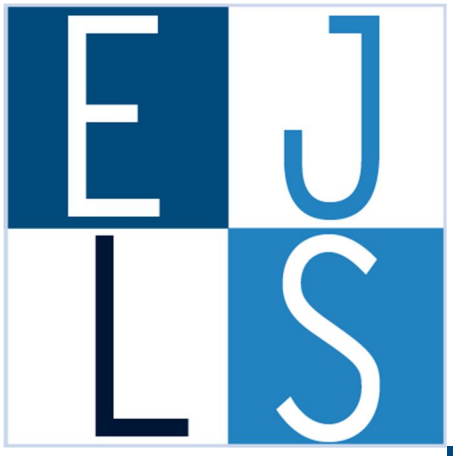

EJLS 10th Anniversary Conference Special Issue 2018

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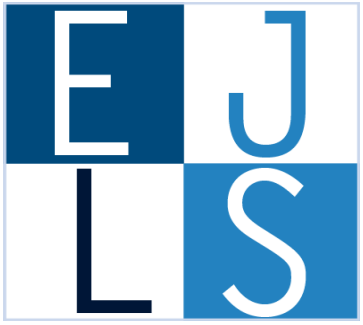

European Journal of Legal Studies
10th Anniversary Conference Special Issue

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EDITORIAL

NO JOURNEY IS A STRAIGHT PATH

Rebecca Mignot-Mahdavi*

Last year, the European Journal of Legal Studies (EJLS) celebrated its tenth anniversary at the European University Institute (Florence, Italy). At a time when the EU fears and encounters erosion and disintegration, the EJLS took this anniversary as an opportunity to invite scholars from all over Europe for an intense and fruitful two-day conference on legal issues arising from the EU project. A selection of four conference papers features in this special issue. While the authors by no means underestimate the unique nature of the challenges currently facing the European project, they equally do not seem to consider that progress towards an ever-closer Union was ever meant to be straightforward.

As such, the conference contributions do not feature dashed hopes of continuous progress towards an increasing number of joint policies adopted in the EU or broken hearts over exiting states. Rather, the five authors propose tools for understanding and organizing micro-processes taking place within the EU, including micro-processes of interaction between EU Member States and EU organs. The result of this common endeavor makes for a refreshing read, breaking from the current alarmist EU literature in which a step backwards is taken as the beginning of the end of the EU project.

This special issue is thus an opportunity to explore ongoing EU mechanics and processes, starting with **Lucie Pacho Aljanati**'s subtle take on questions of uniform application and interpretation of EU law. By sharing her findings on the divergences of interpretation of EU law revealed by different language versions of decisions of the European Court of Justice, she successfully conveys the importance of looking in an informed and reasoned way at the multilingual architecture of EU law. After this deep dive into the issue of

* Rebecca Mignot-Mahdavi is a PhD Candidate at the European University Institute (Florence, Italy) and the Editor-in-Chief of the EJLS.

linguistic integration, **Lena Boucon and Daniela Jaros** provide a rigorous and stimulating analysis of the current dynamics of monetary integration. Their piece examines the application of national law by the European Central Bank within the EU banking union's single supervisory mechanism (SSM) and conceptualizes this application as a new, hybrid, mode of European integration. Moving to the scrutiny of a case of interaction between the national and EU level, **Jasper Krommendjik** invites us to observe the preliminary reference 'dance' between the CJEU and Dutch courts in the field of migration. Through legal-empirical research, the author establishes that the decisions of national judges in the Netherlands not to refer a question to the CJEU do not reflect some political strategies, but rather legal considerations or circumstantial elements. Finally, looking at the national and EU level interaction from a broader perspective, **Lando Kirchmair** revisits the issues raised by the complex relationships between international, EU and national law. After outlining his dissatisfaction with the existing theoretical frameworks, Kirchmair sketches a 'theory of the law creators' circle' in an attempt to reconceptualize these relationships.

With that, I invite our readers to delve into these highlights of the EJLS conference. I wish to congratulate the special task force of editors and the former Executive Board of the journal who made the event a great success. I would also like to express our gratitude to the Academy of European Law, to Anny Bremner, Joyce Davies, as well as Hélène Debuire Franchini and Agnieszka Lempart, without whom the 10th anniversary conference could not have happened.

The completion of this 10th anniversary project is also where some of the editors of the EJLS end their own journey as part of the Executive Board of the journal: Rūta Liepina and Maria Haag, to whom I wish to express heartfelt thanks on behalf of the entire board for their incredible work as Executive Editors, and Marcin Baránski and Théo Fournier, Heads-of-Section for Legal Theory and Comparative Law respectively. My time as Editor-in-Chief of the EJLS, whose adventures I will continue to follow with delight, has also come to an end. It has been wonderful working with and learning from all the editors of the journal, and very gratifying to develop the EJLS projects in the supportive environment of the European University Institute. I wish to extend sincere thanks to the EUI Web communications

services and in particular to Francesco Martino, Web Communications Manager, and Andrea Kostakis for their invaluable help in designing and creating the new website and for providing us assistance with unfailing generosity and enthusiasm. Finally, I wish to express special thanks to the President of the EUI, Professor Renaud Dehousse and his office, to the EUI Law Department, and to the members of the EJLS Departmental Advisory Board, Professor Deidre Curtin, Professor Claire Kilpatrick, Professor Urška Šadl, and Professor Martin Scheinin, for allowing us to develop our projects independently and with the peace of mind knowing that they are always happy to advise and support us when needed.

Thanks to their support, an EJLS prize will be awarded to the best New Voices contribution and another to the best General Article written by a young scholar for the Autumn 2018 Issue and the Spring 2019 Issue.

CONFERENCE ARTICLES

MULTILINGUAL EU LAW: A NEW WAY OF THINKING

Lucie Pacho Aljanati*

This study addresses an essential characteristic of the EU legal order: its legislation is multilingual and equally authentic in all language versions. In this paper, I use corpus analysis to examine the issue of divergences between language versions that come to light in EU case-law. This paper pursues three specific objectives: 1) to study the use of comparison between language versions by the Court of Justice of the European Union (CJEU), 2) to consider the methods of interpretation that the CJEU applies when considering multilingualism, and 3) to delve into the types of divergences and try to elucidate whether they can be attributed to translation problems. This applied study helps to shed light on the implications multilingualism has for the creation and interpretation of EU law. In order to understand how legal translation and interpretation actually work in the EU, I adopt a reasoned approach to face the challenges posed by the multilingual architecture of EU law, a new way of thinking that considers linguistic issues as important as legal issues.

Keywords: multilingual EU law, legal translation, divergences, interpretation, legal certainty

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I am immensely grateful to the two anonymous reviewers for their careful reading and valuable comments.

I. INTRODUCTION

When studying the legal nature of the EU it is common to highlight the binding character of EU legislation and its invocability or direct effect. In this study, I emphasise another important feature of EU legislation: the fact that it is multilingual and equally authentic in all language versions.[1] EU law produces rights and obligations for individuals and this 'justifies the rendering of the legislation in all official languages', as a way to ensure equality before the law.[2]

As a consequence, translation plays a fundamental role in the development and application of multilingual EU law. Translators create texts that are legally binding;[3] they are key actors in law-making because drafting takes

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1 See Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* EU:C:1982:335, para 18.

2 Lucie Pacho Aljanati, *The Court of Justice of the European Union's case law on linguistic divergences (2007-2013): interpretation criteria and implications for the translation of EU legislation.* Doctoral thesis 2015, available at: http://hdl.handle.net/10803/314190

3 On the role of translators as text producers, see, for example, Susan Šarčević, *New Approach to Legal Translation* (Kluwer Law International 1997); Susan Šarčević, 'Challenges to the Legal Translator' in Peter M. Tiersma and Lawrence. M. Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 191.

place through translation.[4] Therefore, the creation of EU legislation includes the work of drafters, translators and lawyer-linguists, who normally act as legal revisers and supervise the linguistic concordance of the language versions.[5] The term 'language version' is used instead of 'translation' because all EU texts are equally authoritative. But can rules carry identical legal implications in all languages? Divergences between the different languages are inevitable. In case of doubt, the Court of Justice of the European Union (CJEU) is responsible for interpreting EU law (Art. 267 TFEU) and acts as the guarantor of uniform application and interpretation of EU legislation, always based on the premise that all versions constitute the same legal instrument.

In this paper, I use corpus analysis[6] to examine issues of divergences that come to light in EU case-law. Searches in the CVRIA database were carried out using the key term 'language versions'. This allows the retrieval of cases in which different language versions were invoked. The period chosen covers 01/01/2017 until 30/06/2017. This corpus analysis pursues three specific objectives. First, I study the use of comparison between language versions. I observe whether comparison is used to reconcile diverging language versions or to support an interpretation when no divergences are present (Section II). Second, I consider the methods of interpretation that the CJEU applies. For this, I divide cases into two main groups: those involving linguistic criteria of interpretation and those resorting to metalinguistic criteria of interpretation (Section III). Metalinguistic methods attempt to reconcile diverging texts by referring to the system and the purpose of the texts, that is to say, applying criteria that go beyond the linguistic level and make it possible to solve the problem without having to choose among the language versions.[7] Section III

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4 See Ingemar Strandvik, 'EU Translation – Legal Translation in Multilingual Lawmaking', Conference proceedings: The Eleventh International FIT/EULITA Forum: The Life of Interpreters and Translators - Joy and Sorrow?

5 On the shared legal-linguistic revision, see, for instance, Manuela Guggeis and William Robinson, 'Co-revision': Legal-Linguistic Revision in the European Union 'Co-decision' Process' in Cornelis Jaap W. Baaij (ed), The Role of Legal Translation in Legal Harmonisation (Wolters Kluwer 2012) 51 and Aljanati (n 2) 64.

6 A corpus typically implies a finite body of texts, sampled to be maximally representative and able to be stored electronically. See Tony McEnery and Andrew Wilson, *Corpus Linguistics* (Edinburgh University Press 2007) 29.

7 Pierre Pescatore 'Interprétation des lois et conventions plurilingues dans la Communauté européenne' (1984) 25(4) Les Cahiers de Droit 996.

also deals with interpretive techniques to solve divergences. It explores the issue of legal certainty in relation to multilingualism. Finally, I delve into the types of divergences and try to elucidate whether they can be attributed to translation problems. In addition, the examples shed light on the way the CJEU constructs meaning (Section IV).

This applied study brings to light some of the implications that multilingualism has for the creation and interpretation of EU law. I sustain that, in order to understand how legal translation and interpretation actually work in the EU, it is necessary to adopt a new way of thinking, which regards not only legal matters but also linguistic ones. Thus, I adopt a non-positivist perspective to address how meaning is construed and how legal certainty is reconciled with multilingualism.[8] These research questions necessitate interdisciplinary insights. I adopt an approach that deals with judicial interpretation from a linguistic perspective, regarding translation as key for the existence of EU legislation.

II. Use of Comparison between Different Language Versions

This section examines the use of comparison between language versions. I observe whether comparison is used to reconcile diverging language versions or to support an interpretation when no divergences are present.

The search in the CVRIA database was done by selecting the following criteria:

Period or date = 'Date of delivery'

Period = 'from 01/01/2017 to 30/06/2017'

Documents = Documents published in the ECR: Judgments;

Documents not published in the ECR: Judgments

Text = 'language versions'

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8 On non-positivist perspectives in relation to meaning, see, for instance, Ralph Christensen and Michael Sokolowski, 'Wie normative ist Sprache? Der Richter zwischen Sprechautomat und Sprachgesetzgeber' in Ulrike Haß-Zumkehr (ed), *Sprache und Recht* (Walter de Gruyter 2002) 65.

Regarding the key term, I carried out many searches in previous studies using several key words. I concluded that the term 'language versions' extracts almost all instances of comparison between different language versions.[9] In addition, in the present study I do not limit the search to any policy area.

Fourteen judgements were obtained. The initial question that arose was whether all instances of comparison dealt with a divergence between different language versions. In ten cases (71%), comparison concerned some kind of divergence. However, there were four cases (29%) in which no divergence was present but the CJEU used comparison to confirm an interpretation, normally by stating that all language versions converged.

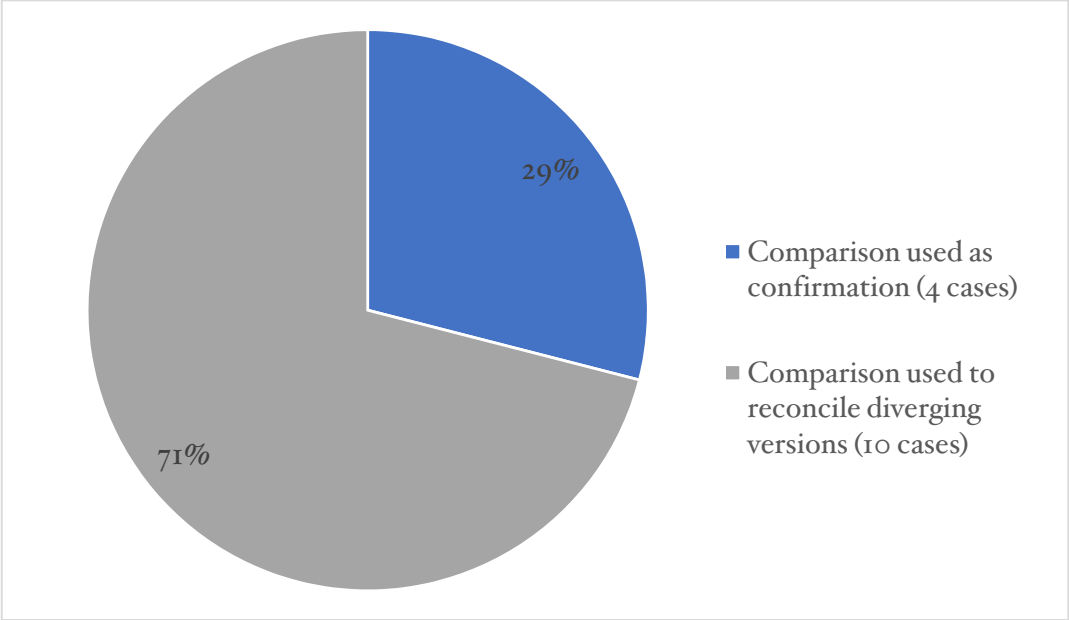

Figure 1: Use of comparison

If we consider the total number of judgements that the CJEU issued during the chosen period, these fourteen judgements represent only 3% of the cases. This figure is in line with the results obtained from larger and different

9 Christensen and Sokolowski (n 8); Fernando Prieto Ramos and Lucie Pacho Aljanati, 'Comparative Interpretation of Multilingual Law in International Courts: Patterns and Implications for Translation' in Fernando Prieto Ramos (ed), *Institutional Translation for International Governance. Enhancing Quality in Multilingual Legal Communication* (Bloomsbury 2017).

periods, which means the period selected for this study is highly representative.[10]

Moreover, looking at the type of proceedings, most cases (79%) are references for a preliminary ruling. These are the typical proceedings in which issues of linguistic divergences are treated. In these cases, the referring court has doubts as to the interpretation of a certain provision and the CJEU, in the framework of its competences (Art. 267 TFEU), has the final word in deciding how it must be interpreted.[11]

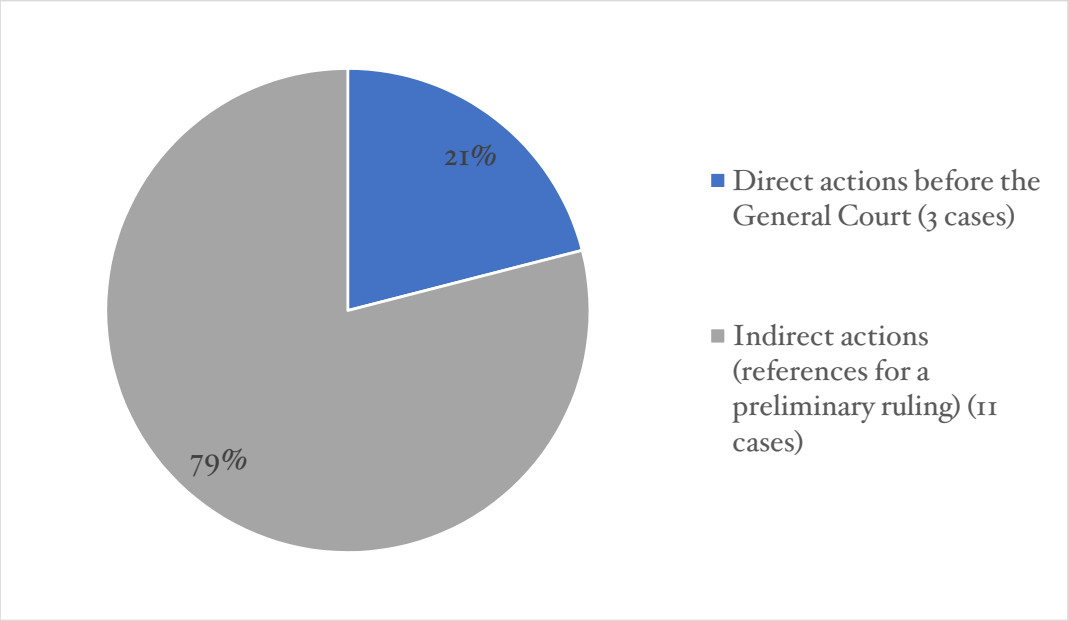

Figure 2: Types of proceedings

In addition, all cases were further classified into three different groups:[12]

Group 1 – Hard cases: divergences treated as a problem of interpretation

Group 2 – Soft cases: divergences not treated as a problem of interpretation

Group 3: No divergence but comparison is used as confirmation

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10 Pacho Aljanati (n 2); Prieto Ramos and Pacho Aljanati (n 9).

11 Pacho Aljanati (n 2).

12 I follow the classification used in previous studies: Pacho Aljanati (n 2) and Lucie Pacho Aljanati, 'Multilingual Interpretation by the CJEU in the Area of Freedom, Security and Justice' in Joanna Jemielniak and Anne-Lise Kjær (eds), *Language and Legal Interpretation in International Law* (Oxford University Press 2018).

Cornelis Jaap Baaij mentions a similar classification: 'discrepancies posing interpretation problems', 'unproblematic discrepancies' and 'no discrepancies'.[13] However, he does not provide details on these three categories and moves on to analyse the interpretive strategies, i.e. he analyses the method of interpretation that the CJEU applies. Joxerramon Bengoetxea differentiates between hard cases and clear cases. The term 'case' refers to a situation or a state of affairs, i.e. to the applicability of the sources to a certain situation in a given context.[14] He explains that hard cases call for interpretation because of semantic or pragmatic features of the case at hand, for example because the meaning of the applicable norm may not be clear owing to polysemy, vagueness, generality and ambiguity of the terms used in the norm, or due to the open texture of legal language.[15] In contrast, the justification of a decision in a clear case tends to be straightforward.[16] 'Clear case' refers to a situation in which 'the applicability of a legal rule or a set of legal rules to certain facts is clear and unproblematic'.[17]

I call Group 1 'hard cases' because the CJEU deals with problematic divergences that require metalinguistic interpretation. However, for Group 2 I use the term 'soft cases' and not 'clear cases' because the judgements present some divergences that are solved relatively easily. From the evidence found in the applied study, we cannot conclude that all requests for a preliminary ruling are hard cases.[18]

I first analyse all instances of divergences quantitatively, without limiting the investigation to any languages in particular. This offers a global picture of how cases are distributed into the three groups and the methods of interpretation that the CJEU applies. The qualitative analysis focuses on an examination of the types of divergences, refining and exploring the linguistic

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13 Cornelis Jaap W. Baaij, 'Fifty years of Multilingual Interpretation in the European Union' in Peter Tiersma and Lawbrence Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 219.

14 Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press 1993) 183.

15 Ibid 168.

16 Ibid 173.

17 Ibid 184.

18 Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013) 80, citing Bengoetxea (n 14).

and translation issues in greater detail. The focus is on Group 1 and Group 2. For this part, comparison is limited to English, French, German and Spanish, as these are my working languages.

The following graph shows the distribution of the cases:

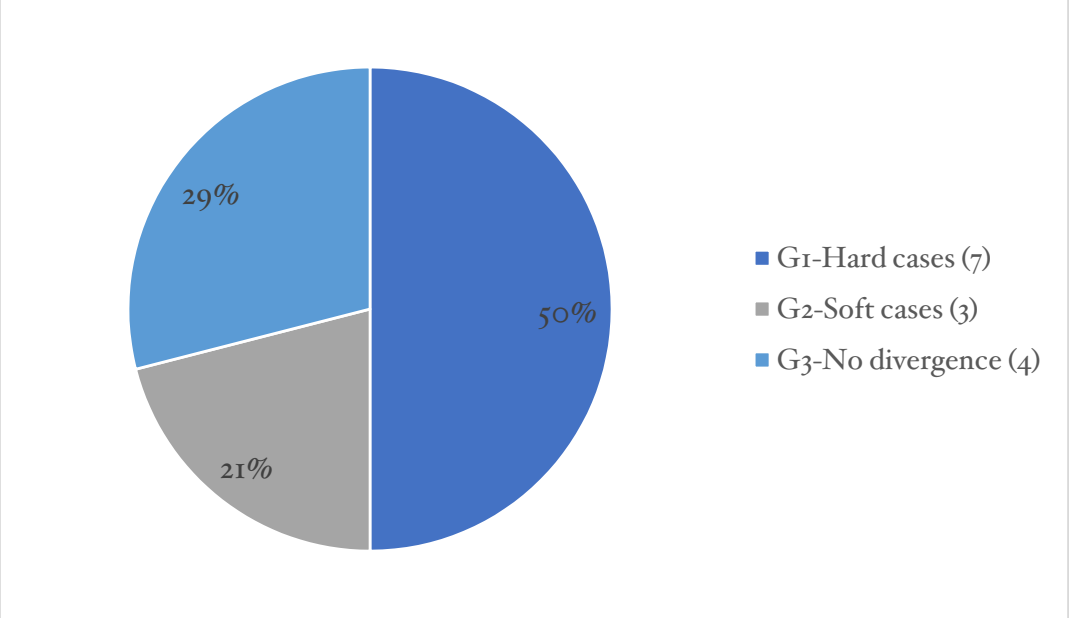

Figure 3: Distribution of cases

I also observe whether the divergence appears at an early stage (the referring court or one of the parties have already noted a divergence) or at a later stage (normally in cases where the referring court poses a question for a preliminary ruling and the Advocate General or the Court unveils the divergence at a later stage when trying to answer the question). The results show that in Group 1, in three cases the divergence was detected at an early stage, while in four cases the divergence appeared later. In Group 2, two of the cases present a divergence that appeared at an early stage and one case concerns a divergence that was noted at a later stage. The stage of discovering the divergence matters because it indicates who initiates comparison and why.

Group 1 – Hard Cases: Divergences Treated as a Problem of Interpretation

G1 – Divergences Detected at an Early Stage

In the *Sharda Europe* case,[19] the Court used the expression 'as the referring court states' in order to acknowledge that there was a divergence between the wording of the Spanish version and that of the other official language versions. The provision in question was the first subparagraph of Article 3(2) of Directive 2008/69 (emphasis added in italics):

ES	2. Como excepción a lo establecido en el apartado 1, todo producto fitosanitario autorizado que contenga una de las sustancias activas enumeradas en el anexo como única sustancia activa, o junto con otras sustancias activas incluidas todas ellas en el anexo I de la Directiva 91/414/CEE, será objeto de una nueva evaluación, *a más tardar, el 31 de diciembre de 2008*, por parte de los Estados miembros de acuerdo con los principios uniformes previstos en el anexo VI de la citada Directiva, sobre la base de una documentación que reúna los requisitos establecidos en su anexo III y que tenga en cuenta la parte B de la entrada en su anexo I por lo que respecta a las sustancias activas enumeradas en el anexo.
DE	(2) Abweichend von Absatz 1 unterziehen die Mitgliedstaaten jedes zugelassene Pflanzenschutzmittel, das einen der im Anhang genannten Wirkstoffe entweder als einzigen Wirkstoff oder als einen von mehreren Wirkstoffen enthält, die sämtlich bis *spätestens 31. Dezember 2008* in Anhang I der Richtlinie 91/414/EWG aufgeführt waren, einer Neubewertung nach den einheitlichen Grundsätzen gemäß Anhang VI der Richtlinie 91/414/EWG. Sie stützen sich dabei auf Unterlagen, die den Anforderungen des Anhangs III dieser Richtlinie genügen, und berücksichtigen den Eintrag in Anhang I Teil B der genannten Richtlinie in Bezug auf die im Anhang genannten Wirkstoffe.
EN	2. By way of derogation from paragraph 1, for each authorised plant protection product containing one of the active substances listed

[19] Case C-293/16 *Sharda Europe BVBA v Administración del Estado and Syngenta Agro, SA* EU:C:2017:430.

	in the Annex as either the only active substance or as one of several active substances all of which were listed in Annex I to Directive 91/414/EEC *by 31 December 2008 at the latest*, Member States shall re-evaluate the product in accordance with the uniform principles provided for in Annex VI to Directive 91/414/EEC, on the basis of a dossier satisfying the requirements of Annex III to that Directive and taking into account part B of the entry in Annex I to that Directive concerning the active substances listed in the Annex.
FR	2. Par dérogation au paragraphe 1, tout produit phytopharmaceutique autorisé contenant l'une des substances actives mentionnées dans l'annexe, en tant que substance active unique ou associée à d'autres substances actives, toutes inscrites à l'annexe I de la directive 91/414/*CEE au plus tard le 31 décembre 2008*, fait l'objet d'une réévaluation par les États membres, conformément aux principes uniformes prévus à l'annexe VI de ladite directive, sur la base d'un dossier satisfaisant aux conditions de son annexe III et tenant compte de la partie B de l'inscription à son annexe I concernant les substances actives mentionnées dans l'annexe.

The divergence is clear because in the Spanish version the date of 31 December 2008 constitutes the deadline by which the Member States must carry out a re-evaluation. In contrast, in the German, English and French versions this date refers to the listing of the active substances contained in the authorised plant protection product that is to be re-evaluated by the Member States. The Court seemed to compare other language versions as well: 'The same is true, inter alia, of the Greek, Italian and Dutch versions of that provision'.[20]

The Court explained that the Spanish version was the one that differed from the rest: 'More specifically, the wording of all those language versions, with the exception of the Spanish version [...]'. According to the Court, this provision indicates that 'the plant protection product concerned must be re-evaluated if all the active substances composing it, together with those listed

[20] *Sharda Europe* (n 19) para 19.

in the Annex to Directive 2008/69, had been listed in Annex I to Directive 91/414 by 31 December 2008 at the latest'.[21]

Immediately after that, the Court invoked the idea that all versions constitute the same legal instrument and must be read jointly: 'the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be given priority over the other language versions in that regard'.[22] The Court then moved on to a teleological interpretation by referring to the 'general scheme and purpose of the rules'.[23] After examining the context and the purpose of the Directive,[24] the Court confirmed that the date of 31 December 2008 corresponds to 'the deadline by which all the active substances contained in that plant protection product, other than those listed in the Annex to Directive 2008/69, must have been included on the list in Annex I to Directive 91/414'.[25] Finally, in this case there was no Opinion of the Advocate General that could provide any other information.[26]

The second case that I analyse in this group is *Pinckernelle*.[27] From a reading of the judgement of the Court, it seems that the divergence appeared later, because no mention is made as to who detected the problem. However, after examining the Opinion of the Advocate General I realised that the divergence was in fact spotted earlier: 'The written observations of the City of Hamburg, Germany, Italy and the Commission all feature discussion of

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21 *Sharda Europe* (n 19) para 20.

22 Ibid para 21.

23 Ibid.

24 Ibid paras 22-24.

25 Ibid para 25.

26 Not all cases have an Opinion of the Advocate General.

27 Case C-535/15 *Freie und Hansestadt Hamburg v Jost Pinckernelle* EU:C:2017:315.

the various language versions of Article 5 of the REACH Regulation[28] with respect to the meaning of 'placed on the market'.[29]

The Commission argued that there were eight language versions (Danish, Latvian, Hungarian, Romanian, Slovakian, Swedish, Slovenian, and Czech versions) in which the words 'in the Community' in Article 5 of the REACH Regulation applied both to manufacture and to placing on the market. Three language versions (Spanish, Lithuanian and German) were ambiguous, and ten (Bulgarian, Estonian, Finnish, Greek, Italian, Dutch, Polish, Portuguese, French and English) appeared to attach the territorial limitation 'in the Community' only to manufacture.[30]

ES	Sin perjuicio de lo dispuesto en los artículos 6, 7, 21 y 23, no se fabricarán *en la Comunidad* ni se comercializarán sustancias, como tales o en forma de preparados o contenidas en artículos, a menos que se hayan registrado de conformidad con las disposiciones pertinentes del presente título que así lo exijan.
DE	Vorbehaltlich der Artikel 6, 7, 21 und 23 dürfen Stoffe als solche, in Gemischen oder in Erzeugnissen nur dann in der Gemeinschaft hergestellt oder in Verkehr gebracht werden, wenn sie nach den einschlägigen Bestimmungen dieses Titels, soweit vorgeschrieben, registriert wurden.
EN	Subject to Articles 6, 7, 21 and 23, substances on their own, in preparations or in articles shall not be manufactured *in the Community* or placed on the market unless they have been registered in accordance with the relevant provisions of this Title where this is required.

[28] Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) 793/93 and Commission Regulation (EC) 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (Text with EEA relevance) [2006] OJ L 396.

[29] Ibid, EU:C:2016:996, Opinion of AG Tanchev, para 35.

[30] *Pinckernelle* (n 27) para 38.

FR	Sous réserve des articles 6, 7, 21 et 23, des substances telles quelles ou contenues dans des préparations ou des articles ne sont pas fabriquées *dans la Communauté* ou mises sur le marché si elles n'ont pas été enregistrées conformément aux dispositions pertinentes du présent titre, lorsque cela est exigé.

A more detailed analysis of the four languages I compare in this study shows that the Spanish and German versions are ambiguous (it is not clear whether 'in the Community' refers to both the manufacture and the placing in the market) whereas in the English and French versions the expression 'in the Community' is explicitly linked to the manufacture of substances.

It is interesting that before engaging in comparison the Court sustained that 'for the purpose of interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part'.[31] Then it compared and remarked the diverging interpretations. After that, it continued with an examination of the context.[32] After a careful analysis, the Court concluded that the expression 'placing on the market' relates to the internal market of the EU. Therefore, the expression 'in the Community' is modifying both the manufacture and placing on the market.

In the *Al Chodor* case,[33] the referring court pointed out that the language versions of Article 2(n) of theDublin III Regulation[34] diverged (emphasis added):

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31 *Pinckernelle* (n 27) para 31.

32 Ibid (n 26) paras 34-43.

33 Case C-528/15 *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and Others* EU:C:2017:213.

34 Regulation (EU) 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member States responsible for examining an application for international protection lodges in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31.

ES	«riesgo de fuga»: la existencia de razones basadas en criterios objetivos definidos *por ley* que, en un caso concreto, permitan pensar que un solicitante, un nacional de un tercer país o un apátrida sujeto a un procedimiento de traslado pueda fugarse.
DE	„Fluchtgefahr' das Vorliegen von Gründen im Einzelfall, die auf objektiven *gesetzlich festgelegten* Kriterien beruhen und zu der Annahme Anlass geben, dass sich ein Antragsteller, ein Drittstaatsangehöriger oder Staatenloser, gegen den ein Überstellungsverfahren läuft, diesem Verfahren möglicherweise durch Flucht entziehen könnte.
EN	'risk of absconding' means the existence of reasons in an individual case, which are based on objective criteria defined *by law*, to believe that an applicant or a third country national or a stateless person who is subject to a transfer procedure may abscond.
FR	«risque de fuite», dans un cas individuel, l'existence de raisons, fondées sur des critères objectifs définis par *la loi*, de craindre la fuite d'un demandeur, un ressortissant de pays tiers ou un apatride qui fait l'objet d'une procédure de transfert.

From a comparison of these versions, we can observe that the German language version of the provision refers to objective criteria 'laid down in legislation'. Other language versions refer to criteria defined 'by law' (in the general sense). In addition, the referring court noted that the European Court of Human Rights interprets the term 'law' broadly.[35] According to the Czech court, 'that term is not limited solely to legislation, but also includes other sources of law'.[36]

[35] Also see the Opinion of the AG who sustains the concept of 'law' as referred to in the Regulation has an independent meaning distinct from that of the concept of 'law' as referred to in the ECHR. *Salah Al Chodor* (n 33) Opinion of AG Saugmandsgaard Øe, para 42.

[36] *Salah Al Chodor* (n 33) para 21.

When the Court started answering the question posed by the referring court, it claimed that a textual interpretation was not helpful in that case:

> [...] a purely textual analysis of the notion of 'defined by law' cannot determine whether case-law or a consistent administrative practice are capable of coming within that concept. In the different language versions of that regulation, the term equivalent to the term 'loi (legislation)' has a different scope.[37]

The Court added that the wording used in some versions is similar to the concept of *droit* (law in the general sense), which can have a wider scope than *loi* (legislation). In addition, other language versions have a more restrictive scope.[38] The difference in scope is significant. The conclusion was that the objective criteria required implementation in the national law of each Member State.[39] Linguistic interpretation was clearly not enough in this case and the Court had to examine the purpose and general scheme of the rules.[40]

G1 – Divergences Detected at a Later Stage

In the *ERGO Poist'ovňa* case,[41] a divergence appeared regarding the Czech, Latvian and Slovak language versions. As I do not command any of these languages, I will limit myself to mentioning the arguments of the Court. It explained that in most of the language versions the provision in question provided that 'the right to commission can be extinguished only 'if and to the extent that' it is established that the contract between the third party and the principal will not be executed'.[42] However, the Czech, Latvian and Slovak language versions of the provision did not contain wording which could be translated as 'to the extent that'.[43]

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37 *Salah Al Chodor* (n 33) para 31.

38 Ibid.

39 Ibid para 28

40 Ibid para 32.

41 Case C-48/16 *ERGO Poist'ovňa, a.s. v Alžbeta Barlíková* EU:C:2017:377.

42 *ERGO Poist'ovňa* (n 41) para 34.

43 The AG enters into a bit more detail and compares the expressions in a footnote: See, for example, the Spanish ('en la medida'), Danish ('i det omfang'), German ('soweit'), Estonian ('ulatuses'), French ('dans la mesure où'), Italian ('nella misura in cui'), Lithuanian ('tik tiek, kiek'), Maltese ('sal-limiti li'), Dutch ('voor zover'),

The Court resorted to metalinguistic criteria of interpretation. It recalled that 'provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union'.[44] Here the Court makes clear that all languages constitute the same legal instrument. It then invoked the purpose and general scheme:

> Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (judgment of 1 March 2016, *Alo and Osso*, C-443/14 and C-444/14, EU:C:2016:127, paragraph 27).[45]

In the *Popescu* case,[46] the Court dealt with the concept of 'entitlement to drive granted before 19 January 2013'. As the divergence concerned the Romanian version, which I do not command, I will not enter into much detail. The provision in question used the expression *drept de conducere acordat*, including the word *drept* which normally refers to the right itself, not the document attesting a right granted, and the word *acordat* which literally means 'accorded' or 'granted', and may refer both to a right and to a document attesting that right.[47]

In addition, both the Advocate General and the Court observed that a literal interpretation of the expression *droit de conduire délivré* in the French version could suggest that the wording of the said provision implies that 'only express entitlements to drive deriving from an instrument formally issued, generally in the form of an individual administrative act, before 19 January 2013 would not be affected, in accordance with that provision, by the requirements of that directive'.[48]

In the face of the differences between various language versions, the Court recalled that 'the wording used in one language version of a provision of EU

Polish ('o ile'), Portuguese ('na medida em que'), and Romanian ('în măsura în care') language versions. *ERGO Poist'ovňa* (n 38) Opinion of AG Szpunar, para 26.

44 *ERGO Poist'ovňa* (n 41) para 37.

45 Ibid para 37.

46 Case C-632/15 *Costin Popescu v Guvernul României and Others* EU:C:2017:303.

47 Ibid para 32.

48 *Popescu* (n 46) para 33.

law cannot serve as the sole basis for the interpretation',[49] in this way confirming the impossibility of relying on a single language version. 'Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages'.[50] The Court used the determiner 'all', which would imply that all official languages are deemed to be compared. Immediately after that, it stated that 'where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the general scheme and purpose of the rules of which it forms part'.[51]

From a reading of the judgement it is not possible to know how many languages were in fact compared. The Court used the expression 'differences between various language versions' without specifying which ones.[52] The Advocate General delved a bit more into the comparison. He commented on the wording in the French version and observed that 'an equivalent approach could be apparent from other language versions of that provision', adding in the footnote: 'See, inter alia, the Danish, German, Croatian, Portuguese and Slovak versions'.[53]

After examining the general scheme and the purpose of the Directive,[54] the Court concluded that following a schematic and a teleological interpretation, 'Article 13(2) of the directive relates only to the holding of driving licences and official documents equivalent to them which expressly authorise their holders to drive'.[55] Therefore, the objectives pursued by the directive and also the context of Article 13 led to an interpretation contrary to that proposed by Mr. Popescu.[56]

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49 Ibid para 35.

50 *Popescu* (n 46).

51 Ibid.

52 Ibid para 34.

53 Ibid, Opinion of AG Saugmandsgaard Øe, para 42.

54 Ibid para 36-45.

55 Ibid para 46.

56 Ibid, Opinion of AG Saugmandsgaard Øe, para 40.

Moreover, in *GE Healthcare* case,[57] there was a problem of interpretation regarding Article 160 of Regulation No. 2454/93 (emphasis added):

ES	Cuando el comprador pague un canon o un derecho de licencia a un tercero, las condiciones mencionadas en el apartado 2 del artículo 157 sólo se considerarán cumplidas si el vendedor, o *una persona vinculada al mismo*, pide al comprador que
DE	Zahlt der Käufer eine Lizenzgebühr an einen Dritten, so gelten die Voraussetzungen des Artikels 157 Absatz 2 nur dann als erfüllt, wenn der Verkäufer oder *eine mit diesem verbundene Person die Zahlung an diese dritte Person* vom Käufer verlangt.
EN	When the buyer pays royalties or licence fees to a third party, the conditions provided for in Article 157 (2) shall not be considered as met unless the seller or a *person related to him* requires the buyer to make that payment.
FR	Lorsque l'acheteur verse une redevance ou un droit de licence à un tiers, les conditions visées à l'article 157 paragraphe 2 ne sont considérées comme remplies que si le vendeur ou une *personne qui lui est liée* requiert de l'acheteur d'effectuer ce paiement.

As the Advocate General explained in his Opinion, the German language version of Article 160 seems to refer to 'a third party separate from both the seller and the person related to the seller'.[58] From a comparative reading it can be seen that none of the other language versions contains a second reference to the 'third party' to whom royalties or licence fees are paid.[59]

The referring court sought to know 'whether the condition laid down in Article 160 of Regulation No. 2454/93 is satisfied in a situation where the 'third party' to whom the royalty or licence fee is payable and the 'person related' to the seller are the same person'.[60] In that regard, the applicant in the main proceedings, GE Healthcare, relied essentially on the German

57 Case C-173/15 *GE Healthcare GmbH v Hauptzollamt Düsseldorf* EU:C:2017:195.

58 Ibid EU:C:2016:621, Opinion of AG Mengozzi, para 61.

59 *GE Healthcare* GmbH (n 57) para 66.

60 Ibid para 63.

language version and claimed that 'the person requiring payment of the royalty or licence fee and the third party to whom the royalty or licence fee is payable cannot be identical'.[61]

In order to answer the question, the Court first reminded that the wording in one language version cannot constitute the only basis for interpretation because 'such an approach would be incompatible with the requirement that EU law be applied uniformly'.[62] In addition, it emphasised that 'where there is a divergence between the various language versions', it is necessary to examine the general scheme and the purpose of the rules. With this reasoning the Court seems to confirm that when we are faced with divergences between language versions, metalinguistic criteria of interpretation are required.

In the Opinion, the Advocate General sustained that the main problem of interpretation was not the fact that the German version added the expression 'third party':

> This is not, however, the deciding factor. The obligation on the buyer to make 'that payment' obviously refers to the payment of royalties or licence fees which the buyer is required to make to the 'third party'.

Both the Advocate General and the Court explained that what mattered in fact was not so much 'the person to whom the payment of royalties or licence fees is made'.[63] The important point was 'whether or not the buyer of the imported goods is able to acquire them from the seller without paying royalties or licence fees'.[64] The Court concluded that it was 'for the national court to ascertain whether that is the position in the main proceedings'.[65]

Finally, in the *Vilkas* case,[66] there was a certain divergence between the various language versions of Article 23(3) of the Framework Decision as regards the conditions for applying the rule set out in the first sentence of that provision.

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61 Ibid para 64.

62 *GE Healthcare* GmbH (n 57) para 65.

63 Ibid EU:C:2016:621, Opinion of AG Mengozzi, para 66.

64 Ibid.

65 *GE Healthcare GmbH* (n 57) para 69.

66 Case C-640/15 *Minister for Justice and Equality v Tomas Vilkas* EU:C:2017:39.

ES	3. Cuando cualquier *circunstancia ajena al control* de alguno de los Estados miembros afectados impida entregar a la
DE	(3) Ist die Übergabe der gesuchten Person innerhalb der in Absatz 2 genannten Frist aufgrund von Umständen, die sich *dem Einfluss der Mitgliedstaaten entziehen,* unmöglich, setzen sich die vollstreckende und die ausstellende Justizbehörde unverzüglich miteinander in Verbindung und vereinbaren ein neues Übergabedatum. In diesem Fall erfolgt die Übergabe binnen zehn Tagen nach dem vereinbarten neuen Termin.
EN	3. If the surrender of the requested person within the period laid down in paragraph 2 is prevented by *circumstances beyond the control* of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.
FR	3. Si la remise de la personne recherchée, dans le délai prévu au paragraphe 2, s'avère impossible *en vertu d'un cas de force majeure* dans l'un ou l'autre des États membres, l'autorité judiciaire d'exécution et l'autorité judiciaire d'émission prennent immédiatement contact l'une avec l'autre et conviennent d'une nouvelle date de remise. Dans ce cas, la remise a lieu dans les dix jours suivant la nouvelle date convenue.

The Court observed that the Greek, French, Italian, Portuguese, Romanian and Finnish versions of that provision made the application of the rule conditional on the impossibility to carry out the surrender by reason of a case of *force majeure* in one of the Member States concerned. However, other language versions of the same provision, such as the Spanish, Czech, Danish, German, Greek, English, Dutch, Polish, Slovak and Swedish versions, referred instead to it not being possible to carry out the surrender on account of circumstances beyond the control of the Member States concerned.[67]

[67] *Vilkas* (n 66) para 46.

