility criteria in Art 263(4). This judicial abdication continues to deny individuals their right to effective judicial protection, and, in turn, seriously undermines the legitimacy of the Union system of judicial review.

Consistency is evidently not a value to be deprecated, least of all in law. But in the context of standing which is not only recognised as incoherent from within the EU judicature, but which has also been the subject of Treaty amendment, it is clearly problematic. The addition of the third head, beyond the lucky plight of the four cases examined above, has not taken us considerably further from when Plaumann imported its clementines in the

early 1960s.[224] It is not only the admissibility criteria for direct actions that remain difficult to satisfy; the courts have refused to shift, in any significant manner, their *approach* to standing. Despite the dissenting threnodies from Advocates General, the Court of First Instance and academic literature, the courts sadly peddle the same arguments advanced prior to the Lisbon reform. This continues to restrict the possibility of direct challenge before the EU judicature as narrowly as possible.

The courts have not budged. They have dug their heels in and stood their ground. Shakespeare's porter might rejoice, but those who expect the courts to make good on their promises of effective judicial protection; those who believe the rule of law must actually be applied and not just referenced in passing; and those who seek from the Treaties a truly complete system of legal remedies are left thoroughly disappointed.

[224] Note that the argument was already being made before Lisbon reforms, see Anthony Arnull, The Action for Annulment: A Case of Double Standards?, in David O'Keefe (ed) *Judicial Review in European Union Law* (Wolters Kluwer, 2001), 189 'What may have been appropriate in the 1960s and 1970s is no longer so at the beginning of the new millennium', quoted Xavier Lewis 'Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System is Broken, Where Should it be Fixed?' (2006) Fordham International Law Journal 1496, 1498.

Structural Reforms in EU Member States: Exploring Sanction-based and Reward-based Mechanisms

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An insufficient level of structural reforms remains a perennial phenomenon in the EU. Despite the gradual expansion of macroeconomic governance, legal instruments fostering the implementation of structural reforms have been underexploited. This article examines the leeway provided by EU Treaties and legislation to use existing and new instruments to incentivize structural reforms more forcefully. First, in light of the recent change in the EU Commission's enforcement practice, we highlight how the sanctions-based regime under the Stability and Growth Pact (SGP) can be extended to incorporate structural reforms. There is significant room for manoeuvre to account for the implementation of structural reforms both in the preventive and the corrective arm of the SGP. Second, contractual agreements on structural reforms offer an alternative to the sanction-based system. Unlike existing instruments, contractual agreements allow for more egalitarian and reward-based incentives and thus deviate from the classic 'surveillance model' of economic governance in the EU. We can conceptualize such agreements in two ways: First, as agreements concluded between the EU and individual Member States, underpinned by financial support as an incentive. Second, as mutual agreements concluded between Member States, which agree on the implementation of structural reforms as a kind of barter trading ensuring reciprocity. We highlight the legal boundaries on scope and design of such agreements and how they relate to the institutional governance setting in the EU.

Keywords: Economic governance, structural reforms, Stability and Growth Pact, contractual agreements

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I. INTRODUCTION

The regime governing the EU Member States' fiscal and macroeconomic policies has undergone significant changes over the last few years. As a reaction to the sovereign debt crises, the legal framework has been modified on various occasions and the scope of economic policy surveillance has been expanded significantly. At the same time, an insufficient level of structural reforms persists[1] and has been lamented widely.[2] Some of these reforms are

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[1] S Deroose and J Griesse, 'Implementing economic reforms - are EU Member States responding to European Semester recommendations?' (October 2014) ECOFIN Economic Brief, 17 <http://ec.europa.eu/economy_finance/publications/economic_briefs/2014/pdf/eb37_en.pdf> accessed 7 January 2016.

[2] European Commission, '2015 European Semester: Country-specific recommendations' (Communication) COM (2015) 250 final; OECD, *Economic Policy Reforms 2012: Going for Growth* (OECD Publishing 2012), Chapter 1; D Anderson and others, 'Fiscal Consolidation in the Euro Area: How Much Pain Can Structural Reforms Ease?' (October 2013) IMF Working Paper <http://www.imf.org/external/pubs/ft/wp/2013/wp13211.pdf> accessed 7 January 2016; European Central Bank, 'Progress with structural reforms across the euro area and their possible impacts' (2015) ECB Economic Bulletin, 2 <https://www.ecb.europa.eu/pub/pdf/other/art01_eb201502.en.pdf> accessed 7 January 2016.

critical for the growth and sustainability of the euro zone as a whole, as they imply positive externalities across countries.[3]

In the past, economic governance in the EU has addressed the lack of structural reforms mainly through five mechanisms. First, before the inception of the euro area, Member States coordinated their economic policies through the (implicit) pressure exerted through compliance with the convergence criteria. Second, during the first decade of the euro, structural reforms were incorporated into the Broad Economic Policy Guidelines, but progress was limited mainly due to the lack of binding coordination mechanisms. Third, more recently significant reforms were implemented in countries under conditionality-based financial assistance programmes aiming at both fiscal and macroeconomic stability.[4] However, reforms have been implemented only under severe pressure, while ownership for the reforms stayed weak. In addition, conditionality-based programmes only applied to a few countries in the first place – they do not offer an instrument to allow for a broader implementation of structural reforms going beyond countries under the programmes.

Fourth, since the introduction of the EU 2020 strategy and the European Semester, the focus of the initially purely fiscal governance has been broadened towards other fields of economic and social policy. However, these instruments (still largely) remain in the sphere of 'soft coordination', which lacks concrete policy tools or a binding effect.[5]

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[3] Simulations show that the simultaneous implementation of structural reforms throughout the euro zone would have a bigger effect on output than they would if implemented by countries in isolation, highlighting the benefits of coordinated policy action; see European Commission, *Quarterly Report on the Euro Area 13(4)* (2014) <http://ec.europa.eu/economy_finance/publications/qr_euro_area/2014/pdf/qrea4_en.pdf> accessed 7 January 2016.

[4] F Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' (2014) 32 Berkeley Journal International Law 64, 73-74.

[5] KA Armstrong, 'The Lisbon Agenda and Europe 2020: From the Governance of Coordination to the Coordination of Governance' in P Copeland and D Papadimitriou (eds), *The EU's Lisbon Strategy* (Palgrave Macmillan 2012) 208-228; on

Fifth, reforms of the binding and sanction-based EU legal framework have allowed for stronger surveillance within the EU, with extended mechanisms on fiscal and macroeconomic governance. In this vein, the Commission announced it would interpret the Stability and Growth Pact (SGP) and the Macroeconomic Imbalance Procedure (MIP) as offering leeway for the account of structural reforms under these procedures to the extent possible.[6] This avenue indeed offers opportunities to perform the existing sanction-based surveillance system with a stronger focus on the implementation of structural reforms.

A sixth (and as yet unexploited) enforcement mechanism relies on the idea of so-called Convergence and Competitiveness Instrument (CCI) proposed by the Commission encompassing contractual arrangements to be agreed between Member State and the Commission underpinned by financial support.[7] A similar idea is 'mutually agreed contractual arrangements'

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the poor compliance record regarding the implementation of country-specific recommendations, see Deroose and Griesse (fn 1) 1; however, the Commission can indirectly incentivize the implementation of the country-specific recommendations based on Articles 121(2) and 148(4) TFEU in line with Article 23 of Regulation (EU) No 1303/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, *OJ L 347, 20.12.2013, p. 320–469*. Based on this provision, the Commission can request the Member State to prioritize projects identified in the country-specific recommendations in order to obtain financial support from the European Structural and Investment Funds.

6 European Commission, 'Communication, Making the Best Use of the Flexibility Within the Existing Rules of the SGP' COM (2015) 12 final, 9.

7 See the two Communications: European Commission, Towards a deep an genuine EMU: the introduction of a Convergence and Competitiveness Instrument' (Communication) COM (2013) 165 final; and European Commission, 'Towards a deep and genuine EMU: Ex ante coordination of plans for major economic policy reforms' (Communication) COM (2013) 166 final. The contractual arrangements were mentioned already in the Commission's blueprint for a deep and genuine economic and monetary union: launching a European debate, European

('*Vertragspartnerschaften*'), floated by German Chancellor Merkel in 2012.[8] The underlying idea is to obtain 'hard' reform commitments from Member States *without* delegating more power to new or old European institutions. Alternatively, one may extend this idea towards bilateral agreements on national reform commitments between Euro members without involving the EU, as envisaged by a joint report from France and Germany on economic reforms focusing on competitiveness and investment issues.[9] This joint report by the respective minsters of economic affairs remained purely political in nature without taking legal effect, but both its level of detail and reciprocal nature could give an indication of the possible design of bilateral CCIs on national reform commitments.[10] Under bilateral agreements between Member States, reciprocity in the deal would ensure the positive cross-border spillovers from the domestic reforms and increase the Member States' otherwise lacking willingness to reform.

Against this background, this analysis explores the existing (but not yet exploited) scope for manoeuvre provided under the current legal framework in promoting structural reforms (fifth and sixth issue mentioned above). On this basis, this contribution seeks to offer legal as well as policy insight. From a legal perspective, the implementation issues surrounding sanction-based and reward-based mechanisms have not featured prominently in the discourse. There are various strands of legal literature on economic

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Commission, 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate' (Communication) COM (2012) 777 final/2.

8 N Busse and M Schäfers, 'Fahrplan für die nächsten Monate' *FAZ* (12 December 2012) <http://www.faz.net/aktuell/politik/europaeische-union/eu-gipfel-fahrplan-fuer-die-naechsten-monate-11992749.html> accessed 7 February 2016.

9 J Duffy, 'French-German Report to Focus on Reform and Investment' (*Euro Insight*, 27 November 2014) <https://euroinsight.mni-news.com/posts/french-german-report
-to-focus-on-reform-and-investment> accessed 7 February 2016.

10 The report was prepared by two academics and outlined a broad reform agenda covering regulatory initiatives, investment strategies and reform priorities, see H Enderlein and J Pisani-Ferry, 'Reforms, Investments and Growth, an agenda for France, Germany and Europe' <https://www.hertie-school.org/fileadmin/images/Downloads/core_faculty/Henrik_Enderlein/Enderlein_Pisani_Report_EN.pdf> accessed 20 March 2016.

governance. In recent years, they focussed on the competence and legality issues surrounding the anti-crisis instruments employed by EU institutions[11], the complex evolution of both soft and hard formats of governance[12] and the overall gradual expansion of coordination methods.[13] This article seeks to add insight into the legal feasibility of practically relevant coordination mechanisms (and thus also to offer policy relevance) by exploring the existing surveillance regime and the scope of manoeuver remaining under the current sanction-based rules incorporated in the Stability and Growth Pact. Also, only scant attention has been given to the (policy-relevant) attempts to shift coordination efforts into a more egalitarian direction by allowing contractual relationships within the multilevel EU governance system to pave the way for a reward-based approach towards economic policy coordination – this gap begs an inquiry on the different formats of contractual agreements.

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[11] More recently, the discussion particularly focused on the competence and legality review of the OMT program (Case C-62/14, ECLI:EU:C:2015:400, *Gauweiler*) and the European Stability Mechanism (ESM) (Case C-370/12, ECLI:EU:C:2012:756, *Pringle*). On the compatibility of OMT programmes with EU law, see A Steinbach, 'The compatibility of the ECB's sovereign bond purchases with EU law and German constitutional law' (2013) 39 Yale Journal of International Law Online 15; Borgers, 'Outright Monetary Transactions and the stability mandate of the ECB: Gauweiler' (2016) 53 CMLR 1-58; on the ESM see S Adam and FJ Mena Parras, 'The European Stability Mechanism through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle' (2013) 38 EL REV. 848, 860.

[12] On the complementarity of hard law and soft law, see M Dawson, 'Three Waves of New Governance in the European Union' (2011) 36 EL Rev. 208; KA Armstrong, 'The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance' (2011) 63 Current Legal Problems 179-214.

[13] A Steinbach, *Economic Policy Coordination in the Euro Area* (Routledge 2014) 72-171; KA Armstrong, 'The New Governance of EU Fiscal Discipline' (2013) 38 EL Rev. 601; A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015) 15; MW Bauer and S Becker, 'The Unexpected Winner of the Crisis: The European Commission's Strengthened Role in Economic Governance' (2014) 36 Journal of European Integration 213-222; G Majone, *Rethinking the Union of Europe Post-Crisis* (CUP 2014) 199, 308; D Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 European Law Journal 676-682; A Scott, 'Does Economic Union Require a Fiscal Union?' in LW Shuibhne and NN Gormley (eds), *From Single Market to Economic Union* (OUP 2012) 40-50.

Thus, this article seeks to offer insight into the coordination instruments both *de lege lata* (Stability and Growth Pact) and *de lege ferenda* (contractual agreements). By tying the legal analysis to the policy issue of an insufficient level of structural reforms, we explore incentive-based mechanisms that promote the implementation of structural reforms in EU Member States. Incentive-based mechanisms refer to both the established sanction-based logic of the existing surveillance mechanisms as well as to reward-based instruments offering benefits to Member States for implementing structural reforms. While the sanction-based logic is enshrined in SGP and MIP, contractual agreements rather follow a reward-based approach.

The article is structured as follows: Section II identifies the flexibility within the existing fiscal surveillance system, with a particular view towards promoting structural reforms. In particular, relevant norms of the SGP and MIP are interpreted and contrasted with the Commission's more recent enforcement practice. Section III examines reward-based coordination discussing nature and scope of contractual agreements between the EU and Member States or between Member States providing a 'quid pro quo' of structural reforms and financial support. Section IV concludes.

II. Sanction-based Promotion of Structural Reforms Under the SGP

The SGP remains the key instrument of fiscal policy coordination, featuring binding rules and sanction mechanisms.[14] In the past, application of the SGP focused on fiscal policy and compliance with numerical budget rules. This narrow focus has been subject to criticism pointing, inter alia, at other elements promoting growth and positive long-term budgetary effects, such as structural reforms. The Commission has identified structural reforms as key elements of the EU's economic policy strategy for growth.[15] In line with the overall trend towards broadening the surveillance focus from a purely

[14] For an interpretation of the SGP as a tool to avoid free-riding, see Steinbach, *Economic Policy* (fn 13) 28; P De Grauwe, *Economics of Monetary Union* (10th edn, OUP 2014) 218-224.

[15] European Commission, 'Annual Growth Survey 2015' (Communication) COM (2014) 902.

fiscal to a more macroeconomic perspective, incentive-based tools can be extended towards promoting structural reforms.

Under the preventive arm of the SGP, the so-called structural reform clause provides the legal basis for introducing the implementation of structural reforms under the fiscal surveillance regime. According to Article 5 of Regulation No. 1466/97, the Commission and Council shall 'take into account the implementation of major structural reforms' when defining the adjustment path to the medium-term budgetary objective. Major structural reforms may, under specific circumstances, justify a temporary deviation from the MTO of the concerned Member State or from the adjustment path towards it. Thus, under the preventive arm, there is an explicit reference allowing the linking of the fiscal regime under the SGP to a broader macroeconomic dimension of structural reforms.[16]

1. Connecting Coordination Mechanisms

In this vein, the explicit reference to structural reforms in Article 5 (which had been incorporated into the Regulation already in 2005) may serve as the basis to connect various economic policy coordination tools to each other. Structural reforms are typically dealt with in the country-specific recommendations of the European Semester. These recommendations are issued in May of each year and provide country-specific policy advice to Member States in areas deemed as priorities for the next 12-18 months.[17]

The implementation of structural reforms identified in the country-specific reforms within the European Semester into the SGP through Article 5 of Regulation No. 1466/97 sets up a comprehensive coordination mechanism that expands the fiscal policy focus of the SGP. It creates a link between the implementation of Europe 2020's aims and the fiscal policy requirements of the SGP, interweaving economic and social policy recommendations with fiscal policy commitments. The recommendations typically address a variety of subjects, including public finances, tax policy issues, and labour market

[16] Regarding the evolutionary process towards linking the purely fiscal focus of EU surveillance to a more comprehensive macroeconomic regime, see Steinbach, *Economic Policy* (fn 13) 103-130.

[17] For a detailed analysis of the European Semester, see Armstrong, 'The New Governance' (fn 13) 601.

questions. Through the European Semester, the EU is no longer restricted to issuing economic and fiscal policy aims. It now also advises national governments on specific measures to reach these aims. We thus see a clear effort to consolidate, synchronize and expand existing forms of coordination.[18] The avowed aim is to stop fiscal and economic policy isolation and align policies with each other.

Importantly, through the structural reform clause, the recommendations under the European Semester are upgraded in terms of their binding nature. Usually, country-specific recommendations are non-binding; the only way the Commission typically can force states to adhere to its recommendations is through peer pressure, i.e., 'naming and shaming'.[19] However, once the country-specific recommendations are channelled through the structural reform clause, they factually gain binding nature as they are tied to the enforcement of fiscal rules.

2. Structural Reforms Under the SGP

A. Preventive Arm

In its Communication, the Commission has set out a number of principles to be followed for the structural reforms clause to be activated.[20] First, reforms must be major in terms of their effect on growth and the sustainability of public finances. Requiring a significant impact enables the Commission to request sizeable and effective reforms and an appropriate choice of policy mix. Second, reforms must have a long-term positive budgetary effect where this effect can correspond to direct budgetary savings from reforms (e.g., pension reform) or through increased revenues (e.g., as a result of an increased labour force). Third, and most controversial, is that the wording of Article 5 of Regulation No. 1466/97 requires the 'implementation' of structural reforms. As pointed out by the Council Legal Service, the Commission's approach is rather ambiguous on this point.[21] While the Commission requires

[18] Steinbach, *Economic Policy* (fn 13) 173-176.

[19] Steinbach, *Economic Policy* (fn 13) 126.

[20] European Commission, 'Making the Best Use of the Flexibility Within the Existing Rules of the SGP' (Communication) COM (2015) 12 final, 11.

[21] Council of the European Union, 'Opinion of the Legal Service', Ref 7739/15 (7 April 2015), para. 21.

'full implementation' of the reform, it acknowledges that adopted reforms may take time and thus views the implementation of reforms as fulfilled when 'the Member State presents a medium-term structural reform plan'. By contrast, the Council refers to the Code of Conduct, according to which the 'implementation' pursuant to Article 5 requires that 'only adopted reforms should be considered'.[22]

a. Interpreting and Applying the Term 'Implementation' of Structural Reforms

The question at stake is what status of implementation is required, that is, whether these reforms have to be formally adopted under domestic laws, giving them binding force,[23] or whether a detailed structural reform plan is sufficient.[24] From a legal perspective, given that interpretation of the term 'implementation' is at stake, recourse should be taken to conventional modes of legal interpretation. Reference to the literal meaning[25] produces ambiguous results as shown in the controversial perceptions between Commission and Council.[26] Implementation clearly is a stepwise approach that ranges from initial internal decision-making among policy-makers up to the actual entering into force of a specific measure. A restrictive reading would imply the completion of the entire implementation process, which, however, would render the clause impractical given the lengthy implementation process.

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[22] ibid para. 23.

[23] ibid para. 23.

[24] European Commission, 'Making the Best Use of the Flexibility Within the Existing Rules of the SGP' (Communication) COM (2015) 12 final, 11.

[25] On this mode of interpretation see only Case 30/59, ECLI:EU:C:1961:2, *Steenkolenmijnen in Limburg v ECSC High Authority*, 49; Case 207/81, ECLI:EU:C:1982:281, *Felicitas v Finanzamt*; see also the Court's literal and systematic approach to interpreting Article 125 TFEU, see V Borger, 'The ESM and the European Court's Predicament in Pringle' (2013) 14 German Law Journal 113, 117.

[26] European Commission, 'Making the Best Use of the Flexibility Within the Existing Rules of the SGP' (Communication) COM (2015) 12 final, 10; Council of the European Union, 'Opinion of the Legal Service', Ref 7739/15 (7 April 2015), para. 23; European Union, 'Specifications on the implementation of the Stability and Growth Pact (Code of Conduct)' (3 September 2012) 5.

Looking from a contextual perspective[27], however, guidance on interpretation may be sought from practice under the financial support programmes of the EU. The pattern of conditionality and disbursement of payment offers an understanding that the favourable treatment (under EU financial assistance, the disbursement of loans) is typically granted on the basis of formalized commitments and their forward-looking implementation. Under the support programmes for Greece, for instance, before each disbursement, a joint mission of Commission, ECB and IMF staff frequently monitors compliance with the conditions of the conditionality programme. More specifically, disbursements of respective tranches are linked to the implementation of milestones agreed between Greece and the troika institutions. Disbursements are tied to forward-looking commitments, including steps to implement these reforms fully through secondary legislation, other administrative acts and complementary reforms.[28] It becomes clear that the practice of requiring implementation of reforms as prerequisite for a disbursement is an institutionalized alternation of 'quid pro quo' on a forward-looking basis. Through the splitting of the financial support into disbursements, the milestones towards implementation can be coupled to respective disbursements.

Applying this functionality to the exchange of structural reforms in return for favourable treatment under Article 5 of Regulation No. 1466/97, one can infer that, in general, a forward-looking commitment should suffice. This implies that implementation in terms of a credible, comprehensive and detailed plan should be sufficient. However, given that the split into disbursements provides an effective tool to review and control the actual implementation (that is, transformation of structural reforms into legislative acts), the question is whether a similar implementation control can be operationalized

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[27] The Court takes account of the meaning of a provision in light of scheme and context, Case 149/77, ECLI:EU:C:1978:130, *Defrenne v SABENA*, Case 87/75, ECLI:EU:C:1976:18, *Bresciani v Amministrazione Italiana delle Finanze*. The Court also applies interpretation methods cumulatively, see more recently Case C-399/11, ECLI:EU:C:2013:107, *Melloni v Ministerio Fiscal*.

[28] Report on Greece's compliance with the milestones for the disbursement to the Hellenic Republic of the third tranche of EUR 1.0bn of the EFSF instalment related to the fourth review under the second programme, 11 August 2014.

with regard to Article 5 of Regulation No- 1466/97. Indeed, the metric of Article 5 provides such implementation control in case of a Member State's failure to implement the agreed reform. In such a case, the temporary deviation from the Medium-Term Budgetary Objective (MTO) will no longer be considered as warranted.[29] On the basis of Article 6(2) and Article 10(2) of Regulation No. 1466/97, the Commission can issue a warning to the Member State and ultimately propose to the Council a recommendation to request that Member States take appropriate policy measures. In case of continued failure to implement the structural reform, euro area Member States may ultimately be requested to lodge an interest-bearing deposit.[30] The existing sanction-based instruments allow an interpretation of the term 'implementation' under Article 5 based on an alternation of ex-ante assessment and ex-post control.

This finding is also in line with an interpretation focusing on the purpose and spirit of the provision.[31] Its aim is to provide temporary fiscal relief in return for the implementation of measures that actually have a long-term positive budgetary effect. This aim can be sufficiently safeguarded through the control mechanism described above, which allows a return to the initial MTO and imposes sanctions in case of implementation failure. In sum, the deviation from the MTO is warranted based on credible reform commitments, the implementation of which is sufficiently incentivized by the threat of modification of the favourable MTO path.

b. Streamlining Coordination Mechanisms

In terms of consistency between the various economic policy coordination instruments, the choice of structural reforms under Article 5 should be streamlined with the policy recommendations of other EU economic policy instruments. First, the Commission can take recourse to the structural

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[29] European Commission, 'Council Recommendation on the 2015 National Reform Programme of Belgium and delivering a Council opinion on the 2015 Stability Programme of Belgium' COM (2015) 252 final, 12.

[30] Article 4 of Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306, 23.11.2011, p. 1–7. .

[31] On this mode of interpretation see already Case 65/76, ECLI:EU:C:1977:7, *Derycke* 34; Case 79/81, ECLI:EU:C:1983:70, *Baccini v ONEM* 1076.

reforms identified in the country-specific recommendations under the European Semester, which offer a detailed set of goals and instruments across economic and social policy areas. Second, the Commission should streamline the application of Article 5 by way of reference to the country-specific recommendations issued under its MIP based on Regulation No 1176/2011. The scope of the MIP goes beyond fiscal parameters that extend to all possible factors related to macroeconomic performance.[32] More specifically, according to Article 8 of Regulation No 1176/2011, the Council adopts a country-specific corrective action plan listing the specific actions required to resolve the imbalances.

Given the significant degree of parallel proceedings under SGP and MIP, the structural reforms clause under the corrective arm provides the legal basis to ensure consistency between the two policy tools. In fact, by June 2015, seven Member States were involved in parallel proceedings under the EDP and the MIP, demonstrating the practical relevance of applying both economic policy regimes consistently.[33] Also, 16 out of 27 Member States were subject to the MIP and thus had received country-specific recommendations under this procedure. The structural reform agenda spelled out in detail under the MIP[34] should thus be the natural reference point for the structural reform clause under the SGP.

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[32] Steinbach, *Economic Policy* (fn 13) 103-122; M Buti and N Carnot, 'The EMU Debt Crisis: Early Lessons and Reforms' (2012) 50 JCMS 899-911; D Gros, 'Macroeconomic Imbalances in the Euro Area: Symptom or cause of the crisis?' (2012) CEPS Policy brief, 266 <http://papers.ssrn.com/sol3/papers.seem?abstract_id=2060118> accessed 7 February 2016.

[33] Croatia, France, Ireland, Portugal, Slovenia, Spain and the United Kingdom.

[34] For example, Belgium has to 'improve the functioning of the labour market by reducing financial disincentives to work, increasing labour market access for specific target groups and addressing skills shortages and mismatches' (European Commission, 'Council Recommendation on the 2015 National Reform Programme of Belgium and delivering a Council opinion on the 2015 Stability Programme of Belgium' COM (2015) 252 final, 6). And France has to 'remove the restrictions on access to and the exercise of regulated professions, beyond the legal professions, in particular as regards the health professions as from 2015', European Commission, 'Council Recommendation on the 2015 National Reform Programme of France and delivering a Council opinion on the 2015 Stability Programme of France' COM (2015) 260 final, 7.

B. Corrective Arm

While there is an explicit reference to structural reforms under the preventive arm in Article 5 of Regulation No. 1466/97, the relevant norms of the corrective arm are silent on the treatment of structural reforms. The only legal term potentially allowing the incorporation of structural reforms into the assessment under the corrective arm is laid down in Article 2 of Regulation No. 1467/97, which states that the Commission '[...] shall take into account all relevant factors [...] in so far as they significantly affect the assessment of compliance with the deficit and debt criteria by the Member State concerned'. The reference to 'relevant factors' has been interpreted by the Commission as including the implementation of structural reforms set out in the European Semester.[35]

Given the vagueness of this provision, the question is whether this interpretation remains within the boundaries of the legal text. A number of aspects can be put forward in the affirmative: First, the Commission enjoys wide leeway of discretion in the application of EU rules. On various occasions, the Court has confirmed that the Commission enjoys wide discretion in the assessment of economic circumstances.[36] Second, there is no indication that interpreting structural reforms as 'relevant factors' would be incompatible with the overall purpose of the excessive deficit procedure. The main purpose of the excessive deficit procedure is to ensure the prompt correction of excessive deficits, i.e., making sure that Member States return to a sustainable fiscal position. Structural reforms would have to further this goal. The Commission[37] and other EU institutions[38] have repeatedly underscored the relevance of structural reforms as an essential element for long-term positive budgetary development. Structural reforms are a requisite

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[35] European Commission, 'Making the Best Use of the Flexibility Within the Existing Rules of the SGP' (Communication) COM (2015) 12 final, 13.

[36] See Case T-201/04, ECLI:EU:T:2007:289, *Microsoft v Commission*, para. 87; Case T-168/01, ECLI:EU:T:2006:265, *GlaxoSmithKline v. Commission*, para. 57.

[37] European Commission, 'Making the Best Use of the Flexibility Within the Existing Rules of the SGP' (Communication) COM (2015) 12 final, 5.

[38] J-C Juncker, 'Completing Europe's Economic and Monetary Union' (2015) Five Presidents' Report <https://ec.europa.eu/priorities/sites/beta-political/files/5-presidents-report_en.pdf> accessed 7 February 2016, 7.

for growth as the basis for fiscal sustainability. The positive correlation between structural reforms and positive budgetary effects is also acknowledged in Article 5 of Regulation No. 1466/97, which explicitly refers to structural reforms that have such a positive budgetary effect. Third, and in the same vein, for the sake of consistency between the preventive and corrective arm of the SGP, the same reasoning and logic should be applied given that both arms share the overriding fiscal policy goals.

Consequently, structural reforms could likely be integrated into the excessive deficit procedure under the same conditions as discussed above for the preventive arm, that is, they must be major, have a long-term positive budgetary effect and be implemented within the meaning discussed above. The peculiar design allows the Commission to account for structural reforms on two stages of the excessive deficit procedure. First, when assessing whether an excessive deficit procedure needs to be launched, the Commission may examine all 'relevant factors' concerning the economic, budgetary and debt positions.[39] The Commission may consider structural reforms as mitigating or aggravating factors that have an effect on its decision to open the procedure or not. Second, structural reforms as a relevant factor are also considered for determining the deadline for the correction of the excessive deficit. Thus, the implementation of major structural reforms constitutes a relevant factor that allows for a multiannual path for the correction of excessive deficit.[40]

As under the preventive arm, the review and control of the implementation of reforms are ensured through procedural remedies. Failure to implement the reform will induce the Commission to consider the Member State's conduct insufficient, leading to the opening of the excessive deficit procedure or to the shortening of the deadline for the correction of the excessive deficit. For Euro area Member States, this means that the Commission may recommend to the Council the imposition of a fine.[41]In sum, there is significant leeway to account for the implementation of

[39] European Commission, 'Making the Best Use of the Flexibility Within the Existing Rules of the SGP' (Communication) COM (2015) 12 final, 13.

[40] ibid 13.

[41] Article 6 of Regulation (EU) No 1173/2011.

structural reforms both in the preventive and corrective arm of the SGP. A comprehensive and detailed structural reform plan containing well-specified measures, verifiable information and credible timelines may lead to a modification of the medium-term budgetary objective. The requirements attached to the degree of implementation should not be too high, given that there is sufficient potential for sanctions and withdrawal of the favourable treatment. Similarly, under the EDP, structural reforms may be a relevant factor when decisions are made about opening procedures and setting the deadline for the correction of the excessive deficit. Incorporation of country-specific recommendations under the European Semester, as well as the corrective action plan under the MIP, ensures consistency of the economic policy tools.

3. Investments and the Structural Reform Clause

The discussion on implementing structural reforms in Member States is often tied to Member States' policy space to promote investments. Politically, the connection is valid given that structural reforms often imply fiscal retraction in the short term, triggering a discussion on using investments as a measure to counter such short-term effects and lay the ground for long-term growth. The EU Commission has addressed such concerns by explicitly linking structural reforms with investments.[42]

The Commission considers that some investments may be deemed to be equivalent to major structural reforms within the meaning of the structural reforms and may, under certain conditions, justify a temporary deviation from the Medium-Term Budgetary Objective of the concerned Member State or from the adjustment path towards it. More specifically, a Member State will benefit under five conditions: i) if its GDP growth is negative or if the GDP remains well below its potential; ii) if the deviation from the MTO does not lead to a deficit above the reference value of 3%; iii) if the deviation is linked to national expenditure on a project co-funded by the EU under one of its various funds; iv) if the co-financed expenditure does not substitute for nationally financed investments, so that total public investments are not reduced; and v) if the Member State compensates for any temporary

[42] European Commission, 'Communication, Making the Best Use of the Flexibility Within the Existing Rules of the SGP' COM (2015) 12 final, 8.

deviations. The (economic) purpose of this extension of the structural reform clause is to allow Member States to benefit from this clause when their own growth is negative and better reflect the country-specific economic situation.[43] In this vein, the Commission's decision is economically founded on those studies that find an over-proportionate decline of public investments during phases of budgetary consolidations.[44]

However, the Commission's assimilation of 'public investments' and 'structural reforms' is questionable. Apart from the obvious literal difference between the two terms, the Commission's own use of the concepts 'investments' and 'structural reforms' suggests that these terms cannot be used interchangeably as legal terms. In its 2015 Annual Report, for instance, the Commission refers to its well-established economic policy strategy resting on three pillars comprising investments, structural reforms and fiscal responsibility.[45] According to that economic policy strategy, investments and structural reforms constitute individual pillars of the EU economic policy and rest on different concepts, though sharing the common goal of promoting sustainable growth. More specifically, structural reforms relate to reallocating resources efficiently, for example by reducing barriers to the reallocation of capital and labour across firms, thus helping to ensure that the most productive firms can achieve their growth potential and the less efficient ones are restructured or leave the industry.[46] By contrast, through investments in macroeconomic terms, the public sector increases and improves the stock of capital employed in the production of the goods and services they provide.[47] 'Public investments' and 'structural reforms' refer to distinct concepts both in relation to the use of these terms in the EU legal framework as well as with regard to the general meaning of these terms.

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43 European Commission, 'Communication, Making the Best Use of the Flexibility Within the Existing Rules of the SGP' COM (2015) 12 final, 8-9.

44 A Turrini, 'Public investment and the EU fiscal framework, European Commission' (2004) Economic Papers No 202, 4.

45 European Commission, 'Annual Growth Survey 2015' (Communication) COM (2014) 902, 5.

46 E Canton and others, 'The Role of Structural Reform for Adjustment and Growth' (June 2014) ECFIN Economic Brief 34, 1-2.

