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Editors Note

Starting a new academic journal is a quest full of excitement, but also a time of uncertainty. With that in mind, the Editorial Board is delighted that our first reading numbers exceeded our expectations. We believe that this is proof of demand for a Journal covering European legal matters from a Nordic perspective, but also the high level of academic interest for European law questions both within the Nordic countries, Europe and beyond. We are also delighted to welcome our new Senior Editor, Professor Theodore Konstadinides (University of Essex). We truly thank him for his interest and commitment to the success of the Journal.

In order to reach all interested academics as well as practitioners, and to maintain the aim to publish issues of the highest quality bi-annularly, we now simultaneously publish our call for papers for the second issue of 2019.

The current issue, just as our last issue, covers a broad range of legal perspectives, including EEA law, ECHR and EU law.

The Editorial Board

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INCORPORATION AND IMPLEMENTATION – THE EXECUTION OF THE EEA AGREEMENT BY THE ICELANDIC STATE

MARGRÉT EINARSDÓTTIR*

Abstract

The EEA Agreement is the most extensive international agreement Iceland has entered into, and plays a vital role in the country´s economy. The principal objective of the Agreement is to expand Europe's internal market, so that the four freedoms, ie free movement of goods, persons, services and capital, apply not only to the EU Member States, but also to the EEA EFTA States. The execution of the EEA Agreement is a complicated task and entails two steps; Firstly, EU acts (that are EEA-relevant), have to be incorporated into the EEA Agreement. Secondly the EEA acts need to be implemented at national level. This two-step process, has not been working sufficiently well in recent years, resulting in failure by the Icelandic state to fulfil its obligations on the basis of the EEA Agreement. The aim of this paper to to explain why, by defining and analysing all the factors that hinder the incorporation of EU/EEA law into the EEA legal order and implementation into Icelandic law. Furthermore the paper aims to provide suggestions on how to improve these processes. This paper argues that there are two underlying principal reasons for this poor performance. Firstly, changes within the EU have added new challenges to the execution of the EEA Agreement. Secondly, a certain lack of willingness among Icelandic politicians to accept the realities of the EEA agreement has led to delays in the proccesses.

1 INTRODUCTION

On 22 September 2017, British Prime Minister, Theresa May argued that a post-Brexit UK accepting EEA membership would mean accepting rules without influence or votes, which would inflict a 'loss of democratic control' that British voters would not accept.[1] Is it true that EEA membership entails a loss of democratic control? And if so, has it effected the execution of the EEA Agreement by Iceland? [2] These are among the principal questions addressed in this paper.

The EEA Agreement is an international agreement between the EEA EFTA States (Iceland, Norway and Lichtenstein) and the European Union and its Member States. The principal objective of the EEA Agreement is to expand Europe's internal market, so that the four freedoms, *ie* free movement of goods, persons, services and capital, apply not only to

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[1] The *Guardian*, 22 September 2017.

[2] The term 'execution of the EEA Agreement' covers both the process of incorporation of legislative acts of the EU into the EEA Agreement and subsequent implementation of the acts into national law.

the EU Member States, but also to the EEA EFTA States.[3] The EEA Agreement is without doubt the most extensive international agreement Iceland has entered into and is vital for Iceland´s economy.[4] Via the Agreement, Iceland, a country with a population just shy of 340,000 inhabitants[5], has access to free movement of goods,[6] services and capital in an area with a population of over 500 million.[7] In addition, the Agreement entitles Icelanders to live, work and study anywhere within this area. The EEA Agreement is thus of great importance for Iceland both in economic and cultural terms.[8] Despite this fact, the Icelandic state has in recent years not complied with its obligations on the basis of the EEA Agreement.[9] The aim of this paper is to explain the factors that have contributed to delays in the execution of the Agreement and provide suggestions on how to improve it.

The paper is organised in the following manner: Section 2 describes some relevant components of the EEA Agreement; Section 3 focuses on the problems facing the Icelandic Government concerning the incorporation of EU secondary law into the EEA Agreement, while the Norwegian incorporation process is examined by way of comparison; Section 4 discusses the implementation problems of EEA secondary law into Icelandic law. Comprehensive researches conducted by European scholars on the causes of the implementation problems in the EU Member States, provide here an important insight concerning the root causes of implementation problems in Iceland. Finally, in Section 5, proposals are made on how to improve the execution of the EEA Agreement in Iceland.

2 THE FRAMEWORK OF THE EEA AGREEMENT

As previously stated, the principal objective of the EEA Agreement is to expand Europe's internal market, so that the four freedoms, *ie* free movement of goods, persons, services and capital, apply not only to the EU Member States, but also to the EEA EFTA States. In order to achieve this goal, it is necessary that the same rules apply to the EEA EFTA States and

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[3] See more detailed discussion on the goals of the EEA Agreement in Frank Büchel and Xavier Lewis, 'The EFTA Surveillance Authority', in C. Baudenbacher (eds.), *The Handbook of EEA Law* (Springer 2016) 117-119 and Halvard Haukeland Fredriksen, 'EEA Main Agreement and Secondary EU Law Incorporated into the Annexes and Protocols', in C. Baudenbacher (eds.), *The Handbook of EEA Law* (Springer 2016) 96.

[4] Information material on the EEA Agreement from the website of the Ministry of Foreign Affairs in Iceland. <https://www.utanrikisraduneyti.is/verkefni/evropumal/verkefni/nr/4578> accessed 6 June 2018.

[5] Information material on the website: <https://hagstofa.is/utgafur/frettasafn/mannfjoldi/mannfjoldinn-a-4-arsfjordungi-2016> accessed 22 January 2018.

[6] Not, however, agricultural goods and marine products in all respects, as provided for in Part II of the EEA Agreement.

[7] *Iceland's Accession Negotiations*, A report commissioned by the Icelandic Confederation of Labour, the Confederation of Icelandic Employers, the Icelandic Federation of Trade and the Iceland Chamber of Commerce, (Reykjavík 2014) 96: <http://ams.hi.is/wp-content/uploads/2014/03/Uttekt-AMS-um-adildarvidraedur-Islands-vid-ESB.pdf>. Summary of the report is available in English at <https://ams.hi.is/wp-content/uploads/2014/03/IIA_EU_Iceland_Report_Executive-Summary.pdf> accessed 10 January 2018.

[8] Reference may be made here to *the European Policy of the Icelandic Government*, the Ministry for Foreign Affairs (Reykjavík 11 March 2014). See <https://.utanrikisraduneyti.is/media/esb/Evropustefna.pdf> accessed 5 January 2018.

[9] See Margrét Einarsdóttir, 'Upptaka afleiddrar löggjafar í EES-samninginn og innleiðing í íslenskan rétt' ['The incorporation of EU secondary law into the EEA Agreement and the implementation into Icelandic national law'], (2005) Tímarit lögfræðinga 545. The main conclusion of the article is that the execution of the EEA Agreement, by the Icelandic state, does not comply with its obligations on the basis of the EEA Agreement.

the EU Member States as regards the internal market. The EEA Agreement, therefore, contains provisions that have the same substance as the basic provisions of the Treaty on the functioning of the European Union (TFEU) regarding the 'four freedoms'.

Accordingly the EEA Agreement entails an obligation to incorporate EU acts that falls within the scope of the Agreement (dubbed as being *EEA relevant*). The main role of the EEA Joint Committee[10] is to incorporate these acts, established by the bodies of the EU, into the EEA Agreement. When secondary law has been incorporated into the Agreement, the EEA EFTA states are under obligation to implement regulations and directives into their internal legal order, as provided for in Article 7 of the Agreement.

2.1 TWO-PILLAR SYSTEM

The EEA EFTA States have not transferred legislative competences to the joint EEA bodies[11] and 'are also unable, constitutionally, to accept decisions made by EU institutions directly'[12]. To adapt to this situation, the EEA EFTA States have their own institutions, on the basis of the EEA Agreement and the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA). These EEA EFTA bodies match those on the EU side.[13] The EEA EFTA institutions and the EU institutions form the two pillars, while the joint EEA bodies are situated between them.[14]

The most important joint EEA body, from the perspective of the day-to-day management of the EEA Agreement, is the EEA Joint Committee. In this Committee, representatives from the EFTA pillar (the EFTA Standing Committee) and from the EU pillar (the EU European External Service) meet. As already mentioned the committee´s main role is to incorporate EU acts, enacted by the EU legislative bodies, into the EEA Agreement.[15] As discussed in the next section, once secondary legislation has been incorporated into the Agreement the EEA EFTA states are under obligation to implement it into their national legislation.

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[10] The EEA Joint Committee is responsible for the management of the EEA Agreement and typically meets six to eight times a year. It is a forum in which views are exhanged and decisions are taken by consensus to incorporate EU legislation into the EEA Agreement. The EEA Joint Committee is comprised of representatives from the EFTA Standing Committee (the ambassadors of the EEA EFTA States) and representatives of the European External Action Service. Information material on the EEA Agreement from the website of EFTA <http://www.efta.int/eea/eea-institutions/eea-joint-committee> accessed 2 June 2018.

[11] The EEA joint bodies are; the EEA Council, the EEA Joint Committee, the EEA Joint Parliamentary Committee and the EEA Consultative Committee, *see* the webpage of EFTA: <http://www.efta.int/eea/eea-agreement/eea-basic-features> accessed 2 June 2018.

[12] *See* the webpage of EFTA: <http://www.efta.int/eea/eea-agreement/eea-basic-features> accessed 2 June 2018.

[13] For example the EFTA Court and the EFTA surveillance authority (ESA) are parallels to the Court of Justice of the European Union and to the European Commission. Other EEA EFTA institutions are the EFTA Standing Committe, the Committee of MPs of the EFTA States and the EFTA Consultative Committee. These institutions mirror – in the correct order – the European External Action Service, the European Parliament and the Economic and Social Committee. *See* the webpage of EFTA: <http://www.efta.int/eea/eea-agreement/eea-basic-features> accessed 3 June 2018.

[14] Georges Baur, 'Decision-Making Procedure and Implementation of New Law', in C. Baudenbacher (eds.), *The Handbook of EU Law, (*Springer 2016) 47-48.

[15] ibid.

2.2 EEA LAW – NO DIRECT EFFECT

EEA law does not entail a transfer of legislative power. Unlike EU law, EEA law does therefore not have direct applicability or direct effect. In order for an individual or legal entity to rely on rights protected by the EEA Agreement, these rights must be implemented into the domestic laws of the EEA EFTA States, cf. Art. 7 EEA and Protocol 35.[16]

Iceland and Norway, as dualist states, therefore need to implement regulations into their domestic laws. EU Member States however need not do so as regulations issued by the EU's legislative bodies are 'directly applicable', as provided for in Article 288 TFEU.[17]

Both EEA EFTA States and EU Member States are required to implement directives into their national law. However, unlike directives in the EEA EFTA States, directives in the EU are capable of vertical direct effect, (if they are unconditional and sufficiently clear and precise) meaning that directives may be enforced directly by individuals against the State after the time limit for their implementation has expired, even if they have not been implemented, or have been incorrectly implemented, into domestic law.[18]

Via Article 2 of the European Economic Area Act No. 2/1993, the main part of the EEA Agreement acquired legal force in Icelandic domestic law. Individuals and legal entities may therefore rely on rights protected by the provisions of the EEA Agreement. However, the implementation of EEA secondary law into the Icelandic legal system represents an ongoing process, cf. Article 7 of the EEA Agreement.

3 THE MAIN REASONS UNDERLYING THE INCORPORATION PROBLEMS

When the EEA Agreement was signed on 2 May 1992, 1,875 EU acts fell within its ambit.[19] Since that time, about 10,000 acts have been incorporated into the Agreement, of which approximately 6000 remain in force.[20]

Decisions concerning whether EU acts should be a part of the EEA agreement are, as previously stated, made during the meetings of the EEA Joint Committee. Before such proposals are submitted to the EEA Joint Committee, extensive preparations are carried out where the EFTA Secretariat, the sub-committees of the EFTA Standing Committee and

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16 This was clearly confirmed for the first time in the ruling of the EFTA Court in the Case E-4/01 *Karl K. Karlsson* v. *the Icelandic State,* [2002] Report of the EFTA Court 240 (para. 28), which stated that: 'It follows from Article 7 EEA and Protocol 35 to the EEA Agreement that EEA law does not entail a transfer of legislative powers. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rule before national courts.' The EFTA Court has since reiterated this on numerous occasions, see *eg* rulings of the EFTA Court in Cases E-11/14 *ESA* v. *the Icelandic State,* [2015] Report of the EFTA Court 4; E-14/14 *ESA* v. *the Icelandic State,* [2015] Report of the *EFTA* Court 30; E-20/14 *ESA* v. *the Icelandic State,* [2015] Report of the EFTA Court 192; and E-1/15 *ESA* v. *the Icelandic State,* [2015] Report of the EFTA Court 330. *See also* M. Elvira Méndez-Pinedo, *EC and EEA Law, A Comparative Study of the Effectiveness of European Law*, (International Specialized Book Service Incorporated 2009) 163-165 and Sigurður Líndal and Skúli Magnússon, *Réttarkerfi Evrópusambandsins og Evrópska efnahagssvæðisins* [*The legal system of the European Union and the European Economic Area]* (Hið íslenska bókmenntafélag 2011) 135-136.

17 Méndez-Pinedo (n 16) 62.

18 Méndez-Pinedo (n 16) 63-66 and Steiner & Woods, *EU Law* (Oxford University Press 2017) 119-127.

19 Information obtained from the EFTA Secretariat on 15 December 2015.

20 See <www.efta.int/eea-lex> accessed 15 June 2018.

working groups play key roles.[21] In addition, Icelandic 'rules on the parliamentary procedure for matters concerning EEA', apply that provide for the manner in which to prepare for the decision of the EEA Joint Committee in Iceland. This process involves a comprehensive consultation by the Icelandic administration with Alþingi (the Icelandic Parliament).

Once all three EEA EFTA States have adequately prepared for incorporation, the EU acts are submitted to the EEA Joint Committee for incorporation into the EEA Agreement. The incorporation of EU acts into the EEA Agreement shall take place 'as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application' of law in the EU Member States and the EEA EFTA States, cf. Article 102.[22]

The contracting parties are aware that it is impossible to attain the goal of Article 102 and eliminate all 'backlog'; (*ie* accumulated acts that have not been incorporated into the EEA Agreement even though their compliance date in the EU Member States has passed) as there is a certain delay built into the EEA Agreement. Rather, the realistic goal is to keep the extent of this backlog as little as possible.[23] There is no fixed rule as to an acceptable duration of delay, although a delay of 6 to 9 months may be considered normal and a delay of less than one year can be considered acceptable. If the incorporation is further delayed, this has significant harmful effects on the object of the Agreement, (*ie homogenous* European Economic Area), as different legislation is then in force in the EU Member States than the EEA EFTA States, for an extended period.[24]

Between 2000 and 2010, the EU and EEA EFTA States appear to have been relatively satisfied with the execution of the incorporation process. As of 2011, however, things took a significant turn for the worse as the number of acts that had not been incorporated, despite the deadline for their compliance date in the EU Member States had passed, increased significantly.[25]

There is no single simple reason that explains why incorporating EU acts into the EEA Agreement has been so slow in recent years. Rather, there are number of factors that contribute to the problem. Certain developments within the EU have rendered the incorporation process more complicated. In addition, certain issues relating to Iceland specifically have caused considerable delays. The next section will address the changes within the EU that have negatively affected the incorporation process.

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[21] *EFTA Bulletin, Handbook in EEA EFTA procedures for incorporating EU acts into the EEA Agreement*. Belgium 2015, 22–26, <www.efta.int/publications/bulletins/handbook-eea-efta-procedures-3191> accessed 10 June 2018.

[22] Sven Norberg, Karin Hökborg, Martin Johansson, Dan Eliasson and Lucien Dedichen, *EEA Law, A commentary on the EEA Agreements* (Fritzes 1993) 142.

[23] Margrét Einarsdóttir, 'Upptaka afleiddrar löggjafar í EES-samninginn og innleiðing í íslenskan rétt' (n 9) 558.

[24] See further discussion on this topic in the report; *Utenfor og innenfor, Norges avtaler med EU*. (Oslo 2012) 95, <https://www.regjeringen.no/contentassets/5d3982d042a2472eb1b20639cd8b2341/no/pdfs/nou20122012 0002000dddpdfs.pdf> accessed 4 May 2017.

[25] Margrét Einarsdóttir, 'Upptaka afleiddrar löggjafar í EES-samninginn og innleiðing í íslenskan rétt' (n 9) 559.

3.1 CHANGES WITHIN THE EU

3.1[a] Regulations – the most common form of EU legislation

The first change relates to the adoption of regulation rather than directives. In recent years the institutions of the EU seem to prefer to adopt secondary law in the form of regulations rather than directives, representing a break with previous practice. Regulations have thus become the most common form of secondary legislation.[26]

Regulations are 'directly applicable' in the EU Member States. They require no implementation; rather, they become a part of the national legislation of the Member States as soon as they come into force, as provided for in Article 288 TFEU.[27] Regulations usually enter into force 20 days after their publication in the *Official Journal*.[28] On the other hand, EU Member States need to implement directives into their national legislation, cf. Article 288 TFEU and are accorded a reasonable period of grace to do so. Directives generally do not enter into force in EU Member States until after the end of this period.

Per Article 102 of the EEA Agreement, secondary laws enacted by EU institutions and which the EEA Joint Committee have found to fall within the scope of the EEA Agreement, should enter into force simultaneously in the EU States and in the EEA EFTA States.[29]

As already explained extensive preparation is carried out by the EEA EFTA States before the EEA Joint Committee can decide on the incorporation of EU acts into the EEA Agreement. Inevitably, this process takes some time. On the basis of the foregoing, it is clear that the time the EEA EFTA States have to prepare for the incorporation of EU acts into the EEA Agreement, before the legislation enters into force in the EU Member States, is shorter in the case of regulations than directives. This change has certainly played a part in the increased problems concerning the incorporation of secondary law that the EEA EFTA States now face.[30]

3.1[b] The scope of the EEA Agreement

Another factor complicating the implementation process is that it has become more difficult in some cases, to decide whether legislation falls within the scope of the EEA Agreement. When EU institutions are processing legislation, the EU Commission must, early in the

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[26] See Sven Norberg and Martin Johansson, 'History of the EEA Agreement and the first twenty years of its existence', in C. Baudenbacher (eds), *The Handbook of EEA Law* (Springer 2016) 36. This can be verified in the search engine of the EFTA Secretariat, *EEA-lex*, see <http://www.efta.int/eea-lex> accessed 6 January 2018.

[27] M. Elvira Méndez-Pinedo (n 16) 62.

[28] Niels Fenger, Michael Sánchez Rydelski and Titus Van Stiphout, *European Free Trade Association (EFTA) and European Economic Area (EEA)* (Kluwer Law International 2012) 132.

[29] Norberg, Hökborg Johansson, Eliasson and Dedichen (n 22) 142.

[30] See Halvard Haukeland Fredriksen and Christian N.K. Franklin, 'Of pragmatism and principles: The EEA Agreement 20 years on' (2015) Common Market Law Review 629, 659–660 and Margrét Einarsdóttir, 'Vaxandi vandkvæði við framkvæmd EES-samningsins – upptaka afleiddrar löggjafar' ['The increasing problems with the execution of the EEA Agreement – the incorporation of EU Secondary Law'] (2016) Tímarit lögfræðinga 503, 507–509.

process assess whether an act falls under the scope of the EEA Agreement.[31] In most cases, this is clear.[32] In other cases, however, the matter involves complex issues, some of which have indisputably become more difficult to tackle in recent years.[33]

One reason for this is the fact that the EU's three-pillar system was abolished via the Lisbon Treaty.[34] Since then, the division between the internal market legislation, falling within the scope of the EEA Agreement, and other legislation, falling outside its scope in most cases, became unclear, as this distinction was no longer relevant to the EU Member States.[35] In addition, following the abolition of the three-pillar system, legislation adopted by EU institutions is at times more comprehensive than before, and covers various fields.[36] This means that a particular act can partly fall under the scope of the EEA Agreement, while other parts of the same act do not.[37] Thus, it can be more difficult to reach an agreement in the EEA Joint Committee, concerning which legislation should be incorporated into the EEA Agreement. This causes delays in the incorporation process.[38]

An example of this is the 'citizen rights' Directive 2004/38. In the view of Iceland (and Liechtenstein) some part of the directive did not fall within the scope of the EEA Agreement. The EU however was determined from the very beginning that the directive should be wholly incorporated into the EEA Agreement. This opinion does not appear to have been supported by any legal arguments, rather resting on a political assessment of the importance of the Directive for the internal market.[39] Directive 2004/38 was the subject of discussion in the EEA Joint Committee for three years. The EU finally lost patience and activated the measures contained in Article 102 of the EEA Agreement. This action

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[31] Cf. Article 99 of the EEA Agreement. See Fenger, Rydelski and Van Stiphout (n 28) 129-130 and Knut Almestad, 'The Notion of 'Opting Out'', in C. Baudenbacher (eds.), *The Handbook of EEA Law* (Springer 2016) 89.

[32] *The EEA Agreement and Norway's other agreement with the EU,* Meld.St. 5 (2012–2013*)* 15 <https://www.regjeringen.no/globalassets/upload/ud/vedlegg/europa/nou/meldst5_ud_eng.pdf> accessed 10 January 2018.

[33] *Iceland's Accession Negotiations* (n 7) 115–116. See also *The EEA Agreement and Norway's other agreement with the EU* (n 32) 12.

[34] Jean-Claude Piris, *The Lisbon Treaty, A legal and political analysis* (Cambridge University Press 2010) 177.

[35] *Iceland's Accession Negotiations* (n 7) 115 and European Economic Area, Joint Parliamentary Committee, Report. *The review of the EEA.* (Brussels 3 May 2012) 3, <http://www.efta.int/sites/default/files/documents/advisory-bodies/parliamentary-committee/jpc-reports/report2-2012-05-03.pdf> accessed 19 January 2018.

[36] Jóhanna Jónsdóttir, *Europeanization and the European Economic Area, Iceland´s participation in the EU´s policy process* (Routledge 2013) 52 and Fredriksen and Franklin (n 30) 654. See also *The EEA Agreement and Norway's other agreement with the EU* (n 32) 15–16 and EEA Joint Parliamentary Committee. *Report on the future of the EEA and the EU's relationship with the small-sized countries and Switzerland.* (Brussels 30 May 2013) 7, <http://www.efta.int/sites/default/files/documents/advisory-bodies/parliamentary-committee/jpc-reports/eea-jcp-report-eea-review.pdf> accessed 19 January 2018.

[37] *The review of the EEA* (n 35) 5.

[38] This issue was brought up in the *EEA Joint Parliamentary Committee Resolution on future perspectives for the European Economic Area*, in 2008, wherein it was stated that: '… whereas a clear distinction between the Internal Market and other EU activities is crucial to the EEA EFTA States, it is becoming increasingly irrelevant in the EU, and as a result, a growing number of legal acts and policy initiatives that are relevant to the EEA also include elements that are not covered by the EEA Agreement; […] which will make it increasingly difficult to define *EEA relevance*, and consequently, to reach agreement on their incorporation into the EEA Agreement.'

[39] As noted by a Commission official when interviewed about Directive 2004/38: 'Sometimes our stance is that things should be EEA relevant because we want them in. In these cases, we do not discuss the legal details. It is relevant because we say it is relevant [...].' See Jónsdóttir (n 36) 107.

amounted to a threat from the EU to the effect that the part of the Annex that relates to the free movement of people would be provisionally suspended, if the Directive were not incorporated. The EEA EFTA States thus finally agreed to incorporate the acts in question into the EEA Agreement.

As illustrated by the incorporation process of Directive 2004/38, it appears that if the EU is determined that a particular act should be incorporated into the EEA Agreement, the EEA EFTA States are in a weak position to prevent it.[40] Strictly speaking, the EEA EFTA States enjoy a veto right on the basis of Article 102 of the EEA Agreement, but as explained above, making use thereof may entail serious consequences. This veto right has therefore never been used.[41]

3.1[c] Increased constitutional problems in the incorporation process

The third change that has occurred, is the increase in the number of EU agencies over the last few years. This change has led to increased constitutional problems in the incorporation of EU acts into the EEA Agreement, especially in Iceland. Many of the EU agencies have been granted powers to make decisions that are binding for individuals, legal entities and authorities in the EU Member States.[42] Such transfer of power to international organisations raises question of compatibility with the Icelandic constitution.

The Icelandic Constitution does not have a provision that specifically permits the transfer of power to international organisations.[43] After the signing of the EEA Agreement on 2 May 1992, an intense dispute arose as to whether the Agreement was compatible with the Icelandic Constitution.[44] The Minister for Foreign Affairs appointed a committee of four respected lawyers[45] to assess whether the Agreement on the European Economic Area entailed a greater transfer of powers to an international organisation than was compatible with the Icelandic Constitution.[46] The conclusion of the committee was that the Constitution permits a transfer of power to international organisations, if it is delimited, well defined and

[40] There are other examples that demonstrate the difficult situation Iceland faces when it either doesn´t want a particular legislation to become part of the EEA Agreement (for substantive reasons), or it consider the legislation to fall outside the scope of the Agremeent. The incorporation of Directive 89/662/EEC concerning veterinary checks in intra-Community trade with a view to the completion of the internal market, that allows the import of raw meat to Iceland is a good example. Iceland was against the incorporation of this Directive but they finally gave in. Iceland then implemented the Directive incorrectly, as was established by the EFTA-Court in Case E-17/15 *Ferskar kjötvörur ehf* v. *the Icelandic State,* [2016] Report of the EFTA Court 4. See also the Joined Cases E-2/17 and E-3/17 *EFTA Surveillance Authority* v. *Iceland,* [2017] Report of the EFTA Court 727.

[41] Margrét Einarsdóttir, 'Upptaka afleiddrar löggjafar í EES-samninginn – Hvað er unnt að gera betur?' ['The incorporation of EU secondary law into the EEA Agreement – What improvements can be made?'], (2016) Tímarit lögfræðinga 3, 34-37.

[42] Fredriksen and Franklin (n 30) 676. See also Morten Egeberg and Jarle Trondal, 'National Administrative Sovereignty. Under Pressure', in E. Eriksen and J. Fossum (eds.), *The European Union's Non-Members. Independence under hegemony?* (Routledge 2015) 173–174 and 178.

[43] Davíð Þór Björgvinsson, 'Stjórnarskrárákvæði um framsal valdheimilda ríkisins til alþjóðastofnana' ['The Icelandic Constitution and the Transfer of Powers to International Organisations'], (2003) Rannsóknir í félagsvísindum IV 213.

[44] Davíð Þór Björgvinsson, *EES-réttur og landsréttur* [*EEA law and national law]* (Codex 2006) 381.

[45] Þór Vilhjálmsson Supreme Court Attorney; Professor Gunnar G. Schram; Professor Stefán Már Stefánsson; and Ólafur W. Stefánsson, Office Manager.

[46] See the *Report of the committee appointed by the Minister of Foreign Affairs on the Constitution and the EEA Agreement, 6 July 1992,* Annex I to Legisl. Doc. 29, 116th Legislative Session, 1992–93.

not overly onerous for any Icelandic parties. The transfer of power that the EEA Agreement involved was considered to fall within these limits and was thus in accordance with the provisions of the Constitution.[47] This conclusion, however, did not go uncontested.[48]

As was the case with the entry into force of the EEA Agreement itself, there have been several instances of complex constitutional issues as regards whether EU acts designated to be incorporated into the EEA Agreement were compatible with the provisions of the Icelandic Constitution. In such cases, the solution has been to appoint respected academics to provide their opinion as to whether the acts in question are compatible with the provisions of the Constitution. In an opinion by Professor Björgvinsson on transfer of power to international organisations regarding the implementation of regulation 1/2003 from 30 October 2004[49], it is stated that 'to describe the legal situation in Iceland it can be said that in legal execution and academic writing an unwritten rule has been formed that allows the general legislature to delegate state power to a limited extent', meeting certain criteria.[50]

Over the years difficult and repeated constitutional problems have risen in the incorporation process and with increase in number of EU agencies (with power to take binding decision) such constitutional problems have become more frequent in Iceland.[51] One may here refer to events surrounding the banking crisis, which caused significant constitutional problems in both Iceland and Norway.[52]

Following the collapse of the banking system in 2008, work was initiated by the EU to create a new, extensive regulatory framework for the supervision of financial markets. Three new supervisory bodies were established: the European Banking Authority[53], the European Insurance and Occupational Pensions Authority[54] and the European Securities and Markets Authority[55]. Those supervisory agencies set up were to be granted powers to adopt binding

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47 See the *Report of the Committee appointed by the Minister of Foreign Affairs on the Constitution and the EEA Agreement* (n 46) and Björg Thorarensen, 'Stjórnarskrárákvæði um framsal ríkisvalds, þarfar eða óþarfar breytingar á stjórnarskrá?' ['Transfer of power based on the Constitution, necessary or unnecessary changes on the Constitution?'], in S. Ólafsdóttir (eds.)*, Fullveldi í 99 ár, safn ritgerða til heiðurs dr. Davíð Þór Björgvinssyni sextugum* (Hið íslenska bókmenntafélag 2017) 124.

48 Einarsdóttir, 'Vaxandi vandkvæði við framkvæmd EES-samningsins – upptaka afleiddrar löggjafar' (n 30) 525.

49 See Annex VII to Legisl. Doc 617, 131th legislative session, 2004-2005.

50 Based on this unwritten rule the general legislature is allowed to delegate state power if the following criteria is met; The transfer is based on law and is delimited and well defined, it is based on an agreement that provides mutual rights and obligations, the international organisations to whom the power is assigned are founded on democratic principles, the transfer does not lead to the curtailment of constitutionally protected rights of citizens and the transfer can be cancelled. See Annex VII to Legisl. Doc 617, 131th legislative session, 2004-2005, Björgvinsson, 'Stjórnarskrárákvæði um framsal valdheimilda ríkisins til alþjóðastofnana' (n 43) 220 and Björgvinsson, *EES-réttur og landsréttur* (n 44) 479. See also the *Report of the Committee appointed by the Minister of Foreign Affairs on the Constitution and the EEA Agreement* (n 46) and Einarsdóttir, 'Vaxandi vandkvæði við framkvæmd EES-samningsins – upptaka afleiddrar löggjafar' (n 30) 527-531. See also Davíð Þór Björgvinsson, 'EES- og framsal ríkisvalds' ['EEA and transfer of state power']. *Afmælisrit Þór Vilhjálmsson sjötugur 9. júní 2000*. (Orator 2000).

51 Einarsdóttir, 'Vaxandi vandkvæði við framkvæmd EES-samningsins – upptaka afleiddrar löggjafar' (n 30) 526.

52 There are other recent incidents of constitutional complications in Iceland, f.e. the pending incorporation of the 'European Union´s Third Enegery Packages'. Regulation 713/2009 established an Agency for the Cooperation of Energy Regulators (ACER) and at the time of the writing it is unclear whether that act will be considered compatible with the Icelandic Constitution by Alþingi.

53 EBA.

54 EIOPA.

55 ESMA.

decisions with respect to the EEA EFTA States´ and the EU Member States´ supervisory agencies and concerning financial undertakings. Iceland and Norway were of the opinion that there was a doubt as to whether the above regulations were compatible with their constitutions. For this reason, there were considerable delays in the incorporation process of the acts into the EEA Agreement.

Early in the incorporation process of the said regulations, the Icelandic state entrusted Professor Thorarensen and Professor Stefánsson, to give their opinions on whether the regulatory framework was compatible with the Icelandic Constitution. In their opinion, dated 25 April 2012, it is stated that the transfer of power to the above-mentioned agencies did not fit 'within the constitutional custom rule that the general legislative authority may transfer state power to a limited extent to international organisations'.[56]

The above-mentioned regulations also created constitutional problems in Norway. The Norwegian Constitution contains a provision that permits the transfer of powers to international organisations by a three-fourths majority, but restricts this transfer to international organisations of which Norway is a member of, cf. Article 115 of the Norwegian Constitution. As Norway is not party to the three-abovementioned supervisory agencies, the incorporation of the aforementioned acts was not adjudged compatible with the Norwegian Constitution.

Iceland and Norway, therefore, had a joint interest in persuading the EU to agree to *substantive adaptations* to the said acts. This proved a difficult task, but finally, on the 14th of October 2014, the EU and the EEA EFTA States signed a joint declaration to the effect that the assignation of power assumed in the regulations would be transferred to the EFTA Surveillance Authority (ESA) and not to the aforementioned supervisory agencies of the EU.[57] According to the agreement, it is assumed, however, that the decisions of ESA will be based on a proposal or 'a draft', which the EU supervisory agency involved would prepare.[58]

It is interesting to compare the procedures in Norway and Iceland in the wake of the above agreement with the EU. Academics disagreed in Iceland on whether the adapted acts were compatible with the Icelandic Constitution. The district court judge Magnússon was asked to provide an opinion concerning whether these EU regulations on the supervision of financial markets, with the before mentioned *substantive adaptations*, respects the rules of the Icelandic Constitution with reference to the transfer of powers. It was his conclusion that this was the case. Professor Thorarensen, however disagreed.[59] On 23 September 2016, Alþingi finally agreed to authorise the government of Iceland to ratify, on Iceland's behalf, the incorporation of a part of the aforementioned regulatory framework on the supervision of financial markets into the EEA Agreement.[60]

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[56] See the Opinion of Björg Thorarensen and Stefán Már Stefánsson on *the Constitutionality of the European System of Financial Supervision*, (Reykjavík, 25 April 2012) Annex XXXI to Legisl. Doc. 1109, 145th legislative session 2015–2016. Björg Thorarensen and Stefán Már Stefánsson came to the same conclusion in their Opinion on *the Constitutionality of the EU regulation 1193/2011 establishing a system of the Union's emissions*, (Reykjavík 12 June 2012).

[57] Conclusion adopted by the EU and EEA-EFTA Ministers of Finance and Economy, 14 October 2014. <www.fjarmalaraduneyti.is/media/frettir2014/Sameiginleg-yfirlysing-fjarmalaradherra-EES-og-EFTA-rikjanna-(a-ensku).pd)> accessed 19 February 2018.