The Court recalled the need for uniform interpretation and the impossibility to consider the text in isolation:

> The need for a uniform interpretation of a provision of EU law makes it impossible for the text of a provision to be considered, in case of doubt, in isolation but requires, on the contrary, that it should be interpreted on the basis of both the actual intention of the legislature and the objective pursued by the latter, in the light, in particular, of the versions drawn up in all languages.[68]

Here the Court highlighted the need to consider 'the actual intention of the legislature', taking into account all language versions. After analysing the origin of the provision in question,[69] the Court concluded that expression used in Article 11(3) referred to a situation which could not have been foreseen and could not have been prevented, as the concept of *force majeure* is usually understood.[70]

Group 2 – Soft Cases: Divergences Not Treated as a Problem of Interpretation

G2 – Divergences Detected at an Early Stage

In the *Khorassani* case,[71] the referring court detected some divergence and the Court acknowledged it but did not treat it as a problem of interpretation.

The provision in question is Section A of Annex I to Directive 2004/39 (emphasis added):

ES	Recepción y transmisión de órdenes de clientes *en relación con* uno o más instrumentos financieros.
DE	Annahme und Übermittlung von Aufträgen, die ein oder mehrere Finanzinstrument(e) *zum Gegenstand haben*.
ENF	Reception and transmission of orders *in relation to* one or more financial instruments.

68 *Vilkas* (n 66) para 47.

69 Ibid paras 48-51.

70 Ibid para 51-52.

71 Case C-678/15 *Mohammad Zadeh Khorassani v Kathrin Pflanz* EU:C:2017:451.

FR	Réception et transmission d'ordres *portant sur* un ou plusieurs instruments financiers.

The Court explained that depending on the language version, the terms 'in relation to' may suggest a more or less direct link between the orders and the financial instrument(s).[72]

The Court used a concessive clause to clarify the question by comparing the different language versions:

> [...] 'although the referring court observes a certain divergence between the different language versions [...] it should be noted that the term 'order' [...] remains the same in the language versions cited by the referring court, being the German-, Spanish-, English- and French-language versions'. [...][73]

The Court contended that the term 'order' remained the same in the language versions cited by the referring court, being the German, Spanish, English and French language versions.[74] It concluded that the words 'in relation to one or more financial instruments' merely served to specify which type of order was being referred to, that is to say, the orders relating to the purchase or the sale of such financial instruments.[75]

In the *NEW WAVE CZ* case,[76] it was also the referring court that noted some differences between the various language versions of Directive 2004/48. The Czech, English and French versions of the directive used respectively the words 'in connection with proceedings' (*v souvislosti s řízením*), 'in the context of proceedings', and 'within the framework of proceedings' (*dans le cadre d'une action*). According to that Court, the French version introduced a closer connection between the proceedings and the application for information.[77] The Court removed the divergence by comparing the different language versions:

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72 *Khorassani* (n 71) para 27.

73 Ibid.

74 Ibid.

75 Ibid para 28.

76 Case C-427/15 *NEW WAVE CZ, a.s. v ALLTOYS, spol. s r. o.* EU:C:2017:18.

77 Ibid para 16.

> [...] as the referring court observes, some language versions [...] do indeed use expressions which could be interpreted as being of a narrower scope than those used in other language versions [...]. The fact remains, however, [...] that it does not follow from any of those language versions that [...].

In order to confirm its interpretation, the Court also analysed the wording of Article 8(1) of Directive 2004/48[78] and the objective of the Directive.[79]

G2 – Divergences Detected at a Later Stage

Finally, in the *Onix Asigurări* case,[80] the Court recognised that there was some divergence between the language versions of Article 40(6) of Directive 92/49, but that the linguistic divergence was not the main problem of interpretation.

ES	6. Los apartados 3, 4 y 5 no afectarán a la facultad de los Estados miembros interesados de adoptar, en casos de urgencia, las medidas apropiadas para prevenir las irregularidades *cometidas en su territorio*. Ello implica la posibilidad de impedir que una empresa de seguros siga celebrando nuevos contratos de seguros en su territorio.
DE	(6) Die Absätze 3, 4 und 5 berühren nicht die Befugnis der Mitgliedstaaten, in dringenden Fällen geeignete Maßnahmen zu ergreifen, um Unregelmässigkeiten *in ihrem Staatsgebiet* zu verhindern oder zu ahnden. Dies schließt die Möglichkeit ein, ein Versicherungsunternehmen zu hindern, weitere neue Versicherungsverträge in ihrem Staatsgebiet abzuschließen.
EN	6. Paragraphs 3, 4 and 5 shall not affect the emergency power of the Member States concerned to take appropriate measures to prevent irregularities *within their territories*. This shall include the possibility of preventing insurance undertakings from continuing to conclude new insurance contracts within their territories.
FR	6. Les paragraphes 3, 4 et 5 n'affectent pas le pouvoir des États membres concernés de prendre, en cas d'urgence, des mesures

78 *NEW WAVE CZ* (n 76) para 22.

79 Ibid para 23.

80 Case C-559/15 *Onix Asigurări SA v Istituto per la Vigilanza Sulle Assicurazioni (IVASS)* EU:C:2017:316.

	appropriées pour prévenir les irrégularités *commises sur leur territoire*. Ceci comporte la possibilité d'empêcher une entreprise d'assurance de continuer à conclure de nouveaux contrats d'assurance sur leur territoire.

The Court pointed out that 'certain language versions of that provision, in particular those in Spanish and French, refer to irregularities 'committed' in the territory of the Member State concerned, which may indicate that this provision applies only where irregular acts have already been carried out'.[81]

Then the Court invoked the need for uniform interpretation of EU regulations and contended that 'where there are doubts', the text of a provision cannot be 'considered in isolation but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages'.[82] Here the Court used the 'criterion of doubt', as it has been designated by Mattias Derlén.[83]

From a comparative reading of the Article, the Court concluded that 'all the language versions use the verb 'to prevent' or a similar word to describe the subject matter of the measures which may be adopted'. As a consequence, the provision refers to the adoption of measures to prevent irregularities in the future.[84] It does not make sense to interpret it as irregular acts that have already been carried out.[85]

The Court reconciled the diverging versions by comparing them. However, in order to answer the question posed by the referring court it highlighted that 'the wording of Article 40(6) of Directive 92/49, considered in isolation,

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81 *Onix Asigurări* (n 80) para 38.

82 Ibid para 39.

83 Mattias Derlén, *Multilingual Interpretation of European Union Law* (Kluwer Law International 2009) 32; Mattias Derlén, 'In Defence of (Limited) Multilingualism: Problems and Possibilities of the Multilingual Interpretation of European Union Law in National Courts' in Anne-Lise Kjær, Silvia Adamo (eds), *Linguistic Diversity and European Democracy* (Ashgate 2011) 145.

84 *Onix Asigurări* (n 80) para 40.

85 In the Opinion, the AG did not compare so it is not possible to provide any further insight into the matter.

does not enable an answer to be given to the question referred. In those circumstances, it is necessary to consider the context in which that provision occurs, and the objectives pursued by that directive'.[86]

Group 3: No Divergence but Comparison is Used as Confirmation

In this group I have analysed three cases of direct actions before the General Court and one case of a reference for a preliminary ruling. The Court used comparison to confirm an interpretation, usually by stating that all language versions converged in meaning.

In *Ball Beverage Packaging Europe v EUIPO – Crown Hellas Can (Canettes)*,[87] it used the following expression: 'that finding follows also from Article [...], which in all the language versions, refers to [...]'. In *Deza v ECHA,*[88] the Court used comparison to support an interpretation, although it did not state that all language versions converged.[89] In *Hernández Zamora v EUIPO - Rosen Tantau (Paloma)*,[90] the Spanish version, which in that case was the authentic version,[91] was compared with the other versions to confirm an interpretation: 'the Spanish version is also consistent with the language versions of the wording of the goods covered by the earlier mark, other than the English version'.[92] In *Rosneft*,[93] the Court observed that 'none of the language versions of Article [...] expressly refers to the 'processing of payments'. That being the

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86 *Onix Asigurări* (n 80) para 41.

87 Case T-9/15 *Ball Beverage Packaging Europe Ltd v European Union Intellectual Property Office* EU:T:2017:386.

88 Case T-115/15 *Deza, a.s. v European Chemicals Agency* EU:T:2017:329.

89 Ibid and EU:T:2017:329, para 173.

90 Case T-369/15 *Hernández Zamora, SA v European Union Intellectual Property Office* EU:T:2017:106.

91 The Court explained as follows: 'Article 120(3) of Regulation No 207/2009 provides that 'in cases of doubt, the text in the language of [EUIPO] in which the application for the EU trade mark was filed shall be authentic'. In the present case, it is therefore the Spanish version of the wording of the goods covered by the earlier mark that is authentic'. Case T-369/15 *Hernández Zamora, SA v European Union Intellectual Property Office* EU:T:2017:106, para 40.

92 *Zamora* (n 90).

93 Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* EU:C:2017:236.

case, reference must be made to the general structure and objectives of that regulation'.

III. Legal Certainty and Methods of Interpretation

This section explores the issues of legal certainty in relation to multilingualism. One can think legal certainty is incompatible with multilingualism, but I sustain both concepts can be balanced. I then mention different methods of interpretation that the CJEU applies and I explain my own classification of interpretive techniques to solve divergences.

1. A Note on Legal Certainty

Law complies with the function of legal certainty when those to whom legal norms are addressed can be informed as to where they stand, so that they can act with full knowledge of the consequences of their behaviour.[94] Legal certainty requires that legal norms be clear (foreseeable) and accessible.[95]

On the one hand, multilingualism allows access to EU legislation in all official languages, thus ensuring a central aspect of legal certainty. The concrete task of making multilingual legislation is done thanks to translation. Without translation there would be no EU legislation. On the other hand, the need to compare different language versions can be seen as the impossibility to rely on a single language version. However, systematic comparison between the twenty-four language versions is very difficult and this applied study has shown that even the CJEU does not use comparison on a routine basis. As a consequence, one could argue that the impossibility to rely on a single language version is detrimental to legal certainty. Nevertheless, the requirement to compare helps to balance the fact that EU legislation is multilingual, and divergences between different language versions are sometimes inevitable. As with many principles in law, in some situations there will be conflicting principles and it is not a question of eliminating one or the other; it is rather a matter of finding a balance between them. This following graph summarises this idea:

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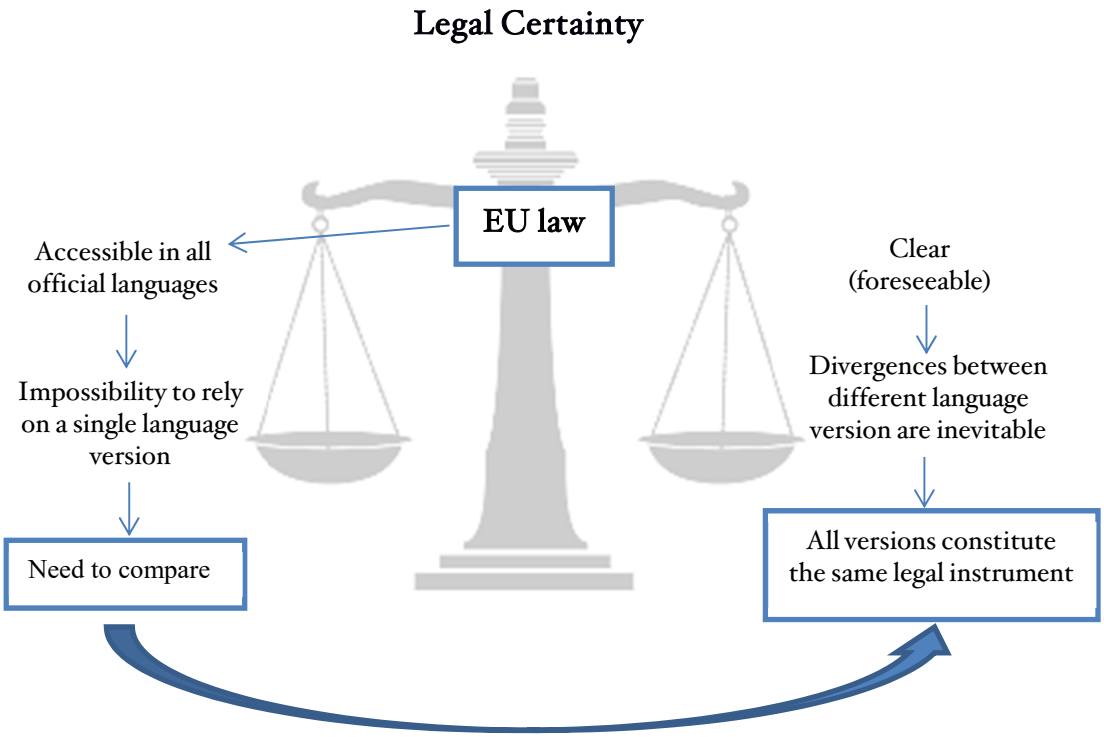
94 Josep Joan Moreso and Josep Maria Vilajosana, *Introducción a la teoría del derecho* (Marcial Pons 2004).

95 Pacho Aljanati (n 2) 103.

Figure 4: Balancing legal certainty and multilingualism



Susan Šarčević remarked that 'whether and to what extent the authentic texts of EU legislation actually have the same meaning is a matter of interpretation'.[96] The CJEU is responsible for interpreting EU legislation (Art. 267 TFEU) based on the premise that no language version prevails over the others and it is necessary to interpret them uniformly.[97]

In this applied study there are three cases that touch upon the question of legal certainty most directly. In *Popescu*, the applicant relied on the Romanian language version for its interpretation, but the Court then arrived at a conclusion contrary to that proposed by Popescu. In *GE Healthcare*, the applicant relied on the German language version, which turned out to be the only version that differed from the rest. These parties learned that their arguments could not be based only on the wording in their national language.

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96 Susan Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the European Union'(2013) 3(1) International Journal of Law, Language and Discourse 1.

97 See Case 19/67 *Van der Vecht* EU:C:1967:49, *CILFT* case (n 2) and Case 30/77 *Regina v Bouchereau* EU:C:1977:172, para 14.

The *Sharda Europe* case is more complex and it illustrates the idea of balance exposed above. First it is necessary to make a reconstruction of the facts.

1.	On 14 January 2009, Sharda submitted an application for re-evaluation of the authorisation it had for the placing on the market of a plant protection product which contained one of the active substances listed in the Annex to that directive. That application was granted by the competent national authorities.
2.	Syngenta brought an administrative action seeking to have the authorisation issued for the plant protection product withdrawn. The administrative action was brought before the Secretaría General Técnica del Ministerio de Medio Ambiente, Rural y Marino (Technical General Secretariat of the Ministry for Environmental, Rural and Marine Affairs, Spain). Syngenta alleged that the application for re-evaluation of that product had been submitted after 31 December 2008. It claimed that this date constituted the deadline for the submission of such an application for re-evaluation under Article 3(2) of Directive 2008/69. The Technical General Secretariat dismissed the action.
3.	Syngenta brought an appeal against that decision before the Tribunal Superior de Justicia de Madrid (High Court of Justice, Madrid, Spain). This High Court annulled the re-evaluation procedure on the ground that the application for re-evaluation had been submitted after the expiry of the deadline set in Article 3(2) of Directive 2008/69.
4.	Sharda brought an appeal against that judgement before the Tribunal Supremo (Supreme Court, Spain). It claimed that this date did not preclude the submission of applications for re-evaluation after 31 December 2008.
5.	The Tribunal Supremo (Supreme Court) was not certain whether this date constituted a deadline for carrying out the re-evaluation or for listing the active substances. It decided to stay the

	proceedings and pose the question to the CJEU for a preliminary ruling.
6.	The CJEU finally stated that this date corresponded to the deadline by which all the active substances contained in that plant protection product had to be included on the list in Annex I to Directive 91/414.

Thanks to comparison between different language versions it was possible to bring to light that Sharda's claim was right. The Tribunal Superior de Justicia annulled the re-evaluation procedure but this was not the right interpretation. If it had compared the Spanish version with other versions the divergence would have come to light earlier. This case is a good example of how comparison can guarantee uniform application of EU law.

2. Methods of Interpretation

In the literature, it is generally agreed that there are three main methods that the CJEU applies: literal, systematic and teleological.[98] Authors sometimes use different terminology, but the essence of the methods is practically the same. Some legal scholars add two more methods: historical and comparative law interpretations. For example, Hans Kutscher[99] refers to literal interpretation, schematic interpretation, teleological interpretation, historical interpretation and comparative law interpretation. Similarly,

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98 See, for instance, Anna Bredimas, *Methods of Interpretation and Community Law* (North-Holland 1978); Bengoetxea (n 13); Joxerramon Bengoetxea, Neil MacCormick and Leonor Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in Gráinne de Búrca and Joseph H. H. Weiler (eds), *The European Court of Justice* (Oxford University Press 2001); Giulio Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) 10(5) German Law Journal 534; Elina Paunio, *Legal certainty in multilingual EU law: language, discourse and reasoning at the European Court of Justice* (Ashgate 2013); Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013).

99 Hans Kutscher, *Methods of interpretation as seen by a judge at the Court of Justice* (Luxembourg 1976).

Neville Brown and Francis G. Jacobs[100] as well as Albertina Albors Llorens[101] talk about literal interpretation, contextual interpretation, teleological interpretation, historical interpretation and comparative law as aids to interpretation. Isabel Schübel-Pfister[102] uses the following categories: *Wortlautauslegung*, *systematische Auslegung*, *teleologische Auslegung*, *historische Auslegung*, and *Rechtsvergleichende Auslegung*.[103]

When dealing with divergences between various language versions, most authors have divided the methods into two groups: interpretation that uses linguistic arguments and interpretation that uses arguments that go beyond the linguistic level. The terminology used in the literature also varies. For example, Pierre Pescatore[104] divides the criteria into *solution réductrice* and *solution métalinguistique,*[105] and Baaij refers to the literal approach and the teleological approach.[106] Derlén,[107] makes a more detailed analysis of the methods and establishes three categories: classical reconciliation, reconciliation and examination of the purpose, and radical teleological method.

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100 L. Neville Brown, Francis G. Jacobs, *The Court of Justice of the European Communities* (3rd ed.) (Sweet & Maxwell 1989).

101 Albertina Albors Llorens, 'The European Court of Justice, more than a teleological court' (1999) 2 Cambridge Yearbook of European Legal Studies 373.

102 Isabel Schübel-Pfister, *Sprache und Gemeinschaftsrecht: die Auslegung der mehrsprachig verbindlichen Rechtstexte durch den Europäischen Gerichtshof* (Duncker & Humblot 2004).

103 Similarly, Buck refers to *grammatikalische Auslegung*, *systematische Auslegung*, *teleologische Auslegung* and *historische Auslegung.* Carsten Buck, *Über die Auslegungsmethoden des Gerichtshofs der Europäische Gemeinschaft* (Peter Lang 1997).

104 Pierre Pescatore, 'Interprétation des lois et conventions plurilingues dans la Communauté européenne' (n 7).

105 Berteloot uses the same categories in German: *reduzierende' Methode* and *meta-linguistische Methode.* Pascale Berteloot, 'Die Europäische Union und ihre mehrsprachigen Rechtstexte' in Isolde Burr & Friedrich Müller (eds), *Rechtssprache Europas* (Duncker & Humblot 2004).

106 Cornelis Jaap W. Baaij, 'Fifty years of Multilingual Interpretation in the European Union' (n 13); Cornelis Jaap W. Baaij, *Legal integration and language diversity: The case for source-oriented EU translation* (Digital Academic Repository, University of Amsterdam 2015).

107 Derlén, *Multilingual Interpretation of European Union Law* (n 83).

I refer to linguistic interpretation and metalinguistic interpretation. Metalinguistic interpretation is equivalent to the teleological-systematic interpretation in that it goes beyond the words, also called 'teleo-systemic' interpretation.[108] As Kutscher affirms, teleological interpretation is closely linked to schematic interpretation and it is difficult to draw a clear line between them.[109]

This applied study shows that linguistic arguments were used in the cases in Group 2 (soft cases):

Linguistic Interpretation	
NEW WAVE CZ	* Comparison to clear the divergence.
Onix Asigurări	* The need for a uniform interpretation of EU regulations makes it impossible, **where there are doubts**, for the text of a provision to be considered in isolation but requires, on the contrary, that it should be interpreted and applied **in the light of the versions existing in the other official languages**. * Comparison to clear the divergence.
Khorassani	* It is necessary to consider **not only its wording but also the context** in which it occurs and the objectives pursued by the rules of which it is part. * Comparison to clear the divergence.

Throughout the case-law, the CJEU settled the normative requirement to compare different language versions by claiming that when interpreting a certain provision, 'where there are doubts', we must do it 'in the light of the versions existing in the other official languages' (as in the *Onix Asigurări* case).

[108] Joxerramon Bengoetxea *The Legal Reasoning of the European Court of Justice* (n 14) 250.

[109] Hans Kutscher, *Methods of interpretation as seen by a judge at the Court of Justice* (n 99) I-40.

In other earlier cases the Court did not mention 'in case of doubt' or 'where there are doubts'. In *Kraaijeveld* it referred to comparison as a requirement: 'interpretation of a provision of Community law involves a comparison of the language versions.'[110] In addition, in the *Ferriere* case, the Court stated that all language versions must be consulted even if the version at hand is clear and unambiguous in isolation.[111]

On the contrary, metalinguistic arguments were used in the Group 1 cases (hard cases).

Metalinguistic Interpretation	
Popescu, *GE Healthcare,* *ERGO* *Poist'ovňa*	* The wording used in **one language version** of a provision of EU law **cannot serve as the sole basis for the interpretation** of that provision **or be given priority over the other language versions**. * The wording used in **one language version** of a provision of EU law **cannot serve as the sole basis for the interpretation** of that provision, **or be made to override the other language versions** in that regard. * Provisions of EU law must be interpreted and applied uniformly **in the light of the versions existing in all EU languages.** * Where there is **divergence** between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the **general scheme and purpose** of the rules of which it forms part.

[110] Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland*, EU:C:1996:404, para 25.

[111] Case C-219/95 P *Ferriere Nord v Commission,* EU:C:1997:375, para 15.

Sharda Europe	* The wording used in **one language version** of a provision of EU law **cannot serve as the sole basis for the interpretation** of that provision or be given priority over the other language versions. * The need for uniform application and, therefore, for uniform interpretation of an EU measure precludes one version of the text being considered in isolation, but requires that the measure be interpreted by reference to the **general scheme and purpose** of the rules of which it forms part.
Pinckernelle	* For the purpose of interpreting a provision of EU law it is necessary to consider **not only its wording but also the context** in which it occurs **and the objectives** pursued by the rules of which it is part. * Comparison revealed a divergence * Analysis of the context to clarify the question
Al Chodor	* Where the various language versions differ, **the scope of the provision** in question **cannot be determined on the basis of an interpretation which is exclusively textual**, but must be interpreted by reference to the **purpose and general scheme** of the rules of which it forms part.
Vilkas	* The need for a uniform interpretation of a provision of EU law makes it impossible for the text of a provision to be considered, **in case of doubt,** in isolation but requires, on the contrary, that it should be interpreted on the basis of both the **actual intention of the legislature and the objective pursued by the latter, in light,** in particular, **of the versions drawn up in all languages.**

In *Popescu, GE Healthcare, ERGO Poist'ovňa* and *Sharda Europe*, the Court used practically the same arguments. In *Pinckernelle* and *Al Chodor*, the Court mentions that textual interpretation is not enough: we need to move on to the context and purpose of the rules. Finally, in *Vilkas*, the Court resorted to the intention of the legislature. In fact, the Court analysed the history of the provision in order to figure out what the intention was. The Court first observed that the wording used in the article in question had its origin in a

previous Convention.[112] Then, different language versions of this Convention were compared. The Court also examined the explanatory report relating to the Convention in its various language versions.[113] In addition, the Court also studied the explanatory memorandum to the Commission's proposal that led to the adoption of the Framework Decision.[114] The Court was then able to deduce the intention of the legislature: 'These various factors contribute to demonstrating that the use in various language versions of that latter concept does not indicate that the EU legislature intended to' [...].[115]

IV. Types of Divergences

This section focuses on the types of divergences that came to light in the study of the case-law. In Group 1 and Group 2, I examined the types of linguistic divergences that appear between different language versions of a piece of legislation. Classifying the types of divergences is not easy and some authors acknowledge the difficulty of classification in linguistics:

> A language is vastly more complex than an automobile engine, and linguistic items, being multi-functional, can be looked at from more than one point of view, and hence given more than one label on different occasions even within the same analytical framework.[116]

Therefore, it is not possible to establish rigid categorisation. However, there are some studies that provide a classification of divergences or of types of translation problems. Among the main works that have dealt with this issue, Kerstin Loehr provides a classification between two main groups: *Divergenzen im Text* and *Divergenzen im Denken*.[117] *Divergenzen im Text* are

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112 *Nord v Commission* (n 111) para 48.

113 Ibid para 50.

114 Ibid para 51.

115 Ibid para 52.

116 Sharon O'Brien, 'Controlling Controlled English. An Analysis of Several Controlled Language Rule Sets Obtaining the Rule Sets', Conference proceedings*: Joint Conference combining the 8th International Workshop of the European Association for Machine Translation and the 4th Controlled Language Application Workshop (EAMT and CLAW)* 2003 106, citing Thomas Bloor and Meriel Bloor, *The Functional analysis of English: a Hallidayan approach* (Arnold 1995) 15.

117 Kerstin Loehr, *Mehrsprachigkeitsprobleme in der Europäischen Union* (Peter Lang 1997) 57.

textual divergences which are possible to avoid, and *Divergenzen im Denken* are conceptual divergences which are harder to avoid.

Both Šarčević[118] and Schübel-Pfister[119] mention the classification proposed by Loehr. Šarčević remarks that divergences can be studied within the lexical field, but that they can also appear in the syntactical and pragmatic fields.[120] Schübel-Pfister explains that Loehr's linguistic perspective coincides partially with a legal perspective. She also distinguishes between *Divergenzen im Text* and *Divergenzen im Sinn* but calls them *Begriffsdivergenzen* and *Bedeutungsdivergenzen* respectively. She explains that *Begriffsdivergenze* can also be referred to as *Textdivergenzen* (textual divergence) and *Bedeutungsdivergenzen* (conceptual divergence) as *Sinndivergenzen*.[121]

Geert Val Calster[122] refers to 'obscurities' in the texts. He proposes the following categories:

> - one version says something different than the other(s); there is a clear conflict between different versions;
>
> - one text uses a word without any meaning, or with an uncertain sense; the corresponding word in the other(s) is clear;
>
> - in one text, a word is used with two or more meanings; the other version's term contains only one of those meanings;
>
> - the word used in one text has a wider meaning than the corresponding word in the other(s) and a text uses a category which does not figure in the other(s).

Pablo Dengler provides a similar classification to that of Van Calster. He looks at the degree of divergence. If the language versions differ completely, he calls it *divergencia abierta* (open divergence). If the language versions do not differ completely but their scope is somewhat different, he calls it *divergencia*

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118 Susan Šarčević, 'Die Übersetzung von mehrsprachigen EU-Rechtsvorschriften' in Maurizio Gotti and Susan Šarčević, *Linguistic Insights 46* (Peter Lang 2006).

119 Isabel Schübel Pfister, *Sprache und Gemeinschaftsrecht* (n 102).

120 Šarčević (n 118) 125.

121 Schübel-Pfister (n 102) 106.

122 Geert Van Calster, 'The EU's Tower of Babel — The Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in more than one Official Language' (1997) 17(1) Yearbook of European Law 374.

parcial (partial divergence).[123] He includes conceptual divergences and divergences because of terminological asymmetry in the same group (partial divergences). However, if there is terminological asymmetry or if a certain element is omitted in a language version, the result can be that the language versions have completely opposite meanings and would therefore be considered 'open divergence'. For this reason, Dengler's classification according to the degree of disparity may be difficult to apply systematically.

In addition, Lawrence Solan mentions that there can be problems of 'word choice' or 'grammatical nuances'.[124] In one of his works, Baaij divides the types of discrepancies into 'translation errors' and 'semantic scope'.[125] In the case of 'translation errors', discrepancies entail the use of distinctly different terms in the various language versions. He claims that 'even when the CJEU does not explicitly believe that a translation error is to blame, it seems that the CJEU is generally more likely to treat these types of discrepancies as 'textual flaws''.[126] However, in my opinion, translation is not always to blame when there are textual flaws. This category of 'translation errors' does not seem to represent a type of linguistic divergence. Whether the problem was caused by an inaccurate translation is another question that should be resolved afterwards. Regarding the 'semantic scope', Baaij points out that 'differences in the scope of terminology in the various language versions may not be an error, but merely a natural and unavoidable trait of translation'.[127] In a later work he divides the case into 'semantic and syntactic discrepancies'.[128]

Most authors tend to distinguish divergences that appear at a grammatical-syntactical level and those that appear at a lexical-semantic level. Both

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123 Pablo Dengler, 'Derecho de la UE y multilingüismo: el problema de las divergencias entre versiones lingüísticas' in Alonso Araguás et al, *Translating Justice* (Comares 2010) 83.

124 Lawrence Solan, 'Statutory Interpretation in the EU: the Augustinian Approach' in Frances Olsen, Alexander Lorz, R. and Dieter Stein, *Translation Issues in Language and Law* (Palgrave Macmillan 2009).

125 Cornelis Jaap W. Baaij, 'Fifty years of Multilingual Interpretation in the European Union' (n 13).

126 Ibid 229.

127 Ibid.

128 Baaij (n 106).

Loehr[129] and Šarčević[130] suggest considering the three areas within the field of semiotics: syntax (or syntactics), semantics and pragmatics. This threefold classification 'goes back to Peirce, but was first drawn and made familiar by Morris'.[131] The classification I propose is, therefore, not guided strictly according to the three fields (syntax, semantics and pragmatics) but they are all related to it. The most structural-systemic aspects of language are grouped under 'structural-grammatical divergences', while the lexical level of discourse is described under 'lexical-conceptual divergences'. I therefore classify divergences according to:

1) Structural-grammatical divergences

2) Lexical-conceptual divergences

As the cases were described in detail in section 2, I summarise the types of divergences in the following tables.

1. Structural-Grammatical Divergences

Addition of syntactic unit in one language version	
GE Healthcare	The German version contained the additional term *Zahlung an diese dritte Person.*
Other aspects of syntax	
Sharda Europe	It is not clear which part of the sentence the adverbial clause of time modifies.
ERGO Poist'ovňa	Three language versions did not contain wording which could be translated as 'to the extent that'.
Onix Asigurări	In a noun phrase: irregularities *within* their territories v irregularities *committed in* their territories.
Pinckernelle	It is not clear which part of the sentence the adverbial phrase modifies.

[129] Kerstin Loehr, *Mehrsprachigkeitsprobleme in der Europäischen Union* (n 117) 17.

[130] Šarčević (n 118) 125.

[131] John Lyons, *Semantics* (Cambridge University Press 1977) 114.

Popescu	The problem was the expression in Romanian (*drept de conducere acordat)*.

2. Lexical-Conceptual Divergences

Khorassani	The German version used an expression that had a more restricted meaning (*zum Gegenstand haben* v. 'in relation to').
Al Chodor	The problem revolved around the use of the term 'defined by law' v. laid down in legislation.
Vilkas	The problem revolved around the use of the term *force majeure* v. 'circumstances beyond the control'.
NEW WAVE CZ	The problem revolved around the use of the term 'in the context of proceedings' v. within the framework of proceedings.

When we delve into the types of divergences, a common question that can be considered is whether discrepancies between different language versions are to be attributed to a translation problem. A defective translation is indeed the reason for linguistic divergence in some of the cases. For example, in *Sharda Europe* the provision in Spanish was not expressed correctly. Translators must have utmost care with adverbials because syntactic aspects can lead to semantic problems. We have seen that depending on the position of the adverbial, it can modify one part of the sentence or the other, having serious legal consequences.

In other cases, the responsibility of translators in not so clear. For this reason, instead of saying whether a certain translation is correct or incorrect, I think that it would be more appropriate to talk about adequacy.[132] In the *Vilkas*

[132] See, for instance, Le Chen and Kin Kui, 'Terminological equivalence in legal translation: A semiotic approach'(2008) 172 Semiotica 33; Fernando Prieto Ramos, 'International and supranational law in translation: From multilingual lawmaking to adjudication'(2014a) 20(2) The Translator, 313; Fernando Prieto Ramos, 'Quality Assurance in Legal Translation: Evaluating Process, Competence and Product in the Pursuit of Adequacy' (2015) 28(1) International Journal for the Semiotics of Law 11.

case, the problem of interpretation revolved around the concept of *force majeur*. Some language versions did not use this term and expressed the same idea with a different expression. It could be argued that 'circumstances beyond the control' expresses the same idea. However, as the CJEU explained in the judgement, there is settled case-law in various spheres of EU law that deal with the concept of *force majeure*.[133] Translators who are aware and informed should take into account if a certain term has been interpreted in the context of EU law. Translations will normally achieve a higher level of adequacy if translators carry out a good contextualization of the translation task.[134]

In addition, I do not think it is fair to attribute all shortcomings to multilingual interpretation to translation.[135] In this regard, we must bear in mind that legal norms are expressed in natural language; as a consequence, ambiguity, vagueness and open texture are inevitable, even if legislation is monolingual.[136] This suggests that we need to move away from a positivist approach that relies on a 'strong language theory'.[137] Supporters of this theory assume that legal norms carry 'autonomous and pre-interpretive meaning'.[138] This implies that 'judicial decisions would be exempt from value judgements

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133 Case C-640/15 *Minister for Justice and Equality v Tomas Vilkas* EU:C:2017:39, para 53.

134 On parameters for contextualising, see, for example, Fernando Prieto Ramos, 'Interdisciplinariedad y ubicación macrotextual en traducción jurídica' (2009) 13(4) Translation Journal 1. On an integrative approach for reaching higher levels of adequacy with appropriate problem-resolving mechanisms, see Fernando Prieto Ramos, 'Parameters for Problem-Solving in Legal Translation-Implications for Legal Lexicography and Institutional Terminology Management' in Le Cheng, King Kui Sin and Anne Wagner (eds.), *The Ashgate Handbook of Legal Translation* (Ashgate 2014); Prieto Ramos, 'Quality Assurance' (n 132).

135 For example, Bobek claimed that 'The enduring problem, however, is the quality of the translations of the Community legislation: inconsistency in terminology, mistakes in translation, parts of legislation. which are incomprehensible'. Michal Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States: 'Don't Do as I Say'?' (2007) 10 Cambridge Yearbook European Legal Studies 12.

136 On natural language and interpretation problems, see Moreso and Vilajosana (n 94) 152-157.

137 Christensen and Sokolowski (n 8) 65.

138 Paunio (n 98) 113.

and deprived of discretion'.[139] In order to understand how multilingual EU law actually works, we need to consider that meaning is created in context and depends on the discourses in which it occurs.[140] Legal concepts are not fixed entities; 'they can and do change'.[141]

V. Conclusions

This applied study has addressed three main points. First, as for the use of comparison, I have found that most cases of comparison of language versions carried out by the CJEU (71%) involve some kind of divergence; the rest (29%) are cases in which comparison is used to confirm an interpretation. Second, from the total number of cases that include some divergence, 70% are 'G1-Hard cases'. This study has revealed a correlation between the 'hard cases' and metalinguistic interpretation. Third, regarding the types of divergences, most cases (70%) are 'structural-grammatical' divergences and the rest are 'lexical-conceptual' divergences. No correlation can be established between the type of divergence and the method of interpretation; i.e. 'structural-grammatical' divergences involve either metalinguistic or linguistic interpretation.

The study of divergences that emerge between different language versions is of paramount importance because it touches upon the question of uniform application and interpretation of EU law. The cases explored here provide an overview of the type of linguistic issues that come to light in multilingual interpretation by the CJEU.

I propose an informed and reasoned approach to deal with the implications of EU law multilingualism in relation to four points. The first point concerns the creation of EU law. The role of translators as key actors in law-making must be kept in mind. They produce legislation that is legally binding and, therefore, there should be more collaboration between drafters, translators and lawyer linguists. Translators could have a greater role by participating

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139 Ibid.

140 Jan Engberg, 'Word meaning and the problem of a globalized legal order' in Peter. M. Tiersma and Lawrence M. Solan (eds.), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 180.

141 Anne-Lise Kjær, 'A Common Legal Language in Europe?' in Mark Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Hart 2004) 388.

more in certain discussions when deciding the content of legislation. This would help translators understand the nuances of certain provisions, as EU law is 'negotiated legislation' and legislation normally passes through three institutions (the ordinary legislative procedure being 'the main decision-making procedure used for adopting EU legislation').[142] Efforts should be focused on improving the legislative technique so that legislation is as clear as possible. As Strandvik also maintains, it is necessary to raise awareness and provide 'formal training in legislative drafting, terminology and translation'.[143] It may not be possible to remove the challenges that are inherent to translation. However, 'by raising awareness about them, we can try to approach them differently, untangle and review our norms, beliefs and values, and update our working routines'.[144]

The second point concerning a new approach relates to the application and interpretation of EU legislation. No strict division between the different tasks surrounding the creation and interpretation of EU law can be drawn. Translators need to be aware of the hermeneutic principles that the CJEU applies when interpreting EU law, especially when the Court reconciles diverging language versions. Bengoetxea explains that 'genuine multilingual legal reasoning occurs at the stage of translation much more so than at the stage of drafting or even deliberation'. The translator 'is bound by a closed and circumscribed universe of meaning'.[145]

The third aspect of this new way of thinking is to accept that divergences are inevitable. It is not a question of establishing English, for example, as the only source text for drafting and interpretation of EU legislation.[146] Ambiguity and vagueness are inherent to natural languages. National courts should be more familiar with linguistic issues in EU law, even if only to have the

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142 See Consilium Europa <http://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure>, accessed 23 October 2017.

143 Ingemar Strandvik, 'On Quality in EU Multilingual Lawmaking' in Susan Šarčević (ed.), *Language and Culture in EU Law: Multidisciplinary Perspectives* (Ashgate 2015) 162.

144 Ibid.

145 Joxerramon Bengoetxea, 'Multilingual and Multicultural Legal Reasoning- the European Court of Justice' in Anne-Lise Kjær and Silvia Adamo (eds.), *Linguistic Diversity and European Democracy* (Ashgate 2011) 118.

146 Proposal by Baaij (n 106) 45.

awareness that different linguistic versions can make the interpretation at hand a bit more complex than they often assume.

The fourth feature of this new way of thinking refers to the great potential that comparison between language versions offers. Comparison can help to elucidate unclear provisions and discover divergences that would otherwise go unnoticed. We must keep in mind that apparent clarity is 'no guarantee of absence of divergence'.[147] How can we know that a text is clear if we do not check the other language versions? We must recall Watkin's idea, which claims that awareness of the inherent flexibility of language should be enough to persuade us that comparison is a necessary step.[148]

This study has shown, however, that linguistic comparison was employed in only about 3% of the total amount of cases decided by the CJEU. This demonstrates there is a wide gap between the normative requirements to compare different language versions and the reality of its application.[149] I consider that the CJEU, as the guarantor of uniform application and interpretation of EU legislation, has the capacity and duty to become a real multilingual court.

147 Derlén (n 83).

148 Thomas Glyn Watkin, 'Bilingual Legislation: Awareness, Ambiguity, and Attitudes' (2016) 37(2) Statute Law Review 116.

149 See Bobek (n 135) 1.

WHO HAS THE FINAL SAY?
THE RELATIONSHIP BETWEEN INTERNATIONAL, EU AND NATIONAL LAW

Lando Kirchmair*

A key focus of much scholarly attention is on the (theoretical) relationship between legal orders. The practical question I intend to answer in this article is the following: how can we know who has the final say – international, European Union (EU) or national law? I proceed in three steps. First, I critically sketch major current theories – monism and dualism, as well as global legal pluralism and global constitutionalism. However, because none of them offers a satisfactory answer to the question posed, I move to the reconceptualization stage of the theoretical relationship between legal orders. In the second step, I offer my account of how to think about the relationship between legal orders by introducing the theory of the law creators' circle (TLCC). The TLCC provides a theoretical foundation for deciding on the source of the decisive norm. It does not, however, provide a general solution which fits any norm conflict stemming from overlapping legal orders. Thus, the purpose of this article is to develop a legal theory which facilitates the understanding of the interaction between international law, EU and national law. Third, I use a doctrinal analysis to show the results of the TLCC application. For instance, in the famous Kadi *saga, according to the TLCC, the EU should have either claimed that the UN Security Council was acting ultra vires or considered the UN Security Council Resolution* faulty *because UN human rights (instead of EU human rights) had been violated.*

Keywords: Monism, Dualism, (Global) Legal Pluralism, (Global) Constitutionalism, TLCC, Relationship between legal orders, International – EU – national law

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All truly wise thoughts have been thought already.
All one has to do is try to think them again.[1]

Johann Wolfgang von Goethe

I. INTRODUCTION

The relationship between international and national law has been debated for centuries. Generally, the floor has been divided between two approaches – dualism and monism. I argue that, in the light of major developments since

[1] Johann Wolfgang von Goethe, *Wilhelm Meisters Wanderjahre - Buch 2 oder die Entsagenden* (Zenodot 2016, originally 1829 2nd ed.) 239 (English translation by the author).

their inception, like the establishment of the European Union (EU), these theories can no longer comprehensively explain the relationship between international, EU and national law.[2] A key focus of my work is to re-conceptualize the theoretical relationship between legal orders.[3] Even though some scholars have doubted the relevance of theoretical inquiries such as a dualistic or a monistic analysis of the relationship between legal orders, I cannot agree with those who trivialize this theoretical discussion by saying it would be 'unreal, artificial and strictly beside the point'.[4] If we continue reading Fitzmaurice's view, it becomes clear that this is simply a dualistic argument. This is because he continued arguing that '[i]n the same way it would be idle to start a controversy about whether the English legal system was superior to or supreme over the French or vice-versa, because these systems do not pretend to have the same field of application'.[5] This is also an implicit theoretical approach, which is in Fitzmaurice's case a dualistic standpoint.[6] Yet, current developments, fundamental changes and new phenomena such as the massive increase in international institutions, actors, norms and tribunals as well as adjudicators make it imperative to seek new theoretical concepts. The so-called 'globalization of law'[7] as framed in

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2 Lando Kirchmair, 'The 'Janus Face' of the Court of Justice of the European Union: A theoretical appraisal of the EU legal order's relationship with international and member state law' (2012) 4(3) Göttingen Journal of International Law 677-691.

3 See, for example, Lando Kirchmair, 'The Theory of the Law Creators' Circle: Re-Conceptualizing the Monism – Dualism – Pluralism Debate' (2016) 17 (2) German Law Journal 179-214.

4 Gerald G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 Recueil des Cours de l'Academie de Droit Int'l. 1 (71).

5 Ibid 71-72.

6 For a practical approach concerning the relationship between international and national law, see, for instance, Helen Keller, *Rezeption des Völkerrechts* (Springer 2003) 6. This practical approach, however, has been criticized by Stefan Griller, 'Völkerrecht und Landesrecht' in Robert Walter et al. (eds), *Hans Kelsen und das Völkerrecht – Ergebnisse eines Internationalen Symposiums in Wien* (Manz 2005) 84, n. 3.

