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EDITORIAL

MEET THE TIME AS IT SEEKS US

Elias Deutscher*

'Meet the time as it seeks us'.[1] These words by Shakespeare that open Stefan Zweig's memoirs *The World of Yesterday* provide us with perhaps the most pragmatic attitude to affront last year's unsettling and tragic events. When Zweig wrote his memoirs shortly before his suicide in exile from Nazi Germany in 1942, he looked back at the profound cultural, social and political transformation of Europe in the first half of the 20th century and tried to grasp an understanding of this tempestuous period. Today, we are also struggling to make sense out of turbulent events that recently landed several blows on our societies. The year 2015 was overshadowed by another episode of the Euro crisis, the culmination of the migration crisis and numerous terrorist attacks across the world.

These events confront our societies with essential questions and major challenges. They also raise profound queries about the role and responsibility of academic research in general, and of an academic legal journal such as the European Journal of Legal Studies (EJLS) in particular. In this context, the EJLS, like any other academic legal journal, faces a fundamental dilemma: how to stay abreast of salient political and societal developments without losing sight of the importance of thoughtful and thorough scientific analysis? On the one hand, legal academic research cannot only take place in the 'ivory tower' and has to cope with important and sometimes brutal societal changes. On the other hand, academic research plays a crucial role by the very fact that it takes a step back in order to engage in a profound reflection and analysis of current developments. Hence, there is an important time lag between immediate information and news coverage by the media and the deferred analysis by academic research. To be aware of this dichotomy and to take the time necessary for well-grounded academic reflection is all the more important in times of constantly updated news feeds, Twitter and blogging, which also increasingly gain importance in the realm of academia.

Indeed, there is often only a thin line between being topical and being ephemeral. To strike the right balance between keeping up with current developments and ensuring at the same time the academic quality of our publications, our journal relies on a two-fold strategy. On the one hand, we aim for continuity as regards the thoroughness and quality of our double-blind review process. As a researcher-run academic journal, we regularly have to face important personal and organizational changes. Finishing their

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[1] William Shakespeare, *Cymbeline* ([1623]) Act 4, Scene III.

Ph.D. at the European University Institute (EUI), Jan Zglinski, as Editor-in-Chief, and Christina Blasi, as Managing Editor, passed the management of the journal, after more than two years, on to a new team. Moreover, longstanding Head-of-Sections Vincent Réveillère and Francois Delerue, handed over to new editors what has become, after years of hard work and relentless efforts, a very dynamic and attractive legal journal. During the last years, all parting members hugely contributed to the quality and reputation of the journal. At this point, we would like to express our deep gratitude for their enormous commitment and great achievements. For the future, we aim to succeed their work by ensuring a high quality publication and increasing the visibility of the EJLS. To do so, we continue to rely on the commitment of our editors in providing thorough and critical peer reviews. This is the most important asset and quality safeguard of our journal.

On the one hand, by promoting the young, progressive and innovative profile of our journal, we intend to keep pace with new developments in both the academic and the societal sphere. Providing an energetic platform for young and emerging scholars, our journal contributes to the diversity and innovation of scholarly legal research. By focusing on the originality of our submissions, we encourage our authors to act as the agenda setters of this journal and to put forward new ideas and perspectives on current legal issues. This balance between thorough peer-review and innovativeness is, to our mind, the best way to provide a profound and insightful analysis of current developments.

Interestingly, delving into this Autumn/Winter 2015 issue, the reader will realise that all contributions are touching upon important issues related to the events that made 2015 such a turbulent year. All of them are providing new ways to think about important recent legal and societal evolutions paired with a solid theoretical and legal analysis.

The current issue kicks off with the *New Voices* section featuring an essay by *Hannes Lenk*, challenging the notion of coherence in EU Foreign Investment Policy. In the context of the current TTIP negotiations, the EU's foreign investment policy is at the focal point of public debates and criticism. The essay, however, goes beyond the familiar objections currently aired by the public and media discourse, unveiling the inner contradictions of a somewhat schizophrenic approach of the EU towards foreign investment treaties. Thus, *Hannes Lenk* points out more profound legal concerns raised by bilateral investment treaties (BITs) and investor-state dispute settlement with regard to the principles of non-discrimination and autonomy, which lie at the core of the Union's legal order.

The interplay between the legal order of the European Union and the international legal order is also the focus of the first article by *Eva Kassoti*. Currently, academic legal literature repeatedly portrays the Court of

Justice of the European Union's (CJEU) *Kadi*[2] saga, and more recently its Opinion 2/13,[3] as symptoms of the CJEU's unwillingness and the EU's incapacity to reconcile its self-perception as an autonomous legal order with openness towards the international legal sphere. *Eva Kassoti's* article, however, takes issue with the predominant view that the CJEU's case law epitomises insurmountable conflicts between the Union as autonomous, self-contained legal order and the coherence of international law. In fact, her article conveys a more nuanced picture. Contrary to what is widely assumed, she shows that the CJEU often refers to case-law of international courts and actively engages in a judicial dialogue with the International Court of Justice (ICJ) when confronted with legal questions of international law. Hence, *Eva Kassoti* demonstrates that the CJEU contributes to the coherence – instead of the fragmentation – of international law, and argues in favour of a more self-confident role of the CJEU in the judicial dialogue with the ICJ.

The second and third articles by *Giulia Vicini* and *Fulvia Staiano* illustrate that in light of the human catastrophe that takes place at the European borders, scholarly legal debate cannot escape from discussing important issues of the current migration crisis. In her article, *Giulia Vicini* critically assesses the Dublin II and III system that is supposed to regulate the entry of asylum seekers in Europe. Analysing the conflicting case-law of the CJEU and of the European Court of Human Rights (ECtHR) in recent asylum cases, she also forcefully points out the blatant contradiction between the fundamental values that Europe repeatedly invokes and the persisting failure of the Common European Asylum System to accommodate the increasing migration flows towards Europe. Moreover, she also underscores the important role of judicial dialogue between the Strasbourg and Luxembourg courts in ensuring that the EU and its Member States live up to the values the European project used to stand for. In the same vein as *Eva Kassoti's* article, her analysis of this ongoing judicial dialogue between the CJEU and the ECtHR also nuances the widely shared view that Opinion C-2/13[4] puts an end to the Union's and CJEU's openness towards other international human rights regimes.

Taking another perspective on the current migration challenge, *Fulvia Staiano*'s article touches upon obscured forms of discrimination that immigrant women are currently facing in Europe. Her contribution explores how insights from American critical race feminism can enhance European anti-discrimination analysis by enabling it to unravel these concealed forms of discrimination. She also demonstrates that European and national migration laws currently fail to take adequately into account the vulnerability of migrant women, who often face multiple patterns of discrimination. On the contrary, these laws rather seem to reproduce and

[2] C-402/05 *P Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2013:518. C-584/10 *P Commission and Others v Kadi* ECLI:EU:C:2013:518.
[3] *Opinion* C-2/13 ECLI:EU:C:2014:2454.
[4] ibid.

entrench certain forms of discrimination. Hence, in the same way as *Giulia Vicini's* contribution, *Fulvia Staiano* puts the finger on the current failure of European and national migration rules to cope with current migration challenges in conformity with the fundamental values they are supposed to protect. Accordingly, her findings constitute a compelling invitation to critically rethink and reform the existing European and national migration laws in order to facilitate the empowerment and integration of immigrant women in our societies.

The fourth article by *Camilla Villard Duran* focuses on the social accountability of central banking, in particular with regard to the European Central Bank (ECB), the US Federal Reserve and the Brazilian Central Bank. The hiatus between the increasing importance and power of the central banks and their lack of social and political accountability has become most obvious with the still ongoing economic crisis. By demonstrating the increasing importance of soft-law for the social accountability of central banks, this article sheds a new light on this issue. Interestingly, *Camilla Villard Duran*'s claim that soft law plays an increasing role in ensuring the accountability of Central Banks finds empirical support in the recent *Gauweiler*[5] case. In this case, the Court of Justice of the European Union (CJEU) had to decide – despite of its soft-law character – on the legality of a press release setting out the modalities of the ECB's Outright Monetary Transactions (OMT) program under the EU treaties.

The fifth article by *Thomas Jaeger* on the planned implementation of road charges for foreign vehicles in Germany is another example of how academic legal research meets recent political developments. First of all, the article clearly shows that EU internal market law is not only a relic from the times when it played a pivotal role for European integration. On the contrary, internal market rules still bite and are still one of the regulatory core elements of EU law. Secondly, *Thomas Jaeger* also demonstrates that EU internal market law often goes beyond the mere guarantee of free movement of production factors and has to deal with important value conflicts. In fact, this article describes how the Bavarian CSU, in order to gain votes during the Bundestag elections in 2013, ostentatiously surfed on a wave of chauvinistic resentment, making the introduction of motorway tolls for foreigners a flagship project of its electoral campaign. From a political perspective, this motorway toll is only one amongst numerous symptoms of the recent raise of chauvinistic and even xenophobic discourses in Europe. In this respect, internal market rules are not only ensuring the mobility of goods or persons, but also constitute a political means to control whether the Member States' regulation corresponds with fundamental values of the European Union and the principle of 'good governance'.

[5] Case C-62/14 *Gauweiler and Others* ECLI:EU:C:2015:400.

Hence, the reader will discover that all contributions of this issue are directly intertwined with legal, political and social challenges our societies currently face. At the same time, they are all engaging with an innovative theoretical debate and thorough legal analysis. This clearly demonstrates that academic legal research and writing does – and certainly should – not take place in a vacuum and cannot hide from reality In this sense, the authors show us how academic legal research can 'meet the time where it seeks us'.

In fact, 'meet the time where it seeks us' also reads as an invitation for academic legal research and debate not to shy away from analysing and discussing current challenges that our societies are confronted with. This is all the more the case in times of profound crisis, since it is the role of law and legal rules to define the answers to these challenges and to ensure the democratic character, the freedom and openness of our societies.

CHALLENGING THE NOTION OF COHERENCE IN EU FOREIGN INVESTMENT POLICY

Hannes Lenk*

There have long been demands for more coherence in EU external action. The Lisbon Treaty has introduced important institutional changes in this respect. However, coherence – in the broad sense of a positive process that is focused on establishing synergies between various policy fields and actors – is still largely lacking for an EU foreign investment policy. An institutional bifurcation of different Directorates-General puts fuel to the fire of a conceptual confusion of intra-EU and extra-EU investment agreements. As a consequence, overarching concerns such as compatibility with the principle of autonomy or effects of investor-state arbitration on the internal market are missing a coherent approach.

Keywords: BITs, coherence, intra-EU, extra-EU, EU foreign investment policy

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I. INTRODUCTION

'Who do I call if I want to speak to Europe?' Although Henry Kissinger probably never actually made this remark,[1] it may by now be one of the most often quoted sentence in textbooks on EU law. It does indeed convey a discomforting sense of reality. EU external relations law is a

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[1] Gideon Rachman, 'Kissinger never wanted to dial Europe', *FT Blogs: The World* http://blogs.ft.com/the-world/2009/07/kissinger-never-wanted-to-dial-europe/, accessed on 18 December 2015.

confusing and complex, almost impenetrable aspect of EU law. This is partly due to technical legal dimension such as the delimitation of competences. More importantly, though, the EU lacks a sense of persistence and reliability when acting internationally. There is in fact a requirement of coherence underlying EU external action. Falling short of a legal principle, however, it is more of an idea; a notion of unity in EU internal and external policy. The Lisbon Treaty meant to make the requirement of coherence more tangible. Using the example of investor-state arbitration (ISDS), the present essay, however, challenges the idea of coherence as an underlying principle of EU foreign investment policy. Whereas the Commission strongly opposes ISDS in intra-EU bilateral investment agreements (BITs), i.e. BITs concluded between two Member States, it vigorously supports the inclusion of ISDS in EU investment agreements. Additionally, the position of Member States diverges significantly on the question of validity of ISDS provisions in intra-EU BITs. This essay claims that the resulting incoherence is rooted in the misconceived application of 'intra-EU' and 'extra-EU' as more than descriptive concepts and the lack of political willingness of Member States.

This first part introduces the requirement for coherence and briefly discusses how it relates to the field of EU foreign investment policy. The second part discusses the Commission's and the Member States' position *vis-à-vis* ISDS in intra-EU and extra-EU BITs. The last part demonstrates that a misconception of 'intra-EU' and 'extra-EU' as distinct concepts or categories of international agreements is causing contradictory positions within the Commission, and prevents the formation of a coherent EU foreign investment policy.

II. Coherence in EU External Action: The Legacy of Lisbon

The requirement of coherence must principally be understood in the context of the Treaty of Maastricht, which left the EU divided along three distinct and separate pillars. While the Community was supranational in character, the common foreign and security policy (CFSP), and police and judicial cooperation in criminal matters remained intergovernmental.[2] The pillars made it virtually impossible for the EU to engage as a unified entity in foreign policy, hence the desire for a single contact point for third countries. The 2007 Inter-Governmental Conference (IGC) was thus explicitly endowed with '... enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the *coherence of its external action*.'[3] The Commission emphasizes in similar terms the importance of '...

[2] Ramses A Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations' (2000) 37(5) Common Market Law Review 1135.

[3] IGC 2007 mandate, para 1, emphasis added; the mandate was concluded by the European Council of 21-22 June 2007 and a draft mandate was attached to the Presidency Conclusions of 20 July 2007 (Doc ST 11177/1/07 REV 1).

articulating coherent and effective external policies...'.[4]The Lisbon Treaty subsequently delivered a wide-ranging reform.[5] It abolished the pillars and further integrated CFSP into the unified institutional framework. It shifted responsibility for external representation on issues concerning CFSP from the rotating presidency of the Council to the president-elect of the European Council.[6] It strengthened the role of the High Representative, who presides over the Foreign Affairs Council, is vice-president of the Commission, and also takes part in the work of the European Council.[7] And most importantly, it consolidated a substantive requirement of coherence in Article 13(1) of the Treaty on European Union (TEU), which now reads: 'The Union shall have an institutional framework which shall [...] ensure the consistency, effectiveness and continuity of its policies and actions.' Additionally, Article 21(3) TEU requires explicitly that, '[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies.'

In order to understand the content of this requirement, it is paramount to first address a linguistic discrepancy of the different language versions of the TEU. Where the English language version refers to 'consistency' the French and German language versions, for instance, refer to '*cohérence*' and '*Kohärenz*', respectively. This could be dismissed as mere linguistic variance, which defied the constitutional reform. Nonetheless, as a lawyer one cannot ignore that coherence and consistency transcend language and manifest themselves in two substantively distinct concepts. While consistency is limited to the absence of substantive incompatibility, coherence refers to a positive and dynamic process focused on creating synergies between various policies and actors.[8] 'Hence, coherence in law would be a matter of degree, whereas consistency would be a static notion in the sense that concepts of law can be more or less coherent but cannot be more or less consistent. They are either consistent or not.'[9]

Thus, the Treaty requires a dynamic process that establishes synergies, rather than laying out the static objective of achieving overall compatibility.[10] In this respect, however, the Lisbon Treaty merely puts lipstick on a pig, a futile attempt to conceal real impediments for policy

[4] Commission Communication, 'Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility', (COM(2006) 278 final), 5.
[5] On the structural and institutional changes see Jan Gaspers, 'The quest for European foreign policy consistency and the Treaty of Lisbon' (2008) Humanitas Journal of European Studies, accessible at http://www.sbc.org.pl/dlibra/publication?id=13362&tab=3.
[6] Art 15(6) TEU.
[7] Arts 18(4) and 15(2) TEU, respectively.
[8] Christophe Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008), 13-14; Wessel (n 2), 1150.
[9] Hillion (n 8), 14; Wessel (n 2), 1150.
[10] Pascal Gauttier, 'Horizontal Coherence and the External Competences of the European Union' (2004) 10(1) European Law Journal 23, 26; Hillion (n 8), 15.

coherence with institutional appearances. If anything, Lisbon enhanced horizontal cross-pillar coherence, albeit that CFSP still remains the odd-one-out amongst the EU's external policies.[11] But the need for coherence goes beyond managing the intergovernmental and supranational structures of the post-Maastricht pillar architecture.[12] Article 13 TEU indicates that coherence stretches across all policy fields, external as well as internal. More importantly, though, it is a multi-dimensional concept. In addition to its horizontal cross-pillar dimension, coherence must also be pursued horizontally within a policy field. It, furthermore, extends vertically, i.e. in an EU-Member State relationship, and institutionally, i.e. between policies of different EU institutions as well as policies formulated in different departments of the same EU institution.[13]

This is of particular importance for EU foreign investment policy. Internally, investment is largely regulated through the internal market provisions in the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of capital and the right of establishment. However, there still is a tight network of intra-EU BITs in force. Externally, on the other hand, the EU was endowed with external competence in the regulation of foreign direct investment (FDI) only with the Lisbon Treaty. Nonetheless, there are already a number of EU investment agreements[14] under negotiation, i.e. EU-Singapore free trade agreement (FTA)[15] and the EU-Canada Comprehensive Economic and Trade Agreement (CETA),[16]. Moreover, the EU approach to drafting ISDS provisions currently transitions towards a permanent investment court in the EU-Vietnam FTA[17] and the EU-US Transatlantic Trade and Investment Partnership[18] (TTIP) agreement.[19] One might, therefore,

[11] Piet Eeckhout, 'The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012), 269.

[12] Gauttier (n 10), 27; Hillion (n 8); Wessel (n 2).

[13] Carmen Gebhard, 'Coherence' in Christopher J Hill and Michael Smith (eds), *International relations and the European Union*, 2nd vol (OUP 2011), 107-109.

[14] For the purpose of this paper the term 'EU investment agreement' includes EU trade agreements with comprehensive chapters on investment, and which provide for investor-state dispute resolution.

[15] Commission Press Release, 'Singapore: The Commission to request a Court of Justice Opinion on the trade deal', Brussels, 30 October 2014, http://europa.eu/rapid/press-release_IP-14-1235_en.htm, accessed on 19 Dec 2015.

[16] Commission Press Release, 'Canada–EU Summit – A new era in Canada–EU relations: Declaration by the Prime Minister of Canada and the Presidents of the European Council and the European Commission', Ottawa, 29 September 2014 http://europa.eu/rapid/press-release_STATEMENT-14-288_en.htm accessed on 19 December 2015.

[17] Press Statement by the President of the European Commission Jean-Claude Juncker, the President of the European Council Donald Tusk and the Prime Minister of Viet Nam Nguyen Tan Dung, Brussels, 2 December 2015 http://europa.eu/rapid/press-release_IP-15-5467_en.htm accessed on 19 Dec 2015.

[18] Council of the European Union, 'Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America' (Doc ST 11103/13).

expect the Commission and the Member States to work together towards a coherent approach on ISDS provisions in investment agreements. On the contrary, however, as we will see the schizophrenic position of the Commission on ISDS in intra-EU BITs and EU investment agreements is only exacerbated by the Member States' pursuit of diverging national interests in intra-EU investment disputes.

III. The Commission's Position on Investor-State Arbitration

1. The Case of intra-EU BITs

Intra-EU BITs are in fact a peculiar phenomenon of EU enlargement. Most of the Eastern European and Mediterranean countries that acceded to the EU in 2004 and 2007 transitioned from heavily state-controlled to free-market economies only since the early 1990s. In the eyes of the EU, these economies had to become more stable, more investor friendly and more integrated into the EU market. Unsurprisingly, these states moved on to conclude numerous BITs with 'old' Member States. It is ironic, though, that the conclusion of these BITs was explicitly encouraged by the EU,[20] seemingly unaware that they would turn into BITs between Member States upon accession. Having turned into a threat for the integrity of the internal market, the Commission is now fighting intra-EU BITs as a beast of its own creation.

Even less comprehensible is the fact that the EU was distinctly aware of the problem, but refused to address it. Reports of the Economic and Financial Committee have raised the issue as early as 2006, but neither the Member States nor the EU have demonstrated much interest in resolving it. The EU sat on a ticking bomb and decided to simply wait and see whether, and to what extent, an explosion would materialize on the internal market. In the meantime, the Commission focused its action on interventions as *amicus curiae*, in a number of intra-EU investment disputes. In *US Steel v. Slovakia*[21] and *EURAM v. Slovakia*,[22] for instance, the Commission submitted briefs emphasizing above all that ISDS in intra-EU BITs constitutes a violation of the EU principle of non-discrimination. In

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[19] The Commission presented a revised textual proposal for a permanent investment court in TTIP on 12 November 2015 http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396&title=EU-finalises-proposal-for-investment-protection-and-Court-System-for-TTIP accessed on 19 December 2015.

[20] See, for instance, OJ L 357/2, 31.12.1994, Europe Agreement Establishing an Association Between the European Economic Communities and their Member States, of the One Part, and Romania, of the Other Part signed on 21.12.1993, art 74(2).

[21] *U.S. Steel Global Holdings I B.V.* v. *Slovak Republic*, UNCITRAL, (PCA Case No. 2013-16).

[22] *European American Investment Bank AG (EURAM) v. Slovak Republic,* UNCITRAL, (PCA Case No. 2010-17).

Micula v. Romania[23] the Commission focused on the supremacy of EU law over the intra-EU BIT. Investment tribunals have, however, largely ignored interventions of the Commission on these points. Other arguments of the Commission are based on international law, and in particular Articles 30(3) and 59 of the Vienna Convention on the Law of Treaties of 1969. Accordingly, in three disputes against Slovakia the Commission reasoned that EU Treaties supersede or alternatively impliedly terminate pre-accession intra-EU BIT.[24]

However, the number of investment disputes initiated under intra-EU BITs has significantly increased during the last decade. And not least since the *Micula* award, which effectively reinstated illegal state aid, the issue now puts increasingly more pressure on the EU. On June 18, 2015 the Commission finally took a proactive approach by formally notifying five Member States of the initiation of infringement proceedings over the termination of intra-EU BITs.[25] The formal letter of notification sent to the Swedish government[26] is for present purposes considered to illustrate the Commission's general position *vis-à-vis* intra-EU BITs. In this letter, the Commission pursues a number of arguments. Most relevant, and by all means most convincing is the reasoning that the substantive as well as procedural protection provided under intra-EU BITs violates the principle of non-discrimination on the ground of nationality, a cornerstone of the EU's internal market. In as far as BITs simply provide more favorable rights to investors than those available under the Treaty, these agreements do not present a *prima facie* violation of EU law.[27] However, investors of a nationality other than that of either State Party to an intra-EU BIT will neither benefit from the substantive rights nor have access to procedural dispute resolution mechanisms, such as investor-state arbitration. In other words, these investors are effectively discriminated against on the ground of their (corporate) nationality. In this respect, it is noteworthy that the general principle of non-discrimination, now enshrined in Article 18

[23] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L.* v. *Romania*, ICSID (Case No. ARB/05/20).
[24] *U.S. Steel* (n 21); *EURAM* (n 22); and *Achmea B.V. (formerly Eureko)* v. *The Slovak Republic*, UNCITRAL, (PCA Case No. 2008-13).
[25] Commission Press Release, 'Commission asks Member States to terminate their intra-EU bilateral investment treaties', Brussels, 18 June 2015, http://europa.eu/rapid/press-release_IP-15-5198_en.htm, accessed on 19 December 2015; for a comprehensive analysis of the Commission's reasoning see Joel Dahlquist, Hannes Lenk, Love Rönnelid, 'The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden' (2016) SIEPS European Policy Analysis, forthcoming.
[26] Formell underrättelse – överträdelse nummer 2013/2207, skrivelse från Europeiska kommissionen, Generalsekretariatet till Sveriges ständiga representation vid Europeiska unionen, June 18 2015 (only available in Swedish).
[27] Angelos Dimopoulos, 'The Validity and Applicatbility of International Investment Agreements Between EU Member States under EU and International Law' (2011) 48 *Common Market Law Review* 63, 78; Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?' (2009) 58(2) International and Comparative Law Quarterly 297, 310.

TFEU, not only applies to natural persons but also extends to legal entities on the internal market.[28]

All in all, the focus of the Commission in respect of ISDS in intra-EU BITs is clear: presenting a Treaty violation they need to go! This position is equally reflected in the Commission's *amicus* briefs, which broadly attack the jurisdiction of tribunals and claim the inapplicability of intra-EU BITs. One might expect similar concerns to arise in the context of EU investment agreements. Paradoxically, though, the compatibility of ISDS in these agreements with EU law plays no significant role in EU foreign investment policy.

2. The Case of EU Investment Agreements

With the coming into force of the Lisbon Treaty Article 207 TFEU endowed the EU with exclusive competence in FDI as part of its common commercial policy. BITs traditionally cover FDI as well as portfolio investments and it remains unclear in this respect if the conclusion of traditional investment agreements falls entirely within EU competence.[29] The issue has recently been brought before the CJEU in a request for an opinion under Article 218(11) TFEU on the EU-Singapore FTA.[30] Regardless of the outcome of the CJEU's opinion, as long as the subject matter of EU investment agreements falls broadly within the scope of the post-Lisbon common commercial policy the EU is in principle also competent to negotiate ISDS provisions.

In July 2010 the Commission issued a communication clarifying how it plans on using its new competence. The communication emphasizes the link between FDI and economic growth and welfare, and underlines the importance of investment agreements as an instrument to harness these benefits. On investor-state arbitration, the communication reads:

> Investor-state [arbitration] is such an established feature of investment agreements that its absence would in fact discourage

[28] Case C-221/89 *The Queen/Secretary of State for Transport, ex parte Factortame* EU:C:1991:320.

[29] The Commission rather strongly argues in favor of a comprehensive investment competences, see Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party (COM (2012) 335 final), pt 1.2.

[30] OJ C 363/18, 3.11.2015, Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU, (2015/C 363/22). The request reads: 'Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically:

- Which provisions of the agreement fall within the Union's exclusive competence?
- Which provisions of the agreement fall within the Union's shared competence? and

Is there any provision of the agreement that falls within the exclusive competence of the Member States?'

> investors and make a host economy less attractive than others. For these reasons, future EU agreements including investment protection should include investor-state dispute settlement.[31]

The communication also acknowledges that the inclusion of ISDS provisions in EU agreements presents challenges in broadly two respects. First, the respective responsibility of the EU and its Member States for measures challenged in investment arbitration needs to be clarified. Second EU investment agreements should endeavor to reform ISDS by increasing transparency, foreseeability and independence of arbitrators.

The Commission addressed the first challenge in its proposal for a regulation, which was adopted in July 2014.[32] Regulation 912/2014 lays out the internal framework for the attribution of financial responsibility between the EU and the Member States and governs the question on who is best placed to act as respondent before an investment tribunal. It is, thus, based on the assumption that future EU investment agreements provide for ISDS provisions and the Commission's proposal, referring to the Commission's earlier communication, was explicit in this respect.[33] The second challenge found strong reinforcement in public protest surrounding the TTIP negotiations. The vociferous criticism of ISDS in TTIP focuses on the disruptive effect of allegedly pro-investor tribunals on domestic regulation. The Commission swiftly responded with a far-reaching transparency campaign and provided open access to a number of key policy and negotiating documents.[34] The categorical rejection of ISDS in TTIP was even more clearly reflected in the nearly 150,000 replies to the public consultation that was launched in March 2014.[35] However, rather than outright excluding ISDS from the TTIP negotiations, which would have appeared to be the obvious consequence of the public consultation, the Commission wrapped investor-state dispute resolution into a mantle of democratic reform. A 'new system [...] which is subject to democratic principles and scrutiny' was also the explicit *conditio sine qua non*

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[31] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Towards a Comprehensive European International Investment Policy' (COM(2010)343 final, 2010), 10.

[32] OJ L 257/121, 28.8.2014, Regulation 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

[33] Proposal for a Regulation financial responsibility (n 29) , pt. 1.1.

[34] Commission Press Release, 'European Commission publishes TTIP legal texts as part of transparency initiative', Brussels, 7 January 2015 http://europa.eu/rapid/press-release_IP-15-2980_en.htm accessed on 19 Dec 2015.

[35] Commission Staff Working Document, 'Report on Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement' (SWD(2015) 3 final), in particular see pt. 3.1.

for the European Parliament's consent to TTIP.[36] It is on this backdrop that one has to read the Commission proposal for a permanent investment court in TTIP, and broader ambition for multilateral efforts in this respect.[37] Bottom line: investor-state dispute resolution is inseparable from EU trade and investment agreements, although perhaps in different form and shape.

In her concept paper of May 2015,[38] Trade Commissioner Cecilia Malmström discusses the opportunity for the EU to reform the traditional ISDS system in order to fully ensure the right to regulate for the EU and its Member States. The concept paper highlights the progress that has already been made in the EU-Singapore FTA and CETA, which, absurdly enough, feature traditional ISDS provisions. It also underlines the aspirations to develop a permanent investment court with an appeal mechanism. Whereas the prospects for such a mechanism are unclear in the context of TTIP, it appears to be already part of the EU-Vietnam FTA.[39] Then, in October 2015, the Commission released its new trade strategy that once again lays focus on the EU as a reform actor in the field of investment protection by reinforcing the right to regulate and transparency, particularly with regard to enhancing legitimacy of investor-state dispute resolution.[40]

The transition towards a more institutionalized and more court-like ISDS mechanism in future EU trade and investment agreements responds to the concerns voiced by public society and demands from the European Parliament. Nevertheless, none of these aspects addresses the compatibility of ISDS provisions with EU law. Considering the Commission's forceful attempts to wipe out intra-EU BITs specifically because of the effect that ISDS has on the internal market, it is startling that none of the above documents addresses the effect of ISDS in EU investment agreements. On the contrary, the positive effects of ISDS on the level of investment protection in these agreements have clearly been endorsed. And on the wider issue of compatibility, only the concept paper

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[36] European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (2014/2228(INI), pt. 2.xv.

[37] Commission Press Release, 'EU finalises proposal for investment protection and Court System for TTIP', Brussels, 12 November 2015, http://europa.eu/rapid/press-release_IP-15-6059_en.htm, accessed on 19 Dec 2015; for the revised negotiating text see n 19.

[38] Cecilia Malmström, 'Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court', Concept Paper, 5 May 2015 http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF accessed on 20 December 2015.

[39]Cecilia Malmström, 'Done deal with Vietnam', *Blog*, 2 Dec 2015 http://ec.europa.eu/commission/2014-2019/malmstrom/blog/done-deal-vietnam_enaccessed on 20 December 2015.

[40] European Commission, 'Trade for all - Towards a more responsible trade and investment policy', 14 October 2015, pt. 4.1.2.

briefly acknowledges the relevance of the principle of autonomy, before quickly dismissing any risk of incompatibility on that basis. In the light of Opinion 2/13,[41] however, there remain legitimate concerns that ISDS provisions clash with the principle of autonomy.[42] And even though these concerns can be addressed through drafting,[43] a shift from traditional ISDS to a permanent investment court are not going to do the trick.

3. The Position of the Member States

Now turning to the position of the Member States, it is noteworthy that, the unaligned EU approach towards ISDS is not only reflected institutionally within the Commission, but also perpetuated vertically in the EU-Member State relationship. Despite the commonly acknowledged inconsistencies of intra-EU BITs with the internal market, Member States have thus far lacked a common approach on the validity of ISDS provisions in intra-EU BITs. This gap is particularly obvious when comparing the submissions of respondent states with those of the investor's home country, i.e. the Member State of which the investor is a national. Moreover, Member State submissions are often not in line with observations advanced by the Commission. In *Achmea*, for instance, the Commission intervened as *amicus curiae* challenging the jurisdiction of the tribunal.[44] In its observations the Commission takes the position that, although the Netherlands-Slovakia BIT was not impliedly terminated (Article 59 VCLT), in accordance with Article 30(3) VCLT the provisions on dispute resolution are no longer applicable.[45] Although Slovakia generally supports the Commission's line of reasoning, it does not, unlike the Commission, pursue arguments purely based on EU law such as a violation of the EU principle of non-discrimination. The Netherlands also intervened as *amicus curiae* before the tribunal, forcefully arguing in favour of the continuous application of the BIT.[46] The tribunal in *Achmea* largely ignored the arguments made by the Commission on the basis of EU law, and disagreed with Slovakia on its interpretation of Articles 59 and 30(3) VCLT.

Subsequently in *EURAM* the Commission also submitted written observations, challenging the jurisdiction of the tribunal on similar grounds. This time, however, the Commission '... *confines its arguments to EU law*'.[47] The Commission maintains that the subject matter of the BIT falls squarely within the scope of the TFEU and presents a violation of the non-

[41] Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms,* EU:C:2014:2454.
[42] Hannes Lenk, 'Investor-state arbitration under TTIP: Resolving investment disputes in an (autonomous) EU legal order' (SIEPS Report (2015:3), 2015).
[43] Stephan W Schill, 'Editorial: Opinion 2/13 – The End for Dispute Settlement in EU Trade and Investment Agreements?' (2015) 16(3) The Journal of World Investment and Trade 379.
[44] *Achmea* (n 24), Award on Jurisdiction, paras 175 ff.
[45] ibid, paras 187-193.
[46] ibid, paras 155-163.
[47] *EURAM* (n 22), Award on Jurisdiction para 117, emphasis added.

discrimination principle under EU law. The Commission furthermore relies on the supremacy of EU law, the *sui generis* character of EU Treaties, the rule of domestic courts as ordinary courts of the EU legal order, and Article 344 TFEU.[48] Grounding its reasoning more substantively in international law, Slovakia supports the position of the Commission, based on Article 59 and Article 30(3) VCLT.[49] The Czech Republic also intervened as *amicus*, supporting the Commission and Slovakia in its reasoning.[50] Austria, on the other hand, took an opposing stand in its own *amicus* brief, submitting that the BIT remains in force and explicitly endorsing the tribunals reasoning in *Achmea* to this extent.[51]

The above is indicative of a split between the Member States, which are commonly on the receiving end of disputes, i.e. Slovakia and the Czech Republic, and those that historically have been home to investors, i.e. the Netherlands. While the former have an interest in ceding their role as a 'punching ball' for foreign investors, the latter have a legitimate policy interest in protecting their investors, on whose well being the economy of the Member States, such as the Netherlands, largely depends. But even the reasoning of respondent States often appears to deviate from arguments brought by the Commission. The inconsistency between positions of individual Member States and that of the Commission unsurprisingly fails to convince investment tribunals of any existing EU position on this matter.

IV. Synthesis: The 'Intra-EU' vs. 'Extra-EU' Misconception

The diverging positions of the Commission *vis-à-vis* investor-state arbitration in respectively intra-EU and extra-EU BITs are seemingly easy to explain. Intra-EU BITs only involve actors on the internal market and are thus conceived as an internal matter. EU investment agreements, broadly subsumed under the concept of extra-EU BITs, involve relationships with third countries, which is a matter of EU external relations. This is also institutionally reinforced. Intra-EU BITs are the responsibility of the Directorate-General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA), whereas EU investment agreements (including the management of existing BITs between the Member States and third countries) fall within the ambit of the Directorate-General for Trade (DG TRADE). However, although a comparison of the two concepts of 'extra-EU' and 'intra-EU' are helpful for the purpose of contextualization, they risk being misconceived as diametrical opposites. 'Intra-EU' and 'extra-EU' are in fact adjectives that denominate a common legal complex, i.e. BITs and their ISDS provisions, and merely define the broader context of contractual relationships

[48] ibid, paras 118-120.
[49] ibid, paras 83-105.
[50] ibid, paras 121-125.
[51] ibid, para 61.

underlying the investment arbitration. The Commission has acknowledged that external EU policies can have an internal effect, and *vice versa*.[52] This is, however, not reflected in the Commission's approach towards ISDS in intra-EU and extra-EU BITs. Indeed, here the Commission largely ignores that ISDS raise similar concerns, for instance its effect on the internal market and its compatibility with the principle of autonomy.

ISDS allows investors to pursue actions for damages before an international tribunal. Where this benefit is available to a selected group of investors on the internal market, while other investors in a comparable situation are left with judicial recourse before domestic courts only, the system is discriminatory. Unlike domestic courts, investment tribunals are neither entitled to refer questions on the interpretation of EU law to the Court of Justice of the European Union (CJEU), nor bound by the primacy of EU law and the case law of the CJEU.[53] More generally, it facilitates certain investors to pick-and-choose the more favorable procedural framework.[54] This situation may be problematic for the internal market, but it is by no means only symptomatic for investor-state arbitration under intra-EU BITs. On the contrary, a company that is incorporated in a Member State but which is owned or controlled by a national of a third country constitutes a company in accordance with Article 49 TFEU as well as, under certain circumstances, an investor under an extra-EU BIT.[55] It is noteworthy, that the CJEU has already addressed this issue and determined that the nationality of a person or entity, which owns or controls a corporation, is not a criterion that justifies differential treatment.[56] However, while the effect is similar to that under intra-EU BITs, it has not received any attention in the extra-EU context. Additionally, the *Micula* dispute has illustrated how investment awards might have an adverse effect on the internal market. In *Micula*, a dispute brought under the Sweden-Romania BIT, the award effectively reinstated illegal state aid, which Romania formerly withdrew in accordance with the Treaty. In these instances, the investment award constitutes a direct violation of EU law.[57] EU rules on state aid apply to all entities on the internal market including those in foreign ownership. A scenario *à la Micula* is, thus, also conceivable in an extra-EU context.

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[52] ibid, paras 127-129.

[53] Wehland (n 27), 300.

[54] Miron discusses the relationship of arbitration tribunals with the CJEU and points out that: '[the CJEU case law] may be identifying arbitration as a "safe shore" from the application of EU law, whenever the European norms may be disadvantageous for the party commencing arbitral proceedings', see Smaranda Miron, 'The Last Bite of the BITs – Supremacy of EU Law versus Investment Treaty Arbitration' (2014) 20(3) European Law Journal 332, 334.

[55] Markus Burgstaller, 'Nationality of Corporate Investors and International Claims against the Investor's Own State' (2006) 7(6) The Journal of World Investment & Trade 857.

[56] *Factortame II* (n 28), paras 29-33.

[57] Christian Tietje and Clemens Wackernagel, 'Enforcement of Intra-EU ICSID Awards' (2015) 16(2) The Journal of World Investment and Trade 205.

As far as the principle of autonomy is concerned, the position of the Commission is remarkably ignorant. In accordance with Article 267 TFEU domestic courts of the Member States can, and in certain circumstances must, refer questions on the interpretation of EU law to the CJEU. In *Opinion 1/09* the CJEU clarified that international agreements, which establish an international court or tribunal, may not '...deprive [domestic] courts of their task, as "ordinary" courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU.'[58] Relying on *Opinion 1/09* the Commission argues in its official letter of notification that intra-EU investment tribunals are incompatible with the Treaty. Consequently, the Commission believes these investment tribunals to be concerned with the interpretation of EU law. This view is explicitly supported by the Commission's reasoning in its *amicus* briefs in, *inter alia, EURAM*.[59] Yet again, this concern does not arise with regards to ISDS provisions in extra-EU BITs. This is nonsensical considering that the intra-EU or extra-EU character of an investor-state tribunal is irrelevant for the question of whether or not the tribunal is seized with questions on the interpretation of EU law.

Unlike the Member States,[60] the Commission appears to see no link between the exercise of its external competence under Article 207 TFEU and its policy towards intra-EU BITs.[61] This overreliance on 'intra-EU' and 'extra-EU' as distinct legal concepts or categories of international agreements is entirely misleading. They are indeed only relevant from an EU law perspective, but have no bearing whatsoever on international investment tribunals. Hence, it would be erroneous to confine intra-EU BITs to the internal market and extra-EU BITs to EU foreign trade policy, without addressing substantive overlaps.

V. CONCLUDING REMARKS

This essay challenges the notion of coherence in EU foreign investment policy. The brief assessment of policy documents and legal positions demonstrates that the internal and external aspects of this policy area are incoherent and partly inconsistent (horizontal incoherence), which is

[58] Opinion 1/09 *European Patents Court* [2011] ECR I-1137 , para 80.
[59] *EURAM* (n 22), Award on Jurisdiction, para 120.
[60] Observations of the Netherlands, *Achmea* (n 24), Award on Jurisdiction, para 163:, 'Currently, the European Union Member States are awaiting proposals from the European Commission regarding the future policy towards the new competence pursuant to article 207 TFEU, which will also touch upon the matter of existing BITs of the Member States. [...] The Netherlands deems it inappropriate to anticipate or even predetermine the question of the status of intra-EU BITs [...]'.
[61] Observations of the Commission, ibid, para 176: '[U]nlike intra-EU BITs, it is important to clarify that the European Commission does not take issue with third party arbitration mechanisms set out in [extra-EU] BITs entered into with non-EU countries.'

manifested through diverging positions within the Commission (institutional incoherence). Vertically, this incoherence manifests itself through the lack of a common position amongst the Member States. The reason for the schizophrenic position of the Commission can be found in the overreliance on 'intra-EU' and 'extra-EU' as concepts with conclusive policy ramifications. This is institutionally reflected in an internal bifurcation underlying the delegation of responsibilities to DG FISMA and DG TRADE. It is pivotal that both DGs see beyond this conceptual differentiation and conceive ISDS as a creature of international law, with common characteristics irrespective of its origin in intra-EU or extra-EU BITs. Coherence in this context requires DG FISMA and DG TRADE to work closer together and to coordinate their positions. This does not mean that policies directed at ISDS in an intra-EU and extra-EU context must be identical. Indeed, they cannot! The intricate web of intra-EU BITs simply cannot be renegotiated in accordance with the internal market, while compatibility of ISDS in extra-EU BITs is almost exclusively a drafting issue. As a positive process, coherence merely requires that overlapping concerns be addressed clearly and comprehensively in a manner that is consistent and coherent across the internal and external dimension of this area of EU policy.

In the context of intra-EU BITs, coherence would furthermore be strengthened if the Member States were to align their positions. If the Member States that are commonly home countries to investors would suddenly act as *amicus* in support of a common EU position, it might finally also persuade investment tribunals. In the extra-EU context it would also be helpful if disagreements between Member States were addressed internally while displaying a common position externally. This could be achieved if the Commission becomes the *prima facie* respondent to investment disputes, not unlike the situation in the WTO. It is premature to predict how investment disputes will be handled, but the recently enacted regulation on financial responsibility under EU investment agreements provides a gateway in this respect.[62]

Lastly, while the Lisbon Treaty attempted to reinforce the notion of coherence through institutional reform, reality suggests that existing or subsisting incoherence is more deeply embedded in diverging inter-institutional and domestic policy interests. It is unhelpful that coherence is often referred to in terms of a notion, a concept, a guiding principle or even a mere idea, underlining its non-justiciability in EU law.[63] Coherence is accordingly achieved through other principles of EU law and first and foremost through the principle of loyal cooperation.[64] Loyal cooperation is

[62] Regulation 912/2014 (n 32); for a comprehensive analysis of the Regulation and the respondent mechanism see Hannes Lenk, 'Issues of attribution: responsibility of the EU in investment disputes under CETA' (2016) Transnational Dispute Management (forthcoming).
[63] Gauttier (n 10), 24; Wessel (n 2), 1152.
[64] Hillion (n 8).

indeed instrumental in achieving coherence, but compliance with the principle can be satisfied without ultimately resulting in positive coherence. Therefore, to avoid coherence from becoming a grand idea – which, although perceived desirable from afar, can never actually be achieved – the time may be ripe to reconsider coherence in terms of a legal principle of EU law.