[58] The Opinion of Skúli Magnússon regarding *the constitutionality of certain new EEA acts regarding Financial Supervision*, Annex XI to Legisl. Doc. 1109, 145th legislative session 2015–2016.

[59] Thorarensen (n 47) 139-141.

[60] See Legisl. Doc. 1109 – case 681, 145th legislative session 2015–2016.

In Norway, however, the legal situation was much clearer after the *substantive adaptations* were made to the before mentioned financial acts. On 13 August 2016, Stortinget (the Norwegian Parliament) granted the Norwegian government authorisation, on the basis of Article 115 of the Norwegian Constitution (which requires a three-fourths majority), to approve the incorporation of the aforementioned regulatory framework in the field of supervision of the financial markets into the EEA Agreement.[61] Following the resolution of the constitutional constraints in both Iceland and in Norway, on 30 September 2016, the EEA Joint Committee approved the incorporation of a part of the regulatory framework into the EEA Agreement.[62]

This regulatory framework came into effect within the EU as early as 2010, six years before the first part of these regulations were incorporated in the EEA Agreement. In the meantime, 178 acts in the field of supervision of financial markets awaited incorporation into the EEA Agreement. In comparison, the *backlog* in past years has numbered between 418 and 550 acts.[63] It is therefore clear that constitutional problems in the incorporation of acts into the EEA Agreement have accounted for a considerable part of the increased incorporation *backlog* in recent years.

3.2 UNIQUE ICELANDIC CONDITIONS – RULES ON PARLIAMENTARY PROCEDURE

Other factors then discussed above have also contributed to complications and delays in the incorporation process. This section will address the preparation process in Iceland.

Decisions concerning whether EU acts should be a part of the EEA agreement are, as previously stated, made during the meetings of the EEA Joint Committee. Before such proposals are submitted to the EEA Joint Committee, extensive preparations are carried out where the EFTA Secretariat, the sub-committees of the EFTA Standing Committee and working groups play key roles.[64] Detailed rules of procedure, set out in the *Handbook on EEA EFTA procedures*, established by the EFTA Standing Committee, apply to the preparation of the decisions of the EEA Joint Committee.[65]

In addition, Icelandic rules apply that provide for the manner in which to prepare for the decision of the EEA Joint Committee in Iceland. These rules were approved by the Presidential Committee of Alþingi, first in 1994 and revised on 16 August 2010 and thereafter entitled 'rules on the parliamentary procedure for matters concerning EEA'[66]. Consultation with Alþingi in the incorporation process was strengthened by the new rules, and if an EU

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[61] See information material on the website <http://svw.no/en/news/aktuelt/propositions-on-the-participation-in-the-eu-financial-supervision---adopted-by-the-parliament> accessed 20 February 2018.
[62] See information material on the website <http://www.efta.int/EEA/news/First-package-acts-European-Financial-Supervisory-Authorities-incorporated-EEA-Agreement-499496> accessed 20 February 2018.
[63] In 2011, the *backlog* was 544 acts, in 2012, the *backlog* was 418 acts and in the year 2013, it was 506 acts, see the article by Einarsdóttir, 'Upptaka afleiddrar löggjafar í EES-samninginn og innleiðing í íslenskan rétt' (n 9) 559. In 2014, the *backlog* was 428 acts, see the annual report of the EEA Joint Committee from 14 October 2015.
[64] *EFTA Bulletin, Handbook in EEA EFTA procedures for incorporating EU acts into the EEA Agreement* (n 21) 22–26.
[65] The rules entered into effect on 20 October 2014 and were updated in October 2016, see <www.efta.int/publications/bulletins/handbook-eea-efta-procedures-3191> accessed 10 June 2018.
[66] Here after 'rules on the parliamentary procedure'. In Icelandic; 'reglur um þinglega meðferð EES-mála'.

act needs to be implemented into Icelandic law through amendments to statutory laws[67], it must be submitted for review three times to Alþingi before being finally incorporated into the EEA Agreement.

The first time an EU act must be submitted to the Foreign Affairs Committee of Alþingi is at the so-called '*standard sheet stage*'.[68] According to Article 2 of the 'rules on the parliamentary procedure', the consultations shall usually not take longer than two weeks. In practice, however, this usually takes a number of months, as the members of parliament have taken a considerable time to scrutinize the EU acts.[69] It is interesting to compare this part of the procedure in Iceland with the procedure in Norway, as there is no such consultation with Stortinget at this stage (*ie standard sheet stage)* in the incorporation process in Norway.[70] This part of the procedure in Iceland has caused delays in the incorporation process.

The second time an EU act must be submitted to the Foreign Affairs Committee of Alþingi is to consult the national parliament about the draft, for the decisions of the EEA Joint Committee, to incorporate the act into the Agreement. This consultation takes place a few days before the meeting of the Committee. The same applies in Norway, as consultation with the European Consultative Committee of Stortinget, also take place concerning the same 'draft', a few days before the meeting in the EEA Joint Committee. It appears however that the consultations in Norway differ in nature from those in Iceland. In Iceland, experts from the ministries meet with the Foreign Affairs Committee, while in Norway, it is the minister responsible for EEA issues as well as, as appropriate, 1–2 ministers who attend the meeting. According to an expert in the Norwegian Ministry of Foreign Affairs and data from the Ministry, technical issues are not discussed during these meetings. Instead, discussions are more political in nature, and address the political interests of Norway in the EEA collaboration and the challenges facing Europe. [71] In Iceland, however, the experts of the ministries are often expected to respond to questions regarding the substance of the acts. Overall, this part of the process is smooth in both countries and does not cause undue delays.[72]

The third reason for which an EU act must be submitted to Alþingi is for the purposes of requesting the parliament to lift constitutional requirements. This applies if an act is incorporated into the EEA Agreement with constitutional requirements, as provided for in Article 103 of the EEA Agreement.[73] In practice, such requirements are made if the act in

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[67] That is it will be implemented through amendments to statutory law, after it has been incorporated into the EEA Agreement, (by which time it will have transformed into an EEA act).

[68] Early in the incorporation process leading to incorporation of EU rules into the EEA Agreement, the EFTA Secretariat sends, what has been termed a *standard sheet*, to experts in the Icelandic ministries. The *standard sheet* requires the experts to specify possible general EEA horizontal challenges concerning the EEA, *eg* provisions containing references to acts not incorporated into the EEA Agreement, provisions raising possible two-pillar issues etc. See *EFTA Bulletin, Handbook in EEA EFTA procedures for incorporating EU acts into the EEA Agreement* (n 21) 23.

[69] Einarsdóttir*,* 'Upptaka afleiddrar löggjafar í EES-samninginn – Hvað er unnt að gera betur?' (n 41) 15.

[70] ibid 38.

[71] Einarsdóttir*,* 'Upptaka afleiddrar löggjafar í EES-samninginn – Hvað er unnt að gera betur?' (n 41) 17–18 and 39–40.

[72] ibid 18.

[73] Article 103(1) of the EEA Agreement, states: 'If a decision of the EEA Joint Committee can be binding on a Contracting Party only after the fulfilment of constitutional requirements, the decision shall, if a date is contained therein, enter into force on that date, provided that the Contracting Party concerned has notified the other Contracting Parties by that date that the constitutional requirements have been fulfilled.'

question will require amendments to statutory law during the implementation, cf. Article 21 of the Icelandic Constitution. A similar procedure takes place in Norway if constitutional requirements have been made, cf. Article 103 of the EEA Agreement. According to the provisions, the EEA EFTA States have six months to lift such reservations, although, as a rule, this process has taken longer.[74]

4 THE MAIN REASONS FOR IMPLEMENTATION DIFFICULTIES

Once an EU act has been incorporated into the EEA Agreement, the EEA EFTA States are under an obligation to implement the act in their national legislation, cf. Article 7 of the EEA Agreement. The precise starting date of the obligation is confirmed in the ruling of the EFTA Court in Case E-15/12 *Jan Anfinn Wahl* v. *the Icelandic State*, where is stated that the implementation must have taken place at the latest on the implementation date in the EU or when the Joint Committee Decision enters into force, whichever is later. Any later date constitutes an infringement of the EEA Agreement.[75]

Since the EEA Agreement entered into force, the implementation of directives into national legislation has represented a highly demanding task for the Icelandic executive and legislative branches. There have been periods in which this task has been completed successfully and Iceland has placed well in comparison with other EU and EEA EFTA States. However, there have also been times during which this task has not gone so well, and over the past few years, Iceland has performed poorly in the implementation of directives into national law and has not complied with its obligations on the basis of the EEA Agreement.[76]

4.1 IMPLEMENTATION PROBLEMS THAT THE EU AND ICELAND HAVE IN COMMON

European scholars in the field of political science have conducted comprehensive researches on the causes of the implementation problems in the EU Member States. As the process for implementing directives into national law is the same in the EEA EFTA States as in the EU Member States, these reseraches provide an important insight concerning the root causes of implementation problems in Iceland.

European academics appear to agree on a number of factors they believe explain delayed or incorrect implementation of directives into the national legislation of the EU

[74] During the period from 1 May 2008 to 10 September 2013, the Icelandic state was unable to lift constitutional reservations within six months in the majority of cases. Thus, during the period, an average of 429 days passed from the day that the act was approved with constitutional reservations in the EEA Joint Committee until Alþingi lifted the reservation. In comparison, the process took 402 days in the Stortinget. The Icelandic state exceeded the six-month deadline in 73% of cases, while the Norwegian state exceeded the deadline in 65% of cases. This information was obtained from the unpublished report of the EFTA Secretariat from 28 October 2013 which the author was kindly granted permission to use for research purposes. Via e-mails, dated 15 March 2017, the EFTA Secretariat confirmed that they did not have comparable information after 2013.

[75] E-15/12 *Jan Anfinn Wahl* v. *The Icelandic State,* [2013] Report of the EFTA Court 534. The judgment only deals with implementation of directives, but the same must apply to regulations.

[76] Einarsdóttir, 'Upptaka afleiddrar löggjafar í EES-samninginn og innleiðing í íslenskan rétt' (n 9) 569–572.

Member States.[77] Thus, it is generally agreed that unclear directives, which are often open to divergent interpretations, lead to delays or incorrect transposition.[78] In addition, it is a common issue in the academic literature on this subject that a lack of manpower and funds in the administration, explain difficulties in the implementation process.[79] Moreover, interest groups appear to be able to exercise considerable influence on the implementation process, if they believe that the substance of the directive is contrary to their interest.[80] Studies have also demonstrated that linking the implementation of a directive to various other changes that the local authorities wish to make, can lead to delays.[81] All of these aspects have also had an impact in the implementation process in Iceland and caused delays, which will be analysed below.

First, one may mention that unclear directives cause as great, or even greater, difficulties in the implementation process in Iceland than is generally the case within the EU Member States. Falkner *et al.* argue that the 'problems of interpretation are all the more likely if those who have to [implement] a Directive are not directly involved in its negotiation'.[82] The EEA Agreement provides for limited possibilities for influencing the formulation of new acquis.[83] Moreover, the Icelandic administration does not have the manpower to monitor all acts that are under development in the EU institutions.[84] This can cause difficulties during the implementation stage.[85]

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77 See Gerda Falkner, Olivia Treib, Miriam Hartlapp and Simone Leiber, *Complying with Europe EU Harmonisation and Soft Law in the Member States,* (Cambridge University Press 2005), see specially 277-316. Robert Thomson, René Torenvlied og Javier Arregui, 'The Paradox of Compliance: Infringements and Delays in Transposing European Union Directives', 37 (2007) British Journal of Political Science 685. Ellen Mastenbroek, 'Surviving the deadline. The Transposition of EU Directives in the Netherlands', (2003) European Union Politics 371. Ernst M.H. Hirsch Ballin and Linda A.J, *Co-actorship in the Development of European Law-making. The Quality of European Legislation and its Implementation and Application in the National Legal Order* (T.M.C.Asser Press 2005). See also Margrét Einarsdóttir, 'Innleiðing afleiddrar löggjafar í íslenskan rétt – ástæður vandans og hvað er unnt að gera betur?' ['The implementation of secondary law into Icelandic national law – The cause of the problem and what improvements can be made?'] (2018) Tímarit lögfræðinga 3, 29-31.

78 Falkner, Treib, Hartlapp and Leiber (n 77) 286–287, Gerda Falkner, Miriam Hartlapp, Simone Leiber and Oliver Treib, 'Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?' <https://www.ihs.ac.at/publications/pol/2004WestEuropeanPolitics.pdf> accessed 12 March 2018 (a slightly revised version of the paper is published in West European Politics 27(3) (2004) 452-473) and Mastenbroek, (n 77) 375.

79 Oliver Treib, 'Implementing and complying with EU governance outputs', (2008) Living Reviews in European Governance 2. See also, Falkner, Hartlapp, Leiber and Treib (n 78). The paper states on p. 10: 'Several cases show that even if the necessary adaptations are not of major magnitude and importane [...] and even if the government as such is not unwilling to transpose, there may still be a delay or (less frequently) an incorrect transposition. In quite many cases this can be attributed to administrative shortcomings. The country where this pattern most clearly occurs is Luxembourg. [...] The main reason for the frequent occurrence of this factor is administrative overload due to a lack of resources in the small country. Equipped with a comparatively low number of staff, the administration is constantly at its limits, having to deal with the national as well as the increasing number of European matters.'

80 Falkner, Treib, Hartlapp and Leiber (n 77) 303–309.

81 ibid 313–316. See also Falkner, Hartlapp, Leiber and Treib (n 78) 11-13.

82 Falkner, Hartlapp, Leiber and Treib (n 78) 14.

83 Cf. Article 99 and Article 100 of the EEA Agreement.

84 *Report of a Steering Committee on the execution of the EEA Agreement*, Prime Minister´s Office. (December 2015) 24 <https://www.stjornarradid.is/media/forsaetisraduneyti-media/media/Skyrslur/skyrsla-styrihops-um-framkvaemd-EES.pdf> accessed 10 June 2018.

85 This is supported by *Report of a Steering Committee on the execution of the EEA Agreement* (n 84), which states that: 'at present, the plan is to implement 80 acts in the field of financial markets and that up to 300 acts are

Second, insufficient manpower and funds in the Icelandic administration have created significant difficulties in the implementation process. In the article by Falkner *et al.*[86] it is stated that overloaded administrative sectors are a particularly difficult problem in smaller member states. This seems to be the case in Iceland. In addition, little has been done in Iceland to bolster education and improve the knowledge of the experts within the ministries about the complex tasks involved in the implementation of the EEA Agreement.[87] Data, to which the Ministry for Foreign Affairs granted the author access for research purposes, also seem to support this, as the date reveals that delays in the implementation of the majority of acts stems, entirely from delays in the administrative branch itself and are not due to delays in Alþingi.[88]

Third, individual stakeholder groups in Iceland appear to exercise some influence on the implementation process. This is supported by the study carried out by Dr. Jónsdóttir in which she examined the impact of stakeholder groups in Iceland on the implementation process. The study shows that several stakeholder groups closely monitor legislation under development within EU institutions.[89] Pressure from stakeholders, however, appears to only cause delays in the implementation process in isolated cases in Iceland and is not a major problem in the implementation process.[90]

Fourth, efforts to link implementation legislation to other legislative reform, which is not related to the EEA Agreement, has also caused delays in Iceland.[91] The processing of a bill generally takes much less time, if it only contains provisions that must be implemented into the national legislation on the basis of the EEA Agreement, than if the same bill also deals with purely domestic legislative issues on which there may be different political views.[92] For this reason, the *Report of a Steering Committee on the execution of the EEA Agreement* recommends that in order to facilitate the implementation of directives into the internal legal order, the implementation legislation should generally contain 'only provisions derived directly from the EEA obligation in question'.[93]

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expected in the next few year. Employees have not been able to monitor the processing of the acts or to gain knowledge of their substance overseas from among the member states or in Brussels. This means that it is difficult to understand and analyse the material thoroughly.'

[86] Falkner, Hartlapp, Leiber and Treib (n 78) West European Politics (2004) 452-473.

[87] Jónsdóttir (n 36) 58-60. See also the *Report of a Steering Committee on the execution of the EEA Agreement* (n 84) 28-29, where is stated that: 'The Icelandic administrative branch is small, and there is, as a rule, a heavy workload on staff in ministries. In addition, the EEA issues have not generally been at the forefront in the prioritisation of tasks.'

[88] The Ministry for Foreign Affairs sent the author the data in question by e-mails on 6 January and 12 January 2017. The data revealed that during the period between 17 November 2014 and 31 May 2016, there were on average 8.7 directives that should have already been implemented by means of statutory laws, but were not. During the same period, there were 10.2 unimplemented directives that should have been implemented by means of administrative regulations. No comparable data for earlier periods is available. It should be noted however, that a much greater number of directives are implemented by means of administrative regulations compared to statutory law. Implementation of individual acts by means of administrative regulations is thus much quicker. See Einarsdóttir, 'Innleiðing afleiddrar löggjafar í íslenskan rétt – ástæður vandans og hvað er unnt að gera betur?'
(n 77) 49-52.

[89] Jónsdóttir (n 36) 62–63.

[90] Einarsdóttir, 'Innleiðing afleiddrar löggjafar í íslenskan rétt – ástæður vandans og hvað er unnt að gera betur?' (n 77) 40-42.

[91] ibid.

[92] *Report of a Steering Committee on the execution of the EEA Agreement* (n 84) 37.

[93] ibid.

Finally, the conclusions of academic literature referred to above diverge regarding the effect of the so called '*misfit hypothesis*'. At its core, this hypothesis posits that if EU legislation is very dissimilar to domestic legislation, then its implementation will be more arduous and time consuming. If, however, the legislation is comparable to existing domestic legislation, the implementation will go smoothly. This hypothesis was not supported by the study of Falkner *et al.*, although other academics have considered it to have more significance.[94]

Nevertheless, there appears to be more agreement that the '*misfit hypothesis*' has more significance if the EU legislation involves changes to entrenched national models, *eg* legislation involving paternity leave in countries where only mothers have had such rights. Changes of this nature appear to meet greater resistance in the Member States. The most important aspect here, however, is which political parties are in power when such changes are to be implemented into the national legislation of the Member States. These changes can be strongly favoured by the government in power; in such cases, legislation is likely to be implemented quickly and smoothly. In other cases, however, such reforms may meet strong resistance, which can cause difficulties in the implementation process.[95]

It may be assumed that the same applies in Iceland. An example of this is the implementation of EU food legislation in Iceland. The legislation met strong political resistance by a conservative government in Iceland that was determined to protect domestic agriculture, and this led to delays in the implementation. Finally, the EFTA Court found that EU food legislation was inadequately implemented into Icelandic law.[96] If, however, during this period, a more liberal political party had been in power, the legislation in question would undoubtedly have been favoured by the government and probably implemented in a satisfactory manner.[97] As in the EU Member States, this hypothesis, however, only applies in a limited number of cases and does not explain the implementation difficulties in the majority of cases.

4.2 IMPLEMENTATION PROBLEMS RESULTING FROM THE NATURE OF THE EEA AGREEMENT OR UNIQUE ICELANDIC CONDITIONS

Although many of the difficulties in implementing directives into national law are similar in the EU Member States and the EEA EFTA States, other issues are unique to the latter. Moreover, there may be conditions unique to Iceland that can explain a part of the problem. These include various dissimilar aspects that require further discussion.

4.2[a] Implementation of Regulations

Regulations are 'directly applicable' and require no implementation in the EU Member States. Instead, they become a part of the national legislation of the Member States as soon

[94] Falkner, Treib, Hartlapp and Leiber (n 77) 289–291.
[95] ibid 291–294 and 309–313.
[96] This was confirmed by the EFTA Court in E-17/15 *Ferskar kjötvörur ehf. and the Icelandic State*, [2016] Report of the EFTA Court 4 and Joined Cases E-2/17 and E-3/17 *EFTA Surveillance Authority* v. *Iceland,* [2017] Report of the EFTA Court 727.
[97] See further discussion in Jónsdóttir (n 36) 140–145.

as they enter into force, cf. Article 288 TFEU.[98] Regulations, however, need to be implemented into national law in Iceland and Norway, cf. Article 7 of the EEA Agreement.

It follows from the above that the authorities in Iceland and Norway must implement more acts (*ie* EEA relevant acts), into their legal order than the EU Member States and Liechtenstein.[99] The execution of the EEA Agreement is therefore more time consuming for these countries, with the additional burden being placed on the Icelandic and Norwegian legislator and administration. This imbalance in workload between the EU and the EEA EFTA States, has increased in recent years. The reason is the EU used to prefer to enact secondary law in the form of directives but this *modus operandi* has recently changed, and, at present, regulations are the most common form of secondary legislation.[100]

It should, however, be noted that it is generally more complicated and time consuming to implement directives than regulations.[101] In that sense, the implementation work itself should be more manageable than was previously the case.

4.2[b] Less time for Implementation

The EEA EFTA States have a shorter time in which to implement EEA acts into their legal order than the EU Member States, in most cases just one day, once an EU act has been incorporated into the EEA Agreement. If the deadline for implementation has already passed in the EU Member States, on the incorporation of the relevant directive into the EEA Agreement, the EEA EFTA States are under an obligation to implement the directive into their internal legal order from the date of entry into force of the decision of the EEA Joint Committee.[102] The same applies to regulations.[103]

The fact is that most Icelandic ministries do not begin preparations for implementation until after an act has been incorporated into the EEA Agreement.[104] On some occasions, it is uncertain whether an act will be incorporated unchanged into the Agreement or whether *substantive adaptations* will be made, thus making it difficult to begin preparations for implementation. In most cases, however, it is clear early in the incorporation process that no *substantive adaptation* will be needed.[105] It goes without saying that it is impossible to implement an EEA act into the Icelandic legal order in a single day, regardless of whether it is to be implemented by statutory law or administrative regulation. It is essential therefore, that the Icelandic administration should begin preparations for implementation during the

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98 Méndez-Pinedo (n 16) 62.

99 Regulations are 'directly applicable' in the EEA EFTA State, Liechstenstein, because it is a monist state. See *the Internal Market Scoreboard* EFTA States, February 2007, p. 10, <http://www.eftasurv.int/press--publications/scoreboards/internal-market-scoreboards> accessed 15 May 2018.

100 See Norberg and Johansson (n 26) 36. This can also be verified in the search engine of the EFTA Secretariat *EEA-lex* (n 26). See also the article written by Egeberg and Trondal (n 42) 173–174.

101 Einarsdóttir, 'Innleiðing afleiddrar löggjafar í íslenskan rétt – ástæður vandans og hvað er unnt að gera betur?' (n 77) 47–49.

102 This is confirmed in case E-15/12 *Jan Anfinn Wahl* v. *the Icelandic State,* [2013] Report of the EFTA Court 534.

103 Einarsdóttir, 'Upptaka afleiddrar löggjafar í EES-samninginn og innleiðing í íslenskan rétt' (n 9) 567.

104 Einarsdóttir, 'Innleiðing afleiddrar löggjafar í íslenskan rétt – ástæður vandans og hvað er unnt að gera betur?' (n 77) 49-50.

105 Einarsdóttir, 'Upptaka afleiddrar löggjafar í EES-samninginn – Hvað er unnt að gera betur?' (n 41) 26–30, discusses special adaptations.

incorporation process, as is already the practice in Norway.[106] This does however not apply in the same way when an EEA Act has been incorporated into the Agreement with constitutional requirements, cf. Article 103, as the Icelandic administration often begins its preparations for the implementation bill in such cases prior to the resolution of the constitutional requirement, cf. Article 5 of 'rules on the parliamentary procedure'.

4.2[c] Prolonged Legislative Processes – Democratic Deficit

Alþingi's deliberations concerning implementation bills (*ie* EEA-related bills) tend to take a long time.[107] Alþingi´s administration collects data on the length of the EEA implementation process from the time a bill is submitted until it is approved as an act of law.[108] According to this data, 435 implementation bills have been submitted to Alþingi between the 117th legislative session in 1993–1994 and the 145th legislative session in 2015–2016. During the period between the 117th and 134th legislative sessions, the average time these bills were considered was 67 days. However, during the period from the 140th to the 145th legislative sessions, the average was 111 days. These numbers show that the processing time before Alþingi has been getting significantly longer in recent years. It is important to note that these average figures do not include the EEA-related bills that were set aside. Such bills must be submitted again before the next legislative session, resulting in significant delays. In the period from the 140th to the 145th sessions, 41% of EEA-related bills were set aside.[109]

4.2[d] Translation of EEA acts

The EU employs a large number of translators responsible for translating European legislation into the 24 official languages of the EU Member States. However, Iceland and Norway do not enjoy such services. [110] In Iceland, the Ministry for Foreign Affairs - Translation Centre, is responsible for translating acts that fall within the scope of the EEA Agreement.[111]

For a long time, late translations caused considerable delays in the implementation process. This has, however, been remedied, and translations generally do not represent an obstruction in the implementation process. Every now and again, however, there are cases when the translation process of the act in question is very slow. Such acts may be dozens or

[106] Einarsdóttir, 'Innleiðing afleiddrar löggjafar í íslenskan rétt – ástæður vandans og hvað er unnt að gera betur?' (n 77) 49-50.
[107] ibid.
[108] The data was sent to the author from the Offices of Alþingi on 16 January 2017.
[109] Between the 117th and the 145th legislative sessions, almost 27% of these bills were set aside. For comparison in the period from the 117th to the 134th legislative sessions, only 15% were subject to the same fate, and in the period from the 140th to the 145th sessions, 41%. It is therefore clear that the number of these bills that have been set aside has greatly increased in recent years.
[110] Information material on the website <https://www.ucl.ac.uk/european-institute/analysis-publications/careers/kayes-translator-careers> accessed 10 April 2018. See also William Robinson, 'Translating Legislation: The European Union Experience', 2 (2014) The Theory and Practice of Legislation 185 and Fredriksen and Franklin (n 30) 664.
[111] *Report of a Steering Committee on the execution of the EEA Agreement* (n 84) 21.

hundreds of pages in length and/or extremely complicated and technical. The translation of such acts can cause delays in the implementation process.[112]

In exceptional cases, it may be necessary to exercise the authorisation contained in the second paragraph of Article 4 of the Official and Legal Gazette Act No. 15/2005, which authorises: 'the publication of only the foreign text of an international treaty if the treaty relates to a specific group of people who, due to their education or other expertise, may be reasonably expected to understand the foreign language'.

In conclusion; there are many factors that contribute to the problems Iceland faces with the execution of the EEA Agreement. Some are due to changes in the EU, other due to the nature of the EEA Agreement or unique Icelandic conditions. Furthermore, some challenges that Iceland faces in the implementation process are similar to challenges in other EU Member States. The next section will address what can be done to improve the execution of the EEA Agreement in Iceland?

5 HOW TO IMPROVE THE EXECUTION OF THE EEA AGREEMENT IN ICELAND?

It is clear that the execution of the EEA Agreement in Iceland does not comply with Iceland´s obligation under the EEA Agreement.

There are two principal reasons for this poor performance on the part of the Icelandic state. The first is a certain lack of willingness among Icelandic Members of Parliament to accept the realities of the EEA agreement, especially the lack of democratic control it inflicts. Secondly, developments within the EU have added new challenges to the execution of the EEA Agreement.

5.1 FACING THE EEA AGREEMENT AS IT IS – INCORPORATION

It is true that, from a legal standpoint, both the EU and the EEA EFTA States have veto powers with respect to the incorporation of EU acts into the EEA Agreement. At the time of the EEA Agreement's ratification, these veto powers were believed to be important for the purposes of preserving the sovereignty of the EEA EFTA States.[113] In reality, however, this has not transpired to be an active veto power, as the use of it can result in the provisional suspension of legislation in the relevant Annex, cf. fifth paragraph of Article 102 of the EEA Agreement. However, perhaps because of this right of the EEA EFTA States, the EU has often shown great patience and willingness to reach an agreement and sometimes agreed on *substantive adaptations* to acts, on a request by Iceland, Norway or Liechtenstein. There have however also been instances in when the EU has lost its patience and threatened to invoke

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[112] Einarsdóttir, 'Innleiðing afleiddrar löggjafar í íslenskan rétt – ástæður vandans og hvað er unnt að gera betur?' (n 77) 56-58.

[113] Norberg, Hökborg, Johansson, Eliasson and Dedichen (n 22) 143. *Report of the European Committee about the relationship between Iceland and the EU*. Prime Minister's Office 2007, 33 <https://www.stjornarradid.is/media/forsaetisraduneyti-media/media/frettir/SkyrslaEvropunefndar-.pdf> accessed 12 April 2018 and Jóhanna Jónsdóttir, 'Can the EFTA states say 'no'? Article 102 and the incorporation of the Citizenship Directive into the EEA Agreement', (2009) Rannsóknir í félagsvísindum X 307, 316.

the fifth paragraph of Article 102, to temporarily suspend a part of the Annex.[114] Moreover, it has generally been quite difficult, for the EEA EFTA States to achieve *substantive adaptations* to acts.[115]

Despite this, the Icelandic state has a complicated and extensive consultation process with Alþingi during the incorporation process, which seems to assume that Icelandic Members of Parliament may realistically submit proposals for *substantive adaptations* to acts, or prevent an act from being incorporated into the EEA Agreement. In other words, this process does not accept the realities of the EEA Agreement, especially not the democratic deficit it entails.

This consultation causes significant delays in the incorporation process and, in fact, achieves little, as there is meagre material input from Members of Parliament.[116] Even if substantive proposals were made during this consultation process, it is clear that there is little likelihood that such proposals would result in *substantive adaptations* to acts that are to be incorporated into the EEA Agreement. It is even less likely that a proposal from Member of Parliament to prevent an act from being incorporated into the EEA Agreement would actually have such an effect.

It is clear that changes are needed. From a democratic viewpoint, this does not mean that consultation with Alþingi in the incorporation process should be discontinued altogether. Where important Icelandic interests are at stake, Iceland should continue to employ any opportunities available to attempt to influence the EU legislation itself or to convince the EU to agree to *substantive adaptations* for Iceland. Here, the key is to convey the views of Iceland early in the EU's legislative process, that is while legislation is still being processed by the EU institutions.[117] If Members of Parliament would have any comments on the legislation at this point, the Foreign Service could make an effort to try to influence the legislation accordingly.

Such a change would have two advantages; it would appear to be more likely that the EU would take into account the views of the EEA EFTA States if they were presented at this stage, rather than after the legislation has been approved by the EU institutions. Second, consultation with Alþingi at this stage would not delay the incorporation process.[118]

5.2 FACING THE EEA AGREEMENT AS IT IS – IMPLEMENTATION

Similar views as those presented previously apply to the powers of Alþingi to reject the implementation of EEA acts that have been incorporated into the EEA Agreements. It is true that neither regulations nor directives can have direct legal effect in the domestic legal order, unless they are made part of domestic law, either by the parliament or, if sufficient, by

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[114] Georges Baur, 'Suspension of Parts of the EEA Agreement: Disputes About Incorporation, Consequences of Failure to Reach Agreement and Safeguard Measures', in Carl Baudenbacger (eds.), *The Handbook of EEA Law* (Springer 2016) 73.

[115] Einarsdóttir, 'Upptaka afleiddrar löggjafar í EES-samninginn – Hvað er unnt að gera betur?' (n 41) 26–30.

[116] ibid 43.

[117] At this point it could be easier for the Commission and the other 28 States to discuss Icelandic concerns and reach a compromise and solution to help an EEA partner state, before formally inviting Parliament and Council to discuss legislative proposal.

[118] Einarsdóttir, 'Upptaka afleiddrar löggjafar í EES-samninginn – Hvað er unnt að gera betur?' (n 41) 44.

administrative regulation.[119] However, the failure of the Icelandic authorities to implement EEA acts correctly into the Icelandic legal order might result in a response from the ESA and finally in the initiation of a case before the EFTA Court, for breaches of EEA law under the EEA Agreement, cf. Article 31 of the SCA. In addition, such a failure may entail state liability, per the *Sveinbjörnsdóttir* judgment.[120]

As data from Alþingi confirms, the processing of legislative implementation bills often takes a long time. The reason for this is that some Members of Parliament do not appear to accept having to pass laws that are created by EU institutions automatically. Rather, they wish to carry out substantive procedure on the legislation, even if delays in the implementation may entail the consequences described in the previous paragraph. Furthermore, the political priorities of the ruling government may have an effect on the implementation of legislation.[121]

In the opinion of this author, this long processing period reflects the resistance of Icelandic Members of Parliament to the democratic deficit or the lack of democratic control of the EEA Agreement. From a democratic point of view, this is understandable. Nevertheless, it is important that representatives in Alþingi take the obligations imposed on Iceland on the basis of Article 7 of the EEA Agreement seriously, and that they are well aware of the consequences of failing to do so. Both rights and obligations are part of the compromise of the EEA Agreement. As it is commonly said, 'you cannot both have your cake and eat it'.

Increasing consultation by the Icelandic administration with Alþingi while proposed legislation is still being considered by EU institutions might give the Members of Parliament an opportunity to have some impact on the legislation. This might lead to more trust and thus more efficient implementation of EEA acts into Icelandic law. As explained above, increased consultation at this stage could for the same reason, have a beneficial effect on the incorporation of EU acts into the EEA Agreement.

One must make the reservation, however, that the possibilities for the Icelandic government to have an impact on legislation under consideration in EU institutions remain limited. On the basis of Articles 99 and 100 of the EEA Agreement, the experts of the EEA EFTA States have certain participatory rights, but no voting rights, in the committees of the European Commission where the legislation is being prepared. The EEA EFTA States are also not represented in the European Parliament.[122] Through the Lisbon Treaty, the powers

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119 This was clearly confirmed for the first time in the ruling of the EFTA Court in the Case E-4/01 *Karl K. Karlsson* v. *the Icelandic State,* [2002] Report of the EFTA Court 240 (para. 28). See further discussion in section 2.2.

120 The Supreme Court of Iceland, judgment from 16 December 1999, Case No. 236/1999 *the Icelandic State* v. *Erla María Sveinbjörnsdóttir* and *counter suit*, see also the judgment of the EFTA Court in the Case E-9/97 *Erla María Sveinbjörnsdóttir* v. *the Icelandic State*. [1998] Report of the EFTA Court 95. See further discussion on the liability of the Icelandic state due to violations of the EEA Agreement in the article by Margrét Einarsdóttir, 'Bótaábyrgð vegna brota á EES-rétti sem rekja má til æðstu dómstóla' ['State liability for breaches of EEA-law committed by courts adjudicating at last instance' (2011) Tímarit lögfræðinga 5 and Stefán Már Stefánsson, 'State Liability in Community Law and EEA Law', in C. Baudenbacher, P. Tresselt and T Örlygsson (eds.)*, The EFTA Court: Ten Years On* (Hart Publishing 2005).