7 In relation to this designation, see Jean-Bernard Auby, 'Globalisation et droit public' in *Gouverner, administrer, juger. Mélanges en l'honneur de Jean Waline* (Dalloz 2002) 135; Anne Peters, 'The Globalization of State Constitutions' in Janne Nijman and Andre Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007) 251; see also David J. Bederman, *Globalization*

the famous *Constitutionalization of International Law*,[8] may be mentioned, among other developments, to elucidate the ever-growing importance of the debate on the final say between international, EU and national law.

I start from the assumption that it is essential to have a theoretical concept for the relationship between legal orders, because I hold, that we cannot intelligibly discuss this relationship without a theoretical concept. Without a theoretical concept, underlying assumptions often remain implicit and are not addressed clearly.[9] My work is based on the conviction that a common (normative) denominator of international, EU and national law is fundamentally necessary to solve norm conflicts between overlapping legal orders.[10] Without such a common (normative) denominator we are left with non-normative or unilateral solutions for norm conflicts between overlapping legal orders. I wish to offer new theoretical insights because I hold that the current approaches do not provide satisfactory accounts. After critically reviewing the current dominant theories (dualism, monism, pluralism and constitutionalism) in the first step (section II.), I depart from Goethe by providing my own theoretical account.

The practical question I intend to answer is the following: how can we know who has the final say – International, EU or national law? The way I try to respond to this question does not follow monism or dualism, nor pluralism or

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and International Law (Palgrave 2008). Neil Walker, *Intimations of global law* (Cambridge University Press 2014).

8 Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926); Jan Klabbers, *The Constitutionalization of International Law* (Oxford University Press 2009); Oliver Diggelmann and Tilmann Altwicker, 'Is there something like a constitution of international law? A critical analysis of the debate on world constitutionalism' (2008) 68 Heidelberg Journal of International Law 623-50.

9 Compare in this regard also András Jakab, *European Constitutional Language* (Cambridge University Press 2016) 1 quoting John Maynard Keynes, The General Theory of Employment, Interest and Money (Palgrave Macmillan 1936) 383 concerning economics: 'The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed, the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist'.

10 Lando Kirchmair, 'The Theory of the Law Creators' Circle: Re-Conceptualizing the Monism – Dualism – Pluralism Debate' (2016) 17 (2) German Law Journal 179-214.

constitutionalism.[11] I intend to answer this question by introducing the theoretical concept of the law creators' circle (TLCC) (section III.).[12] In short, TLCC aims at re-conceptualizing the monism-dualism-pluralism-constitutionalism debate. The aim is to establish whether it is up to national law to determine the effect and validity of international or EU law within the domestic (constitutional) legal order. In more general terms, I wish to provide a theoretical concept to answer the question as to how we can know who has the final say. It does not provide a general solution which fits any norm conflict stemming from overlapping legal orders. The purpose of this article is to develop a legal theory which facilitates understanding of the interaction between international law, EU and national law. TLCC shares its point of departure with most social contract theories. It is based on a hypothetical state imagined as a legal vacuum, denoted the 'legal desert'. However, in contrast to political philosophy, the hypothesis behind the law creators' circle aims solely to elucidate the structural relationship between legal orders, without saying anything about how legal orders in particular or society in general should be organized. The theory is thus based on an abstract definition of law (i.e. the necessary common (normative) denominator) as the binding consensus between natural persons.

On the basis of this theoretical ground, I wish to engage with practice (section IV.) – I apply TLCC to the relationship between international, EU and national law.[13] I present a doctrinal analysis of relevant provisions at EU level on the basis of the TLCC. I am convinced that a theory-based argument on the relationship of EU and Member State (MS) law will fruitfully contribute to the key questions of EU law, such as the doctrine of direct applicability or the primacy question between EU law and fundamental constitutional law of the MS. It could provide for a convincing theoretical

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[11] If you agree with me that current theories cannot offer a convincing account for norm conflict solution regarding the relationship between international, EU and national law you can skip the critique of current theories (II.) and proceed directly to III., TLCC.

[12] Lando Kirchmair, *Die Theorie des Rechtserzeugerkreises – eine rechtstheoretische Untersuchung des Verhältnisses von Völkerrecht zu Staatsrecht am Beispiel der österreichischen Rechtsordnung* (Duncker & Humblot 2013).

[13] Kirchmair (n 10) for an extensive account thereof applied to the relationship of public international law and the Austrian legal order.

argumentation, solving potential tensions between the constitutional courts of MS and the Court of Justice of the EU (CJEU). For instance, arguments embedded in a sound theoretical explanation may help to clarify a potential stress ratio of European integration and the (German) 'constitutional identity' which, according to the German Constitutional Court, is resistant to integration.[14]

II. Current Theories and Doctrines and Their Flaws

1. Dualism & Monism

The relationship between international and national law is a topic of great importance. Generally, the floor has been divided between dualism, as developed by Heinrich Triepel, and monism, mainly formulated by Hans Kelsen, both of which need to be reviewed critically from today's perspective. I argue that these theories can no longer comprehensively explain the relationship between international and EU or EU and national law.[15] And that due to their emergence almost a century ago, they must be understood in their historical context. Current challenges posed by international or supranational organizations like the European Union, and the development of international law in general, overburden these outdated theories.

A. Dualism

The international and national legal orders are 'two circles, which possibly touch, but never cross each other'.[16] This is the famous statement by Heinrich Triepel which forms the cornerstone of the dualistic divide of international (or EU) and national law. Dualism's divide of legal orders was primarily based on the view that the law of the international (or EU) and the national legal orders emanates from different sources, leading to the

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[14] German Federal Constitutional Court, BVerfGE 123, 267 (Lisbon) 30.6.2009. For an overview, see Gerhard van der Schyff, 'EU Member State Constitutional Identity: A Comparison of Germany and the Netherlands as Polar Opposites' (2016) 76 Heidelberg Journal of International Law 167-91.

[15] Kirchmair (n 2).

[16] Heinrich Triepel, *Völkerrecht und Landesrecht* (C.L. Hirschfeld 1899) 111 (emphasis omitted) (translation in the text by the author).

supposition that international (EU law) and national law have arisen from different legal orders relying on different grounds for validity.[17] Although it still holds true that international, EU and national law emanate from different sources, dualism also assumes that the addressees and content of international and national law cannot be identical.[18] Thereby, dualism turns a blind eye towards the direct interaction between international law and individuals. It does so by stating that international law is purely inter-State law and can only stipulate obligations for States,[19] which does not share the same addressees with EU or national law.[20] The division of the legal systems implies that international law may not derogate from national law, and national law may not derogate from international law.[21] In order to give international law an effect within a national legal system, dualism demands a special procedure to transform or incorporate the international norm into a national norm.[22] As a result, the ground of validity of international law within national law rests solely within national law, and the ground of validity of EU law within national law rests too solely within national law.

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[17] Dionisio Anzilotti, *Lehrbuch des Völkerrechts* (W. de Gruyter 1929, German translation by Cornelia Bruns and Karl Schmid) 38-39.

[18] Triepel (n 16) 9, 11, 228-229; Anzilotti (n 17) 41-42.

[19] Triepel (n 16) 228-229, 119-120, 271; Anzilotti (n 17) 41 ff; Gustav A. Walz, *Völkerrecht und staatliches Recht: Untersuchung über die Einwirkungen des Völkerrechts auf das innerstaatliche Recht* (W. Kohlhammer 1933) 238-239, who was considered to be a moderate dualist, yet he did not postulate the impossibility of international law addressing individuals, but stated in 1933 that the character of international law at the time was mediatized through municipal law.

[20] This criticism was already expressed by Alfred Verdross, 'Die normative Verknüpfung von Völkerrecht und staatlichem Recht' in Max Imboden et al. (eds), *Festschrift für Adolf Julius Merkl zum 80. Geburtstag* (Wilhelm Fink 1970) 425, 432 ff; Riccardo P. Mazzeschi, 'The Marginal Role of the Individual in the ILC's Articles on State Responsibility' 14 (2004) The Italian Yearbook of International Law 39, 42-43 with further references in footnote 12, 'This means that international law now regulates some relationships between States and individuals in a formal manner (and not only in a substantive one)'; ICJ, *LaGrand (Germany v. USA)*, Judgment, ICJ Reports [2001], 466, 494, para. 77.

[21] Triepel (n 16) 257-258; Anzilotti (n 17) 38.

[22] Anzilotti (n 17) 41, 45-46.

Dualism faces serious difficulties explaining the basis of international or supranational organizations, because, according to dualism, there would be one international and as many x-national grounds of validity of international or supranational organizations as there are Member States.[23] In other words, the validity of an international organization would have to be divided by its Member States instead of having a uniform validity. Equally hard to grasp is the concurrent (dualistic) assumption that international, EU and national law by default cannot have the same content or addressees.[24] This assumption is flawed, as it would make the norm conflicts between international, EU and national legal orders impossible, which, however, is not the case. Norms from overlapping legal orders conflict constantly. If for instance EU law would never conflict with national law, the supremacy of EU law would be meaningless. [25]

While these flaws are obvious for us today, it was not so when dualism was emerging at the turn of the twentieth century. Think only of the dualistic assumption that international law (EU law at that time did not even exist) is purely inter-State law and so it can only oblige States but not individuals.[26] While this was certainly true when Heinrich Triepel was shaping dualistic thinking, this can no longer be perceived as an accurate depiction of international law today. International law nowadays also addresses individuals directly and shapes national law in many ways.[27] Moreover, trying to fit EU law and its relationship with international and national law under a dualistic scheme seems like squaring the circle, as the dualistic assumptions do not match our understanding of EU law, which has at its core supremacy and direct effect. If there is a conflict between EU and national law, EU law takes precedence over national law. Hence, EU law is binding on national

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[23] Griller (n 4) 83, 97; see also the general criticism by Joseph G. Starke, 'Monism and Dualism in the Theory of International Law' 17 (1936) British Yearbook of International Law 66. For an attempt to save dualism, see Gaetano Arangio-Ruiz, 'International law and Interindividual law' in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007) 15, 22.

[24] Triepel (n 16) 9, 11, 228-229, 254 ff; Anzilotti (n 17) 41-42.

[25] Kirchmair (n 2) 684 with further references. See III.3.B.

[26] Ibid with further references.

[27] See III.2.(d)(iii).

authorities and the ground of validity of EU law is not dependent on national law.

Historically, dualism evinced progress as the separation of international and national law helped international law to become independent. Thus, dualism liberated international law from being understood as 'external State law',[28] and was even referred to as a 'cleansing thunderstorm' by the monist Alfred Verdross.[29] In sum, the legal landscape has changed drastically, and the core assumptions of dualism are no more correct. As a consequence, dualism fails to explain the relationship between international, EU and national law today.

B. Monism

The main characteristic of monism is the assumption of a single unified legal system. The monism theory was developed most prominently by Georges Scelle, Hans Kelsen and Alfred Verdross at the beginning of the 20th century.[30] Monism faces the criticism of having a highly fictitious understanding of the world: nothing less than the 'unity of the legal world order' is proclaimed.[31] This understanding results from Kelsenian adherence to neo-Kantian epistemology, 'because it is only this method [the monist concept of law] and its focus on the *manner* of cognizance, not its *objects*,

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[28] For the term 'äußeres Staatsrecht', see Georg W. F. Hegel, *Grundlinien der Philosophie des Rechts* (1821) §§ 330 ff; Kirchmair (n 2) 688.

[29] Alfred Verdross, *Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten* (Engelmann 1920) 34: ('[R]einigendes Gewitter').

[30] Hugo Krabbe, *Die moderne Staatsidee* (Nijhoff 2nd ed. 1919); Léon Duguit, *Souveraineté et liberté* (Éditions La Mémoire du Droit 1922); Georges Scelle, *Précis de droit des gens: Principes et systématique*, Vol. I (Librairie du Recueil Sirey1 932); Hans Kelsen, 'Les rapports de système entre le droit interne et le droit international public' 14 (1926) Recueil des Cours de l'Académie de Droit International, 227, 299; Alfred Verdross, 'Le fondement du droit international' 16 (1927) Recueil des Cours de l'Académie de Droit International, 247, 287; Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (Oxford University Press 2018); cf. for an overview Christine Amrhein-Hofmann, *Monismus und Dualismus in den Völkerrechtslehren* (Duncker & Humblot 2003) 152 ff.

[31] Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (J.C.B. Mohr 1923); Hans Kelsen, *Reine Rechtslehre* (Deuticke 2nd ed 1960) 329; Arangio-Ruiz (n 23) 18, speaking of 'the natural unity of human kind … [a]s a matter of pure speculation'.

which allows to ascertain *a priori* how positive law is even possible *qua* object of cognizance and *qua* object of the legal science'.[32]

In cases of norm conflicts, the monistic doctrine needs to deal with the question as to which jurisdiction prevails. However, a monistic doctrine, with the so-called primacy of national law must be traced back to a very nationalistic view of international law, which no longer can be considered suitable.[33] In other words, how could popular sovereignty in the form of national law (and thus one people only) rule over international or EU law without denying their law's validity? How should the validity of, say, EU law be based on the popular sovereignty of a single member State legal order and the popular sovereignty of one nation instead of all member States' legal orders and their respective nations?[34] For the failure of answering these questions, the monistic conception with the primacy of municipal law is left aside here.

Monism with the primacy of international law, on the contrary, has attracted a lot more attention. In order to justify the primacy of international law, the monistic doctrine stipulated the premise of a hypothetical unity – being kept together by the 'chain of validity'.[35] The ultimate ground of validity is the famous basic norm of Hans Kelsen.[36] Briefly, the basic norm is a hypothetical

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[32] Paul Gragl, 'The Pure Theory of Law and Legal Monism – Epistemological Truth and Empirical Plausibility' (2015) 70(4) Zeitschrift für Öffentliches Recht 665-736, 668-669 (*italics* original; footnotes omitted) with further references.

[33] Kirchmair (n 2) 688. Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer Reinen Rechtslehre* (J.C.B. Mohr 2nd ed. 1928) 317, himself equated the monistic doctrine with the primacy of national law as the 'negation of all law'. However, later on he left the decision up to politics, see Kelsen (n 31) 339 ff.

[34] Compare also Walz (n 19) 40, who classified this perception of monism as 'pseudomonistic'; see also Starke (n 23) 77, where he stated, '[r]educed to its lowest terms, the doctrine of State primacy is a denial of international law as law, and an affirmation of international anarchy.'

[35] The term 'chain of validity' stems from Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Oxford University Press 2nd ed 1980) 105; Starke (n 23) 75; Catherine Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law' (1997) 16(4) Law and Philosophy 377, 388.

[36] Kelsen (n 31) 196 ff.

concept, which accounts for the unifying foundation of law and its validity.[37] The basic norm is a dazzling concept, which found many diverging interpretations by admirers[38] and critics.[39] The concept of the 'chain of validity' is even more troublesome.[40] Kelsen holds that '[a] norm of general international law authorizes an individual or a group of individuals on the basis of an effective constitution, to create and apply as a legitimate government a normative coercive order. That norm [of general international law], thus, legitimates this coercive order [of a 'state' in the meaning of international law] for the territory of its actual effectiveness as a valid legal order and the community constituted by this coercive order as a 'state' in the sense of international law'.[41] Similarly Verdross argues from the viewpoint of an international basic norm from which also municipal law derives: 'The freedom of States is nothing else than a margin of discretion depending on

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37 For a brief explanation, see Gragl (n 32) 671-673.

38 Robert Walter, 'Entstehung und Entwicklung des Gedankens der Grundnorm' in Robert Walter (ed), *Schwerpunkte der Reinen Rechtslehre* (Manz 1992) 47; Robert Walter, 'Die Grundnorm im System der Reinen Rechtslehre' in Aulis Aarnio et al. (eds), *Rechtsnorm und Rechtswirklichkeit: Festschrift für Werner Krawietz* (Duncker & Humblot 1993) 85; Heinz Mayer, 'Rechtstheorie und Rechtspraxis' in Clemens Jabloner and Friedrich Stadler (eds), *Logischer Empirismus und Reine Rechtslehre: Beziehungen zwischen dem Wiener Kreis und der Hans Kelsen Schule* (Springer 2002) 319; Ralf Dreier, 'Bemerkungen zur Theorie der Grundnorm' in Hans Kelsen-Institut (ed), *Die Reine Rechtslehre in wissenschaftlicher Diskussion* (Manz 1982) 38, 39, note the 'function of the basic norm stipulating unity'

39 Norbert Hoerster, *Was ist Recht?: Grundfragen der Rechtsphilosophie* (C.H. Beck 2006) 134, 138 ff; Peter Koller, 'Meilensteine des Rechtspositivismus im 20. Jahrhundert: Hans Kelsens Reine Rechtslehre und H. L. A. Harts 'Concept of Law' in Ota Weinberger and Werner Krawietz (eds), *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker* (Springer 1988) 129, 157 ff; Griller (n 4) 87-89; Werner Schroeder, *Das Gemeinschaftsrechtssystem: Eine Untersuchung zu den rechtsdogmatischen, rechtstheoretischen und verfassungsrechtlichen Grundlagen des Systemdenkens im Europäischen Gemeinschaftsrecht* (Mohr Siebeck 2002) 75 ff.

40 For criticism, see András Jakab, 'Problems of the Stufenbaulehre: Kelsen's Failure to Derive the Validity of a Norm from Another Norm' (2007) 20 (1) Canadian Journal of Law and Jurisprudence 35-67.

41 Hans Kelsen, *The Pure Theory of Law* (University of California Press M. Knight trans. of Reine Rechtslehre, 2nd ed. 1960, 1967, reprinted 1978), 193-215, 215.

international law'.'[42] According to him, the lawmakers of public international law are not States, but the international community, acting through an international organ with supranational power.[43]

Following this idea that norms can only derive from other norms, the conclusion drawn would have to be that any national law is derived from EU law, and EU and national law from international law. This, however, is an argument, which does not reflect reality.[44] Indeed, the CJEU famously postulated the 'autonomy of the Community legal order'[45] and introduced the 'direct effect'[46] of EU law, which has been interpreted by some voices as a monistic approach.[47] Nevertheless, it would be, even for the most progressive EU Constitutional lawyers, a step too far to argue that all MS legal orders derive from EU law.

The fatal blow for monism with regards to EU law is the relationship between EU law and international law, which appears to show even dualistic elements.[48] This 'Janus face' is inconsequent—at least when trying to uphold the underlying assumptions of Monism *and* Dualism.[49]

While it is important to consider the current dichotomy of legal sources of international, EU and national law, a common normative framework is equally important. Such a framework is necessary to acknowledge the intertwinements of those three legal orders and to enable a norm conflict solution for the norm conflicts arising from this intertwinement. Hence, the changes in the legal landscape forces us to leave behind the almost one-

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42 Verdross (n 8) 35 (translated by the author).

43 Verdross (n 8) 48 ff. But see Krabbe (n 31) 305-309.

44 For criticism of the other monistic concept with the primacy of national law (which would consequently make international and supranational law governed by almost 200 diverging national laws), see Kirchmair (n 2) 681 note 12.

45 Case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66; Case C-284/16 *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158 para 33.

46 Case C-26/62 *Van Gend & Loos* ECLI:EU:C:1963:1.

47 Kirchmair (n 2) 680 with further references in note 10.

48 Compare only Case C-402 & C-415/05P, *Kadi v Commission* EU:C:2008:461: UN law and EU law 'originate from distinct legal orders'. Cf Kirchmair (n 2) 683-5 with further references.

49 See for this conclusion in more detail Kirchmair (n 2) 685-90.

hundred-year-old theories of monism and dualism. Major developments force us to seek an adequate theoretical framework which fits the reality of our time.

Main claims of dualism and monism are summarized in the following table.

Table 1: Dualism & monism overview

	Dualism	Monism
Presuppositions	International and national law have: - different addressees; - different content (international law is purely inter-State law); - different sources.	Neo-Kantian epistemology ('manner of cognizance constitutes the object'). Norms can only derive from other norms.
Theoretical Outcome	International and national legal orders are - separated ('two circles, which possibly touch, but never cross each other', *Triepel*) and - based on different grounds of validity.	If international law is law, the logical consequence is that both national and international law must be seen as a unitary legal order ('unity of the legal world order', *Verdross*). Either international/EU law derives from national law or national law derives from international/EU law.
Legal Consequences	Norms must be incorporated from one legal order into another. Legal subjectivity of international organizations (be it the UN or the EU) would have one	Chain of validity ('*Stufenbau nach der rechtlichen Bedingtheit*'). Ultimate ground of validity is the famous basic norm ('*Grundnorm*').

	international and x-national grounds of validity.	
Failure	Presuppositions outdated.	Remains a theory focused on epistemology. Norm conflict solution is highly hypothetical.

2. Global Legal Pluralism

Another very prominent and more recent account of legal orders and their relationship is global legal pluralism.[50] Eugen Ehrlich studied, as he put it, the 'living law' of the Bukovina at the beginning of the 20th century.[51] Because of his seminal studies Ehrlich is nowadays referred to as one, if not the founding father of legal sociology.[52] Triggered by the findings of Ehrlich, a common understanding of pluralism is nowadays 'the presence in a social field of more than one legal order'.[53] From the vantage point of two different legal authorities present in the same social field, which can also be found to exist in colonial situations, 'legal pluralism' also became a key concept in

[50] Paul S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Oxford University Press 2012); Mireille Delmas-Marty, *Les forces imaginantes du droit (II): Le pluralisme ordonné* (SEUIL 2006); Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Hart Naomi Norberg trans 2009) 44; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010); giving an overview Ralf Michaels, 'Global legal pluralism' (2009) 5 Annual Review of Law and Social Science 243–262.

[51] Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (Duncker & Humblot 1913) 313.

[52] Manfred Rehbinder, *Die Begründung der deutschen Rechtssoziologie durch Eugen Ehrlich* (Duncker & Humblot 2nd ed 1986).

[53] John Griffiths, 'What is legal pluralism?' (1986) 24 Journal of Legal Pluralism 1–47; Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law & Society Review 869–896; Jacques Vanderlinden, 'Le pluralisme juridique: essai de synthèse' in John Gilissen (ed) *Le Pluralisme juridique* (Université Libre de Bruxelles 1971) 19–56, 19.

international law.[54] Roughly from the 1990s onwards, legal scholarship began to embrace the notion of legal pluralism. Berman describes the shift from anthropologically orientated studies towards what he coins 'global legal pluralism' as follows: Formerly, studies were aimed at two distinct legal orders within the same territory, where usually one legal order was hierarchically superior to the other. Moving away from this hierarchical understanding, legal scholars started to understand these different legal orders as 'bidirectional, with each influencing (and helping to constitute) the other'.[55]

Global legal pluralism correctly describes the massive increase in international actors, norms and tribunals as well as adjudicators. Following this descriptive analysis an important question is how we ought to deal with or even solve those legal conflicts resulting from plural, overlapping legal claims. In this regard, it is striking to see that pluralists tend to oversimplify and exaggerate contrasting positions: 'sovereigntists' stand against 'universalists'[56] and are then mediated by a 'pluralist framework'. Such framework is for instance conceptualised by Berman through his 'jurisgenerative constitutionalism'.[57] In other words, 'instead of trying to erase conflict, [he] seeks to manage it'.[58] To 'manage' norm conflicts he reviews a series of 'principles' which are of a procedural nature, instead of being substantial; namely these are 'procedural mechanisms, institutions, and practices'.[59] Likewise the French pluralist, Mireille Delmas-Marty, contrasts

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54 Brian Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney Law Review 375–411, 390; Paul S. Berman, 'Global Legal Pluralism' (2007) 80 Southern California Law Review 1155–1238, 1170.

55 Ibid 1171.

56 See the exaggerations made by Berman (n 54) 1180 stating that sovereigntists 'reject the legitimacy of all communities but the territorially-defined nation-state' and have (at 1180) 'intrinsic reason to privilege nation-state communities over others', contrasting it with a radical universalist position stating (at 1189) that '[i]n contrast to a reassertion of territorial prerogative, a universalist vision tends to respond to normative conflict by seeking to erase normative difference altogether.'

57 Paul S. Berman, 'Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism' (2013) 20 (2) Indiana Journal of Global Legal Studies 665-695.

58 Berman (n 56) 1192; Berman (50) 145.

59 Berman (n 56) 1192, and esp. 1196 ff. as well as Berman (50) 145, and esp. 152 ff.

'utopian unity' with an 'illusion of autonomy'[60] in order to propose to solve or soften this disparity with national margins of appreciation to order pluralism.[61] As an example she mentions the principle of subsidiarity in the law of the European Union.[62] Even though the suggested solutions to manage or soften norm conflicts are rather restrictive and argue, for instance in the case of Berman, only in favour of some procedural rules (neglecting any hierarchical fundamental norms), such claims remain in the realm of *ought*. Prescriptive claims which hold that these rules should be valid in order to settle norm conflicts need to be well justified. By moving in the realm of *ought*, the suggested solutions are also confronted with such problems, that even reductionist procedural mechanisms might be accused of having a strong normative flavour. Thus, also proposals for thin procedural mechanisms are also somewhat overarching substantial value claims.[63]

Samantha Besson in turn suggests that democracy 'ought rather to be the supercriterion' because of its superior legitimacy when 'deciding on the others'. Yet, also she is aware that identifying democracy in international and national norms 'remains extremely complex'.[64] And, one might wish to add, democracy is not always the super-criterion of legal orders whose norms

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[60] Delmas-Marty (n 50) 44.

[61] Delmas-Marty (n 50) 44.

[62] Delmas-Marty (n 50) 45-46.

[63] For this critique of Berman, see Alexis Galán and Dennis Patterson, 'The limits of normative legal pluralism: Review of Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law beyond Borders' (2013) 11 (3) International Journal of Constitutional Law 783-800, esp. at 793 ff. For a response see Paul S. Berman, 'How legal pluralism is and is not distinct from liberalism: A response to Alexis Galán and Dennis Patterson' (2013) 11 (3) International Journal of Constitutional Law 801-808. C.f. further critically also Ralf Michaels, 'On liberalism and legal pluralism' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds.) *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press 2014) 122-142, 141: 'his [Berman's] managerialism also presupposes some superior position from which such management is possible.'

[64] Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Jeffrey L. Dunhoff and Joel P. Trachtman (eds.) *Ruling the world? Constitutionalism, international law, and global governance* (Cambridge University Press, 2009) 381-408, 405.

might be in conflict. In Krisch's account, a somewhat exaggerated[65] 'foundational constitutionalism' stands against 'softer network forms of international cooperation' which are, again, mediated by pluralism.[66] So even the most radical pluralist, Krisch, bases the norm conflict resolution—at least in some cases—upon what he calls 'the *construction* of interface *norms*'.[67] In his opinion, the pluralism is about orders which are linked and know certain forms of common decision-making.[68] Thus, also for him, there *ought* to be certain *norms* ('interface norms'), which 'regulate to what extent norms and decisions in one sub-order have effect in another'.[69] Yet, he immediately falls back on his radical pluralism when saying that these rules are established by each order for itself including steady risk of conflict.[70] His main argument is that in the post-national sphere '[u]nder conditions of strong fluidity and contestation, conflict rules face serious problems of adaptation to a changing environment' and 'are unlikely to be able to truly settle conflicts—they might remain ineffectual or even enflame conflicts further.'[71] However, the consequence is that we actually lack a common (normative) norm conflict solution.

From this very brief overview we can conclude that most of the pluralists also think that there *should* be some kind of rules to assist norm conflict resolution. I argue in brief, that the question as to how we *ought to* deal with or even solve those legal conflicts (based on a (common) framework) resulting from plural, overlapping legal claims is quite different from a descriptive analysis. Already the identification of a conflict necessarily implies an overarching system.[72] It is important to sharply distinguish between a

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65 See for this criticism Gregory Schaffer, 'A Transnational Take on Krisch's Pluralist Postnational Law' (2012) 23 (2) European Journal of International Law 565-582.

66 Krisch (n 50) 300, 183.

67 Krisch (n 50) 285 ff. [*italics* added by the author].

68 Krisch (n 50) 288.

69 Ibid, 285.

70 Ibid, 286. However, note also that Krisch states later (p. 312) that these norms stem from the sub orders (at p. 286) and might clash.

71 Nico Krisch, 'Who is afraid of radical pluralism? Legal Order and Political Stability in the Postnational Space' (2011) 24 Ratio Juris 386-412, 407.

72 Alexander Somek, 'Monism: A tale of the undead' in Matej Avbelj and Jan Komárek (eds) *Constitutional pluralism in the European Union* (Hart 2012) 343-79.

descriptive analysis and a prescriptive proposal for norm conflict resolution. Moreover, I hold that such an overarching normative framework for norm conflict resolution needs to be a common normative framework of all overlapping legal orders.

Some pluralists might claim that they envision 'common' approaches. Still, I would answer that anything which is called plural can hardly provide for a genuinely common normative framework. I argue that it is more accurate to either stay within a purely descriptive analysis of current facts and describe them as pluralistic or move from descriptions to prescriptions. In other words, one must take account of arguing now in the realm of *ought*, by introducing, for instance, the thought that we *ought* to avoid conflicts, and, if they occur, that we *ought* to cooperate somehow to solve or mitigate them. This is what I think is the very first prescriptive step in the (global) legal pluralism debate.[73] Norm conflict identification and proper resolution must be based on a genuinely common normative framework which encompasses all affected legal orders. That means that a pluralistic picture without a common normative framework has no normative (legal) guidance for finding the final arbiter in legal norm conflicts.[74]

Although global legal pluralism may provide a coherent descriptive account of current legal developments, it lacks a satisfying common prescriptive account. Accordingly, claims (for how to solve or why not to solve norm conflicts) which solely rest on the *description* of pluralistic orders do not suffice as a basis for a normative account. If approaches of legal pluralism resort to some sort of 'meta norms or principles' to solve norm conflicts,[75]

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73 For a powerful critique of the hidden 'common point of reference' in pluralistic accounts see Klaus Günther, 'Normative legal pluralism – a critique', *paper presented at the 'Philosophical foundations of global law' conference* at the University of Cartagena, Colombia on 25 August 2016 (on file with the author). See also Klaus Günther, 'Normativer Rechtspluralismus: Eine Kritik' in Thorsten Moos, Magnus Schlette and Hans Diefenbacher (eds) *Das Recht im Blick der Anderen: Zu Ehren von Eberhard Schmidt-Aßmann* (Mohr Siebeck 2016) 43-62.

74 Gragl (n 32) 693-695.

75 Compare Berman (n 77) 665–95, with Delmas-Marty (n 50). With regards to constitutional pluralism, see Mattias Kumm, 'The Moral Point of Constitutional Pluralism' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 216, 220.

they too will need to justify these principles and to give reasons for such common accounts. Otherwise power asymmetries are difficult to avoid. The warning by Klaus Günther is pertinent in this debate: 'Historical experience teaches us that a pluralism of normative orders can rapidly become the victim of power asymmetries, or even bring forth such asymmetries'.[76]

3. Global Constitutionalism

Before moving onto my own proposal, another brief section devoted to global constitutionalism is in order. Constitutionalism on a global, supranational, and national level is an important and wide-ranging concept. Due to the successful emergence of 'global constitutionalism' as a movement and interdisciplinary discipline many diverging issues are discussed under this influential label since its breakthrough in the 21st century.[77] Global Constitutionalism, as much as Constitutionalism, shares the aspiration of establishment as well as the normative guidance and limitation of governmental power. In other words, Constitutionalism 'refers to governance according to constitutional principles'.[78] We speak, thus, of a discourse which involves the 'framing, constituting, regulating, and limiting [of] power'[79] – be it either in a thin or in a thicker form.[80] The constitutionalization of international law is a project which is mainly interested in the substantial development of international law in the form of constitutional norms or principles (or of constitutional norms or principles of the EU for instance).[81] Constitutionalism therefore is usually connected to certain key legal concepts such as the rule of law, human rights, democracy,

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[76] Günther (n 73).

[77] Anne Peters, 'Constitutionalisation', Max Planck Research Paper Series No. 2017-08, 1, forthcoming in Jean d' Aspremont and Sahib Singh (eds) *Concepts for International Law - Contributions to Disciplinary Thought* (Edward Elgar).

[78] Jaako Husa, 'Global Constitutionalism – A critical view', Maastricht European Private Law Institute Working Paper No. 2016/11.

[79] Jean L. Cohen, *Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press 2012) 76.

[80] Wil Waluchow, 'Constitutionalism' in Edward N. Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2017).

[81] For a critical overview of 'world constitutionalism', Diggelmann and Altwicker (n 8).

and inhibits a materially substantiated form of how law should be.[82] Very often also a strong universal flavour is attached to such concepts on a global perspective.

Global Constitutionalism is facing a challenge brought by descriptive legal pluralism: solutions to norm conflicts might differ depending on the context. Thus, another context, so goes the main argument of contextualization, asks for different solutions as different conditions are in place.[83] Once we reveal that the very first prescriptive question is what we *ought* to do with norm conflicts, there are very likely to be very different solutions to different conflicts (and different legal orders involved) depending on the context.[84] This is acknowledged by understanding constitutionalism as a fragmented and contextualized concept,[85] 'a relatively consolidated form of global constitutionalism',[86] or to a certain extent also by Constitutional Pluralism.[87]

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[82] For legal key concepts, see Jakab (n 9).

[83] For such a critique of the pluralistic account of Nico Krisch see also Schaffer (n 65) 579: 'The positive, empirically-grounded study of transnational legal ordering, in contrast, is important for building a normative approach grounded in philosophical pragmatism which recognizes the need for institutional variation in response to different contexts'.

[84] For a similar argument see also Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Ashgate 2009), ch. 3 relying on Robert M. Cover, The supreme court, 1982 Term-Foreword: Nomos and narrative, 97 (4) Harvard Law Review, 1983, pp. 4-68; and Robert M. Cover, 'Violence and the word', 95 Yale Law Journal, 1986, 1601-1629. However, it is important to highlight that my claim for contextualization is much simpler and thus less overladen than the claim Melissaris is making. While Melissaris's main target is a sceptical view of State law—or at least the link between State and law which is unnecessary in his eyes—my argument here is simply that when facing normative conflicts there are much likely to be various different solutions to deal with the conflict depending on the context. Thus I argue against a single — sometimes even not very clear prescriptive — claim of dealing with normative conflicts in the pluralistic world.

[85] Peters (n 77).

[86] Turkuler Isiksel, 'Global Legal Pluralism as Fact and Norm' (2013) 2 Global Constitutionalism 160-195, 190.

[87] See only Neil Walker, 'The Idea of Constitutional Pluralism' (2002) The Modern Law Review 65 (3) 317-359.

What still remains problematic is the specific request for *constitutional* norms, rules and principles. The relationship between legal orders must not always be of a constitutional dimension. Moreover, despite the fact that a relationship between different legal orders must not be guided by one specific constitution, there might still exist a legal relationship between certain legal orders. This holds true, even if we can speak of a Member State legal order as a constitutional order, and the EU legal order as a constitutional order. It is challenging to determine the relationship between these legal orders as it requires to establish which constitutional system has the final say.

Very likely, we will fall back to a sort of non-hierarchical relationship of the involved constitutional systems in order to avoid a subordination of one order under another. Trying to resolve these questions on a constitutional level might thus very likely lead to a 'constitutional stalemate'.

Therefore, I am sceptical about constitutionalism being a helpful concept with regard to the challenge of resolving norm conflicts between overlapping international, EU, and national legal orders. I doubt that constitutionalism is an appropriate concept to guide legal norm conflict resolution of those overlapping but different legal orders. On a global scale, we are well advised to take the descriptive account of global legal pluralism seriously. The massive increase in international actors, norms and tribunals, as well as adjudicators, simply makes it very difficult to speak of constitutionalism *de lege lata* (without definitely excluding the possible existence of a thin layer of global constitutionalism). A cautious assessment is that constitutionalism presumes too many substantial values for the envisaged common normative denominator in order to be a helpful concept for norm conflict solution arising out of the relationship between international, EU and national law.[88]

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[88] Michael Perry, *A global political morality: Human rights, democracy, and constitutionalism* (Cambridge University Press 2017), which envisages 'agapic sensibility' as the foundation for human dignity. Perry's statement illustrates how difficult such universal legal standards are 'this book is about the *political morality* of human rights [...] not about the *international law* of human rights' (*italics* original), p.2. For a critical account of the current state of EU 'constitutionalization', see Dieter Grimm, 'The democratic costs of constitutionalization: The European case' in Dieter Grimm, *Constitutionalism. Past, present, and future* (Oxford University Press 2015) 295.

If we agree that norm conflicts from different but overlapping legal orders should be avoided and if they appear that they should be resolved, then we need to look for appropriate concepts for such a task. I argue that we are in need of a common normative (legal) framework for resolution. Common in the sense that this normative framework is brought about in agreement by all affected legal orders. In other words, if we agree that 'stronger state[s should not be able to] lawfully force a constitutional position on another state or a stronger court on a weaker court, without any legal redress'.[89] Then, we are in need of such a common normative concept. Still, this article takes the stand that constitutionalism is not directly helpful for our question of the relationship of legal orders either.[90] Constitutionalization is more interested in the substantial development of international law in the form of constitutional norms or principles (or of constitutional norms of principles of the EU for instance) than in explaining the relationship between international, EU and national law.[91]

Table 2: Global Legal Pluralism & Global Constitutionalism overview:

	Global Legal Pluralism	Global Constitutionalism
Presuppositions	- Norm conflicts are positive. - Focus on a descriptive account.	- Common values (and further necessities for constitutional unity). - Universality (at least for the claimed legal orders).
Theoretical Outcome	- *Description* of pluralistic orders as the basis for a normative account for norm conflict solution.	- The Constitution guides all embraced legal orders/norm conflicts.

[89] Pavlos Eleftheriadis, 'Cosmopolitan Legitimacy', *paper presented at the 'Philosophical foundations of global law' conference* at the University of Cartagena, Colombia on 25 August 2016 (on file with the author).

[90] Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) writing in the preface that 'Greater 'constitutionalization' of supranational or even international law threatens to rob constitutionalism of its political core.'

[91] Klabbers (n 8) simply presuming it; Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht* (Springer 2012), refraining from strong normative claims. For a critical overview of 'world constitutionalism', Diggelmann and Altwicker (n 8).

Legal Consequences	- Potential norm conflicts without a common solution (individuals might face contradictory claims).	- Always constitutional (depending on the content of the constitution).
Failure	- No satisfactory common account for norm conflict solution. - Descriptive accuracy, but normatively wanting. - Praise of norm conflicts without a common solution.	- Presuppositions are too demanding ('burden of universality'). - Not flexible enough for diverging contexts.

4. An Intermediate Conclusion

A critical approach towards the theories of dualism and monism is now quite common.[92] However, this does not mean that some elements of these theories cannot be applied in a meaningful way and thereby they might still be useful tools to understand specific processes of the relationship between international, EU and national law.[93] And, despite all the criticism these theories faced, their persistence is remarkable. Dualism as well as monism are still referred to in many textbooks, they are present in case law,[94] and in scholarly work.[95] Also in practice, many (national) legal orders are still often referred to as being 'dualistic' or 'monistic'. Thus, there is a need to make the critical points as clear as possible in order to explain why they are of no help in answering the question posed by this article.

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92 Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 ICON 397, 400 denoting those theories 'intellectual zombies'; Kirchmair (n 2); Lando Kirchmair, 'Is the EU legal order the tombstone of the dualistic and the monistic doctrine?' in Michael Thaler and Michel Verpeaux (eds), *La recherche en droit constitutionnel comparé* (L'Harmattan 2014) 71-86.

93 Jakab (n 40).

94 The German Constitutional Court, BVerfGE, 111, 307 (Görgülü).

95 Gragl (n 32); as well as Paul Gragl, 'In defence of Kelsenian Monism: Countering Hart and Raz' (2017) 8(2) Jurisprudence 287-318.

Moreover, this article holds that (global) legal pluralism cannot offer a satisfying normative account for norm conflict resolution between international, EU and national law either. Hence, prescriptive proposals to solve legal conflicts arising from different legal orders on the global plane are better not termed 'pluralistic'. I shall suggest in this article that it is more precise to refer to a necessarily *common* framework which addresses the question as to how those conflicts should be resolved *together* or at least in a way acceptable to all parties.

Finally, this article holds that this common framework depends hugely on the context. Thus, solutions are more likely to be found if we focus on specific contexts instead of trying to provide universal solutions for different situations. This is the reason why global constitutionalism or global law cannot provide universal solutions for norm conflict resolution between international, EU and national law. They do not take the 'burden of universality' seriously enough or end in a 'constitutional stalemate'. Broadly speaking, this is because it is usually far too difficult in our highly complex and dynamic world to come up with global or truly universal solutions.

If my analysis so far is correct, then all major theories on the relationship between legal orders suffer from serious flaws when trying to answer the question as to where to find the decisive source in legal norm conflicts. At the same time, a sound theoretical concept is essential for the relationship between legal orders. Hence, I propose my own theoretical concept: the theory of the law creators' circle. Arguably, this concept provides a sound theoretical foundation without becoming ensnared in the flaws attributed to the existing theories, and it should provide a correct answer to the question posed.

III. TLCC – A Structural Answer

My aim, with what I call the theory of the law creators' circle, is to conceptualize in a very abstract way how we could principally design or, rather, understand the structural relationship between legal orders in general. The goal is to obtain a common denominator which is abstract enough to capture principal issues of relationships between legal orders but still provides enough normative guidance in order to bring about concrete results. How particular situations are analyzed might then differ significantly

depending on which context we are looking at. Only then we are able to answer the question as to how we can know who has the final say.

1. The Underlying Understanding of Law

In order to analyze the relationship between international, EU and national law properly, I establish a working hypothesis: a common denominator of international, EU and national law must be stipulated to enable a transparent and methodologically coherent analysis of the relationship. The legal concept underlying the theory of the law creators' circle[96] concentrates on those legal aspects especially relevant for the relationship between international, EU and national law. Because international law, EU law and national law are different legal fields to a certain extent, an abstract understanding of law is necessary in order to include all three fields under one common denominator. The common denominator is vital because it enables a comparison of those different fields. In order to avoid using sociological, anthropological, psychological or other reasoning embedded in natural sciences,[97] a hypothetical basis is assumed.[98]

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[96] For an extensive account of this theory as applied to the relationship between public international law and the Austrian legal order, see Kirchmair (n 12). For an introduction to the theory (and further references) and its application to international treaties and their relationship to the Austrian as well as the Hungarian legal order as well as the former abbreviation TREK, from the German term 'Die Theorie des Rechtserzeugerkreises', see Kirchmair (n 10), which is an early version of chapter III of this Article.

[97] Jan Klabbers, *An introduction to international institutional law* (Cambridge University Press 2002) 34; Lando Kirchmair, 'How (not) to argue for the relation between natural sciences and law: Why the thesis of an innate 'Universal Moral Grammar' and its relevance for law as argued by John Mikhail fails' (forthcoming) Archiv für Rechts- und Sozialphilosophie.