47 A Turrini, 'Public investment and the EU fiscal framework, European Commission' (2004) Economic Papers No 202, 6.

Undisputedly, even though public investments and structural reforms are conceptually different, there may be cases of coincidence. For example, reforms in the education sector may well go hand in hand with additional investment spending in this area. In such a case, it may be artificial to disentangle structural reforms and public investments, given that both are tied to each other and contribute to improving the adjustment capacity of an economy. However, the Commission broadly assimilates investments and structural reforms and limits eligible investments to projects co-funded by the EU funds which have positive budgetary effect within Article 5 of Regulation No. 1466/97.[48] This approach raises concerns on three grounds: First, and considering the distinct concept of investment and structural reforms, there is no ground for a general assumption that all co-financing expenditures by Member States amount to structural reforms.[49] Rather, a case-by-case analysis that examines to which investments the implementation of structural reforms is intrinsically tied should be made before investments qualify as structural reforms within the meaning of Article 5(1) of Regulation No. 1466/97. It may be comprehensible from the Commission's perspective to avoid a burdensome and disputable assessment of specific investments as to their quality as structural reform, but a general assimilation of investments and structural reforms would not account for the conceptual differences between these terms.

Second, and related to the analysis above, there is the issue of discrimination. In fact, the Commission discriminates against domestic public investments. The Commission gives privilege to any expenditure that is co-funded by the EU for the assessment of 'structural reforms' pursuant to Article 5 of Regulation No. 1466/97. This is an open discrimination against national public investments that might equally be linked to structural reforms. Such discrimination ignores the fact that economic policy-making remains within the competence of the Member States. In principle, Member States retain competence for economic policy (Article 4(1), 5(2) TEU). Instead, the EU's

[48] European Commission, 'Annual Growth Survey 2015' (Communication) COM (2014) 902, 8.

[49] Council of the European Union, 'Opinion of the Legal Service', Ref 7739/15 (7 April 2015), para. 19.

competence lies in coordination of the policies, that is in arranging coordination of policies that remain national in nature.[50] Member States can adopt measures in this field, as long as the competences of the Union are not infringed.[51] The conduct of economic policy inherently enshrines the right to identify and implement investment and structural reform priorities according to a Member State's preference, and in observance of the country-specific state of the economy. The freedom to exercise economic policy as a genuine domain of Member States may be restricted if the EU choices of economic policies override national choices. Under the MIP, such measures can be a part of the action plan.[52] By contrast, the granting of privileges – under the fiscal surveillance of the EU – to economic policy projects identified by the EU through the activities of its funds (while domestic investment projects enjoy a less favourable treatment), generates conflicts with Member States freedom in conducting economic policies.

Third, from the perspective of effectively implementing the legal fiscal framework and given the overall intention of the fiscal surveillance in ensuring sustainable fiscal conduct, there is no indication why investments co-funded by the EU should rather qualify as a structural reform than domestic investment projects. There is neither a general legal rule nor an economic rationale according to which projects promoted by EU funds would be considered fundamentally different from domestic projects, except for the fact that the latter typically imply larger cross-border spillover effects. For example, projects co-funded under the Connecting Europe Facility (CEF) do not primarily promote projects amounting to structural reforms more than domestic projects would do. The CEF finances projects that fill

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[50] Hinarejos (fn 13) 73; D Chalmers and others, *European Union Law* (2nd ed., CUP 2010) 210; B de Witte and T Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle' (2013) 50 CML Rev. 805, 832.

[51] R Palmstorfer, 'To Bail Out or Not to Bail Out? The Current Framework of Financial Assistance for Euro Area Member States Measured against the Requirements of EU Primary Law' (2012) 37 EL Rev. 771, 773.

[52] Article 8 of Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances.

the missing links in Europe's energy, transport and digital infrastructure.[53] Even though this infrastructure may promote the completion of the internal market, there is no indication that a national infrastructure project would not serve similar goals or contribute otherwise to structural reforms in terms of reallocating resources more efficiently.

In sum, an extensive interpretation of the term 'public investment' as a structural reform within the meaning of Article 5 of Regulation No. 1367/97 seems to overstretch the literal and contextual meaning of this provision. However, the Commission's general tendency to promote investments within the boundaries of the fiscal rules may be compatible with the relevant provision under two conditions. First, a case-by-case examination of the investments at stake must give consideration to whether a project is linked to the implementation of structural reforms rather than generally equating public investments and structural reforms. Second, the general privilege of projects co-funded by EU funds over national investment projects appears to be untenable in light of the wording and purpose of the rules. Domestic investments should generally be treated like EU projects when considering their quality as structural reforms for the application of Article 5 of Regulation No. 1466/97. Practical inconveniences seem inevitable: While there are no legal or economic grounds for discrimination, one must concede that considering all public investments as potentially qualifying as structural reforms would imply an additional burden of examination on the Commission's side.

III. Contractual Agreements Promoting Structural Reforms

The current surveillance system under the SGP operates in a hierarchical manner, that is, the EU Commission leads the procedure and has the right to decide authoritatively on the structural reforms that are to be implemented. Also, the SGP incentivizes through sanctions rather than rewards, as monetary or procedural penalties can be imposed in case of non-compliance

[53] Regulation (EU) No 1316/2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) no. 680/2007 and (EC) no. 67/2010, OJ L 348, 20.12.2013, p. 129–171.

of a Member State.[54] That would be fundamentally different if structural reforms were incentivized and incorporated by contractual agreements. Such agreements would modify the existing logic, as structural reforms would be negotiated between the parties and incentives would be set through rewarding the implementation of structural reforms. One can conceptualize such agreements in two ways: First, through agreements concluded between the EU and individual Member States, underpinned by financial support as an incentive. Second, as mutual agreements concluded between Member States, which agree on the implementation of structural reforms in the respective country as a kind of barter trading.

The EU Commission had proposed the Convergence and Competitiveness Instrument (CCI) encompassing contractual arrangements to be agreed between a Member State and the Commission underpinned by financial support.[55] In principle, participation is voluntary and Member States would need to present an action plan similar to that required under the Excessive Imbalance Procedure of the MIP.[56] The arrangements would be based on the

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[54] The sanction-based application of the SGP thus remains within in the 'surveillance model' of EU coordination, in which the EU is the 'discipline enforcer', applying numerical fiscal rules and the existing budgetary and economic surveillance system, see Hinarejos (fn 13) 181; T Börzel, 'European Governance: Negotiation and Competition in the Shadow of Hierarchy' (2010) 48 JCMS 191; A De Streel, 'EU Fiscal Governance and the Effectiveness of its Reform' in M Adams and others (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 85, 87.

[55] See the two Communications: European Commission, 'Towards a deep an genuine EMU: the introduction of a Convergence and Competitiveness Instrument' (Communication) COM (2013) 165 final; and European Commission, 'Towards a deep and genuine EMU: Ex ante coordination of plans for major economic policy reforms' (Communication) COM (2013) 166 final. The contractual arrangements were mentioned already in European Commission, 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate' (Communication) COM (2012) 777 final/2.

[56] European Commission, 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate' (Communication) COM (2012) 777 final/2, 21; see also KA Armstrong, 'Differentiated Economic Governance and the Reshaping of Dominium-Law' in M Adams and others (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 65, 77.

country-specific recommendations adopted under the MIP.[57] The accompanying financial support would only be granted for reforms that create positive spillovers across Member States and thus promote the functioning of EMU. Financial support should be designed to support the financing of difficult reforms. In case of non-compliance with the contract, the financial support can be withheld.[58]

In view of the existing coordination instruments, the main function of contractual agreements is to add a reward-based enforcement mechanism of country-specific recommendations on a voluntary basis and sidelining the sanctions-based systems as foreseen by the SGP and MIP. Its scope of application is naturally greater, as the choice of structural reforms is wider and the point in time of their implementation is unrestricted, whilst the SGP allows for sanctions if certain fiscal parameters are fulfilled. Thus, in practice the added-value of contractual agreements could be seen as an instrument fostering structural reforms during 'good times' when proceedings under SGP and MIP have not been triggered yet. This would also help to maintain structural reform efforts when political-economy mechanisms would rather lower the efforts to undertake structural reforms. This is further supported by the greater ownership that voluntary commitments would have compared to the policy recommendations under the European Semester, which are typically seen by national policy-makers as undesirable interventions of the EU into the national policy space.

1. Contractual Agreements Between the EU and Member States

Assessing the legal feasibility of contractual agreements raises questions regarding the legal nature of contractual agreements and the possible legal basis to allow for such agreements sidelined by a funding facility.

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[57] European Commission, 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate' (Communication) COM (2012) 777 final/2, 21.

[58] European Commission, 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate' (Communication) COM (2012) 777 final/2, 22; for an economic consideration, see HP Grüner, 'The Political Economy of Structural Reform and Fiscal Consolidation Revisited' (2013) Economic Papers 487 <http://ec.europa.eu/economy_finance/publications/economic_paper/2013/pdf/ecp487_en.pdf> accessed 7 February 2016, 37.

A. Legal Nature of Contractual Agreements

The EU treaties are silent on contractual agreements between the EU and its Member States. In the absence of an explicit legal basis under primary or secondary law, which would provide for a certain competence of the EU vis-à-vis the Member States, general considerations apply in principle as to the EU's ability to enter contractual relationships. One may consider such agreements as constituting international law treaties or, based on specific secondary law, as Memoranda of Understanding.

In general, the EU can enter into international agreements according to Article 47 TEU and Article 335 TFEU. In addition, Article 216 TFEU explicitly recognizes the EU's possibility to conclude agreements with third countries and international organizations. The ability to enter into agreements with EU Member States is implicitly acknowledged by Article 50 (2) TEU, according to which the EU concludes an agreement with a Member State leaving the EU.[59] Also, any agreement between the EU and a Member State must remain within the substantial competences granted to the EU under the treaties.[60] The principle of conferral in Article 5 TEU would be violated if the EU were to conclude an agreement outside of the scope of the legal basis of the EU treaties.

Considering the scope of EU contractual external action determined by the EU treaty, it is hard to see how a contractual agreement between the EU and its Member States could be set up as an international treaty, since the competences of EU and Member States to act on a specific field are mutually exclusive. Whoever holds exclusive competence is solely competent to conclude agreements and, in the field of shared competence, Member States lose their competence to the extent that the Union has exercised its competence (Article 2 (2) TFEU). In case of contractual agreements foreseeing structural reforms in Member States, the EU may be competent

[59] For a different view, see European Parliament, *Legal options for an additional EMU fiscal capacity* (2013) 20, which argues that this would undermine the legislative procedure foreseen by the EU Treaties.

[60] See also the 24th Declaration concerning the legal personality of the European Union.

based on Article 136 TFEU or Article 173 TFEU. Agreements promoting the implementation of structural reforms generally appear connected to Article 136 TFEU as a regular norm providing for economic policy coordination. In the past, Article 136 TFEU has been the core legal basis for extending budgetary surveillance and economic coordination,[61] giving rise to concerns about an inadmissible stretching of the boundaries of this norm.[62] According to the Commission, the contractual agreements could be part of the Macroeconomic Imbalance Procedure and based on Article 136 TFEU.[63] However, given that this norm is potentially in conflict with the genuine Member States' competence to conduct economic policy, coordination competences granted to the EU in this area should be interpreted restrictively.[64] In relation to the coordination competences under Article 136 TFEU, this means that they must remain within the scope of the relevant provisions (Article 121 and 126 TFEU).[65] Article 121 (3) and (4) TFEU established a peculiar system of macroeconomic monitoring by setting up the authoritative surveillance competence of the EU institutions. More specifically, Article 8 (1) of the Macroeconomic Imbalance Procedure foresees that the EU Commission and the Member States develop national reform programmes that – unlike the contractual agreements – can be made binding as corrective action plans by the Council.[66] Considering the MIP's focus on removing macroeconomic imbalances through structural reforms, there is a significant conceptual similarity with the measures envisaged to form part of contractual agreements, for which the EU Commission and the respective Member State consensually negotiate the reforms to be

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[61] Hinarejos (fn 13) 33.

[62] K Tuori and K Tuori, The Eurozone Crisis: A Constitutional Analysis (CUP 2014) 168-171.

[63] European Commission, 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate' (Communication) COM (2012) 777 final/2.

[64] J Jäger and E Springle, *Asymmetric Crisis in Europe and Possible Futures* (Taylor & Francis Ltd 2015); U Häde in C Calliess and M Ruffert (eds), *EUV/AUEV-Kommentar* (4th edn, C.H. Beck 2011) Art. 136 TFEU, para. 4.

[65] J-V Louis, 'The Economic and Monetary Union' (2004) 41 CML Rev. 575; U Häde, 'Art. 136 AEUV - eine neue Generalklausel für die Wirtschafts- und Währungsunion?' [2011] JZ 333; B Kempen in R Streinz (ed), *EUV/AEUV-Kommentar* (2nd edn, C.H. Beck 2012) Art. 126 AEUV, para. 2.

[66] Article 8(2) of Regulation 1176/2011.

incorporated into the agreement. Since contractual agreements are less authoritative due to their consensual nature, they should be deemed compatible with the more intrusive competence granted to the Commission under Article 121 TFEU.[67] Member States enter contractual agreements on a voluntary basis securing their policy space and the choice of structural reforms, their general competence in dealing with economic policy issues is acknowledged, and their position is not worsened in case of non-compliance with the contractual agreement (apart from losing the support under the financial incentive scheme).[68] Most importantly, structural reforms agreed upon under contractual agreements are intended to ensure conformity with the broad guidelines referred to in Article 121 (4) TFEU,[69] and they reduce the risk of the proper functioning of the Economic and Monetary Union being jeopardized, which indicates a parallel between the structural reforms under the MIP and the contractual agreements.[70] If the EU can conclude agreements in line with the principle of conferral and to the extent that it enjoys internal competence, Member States cannot longer conclude agreements in this area.[71]

Alternatively, the contractual relationship may be established as a Memorandum of Understanding (MoU). While the EU treaties are silent on this instrument, it has been used frequently during the crisis, rendering financial assistance to states conditional on a number of structural reforms.[72]

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[67] However, one may ask whether there is a need for an additional legal obligation under a contractual agreement, as Member States under the MIP are bound by the specific measures adopted under this procedure, European Parliament (fn 59) 21. The added value of the contractual agreements may then only be the incentivizing of funding (reward-based incentives).

[68] ibid 22.

[69] For a background on the guidelines and their effect, see D Hodson, *Governing the Euro Area Good Times and Bad* (OUP 2011) chapter 5.

[70] See also European Parliament (fn 59) 22.

[71] This is different in the case of 'mixed agreements' that are concluded by both the EU and the Member States with third countries. See A Steinbach, 'Kompetenzkonflikte bei der Änderung gemischter Abkommen durch die EG und ihre Mitgliedstaaten' (2007) 18 EuZW 109-112.

[72] Armstrong, 'The New Governance' (fn 13) 602. See also Hinarejos (fn 13) 131; C Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10 EuConst 393, 411.

More formally, MoUs have even become an integral part of Article 13(3) ESM Treaty as the instrument detailing the conditionality attached to the financial assistance facility.[73] There is some conceptual similarity between the MoUs under the ESM and the contractual agreement discussed here – both tie financial support to conditionality and largely concern the implementation of structural reforms. Incentives towards compliance with contractual agreements can then be set by financial assistance that is granted only if there is compliance, and withheld in case of non-compliance. Similar to the approach chosen under the ESM Treaty, one could adopt secondary legislation allowing for the conclusion of contractual agreements. However, the MoUs under the ESM Treaty were concluded under an international agreement outside of the EU legal framework. By contrast, if MoUs foreseeing contractual agreements were set up under EU secondary law within EU competence and being adopted by the EU Commission, they would become an integral part of the EU legal order. As such, compatibility with other EU legislation and in particular with the fiscal and macroeconomic regime under the SGP and the MIP would have to be ensured – this would be facilitated by the fact that the EU Commission would be the leading institutions both in governing the ordinary fiscal regime and the conceptual agreements.

B. Funding Contractual Agreements

Without the possibility to conclude contractual agreements through international treaties, contractual agreements ought to be established on the basis of secondary legislation.[74] One may consider three potential legal

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[73] Similarly, the European Financial Stabilisation Mechanism (EFSM) was established on the basis of an Council Regulation (EU) No. 407/2010 establishing a European Financial Stabilisation Mechanism, OJ L 118, 12.5.2010, p. 1–4.. Loans and credit lines offered under this regulation are adopted by 'implementing decisions' of the Council under conditions to be determined by the Commission and contained in MoUs. See Council Implementing Decision 2011/77/EU on granting Union financial assistance to Ireland (as amended) OJ L 30, 4.2.2011, p. 34–39 ; Council Implementing Decision 2011/344/EU on granting Union financial assistance to Portugal (as amended OJ L 159, 17.6.2011, p. 88–92. See Armstrong, 'The New Governance' (fn 13) 606.

[74] See also PP Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in M Adams and others (eds) *The Constitutionalization of EU Budgetary Constraints* (Hart Publishing 2014) 29.

grounds in the EU treaties, which allow for the establishment of funding support sidelining contractual agreements.

First, Articles 136 and 121 TFEU may serve as legal basis for a funding scheme sidelining contractual agreements that are otherwise in line with these provisions. In *Pringle*, however, the Court found in relation to the ESM that 'neither Article 122(2) TFEU nor any other provision of the EU and FEU Treaties confers a specific power on the Union to establish a permanent stability mechanism such as the ESM',[75] which raises the question whether the fund attached to contractual agreements would be construed as a stability mechanism like the ESM. However, this is unlikely given the peculiar function of the ESM, as 'the ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism'.[76] Comparison with the ESM thus depends on whether contractual agreements are considered as an economic policy coordination tool or as a permanent stability mechanism. Connecting country-specific policy recommendations to incentivizing payments contains elements of both economic policy conduct and financial support. But while under the ESM financial support seeks 'to safeguard the financial stability of the euro area',[77] under contractual agreements financial support aims at the implementation of structural reforms in order to promote the economic adjustment capacity of a Member State. In sum, in light of the different design and intention of the ESM and contractual agreements discussed here and given that Article 136 TFEU has been the basis for more intrusive policy tools such as the national reform programmes under the Macroeconomic Imbalance Procedure, which does not require the consent of the country concerned, voluntary contractual agreements and financial support should remain within the ambit of economic policy coordination under Article 136 TFEU.

Second, an alternative legal basis that is particularly relevant for the establishment for the fund attached to the contractual agreements lies in Article 175 (3) TFEU. Under this norm, specific measures serving the goals of

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[75] Case C-370/12, ECLI:EU:C:2012:756, *Pringle v Government of Ireland* para. 105.

[76] ibid., para. 110.

[77] ibid., para. 142.

Article 174 TFEU (promotion of overall harmonious development and strengthening of its economic, social and territorial cohesion) can be adopted, including the use of the EU funds specified in Article 175 (1) TFEU. Article 175 (3) provides the basis to adopt further measures, and the phrase 'specific actions [...] outside the Funds' indicates that this provision could be used to establish new financial support instruments.[78] Accordingly, the European Union Solidarity Fund (EUSF) was set up in response to major natural disasters and expressed European solidarity to disaster-stricken regions within Europe.[79] Also, the European Globalization Adjustment Fund, which provides support to people who have lost their jobs as a result of major structural changes in world trade patterns due to globalization, had been based on this provision.[80] The degree of flexibility under this norm is further highlighted by the establishment of the European Grouping of Territorial Cooperation (EGTC), the objective of which is to facilitate and promote cross-border, transnational and interregional cooperation between its members. The EGTC enjoys the legal capacity accorded to legal entities by national law and may be used to implement programmes co-financed by the Community or any other cross-border cooperation project with or without Community funding.[81] Hence, in light of the instruments previously used under Article 175 (3), there are opportunities to design and endow the fund supporting contractual agreements on this basis, provided contractual agreements aim at strengthening the EU's economic, social and territorial cohesion.

Third, and depending on the specific design of the contractual agreements, Article 352 TFEU could provide the legal basis for a fund outside of the

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[78] A Puttler in R Streinz (ed), *EUV/AEUV-Kommentar* (2nd edn, C.H. Beck 2012) Art. 175 AEUV, para. 7; B Eggers in E Grabitz and others (eds), *Das Recht der Europäischen Union: EUV/AEUV* (C.H. Beck, March 2011) Art. 175 AEUV, para. 5.

[79] Council Regulation (EC) No. 2012/2002 establishing the European Union Solidarity Fund OJ L 313, 14.11.2002, p. 3–8.

[80] Regulation (EC) No. 1927/2006 establishing the European Globalisation Adjustment Fund, OJ L 406, 30.12.2006, p. 1–6

[81] Regulation (EC) 1082/2006 on a European grouping of territorial cooperation (EGTC), OJ L 210, 31.7.2006, p. 19–24.

regular EU budget and of an agency entrusted with the implementation.[82] According to the flexibility clause, the EU can take appropriate measures if action by the Union should prove necessary, within the framework of the policies defined in the treaties, to attain one of the objectives set out in the treaties. In *Pringle*, the Court left unanswered the question whether a stability mechanism such as the ESM could be based on Article 352 TFEU.[83] In principle, establishing a fund that promotes structural reforms under Article 352 TFEU appears to be feasible if the fund is necessary to attain the objectives mentioned in Article 3 TEU, notably to attain a 'sustainable development of Europe based on balanced economic growth' and to safeguard the 'economic and monetary union whose currency is the Euro'. However, actions under the flexibility clause must observe limitations imposed by the EU treaties, that is, they must not alter the institutional setting established by primary law. For example, Article 153 (4) TFEU must be observed – this rule allows the EU to support the Member States' social and labour policies, excluding any harmonization of the laws and regulations of the Member States. Given that any contractual agreement is intended to be in line with the country-specific policy recommendations given under the European Semester and the MIP, the policy instruments integrated into contractual agreements are likely to be compatible with other treaty provisions. However, given the unanimity requirement under Article 352 TFEU, and as the Court has made clear in the *Single European Patent*[84] case (namely that it is possible to make use of legal bases requiring unanimity through enhanced cooperation), resorting to enhanced cooperation might be

[82] R Repasi, 'Legal options for an additional EMU fiscal capacity' (2013) <http://www.europarl.europa.eu/RegData/etudes/note/join/2013/474397/IPOL-AFCO_NT%282013%29474397_EN.pdf> accessed 7 February 2016, 12; on the limitations to use Article 352 TFEU as legal basis, see Hinarejos (fn 13) 107; A Arnull, 'Left to its Own Devices? Opinion 2/94 and the Protection of Fundamental Rights in the European Union' in A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (London, Sweet & Maxwell 2000) 61-78, chapter 5.

[83] Case C-370/12 *Pringle v Government of Ireland* (fn 75), para. 67; see also Adam and Mena Parras (fn 11) 852, 859.

[84] Joined Cases C-274/11 and C-295/11, ECLI:EU:C:2013:240, *Spain and Italy v Council*.

the more realistic option, provided the above legal bases should not suffice given the specific design of contractual agreements.[85]

2. Inter se Agreements Between Member States

A. General Design

As an alternative to the contractual relationship between the EU and its Member States, one may also consider bi- or plurilateral agreements between Member States without the involvement of the EU. The interdependence of Member States participating in a single currency means that each state has a vital stake in all the others following sound economic policies. The crisis has shown that a lack of necessary reforms in one Member State can have negative effects in others. Conversely, the adoption of structural reforms in one country has a positive spillover effect on others – hence, there is a mutual interest in implementing structural reforms.[86] Contractual agreements between Member States respond to this rationale. They are bilateral agreements between Member States in which the latter, voluntarily and at their own motion, commit to a certain reform or set of binding reforms. Reciprocity in the deal would ensure the positive cross-border spillovers from the domestic deal and increase the Member States' otherwise lacking willingness to reform.

The practical relevance of such agreements is illustrated by the ambitions expressed in the joint report from France and Germany on economic reforms focusing on competitiveness and investment issues.[87] Even though such bilateral reform agendas have not been considered binding, they reflect both design and nature of the CCIs on a bilateral basis and it remains possible that

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[85] There are, however, obvious legal and political restrictions associated with actions within enhanced cooperation, which cannot be discussed here. See M Schwartz, 'A Memorandum of Misunderstanding - The Doomed Road of the European Stability Mechanism and a Possible Way Out: Enhanced Cooperation' (2014) 51 CML Rev. 389-423.

[86] Grüner (fn 58) 30.

[87] Duffy (fn 9) and Enderlein and Pisan-Ferry (fn 10). To date, this initiative has been a rather political project without leading to a contractual or otherwise legally relevant coordination.

bilateral agreements on structural reforms may politically more likely to be concluded given the reciprocal character of reforms.

In the past, treaties between Member States related to EU matters were seen as possible threat to the EU legal order, especially when they applied to some (not all) Member States ('partial agreements') and were formed without involving the EU institutions.[88] However, Member States resorting to international agreements outside the EU legal order is, in itself, nothing new.[89] Past *inter se* agreements include arrangements such as the Schengen framework[90] or the Prüm Convention, in the area of justice and home affairs. In these cases, deeper integration was pursued by some, but not all, Member States by using an instrument of international law.[91] More recently, *inter se* agreements between Member States reflected a general trend of intergovernmentalism being prevalent as strategy throughout the Euro crisis.[92] A significant part of crisis-related measures – particularly related to budgetary surveillance system, financial stability measures and bailout mechanisms for countries in fiscal distress – has been addressed through measures outside the EU legal framework.[93] This is done through international agreements, as experienced with the treaties establishing the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM), both of which are supplementary to EU law measures governing the EMU.[94] This approach is in line with an intergovernmental type of governance focussing on the leeway enjoyed by national governments

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88 S Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' (2013) 9 EuConst 37, 40.

89 F Fabbrini, Economic Governance in Europe: Comparative Paradoxes, Constitutional Challenges (OUP 2016) 106.

90 The Schengen acquis - Convention implementing the Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/19.

91 Hinarejos (fn 13) 90.

92 Fabbrini, 'The Euro-Crisis and the Courts' (fn 4) 110; Hinarejos (fn 13) 111; KA Armstrong, *Governing Social Inclusion. Europeanization through Policy Coordination* (OUP 2010) 67.

93 Fabbrini, 'The Euro-Crisis and the Courts' (fn 4) 110.

94 Peers (fn 89) 39.

to rely on the flexibility to act outside EU law.[95] While crisis management outside the EU mechanisms proved effective to offer high flexibility in designing tailor-made policy tools, the limits of intergovernmentalism from the perspective of legitimacy and consistency have been voiced repeatedly.[96] It remains to be seen what role intergovernmentalism will play in post-crisis times over the coming years.

B. Legal Scope

EU law imposes restrictions on agreements between Member States.[97] In principle, international treaties involving Member States may be in conflict with the Union's competences. Member States concluding an international treaty in areas for which the adoption of EU secondary law is possible encroach upon the allocation of competences under the EU Treaties. Particularly, as far as the respective competence refers to the ordinary legislative procedure, the co-decision rights of the European Parliament would be infringed.[98] The allocation of competences in relation to exclusive and shared competences determines the scope of restrictions on Member States to conclude international agreements. It is well established that, in areas of exclusive EU competence (Articles 2(1), 3(1) TFEU), Member States no longer have the right to enter into obligations with third countries.[99] While the Court has explicitly made this restriction in relation to third

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[95] Fabbrini, 'The Euro-Crisis and the Courts' (fn 4) 110; see also M Messina, 'Strengthening Economic Governance of the European Union through Enhanced Cooperation: A Still Possible, but Already Missed, Opportunity' (2014) 39 EL Rev. 404; Schwartz (fn 85) 389.

[96] E Chiti and PG Teixeira, 'The constitutional implications of the European responses to the financial and public debt crisis' (2013) 50 CML Rev. 683; readers are invited to study various disciplinary perspectives in J Habermas, *The Crisis of the European Union* (Polity 2012), D Cohn-Bendit and G Verhofstadt, *For Europe* (Carl Hanser Verlag 2012) and S Goulard and M Monti, *De la Démocratie en Europe* (Flammarion 2013).

[97] See S Hindelang, 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter se Treaties? The Case of Intra-EU Investment Arbitration' (2012) 39 Legal Issues of Economic Integration 179-206.

[98] European Parliament (fn 59) 20.

[99] Case 22/70, ECLI:EU:C:1971:32, *Commision v Council (AETR)* 273; Case 804/79, ECLI:EU:C:1981:93, *Commission v United Kingdom (Sea Fisheries)* para. 20.

countries only, it must also apply for the relation between Member States.[100] By contrast, in the area of shared competence (Articles 2 (2), 4(2) TFEU), Member States are excluded only once the EU exercises its competence.[101] That is, if the EU exercises its internal competence, *inter se* treaties between Member States are no longer admissible.[102]

Similar considerations apply in areas where the EU performs coordinating functions, as the Court spelled out in its *Pringle* judgment on the compatibility of the ESM Treaty with EU law. The Court noted that in areas where the European Treaties do not confer a 'specific competence' on the EU, Member States are generally free to act.[103] In the areas concerned here – economic, labour, social policy (Article 2 (3), 5 TFEU) – the Treaty does not confer specific competences, as the EU is allowed to act only by coordination. More specifically, Member States enjoy full competence in the domain of economic and fiscal policy and are thus free to enter into *inter se* treaties. Regarding the prospective content of mutual agreements, general restrictions exist in relation to the EU's exclusive competence to conduct currency and monetary policy (Article 3 (1) c) TFEU). However, if *inter se* agreements coordinating economic policy have an effect on the stability of the euro or the inflation, this would not justify the EU's exclusive competence, as 'such an influence would constitute only the indirect consequence of the economic policy measures adopted'.[104]

However, even though Member States continue to enjoy the freedom to conclude *inter se* treaties, they remain bound by the principle of sincere cooperation under Article 4(3) TEU, according to which the Union and the Member States shall assist each other in carrying out the tasks that arise from the treaties. Above all, this principle requires Member States to show

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[100] R Repasi, 'Völkervertragliche Freiräume für EU-Mitgliedstaaten' [2013] Europarecht 45, 52; D Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (Nomos 2004) 298-299.

[101] The scope of the limitations has also been clarified in Protocol no. 25 on the exercise of shared competence.

[102] See also Adam and Mena Parras (fn 11) 862.

[103] Case C-370/12 *Pringle v Government of Ireland* (fn 75), para. 105.

[104] See Case C-370/12 *Pringle v Government of Ireland* (fn 75), para. 97.

restraint in cases of shared competences, so as not to predetermine potential future EU activities.[105] This also applies to international agreements among Member States.[106] In particular, this principle may also restrict Member States' freedom regarding the content of mutual agreements that aim to implement structural reforms, given that the EU has gained competence in specific fields of economic policy, particularly where fiscal policy conduct is concerned. The EU budgetary and macroeconomic surveillance system has been established on the grounds of Article 121 and 136 TFEU. As discussed above, structural reforms covering economic, social and labour policy have been incorporated into the European Semester, the SGP and the MIP and are developed and decided on by the Commission and the Council. The principle of sincere cooperation requires that mutual agreements between Member States would be in conformity with the country-specific recommendations and adjustment programmes adopted under the EU coordination mechanisms. In conclusion, EU Member States are generally free to conclude *inter se* treaties if these concern competences that genuinely remain in the domain of the Member States. However, content and design of the agreements must take into account the existing legal framework on EU coordination, thus safeguarding the functions of EU institutions.[107]

Member States may also design mutual agreements by way of involving the EU, potentially as a broker and monitoring body for the agreement. The EU Commission would then facilitate and monitor bilateral agreements, and the CJEU may be called upon for judicial review. Guidance on the feasibility of such integration of EU institutions into *inter se* treaties can be sought from the Court's *Pringle* judgment. In that case, the CJEU approved the involvement of EU institutions under the intergovernmental ESM Treaty to be in line with the principle of sincere cooperation (Article 4(3) TEU).[108] The Court found no infringement of Article 13 TEU by assigning specific tasks to

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[105] Repasi, 'Völkervertragliche Freiräume' (fn 100) 45, 52;

[106] Palmstorfer (fn 51) 774; Palmstorfer (fn 51) 774; M Ruffert in C Calliess and M Ruffert (eds), *EUV/AEUV* (4th edn, C.H. Beck 2011) Art. 1 AEUV, para. 13.

[107] For a similar debate on the compatibility of the intergovernmental fiscal compact with the EU fiscal policy surveillance, see Repasi, 'Völkervertragliche Freiräume' (fn 100) 70.

[108] Case C-370/12 *Pringle v Government of Ireland* (fn 75), para.152.

some EU institutions in areas which do not fall under the exclusive competence of the Union, 'provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and TFEU Treaties.'[109] While this finding has been criticized as hampering the institutional design of the EU,[110] allocating tasks to EU institutions in framing *inter se* agreements remains in line with established CJEU jurisprudence.

IV. Conclusions

We currently observe a political-economy climate that gives little indication for deepening integration towards a 'fiscal federalism model' – Member States will continue to retain competence to conduct economic policy.[111] It is thus likely that under-provision of structural reforms will remain a perennial phenomenon in the EU. The crisis revealed the adverse implications of sluggish structural reforms which led to comprehensive reform obligations for countries under financial assistance programmes.

Beyond that, there is scope to employ existing and new legal instruments for the purpose of advancing structural reforms across the euro zone. By exploiting the existing surveillance tools and by introducing new arrangements under the current rules, surveillance and policy options are diversified, which enables more targeted responses to country-specific needs.[112] There is significant leeway to account for the implementation of

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[109] Case C-370/12 *Pringle v Government of Ireland* (fn 75) para. 158; for a comprehensive analysis of the case-law preceding the *Pringle* judgment, in particular the Court's rulings in *Bangladesh* and *Lomé*, see Peers (fn 89); see also Hinarejos (fn 13) 126.

[110] PP Craig, 'Pringle and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 EuConst 263.

[111] Armstrong, 'The Character of EU Law' (fn 12) 179; Armstrong, *Governing Social Inclusion* (fn 93).