121 Einarsdóttir, 'Innleiðing afleiddrar löggjafar í íslenskan rétt – ástæður vandans og hvað er unnt að gera betur?' (n 77) 54.

122 See more detailed discussion in the article of Erik O. Eriksen, '*Democracy Lost: The EEA Agreement and Norway's Democratic Deficit*'. ARENA working paper (online), Centre for European Studies, (21 October 2008)

of the European Parliament in the legislative process were considerably strengthened.[123] This change further reduced the possibility for Icelandic authorities to exert influence on the development of secondary law.[124] Moreover, the Icelandic state has no formal involvement in the Council where the legislation is finally approved by the Member States of the EU.[125]

In light of this, increased consultation with Alþingi at this stage will never represent a 'magic solution'. There is every likelihood that at least some Members of Parliament will continue to see their role as being to safeguard national interests when legislation originating in Brussels and on which Iceland has had little or no impact, is to be implemented into domestic law. This lack of democratic control is therefore likely to continue to cause delays in the implementation process.

5.3 NEW CHALLENGES TO THE EXECUTION OF THE EEA AGREEMENT

Certain developments within the EU have rendered the execution of the EEA Agreement more complicated and increased pressure on the administrative branch.

The increase in the number of EU agencies over the last few years, explain the increased constitutional problems in the execution of the EEA agreement, especially in Iceland. In order to facilitate the fulfilment of the obligations of the EEA Agreement Alþingi needs to incorporate provisions into the Icelandic Constitution, explicitly allowing transfer of power to international organisations.[126] A Constitutional provision that permits transfer of power to international organisations will not solve every problem that might arise in the execution of the EEA Agreement. However, as the comparison of the Icelandic and Norwegian procedures in this article demonstrates, there is much more predictability in the case of a clear constitutional provision as is the case in the Norwegian Constitution, than when the assessment as to whether a transfer of power is compatible with the Constitution is based on an unwritten criteria formulated by academics.

Furthermore, other developments within the EU have called for increasingly complicated work on the part of the administrative branch, which are often time-consuming: Firstly, it has become more difficult to assess whether a given act falls within the scope of the EEA Agreement. Secondly, greater number of regulations, increasingly employed instead of directives, also means that there is additional pressure on the Icelandic administrative branch, when compared to the EU Member States. To respond to this new challenges, the

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7–10. <http://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2008/wp08_21.pdf> accessed 10 February 2018.

123 See f.e. Nigel Foster, *Foster on EU Law* (Oxford University Press 2013) 56.

124 *Report on the future of the EEA and the EU's relations with the small-sized countries and Switzerland* (n 36) 8. See also *Report of a Steering Committee on the execution of the EEA Agreement* (n 84) 12–13. Norway responded to the increased powers of the European Parliament by establishing an office in the premises of the European Parliament in Brussels in an attempt to have an impact, see again *Report on the future of the EEA and the EU's relations with the small-sized countries and Switzerland* (n 36) 9 and *Report of a Steering Committee on the execution of the EEA Agreement* (n 84) 34.

125 See more detailed discussion in the article of Eriksen (n 122).

126 See Ragnhildur Helgadóttir and Margrét Einarsdóttir, 'Iceland and the EEA'. In F. Arnesen, H. Fredriksen, H. Graver, C. Vedder and O. Mestad (eds), *Agreement on the European Economic Area. A Commentary* (Hart Publishing 2018) and Thorarensen (n 47) 140-141. See also *the work of the Constitutional Committee – phase I,* (June 2014), which contains a discussion on the 'Transfer of power authorisations for the benefit of international co-operation', 11-16. See <https://www.forsaetisraduneyti.is/media/stjornarskra/starf-stjornarskrarnefndar-1-afangaskyrsla.pdf> accessed 18 June 2018.

number of employees handling EEA issues within the ministries needs to be increased. At the same time, it is important to improve the knowledge of ministry employees as regards EEA matters and to provide them with training and education in this field.

6 CONCLUDING REMARKS

The EEA Agreement is the most extensive international agreement Iceland has entered into, and is vital to Iceland´s economy. Despite this, the execution of the EEA Agreement by Icelandic authorities is not adequate in all respects. Iceland needs to improve its performance so that the execution of the EEA Agreement complies with its obligations. To achieve this goal it is necessary firstly, that Icelandic politicians stand ready to politically accept the EEA Agreement as it is in reality. Only by doing so will they be able to make the necessary changes so that the incorporation and implementation procedures will be generally smooth and without unnecessary delays. Secondly, Alþingi needs to incorporate provisions into the Icelandic Constitution, explicitly allowing a transfer of power to international organisations. Thirdly, as changes within the EU have added new challenges to the execution of the Agreement with increased pressure on the administrative branch, Icelandic administration needs to be strengthened with increased manpower and lifelong learning in the field of EEA law.

THE EUROPEAN UNION AND THE BREXIT DILEMMA – A VERY BRITISH PROBLEM?

ANNEGRET ENGEL*

Abstract

This paper discusses the key legal issues arising from the constitutional conceptions of both the EU and the UK in the latter's withdrawal process. It argues that the adherent Brexit dilemma is mainly the result of the UK's non-codified constitution on the one hand, exposing legal uncertainty over institutional procedures, regional involvement, or the precise status of international law. Nevertheless, the EU's composition of the withdrawal process as defined in Article 50 TEU has also caused confusion during the negotiations of the withdrawal agreement, the future EU-UK relationship, as well as the possibility of revocation. Due to its unprecedented nature, the several uncertainties and flaws inherent in this case have consumed valuable time and resources which could have otherwise been used more efficiently in order to ensure a smooth and orderly departure from the EU.

1 INTRODUCTION

The European Union (EU) traces its origins back to the European Coal and Steel Community (ECSC) which was established by the Treaty of Paris in 1952. Numerous states have since become members of this exclusive 'club' by accession, the procedure of which can now be found in Article 49 TEU. It was not until 2009 however, when the current Treaty of Lisbon entered into force, when the legal framework explicitly allowed for the withdrawal of an existing Member State. Essentially, withdrawal is the reverse of accession, *ie* the unwinding of membership status. The procedure to do so is laid out in Article 50 TEU, a provision – by the face of it – clearly defined, seemingly leaving no doubt as to the rights and obligations during the withdrawal process for the withdrawing Member State as well as the various institutions of the EU and the remaining Member States.

Reality has, however, painted a different picture when the United Kingdom of Great Britain and Northern Ireland (UK) in June 2016 by means of a referendum voted to leave the EU and subsequently triggered Article 50 TEU in March 2017. The so far unprecedented withdrawal has been a rather painful exercise for both sides of endless negotiations and re-negotiations, legal court proceedings, and turf wars of competence in multilevel governance. The departure of the previously 'awkward' partner[1] has since developed into a full-blown dilemma threatening the integrity of the EU which, almost three years after the UK's decision to leave, is still far from being over. But what are the very roots of the problem? How did we end up in this mess? And could it have been

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[1] Stephen George, *An Awkward Partner: Britain in the European Community* (3rd edn, OUP 1998).

avoided or would it have been different had a Member State other than the UK decided to withdraw from the EU?

This article will be arguing that the legal problems deriving from the inherited constitutional conceptions of both the EU and the UK have led to the current Brexit dilemma. On the one hand, the UK's perspective is one of the more peculiar ones as compared to most other Member States. The lack of a written constitution, devolution, and a dual approach to international law have created various obstacles along the way to leave the EU. In addition, international obligations will continue to pose restrictions on the UK's approach post-Brexit irrespective of its membership in the EU. On the other hand, from the EU's perspective, fundamental principles have complicated the quest for possible solutions and alternatives to the reoccurring impasse in the negotiations of the withdrawal agreement as well as the future relationship between the EU and the UK. In addition, Article 50 TEU itself does not answer all questions regarding the options of a Member State during the withdrawal process, in particular the possibility to be revoked, which therefore had to be clarified by the European courts. These issues shall be addressed in the following.

2 UK PERSPECTIVE

According to Article 50(1) TEU, the withdrawing Member State must do so according to its own constitutional requirements. That includes all questions of institutional and regional involvement from the beginning of the decision finding process until the end of negotiations resulting in the final departure. In addition, account must be had of any overriding international obligations which remain unaffected by the withdrawal from the EU. This all sounds very logical and straightforward, however in reality – and in the rather peculiar case of the UK which, unlike most other countries, does not have a written constitution – this has proven to be somehow more challenging than one would have expected at first sight.

The referendum itself which led to the decision to withdraw from the EU, although it can be and has been criticised for various reasons (binary choice of answer options,[2] non-binding legal character,[3] overspending of the leave campaign,[4] to name but a few) shall not be discussed here as these are political decisions, the way the referendum was held and the fact that the UK government felt bound by its result. What this section will be discussing instead are the legal consequences of an un-codified constitution in such an unprecedented and extraordinary case of withdrawal from the EU. One may think, as stated above, that if

[2] The official question on the ballot paper was: 'Should the United Kingdom remain a member of the European Union or leave the European Union?', see UK Government website: https://www.gov.uk/government/topical-events/eu-referendum/about#what-will-the-referendum-question-be.

[3] The 'advisory' nature of referenda in the UK indicates that their result does not necessarily have to be followed by the government, in particular if there is only a small majority as it was the case in the 2016 referendum (Leave 51.9% versus 48.1% Remain, see https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information).

[4] See the official report of The Electoral Commission on an investigation of the Leave campaign for breaking electoral law: http://www.electoralcommission.org.uk/__data/assets/pdf_file/0019/244900/Report-of-an-investigation-in-respect-of-Vote-Leave-Limited-Mr-Darren-Grimes-BeLeave-and-Veterans-for-Britain.pdf.

withdrawal is the reverse of accession it should be rather straightforward and powers could simply be repatriated to the institutions and regions previously in charge (*ie* before the UK has become an EU member). However, as the following will show, the disentanglement of competences is a complex matter indeed and in particular if there is a lack of legal guidance which poses real challenges to the constitutional system.

2.1 THE ROYAL PREROGATIVE VERSUS PARLIAMENTARY SOVEREIGNTY

The UK's Brexit dilemma started at the first hurdle: triggering Article 50 TEU and the question as to which UK-internal constitutional requirements are necessary to do so. Does it fall under the royal prerogative? Or does Parliament have a say in this? Unlike many of its European neighbours, where such issues would be addressed in their written constitutions, the UK's situation was rather unclear.[5] Unsurprisingly, these issues were raised in judicial proceedings in the *Miller* case and were only clarified in its final judgment by the UK Supreme Court in January 2017.[6]

One of the most peculiar features of (mostly) common law systems is the Crown's or royal prerogative.[7] Under UK law this means that the government, acting on behalf of the monarch, may take action without consent of the UK Parliament. However, the exact scope of this prerogative power is unclear due to the lack of a written constitution, although the courts have previously provided some guidance. For example, the royal prerogative may be exercised for matters in foreign affairs, including the signing as well as the termination of international treaties.[8] Along this line and with regard to the UK's withdrawal from the EU treaties, the Secretary of State for Exiting the European Union tried to argue in favour of the Crown's prerogative in this case. However, as was previously established, the royal prerogative 'does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament.'[9]

As a country taking a dualist approach to international law, the UK clearly distinguishes between foreign and domestic law, with an act of Parliament necessary for the former to take effect in the national legal system. While EU laws would thus initially be considered foreign law, the European Communities Act (ECA) 1972 has 'domesticated' EU rights and obligations to become effective as part of the UK legal framework.[10] Indeed, after more than four decades of EU membership, the disentanglement of laws by source (UK or EU) would be rather difficult. The defenders of the royal prerogative in the *Miller*

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[5] See also Michael Gordon (2016) 'Brexit: a challenge *for* the UK constitution, *of* the UK constitution?' EuConst 12(3), 409-444.
[6] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5. See *eg* discussion in Juha Raitio and Helena Raulus (2017) 'The UK EU referendum and the move towards Brexit' MJ 24(1), 25-42.
[7] See *eg* discussion in Thomas Poole (2010) 'United Kingdom: The royal prerogative' IJCL 8(1), 146-155.
[8] Lord Templeman in JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, p 476.
[9] Lord Oliver of Aylmerton in JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, p 500.
[10] The inherent conflict caused under this dualist approach is best illustrated with the Factortame cases and the application of the principle of EU supremacy under UK law, Case C-213/89, The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others, EU:C:1990:257.

case however argued that despite this domestication of EU laws via the medium of the ECA, it nevertheless remained foreign by nature as was evident in the possibility to withdraw from EU membership and therefore to cease to apply EU laws. This reasoning was rejected by the Supreme Court which found that:

> the continued existence of the new source of law created by the 1972 Act, and the continued existence of the rights and other legal incidents which flow therefrom, cannot as a matter of UK law have depended on the fact that to date ministers have refrained from having recourse to the Royal prerogative to eliminate that source and those rights and other incidents.[11]

Ultimately, the Supreme Court concluded, withdrawal from the EU and therefore repeal of the ECA 1972 can only be exercised by the UK Parliament enacting primary legislation, thus upholding the principle of parliamentary sovereignty:[12] 'ministers require the authority of primary legislation' as mandate in order to be able to make use of their prerogative powers to trigger Article 50 TEU, rather than the other way around.[13] Earlier, the House of Lords Constitutional Committee had already expressed its concerns of constitutionality in case Parliament would not be consulted before triggering Article 50 TEU:

> It would be constitutionally inappropriate, not to mention setting a disturbing precedent, for the Executive to act on an advisory referendum without explicit parliamentary approval – particularly one with such significant long-term consequences.[14]

Thus confirming the prevalence of the principle of parliamentary sovereignty over the royal prerogative for cases of domesticated foreign laws, the Supreme Court's judgment is nevertheless evidence of the conflict – and even uncertainties – inherited in the constitutional framework of the UK.[15] In addition, the quest for the correct institutional procedure has taken valuable time and resources before being able to trigger Article 50 TEU. Only after this judgment was the UK able to proceed with the necessary legislation which, after its approval by Parliament,[16] gave the government the required mandate and thus paved the way for the withdrawal process to officially commence.[17]

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[11] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 93.
[12] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press 1999).
[13] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 101.
[14] House of Lords Select Committee on the Constitution (2016) 'The invoking of Article 50 on the Constitution', 4th Report of Sessions 2016-1, p 8.
[15] See also Sionaidh Douglas-Scott (2016) 'Brexit, Article 50 and the Contested British Constitution' MLR 79(6), 1019-1040.
[16] The House of Commons voted in favour by 498 to 114.
[17] The UK Parliament's decision to trigger Art 50 TEU was subsequently complemented with the European Union (Withdrawal) Bill 2017, Bill to Repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU.

2.2 DEVOLVED POWERS

Another conflict which has occupied the judiciary as well as the legislature in the UK has been that of the different devolved administrations and their powers.[18] According to the UK's devolution settlements, certain competences have been decentralised and transferred to the devolved regions of Scotland,[19] Wales,[20] and Northern Ireland.[21] Areas for which competences have been devolved under these settlements include, but are not limited to, health, education, agriculture, and the environment.[22] However, according to the Sewel Convention, the devolution of competences is merely an expression of goodwill which means that the UK Government retains the *ultima ratio* to legislate in any area of law, even those of devolved powers if deemed necessary.[23] As a result, the distribution of competences within the UK is non-binding and cooperative in nature and thus could be challenged on a case-by-case basis.

Unsurprisingly, this issue was indeed raised in the *Miller* case with the devolved administrations claiming their veto power in the initiation of Brexit proceedings. Essentially, they argued that the UK Parliament would need their consent in order to being able to withdraw from the EU, since devolved competences would also be affected. However, the Supreme Court ruled that no such veto power could be derived from the Sewel Convention for the devolved administrations for triggering Article 50 TEU and thus dismissed their claims.[24] It highlighted the political nature of the convention for which it did not consider the judiciary being the ultimate arbiter, but rather the choice of the UK Government. More, recently the latter has required the legislative consent from the devolved administrations in relation to the EU Withdrawal Act[25] as well as the Trade Bill.[26] Whilst being denied a veto on Brexit itself, influence over how competences are being repatriated to the UK after Brexit is equally vital to the devolved regions. In particular, those areas of devolved competences are under threat of being centralised in the interest of greater unity on the UK internal market post-Brexit.

During the UK's EU membership, the principle of subsidiarity according to Article 5 TEU allowed for regional representation of interests at European level for non-exclusive EU competences.[27] Under such policy areas, the devolved regions have been able to individually shape policy-making for their territories and to directly receive EU subsidies. With the repatriation of powers from Brussels to Westminster rather than directly to the

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[18] See also Jo Hunt 'Devolution' in Michael Dougan (ed.), *The UK after Brexit: Legal and Policy Challenges* (Insentia 2017), 35-52.
[19] Scotland Act 1998.
[20] Government of Wales Acts 1998 and 2006.
[21] Northern Ireland Act 1998.
[22] This also varies as not all devolved regions have the same type and extent of competences.
[23] Memorandum of Understanding and Supplementary Agreements between the UK Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee (December 2001) (Sewel Convention).
[24] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 150.
[25] European Union (Withdrawal) Act 2018, see progress: https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html.
[26] Trade Bill 2017-19, see progress: https://services.parliament.uk/bills/2017-19/trade.html.
[27] See *eg* Rudolf Hrbek (2003) 'The role of the regions in the EU and the principle of subsidiarity' The International Spectator 38(2), 59-73; Antonio Estella de Noriega, *The EU Principle of Subsidiarity and its Critique*, (OUP 2002).

devolved administrations, it remains questionable whether the UK Government will be willing to redistribute such competences to the different regions.[28] In addition, according to Schedule 2 of the EU Withdrawal Bill,[29] the devolved administrations have rather limited powers in relation to retained EU laws: particularly problematic is the fact that according to paragraph 2(1) '[n]o regulations may be made (…) unless every provision of them is within the devolved competence of the devolved authority.' Essentially, this paves the way for a UK-internal competence creep as competences are often overlapping, touching on various policy areas at the same time, and can hardly ever be considered in isolation.

As could thus be argued, the UK-internal struggles are a direct consequence of the vagueness and non-binding nature of the distribution of competences between the devolved regions. The only devolved region with some leverage in the Brexit negotiations is Northern Ireland due to the ten DUP MPs needed to keep the current minority government in place. However, this does not change the legal uncertainties surrounding devolution itself and the move towards more centralised powers post-Brexit which is being justified by the need to avoid further fragmentation of the UK internal market in order to attract international trading partners and foreign investment once the UK has terminated its membership in the EU.

2.3 INTERNATIONAL OBLIGATIONS

EU and international laws are closely intertwined and their disentanglement, far away from being easy, may continue to pose certain restrictions on the UK post-Brexit. In particular, concerning policy areas with a transnational or even global scope, such as external trade or the environment, international obligations will continue to bind the UK in the post-Brexit era irrespective of its membership in the EU. This holds true not only for the often mentioned WTO rules,[30] but also other international treaties of which the UK has become an independent signatory alongside the EU during its membership. In fact, this practice establishes a bilateral relationship vis-à-vis the third country thus capable of holding the UK accountable regardless of EU membership.[31] As goes without saying, the UK will be able to unilaterally withdraw from such treaties after Brexit if it wishes to renegotiate its individual conditions or completely change its international strategy.[32] However, this might result in an increased isolation on the world stage – even if only temporarily. It also remains questionable whether the UK would be able to renegotiate better conditions after its departure from the EU as an independent country due to the various internal political and legal uncertainties.

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[28] See *eg* discussion in relation to environmental law in Annegret Engel and Ludivine Petetin (2018) 'International obligations and devolved powers – ploughing through competences and GM crops' Environmental Law Review 20(1), 16-31.

[29] European Union (Withdrawal) Bill 2017, Bill to Repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU.

[30] *eg* compliance with the 1994 General Agreement on Tariffs and Trade (GATT).

[31] See *eg* Marise Cremona (2006) 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law' EUI Law Working Paper No. 2006/22.

[32] As is *eg* happening with the 1964 London Fisheries Convention, see Mure Dickie (2017) 'UK begins to row back from fisheries convention' Financial Times, https://www.ft.com/content/12451e48-5db5-11e7-9bc8-8055f264aa8b.

In addition, the UK's ability to divert from the much contested EU standards may be further limited by the so-called 'Brussels effect'.[33] This describes the practice by which international trading partners tend to align their standards and even legislation with those of the EU in order to facilitate trade. Also called the concept of extraterritoriality,[34] this is further evidence of the EU's influence and market power worldwide.[35] Thus for the UK, this could potentially mean problems with existing trading partners if its post-Brexit strategy is to significantly lower its standards, for example technical or environmental, so as to attract certain other trading partners not usually compliant with the EU's high standards, such as China or the U.S.[36] Ultimately, this could lead to a 'race to the bottom' which would have severe ramifications for the UK's ability to engage in trade on a global scale. Rather, the UK's future approach should reflect a careful consideration of the margins available for sensitive alignment for a successful trading strategy to be put in place.

3 EU PERSPECITVE

The EU's position has been very clear from the beginning and consistent throughout the negotiations: legally as codified in the treaties as well as politically. Nevertheless, the UK's withdrawal process has exposed several flaws deriving from the setting of Article 50 TEU itself. As stated above, withdrawal can be viewed as the reverse of accession, which certainly holds true from a procedural aspect. However, there is a significant legal difference: During the process of a potential Member State acceding, that state is legally still outside of the EU until accession is complete, thus it constitutes an *external* issue. In contrast, an existing Member State wanting to leave legally remains a member until withdrawal is complete and consequently constitutes an *internal* issue. Therefore, as could be argued, a significant share of the Brexit dilemma stems from the inherent legal concept of Article 50 TEU since internal issues by default receive more prominence and ultimately have the potential to create more turmoil from inside than external issues.

3.1 NEGOTIATING THE WITHDRAWAL AGREEMENT

Article 50(3) TEU envisages a two-year withdrawal period at most from the moment of notification after which 'the Treaties shall cease to apply to the State in question'. The insertion of such a time restriction – unlike in Article 49 TEU for accession – certainly has to be welcomed in that it is aimed to avoid departing Member States remaining inside the EU for an extended amount of time. However, this only applies once the European Council has been notified according to Article 50(2) TEU. As can be seen with the case of the UK, it took whole nine months after the referendum before notification to withdraw was officially issued and Article 50 TEU was triggered.[37] In addition, even once the two-year period has started, it can still be extended according to Article 50(3) TEU by

[33] Anu Bradford (2012) 'The Brussels Effect' Northwestern University Law Review 107(1), 1-67.
[34] In relation to financial regulation, see Joanne Scott (2014) 'The new EU 'extraterritoriality'' CMLR 51(5), 1343-1380.
[35] See also Anu Bradford (2014) 'Exporting Standards: The Externalization of the EU's Regulatory Power Via Markets' International Review of Law and Economics 42, 158-173.
[36] See *eg* the failed TTIP Agreement between the EU and the U.S.
[37] UK Referendum to leave: 23rd June 2016; Notification to withdraw: 29th March 2017.

unanimity.[38] Despite this high threshold for extension and the resulting veto power for each remaining Member State, there is no restriction on how long this extension can be or how many times an extension can be granted, which in fact renders it indefinite. As could be argued, the possibility – even if only theoretical – to prolong the withdrawal period indefinitely is rather problematic in terms of legal certainty.[39]

According to Article 50(2) TEU 'the Union shall negotiate and conclude an agreement' with the withdrawing Member State, 'setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.' This withdrawal agreement is to be negotiated and concluded during the two-year period after notification according to Article 218(3) TFEU, requiring consent of the European Parliament and qualified majority voting in the Council. In contrast, the actual agreement regulating the future relationship between the EU and the then ex-Member State will formally start to be negotiated after departure.[40] The former is thus an EU-*internal* agreement, whereas the latter is an EU-*external* matter, *ie* an international agreement.[41] This distinction is crucial as the future relationship can only be established once it is clear on which terms and conditions the departed Member State has in fact left the EU. As has been pointed out by Tridimas (2016), the withdrawal agreement 'may provide for the treatment of existing rights and obligations but cannot create any new rights'.[42] The three main aspects thus covered by the withdrawal agreement between the EU and the UK were citizens' rights, border issues, and the financial settlement.[43]

During the time of the negotiations of the withdrawal agreement the exiting Member State legally remains a full member of the EU with all rights and duties such membership entails until actual withdrawal is complete and the EU treaties cease to apply.[44] What is in legal terms a clear-cut provision faces difficulties in political realities due to a potential conflict of interests: a Member State wishing to leave the 'club' is still obliged to uphold the EU's fundamental principles and to participate in EU institutions and the various meetings at European level. As can be seen in the case of the UK, problems are likely to arise if the withdrawing Member State is forced to hold elections for the European Parliament shortly before exit or simply poses a threat as to blocking important decisions at EU level, such as

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[38] This is not to be confused with the transition period, as agreed between the EU and the UK, which concerns the time after withdrawal and thus already concerns an external matter. A detailed discussion on this can be found in Michael Dougan (2018) 'An Airbag for the Crash Test Dummies? EU-UK Negotiations for a post-Withdrawal 'Status Quo' Transitional Regime under Article 50 TEU' CMLR 55(2/3), 57-99.

[39] As can be seen with the UK's multiple requests for extension for short periods of time and the EU's unwillingness to refuse such requests, thus causing legal difficulties for the European Parliament elections and legal uncertainty for businesses and citizens.

[40] This fact has been subject to some public debate in the UK with some politicians suggesting the UK should insist on negotiating the future relationship alongside the withdrawal arrangements, see *eg* Boris Johnson https://www.politico.eu/article/boris-johnson-eu-legally-bound-to-discuss-trade-relationship/.

[41] This will be discussed in the next section.

[42] Takis Tridimas (2016) 'Article 50: An Endgame without an End?' King's Law Journal 27(3), 297-313, p 309.

[43] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf.

[44] Art 50(3) TEU.

the budget.[45] To this effect, the Council issued another reminder of the code of conduct when it granted a second extension on Article 50 TEU on 10 April 2019, stressing that this extension 'cannot be allowed to undermine the regular functioning of the Union and its institutions.'[46] In particular, the Council highlighted that automatic withdrawal would be inevitable if the UK were to refuse to hold elections for the European Parliament. The Council further reminded the UK that it was obliged

> to act in a constructive and responsible manner throughout the extension in accordance with the duty of sincere cooperation and [expected] to fulfil this commitment and Treaty obligation in a manner that reflects its situation as a withdrawing Member State. To this effect, the United Kingdom shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives, in particular when participating in the decision-making processes of the Union.[47]

As goes without saying, this duty of participation does not include matters concerning the exiting Member State's own withdrawal; any such meetings are reserved for the remaining Member States despite the former's lingering membership.[48]

3.2 THE FUTURE RELATIONSHIP

Once the Member State in question has ended its membership and has left the EU, negotiations for an agreement on the future relationship may formally commence, after having merely been 'taken account of' in the withdrawal agreement according to Article 50(2) TEU.[49] As such, this agreement on the future relationship constitutes an international agreement between the EU and a third country as provided for in Article 216 TFEU and in accordance with the procedure under Article 218 TFEU. According to Article 3(2) TFEU, the Union's competence to conclude international agreements is exclusive if, for example, its conclusion is 'necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.' However, joint action of the Member States may still be required if a multitude of policy areas and thus different types of competences[50] are covered by the envisaged international agreement

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[45] See *eg* comments made by Conservative MP Jacob Rees-Mogg before a new extension pledge was made by the UK, https://www.politico.eu/article/rees-mogg-uk-should-play-hardball-on-eu-budget-if-brexit-delayed/.

[46] European Council Conclusion EUCO XT 20015/19, Special meeting of the European Council (Art. 50) (10 April 2019), https://www.consilium.europa.eu/media/39042/10-euco-art50-conclusions-en.pdf, point 3.

[47] ibid, point 7.

[48] This again might cause frustration within the exiting Member State and a feeling of not really being able to 'take back control' as was intended.

[49] A non-binding political declaration on the envisaged future relationship was already negotiated alongside the negotiations of the withdrawal agreement: Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom_.pdf.

[50] On an extensive discussion of the different types of competences and the potential conflicts arising therefrom, see Annegret Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer 2018).

For example, in its Opinion 2/15 in relation to the free trade agreement between the EU and Singapore (EUSFTA),[51] the court found that while several parts of the agreement would fall within the area of common commercial policy, including various social and environmental aspects of it, and thus be covered by the exclusive competence of the EU under Article 3(1)(e) TFEU, this could not be said of the entirety of the agreement. In particular, certain provisions regulating the protection of non-direct foreign investment and investor-State dispute settlement were considered to fall under the EU's shared rather than exclusive competences.[52] Therefore, since the provisions of the agreement were of a mixed nature, the EUSFTA as a whole had to be concluded jointly between the EU and the Member States.

Essentially, such a joint approach gives each Member State, and even regions within the Member States,[53] a veto over the negotiated agreement. The ratification process of mixed agreements may thus encounter difficulties which can be best illustrated with another international trade agreement between the EU and Canada (CETA).[54] Here, the regional parliament of Wallonia in Belgium initially refused to give its consent for various reasons, one of which was Wallonia's concerns over the proposed Investment Court System, thus threatening to jeopardise years of complex trade negotiations and the successful conclusion of its final agreement. Wallonia only accepted the provisional entering into force of CETA under the condition that Belgium would request an opinion of the European courts on the validity of the contested Investment Court System.[55] Despite the court's recently delivered opinion in favour of such a system and its compatibility under EU law,[56] the agreement still requires ratification in all Member States to finally fully enter into force, which is thus not yet a given certainty.[57]

As can be seen from the above, a complex free trade agreement on the future relationship between the EU and the UK not only faces lengthy negotiations but also obstacles during the ratification process in the form of opposition from the Member States and their regions trying to protect their own interests in specific policy areas, for example agriculture, the environment, or the protection of certain technical standards.[58] Possible alternatives in the event of a failed ratification of such an international agreement as put forward by Van der Loo and Wessel (2017) include the 'unsigning' or opt-outs for those Member States opposed to the agreement as well as the option of declarations.[59] Another possibility was offered by Advocate General Sharpston who suggested in her opinion on the EUSFTA case a splitting of such multi-competence mixed agreements in order to ensure a swift ratification of those parts of the agreement which are covered by the EU's

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[51] EU:C:2017:376. See also case comment by Marise Cremona (2018) 'Shaping EU Trade Policy post-Lisbon: opinion 2/15 of 16 May 2017', EuConst 14(1), 231-259.
[52] Opinion 2/15, EUSFTA, EU:C:2017:376, para 305.
[53] Depending on each Member State's constitutional requirements.
[54] Comprehensive Economic and Trade Agreement.
[55] Opinion 1/17, Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (C 369/2).
[56] Opinion 1/17, Opinion pursuant to Article 218(11) TFEU (CETA), EU:C:2019:341.
[57] Cf. also the failed TTIP agreement between the EU and the U.S.
[58] See *eg* Panos Koutrakos (2016) 'Negotiating international trade treaties after Brexit' E.L.Rev. 41(4), 475-478.
[59] Guillaume Van der Loo and Ramses A. Wessel (2017) 'The non-ratification of mixed agreements: Legal consequences and solutions' CMLR 54(3), 735-770.

exclusive competences[60] and a better targeted political debate at intergovernmental level for the remaining policy areas without jeopardising the entirety of the negotiated deal.[61]

As could be argued, the inherited fragmentation within the EU deriving from an intergovernmental approach is particularly visible at international level and may have detrimental effects for such crucial negotiations in external relations, which has led various commentators to plead for greater unity in this area.[62] However, there is a variety of factors determining the success and effectiveness of international negotiations, out of which speaking with a single voice is but one.[63] The EU's international identity and trading power is also determined by the upholding of 'European values' and certain high standards, for which it is essential to allowing all actors and interest groups having their say in the negotiating/ratification process of such complex trade agreements. In addition, the most recently concluded Economic Partnership Agreement with Japan,[64] as well as the on-going negotiations for an EU-China Investment Agreement,[65] are further evidence of the EU's ability to attract trading partners around the globe despite potentially lengthy and strenuous negotiations.

3.3 REVOCABILITY OF ARTICLE 50 TEU

Article 50 TEU remains silent as to the possibility to be revoked once it is triggered;[66] a question which was raised in the *Wightman* case,[67] where a preliminary ruling was brought before the European Court of Justice (ECJ) from the Court of Sessions (Scotland). Essentially, the court was asked to provide some clarity on the possibility of unilateral revocability of Article 50 TEU after a Member State's notification to withdraw but before actual departure, *ie* anytime within the two-year period prescribed in Article 50 TEU:

> Where, in accordance with Article 50 [TEU], a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State within the European Union?

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[60] As can be seen from the example with the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled (2013) where the court found sufficient competence stemming from the EU alone to conclude the contested treaty without the need for further joint ratification taking place in the Member States, Opinion 3/15, Marrakesh Treaty, EU:C:2017:114.
[61] Opinion procedure 2/15, Opinion of Advocate General Sharpston, EU:C:2016:992, para 567.
[62] See *eg* Eleftheria Neframi (2010) 'The duty of loyalty: Rethinking its scope through its application in the field of EU external relations' CMLR 47(2), 323-359.
[63] Eugénia Da Conceição-Heldt (2014) 'When speaking with a single voice isn't enough: Bargaining power (a)symmetry and EU external effectiveness in global trade governance' JEPP 21(7), 980-995.
[64] The Agreement entered into force in February 2019, http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/.
[65] Negotiations between the EU and China started in November 2013, http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/.
[66] Some commentators have argued that the possibility of revocation was nevertheless implied in Art 50 TEU; see *eg* Paul Craig (2016) 'Brexit: A drama in six acts' E.L.Rev. 41(4), 447-468; Piet Eeckhout and Eleni Frantziou (2017) 'Brexit and Article 50 TEU: A constitutionalist reading' CMLR 54(3), 695-734.
[67] Case C-621-18, *Andy Wightman and Others v Secretary of State for Exiting the European Union (UK)*, EU:C:2018:999. For a short case analysis, see Panos Koutrakos (2019) 'The European Court of Justice and the politics of Brexit – the Wightman judgment' E.L.Rev. 44(1), 1-2.