[98] See also Loos arguing that legal science as much as social sciences pursue meaningful consequences based on hypothetically presumed values (which makes them normative sciences), Fritz Loos, *Zur Wert- und Rechtslehre Webers* (Mohr Siebeck 1970) 111. For the change from a real to a hypothetical contract, see Koller (n 99) 14, who quotes Immanuel Kant, *Über den Gemeinspruch*: *'Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis'* (Berlinische Monatsschrift 1793) 153 as the first to express the fiction of a social contract.

The definition of law as well as its origins start in the 'legal desert'.[99] The legal desert shall be understood as a legal vacuum: a neutral, pre-legal state without any further specifications. Of course, such a starting point provokes reflexive associations to social contract theories. The legal desert was considered empirically as an anarchic state in which everyone is at war with everyone else, famously expressed as the 'state of nature' by Thomas Hobbes.[100] Natural rights were conceived to be already existing and just to be protected by a social contract by John Locke.[101] Jean-Jacques Rousseau thought it necessary to discard everyone from their property in order to enable the formation of the '*volonté générale*',[102] which is considered to be a prerequisite for the formation of common interests in the first place.

As I do not focus on how a just society can be conceived, the following assumption shall suffice: in the legal desert, a consensus between two or more individuals is widely considered to be *the* possibility which allows the establishment of a binding legal rule to organize cohabitation.[103] Consensus thereby is understood to serve as a tool for objectification of individual interests[104] and does not aim to establish any values or tools that might

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[99] Compare the theories of the social contract summarized by Peter Koller, *Neue Theorien des Sozialkontrakts* (Duncker & Humblot 1987).

[100] Thomas Hobbes, *Leviathan* (1651, Leviathan, German translation by *J. Schlösser* 1996) 96 ff.

[101] John Locke, *Zwei Abhandlungen über die Regierung* (1690 Two Treatises of Government, German translation by *H. J. Hoffmann* 1977) 201 ff.

[102] Jean-Jacques Rousseau, *Vom Gesellschaftsvertrag oder Grundsätze des Staatsrechts* (1762, Du contract social; ou principes du droit politique, German translation by *H. Brockard* 1986) 1. book, 6. chapter, 17 f.; Koller (n 99) 25.

[103] Kirchmair (n 12) 46 ff. Compare thereto also *Weinberger*'s argument aiming at disclosing natural law based theories arguing that legal positivism originates from non-cognitivism holding that it is impossible to cognize right law and justify norms cognitively Otta Weinberger, *Norm und Institution – eine Einführung in die Theorie des Rechts* (Manz 1988) 72 f.

[104] The notion of objectivity therefore refers only to an approximation to objectivity. Compare also discourse theory Robert Alexy, 'Diskurstheorie und Menschenrechte' in Robert Alexy (ed), *Recht, Vernunft, Diskurs – Studien zur Rechtsphilosophie* (Suhrkamp 1995) 127, 129 who circumscribes discourse theory as a procedural theory of practical validity. Jürgen Habermas, *Die Einbeziehung des Anderen* (2nd ed. Suhrkamp 1997) 299f; Jürgen Habermas, *Die postnationale Konstellation* (Suhrkamp

indicate how a just society shall be organized. While the point of departure is very similar to most social contract theories—the 'legal desert'—the aim of this analysis contrasts sharply with the aim of political philosophy as the goal of this article is much more moderate.

Choosing this hypothesis behind the law creators' circle aims at only elucidating the structural relationship between international, EU and national law without saying how society or the State should be organized (or without arguing, for instance, whether the EU has a constitution or not). Yet, it is not a descriptive theory basing the law on sociological facts. The TLCC is a proposal for normative guidance of norm conflict resolution between different legal orders. Whether the hypothetical legal desert is best understood by imagining a natural disaster or other events is left to the reader's imagination. This hypothetical starting point shall guarantee a consistent definition of law. That is, the definition of international *law*, EU *law*, and national *law* must be uniform. For if it is not, the norm conflict resolution between the different legal orders cannot work properly.[105] Analogous to the historical idea of social contract theory, the consensus element is based on the abstract principles of *pacta sunt servanda* and *pacta*

1998) 175; and id., *Faktizität und Geltung – Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992) 138 stating that those regulations are legitimate which alle possibly affected persons might approve as participants in rational discourse. Seyla Benhabib, 'Another Universalism: On the Unity and Diversity of Human Rights' 81 (2007) *Proceedings and Addresses of the American Philosophical Association* 7, 21. This, however, is not meant to suggest that international, EU or national law are the result of a power free rational discourse. It merely shall indicate the need to objectify individual interests.

[105] Yet, it is important to clarify that this definition of law is not supposed to be superior to any other definition of law. Particularly consent as a source of law has been criticised recently. See only Andrew T. Guzman, Against Consent 52 (2012) Virginia Journal of International Law 747-790. My response regarding this so-called consent problem is twofold. First, I argued elsewhere (see, Lando Kirchmair, What came first: the obligation or the belief? A renaissance of consensus theory to make the normative foundations of customary international law more tangible 59 (2017) German Yearbook of International Law 289-319) that there is still something beneficial in consent as a source of (customary international) law. Second, the definition of law made in this article is due to the task of finding a definition of law abstract enough to serve as a common denominator of international, EU and national law.

tertiis.[106] Those principles apply due to pre-legal, reasonable[107] reasons. These pre-legal principles must not be chosen arbitrarily. Their origin needs to be disclosed, because the assumed fiction should not deviate from conceivable or even already scientifically proven pre-conditions. The pre-legal application of the *pacta sunt servanda* rule is based on the assumption that all individuals participating in a consensus must not deviate from the adopted compromise in order not to violate the achieved compromise.[108] Another motivation not to violate the achieved compromise is that any violation could endanger the successful adoption of a future compromise, which, for individuals, would again be positive.[109] Irrespective of the difference between compromise and consensus (not every consensus must be a

[106] Koller (n 99) 12f.

[107] John Rawls, *Politischer Liberalismus* (1998, German translation by Wilfried Hinsch, Political liberalism, 1993) 120, note 1.

[108] Norbert Hoerster, *Was ist Recht? Grundfragen der Rechtsphilosophie* (C. H. Beck 2006) 133 holding that justification of legal evaluation is reliant to ethical premises which in turn are related to a compromise of individual interests.

[109] Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre* (1797) II. main part 2. Chapter § 19 especially 100 f stating that holding a promise is a postulate of pure reason. Compare also John L. Brierly, *The law of nations* (Oxford University Press 1963) 56: 'The ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.'
C.f. [even though relating to *pacta sunt servanda* and international treaties] Georg Dahm, *Völkerrecht*, Vol. I (De Gruyter 1958) 12, especially n. 17 holding that the minimum set of international legal order must include pacta sunt servanda, which holds true for practical reasons. See also Jost Delbrück, ‚Begriff, Geltung u. Erscheinungsformen des Völkerrechts' in Georg Dahm et al. (eds), *Völkerrecht*, Vol. I/1 (2nd ed De Gruyter 1989) 27, 37, by saying who counts consens as a source of law implies pacta sunt servanda C.f. id., ‚Verbindlichkeit und Geltungsbereich der Verträge' in Georg Dahm et al. (eds), *Völkerrecht*, Vol. I/3 (2nd ed De Gruyter 2002) 600, 600 f, stating that *pacta sunt servanda* and *pacta tertiis* are self-evident 'ius necessarium'. See also Jules Basdevant, 'Règles generals du droit de la paix' 58 (1936) Recueil des Cours Vol. IV 471, 642. C.f. Hans Wehberg, 'Pacta sunt servanda', 53 (1959) American Journal of International Law 775, 782 and providing an overview Kirsten Schmalenbach, 'Article 26' in Oliver Dörr/Kirsten Schmalenbach (eds), *Vienna convention on the law of treaties – A commentary* (Springer 2012) para. 13-22 with further references.

compromise), these notions are used as synonyms here. This includes the assumption that individuals have a reciprocal interest in forming legal rules to coordinate cohabitation and to act cooperatively.[110] The compromise is thus based on the general assumption of creating positive effects for all participating individuals. This assumption seems to be justified precisely because, without it, a binding consensus would be senseless. Contrary to social contract theories, these assumptions are not made in order to establish principles of justice[111] or to legitimize specific forms of a societal organization.[112] Without proposing a material content of *just* law, structural arguments regarding the connection of individuals through consensus—in other words, law—shall dominate the articulated understanding of law.

A situation where all individual interests are not represented equally can no longer be considered a consensus according to this definition. This would be the case, for instance, in situations in which individuals are discriminated or a minority lacks acceptance. The disadvantaged individual or minority has the *de facto* possibility of revolting against this imposed consensus. This is reflected in the pre-legal principle *pacta tertiis nec nocent nec prosunt,* which is analogous to the *pacta sunt servanda* principle, held to be pre-legally valid. If these principles are also reflected in positive law, they become a declaratory regulation, which renews but does not establish their validity. However, it

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[110] For an interesting analysis arguing that rules are a cognitive phenomenon based on an inborn (moral) competence similarly to the language faculty brought up by Chomsky, see Matthias Mahlmann, *Rationalismus in der praktischen Theorie – Normentheorie und praktische Kompetenz* (2nd ed Nomos 2009). See also an overview of the current debate in evolutionary psychology given by Michael Tomasello and Amrisha Vaish, 'Origins of Human Cooperation and Morality' (2013) Annual Review of Psychology 231 ff. Lando Kirchmair, 'Morality Between Nativism and Behaviorism: (Innate) Intersubjectivity as a Response to John Mikhail's John Mikhail's 'Universal Moral Grammar' 37(4) (2017) Journal of Theoretical and Philosophical Psychology 230-260.

[111] John Rawls, *Eine Theorie der Gerechtigkeit* (1975 German translation by H. Vetter, A theory of justice, 1971); id., *Das Recht der Völker* (2002 German translation by W. Hinsch, The law of peoples, 1999).

[112] Koller (n 99) 17, who indicates that social contract theories have—on the one hand—to determine an acceptable starting point allowing for a fair agreement. On the other hand, these social contract theories aim to show which principles find reasonable acceptance by all participants.

reinforces the importance of these principles and therefore strengthens the pre-legal assumptions made. In this regard, the choice for consensus seems to be justified to a certain extent by the fact that consensus has been positivized as an important source of law in international law.[113] Moreover, EU law is actually the prime example of a legal order which is based on a real (founding) consensus: the treaties.

Another parallel to social contract theories is the assumed equality between all individuals. This assumption was based on Thomas Hobbes's argument of empirically equal human beings[114] and John Locke's presupposed equality among individuals as a natural right.[115] Jean Jacques Rousseau also acknowledged equality of people as a fundamental precondition for his version of the social contract,[116] as did John Rawls in his famous 'veil of ignorance'.[117] Being aware of the importance of equality amongst individuals, this article will assume that equality.

In order to analyze the relationship between international, EU and national law, it is necessary to outline the underlying concept of law. Following the aforementioned conditions, law is simply defined as a binding consensus (*Willensübereinkunft*) of all participating individuals. The consensus element may be fulfilled by different actions, such as explicit, implied or tacit acceptance.[118] However, only consensus between two or more individuals

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[113] Art. 26 and 35 VCLT.

[114] Compare Hobbes (n 100) 102 on the empirical equality of humans in the state of nature. See for criticism Koller (n 99) 18 f.

[115] Locke (n 101) 203.

[116] Rousseau (n 102) 1. book, 6. chapter, 17 f, who argues even for expropriation in order to achieve equality.

[117] Rawls (n 111) 36. However, see also criticism of the idea of equality by Robert Nozick, *Anarchie, Staat, Utopie* (1974 Anarchy, State, and Utopia, German translation by *H. Vetter* 1976) 214 ff. James M. Buchanan, *Die Grenzen der Freiheit, Zwischen Anarchie und Leviathan* (1975 The Limits of Liberty, Between Anarchy and Leviathan, 1984) 1 ff, who also designed his social contract theory without individual equality. Koller (n 99) 19, 188. Nevertheless, see Buchanan (n 117) 2 on the necessity for methodological individualists to recognize fellow human beings.

[118] Compare for such an understanding of consensus also Rüdiger Wolfrum and Jakob Pichon, 'Consensus' in Rüdiger Wolfrum (ed), *MPEPIL online edition* (2010) para 3.

may produce an objective, i.e. common legal rule.[119] The consensus produces objectivity because it unifies the individual interests of the participants. The resulting overlapping interest, for example, a common rule to organize cohabitation, becomes objective through the binding consensus. Consensus is furthermore understood in an abstract way, with collective will being the central idea. How this common will is ascertained, however, shall not be analyzed. On the contrary, it will be assumed as a starting point. The conviction of the individuals concerned with whether they can establish a positive compromise is assumed to be a sufficiently stabilizing element for this legal concept and its binding character.[120] The pre-legal, reasonable *pacta sunt servanda* principle reflects this.

2. The Theory (of the Law Creators' Circle)

A. Definition

The law creators' circle is defined as the circle of two or more individuals, which originates in the creation of one single binding consensus. In other words, the law creators' circle originates through the creation of law, which rests upon the consensus of individuals. If the very same individuals create another consensus, this is to be considered as a supplement to the same law creators' circle. As a consequence, individuals may only create a binding consensus for themselves.[121] Accordingly, law creators are only the individuals, who are simultaneously the creators and the addressees of the consensus.

In terms of their relationship to each other, the individuals who do not share a single law creators' circle remain in the legal desert. Figure 1 below, illustrates two law creators' circles which are constituted by wholly different

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[119] Weinberger (n 103) 73.

[120] The binding character is considered to be an implied element of the consensus. Eugenio Bulygin, 'Das Problem der Geltung bei Kelsen' in Stanley L. Paulson and Michael Stolleis (eds), *Hans Kelsen – Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* (Mohr Siebeck 2004) 80, 88f with further references at p. 95; Matthias Knauff, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem* (Mohr Siebeck 2010) 25, who speaks of a specific characteristic of law that legal validity rests on useful conventions.

[121] See the above-mentioned pre-legal *pacta tertiis* principle, II.

individuals — for example, individuals A, B and C on the one hand and D, E and F on the other hand.

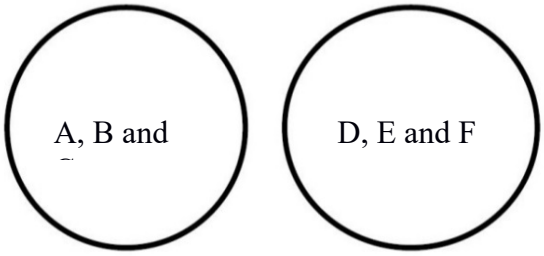

Figure 1

However, this does not imply any judgment of the legal desert. The legal desert is a neutral, pre-legal status. Furthermore, there is the need to stress once again: one single consensus on a specific matter suffices to constitute a law creators' circle between the participating individuals.

B. Conflicts between Different Law Creators' Circles

Individuals who do not share the same law creators' circle are, in relation to each other, in the legal desert (see Figure 2 below; the different colours illustrate that these two law creators' circles established rules with non-identical content). However, this is just theoretically relevant because nowadays ius cogens rules — even though in a very fundamental and limited sense — provide practically for universal fundamental rules by the largest possible law creators' circle. Naturally, the status of a legal desert regarding a specific subject matter lasts only until individuals join a law creators' circle and consent upon this specific subject matter.

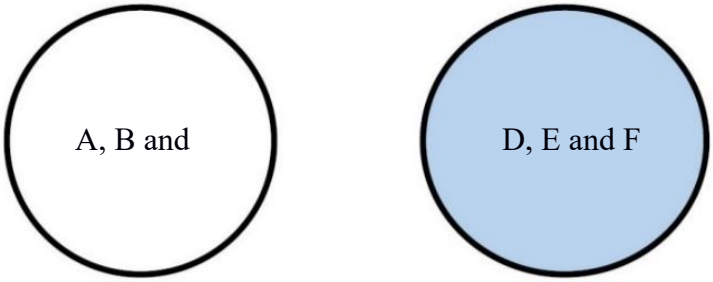

Figure 2

Different law creators' circles are less of a concern. Yet if they overlap, problems may arise. Law creators' circles overlap if an individual is, at the same time, a member of two different circles whose total members are not fully identical (see Figure 3 below). This would be the case, for instance, if the white circle includes individuals A, B, and *C* and the blue circle includes individuals *C*, D, and E. Recall that individuals participating in one law creators' circle are by definition creators and addressees of the consensus.

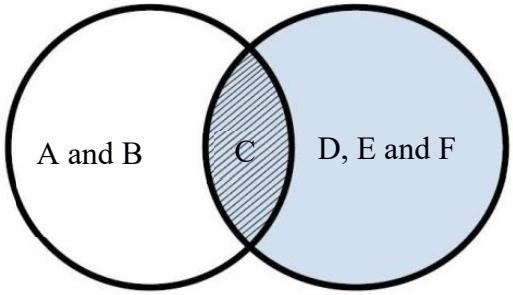

Figure 3

Overlapping circles are unproblematic if they include completely diverging subject matters (see the different colours of the circles in Figure 3 above, which indicate that the white and the blue circles relate to different subject matters). However, if one or more individuals are at the same time members of different but partly overlapping law creators' circles regulating the same subject matter, they are possibly conflicting (see Figure 4 below).

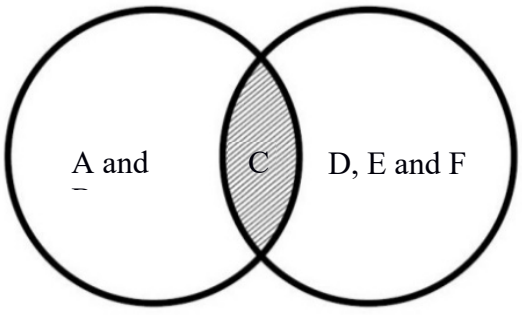

Figure 4

A norm conflict arises if the application of any right or duty in one circle is contradictory to any right or duty in the other circle of which the same individual is also a member (see Figure 4 above).[122] Once a consensus has been established by a law creators' circle, it must not be infringed upon by a single individual, either by simply breaching the consensus without the acceptance of the other members of this law creators' circle, or by stating a conflicting consensus with other individuals (*pacta sunt servanda* as well as *pacta tertii*).[123] In other words, if A, B, and C agree that x is a forbidden action, B, C, and D must not allow x either. However, regarding the solution of this conflict of norms, we remain in the legal desert. As far as different law creators' circles are concerned, the well-known norm conflict solution rules like the maxim *lex posterior* and *lex specialis* do not provide a solution. It is important to emphasize that these norm conflict solution rules may only provide for a solution within one and the same law creators' circle. This, however, does not

[122] Hans Kelsen, *Allgemeine Theorie der Normen* (Manz 1979) 99; Similarly Kelsen (n 31) 209. See also Ewald Wiederin, ‚Was ist und welche Konsequenzen hat ein Normkonflikt' 22 (1990) Rechtstheorie 311, 318, who specifies this by stating that also conflicts between commanding and permitting norms are norm conflicts at 324. This also applies in cases of de facto inability (316). See also Erich Vranes, 'The Definition of ‚Norm Conflict' in International Law and Legal Theory', 17 (2006) European Journal of International Law 395, 418 who also argues in favor of a broad definition of norm conflicts. See also Kirsten Schmalenbach, 'Article 53' in Oliver Dörr/Kirsten Schmalenbach (eds), *Vienna convention on the law of treaties – A commentary* (Springer 2012) para 54. Cf. Karl Engisch, *Die Einheit der Rechtsordnung* (Winter 1935), p. 46; and *id.*, *Einführung in das juristische denken* (7th ed. Kohlhammer 1977) 162. Cf. Thomas Zoglauer, *Normenkonflikte – zur Logik und Rationalität ethischen Argumentierens* (Frommann-Holzboog 1998) 125 ff. For a more narrow definition, which is often used on the international level, see Wilfred Jenks, 'The conflict of law-making treaties', 30 (1953) *British Yearbook of International Law* 401, 426: 'A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.' And also Gabrielle Marceau, 'Conflicts of norms and conflicts of jurisdictions: The relationship between the WTO agreement and MEAs and other treaties', 35 (2001) Journal of World Trade 1081, 1084.

[123] Erich Vranes, 'Lex superior, lex specialis, lex posterior – Rechtsnatur der 'Konfliktlösungsregeln', 65 (2005) Heidelberg Journal of International Law 391, 402, n. 48.

prevent a norm conflict solution circle from being created which embraces both conflicting circles (see Figure 5 below).

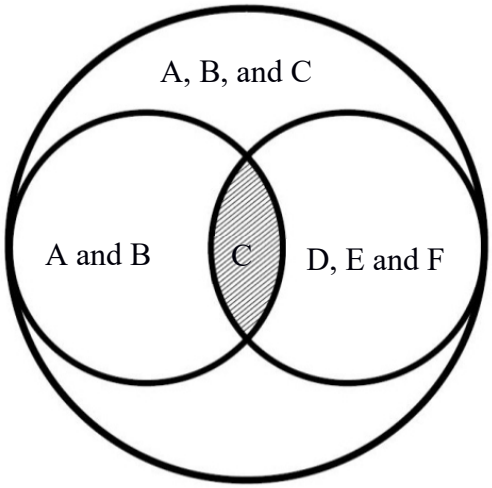

Figure 5

But if there is no embracing conflict solving circle, those individuals remain in the norm conflict solving legal desert. Of course, this does not mean that conflicts might not be solved peacefully and satisfactorily. But there is no legal norm conflict solution rule. The theory of the law creators' circle does not provide any solution for the constellation of partly overlapping and conflicting law creators' circles either.

C. The Theory of the Larger Law Creators' Circle

The theory of the larger law creators' circle is based on the aforementioned pre-legal assumptions, which are the principles *pacta sunt servanda* and *pacta tertiis*. According to these pre-legal principles, the TLCC is fundamental for all agreed consensuses. If a legal rule has been created by a consensus, unilateral abrogation is no longer possible. The rule of the larger law creators' circle always prevails over the rule of the smaller circle, *if* — and this is important — *all* members of the smaller circle are also members of the larger circle — which means that the smaller circle is absorbed by the larger circle. (See figure 6 below, which illustrates that A, B, and C constitute the smaller

circle that is completely absorbed by the larger circle of A, B, C, D, and further individuals and so on and so forth).

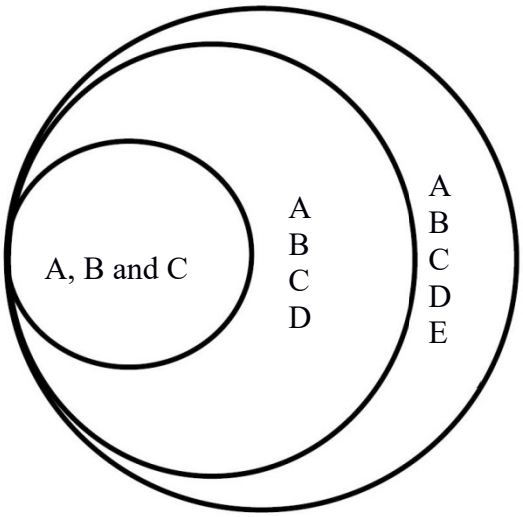

Figure 6

To illustrate this, I will discuss an example: if A, B, and C (the larger law creators' circle) ban smoking in their shared flat, then A and B alone (the smaller law creators' circle) may not re-instate smoking or smoke in their flat without C's acceptance. Consequently, the content of the agreed rule is decisive. The consensus of the larger law creators' circle must not be violated or hindered by a conflicting rule set up by the smaller law creators' circle. If the consensus were to be violated by one or more individuals, this would be a clear breach of the consensus of the larger circle and would thereby violate the pre-legal principle *pacta sunt servanda*.

If the smaller circle does not break a rule of the larger circle, then the smaller circle is free to agree on whatever rules its members would like. For instance, it may agree upon further, more specific rules as long as they do not conflict with a rule of the larger circle. To illustrate this, I re-visit the 'smokers' example: in this scenario, A, B, and C ban smoking again, not only in their flat but also in the pub they frequent. At first glance, it seems less likely that A and B should not be allowed to smoke a cigarette in the pub if they wish to do so when going out one evening without C. To understand this, it is important to take a close look at the consensus agreed upon between A, B, and C. It is

essential to know whether they agreed to stop smoking in general or just when in each other's company. If the agreed consensus aims at preventing them from smoking in general — regardless of the place and whose company they are in — it is only possible for all three of them together to change or end their agreed consensus.

The change of location from their flat to a public bar is intended to show that the content of the agreed consensus is crucial. It is much more likely that they would agree to a ban on smoking in their flat, even if for different reasons, than they would do so in general (also in the pub). Therefore, one might think that A and B are free to smoke in the bar if the consensus agreed upon by A, B, and C does not contain any specifications or any explicit command forbidding them to deviate from this. But if it does include a specification or an explicit command and it is clear that the consensus is a general ban on smoking, they may only override or change it by all three acting together. The command not to deviate from the agreed consensus might, furthermore, be implicitly found in the smoking ban in relation to the shared flat. Without any further specification of the consensus, we can only assume that the command not to deviate originated from the consensus itself. In the pub example, an explicit command stating that a deviation from the agreed ban is or is not allowed might be seen as necessary in order to clarify that A or B, alone or together, might deviate from the ban. Without this explicit command, one could assume that A and/or B are allowed to smoke when C is not present. However, if an explicit command not to smoke in the pub, whether alone or with others, has been agreed on by all three, it is clear that, according to the theory of the larger law creators' circle, any agreement by A and/or B (the smaller circle) to allow smoking in the pub would violate the consensus of A, B, and C (the larger circle). Consequently, it is paramount to know whether the smaller circle has simply established a more specific rule which does not conflict with the consensus of the larger circle, or whether the smaller circle rule directly violates the consensus of the larger circle.

While a mere specification of a rule is not problematic, a norm conflict is. A norm conflict caused by the rule of the smaller circle conflicting a rule of the larger circle contravenes the theory of the TLCC and the pre-legal, reasonable principle of *pacta sunt servanda* which it is based on. If the larger law creators' circle gives a material command, the smaller law creators' circle

must obey this command. If the larger circle agrees on a certain consensus, this same consensus may only be changed or deviated from on the same level as it was agreed on (the larger circle). This also applies to the legal consequences and effects of the consensus on the members of the smaller circle.

According to the TLCC, if the members of the different law creators' circles are not identical or fully included in a larger circle, it is not possible for the smaller law creators' circle to be overruled by the larger circle. This larger circle is not related to the smaller circle because the members of the different circles are not identical (see Figure 7 below). Therefore, it does not matter if those circles include conflicting rules regarding their subject matters because both apply the *pacta tertii* principle. The circles are, in relation to each other, in the legal desert.

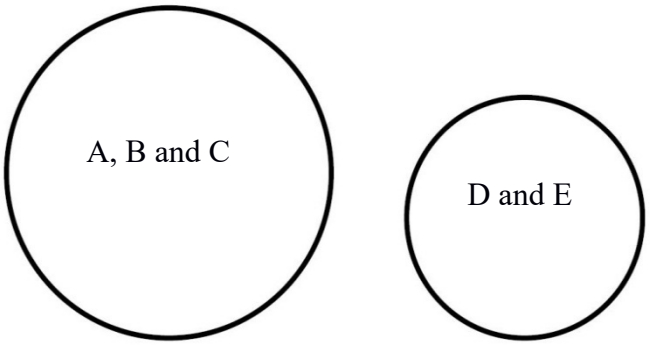

Figure 7

If some, but not all, of the members of both circles with conflicting subject matters are identical, the case is different (see Figure 8 below). The constellation of Figure 8 is very close to the constellation of Figure 4. The question is whether the size difference between constellation 4 and constellation 8 is relevant. It is important to note that the constellation in Figure 8 is impossible with regards to the relationship between international and national law because the State (the smaller law creators' circle) participates in the making of law in the international sphere (the larger law creators' circle) as a unity, acting on behalf of its individuals. Yet, theoretically speaking, it is important to note that the case of Figure 8 is not the primary application of the theory of the larger law creators' circle. The difference from the constellation illustrated in Figure 4 is too insignificant.

Therefore, either a larger circle embracing both circles governs the conflict (see Figure 5 above) or the individuals concerned remain in the legal desert with regards to the solution of the norm conflict.

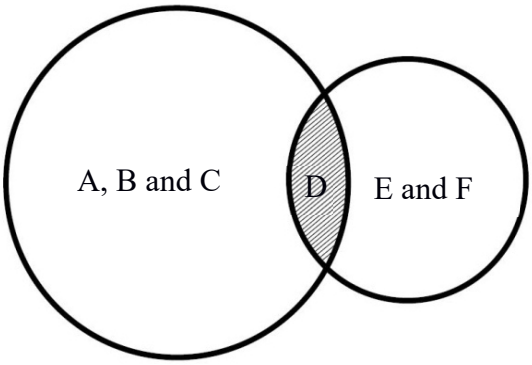

Figure 8

D. Legal Consequences Resulting from a Violation of the Consensus of the Law Creators' Circle

In terms of the relationship between international, EU, and national law, the TLCC forces us to analyze the contents of the rulings of the larger, international (or EU with regards to national) law creators' circle. Contrary to prevailing theories on this relationship, there is no general, blanket legal consequence leading to an absolute or otherwise standardized legal consequence or effect of international law within the national legal order. Consequently, the TLCC does not stipulate a single absolute legal consequence. Generally speaking, the smaller law creators' circle lacks the ability to create a rule that conflicts with any rule of the larger circle (*rechtliches Können*). The larger circle is free to change this general situation.

With regards to the relationship between EU and Member State law, the supremacy of EU law stipulates that Member States can make law conflicting with EU law (*rechtliches Können*). However, they are not allowed to make such law and in case they do anyhow, conflicting Member State law is not applicable (*rechtliches Dürfen*).[124] In order to identify the effect of EU law

[124] Case C-6/64 Costa v ENEL ECLI:EU:C:1964:66.

within the Member State legal orders, the doctrine of direct effect is very well known.[125]

Before coming to the peculiarities of the supranational EU legal order, a brief discussion of the relationship between international and EU or national law shall further illustrate what I have in mind. Using the relationship between international and EU or national law as an example, EU law or national law (the smaller law creators' circle) lacks the ability to create rules conflicting with *ius cogens* norms. EU or national rules conflicting with *ius cogens* are null and void *ex tunc*. The existence of *ius cogens*, however, suggests that the smaller law creators' circle (EU law or national law, both with regards to international law) has the ability to create EU or national rules that conflict with general international law without *ius cogens* character (*rechtliches Können*), but lacks the authorization to do so (*rechtliches Dürfen*). This implies that the focus should be on the emergence of international law. More recent EU or national law lacks the authorization to subsequently change — or even deviate from — international law by incorporating it into the EU or national legal order via reception theories. Therefore, it becomes crucial to analyze the content of the international rulings of the larger law creators' circle. The consensus of the larger, international circle is decisive when the legal consequences or effects of international law are analyzed in relation to national law.

Having said this, it is important to note that most of the international rules do not stipulate a far-reaching effect on national law: (i.) Solely applicable (*schlicht anwendbare*) international rules must, therefore, be differentiated from (ii.) directly applicable (*direkt anwendbare*), and (iii.) individualizing (*individualisierende*) rules.

(i) Solely Applicable Rules

Solely applicable rules, also called inter-State laws, leave it up to the discretion of the national legal order to decide how to implement these rules domestically. Typical wording for such provisions is quite abstract, formulating only general obligations, which are then subject to further specification by national laws. Even today, most of the international rules are

[125] Andreas Th. Müller, *Effet direct. Die unmittelbare Wirkung des Unionsrechts* (Mohr Siebeck forthcoming).

still solely applicable, which means that they do not have a direct effect within the national legal order. Therefore, further specification of the international rule, for instance by national acts, is necessary. The EU or national act concretises and thereby 'implements' the general, i.e. solely applicable, international rule. The TLCC does not challenge this. The TLCC is not an ideological project aiming at advancing international law to have more effect within national law. With regards to the relationship between EU and Member State law this category, very roughly speaking, fits directives in EU law (Article 288 TFEU).[126]

(ii) Directly Applicable Rules

In contrast, directly applicable rules — in other words, self-executing rules — give no discretion to the national legal order in deciding how to implement these rules domestically. Directly applicable norms take effect within the EU or national legal order without any EU or national act except for ratification, and consequently simply do not leave discretion to the national legal order.[127] In this case no further national act is needed and EU or national law-applying organs — such as the courts — have to apply it directly .[128] If an international

[126] However, as is well known: badly implemented or too late implemented directives can, nevertheless, have direct effect. C-6/90 and C-9/90 *Francovich v Italy* EU:C:1991:428. Yet, a detailed analysis of the legal acts of EU law on Member States' legal orders when thinking with the TLCC must be postponed due to a lack of space.

[127] Alfred Verdross and Bruno Simma, *Universelles Völkerrecht – Theorie und Praxis* (3rd ed Duncker & Humblot 1984) 550; Stefan Griller, *Die Übertragung von Hoheitsrechten auf zwischenstaatliche Einrichtungen* (Springer 1989) 355, who defines direct applicability [even related to the EU] as national validity of individual international law norms with direct legal effect without any interference of an additional national act. Compare furthermore August Reinisch, 'Zur unmittelbaren Anwendbarkeit von EWR-Recht' (1993) *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung* 11, 15, with further references in n. 40; and Yuji Iwasawa, 'The doctrine of self-executing treaties in the United States: A critical analysis' 26 (1986) Virginia Journal of International Law 627, 632, n. 27; compare also Thomas Buergenthal, 'Self-executing and non-self-executing treaties in national and international law' 235 (1992) Recueil des Cours Vol. IV 303, 317.

[128] Karen Kaiser, 'Treaties, direct applicability' in Rüdiger Wolfrum (ed), *MPEPIL online edition* (2011) para. 1; Karel Vasak, 'Was bedeutet die Aussage, ein Staatsvertrag sei 'self-executing'? – Zum Erkenntnis des Verfassungsgerichtshofs vom 27.6. 1960, B 469/59' 24 (1961) *Juristische Blätter* 352, 352.

treaty or a provision of it is directly applicable, the smaller (EU or national) circle has already accepted this effect by agreeing to the consensus at the international level. A subsequent unilateral EU or national derogation of the deliberately consented direct applicability of the international treaty is opposed according to the TLCC. Again, very cautiously, this category relates best to EU regulations (Article 288 TFEU).

(iii) Individualizing Rules

A third category of international rules, which can be distinguished from solely and directly applicable rules, is individualizing rules. Individualizing rules are those international rules that directly address individuals, without the need for an EU or national organ to enforce or apply them. They bind or grant rights to individuals directly without the EU or a State intervening (again, except for the making of this international norm).[129] Individualizing international rules are rules which are not directed towards the EU or the State, but directly towards the individual without using the EU or the State as a mediator. Several international criminal law norms or—with regards to national law only—also Article 34 of the European Convention on Human Rights as well as similar provisions constitute examples for individualizing rules. In this case again, there is no need for any incorporation, adoption or transformation of the international rule into the EU or national legal order. The Charter of Fundamental Rights of the EU as well as the possibility of individuals to launch actions for annulment (Article 263 (4) TFEU) come to mind when speaking about individualizing rules of EU law.

E. The Connection between Law Creators' Circles[130]

Based on the analysis in the previous sections, the larger the law creators' circle, the thinner the regulation density becomes. The consensus also tends to be more abstract and fundamental the larger a circle becomes. However, this is not a theoretical restriction on the regulatory possibility of the larger

[129] Compare the enumeration made by Jost Delbrück, ‚Das Individuum im Völkerrecht' in Georg Dahm et al. (eds), *Völkerrecht* Vol. I/2 (2nd ed De Gruyter 2002) 259, 263f with further references. Griller (n 4) 96, 98 ff; Anne Peters, *Jenseits der Menschenrechte: Die Rechtsstellung des Individuums im Völkerrecht* (Mohr Siebeck 2014).

[130] Of Those Circles of Which the Larger Circle Includes All Members of the Smaller Circle, See Figure 6.

or even largest possible law creators' circle. Rather, this is a practical phenomenon. The more individuals that are involved, the more difficult it becomes to reach a consensus. But, theoretically, if all legal rules stemmed from the same largest conceivable law creators' circle embracing all individuals, no smaller law creators' circles would exist. Practically, this is not (yet) the case. Therefore, many subject matters are not embraced by an international, or even a very large EU, law creators' circle. Hence, only the most fundamental rules are embraced by the largest possible law creators' circle. All but these rules are left to smaller law creators' circles at the next smaller level. This continues until the smallest possible level of two individuals. The TLCC's only condition is that the rules of the smaller law creators' circle must not conflict with a rule of the larger law creators' circle.

In reading this, one might be tempted to compare the thoughts articulated here with the *Kelsenian* 'chain of validity'[131] (in German, *Delegationszusammenhang*, on which the hierarchy of norms, *Stufenbau nach der rechtlichen Bedingtheit*, is based).[132] The main characteristic of this chain of validity is that a norm can derive its validity only from another norm.[133] As a consequence of this conviction, monism with primacy of international law stipulates that all national law derives validity from the higher international law.[134] Similarly the 'competence-theory' of Verdross holds that State-sovereignty is a competence derived from international law and thereby the existence of an international constitution is assumed.[135] Besides other crucial

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[131] Raz (n 35) 105; Starke (n 23) 75.

[132] Kelsen (n 31) 196 ff, 221-222.

[133] Ibid; For a critical account of the *Stufenbaulehre* see, for example, Jakab (n 40).

[134] Kelsen (n 122) 221; Verdross (n 8) 35. Compare for criticism thereof (using the legal order of the EU as an example) Lando Kirchmair, 'Die autonome Rechtsordnung der EU und die Grenzen von Monismus und Dualismus' in Matthias C. Kettemann (ed), *Grenzen im Völkerrecht – Grenzen des Völkerrechts* (Jan Sramek 2013) 275.

[135] Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (Mohr Siebeck 1923) 31-35. This assumption of the 'Kompetenz-Kompetenz,' located at the international sphere becomes even more clear by the statement of Alfred Verdross, 'Le fondement du droit international' 16 (1927) *Recueil des Cours* Vol. I 247, 319. Compare generally concerning the 'competence-theory' of Verdross Anke Brodherr, *Alfred Verdross' Theorie des gemäßigten Monismus* (Herbert Utz 2004) 75 ff.

differences between the 'chain of validity' and the TLCC, it is especially important to emphasize that the connection between the larger and the smaller law creators' circle according to the TLCC requires only that the smaller circle must not infringe any rule of the larger circle. If a specific subject matter is not regulated by a consensus at the level of the larger law creators' circle, the smaller circle is free to agree upon any consensus as its members wish. Consequently, the smaller law creators' circle is not derived from the larger circle and the validity of the rule of the smaller circle does not stem — at least not theoretically — from the larger circle.

In a graphical nutshell:

Table 3: The Theory of the Law Creators' Circle:

	TLCC
Presuppositions	- Pre-legal pacta sunt servanda. - Common understanding of the law (however, only in case we want norm conflict solution).
Theoretical Outcome	- Common denominator for norm conflict solution. - Authorization for norm creation of the smaller circle in the larger circle.
Legal Consequences	- Larger circle's consensus trumps (identical) smaller circle's consensus. - Smaller circle must not unilaterally derogate from the consensus of the larger circle. - Content is decisive (in terms of analysing whether the smaller circle is bound by a consensus of the larger circle).
Failure	?

3. Practical Application of the TLCC

Now that the theory has been spelled out, the final Section aims at testing its applicability with the example of the European Union and its relationship to its Member States (III.3.a.) as well as towards other (international) legal orders (III.3.b.).

Here, I apply the TLCC to the relationship between EU law and Member State law as well as EU law and international law. I am convinced that a theory-based argument analyzing the relationship between international, EU and Member State law will fruitfully contribute to key issues in EU law such as the doctrine of direct applicability or the primacy question between EU law and the fundamental constitutional law of its Member States as well as to the relationship between EU and international law. It could provide convincing theoretical argumentation, solving potential tensions between the constitutional courts of some Member States and the CJEU as well as other international courts and tribunals. For example, arguments embedded in a sound theoretical explanation may help to clarify such questions as the tension between European integration and the (German) 'constitutional identity' which, according to the German Constitutional Court, is resistant to integration.[136] Moreover, the famous 'Kadi saga'[137] could be seen in a slightly different light as well.

A. EU Law and Member State Law

According to the TLCC, the EU is the larger law creators' circle with regards to its Member States. All EU Member States in turn are independent smaller law creators' circles which are also part of the EU circle. This is illustrated by Figure 6 above. The consensus established at the level of the larger EU law creators' circle must not be violated unilaterally by a smaller Member State law creators' circle. However, it only concerns the content that has been consented to. For any further consensus, the smaller law creators' circles remain free to consent on what they wish. This stands in contrast to a monist understanding of the relationship between EU and Member State law. The TLCC does not hold that Member State law is delegated from EU law. Nor does the TLCC assume that in order to conceive EU law and Member State law both as law, it is logically necessary to conceive them as a unitary legal

[136] Mattias Kumm, 'Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of 'Chicken' and What the CJEU Might do About It' (2014) 15(2) German Law Journal 203-215.

[137] C-402 & C-415/05P *Kadi v Commission* EU:C:2008:461; C-584, C-593, & C-595/10P *Commission v Kadi* EU:C:2013:518. C.f. Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2014).

order.[138] The TLCC only states that once a consensus has been reached at the level of a larger law creators' circle (which in our case here is EU law), then it must not be derogated unilaterally by a smaller law creators' circle. If the aim is to solve norm conflicts as defined above, then and only then is a common denominator, i.e. a common definition of law, necessary. In contrast to dualism or pluralism the TLCC provides an argument for where to look for such common ground. It is the consensus at the level of the larger circle.

Reaching a consensus at the level of the larger circle might be eased by formal procedures such as majority ruling or the authorization of certain specific organs to create law and so on and so forth. This has often happened in the EU by now as it has developed into a supranational organization with constitution-like character traits.[139] Law making in the EU shows roughly all the basic rule-of-law criteria. However, it is important to emphasize that the TLCC is not about triggering yet an(other) argument as to whether the EU is truly a constitutional community or what is missing in order for it to become one. The TLCC is simply a structural argument which indicates where to look to answer questions such as who has the final say about certain subject matters. Hence, it is of utmost importance to understand clearly what the EU treaties and further legal life within the EU actually involve.

The EU competence regime is decisive in this regard. It is vital to pinpoint exactly which competences have been shifted to the European level. To answer this question, it is important to define where the competence regime is regulated and who decides in case of a dispute about specific competences. The competences in Articles 2-6 TFEU are the starting point and in the case of conflict, the CJEU has the final say on matters of competences (Article 19 TEU). Member States are referred to an action for annulment before the CJEU in case they think the EU lacks competence because they themselves are not authorized to void EU acts.[140] Roughly speaking, if the EU has competence for a specific subject matter, the EU law creators' circle may

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[138] Gragl (n 32) 674, 685; Gragl (30).

