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National Legal Systems and Globalization

New Role, Continuing Relevance

Pierre Larouche
Péter Cserne *Editors*

Springer

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ISBN 978-90-6704-884-2 ISBN 978-90-6704-885-9 (eBook)
DOI 10.1007/978-90-6704-885-9

Library of Congress Control Number: 2012943640

Published by T.M.C. Asser Press, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. Asser Press by Springer-Verlag Berlin Heidelberg

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Preface

This book is the outcome of a research project which was conducted at the Tilburg Law and Economics Center (TILEC), a joint research centre of the Faculties of Law and of Economics and Business Administration of Tilburg University, between 2007 and 2011.

The project was commissioned and funded by the Hague Institute for Internationalisation of Law (HiiL), project number 100-16-503. We are very grateful to HiiL, and in particular to its Director Sam Muller and Deputy Director David Raic, for financial support and understanding throughout the duration of the project. Morly Frishman and Yordana Keremidchieva, both of HiiL, also provided help and support, for which the editors are thankful.

The project was directed by Pierre Larouche, Professor of Competition Law at Tilburg University. Initially, the project team included Filomena Chirico and Saskia Lavrijssen. After both moved on to positions outside of Tilburg University, Maartje de Visser joined the project. She also moved to another project, which led to Péter Cserne joining the team for the completion of the project. While these changes caused some delays in the research, they did enrich the overall result by broadening the range of experiences that went into the contributions. The members of the team were also able to count on much respected colleagues, such as Monica Claes, Eric van Damme or Leigh Hancher, as co-authors for some of the contributions. Finally, Angela Maria Noguera helped the team during her studies in Tilburg and produced an empirical contribution to the project as part of her masters' thesis. More details on the contributors are provided on the following pages.

Conducted within HiiL's general Research Programme, the project has analysed, in an interdisciplinary manner, how national legal systems cope with the challenges of globalisation. The research output of the project has already gained societal relevance by contributing to ongoing practical discussions, on the review and reform of European networks of national regulatory authorities (NRAs) and on the unification or harmonisation of private law in Europe, among others. Putting the individual contributions together in this collective volume, we hope to deliver added value by highlighting the synergies between the various contributions. We

trust that the output of the project will further contribute to debates, both practical and academic, on the role of law in the global world.

Most chapters in this book have been previously published in different versions in academic journals or books. We are grateful to copyright holders for allowing the publication of new versions of the original published pieces. For the present publication, all those chapters have been revised. In some cases, we are able to publish, for the first time, complete versions of papers which, due to space limitations, had been previously published in abridged form.

Finally, we wish to thank all our colleagues who have attended seminars, workshop or conferences where the contributions to this book were presented in paper form, or who delivered comments to us.

Tilburg, Summer 2012 The Editors

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Chapter 1
Introduction

Pierre Larouche and Péter Cserne

Contents

This project started as a response to the original research programme of the Hague Institute for Internationalization of Law (HiiL), entitled "National Law in a Global Society", which struck a relatively pessimistic tone on the future of national law in the current globalization era. For the researchers associated with this project, the prospects of national law seemed less dire. Globalization challenges national legal systems, just like any other organization, to identify and maintain their "core" while accepting that non-core elements will evolve as more complex institutional structures emerge. It is too early to conclude on whether national legal systems can and will handle that challenge. With the appropriate tools—including economic analysis and regulatory theory—it is possible, however, to investigate whether and how national legal systems can evolve in the face of that challenge. We expect that equipped with the results from this research project, one can form a more informed view on whether globalization threatens national legal systems or not.

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_1,

As the institutional structures of regulatory policies become more complex (what is often rendered with the keyword "governance"), the number of actors involved in the production and application of the law increases to include not just one, but many national *triades politicae*, together with supranational and international institutions, as well as private actors like individuals, firms, and associations. A purely legal approach is insufficient to analyze this web of actors and relationships. Interdisciplinary research tools and models become essential. The traditional legal doctrinal analysis of globalization, with a black-and-white perspective whereby globalization threatens national legal systems, is too simplistic. By using an interdisciplinary perspective, this project highlights how national legal systems can cope with the pressures of globalization in ways which a traditional legal analysis would not necessarily identify.