FRAGMENTATION AND INTER-JUDICIAL DIALOGUE: THE CJEU AND THE ICJ AT THE INTERFACE

Eva Kassoti*

This contribution explores the question whether the CJEU has promoted or, conversely, weakened the coherence of the international legal system through its practice within the broader context of the fragmentation debate. In order to do so, the article begins by inquiring into the notions of 'fragmentation' and 'coherence' and argues that the two terms are used to connote a wide array of meanings. Focusing on the judicial aspect, the article continues by examining the extent to which the CJEU is willing to engage with external sources by directly citing the jurisprudence of the ICJ in cases involving questions of public international law. It is demonstrated, that, in its practice, the Court shows a high degree of deference to the authority of the ICJ by routinely having recourse to the latter's case-law. In this light, the article puts into question the manner in which the EU courts are often portrayed in the literature: by refusing to make their own bold pronouncements on international law, the EU courts are actually conducive to the coherence of the international legal system. The article concludes by highlighting that, in order to remain informed and relevant, the fragmentation/coherence debate must also include the 'trans-judicial communication' perspective.

Keywords: fragmentation, coherence, self-contained regimes, judicial dialogue, EU law, international law, ICJ, CJEU, constitutionalism.

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I. INTRODUCTION

In the past decade, the question as to whether, and to what extent, international law is a fragmented legal order has been at the forefront of academic discourse. Irrespective of whether or not fragmentation actually exists (and if so, whether it is best perceived as a problem or as the natural outgrowth of a continuously evolving legal order) it remains true that the move from the half-century judicial monopoly of the International Court of Justice (ICJ) to its present co-existence with the Court of Justice of the European Union (CJEU) raises a host of questions. The EU law's long-standing claim to autonomy and its latest manifestations in the *Kadi*[1] and *Intertanko*[2] judgments have led a number of lawyers to vociferously criticise the Court for being an 'agent of dualism' – thereby endangering the coherence of the international legal order.[3] Nevertheless, critics tend to focus on EU rhetoric and on particular judgments as proof of the EU's contribution to the fragmentation of the international legal order, while, at the same time, ignoring other judgments by the same Court that are undoubtedly 'international law friendly', such as *Brita*[4] and *ATAA*.[5] More fundamentally, the fragmentation narrative tends to overlook the existence and extent of judicial dialogue between the ICJ and the CJEU.

In this light, the present article purports to revisit the question whether the EU Courts have promoted or weakened coherence in international law through their practice by exploring the place of the ICJ's case-law in the legal disputes of the EU. The article begins with some preliminary remarks on the relationship between EU and international law. It asserts that, although the interface between the two legal orders is not without problems, there are no irreconcilable, systemic differences between them. More particularly, it is shown that far from constituting a so-called 'self-contained' regime, the EU shows a high degree of deference for international law. In this respect, it is argued that the EU law's claim to autonomy is not incompatible with the open-ended structure of the international legal system, which, due to its horizontal and decentralised nature, permits the development of highly specialised sub-systems.

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[1] CJEU, Joined Cases C-584/10 P, C-593/10 P, C-595/10P *European Commission v Yassin Abdullah Kadi* [2013] ECLI:EU:C:2013:518.

[2] CJEU, Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-04057.

[3] See for example Jan Wouters, Jed Odermatt, Thomas Ramopoulos 'Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law' Leuven Centre for Global Governance Studies Working Paper No. 96 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2274763 (accessed 31 August 2015).

[4] CJEU, Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-01289.

[5] CJEU, Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-13755.

The article continues by mapping out the debate on the fragmentation of international law, as this constitutes the broader *problematique* within which the question of coherence has been raised in recent years. It is shown that fragmentation has both normative (normative fragmentation) and institutional aspects (substantive fragmentation). The discussion focuses on the latter and substantive fragmentation is defined here as the increased risk of divergent interpretations of international law norms due to the recent proliferation of international courts and tribunals.

Against this backdrop, the article zooms in on the notion of coherence and claims that, in the context of substantive fragmentation, coherence amounts to consistency of *judicial reasoning*, i.e. ascertaining whether the CJEU's reasoning is compatible with that of the ICJ in similar cases – irrespective of whether international law is given precedence in a given case or not. It is asserted that an important variable of adjudicative coherence is the extent to which the CJEU is cognizant of, and engages with, the case-law of the ICJ – since the latter remains the only judicial body with universal jurisdiction over all matters of international law. The article proceeds to examine the patterns of judicial dialogue between the two courts and argues that the CJEU's approach is much more conducive to the unity of the international legal order than it is given credit for. Here, the article identifies a number of areas where the CJEU makes copious references to the authority of the ICJ and demonstrates that, in recent years, the EU courts have been increasingly more receptive to external sources. At the same time, the paper exemplifies how the occasional reluctance of the CJEU to engage in depth with complex international law questions may undermine the quality of trans-judicial dialogue between the two courts. The article concludes by stressing the importance of adding the 'judicial dialogue' perspective to the on-going fragmentation debate. The coherence of the 'incorrigibly plural' world of international legal development cannot be assessed solely in terms of the traditional binaries of validity/invalidity; rather the level and extent of interaction among bodies embedded in different legal orders need to be also evaluated.

II. International Law and EU Law: Some Preliminary Remarks

Although the focus of the article is to examine the extent to which the ICJ and the CJEU engage in inter-judicial dialogue within the overall *problématique* of the so-called 'fragmentation' of the international legal order, it is helpful, from the outset, to offer some preliminary remarks on the relationship between international and EU law. This will provide some background to the discussion that will unfold in the following sections as well as clarify our own vantage point. It is a truism to say that the relationship between international law and EU law is complicated. However, it must be borne in mind that there is an inherent complexity in conceptualising the relationship between any two given legal orders – especially the relationship between a horizontal, decentralised legal order

with weak enforcement mechanisms (international law) and a highly integrated, multi-layered and developed legal order with strong enforcement mechanisms (EU law). The main point advocated in this section is that the level and extent of this complexity is perhaps over-exaggerated: much depends on *who* is looking at the relationship and *what* they are exactly looking at. As a general rule, international lawyers tend to look at EU law merely as a sub-system of international law,[6] while EU lawyers tend to stress the autonomous and *sui generis* nature of EU law and to overlook its links to general international law.[7] However, as it will be shown below, once the debate moves from general theoretical points (and thus, beyond disciplinary biases) to the specifics, it becomes apparent that EU law poses little systemic threat to international law. More particularly, the section argues that: a) The EU does not exist in a systemic vacuum. On the contrary, both the EU Treaties and the practice of the CJEU reveal a large degree of *Völkerrechtsfreundlichkeit;* and b) international law, due to its lack of vertical integration, is, by its very nature, amenable to the creation of *leges speciales* – without this endangering its integrity.

First, any discussion involving questions of 'fragmentation of international law' presupposes the existence of an *international legal system* – however diffuse and decentralised that may be – the unity of which may (or may not) be threatened by the existence of specialised rules or by the practice of different actors and courts *within that system*.[8] Thus, it is necessary to provide a rudimentary blueprint of the relationship between international and EU law in order to ascertain whether the latter constitutes a 'self-contained' regime, namely a 'closed legal circuit' with a complete set of rules and, thus, no need to fall back on rules of general international law.[9] If EU law is indeed a self-contained regime, then this would render any

[6] See for example Daniel Bethlehem, 'International Law, Community Law, National Law: Three Systems in Search of a Framework', in Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law 1998), 169, 178.

[7] See for example the statement by V. Arangio-Ruiz (Special Rapporteur of the International Law Commission (ILC) on State Responsibility): 'Generally, the specialists on Community law tended to consider that the system constituted a self-contained regime. Whereas scholars of public international law shared a tendency to argue that treaties establishing the Community did not really differ from other treaties.' Summary Record of the 2266th meeting, *Yrbk. of the ILC* 1992, Vol. I, p 76, para 2. See also Joseph Weiler, 'The Transformation of Europe' (1991) Yale Law Journal 2403, 2422; Leigh Hancher, 'Constitutionalism, the Community Court and International Law' (1994) NYIL 259, 265-266.

[8] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13/04/2006, (finalised by Martti Koskenniemi), para 15
http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf (accessed on 31 August 2015), hereinafter referred to as the Report on Fragmentation.

[9] Bruno Simma, 'Self-Contained Regimes' (1985) NYIL 111. According to Simma, the term 'self-contained regimes' is used to 'designate a certain category of subsystems, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules.' ibid, at 115-116. For an overview of practice and literature pertaining to self-contained regimes, see also the ILC's Report on Fragmentation (note 8), 65-100.

debate on points of convergence and divergence between EU and international law largely redundant: there is not much point in debating whether certain substantive or institutional aspects of EU law, or of any field of law for that matter, promote or pose a threat to the coherence of international law, unless the point of departure is that these fields are actually embedded in the same legal system.

Both the EU Treaties and the case-law of the CJEU show a high degree of deference for international law. Article 216(2) TFEU expressly recognises the binding character of international agreements concluded by the Union and Article 3(5) TEU stipulates that the Union shall contribute to 'the strict observance and development of international law.' The CJEU has consistently held that international agreements binding on the EU form an integral part of the Union legal order and are, thus, directly applicable.[10] Furthermore, in its practice, the Court frequently has recourse to international law, for example in order to establish the international law meaning of terms referred to by EU rules.[11] As far as customary international law is concerned, the Court has expressly acknowledged its binding force as a source of EU law.[12] It also merits attention that the EU participated in the ILC's effort to elaborate a unified set of rules concerning the responsibility of international organisations, which culminated in the 2011 Draft Articles on the responsibility of international organisations[13] and is actively contributing to the Commission's current attempt to shape a common understanding of the process of identifying customary international law.[14] In this light, it is evident that EU law is by

[10] CJEU, Case 181/73 *R & V Haegeman v Belgian State* [1974] ECR I-449, para 5. For an overview of the relevant case-law see generally Jan Wouters, Andre Nollkaemper, Erika De Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (T.M.C. Asser Press 2008).

[11] See for example ECJ, Case C-63/09 *Axel Walz v Clickair SA* [2010] ECR I- 4239, para 27. Here the Court referred to the 2001 Articles on Responsibility of States for Internationally Wrongful Acts prepared by the ILC in order to ascertain the concept of 'damage' provided for in the 1999 Montreal Convention for the Unification of Certain Rules for International carriage by Air. See also Christina Eckes, 'International Law as Law of the EU: The Role of the European Court of Justice', in Enzo Cannizzaro, Paolo Palchetti, Ramses Wessel (eds), *International Law as Law of the European Union* (Brill 2012), 353-377.

[12] See for example ECJ, Case C-162/96 *A. Racke GmbH &Co v Hauptzollamt Mainz* [1998] ECR I-3655, para 46. For a recent confirmation of this principle, see also ECJ, Case C-366/10 (n 5), para 101. See also Allan Rosas, 'The European Court of Justice and Public International Law' in Jan Wouters, Andre Nollkaemper, Erika De Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (T.M.C. Asser Press 2008)., 80; Alessandra Gianelli, 'Customary International Law in the European Union' in Enzo Cannizzaro, Paolo Palchetti Paolo, Ramses Wessel (eds), *International Law as Law of the European Union* (Brill 2012), 95-98.

[13] Draft Articles on the Responsibility of International Organisations with commentaries, adopted by the ILC in its 63rd session (2011), *Yrbk of the ILC* 2011, Vol II.

[14] See for example the statement made by the delegation of the EU to the UN at the Sixth Committee on the topic of identification of customary international law,

no means 'clinically isolated' from general international law: both the Treaties and the Court expressly acknowledge international law as an integral part of the EU legal order. This proposition tallies with the findings of the ILC in its report on fragmentation. Having examined a number of so-called 'self-contained' regimes the Commission concluded that 'none of the treaty-regimes in existence today is self-contained in the sense that the application of general international law would be generally excluded.' [15]

Secondly, a perusal of the literature on the topic readily shows that a number of distinct legal issues (such as the question of fragmentation of international law, the question of the ranking of international law within the EU legal order, as well as the question of direct effects of international law within the EU legal order) are indiscriminately 'thrown into the crucible' in order to buttress arguments about the (allegedly) irreconcilable, systemic differences between EU and international law.[16] Although this contribution focuses on fragmentation, a few words need to be mentioned at this juncture regarding this 'crucible approach' often encountered in theory. It goes without saying that any objective assessment of the interplay between any two given legal orders necessitates that distinct legal questions are not conflated. While the extent to which international law is given direct effects and its ranking within the EU legal order may indeed serve as *indicia* of the degree of openness of EU law to international law, they may not serve *as indicia of the existence of any systemic differences between the two legal orders*. International law does not regulate its own status within the EU legal order, in the same way that it does not regulate its own status within the legal orders of States or of international organisations.[17] Traditionally, questions of incorporation and of direct effect of international obligations have been regarded as an internal affair; international law being mainly concerned with the result, namely with the question as to whether or not there has been a breach of an international law obligation in a specific case.[18] This much can be deduced from Article 27 of the Vienna Convention on the Law of Treaties[19] (VCLT) and from

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03/11/2014 http://eu-un.europa.eu/articles/en/article_15692_en.htm accessed on 31 August 2015.

[15] ILC Report on Fragmentation (n 8), para. 172.

[16] See for example, Jean D'Aspremont, Frédéric Dopagne, 'Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders' (2008) *ZaöRV* 939, 947-950.

[17] Ramses Wessel, 'Reconsidering the Relationship Between International and EU Law: Towards a Content-Based Approach?' in Enzo Cannizzaro, Paolo Palchetti , Ramses Wessel (eds), *International Law as Law of the European Union* (Brill 2012), 18.

[18] Eileen Denza, 'The Relationship Between International and National Law' in Malcolm Evans (ed), *International Law* (4th edn, OUP 2014), 416; James Crawford, *Brownlie's Principles of Public International Law* (8th edn OUP 2012), 57-58.

[19] Vienna Convention on the Law of Treaties, concluded on 23/05/1969 https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (accessed on 31 August 2015). According to art 27: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

the case-law of the ICJ.[20] The Court confirmed this position recently in the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*: 'The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153(9) ... Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, *if such an effect is permitted by domestic law*.'[21]

Finally, this introductory section shall conclude with a few general remarks on what – the present author at least believes – lies at the heart of the debate regarding the interface between the two legal orders, namely the (seemingly) irreconcilable tension between EU and international constitutionalism. Faced with the recent proliferation of actors, processes and normative outputs, a number of international lawyers have attempted to bring some method in the madness so to speak and retain the unity of international law by articulating and promoting constitutionalist approaches to international law.[22] Although there are different (and often conflicting) accounts of international constitutionalism,[23] mainstream international constitutionalist thinking assumes that certain universal values and principles exist and are shared by all sub-systems of international law – including EU law.[24] This seems, on the face of it at least, to conflict with and undermine EU constitutionalism, namely the idea that the EU legal order is an autonomous constitutional legal order.[25] Without dwelling on the merits of the international constitutionalist thesis (something that would be well beyond the ambit of the present work), it needs to be stressed that, from an international law point of view, EU constitutionalism is not at variance with the systemic nature of international law. International law is a legal system – albeit a diffuse, horizontal one that allows its subjects to contract out of rules of general application and create functional sub-systems of law.[26] Thus, the EU's

[20] See the case-law mentioned in Andre Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011), 117 ff.

[21] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*, *Judgment*, *ICJ Reports* 2009, p 3, para 44 (emphasis added).

[22] Jan Klabbers, 'Setting the Scene' in Jan Klabbers, Anne Peters, Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009), 18-19.

[23] For an overview see Christine Schwöbel, 'Organic Global Constitutionalism' (2010) LJIL 529, 533.

[24] Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) Harv. Int'l LJ 1, 38-40.

[25] D'Aspremont, Dopagne (n 16), 951.

[26] The 'autonomous' character of the legal orders created by the constituent instruments of international organisations was also acknowledged by the ICJ in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *Advisory Opinion*, ICJ Reports 1996, 66. The Court stated that ' ...the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of international law endowed with a certain *autonomy*, to which the parties entrust the task of realizing common goals.' ibid, para 19 (emphasis added).

claim to autonomy is not problematic to the unity of the system since it conforms to a fundamental rule thereof, namely the *lex specialis* rule.[27] In the words of Crawford: '[T]he problems posed by self-contained regimes should not be exaggerated. If States wish to enter into comprehensive relationships that, in effect, contract out of the remainder of the law (peremptory norms aside) they are free to do so.'[28]

The proposition that the autonomy of a particular sub-system does not pose any systemic threats to the whole international law edifice also finds support in the writings of international law constitutionalists. Thus, according to Peters, 'sector constitutionalization', namely the constitutionalist claims raised by different sub-systems, such as EU law, is no anomaly since 'the various processes of institutionalization on different levels do not exclude each other.'[29] In this sense, there is nothing intrinsically incompatible with viewing the EU legal order both as an autonomous, constitutional order and as one embedded in the international legal system.[30]

III. THE MULTIPLE SHADES OF FRAGMENTATION

The previous section canvassed a few general remarks on the interplay between international and EU law. It was shown therein that the tensions that are often assumed to be inherent in the interface between the two legal orders are largely overstated. More particularly, it was proven that: a) far from being a self-contained regime, EU law is embedded in the international legal system to the extent that both the Treaties and the case-law of the CJEU explicitly refer to the applicability of international

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[27] Bruno Simma, Dirk Pulkowski, 'Of Planets and The Universe: Self-Contained Regimes in International Law' (2006) EJIL 483, 500.

[28] James Crawford, 'Chance, Order, Change: The Course of International Law' (2013) Recueil des Cours 9, para 392.

[29] Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters, Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009), 202.

[30] Such a proposition shows that, to a certain extent, the 'fragmentation' discourse is delusive. As Dirk Pulkowski aptly remarks: 'A more practical, hands-on approach would be to comprehend "unity" and "fragmentation" as discursive categories (rather than structural characteristics) of international law. Every legal argument, to be convincing needs to refer to the universal system while, at the same time, taking account of the particularity of the regime ... Particularity and unity are, thus, *topoi* of international legal discourse that mutually depend on each other. Even in the world of legal argument, there is no universe without planets and no planet without universe ... In strong regimes, the law of the universe serves as a source of legitimacy, while the rules of the planet provide the kind of operational effectiveness that advances the goals of the regime. In weak regimes, the rules of the planet often embody a superior legitimacy. In this case, lawyers reach out for the law of the universe to increase the effectiveness of the planetary rules.' Dirk Pulkowski, 'Narratives of Fragmentation: International Law: International Law between Unity and Multiplicity' European Society of International Law (ESIL) Florence Agora Papers 2004 http://www.esil-sedi.eu/sites/default/files/Pulkowski_0.PDF (accessed on 31 August 2015), 10.

law rules in the internal EU legal order; and b) that international law being a legal system that lacks vertical integration may very well accommodate the development of highly integrated sub-systems, such as EU law, without this endangering its unity. Against this background, this section endeavours to explore the phenomenon of fragmentation as one of the two key elements of the present framework of enquiry – the other being coherence. It will be shown that the phenomenon has both normative (normative fragmentation) and institutional aspects (substantive fragmentation). This section will further show that although the problems associated with normative fragmentation can be – to a great extent – resolved by the already existing mechanisms of norm-conflict provided under international law, the same does not hold true for substantive fragmentation. It will be argued that substantive fragmentation, which is here defined as the possibility of divergent interpretations by the plethora of international adjudicatory bodies interpreting and applying the same substantive law, poses a great risk to the unity of international law. The section will conclude by stressing the significance of adding the CJEU perspective to the on-going substantive fragmentation debate; a perspective that has hitherto remained largely unexplored.

Although there is no consensus on an exact definition of 'fragmentation', the term is used in international legal parlance to describe two (inter-connected) problems closely associated with the recent expansion and diversification of international law. In its normative aspect, fragmentation can be seen as the offshoot of the erosion of general international law through the 'splitting up of the law into highly specialised "boxes"' that claim relative autonomy from each other and from the general law.'[31] This erosion carries the risk of the emergence of conflicting norms for the solution of the same legal issue (normative fragmentation).[32] Normative

[31] ILC Report on Fragmentation, (n 8), para 13.

[32] ibid, para 8; Larissa van den Herik, Carsten Stahn, "Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box' in Larissa van den Herik, Carsten Stahn Carsten (eds), *The Diversification and Fragmentation of International Criminal Law* (Brill 2012), 56; Gabriel Orellana Zabalza, *The Principle of Systemic Integration: Towards a Coherent International Legal Order* (Lit 2012), 22. The ILC Report offers some characteristic examples of normative fragmentation. In the context of the celebrated *Loizidou case*, the European Court of Human Rights (ECtHR) proclaimed that normal rules on reservations to treaties do not *per se* apply to human rights law. ILC Report (n 8), para 53; *Loizidou v. Turkey*, Judgment of 23 March 1995, ECHR Series A (1995) No. 310, p 29. Whereas the *Loizidou* case may be seen as an example of a conflict between general law and special law, normative fragmentation also encompasses cases of conflict between different types of special law. A classic instance of the latter category is the approach adopted by the Appellate Body of the WTO in the 1998 *Beef Hormones* case. In that case, the question arose as to the legal status of the 'precautionary principle' under WTO law. The Appellate Body opined that whatever the status of the principle under international environmental law, it had not become binding on the WTO. According to the ILC report, such an approach may suggest that 'environmental law' and 'trade law' may be governed by different principles. ILC Report (n 8), para 55; *EC-Measures*

fragmentation is a well-trodden topic: the ILC's voluminous study on fragmentation dealt with this very question[33] and it has been also comprehensively treated in the literature.[34] It suffices to note here that although this type of fragmentation often carries a negative connotation (as the first step to a dystopian nightmare of a legal order plunged into chaos), the final report of the Commission, as well as the final conclusions of the ILC Study Group on Fragmentation[35] offer a different account of normative fragmentation. The emergence of special treaty regimes, including environmental law, human rights law and EU law, is not accidental but seeks to respond to the emergence of new functional needs, such as the need to protect the environment, the need to protect the interests of individuals as well as the need for regional, economic integration.[36] Such treaty regimes may deliberately create new rules designed to displace general rules or rules of other specialised regimes in order for them to be effective.[37] However, it is important to note that 'such deviations do not emerge as legal-technical 'mistakes'. They reflect the differing pursuits and preferences of actors in a pluralistic (global) society. A law that would fail to articulate the experienced differences between the interests or values that appear relevant in particular situations or problem areas would seem altogether unacceptable.'[38] In this sense, normative fragmentation is to a certain extent inevitable: this type of fragmentation accounts for the expansion of international law into new areas in order to satisfy new needs.[39] At the same time, the ensuing problem of norm-collision is not insoluble. International law offers a toolbox of 'conflict-avoidance devices' in order to reach a workable solution, including rules of priority, such as rules of hierarchy (*jus cogens*), of specialty (*lex specialis*) and of temporality (*lex posterior*), as well as the principle of systemic integration (set out in Article 31(3)(c) of the VCLT).[40]

Renowned international lawyers, such as Simma[41] and Crawford,[42] have also espoused the Commission's sober and pragmatic approach to

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Concerning Meat and Meat Products (Hormones), 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras 123-125.

[33] ILC Report on Fragmentation (n 8), para 13.

[34] See for example Ralf Michaels, Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law' (2012) Duke Journal of Comparative & International Law 349; Wessel (n 17).

[35] Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, *Yrbk. of the ILC* 2006, Vol II.

[36] ibid, para 10

[37] ibid.

[38] ibid, para 11.

[39] Martti Koskenniemi, Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) LJIL 553, 560.

[40] ILC Report on Fragmentation (n 8), paras 46-222, 324-449; see also generally Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003).

[41] See generally Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) EJIL 265.

normative fragmentation. Both Simma and Crawford perceive this type of fragmentation as the natural corollary of a decentralised and horizontal legal order and find the international law mechanisms in place to deal with its ramifications sufficient.[43] As Crawford notes: 'Given that international law grew from bilateral relationships, it is difficult to see how anything has become more fragmented than it was at the beginning: it has just become more diverse. Multilateralism never meant complete coherence of treaty practice or State interest. If States are free to join multilateral treaties, they are free to create a partly fragmented system.'[44] As far as EU law is concerned, there is voluminous writing concerning the role of the EU in the normative fragmentation of international law,[45] and space limitations do not allow an in-depth exposition of the topic. It suffices to mention here that the *lex specialis* nature of EU law to general international law, as well as the principle of consistent interpretation, create a workable framework for the solution of norm conflicts between EU law and general international law on the one hand, and between EU law and other special regimes on the other.[46]

While normative fragmentation may be viewed as a pathology of the international legal system, and while the system may also provide adequate normative tools to cope with the challenges set thereby, the institutional aspect of the phenomenon is more worrisome. In its institutional aspect, the term is used to describe the ramifications of the recent proliferation of international courts and tribunals.[47] The recent expansion and diversification of international law have also fostered the mushrooming of new international courts and tribunals. This mushrooming coupled with the lack of any structural co-operation – let alone hierarchy – among the different judicial *fora* carry the risk of divergent (but 'equally authoritative')

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[42] Crawford (n 28).
[43] ibid, paras 303-309; Simma (n 41), 270-277.
[44] Crawford (n 28), para 394.
[45] See for example Tomer Brouder, Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing 2011); Karel Wellens, 'Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends' in Lambertus Barnhoorn, Karel Wellens (eds), *Diversity in Secondary Rules and the Unity of International Law* (Martinus Nijhoff 1995), 3-38; Leigh Hancher, 'Constitutionalism, the Community Court and International Law' in Lambertus Barnhoorn, Karel Wellens (eds), *Diversity in Secondary Rules and the Unity of International Law* (Martinus Nijhoff 1995), 259-298; Brunno De Witte, 'Rules of Change in International Law: How Special is the European Community' in Lambertus Barnhoorn, Karel Wellens (eds), *Diversity in Secondary Rules and the Unity of International Law* (Martinus Nijhoff 1995), 299-234; Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) Recueil des Cours 101-382.
[46] Allan Rosas, 'International Responsibility of the EU and the European Court of Justice' in Panos Koutrakos, Malcolm Evans (eds), *The International Responsibility of the European Union* (Hart Publishing 2013), 147-151. On the principle of consistent interpretation of EU law in the light of international law binding on the EU, see ECJ, case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 5; see also Bart van Vooren, Ramses Wessel, *EU External Relations Law: Text, Cases and Materials* (CUP 2014), 238-239.
[47] ILC Report on Fragmentation (n 8), paras 8, 13.

interpretations of international law (substantive fragmentation).[48] Two successive Presidents of the ICJ, Judge Schwebel[49] and Judge Guillaume,[50] as well as Judge Rosas of the CJEU[51] have warned against the dangers of conflicting interpretations of international law. Similarly, a number of eminent lawyers, such as Higgins[52] and Charney,[53] have been vocal about the (very real) threat posed by substantive fragmentation. And with good reason: the famous collision between the ICJ in *Nicaragua*[54] and the ICTY in *Tadic*[55] over the question of the degree of control necessary for the attribution of conduct to a State by paramilitary forces present in another proves that the prospect of conflicting interpretations is not a remote one.[56] While judges, lawyers and the ILC[57] have stressed the danger of substantive fragmentation, the manifestation of the phenomenon in the interplay between EU and international law remains under-researched. Thus, there is very little literature on whether the CJEU diverges from the

[48] Crawford (n 28), para 357; Philippa Webb, *International Judicial Integration and Fragmentation* (OUP 2013), 6; Note that some commentators use different terminology to describe the phenomenon referred to here as 'substantive fragmentation'. For example, Webb uses the term 'judicial fragmentation'; see also generally Tullio Treves, 'Fragmentation of International Law: The Judicial Perspective' (2007) Comunicazioni e Studi 821; Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) NYU Journal of International Law and Politics 791.

[49] Statement by Judge S. M. Schwebel, President of the ICJ, to the Plenary Session of the UN General Assembly, 26/10/1999 http://www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1 (accessed on 31 August 2015).

[50] Statement by Judge G. Guillaume, President of the ICJ, to the UN General Assembly, 26/10/2000 http://www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1 (accessed on 31 August 2015).

[51] Allan Rosas, 'Methods of Interpretation – Judicial Dialogue' in Carl Baudenbacher, Erhard Busek (eds), *The Role of International Courts* (German Law Publishers 2008), 187-188.

[52] Rosalyn Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) ICLQ 791, 794.

[53] Jonathan Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) NYU Journal of International Law and Politics 697, 699.

[54] ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua*, *Judgment, ICJ Reports* 1986, p 14, pp 64-65. In that case the ICJ articulated the 'effective control test' for attributing conduct of private individuals to a State. It is noteworthy that the Court affirmed the validity of this test in the 2007 *Bosnian Genocide case*. ICJ, *Application of the Convention on the Prevention and Punishment of the crime of Genocide, Judgment, ICJ Reports* 2007, p 43, p 410.

[55] ICTY, Appeals Chamber, *Prosecutor v. Tadic*, Judgment of 15 July 1999, IT-94-1-A, paras 94 ff. By way of contrast to the 'effective control' test adopted by the ICJ in *Nicaragua*, the ICTY adopted, in that case, the much broader 'overall control' test.

[56] For a commentary, see Antonio Cassese, 'The *Nicaragua* and *Tadic* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) EJIL 649.

[57] Note however that, although the ILC stressed the significance of 'substantive fragmentation', this type of fragmentation was excluded from the ambit of the Commission's work, thus making the question under consideration here all the more important. ILC Report (n 8), para 13.

ICJ when faced with questions of international law. [58] Of course, this is, to some extent, to be expected: the primary task of the Court is the interpretation and application of EU law, and not of international law. However, the EU is nowadays, undoubtedly, a major international actor and a party to a multitude of international agreements. Furthermore, as mentioned above, customary international law is making significant inroads into the case-law of the Court. The increased interface between EU and international law means that the potential for deviating practices is great. Thus, it would be very interesting to examine whether, and if so, to what extent, the CJEU is conducive to the fragmentation of international law through its case-law.

IV. FROM FRAGMENTATION TO COHERENCE

The previous section sketched out the fragmentation *problematique* and placed the research question dealt with in this article within this broader frame of reference. However, before examining whether the CJEU's practice contributes to the substantive fragmentation of international law, it is important, at this point, to establish the usefulness of such an undertaking. In other words, why does it matter whether or not the CJEU plays a role in the fragmentation of the international legal order? Are such inquires merely an academic exercise or are there any significant practical implications thereof? According to the ILC, attempts to grasp the phenomenon of fragmentation in its multiple manifestations are important since it 'puts to question the *coherence* of international law.'[59] Coherence is a desideratum and a standard towards which all legal systems strive – albeit its essence remains rather abstract.[60]

It is noteworthy that, although the concept has, undoubtedly, great epistemic force (as a number of coherence theories of knowledge, truth and ethics have been developed in recent years) no precise or all-encompassing definition may be found in the literature.[61] Rather, it seems that 'coherence' connotes a basic, human desire for intelligibility, for things to fit together and make sense[62] that can take many forms and thus, have many different definitions, according to the type of 'unintelligibility' one is faced with. In this light, it is asserted that, in the case at hand, much

[58] A notable exception in this respect is the work of Judge Rosas, an avid supporter of judicial dialogue, see (n 51).
[59] ILC Fragmentation Report (n 8), para 491 (emphasis added).
[60] ibid.
[61] See generally Kenneth Kress, 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity and the Linear Order of Decisions' (1984) Cal. L. Rev. 369.
[62] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994), 280; Jeremy Waldron, 'The Concept and the Rule of Law', New York University School of Law, Public Law & Legal Theory Research Paper Series Working Paper, No. 08-50
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273005 (accessed on 31 August 2015), 35.

depends on the type of fragmentation one wishes to tackle. 'Coherence' in the context of normative fragmentation differs from 'coherence' in the context of substantive fragmentation. As mentioned above, normative fragmentation refers to situations of norm-conflict, i.e. of having two valid and applicable norms that suggest incompatible solutions so that a choice must be made between them. In this scenario, retaining the coherence of the international legal system can be understood as finding a way to 'ensure ... or enhance ... the consistency of the rules of international law ... and contribute ... to avoiding conflicts between the relevant rules.'[63] The work of the ILC on fragmentation was exactly aimed at tackling such inconsistencies by providing guidelines for making a choice between conflicting norms and for justifying having recourse to one norm instead of another. However, although the abovementioned conflict solution techniques identified by the Commission may help to resolve normative conflicts, there is no guarantee that their application may equally avert conflicting interpretations of international law. Indeed, the lack of a final court of appeal at the international level means that different adjudicative bodies are largely free to give their own rendition of international law and thus, come to inconsistent interpretations thereof. Consequently, answers to the question of coherence in the context of substantive fragmentation must be sought elsewhere.

International lawyers who have extensively dealt with the phenomenon of substantive fragmentation, such as Charney and Webb, have linked coherence in this context to consistency in legal reasoning. Thus, according to Webb, adjudicative coherence 'requires that similar factual scenarios and similar legal issues are treated in a consistent manner, and that any disparity in treatment is explained and justified. The desired outcome is harmony and compatibility, which allow for the co-existence of minor variations and of tailoring of solutions for particular cases'[64] Similarly, in his 1998 Hague Lectures, Charney found that the question of coherence in international adjudication amounted to exploring whether, despite minor variations, international courts are engaged in the same dialectic and render decisions that are largely compatible.[65]

The proposition that coherence, in this context, is synonymous with an integrated approach to legal reasoning also finds support in legal philosophy. According to Dworkin, one of the most influential writers on coherence in law, considerations of fairness require that that like cases must be treated alike and, as such, adjudicative coherence is a principle of formal justice, as well as of good adjudication.[66] In a similar vein, Waldron

[63] *EC- Measures Affecting the Approval and Marketing of Biotech Products*, 7 February 2006, WT/DS291-293/INTERIM, p 299, para 7.68.
[64] Webb (n 48), 5.
[65] Charney (n 45), 137.
[66] Ronald Dworkin, *Law's Empire* (Fontana Press 1986), 165-167. See also Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994), 103; Joseph Raz, *Practical Reason and Norms* (2nd edn, Princeton University Press 1990), 123-148.

describes coherence in law as something akin to a 'requirement of consistency: people must not be confronted by the law with contradictory demands ... Beyond that, there is a felt requirement essential to law that its norms make some sort of sense in relation to another, ... we should interpret them so that the point of one is not defeated by the point of another.'[67]

There are a number of reasons underpinning the need for judicial integration. One of the main aims of international law is to promote stability and predictability in international relations.[68] This aim cannot be achieved unless international courts stay within known patterns and deviate therefrom only with a sound justification.[69] Moreover, in a decentralised legal order with weak enforcement mechanisms much depends on the willingness of its subjects to comply with the obligations they assume. Significant variations in the interpretation of general international law may threaten the legitimacy of the rules of the system. This, in turn, threatens and undermines the confidence placed by States in the way international law is applied.[70] Therefore, retaining the uniformity of law at the international level seems to be more important, than in national legal systems with their strong enforcement mechanisms.[71] More importantly, adjudicative coherence fulfils the abovementioned human desire for intelligibility. As each new ruling takes its place in the existing system, the whole system becomes fathomable to our intelligence, thereby enticing compliance.[72] As Waldron aptly notes: 'Above all, law's systematicity affects the way that law presents itself to those it governs. It means that law can present itself as a unified enterprise of governance that one can make sense of ... In this way, the law pays respect to the persons who live under it, conceiving them now as bearers of individual reason and intelligence.'[73]

Judicial dialogue, namely receptiveness to and visible engagement with the case-law of other courts,[74] is undoubtedly an important parameter of

[67] Waldron (n 62), 35.
[68] Thomas Grant, 'A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law' (1998) FYIL, 231.
[69] Christoph Schreuer, Matthew Weiniger, 'A Doctrine of Precedent?' in Peter Muchlinski, Federico Ortino, Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008), 1189.
[70] Webb (n 48), 7; Charney (n 45), 360.
[71] Charney (n 45), 134.
[72] Waldron (n 62), 35.
[73] ibid, 37.
[74] Francis Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice' (2003) Tex. Int'l L. J. 547, 553, 556; Antonios Tzanakopoulos, 'Judicial Dialogue as A Means of Interpretation', Oxford Legal Studies Research Paper No. 71/2014
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2497519 (accessed on 31 August 2015), 3; Melissa Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law' (2005) Georgetown LJ 487,490.

adjudicative coherence. It has also become a sort of leitmotif for ICJ judges. According to Judge Schwebel, 'judges themselves must realize the danger of fragmentation in the law, and even conflicts of case-law, born of the proliferation of courts. A dialogue among judicial bodies is crucial.'[75] In the same vein, Judge Guillame stressed that, in order to combat fragmentation, international judges 'must inform themselves more fully of the case-law developed by their colleagues, conduct more sustained relationships with other courts, in a word, engage in constant inter-judicial dialogue.'[76] In his Declaration in *Diallo*, Judge Greenwood opined that '[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, ... it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other courts and tribunals.'[77]

Transnational judicial communication may take different forms. From the different taxonomies to be found in the literature,[78] three main categories may be discerned. First, courts may engage in vertical judicial dialogue. This form of communication refers to the jurisprudential interaction between supranational or national courts within the context of a formal, hierarchical system.[79] For instance, the interaction between national courts (e.g. between the court of first instance, the court of appeals and the supreme court) and between international courts in an institutionalised hierarchical relationship (e.g. within the EU: the Court of Justice, the General Court and the Civil Service Tribunal) would fall within this category. Secondly, trans-judicial communication may take place between courts that operate at the same level, or have, more or less, the same status (horizontal judicial dialogue).[80] Bodies that engage in horizontal dialogue may belong to the same regime (e.g. two national courts of appeal), or they may belong to different judicial systems (e.g. national courts in different countries).[81] Finally, and more importantly for our purposes, judicial

[75] Statement by Judge Schwebel (n 49).
[76] Statement by Judge Guillaume (n 50).
[77] Declaration by Judge Greenwood in *Ahmadou Sadio Diallo*, ICJ Reports 2012, p 391, para 8. See also Rosalyn Higgins, 'The ICJ and the ECJ: Two Courts in Europe' (2003) ICLQ 1.
[78] Allan Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) EJLS 1; Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) U. Rich. L. Rev. 99. On grounds of completeness, it needs to be mentioned that Slaughter has identified a further category of judicial dialogue. Mixed vertical-horizontal communication occurs when a supranational body, such as the ECtHR, serves as a conduit for the dissemination of national legal practices. Anne-Marie Slaughter, ibid, 111-112. Apart from the categories mentioned here, Rosas has also identified two further categories of trans-judicial communication. One category concerns the special relationship which exists between the CJEU and national courts when the latter are faced with problems of interpretation or validity of EU law, while the other concerns situations of overlapping jurisdiction between two international courts. Allan Rosas, ibid, 6, 12.
[79] Rosas (n 78), 6; Slaughter (n78), 106-107.
[80] Rosas (n 78), 13; Slaughter (n 78), 103-105.
[81] Rosas (n 78); Slaughter (n 78).

dialogue may concern the interaction between a judicial body called upon to apply a certain set of international rules and the dispute settlement mechanism specifically designed to interpret these rules (semi-vertical judicial dialogue).[82] This type of dialogue is evidenced by direct citation to the case-law of the main interpreter as the latter constitutes persuasive authority.[83] The relationship between the CJEU on the one hand and the ECtHR, the EFTA Court and the ICJ, on the other, are examples of this type of dialogue. Of course, the CJEU is not formally bound by 'external' case-law. However, as Rosas aptly notes, 'it makes sense to follow, or at least be inspired of, what this other dispute settlement mechanism is producing'[84] – especially, since these courts have been specifically set up to interpret the international rules that the EU has committed itself to applying.

To sum up, this section explored another key element of the fragmentation debate, namely the notion of coherence. It was shown that coherence lends itself to different interpretations and its exact definition varies according to the context within which it is used. The section continued by arguing that, within the context of substantive fragmentation, coherence is associated with consistency in the legal reasoning across different courts and tribunals, namely with treating similar legal issues in a consistent manner. Judicial dialogue, that is engagement with the jurisprudence of other international judicial bodies, was identified as an important factor contributing to adjudicative coherence. The section briefly introduced different categories of transnational judicial communication and concluded that, for the purposes of the present work, the semi-vertical dialogue between the CJEU and the ICJ is of particular importance. In the section to follow, the article will examine the question whether the CJEU is conducive to the fragmentation, or, conversely, to the coherence of the international legal order, by examining the extent of judicial dialogue between the two courts as evidenced by the direct citation of ICJ judgments by the CJEU.

V. THE CJEU AND THE ICJ AT THE INTERFACE: PATTERNS OF JUDICIAL DIALOGUE

A survey of the ever-burgeoning CJEU jurisprudence reveals that the EU courts, when faced with questions of international law, show a high degree of deference to the case-law of the ICJ and use it as an authoritative interpretation of international norms that are of relevance to their work. This is especially the case when they are faced with questions of customary international law – chiefly relating to international law of the sea and to

[82] Allan Rosas (n 78), 8.

[83] Slaughter (n 78), 124-125. On the concept of 'persuasive authority' see Patrick Glenn, 'Persuasive Authority' (1987) McGill L. J. 261, 294.

[84] Rosas (n 51), 190. See also Christina Eckes, 'The Court of Justice's Participation in Judicial Discourse: Theory and Practice' in Marise Cremona, Anne Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2013),185-188.

international treaty law.[85] In *Poulsen*, the Court relied on a number of ICJ judgments in order to establish that certain provisions of the 1958 Geneva Conventions and the 1982 United Nations Convention on the Law of the Sea reflect customary international law. According to the Court:

> In this connexion, account must be taken of the Geneva Conventions of 1958 ... in so far as they codify general rules recognized by international custom, and also of the United Nations Convention of 10 December 1982 on the Law of the Sea ... It has not entered into force, but many of its provisions are considered to express the current state of customary international maritime law (see judgments of the International Court of Justice in the Delimitation of the Maritime Boundary in the Gulf of Maine Region Case, Canada v United States of America, ICJ [1984], p. 294, paragraph 94; Continental Shelf Case, Libyan Arab Jamahiriya v Malta, ICJ [1985], p. 30, paragraph 27; Military and Paramilitary Activity in and against Nicaragua Case, Nicaragua v United States of America, substantive issues, ICJ [1986], p. 111-112, paragraphs 212 and 214.[86]

Similarly in *Weber*, the Court expressly referred to the *North Sea Continental Shelf* judgment in order to establish the legal regime applicable to the continental shelf; a question of international law that was relevant for determining whether work carried out in the continental shelf area is to be regarded as work carried out in the territory of a Member State. The Court stressed that:

> [T]he International Court of Justice has ruled that the rights of the coastal State in respect of the area of continental shelf constituting a natural prolongation of its land territory under the sea exist *ipso facto* and *ab initio* by virtue of the State's sovereignty over the land and by extension of that sovereignty in the form of the exercise of sovereign rights for the purposes of the exploration of the seabed and the exploitation of its natural resources (judgment of 20 February 1969 in the so-called *North Sea Continental Shelf* cases, Reports, 1969, p. 3, paragraph 19).[87]

More recently, in the *Salemnik* case, the question of the applicability of EU law to an individual working on a platform on the continental shelf of a

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[85] For earlier, detailed accounts of the extent of trans-judicial communication between the CJEU and the ICJ, see Allan Rosas, 'With a Little Help From My Friends: International Case-Law as a Source of Reference for the EU Courts' (2005) The Global Community Yrbk. of International Law & Jurisprudence 203; Higgins (n 77).

[86] CJEU, Case C-286/90 *Anklagemyndingheden v Peter Michael Poulsen and Diva Corp.* [1992] ECR I-6048, para 10.