[139] Case 294/83 *Parti ecologiste 'Les Verts' v European Parliament* EU:C:1986:166, para 23 'the basic constitutional charter, the Treaty'. See also recently Case C-284/16 *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158, para 33: 'the constitutional structure of the EU'.

[140] Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C: 1987:452.

adopt legal acts. EU legal acts within the framework of EU competences are legally binding and in the case of conflict with MS law they enjoy supremacy.[141] This is largely uncontested.

The question is whether this supremacy has limits, i.e. whether there is a core of a national 'constitutional identity' which is resistant to this supremacy. Similarly, as the TLCC does not say anything about the question as to which political system or which specific norm might be just, neither does it say whether there should or should not be something like a core resistant to integration. The TLCC is neutral towards the content. It does, however, say that once a consensus has been taken at the level of a larger law creators' circle, this consensus must not be violated unilaterally by a smaller circle. Therefore, it is crucial to analyze the norms of the smaller circle which authorize consensus formation in the larger circle. These were national norms on the *authorization* to conclude and ratify international treaties at the very beginning of the EU.[142] By now, the EU autonomously regulates how its own legal edifice changes (Article 48 TEU on ordinary and simplified revision procedures). Major changes like the introduction of completely new treaties, for instance, are subject to ratification by all Member States.[143] In effect, this means that they have to be ratified unanimously by the larger EU law creators' circle (in the sense of the abolishment of the old consensus at this level). A unilateral derogation by only a few Member States would clearly violate the consensus of the larger law creators' circle (which, of course, is not to say that this is not possible). An 'integration resistant core', on the one hand, must not violate any consensus which has been obtained at the level of the larger EU law creators' circle. On the other hand, the larger law creators' circle must not autonomously add competences without authorization by all of the smaller

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[141] See Case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66; as well as Case C-10/97 *IN.CO.GE.'90 and others* EU:C:1998:498; Case C-409/06 *Winner Wetten GmbH* EU:C:2010:503, para 55.

[142] For the designation authorization (instead of incorporation, implementation or the like) compare Kirchmair (n 10).

[143] Dieter Grimm, 'The role of national constitutions in a united Europe' in Dieter Grimm, *Constitutionalism. Past, present, and future* (Oxford University Press 2015) 274, who holds 'that within the purview of European law the latter [national law] can no longer act in a self-determined manner'. Nevertheless, 'the EU has not yet acquired the right to determine its own legal basis'.

law creators' circles. This also holds true for the interpretation of the scope of application of EU law, which essentially must be reflected in the consensus of the larger law creators' circle. This refers to the question on the scope of applicability of the Charter of Fundamental Rights,[144] the rule of law crisis in the EU and judicial independence,[145] as much as to the scope of autonomy of the EU legal order.[146]

The TLCC also puts emphasis on the question as to how to interpret the content of a consensus. The Vienna Convention on the Law of Treaties (VCLT) offers rules for the interpretation for international treaties. Again, by now, the CJEU, based on Article 19 TEU, has developed its own array of interpretation techniques (as there is no provision clearly stipulating which

[144] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105; Case C-206/13 *Siragusa* ECLI:EU:C:2014:126 regarding the scope of applicability of the Charter of Fundamental Rights and the general recurring debate about judicial activism. See, for instance, Allan Rosas, When is the Charter of Fundamental Rights applicable at national level? (2012) 19(4) Jurisprudence 1269-1288, 1270 holding that the 'introduction of a fundamental rights regime into EU law is essentially a story of judge-made law'.

[145] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117 holding basically that the CJEU is competent—relying on the principle of effective judicial protection enshrined in second subparagraph of Article 19 (1) TEU—to evaluate the guarantee of independence of national courts and tribunals if this 'may concern the application or interpretation of EU law' (para 39). This is too prime example of the fine line of how to understand the competence regime of the EU as the appointment and removal of judges actually is an exclusive MS competence.

[146] See only recently Case C-284/16 *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158 and the confirmation that investment arbitration in an intra EU context is part of EU law (and, thus, within the competence of the EU and the jurisdiction of the CJEU). Therefore, investment tribunals in such a context lack jurisdiction as Art. 267 and 344 TFEU preclude provisions establishing arbitral tribunals (para 62) as they could 'interpret or indeed apply EU law' (para 42) and thereby endanger unity, primacy and effectiveness of EU law. While also this decision has caused an upheaval in academia and the 'arbitration world', the TLCC suggests actually simply to look at the competence of the larger law creators' circle, the EU legal order and whether there we find sufficient support for the approach taken—in the case at hand—by the CJEU. If one does so, it seems indeed, that EU law covers the approach taken.

interpretation technique shall be used or be supreme in case of conflict[147]).[148] The interpretation techniques employed by the CJEU largely correspond to 'classical techniques' well known in national law or those mentioned in the VCLT.[149] I will not go into details here. For now, this indication shall suffice.

B. International Law and EU Law

The TLCC is based upon natural persons who reach a consensus. If A, B, and C agree upon a consensus, this must not be violated subsequently by B and C without A. What has just been said about the relationship between EU and Member State law also applies to the relationship between international and EU law. Once the law creators' circle of the EU has agreed upon a consensus with a larger, international law creators' circle, it must not violate it unilaterally. It is thus decisive to, first, clearly identify how the EU law creators' circle can establish a consensus at the larger international level (Article 216-219 TEU). Second, it is important to determine the content of the consensus. This interpretation process is primarily the task of the level at which the consensus has been agreed. This is the international level. For instance, in *Achmea BV*, the CJEU confirmed that in principle EU law allows for an international agreement establishing a court which interprets the provisions of such an agreement with a binding nature for the CJEU.[150] This is accurate also when thinking with TLCC. Yet, the CJEU added the conditionality that this holds true 'provided that the autonomy of the EU and its legal order is respected'.[151] I would add — again thinking with the TLCC — that this condition must be respected from those organs authorized by the EU legal order when concluding international agreements (and international law more generally). This conditionality, however, might not serve as an excuse for breaches of the concluded international agreements for instance

147 Giulio Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' 10(5) (2009) German Law Journal 539.

148 Koen Lenaerts and José A. Gutiérrez-Fons, To say what the law of the EU is: Methods of interpretation and the European Court of Justice, EUI Working Paper AEL 2013/9, available at http://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1&isAllowed=y.

149 Ibid.

150 Case C-284/16 *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158 para 57.

151 Ibid.

in form of unilateral subsequent derogations, because international law as such also does not allow for invoking provisions of internal law as justification for a failure to perform a treaty (Art. 27 VCLT). Third, depending on the consensus, the effect of this consensus on the level of the smaller law creators' circle depends on whether the norm of the international law creators' circle is solely applicable, directly applicable or individualizing.[152]

The international law creators' circle knows four different types of legal sources. These are, according to Article 38 of the Statute of the International Court of Justice (ICJ), (a) international conventions, (b) international custom, and (c) general principles of law. In addition, by now also (d) legal acts of international organizations can be a source of international law.[153] Depending on each source, different rules about their making, interpretation, and their legal effect are applicable. In order to determine their effect within the level of the smaller, in our case, the EU law creators' circle, it is necessary to look closely at the process of making and interpreting them. Unfortunately, there is not enough space to do so here. What I would like to emphasize is that the TLCC is not about the content but about the structural relationship between law creators' circles. If there is a consensus at the larger law creators' circle, the smaller circle must not unilaterally violate this consensus.

For instance, in the famous Kadi saga, the CJEU annulled an EU regulation because this regulation implemented United Nations Security Council resolutions sanctioning suspected terrorists without respecting *EU* fundamental rights.[154] The individual Yassin Abdullah Kadi was associated with Usama bin Laden or the Al-Qaeda network and therefore was enlisted by the UN Sanctions Committee, which was installed in the aftermath of

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[152] III.2.d.i)-iii).

[153] Jörg Polakiewicz, 'International law and domestic (municipal) law, law and decisions of international organizations and courts' in Rüdiger Wolfrum (ed), MPEPIL online edition (2012), para 1.

[154] Joined Cases C-402/05 P and C-415/05 P *Kadi v Council and Commission* EU:C:2008:461 (Kadi I); and C-595/10 P *Commission and others v Kadi* EU:C:2013:518 (Kadi II). For an overview, Clemens Feinäugle, 'Kadi Case' (2014) Max Planck Encyclopedia of Public International Law; Peter Hilpold, 'EU Law and UN Law in Conflict: The Kadi Case' (2009) 13 Max Planck Yearbook of United Nations Law, 141-182.

terrorist attacks on the embassy of the USA in Kenia and Tanzania in 1998. A consequence of this listing was the freezing of Mr. Kadi's and other individuals' or entities' European assets, which was implemented by an EU Regulation in 2002.[155] Kadi challenged this listing in front of EU courts due to alleged violations to use his property freely, the breach of the right to effective judicial review as well as the right to a fair trial according to Art. 6 ECHR. The Court of Frist Instance, however, decided in 2005 that the Court has no authority to call in question the lawfulness of UN Security Council Resolutions.[156] While this judgment was associated with a monist understanding of the relationship between EU and international law, the CJEU did not follow this direction. On 3 September 2008 the Court annulled the regulation concerning Mr. Kadi finding that the CJEU has jurisdiction to review the lawfulness of the contested regulation as it has to ensure full review of the lawfulness of all EU acts 'in the light of the fundamental rights forming an integral part of the general principles of Community law'.[157] By so doing the CJEU found a breach of 'the rights of defence, especially the right to be heard, and of the principle of effective judicial protection.'[158] Moreover, the Court found also that Mr. Kadi's fundamental right to respect for property had been violated.[159] Following this decision the UN Sanctions Committee provided Mr. Kadi with reasons for his listing and gave him the possibility to comment. Thereafter the Sanctions Committee decided to list Mr. Kadi again, which has again, implemented by Committee Regulation.160 Mr. Kadi also brought a case against this regulation before the General Court.[161] Now the General Court followed the reasoning of the CJEU, conducted a full review of the challenged regulation and annulled it on 30 September 2010. The reasons given were that the information and evidence regarding the

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[155] Council Regulation 881/2002 of 27 May 2002.

[156] Case T-315/01, *Kadi v Council and Commission*, 21 September 2005, ECLI:EU:T:2005:332, 225.

[157] Joined Cases C-402/05 P and C-415/05 P *Kadi v Council and Commission* EU:C:2008:461 (Kadi I) 326.

[158] Ibid 353

[159] Ibid 371.

[160] Commission Regulation (EC) 1190/2008 28 November 2008 amending Council Regulation (EC) No 881/2002.

[161] Case T-85/09 *Kadi v Commission* ECLI:EU:T:2010:418.

reasons for Kadi's listing had not been disclosed to him and so his right to defence and effective judicial review and to property were still violated. Even though the Sanctions Committee delisted Mr. Kadi on 5 October 2010, the European Committee, the Council of the European Union and the UK appealed. Finally, the CJEU hold on 18 July 2013 that the improvement of the UN Sanctions Committee procedure was not enough to change his holding in Kadi I.[162]

Very briefly, according to the TLCC, the smaller law creators' circle should have invoked either an ultra vires competence of the larger law creators' circle, stating that the UN Security Council (to put it delicately) overstated its competence. Alternatively, it should have considered the resolution faulty because *UN* human rights had been violated (which would have necessarily implied—admittedly difficult—arguments for the application of human rights, in this case, effective judicial protection, at UN level).[163] This is really just a superficial indication of what the TLCC implies in contrast to the grand old theories. However, I hope that the direction in which an application of the TLCC goes has been made visible and understandable.

IV. Resumé

In this paper, I have argued that the TLCC provides a theoretical foundation for finding a decisive source in a norm conflict situation. It is, however, important to emphasize that the TLCC does not offer an absolute and invariable solution which fits any norm conflict arising between overlapping

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[162] C-595/10 P *Commission and others v Kadi* EU:C:2013:518, 66.

[163] C.f. for such an argument (albeit without TLCC as a basis) Martin Scheinin, 'Is the ECJ Ruling in Kadi Incompatible with International Law?', (2009) 28 (1) Yearbook of European Law 637-653. Gráinne De Búrca, 'The ECJ and the International Legal Order: A Re-Evaluation' in Gráinne de Búrca / Joseph H.H. Weiler (eds), *The Worlds of European Constitutionalism* (2012) 140. Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' 17 (207) European Journal of International Law 881–919. Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23(4) European Journal of International Law, 1015-1024 arguing that the Court indicated a possible opening towards the precedence of Security Counci measures if human rights enjoy sufficient safeguards.

international, EU, and national legal orders. This is a sharp contrast to grand old theories such as dualism and monism, which are considered unable to face major recent developments of international, EU, and national legal orders. While also the predominant stream of global legal pluralism is restricted when answering the question behind this article as it does not offer a satisfactory prescriptive account, global constitutionalism suffers from major shortcomings too. Global Constitutionalism presumes too many substantial values for the envisaged common normative denominator in order to be a helpful concept for the relationship between international, EU and national law. While global constitutionalism cannot carry the 'burden of universality', with constitutional pluralism we likely end in a 'constitutional stalemate'. The TLCC aims to re-conceptualize the current debates that are based on monism, dualism, pluralism, and constitutionalism. Thereby I also aim at avoiding the pitfalls of global legal pluralism and global constitutionalism concerning their appropriateness for norm conflict solution between international, EU, and national legal orders. The goal is to answer the question as to whether it is within the competence of national law to determine the effect and validity of international or EU law within the domestic (constitutional) legal order and the international within the EU legal order or not.

In a nutshell, a law creators' circle is defined as a circle of two or more individuals, which originates in the creation of one single binding consensus. The TLCC is based on pre-legal assumptions, which are the principles *pacta sunt servanda* and *pacta tertiis*. According to these pre-legal principles, TLCC is fundamental for all agreed consensuses. If a legal rule has been created by a consensus, unilateral abrogation is no longer possible. The rule of the larger law creators' circle always prevails over the rule of the smaller circle (A and B), *if*—and this is important—*all* members of the smaller circle are also members of the larger circle. In other words, the smaller circle is absorbed by the larger circle.

What I have outlined so far might be disappointing, given the grand question I dared to ask in the title of this article. However, I am convinced that this complex and enormously important question as to how we can know who has the final say – international, EU or national law? – cannot be answered in an easy and universally uniform way. The vast array of massively diverging

theories and doctrines on the table are proof of that. Yet, I believe that it is important at least to attempt a sort of reconciliation between them. The TLCC is exactly that, with the focus on a structural analysis. I hope I succeeded at least in awakening the reader's curiosity pending the completion of the next necessary step for the TLCC, i.e. providing concrete answers for the current relationship of International, EU or national law. This forthcoming work includes a detailed analysis of the TLCC and the validity and effect of sources of international law in the EU legal order. Moreover, I will aim at expanding the application of the TLCC on the EU competence regime in order to shed some light on questions of constitutional identity and final supremacy.

THE PRELIMINARY REFERENCE DANCE BETWEEN THE CJEU AND DUTCH COURTS IN THE FIELD OF MIGRATION

Jasper Krommendijk*

This article examines the relationship between national courts and the Court of Justice of the European Union (CJEU) based on a legal-empirical research consisting of interviews and a legal analysis of judgments. It empirically tests which factors shape (i) Dutch national courts' motivations to refer a case to the CJEU, (ii) how the CJEU's preliminary rulings are received and implemented by national courts, and (iii) the extent to which the reception of the CJEU's preliminary ruling influences the national courts' future decision to refer. This argument is presented through a case study in the field of migration law in the Netherlands (2013-2016). This article shows that earlier theories about judicial empowerment and bureaucratic politics, emphasising politico-strategic reasons for (non)referral, have a limited explanatory

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value in the context of migration. It is so despite the expectation that strategic reasons are particularly applicable in a highly Europeanised, judicialised and politicised field such as migration law. Judges primarily operate pragmatically when deciding to refer (or not) and when applying the requested CJEU judgments. Even though several national judges expressed criticism about the CJEU and some of its judgments, this has not affected them to such an extent that they felt discouraged from referring future cases or were reluctant to follow-up on CJEU judgments.

Keywords: preliminary ruling procedure; judicial dialogue; national courts; motives to refer; judicial empowerment; follow-up to CJEU judgments

Table of Contents

I. INTRODUCTION

The EU has had a tremendous impact on national law and politics. One of the most important drivers of the European integration project has been the Court of Justice of the European Union (CJEU). The CJEU has been able to have such an impact only as a result of the cooperation of national courts and their references about the interpretation and the validity of EU law.[1] There are, however, growing indications that the referral procedure, which is the 'keystone' of the EU legal system,[2] is not working optimally. National court judges seem to lack the necessary knowledge of EU law or they simply appear unwilling to refer.[3] Prechal, the current judge from the Netherlands at the CJEU, for example held that 'the quality and capacity of the national courts to apply [EU] law and to do so correctly is a matter for serious concern. [...] national judges, even the 'younger' generation, are rather still struggling with

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1 Karen J Alter, *Establishing the supremacy of European Law. The Making of an international rule of law in Europe* (Oxford University Press 2001) 320; George Tridimas, Takis Tridimas, 'National courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure' (2004) International Review of Law and Economics 1215.

2 The power of national courts to make a reference 'constitutes the very essence of the [Union] system of judicial protection'. *Opinion 2/13* EU:C:2014:2454, para. 176; Case C-300/99 P *Area Cova* EU:C:2001:71, para. 54.

3 Michal Bobek, 'Of feasibility and silent elephants: The legitimacy of the Court of Justice through the eyes of national courts' in Maurice Adams et al (eds), *Judging Europe's judges: the legitimacy of the European Court of Justice Examined* (Hart 2013) 197, 212-213; 'Wallis report. Report on the role of the national judge in the European judicial system', 2007/2027(INI), 4 June 2008, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2008-0224+0+DOC+XML+V0//EN, last accessed 31 July 2018.

[EU] law than smoothly applying it'.[4] The actual implementation of the consequent CJEU rulings is also far from ideal, because judgments sometimes only contain a limited number of arguments or lack a clear answer.[5] Hence, many important principles developed by the CJEU have simply remained unimplemented.[6] In addition, several constitutional and supreme courts have openly rebelled against or showed their criticism about the CJEU. The recent years were marked by some high-profile cases, including the Danish *Ajos* case, the Italian *Taricco* saga as well as the German *Gauweiler* episode, that brought some of these problematic features of the procedure to the surface.[7]

The question is whether these often anecdotal allegations about the improper functioning of the preliminary reference procedure are real. Are these three high profile cases merely the tip of the iceberg or the exceptions that prove the rule that the preliminary ruling procedure is generally working well? In other words, is the surge in integration-sceptical national judgments representative of the relationship between national courts and the CJEU or is there a silent majority of integration-friendly courts? If the procedure indeed functions sub-optimally this is crucial to know. Certainly, it would mean that the effectiveness of EU law could be affected if these shortcomings

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4 Sacha Prechal, 'National courts in EU judicial structures' (2006) 25 Yearbook of European Law 429, 432-433.

5 Anthony Arnull, 'Judicial dialogue in the European Union', in Julie Dickson, Pavlos Eleftheriadis (eds), *Philosophical foundations of EU law* (OUP 2012) 109, 129; Marc de Werd, 'Dynamics at play in the EU preliminary ruling procedure' 22 Maastricht Journal of European and Comparative law (2015) 149, 152; Eleanor Sharpston, 'Making the Court of Justice of the European Union more productive' (2014) 21 Maastricht Journal of European and Comparative law 763.

6 Gareth Davies, 'Activism relocated. The self-restraint of the European Court of Justice in its national context' (2012) 19 Journal of European Public Policy 76; Thomas de la Mare, Catherine Donnelly, 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis' in Paul Craig, Grianne de Búrca (eds), *The Evolution of EU Law* (OUP 2011) 363; Takis Tridimas, 'Constitutional review of Member State action: the virtues and vices of an incomplete jurisdiction' (2011) 9 International Journal of Constitutional Law 737.

7 Case C-441/14 *Dansk Industri* EU:C:2016:278; Case C-105/14 *Taricco* EU:C:2015:555; Case C-62/14 *Gauweiler* EU:C:2015:400; Oliver Garner, 'The borders of European integration on trial in the Member States: *Dansk Industri, Miller,* and *Taricco*' (2017) European Journal of Legal Studies 1.

were not addressed. When national courts are frequently confronted with a deficient 'dialogue'[8] or unsatisfactory answers from the CJEU, this might discourage them to refer in future. Why would a judge refer when he or she considers the interaction with the CJEU, in the words of a Spanish judge, 'a monologue'?[9] The President of the Danish Supreme Court pointed to another dysfunctional element in the relationship between the European Court of Justice and the national courts:: 'If the interpretation of the European Court of Justice is taking national courts by surprise, one may fear a growing unwillingness of national courts and parties to a legal conflict to present matters before the Court of Justice'.[10] Omissions to refer could mean that breaches of EU law remain unaddressed. This could in turn have severe implications for the judicial protection of individuals, and most certainly for individuals who are in vulnerable positions such as asylum seekers.[11] This is not to say, however, that more references are necessarily a good thing. Indeed, the average time taken by the CJEU to deal with references could also have negative consequences for the parties and justice objectives in general.

Given the identified problems, it is crucial to understand, firstly, why and how national courts use the preliminary ruling procedure and engage with the CJEU. More specifically, what are judges' (individual) motives to refer or not to refer (section III)? Secondly, how are the requested CJEU's rulings received and implemented by national courts (section IV)? Answers to these questions, which are also depicted in figure 1, enable the third question to be

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8 The author deliberately aims to avoid the rather normative term 'dialogue' and prefers using the more neutral term 'interaction'. As will be outlined in section IV.3, judges often do not experience their interaction with the CJEU as being a dialogue.

9 Mario García, 'Cautious Openness: the Spanish Constitutional Court's approach to EU law in recent national case law', *European Law Blog,* 7 June 2017, https://europeanlawblog.eu/2017/06/07/cautious-openness-the-spanish-constitutional-courts-approach-to-eu-law-in-recent-national-case-law/, last accessed 31 July 2018.

10 Ulla Neergaard, Karsten E. Sørensen, 'Activist infighting among courts and breakdown of mutual trust? The Danish Supreme Court, the CJEU, and the *Ajos* case' (2017) Yearbook of European Law 275, 312.

11 Takis Tridimas, 'Knocking on heaven's door: Fragmentation, efficiency and defiance in the preliminary reference procedure' (2003) 40 Common Market Law Review 9.

addressed. This third question relates to whether there is a feedback relationship between the national judges' perception of their interaction with the CJEU and the national court judges' willingness to refer cases in future (section IV). This article answers these questions on the basis of a case study on the practice of referral in the field of migration in the Netherlands (see section II.2 for a justification of this selection). These questions are not only relevant from a practical point of view, but also from an academic perspective since so far they have not received much attention in the literature (see section II.1).

The results of this research suggest that there is no need to worry about the functioning of the preliminary ruling procedure. The main reason for this optimistic conclusion is that judges primarily operate 'pragmatically' when deciding to refer (or not) and when applying the requested CJEU judgments. Even though several judges expressed criticism as to the CJEU and some CJEU judgments, this has not affected them to such an extent that they were reluctant to follow-up on CJEU judgments or felt discouraged from referring future cases. Another important contribution of this article is that it casts doubt upon the explanatory power of theoretical accounts that portray national courts as strategic actors that primarily refer for 'political' strategic reasons. Above all, judges consider pragmatic reasons, including practical considerations related to the consequences of referring in terms of delays or the importance of the issue at stake. Before turning to these findings, the article firstly gives a literature review, a justification of the selection of migration in the Netherlands as case study and an outline of the methodology (section II.3).

II. Research Design

1. Literature Review

With respect to the first question, the motives to refer, the literature to date has primarily consisted of quantitative studies using econometric models. In addition, those studies primarily tested structural factors at the *Member State level* in order to explain why courts in some Member States refer more than courts in other Member States. Such factors include the level of GDP, the willingness to litigate, support for European integration, presence of judicial

review and the monist or dualist nature of the legal system.[12] Despite ample research, these findings on their own are not wholly satisfactory, since different and sometimes conflicting factors have been identified and because differences within Member States and across time have often been overlooked.[13] Rather than examining these aggregate-level factors, this article looks into the motives of *individual* judges as a way to fill the gaps in earlier research. In doing so, it aims to contribute to a growing literature on the factors and motives shaping the willingness of courts and judges to refer.[14]

One could basically distinguish two types of theoretical perspectives on the motives of judges (not) to refer: politico-strategic reasons and other non-strategic reasons, which are operationalised in Tables 1 and 2.

A. Politico-strategic Considerations to (not) Refer

There are three dominant perspectives in the Europeanisation literature on national courts' motives to refer. Firstly, based on neo-functionalist theories on European integration, the judicial empowerment hypothesis posits that national courts refer to compel the government to change its laws when they

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[12] Stacy A. Nyikos, 'The preliminary reference process. National court implementation, changing opportunity structures and litigant desistment' (2003) 4 European Union Politics 397; Marlene Wind, Dorte S. Martinsen, Gabriel P. Rotger, 'The uneven legal push for Europe: Questioning variation when national courts go to Europe' (2009) 10 European Union Politics 63.

[13] For a good discussion of these differences, see Arthur Dyevre, Nicolas Lampach, 'The Choice for Europe: Judicial Behaviour and Legal Integration in the European Union' (2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926496, last accessed 31 July 2018, 3-4.

[14] Such individual motives have not received much attention (yet). There have been studies on Poland, Denmark and Sweden and (recently) Italy, Germany and France. See for example, Marlene Wind, 'The Nordics, the EU and the reluctance towards supranational judicial review' (2010) 48 Journal of Common Market Studies 1039; Urszula Jaremba, 'Polish civil judiciary vis-à-vis the preliminary ruling procedure: in search of a mid-range theory' in Bruno de Witte et al (eds), *National courts and EU law. New issues, theories and methods* (Edward Elgar 2016) 49; Tommaso Pavone, 'Revisiting judicial empowerment in the European Union: Limits of empowerment, logics of resistance' (2018) Journal of Law and Courts, *pages yet unknown.*

are of the opinion that a national measure violates EU law.[15] Referring is hence used as a 'sword' vis-à-vis the legislator or executive. Asking for a preliminary ruling would increase the chance of government compliance.[16] Secondly, based on neo-realist or intergovernmentalist theories, the sustained resistance view, takes the opposite stance and argues that national courts have a strong incentive to 'shield' national legislation from the CJEU by withholding references because of national interest considerations. They prefer to 'shield' national policy and legislation from undesirable influence of the CJEU, especially in politically sensitive cases.[17] This preference could stem from the national court's loyalty towards the executive, its resistance against the dynamic interpretation by the CJEU, the pressure from the public or other domestic political considerations.[18] Thirdly, the bureaucratic politics model developed by Alter implies that EU law is used in bureaucratic struggles between different levels within the judiciary.[19] This model explains why different national courts have their own (different) incentives to refer and why there is divergence in the number of references among lower and higher courts within and between Member States. It also points out that lower courts use the preliminary reference procedure to 'leapfrog' the national judicial hierarchy in order to seek support from the CJEU as protection against reversal of their decisions by a higher court or the government.[20] This theory spells out why most of the references are made by lower courts in the majority of EU Member States, albeit not in the

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[15] Joseph H.H. Weiler, 'A Quiet revolution: The European Court of Justice and its interlocutors' (1994) 26 Comparative Political Studies 510, 523; Jonathan Golub, 'The politics of judicial discretion: Rethinking the interaction between national courts and the European Court of Justice' (1996) 19 West European Politics 360, 379; Davies (n 6) 85; Alter (n 1) 219 and 228.

[16] Andreas J Obermaier, 'The national judiciary. Sword of European Court of Justice rulings: the example of the *Kohll/Decker* jurisprudence' (2008) European Law Journal 735; Tridimas & Tridimas (n 1) 1215.

[17] Golub (n 15) 375-379; Wind et al (n 12) 63.

[18] Wind et al (n 12) 75-76; Wind (n 14) 1053; Golub (n 15) 377; Karen J. Alter, 'Explaining national court acceptance of European Court jurisprudence: A critical evaluation of theories of legal integration', in: Anne-Marie Slaughter, Alec Stone-Sweet, Jospeph H. Weiler (ed.), *The European Courts and National Courts (*Hart 1998) 225, 236.

[19] Alter (n 18) 241-247.

[20] Alter (n 18) 242.

Netherlands.[21] Note, however, that recent studies suggest that the highest courts in other EU Member States have in recent years 'reconquered' control from the lowest courts over the application of EU law and references to the CJEU.[22]

Table 1: operationalisation of strategic reasons to refer

Motivations (not) to refer	Theory	Proxy
Political/ strategic considerations (section III.1)	Sword	Strike down national law or policy; considerable financial consequences
	Shield	Protect national legislation from EU law
	Leapfrog	Challenge (another) higher court

B. Non-strategic Reasons to (not) Refer

These three politico-strategic perspectives have for a long time dominated the research on the interaction between national courts and the CJEU. The recent literature, however, have not found much support for the theories construing courts as politico-strategic actors. Several authors highlighted the increasing reluctance of lower courts to refer, coupled with a greater usage of the reference procedure by the highest courts in recent years across the EU. In doing so, they showed that earlier accounts which emphasise the important share of lower courts' references in the case docket of the CJEU are no longer telling the full story.[23] Instead of primarily strategic reasons,

[21] In the Netherlands 66% of the references have been made by the highest courts while in 11 Member States, including Belgium, France, Spain and the UK, more than 70% of the references have been made by lower courts. Chantal Mak, Elaine Mak, Vanessa Mak, 'De verwijzende rechter. Rechtspolitieke verandering via prejudiciële vragen van lagere rechters aan het Europese Hof van Justitie' [The referring judge. Legal political change via preliminary references of lower courts to the CJEU] (2017) Nederlands Juristenblad 1724.

[22] Since the situation in most EU Member States currently reflects the practice in the Netherlands, this point does not seem very relevant to consider in relation to the country selection. Daniel R. Kelemen, Tommaso Pavone, 'The European Court of Justice's evolving relationship with national judiciaries' (2017), *unpublished*.

[23] Francisco P. Coutinho, 'European Union law in Portuguese courts: An appraisal of the first twenty-five years after accession' (2017) Yearbook of Eurpean Law 358; Arthur Dyevre, Angelina Atanasova, Monika Glavina, 'Who asks most? Institutional

Pavone concluded, based on a thorough empirical research on Italy, Germany and France, that (a lack of) references can be explained by path-dependent, every-day practices within national courts.[24]

While the literature has focused on strategic reasons for courts to refer, it has not yet formulated hypotheses about the possible non-strategic reasons for the courts to do so. Against this backgroung, five mechanisms can be distilled from existing theoretical and empirical accounts. Firstly, legal-formalist or 'compliance pull' motives based on the 'power of the law'.[25] National courts refer because they feel responsible for a correct application of EU law or, in the case of the highest court, they consider themselves obliged to refer.[26] The highest courts are required to refer when they have doubts about the interpretation and validity of EU law unless it would 'in no way affect the outcome of the case'.[27] This being said, there are two other exceptions for the highest courts to refer, which are commonly referred to as *Cilfit*-exceptions: no reference is necessary when the CJEU has 'already dealt with the point of law in question' *(acte éclairé)* or when 'the correct application of [EU] law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved' *(acte clair)*.[28] Secondly, pragmatic considerations other than strict legal obligations to refer also play an important role.[29] This includes, for example, case specific reasons which relate to the importance of the questions concerned or efficiency reasons

incentives and referral activity in European Union legal order' (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051659, last accessed 31 July 2018; Kelemen & Pavone (n 22).

24 Pavone (n 14); Compare also with Jaremba (n 14) 49; Denise C. Hübner, 'The decentralized enforcement of European law: national court decisions on EU directives with and without preliminary reference submissions' (2017) Journal of European Public Policy 1.

25 Weiler (n 15) 520; see recently Hübner (n 24).

26 Alter (n 1) 230.

27 Case 283/81 *Cilfit* EU:C:1982:335, para. 10.

28 Ibid, para.14 and 16.

29 See more generally about 'pragmatic adjudication' Richard Posner, *How judges think* (CUP 2008); Urszula Jaremba, *Polish Civil Judges as European Union Law Judges: Knowledge, Experiences and Attitudes* (2012), https://repub.eur.nl/pub/37318/, last accessed 31 July 2018, 352.

concerning the consequences of referring in terms of the delay in the specific case or other cases involving the same EU law issue.[30] Thirdly, personal and psychological factors related to the individual judge have been mentioned as well. This includes, for example, the limited knowledge about EU law and/or the preliminary ruling procedure as a reason for non-referral.[31] It has also been noted that some judges might be reluctant to refer, because they are afraid that they ask a wrong question and that the CJEU declares their question inadmissible.[32] Fourthly, institutional and organisational factors related to the institutional dynamics of a particular court have also been put forward. These factors include, for example, the need to meet 'production targets' which discourages references to the CJEU.[33] Fifthly, the literature has also noted that the parties and their requests to refer can influence the courts willingness to refer.[34]

Table 2: operationalisation of non-strategic reasons to refer

Motivations (not) to refer	**Theory**	**Proxy**
Non-strategic considerations (section III.2)	Compliance pull/ legal formalism	The need to comply with the obligation to refer/ correct application of the *Cilfit* doctrine

[30] Judges primarily refer because this is simply necessary for them to solve the national dispute efficiently. If they are not able to interpret EU law on their own, the CJEU might provide the required clarity. Hans-W. Micklitz, *The politics of judicial cooperation in the EU. Sunday trading, equal treatment and good faith* (CUP 2005) 437; Jaremba (n 14) 67.

[31] Jaremba (n 29); Tobias Nowak et al, *National judges as European Union judges: Knowledge, experiences and attitudes of lower court judges in Germany and the Netherlands* (Eleven 2011) 49.

[32] Jaremba (n 29) 229-230; Hanna Sevenster, Corinna Wissels, 'Laveren tussen *Ferreira en Van Dijk*' [Plying between *Ferreira en Van Dijk*] in M. Bosma et al (eds), *Graag nog even bespreken. Liber amirocum Henk Lubberdink* (Raad van State 2016) 83, 90; Kees Groenendijk, 'Waarom rechters niet naar Luxemburg gaan: politieke structuur of rechtscultuur?' [Why judges do not go to Luxembourg: political structure or legal culture?] in R. Baas et al (eds), *Rechtspleging en rechtsbescherming. Liber amicorum voor prof. dr. Leny E. de Groot-van Leeuwen* (Kluwer 2015) 302.

[33] Groenendijk (n 33); Nowak et al (n 31) 54.

[34] Wind (n 14) 1053; Wind et al (n 12) 283.

	Pragmatism	Need of legal clarity; answer perceived necessary to resolve the case
		Reasonable reading of *Cilfit*
		Natural reluctance (e.g. decide themselves)
		Importance of the question
		Consequences of referring for the parties
		Efficiency reasons (delay in case, and other cases)
		Resources necessary to write question, time
	Personal/ psychological	Position in the career
		Background/ expertise
		Knowledge of EU law procedure
		Self-perception: e.g. lower courts as fact finders
		Fear to ask (wrong) questions
		Satisfaction of writing a reference/ contributing to EU law
	Institutional	Awareness (e.g. specialised EU law committees in courts)
		Case management (backlog of cases)
	Request of the parties	Parties requested referral

So far, strategic and non-strategic reasons have not been tested in the field of migration. The findings presented in this article further corroborate recent studies, such as Pavone's, and challenge some major assumptions of the dominant theoretical approaches, namely that politico-strategic reasons alone do not explain the motivation of national judges to refer. In addition, it shows that the influence of parties on national judges' decision to refer is rather limited.

C. Follow-up

There is not much research on the second question dealing with the follow-up to CJEU judgments, except for some older studies finding high rates of

implementation.[35] Bobek observed that 'very little or nothing at all is known [...] whether or not national courts are satisfied with the Court's decision(s) once they receive them, whether they consider them authoritative, and whether the Court's case law is in fact followed'.[36] There is an assumption that preliminary rulings of the CJEU are implemented by the requesting national courts, but there is little systematic evidence supporting that view.[37] While some older studies found high implementation rates,[38] others noted that implementation is not always achieved or straightforward.[39] Other outcomes than full application of the CJEU judgment include: partial application, a reinterpretation of the facts so that the CJEU judgment does not apply, re-referral to the CJEU and concealed or open non-compliance.[40]

This article will thus fill an empirical gap and provide reflection on the current discourse which tends to overemphasise integration-sceptical national judgments.[41] It shows that Dutch judges have generally adopted a positive attitude towards the CJEU and its judgments. It will also be argued

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35 An implementation rate of 90% was found for the Netherlands in the period 1961-1985. Nyikos likewise found an 'extremely high' rate of 96%. Joest Korte (ed), 'Primus inter pares: The European Court and national courts. The follow-up by national courts of preliminary rulings ex Art. 177 of the Treaty of Rome: A report on the situation in the Netherlands' (1990) EUI Law Working Paper; Nyikos (n 12) 410; see also Arjen W.H. Meij, *Prejudiciële vragen van Nederlandse rechters en hun gevolgen* [Preliminary references of Dutch judges and their consequences] (W.E.J. Tjeenk Willink 1993); G. Wils, *Prejudiciële vragen van Belgische rechters en hun gevolgen* [Preliminary references of Belgian judges and their consequences] (W.E.J. Tjeenk Willink 1993).

36 Bobek (n 3) 197.

37 Nyikos (n 12) 398.

38 Korte found an implementation rate for Dutch references (1961-1985) of 90%. Korte (n 35). Nyikos also found an 'extremely high' implementation rate of 96%. Nyikos (n 12) 410. 89% of the respondents in a 2007 survey found the CJEU judgment readily applicable. Wallis report (n 3) 23.

39 Davies (n 6) 81 and 89; Alter (n 18) 233-234; See, for example, the way in which the Danish Supreme Court was unwilling to change its ruling after *Ajos.* Neergaard & Sørensen (n 10).

40 Nyikos (n 12) 399-401.

41 Andreas Hofmann, 'Resistance against the Court of Justice of the European Union' (2018) International Journal of Law in Context 258.

that national judges' personal background and institutional position play an important role in their perception of the CJEU's case law.

D. Feedback Loops

Even less research has been conducted on the relationship between the motives of judges to (not) refer and their perception of the CJEU and CJEU judgments. It is difficult to clearly connect the idea of feedback loops to specific theoretical accounts or previous empirical studies. The notion of feedback loops relates, however, to a certain extent to Mayoral's notion of 'trust', which he defines as 'national judges' belief about whether the CJEU will follow an expected course of action under conditions of uncertainty'.[42] The limited (theoretical) attention warrants further work in this direction. It also explains the more inductive and explorative approach that this study takes with respect to this third question (see further section II.3.C).

2. References in Migration Law in the Netherlands (2013-2016) as a Case Study

Given the shaky empirical support for the theories which portray courts as strategic actors, it is best to select an area of case law where one would expect these theories to apply. The field of asylum, migration and integration, one of the most contested issues that the EU is confronted with nowadays, lends itself to 'test' those theories. This is so because the aforementioned area has been greatly Europeanised in a relatively short period of time. It is also highly judicialised and politicised because many EU Member States, including the Netherlands, have adopted restrictive policies in this area, often testing and sometimes transcending the limits of EU law. It is not only the legislator which has become more restrictive in this field, but also some (highest) courts, such as the Dutch Council of State.[43] This has led to increasing

[42] Juan A. Mayoral, 'In the CJEU judges trust: A new approach in the judicial construction of Europe' (2017) Journal of Common Market Studies 551.

[43] The *Salah Sheekh* judgment of the ECtHR as an illustration of the restrictive approach of the Council of State. In this judgment, the ECtHR dismissed the Dutch government's plea of inadmissibility for non-exhaustion of domestic remedies even though the applicant had not lodged appeal with the Council. The ECtHR justified this by ruling that the Council 'may in theory have been capable of reversing the decision of the Regional Court, in practice a further appeal would have had virtually

litigation at both the national and European level, offering room for courts to challenge (or 'shield') national legislation or the restrictive approach of other courts.[44] Courts are generally reluctant to strike down democratically adopted rules, especially in such a controversial and politically sensitive field as migration. Referring to the CJEU could give national courts an authoritative cover to do so.

In addition, the Netherlands is also a suitable Member State to test these theories. Dutch courts have been 'integration friendly', they generally ask a high number of questions and are eager to engage with EU law.[45] Dutch courts are also at the forefront in the field of migration. The Council of State was, for example, the first national court in the EU to ask questions about the Qualification Directive 2004/83, the Family Reunification Directive 2003/86, as well as the Directive 2003/109 on third-country nationals who are *long-term* residents.[46]

Table 3: Overview relevant cases studied for the period 2013-2016

References by the highest courts	References by lower courts (Rb.)
C-601/15, PPU, *J.N. (ABRvS)*	C-550/16, *A. and S.*
C-133/15, *Chavez-Vilchez (CRvB)*	C-331/16, *K.*
C-153/14, *K. and A. (ABRvS)*	C-18/16, *K.*
C-579/13, *P. and S. (CRvB)*	C-63/15, *Ghezelbash*
C-554/13, *Zh. and O. (ABRvS)*	C-158/13, *Rajaby*
C-383/13 PPU, *G. and R. (ABRvS)*	

no prospect of success.' ECtHR nr. 1948/04 *Salah Sheekh,* CE:ECHR: 2007:0111JUD000194804, para. 123.

44 Möritz Baumgärtel, 'Part of the game': government strategies against European litigation concerning migrant rights', in Tanja Gammeltoft-Hansen & Thomas Aalberts (eds), The Changing Practices of International Law (Cambridge University Press 2018), forthcoming.

45 Bobek (n 3) 213.

46 Respectively C-465/07 *Elgafaji* EU:C:2009:94 (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12); C-578/08 *Chakroun* EU:C:2010:117 (Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12); C-502/10, *Singh* EU:C:2012:636 (Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44).

C-171/13, *Demirci (CRvB)*	
C-148/13-150/13, *A., B., C. (ABRvS)*	

For this article all referred cases and decisions not to refer in the four-year period (2013-2016) were selected. [47] As Table 3 shows, thirteen cases have been referred to the CJEU in this period. Five references came from lower courts (*rechtbank* or *Rb.*) who are not obliged to refer on the basis of Article 267 TFEU.[48] Eight cases were referred by the two highest administrative courts which are active in this area: the Administrative Division of the *Council* of *State (the Council of State* or *ABRvS) and the Central Appeals Tribunal (the Tribunal* or *CRvB)*. There had only been sixteen references in the thirteen years before (2000-2012), which illustrates the increasing Europeanisation in this area. The Europeanisation might of itself also be a factor that has contributed to the growing number of references. There are simply more EU (asylum and migration) rules, as well as more cross-border movements giving rise to more disputes and hence more case law of the CJEU. Lawyers have also become more specialised in EU (migration) law and, hence, increasingly appeal to EU law and request a reference to be made. There is also a reinforcing effect in the sense that once the CJEU has ruled on an issue, this almost unavoidably leads to new questions. One good example is the *Zambrano* ruling which has caused courts to ask new questions regarding the rights of residence of third country nationals with minor children who are EU citizens.[49]

This article will not engage in a systematic comparison of migration with other fields of law. It will, nonetheless, provide some reflections on the

[47] It was decided to focus on the most recent references that reflect the current operation of the procedure and dynamic between courts. The analysis included only references before 31 December 2016 in order to be able to study most, albeit not all, CJEU judgments and the national follow-up. This is so because it usually takes 15 months before the CJEU answers the reference and often at least half a year before the referring court decides the dispute. The limited period does not mean that older or more recent cases and developments are excluded, especially when they were mentioned during interviews or in the literature, but simply that no structured database search was conducted for this period.