With these research objectives in mind and interdisciplinary tools at hand, the project addresses three research questions. The first two were part of the original research design, and the third one was added in the course of the project. The first revisits the ongoing debate on the convergence and divergence of national legal systems, with the help of economic analysis and comparative legal methodology, to ascertain in a more nuanced manner the place of national legal systems in a larger globalized context. The second touches upon the evolution of fundamental principles of constitutional democracy in the light of globalization, testing the hypothesis that these principles continue to live and prosper, albeit in an abstracted form, without being attached to a specific national institutional context. During the course of the project, it became apparent that a fair amount of observed interaction between national legal systems did not fit very well within the available theoretical models. A third research endeavor was added, namely to seek a theoretical account for interaction which would fill the gap between the model of regulatory competition and the contemporary practice of comparative law, using a functionalist methodology.

1.1 Convergence and Divergence: The Continuing Relevance of National Legal Systems

The increasing integration of markets seems to drive concerns about divergence between legal systems ever higher on the policy agenda. Legal divergence is perceived as a major issue not only within the EU, but also worldwide. Lawyers often conclude that since difference jeopardizes citizens' rights and creates excessive costs to companies, it is necessary to correct it in what is apparently the most effective, yet also draconian, way: by replacing different systems with a common one. At the opposite end, another equally typical reaction is to seek refuge in the unique legal culture of each legal system (which leads to irreconcilable divergences between systems), and insist that it be respected and preserved.

An unsophisticated understanding of what is happening often leads both academics and policymakers to formulate ill-founded normative proposals as to what should happen. In fact, under closer examination, the issue is much more complex. Lawyers often quickly conclude that there is divergence just because legal systems appear to contain different rules or use different concepts. Part of the reason for this is that there is no established method to measure convergence or divergence. Second, the "cultural" explanation for divergence does not seem satisfactory as it short-circuits further analysis. Here a richer approach that includes insights gained from economic theory is highly beneficial.

This part of the research project thus raises both explanatory and normative questions. Methodologically, it puts together loose strands of *law and economics* literature (on comparative law, on regulatory competition) as well as comparative law methodology and insights into harmonization, in an innovative fashion which is not found in the literature today.

Chapter 2, by Filomena Chirico and Pierre Larouche, provides the backbone for this first part. It explains that a legal system cannot be viewed as a single and unavoidable expression of a monolithic legal culture, but rather as the outcome of various forces. Economic analysis can help to explain how these factors influence the state of a legal system at a given moment. Furthermore, economics would dictate that removing divergence should only be done if it improves welfare, i.e. if the benefits of change minus the costs thereof exceed the benefits of the current situation minus the costs thereof. In other words, it is not true that a change (unification, for instance) would be beneficial, merely because the current situation (divergence) would lead to costs—such as externalities or transaction costs. Finally, there are different paths to convergence. Even when divergence should be addressed, unification is not necessarily the solution. There is a whole range of possibilities with variable degrees of autonomous decision and cooperation. Bottom-up approaches, such as regulatory competition or legal emulation (charted in Part III of this book) often provide a powerful tool to compare different solutions and to evaluate which one might be preferable.

In the three following chapters, insights from Chap. 2 are further developed in specific cases. In Chap. 3, Filomena Chirico, Eric van Damme, and Pierre Larouche reflect on the work carried out within the Economic Impact Group, a group of academics who were in charge of providing an economic analysis of the Draft Common Frame of Reference (DCFR), and thus inquired into whether harmonization of European private law was appropriate and whether the DCFR was optimal in substance. In Chap. 4, Péter Cserne chronicles how the new civil codes of Central and Eastern European states were prepared. In Chap. 5, he investigates how there might be convergence in the use of consequence-based reasoning by national courts, which can help to put the national legal system in a different light and situate it within a larger context.

1.2 New Institutions, Common Principles

The second part of the project examines the evolution of fundamental principles, such as the rule of law or accountability, in the light of globalization.

Traditionally legal, economic, and regulatory theories describe and analyze these fundamental principles against the background of a specific set of institutions, often using principal-agent theory. It is assumed that the legislative mandate of parliament and/or parliamentary control of the administration as well as the respect of the rule of law ensure the democratic legitimacy of the exercise of government power. In the wake of globalization, new forms of multi-level governance have appeared at the international, European, and national level. They are generally characterized by a network-based interaction between governmental and interested actors ("stakeholders") at various geographical levels leading to the creation, implementation, and enforcement of binding and non-binding legal norms outside the realm of the traditional processes of law-making and execution. In these new governance forms, the *trias politica* is given a less central legitimizing role; direct accountability to the stakeholders is ensured through consultation procedures and transparency gains importance.