[87] CJEU, Case C-37/00 *Herbert Weber v Universal Ogden Services Ltd.* [2002] ECR I-2032, para 34.

Member State was raised again before the Court.[88] The ECJ relied on the passage from the *North Sea Continental Shelf* judgment quoted above[89] in order to prove that a Member State has sovereign rights over the continental shelf adjacent to it and that, therefore, work carried out on installations on the continental shelf is to be regarded as work carried out in the territory of that State for the purposes of applying EU law.[90]

Another area of customary international law where the CJEU has sought the guidance of the ICJ is that of treaty law. It is noteworthy that this field of law is of particular importance to the EU since the Union is not a party to the 1969 or 1986 Vienna Conventions on the Law of Treaties.[91] In *Opel Austria* the General Court was faced, *inter alia*, with the question as to whether a regulation that introduced customs duties to car gearboxes produced in Austria and which was issued a few days before the Agreement on the European Economic Area (EEA) came into force was compatible with the Agreement.[92] The applicant argued that the adoption of the regulation infringed the public international law principle of good faith.[93] The Court observed that 'the principle of good faith is a rule of customary international law recognized by the International Court of Justice (see the judgment of 25 May 1926, *German Interests in Polish Upper Silesia*, CPJI, Series A, No. 7, pp. 30 and 39)',[94] before concluding that '... the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which ... forms part of the Community legal order'[95] and on which 'any economic operator to whom an institution has given justified hopes may rely.'[96]

The international law principles of good faith and of the protection of legitimate expectations were also central to the 2004 dispute between Greece and the Commission.[97] The dispute concerned an agreement between the Commission and several Member States, including Greece, on the sharing of costs relating to the housing of representations in the Commission's offices in Abuja, Nigeria.[98] Having decided that Greece had not paid its share of the costs according to the agreement, the

[88] CJEU, Case C-347/10, *A. Salemnik v Raad van bestuur van het Uitvoeringsinstituut werkenemersverzekeringen* [2012] ECLI:EU:C:2012:17, paras 13-27.
[89] ibid, para 32.
[90] ibid, paras 33-35.
[91] Rosas (n 85), 223. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, concluded on 21/03/1986 http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf (accessed on 31 August 2015).
[92] General Court, Case T-115/94 *Opel Austria GmbH v Council of the European Union* [1997] ECR II-43, paras 1-68.
[93] ibid, para 89.
[94] ibid, para 90.
[95] ibid, para 93.
[96] ibid.
[97] General Court, Case T-231/04 *Hellenic Republic v Commission of the European Union* [2007] ECR II-66.
[98] ibid, paras 7-44.

Commission, in 2004, proceeded to recovery by offsetting the relevant sums.[99] Greece brought an action for annulment against the act of offsetting and argued, *inter alia*, that it was not bound by the agreement in question since it had not ratified it.[100] The Court, however, ruled that, not only the act of ratification, but also Greece's conduct and more particularly the expectations that its conduct led others to entertain were relevant in assessing the case at bar.[101] In that regard, the Court relied, once more, on the principles of good faith and of the protection of legitimate expectations. The Court repeated almost verbatim the abovementioned passage from the *Opel Austria* case and cited the *German Interests in Polish Upper Silesia* case in order to substantiate the finding that the principles of good faith and of the protection of legitimate expectations form part of customary international law.[102] On this basis, the Court concluded that Greece's conduct had raised legitimate expectations to its partners, and thus, Greece was precluded from claiming that it had not accepted the financial obligations stipulated in the agreement.[103]

Finally, it needs to be mentioned that, more recently, the international law principles of good faith and of the protection of legitimate expectations were invoked by the applicant in the context of the 2014 *Eromu* case.[104] The case concerned an action for annulment against a decision of the Commission declaring the State aid granted by Hungary on certain electricity generators illegal as incompatible with the common market.[105] The applicant, a Hungarian electricity generator, claimed that the Commission's decision infringed international law since it, allegedly, infringed the principle of good faith and the principle of the protection of legitimate expectations.[106] More particularly, the applicant submitted that it had a legitimate expectation that its investment would be protected by both the Commission and the Hungarian State.[107] The Court confirmed that the principles invoked by the applicant are part of the customary international law that it is bound to apply citing both the ICJ and its own case-law.[108] However, the Court found that there had been no infringement of the principles in question since the applicant had never received any assurance whatsoever that the State aid granted to it was compatible with the EU rules on State aid.[109]

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[99] ibid, para 44.
[100] ibid, para 55.
[101] ibid, para 84.
[102] ibid, paras 85, 87.
[103] ibid, paras 97-99.
[104] General Court, Case T-468/08 *Tisza Eromu v European Commission* [2014] ECLI:EU:T:2014:235.
[105] ibid, paras 1-52.
[106] ibid, para 305.
[107] ibid, para 320.
[108] ibid, para 321. The Court cited its relevant dictum from the Opel Austria case.
[109] ibid, paras 322-324.

In *Racke* the German Federal Finance Court referred to the Court for a preliminary ruling a question concerning the validity of a regulation suspending certain trade concessions provided for by the Cooperation Agreement between the European Economic Community (EEC) and Yugoslavia.[110] The Court was asked whether the unilateral suspension of the Agreement complied with the conditions for the termination and suspension of treaties on the ground of fundamental change of circumstances (*rebus sic standibus*).[111] The Court tackled the question by first establishing, with reference to the case-law of the ICJ, that the *rebus sic standibus* clause is part of customary international law:

> By way of a preliminary observation, it should be noted that even though the Vienna Convention does not bind either the Community or all its Member States, a series of its provisions, including Article 62, reflect the rules of international law which lay down, subject to certain conditions, the principle that a change of circumstances may entail the lapse or suspension of a treaty. Thus the International Court of Justice held that '[t]his principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the subject of termination of a treaty relationship on account of change of circumstances' (judgment of 2 February 1973, Fisheries Jurisdiction (United Kingdom v Iceland), ICJ Reports 1973, p. 3, paragraph 36).[112]

Having established the customary law status of the *rebus sic standibus* principle, the Court concluded that the EU was allowed to suspend the treaty concluded with Yugoslavia by reason of a fundamental change of circumstances.[113] However, the Court was anxious to stress the exceptional character of the plea of fundamental change of circumstances in relation to the *pacta sunt servanda* principle; a fundamental principle of international law.[114] Again, the exceptional character of the *rebus sic standibus* clause in relation to this principle was justified with reference to the jurisprudence of the World Court. According to the Court the importance of the *pacta sunt servanda* principle 'has been underlined by the International Court of Justice, which has held that 'the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases (judgment of 25 September 1997, Gabsikovo-Nagymaros Project (Hungary v Slovakia), at paragraph 104...).'[115]

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[110] ECJ, Case C-162/96 *Racke*, (n 12), paras. 1-23.
[111] ibid, paras 18-23.
[112] ibid, para 24.
[113] ibid, paras 49-61.
[114] ibid, paras 49-50.
[115] ibid, para 50.

One of the latest instances in which the ECJ turned to ICJ caselaw as a shortcut to ensuring that a rule indeed reflects customary international law is the 2015 *Evans* case.[116] The case concerned a request for a preliminary ruling on the applicability of Regulation 1408/71 on social security schemes to a national of a Member State employed at a consular post within the territory of another Member State.[117] Since the case involved consular staff, the 1963 Vienna Convention on Consular Relations[118] was of relevance to the Court.[119] In order to ascertain the customary law status, and hence, the applicability, of the 1963 Vienna Convention the Court referred to the *Tehran Hostages* case:

> As the Advocate General observed in point 52 of his Opinion, the idea of being 'subject to the legislation of a Member State', as referred to in Article 2 of regulation No 1408/71, ought to be interpreted in the light of the relevant rules of customary international law ..., namely the Vienna Convention of 1963, which codifies the law of consular relations and states principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions (see judgment of the International Court of Justice of 24 May 1980, case concerning the diplomatic and consular staff of the United States of America in Tehran (*United States* v. *Iran*), *Reports of Judgements*, *Advisory Opinions and Orders* 1980, p. 3, paragraph 45).[120]

A case where one of the parties relied on the case-law of the ICJ, but this was rejected by the EU Courts was *Anastasiou*.[121] Here, the Commission argued that the *de facto* acceptance of certificates of products issued by the authorities of the Turkish Republic of Northern Cyprus (TRNC) did not amount to recognition of the entity in question as a State.[122] The Commission based its argument on the *Namibia* Advisory Opinion.[123] This claim was rejected by the ECJ which was quick to point out that the legal and factual situation of Cyprus and that of Namibia were radically different and thus, not comparable.

> In addition, as regards the interpretation which the Commission draws from the Advisory Opinion of the International Court of

[116] CJEU, Case C-179/13 *Raad van bestuur van de Sociale verzekeringsbank v L. F. Evans* [2015] ECLI:EU:C:2015:12.
[117] ibid, paras 1-31.
[118] Vienna Convention on Consular Relations concluded on 24/04/1963, http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf (accessed on 31 August 2015).
[119] Case C-179/13 (n 116), paras 35-36.
[120] ibid, para 36.
[121] ECJ, Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food ex parte S. P. Anastasiou (Pissouri) Ltd. and Others* [1994] ECR I-3116.
[122] ibid, para 34.
[123] ibid, para 35.

> Justice on Namibia, ..., and which is said to have influenced its Application of the Association Agreement, suffice it to say, ..., that the special situation of Namibia and that of Cyprus are not comparable from either the legal or the factual point of view. Consequently, no interpretation can be based on an analogy between them.[124]

The celebrated *Kadi* judgments[125] relating to sanctions against terrorist activities also prompted references to ICJ jurisprudence. The facts underpinning the dispute are well known and thus, they will not be recounted here. It is important to note, however, that citations to the case-law of the World Court abound in the passages of the Court of First Instance (CFI) judgment discussing the question of the primacy of the UN Charter and of SC decisions over other international agreements:

> As regards, second, the relationship between the Charter of the United Nations and international treaty law, that rule of primacy is expressly laid down in Article 103 of the Charter which provides that, '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' In accordance with Article 30 of the Vienna Convention on the Law of Treaties, and contrary to the rules usually applicable to successive treaties, that rule holds good in respect of Treaties made earlier as well as later than the Charter of the United Nations. According to the International Court of Justice, all regional, bilateral, and even multilateral, arrangements that the parties may have made must be made always subject to the provisions of Article 103 of the Charter of the United Nations (judgment of 26 November 1984, delivered in the case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), *ICJ Reports* 1984, p. 392, paragraph 107).[126]
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> That primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations, under which the members of the United Nations agree to accept and carry out the decisions of the Security Council. According to the International Court of Justice, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement (Order of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at

[124] ibid, para 49.
[125] CFI, Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union* [2005] ECR II-3659; CFI, Case T-306/01 *Ahmed Ali Yusuf and Al Barakaaat International Foundation v Council of the European Union* [2005] ECR II-3544.
[126] Case T-315/01 (n 125), para 183; Case T-306/01 (n 125), para 233.

> Lockerbie (Libyan Arab Jamahiriya v United States of America), *ICJ Reports*, 1992, p. 16, paragraph 42, and Order of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom), *ICJ Reports*, 1992, p. 113, paragraph 39).[127]

Moreover, the CFI quoted the *Nuclear Weapons* Advisory Opinion in its discussion of the content and scope of the notion of peremptory norms of international law (*jus cogens*):

> The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, in some circumstances, extend to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute 'intransgressible principles of international customary law' (Advisory Opinion of the International Court of Justice of 8 July 1996, The Legality of the Threat or use of Nuclear Weapons, Reports 1996, p. 226, paragraph 79).[128]

References to the case-law of the ICJ are also to be found in the text of the *LTTE* judgment,[129] one of the more recent cases involving counter-terrorism measures. The Liberation Tigers of Tamil Eelam (LTTE) brought an action for annulment of the act under which they were added to the EU's list of terrorist organisations.[130] One of the arguments made by LTTE was that, by placing it on the list in question, the EU breached the customary international law principle of non-intervention.[131] The Court rejected this plea and argued, citing the *Nicaragua* case, that the principle only applies to sovereign States and not to other entities, including liberation movements:

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[127] Case T-315/01 (n 125), para 184; Case T-306/01 (n 125), para 234.

[128] Case T-315/01 (n 125), para 231; Case T-306/01 (n 125), para 282. The ECJ *Kadi* judgment overturning the CFI ruling has been subject to fierce criticism for allegedly threatening the unity of the international legal order. For an overview of the relevant literature see Sara Poli, Maria Tzanou, 'The Kadi Rulings: A Survey of the Literature' in Marise Cremona, Francesco Francioni, Sara Poli (eds), *Challenging the EU Counter-Terrorism Measures through the Courts*, EUI Working Paper AEL 2009/10, http://cadmus.eui.eu/handle/1814/12879 (accessed on 31 August 2015), 139 ff.

[129] General Court, Joined Cases T-208/11 and T-508/11 *Liberation Tigers of Tamil Eelam (LTTE) v Council of the European Union* [2014] ECLI:EU:T:2014:235.

[130] ibid, paras 1-39.

[131] ibid, para 44.

> As for LTTE's reference to the principle of non-interference which, in its opinion, the Council infringed by placing it on the list relating to frozen funds, it should be noted that that customary international law principle, also called the principle of non-intervention, concerns the right of any sovereign State to conduct its affairs without external interference and constitutes a corollary of the the principle of sovereign equality of states (judgment of the International Court of Justice of 26 November 1984 in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), on competence and admissibility, ICJ Reports 1984, p. 392, paragraph 73, and of 27 June 1986, on the substance, ICJ Reports 1986, p. 96, paragraph 202). As the Council points out, that principle of international law is set out for the benefit of sovereign States, and not for the benefit of groups or movements. Contrary to LTTE's submissions, the placing on the list relating to frozen funds of a movement – even if it is a liberation movement – in a situation of armed conflict with a sovereign State, on account of the involvement of that movement in terrorism, does not therefore constitute an infringement of the principle of non-interference.[132]

Nevertheless, the Court annulled the contested act since it found that the Council had not followed the appropriate procedure under EU legislation on terrorist designations, which required a decision of a competent authority identifying the LTTE as a terrorist organisation.[133]

This section attempted to illustrate the extent of judicial dialogue between the CJEU and the ICJ. The practice of the EU Courts explored herein shows that, when confronted with questions of public international law, the CJEU, rather than proffering its own interpretation of international law, has consistently chosen to defer to the authority of the ICJ. As a result, the CJEU has made extensive use of the latter's case-law as a tool for the interpretation of international law norms relevant for carrying out its tasks. This conclusion tallies with the observations made ten years ago by Judge Rosas. In his article tackling the same question dealt with here, Rosas found that '[w]hile the case-law of international courts and tribunals is not formally binding on the EU Courts, their practice seems to be based on the idea that it makes sense to take this case-law into account as much as possible, as the EU Courts are not necessarily well-equipped to 'know better' than the international dispute settlement bodies set up to apply and interpret public international law.'[134]

Furthermore, it has been also demonstrated, that in the past decade, the EU Courts have shown greater openness to the jurisprudence of the ICJ. While in the past the CJEU sought the guidance of the ICJ mainly for the

[132] ibid, para 69.
[133] ibid, paras 137-229.
[134] Rosas (n 85), 230.

purposes of ascertaining the customary international law status of norms pertaining to the law of the sea and to treaty law, recent practice shows that the EU Courts are making knowledgeable references to the case-law of the ICJ in order to settle a wider gamut of international law questions. These include: the question of the customary law status of the 1963 Vienna Convention on Consular relations; the question of the primacy of the UN Charter and of SC resolutions over other international agreements; questions of *jus cogens*; as well as questions relating to the scope and content of the principle of non-intervention.

The increasingly frequent reliance on the jurisprudence of the ICJ proves that, contrary to the manner in which it is often portrayed in the literature, the CJEU is actually contributing to the coherence of the international legal system, as this term was defined above. Rather than making bold pronouncements on international law, the CJEU's reliance on existing jurisprudence guarantees that the risk of conflicting interpretations of international law norms is mitigated. Thus, the practice of the EU Courts goes a long way towards diminishing the risks of the substantive fragmentation of international law.[135]

VI. The CJEU and the Coherence of the International Legal Order: Trans-Judicial Dialogue and its Discontents

The previous section showed that the CJEU has gradually become more receptive to guidance by its sister court in The Hague in matters falling within the ambit of international law – as evidenced by the increasing number and scope of references to the ICJ's case-law. To the extent that direct citation to the jurisprudence of other courts and tribunals constitutes proof of 'inter-judicial dialogue' and thus, a factor contributing towards adjudicative coherence, it is safe to assume that the conclusions reached above hold true. At the same time, one may very well question whether the use of the term 'dialogue' in this context accurately reflects the current practice of the CJEU. Both in common parlance and in legal terminology, 'judicial dialogue' connotes some type of visible, active engagement with the case-law of other bodies.[136] However, the previous exposition showed that the Court has shied away from delving too deeply into international law. It is noteworthy that, in none of the cases discussed above, did the Court take a proactive stance by exploring the relevant questions beyond the ICJ's *dicta*: it merely, unquestioningly deferred to the latter's authority. In this sense, the CJEU has proven, so far at least, a shy disciple, rather than an enquiring peer – a fact that somewhat diminishes the quality of judicial dialogue between the two courts.

The Court's hesitation to engage in depth with ICJ jurisprudence, and with international law more generally, is evinced by its extremely cautious

[135] The same conclusion was reached by Allan Rosas, see ibid.
[136] See nn 78-82.

handling of international law questions that are not as well-settled as the ones explored above. The 2014 *Parliament and Commission v Council* judgment[137] is a case in point. The case concerned, amongst other things, the legal status of a Council Decision authorising Venezuelan fishing vessels to fish in EU waters off the coast of French Guiana on the condition that they comply with applicable EU law.[138] Although all parties involved in the dispute conceded that the Decision was legally binding as a matter of international law, its exact legal status was unclear. While both the Parliament and the Spanish Government treated the Decision as a unilateral juridical act[139] (i.e. an act of unilateral origin with binding effects in international law), France considered it as having culminated into the conclusion of an international agreement between the EU and Venezuela and the Council seemed to oscillate between these two positions.[140] It needs to be pointed out that, from an international law point of view, the doctrine of unilateral juridical acts first propounded by the ICJ in the *Nuclear Tests* case[141] remains somewhat elusive. According to the ICJ's judgment, unilateral declarations publicly made that manifest an intention to be bound may create legal obligations for their authors without any need of acceptance or reliance on behalf of the addressee.[142] However, despite subsequent judgments of the Court confirming the validity of the principle enunciated in the *Nuclear Tests* case[143] and a decade long study of the ILC on the topic,[144] disagreement still reigns over the normative status of these instruments.[145] The Opinion delivered by Advocate General Sharpston bears the hallmark of true inter-judicial dialogue. The Advocate General provided a rigorous analysis of the juridical character of both international agreements and unilateral acts in international law and critically examined both the relevant case-law of the ICJ and the work of the ILC before concluding that the Decision in question constituted in fact a unilateral juridical act.[146] Unfortunately, the Court did not espouse the Advocate General's enthusiastic approach. Instead of examining

[137] ECJ, Joined Cases C-103/12 and C-165/12 *European Parliament, European Commission v Council of the European Union* [2014] ECLI:EU:C:2014;2400.
[138] ibid, paras 23-25.
[139] On the doctrine of unilateral juridical acts in international law, see generally Christian Eckart, *Promises of States under International Law* (Hart Publishing 2012).
[140] Opinion of Advocate General Sharpston in Joined Cases C-103/12 and C-165/12 (n 137), para 69.
[141] ICJ*, Nuclear Tests Case*, *Judgment*, ICJ Reports 1974, p 250.
[142] ibid, para 43
[143] See for example ICJ, *Case concerning the Frontier Dispute*, *Judgment*, ICJ Reports 1986, p 554, para 39; *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002)*, *Judgment*, ICJ Reports 2006, p 6, para 50.
[144] Analytical Guide to the Work of the ILC, Unilateral Acts of States http://legal.un.org/ilc/guide/9_9.shtml. The final product of the ILC's work on the topic was a set of ten Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *Yrbk of the ILC* 2006, Vol II.
[145] See generally Alfred Rubin, 'The International Legal Effects of Unilateral Declarations' (1977) AJIL 1; Hugh Thirlway, *The Sources of International Law* (OUP 2014), 51.
[146] Opinion of Advocate General Sharpston (n 137), paras 79-87.

whether the Decision could be viewed as a unilateral act, it quickly came to the conclusion that it was a treaty – even in the absence of clear evidence of acceptance on behalf of Venezuela.[147]

The fact that the CJEU is not quite at home when confronted with complex questions of public international law is further corroborated by its confusing stance on non-State actors. As seen above, the Court argued in *LTTE* that non-State entities, including national liberation movements, may not rely on the principle of non-intervention since it only applies to States. However, in *Brita*,[148] a case that involved, *inter alia*, an agreement between the EC and PLO, the Court treated the agreement in question as a treaty within the meaning of article 2 of the 1969 VCLT without exploring whether, and if so, under which conditions, a non-state entity, such as the PLO, may enjoy treaty-making powers.[149] Again, the question of the treaty-making capacity of non-State actors, other than international organisations, is fiercely debated in international legal literature[150] and the hesitation of the Court to address it head-on is thus, understandable. Yet, the Court's occasional reluctance to actively engage with international law leaves something to be desired. While following closely the jurisprudence of the ICJ may help avert the risk of conflicting interpretations, the CJEU's lack of self-confidence as to its capabilities in international law also undermines the quality of inter-judicial dialogue between the two courts.

VII. Conclusions

This article demonstrated that the pluralisation of modern international relations has brought along the danger of the fragmentation of the international legal order by threatening its coherence. It has also been shown that 'fragmentation' and 'coherence' are multi-faceted concepts. They are used to describe a wide array of inter-related problems and goals and, therefore, any discussion involving these concepts needs to carefully differentiate among the various aspects thereof. More particularly, this contribution showed that substantive fragmentation, namely the danger of conflicting pronouncements on international law due to the recent proliferation of international courts and tribunals tasked with interpreting the same substantive law, poses a threat to adjudicative coherence, namely the need for consistency in judicial reasoning. It has been further shown that judicial dialogue, in the sense of active engagement with the jurisprudence of other courts, is an important factor in counteracting substantive fragmentation. The article examined the extent of judicial

[147] CJEU, Joined Cases C-103/12 and C-165/12 (n 137), paras 68-72.
[148] CJEU, *Brita* (n 4).
[149] ibid.
[150] On the treaty-making capacity of non-State actors in international law see generally Jean D'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011); Math Noortmann, August Reinisch, Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing 2015).

dialogue between the CJEU and the ICJ by identifying whether and to what extent the former takes into account the jurisprudence of the latter – since the ICJ's judgments are persuasive authority in the field of international law. In this respect, it was proven that the EU Courts have shown a great degree of deference to the authority of the ICJ. Instead of advancing their own interpretation of international law, they have closely followed the guidance of the ICJ by making a number of direct references to the latter's rulings. It has been also demonstrated that the CJEU has increasingly shown greater willingness to open up to external sources. While initially the jurisprudence of the ICJ was mainly used to settle questions of customary international law relating to the law of the sea and to treaty law, in recent years, the Court has taken into account the jurisprudence of the ICJ in a number of other cases pertaining to international law. On this basis, it was concluded that the practice of the CJEU is conducive to the coherence of the international legal system. At the same time it was also pointed out that the pattern of inter-judicial dialogue between the two courts is occasionally frustrated by the CJEU's reluctance to go into uncharted territory and its tendency to follow closely the ICJ's pronouncements. While this tendency may minimise the risk of divergent interpretations, it somewhat diminishes the quality of inter-judicial dialogue between the two courts.

The overall conclusion reached here casts doubt on the commonly assumed view that the CJEU undermines the coherence of international law – which has gained prominence in the literature especially after the ECJ's pronouncement on the *Kadi* case. In the light of the present findings, it is submitted that this view is erroneous to the extent that it does not take into account all the parameters of coherence defined above. Traditionally, accounts of coherence in international legal theory examine whether the CJEU gives precedence to international law norms by invalidating conflicting EU legislation.[151] However, as shown here, coherence is a complex notion: by limiting our enquiry to the traditional binary of validity/invalidity we ignore the increasing complexities faced by a court called upon to function in a setting where the global, regional and national directly intersect. Fragmentation and coherence debates may not discount the extent of judicial discourse and interaction among international dispute settlement bodies. For, as Higgins suggests, the best way to avoid the fragmentation of international law in practice is 'for us all to keep ourselves well informed. Thus the European Court of Justice will want to keep abreast of the case law of the International Court ... And the International Court will want to make sure it fully understands the circumstances in which these issues arise for its sister court in Luxembourg.'[152]

[151] See for example Jan Klabbers, 'The Validity of EU Norms Conflicting with International Obligations' in Enzo Cannizzaro, Paolo Palchetti, Ramses Wessel (eds), *International Law as Law of the European Union* (Brill 2012), 111-131.
[152] Higgins (n 77), 20.

THE DUBLIN REGULATION BETWEEN STRASBOURG AND LUXEMBOURG: RESHAPING *NON-REFOULEMENT* IN THE NAME OF MUTUAL TRUST?

Giulia Vicini*

This article addresses one of the most challenging inconsistencies in the case law of the ECtHR and the CJEU. It critically analyses the judgments delivered by these two courts on the compatibility of the Dublin Regulation with the fundamental rights enshrined in the ECHR and in the EUCFR, respectively. On the one hand, the article proposes an interpretation of the judgments which is able to reconcile the two different approaches concerning EU Member States' obligations under the Dublin Regulation. On the other, it argues that an irreconcilable interpretation of the principle on non-refoulement *underlies the different thresholds established by the two courts in order to rebut the mutual trust presumption. This divergent interpretation is deemed to trigger a violation of Articles 52 and 53 of the EUCFR.*

Keywords: EU law, ECHR, EUCFR, non-refoulement, Dublin Regulation.

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I. INTRODUCTION

The recent judgment of the European Court of Human Rights (ECtHR) in *Tarakhel v. Switzerland*[1] offers a pretext for reconsidering whether the EU Dublin regulation complies with the protection of fundamental rights. This regulation establishes a hierarchy of criteria in order to identify a single Member State responsible for the examination of an asylum claim lodged by a third-country national. The *Tarakhel* case is not the first time that these criteria have fallen under judicial scrutiny. In the *M.S.S.*[2] and *N.S.*[3] cases, both from 2011, the ECtHR and the Court of Justice of the European Union (CJEU), respectively, considered whether the returns to Greece implemented by the Member States on the basis of the Dublin regulation complied with the European Convention on Human Rights (ECHR) and the European Union Charter of Fundamental Rights (EUCFR). Following these landmark cases, a high degree of inconsistency has affected the dialogue between these two Courts. Although the EU legislator[4] seems to have endorsed the principles laid down in *M.S.S.*, the CJEU appears to have developed an autonomous interpretation of the regulation. This dialogue is likely to be further affected by the recent Opinion 2/2013 of the CJEU, concerning the accession of the EU to the ECHR.[5]

The Dublin regulation is grounded on the presumption that all EU Member States, as well as the States bound by its provisions on the basis of bilateral agreements,[6] observe the fundamental rights of the European Union. Although in agreement with the relative character of this presumption, the jurisprudence of the European Courts diverges over the conditions that might rebut the 'mutual trust' between Member States. Furthermore, a first glance at the case law might suggest that the ECtHR and the CJEU also infer different consequences from the exclusion of such presumption. Clearly, when a State does not respect or ensure the fundamental rights enshrined in Articles 3 ECHR and 4 EUCFR,[7] other

[1] *Tarakhel v. Switzerland* App no 29217/12 (ECtHR, 4 November 2014).
[2] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).
[3] Case C-411/10 and 493/10 *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* ECLI:EU:C:2011:865.
[4] The Preamble of the recast Dublin III Regulation (n 10) reads as follows: '[w]ith respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights.'
[5] Opinion 2/2013 on the Accession of European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms of 18 December 2014, ECLI:EU:C:2014:2454.
[6] Iceland, Liechtenstein, Norway and Switzerland, that have associated themselves with the EU regime on the abolition of border controls (the Schengen agreements).
[7] These provisions prohibit torture and other inhuman and degrading treatment. As pointed out by Ippolito, in *N.S.* the CJEU failed to say 'whether violations of fundamental rights other than in Article 4 may be sufficient to avoid a

Member States cannot safely return an asylum seeker to its territory.[8] The return cannot be executed even though the Dublin regulation designates such State as the only Member State competent to assess his/her asylum claim. Even if both the ECtHR and the CJEU share this view, there seems to be no common and clear understanding on how the Member States, having jurisdiction over an asylum seeker that cannot be returned to the competent State, ought to behave in such cases.

Following an introductory overview on the evolution of the Dublin Regulation and its role within the Common European Asylum System, this paper analyses the shortcomings, which have attracted scrutiny of the European Courts.

This paper then argues that there is little room to reconcile the interpretative approach adopted by the EU judges on the conditions to overcome the mutual trust principle with Strasbourg jurisprudence on Article 3 of the ECHR. Indeed, the interpretative approach adopted by the CJEU is inconsistent with Articles 52(3) and 53 of the EUCFR. These Articles provide that the Charter provisions corresponding to ECHR provisions must be given the same meaning and scope as the rights laid down by the Convention and that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, inter alia, in the ECHR.

The situation is rather different when it comes to the consequences deriving from the rebuttal of the compliance presumption. It is argued that the statements of the two European Courts can be read as providing a set of non-conflicting obligations that Member States must fulfill when a return to the Competent State under the Dublin regulation cannot be executed. On the one hand, the obligations imposed by the CJEU are not in breach of the Convention provisions; on the other, the mechanism of diplomatic assurances recently suggested by the ECtHR in *Tarackel*, though apparently incompatible with the mutual trust principle, might turn out to be a workable path for preserving the functioning of the Dublin Regulation by simultaneously granting the respect of fundamental rights.

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transfer/referral pursuant to the criteria of the Dublin II Regulation'; Francesca Ippolito, 'Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?' (2015) 17 European Journal of Migration and Law 1, 24.

[8] Indeed, arts 3 ECHR and 4 EUCFR are commonly interpreted as implicitly enshrining the principle of *non-refoulement*, according to which an individual cannot be returned to a territory where his life and freedom are endangered.

II. The Dublin Regulation and The Common European Asylum System

The Council Regulation No. 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II)[9] has recently been replaced by Regulation No 604/2013 of the European Parliament and of the Council (Dublin III).[10] Indeed, the EU legal instruments on asylum have been reformed between 2011 and 2013. The reformed legislation finds its legal basis in Article 78 of the Treaty on the Functioning of the European Union (TFEU)[11] and is articulated in the Common European Asylum System (CEAS).

Besides the distribution of competence for examining asylum claims between the Member States,[12] the CEAS regulates the reception of asylum seekers (Reception Directive),[13] the procedures for obtaining the international protection (Procedures Directive),[14] as well as the conditions and the content of this protection (Qualification Directive).[15]

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[9] Council Regulation 343/2003 [2004] OJ L50/1. The first paragraph of art 78 TFEU reads as follows: 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.'

[10] 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 (recast) [2013] OJ L180/31.

[11] This provision corresponds to former art 63 of the Treaty on the European Community.

[12] The Dublin regulation is completed by Regulation No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L180/1.

[13] Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

[14] 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 (recast) [2013] OJ L180/60.

[15] 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 (recast) [2011] OJ L337/9. The CEAS is further completed by the

With the recent reform, the CEAS has entered its so-called 'second phase'[16] aimed at the harmonization of the EU asylum policy. The recast instruments are now being implemented in the Member States and it is certainly too early to estimate the effects of their application. The term for the transposition of the directives has expired only a few months ago, the only exception being the Qualification Directive, which had to be transposed by 21 December 2013.[17] Nevertheless, even a superficial reading of the recast provisions dampens any optimism regarding eventual harmonization. The new legislation, reproducing as it does the minimum standards scheme, continues to leave a high margin of discretion to the Member States.

The harmonization of national asylum legislations ought to be a precondition for the Dublin criteria and mechanisms to work fairly and efficiently. The Dublin Regulation, in fact, leaves asylum seekers bereft of any choice concerning the country where they can lodge their claim. There is a single State competent for examining an asylum application[18] and this State is identified on the basis of objective and hierarchical criteria set forth in the Regulation.[19] This mechanism means that the asylum seeker cannot lodge an application in a different Member State, even when his/her claim is rejected by the competent State (this is the so-called 'one chance rule'). Given the lack of uniform standards of protection within the Member States, the Dublin system entails rather unfair treatment for asylum seekers.[20] The reception conditions and the chances of being

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Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive) [2001] OJ L212/12. This Directive was not triggered by the recent reform.

[16] This second phase was originally conceived by the Hague Program, adopted by the European Council in 2004.

[17] Art 39 of the Recast Qualification Directive of 2011.

[18] 'The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible' (Dublin III Regulation, art 3(1)).

[19] The criteria are to be applied in the order in which they are presented in the Regulation and on the basis of the situation existing when the asylum seeker first lodged his/her application with a Member State (Dublin III Regulation, art 7). Firstly, the Regulation set forth the criteria applicable to minor asylum seekers and other criteria based on the principle of family unity, applicable to all applicants whose family members reside in the EU territory (arts 8-11). Secondly, the Dublin criteria indicate as State competent the Member State which issued a residence document or a visa to the applicant (art 12). Thirdly, the Regulation gives relevance to the (legal or illegal) entry or stay in the EU territory (art 13).

[20] Interestingly, Evelien Brouwer argues that, in cases in which the mutual trust principle is not in the interest of the individuals, a '(higher level of the) harmonization of law is necessary' ('Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9 Utrecht Law Review 135, 136-137). This assumption might apply, for instance, to the Dublin System and the European Arrest Warrant, both implying a risk of violation of art 3 ECHR.

granted international protection vary considerably depending on which State is elected as competent by the Regulation criteria.

The unfairness towards asylum seekers is not the only reason why the Dublin Regulation has been criticized. As a matter of fact, its unfairness extends to the Member States. Despite representing a residuary criterion within the hierarchy set forth by the Regulation, the provision most commonly applied to determine the State competent is Article 10. This provision links irregular entry to the responsibility for the examination of an asylum claim: 'where it is established [...] that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum.'[21] This criterion clearly penalizes the Member States on the external borders of the European Union, especially the Mediterranean States.[22] Hence, the Dublin Regulation is also criticized for not being compatible with the principle of solidarity, included by the Lisbon Treaty in Article 80 TFEU.[23]

The feature of the Dublin criteria and mechanisms, which attracted the scrutiny of the European Courts, is their foundation on the principle of mutual trust.[24] As mentioned above, the whole system is grounded on the presumption that all the Member States and the States bound by the regulation by virtue of bilateral agreements[25] observe EU law, particularly EU fundamental rights and freedoms.[26] On the basis of this presumption, the Member States consider themselves reciprocally as 'safe countries'.[27]

The presumption of compliance covers the principle of *non-refoulement*[28] set forth by the 1951 Geneva Convention relating to the Refugee Status,[29] the

[21] Dublin III Regulation, art 13(1) (former art 10(1) of Dublin II).
[22] Eiko Thielemann, 'Why Asylum Policy Harmonization Undermines Refugee Burden-Sharing' (2004) 6 European Journal of Migration and Law 47, 58; Maria-Teresa Gil-Bazo 'The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited' (2006) 18 International Journal of Refugee Law 571, 578.
[23] See *inter alia* Roland Bieber, Francesco Maiani, 'Sans solidarité point d'Union européenne : Regards croisés sur les crises de l'Union économique et monétaire et du Système européen commun d'asile' (2012) 2 Revue Trimestrielle de Droit Européen 295.
[24] Satvinder S. Juss argues that the Dublin system is 'still anchored in the mind-set of colonial Europe. It assumes that every area in Europe - from Sicily in the south to Scandinavia in the north - is a safe territory for a refugee to access protection once he or she gets there'; 'The Post-Colonial Refugee, Dublin II, and the end of non-refoulement' (2013) 20 International Journal on Minority and Group Rights, 310.
[25] Iceland, Liechtenstein, Norway and Switzerland, that have associated themselves with the EU regime on the abolition of border controls (the Schengen agreements).
[26] Case C-411/10 and 493/10 (n 3), para 83.
[27] The same presumption justifies Protocol 24 on asylum for nationals of Member States of the European Union, attached to the TFEU.
[28] The third Recital of the Recast Regulation Preamble reads as follows: 'Member States, all respecting the principle of *non-refoulement*, are considered as safe countries

European Convention on Human Rights and the EU Charter of Fundamental Rights.

III. SYSTEMIC FAILURES: THE TENSION BETWEEN MUTUAL TRUST AND THE PROTECTION OF FUNDAMENTAL RIGHTS

The question of the judicial dialogue between the European Courts is at the core of a very lively debate concerning Opinion 2/2013 of the CJEU on the accession of the European Union to the ECHR.[30] Although this first attempt to formalize the relationship between the Strasbourg and the Luxembourg Courts failed,[31] the jurisprudence of the two Courts continues to interact in a number of fields[32] and this interaction is partially regulated by EU law provisions.

According to the EU Court of Justice, the European Convention on Human Rights has a 'special significance' within the EU legal order.[33] This special significance has been codified by Article 6 of the Treaty on the European Union (TEU), according to which 'fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

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for third country nationals.' The whole European asylum policy is bound by the respect of this principle by virtue of art 78 TFEU.

[29] Nevertheless, the *non-refoulement* principle proclaimed by art 33 of the Geneva Convention differs from the ones elaborated within the Council of Europe and the EU for two main reasons. Firstly, its application only protects the 'refugee' from being returned 'to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' It is not contended that such protection equally extends to asylum seekers. Nevertheless, the need for the threat to be motivated by one of the conventional grounds considerably diminishes the extent of the protection against expulsion. Secondly, unlike art 3 ECHR, art 33 does not proclaim an absolute principle of *non-refoulement*. The same provision provides an exception to its application in the second paragraph: '[t]he benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

[30] Opinion 2/2013 on the Accession of European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms of 18 December 2014, ECLI:EU:C:2014:2454.

[31] The Opinion delivered by the CJEU has declared the Draft Convention on the Accession of the EU to the ECHR incompatible with the EU founding Treaties.

[32] Specifically on the interaction of the two Courts in the field of immigration and asylum Sonia Morano-Foadi and Stelios Andreadakis, 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence' (2011) 22 European Journal of International Law 1071.

[33] Case C-402/05 and C-415/05, *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2005] ECLI:EU:T:2005:332, para 283.

Moreover, Articles 52 and 53 of the EU Charter of Fundamental Rights regulate the articulation of this Charter with the ECHR. Article 52(3) provides that the Charter provisions corresponding to ECHR provisions must be given the same meaning and scope of the rights laid down by the Convention, without preventing EU law from granting more extensive protection. According to Article 53, 'nothing in [the] Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms.'

This paper addresses one of most challenging inconsistencies between the two European courts' jurisprudence. Both the ECtHR and the CJEU have delivered judgments on the compatibility of the Dublin Regulation with the fundamental rights enshrined, respectively, in the ECHR and the EUCFR. This section outlines the principles and statements emerging from these judgments. The two courts share the view that the mutual trust presumption, on which the Dublin Regulation is based, must be rebuttable in order to ensure that asylum seekers are not returned to territories in which they would face inhuman and degrading treatment. The threshold to rebut this presumption is, nonetheless, different in the ECtHR and the CJEU case law. While the first Court gives relevance to the individual risk the asylum seeker would face if returned to the State competent according to Dublin criteria, the second focuses on the general situation of the national reception system and establishes a higher threshold to rebut the mutual trust presumption. This higher threshold, clearly aimed at preserving the mutual trust principle, is only met when a Member State asylum system suffers from 'systemic failures'. Following a detailed analysis of the case law, this section argues that the restrictive interpretation proposed by the CJEU is not compatible with the clauses set forth in Articles 52 and 53 of the Charter.

1. *The Dublin Regulation and* Non-Refoulement*: The* M.S.S. *Case of the ECtHR*

The right of asylum is not explicitly protected by the European Convention on Human Rights. Nonetheless, in a number of decisions the ECtHR has applied Articles 3 (prohibition of torture), 5 (right to liberty and security), 8 (right to respect for private and family life) and 13 (right to an effective remedy) in order to grant substantial protection to asylum seekers. As a matter of fact, the Strasbourg judges recognize the peculiar status of these applicants as members of a 'particularly underprivileged and vulnerable population group in need of special protection.'[34] Hence, the

[34] *M.S.S.* (n 2) para 251.

Court acts in practice as an 'asylum court'[35] despite the lack of a specific legal basis in the provisions of the Convention.

The cornerstone of the protection granted to asylum seekers is undoubtedly Article 3 of the Convention. The ECtHR has constantly inferred from Article 3 the principle of *non-refoulement*. According to the well-known formula elaborated by the Court, the decision by a Contracting State to expel an individual 'may give rise to an issue under Article 3, and, hence, engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if expelled, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country.'[36] The principle of *non-refoulement* deriving from Article 3 has an absolute character[37] and offers an additional protection against indirect *refoulement*,[38] i.e. against the expulsion to the territory of a State from which there is the risk that the person would be further expelled and exposed to inhuman or degrading treatment in a third country.

The principle of *non-refoulement* elaborated by the Strasbourg Court extends its effect to the field of application of the Dublin Regulation. The Grand Chamber of the ECtHR, in *M.S.S. v. Belgium and Greece*, has partially 'dismantled'[39] the competence-sharing system created by the Dublin II Regulation. Belgium has been condemned for a violation of Articles 3 and 13 of the Convention. By returning the applicant to Greece, Belgium exposed him to widespread inhuman and degrading treatment caused by the insufficiency of the Greek reception system. Moreover, the applicant faced the risk of being further repatriated from Greece to his country of origin, given the documented practice of the Greek authorities to return asylum seekers without granting them access to a fair asylum procedure.[40] According to the Court, Belgium thus violated the principle of *non-refoulement* both directly and indirectly.

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[35] Marc Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court' (2012) 8 European Constitutional Law Review 203.

[36] *Soering v. United Kingdom* App no 14038/88 (ECtHR, 7 July 1989), para. 91; *Cruz Varas v. Sweden* App no 15576/89 (ECtHR, 20 March 1991), para 69; *Vilvarajah v. United Kingdom* App no 13163/87 (ECtHR, 30 October 1991), para 103; *Ahmed v. Austria* App no 25964/94 (ECtHR, 17 December 1996), para 39.

[37] *Saadi v. Italy* App no 37201/06 (ECtHR, 28 February 2008), para 127.

[38] *T.I. v. UK* App no 43844/98 (ECtHR, 7 March 2000); for a more recent judgment see *Hirsi Jamaa and others v. Italy* App no 27765/09, (ECtHR, 23 February 2012), para 146.

[39] Violeta Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' (2012) 14 European Journal of Migration and Law 1.

[40] The findings of the Court concerning the Greek international protection system have been recently reconfirmed in *Sharifi and others v. Italy* App. no 16643/09 (ECtHR, 21 October 2014).