[48] Unless they have doubts about the validity of EU law. Case 314/85 *Foto-Frost* EU:C:1987:452, paras. 15 and 16; E.g. NL:RBDHA:2016:265, para. 8.2.

[49] Case C-34/09 *Zambrano* EU:C:2011:124.

specific nature of the legal field of migration in comparison with other fields based on some provisional findings from a broader 4.5 years research project on the interaction between the CJEU and Dutch, Irish and British courts.[50] These provisional findings suggest that the field of law is an important factor affecting especially the national judges' motives to refer.[51]

3. Research Design and Methodology

This article will address the three research questions presented in the introduction on the basis of a legal-empirical research combining legal analysis and interviews (see figure 1). A doctrinal legal analysis alone is insufficient to answer the three questions. While previous studies primarily relied on interviews and or surveys with judges, this article combines interviews with a comprehensive and structured analysis of judgments of both national courts and the CJEU.[52]

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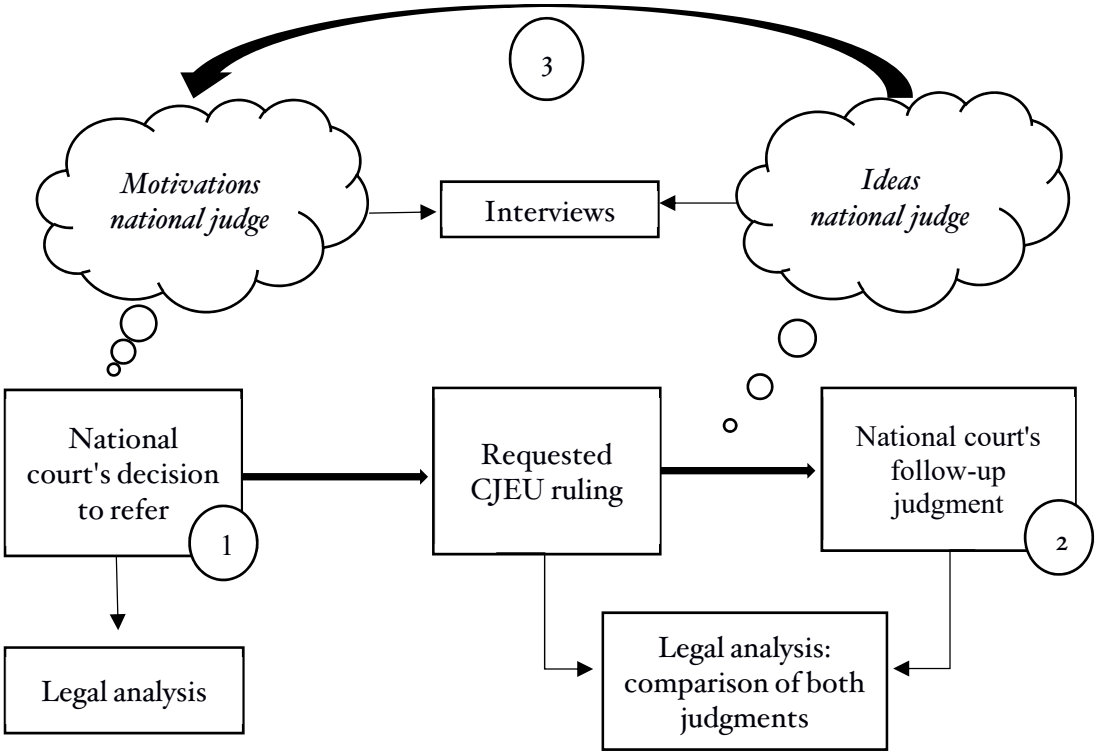
[50] In order to obtain a good insight in judicial motives, this project considers Member States with a different practice of referring by looking at the relative number of references per 1 million inhabitants. UK courts make relatively little use of the preliminary reference procedure. By contrast, Dutch courts ask a high number of questions and are eager to engage with EU law. Ireland is somewhere in between. Complementary to this project, a PhD researcher (Jesse Claassen) is conducting a similar research project on Austria and Germany.

[51] The research on the Netherlands, found, for example, a greater willingness to refer to the CJEU in the field of intellectual property or criminal cooperation and European arrest warrants. This could be compared with the idea of 'hotspots' of references of certain judges in particular fields of law. R.D. Kelemen & T. Pavone, 'The political geography of European legal integration' (2017) ***unpublished***; see also Dyevre et al (n 23).

[52] Wind (n 14); Pavone (n 14).

Figure 1: Research design



This article builds on an innovative dataset gathered through semi-structured interviews with sixteen judges and court clerks involved in the referred migration cases listed in Table 3, as well as cases that were *not* referred. The dataset also includes judges who have no experience in referring ensuring a representative picture.[53] Eleven interviewees work at the two highest administrative courts (ABRvS and CRvB). Five interviews were conducted with asylum judges from lower courts (Rb.). Given this limited number, findings with respect to lower courts should be interpreted with more care.[54] In order to protect the anonymity of interviewees, their names and identities

[53] In order to make this selection, an overview was made of all judges involved in the referred cases as well as decisions not to refer. Two interviews were conducted in 2015, while all others took place between April and November 2017. Almost all judges and court clerks that were approached for an interview were willing to cooperate. Only six judges refused or where unable to meet.

[54] Interviews 14, 22, 39, 51, 83.

are not disclosed.[55] Note that this research is part of a broader research project for which, so far, 36 judges and court clerks have been interviewed.[56]

There are clear limitations to interviews as a research instrument to identify motives.[57] One problem is that asking judges about motives might encourage them to provide *ex post* rationalisations that do not reflect the decision making at the time they decided the case. To mitigate this problem, a recent time period (2013-2016) was chosen.[58] As a result, most interviewees were also generally able to reflect on almost all cases in the selected time period. Another drawback of interview method is that interviewees might be tempted to give socially desirable answers and/or conceal their real motivations. Judges might also be reluctant to acknowledge that politico-strategic reasons played a role in their decision to refer (or not) and conceal that they have engaged in such strategies. As it might conflict with their self-perception or professional ethos of being an independent judge who decides on the basis of the law. Despite the secrecy of judicial deliberations, interviewees were relatively open, seemed honest and were willing to discuss individual cases. To alleviate the aforementioned problems, interviewees were, firstly, encouraged not to reflect on motives in general and *in abstracto*. Rather, they were asked to give concrete examples or probed to reflect on several specific judgments that were identified earlier during the legal analysis. Secondly, the idea was to interview more than one judge involved in certain (important) cases. Interviewees were, thirdly, given a convincing guarantee of confidentiality.[59] Fourthly, the interview data were

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[55] A number between 0 and 100 was randomly selected for the interviews. Note that references to interview numbers is omitted when specific cases are discussed, because this would still make it possible to trace the identity of the interviewees on the basis of the published judgments.

[56] Jasper Krommendijk, 'De hoogste Nederlandse bestuursrechters en het Hof van Justitie: geboren danspartners? Het hoe en waarom van verwijzen' [The highest Dutch administrative courts and the CJEU; natural born dance partners? The ho wand why of reffering], Nederlands Tijdschrift voor Bestuursrecht (2017) 305.

[57] 'Asking someone to identify his or her motive is one of the worst methods of measuring motives'. Lee Epstein, Gary King, 'The rules of inference' (2002) 69 University of Chicago Law Review 1, 93.

[58] Ibid (n 46).

[59] Ibid (n 55).

complemented with the analysis of case law, extra-judicial writing of judges and secondary literature to triangulate the data as far as possible. As mentioned before, the triangulation of different sources illustrates the methodological originality of the article.

A. Motives to Refer

To establish the motives of judges to refer, all national court decisions to refer and to not refer in the time period 2013-2016 were analysed on the basis of the following three questions (see '1' in figure 1): Which considerations played a role in decisions (not) to refer to the CJEU? What were the reasons (not) to refer in the particular cases? How have the *Cilfit*-exceptions been interpreted and applied?

The national court decisions *not* to refer were found on the basis of a careful database search of all published Dutch judgments with the search terms 'prejudiciële vragen' [preliminary questions], '267 VWEU' [267 TFEU] and 'Cilfit'.[60] The disadvantage of this approach is that there could still be some cases in which a reference was appropriate, but which do not mention the issue of referring at all. It seems that the highest courts have been more eager in recent years to carefully reason why a reference is not necessary when one of the parties requested a reference as a result of the case law of the ECtHR (see section III.2.E).To alleviate the problem of discovering 'silent' judgments, two other strategies were used. First judgments of the lower courts in cases that were eventually referred to the CJEU by the highest court were consulted. Second, judgments were also found in the secondary literature.

This being said, an analysis of judgments is not enough to establish the motives of judges to refer, especially because court judgments are often silent on other relevant considerations and calculations beyond purely legal (formalist) reasons. The analysis of judgments did not clarify why questions were raised in one case and not in another. Semi-structured interviews with judges were therefore conducted. The three open-ended questions set out above were raised during the interview to give judges the freedom to come up with reasons out of their own motion without being directed too much. Only

[60] This search was conducted on rechtspraak.nl for the period 1-1-2013 t/m 31-12-2016.

at a later stage of the interview the judges were asked to reflect on some, but certainly not all, motives and factors identified in the literature discussed in section II.1. Lower court judges were also asked about their reasons not to refer the cases that were later referred by the highest court. In addition, judges were confronted with criticism from the relevant literature about the lack of referral in these cases. Tables 4 and 5 in section III provide an overview of the considerations mentioned by the 16 migration judges during interviews.[61]

B. Follow-up

For the second question, the national court's follow-up judgment was compared with the requested CJEU ruling to establish whether and how that court has applied the CJEU judgment (see '2' in figure 1). Secondary literature and commentaries were useful in conducting this analysis because they often contain criticism on the reasoning and approach of the CJEU and/or follow-up by the referring court.

This legal analysis was complemented with interviews with judges involved in these cases (see 'ideas national judge' in figure 1). The following questionswere firstly asked in general in an open way, whereby judges were encouraged to discuss specific cases out of their own motion: Is the reasoning of the CJEU sufficiently clear? Can CJEU judgments be applied easily in the national court case and be used to solve the dispute? Are there cases of incomplete follow-up, and why? Interviewees were subsequently questioned about specific CJEU rulings identified during the doctrinal analysis that were not mentioned by the interviewees themselves.

C. Feedback Loops

The third question on the feedback loops (see '3' in figure 1) was primarily answered on the basis of interviews during which judges were asked whether their interaction with the CJEU and its answers had an effect on their

[61] Note, however, that one should be careful in drawing conclusion from this table. It was often difficult to classify whether an interviewee argued in line with a certain reason or factor, also because an interviewee could partly (dis)agree. It was therefore also decided not to mention in percentages how many judges considered a reason (ir)relevant.

willingness to refer cases in future. In addition, judges were also asked to reflect on the question as to whether they take the expected answer of the CJEU into account when deciding to refer or not.

III. National Court's Decision to Refer

This section takes the motivations of judges (not) to refer as identified in the literature. As will be shown below, politico-strategic reasons play a more limited role in the context of migration than one would expect based on the literature. Moreover, the results also do not support the expectation that such reasons play an important role in the highly Europeanised, judicialised and politicised field of migration (section III.1). The study, in fact, shows that non-strategic reasons can better explain the judges' decision (not) to refer (section III.2).

1. Politico-strategic Reasons

Section II.1 outlined three dominant theoretical perspectives on the politico-strategic reasons for courts to refer: judicial empowerment ('sword'), sustained resistance ('shield') and bureaucratic politics ('leapfrog'). Only a few 'sword' references (section II.1.A) and a couple more 'leapfrog' references, especially from lower courts (section III.1.B), were found in this study. This research did not find any support for the second theory that courts deliberately shield cases from the CJEU.[62]

A. Judicial Empowerment: Protection vis-à-vis the Legislator

The highest national courts have acted in line with the judicial empowerment hypothesis in a few instances. Several interviewees acknowledged this. But almost all of them mentioned the same two references of the Council of State in the area of migration as examples, one of which (*Chakroun*) precedes the 2013-2016 time period. *Chakroun* dealt with a Dutch rule stipulating that family reunification could be refused to a sponsor who does not have a lasting

[62] Nonetheless, it could be argued that when national courts do not refer in order to shield the national legislator they would not raise the issue of referral, because this would throw light on their 'disloyalty', at least from an EU perspective. For a discussion of the strategy to alleviate this problem, see section II.3.

and independent net income equal to at least 120% of the minimum wage in order to maintain himself and the members of his family.[63] There was already quite a lot of criticism regarding the validity of this rule in the light of the Family Reunification Directive and the Council of State referred the case to the CJEU.[64] Similar doubts about the legality of a national rule under EU law also played a role in a second case, *K. and A.*, albeit more in the background. This case dealt with a Dutch rule which required the family members of a third country national residing lawfully in the Netherlands to pass a civic integration exam to enter the Netherlands. The Council of State referred to written observations of the Commission that this rule amounted to a breach of EU law.[65] In cases such as *Chakroun,* it could be argued more cynically, as some interviewed judges did, that national courts are 'hiding behind the back' of the CJEU and that the CJEU is simply 'pulling the chestnuts out of the fire' for national courts.[66] Some judges noted that in case of democratically adopted laws a judge should only make a decision after careful deliberation also in the light of the separation of powers.[67] Some judges acknowledged that the CJEU is sometimes used by national courts to say what they already know with respect to an issue that is actually *clair.*[68] Again, with respect to *Chakroun*, it was quite clear for the Council of State that the rule was contrary to EU law. At the same time, it should be acknowledged that the Dutch courts have not shun away from striking down provisions in Dutch law in the field of migration without referring a question to the CJEU.[69] The latter illustrates that the CJEU is not an indispensable ally. In addition, it also

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63 Case C-578/08 *Chakroun* EU:C:2010:117.

64 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12. The European Commission held that this Dutch rule 'raise[s] particular concerns'. European Commission, 'On the application of Directive 2003/86/EC on the right to family reunification', COM(2008) 610/3, 7.

65 These observations were made in the case of *Imran,* which was withdrawn. ABRvS 1 April 2014 NL:RVS:2014:1196, para. 16, 20.1 and 28; Case C-153/14 *K. and A.* EU:C:2015:453.

66 Interviews 18, 44.

67 Interviews 18, 72.

68 Interviews 10, 12, 18.

69 *ABRvS* 26 April 2017 NL:RVS:2017:1109.

shows that Dutch courts are in general not acting in line with the shield-thesis, protecting national legislation from EU law.[70]

Table 4: overview of the interview replies in relation to the politico-strategic reasons

Theory	Proxy	Mentioned by judges out of their own motion as relevant	Judges considered factor relevant when asked	Judges considered factor irrelevant when asked
Sword	Strike down national law or policy; considerable financial consequences	44; 10; 18	66	72; 89
Shield	Protect national legislation from EU law			
Leapfrog	Challenge (another) higher court	39		14; 22; 52

B. Leapfrog: Bureaucratic Struggles among Courts

Comparatively, more evidence was found in support for the leapfrog thesis of the bureaucratic politics model. At first sight, the quantitative data seems to give solid empirical support to this thesis, but this data is slightly misleading on its own, as will be discussed towards the end of the section.

Four out of the five references in the period 2013-2016 of lower asylum courts were actually used by those courts to explicitly question the interpretation of EU law by the Council of State and to prompt the CJEU to 'correct' this restrictive interpretation.[71] There are also two older cases that clearly illustrate the way in which lower asylum courts have turned to the CJEU as

[70] Ibid (n 46) for the general willingness of Dutch courts to apply EU law.

[71] NL:RBDHA:2013:BZ5462 (*Rajaby*), para. 2.5.5; NL:RBDHA:2015:1004 (*Ghezelbash*); NL:RBDHA:2016:6389 (*K.*), para.19; NL:RBDHA:2016:12824 (*A. and S.*), para. 5.2.

their ally.[72] The first case is *Y.S.* and dealt with the right of access of asylum seekers to the minutes relating to the decision of the Immigration and Naturalisation Service to grant a residence permit. These minutes are internal preparatory documents containing arguments and considerations which are relevant for the decision-making process. [73] They include personal data but also a legal analysis of these data in the light of the applicable rules.[74] The Council of State ruled in several cases that this legal analysis in the minutes does not constitute 'personal data' in the sense of the Law on the Protection of Personal Data transposing the Data Protection Directive, but contains the personal opinions of the case officer.[75] Based on these considerations, the Council of State held that there is no right of access to these minutes.[76] These judgments were criticised by scholars.[77] In light of the criticism, it was not surprising that a lower judge saw a possibility to refer the matter to the CJEU in 2012. In its order for reference, the single-*judge* section of the district court Middelburg explicitly questioned the Council's restrictive interpretation of 'personal data' in the sense of the Data Protection Directive.[78] The court also implicitly criticised the fact that the Council of State had not referred the matter to the CJEU. What makes this case so interesting is that the Council did not stand by idly, but also made a

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[72] Earlier the district court Zwolle asked questions in *Imran* about the compatibility of the civic integration exam with the Family Reunification Directive after the Council of State had ruled positively about this. The court, however, did not explicitly express its disagreement with the Council. Rb. 's-Gravenhage 31 March 2011 NL:RBSGR:2011:BQ0453; C-155/11 *Imran* EU:C:2011:387.

[73] Joined cases C-141/12 and C-372/12 *YS* EU:C:2014:2081.

[74] *ABRvS* 26 June 2008 NL:RVS:2008:BD6230, para. 2.1.1 and 2.1.2; Rb. Middelburg 15 March 2012 NL:RBMID:2012:BV8942, para. 3.2.

[75] Directive 95/46/EC of the European **Parliament** and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

[76] ABRvS 2 February 2011 NL:RVS:2011:BP2831; ABRvS 19 October 2011 NL:RVS:2011:BT8554; ABRvS 2 November 2011 NL:RVS:2011:BU3136, para. 2.3.1.

[77] The critique was related to the restrictive interpretation of 'personal data', the limited reasoning of the Council of State, the insufficient attention for the Data Protection Directive as well as the Charter of Fundamental Rights. Overkleeft-Verburg in *JB* 2011/66; Klingenberg in *JBP* 2013/6.

[78] Rb. Middelburg 15 March 2012 NL:RBMID:2012:BV8942, para. 9.

reference for a preliminary ruling in a similar case. In its order, the Council made clear that it had not changed its opinion and explained its approach, while implicitly criticising the interpretation of the lower court.[79] While Council's previous judgments on the same matter were motivated relatively shortly, the Council seemed to pull out all the stops to 'defend' itself in its order. By doing so, the Council also aimed at moving the CJEU in its direction by formulating the questions differently than the district court and in line with its own approach.[80] The latter illustrates that rather than being merely a dialogue between CJEU and national courts, the preliminary ruling procedure also becomes a forum for dialogue between different national courts.

The interpretation by the Council of State regarding the sufficiency of the safeguards in relation to mobile security monitoring checks was also challenged by a lower court in *Jaoo/Adil*.[81] The Dutch law enabled officials to carry out such checks up to 20 kilometres from the land border to examine whether the persons stopped satisfied the residence requirements under certain safeguards.[82] Confronted with a rebellious lower court that challenged its approach, the Council again referred the matter to the CJEU in order to 'defend' itself and explain the Dutch legal system more elaborately than the district court did.[83] Note that the Council of State did not react to the four more recent leapfrog cases by referring to the CJEU as it previously

79 ABRvS 1 August 2012 NL:RVS:2012:BX3309, para. 2.23.

80 The CJEU eventually sided with the Council of State. E.g. the first question: 'Should the second indent of Article 12(a) of [Directive 95/46] be interpreted to mean that there is a right to a copy of documents in which personal data have been processed, or is it sufficient if a full summary, in an intelligible form, of the personal data that have undergone processing in the documents concerned is provided?' With this question the Council of State seems to sketch some sort of middle way. In addition, the Council also sketches that a broad right of access would imply that reasons will no longer be included in the minute which would also disrupt the free and orderly decision making process. ABRvS 1 August 2012 NL:RVS:2012:BX3309, para. 2.27.

81 Rb. Roermond 16 February 2012 NL:RBROE:2012:BV6172, para. 11. Case C-88/12 Jaoo EU:C:2012:573.

82 Such safeguards related to the intensity and frequency of the checks. The CJEU concluded that EU law did not prevent such checks. Case C-278/12 PPU *Adil* EU:C:2012:508.

83 ABRvS 4 June2012, NL:RVS:2012:BW7489.

did in *Y.S.* and *Jaoo/ Adil*. A possible legal reason or justification for this silence could be that the CJEU has made it easier for higher courts to stick to their earlier finding of an *acte clair* in the case of *Van Dijk*. In this judgment, the CJEU held that the fact that other (national) courts ruled differently or did refer a question does not preclude the higher court from determining that the matter is *clair*.[84]

> The Council of State has not only been challenged by lower courts, but also by its administrative counterpart, the Tribunal, albeit in a more indirect way. In *Chavez Vilchez*, the Tribunal questioned the restrictive reading of *Zambrano* as laid down in the Aliens Circular, which contains the policy rules as applied by the Immigration and Naturalisation Service.[85] The Circular only applied *Zambrano*, giving mothers a right of residence derived from the right of residence of their children, to situations where the father is not in a position to care for the child.[86]

These cases suggest that the leapfrog thesis could explain a high number of references. The previous overview, however, neglects that many lower court judges are actually reluctant to refer.[87] Three out of the five interviewed lower court judges clearly rejected the idea of 'leapfrogging'. The majority of lower court judges think that it is primarily up to the highest courts to refer, given their more limited law making function as first instance courts or because they are simply more loyal to the highest courts.[88] This preference for the highest courts to refer was not only mentioned during interviews, but is also laid down in a memo issued by the Committee of the Presidents of the

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[84] Joined cases C-72/14, C-197/14 *X. & Van Dijk* EU:C:2015:564, paras. 56-63.

[85] CRvB 16 March 2015 NL:CRVB:2015:665, para. 4.2; C-133/15 *Chavez-Vilchez* EU:C:2017:354; Case C-34/09 *Zambrano* EU:C:2011:124.

[86] The Tribunal did, however, not mention the case law of the Council of State upon which this restrictive reading was based. ABRvS 9 August 2013 NL:RVS:2013:2837.

[87] Table 3 shows that lower court judges referred five cases to the CJEU in four years. It could be argued that this is not a lot in the light of the fact that Dutch lower courts handle hundreds of migration cases every year. EU law plays an important role in these cases, because migration is almost completely Europeanised. See *supra* n 50. Kees Groenendijk & Mirjam van Riel, 'Migratierecht is bijna helemaal Unierecht' [Migration law is almost completely EU law] *Asiel & Migratierecht* 9 (2017) 405.

[88] Interview 14, 22, 51.

Administrative Law Departments of District Courts.[89] Likewise, Groenendijk referred to a 'gentlemen's agreement' between the Council of State and lower asylum courts that is the Council of State who should in principle refer.[90] Only one interviewed judge seemed to endorse the 'leapfrog' argument, since he/she referred to 'a bad taste in his/her mouth' as a result of the restrictive case law of the Council of State and mentioned the option of referring as an important mechanism to challenge this case law.[91] Another judge took a more middle-ground position to give the highest courts the chance to rule on an issue first. He/she would only refer when the highest courts are not taking up their responsibility and do something 'strange'.[92]

Summing up, there have been several references in which politico-strategic reasons played a role, especially leapfrog-references of lower migration courts in which they challenged the restrictive approach of the Council of State. However, politico-strategic reasons can only explain a limited number of references and certainly not explain the cases that have not been referred. These strategic reasons also fail to explain the reluctance of many lower court judges to refer given their respect for the judicial hierarchy. As the interviews show, the idea of leapfrogging is not widely shared among lower court judges. This is further illustrated by the fact that the great majority of Dutch references come from the highest courts.[93] The composition of the interview sample – 11 higher court versus 5 lower court judges – can also explain the seeming difference between the outcomes on the basis of the legal analysis – finding some leapfrog cases – and the denial of strategic reasons by judges. In addition, the differences could also stem from the earlier mentioned fact that

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89 One advantage for the highest courts is that they could more easily bundle similar cases. In addition, the highest courts have more experience, time and staff to prepare references. Interview 83. Memo van het Landelijke Overleg Voorzitters sectoren Bestuursrecht van de rechtbanken (LOVB), Sandra van 't Hof, 'Werkwijze stellen van prejudiciële vragen', 12 June 2013. For further discussion and analysis, see Jasper Krommendijk, 'De lagere rechter aan banden. Is er nog ruimte voor de lagere rechter om te verwijzen naar het HvJ?'[The lower court judge restricted. Is there still room for the lower court judge to refer to the CJEU?] (2018) SEW 183.

90 Groenendijk (n 32).

91 Interview 39.

92 Interview 83.

93 Ibid (n 22).

judges (un)consciously hide strategic reasons, because acknowledging such considerations would conflict with their self-image and professional ethos of being a judge.[94] More research is thus necessary to further substantiate the claim that non-strategic reasons matter most.

The research conducted so far on Dutch references suggests that politico-strategic reasons play an even more limited role in fields other than migration.[95] One former asylum judge who now practices in tax law observed that the confrontational relationship between different levels in the judicial hierarchy is typical for asylum law, where emotions and moral or ethical considerations play a bigger role than in an area such as tax law.[96]

2. Non-strategic Reasons

This section examines non-strategic reasons for (not) referring which have been described in section II.1.B. It shows that judges primarily decide (not) to refer for pragmatic reasons (section III.2.B), whereby personal – and to a lesser extent institutional – factors also play an important role (section III.2.C-D). The parties have only a limited influence on this referral decision (section III.2.E). The interviews and legal analysis found hardly any support for the legal formalist idea attributing references to the judges' eagerness to comply with their obligation to refer, or more broadly, to apply EU law (section III.2.A).

Table 5: overview of the interview replies in relation to the non-strategic reasons

Theory	Proxy	Mentioned by judges out of their own motion as relevant	Judges considered factor relevant when asked	Judges considered factor irrelevant when asked
Compliance pull/ legal	The need to comply with the obligation	66; 24; 91; 72		

94 Ibid (n 58-60).

95 Krommendijk (n 89).

96 Interview 51.

formalism (2.2.1)	to refer/ correct application of the *Cilfit* doctrine			
Pragmatism (2.2.2)	Need of legal clarity; answer perceived necessary to resolve the case	83; 66; 43; 91; 89; 10, 72		
	Reasonable reading of *Cilfit*	44; 66; 89; 10; 18; 72		
	Natural reluctance (e.g. decide themselves)	22, 14;25; 66; 81; 44; 72; 89		
	Importance of the question	12; 24; 66; 44; 12; 72; 18		
	Consequences of referring for the parties	22; 66; 24; 91		
	Efficiency/ delay in the case (and other cases)	22; 83; 14; 91; 72; 10; 18		39
	Resources necessary to write question, time		24; 66	39
Personal/ Psychological (2.2.3)	Position in the career	10, 44		
	Background/ expertise	10, 44		
	Knowledge of EU law/ procedure	14		
	Self-perception: e.g. lower	22; 83; 14; 51		

	courts as fact finders			
	Fear to ask (wrong) question	14		
	Satisfaction of writing a reference/ contributing to EU law	12; 10; 39		44
Institutional (2.2.4)	Awareness (e.g. specialised EU law committees in courts)	66; 24; 18, 44, 81, 89.		
	Case management (backlog of cases)	44; 18; 89		
Request of the Parties (2.2.5)	Parties requested referral	22; 91; 44		83; 66; 24; 43; 10, 12, 91; 72

A. Compliance Pull/ Legal Formalism

During the interviews, only some judges mentioned the formalist reason that a case is referred with the idea of complying with the obligation to refer under Article 267 TFEU. Most judges emphasised that a referral is made because there is uncertainty regarding the meaning of a particular provision, for example, because it is used in contradictory ways in EU rules or has not been interpreted by the CJEU before.[97]

Further support for the idea that legal formalist considerations do not figure prominently in judges' mind is that almost all judges of the highest courts

[97] Interviews 10, 43, 66, 72, 83, 89, 91. One example is the case of *Zh. and O.* in which it was unclear whether there are differences in the interpretation of 'public order' for EU citizens or third country nationals. Case C-554/13, *Zh. and O.* EU:C:2015:377.

generally employ a 'reasonable reading' of the *Cilfit*-exceptions.[98] Several judges held that when the question is 75-80% *clair*, there is no need to refer, especially in the field of migration where it would be possible to send a handful of cases to Luxemburg every week.[99] The question is not only whether there is doubt, but also whether the reference is 'worth the effort'. These views thus suggest that *Cilfit* is in practice not applied word-for-word, but rather with 'common sense' where other considerations play a role.[100] Some judges acknowledged that they (implicitly) apply the less strict *Köbler* 'test'. On the basis of this test, there is only a problem, namely state liability, 'in the exceptional case where the court has manifestly infringed the applicable law' which does not include the incorrect reading of CJEU judgments.[101] Given the reasonable reading of *Cilfit*, it is not surprising that judges of the Council of State interpreted the CJEU judgments in *Ferreira* and *Van Dijk* as giving more leeway to national courts.[102] Especially in *Van Dijk,* the CJEU confirmed that the fact that other (national) courts ruled differently or did refer a question does not detract from the highest court's conclusion that the matter is *clair*. The Council used these judgments as an additional justification for non-referral in several migration cases.[103] One lower court judge held that this reasonable *Cilfit*-reading by the Council of State is done selectively whereby *van Dijk* is merely used as a fig leaf, while

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98 'A reasonable reading of *Cilfit'* is also mentioned in Association of the Councils of State and Supreme Administrative Jurisdictions of the EU and Network of the Presidents of the Supreme Judicial Courts of the EU (ACA), 'Report of the working group on the preliminary rulings procedure', www.aca-europe.eu/seminars/2007_DenHaag/Final_report.pdf, last accessed 31 July 2018, 10-11.

99 Interviews 44, 66, 89; Sevenster & Wissels (n 32) 90.

100 Interviews 18, 44, 72; Hanna Sevenster, 'Good old Cilfit – pleidooi voor een 'make-over'' [Good old Cilfit – plea for a 'make-over'] in Tristan Baumé et al (eds), *Today's Multi-layered Legal Order: Current Issues and Perspectives: Liber Amicorum in Honour of Arjen W.H. Meij* (Paris 2011) 297; Sevenster & Wissels (n 32) 91.

101 Interviews 10, 18; Case C-224/01 *Köbler* EU:C:2003:513, paras. 53.

102 Joined cases C-72/14 & C-197/14 *X. & Van Dijk* EU:C:2015:564, paras. 56-63; Case C-160/14 *Ferreira da Silva* EU:C:2015:565, paras. 40-42; Sevenster & Wissels (n 32) 87-89.

103 See several post-*J.N.* cases; ABRvS 13 May 2016 NL:RVS:2016:1624, 1383 and 1384. See also the credibility assessment cases. ABRvS 13 April 2016 NL:RVS:2016:890, 891; ABRvS 5 December 2016 NL:RVS:2016:3231.

another judge noted that the Council of State should have referred more (or other) questions.[104]

B. Pragmatism

The interviews and legal analysis clearly show that judges primarily operate in a pragmatic way and include various considerations in their decision (not) to refer. There is a natural tendency among judges to avoid referring a case to the CJEU all too easily, especially among judges from the highest courts. It is further illustrated by the reasonable reading of *Cilfit*.[105] This 'natural reluctance' means that disputes are primarily solved on other grounds, preferably national grounds. Both existing literature and interviews show that national court judges' first instinct is to decide themselves even though they do not resist CJEU intervention as such, as will be later argued (section IV.2).[106] This also means that a case is not immediately referred when there is only the slightest doubt.[107] The reluctance to refer among lower court judges primarily stems from the way in which they perceive their judicial function as 'primary' courts of fact finding (see section III.1.B).

The first reason for the general reluctance is that formulating questions, as well as the order of reference, is extremely time consuming and labour intensive.[108] One judge stated that formulating a preliminary reference is as difficult as answering it.[109] A lower court judge also noted that it is easier to decide the case yourself.[110] A second reason for the reluctance is that a referral means that not only the referred case, but also similar cases are put on hold until the CJEU hands down a judgment.[111] Such a delay plays an especially important role in the field of migration where there are often many, possibly

[104] Interviews 39 and 83.

[105] Interviews 10, 44, 89; Sevenster (94) 305.

[106] Sevenster & Wissels (n 34) 187; Interviews 10, 66, 72, 81, 89.

[107] Interviews 18, 44.

[108] This is also because the highest courts have the practice of involving many judges and référendaires. Interviews 24, 66, 81.

[109] Sevenster (94) 301.

[110] This judge also stated that it costed two months of extra work in addition to normal work flow. Interview 39.

[111] Interviews 14, 39, 83. Sevenster & Wissels (n 32) 90.

hundreds of cases, in which the same question is discussed.[112] The interviewed judges acknowledged that justice would come to a standstill if every question of EU law about which there is doubt was immediately referred to the CJEU.[113] In the same vein, the current President of the Aliens Chamber of the Council of State, Nico Verheij, stated that a responsible judge takes into consideration the consequences of such a delay.[114] The consequences of a referral on other cases seems to be less of a relevant consideration for lower court judges.[115] These two reasons for the general reluctance also have an institutional dimension which relate to the capacity and case management system within courts (see section III.2.D).

Having described the general reluctance and the pragmatic mindset of judges, the following questions remain: how do judges make the decision (not) to refer in concrete cases and what considerations play a role? The decision (not) to refer primarily boils down to a balancing exercise between conflicting interests: the importance of the question versus the costs of the delay in terms of cases that need to be put on hold and the impact on society.[116] Judges held that referral is less likely when an issue is only incidental or relates to legislation which has been changed already or will be changed in the near future. An exception to this is when it relates to an important matter of principle.[117] Nonetheless, when the question is too important in terms of the number of people and cases affected, it could be more logical not to refer, because it is not considered desirable to put all too many cases on hold for an uncertain period of time.[118] A recent example in which this dilemma played a role are the cases on the intensity of review of the credibility assessment of the asylum claim in relation to Article 46(3) of

[112] Interview 14. See also ABRvS 14 July 2011 NL:RVS:2011:BR3771, para. 2.8.4. Sevenster & Wissels (n 31) 92; Groenendijk (n 32).

[113] Interviews 10, 18.

[114] Nico Verheij, 'Voorwoord' [Foreword], in Bosma et al (n 32) 83.

[115] Interview 39. One judge was silent on this, while another also brought up these consequences. Interviews 22, 83.

[116] Interviews 44, 72, 89; De la Mare and Donnelly (n 6) 372

[117] Interviews 12, 18, 24, 32, 44, 66; Sevenster (94) 301.

[118] Interview 18.

the Asylum Procedures Directive.[119] The Council of State explicitly acknowledged that the text of Article 46(3) of the Procedures Directive does not provide a definite answer and noted that there was no case law of the CJEU (yet) clarifying this provision.[120] Instead of referring those open questions to the CJEU, the Council answered those questions itself and held that the judicial review of the credibility assessment should be more intensive than was common practice to that date. This was also because a referral would mean that the Council 'could almost shut down' as these questions went to the core of its work and would imply that a very large number of cases had to be put on hold. Nonetheless, sometimes judges considered that a referral was unavoidable in order to give judgment, despite the high number of affected cases. This has been seen for instance in the case *A., B., C.* which considered the intensity of review of the credibility of a declared sexual orientation of an asylum seeker.[121] Some judges, also from lower courts, stated that they also consider the position of the affected person(s) and examine whether a reference has negative consequences for the parties.[122] One lower court judge, for example, noted that judges should be careful in referring a legal question when this is not 'helping' the asylum seeker. This judge argued that he/she would have never referred *Ghezelbash,* which concerned the right to an effective legal remedy under the Dublin III Regulation for this reason.[123] This is because a reference would lead to considerable delay with an uncertain outcome that could also be against the interests of the asylum seeker. Another court decided to refer the case, but the Council of State annulled the judgment of the referring lower court leaving Ghezelbash empty handed.[124]

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[119] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/60.

[120] ABRvS 13 April 2016 NL:RVS:2016:890-891, para. 5.2.

[121] Joined cases C-148/13 until C-150/13 *A., B., C.* EU:C:2014:2406.

[122] Interviews 22, 32, 91.

[123] Regulation (EU) No.604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31; Case C-63/15 *Ghezelbash* EU:C:2016:409.

[124] ABRvS 18 May 2017, NL:RVS:2017:1326; Interview 22.

Judges from the highest courts mentioned other pragmatic and practical considerations. Sometimes judges decide not to refer and to wait until a case that lends itself better for referral comes before the court. That way, the latter case allows the court to show the full picture of the issue to the CJEU.[125] At the same time, judges occasionally considered it necessary to refer even though similar questions were already referred to the CJEU by other courts. The reason was to 'feed' the CJEU with the view of the court and to make clear that certain issues also play a role in other Member States. One example is the case of *G. and R.* on the right to be heard in relation to the extension of detention of illegally staying third-country nationals.[126] The Dutch Supreme Court had already asked similar questions about the right to be heard and the consequences of breaches of those rights from the perspective of the rights of defence.[127] The Council of State considered it necessary to refer this case to underline the differences between the context of the two different fields of law, namely customs and asylum. Moreover, the Council wanted a quick answer in *G. and R.* because the claimant was in detention. It therefore successfully submitted a question via the urgent preliminary ruling (PPU) procedure. The Council also decided to refer in *K. and A.* about civic integration requirements despite there being partly similar question raised by a German court in *Dogan*.[128] However, the German court's question had a subsidiary character which entailed the risk of the CJEU not answering it.[129]

C. Personal/ Psychological Factors

This study also found that personal factors and personal differences among judges influence to what extent the judges are willing and able to refer. This research did not find much support for the thesis that the limited knowledge of EU law and the preliminary ruling procedure is an obstacle for referring.[130] This is illustrated by the relatively high number of references in the field of

[125] Interview 10; Sevenster & Wissels (n 33) 91.

[126] Case C-383/13 PPU *G.* and *R.* EU:*C:*2013:533.

[127] Case C-437/13 *Unitrading* EU:C:2014:2318.

[128] Case C-138/13 *Dogan* EU:C:2014:2066.

[129] ABRvS 1 April 2014 NL:RVS:2014:1196, para. 27.

[130] Only one lower court judge mentioned this as an obstacle. Interview 14. Another lower court judge also acknowledged that there is too limited expertise to refer in *Zambrano* cases. Interview 22.

migration and the eagerness of judges to engage with EU law.[131] In addition, migration law is highly Europeanised which means that judges are simply forced to be experts in EU law.[132] Having said that, the (EU law) background of judges matters. Judges, who have an academic or governmental background and/or have more EU law expertise, have a more positive attitude towards the CJEU and are more accustomed with working with a supranational court as the highest authority. By contrast, career judges find it more annoying to refer since it disturbs their autonomy as a judge deciding on disputes, as well as the national judicial process.[133] One judge with a background in EU law held that it is not surprising that career judges who have had a lifelong career in the judiciary and have made it to the top court are not all of a sudden completely devoted to the CJEU, but instead have a more sceptic attitude in the sense of 'Is it up to the CJEU to determine this'?[134] As mentioned before, there are also clear differences between lower court judges in terms of their perception of their judicial function as 'primary' courts of fact (see section III.1.B).

The literature has also identified psychological considerations. During interviews, very few judges actually mentioned those. Only some lower court judges expressed a fear that they might miss essential points in their reference and, hence, prefer not to refer at all.[135] There were, however, a couple of judges who argued in the opposite way by stating that they enjoy writing a good reference.[136] Some judges even mentioned that they derive satisfaction from referring to the CJEU, also because they could contribute to the development of EU law.[137]

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[131] Ibid (n 44-45).

[132] Groenendijk & van Riel (n 87).

[133] Interviews 10, 44.

[134] Interview 10.

[135] Interview 14. Another judge gave this as an explanation as to why a reference costs so much time. Interview 39.

[136] Interviews 10, 44.

[137] At the same time, they noted that the primary purpose of the procedure is to solve a dispute. Interviews 10, 12, 39.

D. Institutional

Institutional factors matter as well and can explain why the two highest courts have become less reluctant to refer over time, also in the field of migration. While the Council of State was criticised years ago for not paying sufficient attention to EU law and withholding references from the CJEU, experts acknowledge that this has improved in recent years.[138] Several institutional reasons account for this, including better coordination of EU law questions, the creation of a committee on EU law and a documentation service that keeps close track of EU law developments.[139] Both the Council of State and Tribunal have regular meetings where EU law developments are discussed.[140] In addition, more judges with a prominent EU law background have been appointed to the Council since 2005.[141]

There are some institutional factors that discourage references. Some judges acknowledged that the case management system within courts affects the general (reluctant) attitude towards referring. Both the financial system rewarding judges based on the number of cases they decide and the increasing pressure on the capacity of courts favour a tendency to solve disputes without referring.[142]

E. The Role of the Parties

Another factor influencing the courts willingness to refer is the role of the parties and their requests to refer. The legal analysis and the interviews show that such requests have only had a minimal impact to the highest courts and most decisions to refer were made by courts from their own motion.[143]

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[138] Groenendijk held that the Council of State did not take its task as highest court in relation to EU migration and asylum law seriously before 2008. Kees Groenendijk in *JV* 2011/4, par. 1.

[139] Interviews 18, 44, 81, 89.

[140] Interviews 24, 66, 89.

[141] This could also be partly attributed to Mortelmans (2005-2016), who also championed the use of the preliminary ruling procedure. Interview 44.

[142] Interviews 14, 20.

[143] Interview 10, 12, 43, 91. It could also be that the parties themselves are not in favour of referring because of the delay, which is, however, also not considered to be decisive for a court. E.g. NL:RVS:2014:27; Interview 10, 72.

National courts are not obliged to act on – or even take into account – such requests.[144] It seems, however, that lower court judges attach more importance to parties' requests.[145] The limited impact of requests is illustrated by Table 6 which indicates that in the majority of decisions of the lowest and highest courts not to refer there was an explicit reference to a request by (one of) the parties. This number is possibly even higher, because it could well be that courts do not explicitly mention that there was a request. Judges of both the Council of State and Tribunal noted that they have started to refer to the parties' requests consistently as a result of the case law of the ECtHR which requires courts to do so on the basis of Article 6 ECHR.[146] Several lower court judges were not aware of this case law, but nonetheless emphasised the importance of providing reasons when a well-founded request was made.[147] Table 7 shows that in only two of the thirteen referred cases there was a request of the parties to refer. Nonetheless, it could be that courts sometimes omit a reference to a request because they do not consider such reasoning necessary.[148] Even though one should be careful in interpreting the quantitative data on their own, those data were confirmed during the interviews. An explanation for the limited impact of requests of the parties is that, as several interviewees noted, the quality of the requests differs and only few of them are serious and well-founded.[149]

Table 6: The decisions not to refer that mention a request of (one of) the parties

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[144] Case 283/81 *Cilfit* EU:C:1982:335, para. 9.