At first sight, these new governance forms are in tension with existing canons of the rule of law and democracy, such as the principles of separation of powers, representative democracy, and ministerial responsibility. Much like the convergence or divergence between legal systems in the context of globalization is often seen in black and white terms, the fate of fundamental democratic principles such as the rule of law and accountability is presented in stark terms: either they are maintained together with the *trias politica* or they fall prey to globalization. A deeper analysis will show whether that is truly the case or whether these principles might not be present under a different guise (i.e. well-regulated consultation procedures in comparison to representative democracy).

In Chap. 6, Pierre Larouche and Leigh Hancher explore how, as EU economic regulation evolves, it moves away from a more formalistic to a more integrative paradigm. This could be seen as an early example of a multi-level governance structure where hermetic barriers (enforced via separation) designed to protect the national realm are abandoned in favor of a more relational approach, where the governance levels share overlapping objectives and where the constitutional questions and issues found at national level seep to other levels under the guise of good governance. Indeed, as shown in Chap. 7, by Maartje de Visser, and Chap. 8, by Saskia Lavrijssen and Leigh Hancher, the debate surrounding the creation of EU-level agencies to succeed the existing regulatory networks in electronic communications and energy, as it was held in 2008 and 2009, had all the trapping of constitutional discussions as we know them from national legal systems. In Chap. 9, Maartje de Visser explores in greater detail how the principle of accountability can be adapted to these new governance forms, and in particular whether accountability must be tied to a specific institutional feature (judicial review) or can be ensured via other institutional arrangements (participation).

1.3 New Models for National Legal Systems in a Global World

The work carried out on the first two parts of this project opened the door on an interesting issue, namely how national legal systems interact with each other. Whether it is academics drafting the DCFR, law reform committees preparing new civil codes in Central and Eastern European countries, regulatory authorities exchanging with one another within regulatory networks, it seemed that the interaction between legal systems could not be adequately captured by existing theory, whether regulatory competition in the law and economics literature, or mainstream comparative law, using a functionalist approach.

Part III of the project investigates this issue further. In Chap. 10, Pierre Larouche takes a critical stance toward both of these theoretical approaches, and explores an alternative, legal emulation. In addition to the examples given in the above paragraph, legal emulation can also be observed in impact assessment (IA) procedures, which have become commonplace in contemporary legal orders. In Chap. 11, Pierre Larouche provides a theoretical background to IAs, trying to answer the basic question why IAs are used. On the basis of empirical research in the IAs carried out by the Commission, Angela Maria Noguera investigates the extent to which legal emulation is actually taking place in the IA practice, in Chap. 12. Finally, building on the study of networks of regulatory authorities in previous chapters, Maartje de Visser and Monica Claes explore, in Chap. 13, another type of network where legal emulation could take place, namely judicial networks.

Part I
Convergence and Divergence: The Continuing Relevance of National Legal Systems

Chapter 2
Convergence and Divergence, in Law and Economics and Comparative Law

Filomena Chirico and Pierre Larouche

Contents

Filomena Chirico is an official at the European Commission, Directorate General Competition (DG COMP). Her contributions reflect her views and not those of the European Commission. At the time of her contribution to the project, she was Assistant Professor, and a member of the Tilburg Law and Economics Centre (TILEC). Pierre Larouche is Professor of Competition Law, Tilburg Law School, Tilburg University and a founding director of TILEC. A version of this chapter was published as "Conceptual divergence, functionalism and the economics of convergence", in Prechal et al. 2008, 463–494. The authors want to acknowledge the contributions made by Arnald Kanning (on regulatory competition) and the comments received from Eric van Damme, Michael Faure and participants at seminars held in Amsterdam (ACLE), Tilburg (TILEC) and the National University of Singapore, as well as the conferences held in Utrecht in the course of the "Binding Unity / Diverging Concepts" project.

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_2,

It is common knowledge amongst legal academics and practitioners that legal systems sometimes diverge. Over the years, law and economics scholarship has paid attention to that phenomenon, under the heading of "comparative law and economics" or "regulatory competition". That scholarship often assumes that convergence or divergence between legal systems is easily perceptible, i.e. that it can be seen in the face of the formal sources of law. For example, the applicable legislation of legal system A states that "title to the goods sold passes to the buyer upon the conclusion of a valid contract", whereas the applicable legislation in system B states that "title to the goods sold passes to the buyer upon delivery of the goods to the buyer". Divergence is explicit and open. Economic actors can be expected to behave accordingly. As a consequence, the literature considers that, through their conduct, economic actors will also influence the evolution of legal systems in order to reach an efficient outcome as regards the appropriate level of convergence or divergence. If needed, legislative action (ranging from mild coordination to outright unification) can also address explicit divergence.