Interestingly, in this case the Court departed from its statements in *Bosphorus*,[41] according to which the Dublin Regulation could have escaped from Strasbourg judicial review. By returning the applicant to Greece, Belgium had acted in accordance with a European Union Regulation. In principle, this could suffice for the equivalent protection presumption to apply and hence to exclude the competence of the ECtHR. Nonetheless, Article 3(2) of the Dublin II Regulation[42] provided a 'sovereignty clause' according to which 'each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in [the] Regulation.' According to the Strasbourg Court, the discretion left to the States, which may refrain from transferring the applicants, renders the *Bosphorus* presumption inapplicable to the case of Dublin transferals. Such transferals, in fact, do not strictly fall within the State international legal obligations.[43]

2. The CJEU Jurisprudence on the Dublin Regulation: The Systemic Failures Criterion

As noted above, the principle of mutual trust between the EU Member States underlies the criteria and mechanisms established by the Dublin Regulation. According to the CJEU, this principle is fundamentally important in EU Law, as it allows the creation and the maintenance of an area without internal borders. This mutual trust principle requires Member States to assume that all other Member States respect EU law and particularly the fundamental rights recognized by EU law. The CJEU agrees with the ECtHR that this presumption must be relative. Nonetheless, it has set a higher threshold to rebut the compliance presumption in order to protect the EU principle of mutual trust.

As a matter of fact, the CJEU reacted to the 'external' evaluation of the Dublin Regulation by the ECtHR a few months after the *M.S.S.* judgment. In the *N.S.* case,[44] the CJEU takes note of the principles laid down in *M.S.S.*[45] and follows the path traced by the Strasbourg Court by claiming that the presumption of compliance with the fundamental rights of the European Union, on which the Dublin Regulation is based, cannot be absolute.[46] An absolute presumption would be incompatible with the law of the European Union[47] and with the obligation to interpret the Dublin Regulation in accordance with fundamental rights.[48] In fact, according to

[41] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* App. no 45036/98 (ECtHR, 30 June 2005), paras 152-165. The Netherlands, third intervening State in *M.S.*, objected to the competence of the Court on the basis of the equivalent protection principle (para 330 of the judgment).
[42] This provision corresponds to what is today art 17(1) of the Dublin III Regulation.
[43] *M.S.S* (n 2), paras 339-340. Similarly, *Tarakhel* (n 1), paras 88-91.
[44] *N.S.* (n 3).
[45] ibid, paras 88-90.
[46] ibid, para 104.
[47] ibid, para 105.
[48] ibid, para 99.

the CJEU, Article 4 of the EUCFR[49] 'must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible" within the meaning of Regulation No 343/2003 where they cannot be unaware that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.'[50]

As an institution of the European Union, the Luxembourg Court obviously aims to preserve the functioning of the Dublin system. According to the CJEU, not any infringements of the European asylum legislation can overcome the presumption of compliance underlying the Dublin Regulation.[51] Only the presence of major operational problems[52] can impede the regular implementation of the competence-sharing system. The threshold established by the Court is reached when the State responsible suffers from 'systemic flaws in the asylum procedure and reception conditions for asylum [...], resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State.'[53]

The subsequent case law of the CJEU progressively complicated the dialogue with the ECtHR. According to the CJEU's judgment in *Abdullahi*, an asylum seeker can challenge the identification of the Member State competent, resulting from the criteria set forth by the Regulation, only 'by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State.'[54] Therefore, the assessment of the applicant's individual risk is neither necessary nor sufficient to rebut the mutual trust

[49] This provision proclaims the prohibition of torture and other inhuman and degrading treatment. According to art 52(3) of the Charter, the Luxembourg Court confers to such provision the same meaning and scope as art 3 ECHR.

[50] *N.S.* (n 3), para 106 (emphasis added).

[51] ibid, para 85: 'if the mandatory consequence of any infringement of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member State responsible were that the Member State in which the asylum application was lodged is precluded from transferring the applicant to the first mentioned State, that would add to the criteria for determining the Member State responsible set out in Chapter III of Regulation No 343/2003 another exclusionary criterion according to which minor infringements of the abovementioned directives committed in a certain Member State may exempt that Member State from the obligations provided for under Regulation No 343/2003. Such a result would deprive those obligations of their substance and endanger the realization of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union.'

[52] ibid, para 81.

[53] ibid, para 86.

[54] Case C-394/12 *Abdullahi c. Bundesasylamt* [2013] ECLI:EU:C:2013:813, para 62.

presumption and to suspend the transferals under the Dublin Regulation.[55] The CJEU has established 'a high barrier against the setting aside of the principle of mutual trust'[56] in order to ensure the capability of the Regulation to serve its primary objectives, which is 'to organize responsibilities among the Member States, ensure speed in the processing of asylum applications[57] and prevent forum shopping[58]'.[59]

In a number of decisions preceding the *Tarakhel* judgment, the ECtHR acknowledged and indeed seemed to approve the 'systemic failures' criterion. The Strasbourg Court, in fact, has declared manifestly ill-founded (in a rather systematic way[60]) the applications of asylum seekers who had been repatriated or were about to be repatriated to Italy by virtue of the Dublin Regulation. Though taking into account, in principle, the individual circumstances of the applicants, the Court rejected their applications with a stereotyped formula which borrows the terms used by the CJEU: 'while the general situation and living conditions in Italy of asylum seekers, accepted refugees and aliens who have been granted a residence permit for international protection or humanitarian purposes may disclose some shortcomings [...], *it has not been shown to disclose a systemic failure* to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group of people, as was the case in *M.S.S. v. Belgium and Greece*.'[61]

In this complicated judicial dialogue, the *Tarakhel* judgment has definitely shed light on the position of the Strasbourg Court. The latter Court has refused to acknowledge the systematic failures criterion by instead emphasizing the relevance of the applicant's individual situation.

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[55] 'As the exceptional situation as described in N.S. does not relate to the characteristics of an individual asylum seeker, Member States are obliged to take exceptional situations into account on a general basis and not as a matter of evidence provided within the context of assessing the admissibility of an individual application.' Opinion of AG Jääskinen in Case C-4/14, *Bundesrepublik Deutschland v. Kaveh Puid* [2013] ECLI:EU:C:2013:244, para 23.

[56] ibid, para 62.

[57] Recital 4 of the Dublin II Regulation. See also Case C-245/11 *K v Bundesasylamt* [2012] ECLI:EU:C:2012:685, para 48.

[58] Opinion of AG Trstenjak in *N.S.* (n 3), para 94.

[59] Opinion of AG Jääskinen, in *Puid* (n 55), para 62.

[60] Maura Marchegiani, 'Il Sistema di Dublino Ancora al Centro del Confronto tra Corti in Europa: Carenze Sistemiche, Problemi Connessi alle 'Capacità Attuali del Sistema di Accoglienza' e Rilievo delle Garanzie Individuali nella Sentenza Tarakhel C. Svizzera' (2014) 5 Ordine Internazionale e Diritti Umani 1113.

[61] *Mohammed and others v. the Netherlands and Italy*, App no 40524/10 (ECtHR, 27 August 2013), para 78 (emphasis added). See further *Abubeker v. Austria and Italy* App no 73874/11 (ECtHR, 18 June 2013); *Halimi v. Austria and Italy* App no 53852/11, (ECtHR, 18 June 2013); *Miruts Hagos v. The Netherlands and Italy* App no 9053/10 (ECtHR, 27 August 2013); *Hussein Diirshi and others v. the Netherlands and Italy* App no 2314/10 (ECtHR, 10 September 2013).

3. *The ECtHR Emphasizing the Relevance of an Individual Assessment in Tarakhel*

The *Tarakhel* judgment concerned a family of Afghan nationals who had lodged a protection claim in Switzerland. This State, which is bound by the Regulation by virtue of a bilateral agreement with the EU,[62] intended to repatriate the applicants in Italy, where they had first been identified.[63] The Court acknowledged that the situation in Italy was rather different to the one found in Greece in the case *M.S.S.*[64] The Italian protection system, unlike the Greek one,[65] did not present systemic failures. This difference led the Court to adopt a different approach.[66] In the absence of generalized and documented violations, the ECtHR has deemed it necessary to assess the individual risk that the applicants would face if expelled to Italy, the competent State under the Dublin Regulation. As a matter of fact, it has been acknowledged that 'while the structure and overall situation of the reception arrangements in Italy cannot [...] in themselves act as a bar to all removals of asylum seekers to that country, the data and information [considered] nevertheless raise serious doubts as to the current capacities of the system.'[67] Accordingly, in the Court's view, 'the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded.'[68]

According to the well-established case-law of the ECtHR, 'to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.'[69] While not implying an obligation to provide the asylum seeker with a house[70] or financial assistance,[71] the obligation of a contracting State under Article 3 ECHR is engaged 'in respect of treatment where an applicant, who [is] wholly dependent on State support,

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[62] Association agreement of 26 October 2004 between the Swiss Confederation and the European Community regarding criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (OJ L 53 of 27 February 2008).

[63] Italy was therefore the State responsible by virtue of art 10(1) of the Dublin II Regulation.

[64] *Tarakhel* (n 1), para 114: 'the current situation in Italy can in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment [...] where the Court noted in particular that there were fewer than 1,000 places in reception centers to accommodate tens of thousands of asylum seekers and that the conditions of the most extreme poverty described by the applicant existed on a large scale.'

[65] ibid, para 114.

[66] ibid, para. 59.

[67] ibid, para 115.

[68] ibid, para 120.

[69] ibid, para 94.

[70] *Chapman v. the UK* App no 27238/95 (ECtHR, 18 January 2001), para 99.

[71] *Müslim v. Turkey* App no 53566/99 (ECtHR, 26 April 2005), para 85.

[finds] herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity.'[72]

The applicants claimed that, during their stay in Italy (ten days before leaving for the Netherlands and hence to Switzerland), they were hosted in a reception center with poor hygiene conditions and without any privacy. Because of the specific situation of the applicants, a family with minor children,[73] the Court found that Switzerland would have acted in breach of Article 3 of the Convention by repatriating them to Italy without obtaining assurances from the Italian authorities that on their arrival they would be received in facilities and in conditions adapted to the age of the children, and that the family would be kept together.[74]

A more recent decision[75] has confirmed that the individual situation of the applicants and not the general situation in Italy was the basis of the ECtHR findings in *Tarakhel*.[76] The Court has in fact declared manifestly unfounded the application of an adult 'able young man with no dependents'.[77] According to the Court, the applicant has not established that, if returned to Italy, he would face 'a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3.'[78] This decision has explicitly acknowledged the principles laid down in *Tarakhel,*[79] but has come to a different conclusion in light of the individual situation of the applicant.

In its *Tarakhel* judgment, the ECtHR clarified that the implementation of the Regulation may affect the protection of fundamental rights, and especially of the principle of *non-refoulement* set forth in Article 3 of the

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[72] *M.S.S.* (n 2), paras 252-253; *Budina v. Russia* App no 45603/05 (ECtHR, 18 June 2009).

[73] 'The Court has established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant [...]. Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status.' See *Tarakhel* (n 1), para 99; *Popov v. France* App no 39472/07 and 39474/07 (ECtHR, 19 January 2012), para 91.

[74] ibid, para 120.

[75] *A.M.E. v. the Netherlands* App no 51428/10 (ECtHR, 5 February 2015).

[76] This was put into question in the joint partly dissenting opinion of judges Casadevall, Berro-Lefèvre and Jäderblom, who have argued that the Grand Chamber in *Tarakhel* departed 'from the Court's findings in numerous recent cases' and justified 'a reversal of [the Court] case-law within the space of a few months'. It would appear that the *Tarakhel* judgment relied on previous case-law, which also concerned the situation in Italy. Indeed, the ECtHR clearly stated that the reception conditions in Italy cannot in themselves act as a bar to the removal of asylum seekers to the Italian territory under the Dublin Regulation. Particular caution and additional requirements are nevertheless required when the return concerns vulnerable asylum seekers.

[77] ibid, para 34.

[78] ibid, para 36.

[79] ibid, paras 28 and 35.

Convention, in a number of cases which are not included in the CJEU interpretation. According to the CJEU, the criteria and mechanisms of the Dublin Regulation might be disapplied only in exceptional circumstances that essentially coincide with the collapse of a national protection system. Conversely, in the ECtHR jurisprudence, the presence of systemic failures is a sufficient, but not a necessary condition to rebut the presumption of compliance with fundamental rights. This means that, between the regular and lawful implementation of the Dublin Regulation and the collapse of a national system there are a number of circumstances that might compromise asylum seekers' rights.[80] Member States shall take into due account all these circumstances in order to implement the Regulation in accordance with the ECHR as well as the EUCFR.

4. The Interpretation of the CJEU Inconsistent with the EUCFR

Article 4 EUCFR prohibits torture and other inhuman and degrading treatment and hence corresponds to Article 3 of the European Convention on Human Rights.[81] In accordance with Article 52(3) of the Charter, the CJEU has interpreted this provision as implicitly stating the principle of *non-refoulement*. Nevertheless, in the Luxembourg jurisprudence, Article 4 EUCFR seems to have a narrower meaning and scope than Article 3 ECHR. As a matter of fact, according to the CJEU, Article 4 is to be interpreted as meaning that the Member States may not transfer an asylum seeker if they cannot be unaware of the systemic deficiencies in the protection system of the State responsible. Therefore, the Member States must consider the general situation in the receiving country to assess whether the repatriation of the asylum seeker is incompatible with the principle of *non-refoulement* proclaimed by Article 4 of the EU Charter.

Conversely, according to the ECtHR jurisprudence, the individual circumstances of the applicants must be duly considered in assessing a potential violation of Article 3.[82] The applicant's individual situation can be disregarded only if there is a generalized risk determined by widespread and systemic violations. As the Court has stated in *M.S.S.*,[83] in such exceptional circumstances, it is implicitly proved that the applicant would be individually affected by a large-scale risk of inhuman and degrading treatment. The adoption of this approach in asylum seekers' claims extends beyond the field of application of the Dublin Regulation.[84] This is likely to be the result of the EU asylum legislation's influence on

[80] Steven Peers, 'Tarakhel v Switzerland: Another nail in the coffin of the Dublin system?' (2014) EU Law Analysis, 4 November 2014.

[81] See Explanations relating to arts 4 and 52(3) of the Charter of Fundamental Rights. Nonetheless, it should not pass unnoticed that the EU Charter explicitly proclaims the principle of *non-refoulement* in art 19, also corresponding to art 3 ECHR according to the Explanations. One might well wonder why the Court is so reticent concerning the applicability of this Charter provision.

[82] *M.S.S.* (n 2) para 219.

[83] *M.S.S.* (n 2) para 359.

[84] See, for instance, *Sufi and Elmi v. UK*, App no 8319/07 and 11449/07 (ECtHR, 28 June 2011), para 293; and *Saadi* (n 37), para 132.

Strasbourg jurisprudence; suffice it to mention the Qualification Directive, which provides subsidiary protection to the civilian or the person whose life is seriously threatened by reason of indiscriminate violence.[85]

An interpretation in accordance with Article 52(3) EUCFR would consider the 'systemic failures' criterion[86] adopted by the CJEU not as a threshold under which there is no potential violation of Article 4, but rather as a condition that might exempt the asylum seeker from proving his/her individual risk.[87]

In light of the case law of the EU Court, the scope of Article 4 of the Charter, proclaiming the prohibition of torture, is narrower than that of Article 3 ECHR in so far as the application of the former provision is not triggered in the presence of an individual risk. Moreover, the high threshold established by the CJEU to rebut the mutual trust principle, which is based on Article 4 of the Charter, may affect human rights and fundamental freedoms as recognized by the Convention, in breach of Article 53 of the Charter. As a matter of fact, the repatriation of the Tarakhel family to Italy, perfectly compatible with Article 4 EUCFR as interpreted by the CJEU, would have amounted to a breach of Article 3 ECHR. A *revirement* in the CJEU jurisprudence is, therefore, sorely needed in order to ensure an interpretation of Article 4 of the Charter compatible with the clauses set forth by Articles 52 and 53 of the same Charter and to prevent further litigation.[88] Nevertheless, a spontaneous 'adjustment'[89] in the jurisprudence of the CJEU seems to be highly unlikely in light of the recent statements of the CJEU in the Opinion 2/2013, concerning the accession of the EU to the ECHR. Interestingly, this Opinion was delivered only a few weeks after the *Tarakhel* judgment of the ECtHR. It

[85] Art 15(c) of the Directive. This provision was interpreted by the CJEU as meaning that the more generalized is the risk, the less the person who claims protection must demonstrate an individual risk; C-465/07, *Elgafaji v. Staatssecretaris van Justitie* [2009] ECLI:EU:C:2009:94.

[86] For an analysis of the genesis and the rationale of this criterion (whose scope extends beyond the implementation of the Dublin system) vis-à-vis the mutual trust principle, see Armin Von Bogdandy, John Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 Common Market Law Review 59.

[87] Cathryn Costello, 'Dublin-case NS/ME: Finally, an end to blind trust across the EU?' (2012) 2 A&MR 83, 89. This interpretation is adopted by the UK Supreme Court in *EM (Eritrea)*, 19 February 2014: '[v]iolation of Article 3 does not require (or, at least, does not necessarily require) that the complained of conditions said to constitute inhuman or degrading conditions are the product of systemic shortcomings' (para 42). This judgment has strongly influenced the ECtHR decision in *Tarakhel* (n 1, para 104).

[88] Guy Goodwin-Gill 'Budeserepublik Deutschland v. Kaveh Puid (E.C.J.) [notes]' (2014) 53 International Legal Materials 341.

[89] Claire Vial, 'La méthode d'ajustement de la Cour de justice de l'Union européenne : quand indépendance rime avec équivalence' in Caroline Picheral, Laurent Coutron (eds), *Charte des droits fondamentaux de l'Union européenne et Convention européenne des droits de l'homme* (Bruylant 2012), 93.

clearly emerges from the Opinion that the CJEU is reluctant to permit external interferences in its field of competence, especially when these interferences are deemed to threaten the primacy and autonomy of EU law.

The interpretative divergences between the European courts are to be read in light of the broader tension, raised by the Opinion in question, between the autonomy and the primacy of EU law and fundamental human rights. The fundamental importance of the mutual trust principle in EU law, which allows for the creation and the maintenance of an area without internal borders,[90] excludes the possibility for Member States to 'check whether [another] Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.'[91] This clearly offers a justification for the approach adopted by the CJEU in *Abdullahi*, which excludes the relevance of the individual risk faced by an applicant. As a result, for the sake of protecting the mutual trust principle, the CJEU seems to have created a new principle of *non-refoulement* which only applies to intra-EU removals. The violation of this principle is only triggered when a Member State, to which an individual has to be returned, suffers from systemic deficiencies that make it highly likely (if not certain) that he/she would face inhuman and degrading treatment upon return. This intra-EU principle of *non-refoulement* is clearly different and less protective than the one inferred by the ECtHR from Article 3 of the Convention. Consequently, insofar as the *Bosphorus* equivalent protection presumption is not applicable to Dublin removals, the Member State acting in accordance with this newly created principle of *non-refoulement* remains exposed to ECtHR scrutiny.

IV. Composing The ECtHR and The CJEU Jurisprudence on State Obligations

Separate from the conditions to rebut the presumption of compliance is the question of the consequences deriving from the rebuttal of such presumption. This final section focuses on the obligations of the Member States having jurisdiction over an asylum seeker whose application shall be examined, according to the Dublin Regulation criteria, by another Member State that does not comply with the EU asylum legislation. This analysis aims to assess, firstly, whether the obligations imposed on the Member States by the CJEU are compatible with the ECHR and, secondly, whether the obligation introduced by the ECtHR in *Tarakhel*, to request and obtain diplomatic assurances from the State responsible under the Dublin Regulation, can be reconciled with the mutual trust principle.

1. The Twofold Obligation Set Forth by the CJEU Compatible with the ECHR

In *M.S.S.*, the ECtHR imposed on the Contracting States a general obligation of abstention from returning an asylum seeker to the competent

[90] Opinion 2/2013 (n 30), para 191; see also *N.S.* (n 3), para 83.
[91] Opinion 2/2013 (n 30), para 192.

State when there are substantial grounds for believing that, if returned, he/she would face the risk of inhuman and degrading treatments. In addition, the reference to the sovereignty clause set forth by Article 3(2) of the Regulation (now Article 17(1) of the Recast), has been interpreted as imposing on the returning State a duty to examine the asylum application.[92] It is, nonetheless, unlikely that the Strasbourg Court intended to impose such an obligation. As mentioned above, the ECHR provisions do not explicitly protect the right to asylum. The Contracting States act in compliance with the ECHR insofar as the asylum seekers under their jurisdiction enjoy the fundamental rights set forth by this Convention. These rights do not include the right to apply for asylum. A different interpretation would merely be 'wishful legal thinking'.[93]

In the *N.S.* case, the CJEU precisely defined the content of the obligation of the States having jurisdiction over an asylum seeker who cannot be repatriated to the State responsible under the Dublin Regulation. This is meant to be a twofold obligation.

Firstly, the Member State, faced with systematic failures in the State identified as competent, must continue to examine the criteria set forth in the Dublin Regulation 'in order to establish whether one of these criteria enables another Member State to be identified as responsible for the examination of the asylum application.'[94] One might argue that the interpretation of the CJEU is inconsistent with the principle laid down in *M.S.S.* by the ECtHR for providing the States with an alternative means to escape from the examination of the asylum application. Nonetheless, provided that the return to another State identified as competent on the basis of alternative Dublin criteria does not trigger a risk of violation of Article 3 ECHR, the additional obligation conceived by the CJEU seems perfectly compatible with the Convention. Again, the ECHR provisions do not explicitly protect the right to apply for asylum, but only prevent the asylum seeker from being repatriated to a country in which he/she would face inhuman and degrading treatment. The expulsion of the asylum seeker to a Member State that does not respect and protect the fundamental rights guaranteed by the EU is explicitly prohibited by the CJEU.[95] If the latter Court acknowledged that the individual risk faced by a specific applicant might also rebut the compliance presumption, the protection from his/her expulsion to the noncompliant Member State would in principle suffice to ensure the observance of the ECHR.

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[92] See *inter alia* Giuseppe Morgese, 'Regolamento Dublino II e applicazione del principio di mutua fiducia tra Stati membri: la pronunzia della Corte di giustizia nel caso N.S. e altri' (2012) Studi sull'integrazione europea 158.

[93] Kay Hailbronner, 'Nonrefoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?', in David Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (International Studies in Human Rights Series, Springer 1988)

[94] Case C-411/10 and 493/10 (n 3), para 107

[95] ibid, paras 94 and 106.

Secondly, according to the CJEU and only as a subsidiary means, where it is impossible to identify another State competent according to the Dublin criteria or where such an identification procedure would be excessively detrimental to the asylum seeker, the State must exercise the sovereignty clause and proceed to the assessment of the asylum claim.[96] Nonetheless, in response to a preliminary ruling introduced by a German judge, the Luxembourg Court has argued that no obligation for the Member States to examine an asylum claim can be inferred from Article 3(2) of the Regulation.[97] In the *Puid* case, the CJEU clarified that the competence of the State having jurisdiction over the asylum seeker derives from Article 13 of the Dublin II Regulation (corresponding to Article 3(2) of the Recast Regulation).[98] This provision, in fact, established that '[w]here no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it.' By virtue of Article 13, the State having jurisdiction over the asylum seeker, being the Member State in which the application was lodged, became the State responsible for examining the asylum claim. The transfer of competence to the returning State in presence of systemic flaws in the Member State identified as competent by virtue of the Dublin criteria is now codified by Article 3(2) of the Dublin III Regulation, which entered into force in January 2014. This obligation is, nonetheless, conditional on the impossibility of identifying another State competent on the basis of the Regulation criteria.

The findings of the CJEU in *Puid* were based on the assumption that the Dublin Regulation does not confer individual rights on the asylum seekers, but only regulates the sharing of competence among the Member States.[99] The Luxembourg Court has answered in the negative the preliminary

[96] ibid, para 108: 'The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.'

[97] Case C-4/14, *Bundesrepublik Deutschland v. Kaveh Puid* [2013] ECLI:EU:C:2013:740, para 37. See also the Opinion of AG Jääskinen in this case (n 55), para 70: 'a substantive obligation on the Member State in which the application for asylum was first lodged cannot be derived from the first sentence of Article 3(2). This provision clearly aims at permitting *any* Member State with which an application for asylum has been lodged to take the position of the Member State responsible in accordance with its sovereign discretion. This might be done, for example, for political, practical or humanitarian reasons. In other words, this provision authorizes, but does not compel, the Member States to examine asylum applications' (footnotes omitted).

[98] ibid, para 36.

[99] Opinion of Advocate General Jääskinen in *Puid* (n 55), paras 58, 59 and 73. See also Opinion of AG Trstenjak in Case C-620/10 *Kastrati* [2012] ECLI:EU:C:2012:10, para 29: 'the objective of Regulation No 343/2003 is not to create procedural safeguards for asylum seekers in terms of the determination of conditions for the acceptance or rejection of their asylum applications.'

question raised by the German judge: there is no judicially enforceable claim, in the hands of asylum seekers, to compel a Member State to examine their applications for asylum based on a duty of that Member State to exercise its competence pursuant to Article 3(2) of the Dublin II Regulation. As argued above, an obligation to examine an asylum claim is not even inferable from the ECHR provisions. Therefore, the interpretation of the Regulation proposed by the CJEU is not incompatible with the Convention, *a fortiori* in light of the Recast Regulation that explicitly imposes on the Member State the duty to assess the application of the asylum seeker who cannot be repatriated to the Member State competent.[100]

From this perspective, insofar as the future case law of the CJEU will acknowledge that the individual risk suffered by an asylum seeker might rebut the compliance presumption, the EU legislation is likely to offer a more extensive protection than the ECHR.

2. Diplomatic Assurances and Mutual Trust: An Alternative Reading of the Tarakhel *Judgment*

Concerning the findings of the Strasbourg Court in *Tarakhel*, as far as there is an agreement on the existence of a wide range of circumstances which might entail a risk of inhuman and degrading treatment under Article 3 ECHR (besides the extreme hypothesis of the dramatic collapse of a national protection system), it should not be surprising that the content of States' obligation varies depending on the seriousness of this risk.

As mentioned above, the Strasbourg Court claims that, though not acting as a bar to all removals of asylum seekers to Italy, the conditions of the Italian protection system might entail the risk of inhuman and degrading treatment for the applicants.[101] Hence, the circumstance that the Italian system, unlike the Greek one, does not suffer from systemic deficiencies undoubtedly excludes an automatic suspension of the 'Dublin returns' to Italy but, at the same time, is likely to alter the regular application of the Regulation. The lesser seriousness of the shortcomings in the Italian reception system allows for the formulation of a 'softer obligation': no examination of the asylum claim or exercise of the sovereignty clause is demanded in this case. Nonetheless, the transfer to Italy is conditional: 'it is [...] incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together.'[102]

[100] Even if such obligation remained conditional to the impossibility to identify another State competent on the basis of the Regulation criteria.
[101] *Tarakhel* (n 1), para 120.
[102] ibid, para 120.

According to the ECtHR, such assurances must consist of sufficiently detailed individual guaranties. The Court considered insufficient the intent expressed by the Italian authorities[103] to allocate the family in an ERF funded reception center in Bologna.[104] This approach is consistent with the previous case law of the Court. In particular, in the *M.S.S.* judgment the ECtHR denied the validity of agreements formulated in vague and stereotyped terms without mentioning individual guarantees based on the applicant's situation.[105]

The Court has failed to provide definitive indications concerning the substantial and formal requirements that these assurances must meet to be considered reliable. Interestingly, the ECtHR has omitted any reference to its previous case law on diplomatic assurances.[106] Therefore, the respect of the principle of *non-refoulement* in implementing the Dublin Regulation continues to largely fall within the realm of the Member States' discretion.

The key question is nonetheless whether this 'soft' obligation to obtain diplomatic assurances is compatible with the principle of mutual trust. As the CJEU has recently claimed in its opinion on the EU accession to the European Convention on Human Rights, 'when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that [...], save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.'[107] Therefore, one may well argue that the request for diplomatic assurances, if automatized, might be in breach of the mutual trust principle.[108] Nevertheless, when diplomatic assurances are

[103] The Italian declaration was referred to the Court by the Swiss government during the hearing (para 75 of the judgment).
[104] ibid, para 121.
[105] *M.S.S.* (n 2), para 354. Moreover, in this judgment the Court argued that, in order to be reliable and to produce effects, the assurances must be obtained before the repatriation of the asylum seeker is disposed (and not only previous to its execution).
[106] Suffice it to mention the judgment of the ECtHR in *Saadi v. Italy* (n 37) in which the Court has indicated a number of requirements, such as the reliability of the authorities issuing the assurances and the assessment of the general human rights conditions in the territory of destination. For an overview on these criteria see Alice Izumo, 'Diplomatic Assurances against Torture and Ill Treatment: European Court of Human Rights Jurisprudence' (2010) 42 Columbia Human Rights Law Review 233. One might nonetheless argue that the criteria set forth in *Saadi*, a case involving a risk of torture, are too demanding for the 'Dublin Returns', which are intra-EU repatriations supported, though not in absolute terms, by the principle of mutual trust between the Member States.
[107] Opinion 2/2013 (n 30), para 192. The risk that, following the accession, the respect of the ECHR would demand a systematic check of other Member States' compliance with fundamental rights makes the Court concluding that 'accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law' (para 194).
[108] See also Opinion of AG Jääskinen, in *Puid* (n 55), para 62: 'the principle of mutual trust may not be placed under question through systematic examination, in each procedure entailing an application for asylum, of the compliance of other Member States with their obligations under the Common European Asylum System.'

requested and obtained, the application of the Dublin Regulation is only conditional and not impeded, as it might be in presence of systemic failures. Moreover, the exchange of assurances might be seen as an enforcement of the principle of cooperation which underlies the Dublin Regulation.[109]

In a way, these considerations bring to mind the *M.S.S.* judgment. It seems indeed that the ECtHR, as it did in *M.S.S.*, is suggesting to the EU an interpretation of the Dublin Regulation, which would be capable of ensuring the compatibility of its implementation with the ECHR without sacrificing the mutual trust presumption. The EU would certainly feel more comfortable to undertake a jurisprudential shift aimed at granting the respect of Articles 52 and 53 of the Charter if this shift did not put the mutual trust principle in danger. Indeed, imposing on Member States a 'soft' obligation to obtain diplomatic assurances, in cases in which an asylum seeker would face an individual risk upon return to an EU Member State, is a small price to pay in order to save the implementation of EU asylum policy from the ECtHR scrutiny.

V. CONCLUDING REMARKS

This paper was dedicated to an analysis of the divergences between the CJEU and the ECtHR jurisprudence concerning the implementation of the Dublin Regulation. The analysis has shown that the CJEU approach, which is justified by the protection of the mutual trust principle in EU law, is in breach of the clauses set forth by Articles 52 and 53 of the EUCFR and exposes the Member States to the judicial scrutiny by the ECtHR, as the *Tarakhel* case clearly showed. One may argue that the CJEU has reshaped the principle of *non-refoulement* for intra-EU removals by stating that the mutual trust principle can only be rebutted in the presence of systemic deficiencies, therefore excluding any relevance for the individual risk faced by an asylum seeker.

In *Tarakhel*, the ECtHR has proposed an interpretation which enables Member States to implement the Dublin Regulation in accordance with the ECHR and the EUCFR. By assuming the existence of a wide range of circumstances which might entail a risk of inhuman and degrading treatment under Article 3 ECHR (besides the extreme hypothesis of the dramatic collapse of a national protection system), the ECtHR made the content of the state obligation dependent on the seriousness of the risk faced by the applicant. In the presence of systemic failures, which make it highly likely (if not certain) that the applicant would face inhuman and degrading treatment in the State competent, the Member States cannot return the applicant to this country. In cases in which the risk of inhuman and degrading treatment is not proven by the general situation in the State competent, but is instead motivated by individual circumstances, a softer

[109] Marchegiani (n 60), 1114.

obligation lays on Member States: that of obtaining from the receiving country assurances that the applicant will be taken in charge in adequate reception conditions and will have access to a fair and efficient asylum procedure.

This interpretation ensures compliance with both mutual trust and the *non-refoulement* principle and therefore represents a workable way for the EU to implement its common asylum policy in conformity with the EUCFR provisions.

BRINGING CRITICAL RACE THEORY TO EUROPE: THE CASE OF IMMIGRANT WOMEN

Fulvia Staiano[*]

This article moves from the consideration that American critical race feminism (CRF) criticism of laws' pretence of universality as well as of its gender and racial essentialism may be fruitfully applied to the situation of immigrant women in contemporary Europe. Drawing from these criticism, expressed in relation to minority women, it aims to unveil the role of immigration law in creating and reinforcing immigrant women's experiences of exclusion. The article thus analyses selected provisions of supranational and national immigration law, with a special focus on two main aspects: the normative and judicial imposition to immigrant women of unviable requirements modelled on the experiences of citizen women, and the failure of laws to take into account their specific needs. In addition to performing a critical review of the gendered effects of immigration law in contemporary Europe, it will offer evidence of the relevance of critical race feminism beyond the time and geopolitical context in which it was developed.

Keywords: critical race feminism, gender and migration, Europe, United States, human and fundamental rights law.

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I. INTRODUCTION

From the late '80s of the twentieth century, a group of scholars in the United States started to express their dissatisfaction with both the doctrinal framing of racial and gender issues in the United States as two separate realms (in feminist legal theory and critical race theory alike) and the American normative framework in force at the time. Their views may be grouped under the umbrella definition of critical race feminism.[1] On the doctrinal level, critical race feminists pointed out the perverse effects of essentialism in critical legal theory.[2] On the one hand, they criticised feminist legal theory for its reliance on an apparently universal concept of women which was in fact modelled on the experiences of white, upper-class, heterosexual women. On the other hand, critical race feminists also highlighted critical race theory's focus on men of color as the quintessential person of color, while overlooking women of color. Thus, these scholars proposed an alternative method of legal analysis, based on a stronger awareness of the complex experiences of disadvantage and discrimination endured by women of color on the intersecting grounds of sex, race, and class, as well as other categories.

On a more strictly normative level, critical race feminists developed their own critique of law. Two main aspects of their analysis appear particularly interesting. Firstly, some critical race feminists argued against the law's pretence of universality, by showing how the law itself may entrench and reinforce structures of subordination not only between the sexes, but also between ethnic groups and social classes. Secondly, critical race feminists contested the rejection of rights as a tool of empowerment for oppressed groups, advocated by some critical legal scholars both in relation to racial minorities[3] and from a feminist perspective.[4] In response to the view whereby rights are merely an expression of an oppressive system and cannot, thus, bring about effective change, critical race feminists – while admitting that a re-thinking of rights was in order – pointed out the

[1] Not all authors mentioned in this article necessarily identify with this definition. I have, however, chosen to focus on the work of scholars whose legal studies on gender and racial issues are largely in agreement.

[2] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] University of Chicago Legal Forum 139, 152 ff; Marlee Kline, 'Race, Racism and Feminist Legal Theory''[1989] Harvard Women's Law Journal 115; Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' [1990] Stanford Law Review 581.

[3] Mark Tushnet, 'An Essay on Rights' [1984] Texas Law Review1363; Alan Freeman, 'Racism, Rights and the Quest for Equality of Opportunity: a Critical Legal Essay' [1988] Harvard Civil Rights – Civil Liberties Law Review 295, 328 ff.

[4] Frances Olsen, 'Statutory Rape: A Feminist Critique of Rights Analysis' [1984] Texas Law Review 387; Janet Rifkin, 'Toward a Theory of Law and Patriarchy' [1980] Harvard Women's Law Journal 83.

transformative potential of rights-based discourses precisely because they were situated within the system in need of change.[5]

Despite the compelling character of these critiques and notwithstanding the obvious existence of racial and gender issues also in Europe, critical race feminism has had a very limited impact on the European legal space and in European legal scholarship. With the important exception of the concept of intersectional discrimination (which has been well received at institutional[6] and academic[7] levels and has started to work its way into jurisprudential analysis[8]), the breakthroughs of critical race feminism have been rarely discussed and applied to this context.[9]

This article aims to mark a step in this direction by exploring an area where the application of critical race feminist thought to the contemporary European context may be particularly fruitful. In particular, it will discuss European and national immigration law by drawing parallels between the current situation of third-country national women in the European legal space and that of women of color between the late '80s and the early '90s of the twentieth century in the United States as analysed by critical race feminists. My analysis will not consist in highlighting the similarities between the issues experienced by these two groups. Rather, the primary aim of this article is to relate the deconstructive and constructive legal analysis carried out in the context of critical race feminism (from now on, CRF) to my own findings on the role of law in reinforcing or curbing the disadvantages and issues currently experienced

[5] Deborah L. Rhode, 'Feminist Legal Theories' [1990]Stanford Law Review 617, 632 ff.

[6] Joanna Kantola, Kevät Nousiainen, 'Institutionalizing Intersectionality in Europe' [2009] International Feminist Journal of Politics 459.

[7] Mathias Möschel, 'The Relevance of Critical Race Theory to Europe' (PhD thesis, European University Institute 2011), 118 ff.; Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009); Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate 2011).

[8] At supranational level, it is possible to recall in particular the landmark judgment of *B.S. v Spain* by the European Court of Human Rights (*B.S. v Spain*, App no 47159/08, ECtHR 24 July 2012). The case concerned a Nigerian woman working in Spain as a prostitute who had been subjected to physical and verbal abuse by police officers on multiple occasions, and who had not obtained redress before domestic courts. In this case, the Court found that the Spanish authorities had breached the applicant's right to be free from inhuman and degrading treatment (art 3 ECHR) in conjunction with her right to equality and non-discrimination pursuant to art 14 ECHR. The racist and sexist character of both the police officers and the judicial authorities' attitude towards the applicant grounded the Court's observation that 'the decisions made by the domestic courts [failed] to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute' [62].

[9] A rare example in this sense is provided by Adrien K Wing and Monica Smith, 'Critical Race Feminism Lifts the Veil? Muslim Women, France, and the Headscarf Ban' [2005] UC Davis Law Review 743.

by third-country national immigrant women in Europe, and to the role and potential of human and fundamental rights law in this realm.

The first part of this article will be devoted to a critical survey and analysis of the views expressed by CRF scholars in relation to the pretence of universality and impartiality of law and to the possible role of rights in exposing and remedying the subordination experienced by oppressed groups of women. Among the wide array of theoretical stances expressed by critical race feminists, special attention will be devoted to those areas which I believe are more likely to be fruitfully applied to immigrant women in contemporary Europe.

The second part of the article will then lay out my own position on the issues detected by critical race feminists in the United States, making reference to the different question of immigrant women in Europe. More specifically, through an analysis of significant single examples of rulings I will tackle two main issues. On the one hand, I will explore the extent to which legal norms applicable to immigrant women in Europe may constitute yet another example of how the law, by being oblivious of difference, creates and reinforces the instances of inequality experienced by this group. On the other hand, I will explore the transformative potential of human and fundamental rights law in revealing and correcting the shortcomings entrenched in law, which prevent the effective protection of immigrant women's rights in the European legal space.

II. CRITICAL RACE FEMINISM AND THE TRANSFORMATIVE POWER OF RIGHTS-BASED DISCOURSES

In 1989, Kimberlé Crenshaw wrote a compelling article[10] in which she illustrated the problematic consequences of the legal consideration of race and gender as mutually exclusive categories. Taking Black women[11] as her reference group, she illustrated the law's failure to effectively grasp their experience of discrimination and subordination on the intersecting grounds of race and gender, and its consequent role in the perpetuation of the *status quo*. In order to illustrate her point, Crenshaw focused in particular on anti-discrimination law, *per se* and on its judicial enforcement. She argued that the anti-discrimination framework in the United States encouraged a focus on sex- and class-privileged Black individuals[12] in race discrimination cases, and on race- and class-privileged women in sex discrimination cases. Subsequently, Crenshaw further developed her theoretical stance by observing that structures of domination and subordination of certain groups of women on the intersecting grounds of sex, race, class and so forth, could be significantly aggravated by laws,

[10] Crenshaw (n 2).

[11] In conformity with critical race feminists' use of the term, in this article I will use the term 'Black' to refer to persons of African descent in the United States.

[12] Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' [1991] Stanford Law Review 1241, 1249.

which failed to consider these specificities. She argued that intersectional subordination was 'frequently the consequence of the imposition of one [normative] burden that interacts with pre-existing vulnerabilities to create yet another dimension of disempowerment.'[13] In the same period, Minow and Spelman stressed the importance of a contextual analysis of law 'in order to expose how apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written.'[14]

While CRF identified law as a flawed and biased system overlooking the specific issues and situation of minority women, and of Black women in particular, many CRF scholars argued in support of rights-based approaches as a strategy to remedy this shortcoming. This view was initially developed in response to critical legal scholars who rejected rights-based discourses because they believed that – while conveying a false sense of fairness – rights ultimately legitimised the *status quo*, and, thus, the oppression of certain groups.[15]

CRFs, on the other hand, firmly believed in the transformative power of rights. They pointed out that access to rights had been a significant achievement for these groups, for instance by recalling the importance of the civil rights movement for Black Americans.[16] CRFs agreed that the legal system of rights protection was not immune to criticism, and that in fact a re-thinking of rights was in order, before the needs of disempowered groups could effectively be taken into account by law. Nonetheless, many were convinced that the language of rights could be re-appropriated by these groups and effectively used as a strategic tool of societal change – precisely because this language constituted the dominant discourse and could be used to push their demands into the spotlight.

This stance was also expressed with specific reference to women experiencing disadvantage on the grounds of sex and race. Mari Matsuda, for instance, referred to legalism and to the very notion of rights as 'a tool of necessity' for 'outsiders, including feminists and people of color.'[17] She proposed the adoption of a multiple consciousness as a jurisprudential

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[13] ibid.

[14] Martha Minow and Elizabeth V Spelman, 'In Context' [1990] Southern California Law Review 1597, 1601.

[15] Nn 3 and 4.

[16] See for instance Kimberlé Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' [1988] Harvard Law Review 1331, 1349 ff, and Patricia Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' [1987] Harvard Civil Rights – Civil Liberties Law Review 401. On the same note, see also Robert A Williams, 'Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color' [1988] Law and Inequality 103.

[17] Mari Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' [1989] Women's Rights Law Reporter 7, 8.

method, not merely in the sense of a strategic shifting of points of view but as a contextual interpretation of law, i.e., as an 'opportunity to operate both within the abstractions of standard jurisprudential discourse, *and* within the details of our own special knowledge.'[18] This approach, she argued, could be fruitfully applied to constitutional rights as well, in order to make them more responsive to the needs of outsiders. Referring to her own perspective as a Japanese-American woman, Matsuda noted that the American Constitution was not written for her, but she could make it her own, 'using [her] own consciousness as a woman and person of color to give substance to those tantalizing words "equality" and "liberty".'[19]

Despite its strong links with the U.S. context, the CRF discourse on rights did not remain confined to that domestic order. Indeed, several scholars started to pay greater attention to international law, and to the increasingly relevant source of law constituted by international human rights law. Thus, the CRF debate on the transformative role of rights shifted its focus from a national to a transnational dimension.

Berta Esperanza Hernández-Truyol, in particular, considered CRF a key tool for the reconstruction of human rights norms on sex-based violence in the light of a stronger sensitivity to the intersections of race, sex, ethnicity and so forth.[20] She observed that human rights had the potential to play an important role in ensuring the enjoyment of full personhood for the most disenfranchised and disadvantaged individuals on the grounds of sex, sexuality, class, and nationality.[21] For this purpose, however, it was equally important to ensure that human rights themselves would not reinforce the hegemonic legal view, which also contributes to these individuals' othering. In this respect, Hernández-Truyol highlighted the potentially central role that critical movements could play in this field.[22] Along the same lines, Penelope Andrews[23] and Hope Lewis[24] called for a CRF analysis of human rights law for the benefit and progress of all women, not simply white Western ones, in an effort to connect local issues with the global and transnational arena of international human rights law.