[112] It is acknowledged that economic governance in the EU is already very multipolar and complex, and generates distrust in the efficacy of both domestic and European politics. Introducing new instruments might add to this complexity in an undesirable way. On the growth of coordination instruments see, inter alia, Steinbach, *Economic Policy* (fn 13); MG Tutty, 'EU Economic Policy Surveillance of Member States' (2013) IIEA Economic Governance Paper, <http://www.iiea.com/ftp/Publications/EU%20

structural reforms both in the preventive and the corrective arm of the SGP. Incorporating structural reform agendas developed under the European Semester and/or the MIP into the proceedings of the SGP would continue the overall trend of applying EU economic surveillance more broadly in a macroeconomic sense rather than being limited to fiscal parameters only. Thus, the current regime offers some flexibility in incorporating structural reforms, even though remaining within the traditional sanction-based logic of implementing policy reforms. Given the mixed compliance record, alternatives to sanctions should be considered.

In this view, contractual agreements between the EU and Member States or among Member States would add a new legal instrument to the arsenal fostering structural reforms in the euro zone. Unlike existing instruments, contractual agreements allow for more egalitarian and reward-based incentives and thus deviate from the classical 'surveillance model' of economic governance in the EU.[113] Rewards would be set either through financial incentives or by reciprocity in the deal if other Member States also commit to structural reforms that generate positive spillover effects.

What are the implications for the further trajectory of economic policy coordination efforts within the EU? Making use of the described flexibility options is likely to be the short-term avenue pursued by the EU institutions. In this vein, the Five Presidents' Report has stressed the use of existing instruments in implementing structural reforms.[114] This may imply a stronger role of the European Semester as the forum to assess comprehensively, on a country-specific basis, the need for structural reforms, which could then be implemented under the MIP and SGP or through arrangements as discussed in this analysis.

By contrast, the outlook for the implementation of contractual agreements seems far less clear. We should remember that it was the Commission that

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Economic%20Policy%20Surveillance%20of%20Member%20States-IIEA%20Economic%20Governance%20Paper%206%20_Michael%20G%20Tutty.pdf> accessed 7 February 2016.

[113] Hinarejos (fn 13) 181; Börzel (fn 54) 191; De Streel (fn 54) 87.

[114] Juncker (fn 38) 8.

tabled the proposals of the Convergence and Competitiveness Instrument, which were then referred to by Germany as potential 'Vertragspartnerschaften'. This explains the different reactions to the proposals. The European Parliament was rather sceptical towards the proposal, probably for fears about its role in contractual agreements[115], while the Council reacted more positively.[116] The involvement of the European Parliament in contractual agreements does not seem to be a likely scenario considering the experience with MoU-based conditionality programmes during the crisis. The role of EU institutions would even be marginal if Member States were to conclude inter se agreements among each other making it most likely that EU institutions will put forward the incompatibility of such agreements with the EU legal order. By contrast, the role of the national parliaments involved could be strengthened through inter se agreements creating stronger ownership and legitimacy of these agreements. As the MoU experience during the crisis has shown, legality review is a preeminent issue. If contractual agreements were based on EU law (i.e. if agreed as MoUs based on secondary legislation), they could be challenged on grounds of EU law, while if the agreements were not EU law only national courts could assess legality on the basis of national law.[117]

Despite the blurry outlook on implementation given heterogeneity of interests, one should consider contractual agreements as an additional policy instrument from a normative perspective. It abandons the current purely sanction-based approach of policy coordination and provides new strategic offers to Member States by incorporating rewards either on financial (EU contractual agreements) or reciprocal (inter se agreements) basis. Also, consistency of policy tools is not likely to suffer given the frequency and visibility of recommendations issued under the EU semester.

What about political feasibility of contractual agreements? The latest Five Presidents' Report does not explicitly refer to contractual agreements as a

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[115] European Parliament resolution on future legislative proposals on EMU: response to the Commission communications 2013/2609(RSP), 24-25.

[116] European Council Conclusions EUCO 217/13, 19/20 December 2013, para. 32.

[117] Kilpatrick (fn 72) 396, 407 discussing also the past experience with the reviewability of decisions adopted under the structural funds.

policy tool highlighting that this approach has recently lost support, which according to commentators is due to some Member States' resistance against this proposal. The vanishing support among Member States may also reflect the concern mainly of the net transfer beneficiaries of current EU financial support schemes that conditionality-based transfers would become the rule increasing the EU's scope of intervention with national policies. However, both Member States and EU should not set aside the option of contractual agreement without further ado. Member States would benefit from incentivizing mechanisms that are – from a political-economy perspective – more effective, as financial support is more persuasive to constituents than just being spared from sanctions. And the EU would enlarge its policy space by diversifying the tools available to improve compliance with EU economic rules.

MUTUAL TRUST AS A TERM OF ART IN EU CRIMINAL LAW: REVEALING ITS HYBRID CHARACTER

Auke Willems*

The term mutual trust has become a household term in the EU criminal justice vocabulary and is regarded to be a prerequisite for a successful application of the principle of mutual recognition. Regardless of its widespread use, it is often used in the vernacular, as if clear in itself. But as mutual trust has become one of the core objectives of the EU's criminal justice policy, and legislation is adopted to build trust, more specificity is required. This article attempts to unpick the notion of trust into its various elements. The argument is put forward that next to the principle's legal and political components, it also consists of more 'social' elements, as trust is a social construct after all. An assessment of the concept of trust developed in the social sciences reveals these additional elements and puts forward the idea of trust as a hybrid notion.

Keywords: EU criminal law, EU law, mutual recognition, mutual trust, fundamental rights, social trust

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I. INTRODUCTION

The topic of this article is the principle of mutual trust in EU criminal law. Development of that field of EU policy often labelled 'EU criminal law'[1] took a flight in the late 90's when mutual recognition was introduced as the core governance principle in an Area of Freedom, Security and Justice (AFSJ), the EU's version of a judicial space launched with the entry into force of the Treaty of Amsterdam. In essence, mutual recognition requires Member States to give full recognition to judicial decisions taken in other jurisdictions across the EU.[2] Mutual recognition in turn functions on a presumption of mutual trust; the logic is that the extraterritoriality of judicial decisions, created by mutual recognition, will only be accepted if there is a sufficiently

[1] A note at the outset; the term 'EU criminal law' is imperfect and potentially misleading. We are not dealing with criminal law in the conventional sense in the EU; no norms that pose an immediate threat to individuals are created at EU level. Nevertheless, the term is widely accepted and used frequently to describe the body of law and policy under examination here.

[2] For more on mutual recognition see for example C. Janssens, *The Principle of Mutual Recognition in EU Law* (OUP 2013); W. van Ballegooij, *The Nature of Mutual Recognition in European Law* (Intersentia 2015).

high level of mutual trust between Member States. Mutual trust can therefore be regarded as the principle behind the principle. The relevance of mutual trust has only increased since the introduction of mutual recognition as the core governance principle in judicial cooperation in criminal justice matters, and particularly since the Treaty of Lisbon gave constitutional status to mutual recognition and expanded the law making powers of the EU in the field of criminal procedural law and coupled them directly with 'facilitating mutual recognition'.[3] Mutual recognition was initially selected as a governance rule to further EU cooperation in criminal justice matters without having to harmonise national legal systems, which was both unfeasible and undesirable. Building mutual trust is regarded as the key to enhancing or facilitating mutual recognition (and the functioning of the AFSJ more widely), and has as such become a core aspect of the EU's criminal justice agenda.

Since mutual recognition was put forward, a number of instruments have been adopted in its wake, the most important of which is the European Arrest Warrant (EAW), applying mutual recognition to extradition.[4] However, the first decade or so of mutual recognition has not been flawless, and the aim to circumvent harmonisation in the field of criminal law by pledging to recognise each other's judicial decisions has proven more difficult than initially thought. An important reason for the difficulties that mutual recognition is facing is attributed to a lack of mutual trust. In response, so called 'trust building measures' have been taken, both legal (most notably within the framework of the Roadmap on Criminal Procedural Rights),[5] and non-legal. While engaging in trust building necessarily implies a lack of (or at least insufficient) trust, mutual recognition operates on a trust presumption, as repeatedly confirmed by the Court of Justice of the European Union (CJEU).[6] Regardless of this inconsistency (or contradiction), over time the

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3 See art 82(2) Treaty on the Functioning of the European Union (TFEU).

4 Council Framework Decision 2002/584/JHA of 13 June 2002, OJ L 190, 18.7.2002, p. 1–20 [hereafter EAW]; on the EAW see for example L. Klimek, *The European Arrest Warrant* (Springer 2014); J. Spencer, 'The European Arrest Warrant' (2003) 7 Cambridge Yearbook of European Legal Studies 201.

5 For more on the Roadmap see section II.3.

6 For more on the CJEU see section II.4.

term mutual trust has become strongly embedded in the EU criminal law vocabulary and the idea that mutual trust is a prerequisite to a successful application of mutual recognition is widely accepted. But despite its widespread use and acceptance as a central policy aim, the concept of trust remains broad and ambiguous, and the EU has not made much effort to give insight into its exact meaning or functioning. Moreover, academic literature on the topic initially mainly challenged the trust presumption on grounds of insufficient regard to fundamental rights throughout the EU, while broader development of the notion of trust itself took off more slowly.

Currently, mutual trust is deployed to serve a broad spectrum of purposes, the most important of which is linked to eliminating differences between national criminal justice systems in the name of trust building (the logic being that if all national systems were perfectly equal trust would not be an issue). This creates an interesting paradox. Mutual recognition as a mode of governance was chosen exactly to enable cooperation while preserving national differences, and mutual trust serves as a prerequisite to that end. But if the principle of mutual trust ultimately leads to convergence (i.e. by eliminating those differences), it in effect reintroduces harmonisation (through the back door) and might actually run counter to the very core idea of mutual recognition. A legitimate question then would be whether mutual trust supports or contravenes mutual recognition. In order to answer this pressing question, a first important step is to clarify the role and function of mutual trust.

This article will address that lack of clarity and put forward the argument that mutual trust is a term of art in the EU criminal law context, with a meaning specific to the particularities of EU criminal justice cooperation. Yet, it is not completely separate from what can be regarded trust as a social construct. It is for this reason that, in addition to (the more conventional) legal/political analysis, a social science perspective is employed. When the two perspectives are combined, a hybrid principle emerges. The purpose of conceptualisation of the principle of mutual trust is twofold. First, it should enable a more informed debate on the functioning of the AFSJ (the criminal law component more in particular). Second, it should allow for scrutinising the legislative programme that is carried out to enhance or build trust.

The article is structured as follows. Section 2 will give insight into the EU's ambiguous trust discourse, followed by an overview of the (critical) reception of mutual trust in EU criminal law literature in section 3. Subsequently, section 4 will present a number of core aspects of trust as developed in the social sciences in order to enlighten the debate on the issue of trust. Section 5 will then identify the characteristics that are particular to trust in the EU criminal justice environment. The last section 6 will combine these two groups of elements and draw general conclusions.

II. THE EU'S TRUST DISCOURSE

1. Establishing the Trust Presumption

The term 'mutual trust' is widely used by the various EU institutions in the criminal justice discourse, *e.g.* in policy documents, legislation and case law. Nevertheless, there is no document setting out a shared understanding of its scope and fundamentals. The term was given prominence from the very beginning of mutual recognition in the AFSJ and serves as its foundation. The mutual recognition-mutual trust nexus is not sufficiently substantiated though; that mutual recognition is not flourishing is sufficiently documented,[7] but that this is because of a lack of trust has not been convincingly shown.

Since its introduction, mutual trust has been both presumed to exist and to lack, hence; 'mutual recognition ... has many faces – as many as mutual trust in the EU's and the Member States' discourse(s)'.[8] This section will give an

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7 Particularly in light of the EAW, *see for example* S. Carrera, E. Guild and N. Hernanz, 'Europe's Most Wanted? Recalibrating Trust in the European Arrest Warrant System' (2013) 55 CEPS Paper in Liberty and Security in Europe <https://www.ceps.eu/publications/europe%E2%80%99s-most-wanted-recalibrating-trust-european-arrest-warrant-system>; L. Marin, 'Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant' (2013) 5(3) *New Journal of European Criminal Law* 327; A. Weyembergh, 'European Added Value Assessment: the EU Arrest Warrant' (2014) Research Paper- European Added Value United http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET(2013)510979(ANN01)_EN.pdf.

8 G. Vermeulen, 'Flaws and Contradictions in the Mutual Trust and Recognition Discourse: Casting a Shadow on the Legitimacy of EU Criminal Policy Making and

insight into the EU's inconsistent and at times contradictory mutual recognition/mutual trust narrative.

Upon inception of mutual recognition at the Tampere European Council (1999),[9] it was not explicitly linked with a requirement of mutual trust.[10] It was not long though until mutual trust came into the picture. Less than a year later the Commission held, when presenting its view on mutual recognition, that '[m]utual trust is an important element, not only trust in the adequacy of one's partners rules, but also trust that these rules are correctly applied'.[11] Again less than a year later in 2001, the Programme to implement mutual recognition was released and made an important contribution to the trust discourse by introducing the presumption of trust;

> Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's' criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.[12]

The articulation of a direct link between mutual recognition and mutual trust has been of paramount importance for the policy to facilitate mutual recognition, or even broader the EU's criminal justice policy as a whole, and still resonates today. By grounding this presumption on the shared

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Judicial Cooperation in Criminal Matters?' in N. Persak (ed), *Legitimacy and Trust in Criminal Law, Policy and Justice* (Ashgate Publishing 2014) 153, 154.

9 For a closer look at the process that led to the adoption of mutual recognition see H. Nilsson, 'Mutual Trust or Mutual Mistrust?' in G. de Kerchove and A. Weyembergh (eds), *La Confiance Mutuelle Dans l'Espace Pénal Européen/Mutual Trust in the European Criminal Area* (Editions de l'Université de Bruxelles 2005) 29.

10 At Tampere, mutual recognition was introduced as the 'cornerstone principle' in EU criminal justice cooperation. See Tampere European Council (15-16 October 1999), Presidency Conclusions, <http://www.europarl.europa.eu/summits/tam_en.htm>.

11 Communication from the Commission to the Council and the European Parliament, 'Mutual recognition of Final Decisions in criminal matters' COM (2000) 495 final, 4.

12 'Programme of measures to implement the principle of mutual recognition of decisions in criminal matters', OJ C12/10, 15 January 2001, 10 [hereafter the Programme].

commitment 'to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law' a justification was given, be it in a rather formalistic manner.

It appears that the trust presumption was regarded to be solid, as at the time no measures to strengthen mutual trust were prioritised. The Programme did set out to 'enhance the protection of individual rights', but as a self-standing goal of the mutual recognition project, not with an instrumental, mutual recognition enhancing, purpose.

The EAW, the first mutual recognition measure, closely followed the Programme's rationale and 'is based on a high level of confidence between Member States'.[13] The instrument attempts to establish from the outset that confidence (or trust) is at its core.[14] But as the instrument contains various indications to the contrary (grounds for refusal, partial abolition of double criminality etc.),[15] this preambular statement can be regarded more as (political) rhetoric than (legal) reality.[16]

2. First Questions on the Validity of the Trust Presumption

Shortly after the introduction of the 'presumption of trust' it was already questioned and the need to enhance trust was articulated by the Commission. In its 2003 Green Paper on procedural rights, the need to strengthen trust was made explicit and directly linked to the absence of a uniform standard of

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[13] EAW, recital 10.

[14] Note the use of the term 'confidence' in the EAW, used interchangeably with 'trust' in the subsequent discourse. It is not clear whether a different concept is denoted, but according to Walker the two differ; 'confidence is an accomplished state upon which we can more or less passively rely; trust is an active way of building confidence or otherwise dealing with the absence of confident expectations', see N. Walker, 'The Problem of Trust in an Enlarged Area of Freedom, Security and Justice: A Conceptual Analysis', in J. Apap and M. Anderson (eds), *Police and Justice Cooperation and the New European Borders* (Kluwer 2002) 19, 22.

[15] See section III. 1 below.

[16] According to Eijsbouts and Reestman, 'In actual fact it [the EAW] seems to breathe *mistrust* of states having a liberal criminal law tradition', see W. Eijsbouts and J. Reestman, 'Editorial - Mutual Trust' (2006) 2(1) European Constitutional Law Review 1, 1.

defence rights.[17] Underlying such calls was the contention that an EU wide measure offering suspects and defendants a minimum standard of procedural fairness would accommodate the lack of trust. Note that the issue was raised prior to the entry into force of the EAW, which is often regarded as the main source of dissatisfaction with the safeguarding of individual rights. But Member States could at the time (the negotiations lasted from 2004 until 2007) not agree on such an instrument,[18] it however seemed obvious that sooner or later the issue of procedural safeguards would return. The second multi-annual programme in the area of justice and home affairs, the Hague Programme, further underlined the mutual recognition-mutual trust nexus,[19] and the subsequent Stockholm Programme elevated the importance of mutual trust and declared 'ensuring trust' to be 'one of the main challenges for the future'.[20] It also repeated the logic that rights of the individual in criminal proceedings are regarded as 'essential in order to maintain mutual trust between the Member States and public confidence in the European Union'.[21]

In the meantime, the adoption of cooperation measures based on mutual recognition continued, but were signified by a change of tone. The 2008 Framework Decision on custodial sentences, declared rather modestly that mutual recognition 'should become the cornerstone' and that relations

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[17] Green Paper from the Commission 'Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union', COM (2003) 75 final.

[18] On these negotiations see M. Jimeno-Bulnes, 'The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union' in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate 2008) 171.

[19] 'The Hague Programme: strengthening freedom, security and justice in the European Union' (2005) OJ C53/01; see also the action plan implementing The Hague Programme, (2005) OJ C198/01. Section 3.2 of the Programme is devoted to 'confidence-building and mutual trust'.

[20] 'The Stockholm Programme — An open and secure Europe serving and protecting citizens' (2010) OJ C115/1; see also the 'Action Plan Implementing the Stockholm Programme', COM (2010) 171 final.

[21] ibid, 2.4.

between Member States 'are characterised by special mutual confidence'.[22] Not even ten years after the inception of mutual recognition and its euphoric introduction, a different, almost timid tone was chosen. This shift was rather sudden, considering that the Commission had noted in 2005 that mutual recognition still 'is' the cornerstone of judicial cooperation.[23] Even more illustrative in this light is the 2014 European Investigation Order (EIO), which explicitly acknowledges that the trust presumption is rebuttable and introduces a human rights refusal ground.[24] The increase in scepticism toward the presumption of trust (call it realism) expressed by the EU legislator in recent mutual recognition measures, is possibly the result of the first decade of experience with the EAW and the insights this gave into the difficulties mutual recognition presented in practice.

3. First Tangible Step in Trust Building: The Roadmap

After years of fruitless debate on an EU procedural rights measure, in 2009 progress was finally made by adopting the Roadmap on Criminal Procedural Rights.[25] The first 'visible' legislative step was taken to build trust by approximating procedural law,[26] and as such presents the most prominent expression of the legal relevance of the principle of mutual trust. The central aim of the Roadmap is to strengthen the procedural rights of suspected or accused persons in criminal proceedings by employing a 'step-

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[22] Council Framework Decision 2008/909/JHA of 27 November 2008, OJ L 327/27, recitals 1 and 5.

[23] Communication from the Commission to the Council and the European Parliament of 10 May 2005- The Hague Programme: ten priorities for the next five years, COM (2005), 184 final, OJ C 236.

[24] Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, recital 19 and art 11.

[25] 'Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings', (2009) OJ C295/1 [hereafter Roadmap]; for more on the Roadmap see e.g. J. Blackstock, 'Procedural Safeguards in the European Union: A Road Well Travelled?' (2012) 2(1) European Criminal Law Review 20.

[26] In addition to procedural approximation, trust building capacities have also been attributed to substantive approximation, see e.g. A. Weyembergh, 'Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme' (2005) 42(6) Common Market Law Review 1567, 1575.

by-step' approach. The starting point was to adopt five measures on basic procedural rights and the Commission was invited to propose EU legislation to this end.[27] However, improving the position of the individual in criminal proceedings throughout the EU is not an end in itself, but rather a means to an(other) end; namely to facilitate mutual recognition, in line with the legal basis employed (Article 82(2) TFEU). Trust serves as the conceptual link between means and ends; hence the full chain, and thus the Roadmap's rationale, is as follows:

Legal measure	**Conceptual aim**	**End goal**
EU wide procedural rights→	enhance trust(worthiness) →	facilitate mutual recognition

Figure 1: Trust as conceptual link between means and ends

Recital 8 gives insight into the Roadmap's rationale regarding trust:

> Mutual recognition presupposes that the competent authorities of the Member States trust the criminal justice systems of the other Member States. For the purpose of enhancing mutual trust within the European Union, it is important that, complementary to the Convention [ECHR], there exist European Union standards for the protection of procedural rights which are properly implemented and applied in the Member States.[28]

The Roadmap thus builds on the trust presumption's formal foundation, namely the existence of the European Convention on Human Rights (ECHR), by introducing EU standards *in addition to* already existing standards. Furthermore, the exact trust relation aimed at by the Roadmap is that *competent authorities* should have trust in *foreign criminal justice systems*. Confirming the instrumental function, not in the first place to improve the position of the individual in order to increase citizens' trust in the EU, as

[27] The first five measures have been adopted on interpretation and translation (OJ L280/1, 2010), the right to information (L 142/1, 2012), the right to access to a lawyer (OJ L294/1, 2013), the presumption of innocence and the right to be present at trial (OJ L65/1, 2016), and on special safeguards for children (OJ L132/1, 2016). One more has been proposed on the right to legal aid.

[28] Roadmap, recital 8.

alleged by the multi-annual programmes, but to enhance cooperation and therefore geared towards judicial authorities. Nevertheless, sound evidence of the ratio of how exactly procedural rights will enhance judicial cooperation (and thus trust) is lacking, as well as why these exact rights are selected by the Roadmap. Is this simply the result of political realities (these are the rights that Member States could agree on), or is there empirical evidence that exactly this approach will facilitate mutual recognition, *e.g.* because national differences in the distribution of these specific rights hamper a successful application of mutual recognition? Unfortunately, the Roadmap itself does not provide clear answers to these questions. This raises issues of subsidiarity (Article 5(3) TEU) and whether the activation of the legal basis of Article 82(2) TFEU is justified (*i.e.* are there 'objective factors which are amenable to judicial review').[29] As the first two measures have just entered into force, it is too soon to tell how these will play out in practice,[30] especially since these are supposed to function as a whole and can as such be fully tested when all measures have been adopted and are in function.[31] But in order to scrutinise whether the programme to introduce EU-wide procedural rights meets the legislative purpose of 'facilitating mutual recognition', through 'enhancing mutual trust', it is important to understand what trust is.

4. The CJEU: A Mutual Trust Stronghold?

Regardless of its limited jurisdiction pre-Lisbon and the five-year transitional period under Lisbon, the CJEU has found ample opportunity to weigh in on

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[29] See also J. Oberg, 'Subsidiarity and EU Procedural Criminal Law' (2015) 5(1) European Criminal Law Review 19; P. Asp et al. 'European Criminal Policy Initiative - A Manifesto on European Criminal Procedure Law' (2013) 11 Zeitschrift für Internationale Strafrechtsdogmatik 430, 432-433; W. de Bondt and G. Vermeulen, 'The Procedural Rights Debate: A Bridge Too Far or Still Not Far Enough?' (2010) 4 EUcrim 163, 164.

[30] For an evaluation see D. Sayers, 'Protecting Fair Trial Rights in Criminal Cases in the European Union: Where does the Roadmap take Us?' (2014) 14(4) Human Rights Law Review 733; E. Cape, 'Transposing the EU Directive on the Right to Information: A Firecracker or a Damp Squib?' (2015) 1 Criminal Law Review 48.

[31] See T. Spronken, 'EU Policy to Guarantee Procedural Rights in Criminal Proceedings: an Analysis of the First Steps and a Plea for a Holistic Approach' (2011) 1(3) European Criminal Law Review 213.

the development of mutual trust.[32] More than any other EU institution, the Court has upheld the presumption of trust and became one of its strongest defenders.[33] But despite mutual trust being a central theme in the Court's AFSJ jurisprudence, it has not qualified or clarified the notion of trust, but merely adhered to the presumption found on shared respect for human rights.

The notion of mutual trust is inextricably linked with the principle of mutual recognition, but the Court's first view of mutual trust came in a different context. In *Gözütok and Brügge*,[34] the Court was asked whether *ne bis in idem* prohibited criminal proceedings in a Member State where prosecution was sought on the same facts that in another jurisdiction had been definitively discontinued.[35] In a landmark decision the Court ruled in the affirmative.[36] The Court held that the main justification for such an EU-wide application of *ne bis in idem* is mutual trust;

> there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.[37]

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[32] For a more in-depth analysis of the Court's case law on the subject see e.g. V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31(1) Yearbook of European Law 319, 336-349.

[33] See also T. Ostropolski, 'The CJEU as a Defender of Mutual Trust' (2015) 6(2) New Journal of European Criminal Law 166.

[34] Joined Cases C-187/01 and C-385/01, ECLI:EU:C:2003:87, *Gözütok and Brügge*.

[35] *Ne bis in idem*, or the principle of double jeopardy, confers to individuals the right not to be prosecuted or tried twice for the same criminal conduct. Traditionally, the principle functioned only within a single jurisdiction. See e.g. A. Weyembergh and I. Armada, 'The Principle of *ne bis in idem* in Europe's Area of Freedom, Security and Justice' in V. Mitsilegas et al. (eds), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016) 189.

[36] See also M. Fletcher, 'Some Developments to the *ne bis in idem* Principle in the European Union: *Criminal Proceedings Against Huseyn Gozutok and Klaus Brugge*' (2003) 66(5) Modern Law Review 769.

[37] *Gözütok and Brügge*, para 33.

Shortly after *Gözütok and Brügge* the trust presumption was transferred to different situations. The first preliminary questions on the EAW were raised in *Advocaten voor de Wereld*,[38] where the Court was, *inter alia*, asked to rule on the validity of the instrument.[39] The Court upheld the measure and held that the instrument was justified 'on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States'.[40]

However, it turned out that the reach of the trust presumption is not infinite and the Court ruled in *N.S.*,[41] an asylum case (a separate AFSJ policy field, also governed by mutual recognition), that the presumption can be rebutted.[42] By opening up the presumption of fundamental rights compliance to rebuttal, the Court radically altered interstate cooperation in the AFSJ. According to Mitsilegas, this seminal ruling 'constitutes a turning point in the evolution of inter-state cooperation in the [AFSJ]', and 'signifies the end of automaticity in inter-state cooperation not only as regards the Dublin Regulation, but also as regards cooperative systems in the fields of criminal law and civil law.'[43] Peers opined that 'logically, the judgment should apply by analogy to other areas of Justice and Home Affairs law'.[44]

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[38] Case C-303/05, ECLI:EU:C:2007:261, *Advocaten voor de Wereld*.

[39] See also F. Geyer, 'Case Note: *Advocaten voor de Wereld*' (2008) 4 European Constitutional Law Review 149.

[40] *Advocaten voor de Wereld*, para 57.

[41] Joined Cases C-411/10 and C-493/10, ECLI:EU:C:2011:865, *N.S. and others*, 21 December 2011, at 86; see also M. den Heijer, 'Case Note' (2012) 49(5) Common Market Law Review 1735.

[42] The Court held that Article 4 of the EU Charter (prohibition of torture and inhuman or degrading treatment) precludes the transfer of an asylum seeker from one Member State to another in accordance with the Dublin Regulation if there are systemic deficiencies in the asylum procedure and reception conditions in the receiving Member State that give rise to a real risk of violation.

[43] Mitsilegas (fn 32), 358.

[44] S. Peers, 'Court of Justice: The NS and ME Opinions - The Death of "Mutual Trust"?' *Statewatch Analysis* <http://www.statewatch.org/analyses/no-148-dublin-mutual-trust.pdf>.

National courts indeed asked the Court of Justice whether an EAW must be executed when human rights may have been breached,[45] first in *Radu*.[46] But because Radu centred his complaint on the refusal of the German authorities to hear him prior to issuing the warrant, a right not given by the EAW nor the EU Charter, the Court rejected the argument and avoided a ruling on the (wider) contentious issue of refusal to execute a warrant when human rights violations occur in the issuing state.[47] The issue (re-)appeared in various subsequent cases, but the Court held on to a close reading of the trust presumption and the exhaustive system of refusal grounds as set out by the EAW.[48] For a while, the Court managed to carefully manoeuvre around the issue, a stance which has been heavily criticised as it values efficient judicial cooperation on the basis of mutual trust over fundamental rights.[49]

It always seemed likely that sooner or later the question would reappear and needed to be faced head on. And indeed, it did. In *Aranyosi* the question was raised whether refusal of a EAW was allowed in case of surrender to a Member State whose prison conditions are below standard.[50] Under such

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45 The EAW itself contains very little on procedural guarantees. There has been debate about the legal value of the preamble's phrase that the 'Framework Decision respects fundamental rights' (Recital 12), and Article 1(3) reiterates Member States' obligation to respect fundamental rights. But a general fundamental rights clause that allows states to refuse surrender in cases in which such rights would be endangered is absent.

46 Case C-396/11, ECLI:EU:C:2013:39, *Radu*.

47 Advocate General Sharpston in her opinion however came to a different conclusion and defended a general human rights refusal ground. See Opinion of Advocate General Sharpston in Case C-396/11, ECLI:EU:C:2012:648, *Radu*. On the topic see also M. Bose, 'Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant' in S. Ruggeri (ed), *Human Rights in European Criminal Law* (Springer 2015) 135.

48 *See* Case C-399/11, ECLI:EU:C:2013:107, *Stefano Melloni*; and Case C-237/15 PPU, ECLI:EU:C:2015:474, *Minister for Justice and Equality v Francis Lanigan*.

49 See for example M. Ventrella, 'European Integration or Democracy Disintegration in Measures Concerning Police and Judicial Cooperation?' (2013) 4(3) New Journal of European Criminal Law 290.

50 Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, *Aranyosi and Căldăraru*; see S. Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a

conditions, *i.e.* if there is a real and substantial risk of inhuman or degrading treatment because of detention conditions in the issuing state, the Court allows postponement of a EAW. But before such a call can be made, the executing authority will have to request all information necessary on the detention, while deferring execution of the warrant; a final attempt to prevent a conflict by way of direct consultations between cooperating authorities.

Despite the high threshold set by the Court ('real and substantial risk') and the obligation to exhaust all means of communication before a request can be postponed, *Aranyosi* presents a significant departure from earlier cases in which it heavily relied on the closed system of refusal grounds and the strong presumption of mutual trust. For now, it remains to be seen what other human rights defects will justify postponement, and what exactly 'postponement' entails, but most important is that the Court has opened up the opportunity to rebut the trust presumption in the context of the EAW. The Court has in *Aranyosi* for the first time ruled that, like in mutual recognition's other incarnations, such as in the internal market and civil law cooperation,[51] there are limits to its application.

Nevertheless, the importance the Court attributes to the principle of mutual trust in the EU legal order should not be underestimated, as can be illustrated by Opinion 2/13,[52] on the EU's accession to the ECHR.[53] In Opinion 2/13, the Court declared the draft Agreement for Accession to be incompatible with

European Arrest Warrant' (2016) 24(2/3) European Journal of Crime, Criminal Law and Criminal Justice 197.

[51] See G. Tosato, 'Some Remarks on the Limits to the Mutual Recognition of Judicial Decisions in Civil and Criminal Matters within the European Union', (2002) 38(3-4) Rivista di Diritto Internazionale Privato e Processuale 869.

[52] Opinion 2/13, 18 December 2014.

[53] On the EU's accession to the ECHR see P. Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013).

primary EU law.[54] The Court, *inter alia*,[55] expresses concerns that accession could undermine mutual trust, and reiterates that it considers mutual trust to be an essential component in order to create 'an ever closer Union'.[56] The Court furthermore underlines that 'the principle of mutual trust ... is of fundamental importance in EU law',[57] and allows no space for evaluation of other Member State's human rights records, as EU law requires this presumption to be firm.[58] The threat that the ECHR would require Member States to assess each other's human rights compliance would undermine that presumption. A reasoning which does not display great believe in the genuine existence of trust. This view is taken even further when the Court turns the trust 'presumption' into an 'obligation'.[59] An interpretation that seems far removed from what even an everyday notion of trust entails; few would contest that if one would be 'obliged' to trust (under penalty of law) this can no longer be considered genuine trust. Furthermore, it alters the perception of the AFSJ as a legal space found on the protection of fundamental rights.[60]

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[54] The Court found a number of obstacles in the Opinion, which is binding, and has made accession very difficult. See e.g. B. de Witte and S. Imamovic, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court' (2015) 40(5) European Law Review 683. The Opinion has been heavily criticised for seeking to protect basic elements of the EU legal order 'by disregarding the fundamental values upon which the Union was founded', see S. Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16(1) German Law Journal 213, 213.

[55] The concern that mutual trust would be undermined is part of a wider argument that accession would be a threat for the autonomy of EU law and its *sui generis* nature. See also S. Douglas-Scott, 'Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell From the European Court of Justice' (2015) UK Constitutional Law Blog <http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>.

[56] Opinion 2/13, para 167.

[57] ibid, para 191.

[58] ibid, para 192.

[59] ibid, 'EU law imposes an obligation of mutual trust between those Member States'.

[60] See also V. Mitsilegas, 'Judicial Concepts of Trust in Europe's Multi-Level Security Governance' (2015) 3 *EUcrim* 90, 92, 'It thus represents a significant challenge to our understanding of the EU constitutional order as a legal order underpinned by the protection of fundamental rights.'

Instead, the Court presents a view of a system in which fundamental rights protection comes only second after adherence to the notion of mutual trust, rather than the other way around.