Clarity on this issue was sought by a group of Parliamentarians[68], whilst being declared a 'hypothetical and academic' question by the Secretary of State for Exiting the European Union (UK) on the grounds that the UK did not seek such revocation.[69] The court of first instance accepted that reasoning and refused to make a preliminary reference in the interest of 'parliamentary sovereignty'. However, the reference was then made by the court of appeal in order to receive clarification on the number of legal options available, even if politically undesirable.[70]

In the main proceedings before the ECJ, the Council and the Commission acknowledged the existence of a right to revoke Article 50 TEU once triggered and before actual withdrawal of the departing Member State, however they argued that such revocation could not be a unilateral act. In particular, they raised their concerns about potential ways of abuse by the withdrawing Member State 'to the detriment of the European Union and its institutions' in an attempt to 'circumvent the rules set out in Article 50(2) and (3) TEU', essentially revoking its notification before re-applying again in order to achieve an additional extension to the two-year notification period.[71] Another possible form of abuse mentioned by the institutions was the potential leverage in negotiations if the leaving Member State 'could threaten to revoke its notification and thus put pressure on the EU institutions in order to alter the terms of the agreement to its own advantage.'[72] The Council and the Commission therefore argued that revocation of Member States' notification to withdraw could only be allowed if the European Council unanimously consents to such a revocation.

In its judgment, the Court did not follow the Council's and the Commission's reasoning. Instead, the Court carefully analysed Article 50 TEU and the sovereign nature of the right to withdraw enshrined therein. It pointed out that despite the lack of an explicit mentioning of the possibility to revoke Article 50 TEU, any such revocation had to be understood in line with the withdrawal itself according to Article 50(1) TEU, rather than by analogy according to the procedure for extension (Article 50(3) TEU) as the Council and the Commission tried to argue.[73] The Court explained that the requirement to seek approval of the European Council 'would transform a unilateral sovereign right into a conditional right subject to an approval procedure.'[74] As a result, a Member State could find itself in a position to being forced to leave the EU if no such approval was granted even if that Member State had changed its mind and now wished to remain within the EU.

The Court therefore held that a Member State's right to revoke Article 50 TEU has to be a unilateral right and only subject to its own national constitutional requirements. Similar as the notification itself, revocation has to be submitted in writing to the European Council, and, crucially, has to be 'unequivocal and unconditional'. Here, the Court made an attempt to mitigate the possibility of abuse by a departing Member State, trying to

[68] Members of the UK Parliament, the Scottish Parliament, and the European Parliament.
[69] Case C-621-18, *Andy Wightman and Others v Secretary of State for Exiting the European Union (UK)*, EU:C:2018:999, para 10.
[70] The UK tried to appeal against the referring court's decision, however unsuccessfully.
[71] Case C-621-18, *Andy Wightman and Others v Secretary of State for Exiting the European Union (UK)*, EU:C:2018:999, paras 39 and 40.
[72] ibid, para 41.
[73] ibid, para 60.
[74] ibid, para 72.

circumvent the procedural limits of the two-year withdrawal period by re-submitting a new notification shortly after revocation: it clarified that:

> the purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end.[75]

The Court thus acknowledged that there is a theoretical possibility for abuse by a Member State in order to negotiate a better deal or to obtain an extension, however this cannot set aside the sovereign nature of a Member State's decision to leave or eventually remain a member of the EU. Ultimately, any obviously abusive behaviour of a withdrawing Member State can then be met with an adequate response from the part of the EU. As has been argued by Benrath (2018), an ambiguous revocation can under certain circumstances be rejected by the European Council. In addition, the default consequence of re-notification after withdrawal would not necessarily have to result in a restart of the two-year period and thus a de-facto extension thereof, but rather should be interpreted as a resuming of the original notification period (under certain constraints) which would thus effectively limit the potential for abuse.[76]

The importance of this decision cannot be underestimated. And that is not only for its actual result, but even more so for the legal certainty it does provide in terms of what options are available to a withdrawing Member State after having triggered Article 50 TEU, irrespective of whether or not that state actually intends to make use of it. As such, it could be argued that this judgment has remedied one of the inherent flaws in Article 50 TEU.

4 CONCLUDING REMARKS

Unprecedented in its history, the UK's withdrawal from the EU has not been without challenges and continues to create legal uncertainties for all parties involved, including citizens which will be affected in their rights. The complexity of this endeavour has only become apparent *peu à peu* in the Brexit process, with many pitfalls and dead ends along the way.

The UK's desire to 'take back control', as often proclaimed since the UK referendum, has not (yet) materialised. Instead, if viewed from the outside, the UK seems hopelessly turning around itself without being able to present a clear strategy out of the current deadlock, let alone a feasible vision for the future. The internal quarrels have consumed much of the Government's time and resources and have occupied the judiciary at various levels. Facilitated by several unwritten rules and non-binding conventions, the legal uncertainties surrounding to the national constitutional requirements in the UK according to which the Member State in question is supposed to withdraw from the EU as prescribed in Article 50(1) TEU have largely contributed to this dilemma.

As could thus be argued, if another Member State ever were to withdraw from the EU in the future the situation would be an entirely different one. With all its internal legal

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[75] ibid, para 74.

[76] Daniel Benrath (2018) 'Bona fide and revocation of withdrawal: how Article 50 TEU handles the potential abuse of a unilateral revocation of withdrawal' E.L.Rev. 43(2), 234-248, p 245.

peculiarities, the UK cannot be seen as a role model of European constitutionalism, but rather as the odd one out. Most EU countries take a less dualist approach when it comes to international law with clearly defined institutional procedures set out in their (written) constitutions and a binding distribution of competences in multi-level governance.[77]

The clarification on the revocation of Article 50 TEU by the ECJ has by contrast not caused any time delay on Brexit itself and allegedly not even affected the decision-making process in the UK as confirmed by the Government's repeated intention not to revoke the withdrawal process. Nevertheless, this provides useful guidance as to the options available once Article 50 TEU has been triggered, thus shifting the point of no return to the actual date of exit upon which Article 50(5) TEU applies allowing the state in question to re-join according to the procedure laid out in Article 49 TEU.

What thus remains is the challenges surrounding negotiating the withdrawal agreement as well as the (separate) future relationship between the EU and the withdrawing Member States. Again, some of the sticking points in the Brexit negotiations were UK-specific as for example the border issues between the Northern Ireland and the Republic of Ireland, however those are political questions which have to be solved by the respective representatives of each side. Legally, the involvement of the EU institutions and the remaining Member States at the different stages of the negotiations is essential to guarantee the legitimacy and proper functioning of the EU legal framework.

[77] See *eg* Germany, where even the different federated parts (Länder) have their own written constitutions.

RETHINKING FINANCIAL REWARDS FOR WHISTLE-BLOWERS UNDER THE PROPOSAL FOR A DIRECTIVE ON THE PROTECTION OF WHISTLE-BLOWERS REPORTING BREACHES OF EU LAW

DIMITRIOS KAFTERANIS*

Abstract

The European Commission recently published a proposal for a Directive on the protection of whistle-blowers reporting breaches of EU law. This proposal is welcomed not only by the legal community but also by many citizens who desire more transparency. The recent scandals revealed by whistle-blowers along with the active role of the European Parliament have led the European Commission to propose this important text of the proposed Directive. The whistle-blower is recognised as an enforcement tool for the EU and is a key component in helping to ensure the successful enforcement of EU law. There is one element, however, that is not discussed by the European Commission: financial rewards for the whistle-blowers.[1] The United States, especially in the financial sector, has adopted a system of financial awards. Europe, on the other hand, is resistant to introducing such incentives. The aim of this paper is to introduce the proposal for a Directive and to highlight the problems that such a step may create at the EU level.

1 INTRODUCTION: WHISTLE-BLOWERS AND THE FINANCIAL CRISIS

The major financial crises of recent years have demonstrated the failure of enforcement of the rules governing the financial sector and also the lack of detecting misconduct in the banking and financial sector.[2] Whistle-blowing gained much attention, firstly in the US and then in Europe following the stock market crash of 2002 and became a topical issue for governments, regulators and scholars. The adoption of different pieces of legislation in the US and Europe demonstrate this attention.[3] Scandals such as ENRON and WORLDCOM, could have had different consequences if the employees' concerns about their opaque practices and their accounting situation were heard and treated properly.[4] These events have

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[1] The European Commission considers financial rewards in the annex of the impact assessment of the proposal for a directive but it does not entail it in the main text of the proposed Directive.

[2] Michael Neal, 'Securities Whistleblowing under Dodd-Frank: Neglecting the Power of "Enterprising Privateers" in Favor of the "Slow-Going Public Vessel"' (2012) 15 Lewis & Clark Law Review 1124-1126 where he analyses what happened with ENRON, WorldCom and their employees who were raising concerns.

[3] See to that extent the adoption of Sarbanes-Oxley Act (2002) and the Dodd-Frank Act (2010) by the US and the Protected Disclosures Act (2014) in Ireland and the Law Sapin II (2016) in France.

[4] Ian A. Engoron, 'A Novel Approach to Defining "Whistleblower" in Dodd-Frank' (2017) (23(1) Fordham Journal of Corporate and Financial Law, 265. Apart from ENRON and WORLDCOM that occurred in the US, Europe also had its own scandals such as Panama Papers or Paradise Papers that implicated European citizens and countries in tax evasion and money laundering.

led the US government to react by enacting legislation in order to assure the safety and soundness of the financial sector.[5] The first piece of legislation was the Sarbanes-Oxley Act of 2002 that entailed provisions for whistle-blowing.[6] Along with this Act and following the crisis of 2008, the Dodd-Frank Act of 2010 was signed by President Obama in an effort to strengthen the rules for the financial sector.[7]

The Dodd-Frank Act adopted a robust system of whistle-blowing protection allowing the Securities and Exchange Commission (SEC) to offer financial rewards to whistle-blowers under certain circumstances.[8] The bounty programme of the Dodd-Frank Act has received attention from the legal and political world as many praised the fact that it allowed for successful claims to be brought to the SEC and for the whistle-blower to be rewarded.[9] It should be noted, though, that financial rewards for whistle-blowers is not a new phenomenon for the US and the financial awards systems dates back to the False Claims Act, adopted in 1863.[10]

Unlike the US context, the protection of whistle-blowers in European countries is incoherent.[11] Cultural, social and political concerns were an obstacle for most of the European countries in relation to the adoption of comprehensive whistle-blowing legislation.[12] The most important step was the recent proposal for a Directive of the European Commission on the protection of whistle-blowers reporting breaches of European law.[13] The text is assuring and inspiring, criticised though for its lack of specific reference to financial rewards for whistle-blowers.[14] The present contribution presents a particular interest due to the recent developments in the US case-law alongside the draft proposal for a Directive on the protection on the whistle-blowers. In addition, the existing legal literature on this issue, at the EU level, is not abundant and the previous texts are outdated.

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[5]Samuel C. Leifer, 'Protecting Whistleblower Protections in the Dodd-Frank Act' (2014) 113 Michigan Law Review, 121, 125-129.

[6] Sarbanes-Oxley Act 2002, Washington D.C., U.S. G.P.O., 2002.

[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o) [Bluebook R. 12.4].

[8]Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, §§748, 922, 124 Stat. 1380, 1381 (2010) (codified in 15 U.S.C. § 78n (2012)).

[9] Christina Parajon Skinner, 'Whistleblowers and Financial Innovation' (2016) 94 North Carolina Law Review 861, 861.

[10] Michael Neal, 'Securities Whistleblowing under Dodd-Frank: Neglecting the Power of "Enterprising Privateers" in Favor of the "Slow-Going Public Vessel"' (2012) 15 Lewis & Clark Law Review 1110-1116 where the False Claims Act along with the IRS whistle-blower program are discussed in detail.

[11] European Commission, Commission Staff Working Document, Impact Assessment accompanying the document of the proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law COM(2018) 218 final, available on: < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018SC0116&from=EN > accessed on 30 October 2018, 3.

[12] European Commission, Impact Assessment (n 11) 14.

[13] European Commission, Proposal for a directive of the European Parliament and of the Council on the protection of persons reporting breaches of Union law COM(2018) 218 final, available on : < https://ec.europa.eu/info/sites/info/files/placeholder_8.pdf > accessed on 10 May 2018.

[14]Theo Nyreröd & Giancarlo Spagnolo, 'Myths and Numbers on Whistleblowing' (2018) Working Paper n° 44, Stockholm Institute of Transition Economics<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3100754 >and see also from the same authors : 'A proposed EU directive on whistle-blower protection' (2018) <https://voxeu.org/article/proposed-eu-directive-whistleblower-protection>.

The article is structured as follows: In the first part, the situation at the EU level will be presented and the reasons for not adopting financial rewards. In the second part, the aim is to present briefly the bounty programme of the SEC and the implications following the United States Supreme Court decision in *Digital Realty Trust, Inc v. Somers* for internal whistle-blowing.[15] Before concluding, the intention is to present some alternative suggestions instead of financial rewards for the future whistle-blowers. The conclusions will recap on the arguments laid out in this article.

2 THE EUROPEAN PERSPECTIVE

The European Commission on April 2018 presented its proposal for a Directive on the protection of whistle-blowers reporting breaches of EU law.[16] This proposal for a Directive came after the pressure of the European Parliament to protect whistle-blowers at the EU level. Scandals such as Luxleaks or Panama Papers have influenced the European Parliament which became an advocate working in favour of the protection of whistle-blowers.[17] The text of the proposed Directive of the European Commission complies with the international standards in this field.[18] The Commission regards whistle-blowing as an enforcement tool for the European legislation. One of the reasons for proposing the Directive is to ensure the stability of financial markets, the balance of EU economies and their fair competition.[19]

The proposal for the Directive, presented by the European Commission on April 2018, is an important text towards an effective protection of the whistle-blowers.[20] The text adopts many of the international standards, in the field, notably the texts of the Council of Europe and the case-law of the European Court of Human Rights.[21] The proposed definition of the whistle-blower is large in an effort to protect people's different types of reporting.[22] The procedural aspect is similar to the one adopted by the European Court of Human Rights in its landmark case *Guja v. Moldova*.[23] The three-tier model is proposed where the whistle-blower should report internally first, to the authorities, as a second step if the internal reporting is not responding, and as a last resort to the public (media).[24] The protection of the

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[15] Digital Realty Trust, Inc. v Somers, 138 S. Ct. 767 (2018).
[16] European Commission, Proposal for a directive (n 13).
[17] European Parliament Resolution of 24 October 2017 on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies (2016/2224(INI)) < http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0402>.
[18] Some examples of international standards considered, inter alia, are the following:
G20 Anti-Corruption Action Plan, Protection of whistleblowers – Study on whistleblower protection frameworks, compendium of best practices and guiding principles for legislation (2012) < https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>. In pg. 32 of the Study, one proposed measure is the possibility of financial rewards for whistle-blowing.
Council of Europe, Recommendation CM/Rec(2014)7, Protection of whistle-blowers, adopted by the Committee of Ministers, 30 April 2014 (where there is no reference to financial rewards).
[19] European Commission, Impact Assessment (n 11) 12.
[20] European Commission, Proposal for a directive (n 13).
[21] ibid., 10.
[22] ibid., 18.
[23] *Guja v. Moldova* App no 14277/04 (ECtHR 12 February 2008).
[24] European Commission, Proposal for a directive (n 13) 20-24.

whistle-blowers is large too, where the whistle-blower is protected in terms of labour, civil and criminal law.[25]

Although the significance of the text, different issues arise in relation to some of its points. One issue is the material scope of the proposed Directive as it is considered that it tries to cover many different areas of EU law, leaving in addition the opportunity to the Member States to enlarge the scope even more which in the end, may create a complexity that may impede whistle-blowing.[26] Furthermore, the fact that the European Commission exempts certain public and private entities from introducing internal reporting structures would be an obstacle to the effective protection of whistle-blowers.[27] Another issue, which is in the interest of this article, is the question of financial rewards for whistle-blowers where a different approach is followed by the US financial authorities and is worthy being analysed in relation to the European perspective.

Although analysing in more details the text would be an interesting exercise, the focus in this paper is on the question of financial rewards. The European Commission discussed the issue in the appendix of the impact assessment accompanying the proposal for the Directive but it did not include it in the main body of the proposed text of the Directive.[28] It is likely that it preferred not to address this issue directly in the proposed text of the Directive as no European country had heretofore put in place such a mechanism. On July 2014, the Financial Conduct Authority of the United Kingdom in a note it published, defended its position not to adopt financial rewards for whistle-blowers.[29] In its reasoning it highlighted that enacting financial incentives for the whistle-blowers could undermine the effective internal whistle-blowing mechanisms - on top of being costly and complex for the financial authorities to administer, and rewarding only a small number of whistle-blowers (only those who are successful).[30]

Interestingly the European Commission in its EU Market Abuse Regulation has provided the possibility for Member States to offer financial incentives to persons that offer information for infringements of the Regulation.[31] Article 32(4) reads:

> Member States may provide for financial incentives to persons who offer relevant information about potential infringements of this Regulation to be granted in accordance with national law where such persons do not have other pre-existing

[25] ibid., 27-28.
[26] European Court of Auditors, Opinion No 4/2018 concerning the proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, available on : < https://www.eca.europa.eu/Lists/ECADocuments/OP18_04/OP18_04_EN.pdf > accessed on 30 October 2018, 6.
[27] ibid., 8.
[28] European Commission, Impact Assessment (n 11) 36, where the European Commission states that: ä 'Member States retain the possibility to apply further measures to facilitate or encourage whistleblowing, which go beyond the core standards promoted by the ECtHR/CoE, such as rewards'.
[29]Financial Conduct Authority & Prudential Regulation Authority for the Treasury Committee, Note for financial incentives for whistleblowers (2014) available on: < https://www.fca.org.uk/publication/financial-incentives-for-whistleblowers.pdf > accessed on 29 September 2018.
[30] ibid., 2-3.
[31] Insley Holly, 'Whistleblowing in the financial services sector – does motive matter ?' (Freshfields Bruckhaus Deringer 2017)<http://risk.freshfields.com/post/102eguw/whistleblowing-in-the-financial-services-sector-does-motive-matter>.

> legal or contractual duties to report such information, and provided that the information is new, and that it results in the imposition of an administrative or criminal sanction, or the taking of another administrative measure, for an infringement of this Regulation.[32]

The European Commission, in its explanatory memorandum for the proposed regulation, highlighted the importance of introducing whistle-blowing mechanisms which will help the relevant authorities to have more information about suspected market abuse.[33] To that end, it allowed the use of financial incentives in order to incentivise more employees to reveal breaches of the Market Abuse Regulation.

Despite these efforts, it seems that no member state has opted for financial rewards.[34] European countries were already reluctant to adopt legislation on the protection of whistle-blowers and consequently more reluctant to the idea of financial rewards.[35] The United Kingdom was among the first to adopt whistleblower protection legislation in 1998 but it still rejects the idea of enacting a bounty programme within the financial markets.[36] Whistle-blowing is viewed differently in the US and Europe. There are cultural differences that should draw our attention.[37] The EU countries would like to ensure the effective relationship of employer and employee and this is mirrored in the adopted legislation at the European level.[38] Common law countries such as Ireland and the United Kingdom mandate internal reporting as a first step for the whistle-blower.[39] To the same direction, the recent French legislation on whistle-blowing requires clearly that the whistle-blower reports internally in order to avail himself of the offered protection.[40]

In the US media, whistle-blowers have been named 'Persons of the Year' in 2002 whereas in Europe there is still some suspicion towards those described as whistleblowers.[41] German society illustrates this suspicion due to strong feelings of aversion resulting from the denunciation practice under the Nazi regime.[42] The same aversion goes for Central and Eastern post-communist EU member states. It is likely that, under the influence of the US legislation for the financial markets and the recent scandals revealed by whistle-blowers, a more positive atmosphere is being created in Europe.

The United Kingdom is an example of where this shift in attitude took place following the introduction of legislation regarding whistle-blowers. Prior to the enactment of the Public

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[32] Regulation (EU) N° 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation), O.J.E.U. L 173/1.
[33] Explanatory Memorandum of the Proposal for a Regulation on marker abuse at pg. 15.
[34] Nyreröd &Spagnolo (n 14) 7.
[35] European Commission, Impact Assessment (n 11) 36.
[36] Financial Conduct Authority (n 29).
[37] Terry Morehead Dworkin, 'SOX and Whistleblowing' (2007) Michigan Law Review, vol. 105, issue 8, 1774.
[38] See to that extent the English, Irish and French legislation on whistle-blowing where both countries are incentivising internal reporting as the first step the whistle-blower should follow.
[39] Public Interest Disclosure Act 1998, Section 43C and Protected Disclosures Act 2014, number 14 of 2014, Ireland, part 2, paragraph 6.
[40] Law n° 2016-1691 of 6 December 2016 related to transparency, the fight against corruption and the modernization of economic life, JORF n°0287art. 8.
[41] Time Magazine, December 2002, pictures of Cynthia Cooper (WorldCom), Coleen Rowley (FBI) and Sharren Watkins (Enron).
[42] Mark Worth, Whistleblowing in Europe 15-16, 47-48 (2013).

Interest Disclosure Act 1998, whistle-blowing had a negative connotation and the media were not in its favour. The adoption of the Act changed this negative perception of reporting wrongdoings and now twenty years later, the picture has changed.[43] The recent case of the Barclays chief executive Jes Staley, illustrates the new attitude towards whistle-blowing. Jes Staley tried to unmask a whistle-blower and the Financial Conduct Authority fined him £642,000 sterling over this scandal.[44] The whistle-blower is not considered an industrial troublemaker but a concerned citizen who wants to report a wrongdoing and rectify it.[45]

Moreover, there are fears that the enactment of a financial rewards scheme will undermine the efforts of internal reporting structures. As it will be discussed later, those fears came true following the decision of the Supreme Court in *Digital Realty Trust, Inc v Somers* in the US.[46] If authorities put in place financial rewards, the worker could be tempted to report directly to them. In this scenario, the internal compliance structures will be powerless and companies will face problems in relation to the loyalty of their employees. Reporting internally is a sign of the employee's loyalty to the company and trust that the wrongdoing will be rectified.[47]

Apart from the possible undermining of internal reporting structures, financial rewards, in the EU level, would be in conflict with the case law of the European Court of Human Rights. The Strasbourg Court has noted in many reprisals, that whistle-blowing which is 'motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particular level of protection'[48]. In addition, the introduction of financial rewards will shift the aim of whistle-blowing away from the public interest, which is an important factor for the European Court of Human Rights and for the proposal of the European Commission for a Directive, to a personal pecuniary scope where reporting will be seen more as a commercial transaction than as an act towards the protection of the public interest.[49]

Taking into account the scenario where the European Commission will ask Member States to provide for financial incentives when reporting breaches of European law, the reality could prove complex. Would allowing macro level authorities, such as the European Central Bank (ECB) or the European Securities and Markets Authority (ESMA), to provide financial rewards to influence public attitudes in relation to the value of whistle-blowing be

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[43] James Gobert & Maurice Punch, 'Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998' (2003) The Modern Law Review, vol. 63, issue 1, 54.
[44] Nick Fletcher, 'Barclays boss Jes Staley fined £642,000 over whistleblower scandal' *The Guardian* (11 May 2018) <https://www.theguardian.com/business/2018/may/11/barclays-jes-staley-fined-whistleblower-fca>.
[45] Gobert &Punch (n 43) 54.
[46] See section C about US.
[47] Bornfelt P-O, Arvidson Markus, Axelsson Jonas & Ahlstrand Roland, 'Whistle-blowing in the light of loyalty and transparency' (2014) Paper to the 7th Nordic Working Life Conference, Goteborg, Sweden, 1-2.
[48] *Guja v. Moldova* App no 14277/04 (ECtHR 12 February 2008), §77.
This point was, also, raised by the European Commission in the appendix of the impact assessment related to the proposal for a directive on the protection of whistle-blowers at page 36-37.
[49] European Commission, Impact Assessment (n 13) 36.

the correct approach? Both agencies, ECB and ESMA, provide whistle-blowing reporting lines but there is little information available on their practices.[50] In addition, the legal instrument that the European Commission has chosen for the protection of whistle-blowers is a Directive.[51] The Directive will set minimum standards that every Member State has to follow, although some jurisdictions may choose to include additional requirements. In the event of a bounty programme, the Directive will set a standard. The Member States will have the discretion as to the form and methods for its implementation.[52] This fact could plausibly create the following situation: every Member State would have different rewards in place. Thus, it may induce forum-shopping behaviour as if there are two or more countries involved, the employee may understandably try to report to the country that offers the best incentive.[53]

3 THE US PERSPECTIVE ON FINANCIAL REWARDS

The Anglo-Saxon legal tradition is keen on allowing private citizens to aid the enforcement mechanisms of the State for certain matters. The most relevant example is the use of qui tam writ that authorises citizens to sue someone if the interests of the State are not respected.[54] The qui tam writ served as the basis for the enactment of the US False Claims Act that had to deal with fraud against the US government during the Civil War and it allowed individuals to bring lawsuits on behalf of the State.[55] In addition, the Internal Revenue Service pays rewards to whistle-blowers when they provide information related to tax concerns.[56] All the above demonstrate that the US legislature is keen on allowing private parties to participate to facilitate the enforcement of US regulations. This became apparent, also, with the enactment of Dodd-Frank and more particularly with its bounty programme.

The modern financial sector is innovative and complex. These characteristics pose particular challenges on the law enforcement agencies. It is common that regulators may lack expertise in certain areas of the financial sector and consequently the detection of misconduct may become more challenging for them.[57] The stock market crash of 2002 and the financial crisis of 2008 has led the United States to react in order to ensure the safeness and soundness of

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[50] European Central Bank, Feedback on the input provided by the European Parliament as part of its resolution on the ECB Annual Report for 2016 at 10 where the ECB was laconic concerning its internal whistle-blowing policies.

[51] Art. 288 of the Treaty on the Functioning of the European Union (2016) OJ C 202.
Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law,* (CUP 2nd edn., 2010) 99.

[52] ibid., 99.

[53] Skinner (n 9) 911 (explaining the unilateral extraterritorialism).

[54] David Freeman Engstrom, 'Harnessing the Private Attorney General: Evidence from Qui Tam Litigation' (2012) 112 Columbia Law Review 1244, 1246.

[55]False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. A suit filed by an individual on behalf of the government is known as a "qui tam" action, and the person bringing the action is referred to as a "relator". For more information about the FCA : < https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf >.
Michael Neal, 'Securities Whistleblowing under Dodd-Frank : Neglecting the Power of "Enterprising Privateers" in Favor of the "Slow-Going Public Vessel"' (2012) Lewis & Clark Law Review, vol. 15:4, 1110.

[56] Yehonatan Givati, 'Of Snitches And Riches: Optimal IRS and SEC Whistleblower rewards' (2018) Harvard Journal on Legislation, vol. 55, 112.

[57] Skinner (n 9) 867.

the financial markets.[58] When Enron and WorldCom collapsed and the stock market crashed in 2002, the US Congress passed the Sarbanes-Oxley Act where there is a reliance on whistle-blowers.[59] Despite this reliance, the Sarbanes-Oxley Act had no provisions for financial rewards. The Sarbanes-Oxley Act did not have the anticipated success and just six years later, the financial crisis of 2008 arrived with disastrous consequences for the world's economies.[60] The US reaction was the Dodd-Frank Act signed by President Obama in order to promote 'the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, and to protect consumers from abusive financial services practices'.[61] Section (b) of the Act provides the possibility to the SEC to grant financial rewards to whistle-blowers in accordance with the Act.[62]

Despite the merits of the policy of private enforcement through financial rewards, businesses and academics raised concerns about this practice. One of the most important concerns about the financial rewards is the undermining of internal compliance. The definition of compliance as it was given by the Basel Committee in its Consultative document on the compliance function in banks is the following:

> An independent function that identifies, assesses, advises on, monitors and reports on the bank's compliance risk, that is, the risk of legal or regulatory sanctions, financial loss, or loss to reputation a bank may suffer as a result of its failure to comply with all applicable law, regulations, codes of conduct and standards of good practice.[63]

The concern is that the financial rewards offered by the SEC, under Dodd-Frank, will discourage employees from reporting internally as they will have more benefits if they report successfully externally, thereby undermining the role of corporate compliance.

The recent decision of the US Supreme Court in *Digital Realty Trust, Inc v. Somers* had hardened the path for internal whistle-blowing. This fear became a reality for the corporate world following the decision of the Supreme Court in the case *Digital Realty Trust, Inc v. Somers*.[64] The problem hinges on the definition of the whistle-blower.[65] In a nutshell, the debate was if, under the Dodd-Frank Act, the definition of the whistle-blower entails those that report internally and not to the SEC.[66] Prior to the decision of the Supreme Court, there

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[58] Engoron (n 4) 265-268.
[59] 18 U.S.C. (2002) s. 806
Terry M Dworkin, 'SOX and Whistleblowing' (2007) 105 Michigan Law Review 1757, 1757.
[60] The Sarbanes-Oxley Act failed as, for more than a decade, did not sufficiently protect whistle-blowers suffering retaliation and despite the legal protection offered by the Act, whistle-blowers did not play an important role in uncovering the financial crisis of 2008. See to that extent: Richard Moberly, 'Sarbanes-Oxley's whistleblower provisions: ten years later' (2012) 64 South Carolina Law Review 1.
[61] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Sta. 1376 (2010)
[62]15 U.S.C. § 78u-6(b)(1).
[63] Basel Committee on Banking Supervision, Consultative Document, The Compliance Function in Banks, §10, 2003.
[64] Digital Realty Trust, Inc. v Somers, 138 S. Ct. 767 (2018).
[65] Engoron (n 4) 275.
[66] Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 773(2018).

was a dichotomy among US Courts on this issue.[67] The Supreme Court decided that the wording of the Dodd-Frank Act recognises a whistle-blower only as an employee who reports to the SEC.[68] This employee is entitled to the anti-retaliation protections offered by the Dodd-Frank Act. Even though the case was brought by the employer of Mr. Somers, it actually turned against him at the end. The Supreme Court favoured the employee being sued, but at the same time it gave a robust consternation to internal compliance programmes.

The authorities may in turn face more reporting from employees. This fact is not negative at first blush, but it may become overwhelming for the investigative authorities if the volumes of reports increase and indeed if some of these reports are of a frivolous nature. The cash-incentivised programme leaves space for speculation from employees that hope to be awarded an amount of money. Therefore, more employees may be encouraged to report to the SEC and more resources will be needed to investigate all these concerns. Under these circumstances, the idea of private enforcement may place a burden on reporting systems utilised by the authorities and the State.[69]

The financial rewards for whistle-blowers can also have implications for social cohesion and relationships in any given society. Even in the open-minded US societies, whistle-blowers are not always considered as an ethical choice and may have negative connotations.[70] The bounty programmes are seen as a sign of limiting corporate loyalty. Encouraging whistle-blowing especially with the possibility of a financial reward may be considered as an enemy of business.[71] The Supreme Court decision is more alarming for the business sector as the State provides an incentive for the whistle-blower to report directly to the SEC and not internally if he desires to be protected under the auspices of Dodd-Frank. However, in the author's view, these anti-social concerns may be outweighed by the social cost of not detecting financial misconduct.

4 ALTERNATIVES TO FINANCIAL REWARDS

The purpose until now was to present the issue of financial rewards in the U.S. and in the EU and to explore the challenges it presents to the EU financial markets. The text of the proposed Directive is an inspiring text that complies with most of the international standards on whistle-blowing. However, there is no provision in it for financial rewards. The spirit of the proposed text is to enhance internal reporting and subsequently reporting to the authorities. Before concluding, it would be useful to propose some alternatives to financial rewards for whistle-blowers. Those alternatives are the promotion of an effective internal whistle-blowing system, of a new model of business education and, last but not least, an international cooperation on whistle-blowing. Those alternatives may positively enhance whistle-blowing without adopting financial rewards.

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[67] Asadi v. G.E. Energy (USA), LLC 720 F.3d 620 (5th Cir. 2013).
Berman v. Neo@Ogilvy 801 F.3d 145 (2d Cir. 2015).
[68] Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 777 (2018).
[69] Dennis J. Ventry, Jr., 'Digital Realty Trust, Inc. v. Somers: Bad News for Employers, Lawyers and Internal Compliance' (2018) JURIST — Academic Commentary<http://jurist.org/forum/2018/02/dennis-j-ventry-jr-digital-realty-trust-bad-news.php>.
[70] Ethan Brown, *Snitch: informants, cooperators & the corruption of justice* (PublicAffairs 2007)
[71] Kenneth D. Walters, 'Your Employees' Right to Blow the Whistle' (1975) Harvard Business Review 26-27.

The adopted legislation will incite whistle-blowers to report internally before addressing their concerns to authorities. Corporations should develop a correct and effective internal reporting mechanism. This will enhance corporate culture and governance as the business recognises an important place for its employees on the good functioning of the corporation.[72] In practice, the corporation should recognise as 'mission-critical' that every corporate compliance department and every individual has rights and responsibilities in relation to whistle-blowing.[73] The creation of such an atmosphere for the internal reporting may diminish the need for financial rewards and reporting to the authorities. Nevertheless, employees would still be able to report to the authorities if the internal reporting system did not address their concerns sufficiently.

Internal reporting presents certain advantages as they were developed above. Despite these advantages, it, also, presents some disadvantages. An important tension is created between the employee's ability to report internally and his duty of loyalty.[74] The contradiction lies to the fact that the corporation should encourage internal reporting whereas, at the same time, this reporting will disrupt the trust relationship between the employee and the corporation. It seems strange the fact that the corporation is obliged to encourage reporting which may harm the internal governance and the corporation itself.[75] This idiomorphic situation creates, additionally, a moral dilemma to the whistle-blower who will hesitate between breaking the corporation's silence in the name of truth or remain loyal and silent to his employer.

Another important alternative step is the promotion of a new model of business education where morality, ethics and values are in the curriculum in order to enhance the sense of the future employees' responsibilities.[76] Business education should focus on trust, honesty, decency, accountability and fairness in order to foster the idea that compensation is not the only motive in the financial sector.[77] The employees in that sector should regard whistle-blowing as a duty towards their company and society.[78] Business school students should be educated in the consequences of wrongdoings in the financial sector and in which way they impact the real economy and society.[79] Instead of providing financial rewards, the State may opt to design a new model of education that will enhance new core values in the business sector for the common good.