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[18] ibid, 9.
[19] ibid, 10.
[20] Berta Esperanza Hernández-Truyol, 'Breaking Cycles of Inequality: Critical Theory, Human Rights, and Family In/justice' in Francisco Valdes, Jerome McCristal Culp and Angela P Harris (eds), *Crossroads, Directions and a New Critical Race Theory* (Temple University Press 2002), 349.
[21] ibid, 351.
[22] ibid.
[23] Penelope Andrews, 'Globalization, Human Rights and Critical Race Feminism: Voices from the Margins' [2000] Journal of Gender, Race and Justice 373.
[24] Hope Lewis, 'Embracing Complexity: Human Rights in Critical Race Feminist Perspective' [2003] Columbia Journal of Gender and Law 510.

III. From the United States to Europe: Immigrant Women as Subjects of Exclusion

The adoption of the described transnational dimension by CRFs encouraged increased attention to the situation of women from countries other than the United States, and in particular from politically non-Western countries ('the Global South').[25] However, it appears that immigrant women were considered in this context mostly in so far as they were also women of color, rather than as a separate and broader group with their own specific needs and difficulties. As a consequence, in these analyses the discrimination and inequality suffered by immigrant women on the grounds of migrant status was often overshadowed by race and sex discrimination. Crenshaw had already referred to the case of immigrant women as an example of how the law fails to address the specific needs of women of color, and of how norms designed on the basis of the experiences of women from certain ethnic groups or classes will be unable to offer effective protection and redress to other women who already face specific issues due to their ethnic origin and/or class.[26] The same may be said for Lewis,[27] who discussed the transformative potential of international human rights law for Jamaican immigrant women in the United States.

The points raised in the context of CRF, however, are in my view applicable to immigrant women in a much broader sense than was actually explored by the above-mentioned scholars. Indeed, I believe that immigrant women taken as a group and not 'simply' as immigrant women of color constitute an important reference for a contemporary re-thinking of CRF thought.

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[25] ibid. See also Hope Lewis, 'Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States' [1997] Oregon Law Review 567; Hope Lewis, 'Universal Mother: Transnational Migration and the Human Rights of Black Women in the Americas' [2001] Journal of Gender Race & Justice 197, where the author discussed migrant status as an intersecting ground of discrimination with race and sex more at length, but always in the perspective of how to ensure the effective implementation of Black women's human rights.

[26] Crenshaw, 'Mapping the Margins' (n 12), 1246. In particular, Crenshaw discussed the marriage fraud provisions envisaged by s 216 of the U.S. Immigration and Nationality Act 1957. She highlighted that s 216 required immigrants who had entered the country in order to marry a U.S. citizen or a permanent resident to remain married for two years before being able to apply for permanent residence status. Crenshaw rightly argued that this provision disproportionally and negatively impacted women, and women victims of domestic violence in particular, because it forced them to choose between enduring the abuse and risking deportation. As a result, this norm aggravated their vulnerability to domestic violence caused by the inevitable dependence of immigrant women on their husbands when first arriving in the U.S. due to language barriers, lack of information, and so forth.

[27] Hope Lewis, 'Lionheart Gals' (n 25). See in particular p 614, where Lewis asks in relation to CEDAW: 'can an instrument intended to protect against discrimination against women on the basis of sex adequately address discrimination on the basis of both race and gender?'

In this respect, I would argue that the main breakthrough of CRF was that it shed light on the barriers experienced by women from particularly disadvantaged groups in accessing legal protections formally recognised to them by the law – as well as its reasoning on fundamental rights as a possible gateway of empowerment. The reason I find these ideas particularly attractive lies in their universal character, i.e., in their potential to transcend the geographical and historical context in which they were conceived and developed, and to be applied fruitfully to other disadvantaged groups of women.

The discussed theories offer an interesting frame for the analysis of the current status of immigrant women in the European legal space. In the next sections, I will, therefore, explore the false neutrality of the laws applicable to immigrant women in the European legal space and the potential of human and fundamental rights to overcome this shortcoming. In particular, I will discuss how apparently neutral laws negatively and disproportionally affect this category from the point of view of access to rights and entitlements on an equal footing. Furthermore, I will analyse relevant examples of interaction between biased norms on the one hand and human and fundamental rights on the other, and I will reflect on the possible role of the latter in correcting the disparate impact of the former on immigrant women specifically.

This two-step inquiry will be carried out with reference to two examples of disparate impact generated by law on immigrant women specifically. The first example concerns the legal enforcement of unviable models for immigrant women (with a specific focus on the one-breadwinner model), which produce disproportionate and negative effects on their possibility to access rights in the host countries on an equal footing with immigrant men. The second example concerns the perverse effects generated by norms, which create a high level of dependence of migrants on family members or employers, negatively affecting their enjoyment of equality within the family, or their possibility to obtain protection and redress against domestic violence and labour exploitation.

Arguably, this type of analysis owes a great debt to the work of the above-mentioned scholars. However, my own methodology differs from CRF reasoning in at least two respects. Firstly, the main aim of CRF analysis was ultimately political. The legal discourse, including the language of rights, was mainly considered as a tool to be used strategically in order to generate societal change for women belonging to minorities. Conversely, my own approach to the matter of the transformative potential of rights is more juridical than political. My ultimate aim is to verify the effects of human and fundamental rights on biased norms applicable to immigrant women rather than to devise the most effective jurisprudential methods in relation to their social impact. Consistently with this choice, I will not speak in terms of oppression or subordination, but rather of disparate impact and indirect discrimination.

A second aspect of differentiation between my own approach and that of CRF concerns the specific grounds of discrimination on which to focus. As I have briefly outlined above, CRFs did not overlook immigrant women. However, because their main focus was the intersections of race and gender, and thus on immigrant women of color, the fact that this group was also negatively and disproportionally affected by law on the grounds of being migrants remained in the background of their analysis. I believe that in order to effectively capture the experiences of exclusion of immigrant women in the European legal space, it is necessary to focus on the disparate impact of applicable laws on the intersection of the gender and migrant status. In some instances, such disparate impact is clearly produced on immigrant women of certain ethnic groups.[28]
However, in the vast majority of the cases that I will be considering, immigrant women more widely emerge as negatively affected as migrants as well as women. While the discrimination grounds of race/ethnic origin and migrant status can certainly overlap, it is equally important to acknowledge that immigrants in general, hence including immigrant women, may also be discriminated due to their being migrants, which qualifies them as foreigners and outsiders even when they do not belong to ethnic minorities in the host country.

While carrying out this analysis, I am aware that by discussing immigrant women as a broad category I may incur criticism of essentialism and over-simplification myself. There is no doubt that third-country national immigrant women in Europe constitute an extremely diverse and heterogeneous group, and that its members may experience different issues depending on culture, religion, nationality, class, marital status, and even personal circumstances. Nonetheless, in addition to recalling that every legal analysis inevitably entails a certain degree of abstraction, I shall also clarify that I do not aim to make claims which are universally valid and applicable to all immigrant women in Europe. In the following sections I will discuss significant examples of the negative impact that certain norms are likely to produce on immigrant women – regardless of their personal

[28] See for instance *Abdulaziz, Cabales and Balkandali v the United Kingdom* (1985) Series A no 94. Here, the applicants – immigrant women who had subsequently obtained British citizenship or become naturalised as British citizens – argued that they had been discriminated against not only on the grounds of sex, but also on the grounds of race due to the stricter conditions imposed by the 1980 Statement of Changes in Immigration Rules to male immigrants pursuing reunification with settled spouses or fiancés, in comparison to those required to female immigrants pursuing reunification in the United Kingdom. The applicants, in particular, recalled that these restrictions did not apply if the resident spouse or fiancé was a British citizen born or having a parent born in the United Kingdom and that this differential treatment *de facto* benefited persons of a specific ethnic origin. Although the Court dismissed the race discrimination claim, merely justifying this conclusion by stating that 'the 1980 Rules made no distinction on the grounds of race and were therefore not discriminatory on that account' [85], it is nonetheless interesting to recall that a minority of the Commission had noted that 'the main effect of the rules was to prevent immigration from the New Commonwealth and Pakistan' and that 'by their effect and purpose, the rules were indirectly racist and there had thus been a violation of Article 14' [84].

situation, attitudes and aspirations but simply by virtue of their being migrants and women – and explore the possible role of human and fundamental rights in this respect.

With CRFs' 'multiple consciousness' in mind, I argue that an effective analysis of the perverse effects of legal norms on immigrant women's rights and entitlements is not possible unless a re-definition of notions of 'right to family life' and 'right to employment' is performed. Thus, in this article I propose an understanding of family life and employment as clusters of rights and entitlements. In this sense, family life should be understood as including key rights such as the right to spousal equality, the right to access family reunification and to enjoy family unity in conditions of equality, the right to live free of domestic violence as well as the right to protection during pregnancy. Similarly, I have chosen to understand the employment domain as encompassing the right to access the host country's labour market in conditions of equality and non-discrimination, the right to non-discrimination in the workplace and in relation to dismissal, freedom from exploitation and abuse by employers, as well as access to justice in relation to employment matters.

While this construction does not necessarily reflect the current understanding of the rights to family life and to employment in international human rights law, as these rights may not be interpreted as encompassing all of the aspects mentioned, I believe that this approach has two merits. Firstly, it effectively reflects the complex experiences and issues of immigrant women in the European legal space. By considering these legal norms against the threshold of the rights included in these clusters, I will, thus, be able to gain a better understanding of how certain legal provisions produce a disparate impact on immigrant women specifically. Secondly, the interpretation of family life and employment as heterogeneous domains allows me to consider the perverse effects that do not stem from individual norms, but rather from the interaction of norms. In particular, this construction reveals how a disparate impact on immigrant women may derive from the combination of norms traditionally assigned to separate legal domains (e.g., family reunification law, labour migration law, but also criminal law, labour law, family law and so forth).

Having clarified this, I shall observe that third-country national women who enter and reside legally in the European Union may be disproportionally and negatively affected by norms applicable to them for many different reasons. In the later sections, I will discuss two significant examples of the gender-related shortcomings of apparently neutral legal provisions, namely the normative imposition of the one-breadwinner model in European and domestic family reunification law, and the enforced dependence from family members and employers respectively observable within EU family reunification law and domestic visa schemes for artistes. While doing so, I will explore the ways in which human and

fundamental rights law has interacted with them and assess the latter's potential to correct said shortcomings.

IV. FAMILY REUNIFICATION LAW AND THE ONE BREADWINNER MODEL

A shortcoming, which is identifiable in family reunification law in particular concerns the imposition of unviable and gendered models on immigrant women exclusively. Because these models may be more easily complied with by immigrant men or by citizen women, immigrant women experience disproportionate difficulties in satisfying the related legal requirements and, thus, in accessing rights and entitlements which are formally recognised to them by the law. Thus, these norms produce a disparate impact on immigrant women's access to the right to family life and limit their possibility to access family reunification in conditions of equality with their male counterparts.

A telling example of this phenomenon is, in my view, identifiable in European family reunification law, which appears to strongly adhere to a one breadwinner model. In particular, its heavy reliance on economic thresholds as the only gate to access family reunification suggests a normative view of the ideal and trustworthy sponsor as one devoted to productive work. On the one hand, these requirements pursue the legitimate objective to ensure that, once admitted to the territory of the Union, family members will not weigh on Members States' social assistance systems and will, therefore, not constitute a burden for their host countries. On the other hand, however, it must not be overlooked that this exclusive focus on financial prerequisites disproportionally and negatively affects immigrant women's possibilities to sponsor family reunification. Due to inequalities and discrimination on the intersecting grounds of sex, immigrant status and ethnic origin, immigrant women in Europe experience less favourable employment opportunities and receive lower salaries in comparison to both male immigrants and citizen women.[29] In addition to this, immigrant women are more likely to be faced with heavy care burdens which make it more difficult for them to reach a satisfactory work/family balance, or to participate in the labour market at

[29] European Union Agency for Fundamental Rights, *Migrants, Minorities and Employment: Exclusion and Discrimination in the 27 Member States of the European Union, Update 2003- 2008*, Publication Office of the European Union, 2010, p 74; Albert Kraler, *Civic Stratification, Gender and Family Migration Policies in Europe: Final Report*, International Centre for Migration Policy Development, Vienna, May 2010; Eleonore Kofman, 'Gendered Migrations, Livelihoods and Entitlements in European Welfare Regime' in Nicola Piper (ed), *New Perspectives on Gender and Migration: Livelihoods, Rights and Entitlements* (Routledge 2008), 77; Eleonore Kofman, Judith Roosblad and Saskia Keuzenkamp, 'Migrant and Minority Women, Inequalities and Discrimination in the Labour Market' in Karen Kraal, Judith Roosblad, and Judith Wrench (eds), *Equal Opportunities and Ethnic Inequalities in European Labour Markets: Discrimination, Gender and Politics of Diversity* (Amsterdam University Press 2009), 56 ff.

all.[30] The possible absence of a kin network in the host country and the low accessibility of childcare services (or lack thereof) in the host country are among the factors that contribute to this phenomenon.

Against this background, Directive 2003/86/EC[31] on the right to family reunification – aimed at third-country nationals regularly residing in the territory of the Union – allows Member States to require that the sponsor provide evidence of having accommodation 'regarded as normal for a comparable family in the same region',[32] sickness insurance for himself or herself and his/her family members, as well as 'stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned.'[33] Similarly, a renewal of the residence permit for the purpose of family reunification may be rejected by the Member States if the sponsor can no longer count on sufficient financial resources.[34] It should be noted that the gender bias implied in these norms stems not only from their strong – if not exclusive – focus on economic requirements (*vis-à-vis* the lower income disproportionally experienced by immigrant women in Europe), but also from the fact that they require the sponsor to be able to financially support his or her family members all by himself or herself, and not only at the time of their first entry, but apparently for as long as they hold a residence permit for family reunification. This constitutes an extremely high economic threshold, all the more so for immigrant women.

Similarly, problematic norms are observable at the domestic level. An interesting example in this respect is provided by art. 3.73 of the 2000 Dutch Aliens Decree (*Vreemdelingenbesluit*), whereby individuals aiming to sponsor family reunification must have sufficient, lasting and independent resources, i.e., resources acquired through paid employment, or contributory social welfare benefits or consisting in personal assets. Interestingly, legal reforms in Dutch law concerning income requirements have been adopted amidst discussions concerning their effects on women's possibilities to sponsor family reunification. In 1998, when the Dutch government's 2000 Aliens Act established an increase in income requirements, arguments both in favour and against this measure concerned female sponsors.[35] On the one hand, the government maintained that the increase would encourage immigrant women to improve their labour market situation, and thus their emancipation. On

[30] Elisabeth Strasser, Albert Kraler, Saskia Bonjour and Veronica Bilger, 'Doing Family' [2009] The History of Family 165.
[31] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] O.J. L 251/12.
[32] Art 7(1)(a) of Directive 2003/86.
[33] Art 7(1)(c) of Directive 2003/86.
[34] Art 16(1)(a) of Directive 2003/86.
[35] Betty De Hart, Tineke Strik and Henrike Pankratz, *Family Reunification: a Barrier or a Facilitator of Integration? Country Report of the Netherlands,* 25 ff, available at http://research.icmpd.org/2012.html?&F= (accessed 8 May 2015).

the other hand, the Green Left submitted data showing that stricter income requirements simply meant that immigrant women were disproportionally affected in their possibilities to sponsor family reunification (with a decrease of sponsors from 48% to 32% since the new thresholds had been established).[36]

With respect to these issues, human and fundamental rights law does not offer any cure-all solutions. To clarify this point, I will now turn to discuss an instance where human rights actually grounded the reinforcement of a breadwinner model, and two national examples where on the other hand fundamental rights produced the opposite effect and contributed to the disestablishment of this model.

As to the first example, in 2005 the European Court of Human Rights faced the question of whether the refusal of the Dutch authorities to grant family reunification to a mother who failed to satisfy the income requirements envisaged by art. 3.73 of the 2000 Dutch Aliens Decree constituted a breach of her and her children's right to family life under article 8 of the European Convention on Human Rights (from now on, ECHR). In this case – *Haydarie v. the Netherlands*[37] – the applicant mother was a widower who had been recognised refugee status in the Netherlands, where she had established her residence together with one of her four children and her disabled sister. Subsequently, she had applied for family reunification with her other children. The Dutch authorities, however, rejected her application on the grounds that she did not have any other income besides general welfare benefits and that it was not possible to find 'special circumstances on the grounds of which it should be held that the aim served by the income requirement under the immigration rules entailed disproportionate consequences for the first applicant.'[38] In particular, the Minister of Foreign Affairs observed that a balance had to be reached between Ms. Haydarie's interest to enjoy family life in the Netherlands and the general interests pursued by Dutch immigration policy. The Minister 'was only prepared to accept the existence of a positive obligation under article 8 when, despite serious efforts made by the first applicant, there were no real prospects for her to obtain lasting, sufficient and independent means of subsistence and, given the circumstances in which she found herself, it would be unreasonable to maintain the income requirement.'[39] Ms. Haydarie, on the other hand, submitted that 'she had to care for her wheelchair-bound sister who refused aid from strangers and that she did not wish to leave her sister alone in the house fearing that she might cause a fire.'[40]

[36] ibid, 26.
[37] *Haydarie v the Netherlands* App no 8876/04 (ECtHR, 20 October 2005).
[38] ibid.
[39] ibid.
[40] ibid.

A stark contrast between an abstract legal model and the reality of the applicant's situation is identifiable in this case. The legal prerequisites imposed by the Dutch authorities were clearly based on a breadwinner model – not simply because the 2000 Aliens Decree required prospective sponsors to comply with financial requirements and did not include welfare benefits in the definition of income for this purpose. Most importantly, although in certain circumstances the national authorities accepted that imposing income requirements would be unreasonable, these circumstances did not imply the consideration of other models besides that of breadwinner. Indeed, the 'serious efforts' required by the Minister involved:

> an active attitude on her part, implying actively looking for and accepting work even where a job would not correspond to her education or professional experience, registering at an employment office ... and interim employment agencies indicating to be willing to accept any kind of work, reacting to vacancy announcements, intensive writing of (un)solicited job applications, and undertaking labour-market oriented studies.[41]

Thus, even when the national family reunification policy admitted an exception to its financial prerequisites, the breadwinner model was still enforced. Unsurprisingly, the care burdens of Ms. Haydarie were qualified as her 'own choice' by the national authorities because 'she could appeal to aid-providing bodies.'[42]

Against this background, I argue that the European Court of Human Rights could have identified a disparate impact on Ms. Haydarie's right to family life through a contextual analysis of article 8 ECHR. A consideration of her situation in context would have revealed that as an immigrant widow with heavy care burdens, and no family network to share them with, she could hardly have pursued paid employment at all. This approach would also have made clear that, as an immigrant and a woman, Ms. Haydarie would have encountered disproportionate difficulties in accessing sufficiently paid employment to singularly support herself, her four children and pay for aid-providing agencies to entrust with her sister's care. In this sense, the *Haydarie* case epitomises very well the potentially beneficial effects of the contextual interpretation of rights proposed by Matsuda[43] as well as Minow and Spelman.[44]

Regrettably, the *Haydarie* judgment illustrates instead how a gender-insensitive interpretation of human rights law may reinforce gendered models imposed by immigration law. Here, indeed, the Court merely endorsed the Dutch authorities' view whereby the unpaid care work

[41] ibid.
[42] ibid.
[43] Matsuda (n 17).
[44] Minow and Spelman (n 14).

performed by Ms. Haydarie was a choice to stay inactive and not to perform 'actual work', stating that 'she preferred to care for her wheelchair-bound sister at home'[45] and that 'it [had] not been demonstrated that it would have been impossible for the first applicant to call in and entrust the care for her sister to an agency providing care for handicapped persons.'[46]

Positive examples of the contextual interpretation of fundamental rights in cases concerning immigrant women's access to family reunification have, on the other hand, been provided at domestic level, and in particular in the Italian order. I shall refer to two meaningful cases of judicial recognition of the possibility to sponsor family reunification for third-country national women devoted to unpaid care work within the household, despite the fact that they did not comply with legally-established income requirements for this purpose.

This recognition occurred through an interpretation of national norms on family reunification on the joint grounds of articles 29 and 30 of the Italian Constitution – which respectively envisage a State obligation to recognise the rights of the family and the right, as well as the duty, of parents to support and educate their children – and of article 35, which establishes a State obligation to protect work in all its forms. Thus, in a case concerning a Brazilian mother whose application for family reunification had been rejected on the grounds that she was not a worker but rather a homemaker, the Italian Constitutional Court held that this exclusion had been carried out on the grounds of a wrongful interpretation of the law.[47] The applicant should have been considered a worker to all effects, because unpaid care work within the household, 'due to its socio-economic value, can be included, despite its peculiarities, within the scope of the protection ensured by art. 35 of the Constitution to work "in all its forms"',[48] as it is:

> a type of working activity that has been recognised on multiple occasions due to its social and also economic relevance, also because of the undeniable advantages that it brings to society as a whole and, at the same time, because of the burdens and responsibilities that are implied in it and that weigh to this day

[45] *Haydarie* (n 37).
[46] ibid.
[47] *Corte Costituzionale*, *sentenza* no. 28 of 12January 1995. The case stemmed from an issue of constitutionality raised with respect to art 4(1) of law no. 943 of 30 December 1986 (*Gazzetta Ufficiale* no. 8 of 12 January 1987), which was subsequently repealed by art 47(1)(b) of *Decreto Legislativo* no. 286 of 25 July 1998, (*Gazzetta Ufficiale* no. 191 of 18 August 1998, S.O. no. 139). The provision at issue established that third-country national workers regularly residing in Italy and employed had the right to family reunification with their spouse and their dependent and unmarried minor children, provided that they were able to ensure them 'normal life conditions'.
[48] *Corte Costituzionale*, *sentenza* no. 28/1995, cit., Legal Grounds, [4].

> almost exclusively on women (also due to widespread unemployment).[49]

In another instance, when the so-called *Testo Unico Immigrazione*[50] was already in force in the Italian order, the Court of Bologna annulled the rejection of a mother's application for family reunification justified by the fact that she had no income.[51] In support of this conclusion, the Court also recalled that denying the mother family reunification simply because she contributed within her own family through unpaid care work constituted an excessively restrictive interpretation in breach of articles 29, 30 and 35 of the Constitution. Moreover, it deemed 'constitutionally illegitimate to allow family reunification with children for foreign women who work outside of the home and deny it to foreign women who carry out their homemaker activity, with the logistic and material support of entire families.'[52]

In these examples, it is interesting to observe how the competent courts discussed the unpaid care work performed by the prospective sponsors of family reunification not as an isolated activity, but rather with reference to the context in which this activity took place. By doing so, they were able to reveal how, despite the fact that the immigrant women involved did not have an income resulting from productive work, they contributed to the well-being and functioning of their families through their unpaid work. This, in turn, encouraged a judicial interpretation of the constitutional value of protection of the family and the constitutional obligation of the State to protect work as also including the homemaker's right to family reunification within its scope.

Arguably, the result of this disestablishment of a strict breadwinner model was a more gender-sensitive understanding of family reunification norms and, therefore, a stronger protection of immigrant women's right to equality and non-discrimination in the field of family life. Immigrants performing unpaid care work within the household – to this day disproportionally women – were indeed allowed to enjoy family life with their children in conditions of equality with male sponsors, provided that the need to ensure that the latter would not weigh on the state finances could be satisfied by referring to the whole income of the family rather than just that of the sponsor.

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[49] ibid.

[50] *Decreto Legislativo* no. 286 of 25 July 1998, *Gazzetta Ufficiale* no. 191 of 18 August 1998, *Supplemento Ordinario* no. 139.

[51] *Tribunale di Bologna*, *ordinanza* of 14 November 2002.

[52] ibid (translation by the author).

V. Enforced Dependence as a Perverse Effect of Norms Applicable to Immigrant Women in Europe

Another issue which is commonly observed in norms applicable to immigrant women in Europe concerns the enforced dependence to which this group is pushed by gender insensitive norms. This shortcoming runs along the lines of the public/private distinction criticised by feminist legal theory as specifically harmful for women.[53] By overlooking factual difficulties experienced by immigrant women in private realms such as the family or certain types of employment relationships, the regulation of the public realm of residence permits or visa regimes may generate deeply gendered effects by further aggravating such difficulties.

When norms concerning residence permits create a strong dependence on other individuals for residence rights, migrants in general will experience power imbalances to their disadvantage. This disadvantage may, however, be particularly serious for immigrant women, because migrant status may combine with gender issues in generating serious violations of their rights in the fields of family life and employment (for instance with respect to their right to equality within the family, or to their right to be free from labour exploitation). This section will discuss two instances of the described shortcoming, respectively concerning EU family reunification law and national labour migration schemes for artistes. In both of these very different realms, it is indeed possible to identify norms which indirectly generate dependence and subordination to the disadvantage of immigrant women specifically.

With regard to the family domain, a good illustration of these points is once again offered by the EU family reunification regime. Directive 2003/86, in particular, establishes a high level of dependence between sponsors and family members, which is particularly likely to generate violations of the latter's right to equality within the family if applied to the case of reunification with spouses. This source envisages very low standards with respect to the possibility for family members to access independent permits, allowing Member States to withhold the granting of said permits for up to five years of residence.[54] In the event of interruption of the relationship justifying the granting of a residence permit for family reunification, Member States are left with the discretional power to grant independent permits in case of divorce, separation or widowhood.[55] In the event of 'particularly difficult circumstances', which also include domestic violence, Member States are instead obliged to grant independent permits.[56] Besides these hypotheses, Member States are allowed to withdraw residence permits or refuse their renewal due to events which

[53] Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed), *Gender and Human Rights* (OUP 2004), 21-22.
[54] Arts 15(1) and 15(4) of Directive 2003/86.
[55] Art 15(3) of Directive 2003/86.
[56] Art 15(3) of Directive 2003/86.

may be well beyond the control of the sponsor: when the sponsor and the family member 'no longer live in a real marital... relationship',[57] when the sponsor engages in a long-term relationship with another person[58] and when the sponsor's residence comes to an end.[59] One may argue that the enforced dependence of family members is gender neutral, since immigrant men may also enter the Union for the purpose of family reunification with their spouses. However, it is crucial to consider that family reunification sponsors are still predominantly male, and that women constitute at present the majority of family migration fluxes.[60] Therefore, in addition to the inevitable factual dependence on sponsors implied in family migration,[61] immigrant women are currently the category most affected by the legal dependence imposed by family reunification regimes.

In the field of employment, another significant example of enforced dependence as a perverse effect of an apparently neutral immigration regime is provided by special visa regimes for artistes. Because this profession is often carried out in private environments such as nightclubs, a high level of dependence between migrant workers and employers may expose the former to an increased risk of labour and sexual exploitation, abuse and trafficking. The correlation between special temporary permits

[57] Art 16(1)(b) of Directive 2003/86.
[58] Art 16(1)(c) of Directive 2003/86.
[59] Art 16(3) of Directive 2003/86.
[60] Eurostat, *First permits by reason, age, sex and citizenship* (most recent data from 2012), available at http://epp.eurostat.ec.europa.eu/portal/page/portal/population/data/database (last accessed on 12 June 2014). In addition to family reunification – which consists of bringing into the host country immediate family members such as spouses or children – these family reasons may also refer to other types of family migration (Eleonore Kofman, Veena Metoo, 'Family Migration' in International Organization for Migration, *World Migration Report*, 2008, 155. See also Nicola Piper, *Gender and Migration*, Paper Prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, 2005, 22.). For instance, family migration also can occur through family formation or marriage migration, whereby second or subsequent generations of children of immigrant origin bring in a spouse from their parents' or grandparents' country of origin, or whereby a settled immigrant or a citizen bring in a spouse from abroad. Other types of family migration consist in the migration of the entire family or sponsored family emigration of not immediate family members.
[61] The factual dependence experienced by family migrants is already significant, since at the time of their first entry they are more likely to need to rely on sponsors in order to navigate life in the new host country. Language barriers, lack of understanding of the host countries' laws, possible lack of social and kin networks all contribute to this factual vulnerability. Arguably, if referred to spousal relationships, this factual dependence may generate serious inequality within the family (Strasser, Kraler, Bonjour, Bilger, 'Doing Family' (n 30), 174; Jordi Roca i Girona, Montserrat Soronellas Masdeu, Yolanda Bodoque Puerta, 'Migraciones Por Amor: Diversidad y Complejidad de las Migraciones de Mujeres' [2012] Papers: Revista de Sociologia 285, 703.

for artistes and an increased risk of trafficking and exploitation has been discussed with reference to the Belgian regime in force during the 90s.[62]

More recently, the Italian and Cypriot rules on the matter have been subjected to criticism precisely because of the strong links with employers implied by them. The Italian regime was chastised by a 2011 Shadow Report on the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[63] which highlighted how 'entry to Italy with a residence permit for artistes (the limited duration of which is linked to the willingness of the employer to maintain the contract) creates a situation of dependence on club managers which is often conducive to exploitation.'[64] Art. 27(2) of the *Testo Unico* provides that holders of artistes' permits cannot be employed in a different sector, nor hired with a different qualification. Pursuant to article 40(14) of the implementing regulation of the *Testo Unico*,[65] artistes may not change employers even at the time of renewal of their residence and work permits.

Similarly, the Cypriot immigration policy was under scrutiny in the past[66] because it allowed the owners of cabarets and nightclubs to apply for residence and work permits on behalf of employees. In addition to this, the Cypriot policy appeared questionable because employers were required to deposit a sum as a guarantee to cover possible repatriation expenses, and artistes were prevented from leaving the premises of the establishment where they were employed from 9 p.m. to 3 a.m. Furthermore, cabaret and club managers were burdened with the responsibility to report absences from work and breaches of contract to the authorities. The penalty for a breach of this obligation, however, also involved the employee who would have had to face repatriation.

With respect to the enforced dependence generated by apparently neutral norms applicable to immigrant women, I would argue that human and fundamental rights – and in particular the right to equality and non-discrimination – have the potential to contrast this perverse effect if

[62] Federico Lenzerini, 'International Legal Instruments on Human Trafficking and a Victim-Oriented Approach: Which Gaps Are to Be Filled?' [2009] Intercultural Human Rights Law Review 205, 233 ff.

[63] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

[64] Italian Platform *Lavori in Corsa: 30 Anni CEDAW*, *Rapporto Ombra in Merito allo Stato di Attuazione da parte dell'Italia della Convenzione ONU per l'Eliminazione di Ogni Forma di Discriminazione nei Confronti della Donna (CEDAW) in Riferimento al VI Rapporto Presentato dal Governo Italiano nel 2009*, June 2011, 43 (translation mine).

[65] *Decreto del Presidente della Repubblica* no. 394 of 31 August 1999, *Gazzetta Ufficiale* no. 258 of 3 November 1999, *Supplemento Ordinario* no. 190.

[66] Entry procedures for artistes were regulated by guidelines issued by the Ministry of the Interior as well as by immigration officers. For an account of the situation of artistes in Cyprus, see *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010) [80]. The judgment extensively cites reports from the Cypriot Ombudsman, the Council of Europe Commissioner for Human Rights and the U.S. State Department.

interpreted through an anti-subordination lens. In order to clarify this point, I will now move on to discuss two examples of this understanding in court judgments which have produced positive results in this field.

My first example concerns the supranational level, and in particular the European Court of Human Rights' judgment in *Rantsev v. Cyprus and Russia*.[67] This case was initiated by the application of the father of a young Russian woman (Ms. Rantsev) who had travelled to Cyprus holding a so-called 'artiste visa' and a work permit for the purpose of being employed in a cabaret (under the above-mentioned Cypriot immigration policy), and who had died under unclear circumstances which suggested that she had been trafficked and sexually exploited. Thus, the father applied before the Court, against both Cyprus and Russia, in order to obtain the recognition of a violation of his daughter's right to life, to be free from slavery, servitude and forced labour, and to liberty and security, among other claims.

With reference to the claim of violation of the right to be free from slavery, servitude and forced labour pursuant article 4 ECHR against Cyprus, it is extremely interesting that for the purpose of assessing a possible violation of positive and negative State obligations under these provisions, the Court did not merely analyse domestic criminal law, but also the national immigration regime. Thus, after considering several reports on the situation of holders of artiste visas in Cyprus, the Court significantly criticised the high level of dependence of artistes on employers permitted by domestic immigration policy. The existence of 'measures [encouraging] cabaret owners and managers to track down missing artistes or in some other way to take personal responsibility for the conduct of artistes'[68] was deemed by the Court as 'unacceptable in the broader context of trafficking concerns regarding artistes in Cyprus.'[69] Similarly, the Court chastised the 'practice of requiring cabaret owners and managers to lodge a bank guarantee to cover potential future costs associated with artistes which they have employed' as 'particularly troubling'.[70] These features prompted the Court to conclude that Cyprus had failed to offer 'Ms. Rantsev a practical and effective protection against trafficking and exploitation',[71] therefore incurring a violation of article 4 ECHR.

A second meaningful example of the potential of fundamental rights to reverse the subordination effects of immigration law is provided by an Italian lower court. In particular, in 2010 the Court of Novara[72] assessed the case of a Russian woman whose application for a long-term residence

[67] *Rantsev* (n 66).
[68] ibid, [292].
[69] ibid.
[70] ibid.
[71] ibid, [293].
[72] *Tribunale di Novara*, judgment of 1 March 2010.

permit on the grounds of her marriage to an Italian citizen was rejected due to an alleged lack of cohabitation between the spouses.[73] In fact, the couple did not live together because the husband had been incarcerated as a precautionary measure after the applicant had reported him to the authorities for committing physical abuse and sexual violence against her. The applicant, however, declared that, despite the domestic violence suffered, she did not intend to leave her husband, and that she had reported him to the authorities under the false belief that he would be checked into a rehabilitation facility to cure his drug addiction. In this case, the Court of Novara grounded its decision on a wide range of international human rights law and European fundamental rights law sources protecting the right to private and family life, including article 8 ECHR, article 7 of the European Charter of Fundamental Rights and Freedoms[74], article 12 of the Universal Declaration of Human Rights[75], article 16 of the European Social Charter[76] and article 17 of the International Covenant on Civil and Political Rights.[77] The Court also referred to article 29(2) of the Italian Constitution, which established a fundamental right to moral and legal equality of spouses within marriage.

On these grounds, the Court interestingly identified a bias against immigrant women implied in the combined effects of the Italian criminal system of protection from domestic violence and Italian immigration law. In particular, it observed that while Italian citizens enjoyed effective protection against domestic violence because national law allows them to immediately obtain court orders imposing precautionary measures to protect them, the same was not true for migrant women. For Italian women, it could be affirmed that 'the fact that precautionary measures involve putting an end to cohabitation – ranging from removal from the conjugal home to precautionary detention – does not negatively impact victims, who can still freely determine their marital situation.'[78] On the other hand, the discussed interpretation prevented immigrant women from effectively enjoying the same protection. Indeed, the Italian authorities' interpretation, whereby a lack of cohabitation between spouses could automatically cancel the right of residence of the applicant:

> creates a clear discrimination between third-country national women and Italian women, and puts the former in the

[73] The requirement of cohabitation had been inferred by the Italian police authorities on the grounds of art 19(2)(c) of the *Testo Unico*, which prohibits the expulsion of third-country nationals cohabiting with their Italian spouse.
[74] Charter of Fundamental Rights of the European Union, O.J. C 364 of 18 December 2000 and then O.J. C 83/389 of 30 March 2010.
[75] Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res. 217 A (III).
[76] European Social Charter [revised] (adopted 18 October 1961, entered into force 26 February 1965) CETS No. 35.
[77] International Covenant on Civil and Political Right (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[78] *Tribunale di Novara*, cit. (translation by the author).

> inacceptable condition of having to choose between suffering family abuse by the spouse without reacting and to risk, after reporting her situation, to be expelled from the State where she has built, as in the case at issue, her entire network of emotional, employment and economic relationships.[79]

Therefore, the Court concluded that this lesser protection was not compatible with immigrant women's right to equality within the family as protected by international and European law as well as by Italian constitutional law. Instead, a different interpretation should have been adopted 'whereby the possibility to react to family abuse with the means set forth by the State is guaranteed without any difference to any person present on the national territory, preventing the status of Italian citizen or third-country national woman married to an Italian citizen, or legal resident on other grounds, from being able to affect her negatively'[80] as well as her 'freedom of self-determination in relation to her ethical and moral sphere.'[81]

In the above-mentioned judgments, human and fundamental rights played an important role in unveiling and contrasting the disparate impact of national immigration norms on immigrant women. In the *Rantsev* judgment, the indirectly discriminatory effects of the Cypriot artiste visa regime were evident. While this aspect was not openly discussed by the Court, from the reports considered in the judgment, it emerged clearly that this regime produced the perverse effects of exposing immigrant women specifically to trafficking as well as sexual and labour exploitation. It was on these grounds that the Court interpreted the prohibition of slavery, servitude and forced labour enshrined in article 4 ECHR as preventing the adoption of immigration policies which foster situations of dependence of permit holders (in this case, disproportionally immigrant women) from employers. A similar interpretation of a fundamental right as an anti-subordination clause was performed in the Italian case with reference to immigrant women's right to family life – understood, coherently with my own construction, as also encompassing the right to live free of domestic violence and the right to marital equality.

VI. CONCLUDING REMARKS

In this brief inquiry, I have discussed how apparently neutral norms may in fact produce a disparate impact on immigrant women, negatively affecting the enjoyment of their rights to family life and employment in conditions of equality with both their male counterparts and women citizens. I have also examined some significant examples of the interaction between biased norms on the one hand, and human and fundamental rights law on the

[79] ibid.
[80] ibid.
[81] ibid.

other, in order to understand what type of impact the former have produced on the latter.

The results of this review suggest that CRFs' observations not only effectively mirror the current legal treatment of immigrant women in the European legal space, but also that many of their intuitions may be used to push for stronger protection of immigrant women's right to equality and non-discrimination in the fields of family life and employment. Firstly, as CRFs have rightly emphasised, it is important to increase awareness in legal studies and practice regarding the fact that apparently neutral norms may produce perverse effects on groups already experiencing factual difficulties. In the case of immigrant women, this occurred, for example, through the legal enforcement of abstract models, which were clearly not designed with their specific situations in mind, or in the overlooking of factual triggers of dependence by certain norms and their consequent reinforcement of inequality and subordination within the family and in employment relationships.

At the same time, another important CRF teaching, which in my view was confirmed to be true also in the European space, concerns the fact that rights are indeed a powerful discourse, and should therefore not be forgone, but rather re-thought so as to properly address gendered shortcomings inherent in legal norms. The judicial examples discussed have shown how human and fundamental rights – as established by both supranational and national law – may alternatively serve to reinforce the perverse effects of biased norms on immigrant women or actually unveil and contrast the resulting violations of their right to equality and non-discrimination.

In this respect, a gender-sensitive interpretation of human and fundamental rights has proven to be key. As I have shown, the most effective results in this sense were obtained when the competent courts implemented these rights by paying attention to the broader context of disadvantage in which the immigrant women involved were situated – e.g., their families in need of their care work, a national situation of trafficking and exploitation of female artistes, an interaction between criminal laws and immigration laws which undermined legal protection from domestic violence. In these cases, a contextual interpretation of the human and fundamental rights of the women involved produced the disestablishment of gendered and unviable legal models, or unveiled how the law itself sanctioned inequalities by crossing the public/private divide underlying certain norms. As a result, immigrant women's rights obtained stronger judicial protection.

In sum, the example of immigrant women in contemporary Europe shows that certain groups continue to experience obstacles to a full enjoyment of their rights which are strongly reminiscent of CRFs' observations and may, therefore, strongly benefit from legal analysis carried out from this

perspective. The judicial examples analysed in this article are both proof of the ongoing relevance of CRF beyond geographical and historical boundaries, and a crucial reminder of the need for a continuous re-thinking of human and fundamental rights law so as to make them actually accessible for all. To paraphrase Matsuda,[82] these rights were not written for immigrant women, but they can and they should be made their own.

[82] Matsuda (n 17).

THE FRAMEWORK FOR THE SOCIAL ACCOUNTABILITY OF CENTRAL BANKS: THE GROWING RELEVANCE OF THE SOFT LAW IN CENTRAL BANKING

Camila Villard Duran[*]

'The money process still required a deep, unacknowledged act of faith, so mysterious that it could easily be confused with divine powers'[1]

Central banks are not traditionally thought of as being socially accountable. In fact, the main innovation of central banks in the 20th century was to make them largely independent from political influence. Thus, the prevailing (economic) analyses of central bank accountability have examined the formal relationships of accountability to political bodies such as the legislature and the executive. However, this article argues that trends in monetary policy-making beginning in the 1990s inadvertently led to the potential for greater social accountability of central banks. Driven by a shifting economic consensus, central banks moved from an approach of secretive currency management to transparent communication with the market. This transformation was prompted by new beliefs about the efficiency of monetary policy. This article argues that the current 'hard law' framework for central bank accountability does not reveal all of the social mechanisms in place. In fact, 'soft law' instruments are causing more and faster institutional changes in the legal framework for the central bank accountability. The role of law is changing accordingly: central banks have their actions controlled in an ex post *model of supervision rather than an* ex ante *form. This study explores the institutional development of accountability mechanisms in two central banks in advanced economies (the US Federal Reserve and the European Central Bank) and in a monetary authority in an emerging economic power (the Brazilian Central Bank). All the three central banks had the same institutional development, despite the significant differences in terms of political, social and economic contexts in which they operate.*

Keywords: Law and central banking, accountability, monetary policy, Fed, ECB, Brazilian Central Bank (BCB).

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[1] William Greider, *Secrets of the Temple: How the Federal Reserve Runs the Country* (Touchstone Book 1987).

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I. INTRODUCTION

Amongst the attributes of sovereignty, central banks (CBs) are as important as symbols, as flags and national anthems. CBs are important institutions in domestic politics and their actions have a direct impact on households and firms. Those CBs that manage currencies accepted as international means of payment and investment vehicles can also shape financial politics worldwide. In the management of the 2008 crisis, CBs gained even greater powers to act in financial markets in order to stabilize credit and money markets. The impact of their actions could be felt on a global scale. With these growing powers, it is doubly important that the appropriate accountability mechanisms are in place.

The central goal of this paper is a comparative analysis of three central banks and their institutional design for the exercise of monetary power. This study analyses 'hard law' mechanisms (established by treaties, constitutions or statutes) for social accountability in three CBs: the European Central Bank (ECB), the United States (US) Federal Reserve (Fed) and the Brazilian Central Bank (BCB). It then examines 'soft law' mechanisms, usually created by CBs themselves, since in some institutions these instruments can play an important role for legitimacy and accountability.

This paper takes a specific legal approach. It conceives of law as a framework to hold CBs accountable. Accountability can be defined as a social relationship between an actor and a forum in which the actor is obliged to explain and justify his conduct; the forum can pose questions,

pass judgment and the actor may face consequences for his actions.[2] For the purpose of this study, monetary accountability is scrutiny of the monetary policy implemented by CBs and the potential imposition of sanctions should policy be deemed inappropriate.