5. A Rather Ambiguous Discourse

On first reading, the trust ratio is as simple as the mutual recognition principle itself. Mutual trust is a prerequisite to mutual recognition and is grounded on the presumption that states adhere to the same standards of justice and fairness (mainly in the form of the ECHR). So far so good. However, an assessment of the dynamics of the trust narrative as developed by the various EU actors since the introduction of mutual recognition shows a more troublesome image. The principle of mutual trust has been used in a rather ambiguous and incoherent fashion, and has fluctuated over time and with different actors within the EU, going from a presumption to a rebuttal. This incoherency erodes on the credibility of the discourse.[61]
A distinction can be noticed between the legislative and the executive branches on the one hand, and the judiciary on the other. Whereas the former (mainly the Council and the Commission, but also the European Parliament by pushing for comprehensive procedural rights measures) relatively soon after Tampere reversed the trust presumption into a lack of trust presumption and called for additional trust building measures, the CJEU has long remained a stronghold of the trust presumption and regards mutual trust a principle of fundamental importance in EU law. Observing the EU's trust narrative an evolution can be noticed though; from a high level of confidence and a strict trust presumption to a rebuttal and more leeway for Member States to derogate from mutual recognition. On the legislative side this evolution can be illustrated by the development from the EAW to the EIO, and on the side of the CJEU from *Gözütok and Brügge* and *Radu* to *Aranyosi*. But besides discussions on whether trust exists, the actual meaning of the concept remains elusive. Illustrative for the ambiguous and loose nature of the discourse is the interchangeable use of terms as trust and

[61] See also Vermeulen (fn 8), 'the credibility of the EU's discourse on the matter (and therefore its moral authority, which is grounded on it) will undeniably be significantly compromised when it is marked by manifest contradictions or illogicality, flagrant ambiguousness or plain conceptual incoherence', 153.

confidence,[62] the many different relations in which trust is supposed to play a role (horizontal, vertical) and generic phrases as 'a climate' and 'a spirit' of trust. The lack of conceptual clarity has not been raised by EU actors as being problematic and the contradictory terms trust presumption and trust building have over the years become strongly embedded in the EU criminal justice vocabulary, leading to a mutual trust dichotomy.

III. The Reception of Mutual Trust in Academic Literature

1. Challenging the Trust Presumption

Mutual trust as a principle of EU criminal law has been embraced not only at EU level, but also in the ensuing literature. The idea that mutual trust is a prerequisite for a successful functioning of mutual recognition in criminal justice matters has largely been accepted.[63] At the same time, the presumption of mutual trust has been criticised for lacking foundation.[64] For example, Konstadinides 'argues that "mutual recognition" does not necessarily imply mutual trust'.[65] While it was initially 'hoped' that the

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[62] Walker (fn 14).

[63] See for example O. de Schutter, 'The Two Europes of Human Rights: The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe' (2008) 14(3) Columbia Journal of European Law 509, 542; H. Nilsson, 'Mutual Trust and Mutual Recognition of our Differences. A Personal View' in G. de Kerchove and A. Weyembergh (eds), *La Reconnaissance Mutuelle des Décisions Judiciaires Pénales dans l'Union Européenne* (Editions de l'Université de Bruxelles 2001) 155, 158.

[64] See e.g. Carrera et al. (fn 7), 'It is argued that the next generation of the EU's criminal justice cooperation and the EAW need to recognise and acknowledge that the mutual trust premise upon which the European system has been built so far is no longer viable without devising new EU policy stakeholders' structures and evaluation mechanisms. These should allow for the recalibration of mutual trust and mistrust in EU justice systems in light of the experiences of the criminal justice actors and practitioners having a stake in putting the EAW into daily effect'.

[65] T. Konstadinides, 'The Europeanisation of Extradition: How Many Light Years Away to Mutual Confidence?' in C. Eckes and T. Konstadinides (eds), *Crime Within the Area of Freedom, Security and Justice: A European Public Order* (CUP 2011) 192, 194; see also M. Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47(2) Common Market Law Review 405, 419; and P. Asp, 'Basic Models of a European

'Member States of the European Union now have reached the level of faith and trust to enable them to accept all of its consequences',[66] it was not long until it turned out that reality was more nuanced. Or, in the words of Vernimmen and Surano; 'mutual trust was simply assumed to exist ... in reality, this trust is still not spontaneously felt and is by no means always evident in practice'.[67]

The trust presumption rests on an equivalence presumption, and in the criminal law sphere this equivalence relates to the quality of judicial decisions and procedural safeguards. Because of large differences between national criminal law systems, in particular in procedural systems of protection,[68] and little regard to individual rights in mutual recognition instruments (mainly the EAW), this ground turned out to be rather shaky. Alegre and Leaf were early to recognise these impending problems, and prior to EU wide application of the EAW warned that serious human rights concerns would arise in applying mutual recognition to the field of criminal justice cooperation.[69] The issue of fundamental rights is regarded as fundamental to the viability of mutual recognition; the idea is that if the safeguarding of defence rights throughout the EU is insufficient, the trust basis is absent and so is the fundament of the mutual recognition project.

Penal Law: Mutual Recognition, Cooperation, Harmonisation' (2008) 4 Europäischer Juristentag 259, 264.

66 Nilsson (fn 63), 158.

67 G. Vernimmen-Van Tiggelen and L. Surano, 'Analysis of the future of mutual recognition in criminal matters in the European Union' (2008) Institute for European Studies, Université Libre de Bruxelles 20, <http://ec.europa.eu/justice/criminal/files/mutual_recognition_en.pdf>.

68 See for example, S. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007), 3; E. Cape, Z. Namoradze, R. Smith and T. Spronken (eds), *Effective Criminal Defence in Europe* (Intersentia 2010); and J. Hodgson, 'EU Criminal Justice: The Challenge of Due Process Rights Within a Framework of Mutual Recognition' (2011) 37(2) North Carolina Journal of International Law and Commercial Regulation 307.

69 S. Alegre and M. Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—the European Arrest Warrant' (2004) 10(2) European Law Journal 200.

There are various fundamental rights related issues that have led to the conclusion that the trust basis is indeed lacking. An example is the proportionality problem,[70] *i.e.* the systematic issuing of high numbers of EAW's for petty crimes by some Member States.[71] Another 'trust' related issue has been in relation to *in absentia* judgments, which has led to amendment of the EAW in 2009.[72] Other examples that can be mentioned are (poor) prison conditions and the (excessive) length of pre-trial detention. Furthermore, a number of non (or non-directly) fundamental rights related 'signals' of distrust have appeared in literature. Prominent 'expressions of distrust' include;[73] the (poor) implementation of the EAW,[74] the constitutional challenges in various Member States to the validity of the EAW,[75] and the EAW's (partial) abolition of double criminality.[76]

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[70] In its 2011 report the Commission observed that confidence in the application of the EAW had been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of very minor offences, see COM (2011) 175 final; Carrera et al (fn 7), argue that the proportionality issue presents one of the major challenges to mutual trust, 19-21.

[71] For more on proportionality see E. Xanthopoulou, 'The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment' (2015) 6(1) New Journal of European Criminal Law 32.

[72] See Council Framework Decision 2009/299/JHA of 26 February 2009, OJ L81/24; see also M. Bose, 'Harmonizing Procedural Rights Indirectly: The Framework Decision on Trials in Absentia' (2011) 37(2) North Carolina Journal of International Law and Commercial Regulation 489.

[73] E. van Sliedrecht, 'The European Arrest Warrant: Between Trust, Democracy and the Rule of Law' (2007) 3(2) European Constitutional Law Review 244, 245.

[74] See M. Fichera, *The Implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice* (Intersentia 2011).

[75] See E. Guild (ed), *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers 2006); E. Guild and L. Marin (eds), *Still Not Resolved: Constitutional Issues of the European Arrest Warrant* (Wolf Legal Publishers 2009).

[76] According to Tomuschat, the abandonment amounts to a mutual vote of mistrust, see C. Tomuschat, 'Inconsistencies - the German Federal Constitutional Court on the European Arrest Warrant' (2006) 2(2) European Constitutional Law Review 209, 225.

2. Mistaken Analogy: The AFSJ Is Not the Internal Market

A common theme in literature has been to seek comparison with the application of the principle of mutual recognition in other policy fields, most notably the internal market sphere,[77] the origin of the principle.[78] The simple transfer of mutual recognition and the analogy between policy fields as alleged by the EU was met with heavy criticism. The two main arguments that have appeared are; the 'harmonisation argument' and the 'qualitative difference argument'.[79]

Regarding the first, according to Peers, simply transferring the principle from the internal market to criminal matters 'might appear unexceptional', 'however, on closer examination, those analogies are deeply flawed', 'because the Council has made the error of assuming that the underlying law need not be comparable'.[80] Those 'underlying laws' do indeed need to be 'comparable' as 'mutual recognition in the internal market was only successful due to the high level of harmonisation that already existed'.[81]

The second main argument against the simple analogy, the 'qualitative difference argument', centres on the fundamental difference between criminal law and market integration. When zooming in on requirements or presumptions of trust in the operation of mutual recognition, significant differences appear. While in the internal market product requirements have to be recognised, which indeed can have serious repercussions for consumer health and safety, criminal law cooperation has even more serious consequences as it involves individuals subjected to disadvantageous or even coercive measures of a foreign state, and as such interferes with fundamental

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77 For a comparison of mutual recognition in the two policy areas see Janssens (fn 2).

78 Mutual recognition was 'invented' by the CJEU in the EU internal market context, in relation to freedom of goods (product requirements) in Case-120/78, ECLI:EU:C:1979:42, *Cassis de Dijon* and gradually expanded to cover other Community policy areas such as the free movement of services, and mutual recognition of diplomas.

79 See also C. Murphy, 'The European Evidence Warrant: Mutual Recognition and Mutual (Dis)trust?' in Eckes and Konstadinides (fn 65) 224, 226.

80 S. Peers, 'Mutual Recognition and Criminal Law in the EU: Has the Council Got it Wrong?' (2004) 41(1) Common Market Law Review 5, 5.

81 Murphy (fn 79), 226.

rights. Therefore, mutually recognizing each other's judicial decisions is more demanding than recognizing goods regulations.[82]

The *subject* of trust (product requirements vs. human rights) thus differs significantly, the *logic* underlying the notion of trust however (the equivalence presumption) is similar. As an illustration to underline the difference, think of the different 'trust' required when someone asks you to borrow your pen or your brand new car. Whereas the former might not be much of a problem, the latter would only occur in more developed relations. By analogy, the same can be said for cooperation in criminal justice matters; a specific type of relation is at stake.

3. General EU Principle of Mutual Trust

The principle of mutual trust is not exclusive to the EU's involvement in criminal justice matters and has long been regarded relevant for EU law.[83] In fact, the principle has relevance for interstate relations more widely, and in international relations theory mutual trust between states is regarded a precondition for stable relations based on expectations about other states' behaviour.[84] The same can be said for the recognition of foreign criminal judgments more broadly.[85]

In the wider EU context, the principle of mutual trust has a similar meaning and is linked to expectations and predictions of how other Member States will act. Its weight has steadily increased over the years and 'has been brought up with increased frequency ... in the European political/legal debate'.[86]

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[82] See also S. Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007) 14(5) Journal of European Public Policy 762.

[83] The principle of mutual trust has been described as being 'at the heart of the European Union', Eijsbouts and Reestman (fn 16), 1.

[84] See for example A. Hoffman, 'A Conceptualization of Trust in International Relations' (2002) 8(3) European Journal of International Relations 375.

[85] See M. Plachta, 'The Role of Double Criminality in International Cooperation in Penal Matters' in N. Jareborg (ed), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag 1989) 84, 118.

[86] P. Cramér, 'Reflections on the Roles of Mutual Trust in EU Law' in M. Dougan and S. Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009) 43, 43.

Mutual trust is in its core a mechanism to ensure compliance with EU law, or maybe better; to explain compliance. Underlying this notion is either a (sufficient) level of comparability of national laws or EU legislation to ensure that national laws are comparable. As abstract as the notion of trust itself is the question what constitutes a 'sufficient level' of comparability. This differs from one policy area to another, and even within a single policy area differences appear between various types of measures (recognition of an extradition request requires different safeguards than recognising out of state evidence). This leads to various notions of trust, in other words, trust functions differently in the various EU policy fields.

4. Calls for Further Development of Mutual Trust

Ever since the EU's involvement in criminal justice matters, it has been hard to find academic literature on the topic that does not somehow mention the term trust. Literature on the issue of trust has often focused on the absence of grounds on which it is supposed to be founded, mainly in the form of procedural rights. Normative development of the concept of mutual trust in the particular EU criminal justice context has come about more slowly.[87] The hiatus has not gone unnoticed though and recently concerns have been raised and the need for development of the principle has been underlined. Herlin-Karnell for example, holds that the lack of 'articulation of what mutual trust actually means in the field of criminal law' poses 'a significant lacuna in EU criminal law cooperation'.[88] And Ostropolski, while speaking of the importance of a principle of mutual trust, recognises that it 'lacks an explicit normative basis'.[89] The recognition of this 'lacuna' is certainly a first step

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[87] For accounts of mutual trust see for example D. Flore, 'La notion de confiance mutuelle: l' <alpha> ou l' <omega> d'une justice pénale européenne?' in de Kerchove and Weyembergh (fn 9) 17; G. Stessens, 'The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Justice and Security' in G. de Kerchove and A. Weyembergh (eds), *L'espace pénal européen: enjeux et perspectives* (Editions de l'Université de Bruxelles 2002) 93; V. Mitsilegas, 'Judicial Concepts of Trust in Europe's Multi-Level Security Governance' (2015) 3 EUcrim 90; and Vermeulen (fn 8).

[88] E. Herlin-Karnell, 'Constitutional Principles in the Area of Freedom, Security and Justice' in D. Acosta Arcarazo and C. Murphy (eds), *EU Security and Justice Law After Lisbon and Stockholm* (Hart Publishing 2014) 38, 42.

[89] Ostropolski (fn 33), 166.

towards filling it, and calls for such development have become more urgent with the increasing use and importance of the term. Fichera has made an attempt to define trust in non-legal terms, but at the same time he stressed that 'future policies and strategies' should take into account that 'mutual trust in European criminal law is not uniformly developed'. [90] A warning that has not been given due consideration by EU policy makers. In a wider EU context, Cramér 'believe[s] that analysing the functions of mutual trust in the European integration process has the potential to be a fruitful endeavour that might further our understanding of the development and functioning of EU law'.[91] This statement seems particularly relevant for the EU criminal law context considering the central function of mutual trust and the pace of development in the field, and strengthens the proposition that the EU's discourse leaves much to be desired and underlines the importance of the concept of trust for the further development of the AFSJ.

IV. Trust as a Social Construct

In order to improve our understanding of mutual trust in the specific environment of EU criminal justice cooperation, it might be useful to take a step back and look at what elements of social trust it actually entails. Mutual trust is not a principle of law that can be closely defined, but is in essence a social construct.[92] The term trust in the EU context is often used in the vernacular, as if clear in itself, but as has been demonstrated in the above, it is far from.

In its broadest form, trust is typically described as the reliance on another person or entity. Trust can be attributed to relationships between people, but

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[90] M. Fichera, 'Mutual Trust in European Criminal Law' (2009) 10 University of Edinburgh Working Paper Series, 19.

[91] Cramér (fn 86), 44, furthermore, he believes 'that further investigation of mutual trust between actors within the EU in relation to the functioning of EU law has the potential to provide us with insights that may enhance our ability to understand the dynamics of EU law and European integration at large', 60.

[92] See also Fichera (fn 90), mutual trust is 'a non-legal term' and 'a sociological approach may be helpful to elaborate a concept that can be applied in a legal-political context', 19.

also to relationships within and between social groups and entities. The broad relevance of trust is accurately described by Gambetta:

> the importance of trust pervades the most diverse situations where cooperation is at one and the same time a vital and fragile commodity: from marriage to economic development, from buying a second-hand car to international affairs, from the minutiae of social life to the continuation of life on earth.[93]

Hence trust is studied in most of the social science disciplines, including history, philosophy and political science. It is important to note that there is not one overarching definition of trust, but that trust takes upon different meanings and forms in the various disciplines. This section will identify four core elements (or indicators) of trust literature that can be used to clarify what trust entails in the specific EU criminal justice sphere.[94] It will be demonstrated that trust as it functions in EU criminal justice cooperation does not fit tightly with the concept of trust as developed in social science literature. Some core elements can be attributed to trust in the area of cooperation under examination, while others are harder to locate.

1. Willingness to Take Risks

The first indicator of trust highlighted here is risk. There is agreement amongst scholars that the willingness to take risks, or the idea that trust '*refers* to an attitude involving a willingness to place the fate of one's interests under the control of others', constitutes an important element of trust relationships.[95] Elster defines this important aspect of trust relationships in the following way; 'to trust someone is to lower one's guard, to *refrain from taking precautions against an interaction partner*, even when the other, because of opportunism or incompetence, could act in a way that might seem to justify precautions'.[96] This behavioural definition of trust requires a double

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[93] D. Gambetta, 'Foreword' in D. Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell 1988).

[94] This is by no means an effort to comprehensively cover trust, but rather an exercise to highlight the value of an inter-disciplinary perspective.

[95] Hoffman (fn 84), 376-377.

[96] J. Elster, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences* (CUP 2003), 344.

abstention; 'one party's refraining from precautions in the hope that the other will refrain from opportunistic behaviour'.[97] According to Heimer, trust comes into play in situations involving both the vulnerability of one party to the other and the uncertainty of the trustee,[98] and she regards vulnerability and uncertainty as the core elements of a trust relationship. In a trust relationship the truster always runs a risk of betrayal,[99] if this risk is removed from cooperation trust is no longer a problem.

When translated to EU interstate relations, more in particular in the framework of the EAW, several precautions have been taken to minimise the risk involved. Both in accordance with the EAW's mandate (the grounds for refusal listed in the EAW), and contrary to it, such as a general human rights refusal ground.[100] Therefore, the risk involved when cooperating on the basis of the EAW is limited. Member States have prior to embarking on cooperation negotiated a document containing specific rules on when a request has to be executed, leaving minimal leeway and a relatively high degree of certainty. 'Mechanisms that create certainty about a potential trustee's future behavior replace the need for trust in relationships,' and 'make betrayal impossible'.[101] Therefore, this important element of a trust relationship does not fully appear in EU criminal justice cooperation. Member States have not shown full 'willingness to place the fate of one's interests under the control of others',[102] and actors are, to a large extent, barred from opportunistic or incompetent behaviour, minimising the risk involved. That is not to say that trust is not involved at all, but that the issue of trust is not clear-cut; trust is required for certain acts on which the

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97 ibid.

98 C. Heimer, 'Solving the Problem of Trust', in K. Cook (ed), *Trust in Society* (Russell Sage Foundation 2003) 40.

99 See for example A. Baier, 'Trust and Antitrust' (1986) 96(2) Ethics 231.

100 For example the UK, section 21(1) of the Extradition Act 2003, requires the judge who is otherwise required to proceed to order the surrender of a wanted person to 'decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998'; another example is the Netherlands, see art 14 Overleveringswet.

101 Hoffman (fn 84), 378.

102 ibid, 376-377.

cooperating Member State could err, but if the margin for error is completely removed, trust is no longer required and has been replaced by certainty.

2. Interest

A second important indicator of trust relationships highlighted here is that of interest. In a trusting relationship, which at minimum consists of two parties, a trustor and a trustee, both parties can be assumed to be 'purposive', meaning that they both aim to satisfy their interests.[103] An important reason to enter into a trusting relationship is to satisfy an interest, or even stronger, interests are likely to be 'the whole point' of many relationships.[104] There is 'strong agreement' in trust literature that 'the decision to entrust one's interests to others is usually based on the belief that the fulfilment of that trust will make the trustor better off'.[105] This can be easily felt when we think of our own experience with trust relationships; actors will likely choose strategies that serve their self-interest.[106]

This element of a trust relationship is evident in EU (criminal justice) cooperation. Member States initially decided to enhance interstate cooperation in criminal matters to be better equipped to combat cross-border crime, a common interest. More specific interests are served by the various cooperation instruments such as the EAW (returning fugitives from justice), but can be grouped under the general goal of strengthening criminal law enforcement and creating a borderless AFSJ. This example does not allow for a definitive conclusion as to whether a relation can be labelled 'trust relation', but merely serves the purpose of showing an aspect of a trust relation.

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[103] J. Coleman, *Foundations of Social Theory* (The Belknap Press of Harvard University Press 1990), 96.

[104] See R. Hardin, 'Conceptions and Explanations of Trust', in Cook (fn 98) 3, 8.

[105] Hoffman (fn 84), 382.

[106] Alternatively, there are accounts that hold trust is grounded in a strong moral commitment to fulfil certain kinds of trust (the belief that trusting is a good thing in its own right). These cases of trust do indeed exist in social life (even though they do not characterise the majority of trust relationships), but will be difficult to find in inter-state cooperation. For an account that considers morally motivated actions to be part of trust, see for example D. Messick and R. Kramer, 'Trust as a Form of Shallow Morality', in Cook (fn 98) 89.

3. Differentiating Between Trust and Trustworthiness

A third element, or maybe more accurate distinction that has to be made when speaking of trust, is to differentiate between trust and trustworthiness. It is a common conceptual slippage not to do so, not only in ordinary language use, but also in trust literature.[107] Simply put; 'if everyone we interact with were trustworthy, there would be no problem of trust'.[108] The assessment of trustworthiness and the act of 'trusting' someone are two separate steps. The use of trust often refers to the entire trusting relationship, both the trusting and the trustworthiness.[109] Statements as 'trust has to be strengthened', 'fostered' or 'enhanced' are examples of such slippage. After all, moving actors towards trusting if the trustee is not trustworthy can be seen as perverse. The most compelling reason for this slippage 'is that *trustworthiness commonly begets trust*.'[110] The use of trust and trustworthiness as one 'combined' concept can be easily explained considering that something that causes trustworthiness will possibly lead to trust. The two are not distinguished from each other since they are connected. It is however necessary to make this distinction considering these are two different aspects of a trust relationship. One might be trustworthy, but you might never act upon it, but there could equally be cooperation with a non-trustworthy actor, especially if the room for choice is narrow or lacking at all.

Much of the concern with trust in the EU criminal law context is actually concern over the lack of trustworthiness. The EU is currently asserting to 'build trust' with for example the Roadmap. But these seem more like attempts to increase trustworthiness. It is not necessary that these will lead to trust.

There can be many different reasons why someone (this includes groups and entities) is perceived as trustworthy. Important in this light is information.[111]

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[107] Hardin (fn 104), 16.

[108] K. Cook, 'Trust in Society', in Cook (fn 98), xiv.

[109] Hardin (fn 104), 16.

[110] ibid, 17.

[111] See also Alegre, 'mutual trust must be based on mutual knowledge that such trust is reasonable', as it can take away 'the blindfold'. S. Alegre, 'Mutual Trust- Lifting the Mask' in de Kerchove and Weyembergh (n9), 41, 43.

Expectation is essential in most accounts of trust, meaning that trust follows on the expectation that a truster has; 'trust is ... inherently a matter of knowledge or belief'.[112] Of course we often trust or distrust for bad reasons. It is important to stress that when speaking of reputation, we essentially speak of reputation for trustworthiness, not trust. As said, trusting necessarily involves taking risks, and 'actors that fail to accurately assess their counterparts' reliability are more likely to have their interests betrayed'.[113] The danger of betrayal can be reduced by improving both the amount and quality of information available about cooperation partners. Information is key in enhancing trustworthiness.[114] In the EU context there currently seems insufficient information on the various national legal systems at play in the AFSJ in order to make a fair assessment of trustworthiness.

4. Trust Is a Three-Part Relation

A last aspect highlighted here is that trust is a three-part relation; A trusts B to do X.[115] Trust relationships are never unconditional; therefore, all three parts are necessary. It does not make much sense to simply state that A trusts B. In order to clarify the underlying logic of the trust relation and to be precise about what we mean we have to always be able to add the 'to do x' part to the equation. A might trust B to do X and Y, but not to Q and R. In other words, trust is very much contextual.

In contrast, there are theories of trust that suggest trust between parties can be general, thus a two-part relation that takes the form 'A trusts B'.[116] However, there are not many relationships in which a truster has unconditional trust in the trustee, hence the three-part relation is the stronger argument.[117]

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[112] Hardin (fn 104), 7.

[113] Hoffman (fn 84), 379.

[114] Of course, the opposite can also be true when this information shows that the other party is not worthy of trust; see also Alegre (n111), 45.

[115] Hardin (fn 104), 12-16.

[116] See e.g. R. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon and Schuster 2000).

[117] One possible argument to the contrary could be that the three-part relation of trust 'makes it seem that the list of issues over which A trusts B is known in advance, but in practice this is rarely the case.' However, the 'list' does not have to be known in

The addition of the 'X' is particularly important for the type of trust we are analysing, since mutual recognition operates in an *ad hoc* manner, meaning that cooperation takes place only in those areas designated by specific legislation. Trust is thus only required for these specific acts. Mutual recognition does not function in a broad manner, *i.e.* Member States are not required to trust every single aspect of the other legal systems. In order to make valid, and more importantly, meaningful statements about trust between EU Member States it always has to be specified to what 'action' exactly this trust refers. Increased specificity might make it easier to comprehend the 'trust problem' and to form policies in accordance, as it filters out a lot of unnecessary noise. Therefore, the abstract idea that some form of generalised trust is required in order to enhance judicial cooperation in criminal matters is not only inaccurate, it also clouds the reality that in order to make specific aspects of judicial cooperation work, specific supporting measures are required. Such a perspective makes the trust building policy more comprehensible and might lead to more concrete goals.

5. Why Are We Even Speaking of Trust?

The above has shown that what is labelled mutual trust in the EU criminal law context is not a clear-cut example of what a trust relationship is according to social science literature on the topic. For example, the important element of risk (a core part of trust) is minimised by pre-existing legal arrangements. At the same time, it is clear that the relations at stake serve a particular interest and fulfil this element of trust relations. As such we might consider the trust at issue to be a *species* of the *genus* social trust, not a stereotypical application of the concept of trust, but one with specific characteristics in the EU criminal justice context. Hence, trust in this particular context has a meaning that differs from everyday notions of trust, and therefore a policy to build or enhance trust should answer to its specific needs. Social science literature on trust can help in achieving this by showing where trust is at stake, and where it is not. In case it is the latter, it should be questioned whether legislative instruments to build trust should be employed, as these have far reaching consequences for national criminal law, something which should be kept to a minimum in line with mutual recognition's rationale. In the current discourse

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advance, it can develop over time and the 'X' will present itself when examining an ongoing relationship, see Hoffman (fn 84), 378.

trust relates to pretty much everything that stands in the way of a successful functioning of mutual recognition, in this sense it is a collective term. While this is convenient for policy makers and legislators, *i.e.* the answer to every problem is trust (or better a lack thereof), it is not very helpful in furthering the establishment of an AFSJ.

V. Mutual Trust, a Term of Art

Mutual trust in the EU criminal justice sphere thus has a meaning and function specific to its environment, and does not in every possible sense link with the social construct that trust is. Therefore, a social science perspective only tells part of the story and mutual trust consists of additional elements. This section will highlight a number of its core elements, supporting the idea that mutual trust is a term of art in the EU criminal justice environment.

1. Fundamental Rights

The core of mutual trust in the EU criminal law sphere is its link with fundamental rights. The meaning attributed to mutual trust in literature largely comes down to 'the relationship between the level of harmonisation (in sense of "harmony") of procedural law and procedural safeguards on the one hand, and the level of mutual trust as a condition for successful mutual recognition on the other'.[118] Criticism has mostly focused on the (false) presumption of trust, by pointing to the widespread and often poor provision of defence rights throughout the EU,[119] and the absence of a (explicit) fundamental rights refusal ground in the EAW. The CJEU has recently for the first time allowed to derogate from mutual recognition when fundamental rights will be violated.[120] If the Court continues this line of reasoning there might be more instances in which refusal would be permitted. A positive development in light of safeguarding fundamental rights in an AFSJ and recognition of the different realities within this area, as, argued by Mitsilegas, mutual trust does not only follow on the existence of

[118] Vernimmen-Van Tiggelen and Surano (fn 67), 10.

[119] See n 68.

[120] In *Aranyosi*, see section II.4.

fundamental rights, but also *vice versa*.[121] Mutual trust and the safeguarding of defence rights throughout the EU could actually be enhanced by recognising limits to its presumed existence, contrary to the Court's earlier line of cases in which it contended that any limit to the presumption of trust would hinder the implementation of mutual recognition. In light of these recent developments, the process to mitigate the fundamental rights critique seems to have really taken off. But, while fundamental rights might indeed form the core of a concept of mutual trust in criminal justice cooperation, the concept entails more than just the link with fundamental rights and the quest to harmonise these standards.

2. Reciprocity

Reciprocity is an example of another core aspect of the principle of mutual trust. As aptly described by Fichera 'mutual trust can be intended as the reciprocal belief that others' behaviour will not violate the basic common principles that lay at the heart of the EU legal systems.'[122] The idea of reciprocity is that while the EU lacks a general mechanism to enforce its legislation, Member States more frequently than not comply with EU law.[123] One explanation for this high degree of loyalty with EU law is the expectation that all other Member States implement and apply EU law in the same efficient manner. Without this expectation, the Union would not function as it does today, 'accordingly, all Member States have a self-interest to comply in order to safeguard the stability of the system'.[124] Yet, the CJEU has held that the principle of reciprocity does not have legal status in the Union. In *Hedley Lomas*, the Court ruled that a Member State cannot unilaterally decide to relieve itself of its obligations under Union law because another Member State has breached its obligation.[125] In its decision the Court emphasised the

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[121] Mitsilegas speaks of a 'symbiotic relationship' and identifies several dimensions to the relation mutual trust-fundamental rights, see V. Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Freedom, Security and Justice' (2015) 6(4) New Journal of European Criminal Law 457.

[122] Fichera (fn 74), 207.

[123] Eijsbouts and Reestman (fn 16), 1.

[124] Cramér (fn 86), 53.

[125] Case C-5/94, ECLI:EU:C:1996:205, *Hedley Lomas*, para 20.

need for mutual trust between Member States,[126] and by doing so distinguished reciprocity from mutual trust. This decision is understandable when thinking of the consequences of giving formal status to reciprocity; if one Member State for whatever reason errs in its obligations under EU law, this would threaten the whole system. That is not to say there is no role for reciprocity, it functions more at the level of a state's psyche, namely it has an interest in cooperation for the sole reason that other Member States do the same, and since they have that same interest this will not easily lead to problems. Only the most fundamental concerns might lead Member States to disobey and risk jeopardising this harmony or *status quo*.

Reciprocity underlying compliance is a common mechanism in theories of international relations and public international law.[127] Whereas the EU might have limited enforcement powers, on the international level this is even more so as a global government is lacking. Reciprocity is widely accepted as a standard of behaviour which can produce cooperation among sovereign states.[128] Reciprocity is thus an important factor in explaining cooperation between sovereign actors based on self-interest.

In the criminal law sphere, more in particular the EAW, reciprocity has no formal status, yet it forms an important aspect of mutual trust in this context. A concrete example of reciprocity in the EAW context was Spain's reaction to Germany's temporary suspension of the EAW pending constitutional amendment. Spain, invoking reciprocity, declared that it would no longer execute EAW's, and that it would process requests from Germany under the 'old' pre-EAW legal framework.[129]

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[126] ibid, para 19.

[127] See e.g. R. Keohane, 'Reciprocity in International Relations' (1986) 40(1) International Organization 1.

[128] Or as Zoller puts it, reciprocity 'is a condition theoretically attached to every legal norm of international law', E. Zoller, *Peacetime Unilateral Remedies* (Transnational Publishers 1984).

[129] See Z. Deen-Racsmány, 'The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges' (2006) 14 European Journal of Crime, Criminal Law and Criminal Justice 271, 300.

The idea that states have a common interest in suppressing international (cross-border) crimes is the foundation of *why* states would engage in international cooperation in criminal matters.[130] If states want to successfully fight crime, especially in a globalising world without borders, cooperation is a necessity, and reciprocating other states' assistance and efforts in doing so becomes a must. Trust as a mechanism explaining cooperation refers to this self-interest and reciprocity. In the end, Member States would not engage in a measure such as the EAW if their actions would never be reciprocated, when they extradite a suspect under the EAW, they 'trust' that next time when they themselves request a person under the scheme, that effort is returned.

3. The Loyalty Principle

The loyalty principle,[131] or the principle of sincere cooperation, is a fundamental principle of EU law and has been central in shaping the EU's legal order. Particularly relevant in the early stages, when obligations were not as inclusive as they are nowadays, but the principle has never left the institutional stage. Member States show a high degree of loyalty with EU law, despite the lack of a general enforcement mechanism. This can partly be ascribed to (a degree of) trust and the expectation that other Member States will act in a similar manner. As such loyalty is an outcome of trust and reciprocity. The principle carries weight particularly in the criminal law sphere, as its development has been piecemeal, and enforcement opportunities have slowly improved, but are still incomplete.[132] Fichera regards the principle of loyal cooperation as 'the basis of mutual trust and mutual recognition'.[133] The link between loyalty and reciprocity is more precisely the 'belief that others' behaviour will not violate the basic common

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[130] This idea dates back to Grotius, see H. Grotius, '*De Jure Belli ac Pacis*, Volume 2, Chapter XXI, Sections III and IV' in J. Brown Scott, *The Classics of International Law* (The Carnegie Institution 1925, translated by F. Kelsey) 526.

[131] The loyalty principle has been codified in Article 4(3) TEU. See also M. Klamert, *The Principle of Loyalty in EU Law* (OUP 2014).