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[72] Michael Neal, 'Securities Whistleblowing under Dodd-Frank: Neglecting the Power of "Enterprising Privateers" in Favor of the "Slow-Going Public Vessel"' (2012) Lewis & Clark Law Review, vol. 15:4, 1132.
[73] ibid., 1132.
[74] Janet Malek, 'To tell or not to tell ? The ethical dilemma of the would-be whistleblower' (2010) Accountability in Research, vol. 17:3, 115, 123.
[75] Patrice Cailleba and Sandra Charreire Petit, 'The whistleblower as the personification of a moral and managerial paradox' (2018) Revue Management, vol. 21, 675, 677.
[76] Hilary J. Allen, 'The Pathologies of Banking Business as Usual' (2015) 17 University of Pennsylvania Journal of Business Law 861, 894.
[77] Allen (n 76) 895.
[78] Inger Hoedt-Rasmussen and Dirk Voorhoof, 'Whistleblowing for sustainable democracy' (2018) Netherlands Quarterly of Human Rights, vol. 36(1) 3-6, 4-5.
[79]Brett McDonnell, 'Don't Panic! Defending Cowardly Interventions Durimg and After a Crisis' (2011) 116 Pennsylvania Student Law Review 1, 13, 27.

Remodeling of business education, with the introduction of more classes on business ethics, occurs, often, when a banking or financial crisis happens.[80] This demonstrates that business education presents a certain contradiction: on the one hand, promotion of business ethics and consideration of the common good and on the other hand, the employees are required to demonstrate their loyalty and the fact that they should be responsible and free to decide.[81] Therefore, the employee, especially the one who holds a superior position, is faced with his business education where business ethics have an important position and should be integrated during his working experience and the need for a dedicated and loyal employee in his everyday working life. To that end, education should not only be understood in terms of academic training but broadly. Education should be continued in the working place with special training sessions which will transform the reporting of 'bad' news to 'good' news.[82] As a result, the corporation itself can invest in education in order to overpass the aforementioned contradiction.[83]

A last alternative solution is an international coordination of the issue by using the financial regulatory networking institutions such as the Basel Committee.[84] At the moment, the SEC offers significant financial rewards which worried the Congress when enacting the Dodd- Frank Act as there is no international consensus on a meaningful reform of the financial markets.[85] The U.S. efforts to project their rules to other countries has been opposed by several European Nations. The U.S. Supreme Court held in *Morrison v National Australia Bank* that antifraud provision of the U.S. securities laws does not apply extraterritorially. [86] Perhaps, international organisations such as the International Organisation of Securities Commissions (IOSCO) or the FSB (Financial Stability Board) may lead the discussions in order to find a sustainable solution about whistle-blowing in financial markets and more specifically about financial rewards.[87]

Despite the fact that an international solution to financial rewards may an optimal solution, the use of international law may not offer the necessary legal strength such a step will need. The problem lies to the soft law characteristics of international law.[88] An international law solution will not be a binding one as international law cannot be binding for states. It is certain that, in the financial sector, international legal instruments are respected and followed by many states but they do not have a binding legal nature.[89] In addition, the international law has an enforcement problem as there will be no authority able

[80] Patrice Cailleba and Sandra Charreire Petit, 'The whistleblower as the personification of a moral and managerial paradox' (2018) Revue Management, vol. 21, 675, 677.
[81] ibid.
[82] Michael Davis, 'Avoiding the tragedy of whistleblowing' (1989) Business and Professional Ethics Journal, 10-11.
[83] ibid.
[84] Skinner (n 9) 922.
[85] John C. Coffee, Jr., 'Extraterritorial Financial Regulations: Why ET Can't Come Home' (2014) 99 Cornell Law Review 1259.
[86]561 U.S. 247 (2010) 265.
[87] International Organisation of Securities Commission, < https://www.iosco.org/about/ > and Financial Stability Board, < http://www.fsb.org >.
[88] Cornelia Manger-Nestler, 'Impacts of International law on the restructuring of the global financial system (2011) 15 Max Planck Yearbook of United Nations 165, 204.
[89] David Zaring, 'Legal obligation in International law and International finance' (2015) 48 Cornell International Law Journal 1, 176.

to control the enforcement of such measure.[90] If an international legal solution is adopted for financial rewards, its implementation will rely on the good will of states and the need for their international image in the financial industry which may lead to the adoption of that solution.

5 CONCLUDING REMARKS

The European countries and the EU have made significant progress on the issue of whistle-blowing at the banking and financial sector.[91] This progress demonstrates a change of culture towards accepting whistle-blowing. Despite this progress, the issue of financial rewards for the whistle-blowers remains controversial for the EU compared to the US practice. Cultural and societal factors in the EU, such as the memories of the Nazi regime or of the Soviet Union, had impeded the acceptance of whistle-blowing which in turn results in an impediment with the issue of financial rewards. The US conception for financial rewards is different as demonstrated.

The financial rewards discussion for the financial markets, and maybe for other sectors, will continue at the EU level in the light of the proposed Directive of the European Commission. The purpose of this paper is to highlight that the enactment of a bounty programme similar to the one of the SEC may not be effective at the EU level at this point. The most important step is to follow the discussions, relating to the proposal for the Directive, and indeed to examine the final version when this is made available. Once the Directive is adopted, then the discussion about financial rewards could reappear as a Directive on the protection of whistle-blowers may change the EU culture on the issue.

The financial rewards have been considered in the light of the US practice and the conclusion is that it may be premature for the EU to ask for bounty programs from the Members States. As a first step, the legislation could be introduced and following a review of its effectiveness and suitability in this context, the issue of financial rewards may be reinforced and introduced by the different Member States or even at the EU level. It is recommended that the alternatives to financial rewards, as discussed, should be put in place with the final aim to reopen the discussion about them once the directive is voted and implemented at the EU level.

[90] Jean d'Aspremont, 'The collective security system and the enforcement of international law' in Marc Weller(ed.) The Oxford handbook of the use of force in international law (2015, OUP) 129.

[91] There are specific provisions on whistle-blowing resulting from the EU legislation on banking and financial law. See to that extent : art. 23 of the SSM Regulation, art. 36 of the SSM Framework Regulation and the Regulation for prudential requirements for credit institutions and investment firms (575/2013) for the banking sector. For the financial sector see : art. 32 of the Market Abuse Regulation (596/2014) and its Commission Implementing Directive 2015/2392) and art. 96 of the Payment Services Directive (2015/2366).

THE WORKLOAD OF THE EUROPEAN COURT OF HUMAN RIGHTS: A BACK-DOOR TO BECOMING A CONSTITUTIONAL COURT OF EUROPE

DAMJAN GROZDANOVSKI*

Abstract

The workload of the European Court of Human Rights has been one of its main concerns, and having in mind that justice delayed is justice denied – it has been justifiably so. In order to deal with the backlog of pending cases before the Court the Convention mechanism has been subject to change on several occasions, with the first significant change occurring in 2010. It is undisputed that these changes affected the way in which the Court deals with cases, but have they also affected the very nature of the Court? The aim of this article is to provide an overview of these changes, and an analysis of the effects that these changes had on the nature of the Court and on the protection of human rights in Europe.

1 INTRODUCTION

Since its establishment in 1959, the European Court of Human Rights (the Court) played a central role in the development of human rights in Europe. For example, the Court has, through its case law, extended the scope of the inviolable right to life even to cases of legal deportation of foreigners to their home country where death penalty can be executed,[1] and sanctioned the participation of European states in the CIA's secret rendition operations as contrary to the prohibition of torture.[2] This was made possible by the applications of individuals lodged with the Court, with which these individuals complained of a certain action of a member State. These individual applications enable the Court to protect human rights in individual cases, while at the same time to set human rights standards applicable in all Council of Europe member States. Because of these reasons, the right to individual application has been repeatedly placed in the centre of the European Convention on Human Rights (ECHR) mechanism.[3]

It is indeed the right to individual application, as enshrined in Article 34 ECHR, which differentiates the European Court of Human Rights from most international courts.[4] The fact that any person claiming to be the victim of a violation by a Council of Europe member State can complain to the Court, defined the nature of this Court as a true human rights court.

However, it is unlikely that anyone expected that this very same right to individual application, with time would become the main obstacle for the proper functioning of the

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1 *Bader and Kanbor v. Sweden* App no 13284/04 (ECtHR, 8 November 2005), paras 45-46.

2 *El-Masri v. Macedonia* App no 39630/09 (ECtHR, 13 December 2012), para 218.

3 Izmir Declaration (27 April 2011), para A (1); Interlaken Declaration (19 February 2010), para 1; Brighton Declaration (21 April 2012), para 13; Brussels Declaration (27 March 2015), para 1.

4 Other examples are the Court of Justice of the European Union, where preliminary references greatly outnumber direct actions, and the ECOWAS Court.

Court. With pending application steadily rising since the Court started to work as a fulltime institution in 1998, they reached their peak with 160.200 pending cases in 2011.[5] At this time each application had to wait at least a year before the Court proceeded with the initial examination of the case. This was an obvious sign that the Convention mechanism required change – and all concerned parties agreed that this was necessary. However, there were different views as to what these changes should be and how they should be implemented.

The first clash of these views occurred at the beginning of the new century, with discussions taking place both inside and outside of the Council of Europe. On one side of this clash was itself the President of the Court at that time, who encouraged the idea that the Court should concentrate its efforts on decisions of 'principle', have a more 'constitutional' role and promote general instead of individual justice.[6] The advocates of these views hoped for and actively supported 'a constitutional future for the European Court of Human Rights'.[7]

On the other side of the spectrum were the supporters of individual justice, most notably the NGOs, but also scholars, who criticised attempts to 'obstruct individuals' redress for human rights violations'[8] and to undermine the fundamental right to individual petition.[9] As mentioned above, even supporters of individual justice did not oppose change in the Court's system, however they feared that with the changes, as they were proposed, the Court would lose its trait, that is, it would no longer offer practical, tangible and concrete redress to the individual, and instead would turn to abstract and general justice – already specific for many, if not all bodies of international law. Overall, the early years of the new century seemed to be a crucial period for the future of the Court.

In reality, ever since the entry into force of Protocol 11 to the ECHR, the Court has had a dual function. In the eyes of the individual, it was as a court of last resort which can provide individual relief. After Protocol No. 11 to the ECHR, the right to individual application became fully institutionalised[10] and could be seen as the motor of the enforcement machinery under the Convention.[11] As mentioned above, all High Level Conferences on the future of the Court have, already in their first paragraphs, stressed the importance of the right to individual application. Even the Court itself stated that it primarily fulfils its task of ensuring the observance of the engagements undertaken by the member States 'by providing individual relief'.[12] Having this in mind, first and foremost the task of the Court, before the changes came into effect in 2010, was to provide individual justice.

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[5] Press release ECHR 312, 24 October 2013.
[6] Luzius Wildhaber, 'The European Court of Human Rights in action' (2004) No. 21 Ritsumeikan Law Review, 91
[7] Luzius Wildhaber, 'A constitutional future for the European Court of Human Rights?' (2002) 23 Human Rights Law Journal, 161-165.
[8] Amnesty International Press Release, European Court on Human Rights: Imminent reforms must not obstruct individuals' redress for human rights violations, 24 April 2004.
[9] Marie-Aude Beernaert, 'Protocol 14 and New Strasbourg Procedures: Towards Greater Efficiency? And at What Price?' (2004) 5 European Human Rights Law Review, 544-57.
[10] Luzius Wildhaber, 'Rethinking the European Court of Human Rights' in Jonas Christoffersen and Mikael R Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP 2011) 208.
[11] Ed Bates, *The Evolution of the European Convention on Human Rights – From its Inception to the Creation of a Permanent Court of Human Right*s (OUP 2010), 149.
[12] *Djokaba Lambi Longa v the Netherlands* App no 33917/12, (ECtHR, 9 October 2012), para 58.

However in a more profound sense, it was also a constitutional court.[13] In this regard, even in the first years of its functioning as a full-time institution, the Court has built a precedent-based jurisprudence, thereby setting Pan-European human rights standards.[14] The Court also frequently applied in its judgments balancing and proportionality tests, characteristic of many constitutional courts.[15] In addition, the Court has stated its judgment do only provide individual redress, but they also serve to 'elucidate, safeguard and develop the rules instituted by the Convention thereby contributing to the observance … of the engagements undertaken' by the member States[16] and that the Court's role 'cannot be converted into providing individualised financial relief in repetitive cases arising from the same systemic situation'.[17]

The institutional debate within the Council of Europe was of course much less intense, as it was suppressed by the urgent need for reform. In this regard, in 2003, the Committee of Ministers appointed the Steering Committee for Human Rights (CDDH) to draft a reform proposal to 'assist the Court in carrying out its functions' and to reflect 'on the various possibilities and options' to ensure 'the effectiveness of the Court in the light of this new situation'.[18] The CDDH came up with concrete solutions and thus, the first significant change in this regard was adopted in May 2004 and effectuated in June 2010.[19] Other changes followed, of which the most recent one entered into force in August 2018.[20] On the other hand, the institutional supporter of the Court's role as guarantor of individual justice was the Parliamentary Assembly of the Council of Europe, which has scrutinised and at times, as shall be seen below, criticised these changes, seeing them as a hindrance to the right to access to court.

The changes came in many different forms – mostly as Protocols to the ECHR, but also through case law of the Court, as well as changes to the Rules of Court. The latter were particularly convenient having in mind that they are adopted by the Plenary Court and can enter into force quickly, compared to the delayed entry into force of the Protocols, due to the lengthy, and even deliberately deferred ratification procedures in the Parliaments of the Council of Europe member States.

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[13] Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (2009) Faculty Scholarship Series, 2. See also, *Loizidou v. Turkey* App no 15318/89 (ECtHR, 23 March 1995), para 75.

[14] Steven Greer 'Constitutionalizing Adjudication under the European Convention of Human Rights' (2003), 23(3) Oxford Journal of Legal Studies, 405.

[15] Inter alia, Robert Alexy, Constitutional Rights and Proportionality (2014) 22 Journal for Constitutional Theory and Philosophy of Law, 52-57.

[16] *Guzzardi v Italy* App no 7367/76 (ECtHR, 6 November 1980), para 86.

[17] *Wolkenberg and Others v Poland* App no 50003/99 (ECtHR, 4 December 2007), para 76.

[18] Christina G. Hioureas 'Behind the Scenes of Protocol No.14: Politics in Reforming the European Court of Human Rights' (2006) Volume 24/Issue 2 Berkeley Journal of International Law <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1320&context=bjil> accessed 29 May 2019.

[19] Protocol No. 14 to the ECHR – Point 2 of this Article.

[20] Protocol No. 16 to the ECHR – Point 5 of this Article.

At first sight, these changes have had an outstanding effect – the backlog of pending cases was halved in just three years, with 151.600 pending cases in 2011 to 69.900 in 2014,[21] and further decreasing to 56.300 at the end of 2018.[22] Looking at the statistics again, it sounds rather unnatural, to say the least, for a court to deal with more than 230.000 applications in a period of three years. In this regard, as it will be explained in the first part of point 2 of this Article, such reduction was mostly due to the vast number of dismissed cases.

These numbers are, however, only one side of the coin. The other side is the effect that these changes have had on the right to individual application and to the general perception of the Court as a guardian of human rights in Europe. It must not be overlooked that each case before the Court is often of paramount importance for the applicant and represents a last opportunity for the protection of its rights.

By analysing the effect these changes had on the nature of the Court, this Article argues that the unbearable caseload has given the Court a push to visibly (and hastily) tip over to the constitutional side of the individual – constitutional scale. Of course, the Court is limited by the framework of the ECHR, but it will be shown that it has used most of the constitutional instruments provided by the ECHR to the maximum.

This Article shall give an overview of the changes in the Convention mechanism, in order to prove that these changes, while dealing with the backlog of the Court, have changed its very nature. The first significant change – Protocol No. 14 to the ECHR, which entered into force on 1 June 2010, introduced among other things, the 'no significant disadvantage' admissibility criterion. Then, the development of the pilot judgment procedure through the Court's case law, and its inclusion on 21 February 2011 in Rule 61 of the Rules of Court gave the Court even more constitutional powers.

Added to this are the substantial changes of Rule 47 of the Rules of Court, which entered into force on 1 January 2014. This Rule deals with the procedural aspects of individual applications, and directly affects the right to individual application. In the end, the most recent change is presented, as effectuated by Protocol No. 16 to the ECHR, which entered into force on 1 August 2018 in relation to those Council of Europe member States which have ratified the Protocol. This Protocol prescribes the possibility for the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR, which represents a significant addition to the Convention mechanism. All of these changes and their features are presented from the aspect of (un)intentionally altering the very nature of the Court.

2 PROTOCOL NO. 14 TO THE ECHR - SINGLE JUDGE COMPETENCES AND NEW ADMISSIBILITY CRITERION

This protocol to the ECHR was the first serious attempt to combat the Court's continuous build-up of pending cases. However, it faced difficulties even before entering into force - although the final text of this Protocol was adopted in May 2004, it entered into force more

[21] ECHR – Analysis of Statistics 2017, 7.
[22] ECHR – Analysis of Statistics 2018, 6.

than six years later, in June 2010.[23] This long period even forced the Committee of Ministers to adopt a new provisional protocol, Protocol No. 14bis to the ECHR, which introduced only some of the changes prescribed in Protocol No. 14, namely, enabled a single judge to be able to reject manifestly inadmissible applications. This was seen as a quick way to significantly increase the Court's filtering capacity, until Protocol No. 14 enters into force.[24] Nevertheless, Protocol No. 14bis did not have a significant impact, having in mind that it was in force for only less than 9 months – until Protocol No. 14 finally entered into force in June 2010 and gave effect to two significant changes in the Convention mechanism. Firstly, the competences of single judges were extended and secondly, a new admissibility criterion was introduced.

First, regarding the competences of single judges, a new Article 27 ECHR gave the power to a single judge to declare an application inadmissible or strike it out of the Court's list of cases, where such a decision can be taken without further examination. In accordance with the new Article 24 ECHR, a single judge in such a case is assisted by rapporteurs who function under the authority of the President of the Court. From a procedural aspect, this extension of powers of single judges was warranted and indeed provided instant relief for the Court's backlog problem by enabling single judges to swiftly dismiss manifestly ill-founded applications, as presented below.

However, from substantive viewpoint it is clear that the decrease in the backlog of the Court was not due to fact that the Court delivered more judgments, but to fact that the Court was dismissing cases at a significantly faster rate. Looking at the statistics of the Court,[25] at the end of 2011 there was a 42% decrease in delivered judgments compared to 2010, whereas 31% increase in dismissed applications compared to 2010. Moreover, in 2011 and 2012 the Court decided only 1.551 and 1.678 application by judgment respectively – ironically in the years of the worst backlog, 2006-2010, the Court delivered more judgments! Even though the number of judgments per year eventually increased, it seems that in the first years of the entry into force of Protocol No. 14, the Court spent more time dismissing applications then creating case law. This was problematic, as increasing the number of dismissed applications at the expense of delivered judgments seems incompatible with the purpose of Protocol No. 14 presented in its Explanatory Report. [26]

The extension of the competences of single judges, were also problematic when viewed a substantive aspect. The rapporteurs assisting the single judge are non-judicial officers working in the Registry of the Court,[27] but nevertheless they play a crucial role in the process of assessing if an application is admissible or inadmissible. Namely, the Court has been criticised for its process of assessing and categorising the many incoming applications: Periodically, a judge is

[23] With extended discussions in the parliaments of the member States, especially Russia. See, Jennifer Reiss 'Protocol No. 14 ECHR and Russian Non-Ratification: The Current State of Affairs' (2008) Vol. 22 Harvard Human Rights Journal, 293.
[24] Explanatory Report to Protocol No. 14bis to the ECHR (27 May 2009), 3.
[25] ECHR – Analysis of Statistics 2011, 6.
[26] Explanatory Report to Protocol No. 14 to the ECHR (13 May 2004), para 37.
[27] Article 18A of Rules of Court from 1 August 2018.

presented with a list containing single-sentence descriptions of new applications[28] and on the basis of this sentence, the judge rubber-stamps the draft decision-letter, which is again prepared by the non-judicial Registry officer.[29] This leaves the applicant with a decision-letter of inadmissibility without the judge even looking into the case-file. Such decision-letters often do not contain an explanation since there is no formal obligation for explanations. Furthermore, this decision is final without possibility to appeal,[30] and the case file is destroyed in accordance with the internal procedures of the Court. Moreover, these decisions-letter are not published.[31]

Given the fact that 29,300 out of 43.100 cases in 2018 were identified as single-judge cases likely to be declared inadmissible,[32] in around 70% of the cases the final decision was in substance taken by the Registry staff. The possibility for a judge to actually look into the case and amend the draft decision of the rapporteur is always, but in practice this is rarely the case.

Nevertheless, from June 2017, the Court, after officially announcing that the backlog has been eliminated, stated that it has changed the way in which it delivers single-judge decisions, and now instead of a decision-letter, applicants receive a decision of the Court sitting in single judge formation, which decision in many cases refers to specific grounds of inadmissibility.[33] This basically implies that the Court was aware of its problematic practices, however it considered them necessary as long as the problem with the backlog existed. However, this pledge of the Court was not fully included in the revised Rules of Court applicable as of 1 August 2018, where Article 52A still leaves the possibility of the applicant being informed by letter.

The extension of the competences of single judges has indeed been justified by the development of the Court and it had an immediately visible effect on the backlog of the Court. However, the fact that the Court (over)used these competences to free itself of 230.000 applications in three years, even at the cost of reducing its judgment output, was not a step towards constitutional justice, but rather a step away from individual justice. It was the first sign of the Court's shift of attitude towards individual applications. Apart from this, the quick dismissal of cases through template-type decision-letters had a negative effect on the general perception of the Court and its legitimacy, which in turn affected the willingness of individuals to appeal to the Court.[34]

Secondly, Protocol No. 14 established the often criticised 'no significant disadvantage' admissibility criterion. The purpose of this new admissibility criterion is to enable a more

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[28] Dinah Shelton, 'Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights' (2016) 16 HRLR, 308.
[29] Ian Cameron, 'The Court and the Member States: Procedural Aspects' in Andreas Follesdal and others (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013), 33.
[30] Article 27 (2) ECHR.
[31] Helena De Vylder, 'Stensholt v. Norway: Why single judge decisions undermine the Court's legitimacy' (*Strasbourg observers*, 28 May 2014) <https://strasbourgobservers.com/2014/05/28/stensholt-v-norway-why-single-judge-decisions-undermine-the-courts-legitimacy-2/> accessed 17 March 2019.
[32] ECHR – Analysis of Statistics 2018, 4.
[33] Press release ECHR 180 (2017) from 01.06.2017.
[34] Helena De Vylder, 'Stensholt v. Norway: Why single judge decisions undermine the Court's legitimacy' (*Strasbourg observers*, 28 May 2014) <https://strasbourgobservers.com/2014/05/28/stensholt-v-norway-why-single-judge-decisions-undermine-the-courts-legitimacy-2/> accessed 17 March 2019.

rapid disposal of so-called 'unmeritorious cases'[35] or 'insignificant violations'[36] and thus to allow the Court to concentrate on its central mission of providing legal protection of human rights at European level. The usage of the above cited words immediately suggests the lessening of the importance of the right to individual application, which the Court regard(ed) as a key component of the machinery for protecting the rights and freedoms set forth in the ECHR.[37] Basically, the 'no significant disadvantage' criterion, as codified in Article 35 (3) (b), is an ECHR version of the *de minimis non curat praetor* principle.

Since Article 35 (3) (b) ECHR does not define what is insignificant disadvantage, the Court has, through its case law, given a such a definition. When it comes to financial disadvantage, the Court has stated that amounts around or less than 500 Euro are considered to be insignificant and do not warrant its consideration.[38] Also, the Court has stated that it is not bound by the amount claimed as non-pecuniary damages, since this amount is often calculated by the applicants themselves on the basis of their own speculation.[39]

Apart from financial disadvantage, the Court has taken into consideration other types of disadvantage, such as personal[40] or procedural[41] disadvantage. Notwithstanding these criteria, the Court still has a lot of discretion in deciding what it considers to be (in)significant disadvantage for the purposes of Article 35 (3) (b).

Article 35 (3) (b) also prescribes two safeguard clauses. Namely, even when the disadvantage for the applicant is insignificant, the Court may still declare the case admissible on the basis that respect for human rights requires an examination on the merits or on the basis that the case has not been duly considered by a domestic tribunal.

Regarding the first safeguard clause, the Court examines whether the case involves question of a general character which would clarify the States' obligations under the Convention or induce the respondent State to resolve a structural deficiency.[42] Paradoxically there is more case law which prescribes when this safeguard clause is not fulfilled. Namely, respect for human rights does not require an examination on the merits of an insignificant violation of the ECHR when:

- the Court has already established substantial case law on the issue at stake;[43]
- the Court has already addressed the problem in the respective country and acknowledged that it is systemic;[44]

- the national law subject to complain by the applicant has been repealed, so that the complaint of the applicant is of historical interest only;[45]

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[35] Explanatory Report to Protocol No. 14 to the ECHR (13 May 2004), 14.
[36] *Nina Vasilyevna Shefer v. Russia* App no 45175/04 (ECtHR, 13 March 2012), para 18.
[37] *Mamatkulov and Askarov v. Turkey* App no 46827/99 and 46951/99 (ECtHR, 4 February 2005), para 122.
[38] *Kiousi v. Greece* App no 52036/09 (ECtHR, 20 September 2011).
[39] ibid.
[40] *Luchaninova v. Ukraine* App no 16347/02 (ECtHR, 9 June 2011).
[41] *3A.CZ s.r.o. v. the Czech Republic* App no 21835/06 (ECtHR, 10 February 2011).
[42] *Korolev v. Russia* App no 25551/05 (ECtHR, 1 July 2010).
[43] *Bazelyuk v. Ukraine* App no 49275/08, (ECtHR, 27 March 2012).
[44] *Vasilchenko v. Russia* App no 34784/02, (ECtHR, 23 September 2010), para 49.
[45] *Ionescu v. Romania* App no 36659/04, (ECtHR, 1 June 2010), paras 38-39.

Having these principles in mind, it appears that the first safeguard clause would rarely apply to reasonable time complaints under Article 6 (1) ECHR against counties which are known for their unreasonable length of proceedings, since there would normally be substantial case law on that issue.[46] These cases are a perfect example of what the Court considers to be 'unmeritorious cases'.

Regarding the second safeguard clause, a case will nonetheless be declared admissible if it has not been duly considered by a domestic court. This was included to ensure that the applicant's case has been heard at national level, that is, to ensure that individual justice was not denied. For the purposes of this Article, the Court considers a case to be duly considered by a domestic court if that court reviewed the applicant's case, regardless of whether it properly examined the applicant's claims of breaches of the rights enshrined in the ECHR.[47] Additionally, minor imperfections do not imply that the case has not been 'duly' considered by a national court.[48]

Apart from setting a low threshold for what it considers to be a duly considered case, the Court further held that when 'an applicant alleges a violation of the ECHR by the last-instance judicial authority of the domestic legal system, the Court may dispense with the [second safeguard clause]',[49] whereas at times it simply did not apply this safeguard clause at all and went on to rejected the cases as inadmissible according to Article 35 (3) (b) without examining whether they were duly considered by a national court.[50] All in all, the second safeguard clause proved to be ineffective partially because of its mild wording, but mostly because of the Court's restrictive interpretation. In fact, apart from clear-cut cases where there was no legal remedy available for the applicant,[51] the Court has not given effect to the second safeguard clause.

This behaviour of the Court seems to be in line with Protocol No. 15 amending the ECHR, because when this Protocol enters into force,[52] the second safeguard clause from Article 35 (3) (b) ECHR shall be deleted. This is done again with the aim of enhancing 'the effectiveness of the system'.[53] Nevertheless, since the second safeguard clause did not have a significant impact in practice,[54] it can be expected that its deletion will also not cause

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[46] Here referring to Italy and other Southern European countries. See, *Giorgi v. Italy* App no 23563/07, (ECtHR, 6 March 2012), para 61; *Jovanovska and Others v. Macedonia* App no 14001/13 and 22883/14 (ECtHR, 14 November 2017), para 13; *Galović v. Croatia* App no 54388/09 (ECtHR, 5 March 2013), para 75. See also, *Dudek v. Germany* App nos 12977/09, 15856/09, 15890/09, 15892/09 and 16119/09 (ECtHR, 23 November 2010).

[47] *Vincent Cecchetti v San Marino* App no 40174/08 (ECtHR, 9 April 2013), paras 39-41. Even though in one earlier case, the Court had a different view, *Flisar v Slovenia* App no 3127/09 (ECtHR, 29 September 2011), para 28.

[48] Janneke H. Gerards and Lize R. Glas, 'Access to justice in the European Convention on Human Rights system' (2017) Vol. 35(1) Netherlands Quarterly of Human Rights, 21.

[49] *Galović v Croatia* App no 54388/09 (ECtHR, 17 September 2009), para 77.

[50] *Shtefan and Others v. Ukraine* App no 36762/06 (ECtHR, 31 July 2014), paras 30-32.

[51] *Dudek v Germany* (n 46). Also, in few more cases the Court has joined the examination of the second safeguard clause to the merits of the complaints, see *Fomin v Moldova* App no 36755/06 (ECtHR, 11 October 2011), para 20

[52] Pending the ratification by Italy and Bosnia and Herzegovina. Chart of signatures and ratifications of Treaty 213 (Protocol No. 15 amending the ECHR) <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/213/signatures?p_auth=PIKIXLbw> accessed 18 March 2019.

[53] Explanatory Report to Protocol No. 15 amending the ECHR (CETS No. 213), para 23-24.

[54] Antoine Buyse, 'Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35

turmoil. However, it remains to be seen whether the Court will view its deletion as encouragement to use Article 35 (3) (b) ECHR more frequently.

Having in mind the broad definition of 'insignificant disadvantage' as well as the narrow definition of the two safeguard clauses, it is unsurprising to see different cases being declared inadmissible under this Article. Two cases are shall be presented as example in this regard.

The first case[55] involves an individual who was not wearing his seat belt and insulted the police, thereby receiving a fine of €150. This individual brought the case before the Court complaining that his freedom of expression and his right to fair trial have been violated. The Court declared the case inadmissible according to Article 35 (3) (b) ECHR by stating the amount in question did not represent a particular hardship for the applicant and moreover that the subject matter of the complaint did not give rise to an important matter of principle. Both of these conclusions are more or less obvious from the facts of the case.

The second case,[56] involves criminal proceedings against an individual for organising an international prostitution ring, trafficking in human beings committed as part of an organised gang, and criminal conspiracy. The proceedings before the national courts concluded with a partial charge sentencing the individual to six years' imprisonment, a fine of 10,000 Euro and a five-year exclusion order from certain departments of France.[57] The individual brought the case before the Court complaining of discrimination in the enjoyment of his right to a fair trial, as well as infringement of the right to an effective remedy, because he was not offered a common procedural safeguard (video recording of interviews at the investigating judge's office). The French Code of Criminal Procedure had provisions which established that this safeguard shall not apply where the investigation concerns organised crime - and this condition was fulfilled in the present case.

During the proceedings, the *Conseil constitutionnel* declared these provisions unconstitutional stating that they were discriminatory, and it was exactly the applicant's complaints which motivated the *Cour de cassation* to refer a request for preliminary ruling on the constitutionality of these provisions to the *Conseil constitutionnel*. Yet, the *Conseil constitutionnel* abrogated this provisions *ex nunc*, which basically led to the applicant being sentenced to prison in a procedure in which certain decisions have been based on unconstitutional provisions.

The Court declared the application inadmissible pursuant to Article 35 (3) (b) ECHR, stating that, even if there was discrimination, it did not have any significant impact on the exercise of his rights or on his personal situation.[58] However, as pointed out in the partly dissenting opinion of one judge,[59] the case was not straightforward and involved arguable claims which deserved to be examined by the Court on the merits. Namely, the Court had to determine whether the applicant's right to an effective remedy has been violated, because

§ 3 (b) ECHR' (2013) Liber Amicorum for Leo Zwaak, 11 <http://ssrn.com/abstract=2244283> accessed 18 March 2019.

[55] *Sylka v. Poland* App no 19219/07 (ECtHR, 3 June 2014).

[56] *Nikolov v. France* App nos 70474/11 and 68038/12 (ECtHR, 10 November 2016). Note that there are two concurring and one dissenting opinion regarding the admissibility of the case.

[57] Interestingly one of the departments was Bas-Rhin, where the Court is located.

[58] Conversely, see *Luchaninova v. Ukraine* (n 40), where the Court found that a conviction, even though it was not accompanied by a penalty, did have a negative effect on the personal situation of the applicant.

[59] Partly dissenting opinion of Judge Mits in *Nikolov v. France* (n 56).

in the present case this right was crucial for the proper protection of the applicant's rights within the domestic legal system.[60] The Court, however, skipped this step and declared the whole case inadmissible.

These cases best illustrate the wide application of this Article and to some point the discretion the Court enjoys when applying it, although there are cases in which the Court has taken into consideration a variety of factors,[61] as well as assessed the applicant's subjective perceptions in addition to what is objectively at stake in a particular case.[62] The broad interpretation of 'insignificant disadvantage' and the low threshold for the safeguard clauses, or even their non application, seem to confirm the fears of the Parliamentary Assembly of the Council of Europe that the new admissibility criterion is 'vague, subjective and liable to do the applicant a serious injustice'.[63] It gives the Court a second chance to dismiss an application which satisfies all the other admissibility criteria, and save resources on cases which it considers not to deserve its attention. This criterion represents another tool in the Court's arsenal for reducing its backlog and enabling itself to focus on decisions of principle. This would have been perfectly justified, had the Court established clear rules and applied them consistently, thereby providing applicants with legal certainty, much needed in times of change.

3 RULE 61 OF THE RULES OF COURT – PILOT JUDGMENT

In practice, when an application reaches the Court and contains all the needed information it is firstly classified in three categories: clearly inadmissible, repetitive or non-repetitive. Clearly inadmissible cases are dealt by single judges as explained in the first part of point 2 of this Article, whereas repetitive and non-repetitive cases are dealt by three judge Committees or seven judge Chambers, respectively.