[145] One judge even held that he would almost never refer without one of the parties making such a request. Interview 22.

[146] Interviews 5, 10, 12, 31, 69, 77; Sevenster & Wissels (n 32) 89; *Dhahbi v Italy* ECHR nr. 17120/09 CE:ECHR:2014:0408JUD001712009; *Schipani v Italy* ECHR nr. 38369/09; CE:ECHR:2015:0721JUD003836909.

[147] Interviews 22, 83. One judge was aware of this case law and also held that this case law is applicable to lower courts, despite this being far from clear. Interview 39. For a discussion, see Jasper Krommendijk, "Open Sesame!' Improving access to the CJEU by obliging national courts to reason their refusals to refer' (2017) 1 European Law Review 46.

[148] Interview 89.

[149] Interviews 10, 12, 24, 72.

	Council of State		Tribunal		Lower asylum courts		Total	
	N	%	N	%	N	%	N	%
Request is explicitly mentioned	18	69%	0	0%	35	73%	53	71%
Request is not mentioned	8	31%	1	100%	13	27%	22	29%
Total	26	100%	1	100%	48	100%	75	100 %

Table 7: The referred cases that mention a request of (one of) the parties

	Council of State		Tribunal		Lower asylum courts		Total	
	N	%	N	%	N	%	N	%
Request is explicitly mentioned	1150	20%	0	0%	1151	20%	2	15%
Request is not mentioned	4	80%	3	100%	4	80%	11	85%
Total	5	100%	3	100%	5	100%	13	100%

Despite the limited impact of parties' requests to refer in the investigated period, there have been a couple of successful instances whereby a joint and organised endeavour of asylum lawyers, academic EU law experts and NGOs managed to obtain a referral.[152] This includes *Imran*, referred to the CJEU in 2011 by the district court of Zwolle, which concerns the compatibility of the civic integration exam with the Family Reunification Directive.[153] Also *Sahin,*

[150] NL:RVS:2014:1196 (*K. and A.*).

[151] NL:RBDHA:2016:12824 (*A. and S.*), para. 3. Interviews confirmed that there was no request in *Rajaby* and *Ghezelbash.* For the other two referral it is (yet) unknown.

[152] For an account of a successful case of bottom-up legal mobilisation in relation to the Return Directive in Italy, see Virginia Passalacqua, '*El Dridi* upside down: a case of legal mobilization for undocumented migrants' rights in Italy', Tijdschrift voor Bestuurswetenschappen en Publiekrecht (2016) 215.

[153] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12. Jos Hoevenaars, *A people's court? A bottom-up approach to litigation before the Court of Justice of the European Union* (Eleven International Publishing 2018) 209.

referred to the CJEU by the Council of State in 2006, was instigated by a Working Group set up in 2003 with a view to obtain a reference to the CJEU in order to challenge the increased administrative fees for residence permits.[154] In several other cases, such (academic) experts have only got involved after references were made.[155] A Strategic Litigation Committee, consisting of academics and asylum lawyers, has been active since 2014 and is actively looking for cases which can be brought before the CJEU or the ECtHR. This Committee has so far had little impact.[156] Of the thirteen referred cases included in this article, the Committee was only involved after the reference was made in *J.N.* and *Ghezelbash*.

When discussing the role of the parties in relation to the instigation of a reference it is also important to discuss the position of the State Secretary for Justice and Security which is responsible for asylum and migration. It could be argued that this 'party' has had a greater effect on the willingness or ability of courts to refer. This is because the State Secretary has used its power in, for example, *Imran* and *Rajaby* to issue a residence permit strategically in order to avoid a referral or prevent a reference from being answered by the CJEU.[157] When the State Secretary does so, a ruling from the CJEU is no longer necessary because it can obviously not affect the outcome of the case. As a result, the case is withdrawn from the docket of the CJEU. There are also cases where the court expressed an intention to refer, and draft questions were already prepared, but the case was settled (shortly) before being lodged with the CJEU.[158] The risk or threat of a reference can thus change the behaviour of the State Secretary.

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[154] Hoevenaars (n 152) 215.

[155] Examples include the case of *Elgafaji* (n 46) and *Zambrano* (n 49). Hoevenaars (n 152) 212-213.

[156] The project leader, Sadhia Rafi, confirmed that until March 2017 the work of the committee has not caused a court to refer. The request of the parties as well as a note of the committee were, however, referred to in NL:RVS:2016:890-891. See also the, so far unsuccessful, strategic litigation case of the Dutch Public Interest Litigation Project with respect to Afghan 1F'ers. NL:RBDHA:2017:11809.

[157] C-155/11 *Imran* EU:C:2011:387; C-158/13 *Rajaby*. See also Baumgärtel (n 45) 11-13.

[158] Groenendijk (n 32) 17-18.

In sum, this section provided an overview of a myriad of reasons and factors affecting the willingness of judges to refer, even though some have a more limited explanatory value (see table 9 for an overview). The preceding analysis shows that several non-political reasons or factors play a more important role than political reasons for the decision (not) to refer. There is often more than one reason that could explain a decision (not) to refer, sometimes even conflicting reasons for and against. Hence, it is very difficult to explain the judicial decision-making in relation to referring to the CJEU by a single factor.

IV. The National Court's Follow-up

The second question of this article deals with the follow-up to the preliminary rulings by the national court. Dutch judges have generally been content with their interaction with the CJEU and its judgments (section IV.1). At the same time, the judges discussed several unclear and problematic judgments during the interviews (section IV.2). They also expressed concerns about the functioning of the preliminary ruling procedure and the limited 'dialogue' with the CJEU (section IV.3). However, these factors did not affect their willingness to apply the CJEU judgment to the national dispute. On the contrary, they applied almost all judgments fully and automatically (section IV.4). This once again bears witness to the pragmatism on the part of national judges.

1. Judges' Satisfaction with the Usefulness of CJEU Judgments

What is interesting about the perception of CJEU rulings by national judges is that they assess them not so much from an analytical perspective. They are not interested in whether the CJEU answered all questions satisfactorily and in line with its earlier jurisprudence. Rather, what matters most for national judges is whether the CJEU judgment helps them to solve the case at hand.[159] This means that judges primarily look at what the CJEU has said and whether that is easily applicable, instead of focusing on what the CJEU failed to say.[160] This is not to say that judges disagreed with the shortcomings identified in

[159] See also Micklitz (n 30) 433.

[160] Interviews 10, 18, 91.

the academic literature, such as the insufficient judicial reasoning, incorrect rephrasing of the question, or a neglect of some questions or the reasoning of the referring court. Almost all judges acknowledged these deficiencies. But it did not prevent them from concluding that a ruling by the CJEU was useful. During the interviews, most judges named several judgments – elsewhere criticised as deficient – that they considered adequate, as illustrated in Table 8. One example that shows the difference of perspective is *J.N.*, which concerned the detention of third country nationals with a view to their removal. While the CJEU only paid relatively limited attention to the relationship between Article 8(3) of the Reception Conditions Directive and the case law of the ECtHR, which was explicitly included in the questions of the Council of State, the judgment was considered useful.[161]

Table 8: Overview of cases that were explicitly discussed during interviews[162]

Referring court	Clear and useful judgments	In between	Unclear and problematic judgments
Council of State	C-383/13 PPU, *G. and R.* C-554/13, *Zh. and O.* C-153/14, *K. and A.* C-601/15 PPU, *J.N.*	C-148/13-150/13, *A., B., C.* C-187/10, *Unal*	C-225/12, *Demir*
Tribunal		C-579/13, *P. and S.*	C-485/07, *Akdas*
Lower courts	C-63/15, *Ghezelbash*		

Almost all interviewed judges held that the judgments of the CJEU are generally useful.[163] Some interviewees were a bit more critical and emphasised that the quality varied.[164] At the same time, they acknowledged that such criticism with respect to certain judgments is normal and is something they

[161] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96; Case C-601/15 PPU *J.N.* EU:C:2016:84.

[162] The following judgments of the Tribunal were not discussed in interviews: C-171/13 *Demirci*; C-133/15 *Chavez-Vilchez*. The same holds true for the district court cases C-550/16 A. and S; C-331/16 K.; C-18/16 K. (no CJEU judgments at the moment of interviewing); C-158/13 Rajaby (removed).

[163] Interviews 10, 12, 18, 24, 44, 66, 72, 91.

[164] Interviews 18, 24, 89.

are familiar with themselves.[165] One judge held that approximately 80% of the requested CJEU rulings were answered in a satisfactory way, while another noted that three out of ten cases were less satisfactory.[166]

2. Unclear and Problematic CJEU judgments

There have hardly been any judgments that judges considered impossible to implement. The exception is the 'extremely difficult' case of *Demir* concerning the meaning of the term 'legally resident' in Article 13 of the Association Council Decision 1/80. This judgment was referred to as a true 'brainteaser' that needed to be studied for days to grasp its meaning.[167]

Despite their general satisfaction, judges discussed several CJEU judgments that they considered problematic. What judges found most troublesome is that CJEU judgments contain an unclear answer or no answer at all. Some judges held that especially in the migration law area, the CJEU renders too many judgments that lack an unambiguous answer, while including several criteria for individual assessments instead of clear-cut and automatic limits.[168] One lower court judge noted that referring courts should be critical towards themselves as well, because an unclear question inevitably leads to an unclear or vague answer from the CJEU.[169] The Tribunal was confronted with a rather ambiguous judgment in *P. and S.* about the obligatory integration exam under pain of a fine. The CJEU gave the Tribunal the difficult task to examine whether the means of implementing that obligation jeopardise the objectives of the Directive on third-country nationals who are long-term residents. The CJEU required the Tribunal to consider the 'specific individual circumstances'.[170] The case *A., B., C.* was also mentioned as an example in this context, because according to some judges, the CJEU only mentioned what courts could *not* do in order to assess the credibility of a

[165] Interviews 10, 44.

[166] Interviews 91, 10.

[167] Several flow charts were made for this purpose. Case C-225/12 *Demir* EU:C:2013:725.

[168] Interviews 66, 72, 81, 89.

[169] Interview 83.

[170] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44; Case C-579/13 *P. and S.* EU:C:2015:369, para 49.

declared sexual orientation of an asylum seeker.[171] One judge even asked whether it was useful to refer in the end, because of the loss in time and the fact that the CJEU completely left it to the national court to solve the case on the basis of considerations that the Council of State had already identified and discussed before referral.

Instead of these 'deference' judgments with very general answers that completely defer to the national court on the point of law, the interviewed judges preferred so-called 'outcome' judgments, as they give a very specific answer that leaves no margin for manoeuvre for the national court.[172] This goes contrary to the argument in the literature that national courts actually do not like CJEU judgments that are too 'interventionist', because judges perceive such 'excessive intervention' as an usurpation of their own jurisdiction or as infantilisation of their own role.[173] In fact, the interviews provide very little support for the argument that national courts disfavour 'interventionist' judgments. Only one judge was critical about a very detailed CJEU judgment that closely interpreted national law, but this judgment was outside the field of migration.[174] Judges opted for the contrary view and expressed their content with CJEU rulings that almost solved the case at hand. One example is *K. and A.* about the requirement for family members of a third country to pass a civic integration exam. The CJEU went into great detail in interpreting Dutch law and by hinting at a breach of EU law. It left little room for manoeuvre to the Council of State because it held itself that the requirement and the high fees make it impossible or excessively difficult to exercise the right to family reunification.[175] Judges did not consider the approach of the CJEU problematic, but valued the clear directions offered.

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[171] Joined cases C-148/13 until C-150/13 *A., B., C.* EU:C:2014:2406.

[172] Tridimas (n 6).

[173] Gareth Davies, 'Abstractness and concreteness in the preliminary reference procedure: implications for the division of powers and effective market regulation', in Niamh N Shuibne (ed), *Regulating the Internal Market (*Edward Elgar 2006) 210, 232; Jan Komárek, 'In the Court(s) we trust? On the need for hierarchy and differentiation in the preliminary ruling procedure' (2007) 32 European Law Review 467; Tridimas (n 6) 754; De la Mare and Donnelly (n 6) 391.

[174] Case C-137/09 *Josemans* EU:C:2010:774.

[175] Case C-153/14 *K. and A.* EU:C:2015:453.

In the exceptional case that the CJEU does not answer the question, courts feel sometimes compelled to send the question back again. The Tribunal considered this option after the CJEU judgment in *Akdas* in 2011 concerning the exportability of social security allowances for migrant workers from Turkey, because the ruling was unclear in several respects.[176] It was eventually decided not to resubmit the same case, but the Tribunal asked new questions about the same issue in *DemirciI,* where the Turkish workers had, unlike in *Akdas*, acquired the Dutch nationality.[177] In addition, judges also considered it bothersome when the CJEU offers the impression that it does not take certain issues that are considered to be important in the Netherlands seriously.[178] The same holds true for the CJEU going into another direction than anticipated by the referring court. This in itself is not a problem but can become one if the CJEU ignores the reasoning or the suggested answer of the referring court and/or does not provide sufficient arguments for this different interpretation. The only case that falls into this category is *Unal* about the withdrawal of the residence permit of a Turkish worker with retroactive effect.[179]

3. Judges' (Dis)Satisfaction with their Interaction with the CJEU

In addition to criticising particular CJEU judgments, some judges were also critical about the CJEU more generally and noted the absence of a genuine dialogue with the CJEU.[180] Some judges observed in this context that the CJEU sometimes presents itself as a 'know-it-all' who is only communicating

[176] Case C-485/07 *Akdas* EU:C:2011:346.

[177] Case *C-171/13 Demirci* EU:C:2015:8.

[178] Interviews 10, 12, 89, 91.

[179] In addition, the Council of State explicitly held that there was no fraud, but that did not prevent the CJEU from dealing with this matter. Case C-187/10 *Unal* EU:C:2011:623*,* paras. 45-48.

[180] Several judges spoke about a 'black box' and the fact that the referring court does not play a role in the period of 1.5 years during which the case is considered by the CJEU, because it can, for example, not express its opinion on the submissions of the parties and/or interventions of the Commission and Member States. Others who do not necessarily have the required expertise are involved to a greater extent. Interviews 10, 24, 44, 66, 81, 89, 91.

in one direction.[181] One judge, for example, held that he/she got the feeling during a visit in Luxembourg that the attitude of CJEU judges was: 'you come to us, we determine the rules'.[182] Another judge noted the defensive reaction of CJEU judges when he/she raised shortcomings in the CJEU's case law.[183] Other judges mentioned an ivory tower mentality and even wondered whether CJEU judges are sufficiently in touch with the society at large. This was because the CJEU, in the national judges' view, paid insufficient attention to societal concerns and questions related to the feasibility of the implementation of CJEU judgments, especially in the area of migration.[184] Some judges also pointed to the translation of CJEU judgments in Dutch that they considered not always suitable because this is primarily carried out by Flemish professional translators.[185]

The earlier mentioned difference between career judges and judges with an academic, governmental or EU law background also plays a role with respect to the perception of the (interaction with the) CJEU. More EU-oriented judges have a relatively better understanding of the difficult legal and political context that the CJEU is working in and the fact that it has to take into account 28 different legal systems. They are also more aware of the fact that the CJEU has considerably reduced the average time to decide on the preliminary references in the last twenty years.[186] Some noted that colleagues with less direct EU-law experience complain more frequently about the long delay. [187] In addition, those who are less enthusiastic about referring are more critical about the CJEU judgments; either the CJEU limits the room for

[181] Interviews 18, 44, 89.

[182] Interviews 44.

[183] Interviews 12.

[184] Interviews 72, 89.

[185] Interviews 24, 43, 81, 89. One example outside the field of migration is the social security case *Franzen* where the reference to 'onvermindend' ('leaving aside') should have been 'met uitzondering van' ('with the exception of') in the following statement: 'Consequently, leaving aside the exclusion provided for in Article 6a(b) of the AKW and the AOW, which aims to transpose the single State principle into national legislation, the mere fact of residence in the Netherlands is sufficient for entitlement to child benefits.' Case C-382/13 *Franzen* EU:C:2015:261.

[186] Interviews 18, 39, 43, 44, 91.

[187] Interviews 10, 89.

manoeuvre of the national judge too much, or it gives too limited direction.[188] The interviewed lower court judges seemed on average more positive about the CJEU case law, especially the judge who argued in line with the leapfrog argument and clearly perceived the CJEU as an 'ally'.

4. The Referring Court's Follow-up

The dissatisfaction with some CJEU judgments and the interaction with the CJEU has not affected the national judges' willingness to act upon the requested CJEU rulings. Both the legal analysis and the interviews did not find support for the earlier mentioned accounts in the literature that national courts do not always comply with the CJEU. No follow-up judgments were found where the referring court went into a different direction than suggested by the CJEU. During the interviews no such instances were mentioned, even when the CJEU required courts to alter their jurisprudence. In the area of migration and asylum law, courts have generally opted for a minimalist reading of CJEU judgments in order to avoid extend the rights of the asylum seeker too much.[189]

The interviewed judges presented the follow-up to CJEU judgments almost as an automatic mechanism even when this meant that they had to change their own case law. Interviewed judges considered changing their case law to be 'part of the game'. They noted that when the CJEU rules in a certain way, 'that is just the way it is'. The court is simply obliged to comply with the CJEU judgment.[190] Judges even considered it more bothersome when the CJEU does not give an answer than when the CJEU gives a rap over the knuckles of the referring court in a clear and insightful way.[191] Examples that were also mentioned in interviews include *Zh and O*, where the CJEU required an individual assessment of the risk to public security or national security for third country nationals and EU citizens alike, contrary to what the Council

[188] Interviewees primarily noted this about other judges. Interviews 10, 39, 44.

[189] One example is the broadly formulated (or vague) judgment of *Elgafaji* on subsidiary asylum protection which was interpreted in a restrictive way by the Council of State so that it only applied to a very limited number of situations. Hoevenaars (n 153) 213.

[190] Interviews 18, 72, 89, 91; Sevenster & Wissels (n 33) 93.

[191] Interviews 12, 18, 72, 91.

of State initially thought.[192] The Council did not show any difficulty in implementing this assessment in its follow-up judgment.[193] The Council also rather easily changed its practice after it was warned by the CJEU in *J.N.* that the Council's more fundamental-rights-friendly approach was not in line with the principle of the Reception Conditions Directive that requires a removal to be carried out as soon as possible.[194]

V. FEEDBACK LOOPS?

The third question of this article is whether there is a relationship between the national judges' perception of their interaction with the CJEU and its answers (question 2) and their willingness to refer cases in the future (question 1). Even though judges were critical about the CJEU or some CJEU judgments, this has not affected them to such an extent that they became less inclined about referring future cases. This once again shows the pragmatism on the part of judges.

Judges hardly take their previous experiences into account when making the calculation of referral, besides for two exceptions showing that they take into consideration the expected answer of the CJEU. Firstly, it is not always considered useful and time efficient to refer when there is the perception that the CJEU merely gives very general, already-known criteria (so-called 'deference cases'), and/or leaves the assessment entirely to the referring court (see section IV.2).[177] Secondly, when making a decision (not) to refer, judges also consider whether it is possible to clearly explain the legal problem within the maximum of 20 pages for the order of reference to judges who are not familiar with the legal system.[195] It could also happen that the details of the

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[192] Case C-554/13 *Zh. and O.* EU:C:2015:377.

[193] Interviews 10, 89. ABRvS 20 November 2015 NL:RVS:2015:3579, para. 7.

[194] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96. The Council of State held that the introduction of an asylum application by a person who is subject to a return decision automatically causes all return decisions that may previously have been adopted in the context of that procedure to lapse. Case C-601/15 PPU *J.N.* EU:C:2016:84, paras. 75-76; ABRvS 8 April 2016 NL:RVS:2016:959, para. 3.2.

[195] Interviews 10, 18.

Dutch legal system are lost in translation to French, the working language of the CJEU.[196] These considerations played a role in the earlier discussed cases about the intensity of judicial review of the administration's assessment of the credibility of the asylum claim.[197] The idea was that it would be difficult to have the CJEU rule on this issue related to a matter of principle, namely the relationship between the judiciary and the administration. Additionally, interviewees considered that there are notable differences in opinions as to the intensity of review within the Netherlands, let alone in the EU with 28 different legal systems. Likewise, a lower court judge argued that a reference to the CJEU was in principle possible in a case in which an asylum seeker from Afghanistan sought subsidiary protection on the basis of art. 15, sub c, of the Qualification Directive because of a serious and individual threat in Afghanistan 'by reason of indiscriminate violence in situations of international or internal armed conflict'.[198] The judge had to grapple with the question about the required level of violence necessary to establish such protection. He/she considered, however, that this question does not lend itself to be referred to the CJEU because it would be nearly impossible for the CJEU to come up with concrete and helpful guidelines.[199] The expectation was that a referral would only lead to a deference case not worth the burden of the delay in this case.

This relatively short explorative analysis of the third question on feedback loops raises several questions that would be worth exploring in further research. One pertinent question is, for example, to what extent one can speak of feedback loops with respect to the great majority of judges that have never referred or referred only once or twice? One might also wonder, do feedback loops play a more important role in EU Member States in which courts, and especially constitutional courts, tend to be more critical of the

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[196] Interview 10.

[197] Interviews 10, 18.

[198] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9.

[199] Rb. 3 March 2017 NL:RBDHA:2017:3443, para. 5; Rb. 16 May 2017 NL:RBDHA:2017:5164.

CJEU and CJEU judgments? In addition, which factors affect feedback loops more: primarily CJEU related factors (question 2) or the motives and attitude of judges towards referral (question 1)? It could be that judges and courts that have been more critical towards the CJEU and EU law *from the outset* also perceive the CJEU in a more critical way than Dutch courts and judges do. The implication of this is while looking at roughly the same glass, more critical courts will describe the glass as half empty, while more positive courts will perceive the glass as half full.

Answering these questions requires a broader comparative research project on a considerable number of EU Member States, possibly also examining the interaction between CJEU and national courts over a longer period of time. If a great variance in the prevalence of feedback loops across EU Member States is found this could perhaps mean that the (prefixed) attitudes of judges are more important than CJEU related factors. It might even be so that those attitudes are hardly affected by the way in which the CJEU operates and handles requests for preliminary rulings. This also implies that the CJEU has limited control over and possibilities to change the way in which national courts engage with it. In contrast, if CJEU related factors matter more, this could mean that the CJEU can better control and change its perception by national courts. This also suggests that it is worthwhile exploring whether and how the preliminary ruling procedure needs to be reformed to ensure continuing engagement of national courts.

VI. Conclusion

This article examined two aspects of the referral procedure: the motives to refer and the national judges' perception of the CJEU judgments, and their ability to solve the national dispute on the basis of the CJEU judgments. With respect to the motives to refer, this article examined several theoretical assumptions and empirical claims put forward in the existing literature (see Table 9 for an overview). This article showed that judges mainly operate in a pragmatic way and predominantly include pragmatic and practical considerations in their decision (not) to refer, such as the consequences of referring in terms of delays or the importance of the issue at stake. Only a limited number of references were made by lower asylum courts, to 'leapfrog' the national judicial hierarchy and challenge the more restrictive approach of

the supreme administrative courts. Most lower court judges do not support the leapfrog argument. Even less cases were referred to get an authoritative pronouncement ('sword') on the existence of a breach of EU law by a national measure that would subsequently compel the government to change legislation.

Table 9: Overview of findings with respect to motives (not) to refer

Motives (not) to refer	**Prevalence (Absent, very low, low, moderate, high)**
Politico-strategic reasons	**Low**
Judicial empowerment ('sword')	Low (in some referred cases)
Sustained resistance ('shield')	Absent
Bureaucratic politics ('leapfrog')	Moderate (in some referred cases)
Non-strategic reasons	**High**
Legal formalism (Compliance pull)	Very low
Pragmatism	High (in all cases, both referred and non-referred)
Personal/ psychological	High
Institutional	Moderate
Request of the parties	Low (in some referred cases)

As to the second follow-up question, this study shows that the referring court implements the requested CJEU judgment fully and automatically. This is the case despite the fact that most interviewed judges were not necessarily satisfied with all CJEU judgments, the procedure before, or the dialogue with the CJEU. The judges' own personal background and institutional position also plays an important role in their perception of the CJEU's case law. National court judges seem to like strong guidance by the CJEU providing clear solutions for the case at hand. This finding contrasts with prevailing assumptions about the relationship between CJEU and national courts that consist in criticising 'interventionist' CJEU judgments. With respect to the third question about feedback loops, this study demonstrates that the willingness of judges to refer is not affected by their previous experiences and dissatisfaction. The national judges' responses to these two questions once

more bear witness to their pragmatic attitude towards the preliminary reference procedure.

In sum, the interaction between the CJEU and Dutch courts in the field of migration does not give rise to concerns about the functioning of the preliminary ruling procedure. What does this finding tell us about the broader picture? More specifically, is there cause for concern given the allegedly growing number of integration-sceptical national judgments as mentioned in the introduction? Even though the scope of this article is limited, focusing on Dutch migration cases for a limited period of time, it is still possible to offer some meaningful reflections. It is safe to say that the literature tends to overemphasise a few high profile cases over the large majority of 'often extremely boring' rulings which are neatly implemented.[200] The procedure functions well in the great majority of cases.[201] This also suggests that the growing pessimism in the literature could be the result of the fact that there are more high profile CJEU judgments which are extensively discussed and criticised in the popular press and in the academic literature. The seemingly growing criticism is also a natural development that could simply be the result of the growing competences of the EU in fields of law, which have traditionally been the sole domain of EU Member States, such as criminal law. In addition, the legally binding effect of the EU Charter of Fundamental Rights in 2009 also means that the CJEU is operating in an area that has long been dominated by generally more EU sceptic constitutional courts. These two developments have consequently stirred those constitutional courts into action, which is not necessarily a positive sign of their willingness to engage with EU law. Referring to the CJEU is also a way for such courts to challenge the authority and legitimacy of the CJEU. This is a source of concern that should be examined at greater depth, also in the light of the unresolved questions formulated earlier in relation to the feedback loops. At the same time, we should not forget that 'hard cases', such as *Ajos, Gauweiler* or *Taricco* receive a disproportionate amount of attention,

[200] De Werd (n 5) 156.

[201] This was also the outcome of the ACA Europe Seminar on the preliminary ruling procedure in The Hague on 7 November 2016. See www.aca-europe.eu/index.php/en/seminars/511-seminar-in-the-hague-on-7-november-2016, last accessed 31 July 2018.

often to the detriment of the great majority of cases in which the preliminary ruling procedure functions well.

The Application of National Law by the European Central Bank within the EU Banking Union's Single Supervisory Mechanism: A New Mode of European Integration?

Lena Boucon* and Daniela Jaros†

The Single Supervisory Mechanism (SSM) contains a new and unprecedented feature in EU law: its founding regulation enables a European institution (the ECB) to directly apply national law. This paper examines the theoretical and practical implications of this feature of the SSM through the lens of European integration. It highlights the ways in which the ECB may harmonize national laws, why harmonized administrative procedural rules are necessary in this field and what remedies would be available should a decision of a European institution taken on the basis of national law be challenged before the CJEU. The paper concludes that the SSM may be described as a hybrid mode of European integration since it departs from the traditional models of the execution of EU law, and challenges some of the founding principles of EU law, such as the autonomy of the EU legal order and the principle of non-discrimination.

Keywords: Single Supervisory Mechanism (SSM), European integration, autonomy of the EU legal order, principle of non-discrimination, European Central Bank, direct application, administrative procedural law, remedies

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I. INTRODUCTION

European integration is commonly seen as the deepening of links between the European Union (hereafter 'EU' or 'Union') and its Member States, on the one hand, and the links between individual Member States, on the other hand. This is usually achieved by enhancing the powers of the Union over the powers of the individual Member States.

Enhancing European integration is considered necessary in certain areas because the EU is seen as the most appropriate level to deal with issues that go beyond the national sphere. From a legal perspective, integration is subject to three cornerstone constitutional principles of the EU legal order: the conferral principle,[1] the principle of subsidiarity,[2] and the principle of

[1] Under the conferral principle, the Union shall act only within the limits of the competences conferred upon it the Member States (Article 5(2) Treaty of the European Union (TEU).

[2] Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States [...] but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (Article 5(3) TEU).

proportionality.[3] The idea of creating a European Banking Union was no exception to this concept of European integration since it seeks to give the European Central Bank (ECB) certain supervisory tasks over the EU financial system. The global financial crisis that hit the Union and in particular the Eurozone in the late 2000s exposed the deficiencies and systemic risks arising from the existing regulatory and supervisory architecture. A consensus was reached that the banking sector could no longer be governed exclusively at the national level. The way in which banking supervision was to be developed at the European level included several new features.

In the aftermath of the Eurozone crisis, the European Banking Union was set up based on three pillars. The first two, the Single Supervisory Mechanism (SSM)[4] and Single Resolution Mechanism,[5] were designed to ensure that all European banks would be subject to uniform supervision, as well as to ensure orderly bank resolutions when necessary. The third pillar, a common European Deposit Insurance Scheme, is still awaiting completion.[6]

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3 Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaty (Article 5(4) TEU).

4 Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 (hereafter 'SSM-R') and Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014] OJ L141/1 (hereafter 'SSM-FR').

5 Regulation (EU) 806/2014 of the European Parliament and the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ 225/1 with its implementing and delegated acts (the regulation is currently under review). For an overview, see also Karl-Philipp Wojcik 'Bail-in the Banking Union' (2016) 53 Common Market Law Review 91, 100-106.

6 Directive 2014/49/EU of the European Parliament and the Council of 16 April 2016 on Deposit Guarantee Schemes |2014] OJ L 173/149; European Commission 'Effects Analysis on the European Deposit Insurance Scheme', (2016) <https://ec.europa.eu/info/sites/info/files/161011-edis-effect-analysis_en.pdf> accessed 9 March 2018.

Prior to the creation of the European Banking Union, the integration of the European financial system took place in four steps.[7] A process of 'integration through harmonisation' occurred from 1973 to 1984, based on the principle of the full harmonisation of national rules while maintaining home-country control and the principle of non-discrimination. Given its rather limited success,[8] a shift took place from 1985 through 1998. Minimum harmonisation replaced full harmonisation. This shift notably led to the provision of a 'single passport' to financial institutions for the provision of services throughout the then Community.[9] As noted by Pedro Gustavo Teixeira, Director General of the Secretariat and Secretary to the Decision-making Bodies of the ECB, Member States were required to 'adapt their laws and regulations' but only to meet minimum levels of harmonization in an effort to prevent a 'race to the bottom'.[10] A process of integration through governance followed from 1999 through 2007, characterized by the introduction of a common currency, the Euro, and the transfer of monetary policy from national central banks to the ECB in accordance with the Financial Services Action Plan and the Lamfalussy framework of governance.

The global financial crisis eventually hit Europe, where the financial crisis was followed by the Eurozone crisis. Therefore, from 2008 through 2012,

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7 Pedro Gustavo Teixeira, 'Europeanising prudential banking supervision – Legal foundations and implications for European integration' (2014) 2/14 Arena Report Series <http://www.sv.uio.no/arena/english/research/publications/arena-reports/2014/report-2-14.pdf#page=537> accessed 3 January 2018, 532.

8 See European Commission, 'Completing the Internal Market' (1985) White Paper COM(85)310 <http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf> accessed 11 March 2018. For an account of the different approaches towards harmonisation, see, for instance, Jacques Pelkmans, 'The new approach to technical harmonization and standardization' (1987) 25/3 *Journal of Common Market Studies* 249.

9 See, in particular, Second Council Directive 89/646/EEC of 15 December 1989 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking Up and Pursuit of the Business of Credit Institutions and Amending Directive 77/780/EEC, OJ L 386, 30 December 1989.

10 Pedro Gustavo Teixeira, 'Europeanising prudential banking supervision – Legal foundations and implications for European integration' (2014) 2/14 Arena Report Series <http://www.sv.uio.no/arena/english/research/publications/arena-reports/2014/report-2-14.pdf#page=537> accessed 3 January 2018, at 545.

Member States engaged in the fourth integration phase that may be described as 'integration through crisis', during which they implemented unilateral and intergovernmental actions[11] primarily aimed at safeguarding their own interests at the expense of the 'EU common interest'. During this period, while the making of banking regulation was divided between the European and the national levels of governance, the organisation of banking supervision, the enforcement of regulatory rules and the resolution of banks resided exclusively within the ambit of the Member States. This institutional framework corresponded to the traditional form of EU integration, described as an indirect or decentralised enforcement of EU law. On the one hand, rules for certain substantive issues were adopted at the EU level, subject to the principles of subsidiarity and proportionality, i.e. the EU would legislate in these fields only to the extent necessary. On the other hand, Member States were the primary enforcers of such rules through their own national supervisory frameworks. They also retained the power to legislate as long as a given action was not viewed as being better achieved at EU level.

This paper aims to analyse the rules enshrined in the SSM Regulation ('SSM-R') and their practical legal implications in order to show to what extent they differ from traditional modes of European integration. In other words, its purpose is to determine whether the SSM's features make it an 'original' or 'new' mode of European integration, thus breaking with the traditional modes of European legal integration.

Admittedly, the concept of European legal integration is a rather loose one.[12] Generally speaking, it is viewed as referring to a process of integration through law: while the law is a product of the European Union, the European

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[11] Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis* (Cambridge University Press 2014); Thomas Beukers, Claire Kilpatrick and Bruno de Witte (eds), *Constitutional Change through Euro-Crisis-Law* (Cambridge University Press 2017); on the positive aspect of intergovernmentalism see Daniela Jaros, '"The Eurozone Crisis" – A Book Debate In Defence of "Good Intergovernmentalism"' (Verfassungsblog, 12 April 2014) <https://verfassungsblog.de/in-defence-of-good-intergovernmentalism-2/> accessed 9 March 2018;

[12] Hanne Petersen, Anne-Lise. Kjaer, Helle Krunke & Mikael Rask Madsen, 'General introduction: Paradoxes of European legal integration' in Hanne Petersen, Anne-Lise. Kjaer, Helle Krunke & Mikael Rask Madsen (eds) *Paradoxes of European legal integration* (Routledge 2008).

Union is also, to some extent, a creature of the law.[13] For the purposes of this paper, European legal integration is used to refer to the process through which EU law gradually penetrates into the domestic law of its Member States,[14] or the process according to which EU law 'behaves like an occupying authority on foreign soil, by making use of national procedures and by mobilizing state organs so as to directly incorporate its norms with the national jurisdiction of the EU states'.[15]

By 'traditional mode of European integration', we refer to the ways in which EU law has penetrated the national legal orders so far. This pertains partly to the legal tools used by the EU institutions. Basic principles are entrenched in the EU's constitutive treaties, such as the principles of conferral, subsidiarity, proportionality, sincere cooperation, or equal treatment and non-discrimination. In addition, the European legislator has at its disposal different acts of secondary legislation, namely regulations, directives, individual acts or acts of soft law. The Court of Justice of the European Union (CJEU) has recognized additional fundamental concepts, namely the principles of direct effect,[16] and of primacy of EU law.[17] It has also developed defining principles of interpretation with the aim of ensuring consistent application of EU law across the Member States, namely the principle of the autonomy of the EU legal order and of effectiveness of EU law.

In addition, EU law has traditionally penetrated the national orders according to two main patterns. First, the decentralized (or indirect) model of execution of EU law, which is by far the most common within the EU legal order, implies that while substantive law-making takes place at EU level, Member States are entrusted with the task of applying such rules according to their own procedures and through the national state organs. It is in this

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[13] See Mauro Cappelletti, Monica Seccombe & Joseph Weiler (eds), *Integration through law: Europe and the American federal experience*, *Vol. 1: Methods, tools and institutions* (Walter de Gruyter and Co. 1986).

[14] Anne-Marie Burley & Walter Mattli, 'Europe before the Court: A political theory of legal integration' (1993) 47/1 International Organization 43.

[15] Loïc Azoulai, 'The force and forms of European legal integration' (2011) 6 EUI Working Paper 1.

[16] Case 26/62 *Van Gend en Loos* EU:C:1963:1.

[17] Case 6/64 *Costa c. ENEL* EU:C:1964:66.

context that the CJEU has recognized the principle of procedural autonomy of the Member States.[18] Second, the centralized (or direct) model of execution of EU law signifies that the EU institutions are responsible for the application, implementation and enforcement of EU rules. A typical example is competition law, for which the European Commission may impose fines and other sanctions on undertakings infringing the competition provisions of the Treaty on the Functioning of the European Union (TFEU).

Where does the SSM lie against this background? The SSM is intended to create 'an efficient and effective framework for the exercise of specific supervisory tasks over credit institutions by a Union institution' and to ensure 'the consistent application of the single rulebook to credit institutions'.[19] The ECB is its cornerstone. In accordance with Article 127(6) TFEU and Article 4(1) and Article 5(2) of Regulation (EU) 1024/2013 (SSM-R), almost all prudential powers over the Eurozone's largest banks and the power to regulate market access with regard to all banks in the Eurozone have been transferred to the ECB. Moreover, pursuant to Article 6 SSM-R, powers of indirect oversight over national competent authorities with regard to their supervision of smaller banks in the Eurozone have also been assigned to the ECB. Against this background, the SSM comprises several peculiar features. Our survey of these features will demonstrate how and why the SSM constitutes a new mode of European integration. As we will see, the SSM consists in a direct application by a European institution of national (rather than EU) law, thus breaking with the traditional ways in which EU law has so far penetrated the national legal systems (II). The paper then discusses the practical implications and complexities created by this original legal

[18] See, for instance, Case 33/76 *Rewe-Zentralfinanz eG and Rewe Zentral AG v. Landwirtschaftskammer für das Saarland* EU:C:1976:188, 5: '[...] in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature [...] the position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect'.

[19] Recital 87 SSM-R.

framework (III) before looking at it in light of the theory of European integration (IV).

II. Surveying the Novel Features of the SSM

The SSM is based on a fundamental distinction between banking regulation and banking supervision. While the former mostly refers to prudential rules[20] applicable to credit institutions, the latter relates to the enforcement of those prudential rules and the structure of the authorities responsible for enforcement.

Systemic risks inherent in the previous system of national supervision of credit institutions operating within an integrated European market were very clearly exposed during the Eurozone crisis. The EU and, in particular, the Member States of the Eurozone realized that the discrepancy between the different supervision of credit institutions across the Eurozone by the national supervisors gave rise to profound deficiencies and put the sustainability of the whole system at risk. Just as the creation of the monetary union was intended to solve the 'impossible trinity'[21] of fixed exchange rates, free movement of capital and autonomous monetary policy, the creation of the banking union was aimed at solving the 'financial trilemma'[22] of financial

[20] 'Prudential' means relevant to the stability of the financial markets. Typical 'prudential rules' are therefore capital or liquidity requirements for banks or governance requirements. In addition to 'prudential rules', there are other rules banks must comply with, such as, for example, rules related to consumer protection, which are not prudential as their primary objective differs from that of the stability of the financial markets (what may be best for the protection of consumer interests may not be best in terms of financial stability). In practice, of course, the distinction is not always clear-cut, given that overall compliance with non-prudential rules has an impact on compliance with prudential rules and vice-versa.

[21] Robert A. Mundell, 'Capital Mobility and Stabilization Policy under Fixed and Flexible Exchange Rates' (1963) 29 Canada Journal of Economics 475; Marcus J. Fleming, 'Domestic Financial Policies under Fixed and under Floating Exchange Rates,' (1962) 9 IMF Staff Papers 369; Maurice Obstfeld, Jay Shambaugh and Alan Taylor 'The Trilemma in History: Tradeoffs among Exchange Rates, Monetary Policies, and Capital Mobility' (2005) 87 Review of Economics and Statistics 423-438.

[22] Dirk Schoenmaker, 'The Financial Trilemma' (2011) Economics Letters 111 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1340395> accessed 3 May 2018.

stability, national financial regulation and cross-border banking (financial integration). In order to safeguard financial stability and an integrated banking market, Member States thus decided that action at EU level was necessary, since only further integration of financial regulation across the EU could address the many challenges[23] brought about by the Eurozone crisis. Against this background, the SSM was conceived and the SSM-R and the SSM-FR were adopted in 2013 and 2014 respectively.

As far as the SSM-R is concerned, its recitals stress the need for more European integration and are thus in line with the traditional *méthode communautaire*. The recitals also point to the fragmentation of the financial sector and the threat it poses to other EU policies, namely the single monetary policy and the internal market. This gives rise to a need to intensify the integration of banking supervision, which in turn will bolster the Union, restore financial stability, and ultimately lead to economic recovery.[24]

As mentioned above, instead of harmonising national substantive prudential laws,[25] the SSM-R focuses exclusively on the modes of supervision of credit institutions. In other words, it does not focus on the content of the rules applicable to credit institutions, but on the interplay between supervisors, as well as the tasks and powers of the latter. Below (see Section III.1), we discuss how this plays out in practice and examine the extent to which the ECB does in fact act as a regulator, notwithstanding the supposed deference to national prudential rules, by virtue of its mandate.

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[23] It should also be noted that participating in the Banking Union was made a condition for receiving loans from the European Stability Mechanism (ESM) that was set up as a result of crisis to provide emergency loans to Eurozone Member States that have (had) difficulties servicing their sovereign debt obligations. On the conditionality of the 'troika's' loans to Eurozone countries in distress, see also Tuori and Tuori (n 13).

[24] See, for instance, Recital 2 of the SSM-R, which provides that: 'The present financial and economic crisis has shown that the integrity of the single currency and the internal market may be *threatened by the fragmentation* of the financial sector. It is therefore *essential to intensify the integration of banking supervision* in order to bolster the Union, restore financial stability and lay the basis for economic recovery' [emphases added].

[25] On the harmonisation of prudential rules, see below under 3.2.

In line with other processes that aim to further European integration, the SSM-R centralises banking supervision at the ECB. Supervision of credit institutions, previously within the remit of national authorities, is now the responsibility of the ECB. Given the limits of Article 127(6) TFEU,[26] which only provides for the power to confer 'specific tasks' regarding prudential supervision to the ECB, the European legislator could not opt for a total transfer of supervisory tasks to the ECB. Instead, it has set up a complex supervisory architecture, involving both the European and the national levels. While the aim of the SSM-R is to centralise supervision at the ECB, the SSM creates a continuing role for the national authorities, relying on them for expertise, implementation, and, at a more basic level, manpower.[27] However, the SSM-R avoided relying on clear-cut criteria to divide the respective competences of the ECB and the national supervisors. Instead, the concept of 'significance' of credit institutions (Article 6(4) SSM-R)[28] is at the heart of the SSM-R: the ECB is now the sole institution responsible for the supervision of 'significant institutions', with further responsibility to devise the so-called 'common procedures'[29] and to indirectly supervise 'less

[26] Article 127(6) TFEU forms the legal basis of the SSM-R, which was thus adopted unanimously by the Member States. It provides that 'The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings'.