The Fed (established in the 1910s) and the ECB (established in the 1990s) are the most important CBs in the world. They issue the two leading currencies, with the US dollar and the Euro being most frequently used internationally as means of payment, reserves and investment vehicles for both states and private actors.[3] Their actions, therefore, have more stakeholders than other CBs: since their currencies are *de facto* used at the level of the international monetary system, these two CBs carry out global financial missions even without specific legal mandates covering their global actions. For these banks, therefore, accountability and transparency mechanisms are especially relevant. The BCB, a monetary authority in a rising economic power, established in the 1960s, is an example of an institution that has its policies highly influenced by foreign markets in US dollars and the Fed's policies.

These three CBs were established in very different historical moments and political contexts. Yet, interestingly, they have developed the same legal framework for accountability and transparency – i.e. based on instruments of soft law – and are held accountable not to political agents, but mainly to national and international economic actors. This can be explained with reference to the economic consensus on monetary policy implementation that has been pervasive since the 1990s: price stability as the main monetary goal and market communication as an instrument to manage inflation expectations.[4] The earlier mystery and the secrecy of the currency management have been replaced by the disclosure of methods and goals for the CBs' decision-making process. This framework of transparency was designed with an underlying economic purpose, i.e. to provide information to markets; however, it established new instruments that potentially can improve CBs' accountability towards political and social actors, both at the domestic and global level.

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[2] Mark Bovens, 'Analysing and Assessing Accountability: a Conceptual Framework' [2007] 13 ELJ 447; Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' [2010] 33 WEP 946.

[3] Benjamin Cohen and Tabitha M Benney, 'What does the international currency system really look like' (2014) 21(5) RIPE http://www.tandfonline.com/toc/rrip20/21/5#.VRgsa_nF9cg (accessed 12 January 2015).

[4] Alan Blinder, *The Quiet Revolution: Central Banking goes Modern* (Yale University Press 2004); Charles Goodhart, 'The Changing Role of Central Banks' (2010) 1(1) BIS http://www.bis.org/publ/work326.pdf (accessed 15 July 2012); Marvin Goodfriend, 'How the World Achieved Consensus on Monetary Policy' [2007] 21 JEP 47; Rosa Lastra, 'The role of central banks in monetary affairs: a comparative perspective' and Christine Kaufmann and Rolf H Weber 'Transparency and monetary affairs' in Thomas Cottier et al (orgs), *The Rule of Law in Monetary Affairs* (CUP 2014).

The main arguments of this paper are as follows: (i) the current 'hard law' framework does not reveal all of the social accountability mechanisms in place in the CBs under study; (ii) while 'hard law' mechanisms still represent an important component of the legal framework designed for social accountability, 'soft law' mechanisms are causing more and faster institutional changes in the accountability and, consequently, the legitimacy of CBs; and (iii) based on findings (i) and (ii), the role of law in this domain has changed: CBs have their actions controlled in *ex post* form (political powers and social actors evaluate if the CB attained its goals) rather than an *ex ant*e model (by a prior definition of policy limits, e.g. a ceiling for reserve requirements or a limit for the issuance of paper money).

This article is divided into six sections. Following this introduction, I present an overview of the economic literature on accountability in CBs. I then identify the main gap in this literature and highlight what a legal perspective can add to the study of this subject. The third section proposes a legal concept for accountability and discusses how it can be applied to the study of CBs. The fourth section presents the case studies, analysing the social accountability mechanisms in the ECB, the Fed and the BCB that have a 'soft law' nature. This research focuses on the analysis of accountability instruments geared towards the general public and political powers (what is usually referred to in the economic literature as 'operational transparency').[5] The fifth section presents the main conclusions related to the case studies and highlights directions for future work. The final section concludes.

II. A LEGAL ANALYSIS OF ECONOMIC RESEARCH ON CENTRAL BANK ACCOUNTABILITY: SOFT LAW NEGLECTED

In the economic literature, there is no broad agreement on the exact relationship between the concepts of accountability and transparency. Empirical economic research on central banks is usually based on rankings of these banks on the basis of their accountability and transparency. However, there is often confusion between authors' description of *ex ante* or *ex post* accountability, as well as *de facto* or *de jure* transparency in the form of disclosure of monetary targets, procedures and information.[6] By

[5] For detailed studies of political accountability mechanisms, see the well-known research of Fabian Amtenbrink, *The Democratic Accountability of Central Banks: A Comparative Study of the European Central Bank* (Oxford and Portland 1999); Bernard J Laurens; Marco Arnone and Jean-François Segalotto, *Central Bank Independence, Accountability and Transparency: a Global Perspective* (Palgrave Macmillan 2009); Camila Duran, *L'encadrement Juridique de l'Accountability de la Politique Monétaire : une étude de la Banque Centrale Brésilienne (BCB), de la Banque Centrale Européenne (BCE) et de la Réserve Fédérale des États-Unis (Fed)* (Atelier National de Reproduction des Thèses Lille 2012).

[6] Jakob De Haan, Fabian Amtenbrink and Sylvester C W Eijffinger, 'Accountability of central banks: aspects and quantification' (1998) Working paper avaiable at: http://ssrn.com/abstract=1307581 (accessed 5 May 2011); Amtenbrink (n 5); Lorenzo

contrast, this paper clearly argues that accountability is essentially an *ex post* mechanism, yet e*x ante* targets are needed for *ex post* evaluation of the CB's actions.

Laurens et al.,[7] for example, evaluate an extensive sample of 98 monetary authorities. The authors examine accountability mechanisms such as the legal definition of monetary targets (including their prioritization and quantification), the legal obligation to explain and justify actions taken (i.e. the publication of reports addressed to political authorities and to the public in general) and the existence of a decision-making process that provides detailed explanation of reasons underpinning collective deliberations. Transparency was defined as operational (disclosure of targets), economic (disclosure of monetary strategies and analysis) and in relation to procedures (publication of minutes or voting records).

They argue that there is a positive and significant correlation between accountability and transparency, i.e. accountable CBs tend also to achieve a high degree of transparency.[8] Nonetheless, this correlation could also imply that they are measuring the same phenomenon. Transparency facilitates and integrates the political process of accountability. Scrutiny of CBs' actions is based on disclosure. Moreover, transparency could be conceived as a form of *social* accountability, which allows other stakeholders – not only national political powers – to evaluate CBs' decisions and make judgments.

This flaw, of seeing transparency as distinct from accountability when in fact the two are mutually reinforcing and, at root, the same phenomenon, becomes evident when considering a subset of the monetary authorities studied by Laurens et al: those in advanced economies (25 Central Banks). The authors find that in these institutions a high degree of transparency was not followed by a proportional growth in 'accountability' mechanisms. This variation can be explained, according to the authors, by the legislative process for establishing the instruments to hold CBs accountable. Since creating accountability mechanisms requires a change in legislation, it is dependent on political will and, thus, demands a higher political consensus.

Bini-Smaghi and Daniel Gros, 'Is the ECB accountable and transparent?' (2001) European Institute of Public Administration (EIPA), Maastricht ; N Nergiz Dincer and Barry Eichengreen, 'Central bank transparency: where, why, and with what effects?' (2007) NBER Working Paper Series 13003/2007; Carin van der Cruijsen, David-Jan Jansen and Jakob de Haan, 'How much does the Public Know About the ECB's Monetary Policy? Evidence from a Survey of Dutch Households' (2010) ECB Working Paper Series 1265 1/2011
http://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1265.pdf (accessed 18 November 2012); Laurens et al (n 5). This argument also applies to official documents, see International Monetary Fund (IMF), 'Code of good practices on transparency in monetary and financial policies: declaration of principles' (1999) IMF, Washington DC.

[7] Laurens et al (n 5).

[8] ibid, 137-163.

The barrier to establishing 'formal' accountability rules is, thus, deemed higher than for transparency mechanisms. Laurens et al also argue that CBs in advanced economies were able to use new technological tools to improve transparency, but they have not invested the same amount of efforts in their 'accountability frameworks'.[9]

I argue that this economic perspective on CB accountability is premised on two inaccurate assumptions: (i) the tools of transparency are necessarily 'informal' (*de facto*) and (ii) the accountability mechanisms have primarily a political nature and are always 'formal' (*de jure*), i.e. they are established by hard law and aimed at accountability to political powers.

The economic perspective tends to reduce the social relations of accountability only to reports required by hard law. It ignores instruments with a low degree of normativity or 'legalness' (such as regulations and CBs' regulatory decisions), which also *create* relationships of accountability. The economic perspective fails to capture the complexity of these *social* mechanisms, since they can be established through soft law, i.e. by political decisions with a lower degree of formality.

In fact, at the same time as developed countries' CBs have innovated on instruments to achieve better communication with markets, they have *established* greater accountability instruments. However, these accountability mechanisms have emerged as soft law, outside of the battles in the political arena, and have, therefore, gone unnoticed in the economic literature, which refers to them only as 'mechanisms of operational transparency'.

However, it is important to mention that the mere existence of soft law accountability mechanisms does not necessarily mean CBs will be accountable. Soft law can encourage innovation and experimentation, but there is a risk: it can also be a way to avoid definite, binding commitments, allowing CBs to easily change the mechanisms in moments of pressure.[10] Further, the growing complexity of monetary policy, especially during times of crisis, could undermine the effectiveness of accountability mechanisms, especially for a broad public audience that, unlike market participants, may struggle to understand the implications of complex monetary policy decisions.

Nonetheless, law (even, soft law) is not neutral or external to the political process of CB accountability. Law is a technical and symbolic discourse that can both aid monetary policy implementation and at the same time promote accountability. Once legal mechanisms to hold CBs accountable are established and an institutional space for dialogue (between social

[9] ibid, 172.

[10] Nicholas Bayne, 'Hard and Soft Law in International Institutions: Complements, not Alternatives' in John Kirton and Michael Trebilcock, *Hard Choices, Soft Law* (University of Toronto 2007).

actors, political powers and the CB's managers) is created, there is already an effect on the operations of the CB. This structure is an institutional reality and may allow social actors to contest the political choices underlying monetary policy implementation and its distributional effects.

After an important historical period of innovations in monetary actions, e.g. balance-sheet policies and quantitative easing (QE),[11] the period after the 2008 crisis has re-focused on the question of accountability. As demonstrated in Section 4, all three CBs appear to have the legal instruments that would allow for *ex post* evaluation, yet until now only the Fed has been seriously called to account for its decisions.[12]

Given this argument for the importance of soft law accountability mechanisms, several steps are necessary to ascertain their true impact on CBs' accountability legal framework. First of all, it is necessary to identify whether an accountability instrument is in fact a legal rule. Once created, the legal rule generates a social expectation for the maintenance of the mechanism. In time, this rule can then create a forum to question and make judgements about monetary options. That seems to have happened with the Fed's actions in the aftermath of 2008 crisis: political and social judgements on the efficiency and fairness of these actions were feasible.[13] Secondly, monetary policy is a complex and arguably scientific issue (at least, this is how the discourse around monetary policy describes it), but it has clear wealth distributional effects between classes (and even nations), i.e. it has a political nature. Therefore, the potential public impact of an accountability rule is significant. It permits the assessment of *political* choices that have social effects. It compels public authorities to explain their rationale. As long as more instruments of transparency are established by rules, it will be more difficult to remove them. I argue below that CB regulations and decisions do in fact have a legal nature and that CBs have established accountability mechanisms since the 1990s. These instruments can potentially reinforce the accountability of CBs over time. After a period of crisis, CBs' decisions are today again being questioned and these instruments are, therefore, even more important.

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[11] Hervé Hannoun, 'The Expanding Role of Central Banks since Crisis: What are the Limits' (2011) 150th Anniversary of the Central Bank of the Russian Federation BIS 1/2011 http://www.bis.org/speeches/sp100622.pdf (accessed 10 April 2012); Philipp Bagus and David Howden, 'Qualitative Easing in Support of a Trumbling Financial System: a look at the Eurosystem's Recent Balance Sheet Policies' (2009) 29(3) IEA http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0270.2009.01948.x/abstract (accessed 22 March 2012); Bagus and Markus H Schiml, 'New Modes of Monetary Policy: Qualitative Easing by the Fed' (2009) 29(2) IEA http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0270.2009.01893.x/abstract (accessed 23 March 2012).

[12] See 'US Federal Reserve faces heightened scrutiny from Congress' (12 May 2015) *Financial Times*.

[13] ibid.

The three CBs chosen for this case study were established in different historical periods: the 1910s (the Fed), the 1990s (the ECB), and the 1960s (the BCB). They operate in very different political and economic contexts. Also, there is a huge variation between their institutional set-up: one CB is a supranational institution with monetary powers and limited financial regulation authority (the ECB); the other is a federal agency that works alongside with regional private banks (the Fed); and the third one is a national and centralized CB, not *de jure* independent from political powers in contrast with the other two (the BCB).

However, they were chosen because the two advanced economies' CBs and the emergent BCB have developed the same institutional pattern during the last decade: they have innovated their accountability framework through soft law instruments. As said above, this specific form of institutional innovation can be attributed to an economic consensus on the nature of monetary policy implementation. These CBs have specific concerns in relation to operational transparency. Both ECB and Fed manage international currencies. The BCB, in turn, is concerned with foreign investments in the Brazilian financial market and capital flows.

III. THE LEGAL STRUCTURE OF CENTRAL BANK ACCOUNTABILITY

The aim of this section is to identify the legal structure of mechanisms dedicated to the CB accountability. For this purpose, it is pertinent to develop a theoretical framework for the recognition of an accountability rule: How do we know an accountability rule when we see one?

As outlined in the introduction above, accountability is an established social relationship between an actor and a forum in which the actor is obliged to explain and justify its conduct; the forum can pose questions, pass judgments and the actor may face consequences.[14] Monetary accountability is a form of scrutiny and implies the potential use of sanctions over the currency management implemented by the CBs. Monetary accountability is a social relationship institutionalized by law. The legal framework for monetary accountability implies rules with different degrees of 'legalness'[15] – i.e. soft or hard in a *continuum*. I conceive normativity or 'legalness' as a matter of graduation.[16] Legalness is the *quality* of a legal standard that creates an accountability mechanism.[17]

[14] Bovens (n 2).

[15] This study employs the concept of 'legalness' as '*juridicité*' as developed by Gérard Timsit, *Archipel de la Norme* (PUF 1997).

[16] Alain Pellet, 'The normative dilemma: will and consent in international law-making. Rapport au colloque de Canberra 1990' (1992) Australian Ybk of Intl L; Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' [2009] 54(3) IO 421; Catherine Thibierge, 'Rapport de Synthèse: le Droit Souple' in Catherine Thibierge, *Le Droit Souple: Journées Nationales - Tome XIII Boulogne-sur-mer* (Dalloz 2009).

[17] Timsit (n 15).

Accountability rules involve legal procedures and parameters for monetary actions. This legal relationship encompasses interaction between different agents – CBs and the forums in which they can be scrutinized. The forums have the legal power to assess, judge and potentially impose sanctions on the CBs (table 1).

Table 1. Monetary accountability as a social relationship and as a legal framework

The social relationship of accountability is:	Rules intended to improve the social accountability of a monetary authority are:
1. A relationship between an actor and a forum, ...	Relational rules – between a CB and social forums – ...
2. ...in which the actor is obliged...	...institutionalized by law ...
3. ...to explain and justify...	...which define a legal form of scrutiny ...
4. ...his conduct.	...of an action or an omission (the object of accountability process).
5. The forum can pose questions, ... **6. ...pass judgments ...**	The forum has the *legal power* to scrutinize the CB. There are procedures and parameters for monetary actions established by *legal instruments* (soft or hard law).
7. ...and the actor may face consequences.	The forum can impose sanctions: legal, economic, reputational or social repressive measures. The legal nature of an accountability rule does not depend on the legal nature of its sanction.

In addition, one must distinguish two different perspectives for the analysis of accountability relationships. Accountability may be conceived as a virtue or as a mechanism.[18] As a normative concept (accountability as a virtue), it is a set of standards for the evaluation of public agents' behaviour, i.e. did CBs behave in a manner that was accountable to its stakeholders? In a narrower and descriptive sense, accountability is an

[18] ibid.

institutional relationship or an arrangement in which an actor can be held to account by a forum, i.e. can the CB be held responsible for its actions by its stakeholders? This study conceives the monetary accountability relationship in the latter, descriptive sense and my legal approach sees law as an instrument for institutional design.

Social accountability involves the scrutinization of CBs by social forums. The social forums may comprise citizens, communities, independent media and interest groups, including academics, professional peers, market and civil committees. They are the 'CB watchers'.

This paper conceives of social accountability in terms of what Grant and Keohane[19] classify as market and peer accountability relationships. Market accountability is a relationship whose forum comprises consumers and investors (equity- and bond-holders). It is characterized by their influence, which is exercised in whole or in part through market mechanisms. In monetary accountability, the market relationships include international or national investors who act directly on the real economy or through financial markets. These actors have their financial decisions influenced by monetary policy. In turn, consumers 'hold' fiat money (managed by a CB). Sanctions from these market actors may manifest as restrictions on access to capital, demands of higher interest rates or even refusal to accept fiat money.

Peer accountability arises as the result of scrutiny by professional institutions or organizations characterized by the same scientific values and ideas. Sanctions issued by this type of social forum are related to effects on network ties, scientific support, reputation and prestige. Grant and Keohane[20] identify 'public reputation' as a type of accountability mechanism. Nevertheless, 'public reputation' can be affected by several different social forums (whether professional, related to market, etc), or even by political forums. In addition, reputational sanctions very often have the ability to activate the political mechanisms that have real 'teeth'.[21]

For the purpose of this article, I refer to 'social forums' as a large group of CB watchers comprising market agents, academic peers, media and citizens in general. My main concern is by which legal means this diverse group can assess information and motivation of CB monetary actions.

[19] Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' [2005] 99 APSR 29.
[20] ibid.
[21] See Catalina Smulovitz and Enrique Peruzzotti, 'Societal and Horizontal Controls: Two Cases of a Fruitful Relationship' in Scott Mainwaring and Christopher Welna, *Democratic Accountability in Latin America* (OUP 2003). See also Mathew D McCubbins and Thomas Schwartz, 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms' [1984] 28 AJPS 165.

IV. ACCOUNTABILITY MECHANISMS FOR CENTRAL BANKS: THE LEGAL FRAMEWORK OF THE ECB, THE FED AND THE BCB

This section applies the framework set out above, analysing the mechanisms for social accountability for the monetary actions of the ECB, the Fed and BCB. The key accountability mechanisms identified by this research are: (i) the legal basis of central bank mandates, (ii) the monetary objectives set for the central banks, and (iii) legal instruments related to operational transparency to hold them accountable to different stakeholders, at national and international levels. Although the first two instruments establish legal parameters to evaluate monetary actions (*ex ante* mechanisms), together all three constitute an accountability process.

1. Legal Basis of Central Bank Mandate

With respect to political accountability, changes to the legal basis of CBs, or merely the threat of such changes may be a sanction for the monetary authority. That depends on the legal conditions and political consensus required for an amendment to the CBs legal foundation text. Furthermore, the legal basis provides parameters for governments and social actors to evaluate monetary actions (or inactions). This basis supports the exercise of monetary power by CBs and, depending on its degree of 'legalness', can strengthen the social perception of monetary authority legitimacy. To establish how exactly the legal basis of a CB plays a role as an accountability instrument, one must examine its degree of 'legalness'.

Analysis of the institutional basis of CBs reveals three different ways of structuring the establishment of a monetary authority by law. The first model involves the constitutional recognition of a central bank combined with a legislative act structuring its monetary operations. This is the case for the BCB. The Brazilian Constitution of 1988 states that monetary issues are the exclusive matter of the Federal government and must be exercised through a specific institution, namely a 'central bank' (Article 164, Constitution of 1988). The Brazilian Constitution does not specifically invoke the BCB but references a central bank as the institution responsible for monetary policy implementation. Therefore, a hypothetical annihilation of the BCB would be dependent on a high degree of political consensus, since a constitutional amendment would be necessary, requiring approval by three fifths of the Congress. Also, the Constitution establishes that the financial functions must be defined in a 'complementary act' (Article 192, Constitution of 1988) whose approval shall require an absolute majority of the Congress (Article 69, Constitution of 1988).

The second model for organizing a monetary authority is illustrated by the Fed. The 1787 Constitution of the United States assigns the power to issue money to the Congress and does not contain references to a CB. References to currency matters in the 1787 Constitution can only be found in the description of the power of Congress regarding the regulation of the value of currency and the prohibition for individual states to issue paper

money (Article 1, Sections 8 and 10, Constitution of 1787). In 1819, the Supreme Court of the United States recognized that Congress had the constitutional prerogative to make 'necessary' and 'proper' laws in order to exercise its powers (Article 1, Section 8, Constitution of 1787) and could establish a CB designed specifically for monetary control.[22] The Fed is thus an agency of the legislative power.

The third model for creating a monetary authority is represented by the ECB as a supranational institution. The ECB is not conceived under a legal regime created by a single State. It was established by a constitutional treaty, born out of an agreement between the Member States of the European Union to share their monetary sovereignty. This legislative instrument was signed by the executive of Member States and then needed to be ratified by their parliaments according to their constitutional requirements. The ECB is a European institution under the terms of Article 13(1) of the Treaty on the Functioning of the European Union (TFEU). The TFEU states that the EU has exclusive competence in monetary policy for Member States whose currency is the euro.[23]

The three models for structuring the monetary authority can be summarized as below (table 2).

Table 2 – The legal basis of the ECB, the Fed and the BCB

	ECB	Fed	BCB
Legal basis	Supranational and constitutional status, monetary powers under a treaty	Without constitutional status, monetary powers under a Congressional act	Constitutional status, monetary powers under a Congressional act

The ECB is the only monetary authority expressly referred to in a legislative act that regulates the monetary system. The ECB is also recognized as a European institution on par with the entities of the EU executive and legislative powers. It has its monetary powers provided by the same instrument. In order to change the ECB basis, a (very) high political consensus would, therefore, be required.

The European political powers have, thus, lost the most drastic sanction for their monetary authority: the ability to change, or even threaten to change, its legal basis. The legal structure, which insulates the ECB from the threat of legal reform by political actors, may act as a block against the

[22] *McCulloch v Maryland* 17 US 316 (1819).
[23] Art 3(1)(c), Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/01 (TFEU).

implementation of any *legal* sanctions. This design not only ensures a high degree of operational autonomy for the ECB, but also means that the accountability instruments (especially the political ones) tend to be fewer and less effective compared to those available for checking national monetary authorities.

There are, however, rules that provide for a simplified revision for the ECB and ESCB statutes. In such a process, the Council and the European Parliament are the entities involved.[24] Nevertheless, the status of independence, the monetary objectives and the very existence of the ECB cannot be changed by this procedure. This procedure led by the Council and Parliament has authority over only very few operational powers. Furthermore, the decision-making process provides for the recommendation of or consultation with the ECB governing council. This demonstrates that the mechanism was not designed specifically as an accountability instrument for the EU political powers (as a way to eventually 'punish' the CB), but only as a way to make more flexible operational and technical changes that are necessary for the ECB itself.[25]

In times of crisis, the legal basis of the monetary authority is particularly important, as witnessed after the 2008 crisis. The time for political negotiations and legislative process can cause the success or failure of measures to overcome macroeconomic shocks. The design of the supranational monetary authority in the euro area tends to multiply veto points to such measures. The ECB was pushed to innovate and assumed the risk to be challenged by courts.[26] However, outside of crisis' events, this structure tends to ensure the highest degree of legal predictability.

In a broader perspective, one must recognize that, despite the institutional differences between these three monetary authorities, the high degree of 'legalness' of their institutional basis allows them to operate stably within the parameters agreed by political powers by means of a statute or a treaty. The social (and political) oversight of their actions (as well as the social perception of their responsibilities and powers) tend to be reinforced by the fact that their legal structure is subject to negotiations in the political arena and is articulated by instruments with a relevant degree of 'legalness'.

2. Monetary Objectives

Clear and specific monetary objectives to be pursued by the CB are crucial parameters for assessing their behaviour. Performance in accordance with

[24] Art 129(4),TFEU.

[25] Carel van der Berg, *The Making of Statute of the European System of Central Banks* (Dutch University Press 2005).

[26] See the CJEU case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag* ECLI:EU:C:2015:400. The ECB's outright monetary transactions in secondary sovereign bond markets (OMT) was contested by Germany in relation to the interpretation of arts 119 TFEU, 123 TFEU and 127 TFEU and of arts 17 to 24 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank.

these parameters can be evaluated by both political and social forums. The degree of 'legalness' of the act that specifies CB's policy objectives reveals the extent to which the monetary target can be used as a predictable and stable reference for accountability evaluation. If there are multiple policy objectives for the CB, with no hierarchical ordering among them a margin of choice is delegated by the political powers to the CB. The monetary authority can choose at its discretion to pursue a specific objective over another. This ambiguity may make it more difficult for political and social forums to monitor and evaluate the CB's behaviour.

Regarding monetary objectives, the CBs of this study can be divided into two types. The first type is a CB with priorities designated by political powers. The ECB falls into this type. However, the ECB itself quantitatively defines its target without the involvement of political powers. The second type (containing the BCB and the Fed) comprises monetary authorities with multiple objectives. In the BCB's case, the inflation targeting system was adopted explicitly by the executive power, i.e. this objective was part of the legislative basis of the CB; while in the case of the Fed, this system was adopted only by the CB initiative.

The ECB's priorities are explicitly designated by political powers. Article 282(2) of the TFEU states that price stability is the primary objective of the central banks system managed by the ECB. Without prejudice to this objective, the ESCB may support other EU economic policies. In 1998, the ECB governing council quantified the price stability objective by a collegial decision: an average inflation of 2% per year.[27]

The second type includes both the Fed and the BCB. The Fed aims at full employment and price stability objectives, a dual mandate without hierarchy,[28] alongside a financial stability aim. Neither the Federal Reserve Act, the CB's regulations nor its multiyear strategic plans set priorities or quantify objectives. However, it could be argued that the Fed's institutional practice since Alan Greenspan's administration was consistent with implicit adoption of an inflation targeting system.[29] During the 2008 crisis, public statements made by former Chairman Ben Bernanke referenced an implicit inflation target of 2%. However, it was not until January 2012 that the Fed decided to adopt an explicit inflation target by a Federal Open Market Committee (FOMC)'s decision.[30] This specific decision, unlike previous public statements, may reveal some degree of 'legalness'.

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[27] In 2003, it reformulated the quantitative objective to clarify that its achievement is expected in the medium term and in order to avoid deflation risks the target must be considered achieved if inflation is below, but close, to 2% (ECB governing council's decisions on 13th October, 1998 and 8th May, 2003).

[28] Federal Reserve Act (1913), s 2a.

[29] Goodfriend (n 4); Peter Boffinger, *Monetary Policy: Goals, Institutions, Strategies and Instruments* (OUP 2001).

[30] FOMC decision on 25th January 2012 ('FOMC statement of longer-run goals and policy strategy').

Similarly, in the case of the ECB, as in the case of the Fed, I argue that their collective deliberation constitutes an act capable of generating *legal effects*. The public statement of their inflation target uses a specific legal formula, a particular code. It is possible to identify the will to create a legal standard by the issuer of this decision (the ECB governing council and the FOMC). The action is intended to create an obligation for the bank itself. Furthermore, this decision is directed outside as it can allow social and political forums to assess compliance.

From this perspective, the decision of the ECB governing council as well as of the FOMC would correspond to a unilateral act of will. For the Fed, it took some time to use this code. After 2012, the references to an inflation target appear to have the explicit intention of establishing a rule. The reference to a 2% target is not vague anymore. It was communicated to Congress and is now publicly assumed as a Fed decision.[31] However, in its statements, the Fed explicitly denied that the consequence of the inflation target adoption could be a legal hierarchy or prioritization of its monetary objectives.

The BCB must carry out the National Monetary Council (*Conselho Monetário Nacional* – CMN) provisions. The CMN has a political nature and it is an institution with multiple functions in accordance with Article 3 of Law no. 4595 of 1964. Notwithstanding, in 1999, the Brazilian Executive – by the adoption of the Decree 3088 – inaugurated an inflation targeting system as 'a guideline for the monetary policy regime.' This act introduced price stability as a primary objective for the Brazilian monetary system. The CMN defines a quantitative inflation target – and a margin of tolerance – for each calendar year, which must be achieved by the BCB. The Decree is an act that can be changed by the Brazilian President without going through a legislative process.[32]

Amongst the three CBs, the Fed is the only monetary authority that has the legal power to choose the policy objective to be prioritized at any point. Therefore, it requires close oversight by social and political forums, since its multiple goals do not explicitly delineate institutional behaviour. This tends to preserve the Fed's political autonomy. However, the Fed is a

[31] See the 'Semi-annual monetary policy report to Congress before the Committee on Financial Services, U.S. House of Representatives', Washington D.C., 29th February 2012.

[32] The adoption of the *Decreto 3088* was followed by the abandonment of a fixed exchange rate system and was sought to ensure international credibility for Brazilian monetary policy. It was originally inspired by the Bank of England's system. See Joel Bogdanski, Alexandre Tombini and Sérgio R Werlang, 'Implementing Inflation Targeting in Brazil' (2000) BCB Working Paper Series https://www.bcb.gov.br/pec/wps/ingl/wps01.pdf (accessed 5 February 2011). Through the *Circular* 2698 of 1996, the BCB created a special committee serving as the main forum for the decision-making process related to monetary policy: the Monetary Policy Committee (*Comitê de Política Monetária* – COPOM) inspired by the FOMC.

legislative agency and the US Congress historically intervenes in the aftermath of a crisis, creating new mechanisms of surveillance by law. That was the case in the 1970s as well as with the 2008 crisis.

The ECB's behaviour can be more easily assessed by social forums. The monetary objective established by treaty and the inflation target set by the institution are clear and precise. Nevertheless, the act that created a quantitative target was issued by the CB itself. As a result, it can be changed at any time. Another issue may arise concerning the ECB authority to define this rule. Should an EU political body not review this type of rule periodically as is the case for the BCB? After all, the quantitative inflation target determines the application of a legal standard specified by treaty, which was negotiated by political powers. Is the price stability defined by the ECB what the EU powers wanted (or want) for the eurozone? Would a degree of flexibility be desirable, according to European political powers? The Eurozone crisis after 2010 raises this set of questions.[33]

Similarly, the Brazilian monetary regime provides a quantitative criterion for evaluation of the BCB's behaviour. However, a ministerial institution, the CMN, defines the quantitative target annually: the decision is in the hands of a political power. Only the execution is assigned to the BCB. Also, the degree of 'legalness' of this act that introduced the inflation targeting system raises questions about its stability and predictability. After all, it was established by an executive act, so it may be revoked at any time without significant institutional constraints. Since 2011, the actual institutional practice is to aim at the ceiling of the target range (e.g. to aim at inflation of 6,5% when the target is 4,5%, +/- 2%), amplifying the BCB's leeway with respect to inflation.[34]

The following table summarizes the legal instruments for social accountability related to the monetary objectives of the BCB, the ECB and the Fed.

[33] See Lastra (n 4).

[34] Comitê de Política Monetária (COPOM), 'Ata da 161ª reunião' (31 August 2011) https://www.bcb.gov.br/?COPOM161 (accessed 13 June 2015). At that time the BCB decided to reduce the basic interest rate (SELIC) even while confirming that the accumulated inflation over 2012 was already above the central inflation target of 4,5%. Note that in the previous month, the expected inflation was the driver reason for an increase in the SELIC interest rate.

Table 3 – Monetary objectives of the ECB, the Fed and the BCB

		ECB	Fed	BCB
Monetary Objectives	Definition of monetary objectives	By treaty	By statute	By statute and by executive decree
	Hierarchy of monetary objectives	By treaty	*Without hierarchy (at central bank's discretion)*	By executive decree
	Measurement of monetary objectives	Quantitative target: defined by the ECB governing council	Quantitative target: defined by the FOMC	Quantitative target: defined periodically by a ministerial institution (legal structure provided by an executive decree)

3. The Legal Framework for the Relationship Between Central Banks and Social Forums

In this section, the analysis focuses on examining specific social accountability mechanisms related to operational transparency. These instruments allow for the oversight of monetary policy implemented by CBs and are generally directed towards social and market forums – but they can also be used by political powers. Specifically, they are related to the legal obligation of disclosing the economic rationale of monetary actions.

The three CBs analysed in this study have legal mechanisms for social accountability. Interestingly, some mechanisms were established by a regulation created by the CB itself or were extended at the initiative of the monetary authority from stipulations issued by political powers. That is to say, in some cases the monetary authorities themselves introduced measures that made them more accountable.

The BCB, through the issuance of a *Circular* (regulatory decision),[35] created new legal mechanisms for social accountability in 2005, since it requires

[35] *Circular 3297* 2005 (BR).

the agency to disclose its decisions and motivations for policies. According to Article 5 of this *Circular*, the decision on interest rate policy taken by the BCB's monetary policy committee shall be publicly released.[36] These minutes provide the committee reasoning, the relevant data on which the deliberation was based, as well as the final decision, indicating the number of votes and, since May 2012,[37] revealing the identity of dissenting members. The Brazilian Executive has also created a mechanism for social accountability. The BCB is required to release reports containing an analysis of the inflation targeting performance, the impact of past monetary decisions and a prospective inflation evaluation.[38]

The acts of the Brazilian executive power and its CB suggest a change in their institutional behaviour. Created in 1964, the administration inherited from the authoritarian regime conceived legal obligations for social accountability by its own initiative and by the executive power, to which it is explicitly linked. The inertia of the legislature in creating legal instruments for social accountability was overcome by the monetary authority itself in the last decade. Even if, at first, the institutional innovation of the CB aimed to achieve efficiency in monetary policy implementation, it ultimately created – especially, after the adoption of inflation targeting system in 1999 – a form of social accountability, not only by its institutional behaviour, but also by issuing acts having a certain degree of 'legalness' (*Circulares*). These acts have not only created an obligation for the BCB, but also assigned an authority to social forums assessing its compliance.

The ECB has a particular structure. In Europe, the general rule is that 'any citizen of the Union [...], shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium' and 'each institution, body, office or agency shall ensure that its proceedings are transparent.'[39] However, the same article withdraws the ECB from this general principle as regards its monetary decisions.

The confidentiality of the ECB deliberations is guaranteed by the treaty and regulated by the CB, which specifies a period of thirty years for their disclosure.[40] Article 132(2) of the TFEU delegates the disclosure of

[36] Art 4, § 4 states that the minutes of its meetings must be disclosed within six days after their conclusion. The calendar of meetings should be made public in October each year. See *Circular 3297* 2005 (BR), art 6.

[37] BCB executive board's vote no. 97 on 16th May 2012 in accordance with *Lei de Acesso à Informação 2011(BR)*.

[38] See *Decree 3088 of 1999* (BR). The BCB is also obliged to publish an analysis of its past actions and the Brazilian inflation targeting system development (reports on inflation – '*relatórios de inflação*').

[39] Art 15(3),TFEU.

[40] Public access to ECB documents is governed by its decision on 4th March 2004 (ECB/2004/3; 2004/258/C), pursuant to art 10(2) of the Rules of Procedure of the ECB Governing Council and art 23(2) of the Rules of Procedure of the ECB. This decision governs the *ad hoc* procedure to access ECB documents. Free access is

decisions to the ECB's discretion. Protocol 4 states that the governing council meetings are confidential and that it is up to the ECB to announce them.[41]

The ECB institutional practice has been to release its decision in a public statement after its main monetary policy meeting. Then, the institution organizes a press conference (with its president and vice-president) and a press conference open to journalists' questions, in which the motivations for its decision are revealed. In February 2015, the ECB decided to publish its minutes. The *Financial Times* attributed this decision to the 'public pressure for more accountability after the global financial crisis [that] has forced traditionally secretive rate setters to open up.'[42] Politically, however, the power to decide the degree of transparency and the level of social accountability concerning monetary decisions is granted to the ECB.

Yet the ECB does not disclose whether there were any dissenting votes in the final decision. The institution presents its deliberation as the result of a 'consensus'. This position is justified by the bank's desire to preserve its operational independence, avoiding political pressure on central bankers who form its council.[43] This allows members of the national CBs to act in a European perspective 'decoupled' from their national positions.

Regarding disclosure of monetary information, the main difference between the ECB and the BCB is that the latter decided to issue acts in order to create obligations related to social accountability. Although the ECB has behaved in this way since its creation, releasing pertinent monetary information, there were no obligations explicitly stated in legal acts issued by the institution prior to 2015. For the BCB, it is clear that there is a formal requirement regarding the disclosure of information, even if its degree of 'legalness' is low: it is a mere regulation (*Circular*). For the ECB, the disclosure of decisions and their motivation through press releases and conferences have been a practice since June 1998. Sessions opened to journalists' questions began in October 1998. This practice was conducted by all presidents that the institution has had. There seems to be a political intention to continue this behaviour. In this sense, I also argue that there is a degree of 'legalness' in this ECB act.

When it comes to analysing the case of the Fed, there is a wide range of legislative provisions concerning accountability, also expanded or specified in the Fed's regulations. Regarding the application of the Freedom of Information Act (FOIA), the Board of Directors issued the Regulations

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possible only *thirty years* after the monetary decision, unless otherwise determined by the body responsible for issuing it (pursuant to art 10(3), Rules of Procedure of the ECB governing council and art 23(3), Rules of Procedure of the ECB).

[41] Art 10(4), Protocol No 4.

[42] See 'European Central Bank opens up with release of minutes' (19 February 2015) *Financial Times*.

[43] See the *ECB Monthly Bulletin,* November 2002.

Regarding Availability of Information.[44] Section 261.10 of this instrument provides that the board of directors must publish various reports on Fed's actions.

The Government in the Sunshine Act of 1976 states (with certain exceptions) that 'every portion of every meeting of agency shall be open to public observation.'[45] Notwithstanding, the statute provides exceptions for meetings that can lead to 'financial speculation' or put a financial institution at risk. The Rules Regarding Public Observation of Meetings, issued by the board of directors, states that the meetings related to 'monetary policy matters' (section 261b.7, a) should be conducted without public observation because they could cause 'financial speculation'. In the Statements of Policy (12 CFR 281) issued by the FOMC, the Fed argued that the FOMC does not correspond to the definition of federal 'agency' contained in the Government in the Sunshine Act of 1976. The FOMC is a committee, unlike the Fed's Board of Directors. Thus, the FOMC would not need to immediately disclose transcripts of the meetings that are not available. However, the committee, 'recognizing the purpose of the legislative power' in enacting this statute, decided to publicize a 'record of policy actions' one month after its meetings. According to the Fed, this complies with the legal requirements.

Since 1994, the FOMC releases files with a record of its actions and detailed transcripts of its meetings five years after they occurred. Moreover, in the same year, it became an institutional practice to announce changes in interest rate policy immediately after the meetings. According to Alan Greenspan, at that time there was a strong legislative pressure for the adoption of this practice.[46] Since 1999, the committee has announced its policy decision even if there has been no change. Since 2004, the minutes of meetings are available three weeks after the respective meeting, however transcripts continue to only be disclosed five years later. The interest rate decision is notified immediately by a press release. There are also press conferences conducted by the chairman. Unlike the ECB, the Fed reveals the positions and names of committee members who dissented from the final decision.

In 2010, in the aftermath of the economic crisis and given the increased powers acquired by the Fed to intervene in financial markets, the US Congress decided to amend the Federal Reserve Act to include new mechanisms for its social accountability. The two main mechanisms are: (i) the creation of a page on the Fed's website entitled 'Audit', which became a repository of information on the Fed's performance and provides all reports to the Congress and those prepared by independent auditors and

[44] The Rules Regarding Public Observation of Meetings (12 CFR), s 261b.
[45] Sunshine Act (1976), s 552b.
[46] John T Wooley, 'The US Federal Reserve and the Politics of Monetary and Financial Regulatory Policies' in Kenneth Dyson and Martin Marcussen, *Central Banks in the Age of the Euro: Europeanization, Convergence and Power* (OUP 2009).

by the Office of Inspector General (OIG) and other relevant information that the board of directors 'reasonably believes is necessary or helpful to the *public* in understanding the accounting, financial reporting, and internal controls of the Board and the Federal reserve Banks' (my emphasis)[47] as well as (ii) the disclosure of information on emergency loans granted and on the open market operations conducted by the Fed during the crisis management.[48]

The Fed, compared to the BCB and the ECB, is the monetary authority most subject to rules of a legislative nature for social accountability. Also, the Fed wanted more than just a political and sporadic decision to disclose information: it designed special measures in order to create a *legal obligation* to release such information.

As the Fed has been closely monitored by the US Congress in post-crisis periods, during the 1970s and post-2008,[49] the Fed's own initiatives to publish regular data and regulate its disclosure tend to potentially avoid confrontations with the legislative power. The Fed has taken steps to determine the format, frequency and quantity of data to be disclosed that could prevent future unilateral decisions taken by the Congress. In particular, this seems to be the case for rules relating to the application of the Government in the Sunshine Act.

Legal instruments for monetary policy accountability related to social forums can be summarized as follows in Table 4.

[47] Federal Reserve Act (1913), s 2b.
[48] Federal Reserve Act (1913), s 11s.
[49] The Federal Reserve Reform Act of 1977 and the Dodd-Frank Act are the main legislative initiates that changed the accountability of the Fed.

Table 4 – The legal framework for the relationship between central banks and social forums

		ECB	Fed	BCB
The legal framework for the relationship between central banks and social forums	**Rules related to disclosure of decisions (interest rate policy)**	Institutional behavior *via press release*	Statute and regulations *via press release*	Regulations (*Circulares*) *via press release*
	Rules related to disclosure of motivation (interest rate policy)	Institutional behavior and, after 2015, ECB decision *via press conference and minutes*	Statute and regulations *via minutes and others means*	Regulations (*Circulares*) *via minutes*
	Rules related to disclosure of data (decision basis) and motivation	Institutional behavior and treaty *press conferences, monthly bulletins and minutes*	Statutes and regulations *several methods of publication (reports, bulletins, minutes, etc.)*	Executive decree *reports on inflation*
	Rules related to disclosure of financial information	Treaty (frequency extended by institutional behavior)	Statute and regulations	Statute

V. WHAT DO THESE INSTITUTIONAL CHANGES REVEAL?

Given the growing complexity of monetary issues, it seems that the role of law (as a system for structuring the exercise of power by CBs) has changed. This transformation comes from the change of paradigm concerning CB interventions in currency management: from an action manipulated and *ex ante* controllable by administrative rules (rule-based instruments) to an action in which these institutions operate primarily as agents in open

market operations (market-based instruments).[50] Actually, CBs no longer manage currency by preponderantly issuing binding norms, as was usual in the 1960-70s, especially with respect to reserve requirements.[51] Instead, as a main model of policy implementation, CBs act as market agents, formalizing repurchase agreements (open market operations) and swap contracts. Moreover, they intervene in financial markets by shaping incentives, i.e. by setting short-term interest rates and inflation targets.[52]

As a result, the role of public law in creating a framework for monetary policy implementation has moved: (i) from outlining instrumental rules for policy actions (*ex ante* regulation, e.g. the legal limits on reserve requirements or the gold standard as political control of paper money's expansion) (ii) to establishing legal mechanisms to render discretionary actions accountable (a model of *ex post* regulation, e.g. the duty to report monetary actions to the Congress or the disclosure of their motivation to a wider audience). The historical pendulum movement between 'rules' and 'discretion' in monetary policy seems to point to more 'discretion' for contemporary central banking.[53] However, the presence of accountability mechanisms in central bank framework means presence of rules, regardless their degree of 'legalness'.