This chapter takes a broader perspective on issues of convergence and divergence between legal systems.

First of all, it takes a more complex view of convergence by relaxing the assumption that language is unequivocal: the same words can mean different things to different people, what we will call "conceptual divergence". In the case of explicit divergence mentioned in the previous paragraph, divergence literally springs to the eye, and actually in a number of cases it reflects a deliberate choice to diverge.[1] In contrast, "conceptual divergence" often lurks below the surface and is neither immediately perceptible nor entirely deliberate.[2] In a case of explicit divergence, there is no doubt in the minds of the agents that there is divergence, whereas in the case of conceptual divergence, it can be that the agents believe that they are indeed using the same concept, since they label it with the same term, while they are in fact using diverging concepts. We will come back to this point during this chapter: sometimes the standard analysis must be adapted to deal with conceptual divergence, but very often it makes no difference whether the divergence is explicit or conceptual.

[1] Between different legal orders or within a single order which allows this practice under certain circumstances, like a federation.

[2] Prechal et al. 2008.

Secondly, this chapter also takes into account a broader range of dynamic tools to address convergence and divergence. As mentioned in the outset, the literature so far (perhaps reflecting a private law bent) tends to rely primarily on the choice of economic actors as regards the law governing, or applicable to, their legal relationship as a tool to reach an efficient outcome. Whilst this tool is undeniably available and effective, it is also limited: economic actors cannot influence the law at will and moreover legal issues are often peripheral in the choices made by economic actors. In this chapter, we want to suggest that there is also—or ought to be—a "marketplace of legal ideas", i.e. a market-like process where legal ideas are central and where members of the legal community are the main actors. Under certain conditions, this marketplace of ideas can provide more wide ranging and effective tools to deal with convergence and divergence.

Against this background, this chapter deals with a number of basic issues, explained hereunder. At the same time, it also illustrates a number of basic propositions arising from the economic analysis of the law.

First of all, this chapter examines why different legal systems would diverge (2.1). That part illustrates the basic proposition that the existing state of affairs is not fortuitous and will usually turn out to be in equilibrium. In other words, it is the outcome of various forces. The "spontaneous"[3] ordering of law (and of society) must at least be carefully studied on its merits, and if it is indeed in equilibrium, then it might be adequate. Note that in the context of this chapter, the existing state of affairs is the legal systems as they exist at a given moment, with whatever amount of divergence or convergence might be present. We are therefore not dealing with an issue of "unbridled" market forces versus "discipline" from the law, but rather with the higher level issue of variety amongst legal systems (each of which had to solve the first-level issue of whether and if so which law is appropriate to deal with various economic and social problems) and legal intervention to constrain that variety.

Secondly, this chapter touches upon methodology, i.e. what is divergence and how it can be detected (2.2). This part is not so much concerned with the economic analysis of the law, but rather with comparative law methodology. It illustrates a more general proposition arising from any multi-disciplinary ("Law +") approach to the law, namely that it is crucial that the law be seen in a broader context, i.e. including both the policy choices underlying it and its practical outcome.

Thirdly, this chapter explains under which conditions divergence should be seen as a problem (2.3). Finally, it explores possible solutions to the problem (2.4). The last two parts rest on another fundamental proposition from economics: almost every change involves a trade-off. In the words of Friedman, "there is no such thing as a free lunch". Jurists are notoriously weak here. We tend to focus on the

[3] Of course, there is no such point of reference as a "spontaneous" market economy at the scale and level of our large industrialsed societies, as economists would sometimes claim. Economics tend to take for granted a set of basic law which enables the market economy to work in the first place (usually the basic legal disciplines as they would be reflected in codes or the common law). "Spontaneous" should perhaps be better read as "bottom-up" in the context of this project.

Table 2.1 Costs and benefits of legal change

Complete decision matrix	Costs	Benefits
Current	C_{now}	B_{now}
Change	C_{after}	B_{after}

downsides (disadvantages, costs) of the current situation and the upsides (advantages, benefits) of the envisaged change when deciding whether to change (Table 2.1), often ignoring the upsides of the current situation and the downsides of the envisaged change.