[132] From 1 December 2014, the Commission can use its infringement powers in the field of police and judicial cooperation in criminal matters.

[133] Fichera (fn 90), 12.

principles that lay at the heart of the EU legal systems'.[134] So (receiving) loyalty has a price, namely acting loyal. This circularity can also be found in the concept of trust, in order to be trusted one has to act trustworthy. Somewhere in that chain a leap has to be taken in order to overcome the initial deficit. In this sense it helps that loyalty (or 'sincere cooperation') has the status of a legal principle and Member States are bound to 'assist each other in carrying out tasks which flow from the Treaties'. Therefore, when Member States are acting 'insincere', *i.e.* not in accordance with their obligations under the Treaties or secondary law, they breach a legal obligation. And even though the drafters have chosen to keep the term trust out of the formal sphere of the Treaties, the loyalty principle has been described as consolidating the concepts of 'trust, solidarity and respect'.[135] The (three) concepts are regarded as inextricably linked, and in order for Member States to operate loyally, trust is required.

According to Herlin-Karnell, the 'elasticity of the loyalty principle' is at the core of the interpretation of mutual trust.[136] It is indeed a question of how much loyalty national courts are willing to show, and as evidenced by the case law on the EAW there are limits as to this, even without a formal ground to review the compatibility of the EAW with human rights. Examples as these reveal the parameters within which cooperation on the basis of mutual trust operates, and that as much as mutual trust is limited, the principle of loyal cooperation is too.

4. The Equivalence Presumption

An important aspect of trust is (its relation with) the equivalence presumption.[137] The presumption originates in the internal market application of mutual recognition, namely that national regulation may be different, but equivalent. In the criminal law sphere, the subject of equivalence is different, market regulation can be substituted for procedural safeguards in criminal proceedings, but the logic is the same. The equivalence

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[134] ibid, 13.

[135] Janssens (fn 2), 151.

[136] E. Herlin-Karnell, 'From Mutual Trust to the Full Effectiveness of EU Law: 10 Years of the European Arrest Warrant' (2013) 38(1) European Law Review 79, 80.

[137] See also Fichera (fn 90), 14.

or comparability presumptions are underlying or even equal to the trust presumption, and as such lead to a double presumption. In this regard it has to be noted that the equivalence presumption in the criminal sphere is more absolute than in the internal market and allows for few exceptions.[138]

The specific degree of equivalence required for smooth cooperation is not known from the outset, and even if it would, this will be hard to express or measure (possibly in terms of minimum requirements). But given that Member States enter into cooperation, at least the general perception is that there is sufficient equivalence. More specifically this has to be established in practice, *i.e.* by trial and error. The degree of equivalence required for a specific measure will thus be exposed by the process started with the negotiation of an instrument to its application in practice. This process is a manifestation of the flexible nature of trust; the institutional architecture therefore has to allow that its limits are dynamic and subject to negotiation and limitation where necessary. This can in turn serve as a mechanism that will point out in what specific areas harmonisation, i.e. greater equivalence, is required.

One important distinction that has to be made here is that equivalence is different from compliance. There will largely be equivalence as to fundamental rights standards within the EU (all states are bound by the ECHR), however when it comes to compliance with these standards, large differences appear. This is linked to the distinction, frequently made in literature, between trust *in abstracto* and trust *in concreto*.[139] The equivalence presumption does nothing more than presuming that standards, even though different, are equivalent - a formalistic or *in abstracto* approach. The question whether these are correctly applied in practice is a different one and can be described as *in concreto*. So it can be said that while trust may (be presumed to) exist *in abstracto*, there are signals that trust *in concreto* is more problematic.[140]

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[138] See Tosato (fn 51).

[139] See for example Janssens (fn 2), 141-144.

[140] See J. Ouwerkerk, 'Mutual Trust in the Area of Criminal Law', in Meijers Committee, *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law* (2011) 38, 47.

VI. The Hybrid Character of Mutual Trust

In the above, several elements of the principle of mutual trust in the EU criminal justice context have been identified. Broadly speaking, these could be grouped into 'social' and 'legal-political' elements. When these two groups of elements are brought together, a complete, and arguably hybrid image of trust appears. On the one hand elements which in social science literature have been attributed to a concept of (social) trust, on the other elements which are more particular to the surroundings of EU cooperation, or even more specifically to EU criminal justice cooperation. It is important to value both sides or aspects of mutual trust equally since treating trust as if purely legal-political would raise false expectations. The power to control and steer trust by means of legislation is only a limited one, and a wide variety of factors impact on its existence. The role of trust building legislation is to create the conditions for Member States to be trustworthy. But if one thing, trust cannot be forced. Therefore, a conclusive presumption as for example in Opinion 2/13 is not constructive. The path chosen by the Court in *Aranyosi*, namely to open up the presumption to rebuttal, is more likely to enhance trust by stimulating dialogue and in the process improving trustworthiness.

On the legal and political side, mutual trust has emerged as a core principle in the development of the field labelled as EU criminal law and is widely regarded to be a prerequisite for mutual recognition-based cooperation. It had already gained relevance for EU law long before and trust might be the very reason why Member States cooperate to begin with. In the context of the AFSJ, the principle has a slightly different meaning from its application in other EU policy fields, mainly because of the nature of the issues involved, namely dealing with criminal law necessarily involves (the violation of) fundamental rights. The principle of mutual trust brings together several of the foundational principles of the EU's legal order and as such is a collective notion. Mutual trust links with reciprocity and loyalty, functions on a level of equivalence and, particularly important in the criminal law context, heavily relies on respect for fundamental rights and procedural fairness.

But while mutual trust in the AFSJ operates in a legal and political environment, it cannot be seen as completely detached from its nature as a

social construct. If this were the case, we could just let go of the term trust altogether. If we call it trust, it should at least have some links with what trust is; a social construct which is to an extent an abstract notion, but that should not be an excuse to suspend further efforts to understand its meaning and functioning. While the version of trust under consideration here shows anomalies vis-a-vis the concept of social trust, as for example the tendency to minimise risks in criminal justice cooperation, there are also similarities, such as the interest-based nature of the relationship at stake. Hence, keeping a close eye on trust as in social science literature can help explain the phenomenon under examination and guide future attitudes towards trust. Accordingly, a number of adjustments to the EU discourse might be helpful and can improve clarity. For example, distinguishing between trust and trustworthiness, recognising the importance of information, and adding the X when making statements about trust have been suggested in this light.

Important to stress is that this has by no means been an effort to closely define trust; this is not only impossible, it would also run counter to the dynamic and flexible nature of the principle.[141] Nevertheless, increased normative clarity is needed to hold to account those who have turned trust and trust building into the core of the EU criminal justice policy and are legislating in accordance. A conceptual idea of what mutual trust is and what it is not, can contribute to a fair and just enhancement of cooperation in penal matters among EU Member States, possibly with less emphasis on trust building, or at least recognise that this might (often) be political rhetoric more than legal reality.

A trust building policy should keep in mind the essence of mutual recognition; cooperation despite differences, and mutual trust's function is to enable cooperation on the basis of regulatory differences. The scope of its functioning lies within the boundaries of what is acceptable for Member States. If the divergence is too great the system of mutual recognition will fall apart, but if the divergence is too little, there is no longer a need for trust. Focussing on harmonisation in the name of trust building is not only contrary

[141] See also Suominen, 'Mutual trust is difficult to quantify. It is a very abstract construction, which seems to be normative or even ideological', A. Suominen, *The Principle of Mutual Recognition in Cooperation in Criminal Matters* (Intersentia 2012), 47.

to the original objective of mutual recognition and the much valued sovereignty of national criminal systems, but it is questionable whether harmonisation should be regarded as trust building altogether. The more harmony the less need there is for trust and *vice versa*. Hence, if the aim is to remove differences, trust evasion might be a more accurate term than trust building. In other words, if there were no more differences between national systems, trust would no longer be an issue and cooperation would be fully automatic.

Instead, an effort should be made to create the conditions that enhance trustworthiness while preserving, as much as possible, the identities of national criminal justice systems. Since the (ground breaking) EAW a large number of mutual recognition instruments have been adopted, with varied success. In the process, the critique on the functioning of the AFSJ has only increased. In this sense mutual trust is a threat and an opportunity at the same time. A continuation of the emphasis on the presumed existence of trust will further diminish the desire to cooperate as Member States might not want to be pressed to trust and cooperate in sensitive areas of criminal justice.[142] When it is acknowledged that trust cannot be forced upon judicial authorities and be steered and controlled by legislation, but that its (slow) growth might involve taking some risks and reciprocating trustworthy behaviour, the principle of mutual trust might prove valuable in the quest to enhance EU criminal justice cooperation.

[142] See also Nilsson, who points in light of the 'clawing back of powers from Brussels' to 'the recent yellow card from national parliaments in 11 Member States in respect of the setting up of the European Public Prosecutor's Office is another sign that Member States want to be very cautious in this very sensitive area.' H. Nilsson, 'Where Should the European Union Go in Developing Its Criminal Policy in the Future?' (2014) 1 EUcrim 19, 21.

FROM TRANSCULTURAL RIGHTS TO TRANSCULTURAL VIRTUES: BETWEEN WESTERN AND ISLAMIC ETHICS

Michele Mangini*

Some kind of transcultural consent is strongly needed between Western and Islamic societies. Human rights can provide such consent but their traditional Western foundation remains alien to a large part of Muslim sensibilities. In address of this we must first turn our attention to the Islamic concept of 'maqasid'. By drawing upon Martha Nussbaum's list of basic capabilities and Tariq Ramadan's extensive reading of maqasid, we can prepare a sounder grounding for human rights within Islamic societies. Maqasid and capabilities call attention to the tradition of Islamic virtues. These so greatly overlap the Western ethics of virtues that they raise hope of transcultural cohesion.

Keywords: Islamic Ethics, Virtues, Human Rrights

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I. Premise

Most theoretical discussions in the area of ethics – both private and public – raise concepts which range amongst those such as rights, utility, social contract, personal autonomy and the like. These discussions are typically Western insofar as all those concepts belong to the Western philosophical and legal tradition. They are concepts that are deeply embedded in our culture and in which, as in the case of the outstanding example of 'human rights', we clearly see a strong influence of the Christian religion. Through natural law theory we can trace back the origins and first development of human rights to the work of the canonists between the 12th and 13th century: the *ius naturale* is understood as a power, faculty and subjective capacity inherent in the human person. It is an idea that expresses a need for the protection of the autonomy of men and women, for all their practical interests.[1]

As is well-known, the idea of human rights (HR) has grown from this culturally specific origin – located in the philosophical, religious and legal culture of Western Europe – to become an international standard, applied all over the world through documents which have found general consent, even beyond Christian culture, such as the Universal Declaration of Human Rights of 1948 (UDHR). However, a global consensus towards HR is confronted in particular by those in Islamic countries, who can adhere to very different and sometimes conflicting perceptions of HR and their compatibility with Islamic culture. Positions about HR can range from a

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[1] See B Tierney, *The Idea of Natural Rights* (Scholars Press 1997), p 65. With regard to the large domain of ethics, a cautionary note should be put in place at the start: the general assumption underlying this paper is that there is only one ethics that works similarly for all human beings, despite their social, political and religious differences. I believe the ethics of virtues of classical Greece is what best embeds that core of ideas that has been transmitted through the centuries in the West by the natural law tradition and that we also find in Islamic ethics, thanks to the legacy of the Greeks. By contrast, the idea of 'rights' seems to be partially biased by modern Western individualism and misses the ideas of excellence and solidarity which, among others, are central to Islamic ethics. Evolution in the Islamic culture, as many contemporary voices show, may find a stronger place for HR, but so far my argument is that it is not yet a transcultural concept to the same extent that an ethics of virtues is.

claim that Islam invented rights already in the seventh century[2] to a rejection of rights because they are inextricably connected with Western values and in opposition to Islamic traditional priorities and values. For example, in the Preamble to the UDIHR (Universal Declaration of Islamic Human Rights 1990) 'the authors proclaim in the Arabic version that they believe that human reason (*al-'aql al-bashari*) is insufficient to provide the best plan for human life, independent of God's guidance and inspiration.'[3] I believe it is correct to say that it is especially the second pole of opposition that gathered more supporters in recent times, in which radical Islamist views seem to have often had the upper hand against moderate Muslims. A balanced understanding between HR and Islamic values can be found in the 1990 Cairo Declaration of Human Rights, although a careful reading may show some ineliminable differences with Western values and priorities.

It is important to emphasise that there is no unanimous agreement about the role and position of reason in Islam, with Islam referring here to both Islamic religion and Islamic ethics. Some recent commentators argue in favour of the Islamic tradition within the scheme of political liberalism Rawls provided. Muhammad Fadel has developed an interesting argument according to which:

> (1) fundamental theological and ethical doctrines in the Islamic tradition privileged rational inquiry and deliberation as the preconditions to establishing political life, living a moral existence, and obtaining religious salvation, commitments which are either consistent with or require a political commitment to freedom of thought; (2) as a result of the centrality of rational inquiry in the quest for salvation and conceiving the basics of the ethical good life, Islamic theology and ethics placed relatively greater emphasis on the procedural integrity of inquiry rather than its substantive conclusions, and as a result Muslim ethical theory produced a system of normative pluralism that expressly recognized the burden of judgment; and (3) as a result of this normative pluralism, Islamic jurisprudence grew to recognize the legitimacy of rule-making based on arguments whose premises – while consistent with revelation – were non-revelatory and therefore that

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[2] See, for example, Abu'l A'la Mawdudi, *Human Rights in Islam* (Islamic Foundation, 1980).

[3] A Meyer, *Islam and Human Rights* (Westview Press 1991), p 58.

> Islamic law, as a historical matter, recognized the legitimacy of public reason arguments.[4]

Fadel holds that the political commitment implicit in various pre-19th century Islamic doctrines is consistent with the 'constitutional essentials' of a politically liberal regime. What is most interesting, in my view, is the tradition of rational enquiry and debate, highlighted by Fadel, that characterises scholastic theology, moral theology and law. The Arabic term for the first is *ilm-al-kalam*, the science of speech or disputation in which Muslim theologians developed their metaphysical, ontological and epistemological doctrines. The object of *kalam* was to discover truth about being, about how humans obtain knowledge and about religious dogma through the use of reason. Moral theology or *usul al-fiqh* is centered on how God judges human acts. It is concerned with questions regarding the nature of moral enquiry and other questions on moral judgement: how both true and probable moral judgements are reached. *Usul al-fiqh* has many important tasks such as distinguishing between legitimate and illegitimate ethical disagreement or identifying the 'data' that is relevant for ethical inquiry.[5] Finally, Fadel recalls *fiqh* or positive law whose contribution to our purposes is noteworthy because legal rules were developed within negotiable political commitments – rather than non-negotiable moral and theological commitments – and, so, they were reasonable rather than true rules.[6] In short, he argues that because of the prominent role that reason played in the theological and legal discourses of Islam, we can plausibly derive a commitment to a society that provides space for free normative enquiry. Further, according to Fadel, the centrality of individual enquiry in Islamic salvation theory leads a committed Muslim to endorse openly liberal constitutional essentials, 'as they clearly provide sufficient political space for her to discover those truths necessary for her salvation'.[7]

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4 M Fadel, 'The True, the Good and the Reasonable: the Theological and Ethical Roots of Public Reason in Islamic Law' University of Toronto Legal Studies Series, Res.Paper n. 977206, pp 4-5.

5 See Fadel (fn 4), pp 32-3.

6 See ibid, pp 39-40.

7 ibid, p 98.

'Rights discourse' is very clearly a field where confrontations between Western and Islamic culture have been continuous in time and explicit on contents.[8] However, I want to argue that there are other conceptual areas in which exploration might yield riper fruits. One such area worth-exploring may be that of the ethics of virtues (EV) whose revival in the last decades has introduced many elements of innovation in a moral debate that was so far just a battlefield between utilitarian and Kantian theories. In my view, the move toward human development and excellence – which is the core of EV – is congenial to the proposal of looking at it as an area of potential transcultural consent, as a set of ethical values that are good for people belonging to different cultures.[9] In a nutshell, the basic idea of my claim is that of looking for an area of transcultural ethical consent, setting temporarily aside the rights discourse because, notwithstanding certain declarations of allegiance to HR from the Muslim world, their rationalist and individualistic core flies in the face of the Islamic emphasis on God's guidance and inspiration.[10] For this sort of reason a contractualist philosophy, such as Rawls', remains alien to most of Islamic culture although, if interpreted according to different lines, it might enjoy a better reception.

I say 'temporarily setting aside' the rights discourse because I maintain that we cannot help thinking and acting in terms of rights: their influence on our liberal morality is pervasive also because of their legal counterpart. Legal rights give a crucial position to the rights discourse in liberal societies also at

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[8] I want to use the term 'discourse' rather than alternative terms such as 'framework' because I believe it gives a better rendition of that lively exchange of ideas and discussion that is common within – and outside – liberal societies with regards to 'rights'. 'Discourse theories', including an important status for rights, have acquired a well-known standing after J Habermas's *Facts and Norms* (MIT Press 1996).

[9] I believe that EV may contribute a relevant set of values for constructing a more integrated 'overlapping consensus' (in Rawls's terms), but across cultures as diverse as Islamic and Western culture (see section V).

[10] Notwithstanding the limits of rights I am trying to describe here, we have to acknowledge the flexibility of the concept of rights that in recent decades has been incorporating many emerging social values, such as the so called rights of second and third generation (the former including especially economic and social rights, while the third generation includes, e.g., group and collective rights, rights to self-determination, rights to intergenerational equity, etc.).

the political level.[11] However, rights-based moralities, to use Raz's expression, are impoverished moralities which cannot make room for ethical concepts such as the virtues or supererogation.[12] So, we have an exhortation to go beyond rights-based moralities and towards EV from a liberal thinker that can find a parallel in my attempt at retrieving ancient Islamic ethics of virtues to show its significant overlap with contemporary Western EV.

What is the reason for such retrieval? The easy answer would be to consider the common roots of Western EV and Islamic EV in Greek ethics through the work of Avicenna, Averroes, Al-Farabi and Al-Ghazali, among others. As is well-known, Western culture has retrieved classical philosophy in the Middle Ages (from the 12th century onwards), after a long 'dark age', thanks to translation from the Arabic sources. Arabic philosophers had preserved and cherished the legacy of classical Greece and Western culture has benefitted much from this effort of preservation. As we shall see in some detail, the Arabic culture experienced in the Middle Ages a flourishing EV that was in the first place relying on the philosophy of great masters such as Plato and Aristotle but also, in the second place, synthetizing elements of the Islamic religion. Thus, it is easy to conclude that the common roots of Western and Islamic EV lead to a stronger area of consent than the rights discourse.

Is this a satisfactory and persuasive answer to the problem of identifying an area of transcultural consent? There are various charges against such an easy solution because it seems to ignore the religious elements that have gained the upper hand in Islamic ethics. Therefore, if we want to give pride of place to the EV within Islamic culture, we need a fresh start. We need to find out whether there is a stronger connection between the virtues and Islam. I believe this connection can be found in the concept of *maqasid* (goals or purposes) whose development occupies a growing space in Islamic doctrine. We can rely on it for a two reasons: first, it is a teleological concept as much as the classical virtues; second, working through the *maqasid* we can weave a

[11] I should emphasize how the discourse on human rights is one place where sharp distinctions between legal and political philosophy waters down, because of the strong interconnections between legal and political issues.

[12] See J Raz, *The Morality of Freedom* (Clarendon Press 1986), pp 195-6.

thread of continuity from the age of Al-Ghazali, who introduced the concept, to our age. Another more general reason to take the *maqasid* as a reliable concept in our path towards an Islamic EV can be derived *a contrario*, in my view, from the place of HR in Islamic thought. Notwithstanding some general declarations (that we shall consider shortly) on the role of HR in Islamic society, it is plausible to hold that what is crucial in Islamic ethics is the traditional tenet that Islam provides a scheme of duties not of individual rights.

In reading documents such as the Preamble to the UIDHR what is worth emphasizing is the centrality attributed to human duties over human rights: insofar as the Islamic sources of principles and rules represent the divine will, they secure rights less than they ensure obedience to divine commands. To make things even clearer, some authors point out that while the Western perspective is anthropocentric, the Islamic one is theocentric. According to the latter there are no HR in the modern sense, but only rights that stem from man's primary duty to obey God.[13]

If the argument for setting aside the rights discourse looks sound enough, my reasons for inquiring into the *maqasid* may be helpful in leading us in the direction of the virtues. The five foundational goals (*maqasid al-Shariah*) are: faith, life, property, intellect, and progeny. However, contemporary authors such as Tariq Ramadan emphasize that the Shariah calls for the cultivation and protection of 36 further *maqasid* among which there are dignity, welfare, knowledge, autonomy, etc.[14]

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[13] See A K Brohi, *Islam and Human Rights* (PLD 1976), pp 151-2.

[14] See T Ramadan, *Radical Reform: Islamic Ethics and Liberation* (OUP 2009), pp 138-9. Ramadan builds his large 'pool' of *maqasid* with a reasoning that starts from the sacred text and includes a few passages: first, Sharia is based on two co-equal purposes, protection of religion and protection of welfare (*maslaha*); second, protecting these two founding pillars depends on protecting three further fundamental objectives: life, nature and peace; from here he introduces a third level based on the protection of 13 *maqasid* directed at promoting human wellbeing (dignity, welfare, knowledge, creativity, autonomy, development, equality, freedom, justice, fraternity, love, solidarity and diversity): finally, he says that the Sharia calls for the protection and promotion of 23 further *maqasid* concerning the inner being (education, conscience, sincerity, contemplation, balance and humility), the life of

My argument, in short, is that, it is through the retrieval of all human purposes included in the Shariah that we can focus – again – on the EV developed by classical Islamic philosophers. In other words, I believe we can make sense of the virtues in the Islamic tradition not only because of their crucial place in the ethics of great philosophers and theologians of Islam, such as Averroes, Avicenna, Al-Farabi and Al-Ghazali – to cite only the most well-known – but also because the virtues may be taken as a concretization of the *maqasid*, as the purposes of the Shariah that become concrete through the exercise of the virtues. What I shall try to show is that there is a significant overlap between the classical virtues – as described by classical philosophers of Islam – and a large number of *maqasid* as they can be retrieved in the Shariah. I also find an important overlap in the interpretation of *maqasid* between contemporary authors such as Ramadan and traditional authors such as Al-Ghazali. Of course, I cannot claim that there is a perfect overlap between classical virtues – deriving from Greek philosophy – and the *maqasid*: an explicative case would be that of 'humility'. Humility is both a virtue for many Muslim philosophers and a *maqasid* included within the Shariah, but its core of self-denial runs against the characteristic self-centeredness of classical Greek virtues. In turn, humility finds its place also in Christian catalogues of virtues, such as Augustine's, that leave to the human being a secondary place with regard to God's guidance and commands. These few hints may lead us to the conclusion of the argument: although there is a large room for transcultural consent between Western and Islamic culture in the area of EV and *maqasid*, we should not forget that there is a gap between secular and religious catalogues of virtues that can be found both in the Western and in Islamic culture. Humility, for example, is praised as a central virtue both by Augustine and by Al-Ghazali, but it is unrecognized by secular

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the being or the individual (physical integrity, health, subsistence, intelligence, progeny, work, belongings, contracts and neighborhoods) and the welfare of societies and groups (rule of law, independence, deliberation, pluralism, evolution, cultures, religions and memories). Ramadan is aware of the farfetched nature of his list: 'Contemporary times compel us to return to the texts and extract objectives that may have appeared secondary in the past' (p 140). This list, he says, must be considered as a provisional elaboration, always open to further openings depending on new scientific knowledge.

catalogues. Therefore, while finding a common path in the area of EV, we should bear in mind that, as we shall see, there is a larger area of consent between Christian and Islamic religious ethics than between Western secular and Islamic EV.

In the new ethical picture that seems available according to my previous considerations one may wonder about the space left for the rights discourse that is so much on the banners in our times. I anticipate that, while its individualistic thrust clashes with the deep core of Islamic ethics – religious and community-oriented – there is still an important role to play for HR with regard to the virtues and *maqasid*. From this perspective, HR may be considered as spheres of protection that warrant the project of human development embedded in the virtues and in *maqasid*. In this way, rather than depending on deontological foundation, as it traditionally happens in liberal theories of rights, these would rely teleologically on considerations of wellbeing. As we shall see, this new ethical picture will attempt to overcome two typical liberal boundaries by, first, proposing a view of rights not only as individualistic, but also as community-oriented guarantees and, second, by setting human wellbeing in a religious context where virtues and *maqasid* may lead beyond the usual threshold.

My quick hints should not give the impression that my approach may dispel all problems that the concept and the practice of rights raise in the Islamic culture. Rather, I believe that there are some difficulties that can hardly be entirely bypassed. In my view the two most relevant difficulties are the following. First, it is difficult to accept the idea that rights can only exist in relation to human obligations towards God, fellow humans and nature, as defined by the Shariah.[15] Second, it is similarly difficult to accept the idea that the individual can neither be considered apart from society, nor can his rights be considered in conflict with those of the community.[16] These are barriers against a transcultural understanding between the West and Islam that the ethical appoach of virtues may at least help to reduce.

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[15] See Abdul Aziz Said, 'Precept and Practice of Human Rights in Islam' (1979) Universal Human Rights 1, p 73.

[16] See Cherif Bassionni, 'Sources of Islamic Law and the Protection of Human Rights', in *The Islamic Criminal Justice System* (Oceana 1982), pp 13-4.

From my introductory remarks the first steps of the agenda ahead of us are quite clear. First, I want to address the problems of the rights discourse with regard to central declarations of Islamic rights, such as the UIDHR and the Cairo Declaration on Human Rights in Islam. I will focus on some of the most important rights included in these declarations in order to test their compatibility with the standard international view of HR and, alternatively, with the ethical approach of the virtues (section 2-3). Of course, this second comparison will be postponed to a later stage, after an exploration of *maqasid al-Shariah* and of the Islamic EV. Thus, as the third step we need to consider carefully the concept of *maqasid al-Shariah*, keeping in mind the goal of human development that is common to the virtues. I shall consider not only the five foundational goals of the Shariah already mentioned, but also the other *maqasid* enumerated by Ramadan. My assumption is that Ramadan's extensive interpretation of *maqasid al-Shariah* covers most of the area of values usually attributed to the EV, including also some other political principles (section 4). Finally, the second stage of this inquiry will be devoted to a thorough analysis of Islamic EV. I anticipate that insofar as we read important past philosophers of Islam, such as Alfarabi, Avicenna and Averroes, we find explicit references to Plato and Aristotle. Although they tend to neglect the major theoretical differences between Plato and Aristotle, we may find references to the 'end of human perfection' and to the employment of theoretical and practical wisdom which take this Islamic ethics very close to Western EV through the common roots of Greek philosophy (section 5-6-7). However, in inquiring into Islamic virtues we should always remember that a relevant part of Islamic ethics rejects to a certain extent the influence of the 'philosophers' – including not only Greek philosophers, but also some Muslim authors I have just quoted. As we shall see, in the work of Islamic thinkers, such as Al-Ghazali, 'revelation' takes a central position, but without excluding rational inquiry and, so, leaves wide room to argue for the compatibility of the concept of *maqasid* with that of the virtues to argue from *maqasid* to the virtues and opens the way for a sounder transcultural consent.

II. The Evolution of Human Rights

The rights discourse and particularly HR have a pervasive and influential appeal in the contemporary world, overcoming cultural and religious barriers. It is well-known that both in post-communist countries and in Islamic countries claims of freedom and equality are raised in the name of HR. The recent events of the so called 'Arab Spring' have shown the strength of the appeal of HR against tyrannical governments that violated the principles of freedom and equality of their citizens in many Mediterranean countries of the Islamic world. However, as the development of events seems to show, the push of HR was first accompanied and then overcome by the rise of Islamic traditional values. Those governments were charged not only with not respecting HR, but also with violating Islamic values whose hold on individual conscience seems, by now, stronger than the appeal of HR.

In order to verify whether this is really so and why it is so, we need to inquire into the foundations of HR: What do they stand for in Western societies? Can those foundations be exported to a radically different culture such as Islam? In attempting to respond to these questions, I will develop an argument in three steps. First, I shall consider the birth and evolution of HR in the West as a sign of moral and social progress. Second, I will consider how HR have grown as an international standard capable of imposing transculturally its normative criteria. Finally, I shall tackle two important Islamic declarations of HR: the UIDHR (1981) and the Cairo Declaration (1990). From their examination we shall see how HR are understood in the Islamic context dominated by the Shariah. My conclusion here will point to the necessity of re-interpreting HR in the Islamic context according to the basic presuppositions of Shariah.

The first point that deserves our attention is that HR belong to a modern Western tradition which first dates back to the growth of rationalist and humanist thought in European Renaissance and later to the culture of the Enlightenment. The protection against State's infringements and the development of individual freedom was the main concern of British and French thinkers whose ideas found expression at the end of the 18th century in the American Declaration of Independence (1776) and in the *Déclaration*

des droits de l'homme et du citoyen (1789). Thus, the historical evolution of HR was marked by the rise of American and European constitutions protecting individual – mostly negative – rights that granted people basic freedoms such as freedom of expression. It seems evident that at their core these concepts were 'individualistic', protecting the individual against the state.[17] They also carried the important legacy of natural rights, addressed to the development of human personality, as a legacy of the Middle Age canonists.[18]

Natural rights are ideal claims that can be invoked against other people or against the community as a whole to protect the human individual from infringements of their liberties. As is well-known, the evolution of natural rights has taken place in Europe in the last three centuries with a historical development described by T.H. Marshall[19] as a path toward citizenship that goes from civil to political and, finally, to social rights.[20] What should be noted with regard to Marshall's theory of the evolution of rights is that it was

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[17] A different position is developed by Samuel Moyn who takes human rights to have become the leading concept that we now know only from the 1970s on. Even in 1968 other vindications were brougt about by students and protesters demanding a better world. It is only in the 1970s that human rights were looked at as a kind of international law capable of stewarding utopian norms and the mechanism of their fulfillment. See S Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010). But consider also Rainer Forst's views according to which human rights are founded upon a Kantian idea of dignity: it is a moral foundation that downscales all internationalist defences of rights. See R Forst, *The Right to Justification* (Columbia University Press 2011).

[18] A reconstruction of the history of human rights as directed at favouring the development of human personality is offered by Lynn Hunt who uses 18th century novels (such as Rousseau's *Eloise*) to explain how the experience of reading raised individual autonomy in readers who identified themselves in the protagonists: 'Human rights could only flourish when people learned to think of others as their equals, as like them in some fundamental fashion'. L Hunt, *Inventing Human Rights* (Norton Company 2008), p 58.

[19] See T H Marshall, *Citizenship and Social Class*, (CUP 1950), pp 28-9.

[20] Marshall's scheme of the evolution of human rights should not lead us to forget that the rights discourse is much richer than what is possible to show in my sketchy summary: for example, so called rights of second and third generation give new impulse to the guarantees offered by human rights and especially the idea of 'collective rights' included in the rights of third generation seems to go much beyond the usual 'individualistic' understanding of rights (see n 6).

directed by an ideal of substantive equality and aimed at legitimising an increasing degree of redistribution of resources. By contrast, our interest in the Islamic context is still only focused on the ideal of equal political rights within the Muslim community on the one hand and, on the other, equality between Muslims and religious minorities. The ideals of freedom and equality are central in all declarations of HR and can be considered among the major obstacles to the acceptance of HR within the Islamic culture. However, a quick look at the recent history of this acceptance may be helpful in our path towards the Islamic virtues, towards focusing on what may be proposed as a new ethical approach for transcultural consent between Western and Islamic culture.

III. ISLAM AND HUMAN RIGHTS

As is well known, after World War II HR have grown as an international standard with enormous influence on different cultures. Documents such as the UDHR of 1948 or the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 and the International Covenant on Civil and Political Rights (ICCPR) also of 1966 gained widespread consent. Not all Muslim states ratified these Conventions,[21] but at least HR documents became a standard of values widely accepted or criticized. It is not my point here to follow the wide and lively debate about the extent of acceptance of HR in Muslim countries.[22] Rather, I want to make a few points about the present situation of HR with regard to the Islamic culture. My few general points will then be tested against well-known declarations of Islamic rights such as the UIDHR and the Cairo Declaration of HR.

A first point that should be emphasized for the understanding of all discussions about Islam and HR is the following: basically, where the Western man's perspective is anthropocentric, the perspective of Islam is theocentric. Man's only task is to serve His Maker.[23] Typical principles of Western legal philosophy, such as humanism, individualism and rationalism are rejected by most Islamic authors insofar as they are taken to give rise to

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[21] See Meyer (fn 3), p 24.

[22] A helpful, though not updated account can be found in Meyer (fn 3), ch 2.

[23] See A K Brohi (fn 13), p 151.

all the rights without making any reference to God. Conservative Islamic authors start from the subordination of man to God and the Islamic law to justify the rejection of individual rights in favour of an emphasis on the concept of duties. Sometimes the rejection of individualism is also grounded on a model of communal solidarity that is premodern and does not confront the problems of modern nation states.

The duty to respect rules of communal solidarity when the addressee is a modern nation state, with all its technological devices of control and possible repression of individual dissent, risks leaving individual freedom unprotected. Against the danger of oppressive government practices, Islamic authors either tend to think in terms of an idealized relationship between the ruler and the ruled in which the rulers just follow God's mandate. Or, in case of abuses by the ruler, they believe proper to appeal to the Shariah, if official action has violated some of its principles. However, it often happens in Islamic States that political government and religious authority are concentrated in the same hands, so there is no point in appealing to the latter against the former.