The legal design of an accountability mechanism consists in an *ex post* structure, since the institutional process presupposes the assessment of an act (or of an omission) that has already been implemented by a CB (e.g., a short-term interest rate). Even if it takes prior legal parameters for behaviour, such as monetary goals or inflation targets, into account, the *ex ante* element has a 'cognitive' nature, i.e. the anticipation of a future assessment.[54] Given this shifting pattern of monetary policy, the accountability relationship implies scrutiny of CBs' discretionary actions that were taken based on parameters previously set out by a legal standard.

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[50] Bernard J Laurens, Monetary Policy Implementation at Different Stages in Market Development (IMF Occasional Paper 2005).

[51] Reserve requirements are the amount of funds that a depository institution must hold in reserve against deposit liabilities.

[52] Iain Begg, 'Monetary Policy Strategies' in Marcussen Dyson, *Central Banks in the Age of the Euro: Europeanization, Convergence and Power* (OUP 2009); Ben S Bernanke; Thomas Laubach; Frederic S Mishinki and Adam S Posen, *Inflation Targeting: Lessons from International Experience* (PUP 1999); Ulrich Bindseil, *Monetary Policy Implementation: Theory, Past, Present* (OUP 2004); Boffinger (n 29); Goodfriend (n 4).

[53] For an important analysis on this subject, see Stanley Fischer, 'Rules versus discretion in monetary policy' in B M Friedman and F H Han, *Handbook of Monetary Economics*, vol II (Elsevier 1990). For an interesting historical account involving Benjamin Strong of the New York Federal Reserve, see Robert L Hetzel, 'The rule versus discretion debate over monetary policy in the 1920s', (1985) Federal Reserve Bank of Richmond Economic Review 71.

[54] Marie-Anne Frison-Roche, 'Le Couple ex ante-ex post, Justification d'un Droit Propre et Spécifique de la Régulation' in Marie-Anne Frison-Roche, *Les Engagements dans les Systémes de Régulation* (Dalloz 2006).

The operational transparency envisaged by CBs was initially aimed at monetary policy efficiency, an economic goal. It was the product of a change of economic consensus on monetary policy.[55] Nevertheless, the creation of these mechanisms had a secondary and relevant (legal) effect: institutionalizing structures allowing for social accountability. These same instruments are also available for political powers' scrutiny of monetary authorities.

I believe that, instead of CBs resorting to a battle in the political arena – to include accountability mechanisms in statutes or treaties through political negotiations – they may have found a faster, though no less effective, means of institutional innovation and experimentation. In other words, CBs have improved their legal framework for accountability through soft law instruments – i.e. the enactment of regulations and unilateral acts that can generate legal effects. I argue that these mechanisms of operational transparency (e.g. regulations and unilateral acts that create obligations in communicating monetary decisions) can indeed serve as legal instruments for social accountability. Actually, they consist of rules that create legal parameters for scrutinizing and checking CB actions through soft legal instruments. In this sense, the mechanisms referred to by economists as '*de facto* accountability' and 'operational transparency'[56] in fact consist of legal instruments for *social accountability*. These instruments frame a specific relationship between central banks and social forums, and they can have different degrees of 'legalness'.

Therefore, there is an emergence of a new legal approach:[57] (i) from a traditional 'exogenous' normativity approach imposed by the State (ii) to an 'endogenous' normativity approach that is non-hierarchical, created by economic agents themselves, including by regulatory authorities that act as a market agent in order to develop their functions. This model reveals a polycentric and decentralized regulatory regime, which is characterized by its fragmentation and complexity as well as interdependence between different social actors where the State bureaucracy is no longer the sole locus of authority.

This administrative trend changed the structure and role of the State in the monetary policy. Moreover, it is possible to argue that it had an impact on the accountability design of public structures. Especially for CBs, as shown in the prvious section, I believe that a trend can be identified: (i) from rules of accountability designed by constitutions, statutes and treaties (rules created by States) and aimed primarily at accountability to the

[55] See n 4.

[56] See, for instance, Laurens et al. (n 5) and Bank for International Settlements (BIS), *Issues in the Governance of Central Banks: a Report from the Central Bank Governance Group* (BIS 2009).

[57] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in a Polycentric Regulatory Regimes' (2008) LSE http://www.lse.ac.uk/collections/law/wps/WPS2008-02_Black.pdf (accessed 14 June 2013); Jacques Chevallier, *L'État post-modern* (LGDJ 2004); Timsit (n 15).

political authorities (ii) to rules produced by the CBs themselves self-regulating their actions and aimed at legitimising their decisions, mainly geared towards social forums.

In the economic debate, this movement towards more transparency and open communication by CBs is aimed at ensuring monetary policy implementation. The mystery of the bureaucratic performance has been replaced by transparency of methods and goals. Moreover, in addition to the efficiency gains of transparency, it is possible that these bureaucracies hope that more communication to the public in general can eventually ensure greater legitimacy for CB's actions. In other words, transparency can help to assure, together with other institutional mechanisms, the social acceptance of the CB's mandate.

Given an economic approach, transparency and predictability are prerequisites for monetary policy effectiveness in globalized and complex financial markets. From the point of a political and legal view, transparency is a precondition (i) to legitimate monetary policy implemented by *de facto* or *de jure* independent CBs and (ii) for the accountability of these institutions – it enables social forums and political institutions to monitor and evaluate their operation.[58] In the 2008 aftermath, these instruments proved to be valuable to politicians, academics and the media. The monetary actions of the most important CBs were widely divulgated. For instance, the Group of 30 (G30), an intellectual community in central banking, published a detailed report on CB responses to crisis.[59] All these materials were made available by the CBs.

The 'unelected bodies' or 'non-majoritarian institutions,[60] e.g. independent CBs and regulatory agencies, have a direct source of legitimacy, and not only the legitimacy derived from their establishment by political powers. Their legitimacy can be compared to the legitimacy of the judiciary. They are responsible for the empirical component of public policies and for the professional judgments on a deeply technical subject, developing analysis of evidence and data. They are public structures responsible for problem solving, in contrast to political powers responsible for value judgments.[61]

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[58] Pedro Schwartz and Juan Castañeda, 'Central Banks: from Politically Independent to Market-Dependent Institutions' (2009) 3(29) EA http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1484145 (accessed 27 July 2010).

[59] The Group of 30, 'The Fundamentals of central banking : lessons from the crisis' Washington DC (2015) http://group30.org/images/PDF/CentralBanking.pdf (accessed 16 October 2015).

[60] Frank Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (CUP 2007); Mark Thatcher and Alec Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) WEP 25(1) http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1073&context=fss_papers (accessed 7 June 2013).

[61] Vibert, (n 60); Pierre Rosanvallon, *La Contre Démocratie: la Politique à L'âge de la Défiance* (Éditions du Seuil 2006).

CBs have a specific knowledge related to the currency management on which they base their technical authority. They are what Robert Castel[62] defines as the '*expert instituant*', i.e. authorities that not only assess a given situation from their technical point of view, but also recreate the empirical conditions with their own knowledge. In other words, monetary authorities are functional experts who deal with data and shape evidence at the same time. The function of a CB goes beyond the expression of an opinion, a compilation of information or the design of a mere report to resolve a conflict or clarify a political choice. CBs define their own technical criteria and the actual circumstances to which they devote themselves. As a result, this institutional structure is more complex than a body merely designed to analyse empirical evidence and data.

Furthermore, these agencies are embedded in epistemic communities both at the domestic and international level. Epistemic communities are networks of professionals with recognized expertise and competence in a particular area.[63] They claim authority over a relevant field of knowledge. They also share a specific set of values, norms and beliefs, which is derived from their analysis of practical problems in an expertise domain. Epistemic communities also share notions of validity while defining the criteria for selection of problems and their solutions.[64] For CBs, the Bank for International Settlements (BIS) has institutionalized international cooperation among monetary authorities. In such arrangements, CBs are national representatives, imbued with the powers to decide standards or policies at the international level that will be implemented within their territories. The Basel Accords on financial market regulation is just one example.

As a matter of fact, monetary authorities have heavily invested in their research departments to establish and build the bases for their decisions and economic evaluations. The symbolic effect is an ideological consensus in relation to the technical knowledge of monetary policy. For example, in December 2002, 74% of the publications on monetary policy, in edited journals in the United States and published by US economists, came from the Fed-published journals or were co-authored by a Fed staff economist.[65] The fifty largest PhD-granting economic institutions in the US employ around 390 economists in macroeconomics, monetary policy and banking. The US Fed system alone used to have 27% more.[66] In terms of full-time

[62] Robert Castel, *Figures Professionnelles: Dispositions Règlementaires et Genèse de l'Expertise - l'Expert Mandaté et l'Extpert Instituant. Situation d'Expertise et Socialisation des Savoir*s (CRESAL 1985).

[63] Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination' [1992] 46 IO 1.

[64] ibid; Sheila Jasanoff, 'Peer Review in the Regulatory Process' (1985) 1(5) STHV http://sth.sagepub.com/content/10/3/20.full.pdf (accessed 23 August 2012).

[65] Lawrence White, 'The Federal Reserve System's Influence on Research in Monetary Economics' (2005) 2(2) EJW http://econjwatch.org/file_download/90/2005-08-white-invest_apparatus.pdf (accessed 15 March 2015).

[66] ibid.

researchers, the ECB has more PhDs in economics than the London School of Economics and Political Science – LSE.[67] In 1999, the BCB created its Department of Research and Economics Studies ('Depep') with offices in three major cities (Brasilia, Rio de Janeiro and São Paulo). The person responsible for the creation of the Depep, Alexandre Tombini, is currently the BCB governor.

Marcussen[68] identifies a further step in the development of CBs in the 2000s. He points out that there is an important feature in the current situation that makes it more difficult to assess CBs' performance: the rise of a scientific discourse in monetary decisions. The movement of 'scientization' in central banking poses new challenges for accountability and the relationship between social forums and technocrats. The main concern is how social forums can engage with a high-specialized institution, as well as how to exercise controls on its power (which seems to be based on knowledge and 'science'). While the 1990s were characterized by the discourse of political autonomy for CBs, the 2000s seems to be characterized by the ideological process of 'scientization' in currency management, reinforced by the growing reliance on research departments.[69]

Nowadays, CBs tend to ensure their legitimacy and their authority in currency management using ideas of the scientific domain, mainly from economics. Science has becomes the source of their cognitive authority. For instance, the 'Taylor rule', created by the Stanford economist John B Taylor to describe (and then to prescribe) the Fed's policy,[70] became a recipe for central bank practice. This policy 'rule' was incorporated in the political economic analysis or the decision-making process of CBs in advanced and emerging economies.[71]

With the 2008 crisis, these technocrats gained more power and technical credibility in order to intervene in markets. Their scientific discourse seems to be valued again and it was extended to the political domain. For instance, in Europe, as an immediate response to crisis, a former central

[67] Martin Marcussen, 'Scientization of Central Banking: the Politics of A-politicization' in Dyson Marcussen, *Central Banks in the Age of the Euro: Europeanization, Convergence and Power* (OUP 2009).
[68] ibid.
[69] ibid.
[70] John B Taylor, 'Discretion versus policy rules in practice' (1993) Carnegie-Rochester Conference Series on Public Policy 39; 195–214, 202.
[71] See the empirical analysis of Pier F Asso, George A Kahn and Robert Leeson, 'The Taylor rule and the practice of central baning' (2010) The Federal Reserve Bank of Kansas City RWP 10-05
https://www.kansascityfed.org/publicat/reswkpap/pdf/rwp10-05.pdf (accessed 10 January 2015).

banker, Lucas Papademos, and a former European bureaucrat, Mario Monti, were appointed as prime ministers of their home countries.[72]

Accountability mechanisms as a model of *ex post* regulation tend to gain more significance with the growing discretionary powers of CBs. However, can these mechanisms actually be effective? Who can understand the minutes of the CB's meetings? How to assess the political options available and the trade-offs underlying them? Monetary decisions have distributional effects, but economic language tends to create difficulties in understanding them at their core. Therefore, two crucial questions remain: is the contemporary movement towards CB transparency, in fact, more of secrecy? If positive, how could accountability mechanisms created by soft law overturn this tendency? The legal structure for monetary accountability is an institutional reality, regardless its degree of 'legalness'. It has the potential to allow social actors to contest the political choices of CBs. To overcome the complexity of these economic decisions, the social forums that are capable to scrutinize them are mainly academia and specialized media. Nevertheless, in different degrees, sanctions with 'teeth' are only at the disposal of political powers.

VI. CONCLUSION

In the CBs studied, there were standards and procedures developed by law that provided them with mandates and objectives. The sources of law that lay out the CBs' mandates and also prescribe procedures and standards for their actions, are quite different from each other. Nevertheless, it is possible to identify two types of legal mechanisms specifically for their accountability: (i) 'hard' rules of accountability designed by constitutions, statutes and treaties and aimed mainly at accountability to political agents, and (ii) more recent 'soft' rules created by the CBs themselves and geared towards social accountability. The analysis of the legal structure of these instruments revealed that most institutional changes in monetary policy accountability in recent decades took place through mechanisms with a low degree of 'legalness' (more of soft law). This trend is common to the three CBs studied.

In the case of the ECB, the absence of hard mechanisms of social accountability pushed the bank to create its own rules on an inflation target and mechanisms to publish its own decisions, even though the European treaty gave the opportunity to the ECB operating without such disclosure. Did the ECB create these 'soft' rules just as a concern about

[72] However, as pointed by Borio, after the 2008 economic crisis CBs have been facing three major challenges: economic, intellectual and institutional. See Claudio Borio, 'Central Banking Post-Crisis' (2011) BIS Working Paper 353 1/2011 http://www.bis.org/publ/work353.pdf (accessed 10 March 2013). See also Michael Aglietta, 'Complément A: La Rénovation des Politiques Monétaires' (2011) Rapport CAE 1/2011, 195 http://www.cae-eco.fr/Rapport-Banques-centrales-et-stabilite-financiere.html (accessed 8 September 2012); Goodhart (n 4).

monetary policy efficiency? I believe that this decision was also taken to legitimize its actions in a complex political environment.

In the case of the BCB, formal mechanisms of social accountability were established by the executive power and through regulations. These rules, created in the late 1990s, were aimed at monetary policy efficiency and to raise international market confidence. However, I believe that these mechanisms have also proved themselves useful for (i) the legitimacy of the Brazilian central bank decision-making process during 2000s, as well as (ii) safeguarding its *de facto* independence from political powers.

In the case of the Fed, the creation of an inflation target after the 2008 crisis was an unexpected political event, since the institution has been avoiding the definition of a quantitative criterion since the 1990s. However, the Fed has a traditional practice of creating accountability mechanisms related to operational transparency since the administration of Governor Alan Greenspan.

The exact mechanisms for social accountability, and the process of their creation, appear to be shaped by shared economic beliefs. The historical and institutional framework (in which monetary authorities operate) tends to be relevant to the design of their relationship with political powers and social forums. However, global theoretical-economic convergence in monetary policy, i.e. operational transparency for the interest rate policy, may be the most important driver of the common trend among these three CBs: the creation of social accountability mechanisms often led by the monetary authority itself.

These 'transparency' mechanisms were originally intended as a means to achieve efficiency in currency management. However, the instruments of monetary transparency have established a legal structure for social accountability. Their creation has led to the introduction of instruments not only of technical and political nature, but also of a legal nature destined to social accountability.

Actually, it is difficult to come back and change this structure by the CBs themselves. Once this legal set-up becomes an institutional reality, even if a 'soft'one, it creates a legal expectation, potentially allowing social actors to contest the political choices underlying policy decisions. This structure tends to be relevant especially in the post-crisis context.

ROLLING PENNIES ON THE ROAD?
EU LAW CONFORMITY OF ROAD CHARGES FOR LIGHT VEHICLES

Thomas Jaeger*

The EU law conformity of road charges has received some recent attention following the German government's plans for implementation of an infrastructure charge for vehicles below 3,5 tons on motorways and through-roads. The peculiarity of those plans lies in their double nature, combining the introduction of a charge for Univ.-Profall users with a rebate on the level of motor vehicles taxes for German-registered vehicles. This contribution uses the occasion of the German case to look at the provisions and principles of EU law applicable to road charges for light vehicles and undertake an assessment of the current developments.

Keywords: Road tax, road charges, light vehicles, combined fee and rebate mechanism, motor vehicles tax, transport, measures of equivalent effect to customs duties, indirect taxation, free movement of goods and services, discrimination, Article 92 TFEU, Article 30 TFEU, Article 110 TFEU, Article 34 TFEU, Article 18 TFEU.

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I. INTRODUCTION

General traffic in Germany does not currently have to pay for road use. However, since 2013, a debate has been raging back and forth in Germany about the introduction of road charges[1] for light vehicles (below 3,5 tons).

Germany is an EU Member State that prides itself of a strong and innovative automobile industry and, for example, still has no general speed limit imposed on motorways. Road taxes for individual traffic were long seen as a political taboo there. That changed in the run-up to the 2013 general election, when the conservative government's Bavarian junior partner in the coalition decided to run a campaign to graze off voters on the right-hand edge of its spectrum. Playing outright on xenophobic resentment, the regional party called for foreigners to start paying for the use of notoriously clogged German motorways.

Although that demand immediately raised concerns over its compatibility with European law and the major coalition partner was reluctant at first, the introduction of general usage charges for light traffic set was eventually enshrined in the acting government's 2013 Coalition Pact,[2] however under the condition that it would not pose an extra burden on domestic vehicle owners. Consequently, the Coalition Pact speaks of the introduction of a 'car toll[3] to ensure that holders of passenger cars not registered in Germany contribute to the financing of the motorway network without taxing domestically registered vehicles higher than today' and 'with the proviso that no German vehicle owner is more heavily burdened than today'.[4]

[1] The term charges is used here to comprise all forms of direct charges levied for the use of roads, ie tolls for passage of certain roads, distance or time based usage fees, congestion or environmental charges and the like. Unlike taxes (eg a motor vehicles tax), the revenue of these charges is usually purpose-bound and does not flow toward the general budget. The German model is best described as a (time based) usage fee. For a terminological distinction, also Art 2(b) of the Eurovignette Directive (n 25).
[2] Heike Münzing, Zur Einführung einer Pkw-Maut in Deutschland, NZV 2014, 197, 197.
[3] For terminological distinction see n 1.
[4] Both citations own translation from Coalition Treaty 2013, Deutschlands Zukunft gestalten, available at www.cdu.de/koalitionsvertrag (accessed 19 May 2015), 8: , '...

Since then, the responsible ministry had tried to devise a law capable of bridging a seemingly impossible gap: imposing a road charge that would have no burdening effect on domestic car owners while nonetheless not appearing discriminatory by European law standards.

The German government's immediate sparring partner was, of course, the European Commission, where the proposals were scrutinized at various stages.[5] In June 2015, the Commission decided to open infringement proceedings against Germany.[6] The Commission's main concerns appertain to indirect discrimination based on nationality. One yardstick of measurement in connection to this issue will be the principles laid down in a 2012 Commission Communication[7] on road infrastructure charges for private vehicles.

The Netherlands and Austria, the Member States potentially most affected by a foreigner-only charge among Germany's neighbours, announced that they were contemplating considering independent infringement actions against Germany in case the Commission failed to take up the case.[8] Both sides, Germany and the opposing Member States, have produced expert opinions on the legality of the package and submitted them to the Commission.[9]

The road charges package gained parliamentary consent in spring 2015 and was initially set to take effect as of 1 January 2016. Due to the opening of infringement proceedings, however, the entry into force was temporarily suspended to await their outcome.[10]

This contribution explores the EU law framework for road charges in detail. It uses the occasion of the German case to look at the provisions and principles of EU law applicable to road charges for light vehicles and undertake an assessment of current developments. The German case has, of course, received some scholarly attention in German writing.[11] However,

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europarechtskonforme PKW-Maut, mit der wir Halter von nicht in Deutschland zugelassenen PKW an der Finanzierung zusätzlicher Ausgaben für das Autobahnnetz beteiligen wollen, ohne im Inland zugelassene Fahrzeuge höher als heute zu belasten', and 29: , '...mit der Maßgabe, dass kein Fahrzeughalter in Deutschland stärker belastet wird als heute'.

[5] Eg Com Press Release of 2 December 2014, SPEECH/14/2280.

[6] Com Press Release of 18 June 2015, IP/15/5200.

[7] Communication on the application of national road infrastructure charges on light private vehicles, COM(2012) 199 fin.

[8] Eg derstandard.at online version of 12 May 2015, Wien sucht Verbündete gegen deutsche Maut.

[9] For Germany, Rechtsgutachten by Christian Hillgruber of 17 October 2014 (and reply to Commission concerns on 13 December 2014), available at http://www.bmvi.de (accessed 19 May 2015); for Austria, hntv.de online version of 15 May 2015, Österreich macht mobil gegen Pkw-Maut.

[10] BR.de online version of 18 June 2015, Dobrindt verschiebt Maut-Start.

[11] Münzing (n 2); Friedemann Kainer and Sarah Ponterlitschek, 'Einführung von nationalen Straßenbenutzungsgebühren für Pkw', ZRP 2013, 198; Daniel Engel and

English contributions on the issue, taking on a broader perspective, are sparse.

II. THE GERMAN FEE AND TAX REBATE MECHANISM

The legislative package brought about in Germany comprises two linked measures. Its first leg introduces a road usage fee[12] for passenger cars (categories M and M1G) on motorways and federal through-roads.[13] As the package's second leg, the general passenger car fee is flanked by changes to the motor vehicles tax[14] with a view to offsetting its financial burden for holders of automobiles registered in Germany.[15]

The time-based fee for the use of motorways and federal through-roads applies generally to all light vehicles in classes M and M1G (up to eight seats, including eg mobile homes), but not to motorcycles. [16] Foreign and domestic vehicles are caught alike, but foreign vehicles pay for motorway use only and may use through-roads free of charge.[17] The fee is to be collected through an electronic permit (vignette) that must be purchased beforehand.[18] For vehicles registered in Germany, the fee is to be automatically assessed and collected by the motor vehicle authority, which already keeps the vehicle registration register.[19] German vehicle owners will thus have no additional paperwork to do.

The amount of the fee is calculated according to motor power and emissions and is set at a yearly maximum of 130 Euros,[20] with the expected average around 80 Euros.[21] Short-term permits will be available for 10 days and two months and set at three progressive levels corresponding to motor power and emissions level (5/10/15 Euros and 16/22/30 Euros respectively).[22]

Jan Singbartl, 'Die Einführung einer Pkw-Maut zulasten von EU-Ausländern – europarechtskonform?', vr 2014, 289; Stefan Korte and Matti Gurreck, 'Die europarechtliche Zulässigkeit der sog. Pkw-Maut', EuR 2014, 422; Lukas Beck, 'Autobahnmaut und Europarecht', NZV 2014, 289; Christian Maaß, 'Die PKW-Maut ist erst der Anfang', ZUR 2014, 449; Matthias Zabel, 'Die geplante Infrastrukturabgabe („Pkw-Maut') im Lichte von Art 92 AEUV', NVwZ 2015, 186; Volker Boehme-Neßler, 'Pkw-Maut für Ausländer?', NVwZ 2014, 97.

[12] For terminological distinction see n 1.

[13] 'Infrastrukturabgabe für die Benutzung von Bundesfernstraßen'; Entwurf eines Gesetzes zur Einführung einer Infrastrukturabgabe für die Benutzung von Bundesstraßen (InfrastrukturabgabenG), BTDrs. 18/3990, final version BTDrs 18/4455.

[14] 'Kraftfahrzeugsteuer'; for terminological distinction see n 1.

[15] Entwurf eines Zweiten Verkehrssteueränderungsgesetzes, BTDrs. 18/3991, final version BTDrs 18/4448.

[16] § 1(1) InfrastrukturabgabenG (n 13).

[17] § 1(2) InfrastrukturabgabenG (n 13).

[18] § 5(1) InfrastrukturabgabenG (n 13).

[19] § 6 InfrastrukturabgabenG (n 13).

[20] Anlage zu § 8 InfrastrukturabgabenG (n 13).

[21] BTDrs 18/3990 (n 13), 30, sets the average at 74 euros, subsequent estimates are higher.

[22] BTDrs. 18/4455 (n 13), 14.

The second leg of the mechanism corresponds to the first and undertakes to lower the motor vehicles tax for domestically registered vehicles. In fact, the provision introduced in the motor vehicles tax law is an exact (negative) copy of the one that details out the fee levels in the road usage fee law.[23] By virtue of that flanking second leg, German vehicle owners receive a vehicles tax rebate for the exact amount of their fee burden. For them therefore, the economic effect of the usage fee will be neutral.

The measures apply exclusively to light vehicles, ie passenger cars and small transport vehicles. Heavy goods vehicles (HGV; above 3,5 tons) are already subject to a (distance based) motorway usage fee in Germany. That fee was introduced in 2005[24] in line with the Eurovignette Directive.[25] That Directive stipulates that HGVs may be billed for the cost of constructing, operating and developing infrastructure and to that end defines common rules on distance-based tolls and time-based user charges (vignettes) for HGVs for the use of certain infrastructure only.[26] It is not applicable to fees for light vehicle traffic as the ones now envisaged in Germany.

III. LIGHT VEHICLE CHARGES UNDER EU LAW

The Commission's 2012 Communication underlines the principle that, given the absence of harmonization in the field, Member States are in principle free to implement road charges for light vehicles.[27] Nonetheless, according to the Communication, such charges may not run counter the principles of non-discrimination on grounds of nationality (Article 18 TFEU) and proportionality. This will be examined here.

Article 18 and the proportionality principle, however, apply only subsidiarily, when more specific provisions fail to bite. In that regard, a fee and rebate mechanism like the one envisaged in Germany might run counter to a number of such more specific EU law provisions. Immediately relevant here is the TFEU's Roads and Transport Chapter, ie Articles 90 et seq. and secondary law. Potential conflicts may however also arise in the area of the fundamental freedoms (particularly[28] as regards free movement of goods under Article 34 TFEU) and the provisions on customs duties (Article 30 TFEU) and indirect taxation (Article 110 TFEU). The applicability and substance of those provisions regarding road usage charges will thus be examined here first.

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[23] BTDrs. 18/3991 (n 15), Art 1 no 7 (changes to § 9 (6) to (8)).
[24] Bundesfernstraßenmautgesetz, BGBl 2011 I S 1378; LKW-Maut-Verordnung, BGBl 2003 I S 1003.
[25] Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures, [1999] OJ L 187/42.
[26] For more see Detlev Boeing, Matthias Kotthaus, Tim Maxian Rusche, Art 91, para 94 ff, in Eberhard Grabitz, Meinhard Hilf, Martin Nettesheim (eds), *Das Recht der europäischen Union – Kommentar*, 47th supp 2012.
[27] Communication 2012 (n 7), 3.
[28] For an assessment under Art 45 TFEU see Kainer and Ponterlitschek (n 11), 200; Engel and Singbartl (n 11), 289 ff.

It is important to point out in that context that many of the Treaty provisions potentially applicable to a road fee mechanism are mutually exclusive. This is, as will be shown in greater detail when those norms are discussed, particularly so as regards the prohibitions of customs duties and discriminatory indirect taxes (Articles 30 and 110 TFEU) vis-à-vis each other as well as vis-à-vis the prohibition of restrictions on goods (Article 34 TFEU). Which of these norms is applicable, however, depends on how one looks at the facts at hand, i.e. what the actual effects of the measure under scrutiny are deemed to be. As is not uncommon in legal disputes, the facts lend themselves to different assessments of their effects. Depending on that assessment, one or the other provision will apply. For the German fee and rebate mechanism in particular, the assessment of the effects of the measure is actually a key issue in the dispute (particularly: are there combined or separate effects for the two legs of the measure and are those effects the result of a customs- or tax-like measure or are they some other form of restriction affecting goods?).

Against that background, this contributon takes the widest possible approach when looking at Treaty norms that, depending on the assessment of the effects of the measure, might potentially apply. Accordingly, all of the aforementioned provisions, i.e. Articles 30, 34 and 110 TFEU, will be examined here notwithstanding that in the end, only one of them can apply. This also explains why Article 34 is discussed towards the end of the paper as one final and admittedly remote possibility, although that provision does usually not apply to measures involving charges or taxes (but instead yields to the more specific norms of Articles 30 and 110):[29] If none of those more specific norms is deemed to apply because the effects of the mechanism are deemed not to fall under the customs or tax provisions, ie if there were no visible customs or tax effects, maybe the measure has other, non-fee related prohibitive effects that might be assessed under Article 34.[30]

1. Compatibility With the Transport Chapter: Art 92 TFEU

The central focus for assessing the legality of road usage fees lies on the TFEU's traffic Chapter and, there in particular, on Article 92's standstill obligation. Article 92 provides that in the absence of harmonization (under Article 91 TFEU) 'no Member State may ... make ... provisions governing the subject on 1 January 1958 ... less favorable in their direct or indirect effect on carriers of other Member States as compared with carriers who are nationals of that State.'

[29] Consistent jurisprudence, eg Case C-313/05 *Brzeziński* ECLI:EU:C:2007:33, para 50; Case C-228/98 *Dounias* ECLI:EU:C:2000:65 para 39; Case C-383/01 *De Danske Bilimportører* ECLI:EU:C:2003:352 para 32.

[30] Potentially less restrictive (applicability of Article 34 to charges where there are excessive effects on goods) older case-law Case C-47/88 *Commission/Denmark* ECLI:EU:C:1990:449, paras 12 ff; Case 31/67 *Stier* ECLI:EU:C:1968:23, 241.

Article 92 is thus two-sided. First, as generally in EU law, where harmonization (or EU-led liberalization) has occurred, the conditions stipulated therein prevail. Second, in the absence of harmonization, ie regarding usage charges for light vehicles, a combination of non-discrimination and standstill applies: foreign and domestic users of traffic systems may be subjected to historic, perpetuate differing conditions of use.[31] The prohibition contained in that second regulatory side of Article 92 is therefore less stringent than the general non-discrimination clause of Article 18 TFEU, since those kinds of less favorable treatment that were in place already at the standstill date in 1958, remain possible.[32]

A. Secondary Law

The main pieces of harmonization in the area of road charges are the Eurovignette Directive 1999/62/EC[33] and Council Decision 65/271[34] on competition in transport.

a. The Eurovignette Directive

Relevance of the Eurovignette Directive in the current context is easily dismissed: it concerns only road pricing for HGVs, ie vehicles for the carriage of goods by road above 3,5 tons.[35] The fee imposed by Germany applies to small (eight seats or less) vehicles for passenger transport only, irrespective of weight (although most will be below 3,5 tons).[36] Although the Directive thus sets maximum levels for road usage charges in particular,[37] the German general road usage fee does not conflict with them.

b. The 1965 Decision

As regards the 1965 Decision, two provisions (both still in force)[38] might be relevant for a road usage charge: Article 1(a) prohibits double taxation of motor vehicles by a Member State other than that in which they are registered. Article 4 stipulates that Member States may not apply any specific taxes to the carriage of goods by road in addition to turnover tax.
On the formal face of course, a road charge is neither a vehicles tax nor a tax on goods transport. Nonetheless, under certain circumstances, its effects might be equivalent to either type of tax.

A finding of equivalent effects of a road charge to taxes has two implications: on the one hand, it might justify a re-classification of the charge as a vehicles tax proper. This question is dealt with in the present

[31] Also Boeing et al(n 25) Art 92, para 4.
[32] Also Peter Schäfer, Art 92, para 6, in Rudolf Streinz (ed) *EUV/AEUV-Kommentar*[2] (2012).
[33] See n 25.
[34] Council Decision 65/271/EC on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway, [1965] OJ 88/1500.
[35] Art 2(d) Eurovignette Directive.
[36] § 1(1) InfrastrukturabgabenG (n 13).
[37] Annex II Eurovignette Directive.
[38] Also Boeing et al (n 25) Art 91, para 39.

section On the other hand, effects equivalent to a tax on goods might bring a road charge within the scope of application of Articles 30, 34 or 110 TFEU, which all deal with different aspects of cost-based obstacles to the marketing of goods in the internal market. This latter aspect will be discussed in separate sections on those provisions further below.

A suspicion that it might be appropriate to re-classify of a road charge as a vehicles tax might arise depending on the actual effects of the measure. After all, EU law as a matter of principle takes an effects-based, never a formalistic approach, when assessing the compatibility of national measures.

The German example is such a border-line case, where an initial suspicion as to tax-equivalent effects of a measure that is formally denominated a charge arises. The reason for this lies in the existence of an intrinsic link between the German road charge and the German motor vehicles tax system.

The alleged link is firstly factual in the sense that the changes to the vehicles tax law were taken in parallel with the introduction of the road fee and with the declared aim of neutralizing its tax effects. Secondly, the link is also functional, since the provisions introduced to the vehicles tax law are an exact negative copy of the road fee mechanism. These measures are therefore two sides of the same coin: they cannot be split, would not have been taken individually or separately and could not achieve the regulatory aim behind them individually.

The Court has already in the past dealt with a German mechanism coupling a time-based road fee with a reduction of domestic motor vehicles taxes. Although the Court stopped short of re-qualifying the road charge as a vehicles tax in the sense of Decision 65/271, it recognized the close factual link between such a charge and vehicles taxation: an introduction of the charge might jeopardize harmonization measures to eliminate the double taxation of motor vehicles.[39]

The Advocate General for that case, Francis Jacobs, was even clearer as regards the classification of a road charge as a measure equivalent to a vehicles tax:

> In the absence of harmonization of the rates of vehicle duty, one consequence of the elimination of double taxation is that the burden of vehicle duty may vary as between vehicles from two different Member States[.] The introduction of road tax ..., combined with the reduction in ... vehicle duty, had the express aim of dealing with the consequences of such disparities for the conditions of competition of transport undertakings. ... In my view, it is difficult to reconcile the intended effects of such a

[39] Case C-195/90 *Commission/Germany* ECLI:EU:C:1992:219, para 27.

> measure with the goal of eliminating the double taxation of motor vehicles, which goal must in my view be taken to include the avoidance of measures having an equivalent effect, in whole or in part, to such double taxation. The [road charge at hand] might be thought to have such an equivalent effect, because it introduces a charge paid by carriers from other Member States which has the specific aim of enabling the burden of vehicle duty paid by German carriers to be reduced.[40]

The Advocate General was therefore clear that the concept of double taxation of motor vehicles in the 1965 Decision included measures having an equivalent effect and that a road charge is to be regarded as such a measure where it seeks to counterbalance the burden of vehicles taxation for transporters. In other words, the Advocate General recognized that an intrinsic link between the vehicles tax system and a road charge justifies classifying the charge as a measure of equivalent effect to vehicles tax.

Whether or not a road charge is to be re-classified to fall under the 1956 Decision thus depends on the circumstances of the case and, more precisely, on the presence of an intrinsic link. Where, like in the German case, a road charge is functionally coupled with a rebate on motor vehicles taxes, that mechanism simply shifts a part of the vehicles tax burden from one law to another. Such a formal move should not affect the nature of that fee as a functional part of the vehicles tax system.

This is underlined in the case at hand by the fact that from the point of view of German-registered vehicle owners, the motor vehicles tax liability does effectively not change in any way — neither in terms of the overall tax burden nor in terms of associated paperwork. They will not factually notice the regulatory change at all.

Where a road fee is an intrinsic functional part of the vehicles tax mechanism, its extension to foreign-registered vehicles would have to be considered a form of double vehicles taxation: foreign vehicles are subject to a vehicles tax in their Member State of registration and will, in addition, be submitted to bear part of a national (here: German) vehicles tax burden. In these circumstances a road usage fee for light vehicles, like the one devised for Germany, runs counter to Article 1(a) of Decision 65/271.

B. Primary Law

In addition to a potential infringement of the 1965 Decision, the combined road fee and rebate mechanism might also conflict with the standstill leg of Article 92 TFEU. Two questions arise here. The first is whether Article 92 applies to light vehicle traffic at all. Secondly, if it applies, what is the actual import of the prohibition contained in Article 92.

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[40] Opinion of the AG for Case C-195/90 *Commission/Germany* ECLI:EU:C:1992:123, paras 59 and 60.

a. Applicability of Article 92

Doubts as to the applicability of Article 92 to light vehicles traffic, particularly to individual traffic and passenger cars, might arise from its wording, which refers only to 'carriers' ('transporteurs'/'Verkehrsunternehmer' in the original French and German versions). This indicates that non-commercial individual traffic might not fall under the standstill and non-discrimination clauses of Article 92. Any subsequent introduction of additional burdens or unequal treatment in relation to non-commercial traffic would then only be subject to other Treaty provisions.

This also seems to be the Commission's reading of Article 92, which in the early stages of the German plans stated that '[r]oad tolling schemes have to comply [only] with general Treaty principles as concerns ... passenger cars. ... As far as passenger cars are concerned, [therefore], Member States are free to set the level of circulation taxes for resident drivers'[41] as long as this does not constitute discrimination on the grounds of nationality. Consequently, 'reducing circulation taxes for resident users ... and implementing proportional user charges for all users would, in principle, not constitute discrimination on grounds of nationality.'[42] This statement encouraged the German government to give its plans the final go ahead and include them in the 2013 coalition pact.[43]

As was shown, the German fee will not apply to light vehicles of more than eight seats and not to HGV traffic. Nonetheless, transport services in light vehicles, ie individual and group taxi services and deliveries, will be subject to the fee. Irrespective of the size of the undertaking providing such services (ie the self-employed taxi driver or delivery person as well as large taxi or deliveries firms), the fee will therefore affect undertakings ('Unternehmen') in the sense of EU law[44] and - therefore - also in the sense of Article 92 ('[U]nternehmer').[45] As a result, that aspect of the measure is to be assessed under Article 92.

b. Non-Discrimination and Standstill

As regards, next, the regulatory content of Article 92, the key question is whether the prohibition laid down therein prohibits any kind of deterioration of the conditions of traffic - even where they hit domestic and foreign users alike - or just discriminatory deteriorations of traffic conditions. For their differing views on the leeway accorded by Article 92 to Member States to move away from the traffic conditions of 1958, these

[41] Written answer by Siim Kallas on behalf of the Commission to the question of MEP Michael Cramer (Verts/ALE), 8 October 2013, Doc. no. P-011520-13.
[42] ibid.
[43] Korte and Gurreck (n 11), 422.
[44] On the EU law concept of an undertaking Alison Jones, 'The Boundaries of an Undertaking in EU Competition Law' (2012) 8(2) Eur. Comp. J, , 301, 301 ff.
[45] Equally Korte and Gurreck(n 11), 427; Zabel (n 11), 187 ff

two readings of Article 92 are referred to as static (the former, stricter reading) vs dynamic (the latter, more generous reading).[46]

The more generous reading draws upon political arguments: it argues that the interpretation of Article 92 should take into account the drastic changes that the conditions of intra-community transport experienced since the standstill date in 1958. In particular, road transport burgeoned along with the progressive integration of the internal market. Accordingly, Member States should retain freedom to dynamically react to this development through curbing measures, like road charges, that abolish benefits for foreign carriers as long as they entail no discrimination.[47]

The (prevalent) more stringent reading[48] is based on the case law on Article 92 and its wording. The leading case, *Commission/Germany*, of 1992 has very similar facts to the current German mechanism. *Commission/Germany* concerned the first German attempt to establish an HGV fee (time based) for the use of federal roads and motorways in the early 1990s. The measure fell quite clearly within the ambit of Article 92: like in the current system, the idea was to set off the fee domestically via a reduction of motor vehicles taxes. The Court of Justice found that Article 92 'is intended to prevent the ... common transport policy from being ... obstructed ... by the adoption ... of national measures the direct or indirect effect of which is to alter unfavorably the situation ... of carriers from other Member States in relation to national carriers.'[49] This applies irrespective of the (eg environmental) objectives of such a measure.[50] Article 92, however, 'does not preclude a Member State from adopting measures which have the same unfavorable effects for national carriers as for carriers of other Member States.'[51] According to this balanced standard, the measure at the time fell afoul of Article 92. This reading of Article 92 was also confirmed in subsequent jurisprudence.[52]

The Court's approach is a strict or static one in the sense that any changes to the conditions of competition between domestic and foreign carriers are prohibited. This means that foreign carriers may, in particular, not be

[46] Boeing et al (n 25), Art 92, paras 5 ff; Korte, and Matti Gurreck (n 11), 429.
[47] Christian Jung, Art 92, para 5, in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV-Kommentar*[4] (2011); Gerhard Muzak, Art 92, para 11, in Heinz Mayer and Karl Stöger, *Kommentar zu EUV und AEUV*, 133rd supp 2012; Thomas Ebenroth, Rafael Fischer and Christoph Sorek, 'Deutsche Straßenbenutzungsgebühr und EG-Recht', BB 1989, 1566, 1574 ff
[48] Matthias Knauff, § 6 Transportrecht, 303, para 65, in Matthias Ruffert (ed), *Europäisches Sektorales Wirtschaftsrecht* (2013); Boeing et al (n 25) Art 92, para 12; Schäfer (n 32), para 7; Gerhard Stadler, Art 72, para 4, in Jürgen Schwarze (ed), *EU-Kommentar*[2] (2009).
[49] *Commission/Germany* (n 39), para 20.
[50] *Commission/Germany* (n 39), para 33.
[51] *Commission/Germany* (n 39), para 21.
[52] Joined Cases C-184/91 and C-221/91 *Oorburg* ECLI:EU:C:1993:121, para 12 ff.

deprived of competitive advantages that they might have enjoyed vis-à-vis domestic carriers.

The Court explains its stringent approach with the preservation of maneuvering space in the common transport policy and the need to keep legislative options open. In addition, a stringent reading is relatively more effective in terms of harmonization of transport conditions in the internal market, since it fosters Member States' willingness to compromise on transport legislation in the Council.[53]

A strict reading of Article 92 would mean that any introduction of road charges vis-à-vis foreign users that were formerly allowed to use roads for free is in conflict with Article 92, unless domestic users are subjected to a corresponding charge that forestalls a change to the conditions of competition between foreign and domestic road users. This means, in other words, that the level of charges between foreign and domestic users must be kept at the same distance. If the former level was zero, new charges may only be homogeneously for foreign and domestic users to set the level for both groups equally at zero plus X.

Coupled with the rebate on the level of motor vehicles taxes, the two-legged German mechanism does not impose 'the same unfavorable effects'[54] on domestic and foreign carriers alike. Instead, foreign carriers are deprived of the formerly enjoyed benefit of free use of German motorways, whereas, if the infrastructure law is read in conjunction with the vehicles tax rebate, domestic carriers effectively continue to use these roads for free. This is, in other words, not just a mere deprivation of foreign carriers of a benefit formerly enjoyed, but an effectively less favorable economic position as compared to German carriers for whom fees are fully set off.