Having in mind that the category of clearly inadmissible cases, to which are placed by far the most cases,[64] no longer constitutes a problem for the Court, the next on the agenda was the category of repetitive cases. These repetitive cases in 2018 constituted 29.350 out of 56.350 pending cases.[65] The Court found a solution for dealing swiftly with these cases through its case law – the pilot judgment procedure.

The case which served as the basis for the official introduction of the pilot judgment procedure in Article 61 of Rules of Court, concerned a certain Polish legislative scheme, affecting around 80.000 people, which violated the right to property as enshrined in Article 1 of Protocol No. 1.[66] Moreover, there were 167 applications pending at that time before the Court regarding the very same issue.[67] The solution of the Court in this case was based on Article 46 ECHR and involved the obligation of the Council of Europe member States to

[60] The dissenting opinion went on to conclude that there was no violation of the right to an effective remedy.
[61] *Živić v. Serbia* App no 37204/08 (ECtHR, 13 September 2011), para 46.
[62] *Inter alia*, *Korolev v. Russia* App no 25551/05 (ECtHR, 1 July 2010) .
[63] Parliamentary Assembly of the Council of Europe, Opinion No. 251 (2004), para 11.
[64] Here referring to new cases. The majority of pending cases are repetitive cases.
[65] See, ECHR – Analysis of Statistics 2018, 6. The reason that there is a high number of new clearly inadmissible cases and a low number of pending clearly inadmissible cases is the swift dismissal of clearly inadmissible cases by a single judge. See that there were 40.023 inadmissible cases decided in 2018, compared to 2.738 judgments delivered in the same year.
[66] *Broniowski v. Poland* App no 31443/96 (ECtHR, 22 June 2004).
[67] ibid, para 193.

adopt in their domestic legal order general and/or individual measures which would put an end to the violation found by the Court and to redress the effects of the violation as much as possible. This was particularly suitable in cases where the violation originates from a systemic problem connected with the malfunctioning of domestic legislation, since such systemic problems generate lot of complaints which would eventually end up before the Court in Strasbourg ie would increase the caseload of the Court.[68]

This case was followed by other cases which dealt with a systemic problem affecting many persons.[69] This led to the need, as stated in point 7 b) of the Interlaken Declaration[70] to 'develop clear and predictable standards for the pilot judgment procedure as regards selection of applications, the procedure to be followed and the treatment of adjourned cases.' Having this in mind, the Court on 21 February 2011 inserted Rule 61 in its Rules of Court, which regulates the pilot-judgment procedure. Apart from the established principles in its case law, the Court added the possibility to specify the time in which the general remedial measures are to be adopted[71] and the possibility to adjourn the examination of all similar applications during this time.[72] As any final Court's decision, the pilot judgment is transmitted to the Committee of Ministers, which supervises its execution. In this regard, the Committee of Ministers annually issues a decision which notes the specific actions the state undertook in order to comply with the pilot judgment.[73]

The Court should only use the pilot judgment procedure in relation to cases which involve many individuals affected by a specific and distinct action of the state. In this way, the country would be required to regulate a specific area with concrete measures, and furthermore individuals would have no doubt whether their case falls within the scope of the pilot judgment or not. On the other hand, pilot judgment in cases which involve general and undefined structural deficiencies, for example non-enforcement of domestic judgments[74] or excessively long court
proceedings[75] prove to be inefficient, since countries are unable or unwilling to comply with them.[76]

A top example of an inefficient pilot judgment is the *Ivanov v Ukraine* case,[77] which concerned the systemic problem of non-enforcement of domestic decisions in Ukraine. With this pilot judgment the Court ordered Ukraine to set up, within one year from the date

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[68] ibid, paras 190-192.
[69] *Hutten-Czapska v. Poland* App no 35014/97 (ECtHR, 19 June 2006); *Suljagić v. Bosnia* and Herzegovina App no 27912/02 (ECtHR, 3 November 2009).
[70] Interlaken Declaration - High Level Conference on the Future of the European Court of Human Rights, 19 February 2010.
[71] Rule 61, para 4 of Rules of Court.
[72] ibid Rule 61, para 6.
[73] For example, the measures of Belgium to comply with the pilot judgment in the case *W.D. v. Belgium* App no 73548/13 (ECtHR, 6 September 2016) were examined on the 1302nd meeting, 5-7 December 2017 (DH) which produced the document CM/Notes/1302/H46-5 from. The assessment was carried out again on the 1324th meeting, 18-20 September 2018 (DH), which produced the document CM/Notes/1324/H46-3.
[74] *Ivanov v. Ukraine* App no 40450/04 (ECtHR, 15 October 2009).
[75] *Gazsó v. Hungary* App no 48322/12 (ECtHR, 16 July 2015).
[76] Eline Kindt, 'Non-execution of a pilot judgment: ECtHR passes the buck to the Committee of Ministers in Burmych and others v. Ukraine' (*Strasbourg observers,* 26 October 2017) <https://strasbourgobservers.com/2017/10/26/non-execution-of-a-pilot-judgment-ecthr-passes-the-buck-to-the-committee-of-ministers-in-burmych-and-others-v-ukraine/> accessed 18 March 2019.
[77] *Ivanov v. Ukraine* (n 74).

on which the judgment becomes final, an effective domestic remedy capable of securing adequate and sufficient redress for the non-enforcement or delayed enforcement of domestic decisions, in line with the Convention principles. From the outset, it seems that the structural problem had deep roots within Ukraine's legal system, whereas the measure requested has been formed broadly.[78] Because of this Ukraine was not able / willing to act in accordance with the instructions, and cases before the Court continued to pile up, until the situation culminated with the *Burmych and Others v Ukraine* cases.[79]

In what seems to be one of the most controversial judgments, the Court decided to strike 12,148 applications out of its list of cases 'at a single blow'. By stating that it discharged its function under Article 19 ECHR with the *Ivanov* pilot judgment, the Court decided to transmit these applications to the Committee of Ministers in order for them to be dealt with in the framework of the general measures of execution of the *Ivanov* judgment. This led to stunning statistics for 2017 – 15,595 applications decided by judgment, that is, a 709% increase compared to 2016.[80] Additionally, the Court went even further by stating that in future similar applications, the applicants shall be considered 'victims' within the meaning of Article 34 ECHR[81] and the Court would in turn transmit their applications directly to the Committee of Ministers, except the inadmissible ones.[82] Thus, the Court appears to become a filtering body for the Committee of Ministers. This dramatically affected not only the statistics, but also individual human rights.

In this regard, the 41-paragraph joint dissenting opinion of seven judges in the case criticises the majority using unusually strong words, starting with 'The present judgment has nothing to do with the legal interpretation of human rights.' and ending with 'This judgment is without legal basis in the Convention, it throws thousands of desperate people into a legal limbo and undermines the protection of human rights of the Convention - we most emphatically dissent.'

Particularly problematic in this case is the disposal of human rights claims in a summary manner without individual assessment, as well as the transfer of present and future cases to the Committee of Ministers. This undermines the human rights protection at European level, since it replaces judicial protection of individual human rights with non-enforceable decisions of a political body. This does not seem to be in line with Protocol No. 14 to the ECHR, as this Protocol empowered the Committee of Ministers only to supervise the execution of the Court's judgments and to initiate infringement proceedings before the Court against any State refusing to comply with a judgment.[83] On the other hand, this Protocol empowered committees of three judges to rule on the merits of a repetitive application.[84] A legitimate question to ask is why the Court did not make use of these competences in the present case – it may not have been as efficient as striking out more than 12,000 cases, but it sure would have been much more suitable in terms of individual human

[78] For a well-formed and concrete measure see, *Suljagić v. Bosnia and Herzegovina* App no 27912/02 (ECtHR, 3 November 2009). Also see, *M.C. and Others v. Italy* App no 5376/11 (ECtHR, 3 September 2013)
[79] *Burmych and Others v. Ukraine* App no 46852/13 et al. (ECtHR, 12 October 2017).
[80] Analysis of statistics 2017, 6.
[81] *Burmych and Others* (no 79), para 203.
[82] ibid, para 221.
[83] Article 46 ECHR.
[84] Article 28 ECHR.

rights protection. Thus, this action of the Court seems to distort to the well-established and unique system of judicial protection of individual human rights at European level.

Of course, one argument in favour of the majority decision could be that the Court has already done everything in its power,[85] therefore it was time to ease the burden on itself and transfer the cases to the Committee of Ministers, which could solve them in a more political manner. However the Court itself prevented the use of this argument, by stating that it would be 'appropriate to reassess the situation within two years of the delivery of the present judgment'.[86] By doing so, the Court seems to have provided itself with only momentary judicial relief and convenience.

Another striking feature of the reasoning of the Court in this judgment is the use of the word 'burden'[87] when in essence referring to the duty of the Court to hear individual applications. It seems that what once the Court regarded as a central feature of the control machinery of the ECHR, has suddenly become an unnecessary burden on the Court. Without going into details as to the context in which this was said, potential applicants definitely viewed it as an off-putting message.[88]

Again, central for the Court when applying the pilot judgment procedure are the notions of efficiency, as well as 'going beyond the sole interests of the individual applicant'.[89] Similarly as the 'no significant disadvantage' criterion, the pilot judgment procedure enables to Court to focus on significant cases which warrant consideration on the merits, instead of repetitive cases, which only require the application of already established rules and principles. It enables the court to contribute to general justice, leaving individual justice to other national or international bodies. And again, similarly as the 'no significant disadvantage' criterion, it is the view of the author that this would have been perfectly justified, had the Court applied it in a way which would ensure minimum individual justice and had the Court not at times (mis)used this procedure to free itself from its Convention-prescribed duties.

4 REVISED RULE 47 OF RULES OF COURT - CONTENS OF AN INDIVIDUAL APPLICATION

The revision of Rule 47 of Rules of Court, which deals with the contents of an individual application and which entered into force on the 1 January 2014, was another of the methods to 'facilitate filtering'[90] of cases brought before the Court. The introduction of strict formal admissibility rules complemented the system of substantive inadmissibility which enabled single judges to dismiss manifestly ill-founded cases, as explained in the first part of point 2 of this Article. The main difference between these two types of admissibility rules is that the individual applications which do not comply with the formal rules, as shall be seen below, are outright dismissed without being allocated to any of the Court's judicial formations ie are dismissed by the Registrar of the Court.

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[85] The Court had 6,000 identical judicial decisions against Ukraine, and approximately 12 million Euro in just satisfaction awards against Ukraine.
[86] *Ivanov v. Ukraine* (n 74), para 223.
[87] ibid, para 174, para 201.
[88] In 2018 there was a decrease of 32% of new applications compared with 2017, Analysis of statistics 2018, 4
[89] *Broniowski v. Poland* App no 31443/96 (ECtHR, 22 June 2004) para 36.
[90] Report on the implementation of the revised rule on the lodging of new applications 02/2015, 1.

Before 1 January 2014 the Court looked into the nature of the formal errors and the applicants not complying with the formal rules were notified of their errors and were often given extension of the six-month time limit.[91] This was in accordance with the view of the Court that 'the rules of admissibility must be applied with some degree of flexibility and without excessive formalism'.[92]

The Court's change of attitude was best visible when it dismissed an application submitted on 21 May 2014, and used it to stress the strict examination and application of the revised Rule 47, as well as the six-month time period for lodging an application as prescribed by Article 35 (1) ECHR.[93] Such change of attitude, especially after the Court has shown leniency towards the formal rules, was followed with a significant rise in the number of dismissed applications. Since exceptions to this rule are practically non-existent, except for requests for interim measures, incomplete applications are declared inadmissible without even being allocated to any of the Court's judicial formations.[94] Namely, 12,191 applications or almost a quarter of all the applications lodged in 2014, failed to comply with the revised rule and were thus disposed of administratively.[95] Moreover, this number does not include complaints submitted on a different form than the one provided on the Court's website, since those complaints were not even considered to be applications. Again, the efficiency gains were the centre of attention. Nevertheless, since applications disposed of administratively are destroyed and never published or reviewed, one can only wonder how serious a breach of human rights those 12,191 application or other letters might have complained of.

As time passes and individuals and lawyers get familiar with the procedural rules of the Court,[96] the number of applications disposed of administratively decreases – in 2016 there was a 35% decrease compared to 2015.[97]

In this part, suffice it to say that establishing a system of formal rules to which every application would be subjected to, was indispensable to ensure the proper functioning of the Court. Nevertheless, the fact that the newly established system did not have a sufficiently long transitional period and the sudden change of attitude make questionable the way in which it had put into effect such a system.

Speaking of procedural admissibility rules, it is important to note that when Protocol No. 15 amending the ECHR enters into force it shall reduce the time for submitting an application to the Court from six to four months from the date on which the final national decision was taken.[98] A transitional provision which provides that this new rule shall enter into force six months after Protocol No. 15 enters into force and furthermore shall not apply to applications in respect of which the final national decision was taken prior to the date of

[91] Janneke H. Gerards and Lize R. Glas, 'Access to justice in the European Convention on Human Rights system' (2017) Vol. 35(1) Netherlands Quarterly of Human Rights, 11.
[92] *İlhan v. Turkey* App no 22277/93 (ECtHR, 27 June 2000), para 51.
[93] *Malysh and Ivanin v Ukraine* App nos 40139/14 and 41418/14 (ECtHR, 9 September 2014).
[94] ibid.
[95] See Report (n 90).
[96] ibid, 3.
[97] ECHR – Analysis of Statistics 2016, 4.
[98] Article 4 of Protocol No. 15 amending the ECHR.

entry into force of this new rule,[99] will hopefully mitigate the negative effects that any change of the procedural admissibility rules has on the right to individual application. Nevertheless, this change represents another significant step forward in the continuous efforts to introduce stricter procedural admissibility rules, which inevitably affect the right to individual application.

5 PROTOCOL NO. 16 TO THE ECHR - ADVISORY OPINIONS

Protocol No. 16 to the ECHR, which entered into force on 1 August 2018 in relation to those Council of Europe member States which ratified it,[100] gives power to the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR. This is the most recent change in the Convention mechanism which aims to improve the 'long-term effectiveness of the ECHR control mechanism'.[101] Even when discussing the possible extension of the Court's advisory jurisdiction, the Court hoped that the procedure would be designed in a manner so as to enable it to decrease its workload,[102] firstly by strengthening its constitutional role,[103] and secondly by reinforcing the domestic courts' role in implementing the Convention.[104] Thus, this change in the Convention mechanism can be seen as the latest attempt to reduce the caseload and at the same time enable the Court to focus on important questions of principle.

In this regard, the first request for advisory opinion came from the French *Cour de cassation*, concerning surrogacy, which the Court swiftly accepted.[105] Looking way in which the French *Cour de cassation* formed the questions, there is an immediate resemblance of this procedure with the preliminary reference procedure before the Court of Justice of the EU. The advisory opinion which came from the Court,[106] however, did not resemble a judgment under Article 267 TFEU, as it did not engage with the facts of the case as much,[107] nor with the arguments submitted by the participants in the proceedings.[108]

On the other hand, and surprisingly so, the answer of the Court was quite limited to the context of the case pending before the requesting court.[109] Apart from the (already established)[110] finding of the Court that an absolute impossibility of recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother would violate the Convention,[111] the Court does not seem to set any

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[99] ibid, Article 8, para 3.
[100] Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia, Ukraine. It shall enter into force in relation to the Netherlands on 01/06/2019 - Chart of signatures and ratifications of Treaty 214 (Protocol No. 16 to the ECHR) < https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/214/signatures?p_auth=EzUkBjcI> accessed 18 March 2019
[101] Explanatory Report to Protocol No. 16 to the ECHR (2 October 2013), 1.
[102] Reflection paper on the proposal to extend the court's advisory jurisdiction, ECtHR 2013, para 15.
[103] ibid, para 5.
[104] ibid, para 16. See also, Janneke Gerards 'Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal' (2014), Maastricht Journal of European and Comparative Law Vol 21 Issue 4, 632.
[105] Press release ECHR 415 (2018) from 04 December 2018.
[106] Advisory Opinion P16-2018-001 (ECtHR, 10 April 2019).
[107] ibid, para 25.
[108] ibid, para 34.
[109] ibid, para 36.
[110] *Mennesson v France* App no 65192/11 (ECtHR, 26 June 2014), paras 99-100.
[111] ibid, para 42.

Europe-wide surrogacy standard. Therefore, if the Court's competence to give advisory opinion is to be assessed by its first delivered opinion, it can be said that the Court itself refuses to use this competence to reinforce its constitutional role.

However, looking at the advisory opinion procedure from a more general aspect, central to it is the principle of subsidiarity, which was included in recital 3 of the Preamble of the ECHR through Protocol No. 15 to the ECHR.[112] According to principle, national authorities are better placed than an international court to evaluate local needs and conditions, and it is the national courts which are primary obliged to protect the rights and freedoms enshrined in the ECHR. In this regard, it would have been very useful for the Court to use the first advisory opinion to provide national authorities with general principles or instructions as to how they should act, thereby reinforcing the principle of subsidiarity, as well as its constitutional role. On the contrary, if the Court only offers an opinion applicable to a specific situation as it did in its first advisory opinion, it risks making it comparable to actual cases before it, thereby making it redundant. For now, it remains to be seen whether the Court shall give more weight to this procedure in its future advisory opinions.

It seems that the advisory opinion procedure represents a concrete step in the process of constitutionalisaton of the Court, which the Court itself seems to support,[113] even though in its first advisory opinion it has not acted accordingly. Nevertheless, the possibility for the Court to set Europe-wide human rights standard without having an individual application before it and
without actually solving a case, undoubtedly represents a major change in the Convention mechanism.

6 CONCLUSION

All of the above changes successfully managed to counter the far-reaching backlog problem of the Court - the Court proudly stated in 2017 that the backlog problem has been eliminated. However, the process to reform the Convention mechanism cannot be viewed in isolation.

On the contrary, a change in one part of the mechanism, inevitably affects the mechanism as a whole. In this regard, the changes presented in this Article have definitely altered the nature of the Court, for better or for worse. Nine years after the first change was put into effect, the Court deals with cases almost completely differently and furthermore, is perceived differently by individuals. This especially applies to the perception of the Court in the developing European countries where the Court used to be perceived as a Court of last resort which protects individual human rights and contributes to individual justice. For example, in 2018 there were 7.267 cases against Ukraine, out of which only 10 were declared admissible (around 0.1%).[114]

The Council of Europe, and the Court itself, decided that protection of human rights in Europe would be better carried out if the Court contributes to constitutional, general justice. Equipped with the powers to adopt pilot-judgments and deliver advisory opinions, while having the means to dispose itself of individual repetitive cases which do not contribute

[112] However, the principle of subsidiarity has been developed and used by the Court long before its codification in the ECHR.
[113] Reflection paper (n 102), para 5.
[114] ECHR – Analysis of Statistics 2018, 59.

to its case law, the main task of the Court now seems to be to ensure that 'administrative and judicial processes in member states effectively conform to pan-European Convention standards'.[115] Therefore, it can be said that the Court now functions more as a Constitutional Court of Europe.

This does not in itself have a negative effect on the human rights situation in Europe. To this day, the Court still protects human rights and contributes to their development in Europe and will most certainly continue to do so. However, the way in which was this change happened can be questionable. As explained above, some of the measures were radical and were implemented in a short period of time, not allowing the public to get a grasp of the seriousness of the changes. Moreover, it seems that at times the Court's backlog problem has been used as an excuse to promote its constitutional function, which in turn was presented as an excellent way to counter the backlog problem, while improving the situation of human rights in Europe. Even though it is true that the constitutional role of the Court has contributed to both of these aims, it would have been much better if this process had been carried out more openly and steadily, instead of rushing to solve the backlog problem.

The problem with the Russian non-ratification of Protocol No. 14 for six years, proved that the Court was not yet on the brink of collapse, that is, it could still function, even though sluggishly, despite the great backlog. Therefore, there was no need to rush through the process, and risk undermining the unique system which took great effort to establish. Indeed, some of the actions of the Court in the last period have been rather rash and subject to criticism or even condemnation from members of the Court and the Council of Europe, not to speak outside of it.

Unlike the European Court of Human Rights whose nature seems to be implicit, certain judges of the Court of Justice of the EU have clearly stated that the CJEU is not a human rights court.[116] With the European Court of Human Rights now taking a more constitutional function and distancing itself from cases which offer nothing more but individual redress, there is a possibility of legal vacuum in the protection of individual human rights in the so called repetitive cases. This was best visible in the *Burmych* cases, as well as in the unmeritorious cases referred to in the main part of the Article. Therefore, it is now up to the Council of Europe, and particularly the Committee of Ministers, to supervise the execution of judgements, especially pilot judgments, and to promote the principle of subsidiarity in accordance with which violations of rights enshrined in the ECHR should be sanctioned by the domestic courts. Also, national courts should be encouraged to refer to the case law of the Court more often and in that way protect the rights enshrined in the ECHR at national level. This is crucial for individual justice to be ensured in a changed European legal order, in which the Court plays a more constitutional role.

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[115] Steven Greer, 'Constitutionalizing Adjudication under the European Convention of Human Rights' (2003) 23(3) Oxford Journal of Legal Studies, 405.

[116] Xavier Groussot, Nina-Louisa Arold Lorenz and Gunnar Thor Petursson, 'The Paradox of Human Rights Protection in Europe: Two Courts, One Goal' in Oddný Mjöll Arnardóttir, Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection* (Routledge 2016) 19.

PATTERNS OF FEDERALISM IN EU MACROECONOMIC POLICY

JOSEFIN JENNERHEIM*

Abstract

The purpose of the article is to discern the pattern of federalism in EU macroeconomic governance and seek explanations for the strengthening of the framework in this regard. The article operates in a constitutional perspective, adopting a multidimensional approach in order to fulfil the purpose. These approaches have in common that they regard issues of legal power, resulting in a structure of five critical axes related to the nature of the Union's competence in macroeconomic governance. More precisely, within these dimensions, the nature of the exercise of legal power, its constitutionality and its implications for the allocation of power between the Union and the Member States are explicated. This thematized presentation is sought to make effective the unearthing of a pattern of federalism. Lastly follows a discussion on the direction of the EU institutional practices in macroeconomic governance and the underlying causes for this development. In addition to drawing on the conclusions on the questions basing the article, this discussion will also feature thoughts on the recent battle between the Commission and the Italian government as regards the latter's national budget.

1 INTRODUCTION

Over a decade ago, the renowned EU scholar Gráinne de Búrca put forward the following lengthy proposal, of which I will reproduce in full by reason of its brilliance:

> An interesting research question might therefore be to examine the 'pattern(s) of federalism' in the EU to date, and to try to provide a careful, systematic and considered account of why, despite the repeated concerns articulated by certain governments, both national and regional, about the creeping competences of the EU and the growth of its central powers at the expense of statal and regional capacity, the trend - both in terms of the constitutional/ treaty framework through its many amendments, culminating in the current constitutional treaty, as well as in terms of the practice of its institutions - has been mostly in one direction so far.[1]

De Búrca's inquiry was proposed prior to the global and European economic crises but might be the most urgent in post-crisis (potentially, pre-new-crisis[2]) times. The institutional measures adopted in response to the crisis have been claimed to counter the principle of the

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[1] Gráinne De Búrca, 'Limiting EU powers', (2005) European Constitutional Law Review 12, 92, 98.

[2] International Monetary Fund, 'A Decade after the Global Financial Crisis: Are We Safer?' (Global Financial Stability Report October 2018), <https://www.imf.org/en/Publications/GFSR/Issues/2018/09/25/Global-Financial-Stability-Report-October-2018#Front%20Matter> accessed 9 April 2019.

rule of law[3], have adverse effects on legal certainty[4] and been described as exuberating elements of authoritarianism[5]. This enumeration includes only some of the concerns voiced by contemporary legal scholars. The description of these measures ranges from 'nasty overregulation'[6] to being necessary to prevent further crises in the euro area[7], which of course do not have to be mutually exclusive. In any case, one can conclude that the constitutional set-up pre-crisis versus post-crisis has been changed dramatically.

The constitutional implications of the economic crisis has been analysed, by Alicia Hinarejos[8], as well as Karlo Tuori and Klaus Tuori[9], to name a few. In this article, I will focus the magnifying glass on a specific part of the Union's economic policy – namely, macroeconomic policy. Accordingly, taking up de Búrcas invitation, this article aims at answering the questions posed by de Búrca in the context of the macroeconomic framework in the EU legal order.

As pointedly put by Guillaume Tusseau, federalism is a complex concept, and undoubtedly, various forms of federalism exists in different legal orders. In addition, the general concept of federalism cannot be considered a neutral term, and therefore, the various connotations of federalism may cloud the legal analysis if one adhere to such an ambiguous concept.[10] For these reasons, the foundation of my exploration of the patterns of federalism in EU macroeconomic framework is Tusseau's theory on power-conferring norms which he adopted for the question of whether the EU is a federal order. So, on the basis of Tusseau's theory, I will answer the following questions in this article: (i) how the Union is exercising/has exercised legal competence in the context of the macroeconomic framework, and (ii) how this exercise affects the allocation of legal power between the Member States and the Union. By answering these questions, my intention is to provide a part of the pattern considered by de Búrca.

Additionally, I will test de Búrca's depiction of consistently increasing centralization of legal power in the EU legal order. As I will argue, I find that there has indeed been a theoretical centralization, which however has not materialized in practice. The reasons therefore will be discussed within the frame of my conclusions on the exercise of legal power in macroeconomic policy and its implications for the allocation of legal power in the EU legal order, in consideration of the fact that there are many reasons that centralization has developed in the described manner.

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[3] Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) Oxford Journal of Legal Studies 35(2), 325, 325 ff.

[4] Pablo Martín Rodriguez, 'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis' (2016) European Constitutional Law Review 12, 265, 265–293.

[5] Alexander Somek, 'Delegation and Authority: Authoritarian Liberalism Today' (2015) European Law Journal 21(3), 340, 357 ff.

[6] ibid, 345.

[7] This is naturally the position of the Union legislator, see for example: European Commission, 'EU Economic governance "Six-Pack" enters into force' (Press Release) MEMO/11/898.

[8] Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford Scholarship Online 2015).

[9] Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis – A constitutional analysis* (Cambridge University Press 2014).

[10] Guillaume Tusseau, 'Theoretical Deflation: The EU Order of Competences and Power-Conferring Norms Theory' in Loic Azoulai (ed), *The Question of Competence in the European Union* (Oxford Scholarship Online 2014) 40 ff.

Naturally, many of the EU policy areas and thereto corresponding secondary legislation will affect macroeconomic issues in the Union in its different dimensions. All of the provisions that have an effect on the macroeconomic choices of the Member States will not be provided for in this article. The stem of the framework under consideration in this article is Regulation 1176/2011 ('the MIP-regulation')[11], which was adopted as a part of the six-pack legislation as a response to the economic crisis[12]. This regulation and its relation to other instruments of relevance will be briefly described below.

2 CONFERRAL VERSUS CONSTITUTIONALISATION IN A FEDERAL ORDER OF COMPETENCES

Not only is the discern of a pattern of federalism a difficult task in itself, but within this task, there is a web of concepts that have or could have a bearing on the outcome of the task. All these threads cannot be entertained in this article, for reasons of both sanity and space. Instead, the below concepts that I have chosen to consider all regard the issue of legal power of the EU.

2.1 CONFERRAL VERSUS CONSTITUTIONALISATION

There are two traction forces in the development of federalism in the EU. To simplify, this relationship can be described as follows. Conferral, on the one hand, aims to ensure that the legal power retains in the hands of the Member States, by limiting the Union's action to the competences conferred on it by the Member States in the Treaties.[13] Constitutionalisation, on the other hand, is the process of which the EU constitution is regarded to mainly be shaped by other constitutional actors than the Member States, namely the EU institutions.[14] The principle of conferral as set out in article 5(2) TFEU entails that 'the objectives [of the Union] are functional to competencies, and not the other way around'.[15] Thus, the Union institutions cannot act outside of their competences on the ground that the action attains a Union objective.

De Búrca advocates that although the principle of conferral is an 'important starting point' for addressing the exercise and division of power, 'the actual nature of the federal system in question emerges through the institutional practice over time'.[16] In light thereof, my intention is not to provide a normative review on the topics discussed the article, and so, I will not set conferral as an ideal, neither to dismiss it on the grounds of the process of

[11] Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25 (The MIP-regulation).
[12] European Commission, *MEMO/11/898* (n 7).
[13] Articles 5(1) and 5(2) TFEU; Barbara Guastaferro, 'The European Union as a Staatenverbund? The Endorsement of the Principle of Conferral in the Treaty of Lisbon' in Martin Trybus and Luca Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Cheltenham, 2012: Edward Elgar) 123; Stephen Weatherill, 'The Constitutional Context of (Ever–Wider) Policy–Making' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford Scholarship Online 2012) 571; Inge Govaere, *To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon* (College of Europe: Research Papers in Law 04/16 2016) 2.
[14] Tuori and Tuori (n 9) 3 ff.
[15] Guastaferro (n 13) 127.
[16] De Búrca (n 1) 94.

constitutionalisation. Rather, both of these concepts will be kept in mind as I analyse the exercise of EU legal power in macroeconomic policy.

As the Member States have conferred competence to the Union, the principle of conferral constitutionally limits the use of those competences. Another pair of conceptual lenses is that of delegation, in that the Member States have delegated powers to the Union. On this note, Alexander Somek has created a theory about trust and delegation of power. According to Somek, a delegation of power presupposes trust from the delegator towards the delegated. Overstepping a mandate will result in either 'the normative reassertion of an expectation ('you should have') or the cognitive adjustment to a new situation ('so, this is what you had to do')'. The inherent problem with the presumption of trust is therefore, even as it builds on a legal mandate, that the delegator always can derive a normative confirmation ('you should or should not have') after the fact. Somek states that in legal systems such as these, 'the reversal in the direction of control is built into the relationship'. The Member States must therefore trust the Union as it has conferred power on it, but the control of the exercise of power can only happen after the exercise has taken place. Somek calls this fault in the system of delegation a 'modal indifference of trust'. Somek maintains that the only efficient way to deal with this issue is by political bodies rather than the judiciary through democratic control. In this regard, he argues that political bodies are able to redefine the relationship to the delegated whilst the judicial bodies are limited to address the normative mode (you should or should not have done so).[17] A system wherein the people have no democratic outlet result in a 'trust trap', in which they cannot assert their normative expectations and thereby believe they must accept their fate.[18]

2.2 LEGAL POWER AND POWER-CONFERRING NORMS

When one is exploring the constitutional relationship between the legal power of the Member States and those of the Union, there is a need for a concept of legal power. In Neil Maccormick's theory of legal power, he argues that power give rise to reasons for action or inaction that would, without it, not have existed. *Legal* power is further explained as the legally conferred ability to affect or prevent change in another person's legal position without the consent or dissent of that person. As regards the distinction between normative power and power-in-fact, especially political power, Maccormick argues that, although they should be distinguished, these powers are often interdependent; the legal order and political power go hand in hand. The legal order and legal power are dependent on legitimacy, consequently, if the legal actor, having legal power, cannot exercise its power-in-fact, it will erode the legitimacy of the legal order.[19]

In light of the multifaceted playing field that is the EU legal order, as set out above, there is a need for a tool to outline the constitutional relationships of the legal orders contained in the EU legal order, namely that of the Member States and that of the EU. Such a tool is found in Tusseau's theory on power-conferring norms. Tusseau's 'proposed concept' of power-conferring norms includes four elements. The first concerns the actor

[17] Somek (n 5) 351.
[18] ibid 352 ff.
[19] Neil MacCormick, 'Powers and Power-Conferring Norms' in Stanley L. Paulson (ed), *Normativity and Norms: Critical Perspectives on Kelsian Themes* (Oxford University Press 1999) 493 ff.

empowered to produce legal norms. The second is that of the action by means of which that actor can produce norms. Thirdly, the 'range of application' of the power-conferring norm determines the 'area of reality' in which the actor is empowered to act, for example in regard to territorial, temporal material and/or personal criteria. The fourth element is the 'range of regulation' which refers to the normative meaning of the production of the power-conferring norms, namely to the type of norm that is empowered and its level in the normative hierarchy.[20]

Additionally, Tusseau identifies types of relationships between power-conferring norms in the EU legal order. The relationship is twofold - namely that of the 'principle of hierarchy' and the 'coordination of power-conferring norms'. The former refers to the vertical relationship between the power-conferring norms produced by the various actors, and the nature of that hiearchization. Conversely, the latter refers to the horizontal relationship between power-conferring norms in relation to their respective ranges of application.[21]

Tusseau's theory, albeit reiterated here in a scaled-down version, provides useful tools in outlining the nature of the legal power conferred on the Union and its relationship to the legal power of the Member States, thus in turn for mapping the pattern of federalism created by the Union's exercise of power in macroeconomic policy.

3 CRITICAL AXES OF MACROECONOMIC COMPETENCE PRACTICE

The rationale of this article, as explained above, is that the examination of the Union's exercise of legal power and its allocation in the EU legal order will produce a basis for discussing the structure of federalism as regards the Union's macroeconomic policy. There is naturally many aspects of such an exercise, all of which will not be accounted for in this article. Perhaps most pertinently, it will not consider the roles of the principles of subsidiarity and proportionality.

The following five dimensions will be considered; (i) the instruments used in macroeconomic policy and their respective ranges of regulation and application, (ii) the use of enhanced cooperation, (iii) the implications of enforcement mechanisms in the framework, (iv) the constitutional actors empowered by the legal instruments, and (v) the objectives of macroeconomic policy. Hypothetically or factually, the intersection of all these axes will represent the relationship between the Union's and the Member States' legal power that makes up the federal pattern sought after.

3.1 THE BASICS AND UNDERLYING PRINCIPLES OF ECONOMIC POLICY COMPETENCE

The original set-up of the economic constitution included a 'decentralised' fiscal policy, in which the Union lacked a 'centralized fiscal policy function and … centralized fiscal capacity' within a monetary Union.[22] Prior to the economic crisis, the EU economic governance focused on fiscal policy rules, primarily through the Sustainability and Growth Pact ('SGP')

[20] Tusseau (n 10) 46; see also ibid 46 ff.
[21] ibid 54 ff; see also ibid 55 ff.
[22] European Commission, 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate' COM (2012) 777 final, 2.