Second, previous considerations lead us to think that there are good reasons for an independent standard of evaluation, such as HR, also in Islamic states, notwithstanding their differences of cultural heritage. However, HR have to confront not only the declared hostility of those Muslim positions which take HR as a concept coming from an alien culture, but also the more insidious challenge from cultural relativists. Cultural relativism was born in Western theory, but it has been quickly picked up by some Muslim authors. It maintains that comparisons among cultures on the grounds of an alleged universal standard of evaluation such as HR are impermissible. The so called UDHR only shows 'moral chauvinism and ethnocentric bias'.[24] Islamic norms and values, relativists say, cannot be judged by the criteria of international law because these belong to the alien Western culture.

[24] A Pollis, P Schwab, 'Human Rights: A Western Construct with Limited Application' in A Pollis, P Schwab (eds), *Human Rights: Cultural and Ideological Perspectives* (Praeger 1979), p 14.

Whatever the stance of cultural relativism in the general debate – and it should be emphasized that it is a concept developed in anthropology and moral philosophy rather than used in the field of law – one should consider the status of HR in Muslim countries according to the real extent of their acceptance or rejection. Even a quick survey may show that HR exercise some appeal in Muslim countries, despite their supposed conflictuality with Islamic values.

Third, we should consider Islamization programs that have been carried forward by the governments of Iran, Pakistan and the Sudan between the end of the 1970s and the 1980s. They represented revolutionary upheavals controlled by conservative clerics, as in Iran, or autocratic leaders, as in Pakistan and Sudan. President Nimeiri and President Zia, of Sudan and Pakistan respectively, assumed the role of pious leaders, declaring that the tenets of Islam justified military dictatorship and the suppression of individual freedoms.[25] Central in Zia's programme of Islamization was his undermining of the integrity and independence of the judiciary through the appointment of new judges with a religious education but deficient in professional qualifications. In Iran, after overthrowing the corrupt and despotic regime of the Shiah Reza Pahlavi, the clerics imposed a return to the roots of Islamic values, rewriting the constitution in order to insert a number of vague Islamic qualifications that changed the meaning of original rights provisions. Being vague enough to be always interpreted by clerics for application, HR were destined to be subject to Islamic principles in each and every case of conflict.[26] Grass-root movements vindicating individual freedoms and HR in those years and later on (e.g. the so called 'Arab Spring') show the variegated perception of HR vis-à-vis the Islamic law in Muslim countries. Many observers, including some Muslim intellectuals, have denounced the abuses of rights and denials of freedom that characterized those regimes at that time. The lack of respect for human rights seems to go

[25] Ironically, learned scholars from Sudan argue that the state should not attempt to enforce Sharia because that is contrary to the principles of Islam. Muslims should be left free to live according to the principles of Islam because Sharia involves a religious obligation for individuals rather than public coercion. See Abdullahi, Nahmed An-Na'im, *Islam and the Secular State* (Harvard University Press 2008).

[26] See Meyer (fn 3), pp 30-42.

hand in hand with a political regime unrespectful of democratic consent. Current developments of the so called 'Islamic state' in the Middle East only confirm a strict relationship between Islamization, on the one hand, and violence and denial of freedom, on the other.

Notwithstanding the difficulties of reception of HR that were already pointed out, the international standard has met some degree of acceptance in Muslim countries. The UIDHR of 1981 and the Cairo Declaration of 1990 show, on the one hand, the desire of many Muslims to come to terms with standards of evaluation which enjoy a widespread allegiance all over the world. On the other hand, many 'Islamic provisions' inserted in the articles on rights show the extent to which rights can be effectively protected and implemented. Just by way of exemplification, we may notice that many rights commonly belonging to HR catalogues, such as the right to liberty (article 2a), right to justice (article 4a), right to freedom of expression (article 12a), right to disseminate information (article 12d), right to protest and go on strike (article 12 c) and others are all granted within the limits of Shariah requirements. In the English version of the UIDHR rights are qualified 'according to the Law' and in the Explanatory Notes it is made clear that by the term 'Law' it is meant the Shariah, defined as 'the totality of ordinances derived from the Qur'an and Sunnah and other laws that are deduced from these two sources by methods considered valid in Islamic jurisprudence'.[27] The vagueness of the reference to Islamic jurisprudence leaves significant leeway in the interpretation of rights. If we also consider that in Islamic countries authorities in charge of interpretation do not have a standing independent of government, as it happens in Iran, we may conclude that the possibilities for an individual to demand protection against government abuses are minimal.[28]

One could wonder whether almost ten years later the Cairo Declaration can mark any clear progress with regard to the international standard of HR. I believe we can identify a progress with regard to the treatment of women: women's subordination to men in the Islamic culture has been one of the most common charges put forward against declarations such as the UIDHR

[27] UIDHR, http://www.alhewar.com/ISLAMDECL.html, eng vers, p 16.

[28] See Meyer (fn 3), pp 86-9.

which did not have any clear provisions to protect women's rights. In the Cairo Declaration, after article 5 which confirms (as in UIDHR) the importance of the family as foundation of society, we find article 6 that states that: '(a) woman is equal to man in human dignity and has rights to enjoy as well as duties to perform'; however, it also adds that: '(b) the husband is responsible for the support and welfare of the family.' So, it seems that equal dignity is not paralleled by equal responsibility in taking care of the family. Notwithstanding this limitation, article 6 may be considered an attempt to meet the requirements of the international standard.

Many standard rights provisions are aligned with the international standard, such as free movement (article 12), work (article 13) and property (article 15) but 'within the framework of Shariah'. Special attention is dedicated to the rights of the child (article 7) whose education is to be promoted 'in accordance with ethical values and principles of the Shariah.' The right to freedom of expression was guaranteed in the UIDHR (article 12) so long as it remains within the limits prescribed by the Law. These limitations are expressed even more clearly in the Cairo Declaration in which article 22 states that 'everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shariah.'

If one may have had the impression that at some point the Cairo Declaration left more leeway for interpretation in favour of the international standard of HR, the provision of article 24 comes to dismantle any illusion: 'all the rights and freedoms stipulated in this Declaration are subject to the Islamic Shariah.'

Whatever individual freedoms and rights have been established in the Declaration, its authors want to emphasize the supremacy of the religious law, the Shariah. Their difficulties in finding a compromise are further illustrated in the *Resolution n. 41/42*, attached to the Cairo Declaration where we read that human rights are recognized as universal in nature, but they must be considered in an evolving context and taking into account the various historical, cultural and religious backgrounds (point 5). This appeal to contextualization is at odds with the recognition that it is necessary to achieve universality, objectivity and non-selectivity in the application of

human rights standards and instruments (point 4). In my view it is possible that this contradiction speaks in favour of further progress towards reaching the international standard of HR in the next years, at least in terms of declarations. Unfortunately, we all know that HR are also violated in countries which have thoroughly subscribed to the UDHR.

To conclude my remarks on HR and Islam, it seems clear that, on the one hand, HR are a standard of evaluation that many Muslims find appealing as a protection against government abuses. On the other hand, however, the international standard of HR now in use is a Western conception that does not suit well Islamic sensibilities. A different proposal should try to remain grounded in HR, while integrating them with other values, coming close to the roots of Islamic values rather than pushing on the uncritical reception of Western values.

IV. From Rights to Maqasid al-Shariah

These considerations leave us with the impression that Muslim countries and Islam as a religious culture are far from being alien to the rights discourse because rights are considered by appealing to large numbers of people – possibly even majorities – in many Muslim countries. HR and democracy are considered an important option for people who often come from a past of denial of individual freedoms. However, as noted already, Western emphasis on individual rights seems to remain foreign to the conscience of many Muslims whose ethical development is deeply rooted in Islamic religion. By contrast, the instances of individual freedom and human dignity that are embedded in HR are deeply rooted in the Shariah, according to many Muslim thinkers. Therefore, my strategy is that of considering carefully the *maqasid al-Shariah* in order to find in these fundamental purposes of Islam better ground for HR. What is proposed is a straightforward teleological foundation for HR that grounds the idea of rights on human wellbeing and development. Such a foundation on *maqasid* seems also to dovetail quite nicely with the proposal of emphasizing the Islamic EV in order to find a sounder basis for transcultural consent.

I have already gestured towards the idea that the EV is a more promising area of transcultural consent between Western and Islamic ethics than HR. The reasons for this view can be easily explained. While rights in Western ethics have a typical deontological foundation that defines their status as individual guarantees, the virtues, by contrast, have a typical teleological foundation that goes back at least as far as Aristotle.[29] As it is well-known, the virtues make sense because they are exercised within an ideal of human wellbeing and development. Islamic philosophy of the past, as we shall see, accepts entirely classical EV not only because they are deeply infused in Greek culture, but also because they perceive the affinity between the virtues and the *maqasid al-Shariah*: the former are more 'Islam-friendly' than rights are because the orienting idea of 'end' or 'purpose' is common both to virtues and to *maqasid*. Once the ideas of virtues and *maqasid* are discussed, we need to make clear what is left in terms of rights: their pervasiveness in contemporary society is such that no ethical approach can neglect them entirely.

At this point I need, first, to introduce the concept of *maqasid al-Shariah* and the way it has developed through time; second, I want to stress how the interpretation of *maqasid* is grounded on *ijtihad* as personal reasoning that follows the teaching of Qur'an and Sunnah; finally, I will follow Tariq Ramadan's proposal to interpret extensively the idea of *maqasid al-Shariah*. What derives from this reading, I shall maintain, is a view centered on human wellbeing and development that overlaps with the gist of the virtues and identifies a legitimate ground for transcultural consent.

The *maqasid* approach to Islam, as it is defined by some commentators,[30] is taken by many contemporary political parties in Muslim countries as a potential for reforming Islamic laws in areas where changes are widely demanded, such as, for example, the status of women.[31] The question is

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[29] However the literature is not unanimous: for a review of deontological and teleological foundations of virtue ethics see: G Trianosky, 'What Is Virtue Ethics All About?'(1990) 27(4) American Phil Quart. 335.

[30] See H Rane,'The Relevance of a Maqasid Approach for Political Islam Post Arab Revolution'(2012-3) 28 *J.L. And Relig.* 489.

[31] However, it should not be forgotten that there is still a large gap between inspiring ideals such as *maqasid al-Shariah* and the practices of violence and extremism that are

whether there is enough room in the concept of *maqasid* for this extensive interpretation. It was developed by the twelfth century theologian Al-Ghazali by reference to five fundamental objectives of the Islamic law: life, religion, property, progeny and intellect. In the 16th century Ibn Taymiyyah and others developed a more open-ended list of values, understanding *maqasid* in terms of promoting benefit and preventing harm.[32] The new list included fulfillment of contracts, preservation of kinship ties, honoring the rights of one's neighbours, sincerity, trustworthiness and moral purity.

After many centuries and dramatic changes in the conditions of life of Muslims, many authors have tried to develop an approach to Islam relevant to the operations of the state and society. Ibn Ashur, for example, discusses the preservation of the family system, freedom of belief, orderliness, civility, human rights, freedom and equality.[33] Other recent works, such as Jasser Auda's, offer interpretations of the evolution of *maqasid* from pre-modern to modern times. The old concepts have now evolved into family care, pursuit of scientific knowledge, upholding human rights and dignity, freedom of belief, and economic development.[34]

It is to be emphasized how the thrust of the concept lends itself to an evolution in the Shariah interpretation that is centered on public interest and wellbeing *(maslaha)*, rejecting literal readings of sacred texts and giving priority to the spirit of the message of Qur'an and Prophetic traditions.[35] Rather, it is well-founded to say that the evolutive interpretation of *maqasid* can be taken as an essential form of *ijtihad,* independent reasoning.

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so frequent in Islamic countries. See M Bohlander, 'Political Islam and Non-Muslim Religions: A Lesson from Lessing for the Arab Transition, Islam and Christian-Muslim Relations', (2014) 25(1), 27-47.

[32] See Mohammad Hashim Kamali, *An Introduction to Shariah* (Ibniah 2006), pp 116-8.

[33] See Muhammad Al-Tahir Ibn Ashur, *Treatise on Mawasid al Shariah* (Int.l Inst. Islamic Thought 2006), pp 142-60, 233-63.

[34] See Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A System Approach*, (Int.l Inst. Islamic Thought 2008). According to Auda – and Ramadan – as we shall see, the *maqasid* lend themselves to an evolutionary interpretation that incorporate the many of the contents protected by human rights.

[35] See Kamali (fn 32), pp 128-30.

The concept of *ijtihad* is the second point I want to emphasize. I take it as a central aspect in the ethical approach I am trying to sketch here. Addressing *ijtihad* requires a shift of focus toward the area of interpretation, meaning both legal interpretation and interpretation of sacred texts. As it is well-known, Western hermeneutics was born in the first place from the exercise of interpretation of Christian sacred texts, such as the Bible.[36] Similarly, with the Islamic faith we find debate among different approaches to interpretation. While literalism claims that knowledge of the Shariah can never go beyond what is explicitly documented in the sources, other commentators rely on *ijtihad* as the principal instrument of maintaining harmony between Revelation and reason in the Shariah.[37] The theory of the *ijtihad* has received contributions from scholars such as Al-Ghazali, Al-Amidi and Al-Shirazi. Al-Amidi defined *ijtihad* as 'the total expenditure of effort in the search for an opinion as to any legal rule in such a manner that the individual senses (within himself) an inability to expend further effort.'[38] Other important secondary sources of Islamic law are said to represent diffrerent forms of *ijtihad*: consensus of opinion (*ijma*), analogy (*qiyas*), juristic preference (*istihsan*) and consideration of public interest (*maslahah*).

Then, it is plausible to say that *ijtihad* expresses a canon of interpretation conducive to *maqasid al Shariah*, to define those broader aims and objectives of the law that literalism can only fail to achieve. However, we should note that not all variants of literalism work in the same way. So called 'juristic induction' works on the aggregate of a number of texts, literally interpreted, that point to a meaning that transcends each text individually. The meaning derives from the whole and goes beyond the individual texts. It was through the process of juristic induction or *istiqra* that pre-modern jurists such as Al-Shatili or Al-Ghazali vindicated the *maqasid al-Shariah*. According to the latter, justification has to rely not on any single source but on the cumulative

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[36] Gadamer, *Truth and Method* (Crossroad 1988), p 295 ff.

[37] See Mohammad Haskim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 1991), p 366.

[38] B Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihad*' (1978) Am. J.Comp.L. 26, pp 199-207.

strength of proofs that are too many to enumerate.[39] *Ijtihad,* some commentators conclude, should include also an effort of 'creative imagination' in interpreting new contexts such as those of contemporary HR and democracy, but still within the bounds of the Shariah. A 'purposive approach' to legal interpretation, based on *maslahah* (public interest) and on the five basic *maqasid* of Islam, is recommended. This approach would preserve the ethical and moral precepts underlying the spirit of the Shariah.[40]

Finally, my third stage in this quick discussion of the concept of *maqasid* addresses Ramadan's extensive interpretation. I have already noted how some scholars have proposed an extensive view of *maqasid*, multiplying their number and thrust. Tariq Ramadan is an innovator who makes, first, a radical shift in methodology by grounding Islamic ethics in nature and inclining unambiguously toward a theory of natural law.[41] He takes the frequent invocations of the universe and the natural world in the Qur'an as 'signs' of God's creation. They show the dignity of nature as a foundation of values, according to the sacred text.[42] In Ramadan's proposed 'radical reform' the objective is the persuasion of multiple communities – Muslim and non Muslim, progressive and conservative alike – that a new and extensive understanding of *usul al-fiqh* is possible. The latter is usually understood as the system of methodological principles that 'provides criteria for the correct deduction of the rules of *fiqh* from the sources of Shariah.'[43] In these sources Ramadan wants to integrate 'the Universe and social and human environments into the formulation of the ethical finalities of Islam's message.'[44] In advocating such integration, Ramadan has the illustrious precedent of Al-Ghazali who believed that 'the noblest knowledge is where

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39 See quotation and comment in Sherman H Jackson, 'Literalism, Empiricism, and Induction: Apprehending and Concretizing Islamic Law's Maqasid Al-Shari'ah in the Modern World' (2006) Mich.St.L.Rev., p 1477.

40 Nazeem MI Goolam, '*Ijtihad* and Its Significance for Islamic Legal Interpretation', (2006) Mich.St.L.Rev., p 1465 ff.

41 It is quite likely to argue from these premises – without considering other works by Ramadan – that his natural law approach may endorse a language of natural rights in tune with his argument from *maqasid*.

42 See T Ramadan, Radical Reform: Islamic Ethics and Liberation (OUP 2009), p 88.

43 See Mohammad Haskim Kamali, *Principles of Islamic Jurisprudence* (fn 37), p 2.

44 Ramadan (fn 42), p 5.

Reason and Tradition are coupled, where rational opinion and the Shariah are in association.'[45]

Ramadan's metaethical effort to integrate the sciences of the Text (Revelation) and the sciences of the Universe is coupled with his wide understanding of *maqasid*. Experts in the Revealed Book and in the Book of the Universe, 'each with their own methods and standards of proof, have to collaborate, first, on identifying higher ethical principles and objectives and, then, on elaborating specific applied ethical norms expressed as *maqasid* for individual areas of human activity.'[46] His multidimensional scheme of *maqasid* starts from two co-equal purposes; namely, the protection of religion and the protection of welfare. The protection of these two founding pillars requires three more fundamental objectives: life, nature and peace. The third level introduced by Ramadan consists of the protection and promotion of 13 further *maqasid*, such as: dignity, welfare, knowledge, creativity, autonomy, development, equality, freedom, justice, fraternity, love, solidarity and diversity.[47] However, he further argues that the Shariah calls for the promotion of other 23 *maqasid*, related to the inner being, the life of the individual or social life. Just by way of example, the list includes education, conscience, sincerity, health, subsistence, intelligence, rule of law, independence, deliberation, etc.[48] This list has a wide thrust that encompasses both individual ethics and politics. Ramadan's reformist attitude engages with conservative clerics on a vast scale, as Andrew March emphasizes in his review. I want to borrow from Ramadan's lists and dwell particularly on personal rather than public ethics.[49] In what follows, I shall try to present an integrated sketch of the relations among *maqasid*, rights and

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45 See Al-Ghazali, *Mustafa min Ilm al-Usul* (English translation: Mansur Hammad, Ahmad Zaki, Doctoral Dissertation (University of Chicago 1987).

46 A March, 'The Post-Legal Ethics of Tariq Ramadan: Persuasion and Performance, in "Radical Reform: Islamic Ethics and Liberation" – A review of T Ramadan (2010) *Middle East L. and Governance Journ.* 2, p 261.

47 T Ramadan (fn 42), pp 138-9.

48 See ibid, p 143.

49 I take the ethics of virtues discussed in section V as an approach concerned with individuals without being individualistic: this is the reason why I prefer to use the term 'personal ethics' with regard to the ethics of virtues.

virtues: they all hinge on a central idea of human development that may represent a potential focus of transcultural consent.

V. From Maqasid al-Shariah to the Virtues

The first point to start with is the ideal of human development that seeks to encompass the sense of much of Ramadan's lists. 'Dignity, welfare, knowledge, autonomy, education', just to name a few, can be clearly summed up in the above mentioned ideal. Those values belong to the ethical spirit of the Shariah – as we shall see by inquiring into the work of the great theologian of the Islamic tradition Al-Ghazali – and will surely raise less controversy than the political and legal values proposed by Ramadan: 'rule of law, independence, deliberation, pluralism, evolution, cultures'. I will set aside the political discussion that would probably lead us to the well-known anthitesis of liberal/non-liberal principles. This discussion, often framed in Rawlsian terms, notwithstanding its importance, misses, in my view, part of its ethical relevance because it neglects individual ethics. Even some careful liberal thinkers recognize that 'rights-based moralities' are impoverished, if they do not take into account concepts such as the virtues. As already noted, Raz holds that the virtues are among the most important candidates for filling in that loss of ethical meaning that we experience, if we rely only on rights.[50]

In my view, there is an ideal of human development in Ramadan's list that also overlaps with many liberal perfectionist positions in the Western debate. Although the enlarged list of *maqasid* presented by Ramadan is explicitly drawn from the Shariah, it seems not farfetched to say that at least the values concerned with individual ethics encompass a perfectionist programme. Political and ethical perfectionism are theoretical positions recently advocated by a few authors in the liberal debate, but often criticized by many other orthodox liberals.[51] At the political level, perfectionism entails an effort of the State to promote some kind of conception of the good life of its

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[50] See J Raz, *The Morality of Freedom* (Clarendon Press 1986), pp 196-8.

[51] W Galston, *Liberal Purposes* (CUP 1991); R Dworkin, 'Foundations of Liberal Equality', in *The Tanner Lectures on Human Values* (University of Utah Press 1991); T Hurka, *Perfectionism*, OUP 1993); J Raz, *The Morality of Freedom* (fn 12); G Sher, *Beyond Neutrality* (CUP 1997); S Wall, *Liberalism, Perfectionism and Restraint* (CUP 1998).

citizens. At the ethical level, each citizen is committed to improve his/her good life according to certain objectively valid criteria. In my view, Ramadan's lists amount to an ethical and political perfectionist program and it may be very helpful to verify its overlappings with Martha Nussbaum's Aristotelian conception, expressed in 'Aristotelian Social Democracy' (ASD) and 'Non-Relative Virtues' (NRV).[52] While the first essay concerns more the political level, the second claims to propose an objectivist conception of human ends across societies. From both points of view, HR remain an important sphere of protection for human beings but, in Nussbaum's view, rights are coherently justified on the grounds of a conception of good human functioning. In my view this appears as a much sounder foundation than what happens in many contemporary catalogues of HR.

A first important point that Nussbaum stresses in ASD[53] is that of calling her proposal a 'thick vague conception of the good'. 'Thick' comes in opposition to Rawls' 'thin theory of the good': it has to deal not only with all-purpose means to good living but also with 'human ends across all areas of human life'.[54] I believe that this outline, proposed by Nussbaum, but drawn from Aristotle's reflections, even if it is somewhat controversial for its universalist character, can be subscribed to by people such as Ramadan and other Islamic authors, concerned with human welfare, as the Shariah prescribes. The thick conception wants to get at an account of human functioning that can be shared in diverse societies, but without imposing an objectivist conception of the human good which may raise big controversy. In NRV Nussbaum proposes a hermeneutical account of what it is to be a human being that is not based on any 'metaphysical biology' (as Aristotle is often charged with), but on the commonness of myths and stories from many times and places, stories explaining to both friends and strangers what it is to be human, rather than something else. These stories define many characteristics of the human being that make it what it is, rather than another creature: for example, the human being, differently from the gods (of the ancient Greeks), lives a mortal life

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[52] M Nussbaum, 'Non-Relative Virtues', in *Midwest Studies in Philosophy Vol. XIII*, (Notre Dame University Press 1988); M Nussbaum 'Aristotelian Social Democracy' in H Richardson, G Mara and R Douglass (eds), *Liberalism and the Good* (Kegan 1990).

[53] M Nussbaum, 'Aristotelian Social Democracy' (fn 52), p 217.

[54] ibid.

and, differently from the Cyclopes, shows sensitivity to the needs of others and a sense of commitment and affiliation.

The kind of myths and stories that are told in every society from generation to generation represent features of our common humanity that can also be plausibly considered shared in Islamic societies. I believe each of us can recognize the general features of his/her life in the list presented by Nussbaum: mortality, capacity for pleasure and pain, cognitive capabilities of perceiving, imagining and thinking, early infant development, practical reason, affiliation with other human beings, relatedness to other species and nature, humour and play and separateness. Such a list, Nussbaum says, is open-ended because some items can be added or subtracted and is also evaluative in having already made some choices.[55] What is most important to us is that from these circumstances Nussbaum derives a list of basic capabilities such as being able to live to the end of a complete human life, to have good health, to avoid unnecessary and non-useful pain, to use the five senses, etc.[56] According to Nussbaum's interpretation of Aristotle's ethics, this list expresses what counts most for human well-functioning.

Ramadan's list of *maqasid* appears at one time larger and narrower than Nussbaum's list. It is larger insofar as it includes political values, such as the rule of law, pluralism, evolution, cultures, religions and memories. Some of them attain the organization of political institutions, others emphasize the necessary plurality of certain concepts (e.g. 'religions'). Ramadan's list is also narrower, however, insofar as it covers things such as physical integrity, health, subsistence, intelligence, progeny but forgets, for example, the capability to form a conception of the good or to live with concern for nature. However, these slight differences should not hide the fact that the purposes (*maqasid*) included in the Shariah are aimed at public interest and human welfare. With regard to human development, Nussbaum's list seems only to offer a more complete and coherent set of purposes, articulated as capabilities. Insofar as Ramadan wants to persuade traditional religious scholars in Islam he should better consider Nussbaum's list of capabilities

[55] ibid, p 224.
[56] ibid, p 225.

grounded in a plausible conception of the human being. Although he may object that his own lists of maqasid traced in the Shariah range also at a political level, Ramadan may be willing to admit that his move to ground Islamic ethics in nature nicely meets a list of capabilities grounded in a conception of the human being.

Now, it is time to go back to the EV that I introduced as the 'innovative' feature of my approach to Islamic ethics. Of course, the long tradition of EV, covering both Western and Islamic ethics, gives an almost paradoxical flavour to the idea that EV be innovative in Islamic ethics. I can comment that, on the one hand, most Muslim authors seem to have lost track of the secular tradition of EV in their culture, probably as a consequence of the pervasiveness of Western 'rights discourse'. On the other hand, a slight element of innovation consists in using Nussbaum's Aristotelian approach to capabilities and virtues to find common ground with Islamic ethics. On these presuppositions I will proceed, first, by giving a quick summary of Nussbaum's proposal concerning 'non-relative virtues' and, second, by offering, to some extent, a detailed account of the views of the major classical Islamic philosophers on the virtues.

First, we should consider Nussbaum's proposal with regard to non-relative virtues.[57] Following Aristotle, Nussbaum lists a number of spheres of experience the most important of which are: fear of important damages, especially death, bodily appetites and their pleasures, distribution of limited resources, management of one's personal property where others are concerned, attitudes to slights and damages; association and living together, and others.[58] All these spheres define necessary circumstances of our human life and we would generally recognize a life lacking in one of these as defective, as missing something specifically human. To give a couple of examples: we could hardly recognize the life of an immortal being as a human life (literary cases of this kind strike us just because they fuel extraordinary possibilities), while social bonds, although only empirically founded, seem to constitute a

[57] She has often come back to the issue of EV, although her non-relative proposal remains the one formulated in NRV. See also her 'Virtue Ethics: A Misleading Category'(1999) 3 *The Journal of Ethics* 1989.

[58] Nussbaum, 'Non-relative Virtues' (fn 52), p 35.

part of a specifically human life, whatever theoretical approach we want to choose.

There is a general and elastic correspondence between these spheres and the list of virtues sketched by Nussbaum.[59] Courage seems in play when mortality is involved, temperance for bodily appetites and their pleasures, justice for the distribution of scarce resources, generosity in dealing with one's own property, friendliness in one's social bonds, etc. Of course, there are virtues such as magnanimity which, taken as attitudes and actions regarding one's own worth, seem culture-bound to ancient Greece, and we could think of others, such as the attitude to our natural environment, which are 'progress-bound' and are still nameless in our culture.

By and large, however, the list of basic spheres and corresponding virtues is justified by their acceptance independently of differences in time and place. We can still recognize what is good and bad in literary cases from the past or from very foreign cultures because their virtues and vices still correspond to our 'thin' descriptions. Thin descriptions of what courage or justice are need to be filled in accordance to specific circumstances of place and time, as we already mentioned, but holding that the right response is courage rather than cowardice or rashness is inescapable from the human condition. When fear of severe harm to our body and even death are concerned, we admire the courageous person rather than the coward or the rash one. There is no personal intuition here to identify what is virtue and what is vice, but a large convergence of shared opinions through time and space.[60]

VI. The Role of Reason in the Islamic Tradition

In order to asses the Islamic position on EV and verify the possibilities of finding a common ground with the capabilities approach proposed by Nussbaum, we need to travel a certain distance both theoretically and

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[59] ibid, pp 35-6.

[60] It is worth-mentioning here that the idea of virtue has a higher degree of universality than the competing conception of 'fundamental rights' which is so often on the banners now.

historically. I believe we should take our inquiry back to the first centuries of Islamic thought because in that period we find a well-known divide whose exploration can give precious hints for a correct understanding of the present situation.

I shall try to proceed by showing how a sharp distinction between the two schools of thought which struggled for supremacy in the Islamic field from the eighth to the eleventh century A.D., the Mu'tazalite and the Ash'arite schools of theology, would not give the correct sense of the nuances of thought that differentiated early Islamic schools. The debate rotates around the relationship between Sharia and reason: it is such an important issue that it influences the pre-modern and the modern period alike. Muslims confront the role, scope and authority of reason with a religious tradition in which the Qu'ran refers God's word, as revealed to the Prophet Muhammad.[61] In inquiring into the possible roles of reason in Islamic ethics and law, I want to depart from the major opposition between the Mu'tazilite and the Ash'arite school. However, I acknowledge the necessity of accounting for more nuanced distinctions concerning the ontological authority of reason in Sharia and, also, concerning the extent to which 'reasoned deliberation about the good and the bad can assume sufficient normative authority to result in Sharia's norms that reflect what God desires or wills.'

I want to start by describing a few basic aspects which characterize the Mu'tazilite, rationalist position. Historically this position developed its set of views earlier than the traditionalist, Ash'arite school. The latter can be said to have developed as a reaction against rationalist views. The ethical tenets that sum up into the Mu'tazalite ideal seem to encourage in the human beings a measure of freedom and power to act in opposition to the faith in a divine omnipotence crushing human free will.[62]

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[61] See A Emon, *Islamic Natural Law Theories,* Oxford University Press, Oxford, 2010, p 11.

[62] For my reconstruction of the Mu'tazalite views I am largely in debt to G F Hourani, 'Divine Justice and Human Reason in Mu'tazalite Ethical Theology' in R G Hovannisian (ed), *Ethics in Islam*, (Undena Publ 1985), pp 73-83.

The Mu'tazalite method of research can be characterized as a method of *kalam*, dialectic within theology. In other words, they dealt with a selective interpretation of the Qu'ran which takes certain principles as fundamental and derives extensive inferences. It seems particularly relevant to the Mu'tazili *kalam* dealing with the notion of justice. They do not take justice to depend on God's will but, rather, believe that God always acts in ways consistent with justice. This has a few other implications, but now it is worth emphasizing that, according to the Mu'tazili's view, even God's acts can be measured against justice.

The logically prior tenet from which most of the Mu'talizi reflection started is the metaethical thesis according to which ethical attributes such as 'just', 'obligatory', 'good' and 'evil' have an objective existence. The 'definitions of these objective terms were worked out in terms of what deserves to be approved, tolerated or disapproved.'[63] What is approved or disapproved is independent of God's will and cannot be reduced to what is commanded, permitted or forbidden by God. However, even though it is logically possible for God to be unjust, it is inadmissible on rational and moral grounds, as some Mu'tazilites held.

The second tenet of the rationalist school that deserves attention is that human beings have power to act independently of the divine will. Rewarding and punishing, the Mu'tazilites argue, would only make sense, if men had a chance of being just or unjust on their own responsibility. With regard to rational and religious grounds to establish the principle of human responsibility, on the one hand the Qu'ran states several times that God does not impose on anyone duties beyond his power (notwithstanding the fact that other passages state the principles of predestination). On the other hand, on rational grounds the Mu'tazilites argued that capacity is a condition of obligation, as it is declared also by Sharia law. Thus, the power to choose freely is a precondition for any attribution of responsibility.

The third and basic principle put forward by the rationalist school is epistemological: they hold that 'human beings also have the power to know

[63] See Hourani (fn 63), p 75.

objective ethical truths and make ethical judgments to some extent by direct thought or reason.'[64] The objective existence of terms such as 'justice, obligation and evil' entails that man can have knowledge of these meanings. An important consequence of this position is that anyone can know the main obligations and prohibitions of life by his reason: not only Sharia lawyers can give answers on what obligations we have. However, the doctrine of rational ethical knowledge does not entail that we can know all our obligations by natural reason because this has to be supplemented by revelation on details. Revelation is not made useless by reason, according to the Mu'tazilites because it still preserves the important function to motivate right conduct and thought.

The account I have offered of the metaethical frame of the Mu'tazilite position describes views that are familiar to Western thought insofar as they are the direct legacy of Greek ethics. However, over time this account has been overwhelmed by the traditionalist ethical view: the Ash'arite school which reacted to the rationalism of Mu'tazilites. Ash'arite theology can be summarized under a few principles which are in direct opposition to the three Mu'tazili tenets we have just identified. On the first metaethical position, in contrast with rationalist objectivism of values, the Ash'arite held 'that values are not just "objectively" present in human actions and readily available to reason, but that they are the result of the divine will.'[65] This position is a kind of theistic subjectivism centered on the divine will that cannot be known by reason, but only approached through sources such as the divine scripture and prophetic saying. Ash'arite theology establishes the superiority of 'tradition' or 'revelation' over reason not *per se,* but because tradition and revelation lead to faith and its unity in the fellowship of believers, the *umma*.

A second important point of dispute had to do with the second tenet of the Mu'tazilite school: the Ash'arites wanted to deny that human beings have power to act independently of God's will. The central term for them was *kasb* or 'acquisition'. The idea is that man 'acquires the responsibility of his acts, even though, according to the Ash'ari, man's power to perform his acts is not

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[64] ibid, p 74.