[27] Gianni Lo Schiavo, 'The Single Supervisory Mechanism: Building a New Top-Down Cooperative Supervisory Governance in Europe' in Federico Fabbrini et al. (eds), *What Form of Government for the European Union and the Eurozone?* (Hart 2015).

[28] Significance is determined based on criteria set out in Article 6 (4) SSM-R, the list of supervised credit institutions and financial holding companies, updated in 2017, is available at <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/list_of_supervised_entities_20160331.en.pdf?54830cfdd60d51025d0fd0716d4376e2> accessed 3 January 2018.

[29] 'Common procedures' are: Authorisation of credit institutions and withdrawal of authorisations of credit institutions (Article 4 (1) (a) SSM-R) and as well as the assessment of notifications of the acquisition and disposal of qualifying holdings in credit institutions (Article 4 (1) (c) SSM-R).

significant institutions'.[30] National competent authorities retain certain powers with regard to significant institutions (i.e. anti-money-laundering) and the power to directly supervise less significant institutions.

The SSM has been described as a 'unique and unprecedented juxtaposition of European and national competences', including: (i) exclusive competences of supervision of the ECB; (ii) national competences of supervision; (iii) instruction/oversight competences of the ECB; and (iv) shared and parallel competences among the ECB and national supervisors.[31] In parallel to this division of competences, the SSM-R has also introduced an 'integrating' organizational set-up through the creation of so-called Joint Supervisory Teams (JSTs).[32] Supervisors at the ECB and from national competent authorities work together on a daily basis in JSTs led by JST-coordinators at the ECB. European and national competences are thus deeply intertwined, even though the ECB has the final say about the qualification of a credit institution.

While the SSM-R relies on a dichotomy between banking regulation and banking supervision and primarily deals with the latter, it nonetheless does not ignore the former entirely. Instead, it deals with regulation in an original and somewhat troubling manner, since it relies, to an unprecedented extent, on national substantive laws. It does so according to three distinct schemes.

Firstly, Article 4(3) SSM-R expressly provides that the ECB is to apply 'all relevant Union law' while carrying out the tasks conferred on it by the SSM-R, which may imply applying national laws directly. This may occur in two situations. Where Union law is composed of Directives, the ECB is required to apply 'the national legislation transposing those Directives', which may thus differ from one Member State to another. Alternatively, where Union law is composed of Regulations and where such Regulations grant options for Member States, the ECB is equally required to apply 'the national legislation exercising those options', which similarly is likely to differ across the Member States.

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[30] 'Guide to Banking Supervision' (ECB) <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf> accessed 3 January 2018.

[31] Teixeira (n 9) at 554.

[32] Recital 79 of the SSM-R; Articles 3-6 SSM-FR.

Secondly, Article 6(5)(a) SSM-R grants the ECB powers through which it shall instruct – through regulations, guidelines or general instructions – national regulators on how they are to perform their supervisory tasks[33] and on how they are to adopt their supervisory decisions. In other words, even when it does not have an exclusive competence, the ECB has been granted the power to instruct national regulators on how to apply their respective national laws.

Thirdly, under the third subparagraph of Article 9(1) SSM-R, when the ECB lacks certain powers to carry out the tasks conferred on it by the SSM-R, the ECB may instruct national regulators to make use of their powers 'under and in accordance with the conditions set out in national law'. In other words, the ECB may require national regulators to fill in when it is itself not entitled to intervene.

Hence, for the first time in the history of EU integration, an EU institution must make direct use of national law while carrying out the tasks conferred on it by EU law. The following sections scrutinize the various practical implications of the aforementioned provisions and show how these provisions ultimately create what can be described as a new form of integration.

III. Issues Arising from the Direct Application of National Law by the ECB

The aforementioned Articles 4(3), 6(5)(a) and 9(1) SSM-R raise difficult questions about the delineation of competences between the ECB and national competent authorities, on the one hand, and the extent to which national laws are applicable, on the other hand. A delineation of competences and a common understanding of the applicable law is, however, necessary to understand: (a) the degree to which integration is intended by the SSM-R and (b) the contexts in which national supervisors (and consequently Member States) remain competent. In the absence of clarity on the distribution of competences, legal certainty and foreseeability are undermined. In this regard, three types of problems can be identified.

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[33] Excluding the authorisation of credit institutions, the withdrawal of authorisations of credit institutions (Article 4(1)(a)), and the assessment of notifications of the acquisition and disposal of qualifying holdings in credit institutions (Article 4 (1) (c)).

First, in many cases, the transposition of directives is deeply embedded in pre-existing national provisions, partly in order to take into account national legislative and regulatory specificities. From the perspective of EU law, the purpose of directives is to harmonize substantive rules and outcomes while leaving it to Member States to choose the means for achieving this goal.[34] Therefore, it is often not easy to disentangle a national provision that corresponds to part of an EU directive from other provisions or parts of provisions that do not stem from EU law. However, this question must not be confused with the question of the division of competences between national authorities and the ECB.

Second, national provisions are not only surrounded by other provisions within their national legal settings but may also have to be interpreted or applied in a specific way due to domestic case-law, soft-law instruments or administrative acts or practice. Can the ECB treat national legal provisions as black letter law that it can interpret autonomously, disregarding the national context of these provisions? The SSM-R leaves that question open.

Third (3.3.), in the absence of a harmonized European administrative procedural law, the question of the extent to which the ECB is bound by procedural provisions that are part of national law arises. The SSM-R and the SSM-FR do contain a minimum of general procedural provisions. However, the regulations remain silent about whether national administrative provisions (e.g. deadlines) have to be applied in addition to those general provisions and about what happens when national provisions are more specific while not contradictory to those general provisions set in the regulations.

The following subsections explore these three problem areas, linking them to current case law pending before the CJEU and the ECB's initial positions on these issues to date. In a fourth subsection (III.4), the paper looks at how these practical implications play out in the context of applicable remedies.

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34 Article 288(3) TFEU; see further detail in Ulrich Haltern, *Europarecht* (Mohr Siebek UTB 2007) 336.

1. National Provisions Qualifying for Direct Application by the ECB under Article 4(3) SSM-R

For the purpose of banking supervision, the ECB may only apply national law within the limits of the competences transferred to it on the basis of Article 127(6) TFEU, and therefore by Articles 4(1) and 5(2) SSM-R, and not beyond. Essentially, the ECB is competent to exercise all prudential supervisory powers with regard to credit institutions and financial holding companies, while Member States and their authorities remain competent for areas such as anti-money laundering and consumer protection with regard to banks, capital markets and insurance regulation as a whole, as well as for civil and company law issues. In practice, it is often difficult to delineate the competences transferred to the ECB from those remaining within the remit of national competent authorities and other national authorities. It is therefore not surprising that this issue has already given rise to two preliminary references to the CJEU,[35] *VTB Bank AG v Österreichische Finanzmarktaufsicht* and *Fininvest and Berlusconi v ECB*, and has been addressed in a statement by the ECB in a letter sent to all supervised banks.[36]

However, once this delineation is made and it is established that a certain task is within the competence of the ECB, Article 4(3) and Article 9 SSM-R will come into play. As explained above, for the purpose of fulfilling its tasks, the ECB may use directly applicable EU law (regulations), national law transposing EU law (directives) and national law exercising options granted to Member States. According to Article 9(1) Subparagraph 3 SSM-R it also has a third option. If needed for the fulfilment of the tasks assigned to it under Article 4(1) SSM-R, the ECB may instruct national competent authorities to make use of law that is not transposing EU law on behalf of the ECB. This third category can also be described as the ECB's indirect

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[35] Case C-52/17 *VTB Bank (Austria) AG v Österreichische Finanzmarktaufsicht* EU:C:2018:178, Case C-219/17 *Fininvest and Berlusconi v ECB*, see also Raffaele D'Ambrosio, 'The ECB and NCA liability within the Single Supervisory Mechanism' (2015) *Banca d'Italia Quaderni di Ricerca Giuridica della Consulenza Legale* 78, 79.

[36] European Central Bank, 'Additional clarification regarding the ECB's competence to exercise supervisory powers granted under national law' <https://www.bankingsupervision.europa.eu/banking/letterstobanks/shared/pdf/2017/Letter_to_SI_Entry_point_information_letter.pdf?abdf436e51b6ba34d4c53334f0197612> accessed 3 January 2018.

competence to make use of national law. In sum, the question whether the ECB can make use of a power assigned to competent authorities by national law has to be answered in a two-step-approach: (i) Is the ECB acting within the remit of Articles 4(1) and 5(2) SSM-R? (ii) If yes, is the provision it is intending to use a transposition of EU law or is it purely a national provision? If the former is the case, the ECB may apply that provision directly. If the latter is the case, it may instruct the relevant national authority to make use of this power on behalf of the ECB. As noted above, it is often difficult to determine whether a provision is 'purely national' or an implementation of EU law, given that laws implementing directives are often embedded into the national context and not so easy to disentangle.

Both issues, the delineation of the ECB's competences from those of national competent authorities and the extent to which national laws apply, are complex. As noted, two requests for a preliminary ruling have been filed so far, each addressing a different aspect of the question. In *VTB v Österreichische Finanzmarktaufsicht*, the compatibility of a national provision with EU law is disputed[37] while in *Fininvest and Berlusconi v ECB*, the applicant

[37] Case C-52/17 *VTB Bank (Austria) AG v Österreichische Finanzmarktaufsicht* EU:C:2018:178. The relevant question referred is 'Does EU law (in particular, Article 395(1) and (5) of Regulation (EU) No 575/2013 [...] *preclude* a national provision such as that which was contained in Paragraph 97(1)(4) of the Bankwesengesetz (Law on Banking) [...] where, despite the fact that the conditions for applying the exemption provided for in Article 395(5) are satisfied, (absorption) interest is levied for a breach of Article 395(1)?' Put differently, the question is whether EU law can bar the use of a national provision aimed at economic oversight (which is outside the scope of the SSM-R) if that provision is linked to a breach of a prudential requirement (within the scope of the SSM-R). The advocate general's opinion from 13 March 2018 suggests that it does (para 67-69), arguing that making use of the national provision would distort the prudential provision in question. In its ruling of 7 August 2018, the Court came to the same conclusion as the AG. However, the main point the Court makes is that the national provision is linked to a breach of Article 395(1) CRR (automatically levying an interest) without examining the conditions of Article 395(5) CRR under which a breach of Article 395(1) would be allowed. It therefore concludes that Article 97(1)(4) of the Bankwesengesetz is not compatible with EU law. With regard to the general qualification of the 'absorption of interest' as provided for in Article 97(1)(4), the Court further held that it must be qualified as administrative measures in the sense of Article 65(1) of the CRD IV (therefore 'implementing EU law').

has challenged what it considers to be an inaccurate application of domestic law by the ECB under Article 4(3) SSM-R.[38]

2. Uniform Application of Implemented Directives Across the SSM

The ECB might understandably wish to apply a harmonized set of rules across the 19 SSM Member States, given that the aim of the Banking Union is to level the supervisory playing field. If banking supervision is to be integrated, all banks should be subject to the same set of rules. The opposite is true if banks across Member States are treated differently based on diverging implementations of EU law. Indeed, applying 19 different implementations of the Basel III framework, which has been transposed at EU level in the form of a directive, namely Directive (EU) No 2013/36 (Capital Requirement Directive 'CRD IV'), and Regulation (EU) No 575/2013 (Capital Requirements Regulation 'CRR'), inevitably raises several challenges for the ECB.[39]

First, the ECB is faced with multiple national laws, which are highly fragmented, partly because the current directives and regulations that set out prudential rules comprise over a hundred options and discretions left to the

[38] Case C-219/17 *Fininvest and Berlusconi v ECB*: The applicants raise the issue of the distinction between the question of competence and of the correct application of national law. In a first set of pleas, the applicants have called into question the ECB's expansion of its powers under Article 4(1)(c) and Article 15 of the SSM-R, while, in a second set, they allege that the ECB has violated the principles of lawfulness, legal certainty and the foreseeability of the administrative action in applying Article 4(3) of the SSM-R and the national transposition of the applicable provisions, Article 23(1) and (4) of the CRD IV.

[39] The harmonized set of material rules applying to banking regulation in the EU is commonly referred to as the 'Single Rulebook'. It consists of the CRD IV, the CRR and other legal acts such as, in particular, Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) adopted at the level of the European Banking Authority (EBA), as well as Guidelines issued by the EBA. Whether the 'Single Rulebook' provides for a truly harmonized set of rules has been critically challenged. See Valia Babis 'Single Rulebook for Prudential Regulation of Banks – Mission Accomplished?' (2014) University of Cambridge Faculty of Law Research Paper 37/2014 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456642> accessed 4 January 2018 and Angelo Baglioni, *The European Banking Union* (Palgrave MacMillan 2016) 21.

Member States.[40] Second, the ECB might be put in situations where Member States do not have consistently transposed EU secondary acts of legislation. Furthermore, it is not yet clear what precisely is meant by 'national law' in Article 4(3) SSM-R. It also remains unclear whether the ECB may interpret national provisions implementing the EU law autonomously, as it does by publishing guidance on the interpretation of the underlying CRD IV provisions, or whether it is bound by the national context surrounding national provisions, especially by national case-law.

Therefore, which EU principles and mechanisms may the ECB rely on to ensure a uniform, effective and fair application of EU law and thus overcome the various challenges pointed out above?

First, the SSM-R itself refers to the primacy of EU law in its recital 34. The primacy principle may accordingly constitute a powerful instrument through which the ECB could disapply any national rule that does not comply with EU law. The ECB could make strict use of the primacy principle in such a way as to ultimately apply the same set of rules across all the Member States.

Second, the ECB may invoke the principle of sincere cooperation (Article 4(3) of the Treaty on the European Union ('TEU')), under which 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties' to justify 'favoring' EU law over national law.

Third, it might also be tempting for the ECB to directly apply provisions from the directive, rather than the national provisions implementing this directive. The ability of European institutions, however, to apply directives directly is strictly limited, as set out in the case-law of the CJEU.[41] Briefly put, direct application of directives is confined to situations in which an individual's rights are violated by his/her Member State's failure to implement a directive correctly (or failure to implement it at all) and is subject

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[40] 'Overview of options and discretions set out in Directive 2013/36/EU and Regulation (EU) No 575/2013' (European Banking Authority) < http://www.eba.europa.eu/supervisory-convergence/supervisory-disclosure/options-and-national-discretions> accessed 3 January 2018.

[41] Paul Craig and Grainne De Burca, 'EU Law' (6th edition Oxford University Press 2015) at 200s.

to certain conditions, for example that the provision to be directly applied is unconditional and sufficiently precise. This case-law appears to preclude an organ of the European Union from directly applying a directive for the purpose of harmonization, even if the directive has been implemented inconsistently or incompletely. That being said, it may not be inconceivable: the CJEU has traditionally adopted a teleological approach and has sometimes adopted creative interpretations of EU law that are geared towards advancing and furthering European integration and preserving the integrity of the EU legal order. In recent years, the CJEU has notably upheld all challenged measures adopted by EU institutions or organs, such as the Eurogroup, in response to the sovereign debt and financial crises.[42] On the one hand, it is noteworthy that the CJEU has never expressly precluded an EU institution from relying on the direct effect principle, since this issue has never been raised before. On the other hand, as noted above, it is the first time in the history of European integration that an EU institution has been entrusted with the task of applying national law. Therefore, a creative interpretation of the direct effect principle, coupled with the effectiveness and uniform application of EU law principles, could allow the ECB to directly rely on the EU rules instead of the corresponding domestic rules. In situations where Member States have manifestly transposed EU secondary acts of legislation incorrectly, the ECB could therefore argue that in order to perform the tasks entrusted to it by the SSM-R and to comply with the primacy and effectiveness principles, it has a 'duty' to directly apply the EU provision, notwithstanding the absence of any corresponding national rule. In other words, if the CJEU has paved the way for *individuals* to rely on the direct effect doctrine, why would it not reach a similar conclusion regarding an EU institution charged with applying a coherent set of rules in the Members States in the face of highly fragmented national provisions?

Fourth, the ECB could refer where possible to acts of the European Banking Authority ('EBA'), the common European Banking regulator that has already

[42] See, in particular: Case C-370/12 *Pringle* EU:C:2012:756 and Case C-62/14 *Gauweiler* EU:C:2015:7. See also, among others, Joined Cases C-105/15 P to C-109/15 P *Konstantinos Mallis and others* EU:C:2016:702 on a 2013 Eurogroup statement concerning the restructuring of the banking sector in Cyprus.

established harmonized rules in this sector.[43] The EBA can issue regulatory and implementing technical standards, which can be elevated to the status of an EU regulation if the EBA has been delegated authority to adopt such standards under the relevant secondary law acts. Furthermore, the EBA may also issue guidelines on any matter arising from the legal acts referred to in Article 16(1) of Regulation (EU) No 1093/2010 ('EBA-R'). Such guidelines are not legally binding, but are subject to a 'comply or explain' mechanism under Article 16(3) EBA-R. In this way, supervisory authorities (which now include the ECB) must declare whether they comply with the EBA guidelines or explain why they do not. The EBA must stay within the limits of the applicable secondary law acts when releasing such guidelines. What EBA guidelines do, however, is provide much more detail on secondary law provisions. In this way, they harmonize the interpretation and sometimes even the process surrounding these provisions and they therefore do effectively bind supervisory authorities to interpret national law implementing directives in a particular way. In areas that are primarily regulated by CRD IV, and not by its directly applicable counterpart, the CRR, it is useful for the purpose of applying a uniform set of rules across the Eurozone that the EBA produces guidelines that are as detailed as possible in order to harmonize the understanding of implemented provisions.

While relying on the regulatory products of the EBA, the ECB may, however, also act as a regulator to a limited extent. National supervisory authorities generally do produce soft law such as circulars, guidance or minimum standards. Within a limited mandate that varies from Member State to Member State, they sometimes even produce legally binding regulatory products in order to make supervisory expectations and practice more transparent for market participants and to optimize the supervisory process. The ECB also produces similar soft law instruments through public

[43] For a critical examination of the EBA's role see 'European banking supervision taking shape — EBA and its changing context' (European Court of Auditors, 2014) <https://www.eca.europa.eu/Lists/ECADocuments/SR14_05/SR14_05_EN.pdf> accessed 5 January 2018.

consultations,[44] general communications (letters),[45] and recommendations, as well as legally binding decisions and regulations.[46] To elaborate on the nature of these different instruments would go beyond the scope of this paper. However, it is important to note that several of these ECB instruments do attempt to provide a firm interpretation of CRD IV provisions, even if they always contain the disclaimer 'notwithstanding national law'. Areas of prudential banking regulation such as internal governance, suitability requirements for members of the management bodies of credit institutions and remuneration policies within banks are solely regulated by the CRD IV and not by the CRR as they are generally closely linked to national company law, which is not harmonized across the EU. If the ECB creates a guide on the relevant CRD IV provisions,[47] the question is how these guides interact with the national provisions implementing these CRD IV provisions and how they relate to national case law, soft law instruments or administrative practice.

One may question how far the ECB's mandate to regulate may be stretched: when does the task of the legislator end and where does administrative practice start? It is known from national contexts that the line between legislative and executive levels of government may not always be easily drawn. Within the SSM, the difficulty of separating the legislative from the executive is ultimately closely linked with the political questions of (i) how

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44 'Public Consultations' (ECB) <https://www.bankingsupervision.europa.eu/legalframework/publiccons/html/index.en.html> accessed 3 January 2018.

45 'Letters to Banks' (ECB) <https://www.bankingsupervision.europa.eu/banking/letterstobanks/html/index.en.html> accessed 3 January 2018.

46 'General Framework' (ECB) <https://www.bankingsupervision.europa.eu/legalframework/ecblegal/framework/html/index.en.html> accessed 3 January 2018.

47 For example, with regard to the suitability assessment of members of the management body of credit institutions, the ECB has published a 'Guide to Fit & Proper Assessments' <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fap_guide_201705.en.pdf?de3bbbd9ecadd9cd2d75889d39effaaf> accessed 3 January 2018; it has also published a Recommendation ECB/2016/44 on dividend distribution policies [2016] OJ 481/1.

much integration was intended through the SSM-R and (ii) whether the ECB has received a mandate to 'harmonize' national law implementing directives through a common administrative practice across all SSM Member States.

The simplest solution to many of the problems raised in this subsection would be to merge the two-fold CRR/CRD IV regulatory regime into one or two directly applicable regulations. In that way, the possibility given to the ECB to use national law based on Article 4(3) SSM-R would practically become obsolete as almost all relevant prudential law for banks would be directly applicable. However, the European legislator has not chosen this path. Instead, it seems to maintain the division between the CRR and CRD IV as it is foreseen now, at least as far as the Commission's proposals for the CRR 2 and CRD V are concerned.[48]

3. Identifying Applicable Procedural Rules in Absence of a Common European Administrative Procedural Law

The third problem arising from the direct application of national law under Article 4(3) SSM-R is the issue of the applicable procedural law. The EU does not have a harmonized body of law regulating administrative procedure; in fact, the CJEU has long recognized the principle of national procedural autonomy. While this is not a problem as long as national institutions have a national administrative law at their disposal, it becomes an issue when an EU institution is required to apply substantive national law (implementing an EU directive) without being bound by national administrative rules. Substantive and procedural rules cannot always be properly disentangled and there is a risk of distorting national provisions when applying them in a void without reference to their proper procedural framework. However, pursuant to

[48] Proposal COM(2016) 854 final for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures [2016]; Proposal COM(2016) 850 final for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012 [2016].

Article 6 of the European Convention of Human Rights (hereafter 'ECHR') and Article 47 of the Charter of Fundamental Rights of the European Union (hereafter 'CFR'), as well as the corresponding case-law of the European Court of Human Rights[49] and the CJEU,[50] there are a number of supra-national principles of fair trial and due process which have emerged in cases relating to criminal proceedings, and which can and have been extended to administrative procedures through the case-law of the respective courts.[51] These principles are access to independent courts, the right to a legal remedy and the principle of *ne bis in idem*. For the purpose of the SSM, the SSM-FR contains its own general due process provisions for adopting ECB supervisory decisions in its Title 2 (Articles 25 – 35 SSM-FR), including the right to be heard (Article 31 SSM-FR), the right to have access to files in the ECB supervisory procedures (Article 32 SSM-FR), the obligation for the ECB to state the reason (material facts and legal reasons) for any supervisory decision (Article 33 SSM-FR), as well as on the notification of ECB supervisory decisions (Article 35 SSM-FR).

However, national administrative laws often contain more detailed procedural rules, such as deadlines, specific notification obligations or specific requirements with regard to form. Furthermore, each Member State draws a different line between substantive and procedural provisions – sometimes material provisions applying to the supervision of banks are stipulated in a separate set of rules from procedural provisions, such as deadlines, notification obligations, sanctions, the right to be heard or the right to appeal. Sometimes, these procedural provisions are integrated into the material provisions. The question that arises is to which extent the ECB can be bound by national procedural law: how far are the procedural elements

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[49] *Engel et al v The Netherlands* App no. 5100/71 (ECtHR, 23 November 1976)

[50] E.g. C-489/10 Bonda ECLI:EU:C:2012:319; C-617/10 *Åklagaren v Akerberg Fransson* EU:C:2013:105.

[51] Christoph Grabenwarter and Anna Katharina, 'Justiz- und Verfahrensgrundrechte' in Dirk Ehlers (ed) *Europäische Grundrechte und Grundfreiheiten* (De Gruyter 2014); Jörg Gundel, 'Justiz- und Verfahrensgrundrechte' in, Dirk Ehlers (ed) *Europäische Grundrechte und Grundfreiheiten* (De Gruyter 2014); Peter Jedlicka, 'Vewaltungsgeldbußen im SSM – Steht der gewährte Rechtsschutz für Kreditinstitute im Einklang mit der Rechtssprechung von EGMR und EuGH?' (2016) Zeitschrift für Finanzmarktrecht 481.

of certain material provisions stemming from implementation of the CRD IV part of that implementation and when are they purely national administrative law? [52]

One practical way to answer this question is to say that procedural provisions may only be applied by the ECB insofar as they clearly stem from EU law. For example, the CRD IV does contain some procedural provisions, such as Article 22 CRD IV on the assessment of qualifying holdings in a credit institution, which stipulates in its paragraph 2 that competent authorities shall have a maximum period of 60 working days from the day they are notified of an intended acquisition. In these cases, this deadline will have to be applied by the ECB as implemented. However, there are less clear-cut examples of procedural provisions in the CRD IV, such as the assessment of suitability of members of the management body or key function holders. Here, the CRD IV only stipulates the material criteria that these persons have to fulfil, leaving it open to supervisory authorities to determine the process for assessing these criteria. Is this process then part of the implemented EU law that has to be applied by the ECB or can the ECB develop its own process, being bound only to ensure that the relevant persons fulfil the material suitability criteria as implemented? In practice, this problem has been solved with a compromise: the ECB has developed its own rather high-level assessment process through its Fit & Proper Guide,[53] while national law may add more specific procedural provisions.

4. Remedies

From the credit institutions' perspective, the direct application of national law raises the question of what kind of remedies are available against supervisory decisions[54] taken by the ECB or national authorities.

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[52] Klaus Lackhoff, 'Single Supervisory Mechanism – A practitioner's guide' (Beck 2017).

[53] ECB (n 49).

[54] With regard to 'decisions' taken by the ECB, within the meaning of administrative acts as defined in Article 288 TFEU, it is important to distinguish between the following: simple supervisory decisions (e.g. granting a license, approving a qualifying holding, approving a reduction of own funds, an application of a waiver, or the suitability of a member of a management body); supervisory measures (Article 16 SSM-R based on Article 104 CRD IV), which are meant to reinstate legal compliance

Supervisory action generally takes the form 'decisions'. It is important to determine whether the ECB or the national competent authority ultimately issues a supervisory decision containing a supervisory measure or imposing a sanction, as this determines the remedies available to the addressee of the decision. Decisions issued as decisions of the ECB ('on ECB paper') may only be reviewed at the ECB-internal administrative board of review (Article 24 SSM-R) or before the CJEU. Decisions issued by national competent authorities may be challenged before national administrative courts. In terms of European integration, this makes a big difference, especially as national courts have different bodies of case-law to refer to as compared to the CJEU, which has yet to develop its own case-law on this subject-matter and is limited to reviews pursuant to actions for annulment under Article 263 TFEU (recital 60 to the SSM-R). Thus, no actions based on Article 261 TFEU can be brought.[55] Such actions could have been relevant for remedies against pecuniary penalties imposed directly by the ECB (Article 18(1) SSM-R).

Another complication arises from the fact that national competent authorities maintain far-reaching powers in areas for which the ECB is ultimately competent. In many cases, they prepare draft decisions that are then adopted by the ECB according to its decision-making procedure (see e.g. Article 14 or 15 of the SSM-R). In procedures pursuant to Article 15, national competent authorities assess a proposed acquisition (based on their implementation of Articles 22 and 23 CRD IV) and submit a draft decision to the ECB to either oppose or not oppose the acquisition. The *Consiglio di Stato* recently referred an interesting question arising from such a situation to the CJEU in a request for a preliminary ruling[56] about the legal nature of draft decisions submitted by national authorities to the ECB and the basis on which the ECB makes its decisions. The status of these draft decisions is very relevant for present purposes as these decisions can be characterized as an

(e.g. by imposing additional own fund or liquidity requirements, by limiting variable remuneration, or by restricting business); and administrative sanctions (Article 18 SSM-R), which generally consist of pecuniary penalties imposed for breaches of applicable prudential provisions.

[55] Jedlicka (n 51); Gijsbert ter Kuile, Laura Wissink and Willem Bovenschen, 'Tailor-made Accountability within the Single Supervsiory Mechanism' (2015) 52 Common Market Law Review 155.

[56] Case C-219/17 *Berlusconi and Fininvest v Banca d'Italia*.

instance of 'the ECB applying national law': while national authorities draft the decision, with their expertise and knowledge of the national particularities, they are ultimately adopted by the ECB. The Court can deal with the question of whether an action for annulment against a decision of the ECB is sufficient if the decision is based on a draft proposal of a national competent authority, in particular if the decision of the national competent authority is solely based on national law and, in this case, national case-law. The Court can also say something about the legal nature of national competent authorities' draft decisions submitted to the ECB, especially as the ECB is not bound by them.

In the national context, the problem could be turned around in cases where national competent authorities act upon instructions of the ECB (Article 9(1) SSM-R). In these cases too, the question can be asked whether the credit institution has a sufficient remedy in being able to appeal only against the national competent authorities' decision and not the underlying instruction of the ECB.

To summarize, the supervision model set up by the SSM-R gives rise to many challenges with regard to the availability of effective remedies. The first issue that arises is that of the competent authority to supervise credit institutions. Identifying the competent authority is complicated by the fact that the SSM-R does not comprise sufficiently clear-cut criteria to determine whether the ECB or the national authorities are competent.

The second issue relates to the fact that it is extremely difficult to assess and characterize the nature of decisions taken by the ECB and the national authorities. The scenario which raises the fewest difficulties involves decisions taken by the ECB on the sole basis of EU law (e.g. application of provisions that do not involve national rules). Provided that the ECB is competent to exercise its supervision powers, the CJEU then has sole jurisdiction to review its decision. However, given the complexity of the mechanism, it is likely that other scenarios will arise. First, what happens when the ECB applies (and thus interprets) national law? The CJEU will have jurisdiction since the decision at stake has been taken by an EU institution, but it does not have jurisdiction to review national law. The CJEU would be faced with an unprecedented challenge, since the Treaties do not provide for any mechanism allowing the Court to refer questions of interpretation of

national law back to national courts. Second, how will national courts deal with cases where applicants challenge a decision adopted by a national authority that has done so on the basis of the ECB's instructions? Will applicants have to challenge both the 'national' decision before national courts and the ECB's instructions before the CJEU? How will the CJEU qualify the ECB's instructions? As decisions or as preliminary acts, which, as such, may not be challenged? What about the cases where a national authority acts on the basis of the ECB's instructions but misinterprets these instructions? How will national courts and the CJEU cooperate in a manner that does not undermine the EU primacy principle and ensure that EU law is applied consistently and uniformly across Member States?[57]

Third, what happens when national authorities impose penalties in respect of breaches of national provisions transposing the SSM-R and Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms? The CJEU has very recently ruled that such decisions are not governed by national law but rather by Article 65(1) of Directive 2013/36, i.e. by EU law.[58] The second and third issues also give rise to a risk of lengthy procedures, especially when decisions are being simultaneously challenged at national and EU levels, such as replies to requests for preliminary rulings. Overall, there is a risk that the remedy regime as set up does not satisfy the due process requirements of Article 6 ECHR and Article 51 CFR nor Article 13 ECHR on effective remedies. Further analysis is, however, beyond the scope of this paper.

Overall, as far as the availability of remedies is concerned, the SSM-R thus raises more issues than it solves.

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[57] Some of these questions are discussed by Andreas Magliari, "Il *Single Supervisory Mechanism'* e l'applicazione dei diritti nazionali da parte della banca central europea,' (2016) <https://dottoratoblog.files.wordpress.com/2016/01/magliari_il-ssm-e-lapplicazione-dei-diritti-nazionali-da-parte-della-bce.pdf> accessed 3 January 2018, at 32.

[58] Case C-52/17 *VTB Bank (Austria) v. FMA* at 41.

IV. The SSM as a Hybrid Mode of European Integration

It follows from the discussion above that not only are EU and national competences intricately intertwined, but so are EU and national laws. Nothing new so far, some could be tempted to say. The EU, like other federal polities, has indeed traditionally been characterized by a complex division of competences in many areas, where it is difficult to delineate the EU and national levels of governance and where EU and national laws are therefore deeply intertwined. However, the above discussion reveals that the specific features of the SSM-R, including the application of national law by an EU institution for the first time in the history of European integration, imply a new mode of European integration. This new way for EU law to penetrate into the national legal orders relates to three important aspects of the theory of European integration, as defined in the introduction: the mode of execution of EU law, the founding principles of EU law, and the role of EU institutions. These three aspects are discussed in turn below.

1. The SSM as a Hybrid Mode of Execution of EU law

The SSM represents a unique way to further European integration. On the one hand, it combines features of traditional forms of European integration, including: (i) situations where the ECB applies EU law i.e. instances of direct administration/enforcement of EU law; (ii) situations where national supervisors apply EU law, i.e. instances of indirect administration/enforcement of EU law; and (iii) situations where the ECB may instruct national supervisors, i.e. other instances of indirect administration. Such instances may already be found in other areas, in particular the law of state aid, when national authorities are required to recover an incompatible aid.[59]

On the other hand, the application of national law by the ECB is an undeniably novel feature. From a European integration theory perspective, this means that an EU institution must draw on national law to carry out the tasks entrusted to it by EU law. This model does not correspond to any

[59] Andreas Witte, 'The application of national banking supervision law by the ECB: Three parallel modes of executing EU law?' (2014) 21/1 Maastricht Journal of European and Comparative Law 89' at 97s.

traditional scheme of execution of EU law. It does not involve direct enforcement of EU law. If the ECB does directly supervise credit institutions, it not only applies rules adopted at EU level, but also applies national rules that are intended to implement EU acts of secondary legislation. However, this situation is distinct from the indirect enforcement of EU law model, since the supervision is operated at EU level and not at national level.

Instead, the governance model set up by the SSM-R consists of the EU legislator adopting rules that are subsequently transposed into national legal systems before being applied by an EU institution in decisions about national credit institutions.[60] Thus, rules move back and forth from the EU legal order to national legal orders. This is coupled with a mix of direct execution of EU law, an EU institution enforcing a set of rules vis-à-vis individuals or legal persons, and a hybrid mode of execution of EU law, an EU institution applying EU rules as transformed by national authorities.

Thus, it may be concluded that the SSM breaks with traditional modes of European integration, and constitutes a hybrid mode of execution of EU law in the sense that: (i) it furthers European integration to the extent that supervision *per se* has been centralized in the hands of the ECB, but (ii) it limits European integration to the extent that it still leaves it up to the Member States to decide on *how* to supervise the credit institutions covered by the SSM-R.

Through this unique interplay between EU and national supervisory competences and prudential laws, the operation of the SSM may have deep implications for the founding principles of EU law.

2. The SSM in Light of the Founding Principles of EU law

The SSM has substantial implications for two main principles of EU law, namely the overarching principle of the autonomy of the EU legal order and the substantive principle of non-discrimination, which mirrors that of equal treatment.

[60] Magliari (n 59) describes it as a 'circular movement', at 26-30.

A. The Autonomy of the EU Legal Order

Regarding the autonomy of the EU legal order, there is little doubt that having an EU institution apply national laws is a real challenge for the principles of effectiveness, consistency, uniformity, direct effect, and primacy.

One might indeed wonder whether the complex supervisory architecture described above complies with the principle of effectiveness of EU law by creating a situation that could lead to an ineffective supervision of credit institutions.[61] How can the ECB possibly pursue effective supervision while applying more than a dozen national laws? Is the ECB able to deal with the particularities and nuances of the national legal orders? In addition, as seen above, the many complexities of the SSM-R are likely to be exposed to litigation, not only on the rules on supervision themselves but also on the respective jurisdictions of the CJEU and of the national courts.

In the same vein, having an EU institution apply national law, which itself transposes EU acts of secondary legislation, might undermine the principles of consistency and uniformity, which are central to the application of EU law, since the ECB could be led to apply the same provisions of EU law differently across the Member States.

Finally, the SSM-R also raises the issue of the primacy principle, which is crucial for the preservation of the autonomy of the EU legal order. Admittedly, Recital 34 provides that the application of national law by the ECB 'is without prejudice to the principle of the primacy of Union law.' Such application must therefore be carried out to the extent that it does not breach this founding principle. But determining the extent to which a national rule complies with EU law is an extremely difficult task, especially because the

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[61] See Eddy Wymeersch, 'The Single Supervisory Mechanism or "SSM", part one of the Banking Union' (2014) European Corporate Governance Institute (ECGI) - Law Working Paper 240/2014 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397800&rec=1&srcabs=2403859&alg=1&pos=5> accessed 3 January 2018, at 5: 'As long as regulation and supervision were national, these differences did not create internal tensions, but led to significant cross-border friction [...]. In the future the opposite is likely to occur, which will affect the effectiveness of supervision, as the single supervisor will be obliged to act on the basis of divergent 'underlying' national regulations in different Member States.'

relevant EU acts of secondary legislation leave many options open to the Member States.

B. The Principle of Non-Discrimination

Turning now to the substantive principles of non-discrimination and equal treatment, the application of national law by the ECB to the significant institutions alongside the tasks carried out by national supervisors vis-à-vis less significant institutions might entail two sets of implications.

Firstly, significant banks might be supervised differently across Member States. If Member State A has more stringent rules than Member State B, the ECB will apply more stringent rules to credit institution A than to credit institution B. As a result, significant credit institutions might be discriminated against on the basis of their place of residence. The SSM therefore does not solve the issue that supervision may still be more or less stringent across Member States.

Secondly, there is a risk that the ECB, when supervising a significant institution in Member State A, could interpret and apply a national rule in a manner that is inconsistent with the interpretation of the national supervising authority that has retained the competence to supervise less significant institutions. Once again, this is likely to give rise to litigation and raise issues as to which of the EU or national courts has jurisdiction to settle the disputes.

3 The SSM and the Role of EU Institutions

From a broader perspective, the SSM-R raises doubts about the functions that can be properly performed by EU institutions. It should be recalled, in this respect, that one of the main purposes of the European Union is to create 'an ever-closer union among the peoples of Europe', which necessarily requires going beyond, and sometimes even conflicting with, national interests. This can be compared to the tasks carried out by the Member States at the national level which seek to pursue the national public interest, which in turn subsumes the interests of the individual members of their polity.

In this regard, the CJEU has already described the Community (now Union) system as being 'designed to ensure that the general interest of the Community [Union] would be protected'[62] against national interests which, if they were to prevail, could jeopardize the sustainability of the whole system. In other words, it has drawn a clear distinction between the respective interests of the Member States and the Union.[63] The EU institutions are therefore logically under an obligation to pursue, develop, and preserve the Union's general interest. The Commission, which 'shall promote the *general interest of the Union*',[64] is the institution which embodies this general interest to the greatest extent. As the General Court has put it, the Commission 'exercises its functions entirely independently from the Member States in the general interest of the Community [Union]'.[65] The same goes for the Council, even if it is, admittedly, a platform where Member States may raise their 'national voices'. The Court has stressed that, when adopting new uniform rules at EU level, the Council is 'required to take account not of the special interests of the various Member States, but of the general interest of the Community [Union] as a whole'.[66] As a result, the EU secondary acts of legislation also necessarily embody the Union's general interest.[67]

Where does the ECB, to the extent that it applies national laws while carrying out its supervisory tasks, lie? The SSM-R is the result of tough negotiations between Member States, which have ultimately consented to a more centralized supervision of their credit institutions without agreeing to a uniform way of supervising them. Two situations should be distinguished.

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[62] Case 231/78 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* EU:C:1979:101 at 15.

[63] See, for instance, Case 2/60 *Niederrheinische Bergwerks - Aktiengesellschaft and Unternehmensverband des Aachener Steinkohlenbergbaues v High Authority of the European Coal and Steel Community* EU:C:1961:15 at 145.

[64] Article 17 TEU [emphasis added].

[65] Case T-41/98 *Nederlandse Antillen v. Commission* EU:T:2000:36 at 59.

[66] Case C-150/94 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union* EU:C:1998:547 at 62. See also, in the same vein: Case 46/76 *W. J. G. Bauhuis v The Netherlands* EU:C:1977:6 at 29.

[67] See, for instance, Case C-128/89 *Commission v. Italy* EU:C:1990:311 at 14 and Case C-282/90 *Vreugdenhil v. Commission* EU/C/1992/124 at 24.

When the ECB applies regulations and directives that do not leave the Member States with any leeway, it can be argued that it promotes, like any other EU institution, the general interest of the Union. However, the same cannot be said of situations where it applies national laws through which Member States have exercised the options made available to them by the EU secondary acts of legislation. Indeed, such national laws constitute a means for the Member States to protect their own individual interests and thus to preserve their own policy choices. As a result, the ECB is no longer safeguarding the EU common interest, but also necessarily individual national interests, which may sometimes be at odds with the sustainability of the whole system. This aspect clearly breaks with the traditional modes of European integration: the ECB is now an EU institution which does not solely embody the Union's interests, intended to subsume national ones, but also preserves national particularities.

V. Conclusion

This paper has discussed the peculiar features of the SSM in light of the theory of European integration and has argued that the ECB's application of national laws while supervising significant credit institutions breaks in several regards with the traditional modes of European integration.

The SSM-R comprises several unique features relating to the division of competences between the ECB and national supervisors and the relationship between EU and national laws. The application of national laws by the ECB has significant practical implications, including the identification of the national provisions which qualify for direct application, the necessity of applying supervisory rules uniformly across Member States, the application of procedural rules in the absence of common European rules, and finally remedies. Overall, this paper claims that the SSM may be described as a hybrid mode of European integration.

The issues that stem from the new supervision regime are, for the most part, not entirely new (for example, the division of competences between the EU and national levels and the separation of EU and national laws), but they have become more pressing. It is likely that they will give rise to unprecedented complexity in cases that will with increasing frequency be brought before EU and national courts.

It remains to be seen, in practice, whether the system set up by the SSM-R is sustainable and ultimately allows for better and more efficient supervision of credit institutions, which eliminates or at least substantially mitigates the systemic risks that were identified during the global financial crisis and during the Eurozone crisis.

It equally remains to be seen whether the ECB and the national supervisors, on the one hand, and EU and national courts, on the other, will depart from the traditional ways of furthering European integration to the extent that the SSM-R invites them. Indeed, as shown earlier, it is likely that the ECB will rely as much as possible on EU law when exercising its supervisory powers. This approach, while perhaps blurring the variation in national implementations of EU law and the options and discretion left to Member States, would nevertheless allow for more clarity, and thus legal certainty, and would be more consistent with the principles of non-discrimination and equal treatment. The sustainability of the system also strongly depends on how the ECB will apply these rules in practice and how national supervisors cooperate with them. Similarly, the EU and national courts will play a significant role: it remains for them to establish a clear path to the otherwise complicated system of judicial review stemming from the SSM-R, for example through broad interpretation of the competence conferred to the ECB or broad application of the direct effect principle. In other words, it remains to be seen to what extent the various actors involved will make use of the tools traditionally used to further European integration. Provided that supervisors and courts cooperate, it is possible that, in practice, the SSM will ultimately share more features with the direct execution of EU law model than it does under a literal interpretation of the applicable legal provisions.