(as it was designed prior to the six and two-pack legislation). The economic distress of the crisis has been explained by the European Commission ('Commission') to be partially caused by the non-compliance of the rules of the SGP. The Commission has argued that 'features of the original institutional setup of [the Economic and Monetary Union], in particular the lack of a tool to address systematically macroeconomic imbalances' was a vulnerability in the old system.[23] However, the strengthening of EU economic governance post-crisis has been described as a challenge to the underlying principle of fiscal autonomy of the Member States.[24]

As per article 2(3) TFEU, '[t]he Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide'. Further, article 5(1) TFEU reads:

> The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies. Specific provisions shall apply to those Member States whose currency is the euro.

Notably, these provisions do not specify whether the Union's competence in economic policy is shared or exclusive, or in general how it relates to the competence of the Member States. The ambiguity has prompted varying scholarly interpretations of the nature of this competence. In one corner, there is the view that economic policy is attributed the area of shared competences as it is a residual competence in accordance with article 4(1) TFEU[25].[26] Additionally, there are those who argue that competence in economic policy exists on a spectrum between shared competence and the category of supporting, coordinating and supplementary (article 2(5) TFEU).[27] This approach is somewhat similar to that of Roland Bieber who opposes the attribution of coordinating competence to shared competences, instead considering that the Union's competence in economic policy is a 'sui generis', dividing the competence in relation to each type of measure.[28]

Lastly, the terms 'providing arrangements' and 'coordinate' in the Treaty provisions have also sparked a debate on its implications for the nature of competence in economic policy, in which some scholars argue on the basis of this language, that the Union cannot pursue its own economic policy nor decide on the policy choices of the Member States.[29]

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[23] ibid.
[24] Tuori and Tuori (n 9) 188 ff.
[25] Article 4(1) TFEU stipulates that 'the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6', whereas economic policy is listed in article 5 TFEU.
[26] Allan Rosas and Lorna Armati, *EU Constitutional Law – an introduction* (3rd edn, Hart Publishing 2018) 23-25; Jean-Claude Piris, *The Lisbon Treaty: a legal and political analysis* (Cambridge University Press 2010) 77.
[27] Robert Schütze, *European Union Law* (Cambridge University Press 2015) 242.
[28] Roland Bieber, 'Allocation of Economic Policy Competences in the EU' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford Scholarship Online 2014) 89 ff.
[29] Hinarejos (n 8) 73 ff; Koen Lenaerts, 'EMU and the EU's constitutional framework' (2014) European Law Review 39(6) 753, 766.

3.2 TOOLS OF MACROECONOMIC POLICY: MEANS OF INFLUENCE

In the first axis of macroeconomic competence, the instruments used in macroeconomic policy and their respective ranges of regulation and application can be said to make up the scope of the macroeconomic framework. In other words, this scope should answer what legal production the Union can create on the basis of the macroeconomic competence conferred on it.

3.2[a] The MIP-regulation and related instruments

As such, macroeconomic policy is not expressly mentioned in the Treaties. However, the MIP-regulation is based on article 121(6) TFEU. Article 121(6) TFEU provides for detailing (through regulations) the multilateral surveillance procedure, which entails surveillance and assessments of economic developments in the Member States and enabling consistency of the economic policies with the Broad Economic Policy Guidelines ('BEPG's') adopted in regard to each Member State.[30]

The preamble of the MIP-regulation recognizes that 'supplement' to the multilateral surveillance procedure with 'specific rules' for detecting, preventing and correcting macroeconomic imbalances is appropriate.[31] The MIP-regulation is complemented by Regulation 1174/2011 ('the Enforcement-regulation')[32] which provides for financial sanctions for the Eurozone States following non-compliance with parts of the MIP-regulation.

The procedure for detecting and preventing imbalances is called the macroeconomic imbalance procedure ('MIP'). The regulation defines a macroeconomic imbalance as:

> [...] any trend giving rise to macroeconomic developments which are adversely affecting, or have the potential adversely to affect, the proper functioning of the economy of a Member State or of the economic and monetary union, or of the Union as a whole.[33]

Clearly, the definition of macroeconomic imbalances is very broad. The detection of imbalances is facilitated by the so-called scoreboard which is created by the Commission and is based on numerous numerical fiscal benchmarks.[34] The Commission produces reports on all Member States on the basis of the scoreboard[35], which may prompt the Commission to undertake an in-depth review of Member States at potential risk [36]. On the basis of this review, the Commission can conclude that the Member State in question is experiencing either no imbalance, an imbalance or an excessive imbalance. Where an (non-excessive) imbalance is detected, the Council of the European Union ('Council') may address

[30] Articles 121(6), 121(3) and 121(2) TFEU.
[31] Regulation (EU) No 1176/2011 (n 11), para 9.
[32] Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area.
[33] Regulation (EU) No 1176/2011 (n 11) art. 2(1).
[34] ibid art. 4.
[35] ibid art. 3(2).
[36] ibid art. 5.

recommendations to the Member State in question, as part of the MIP's 'preventive action'.[37] In this regard, the regulation specifically refers to article 121(2) TFEU.

Where an excessive imbalance is detected, the Council may open an Excessive Imbalance Procedure ('EIP') and recommend the Member State to take corrective action. The recommendation will 'specify a set of policy recommendations to be followed' and a deadline for doing so.[38] This procedure is based on article 121(4) TFEU, as specified in article 7(2) of the MIP-regulation. Following the opening of an EIP, the Member State must submit a corrective action plan ('CAP'), setting out specific policy actions it has implemented or intends to implement. These actions are to be 'based on' the recommended action stipulated by the Council (article 8(1)). The policy response of the Member State should cover the 'main economic policy areas, potentially including fiscal and wage policies'.[39] The Council may adopt a decision of non-compliance with such a recommendation by reverse Quality Majority Voting ('QMV'). The condition to establish non-compliance is that the Council, on the basis of a Commission report, considers that the Member State 'has not taken the recommended corrective action' (article 10(4)). If the Member State continues its failure to implement the recommended corrective action, the Council may, following a recommendation by the Commission, impose fines and interest-bearing deposits on Eurozone States.[40] Financial sanctions can only be imposed on Eurozone states.[41] The decisions are taken by the Council by reverse QMV.[42] An EIP is cancelled when the institutions consider that the excessive imbalance has ceased to exist (article 11). The financial sanctions will be further discussed below.

In 2019, the Commission concluded on the basis of its in-depth reviews that ten Member States were experiencing imbalances, three Member States were experiencing excessive imbalances, and one Member State were not experiencing any imbalance at all. In 2018, the respective numbers were eight and three.[43] However, no Member State have been subjected to the EIP yet (2019).

The recommendations under the preventive action in the MIP and under the EIP are integrated into the Country Specific Recommendations ('CSRs') that are adopted as a part of the European Semester of economic policy coordination ('European Semester'). Recommendations in the framework of the preventive arm of the Stability and Growth Pact[44], the Europe 2020 strategy, the BEPGs, the Employment Guidelines, and the MIP (which encompass both the recommendations under the preventive action and under the EIP), are integrated into the single package, that is the CSRs. Macroeconomic issues are also connected to the SGP in that the Commission, when it is assessing the level of deficit in a

[37] ibid art. 6.
[38] ibid art. 7(2).
[39] ibid paras, 15-19.
[40] Regulation (EU) No 1174/2011 (n 32), art. 3.
[41] ibid art. 1(2).
[42] ibid art. 3(3).
[43] European Commission, '2019 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011', COM (2019) 150 final, 5-7.
[44] The SGP encompass Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1 and Council Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6.

Member State, shall take into account, inter alia, the economic policies in the context of macroeconomic imbalances.[45] Based on the report written by the Commission, the Council will decide whether the Member State has taken effective action in response to its recommendations.[46] A fine can be imposed by the Council if it decides that a Member State has not 'taken effective action to correct its excessive deficit'.[47] Consequently, a failure to properly address a macroeconomic imbalance might lead to the decision that a Member State has taken insufficient action to correct a deficit.

As a part of the Two-pack[48], regulation 473/2013 ('DBP-regulation')[49] establishes enhanced monitoring and surveillance of Member State's draft budgetary plans ('DBP's'), in particular the compliance of the plans with the policy guidance provided under the European Semester. The Eurozone Member States must submit their DBPs annually to the Commission and the Eurogroup and they must be consistent with the recommendations issued in the context of the SGP, and any recommendations issued in the context of the European Semester, including the MIP (article 6(1)). The Commission may request a revised plan 'where the implementation of the draft budgetary plan would put at risk the financial stability of the Member State concerned or risk jeopardising the proper functioning of the economic and monetary union'.[50] The DBP-regulation and the MIP-regulation thus interrelate in two ways. Firstly, the DBP must expressly be consistent with recommendations issued under the MIP-regulation. Secondly, as risks to the proper functioning of the Economic and Monetary Union ('EMU') may determine the existence of macroeconomic imbalances in accordance with the MIP-regulation, it is possible that macroeconomic imbalances can become important in the assessment of the DBPs. By that logic, a revised DBP might be requested if the plan is deemed to insufficiently deal with a macroeconomic imbalance (and thus risk jeopardising the proper functioning of the economic and monetary union). The Commission has only once requested a new DBP, which happened in 2018 in regard to Italy's 2019 DBP. The Commission considered the DBP to be inconsistent with a Council recommendation issued in accordance with the preventive arm of the SGP. This regards the various numerical benchmark rules which are a part of the adjustment path towards the MTO. Furthermore, the Commission noticed that Italy did not comply with the condition of the DBP-regulation to endorse its plan by an independent body.[51] The Commission noted further that, whilst Italy has the sovereign power to decide their

[45] Council Regulation (EC) 1467/97 (n 44), art. 2(3)(b).
[46] ibid art. 4(2).
[47] Regulation (EU) 1173/2011 of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1, art. 6(1).
[48] The Two-pack is a legislative package which consists of Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1 and Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] L140/11.
[49] Regulation 473/2013 (n 47).
[50] ibid, art. 7(2) and para 20.
[51] European Commission, 'Commission Opinion of 23.10.2018 on the Draft Budgetary Plan of Italy and requesting Italy to submit a revised Draft Budgetary Plan' C(2018) 7510 final.

'budgetary priorities', it must still comply with the numerical fiscal rules set out in the recommendations under the SGP.[52]

3.2[b] A constitutional basis

The legal basis of the MIP-regulation is, as stated above, article 121(6) TFEU which empowers the Union to adopt detailed rules on the multilateral surveillance procedure referred to in articles 121(3) and 121(4) TFEU through the ordinary legislative procedure ('OLP'). Article 121(3) TFEU empowers the Council to:

> monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment'.

As such assessments are to be based on 'reports submitted by the Commission', the Commission too is empowered in relation to these monitoring missions and assessments. Article 121(3) TFEU further reads that:

> For the purpose of this multilateral surveillance, Member States shall forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary.

It is clear from article 121 TFEU that the multilateral surveillance procedure covers general economic policies, as the 'economic development' is referred to in article 121 (3) TFEU. The range of application of Union action in this competence area therefore regards all aspects of economic policy. On that basis, I argue that the range of application of the power-conferring norms in question (article 121 TFEU) also includes 'sensitive'[53] policy areas such as taxation, education and the housing market.

However, a broad range of application could be mitigated by a narrower range of regulation. Article 121(2) TFEU empowers the adoption of BEPGs and article 121(4) TFEU empowers the adoption of warnings and recommendations. The recommendations as per article 121(4) TFEU are to be adopted by the Council, and the warnings adopted by the Commission. Regarding the procedure, the article stipulates a QMV for the adoption of the recommendations. The recommendations based on article 121(4) TFEU are connected to a range of application; inconsistency with the BEPG or risk of jeopardizing the proper functioning of the EMU. Again, considering that the procedure in article 121(4) TFEU is connected to the surveillance of article 121(3) TFEU, the Commission and the Council can regard all aspects of economic policy of the Member State when evaluating the consistency with the BEPG or whether the policy risk jeopardizing the proper functioning of the EMU.

As for the wording of article 121(6) TFEU, it confers a competence to detail the 'procedure' of the multilateral surveillance. Consequently, when the Union wants to exercise

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[52] European Commission, 'European Commission Opinion on the 2019 draft budgetary plan of Italy', (Press Release) MEMO/18/6175.

[53] For example, Garben has stated that '[m]ember States are legitimately concerned about granting the EU a hard competence in this area, as they fear it may become a blank cheque for the EU to decide on highly *sensitive* decisions of a re-distributive nature at the core of their sovereign powers'. Sasha Garben, 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union' (2017) 13 European Constitutional Law Review 23, 43 f (emphasis added).

its competence to adopt recommendations as per article 121(4) TFEU, a semantic interpretation would imply that article 121(6) TFEU facilitates the adoption of a more detailed procedure than provided in the former, in the form of a regulation adopted in accordance with the OLP. In accordance with such an interpretation, the more detailed provisions must comply with the procedure set out in articles 121(3) and 121 (4) TFEU. This would be necessitated by the range of application of article 121(6) TFEU, compliance with articles 121 (3) and (4) TFEU being a material criterion. Thus, no other actors can be empowered, no other procedure may be facilitated, and the range of application and regulation may not be altered. With that interpretation in mind, article 121(6) TFEU setting out detailed rules cannot empower the Council to adopt any other instrument than a recommendation in the event of inconsistency with the BEPG or when there is a risk of jeopardising the proper functioning of the EMU. Likewise, article 121(6) TFEU cannot empower the Council to act in any other circumstance than in the event of inconsistency with the BEPG or when there is a risk of jeopardising the proper functioning of the EMU.

In line with what has already been discussed, the subject matter of the multilateral surveillance procedure covers all economic policy issues to the extent that it has importance for the coordination of economic policies and convergence of the economic performances of the Member States. In respect of the subject matter of the surveillance and coordination as empowered by the MIP-regulation, which is essentially all economic issues that might be of importance when detecting and assessing an imbalance, the scope of application of article 121 TFEU encompass the subject matter of the regulation.

The Union has the competence to direct recommendations on economic issues to the Member States, firstly on the basis of article 121(2) TFEU and secondly on the basis of article 121(4) TFEU. The latter power-conferring norm regards the situation of an inconsistency with a BEPG or in the event a Member State is jeopardizing the proper functioning of the EMU. The recommendations adopted in response to an imbalance or an excessive imbalance, of which the existence of an imbalance can be established on the basis that it jeopardizes the EMU, are based on article 121(4) TFEU.

The CSRs, of which the recommendations under the MIP are a part, are legally based on article 121(2) TFEU.[54] Article 6(1) of the MIP-regulation expressly states that the recommendations under the preventive action of the MIP are legally based on article 121(2) TFEU. Conversely, the recommendations under the corrective arm (*ie* the EIP) are legally based on article 121(4) TFEU as per article 7(2). The ranges of regulation as per these Treaty provisions encompass recommendations. The Union has therefore complied with the range of regulation is this regard.

In conclusion, when the Council is adopting recommendations in response to an imbalance or an excessive imbalance, it is acting within the competences conferred upon it in relation to the ranges of application and regulation.

One can of course question whether the Treaty provisions basing the BEPGs restricts the detail of these guidelines. This was of less interest prior to the adoption of the MIP-regulation, since there was limited means of enforcement. With the introduction of financial sanctions and an obligation to comply with (take) recommended policy action under the EIP, the more detailed the recommended action, the more power the Member States are subjected

[54] Note that they are also legally based on article 148 TFEU as regards employment guidelines.

to. This is because the hierarchical relationship between the power conferring norms concerns the level of compliance necessitated. It is logical that the more detailed the recommendation, the more aspects require compliance. Of course, this does not say anything about the content of the recommendation, *ie* if it regards 'sensitive' aspects of economic policy. Semantically then, the power-conferring norm (article 121(2) TFEU) does not limit the detail of the recommendations ('broad' is a vague word). The limit would rather be argued from a teleological perspective, in line with the underlying principles of State sovereignty in policy areas requiring democratic legitimacy. In that regard, the German Constitutional Court has already flagged its intention to uphold parliamentary sovereignty over tax issues.[55] In my view, the (possible) unconstitutionality does not lie in the (more or less detailed) recommendations in relation to the economic development of the Member States, but in the possibility to enforce them which will be discussed below.

In accordance with the MIP-regulation, the Council may adopt decisions establishing non-compliance with a Council recommendation adopted under the EIP. Considering that the power-conferring norms in question, which are relied on as legal bases, do not stipulate Council decisions within its ranges of regulation, the Union has acted outside of its competence when adopting decisions of non-compliance. As it changes the legal position of the Member states (by holding in legally non-compliance), without their consent or dissent, the Council is exercising legal power by its adoption.[56] The decisions are also significant in that they are connected to the adoption of financial sanctions, which will be discussed below.

It has been proposed that the MIP-regulation unjustifiably, from a perspective of competence, go beyond the scope of article 121 TFEU. Hinarejos describes the introduction of the MIP-regulation as extending the surveillance and enforcement of numerical fiscal rules to the surveillance of national fiscal and economic policy choices. She argues that this 'contributes to a progressive blurring of the distinction between fiscal rules and more delicate, policy-based decisions'.[57] She further argues that the Union's competence associated with numerical fiscal rules in comparison with economic policy is much stronger, which is reasoned by the fact that numerical fiscal rules are seen as apolitical and are connected instead to the currency union (wherein the Union has exclusive competence).[58] In my view, the argument presented by Hinarejos is rather vague and the fact that the Union previously did not pursue general fiscal and economic policy does not mean that it could not legally do so. In line with what I have argued above, the Union has not acted outside its competences when adopting recommendations under the MIP. Macroeconomic policy is a more delicate policy area, and the Union admittedly has a larger discretionary power since the MIP is controlled less by numerical fiscal rules than the EDP is. However, a more credible argument has been put forth by Bieber, who described the institutional implementation of the multilateral surveillance procedure as the product of a 'dormant substantive competence' and he holds that the Union has interpreted the 'procedural power' of multilateral surveillance broadly.[59]

[55] See comments by Hinarejos (n 8) 148-149, on: BVerfG, 2 BvR 987/10 et al., Decision of 7 September 2011; BVerfG, 2 BvR 1390/12 et al., Decision of 12 September 2012.
[56] In accordance with MacCormick's theory of legal power, see MacCormick (n 19) 493 ff.
[57] Hinarejos (n 8) 71.
[58] ibid 72-73.
[59] Bieber (n 28) 92.

3.2[c] Influencing or dictating the Member States' policy choices?

In accordance with the order depicted above, the Union not only monitors the policy choices of the Member States, but also tries to influence the policy choices of the Member States (by the CSRs including the recommendations under the MIP) and in cases of economic distress in the Member States, may enforce its visions of the appropriate policy response in the Member State as per the EIP. To say that the Member States are free to form their economic and fiscal policy completely autonomously as long as they adhere to the numerical fiscal objectives is therefore not correct. Roland Bieber considers that recommendations do not to alter the allocation of powers between the Union and the Member States.[60] As I will argue herein, I am of the opposite conviction.

The relationship between the power-conferring norms of the Member State and that of the Union can be viewed on a vertical and horizontal level in accordance with Tusseau's theory. As to the vertical relationship, which regards the range of application, the Member States are by virtue of their sovereignty not limited in regard to the range of application of their economic policies. The power-conferring norms in the TFEU empowers the adoption of recommendations which, by its nature, respond to the same range of application (*ie* the economic policy within the Member State). Consequently, the power-conferring norms overlap on a horizontal level.

Moving further to the issue of the hierarchical relationship, article 121(4) TFEU states that the Member States' respective economic policies must be 'consistent with' the BEPGs. In accordance with Tusseau's theory, this would entail that the policies do not have to conform with the BEPGs, conformity being the strictest version of primacy, but must be compatible with them, which only requires 'a simple absence of conflict'. Of course, as these are 'guidelines' of 'broad' character, an absence of conflict is more easily achieved than it would be if the power-conferring norm was detailed, thus diluting the hierarchical relationship between the national and EU norms. On the other hand, the CSRs have been described as getting progressively more detailed.[61]

The language that is used in the MIP-regulation is ambiguous as to the degree of compliance between the CAP and the Council recommendations that is necessitated. It is stated that the recommended action is to be 'followed' (article 7(2)) which contrasts the language of article 8(1) that stipulates that the policy response should be 'based on' the recommendation. Following is semantically stronger; you follow an order for example. Conversely, basing an action on the recommendation only implies that the recommendation should be a starting point. Also inviting a stricter conformity is the wording of article 10(2), stipulating that non-compliance shall be established if the Member State 'has not taken the recommended corrective action'. In conclusion, the wording of the articles renders the degree of compliance needed unclear.

As for a teleological interpretation, the objective of the EIP is essentially to ensure the functionality of the EMU. In addition, an EIP must be cancelled if an imbalance no longer exists. Considering that a decision establishing non-compliance is contingent on an ongoing EIP, such a decision cannot be rendered if the EIP is cancelled. And as an EIP must be

[60] ibid.

[61] Hinarejos (n 8) 163. This development is seen by Hinarejos as one of the possible ways forward for the integration process, at the same time challenging its appropriateness, see ibid 188 ff.

cancelled following the ending of an imbalance, the fact that a Member State 'has not taken the recommended corrective action' would not justify a non-compliance decision in the event of the extinction of an imbalance. In such a situation, the action of the Member State does not even have to be compatible with the recommendation of the Council as to the measures taken, only to the effect (that is to end the imbalance and ultimately ensure the functionality of the EMU). What one can deduce is that the Member States' policy responses when they are subject to an EIP must to some degree comply with the Council's recommendation if the imbalance persists (meaning that the effect is not satisfied), and that they cannot be reprimanded if they follow those recommendations. If they do not follow the recommended action, then they must attain the effect intended with the recommended action (namely to end the imbalance) in order to avoid the risk of a decision of non-compliance.

Article 121(4) TFEU only empowers non-legally binding instruments. If one employs a concept of legal power and the relationship between power-conferring norms as I have done, the issue of whether the norm is legally binding or not is not decisive in determining the vertical or hierarchical relationship between the power-conferring norms. What this issue does affect is the accountability of the Member State. Undeniably, the absence of enforcement mechanisms has proven to be a hindrance to the compliance with the CSRs as demonstrated above. In that regard, the legal power of the Union can be seen as meaningless; the Union screaming its CSRs into a void. However, as will be noticeable from the subsequent subchapter, the interplay between hard law and soft law in the macroeconomic framework adopted after the crisis will affect this assessment. This conclusion is also modified by the introduction of the reverse QMV which will be discussed in relation to legal power in subchapter 4 of this chapter.

Lastly, I would like to clarify that stating that the recommendations are hierarchically superior to national budgets is not to be interpreted as implying anything in regard to the principle of primacy of EU law. In other words, even as I argue that there exists superiority of the CSRs in light of Tusseau's theory, I am not arguing that a national body is ought to disapply national budgetary provisions in favour of the CSRs, which the EU principle of primacy would require.

3.3 DIFFERENTIATED INTEGRATION: THE USE OF ENHANCED COOPERATION

Tuori and Tuori argues that there is an 'ongoing constitutional mutation in [the economic] field […] aimed at removing obstacles to a further differentiation of the Eurozone from the rest of the Union'[62] and Bieber has described this development as a 'shift in the substantive economic competences' from the Member States to the Union[63]. The culprit identified for this development is the use of enhanced cooperation. These scholars argue that enhanced cooperation has dramatically impacted the institutional practices of the Union in the area of economic policy.

[62] Tuori and Tuori (n 9) 171.
[63] Bieber (n 28) 93.

3.3[a] Using enhanced cooperation to further Union competences?

Above, I accounted for theories on EU constitutionalisation in which the practices of the institutions may provide insight into the nature of the competence in a certain area. With the relatively extensive use of enhanced cooperation in the area of economic policy, EU constitutionalisation in general could be regarded to enter unchartered territory. This is because, as I will argue, the Union has used enhanced cooperation in a way to further its competences.

Enhanced cooperation may be used in the non-exclusive areas of Union competences, and such cooperation 'may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties'.[64] Enhanced cooperation should be a 'last resort' when it has been 'established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole'.[65] Measures adopted by enhanced cooperation must comply with the Treaties and in general with Union law and may not 'undermine … the economic, social and territorial cohesion … between the Member States'.[66] It must also 'respect the competences, rights and obligations of those Member States which do not participate in it'[67] and all Member States must be able to join at all times[68].

To note is that the reach of article 136(1) TFEU (which empowers enhanced cooperation in the Euro Area) has not yet been subjected to judicial review. In fact, since enhanced cooperation before the Lisbon treaty usually took place outside the scope of the Treaties, the Court's jurisdiction was curtailed with the effect that the nature in general of this mechanism is rather unexamined.[69] In that regard, it has been pointed out that the 'constitutional scope' of enhanced cooperation remains unclear.[70]

Tuori and Tuori argues that the wording of article 136 (1) TFEU implies that not only the procedure but also the substance of articles 121 and 126 TFEU must be respected. By that logic, they question the constitutionality of the power to impose financial sanctions, the monitoring of annual budgets, and the recourse to reverse QMV. Furthermore, they reason that the principle of conferral motivates a limit to the extension possible by enhanced cooperation, stating that: 'If, however, creating new competence for EU institutions for strengthening coordination and surveillance of euro states' budgetary discipline were allowed, it is difficult to see how the limits of such competences should be defined'.[71]

Conversely, Piris argues that the scope of article 136 TFEU is 'extremely wide', focusing instead on the broad language used in the article ('strengthening the coordination

[64] Article 20(3) TEU.
[65] Article 20(2) TEU.
[66] Article 326 TFEU.
[67] Article 327 TFEU.
[68] Article 328(1) TFEU.
[69] Ester Hernil-Karnell, 'Enhanced cooperation and conflicting values: are new forms of governance the same as 'good governance'?' in Martin Trybus and Luca Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar 2012), 149.
[70] Federico Fabbrini, 'Enhanced Cooperation under Scrutiny: Revisiting the Law and Practice of Multi-Speed Integration in Light of the First Involvement of the EU Judiciary', (2013) Legal Issues of Economic Integration 40(3), 197, 198 ff.
[71] Tuori and Tuori (n 9) 170 ff.

and surveillance' and 'setting out policy guidelines'), which are conditions he argues a broad array of measures could meet.[72]

With such a divided academic background, I will embark on forming my own conclusion on the basis of Tusseau's theory on power-conferring norms. In line with the argumentation below, my conclusion will parallel Tuori's and Tuori's assessment rather than Piris'.

The Enforcement-regulation provides for the use of fines and deposits adopted by a Council decision on the basis of a recommendation by the Commission by reverse QMV. The legal bases of the Enforcement-regulation are articles 121(6) TFEU and 136 TFEU. However, as I explained above, the range of application of article 121(6) TFEU s connected to articles 121(3) and 121 (4) TFEU. Article 121(4) TFEU only provides for the use of a recommendation as a sanction for inconsistency with the BEPG or in the event of a 'risk of jeopardising the proper functioning' of the EMU, and such a recommendation is to be adopted on the basis of a normal QMV.

Firstly, the regulation provides for the adoption of a decision as opposed to a recommendation. These are two different instruments, and especially, a decision is legally binding whilst a recommendation is not (article 288 TFEU). Thus, the Union has not acted within its range of regulation when providing for a decision instead of a recommendation. Secondly, article 121(4) TFUE limits the procedure to normal QMV, but the regulation stipulates reverse QMV. Therefore, the Union has not complied with the power-conferring norms also in regard to the procedure.

The question is then if article 136 TFEU could provide for the adoption of a decision based on reverse QMV. The provision provides for the adoption of 'measures' which is a broad term that could include decisions. However, the article also states that the Council shall act 'in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14)'. As for the wording in the article, I hold that the measures to enhance cooperation are to be in accordance with the relevant procedure in articles 121 and 126 TFEU. As such, enhanced cooperation relating to article 121(6) TFEU must then comply with the procedure set out therein. With procedure, it is contextually logical to be referring to the procedure of adoption of a measure. For article 121(6) TFEU then, that would entail a procedure of normal QMV when adopting recommendations on the basis of article 121(4) TFEU and the OLP when adopting procedural rules on the multilateral surveillance in the form of regulations. On the other hand, it could be argued that the range of regulation is not identical to procedure, and thus, the wording of article 136 TFEU does not limit the range of regulation in the same way as it limits the procedure. That would mean that article 136 would, for example, open for the competence to adopt a decision instead of a recommendation. Furthermore, such an interpretation would enable other actors to be empowered, for example, expanding the power of the Commission beyond the use of a warning. If one employs such an interpretation, the empowerment of the Council by the Enforcement-regulation to adopt fines and deposits is not contrary to its conferred powers since article 136 TFEU only limits the procedure (being a QMV). Perhaps the fact that article 136 TFEU provides for a 'strengthen' coordination and surveillance is the reason why the article has undoubtedly been

[72] Jean-Claude Piris, *The Future of Europe – Towards a Two-Speed EU?* (Cambridge University Press 2011), 107.

interpreted so broadly by the Union legislator. The language is ambiguous; introducing the legal power to adopt financial sanctions by Council decisions does strengthen framework. This was also the express purpose of the financial sanctions; the Union was unhappy with the level of compliance.

A teleological interpretation would have to incorporate the purpose behind enhanced cooperation, namely that 'objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole'. Seemingly, it regards political unwillingness of certain Member States to further integration rather than bypassing legal conditions.[73] Such an interpretation of the objective underscores that the legal power of the Union is not governed by provisions of enhanced cooperation, as those provisions only facilitate power-in-fact. In light of this, the use of the word 'procedure' in article 136 TFEU even in combination with the aim at strengthening surveillance and coordination would not refer to procedure in a strict sense. Procedure, instead, would mean all the conditions laid down in articles 121 and 126 TFEU.

Thus, I conclude that it would not be allowed to change the empowered actor(s), the procedure, the range of regulation or the range of application.

Furthermore, the intended consequence of the enhanced cooperation is clearly to enhance the efficiency of the framework.[74] This is compatible with the 'strengthening' of the multilateral surveillance procedure semantically provided by article 136 TFEU. However, every centralized measure could be regarded to strengthen surveillance, which would give a free-pass for the Union to adopt ever more intrusive measures. In light of the principle of conferral, integrated into the Treaties, of which the aim is to delimit the Union's competences, such an interpretation is counter to the purpose of the principle.

Consequently, as the Enforcement-regulation, which is based on article 121(6) TFEU in combination with article 136 TFEU, provides for the adopting of financial sanctions by a Council decision by reverse QMV, it is doubtful that it is compatible with the competence of the Union as conferred by these provisions. The problem is then, not that it provides for the adoption of financial sanctions, which is not countering to ensuring consistency with the BEPG or to avoid risks of jeopardising the functionality of the EMU, which would be the material criterion. Instead, the problem lies with the range of regulation and the procedure stipulated by the relevant power-conferring norms.

3.3.[b] Reconciling cohesion in a differentiated economic landscape

It has been visible in the explication of the economic and fiscal framework in the Union that much of the legislation adopted would not have been possible without the possibility of enhanced cooperation. Emerging is a landscape of economic policy wherein the rules for the Euro States and the rest of the Member States are increasingly different. As a reminder, 19 of the 28 Member States (including the UK at the moment) are part of the Eurozone. 6 Member States are not currently part of the Eurozone but are obligated to join once they

[73] See also Fabbrini (n 70) 203.
[74] See for example Regulation (EU) No 1174/2011 (n 32), para 20.

meet the criteria. The UK and Denmark have a derogation under the Treaty, and Sweden has a de facto opt-out.[75]

EU constitutionalism have traditionally been centred around the idea of an 'ever closer Union'[76] depending on unity. The nature of enhanced cooperation opposes this as it is based on differentiation. The assumption previously was that the legal threshold for applicability of enhanced cooperation was high, which was perceived as a sign of aversion to differentiation.[77] A possible explanation for the successful use of enhanced cooperation in recent years, successful as it has de facto been used whereas enhanced cooperation had never been put into practise prior to 2010,[78] is that the EU now has competence in 'sensitive policy areas'[79] which economic policy is usually considered to be. In other words, the need for enhanced cooperation might be less prominent in areas in which the Member States are more likely to agree on, thus not resulting in a 'last resort' situation.

I already proposed that enhanced cooperation opposes Member State unity, but what do I base this assumption on?

On the one hand, Deirdre M. Curtin and Ige F. Dekker argue that the possibility provided by enhanced cooperation for the EMU to create a 'legal sub-system' does not in itself threaten the unity of the Union as long as the legal practices are governed by common EU principles, objectives and concepts. Of particular importance in this regard they hold the principle of coherence[80] which they describe as the objective that:

> The different parts of a legal order are connected by common basic legal concepts uniting competing and sometimes even contradictory of such basic legal concepts used in the different legal sub-systems of the legal institution.[81]

In this case then, the EMU and the periphery must be connected by common basic legal concepts which unite the competing or contradictory basic legal concepts of the two systems. In this regard, all of the Member States have to regard their economic policies as a matter of common concern and coordinate them within the EU framework. The objectives as stated in articles 119 and 120 TFEU are also common to all Member States. In fact, also the proper functioning of the EMU is a common objective as it is a protected interest in article 121(4) TFEU.[82]

On the other hand, in the field of divorce wherein enhanced cooperation was first used, Jan-Jaap Kuipers expressed concern that enhanced cooperation used to tame a controversial issue in substance may 'not lead to a two-speed Europe, but rather push Europe

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[75] Francis Snyder, 'EMU - Integration and Differentiation: Metaphor for European Union' in Paul Craig and Gráinne de Búrca (eds), *The evolution of EU law'* (2nd edn, Oxford University Press 2011), 703.
[76] See the preamble of both the TEU and the TFEU which feature this term.
[77] Matej Avbelj, 'Differentiated Integration - Farewell to the EU-27' (2013) German Law Journal 14(1) 191, 201.
[78] ibid 200.
[79] ibid 201 ff.
[80] Deirdre M. Curtin and Ige F. Dekker, 'The European Union from Maastricht to Lisbon: Institutional and Legal Unity out of the Shadows' in Paul Craig and Gráinne de Búrca (eds), *The evolution of EU law* (2nd edn, Oxford University Press 2011), 173.
[81] ibid 158.
[82] See a discussion on the proper functioning of the EMU as a protected interest in chapter 3.6 below.

into two directions'.[83] In that regard, Fabbrini has argued that enhanced cooperation may only be used if the Member States wish to proceed with integration in a new policy area. He expresses concern that the opposite use would:

> […] in fact ... not serve the goal of furthering the process of EU integration but would rather allow a group of states to unilaterally impose its position in circumvention of the EU decision-making procedure, with potentially damaging effects on the integrity of EU law.[84]

Federico Fabbrini argues that the requirement that enhanced cooperation does not affect the non-participating States, entails that the production of it may not bind those states or become a part of the Union acquis[85] The aim with the enhanced cooperation in relation to the macroeconomic framework is to make that framework effective. In that regard, the measures themselves are not adverse in relation to non-participating Member States. On the other hand, concerns have been voiced as to the emergence of a euro area 'core', in which the Eurozone countries, deeper integrated, would display 'dominant political influence within the European Council and acting as a powerful legal block also within the Council'.[86] This is especially delicate in regard to the EIP in which only a majority against an opening of an EIP or the establishing of non-compliance is needed.