[65] S Stelzer, 'Ethics' in T Winters (ed), *The Cambridge Companion to Classical Islamic Theology* (CUP 2008), p 166.

his own.'[66] They held that it is God to set in motion the power of choice in men and, thus, 'creates' man's behaviour. In this doctrine, there is not much room left for the attribution of responsibility to human beings. The idea of acquisition makes little progress in terms of free choice: it entails simultaneity of man's power and will with God's creation of the act, but man is no more than a receptacle for it. However, the doctrine of secondary causes made some steps in the direction of distinguishing between the agent and the Creator: when the former receives an attribute or an act, 'its qualification relates to that receptacle, not to any other.'[67]

It is worth-emphasizing that about three centuries after the dispute between the two Islamic schools in the Christian West Aquinas tried to devise a theory of the virtues which went beyond the Augustinian position that virtue is a gift of God. Augustine did not ascribe any important role to human effort because in his view the infused virtues are produced in us 'without us' and prepare the way to receive the cardinal virtues from God. Aquinas left more room to human effort through the doctrine of 'acquired virtues'. These direct a person's action with regard to his highest good in the worldly life, but they also prepare the person to receive its 'infused' counterpart, realizing in this way a harmonious transition.[68]

I believe Aquinas's move has been crucial toward the affirmation of freedom of choice in the Western philosophy, while the Mu'tazilites were not given the same opportunity because of their suppression through the decrees of the caliph Qadir in 1017 and 1041. Probably most of the *ulama* showed hostility toward the Mu'tazili rationalistic methodology of inquiry into questions of law and ethics. The majority of the Islamic clergy, well-known on the positive sources of Qu'ran and *hadith,* felt it much easier and uncontroversial to tackle theological questions on the grounds of those sources rather than recurring to the controversial and difficult rationalistic methodology.

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[66] G Makdisi, 'Ethics in Islamic Traditionalist Doctrine', in R G Hovannisian (ed), *Ethics in Islam* (fn 63), p 52.

[67] ibid, p 54.

[68] See J Inglis, 'Aquinas's Replication of the Acquired Moral Virtues', (1999) 27 Journal of Religious Ethics 11, pp 3-27.

The general thrust of Ash'arite theology is shown clearly also by their rejection of the third Mu'tazili tenet: they denied that human beings have the power to know objective truths and make ethical judgments to some extent by reason. The traditionalist school held that Islamic theology had to concentrate on God's commands and prohibitions in order to know what is good to do. If it is God who indicates what is good and what is evil, we can also derive ethical obligations from these indications. It is all in the scriptures, according to the traditionalists: there is no need of rational reflection. However, a centuries long debate between the schools has produced a more nuanced understanding of the determination of good and evil. Philosophical theology – *kalam* – and juridical theology – *usul al fiqh* – confront each other on the problem of the legitimacy of ethical knowledge. What is at stake is not so much a radical alternative between reason and revelation, but whether the determination of knowledge is 'made by reason unaided or by reason aided by the data of revelation.'[69]

VII. Hard and Soft Natural Law in the Islamic Tradition

The account I have just offered of the Mu'tazilite and Ash'arite views shows a sharp contrast that may be useful for the reader who wants to grasp a basic sketch. However, as it often happens, real historical positions present a much more nuanced picture of the relations between Sharia and reason. Anver Emon offers a useful key of understanding by centering his discussion on natural law jurisprudence. He says that 'the question of whether human moral enquiry into the good (*husu*) and the bad (*qubh*) can be an authoritative basis for assessing a rule of law consonant with the divine will when source texts are silent' remains an open question for us.[70]

He distinguishes two models of natural law theory, called Hard Natural Law and Soft Natural Law. The first relied on the theological presumption that God only does what is good: God wants X *because* X is good. In short, the argument is that God is only just and created the world to benefit humanity. We can discern these benefits through the use of our reason and develop norms of behaviour based on the divine will. The central point of this view

[69] Makdisi (fn 67), p 63.

[70] Emon (fn 61), p 24.

that marks the difference from the crude Mu'tazilite position I have referred to earlier is that 'hard naturalists fused the value arising from God's justice and will with the facts of a natural order to invest nature with both objectivity and value.'[71] From the fusion of fact and value we can understand how hard naturalists thought that by observing the natural world they could reason about the good and the bad and transform empirical assessments into normative ones.

By contrast, it is no surprise that the voluntarist jurists that can be gathered under the label of Soft Natural Law sided with the Ash'arite in rejecting the theology of Hard Natural Law as potentially undermining God's omnipotence: God's will cannot be limited by only doing the good as discovered by human reason. So, how to deal with those cases in which no source text addresses the issue? Is there any other way out than suspending judgment? The crucial move of Soft Natural Law theories is that of balancing nature as a benefitting source with God's grace. The argument of grace both allows for the fusion of fact and value in nature – natural reason remains authoritative – and preserves a theological commitment to God's omnipotence.[72] We human beings can rely upon God's creation of nature, because he did it out of grace, but He is not limited in His power to alter His creation at any time.

What is most important for our purposes in this paper is that Soft Natural Law theories designed models of practical reasoning centered around concepts such as *maslaha* (perceived general good that speaks to the perfection of the polity) and *maqasid al-Sharia* (the five fundamental values of life, lineage, property, mind and religion). However, Soft Naturalists ironically did not employ those concepts to answer the challenge of modernity, as some contemporary reformers do (as referred in section 4). Rather, a *maslaha* argument was called on by some of these jurists to justify a rule of law in the absence of a source-text. *Maqasid* and *maslaha* were taken as devices to limit the operation of reason in the law. If contemporary reformers

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[71] ibid, p 26. He refers to authors such as al-Jassas, Qadi Abd al-Jabbar and Abu al-Husayn al-Basri.

[72] ibid, p 32.

can look at them as sources of progress, this may be taken as a sign of proximity between reasoned deliberation and God's grace.

The first important author who shows clearly all the main tenets of soft natural law is Al-Ghazali whose theory shows both the fusion of fact and value and the element of divine grace that preserves God's voluntaristic omnipotence. The latter is at the origin of all our reasoning through the jurisprudence of *maslaha*: this is reliable because we as humans can count on what results from God's gracious creation. Al-Ghazali offers the clearest example of a connection between *maslaha* and *maqasid al-Sharia* and the kind of reasoning that can derive from them. *Maqasid* are the basic aims of Sharia but are not derived from scriptural source-texts: they are, rather, intuitively known.[73] The *maqasid* provide the values to which any *maslaha* must pose a nexus to contribute to the development of particular rules of law. The nexus between the *maslaha* and a particular rule is identified by Al-Ghazali as *munasaba*: it is a rationale that cannot be rejected unless by showing its illegitimacy. A typical classical example is developed by Al-Ghazali's reasoning from the prohibition on wine consumption. He inferred from the prohibition that its *munasaba* or rationale had to do with wine's intoxicating effect and the necessity of protecting the integrity of the mind (one of the *maqasid*).[74]

These few hints may give the impression that Al-Ghazali spouses entirely the position dubbed as Soft Natural Law and its understanding of reason. However, we would be misled by not paying attention to the different periods of Al-Ghazali's life. His most clearly ethical work, the *Ihya' Ulum al-Din*, dates to his mature age, his Sufi period. This work requires more attention with regard to the ethics of virtues which offers but a few hints that may be put forward with regard to the role of reason.

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[73] In Ibrahim Muhammad Ramadan (ed), *al-Mustafa min 'Ilm al-Usul*, (Beirut: Dar al-Arqam, I), pp 636-37 al-Ghazali illustrates the five values of *maqasid* by referring to scriptural examples.

[74] See Al-Ghazali, *Shifa al-Ghalil*, Muhammad al-Kubaysi (ed) (Baghdad: Ra'asa Diwan al-Awqaf 1971), p 146.

With regard to knowledge of good and evil, reason can help only by the understanding of what the prophets communicate to us, but insofar as the truth is conveyed to us through revelation we do not need reason at a higher level. We can walk along the way of the prophets only through revelation.[75] According to one view, the mystical element remains dominant within Al-Ghazali's ethical theory, notwithstanding the presence of philosophical and religious elements. By contrast, according to another view, the conjunction of reason and revelation allows the achievement of moral perfection or moderation.[76]

However, if we look at previous works such as *al-Mustasfa* and *Shifa al-Ghalil* there is plenty of room to identify a sounder basis for practical reasoning in al-Ghazali. He wants to legitimize 'silent *maslaha*' as authority to justify Sharia rules only when it poses the strongest nexus to the basic values. This nexus has to be carefully scrutinized and shown to serve necessary interests for the benefit and perfection of society at large.[77] Al-Ghazali employs, among others, the example of Muslims used as human shields by unbelievers waging war. The question is whether to strike, killing innocent Muslims, or refrain from striking, letting the unbelievers conquer the land of Islam. In the

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[75] See M A Quasem, *The Ethics of Al-Ghazali* (Selangor Malaysia 1975), p 28.

[76] See Fakhry *Ethical Theories in Islam* (Brill 1991), p 199. It is interesting to notice that the reception of the *Ihya* in the centuries that followed was more than controversial, arising dispute and burning. By that work Al-Ghazali wanted also to promote the otherworldly sciences over the worldly ones, leaving little role to *fiqh* (jurisprudence) and *kalam* (theology). He advocated Sufism among the religious sciences as the one that may lead to certainty but, notwithstanding the success of Al-Ghazali's book in later centuries, the radical religious implications were gradually lost sight of. The success of the *Ihya* in the Islamic West (the Maghribi Sufi movement) depended on its collecting and rationalizing the fruits of centuries of Eastern Sufi thought that was presented as a package to emerging Western Sufis. However, the *Ihya*'s attack against worldly scholars, those *fuqaha* (experts of *fiqh*) who were dominant in Al-Andalus (Islamic Spain) in the 12th century led eventually to the burning of the book. But not many years later the process of acceptance of the *Ihya* was underway in the Maghrib as elsewhere. See K Garden, *Al-Ghazali's Contested Revival* (University of Chicago, Ph.D. Dissertation2005), available at https://www.academia.edu/43 8972/Al-Ghazalis_Contested_Revival_IhyaUlum_Al-Dinand_Its_Critics_In_Khor asan_and_the_Maghrib_Morocco_Tunisia_Algeria_Spain_.

[77] See al-Mustasfa 1, p 640.

second case, he argues, they will kill all the Muslims and also the prisoners used as shields. Al-Ghazali thinks that the second option poses a tighter nexus to the aim of the law which is to reduce killing and, in more general terms, to contribute to the perfection of society.[78] This kind of reasoning also seems quite compatible with contemporary utilitarian-like styles of reasoning and certainly shows an allegiance to reason that may have been reduced in later works.

It is important to emphasize that al-Ghazali's line of understanding of Sharia found other influential followers in later centuries, such as Fakr al Din al-Razi. He is prominent among those who proposed a reasoned deliberation based on the use of *maslaha* where Sharia is silent. In his major work, *al-Mahsul*, al-Razi argued that God legislates rules for the benefit (*maslaha*) of the people: when a connection between rules and *maslaha* can be identified, we have an acceptable justification even if Sharia is silent. However, al-Razi shows his legal capacities in not being content of proposing the ontological authority of natural reason through the concept of *maslaha*. Similarly to al-Ghazali, he is concerned with identifying the *ratio legis* of a rule: he uses the concept of *munasib* to identify the rational nexus between a given rule and the five basic goals of the law or *maqasid*.[79] A final, but eloquent appeal to reason may be found in the proposed hierarchical connection between *maslaha* and the basic aims of the law: it is only the first, *darura* or necessary interest (not a simple *need* or a *perfectionist value*) that can justify the creation or extension of the law.[80]

Al-Razi's theoretical moves that I have quickly referred to show, as Emon holds, his intention to fuse fact and value in nature, similarly to Hard Naturalism. But, as in the case of al-Ghazali, he wants to reject the view that there is a permanent quality of the natural order that *obligates* God to do good. So, we see here the element of divine grace to come back to grant God's omnipotence. However, this element does not undermine our reasonable reliance on the regularity of nature and the benefits it presents.[81]

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[78] See Emon (fn 61), pp 139-40.

[79] See al-Razi, *al-Mahsul*, 5, p 160.; see also Emon (fn 61), p 154 ff.

[80] See al-Razi, *al-Mahsul*, 6, p 163.

[81] See Emon (fn 61), p 159.

The red thread offered by the Soft Natural Law framework gives us a clear sense of how the Islamic landscape of the Middle Ages was far less black and white – Mu'tazilite v. Ash'arite – than what it might appear at a first look. Most acute writers on the voluntarist side such as al-Ghazali and al-Razi did not neglect at all the role of rational inquiry in extending the application of the Sharia. Something more and particularly noteworthy can be said with regard to other two famous names militating respectively in the philosophical and in the theological camp. In the philosophical camp, Miskawayh is noteworthy on the issue of reason: he holds that the intellectual perfection of wisdom can and should be overcome in a higher spiritual realm in which man can receive the illumination of the divine light. In this way man can partake of the divine perfection, overcoming all worldly desires and anxieties.[82] Miskawayh tends to locate the idea of happiness in an intellectual, spiritual and divine realm where it cannot be marred by terrestrial or bodily events. The connection with the divine will can be described in 'mystical' terms which seem to draw away from the Aristotelian framework of thought, notwithstanding Miskawayh's confidence that it can be fitted into the latter's scheme.

In turn, in the theological camp we find a thinker usually considered as an icon of extremist Islamism, Ibn Taymiyya whose project, once carefully assessed, can be described as an attempt to draw a sort of '*via media*', carrying forward a message of moderation.[83] It should be emphasized that Ibn Taymiyya, notwithstanding his popular perception as a prominent religious figure throughout Islamic history, 'was regarded with an attitude of "fluctuating scepticism" within the Damascene Hanbalite circles.[84] Sophia Vasalou emphasizes how the explicit theme of Ibn Taymiyya's most relevant works was that of identifying dialectically a balance between opposing extremes, elements of truth contained in different views aiming at the final claim of harmony between reason and revelation.

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[82] See Miskawayh, *Tahdhib al Akhlaq* (English translation by C K Zurayk, *The Refinement of Character* (Beirut 1966), p 77.

[83] Laoust, Essai sur les doctrines sociales et politiques de Taḳi-d-Din Aḥmad b. Taymiya (Le Caire 1939), p 221.

[84] S Vasalou, Ibn Taymiyya's Theological Ethics (OUP 2015), p 13.

It would be senseless to try to sketch here all the main lines of reflection put forward by Ibn Taymiyya in his huge and non-systematic production. It may be helpful to recall that most of the questions we are concerned with in Taymiyya's work can be grasped under the rubric of *al-Tahsin wa'l-taqbih* or 'the determination of good and bad' or 'right and wrong'. With regard to his focal issue, Ibn Taymiyya states clearly his proposal of drawing a *via media* that encompasses both the Mu'tazilite position, according to which an act contains benefit or harm and it would do so even if the Law did not report it, and an Ash'arite position, according to which the Lawgiver commands something that becomes good and forbids something that becomes bad. He finally allows for a third category of acts that the Lawgiver commands only to put his servants to test.[85]

What seems most characterizing of Ibn Taymiyya's views for our purposes is his ontology of value that takes distance from the Ash'arite's rejection of reason: he openly embraces the objectivity of values, though leaving the door open to other categories of acts, as we have just seen.[86] With his doctrine of God's determination of human acts Ibn Taymiyya wants to re-balance the conflict between God's justice and God's power that had been settled by the Mu'tazilite in favour of the former. However, the place where we really find a declaration of his objectivism of values is where he says that 'an act contains benefit of harm (*maslaha as-mafsada*) even if the Law had not come to report that.'[87] Notwithstanding the importance of deontological considerations, Vasalou states clearly that 'it is the notion of utility, [...] that appears to carry moral ultimacy within Ibn Taymiyya's scheme.'[88] He states, similarly to Western utilitarians, that 'every living being strives for what brings it enjoyment and pleasure.'[89] Elsewhere we find that there are things beneficial

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[85] See Ibn Taymiyya, 'Majmu Fatawa shaykh al-Islam Aḥmad ibn Taymiyya', in Abn al-Rahman ibn Muhammad ibn Qasim and Muhammad ibn 'Abd al-Rahman ibn Muhammad (eds), *Mas'alat tahsin al'-aql wa-taqbihuhu* (Riyad: Matabi, al-Riyad 1961) 37 vol, vol 8, pp 428-36; and see Vasalou's comments (fn 85), p 21 ff.

[86] See Vasalou (fn 85), pp 27-8.

[87] Ibn Taymiyya, 'Mas'alat tahsin al'-aql wa-taqbihuhu' (fn 86), vol. 8, pp 434-5.

[88] Vasalou (fn 85), p 34.

[89] Ibn Taymiyya, *Qa'ida fi'l-mahabba*, p 112.

and agreeable to human beings and things contrary and harmful: the first give them pleasure, the second pain.[90] Often we find, Sophia Vasalou observes, Ibn Taymiyya gliding from psychological descriptions to more normative tones, from stating that 'every living being strives for what brings it enjoyment and pleasure' to 'living beings should attain what benefits them and gives them pleasure.'[91] What is most striking in Ibn Taymiyya's presentation of ethical issues is the union of two different claims: first, an objective claim about benefit as an ethical value and, second, an ascription of subjective emotive states according to which we experience love for those who show justice, knowledge, beneficence, etc. and desire to praise them and wish them well.[92] This approach, Vasalou notes, reminds us of Hume's sentimentalist analysis of moral notions by which he takes an action or character to be vicious or virtuous, if we have sentiments of blame or praise 'from the constitution of our nature'.[93]

In concluding my non-systematic remarks on the role of reason in the Islamic tradition, I want to emphasise the extent to which reasoned deliberation about the good and the bad results is important in determining the interpretation of Sharia. The weight and influence of Middle Ages thinkers on the Islamic tradition is paired and renewed by those contemporary Muslim thinkers, such as Muhammad Fadel, who try to find elements of compatibility between John Rawls' liberal scheme of public reason and the tradition of rational inquiry that Fadel retrieves in Islamic theology and law (cf section 1).[94]

It is important to remember how Fadel is not alone in proposing a liberal, Rawlsian scheme as a solution able to encompass and find room for Islamic values. Andrew March is a liberal, non-Muslim political theorist who proposes a 'compatibility view', arguing that Islam may be interpreted as a strong moral commitment, a 'comprehensive doctrine' in Rawls' terms, that

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90 See Ibn Taymiyya, *Majmu Fatawa*, (fn 8), pp 308-9.

91 See Vasalou (fn 85), p 35.

92 See Ibn Taymiyya, ar-Radd 'ala al-Mantiqiyyin, p 423.

93 Vasalou (fn 85), p 38.

94 See M Fadel, 'The True, the Good and the Reasonable: the Theological and Ethical Roots of Public Reason in Islamic Law (fn 4).

can be shown at least not in conflict with those political values that are specified by a liberal-democratic conception of justice.[95] March takes his search for an overlapping consensus as an exercise in 'comparative ethics', meaning liberalism, on the one hand, and Islamic ethics, on the other, understood as the tradition of Islamic law, including Qur'anic exegesis (*tafsir*), *hadith*, commentary, jurisprudence (*usul al-fiqh*) and substantive legal-ethical rulings (*furn' al-fiqh*).[96] March aims at a point of equilibrium that requires the least amount of revision of traditional Islamic commitments in order to require the least amount of departure from traditional and widely held beliefs.[97]

I would only comment on March's and Fadel's attempts that in order to maximize their possibilities of success they should consider whether to enlarge Rawls' scheme of overlapping consensus so that also a selection of the classical virtues that receive allegiance from Islamic and Western quarters alike can be included.[98] A stronger foundation of values would be better

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[95] See A March, Islam and Liberal Citizenship: The Search for an Overlapping Consensus (OUP 2009), pp 12-3.

[96] ibid, p 14.

[97] ibid, p 14.

[98] The push to reform Islam from the inside is not peculiar to the contemporary authors I have just presented – and to many others who work in the same direction in our days. We would not have a clear picture of present day situation without recalling the modernist Islamic movement that emerged in many Islamic countries between the 19th and the 20th century. People such as Rashid Rida (Lebanon), Rafi' al-Tahtawi (Egypt) and Khayr al-Din (Tunisia) have strongly supported the argument for freedom of expression. First, they realized the degree to which Islamic countries fared backward with regard to European civilization and progress and recognized that progress in the governance of mankind relied primarily on respect for personal and political rights (See Khayr al-Din, *The Surest Path*, in Kurzman, *Modernist Islam 1840-1940* (OUP 2002), p 40 ff.). Some of them – in particular Rida – remarked that there is continuity between social progress and religious evolution because a *hadith* says that 'God sends to nation at the beginning of every century someone to renew its religion.' (Kurzman, p 6) Second, scholars belonging to the modernist movement had first to argue against *aqlid* – following established scholars – in order to defend their right to make innovative arguments. For example, Tahtawi and Rida – along many others – appealed to *ijtihad* as rational interpretation but so long as it supported the principles of religion (see Kurzman, p 13). Third and last, with regard

received in my view by Muslims who traditionally have in their cultural background concepts such as *maqasid* and *maslaha* that make reference to valuable purposes to realize in a Muslim community. The work ahead of political theorists would be, according to this program, that of defining a strong common ground in which virtues, *maqasid,* and *maslaha* could find their place and compatibility with classical liberal principles.

VIII. The Virtues in the Islamic Tradition: A Short Account

Following this sketchy description of the role of reason in different streams of Islamic ethical theory, we should now approach the core interest of our inquiry: the virtues. In parallel with the previous step, I want to start my account with those Islamic authors such as Al-Farabi, Ibn Sina and Ibn Rushd who show most clearly the Greek legacy. For each of these philosophers, I want to focus in detail upon a few points which show very clearly their connection with Aristotle's and Plato's EV.

First, we should notice how Al-Farabi distinguished between moral and intellectual virtues, following a well-established tradition that gives a special place to practical wisdom among those belonging to the latter category. Its place depends on its capacity of determining the right kind of action in each kind of situation. Similarly to the Western tradition, the person of practical wisdom is designated as 'reasonable'.

Second, among the moral virtues a special mention is reserved to friendship which is treated along Aristotelian lines, but with some religious element which helps to design what virtuous men hold in common. According to Al-

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to the direction of the progress inspired by the European model Khayr al-Din notes that Muslims should not ignore values that are correct and come from other cultures, but that were formerly possessed by Muslims (often these writers emphasize how Europeans have drawn from Islamic countries knowledge that they have later developed (see Kurzman, pp 17-8). Among the new conquests of the European culture to be implemented by Islamic countries Tahtawi counted and praised 'constitutionalism' founded on equality, taken as sharing the same laws and being equal before the state: a view that also the sacred text dictates (see Kurzman, p 20).

Farabi, they have to represent a community of belief or action, focused on beliefs regarding God, spiritual entities, the origin of the world. These common beliefs, in turn, make possible a community of virtue and mutual advantage.

In Ibn Sina's short tract on ethics (*Fi 'Ibn-al-Akhlaq*) we find more attention being dedicated to single classical virtues, such as temperance, justice and wisdom. They correspond to the three powers of the soul: the concupiscent, the irascible and the rational respectively. Each of the general virtues has subdivisions which specify aspects of temperance, courage and wisdom according to the plurality of ways in which they can be manifested in practical life. It is also worth mentioning that Ibn Sina shows more clearly than Al Farabi and Ibn Rushd the influence of Islamic religion on his view of the virtuous man and his performing religious duties. In his view, the religious man of virtue 'will be assisted by God to achieve success in whatever he undertakes.'[99]

In Ibn Rushd (Averroes) we find, with regard to the virtues, an approach clearly deriving from the Platonic division of the soul into three parts corresponding to three parts of the city. Wisdom, courage and temperance lead each its own sphere of conduct, while justice famously has an ordering role among the three parts of the soul (It is worth-mentioning that this Platonic account of justice is later supplemented by an Aristotelian notion of universal 'common justice').[100] The only distinctive feature of Averroes's conception of the virtues that needs to be emphasized is his conviction that virtues can also be inculcated by coercion.[101] It should be made clear that virtues, according to Aristotle's view, can be only taught to young people of well-born character who are naturally disposed toward what is fine and good. By contrast, the many obey, fear and avoid what is bad and antisocial only to achieve some share in virtue and show some degree of decency.[102] However, it is a milestone of the Aristotelian EV that virtues can be exercised only on

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[99] ibid, p 87.

[100] See Averroes, *Moralia Nicomachia*, fol. 65 b.

[101] See Fakhry (fn 77), p 90.

[102] See Aristotle, *Nicomachean Ethics*, 1179 b 5-19.

the grounds of an autonomous choice: coercion leads the agent beyond the realm of virtue.

Miskawayh focuses his attention on virtue as the perfection or excellence of the rational part of the soul. He seems strongly driven towards an intellectualist conception in which virtue belongs with knowledge and cognition, while the activities proper to the body are shunned. Miskawayh also follows the traditional Platonic tripartition of the soul between wisdom, courage and temperance; while, in an Aristotelian fashion, each virtue is described as a means between two extremes. It is to emphasize that from each of the cardinal virtues he derives, in a non-Aristotelian fashion, a table of intellectual and moral virtues which seem to mark some distance from their Greek predecessors.[103]

A special mention is deserved by Miskawayh's treatment of two virtues as pre-eminent over all others: justice and friendship. The first is conceived in Platonic terms as an equilibrium resulting from the virtues of wisdom, temperance and courage. It is a mode of unity, in Platonic terms the 'perfection of being'. In turn Miskawayh appears influenced by Aristotle in designing other distinctions within the concept of justice – we can find a heterogeneous element in his conception of 'divine justice'. This idea is located in the realm of metaphysics, according to a Platonic and Pythagorean view and Miskawayh goes on also to assert that in the *Nicomachean Ethics* the highest form of justice is that emanating from God.[104]

As to friendship, this is taken by Miskawayh as the ideal condition of the human relationships. Justice comes in only when this noble disposition cannot be achieved. Most of what he says about forms and varieties of friendship is of Aristotelian inspiration but for his consideration of divine love (friendship) which has a clear neo-Platonic derivation – as in the case of divine justice. The love for his Creator entails obedience for and glorification

[103] See Miskawayh, *Tahdhib al-Akhlaq*, 19 ff.

[104] The Aristotelian source of this alleged statement is uncertain. See Fakhry (fn 77), p 115 .

of God and it is a prerogative especially of the man of 'divine learning' because one can love deeply only what one knows.[105]

We should now go back again to Al-Ghazali's ethics and consider his views on the virtues as a position which, although stemming to some extent from the classical conception, makes a few steps aside in the direction of a religious understanding of the virtues. A few points deserve explicit mention in Al-Ghazali's EV. First, more than other Islamic thinkers, he locates the virtues within the context of the good character which is taken as an established state of the soul from which good actions – i.e. those which are praised by reason and the *Sharia* – proceed.[106] This definition by Al-Ghazali marks a relevant difference with classical ethics insofar as the faculties of anger and desire have to yield to the dictates of reason *and* the *Sharia*. Following the previous presentation of the place of reason in Al-Ghazali's ethics, we should notice how its role is less crucial in comparison to classical EV. However, the inclusion of Sharia as a criterion of evaluation and judgment seems to help the work of reason rather than contrasting its determinations, as it happens in determining the mean for each virtue in different circumstances.[107]

Second, 'the mean', the correct state of realizing each virtue, according to an Aristotelian doctrine that is also entirely endorsed by the Aquinas, is emphasized by Al-Ghazali for at least two reasons. The first reason is that it keeps the virtues in their worldly dimension because the state of the mean is determined by practical reason that mediates between two extremes, as in the case of courage that is a mean between a state of defect (cowardice) and a

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[105] See Miskawayh, *Tahdhib al-Akhlaq* (fn 83), p 147 ff; and the comment in Fakhry, (fn 77), p 118.

[106] See Al-Ghazali, *Ihya Ulum ad-Din,* III, p 46. According to Al-Ghazali it is through 'the conjunction of reason and revelation (*al-aql, wa'l-shar*) that the moral perfection of 'moderation' is achieved. Fakhry (fn 77), p 199. Fakhry correctly emphasizes the analogy with Aristotle's ethics. Al-Ghazali strongly emphasizes the process of struggling against passions (*hawa*) and the condition of overcoming and subduing them is the 'present heaven' of mankind. See *Mizan al-Amal*, p 48. This view appears as a clear remind of the Aristotelian harnessing of passions.

[107] See ibid, III, pp 84, 147.

state of excess (bravery): the same procedure applies in each sphere of conduct in which a virtue – e.g. temperance or generosity – comes in.[108]

By contrast, the second reason that leads Al-Ghazali to emphasize the importance of the mean takes the mean towards the otherworldly dimension: keeping to the mean entails remaining as far as possible from the grasp of desires and, thus, achieving the greatest possible resemblance to the angels.[109] Good character can be achieved through the state of the mean as this results in the virtues of wisdom, courage, temperance and justice. In particular, Al-Ghazali considers justice as the state of balance in which 'reason, desire and anger are kept in their proper place and given their due'.[110] It is worth-mentioning that, notwithstanding several resemblances with the classical conception of the virtues, the virtues just enumerated find their highest realization when getting close to the way of the Prophet.[111]

Third, I believe it necessary to emphasize Al-Ghazali's view on the possibility of changing character through effort and appropriate moral training. It is a distinctive feature of his ethical thought and marks a point of difference with regard to classical EV. In acquiring good character Al-Ghazali mentions divine gift – for people who are good by nature – mortification and self-training. The latter can be equated with 'habituation' which is the method of acquisition of the virtues most in line with the tradition of classical thought. By contrast, the idea of mortification is unknown to classical EV and derives from Al-Ghazali's conviction that it is possible to correct an evil character through the help of a spiritual guide. Such work of self-correction requires as

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[108] See ibid, III, pp 85-86, 199.

[109] See ibid, pp 50, 83.

[110] M A Quasem, *The Ethics of Al-Ghazali* (fn 76), p 85; see. Al-Ghazali, *Al-Arba in fi Usul ad-Din*, p 73. It is very clear that these hints about the structure of virtue resemble Aristotle's conception of virtues to a large degree. For example, *Nicomachean Ethics* 1106 a 26- b 7 (about the mean); 1102 a 14 ff (about rational and non-rational parts of the soul).

[111] However, the general division of virtues among wisdom, courage, temperance and justice – and the further subdivision of each of these principal virtues – follows roughly the Aristotelian virtues, as laid down in NE, V, chaps. 1-2-6-7. In particular, it is Al-Ghazali's treatment of justice that corresponds to the Aristotelian scheme. See Fakhry (fn 77)), p 201.

first step the awareness of one's evil traits and a search for spiritual guidance. Second, the general method for healing diseases of the soul is by removing its causes. In other words, every vice should be removed by its opposites through knowledge and action.[112] Once the man of vice is made aware – through his spiritual guide of the nature of his vice, its causes and its power of harming in this life or in the next – it is necessary to treat the vice through action. The action should be of a nature opposite to that of the vice in order to start the operation of removal of the latter. This 'practical remedy' of removal, as Al-Ghazali calls it, requires a high degree of patience.[113] Although the removal of evil character traits is accomplished through a man's conscious efforts, there is a supernatural element of divine grace. The purification of the soul is only accomplished by the grace of God and through his help.[114]

In my view, there are two features in Al-Ghazali's account of the possibility of changing character which are worth-emphasizing. Both of them mark a difference between his ethics and the classical tradition. The first is the same idea of the change of character for adults which is unknown to writers such as Aristotle. He discusses the way to make young people virtuous through habituation, argument and the law. The latter and its sanctions are necessary for the many who cannot be stimulated towards what is fine and good. The many, Aristotle says, can obey for fear of sanctions and can at best become decent because it is unlikely to alter by argument what has long been absorbed by habit.[115] In other words Aristotle does not believe in the possibility of transforming vicious people into fine and virtuous characters. Classical, worldly EV cannot propose such a move because it is a transformation which goes beyond its potentialities. Rather, it is the second distinctive feature in Al-Ghazali's views on this issue that makes the transformation possible. It is the appeal to divine grace, to the otherworldly element to mark the main difference with Aristotelian (and, generally, classical) EV.

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[112] See Al-Ghazali, *Ihya Ulum ad-Din,* III, p 129.

[113] See ibid, III, pp 173; IV, p 50.

[114] See ibid, IV, p 368.

[115] See *Nicomachean Ethics*, 1179 a 33- b 19.

That element finds full realization in the *mystical virtues* which Al-Ghazali takes as a necessary second stage after the purification of the soul through self-training and mortification. Most important among the mystical virtues are repentance, fear, ascetism, patience, gratitude, sincerity, truthfulness, trust, love and satisfaction. The seeker after God looks at a path that he has to ascend step by step toward the top where he finds love. The nature of a mystical virtue is at bottom that of a basic virtue in human nature. It is a disposition of the soul to which Al-Ghazali adds the element of knowledge and that of action. He takes knowledge of the benefit of a virtue to be the cause of the disposition and, in turn, this gives way to action.[116] The acquisition of these mystical qualities is identified by Al-Ghazali as the enlightenment of the soul, the state which is most near to God and which can be attained only by the highest category of men: the mystics. They are qualities which lead to salvation, the highest form of happiness.[117] It is quite plausible to recognize some degree of similarity between Al-Ghazali's mystical virtues and the Christian conception of the virtues, elaborated by philosophers (and doctors of the church) such as Augustine and Thomas Aquinas.

IX. Conclusion

The often harsh conflictuality between Western and Islamic culture is surely grounded in a plurality of causes. My short inquiry has not taken into consideration political and economic causes of conflict. This would entail an entirely separate reflection. By contrast, I have dwelled on the ethical differences between the two cultures, focusing on three basic concepts: human rights (HR), *maqasid al-Shariah* and the virtues. My argument about HR basically consists of three points: first, notwithstanding their birth in a Christian and individualistic Western context, HR preserve their appeal also for large numbers of Muslims; second, a large part of the appeal of HR as an international standard relies on the general demand of some limits on government abuses against individual freedoms; third, what remains a point of divide between Western and Islamic culture is the ultimate submission of any human right to the evaluation according to Shariah criteria.