Without the intertwined effects of the road fee on the one hand and the rebate on the motor vehicles tax on the other, the introduction of road fees would therefore be in line with the ECJ's reading of Article 92.[55] In the way the mechanism effectively works, however, it is incompatible with that provision.[56]

A fee mechanism like the one devised in Germany falls foul of Article 92 even under the more generous reading of that provision:[57] The fact that in effect only foreign carriers pay for road use while domestic carriers use them for free is not just an alteration of the conditions of competition to the detriment of foreign carriers (static reading). Rather, it is a unilateral imposition of one-sided negative effects on those carriers which will place

[53] Equally Boeing et al(n 25) Art 92, para 12.
[54] *Commission/Germany* (n 39), para 21.
[55] Equally Zabel (n 11), 189 ff.
[56] Equally ibid, 190.
[57] Different however ibid, 190.

them in a worse economic position than German carriers (dynamic reading). Even with a generous reading of Article 92 therefore, which is not warranted under the ECJ's case-law, that measure could not hold.

Concerns under Article 92 could thus only be eliminated where, contrary to what is suggested here, the two mechanisms were looked at separately and the rebate on motor vehicles tax was artificially blinded out from the examination of the usage fee.[58] Again, that result would be the same both under a dynamic as well as under a static reading of Article 92: examining the law on fees alone, the competitive situation of domestic and foreign carriers vis-à-vis each other is not altered if the former fee level was zero and the level is now raised to an equal level of zero plus X for everyone. By itself therefore (ie blinding out the set off mechanism), the introduction of road charges would constitute a measure with 'the same unfavorable effects for national carriers as for carriers of other Member States'[59] in the Court's reading of Article 92. However, as was pointed out earlier, an isolated examination is not called for, given that the two legs of the measure are intrinsically, ie factually and functionally, linked. In fact, an artificial separate assessment only abets the circumvention of the prohibition in Article 92.[60]

Where the combined non-discrimination and standstill prohibition of Article 92 are infringed, there is no leeway for justification arguments:[61] Article 92's prohibition is absolute.[62] The only exception to this rule is the possibility foreseen in Article 92 to obtain specific Council authorization for a given measure.

In conclusion therefore, a road fee mechanism like the one devised in Germany is incompatible with Article 92 combined non-discrimination and standstill requirements insofar as it is applied to transport services in light vehicles, ie individual and group taxi services and deliveries.[63] A separate examination of the two components of that mechanism with a view to expunging such concerns would artificially negate the measure's unequal effects for domestic and foreign carriers and is therefore to be rejected.

2. Tax Effect on Goods: Articles 30 and 110 TFEU

Articles 30 and 110 TFEU are two closely related provisions prohibiting different forms of charges levied on goods. A road usage charge might come within the ambit of those norms for its potential price effect on

[58] Similarly (regarding a separation of the two measures in time) Korte and Gurreck (n 11), 431; also Kainer and Ponterlitschek (n 11), 200.
[59] *Commission/Germany* (n 39), para 21.
[60] Similarly Korte and Gurreck(n 11), 431.
[61] *Commission/Germany* (n 39), para 33; Case C-17/90, *Pinaud Wieger*, ECLI:EU:C:1991:283, para 11 ff.
[62] Also Korte and Gurreck(n 11), 434; Zabel (n 11), 190; Jung (n 46) Art 92, para 9.
[63] Equally Engel and Singbartl(n 11), 293; also (although critical of that result) Kainer and Ponterlitschek (n 11), 201.

transported goods: extra charges borne by transporters of goods in light vehicles (eg express couriers) transported through or imported into a Member State imposing such charges will be added onto the price of those goods: '[A] charge which is imposed not on products as such, but on the specific activity of an undertaking in connection with products ... falls within the scope' of those provisions 'in so far as it has an immediate effect on the cost of national and imported products.'[64]

Even if a road charge does not directly target goods, it nonetheless affects them in a manner similar to a direct goods tax. As it will be elaborated further below, that potential cost effects of a road charge for imported vis-à-vis national products brings the charge within the scope of Articles 30 or 110.[65]

It is of course true that the quantitative scale of the charge's effect on goods is limited insofar as by far most goods transports on the road use HGVs. Nonetheless, as it was pointed out, certain transport services typically rely on light vehicles, like mini vans. This is particularly so for quick (overnight or same-day) deliveries, eg of urgent parcels, pharmaceuticals, small spare parts etc.

In the neighbouring area of measures of equivalent effect to quantitative restrictions on the importations of goods (Article 34) the case-law takes a markedly wide approach when assessing the effect of state measures on goods: it includes any measures (except selling arrangements, discussed below) capable of hindering, directly or indirectly, actually or potentially, intra-Community trade,[66] without there being any minimum threshold for its application: no distinction is drawn there according to the effect of a measure on trade.[67] The bottom-line drawn in that regard is only where effects are uncertain or speculative.[68] That is, however, not the case here, given certain goods are manifestly transported by use of light vehicles.

In sum therefore, the Treaty provisions relating to goods are directly relevant also for road charges for light vehicles. The fact that the overall quantity of goods transported in light vehicles is less than for HGV transports does not exclude the applicability of those provisions.

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[64] Both citations Case C-221/06 *Stadtgemeinde Frohnleiten* ECLI:EU:C:2007:657, para 43.

[65] Already Case 20/76 *Schöttle* ECLI:EU:C:1977:26, para 14 ff; Case 252/86, *Bergandi* ECLI:EU:C:1988:112, para 27; Case C-90/94 *Haar Petroleum* ECLI:EU:C:1997:368, para 38; similarly Joined Cases 317/86, 48/87, 49/87, 285/87, 363/87 to 367/87, 65/88 and 78/88 to 80/88 *Lambert* ECLI:EU:C:1989:125, para 3 ff.

[66] See, eg, Case C-323/93 *Centre d'Insémination de la Crespelle* ECLI:EU:C:1994:368, para 28; Case 8/74 *Dassonville* ECLI:EU:C:1974:82, para 5.

[67] See Case C-126/91 *Yves Rocher* ECLI:EU:C:1993:191, para 21.

[68] See Case C-379/92 *Peralta* ECLI:EU:C:1994:296, para 24.

A. Principles of Application

While Article 30 addresses charges levied at the border and because a border is crossed, Article 110 deals with fiscal rules within the Member State, ie charges levied once the goods are inside the State's territory.[69] So the focus of Article 30 is on measures affecting the cost basis of imported foreign goods, whereas Article 110 focuses on differences in the tax treatment of similar goods irrespective of their origin.[70] In addition to this difference in scopes of application, differing standards apply: Article 30 is a relatively stricter norm in that it incorporates an absolute prohibition, not open to justification,[71] which does not (like Article 110) hinge upon a finding of discrimination or protectionism in the measure.[72] Both norms are mutually exclusive: a state measure will only fall under either one of them.[73]

Two observations are particularly important in delineating the respective scopes of application vis-à-vis road charges. Firstly, if a charge is part of the 'general system of internal taxation'[74] in that it applies to all products at a given stage of marketing, it falls under Article 110.[75] Secondly, a mechanism that leads to a complete offset of the price effect of a charge in relation to domestic goods is always a matter of Article 30 – even if it is by its form designed like an integral part of the domestic fiscal or parafiscal systems.[76]

In the German example, the road usage fee is not a charge specifically targeting imported goods. Nonetheless, it will fall under Article 30, not Article 110, insofar as domestic transporters of goods are effectively compensated for the burden imposed by the road charge via the rebate mechanism. If no compensation takes place, the yardstick for EU law compatibility is Article 110.

Which of the two norms is to be applied thus primarily depends on the approach taken towards the two legs of the mechanism: do the combined fee and rebate mechanism together constitute one measure or are they separate measures? If examined together, the measure has the effect of fully compensating domestic transporters, thereby shielding goods transported by domestic road users from the burden. That cost and price neutrality is in fact, as was shown, the declared aim of the measure. Consequently, the more stringent standard of Article 30 would apply. Were it was, however, to be found that the road fee and the tax rebate

[69] Eg Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (2013), 52ff.
[70] For more Hans-Georg Kamann, Art 30, para 23, and Art 110, para 32, in Rudolf Streinz (ed), *EUV/AEUV-Kommentar*[2] (2012).
[71] Barnard(n 69), 50.
[72] Eg Joined Cases 2/69 and 3/69 *Diamantarbeiders* ECLI:EU:C:1969:30, para 15 ff.
[73] Case 10/65 *Deutschmann* ECLI:EU:C:1965:75, 473.
[74] Case 39/82 *Donner* ECLI:EU:C:1983:3, para 7.
[75] ibid, para 8.
[76] Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest* ECLI:EU:C:1992:118, para 27 ff; Case C-72/92 *Scharbatke* ECLI:EU:C:1993:858, para 10; Case C-17/91 *Lornoy* ECLI:EU:C:1992:514, para 21.

mechanism have nothing to do with each other and constitute separate measures, a separate examination (of, then, only the road charge) would be carried out under Article 110.

B. Traffic Charges As Equivalents of Customs Duties?

Article 30 bans charges having equivalent effect to customs duties, ie charges that are levied on goods because those goods cross a border between member states:[77] '[A]ny pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of [Art 30 TFEU], even if it is not imposed for the benefit of the state, is not discriminatory or protective and if the product on which the charge is imposed is not in competition with any domestic product.'[78]

This is, therefore, an absolute prohibition without possibility for justification.[79] It is not subject to a *de minimis* logic ('however small'), applies irrespective of the aims and purposes of the charge and is not limited to discriminatory charges.

a. Direct or Indirect Effect on Goods

Older case-law seems to suggest that Article 30 only related to charges 'being imposed specifically upon a product' and thereby 'altering its price'.[80] As part of the provisions governing the conditions for the free movement of goods, Article 30, however, like the concept of equivalent effect in Article 34 TFEU (see below), is to be interpreted strictly and thus takes a broad, effects-based approach.[81]

Therefore, as was also pointed out here at the outset, it is not necessary that a given charge is one specifically levied on goods or specifically relates to goods. '[A]ny pecuniary charge' can be caught by Article 30 for any price effect it might have, as long as that price effect arises due to the fact alone, that the goods 'cross a frontier'.[82] As a consequence, a road usage charge that also affects goods is not in principle excluded from the scope of application of Article 30 because it is not a specific charge on goods.

In addition, as was just shown in the principles section,[83] the combined effect in the German example of road fees and a compensation mechanism means precisely that this is not a burden imposed as an integral part of the national tax system. Instead, that fee constitutes a unilateral burden that

[77] For more, eg, Barnard (n 69), 44 ff.
[78] Case 24/68 *Commission/Italy* ECLI:EU:C:1969:29, para 9.
[79] Barnard (n 69), 50.
[80] Both citations *Deutschmann* (n 73), 473.
[81] To that effect Case 46/76 *Bauhuis* ECLI:EU:C:1977:6, para 12.
[82] Both citations *Bauhuis* (n 81), para 10.
[83] See at n 76.

only foreign transporters are subjected to because they cross the border into the respective Member State.

Indeed, a road usage fee applicable to the whole of the national system of high-level, interconnecting roads such as motorways affects those goods only 'by reason of the fact that they cross a frontier':[84] high-level roads are typical points of entry for commercial transporters of goods from other Member States. The electronic permit must be purchased at the border or before the border is crossed and constitutes the precondition for goods transported in small vehicles to cross the border into Germany. Crossing the border into Germany is thus the relevant act that triggers the obligation to pay.

b. Return for a Service?

Nonetheless, not all charges levied at the border run counter to Article 30. A charge is not caught by Article 30 if collected in return to a service or 'benefit provided ... for the exporter representing an amount proportionate to the said benefit'.[85] General advantages will however not suffice: the operator must obtain 'a definite specific benefit'[86] in return.[87]

In return for a road charge, goods transporters may use the national system of roads, particularly motorways. The provision and maintenance of high-speed road links can be seen as a service that sets off the charge. That service is also directly consumed by those paying the charge and thus constitutes a sufficiently specific benefit in the aforementioned sense.

What remains open in the German example is whether the fee is also proportionate in the sense that it corresponds to the actual value of the consumed service. Proportionality is hard to measure for the yearly total of that fee, as the charges currently applicable in those Member States that have implemented road charges vary greatly (from around 30 to around 150 euros).[88] In addition, it is hard to compare those existing examples to one another, as proportionality of a charge will depend particularly on the local price level and on the size and quality of the road system made available in return for the charge. In Germany, the price level is somewhat above the European average. The quality of the (often aged) motorways is average at best, but their number is quite large.

Proportionality can, however, be measured within the system itself, ie by relating the cost of permits for shorter periods to the yearly price. The 2012 Communication provides some coarse guidance in that regard: rates should be around 10% monthly, 5% weekly and 2% daily in relation to the

[84] *Bauhuis* (n 81), para 10.
[85] ibid, para 11.
[86] Case 18/87 *Commission/Germany* ECLI:EU:C:1988:453, para 7.
[87] Also Barnard (n 69), 50 ff.
[88] See the overview in the Annex to Communication 2012 (n 7).

price for a year's use.[89] In Germany, 10-day and two-month permits will be available at 5 to 15 Euros and 16 to 30 Euros respectively, with the upper price always being the one applicable to heavy polluters.[90] Measured against the yearly maximum charge of 130 Euros (ie the ceiling applicable to heavy polluters),[91] fees for short-term use would thus range between 3,85 and 11,54 % for ten days and 12,31 and 23,08 % for two months. This exceeds Commission recommendations by approximately 15% of the relative fee level. If heavy polluters are therefore compared to one another, year-long users receive preferential treatment to short-term users if measured against the recommendations in the Communication. That effect is, in particular, not in line with the polluter-pays principle, which is also recognized in the Communication.[92]

On average, Germany expects the yearly fee paid by most vehicle owners to be around 80 euros.[93] If the averages are compared to one another (10 Euros for 10 days, 22 Euros for two months), the picture is the same: the 10-day fee will be set at 12,50% of the average, the two-month fee even at 27,50 %. Here again therefore, Commission recommendations are exceeded by between 1/4th and 1/3rd of the relative fee level and short-term users are put at an even clearer disadvantage.

The disproportionality of the fees for short-term use in relation to yearly use in the German example indicates that the users pay more than the service rendered is actually worth. At the same time, that disproportionate fee affects the price of goods at the occasion of their importation into, or transit through, Germany. In consequence, the road usage fee for light vehicles in Germany likely contravenes the prohibition of charges having equivalent effect as customs duties laid down in Article 30 insofar as it includes, and hence affects, transporters of goods in light vehicles.

C. Traffic Charges As Discriminatory Indirect Taxes?

Article 110 TFEU prohibits discriminatory indirect taxation for similar types of goods and substitutable (ie competing) goods. Already from its wording ('any internal taxation of any kind'), Article 110 takes the same broad, effects-based approach as Article 30 (and Article 34)[94] that encompasses any 'disguised restrictions on the free movement of goods which may result from the tax provisions of a Member State.'[95]

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[89] ibid, 7.
[90] BTDrs 18/4455 (n 13), 14.
[91] Anlage zu § 8 InfrastrukturabgabenG (n 13).
[92] Communication 2012 (n 7), 1.
[93] BTDrs 18/3990 (n 13), 30, sets the average at 74 euros, subsequent estimates are higher.
[94] See n 81.
[95] Opinion of AG Sharpston, Case C-221/06 *Stadtgemeinde Frohnleiten* ECLI:EU:C:2007:372, para 26; also Opinion AG Mengozzi, Case C-206/06 *Essent Netwerk* ECLI:EU:C:2008:33, para 43.

As was pointed out here at the outset, non-goods specific charges are therefore in principle caught by Article 110.[96] The Court has repeatedly held in the past that the provision applies to 'a tax which in fact compensates for taxes which are imposed on the activity of the undertaking and not on the products as such.'[97] This includes, in particular 'a charge imposed on the international transport of goods by road.'[98] Consequently, Article 110 demands that road usage charges, which are a form of 'tax which has an immediate effect on the cost of the national and imported product must ... be applied in a manner which is not discriminatory to imported products.'[99]

Nonetheless, Article 110 is not applicable to a combined road charges mechanism like the German one, ie that affords the full domestic compensation for the charge.[100] As was just shown, the prohibition of Article 30 was considered to be applicable because a combined assessment of the interaction of the two legs of the German mechanism show that the fee borne by imported goods there was fully compensated domestically. Thus, leeway for an assessment under Article 110 would open up only if the two legs of the mechanism were to be artificially separated.

In the latter case, however, no discrimination of similar goods and no protective effect for competing goods would arise either: if the German road usage fee is looked at by itself, the level of fees is the same for domestic and imported goods. There would thus be no room for application of Article 110 without there being a need to even enter into the questions of similarity of the goods affected, insofar as domestic and foreign goods across the board would be treated alike.

In short therefore, Article 110 is in any case irrelevant to a road charge mechanism that, like in Germany, affords full domestic compensation:[101] when the legs of the mechanism are artificially separated, there is no discriminatory effect in the sense of Article 110. When the legs are examined together, the fact that the charge is fully compensated through the rebate on motor vehicles tax means that the (relatively stricter) prohibition of Article 30 is to be applied. A merely partial domestic compensation would, by contrast, open the mechanism up for an assessment (not undertaken here) under Article 110.

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[96] Different (applicability to specific goods charges only) however Korte and Gurreck (n 11), 425; Christian Seiler, Art 110, para 22, in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der europäischen Union – Kommentar*, 43rd supp 2011.

[97] *Schöttle* (n 65), para 14; see also the case-law cited in n 65.

[98] *Schöttle* (n 65), para 16 (there: distance- and weight based charges).

[99] ibid, para 15.

[100] Apparently different however Kainer and Ponterlitschek (n 11), 200.

[101] Likewise (but with different reasoning) Korte and Gurreck (n 11), 425.

3. Goods Transported Over Motorways: Article 34 TFEU

Article 34 TFEU prohibits measures of an effect equivalent to quantitative restrictions on the importation of goods. Like the Articles 30 and 110 that were just discussed, Article 34 is concerned with the effects of national provisions on the free flow of goods in the internal market.

As was explained aleady at the outset, the norms are mutually exclusive: "[A]ccording to settled case-law [Article 34] does not extend to the obstacles to trade covered by other specific provisions and obstacles of a fiscal nature or having an effect equivalent to customs duties, which are covered by Articles [30 or 110]."[102] Although the Court is sometimes less strict and seems to accept the application of Article 34 to customs- or tax-like measures when the effects on the free movement of goods are particularly intense,[103] Article 34 will normally not apply to a road fee mechanism.

Insofar as Articles 30 or 110 are considered relevant to a road charge collected already at the frontier as goods enter into a Member State, there is thus no room left for subjecting those charges to an additional test under Articles 34 and (for justification) 36 TFEU.[104] However, as was also already highlighted at the beginning, where the applicability of all customs- or tax-related norms was dismissed for a lack of relevant effects of the mechanism, this might re-direct attention to Article 34 as regards potentially restrictive effects of non-tax parts of the measure. This may admittedly be a remote possibility only, but it is still to be dealt with here for the sake of completeness of the argument.

Just above, it was argued that Article 30 in particular is applicable to road charges like the German ones. However, that assessment hinges upon a number of assumptions related to the facts of the case, such as the applicability of Article 30 to measures with indirect effects on goods, the combined examination of the fee and rebate mechanism and the inadequacy of the charge in relation to the service returned. One may however also look at the facts differently and focus less on the price effect for goods of the fee mechanism and more on the general effect of the measure of rendering goods transport into or via Germany less attractive. Insofar as these facts were to be assessed differently, eg by emphasizing indirect non-tax effects of the fee measure, room for scrutiny under Article 34 might open up.[105]

If that exercise succeeds, an assessment under Article 34 might be relatively more attractive for the Member State concerned than under the strict standard of Article 30 because of the possibility of justification

[102] Case C-313/05 *Brzeziński* ECLI:EU:C:2007:33, para 50; see also the case-law cited in n 29.
[103] See n 30.
[104] Already Case 7/68 *Commission/Italy* ECLI:EU:C:1968:51, 430.
[105] *Commission/Italy* (n 104), 430

afforded by the former norm. As it will be shown on the German example, it is of course not a given that any such justification attempts would succeed.

A. Effect on Goods

The effect of roads charges on goods was already explained in the introduction to this section. It is thus only briefly restated here for the sake of completeness. On top of the price effect dealt with above in the context of Article 30, which poses an extra burden on transporters, the measure might also have a generally impeding effect on the flow of goods in the internal market, via Germany. The measure might thus have the potential indirect effect of impeding the cross-border flow of goods in the internal market.[106] As was shown, this is enough to bring such a charge within the scope of application of Article 34, without there being a need to quantify a specific minimum scale or threshold of that effect.[107]

Article 34 has a markedly broad scope of application that covers any measure 'taken by a Member State, the aim or effect of which is to treat goods coming from other Member States less favourably' or 'which hinders access of products originating in other Member States to the market of a Member State'.[108] A road charge with a price effect on transported goods would, in principle, fall within the scope of Article 34 for its potential of hindering goods trade in the internal market.

B. Disadvantage for Foreign Goods

Yet, the Court in its older jurisprudence carved out certain selling arrangements from the scope of application of Article 34.[109] Selling arrangements are rules stipulating the conditions under which a product is sold, eg the place or time of sale, but also its price.[110] A road charge rendering the sale of goods in a Member State more expensive could generally qualify as a mere selling arrangement and thus fall outside the otherwise broad scope of Article 34.[111]

However, the exception only applies to selling arrangements that actually 'apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.'[112] Whereas, therefore, national road charges with price effects that are absolutely equal in their effects for foreign and domestic goods are not caught by Article

[106] Case C-110/05 *Commission/Italy* ECLI:EU:C:2009:66, para 33.
[107] See at n 67.
[108] Case 142/05 *Mickelsson* ECLI:EU:C:2009:336, para 24.
[109] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* ECLI:EU:C:1993:905, para 16.
[110] Already *Keck* (n 109), para 18.
[111] Also Stefan Leible and Rudolf Streinz, Art 34, para 98, in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der europäischen Union – Kommentar*, 55th supp 2015.
[112] *Keck* (n 109), para 16.

34, any charge that puts foreign products at a greater disadvantage or even discriminates against such products is still included in its scope of application.

At this point again therefore, the question returns whether a two-legged mechanism, like the German road usage fees and tax rebates, is examined together or separately. Depending on the approach to this issue, a road usage fee will or will not be caught by Article 34.

A combined examination of the German example reveals that foreign transporters, and thus foreign goods, are discriminated against, as from an economic point of view they alone bear the road fee while goods transported by domestic vehicle owners are spared. Thus, in its combined effects , the German road fee mechanism is equally applicable only in law, while it does not in fact affect domestic and foreign operators and goods in the same manner. This is therefore not just a measure of unequal effects but, an indirectly discriminatory measure that subjects foreign operators and goods to less favorable conditions only because of their non-German place of vehicle registration. A discriminatory measure can never qualify as a mere selling arrangement. A measure of this kind therefore always falls within the scope of Article 34.

If, by contrast, the two legs of such a mechanism were to be artificially separated and the road fee was examined on its own, it would look like a mere selling arrangement: insofar as it applies in law to 'all relevant traders operating within the national territory'[113] and the measure's unequal effects resulting from the granting of a tax rebate would be blinded out, that measure would fall outside the scope of Article 34. It was, however, shown above that such a separate examination would be inappropriate in the German case.

C. No Justification

Insofar as the combined road fee and tax rebate mechanism in the German example is caught by Article 34, it can also not be justified under Article 36 TFEU or additional mandatory requirements[114] of public interest.

Firstly, mandatory requirements beyond Article 36 are likely[115] to be available only for indistinctly applicable measures.[116] The combined road charges and rebate mechanism is, however, precisely not indistinctly applicable.

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[113] ibid.

[114] Case 120/78 *Rewe-Zentral AG* ECLI:EU:C:1979:42, para 8.

[115] Jurisprudence has seen a few exceptions, eg in Case C-2/90 *Commission/Belgium*, ECLI:EU:C:1992:310, para 22 ff.

[116] Eg Case C-21/88 *Du Pont de Nemours* ECLI:EU:C:1990:121, para 14; Joined Cases C-321/94 to C-324/94 *Pistre* ECLI:EU:C:1996:401, para 53; for more, cf Barnard (n 69), 100 ff.

Secondly, the only visible aim behind including foreigners and excluding domestic vehicle owners from the road usage fee is economic. According to settled case-law aims of a purely economic nature cannot normally constitute overriding reasons in the public interest that justify restricting a fundamental guarantees of EU law.[117] This principle applies at least below the threshold of costs jeopardizing the overall equilibrium of an area (eg equilibrium of the social security system, the education system, or, for the case at hand, the infrastructure system).[118]

In conclusion therefore, were, contrary to the argument made here, the combined road fees and rebate mechanism devised for Germany to beconsidered not to be caught by Article 30, it might alternatively be caught by Article 34 as a measure discriminating against goods transported in foreign-registered vehicles.[119] In the absence of legitimate reasons for justification, that mechanism would also infringe Article 34.

4. Services Relying on Motorways: Article 56 TFEU

Another[120] EU law provision that a road charge might be suspected to run counter to is the freedom to provide services under Article 56 TFEU. After all, such a charge would not only, as was just shown in the context of Articles 30, 34 and 110, have a price effect for goods transported into or through a Member State, but also for services rendered in that Member State or where service providers pass through.

Similarly to Article 34, Article 56 is subject to a broad, effects-based approach: it 'requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.'[121] A charge levied on road use would in principle qualify as a measure that renders the cross-border provision of services less attractive and thus falls within the scope of the prohibition of Article 56.

However, similarly to Article 34, a specific exception from the scope of the prohibition applies also in the context of Article 56. Selling arrangements,

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[117] Case C-109/04 *Kranemann* ECLI:EU:C:2005:187, para 34; Case 352/85 *Bond van Adverteerders* ECLI:EU:C:1988:196, para 34; Case C-288/89 *Gouda* ECLI:EU:C:1991:323, para 11; Case C-398/95 *SETTG* ECLI:EU:C:1997:282, para 23; Case C-35/98 *Verkooijen* ECLI:EU:C:2000:294, para 48; Case 388/01 *Commission/Italy*, ECLI:EU:C:2003:30, para 22.

[118] Eg Case 147/03 *Commission/Austria* ECLI:EU:C:2005:427, para 64 ff; Case 293/83 *Gravier* ECLI:EU:C:1985:69, para 18.

[119] Also Lukas Beck (n 11), 289.

[120] For an assessment also under Art 45 TFEU, cf Kainer and Ponterlitschek (n 11), 200.

[121] Case C-76/90 *Säger* ECLI:EU:C:1991:331, para 12.

the area excluded for Article 34, do not play a role here.[122] Instead, the Treaty directly stipulates a specific exception. Article 58(1) TFEU excludes the applicability of Article 56 in the area of transport services.[123] Transport services are instead exclusively governed by the provisions of the Transport Chapter, which was discussed before.

Article 56(1) is therefore not directly relevant for the assessment of road charges.[124] Still, it was shown before that also under the rules applicable to transport services under the Transport Chapter, a combined road fee and tax rebate mechanism is contrary to EU law.

5. Artice 18 TFEU and the Proportionality Principle

The 2012 Communication recalls that traffic charges on light vehicles must be in line with the prohibition of discrimination on grounds of nationality under Article 18 TFEU and with EU law's general proportionality principle.[125] Both principles only apply subsidiarily to the provisions examined here before, as these contain the more context-specific prohibitions of discrimination.

Room for application of these more general standards is therefore restricted to two constellations: they may, firstly, become relevant because the applicability of the remaining provisions was, contrary to the argument made here, rejected. Secondly and more importantly, they are relevant in relation to users not covered by those other (essentially goods- and transport related) norms. A look at the general principles is thus warranted particularly for the effects of the road usage charges on non-commercial traffic and on commercial traffic not relating to goods and services.

Still, the outcome of an examination under Article 18 and the general proportionality principle would eventually not be any different if those other norms are blinded out. What is more, the outcome is also the same irrespective of whether the two legs of the measure at hand are artificially separated or looked at for their combined effects. In both cases, they fall foul of the proportionality and non-discrimination principles.[126] The differences between a separate and a combined examination are therefore just a question of degree of severity of the infringement of those principles.

A. A Separate Examination of a Combined Fee and Rebate Mechanism
It was shown before in the context of Article 30 that while the objective appropriateness of an overall level of road charges cannot easily be

[122] Case C-384/93 *Alpine Investments* ECLI:EU:C:1995:126, para 36.
[123] See also Korte and Gurreck (n 11), 428.
[124] Apparently different however a considerable part of German literature, cf Beck (n 11), 289; Kainer and Ponterlitschek (n 11), 200; Engel and Singbartl (n 11), 289 ff.
[125] Communication 2012 (n 7), 4 ff.
[126] Equally Engel and Singbartl (n 11), 293; Boehme-Neßler (n 11), 100; different (compatibility with these principles) Kainer andPonterlitschek(n 11), 201.

checked,[127] the appropriateness of fees for short-term use can. It was also shown that the fees in the German case put short-term users at a disadvantage in relation to year-long users of vehicles within the same or similar emissions classes:[128] those groups of users pay relatively more than their fair share of the yearly fee.

The charge applied to light vehicles in the German example is therefore disproportionate in the light of the Commission's recommendations on fee levels.[129] This is already so where it was unduly disregarded that domestic road users are fully compensated (ie when the two legs of the measure were examined separately). As it was shown, that kind of disproportionality becomes all the more problematic insofar as it also contravenes the polluter-pays logic relevant to infrastructure charges.[130]

The effect of the German mechanism to place short-term users at a disadvantage vis-à-vis year-long users with comparable vehicles moreover entails discrimination against non-nationals as year-long permits will typically be purchased by domestic users and short-term permits are primarily attractive for foreigners using national motorways on an irregular basis only. In the German case, there is no intrinsic explanation or justification for this effect. Quite to the contrary: the polluter-pays principle would imply that groups who use infrastructure more frequently should bear a relatively heavier burden to discourage use.[131] Under such circumstances therefore, a road charge would have a discriminatory effect in the meaning of Article 18 TFEU even if the fact that domestic road users are fully compensated was unduly blinded out.[132]

B. Combined Examination of a Fee and Rebate Mechanism

When the two legs of a fee and rebate mechanism are examined together, the discriminatory effect just observed is even more straightforward: given that domestic users are fully compensated for their share of the charge by way of a corresponding rebate (in Germany: on motor vehicles tax), the charge constitutes an extra burden for non-nationals only. As was stated before, a combined examination looking at the effects, not the form, of the mechanism is also the only appropriate approach under EU law.[133]

Again, no intrinsic explanation or justification is visible here.[134] Given the importance of mutual access to infrastructure interconnecting the Member States of the Union, any restrictions on that access weigh particularly heavy and would, accordingly, call for a particularly pressing and convincing justification. In particular, an argument to the effect that

[127] See n 88.
[128] See nn 91 and 93.
[129] See n 89.
[130] See n 92.
[131] With a different outcome Kainer and Ponterlitschek (n 11), 201.
[132] Similarly Münzing (n 2) 198.
[133] Likewise (but with a different outcome) Kainer and Ponterlitschek (n 11), 200.
[134] Boehme-Neßler (n 11), 99 ff.

domestic taxpayers already finance the building and maintenance of infrastructure by way of their general tax obligations and that foreigners should contribute their share is not valid: as was shown before in the context of Article 34, aims of a purely economic nature will normally not serve as reasons of public interest justifying restrictions.[135] This certainly applies as long as, which will not typically be the case and is certainly not the case for Germany, the overall equilibrium of the infrastructure system was not jeopardized by the fact that foreigners have free access to domestic roads.[136]

Simple financial considerations alone, ie the normal cost effect of building and upkeeping infrastructure benefiting also non-nationals, will thus not justify the imposition of a light vehicles charge on foreign users only. Such a charge, like the combined German fee and rebate mechanism, would thus amount to discrimination on grounds of nationality.

IV. SEPARATION OF FEE AND REBATE MECHANISMS IN TIME?

In the context of the German case, the Commission apparently suggested recently that separation of the two legs in time, ie the implementation first of a general usage fee and only at a later point in time of a lowering of vehicles taxes for German-registered vehicles, might justify an isolated assessment of the fee mechanism only.[137]

1. Separation Would End Most, But Not All Concerns

Such a separation would indeed render the fee mechanism compatible with Article 92 insofar as the imposition of a fee for everybody would no longer be discriminatory and the conditions of competition between foreign and domestic carriers would remain equitable (at the new level of X for all). The same applies to discrimination under Article 18. Also, the severing of ties between the fee and corresponding changes to the motor vehicles tax law would eliminate concerns of incompatibility with the 1965 Decision.

If the fees were not fully set off by way of a rebate any more, the effects of the fee would no longer qualify as a measure equivalent to a customs duty in the sense of Article 30, but would instead have to be examined under the discrimination and protectionism tests of Article 110. The outcome of the test under Article 110 is not quite straightforward. As was shown in the context of Article 30, the German mechanism yields indications that the fee level for short-term users might be disproportionate. This would evidently also have to be taken into account when assessing any protective effect of the fee for non-competing products under Article 110(2).

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[135] See n 117.

[136] See n 118.

[137] derstandard.at online version of 3 June 2015, 'Deutsche Pkw-Maut: EU schlägt schrittweise Einführung vor'; welt.de online version of 3 June 2015, 'Brüssels Nein zur Pkw-Maut würde Millionen kosten'; wiwo.de online version of 3 June 2015, 'EU schlägt schrittweise Einführung vor'.

This, however, also means that a separation of the measures could not end concerns under the general proportionality principle. Discrepancies with the standards of proportionality required in particular under the 2012 Commission Communication would therefore remain and require an adaptation of the fee levels for short-term users.

This, finally, leads over to Article 34. It was shown here that if the fee imposed was examined alone, ancillary effects of that fee might potentiall be covered by Article 34, but would still fall outside the scope of Article 34 as a selling arrangement. However, that would only be so if the fees were indeed indiscriminate in their effects for domestic and foreign users.

Disproportionate fee levels for short-term users, who will typically be foreigners, would mean that the effects of the fee are not indiscriminate for foreign and domestic goods, but that foreign goods will typically be more affected by the fee.[138] If that is so, even a separation of the two legs would not end potential concerns against the fee under Article 34. In addition, justification under Article 36 and a rule of reason would face problems of explaining that disproportionate effect particularly in view of the fact that it is, as was also shown, in particular not in line with the polluter-pays logic.

2. Qualitative Requirements for Separation

Even in respect of the areas just mentioned above, where the separation might work to eliminate concerns (Articles 30 and 92), it was however pointed out before that EU law generally takes a functionalist approach, ie looks at the actual effects of the mechanism as a whole and not at formal circumstances. This means that any attempt to separate fee and rebate mechanisms from one another, which in the German case are factually and legally closely intertwined, must amount to far-reaching structural changes that bring the complementary character and combined effects of the two legs of the mechanism genuinely to end.

To factually end the complementary character and combined effects of the two legs of the mechanism, changes on two levels will likely be necessary.

One change is, clearly, a distinct timely separation of the implementation of each of the legs. In view of the German mechanism's political history, whereby the aim to exempt German-registered vehicles from the fee formed the central focus from beginning to end, the timely separation would probably have to be drastic to be convincing. Convincing means, that the timely separation credibly demonstrates that the intended beneficial economic effect for German-registered vehicles no longer occurs. The timely separation must, in other words, warrant a delay sufficiently large to forestall changes to the conditions of competition between domestic and foreign carriers. This will be so only if German-registered users are required to start paying fees along with everybody else

[138] To that effect Case C-322/01 *DocMorris* ECLI:EU:C:2003:664, para 70 ff.

long before possible competitive effects of a lowering of motor vehicles taxes kicks in. We are, in other words, likely speaking of several years here.

A timely separation alone will, however, not suffice, if the rebate eventually granted still corresponds exactly to the amount of the usage fees paid. As long as the two legs of the measure exactly match each other in value, the link between them can never credibly be separated and the competitive effects of neutralization of the usage fee burden for German-registered carriers will effectively occur. A credible separation of the two legs of the measure will therefore, in addition to a delay in time, also require changes in the calculation and amount of the lowering of motor vehicles taxes. In other words, the German government's promise of guaranteed economic neutrality of the usage fee for each individual German-registered vehicle owner would have to be abandoned. Some easing of the motor vehicles tax burden according to the logics of that field of taxation is acceptable and part of sovereign national taxation, guaranteed neutrality in terms of a prolongation or export of the logics applicable to the road usage fees into the tax system is not.

Whether the Commission's compromise proposal[139] thus actually ends the concerns over the design of the light vehicles traffic fee in the German case will depend on how sincere the German legislator's approach in that regard will be. Beyond the German case, the considerations laid out here provide general guidelines for the assessment of road fee mechanisms that, as often, seek to mitigate burdening effects on domestic users.

V. CONCLUSION AND OUTLOOK

The introduction of road charges in the hitherto harmonized area of light vehicles traffic must conform to a number of provisions in primary and secondary EU law, far beyond the mere principles of non-discrimination on the grounds of nationality and respect for proportionality that are mentioned in the Commission's 2012 Notice. These provisions have more precise scope of application than the more general norms invoked by the Commission and therefore allow for a relatively more precise scrutiny of national measures as regards their compatibility with the aims of the internal market. As the more specific norms, they also enjoy preferred application vis-à-vis the general principles.

The foregoing examination revealed that Member States have the possibility to introduce road charges for light traffic, but that their legality depends on a number of factors. Particularly stringent in that regard are the limits set by the TFEU's traffic-related provisions, namely Decision 65/271 on the secondary law level and Art 92 on the level of primary law. Those provisions of the Transport Chapter exclude the applicability of Article 56 regarding the effects of the charge for the provision of transport services. While the former prohibits certain forms of double taxation and

[139] See n 137.

goods taxes, the latter sets out a stringent non-discrimination and standstill regime that recognizes that the conditions of road access for foreigners constitute a decisive factor in cross-border competition and that seeks to protect those conditions against deterioration. As the German example shows, the imposition of road fees may run counter to both sets of norms.

Also beyond the Transport Chapter, the Treaty sets limits to Member States' freedom to impose charges on light traffic. The most decisive norms in that regard are Articles 30, 34 and 110, all of which deal with the price effects of a road charge on transported goods. Depending on how such a charge is devised, it will likely come within the scope of application of either one of those norms (which are alternative, not cumulative). Furthermore depending on the design of the charge and on which of the treaty articles applies, any negative effects of the charge on the conditions under which goods can be marketed might be justified by overriding reasons of public interest. Article 30 is however not open to such arguments. For Articles 110, they are part of the discrimination assessment undertaken in this paper. A justification assessment in the classic sense is thus only available in the context of Article 34. However, given the importance of mutual access to infrastructure interconnecting the Member States of the Union, the reasons given would have to be particularly convincing. The two-legged mechanism in the German example was, due to the fact that the fees are charged only because the border into Germany is crossed and because the fees imposed are fully set-off regarding domestic goods, qualified here as a charge of equivalent effect to a customs duty under Article 30, which runs into an absolute prohibition without the possibility for justification.

Thus, in sum, Article 18 and the general proportionality principle have a very limited scope of application here – if any. Article 92 applies to all charges affecting commercial transport service providers, whereas Articles 30, 34 and 110 catch all negative effects of the charge on the price of goods transported by foreign carriers. Potentially also, road charges might also conflict with the free movement of workers under Article 45 TFEU.[140]

All of this effectively limits the relevance of the general prohibitions to the non-commercial sphere. There too, however, Decision 65/271 applies in terms of a potential double taxation of (commercial as well as non-commercial) vehicle owners through a road use charge. As the German example shows, a road charge that is designed to grant a rebate on vehicles taxation to offset the domestic effects of the road charge might qualify as such prohibited instance of double taxation. In such a case, there remains effectively no set of facts for which an assessment under the general principles would still be relevant.

[140] See n 28. Arguably however, those effects might finally be too remote, cf Case C-190/98 *Graf* ECLI:EU:C:2000:49, para 15 ff.

Another important conclusion from the foregoing assessment is that, of course, road charges are particularly problematic where, as in the German example, they are effectively imposed on foreigners only. Whether that is done directly in terms of a foreigner-only law or, as in Germany, indirectly via a combination of formally separate mechanisms leading to the same effect, makes no difference under the generally effects-based approach of EU law. Any other approach would abet the circumvention of EU law.

Concerns of possible circumvention arise in particular where, as the Commission apparently suggested for the German case, the imposition of traffic fees is flanked by an easing of the overall tax burden, but the ties between those two measures in time and fact should be blurred.[141] It is possible to flank the introduction of traffic fees by changes to the overall domestic tax burden, but the threshold for legality of such an approach would be quite high. That threshold is one of effect, not form: The separation in time and functioning must be genuine in the sense that competitive cross-effects are forestalled. This calls for a delay of several years between such measures to allow competitive effects to kick in equally, as well as for the non-neutrality of the overall cross-effects of the package in the sense that the flanking changes may not be designed precisely so as to neutralize the effects of the charge. This also means that flanking tax law changes must follow their own logic and may not just implement or import fee calculation logics into the tax system.

In the absence of the peculiarities of the German case, road charges that are truly indistinctly applicable will have to be checked under Article 92 only, ie for a potential alteration of the conditions of competition in road transport. If collected at the border because the border is crossed, they may also come within the ambit of Article 30. They will, however, stay clear of that Article if it can be shown that those charges are part of a general system of internal taxation (and should thus be checked under Article 110 where, however, a non-discriminatory applicable charge will not run into problems). By contrast, Article 34 will never pose an obstacle to an indistinctly applicable road charge, which is essentially a selling arrangement excluded from its scope.

The German case demonstrates the difficulties encountered by national legislators in the attempt to come to terms with the opposing needs of generating sufficient revenue for the expansion and maintenance of infrastructure on the one hand, while not significantly increasing the cost base for domestic undertakings and users on the other hand.[142] Although those difficulties might arguably be overcome in a more elegant manner that is less invasive for the functioning of the internal market than in the German example, even a more cautious national legislator will experience them in one form or another.

[141] See n 137.
[142] Cf also Maaß (n 11), 449 ff.

For this reason, the Commission's announcement that it would not just try to swat down the German fee mechanism, but also use the occasion to try to push for a more general solution to light traffic road pricing is to be particularly welcomed. In that regard, the Commission is apparently[143] set to elaborate an EU-wide framework for light traffic charges that might look similar to the Eurovignette Directive for HGV traffic in terms of type and depth of regulation. Unlike the existing system for HGVs, such a framework could address especially the needs of the users for small travel.

Current Commission plans envisage distance-based instead of time-based usage fees. This would be more in line with the polluter-pays principle, but it would also require relatively more infrastructure on the road (toll booths or electronic equipment on roads and in vehicles) and accordingly relatively more administrative effort both on the part of users as well as Member States. In addition, distance-based systems are significantly more sensitive in terms of data protection. In other words, the factual, legal and thus political hurdles for an EU-wide distance-based road charge system for light traffic are not to be underestimated.

That is likely one of the reasons why the Commission is currently only aiming at a voluntary scheme in which Member States could decide to opt in. A voluntary scheme would not clear out all problems Member States currently experience in the setup of road charges: since that scheme might not fit particular national needs or limitations (of infrastructure, but importantly also of national constitutional law), Member States might still be inclined to go their own ways. However, even a voluntary scheme would at least provide an initial point for orientation as to the principles that national road charges for light traffic could and should follow to minimize their negative effects for the internal market and maximize their environmental steering effects.

And Germany? Who knows – should the Court of Justice bring its envisaged road fee and tax rebate mechanism to a fall, perhaps Germany might even join an optional EU-wide tolling system next time around.

[143] Cf Reuters UK of 30 January 2015, 'EU-wide toll could end road spat with Germany' (accessed 2 June 2015) at http://uk.reuters.com/article/2015/01/30/eu-transportation-idUKL6N0V94LM20150130.