It might still be too early to determine the long-term effects of the differentiation of the Eurozone States. The framework is quite young, and the most intrusive measures, namely financial sanctions, are at this point unused. In what ways the differentiation might affect the allocation of power not only between the Union and the Member States in general, but internally between the Eurozone and the non-Eurozone states, are probably going to be further discussed in the future. For now, I claim it suffices to determine that there are concerns about the differentiation in the field of economic policy.

3.4 INTRODUCING ACCOUNTABILITY: ENFORCEMENT MECHANISMS

The economic and fiscal framework prior to the adoption of the six-pack in response to the crisis was considered too ineffective. Therefore, the six-pack introduced and made more effective financial sanctions in this area.[87] The possibility for EU to enforce its powers on the Member States is another layer of the relationship between the two legal orders.

3.4[a] The nature of recommendations

The Treaty recognizes that the Union is exercising competence when its adopting directives, regulations, decisions, recommendations and opinions (article 288 TFEU). The same article stipulates that directives, regulations and decisions are legally binding. The legal effect of recommendations and opinions are however not provided for. Generally, recommendations

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[83] Jan-Jaap Kuipers, 'The Law Applicable to Divorce as a Test Ground for Enhanced Cooperation' (2012) European Law Journal 18(2) 201, 213.
[84] Fabbrini (n 67) 208.
[85] ibid 203.
[86] 'What do we want? Flexibility! Sort of … When do we want it? Now! Maybe…' (Editorial Comments). (2013) Common Market Law Review 50(3) 673, 680.
[87] European Commission, EU Economic governance "Six-Pack" enters into force, MEMO/11/898 (n 7).

are attributed the group soft law instruments, which are distinguished from hard law instruments.[88] As for the distinction between hard law and soft law, Fabien Terpan argues that the categorization of an instrument depends both on the existence of an obligation and its enforcement. Enforcement is key to understanding how the norm intends to ensure that the obligation is fulfilled or that the assigned goal is achieved.[89] Terpan maintains that '[p]rogrammes, general guidelines and objectives cannot be any more than weak forms of obligations'. The reasons he provides are that the Member States do not commit to achieving specific objectives, that they are not transposable to national law or directly applicable, and that they must only be 'taken into account' by the national authorities.[90] The responses to the euro area crisis in the form of adopted measures lies at the heart of the debate on hard law and soft law in the EU legal order.

The CSRs cover substantive economic policy, and even as their precision vary thus far, the constitutional limit of this precision is not clear. This is especially the case considering that the CSRs combine recommendations based on several different instruments. Even as the BEPGs are supposed to be 'broad' in accordance with article 121(2) TFEU, recommendations may also be directed on the basis of article 121(4) TFEU for which no such limit is posed.

It is possible to delve deeper into the impacts of recommendations as a union instrument, however, I will stop short of such a dive in consideration of the recommendations' interaction with decisions in the context of macroeconomic governance, discussed below.

3.4[b] Freedom conditioned on economic health

Financial sanctions in the EIP are connected to an event of non-compliance with a Council recommendation. As the Member States cannot produce Council recommendations, they have not 'given up' a power they previously possessed. The competences of the Union versus the Member States are thus not overlapping. This is in contrast to the CSRs, where the Member States have 'given up' their power to autonomously decide their economic policies. The financial sanctions, I would argue, do not in themselves change the allocation of power between the Member States and the Union from a legal perspective. A financial sanction does not implicate the hierarchical relationship between Union law and national law; if Union law in a certain field is considered superior to national law, the absence of financial sanctions does not change that. The reason the question of hierarchy is not relevant is because, as I stated, there is no overlap of competences; there is no division of the ranges of application between the power of the member States and the Union since the Member States do not possess this power at all.

Kenneth Armstrong's hybrid form of 'new governance'; hybridity between rules based and coordination-based governance; is attaining to explicate how instruments and modes of governance are utilized in a new way to optimize governance capacity. In the new governance

[88] I have relied on the distinction and explanation of soft law and hard law made by Terpan in Fabien Terpan, 'Soft Law in the European Union—The Changing Nature of EU Law' (2015) European Law Journal 21(1) 68, 70 ff.
[89] ibid 72-73.
[90] ibid 81.

system, the initial recommendations, which are a token of the soft Open method of coordination ('OMC') and a coordination-based governance, can result in decisions of non-compliance and even sanctions in the form of fines, which in contrast are characteristics of rules-based governance.[91] Thus, Armstrong describes an interplay between rules-based and coordination-based governance in fiscal governance related to the SGP which 'erodes the dichotomous relationship between the 'hard' sanctions of the EDP and the 'soft' persuasion of economic policy coordination'.[92] I argue the same can be said for the EIP. In constitutional terms, the recommendations under the EIP are not legally binding per se as their source is a non-legally binding instrument. However, as non-compliance with a recommendation ('not taken the recommended action') may result in financial sanctions, the recommendations are connected to an enforcement mechanism. Even though, as I argued, the financial sanctions themselves do not influence the hierarchical relationship between the norms of the two legal orders, the consent or dissent needed of the Member States to the sanctions is affected. The Member States' possibility to consent/dissent, not only to the introduction of an obligation to take the recommendations into consideration, but to actually implement the recommendation is decreased. If the (Euro Area) Member State dissents to take the recommended action under an EIP, a decision establishing non-compliance may be accompanied by financial sanctions. This is a system designed to make effective the framework, to decrease the level of dissent.

Following this line of thought, the recommendations should be regarded as legally binding under an EIP regardless of their formal form (recommendations are not legally binding), because not complying with them may result in financial sanctions. The insertion of a Council decision (ie formally legally binding) establishing non-compliance is perhaps reasoned by the fact that it would be hard to swallow financial sanctions on the basis of a formally non-legally binding instrument. The decisions therefore work as a conversion instrument in regard to enforcement. However, the Union lacks competence in accordance with the chosen legal basis to adopt decisions, in accordance with the line of argument presented in the previous chapter. Even as it may be argued that financial sanctions are based on enhanced cooperation, the EIP may be launched also in relation to a non-euro area Member State, a situation wherein article 136 TFEU is not applicable. The decision itself establishing non-compliance is therefore not complying with the power-conferring norm of which its empowerment rests on.

Concerning the issue of accountability, Armstrong highlights the inadequacy of attributing the traditional accountability method to this new form of governance, as the actors in the new form are the Commission (initiating) and the Council (recommending/deciding) whereas the old method heavily involved the Court in the form of infringement actions. Secondly, he highlights how financial sanctions are, albeit connected to benchmarks (*eg* the medium-term objectives in relation to the SGP, the indicators in the scoreboard in relation to the MIP-regulation) but the decisions of non-compliance rest on discretionary evaluations in which the Commission may base its action on evaluations differing from that of the Member States. These evaluations rely on the gathering of data as

[91] Kenneth Armstrong, 'The New Governance of EU Fiscal Discipline' (2013) European Law Review 38(5) 601, 609 ff.
[92] ibid 612.

a part of the multilateral surveillance procedure which is now embedded in the European Semester, in other words, as a part of the coordination efforts. Thus, the rules-based governance associated with the sanctions regime is operating within a coordination-based governance 'in a hybrid structure'.[93] As regards this discretionary power, not only does the Commission decide which factors are a part of the scoreboard but also, the broad definitions of an imbalance and an excessive imbalance make the establishing thereof sensitive to discretionary evaluation. This discretionary power in relation to establishing an imbalance or excessive imbalance also affect the allocation of powers in a centralize-friendly way, considering that it opens the possibility of enforcing the norms produced by the Union.

In summary, financial sanctions which are provided for in the Enforcement-regulation do not do not relate horizontally to a Member State's power-conferring norm. However, they operate as a form of enforcement mechanism for the legal power exercised by the Union in the macroeconomic framework in relation to the otherwise non-legally binding recommendations.

Bieber argues that 'the autonomy of the Member States in [the economic policy] area exists only to the extent that the criteria established by the Union are met'.[94] The opening of an EIP could be attributed that description. Under the EIP, the Union may consider most areas of economic policies of a Member States and recommend policy response to which the Member State must comply with in order to guarantee absence of financial sanctions. Thus, when a Member State is experiencing macroeconomic imbalances, the Member State's leeway for action will be limited considering that the Union may then produce norms which affect the Member States' power to act autonomously in the policy area.

3.4[c] Briefly on the compliance research

As already mentioned, the pre-crisis framework was considered ineffective which was partly reasoned by the low-level of compliance with the SGP. The reformation in 2011 introduced financial sanctions, which might be a sign that the OMC did not deliver a level of compliance needed especially during the crisis. Which was explained above, the macroeconomic framework contains enforcement mechanisms different from those generally associated with the OMC. The purpose of the article is not to examine the national implementation of the Union's recommendations, which would also consider the allocation of power that has taken place in practice. The national implementation would enrich the discussion on how much the Union's exercise of its competence affects the competences of the Member States. However, such an endeavour would be too comprehensive for the present article and I find it sufficient to provide a brief insight into the research on this issue.

The internal institutional research on the national compliance with the CSRs have demonstrated that most CSRs receive 'limited' or 'some' progress. However, the researchers clarify that it is difficult to quantify qualitative assessments in this regard. The level of detail and quantity of recommendations differ in relation to the severity of the economic situation in the Member State. Moreover, many of the recommendations relate to long-term challenges and thus requires substantial institutional and structural reform, which might be difficult to account for when looking at a time span of implementation of less than a year (which was

[93] ibid 612-613.
[94] Bieber (n 28) 92.

the case in this study). The researchers also draw attention to the fact that the Commission *in dubio* attributed the progress to a lower category. In relation to policy areas, implementation was highest for the sector of financial and public finances reforms. Lowest implementation was been noted for tax reforms.[95] External research also points to a low degree of compliance with the CSRs, being a bit more pessimistic than the internal research. In particular, a problem identified with the 2015 CSRs was an inconsistency between the Euro Area recommendations and the CSRs.[96]

However, the strengthening of fiscal and economic surveillance is still relatively young which might impact the conclusions that can be drawn of the effectiveness of the legislation. Additionally, the EIP has not yet been launched, which might also affect the assessment of effectiveness.

3.5 THE FACE BEHIND CHANGE: ACTORS OF INTEGRATION

The question of the allocation of power between the Member States and the Union inevitably involves the topic of which kind of entity the EU is. The EU model is constructed as to accommodate the interests of three distinct groups, namely: the citizens through the European Parliament; the sovereign states through the Council; the supra-national through the Commission. This model is built rather on the idea of separation of interest than separation of power.[97] In this regard, it has been noted that an intergovernmental decision-making structure would typically entail consensus by the Member State; in constitutional terms, require unanimous voting in the Council. Conversely, a supranational structure is at hand when the Union is acting independently in a federal-like relationship vis-à-vis the national governments. Such an arrangement would be facilitated by majority voting in the Council.[98] Therefore, inter-institutional distribution of power has an impact, not only internally but also on the distribution of power between the Member States and the Union. On that background, it is important to keep the makeup of the actors involved in mind when assessing the allocation of power between the Member States and the Union. More specifically, where unanimity in the Council is required, power cannot be exercised to the dissent of a Member State as it is able to block that exercise by their vote. Conversely, where binding measures are adopted by the Commission or where a judgement is made by the Court, the exercise of power is supranational in nature since the Member States do not have representatives therein that act on their behalf.

3.5[a] The empowerment of the Commission

The MIP-regulation is legally based on article 121(6) TFEU. The multilateral surveillance procedure entails that recommendations in response to an inconsistency with a BEPG or in

[95] Servaas Deroose and Jörn Griesse, 'Implementing economic reforms – are EU Member States responding to European Semester recommendations?', (ECFIN Economic Brief Issue 37/October 2014).
[96] Zsolt Darvas and Álvaro Leandro, 'The limitations of policy coordination in the euro area under the European Semester' (Bruegel Policy Contribution Issue 2015/19 2015), 6 ff.
[97] See Giandomenico Majone, 'The Community Method' in *Dilemmas of European Integration*, (Oxford University Press 2005).
[98] Stephen C. Sieberson, 'Inching toward EU Supranationalism - Qualified Majority Voting and Unanimity under the Treaty of Lisbon' (2010) Virginia Journal International Law 50(4) 919, 923.

the risk of jeopardizing the functionality of the EMU are to be taken by a QMV in the Council. Article 121(4) TFEU does in that regard not deviate from the general rule stipulated in article 16(3) TEU. In consideration of Tusseau's theory, article 121(6) TFEU in combination with the other subparagraphs of article 121 TFEU setting out the multilateral surveillance procedure are the power-conferring norms of which the normative production must comply with.

The MIP-regulation stipulates that a Council decision establishing non-compliance is decided by reverse QMV. In other words, the Union has overstepped its conferred competence by stipulating that a decision can be taken by reverse QMV. It is a very blatant overstep, as in contrast to the financial sanctions, one cannot argue justification by reference to article 136 TFEU. This article is not the legal basis for the MIP-regulation, and the decisions can be taken in regard to all Member States. Taking the Union's recommended action was previously subjected to a soft obligation source (CSRs). The Union legislator has thereby introduced legally binding instruments in the multilateral surveillance procedure.

3.5[b] Unpoliticized policy steering

The reverse QMV procedure is a new installation as per the Six-pack. The reverse QMV works – unsurprisingly – in the same manner as a QMV but in reverse. What has been said about a (normal) QMV as regards its supranational nature, is even more true for its reflection, the reverse QMV. A switch from unanimity to QMV removes a veto-power for the Member States, but a switch from (normal) QMV to reverse QMV results in loss for the Member States of their option of political bargaining. The introduction of the reverse QMV has been described as '[freeing] the application of technical rules on fiscal discipline from political interference'.[99] This is due to the fact that, really, only a minority is needed to adopt the Commission's recommendation because only a qualified majority may 'stop' the Council recommendations from being adopted. The recommendations are in that regard practically automatically adopted.[100] The difference with a (normal) QMV is that a Council majority actively had to endorse the recommendation. AS regards legal power, the strength of a Member State's dissent, or its possibility to influence the likelihood that the power will be exercised regardless of its consent, is therefore considerably impaired by the reverse QMV procedure.

The recourse to a supranational actor rather than an intergovernmental actor is by itself then important for the allocation of power between the Member States and the Union. The Commission is given a role in the multilateral surveillance procedure as per the Treaty and is present in many situations in the legal framework. So why shed particular light on the issue of reverse QMV? The reverse QMV in this context is stipulated for the decision establishing non-compliance of a Council recommendation in an EIP, which relate to both Euro Area and non-Euro Area Member States, and for imposing financial sanctions in an EIP, which is only possibly for Euro Area Member States. The ability to impose financial sanctions is also a weapon of enforcement. This creates a combination of an enforcement mechanism of which the operator is, by and large, a supranational actor. The reason of this combination is

[99] Lenaerts (n 28) 764.
[100] Luca De Lucia, 'The Rationale of Economics and Law in the Aftermath of the Crisis: A Lesson from Michel Foucault' (2016) European Constitutional Law Review 12(3) 445, 448.

visible from the history of enforcement of fiscal discipline. Not only did a lack of enforcement mechanisms exist, but the EDP was a last resort for fiscal discipline and the only enforcement mechanisms for the recommendations based on article 121 TFEU were monitoring and peer pressure. Additionally, the actor empowered to use these enforcement mechanisms were the Council acting by (normal) QMV, which evidently lead to a scenario in which politics ruled rather than upholding the rule of law.[101]

It is quite clear from the systematics of article 121 TFEU that the Council has a central role. It is the Council that adopts the BEPGs, that directs recommended policy action in the event of inconsistency with the BEPGs or when there is a risk to the proper functioning of the EMU. The Commission on the other hand, is set to report to the Council on its surveillance, and in that role also receive information from the Member States (although it may also address warnings to the Member States).

The idea, as discussed above, was that the actor in the economic constitution would be intergovernmental to ensure a high level of State sovereignty. However, when considering secondary law, the reverse QMV has shifted this intra-institutional power balance which in turn shifts the allocation of power between the Member States and the Union.

3.6 THE OBJECTIVES OF MACROECONOMIC GOVERNANCE: SAVING THE EMU

The last dimension of this legal excel spreadsheet is that of the objectives of the EU's macroeconomic governance. As was argued above, the objectives of economic policy relate to EU competences as they are functional thereto. In other words, these objectives are a part of the EU's competence in macroeconomic policy.

3.6[a] The main rationale for supranational surveillance

In terms of Tusseau's theory, the objectives can be perceived as relating to the range of application in that there exists a material criterion that the normative production seeks to attain certain objectives. Wherein the normative production of a power-conferring norm fails to seek those objectives, it would not be within the competences conferred on the actor as per that norm.

In a Commission Communication regarding the MIP, the Commission states that:

> The main rationale for a supra-national surveillance mandate builds on the fact that macroeconomic imbalances and economic policies in one country have relevance also for other Member States. This is due not only to the fact that in highly integrated economic areas economic developments in one country spill over to other countries, but also to the fact that, if left unaddressed, macroeconomic imbalances may compromise the proper functioning of the monetary union and the common policies and institutions of the Union, such as the Single Market.[102]

[101] Ermot Hodson, *Governing the Euro Area in good times and bad*, (Oxford Scholarship Online 2012), 79 ff.
[102] European Commission, 'The Macroeconomic Imbalance Procedure Rationale, Process, Application: A Compendium' (Institutional Paper 039, 17.11.2016), 7.

By extension, the proper functioning of the EMU (and the interconnection between the economic developments of the Member States) is identified by the Commission as 'the main rationale' for the Commission's competence of surveillance.

The proper functioning of the EMU is not one of the objectives set by article 119 TFEU. Article 119(3) TFEU identifies the following as 'guiding principles' of the Union and Member State action in economic policy: 'stable prices, sound public finances and monetary conditions and a sustainable balance of payments'. The proper functioning of the EMU is thus not explicitly set as a 'guiding principle' by the Treaty, but it is referred to in article 121(4) TFEU as a reason for EU intervention. By a teleological interpretation then, article 121(4) makes the proper functioning of the EMU a protected interested.

Article 136(1) TFEU also establishes the proper functioning of the EMU as the rationale for the recourse to enhanced cooperation. In that regard, the preamble (para 1) of regulation 1173/2011[103], that is the regulation enabling financial sanctions in relation to the SGP, states that: '… [the] budgetary policies [of the Member States] are guided by the need for sound public finances and that their economic policies do not risk jeopardising the proper functioning of economic and monetary union'.

Hence, the preamble places the proper functioning of the EMU and sound public finances on a par, even as only the latter is expressly a guiding principle in economic policy.

Considering that the proper functioning of the EMU is set as a protected interest by the TFEU, that it is used as a rationale for the MIP-regulation and that Regulation 1173/2011 treats the proper functioning of the EMU as a guiding principle, it can be said to be an objective of macroeconomic governance.

3.6[b] Understanding the Proper Functioning of the EMU as an Overriding Objective

The expressed basis for the strengthening of Union (especially, Commission) surveillance of macroeconomic policy is, in accordance with the above, the proper functioning of the EMU. That the EMU functions properly can be understood from a concept of solidarity. In a negative sense, the solidary behaviour, heeding to the EU guidance, is in this concept confined to the 'self' but contributes to the interest of the whole *ie* the EMU. In a positive sense, the Member State would act to benefit the other members of the group, *ie* the other Member States. As to the motivation behind the solidary behaviour, it could act by a normative solidary motivation, wherein the motivator is the common good of the group. Conversely, factual solidarity exists when the group experiences interdependence and solidarity is therefore implicit.[104]

Translated to the context of macroeconomic governance[105], the Commission identifies a factual solidarity, namely the spill-over effect for which the economic development in one country is perceived to influence others. But appealing to the proper functioning of the EMU is arguing for normative solidarity, in other words, the EMU is the group of which the Member States forms a part, and its 'proper functioning' is the common good. As to the

[103] Regulation (EU) No 1173/2011 (n 47).
[104] See Borger's concept of solidarity in Vestert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) European Constitutional Law Review 9(1) 7, 9-11.
[105] Note that Borger analyses EU economic governance in light of the solidarity concept he has created, but does not develop on the MIP-regulation.

behaviour of the Member States, heeding to the EU guidance is mainly confined to the self, *ie* exhibits negative solidarity. The Member States are to pursue its own fiscal soundness (follow the recommended policy action) which will ensure solidarity, *ie* that the EMU functions properly (normative) and to avoid adverse spill-over effect (factual).

Contrariwise to the concept of solidarity, EU has been described as a (rather maleficent) besserwisser, exercising authoritarian power by use of an emergency law rationale. In this regard, Somek has paralleled (ironically): '[a]s is well known, intoxicated persons are not only severely impaired in their driving skills, but also incapable of recognising their impairment'.[106] In other words, the author perceives the Union to reason its economic governance in terms of being better equipped than the Member States to make judgements. Translated into the macroeconomic framework, Member States experiencing economic distress (the intoxicated) are, seemingly evidently, not equipped with the financial intellect to regard its own impairment, thus in need of the (sober) EU (unwanted, but necessary) guidance. The EU economic 'permanent and systematic interference with national competence' is regarded by Somek as an expression of authoritarianism, albeit not of outright repression.[107] The proper functioning of the EMU is in this view a rationale invoked, and its nature determined, by the Union in order to ex post explain that it had the competence to adopt the measures.

Considering that objectives are functional to competencies, and not the other way around, the EU does not have the competences needed to attain the objective, instead, by the limit of the principle of conferral, only the competences which have been conferred may be used to attain the objective. This entail that, even as for example the use of financial sanctions may dissuade action which would risk the proper functioning of the EMU (*ie* attain the objective), it could only be used if the Union has been conferred such a competence. However, as stipulated in article 121(4) TFEU, the Union is conferred a competence to preserve the smooth functioning of the EMU. Thus, there is no clear cut between the objective and the competence to preserve proper functioning of the EMU.

Whether or not one categorizes this as an objective or as a competence, the Member States have given up their power to autonomously set the objectives of economic policy. More and more, the secondary law adopted by the Union hammers the functionality of the EMU as its justification and goal, making it now not only an abstract vision, but a form of power that is difficult to question. On that note, 'a huge simplification of values has taken place, since certain economic objectives must prevail over all other values'.[108] The implementation of this, now, overriding objective is insensitive to political bargaining due to the reverse QMV, in fact then decided by the Commission. Moreover, as the framework of economic policy is now moving towards evaluation-oriented governance, in that steering the actions of Member States rest on the evaluation of their economic performance rather than their compliance with certain norms[109], the importance of this overriding objective is further strengthened. The Union may evaluate the economic performance of the Member State in light of the overriding objective.

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[106] Somek (n 5) 354.
[107] ibid 340 ff.
[108] De Lucia (n 100) 455.
[109] ibid.

On the other hand, the constitutional scope of the framework only allows the Union to try to coordinate policies, albeit through enforcement measures in the direst circumstances, in light of the interest of the Union (that is, the smooth functioning of the EMU), but the Union cannot implement policies on a supranational level.

4 A FEDERAL PATTERN

To reiterate, the purpose of the article is to discern a pattern of federalism and to offer an explanation as to why, on a broader note of EU constitutionalism, this development has mostly been characterized by centralization.

4.1 SNAPSHOT OF THE ECONOMIC CONSTITUTION: THE INSTITUTIONAL PRACTICE AND ITS DIRECTION

A first conclusion on the presentation above and comparing the pre- and post-crisis exercises of competence is that the Union has ventured into a new area – that is, macroeconomic governance. The direction of institutional practices has in that regarded meant an expansion of the substantive areas in which the Union exercises its competence. Macroeconomic policy was in my view foreseen as an area of Union competence as per the Treaty provisions, but the MIP-regulation is the first legislative act directly aimed at governing macroeconomic policy.

Secondly, the use of soft law, namely recommendations initiated by the Commission and adopted by the Council, is also inherent in primary law. In my opinion, the constitutional frame allows for the level of detail, what could be perceived as the level of intrusiveness, of the recommendations to increase. [110] The reason thereto is that article 121(4) TFEU does not put a cap on the level of detail. On the other hand, the underlying principle behind the allocation of power between the Union and the Member States in this regard is to protect state sovereignty in matters requiring democratic legitimacy and control. On that note, even as the recommendations may become increasingly detailed, recommendations under the MIP or the EIP may only reason to protect the proper functioning of the EMU rather than to directly relate to a Union stance on redistributive justice. As was articulated by Hinarejos, the fuller surveillance model of future integration would entail specific recommended action which the Union may enforce.[111] I agree with her that we are in the initial phase of this model. Because I argue that there is no cap on the level of detail of the recommended corrective action, which is enforceable through financial sanctions, the possibilities of reaching that model completely are in theory existing.

On a broader note, what can be said on the nature of macroeconomic coordination? Tusseau highlighted the vulnerability of using vague language, which would make redundant a semantic interpretation of 'providing arrangements' as article 2(3) TFEU foresees. Looking at the normative production of article 121 TFEU, in particular the CSRs and the MIP-regulation, I argue that the Union is acting on a spectrum between providing arrangements and legislating economic policy. On the one hand, it is not merely providing arrangements

[110] Note again, that this considers only Tusseay's theory of power-conferring norms and not, for example, the principles of subsidiarity and proportionality.
[111] See Hinarejos (n 8) 181 ff.

as the secondary legislation enables enforcement of recommended policy action. In that regard, the Union will require policy response to decrease an imbalance which is defined in part in relation to the proper functioning of the EMU. That means that the Union has the possibility to enforce their view on sound fiscal and economic policies in light of the interests of the Union. On the other hand, such policy interference is only possible in a particular situation, that is under the existence of macroeconomic imbalances. This limitation to the Union's possibility to act is clearly very different from the sovereign nation state's unlimited possibility to pursue its own economic agenda. However, as it is the Union who establishes the existence of an excessive imbalance, for which the definition is broad and sensitive to discretionary evaluation, the centralization of legal power is theoretically strong. In other words, there is a theoretical distribution of power characterized as more federal-like in the sense that the macroeconomic power is centralized to the Union's intergovernmental and supranational institutions. If this possibility is seized and whether it will be met by obedience by the Member States or if they will challenge the exercise of Union power is a question for the future.

On the analysis presented in chapter 3, I argue that the direction of the Union's practices is in theory characterized by general deeper integration on substantive macroeconomic issues but differentiated integration in relation to enforcement. By theory I refer to the competences exercised by secondary law which should be opposed to the practice in terms of whether and how the Union decides to make use of those competences. The direction of the practices in the sense of legislation but not necessarily implementation is moving towards hard enforcement. This is evidenced by the interplay between hard and soft law, which entails that soft law instruments (recommendations) are enforceable by use of, or at least threat of, financial sanctions (hard law). Additionally, the increased importance of the role of the Commission results in a step towards Member State accountability for compliance with the EU macroeconomic framework. However, as I have already mentioned, the Commission has consistently established the existence of macroeconomic imbalances and even those of excessive nature, but the Commission has never recommended opening an EIP. Additionally, the research shows that adherence to the CSRs is seldom high, mostly scoring as 'limited' or 'some' progress (towards compliance).

4.2 THE EVOLUTIONARY ECONOMIC CONSTITUTION – UNDERLYING CAUSES

The second question posed by de Búrca was why integration is strengthened despite so much resistance. The deepening of integration has been seen in most policy areas in the history of the EU project, and I am optimistic that I have shown that these broad brushstrokes can also be used to paint the picture of the governance of EU macroeconomic policy. As for the reasons the centralization is accepted, in the sense that the frameworks are adopted, I believe that there are many possible answers which lie outside the frame of the article. However, I will propose some explanations based on what has been discussed above.

I would argue that one possible culprit in this plot is the vagueness of the expressed limits of the competence in economic policy. The scholarly division as to how to interpret coordinating competence as illuminated above underlines this ambiguity. It could be argued that the Union needed to fill in the blanks by its institutional practices. The political background of this is of course constructed mainly on the bricks of the economic crisis. In

line with the argument made by Somek, the crisis could accentuate the already underlying modal indifference of trust in the sense that the Union could point to the economic distress of the Member States as a need for the Union's presumed wisdom and guidance. Italy's disobedience in regard to their 2019 draft budget could be perceived as a sign of the cracks in the trust relationship. Conversely, the increase of EU-scepticism and even EU-hostility would be reasons for an opposite development. Perhaps for the Member States which have received financial assistance in particular, foregoing guidance to appease public opinion might be difficult. In any event, the deliberate vagueness of the Treaty provisions as to the nature of the Union's competence in economic policy could be one reason further integration was possible.

Further in relation to Somek's trust theory, the reverse direction of control entails that a situation of 'ask for forgiveness rather than permission' is created, in the sense that legislation as a rule is adopted on the basis of a QMV (in accordance with the OLP) and that it can only thereafter be challenged by the Member States in an annulment proceeding as set out in article 263 TFEU. The CSRs cannot be challenged in this way, which is expressly stated in the same article, but the MIP-regulation and the Enforcement-regulation could be challenged because they are legislative acts. However, no such actions have been initiated by the Member States. Even if it would, according to Somek, the only viable control is democratic control. In the macroeconomic framework, no such control exists. This might explain why the people affected by the measures, that is the Union citizens, are increasingly turning to EU-sceptic and EU-hostile national parliamentary parties. As seen in the case of Italy, such parties are the counter-pole to the EU institutions, challenging the measures adopted. On the other hand, the interests of the Member States are supposed to be represented by the Council, which is the actor adopting the CSRs and any decision under the EIP, including sanctions. In that view, the level of delegation, and by extension the level of asymmetry in the trust relationship, is lower and less susceptible to the trust trap. But the Member States' possibilities to influence those decisions are weakened by the introduction of the reverse QMV. The element of the modal indifference of trust, namely of reverse direction of control, in combination with the weakening of the Member States' influence in the Council may be another reason why the strengthening of the framework has taken place.

As one is discussing the strengthening of the macroeconomic framework, it is important to keep in mind that this policy area is still one of the most de-centralized competence areas of the Union. Even as legal power has become more centralized, most power remains within the competences of the Member States. The substantive macroeconomic policies of the Member States are diverse and cannot be said to inhabit a strong harmonization. It seems likely that the democratic dimension is the biggest brake pad in the development of the EU macroeconomic framework. The need thereof is also recognized by the Commission.[112]

The Commission has argued that the economic crisis revealed that the realities of fiscal policy interconnect with the realities of macroeconomics. On that basis, it argued that macroeconomic policy also needed to be centrally governed to some extent. Venturing into financial and numerical fiscal policy rules could therefore be perceived as the first step of EU

[112] European Commission, COM (2012) 777 final (n 22) 11.

economic governance. Subsequently, macroeconomic governance followed by that logic.[113] Another reason for the centralization of macroeconomic governance may therefore be that the legal separation of these policy areas did not mirror the economic reality, that is interconnection therebetween. Considering the growing importance of the objective relating to the proper functioning of the EMU, that interconnectivity becomes further influential. If fiscal prudence was the overriding objective, the interconnectivity would be less important because fiscal prudency can be evaluated on an intra-state rather than inter-state level. The same is not possible for the proper functioning of the EMU, as the EMU by nature requires an inter-state evaluation. Focusing rather on an inter-state than an intra-state objective may also give rise to centralization since the issue focuses more on the group than the individual. The recognition of the interconnection between the policy areas, in combination with the interconnection between the Member States, resulting in the growing importance of the proper functioning of the EMU, may therefore be another reason for centralization of EU legal power in macroeconomics.

5 PREDICTIONS: LOOKING AHEAD

My prediction is that the most telling tale of EU economic governance in the future will star Italy, as it is currently the most vocal in its official resistance to Union intervention in regard to its national budget. Whether the Commission decides to recommend Union action, either in launching the EDP or the EIP, will speak of the willingness to use the enforcement mechanisms that are available. If it does not make use of those mechanisms, it seems likely that the framework will suffer the same fate as the BEPG and SGP did in the 90's and early 2000's[114] in the sense that the perception that accountability exists for the Member State would probably decrease. Just as the Union lacked bite in relation to those earlier instruments, so would it seem to do now. The aspect that speak against such a development is the post-crisis situation which creates a different context than was the situation for the SGP and BEPGs pre-crisis. On the other hand, the Union has faced backlash over the austerity measures. Even as the austerity measures regard the financial assistance, the discourse could taint the trust of EU fiscal and economic governance by making the Union less inclined to interfere. That might especially be the case as the Union is experiencing growing EU-scepticism and even EU-hostility. As regards Italy, the Italian government's intention is to launch socio-economic reforms to tackle the dire economic situation in the country.[115] That would mean increased public spending, which is what the Commission critiqued in its opinion on Italy's DBP in light of the debt and deficit situation in the country. It is beyond doubt that the Union is within its legal mandate to launch an EDP against Italy. However, the danger emerges if the Union fails to effectively communicate to the EU citizens the reasons it reasons these reforms should not take place. In particular, the Union institutions must appeal to the interests of those citizens rather than the interests of the Union, or the trust in the EU project could be threatened.

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[113] European Commission, *'The Macroeconomic Imbalance Procedure Rationale, Process, Application: A Compendium'* (n 102) 18.

[114] See Hodson (n 101).

[115] See eg Gavin Jones, 'Italy government approves flagship welfare reforms' *Reuters* (17 january 2019) <https://www.reuters.com/article/us-italy-politics/italy-government-approves-flagship-welfare-reforms-idUSKCN1PB1TK> accessed 20 June 2019.