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[116] See *Ihya Ulum ad-Din*, IV, p 59.

[117] See ibid, IV, pp 29, 213.

At this point the idea of *maqasid* comes in as a necessary supplement that may bring HR closer to Islamic culture. The argument about *maqasid* departs from the idea that if we accept an extensive reading of the concept that understands it as a core of human welfare and development, we may also define a better foundation for HR. In order to found the *maqasid* argument we do not rely only on Ramadan's proposal, but also, as I tried to show, on a tradition that goes back to al-Ghazali and al-Razi. On the grounds of the large range of Ramadan's *maqasid* we can establish a teleological foundation for HR. In turn, Nussbaum's Aristotelian approach to ethics defines a list of basic capabilities that, on the one hand, largely overlaps with the list of *maqasid* and, on the other, prepares the ground for the virtues as correct answers in the spheres of experience defined by the capabilities. Nussbaum proposes a list of virtues which follows closely Aristotle's classical virtues. They identify correct ways of choosing in the basic spheres of human experience.

The third stage of the argument could not help being concerned with a summary examination of the major virtues. I tackle two main issues: first, the role of reason in ethical thought and the well-known debate between Mu'tazilite rationalist positions and the Ash'arite theistic views. This is a methodological issue that I have presented not only in the form of the crude opposition between Mu'tazilite and Ash'arite views, but also in the form of the more nuanced opposition between Hard Natural Law and Soft Natural Law. Each of these two theories is strictly connected respectively to Mu'tazilite and Ash'arite positions, but they are both offering an understanding of fact and value as a fusion that, in the case of Soft Natural Law, is tempered by the element of divine grace that leaves God free to alter his creation at any time. This approach also allows us to read an author usually enlisted on the voluntarist side, such as Al-Ghazali, as supporting rational inquiry in extending the application of the Sharia. He founds much of his work of interpretation on concepts such as *maqasid* and *maslaha* that give content and form to the ideas of rational purposes in the law and public good. Another important author that is discussed with regard to the issue of reason is Ibn Taymiyya, often considered as a banner of religious extremism. Following Vasalou's careful inquiry, it emerges that it is the notion of 'utility' that carries moral ultimacy, according to Ibn Taymiyya. It has an objective

ethical value that is paired by a Hume-like sentimentalist analysis of subjective emotive states and their value for us.

The methodological dispute over the role of reason reflects also on the other issue that is tackled in this paper, that of the virtues. The virtues are examined through the work of philosophers such as Al Farabi, Ibn Rushd and Miskawayh, among others. Their theories are inclined mostly towards Aristotelian and Platonic virtues. Their appeal to fundamental virtues such as wisdom, courage, temperance or justice and friendship shows, in my view, that Nussbaum's overall reconstruction would not be foreign to their understanding of the virtues. Further, also in the work of a religious thinker such as Al-Ghazali, we find a basic Aristotelian scheme of virtues to which the religious element of the mystical virtues is added. The religious element remains an evident mark of difference with classical virtues but, it is worth-emphasizing, no more so than what the religious element of Christianity led Aquinas's ethics to diverge to some degree from the Aristotelian view of the virtues. In concluding on this point, I consider it plausible to hold that insofar as the virtues can be taken as concepts whose thrust is largely overlapping with *maqasid*, they define some fundamental feature of the good life that can be accepted transculturally, both among Westerners – Christians and non-Christians alike – and among Islamic devotees. Thus, it seems sound to some extent to hold that the virtues can be subsumed and integrated within a more flexible scheme that goes beyond HR: something similar to an enlarged 'overlapping consensus'.

Finally, one might wonder whether in the end this paper wants to offer a competitive approach to the mainstream one of human rights or, rather, whether it wants simply to *integrate* some classical idea in a liberal/modernist approach to Islamic ethics. The latter alternative makes more sense, in my view, because of the large number of Islamic writers that have taken seriously the possibility of an Islamic political regime based on liberal concepts, such as human rights. I should emphasize how an understanding compatible with some degree of liberalism already underlies what was already at work with many writers of the modernist Islamic movement of the 19th and 20th

century.[118] However, in order to have the integration of the virtues in the liberal framework to work effectively I believe we should find some room for the virtues in a scheme of 'overlapping consensus' that takes them not as a 'comprehensive conception' but as a crucial element of that (trans)cultural consent that allows a society to function correctly, even with strong degrees of cultural difference.

[118] see n 99.

FRANCESCO DE CECCO, STATE AID AND THE EUROPEAN ECONOMIC CONSTITUTION (HART PUBLISHING 2012) 210PP. ISBN 9781849461054, £55.00

and

JUAN JORGE PIERNAS LÓPEZ, THE CONCEPT OF STATE AID UNDER EU LAW - FROM INTERNAL MARKET TO COMPETITION AND BEYOND (OXFORD UNIVERSITY PRESS 2015) 320PP. ISBN: 9780198748694, £60.00

by Jotte Mulder*

It is fair to say that of all areas of EU internal market law, state aid rules have long been the least theorised. This may be changing. Recent years have seen some important contributions to the discussion of the EU state aid rules, in particular with respect to their wider function, meaning and constitutional status within the internal market. As a starting point it should be noted that the existing literature on the economic constitution tends, with notable exceptions, to focus primarily, if not exclusively, on the impact of free movement case law. In addition, as noted, competition law and, particularly, state aid law are mostly subject to specialised debates, often related to rather insulated approaches within those areas of law. The latter fact must be related to the ever-increasing specialisation within each area of internal market law, in particular the fact that competition and state aid rules are subject to a high degree of practitioners-led debates, whereas free movement tends to be mostly an academic affair. Free movement law is therefore relatively more often the subject of wider academic reflections, whereas competition and state aid are more inwardly focused and less often directly part of the wider constitutional narrative on the economic constitution of the Union. Both of

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the books discussed in this review recognise and posit that a narrative, which considers one of the salient constitutional questions to be that of the social effects of internal market law, has to include a thorough reflection on Union state aid law. This review discusses and briefly compares two important and enriching contributions to this narrative.

The first book that will be discussed is Fransesco de Cecco's 'State Aid and the European Economic Constitution'. This is truly a pivotal contribution to the contextualisation of state aid rules within the wider academic narrative on the so-called economic constitution of the Union.

The book is divided into three parts. Part I develops the normative outlook with a discussion of the constitutional framework of the internal market and the nature of state aid law within that context. The emphasis is placed on the distinctive nature of state aid control which acts as 'a significant constraint on the Member States' freedom to stimulate regulatory competition' (p 55). In part II, de Cecco puts the issue of Member States' diverging roles as market participants and regulators centre-stage. How do the state aid rules respond to these different roles? Part III deals with two specific issues of particular importance in the current debate on the role of state aid: the issues of regional taxation and public service.

The question at the centre of de Cecco's book concerns the potential structurally distortive effects of economic integration on the fundamental structures of domestic societies. Of particular interest to de Cecco is the question how the Court of Justice of the European Union (the Court) and the General Court (the GC) have dealt with this balance in their *jurisprudence* in the field of state aid law. De Cecco forcefully argues that this is a question that is central to state aid law because its application influences sensitive questions that relate to the extent to which fiscal powers can be devolved from central governments to sub-national governments or how public services should be run. De Cecco's consistent and overarching question is how state aid law limits national regulatory autonomy and the extent to which this has prompted the Court to redefine the concept of state aid (p 135): 'These questions matter not only to state aid but also to the European economic constitution as a whole, as answers to them have profound

consequences on the way in which the EU legal order structures the relationship between market and nonmarket concerns.'

De Cecco sets out his normative perspective on this balance by submitting that 'the legitimacy of EU law rests on its ability to deliver a single market which does not undermine the capacity of Member States to pursue redistributive policies and to preserve the delicate balance between EU law supremacy and national concerns regarding their constitutional spaces' (p 2). Thus, the author argues that there is a constitutional space that belongs to the Member States that is potentially at risk in state aid law. Specifically, de Cecco aspires to demonstrate that the regulatory standards, which are introduced on the basis of the EU state aid rules may nudge public bodies towards actions that are exclusively justified on the grounds of their commercial self-interest. As such, de Cecco argues that public bodies may be 'confronted' with the requirement to satisfy a particular conception of self-interest that is modelled after values that might have been, up until that point, foreign to the public body (p 76). Thus, the self-interest of Member States as market participants may get in conflict with their role as 'public authorities or with policy objectives that embody the authority of the public mandate' (p 77).

De Cecco proceeds by discussing this important constitutional balance, mostly, by critically assessing the case law of the European Courts. The authors' legal analysis is superbly eloquent and theoretical reflections are supported and consistently conjoined with analysis of case law, which makes the book a very pleasant read. In all of his critical evaluations of the case law, de Cecco coherently looks at the ability of the Court to deliver a legal infrastructure for market integration that does not compromise the wider 'non-market' values that may be embedded in national political and constitutional systems. De Cecco highlights strands of case law that are illustrative of a Court that is concerned with the creation of a legal space where Member States are free to pursue their public interests, a legal space that is in most instances successfully crafted by the Court. In his analysis, de Cecco highlights important strands of case law and diverging approaches to these fundamental constitutional questions by the GC and the Court. The

analysis of case law is largely novel and original, especially within the normative framework that is advanced by the author.

I have three minor reservations with regard to this exciting piece of scholarship. However, it should be noted that the following minor points do not, in any way, undermine the richness of de Cecco's work.

First, the normative perspective of de Cecco could have been combined with a more explicit acknowledgment of the central field of tension in which the EU state aid rules operate. De Cecco elaborates on some profound issues that arise when efficiency principles are installed within an administrative context that could also be based on trust, informal values, public spiritedness and so forth. However, the balance from the perspective of state aid is difficult because such amorphous elements of state-society-market relations are, from a state aid perspective, perceived as important factors contributing to in-transparency and constitutive to relationships, which are likely to end up in granting covert advantages granted to some undertakings and not to others. The rigidity of the prudent private investor standard *leaving aside all social, regional-policy and sectoral considerations* is, at least partly, based on an idea of administrability and transparency in state aid matters. This balance between administrability on the one hand and a need for context-specificity on the other stands at the centre of state aid law but is not very clearly developed by the author.

Secondly, state aid policy and law underwent considerable changes. The most recent one is not accommodated by the author, namely modes of adaptation of the European *praxis* created by the economic and political emergency of the financial crisis. At the time of publication in 2012, the financial crisis had already had a strong impact on the application of state aid law in Europe. This would have opened a new front for the author to engage with and reflect upon in light of the economic constitution but, granted, could have required a slightly different orientation and shape of the book.

Thirdly, the author could have given some more attention to the importance of the policy dimension of the state aid rules. The Commission has issued an extensive collection of guidance papers, forms for notifications and

reporting, block exemption regulations, temporary rules, horizontal rules and sector-specific rules that Member States can rely on in their design of aid schemes or *ad hoc* individual aid actions. These documents all serve the purpose of minimising conflicts and streamlining, in procedural terms, the allocation of governmental aid mechanisms. In this sense a lot of the potential conflicts that are of concern from the perspective of state aid have been 'negotiated' and Member States have agreed to follow certain procedures on when they grant state aid in specific sectors.

This is important in light of the normative concerns expressed by the author because it is likely that the efforts of the Commission to nudge Member States towards the implementation of self-assessing 'evaluation communities' that structure and implement a very specific idea of governance has systemic effects. That is to say that there are likely to be policies or objectives that are not developed because Member States are already thinking only in terms of the smart regulation rationale of the Commission. Within this context, normative claims over the functioning of the state aid regime as a covert technocratic process that depoliticizes the formulation and pursuit of social objectives can be formulated on the basis of concerns about its democratic legitimacy and as an encroachment on the constitutional space for Member States to develop aid schemes. It matters whether policy objectives developed by Member States are to be defined within the technocratic domain of the proceduralised world of the state aid rules or whether they are allowed to take shape within 'normal politics' and the democratic arenas of the Member States. The question is therefore whether, in light of the normative concerns pursued by the author, his focus on case law was the most salient or he would have done better focussing on the silent encroachment of constitutional spaces by the European Commission. Granted, this could have easily required a completely different book and, as has been highlighted several times, the author has produced an outstanding piece of scholarship with his chosen focus in the field of EU state aid law.

Piernas' ambitions in 'The Concept of State Aid Under EU Law' are exactly to dissect the relationship between the policy of the Commission and the development of the essential legal categories of the EU state aid rules.

Thereby, Piernas shares the ambition of de Cecco to discuss EU state aid law 'in context'. Yet, where de Cecco reflects on EU state aid case law in the context of a constitutional perspective, Piernas discusses the development of case law in the context, mainly, of the policy sphere of the European Commission. Moreover, the author seeks to demonstrate a link between the policy initiatives of the European Commission and the development of EU state aid law in the case law of the Court. The book is set up so as to discuss leading cases in the field, which are coherently presented throughout the work. In his discussion of these cases, Piernas' recurring argument is that by focusing on the position of the Commission and developments in state aid policy, it is possible to provide a better understanding of the development of the case law. If only because of the novelty of this effort, the work is certainly a major and remarkable contribution to the field of state aid law. State aid law has not yet been approached on this basis and the coherent and consistent discussion of case law is in itself likely to set the book up as one of the important referential works for some time to come.

The basic set up of the Piernas' book is as follows: in the first part, EU state aid law is discussed in perspective. Then, four separate chapters discuss the different elements of article 107(1) TFEU. The notions of advantage and selectivity are covered in chapters 4 and 5. The requirement that state aid has to be granted 'by the State or through State resources' is addressed in chapter 6. The effect on trade and distortion of competition conditions are discussed in chapter 7. Finally, in part III Piernas discusses, as a separate case study, the effects of the financial crisis on the state aid concept and he offers a synthesis of the evolution of the concept of state aid in four distinctive periods.

Piernas demonstrates interesting links in the development of state aid concepts within a very strong policy-driven context. This is particularly revealing and interesting in the development of the concept of selectivity, where Piernas manages to unveil clear linkages between Commission policy and interpretations and developments in the case law (p 103 and further). However, Piernas' suggestion of a strong link between the policy preference and developments in the case law of the Court is not always equally convincing, if only simply because of a number of rulings that appear to directly oppose policy preferences of the Commission. One can point for

example to the unwillingness of the Court to support an expansive notion of aid (*PreussenElektra*)[1], which is clearly a policy preference for the Commission, or to the margin of appreciation that is granted by the Court to Member States in the pursuit of services of general economic interest, which the Commission would rather have linked to a stricter market failure rationale. Or one can point to the case law of the Court that accommodates the objectives pursued for the purpose of determining whether a State acts in its capacity as shareholder or regulator (*Adria-Wien Pipeline/EDF*)[2], which the Commission fundamentally disagrees with.

As such, there are some important and, in my view, desirable differences of policy preferences of the Commission and evolution of state aid concepts in the case law. These differences can be easily explained and justified. Whereas the Commission pursues effective enforcement, the Court is concerned with wider constitutional concerns that include the safeguarding of that constitutional space and balance, which is of such concern in de Cecco's contribution. Instead, Piernas does not pay much attention to such differences (e.g. p 170), based on the fundamentally different role of the Court vis-à-vis the Commission, or occasionally brushes these divergences away as 'mistakes' from the Court (e.g. p 95). Therefore, in the same way as de Cecco's work could have benefitted from more linkages between the case law and the effects of the Commission's policy dimension, Piernas' work could have benefitted from a slightly more theoretical reflection that could have positioned the Court as a constitutional actor within the internal market. A constitutional actor whose sole concern is *not* just the effective enforcement of the Union state aid rules.

Moreover, the contextual approach adopted by Piernas could have profited from a slightly wider (societal) contextual approach than 'merely' taking into account the dimension of the Commission's policy preferences. It would have been interesting to, for example, include some 'external' societal developments in chapter 3 'the evolution of European State Aid Policy' and to establish potential connections between processes of privatisation and

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[1] Case C-379/98, ECLI:EU:C:2001:160, *PreussenElektra*.

[2] Case C-143/99, ECLI:EU:C:2001:598, *Adria-Wien Pipeline* and Case C-124/10 P, ECLI:EU:C:2012:318, *Commission v. EDF*.

liberalisation on the evolution of the concept of state aid. These societal processes have led to new forms of regulatory intervention and the gradual process by which the role of the state as a direct provider of public services has disappeared and has led to the creation of 'new regulatory tools' that are aimed at safeguarding the public interest on the basis of terms set by new public management reforms. These developments coincided with the adoption of the market economy investor principle. One of the key features of these reforms has been to *not* make any distinctions between the public and the private sector when it comes to how the public sector is managed: separating commercial activity from non-commercial activity and emphasizing financial reporting and accountability. It is interesting to think about how these developments have influenced Union state aid law. For example, on the basis of the state aid rules the relationship between the state and the provider of public services in many of these regulatory bonds has to be based on the behavioural standard of the prudent investor in every action that brings forth an advantage or, alternatively, to notify the state aid. This has led to a new reality for authorities pursuing regulatory intervention in the market. Although the Court recognises explicitly that the private investor principle has to be excluded in the event that the state acts as a public authority, since such situations can never compare to those of a private investor in a market economy, the new regulatory tools and implementation of principles of new public management make it increasingly obscure to understand what public authority actually entails outside of the traditional functions that have always been strongly associated with state authority (police, public health, public security).

This last comment could have easily required a completely different book and, as has been highlighted at the start, Piernas has produced an important piece of scholarship with a clear added value, perhaps even because of his focus on the impact of the Commission's policy on the development of Union state aid law.

In summary, both books contribute in their own original ways to a further understanding of state aid law *in context*. De Cecco reflects on state aid law in a broader constitutional context. Piernas reflects on state aid law in a wider

institutional context. The authors should be applauded and both books are highly recommended readings for scholars, students and practitioners alike.

Marise Cremona and Anne Thies (Eds.), The European Court of Justice and External Relations Law: Constitutional Challenges (Oxford: Hart Publishing 2014) ISBN: 978-1-84946-504-5. 298pp. £50.00 (Hardback).

Graham Butler*

Without outlining the challenges and the balancing act that the Court of Justice must always strive to achieve, and the potential pitfalls that ensue, this book is a worthy read for those perplexed about the foreign relations issues of the Union, and those interested in how the primary judicial actor of the Union interacts with law surrounding it, given the constitutional parameters. Over the length of this book review, it will be explained why this publication is a valuable contribution to the understanding of the Court of Justice as a judicial actor in the field of EU foreign policy and external relations.

One of the most characteristic paradoxes and contradictions in European Union law is that EU *external* relations law is in fact inherently *internal* in its dynamics from a legal perspective. Whereas the Union actively attempts to fit into the global order, both legally and politically, the undercurrents of it mean that internal strife must first be settled on a sound and firm setting in order for its international ability to be able to deliver 'foreign policy' results. It is impossible to argue that the Court of Justice has *not* shaped the external dimension of the Union's policies, particularly so once it is understood what the Court of Justice has done to shape its character. The Court's mandate being imposed by the Treaties, and furthered through self-anointment actions, as covered at length in this book's contributions, has gently crafted the manner in which the EU's international relations are conducted. Whether it is international agreements that form a key part of the external space in which the Union operates, or otherwise, the Court has found itself as a key interlocutor within the governing processes as *the* judicial adjudicator. This has all been spurred on by the often ill-defined Treaties that are at best, mildly coherent, and at worst, blatantly contradictory. The Treaty

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of Lisbon, as alluded to in the introduction of the book, was an attempt by the intergovernmental conference to 'clean up' the existing legal instruments that were scattered throughout different provisions. Convened after the ill-fated Constitution for Europe, the intergovernmental conference, amongst other things, sought to amalgamate and categorise as much external relations law within the primary law, the Treaties, as was practically possible. Despite this honourable attempt, the provisions still lack as much clarity as they might otherwise could have.

The law of EU external relations can be broadly separated into two distinct entities for the purposes of practice and analysis, with firstly, the Common Foreign and Security Policy,[1] and secondly, the other regular external relations of the Union, that of *non*-CFSP. Some progress was made in this regard at making the Treaties more coherent, for example in CFSP where Decisions are now the predominant tool, and with its 'specific rules and procedures' that still govern their nature as if a standalone pillar still existed, with its shadow still very clearly visible.

This book takes aim at just one angle, albeit an important one, and that is the approach of the Court of Justice of the European Union within the field of EU external relations law. In attempting to cover many aspects of the Court's approach to external relations, including answering intricate questions of EU external representations as an international actor, to matters of constitutional importance for the Union, the book captures as much as it could be reasonably expected, given its broad nature. Matching such scholarly ambition with qualitative results, to meet legitimate expectations, is not an easy feat.

Scholarship on the legal dimension of EU external relations has been broached for some time, albeit by a limited number of specialised scholars. The edited collection contains three contributions in each of the four neatly allocated sections. Commencing in Part I with a discussion on the Court of Justice's role in the development of the external relations law, a thematic approach is evident. With corresponding questioning titles, touching upon

[1] Somewhat (dis-)affectionately known as CFSP.

the institutional nature of the Court of Justice, *Cremona*, *de Witte*, and *Hillion*, each ponder three flammable questions – whether it is reticent, selfish, or indeed powerless. In the first substantive contribution to the collection, *Cremona* introduces the question whether the Court is non-interventionist or not. By linking what would generally be considered 'policy objectives' with the Court's own role in the institutional framework of the Union, a picture is painted of the Court's approach to questions before it, and its attitude towards such. As *de Witte* alludes to, the Court of Justice's 'relationship' with other international judicial bodies has been strained at best. By delving into the case law of the Court, largely focused on major Opinions and judgments, he details the history of the Court's attitude to other entities, ranging from the *Opinion 1/91* on the establishment of an EEA Court, which it prevented; as well as *Opinion 2/94*, declaring that the EU had no competence to accede to the European Convention on Human Rights (ECHR). By addressing the *Mox Plant* case on jurisdiction and Treaty obligations vis-à-vis the International Tribunal for the Law of the Sea (ITLOS) under the UN Convention on the Law of the Sea (UNCLOS), as well as the complex issue of the European and Community Patents Court through *Opinion 1/09*, it is clear that the Court finds that international agreements that open a potential jurisdictional clash with the Court of Justice find themselves coming in for sharp critique. In concluding the theme of provocative questions, *Hillion* asks whether the Court is powerless in the context of the CFSP. Of all external relations policies, CFSP is the most peculiar, with its 'specific rules and procedures' determined by its own Title within the TEU. The post-Lisbon provisions of the Treaties on CFSP have led to a series of inter-institutional disputes opening up the Court to adjudicating on differing interpretations of how far CFSP can be stretched, given the boundary-policing role in which the Court has been placed. Furthermore, it is considered how the new Article 218 TFEU is interpreted on the opening, negotiating, and conclusion of international agreements. The importance in which the institutions, particularly the Parliament, have attached to such litigation is noteworthy given that the Court's judgments have a lasting impact on the practice of CFSP and other external relations provisions of the Treaties.

Part II threads a little further by appraising the jurisprudential construct of the Court of Justice, and the distribution of external competence. In dealing with the division of competences in a vertical sense, *Neframi* discusses the

principle of conferral in the multilevel architectural framework. The division of competence between Member States and the Union is not categorised in any explicit manner, yet the Treaty of Lisbon merged specific CFSP objectives with overall external relations objectives. The chapter concludes that the constitutionalising process of external relations competences will entail the Court continuing to play an important role. Next, *Kuijper* tackles the pertinent question of whether EU foreign policy and external relations is still retained at executive level. Traditionally in the nation state concept, it has been executive actors who have amassed and retained control of sensitive areas of policy, such as foreign, security, and defence matters. The lack of plurality in the decision-making regime meant the domain was preserved for governments, as opposed to parliaments and judiciaries. The separation of powers and institutional balance in an EU context, however, poses a different set of questions, given the evolutionary nature of the Treaties, which set down the rules for each institutions' and actors' respective positions. Finally in Part II, *Van Elsuwege* contextualises the inter-institutional relations and the battle-ground clashes that have opened up as a result of the Treaty of Lisbon coming into effect in 2009. The Court of Justice is finding itself as a marshal given the CFSP and non-CFSP distinction when it comes to choice of legal basis for external measures, with the 'centre of gravity' test making up for the indistinguishable border between the areas. This results in the role of the Court of Justice being propelled further than it may have itself wanted. Given the potential conflicts, *Van Elsuwege* questions what the role of the Court of Justice should be in external relations as a judicial adjudicator, noting the ever-present and continued friction between CFSP and non-CFSP legal bases.

In the penultimate Part III, *Thies* deals with the 'general principles' in the development of EU external relations law. Progress in this field generally derives from judgments of the Court of Justice, and such principles of Union law are just as important in external relations as any other. *Thies* demonstrates that the international dimension of external action by the EU is multidimensional, given the action of Member States on the same international playing field. Similarly, the flexibility that is needed for external action, playing in tandem with the strict ramification of Union law that the Court has to uphold, can generate debate on the role of the Court itself.

Following this, *Azoulai* questions the legal reasoning surrounding the Court in external relations matters. Through his assertions, it is pointed out that the legal cognition of the Court has been subject of much interest in recent years. Given the *ERTA* doctrine that was created in 1971 and has developed since, it is argued that its significance should never be understated. Differentiated integration has developed across the Union, either through derogation, practice, or political understanding, resulting in the uniformity of Union law coming under fire in a number of different ways. Finally in Part III, *Eckes* examines the ramifications that judicial discourse has had on the Court, and how its interaction with other judicial and quasi-judicial bodies in multi-layered systems of governance has contributed to its pivotal position.

In a two-to-one practitioner / academic divide, Part IV commences with *Kokott* and *Sobotta* on the Union law versus international law balance. Whilst there is an abundance of literature on the *Kadi* saga already in circulation, the contribution seeks to add further remarks on effective judicial protection within the Union in light of the special circumstances of such delicate cases on individuals through restrictive measures. The back and forth between the General Court (the Court of First Instance for *Kadi I*) and the Court of Justice is by no means a settled area of law on striking the balance between the two fields. Next, *Heliskoski* examines the Draft Accession Agreement of the Union to the ECHR, analysing the relationship between the Court of Justice, and the European Court of Human Rights (ECtHR). The prior involvement issue that is delved into was one picked up by the Court of Justice in Opinion 2/13[2] (delivered after the publication of this book), which has effectively slowed the accession process down to a halt. Although only dealing with a minor issue from the accession difficulties, it can be taken from the focused contribution that the two legal orders – that of the Union and that of the Strasbourg system – are intrinsically difficult to meaningfully intertwine. The final contribution to the volume by *Wouters*, *Odermatt* and *Ramopoulos* picks apart institutional approaches to international law – that of the judiciary, and the legislature. It is undeniable that the Treaties continued resilient silence has been the direct result of a lack of unanimity amongst decision-makers as to how to balance the interests of the various actors. The

[2] Opinion 2/13, ECLI:EU:C:2014:2454.

post-Lisbon framework in which the Union's institutions act is obliged to take international law into greater account, which the authors justify as means for making the comparison between European Union law and international law. From a rigid approach, to a more encapsulating methodology, the Court has clearly had issues with accepting international law on its face value within the Union legal order that it itself has proudly constructed. Despite the inconsistencies in which the actors adopt their methodological approach to international law, it is unlikely that coherence will come to the fore, with the increasingly 'unfriendly' approach that the Court is opting for.

Scholarship on the law of the EU's external relations was very much late to the game. It is contributions to the literature such as this that help to bind it all together, and ensure that the sub-discipline is more wholesome and accessible to those who have yet to grasp the intricate knowledge of the ins and outs of external relations – from the legal basis, to external representation discussions, debates, litigation, and institutional balance. It is often the case that edited volumes fail to have a common thread that would allow for a publication to excel, and become essential reading. This collection however, has no such issue. With a detailed set of objectives put forth at the introductory stages of the book, the book manages to hit the mark in capturing many of the purposes which it attempts to achieve. As the external relations of the Union continue to develop in the way that it has, so will the issues that arise as the pressure of the unitary legal order comes under continued attack. At least one chapter has already been cited in a recent Advocate-General Opinion,[3] showing the high esteem the book already holds in the eyes of practitioners.

Since the book's publication, the Court of Justice through Opinion 2/13 has found the Draft Accession Agreement of the Union to the ECHR to be incompatible with the Treaties. How such a landmark Opinion of the Court would feed into the narrative of the authors if such knowledge was on hand at the time is a question of pertinence. Opinion 2/13 has been such a controversial ruling from the Court of Justice that in due course, will

[3] See Opinion of Advocate General Wahl in Case C-455/14 P, *H v. Council and Commission* ECLI:EU:C:2016:212, paragraph 39, footnote 17.

necessitate some of the contributors to this book to revisit many of the pressing questions on the Court's role in the EU external relations. Having said that, this book is just one angle on EU external relations law – that of the Court of Justice. Other important institutions in EU external relations law are the Commission (in trade), the Council (by far in CFSP), and the Parliament, which finds itself with a strained, but increasing role as practical developments get locked into subsequent legal revisions.

Notwithstanding the role of other institutions in external relations law, the Court is still a prime actor, and will continue to possess strong constitutional status. The post-Lisbon environment and the prolonged use of the existing Treaties may mean that the development of external relations from a legal perspective may have to be governed by judgments and Opinions of the Court of Justice. If so, then its prominence is only going to increase further, on top of its already cemented place as the ultimate arbiter of Union law. There is further research to be done on the EU judiciary and its place within EU external relations law, with the political question doctrine potentially being the starting point for a new research agenda. In the meantime, this book is essential reading for advanced researchers in EU external relations law that reaps fascinating insights from an academically diverse range of authors, collectively striving to further understand and explain the Court's true impact.

EPILOGUE

GIOVANNI BOCCACCIO

THE DECAMERON

FIRST DAY - THIRD STORY

Melchizedek the Jew, with a story about three rings, avoids a most dangerous trap laid for him by Saladin.

'[...] Saladin, whose worth was so great that it raised him from humble beginnings to the sultanate of Egypt and brought him many victories over Saracen and Christian kings, had expended the whole of his treasure in various wars and extraordinary acts of munificence, when a certain situation arose for which he required a vast sum of money. Not being able to see any way of obtaining what he needed at such short notice, he happened to recall a rich Jew, Melchizedek by name, who ran a money-lending business in Alexandria, and would certainly, he thought, have enough for his purposes if only he could be persuaded to part with it. But this Melchizedek was such a miserly fellow that he would never hand it over of his own free will, and the Sultan was not prepared to take it away from him by force. However, as his need became more pressing, having racked his brains to discover some way of compelling the Jew to assist him, he resolved to use force in the guise of reason. So he sent for the Jew, gave him a cordial reception, invited him to sit down beside him, and said:

'O man of excellent worth, many men have told me of your great wisdom and your superior knowledge of the ways of God. Hence I would be glad if you would tell me which of the three laws, whether the Jewish, the Saracen, or the Christian, you deem to be truly authentic.'

The Jew, who was indeed a wise man, realized all too well that Saladin was aiming to trip him up with the intention of picking a quarrel with him, and that if he were to praise any of the three more than the others, the Sultan would achieve his object. He therefore had need of a reply that would save him from falling into the trap, and having sharpened his wits, in no time at all he was ready with his answer.

'My lord,' he said, 'your question is a very good one, and in order to explain my views on the subject, I must ask you to listen to the following little story:

'Unless I am mistaken, I recall having frequently heard that there was once a great and wealthy man who, apart from the other fine jewels contained in his treasury, possessed a most precious and beautiful ring. Because of its value and beauty, he wanted to do it the honour of leaving it in perpetuity to his descendants, and so he announced that he would bequeath the ring to one of his sons, and that whichever of them should be found to have it in his keeping, this man was to be looked upon as his heir, and the others were to honour and respect him as the head of the family.

'The man to whom he left the ring, having made a similar provision regarding his own descendants, followed the example set by his predecessor. To cut a long story short, the ring was handed down through many generations till it finally came to rest in the hands of a man who had three most splendid and virtuous sons who were very obedient to their father, and he loved all three of them equally. Each of the three young men, being aware of the tradition concerning the ring, was eager to take precedence over the others, and they all did their utmost to persuade the father, who was now an old man, to leave them the ring when he died.

'The good man, who loved all three and was unable to decide which of them should inherit the ring, resolved, having promised it to each, to try and please them all. So he secretly commissioned a master-craftsman to make two more rings, which were so like the first that even the man who had made them could barely distinguish them from the original. And when he was dying, he took each of his sons aside in turn, and gave one ring to each.

'After their father's death, they all desired to succeed to his title and estate, and each man denied the claims of the others, producing his ring to prove his case. But finding that the rings were so alike that it was impossible to tell them apart, the question of which of the sons was the true and rightful heir remained in abeyance, and has never been settled.

'And I say to you, my lord, that the same applies to the three laws which God the Father granted to His three peoples, and which formed the subject of your inquiry. Each of them considers itself the legitimate heir to His estate, each believes it possesses His one true law and observes His commandments. But as with the rings, the question as to which of them is right remains in abeyance.'

Saladin perceived that the fellow had ingeniously side-stepped the trap he had set before him, and he therefore decided to make a clean breast of his needs, and see if the Jew would come to his assistance. This he did, freely admitting what he had intended to do, but for the fact that the Jew had answered him so discreetly.

Melchizedek gladly provided the Sultan with the money he required. The Sultan later paid him back in full, in addition to which he showered magnificent gifts upon him, made him his lifelong friend, and maintained him at his court in a state of importance and honour.*

* Giovanni Boccaccio, *The Decameron [1348-1351]: Translated with an Introduction and Notes by G. H. McWilliam - 2nd edition* (Penguin 1995) 41–44.