Obviously, change should only be done if the benefits of change minus the costs thereof exceed the benefits of the current situation minus the costs thereof. In formal terms, change would be justified if and only if

$$B_{after} - C_{after} > B_{now} - C_{now}$$

and not merely because

$$B_{after} > C_{now}$$

The cost/benefit analysis just outlined extends to all sorts of costs and benefits,[4] not just to economic costs and economic benefits, which might be more easily quantifiable. Non-economic costs and benefits are equally important, and the mere fact that a choice also has non-economic implications—which is actually the rule more so than the exception—does not render a cost-benefit analysis superfluous, quite to the contrary.

2.1 Why Would Divergence Occur?

When browsing through the legal literature, one cannot escape the impression that jurists are slightly (at least) biased against divergence. Convergence, harmonisation and even stronger phenomena like unification are often perceived as positive developments in and of themselves. Even those who write in praise of divergence present it in such a fashion—calling upon irreducible cultural differences beyond apprehension[5]—that it seems to border on the irrational, a line of argument which ultimately feeds into the bias against divergence.

Without dismissing the cultural argument as a whole, it seems more satisfactory to investigate what is behind certain choices of legal rules.

Why would divergence occur at all? With the use of economic theory, divergence can be rationally explained with at least three lines of reasoning.

[4] The discussion on the goals of regulating is very wide. From the perspective of the economic analysis of law, see Kaplow and Shavell 2001.

[5] Legrand 1996, 2004, 245; Teubner 1998.

2.1.1 Divergence as a Rational but Not Deliberate Phenomenon

Under this line of reasoning, divergence can be explained rationally, but it does not necessarily result from a deliberate choice on the part of those concerned. Two different strands of economic theory can be brought to bear here.

2.1.1.1 Informational Imperfections

Firstly, divergence can be explained by *informational imperfections* (or asymmetries) as between various jurisdictions. The law progresses in great part as a result of outside pressure, which takes the form of new information about the world outside the law (e.g. a new case never seen before, technological developments, social evolution, etc.) that the law must then process. Legal systems evolve within different informational environments. The comparative scholar will often observe that certain areas of the law are more developed in certain jurisdictions as a result of specific historical occurrences.[6] Similarly, larger jurisdictions tend to run ahead of cutting-edge legal developments because, statistically, novel cases will tend to arise there first. Furthermore, there will rarely be an obvious "perfect solution" to a given legal problem that can immediately be singled out. Therefore, much like in economic activity, when it comes to the development of the law, decisions taken under asymmetric (and imperfect) information may lead different actors onto different paths.

2.1.1.2 Network Effects

Secondly, network economics can also help to explain divergence. The starting point is the notion of *network effects*[7] (also presented as demand-side scale effects): for certain products, the value of the product to the individual user increases as the number of users increases. The classical example is telecommunications: in the absence of interconnection, the value of a subscription to a network with 1000 subscribers is much less than that of a subscription to an otherwise identical service provided over a network with 1 million subscribers. In telecommunications, network effects are strong, but the theory can also be applied more loosely to other phenomena, including fashion and language. It can be ventured that the "market" for legal ideas is also subject to network effects[8]: the

[6] For instance the doctrine of *Wegfall der Geschäftsgrundlage* in Germany as a result of the Great Depression.

[7] Shy 2001; Lemley and McGowan 1998; Liebowitz and Margolis 1994; Katz and Shapiro 1985.

[8] Anthony Ogus argued, for instance that "the acknowledged characteristics of 'legal culture', a combination of language, conceptual structure and procedures, constitute a network which, because of the commonality of usage, reduces the costs of interactive behaviour". See Ogus 2002.

more members of the legal epistemic community subscribe to a given opinion, the more attractive it becomes, sometimes irrespective of its inherent validity.[9] The effect is not as strong as in telecommunications, of course, since some jurists—fortunately so in many circumstances—can still decide not to be swayed by the mere fact that the majority holds a certain view, and try to reverse network effects by convincing their peers to espouse another view.

More specifically, two specific properties associated with network effects can explain divergence. The first one is called *tipping*[10]: a small movement in demand can trigger a snowball effect.[11] In the case of legal ideas, a single leading decision or a leading article at a given point in time can quickly lead to the emergence of a majority view. The second one is called *path dependency*: once network effects have worked to the advantage of one firm, it becomes very difficult to "change the course of history".[12] In the case of legal ideas,[13] here as well once certain choices have been made and are deeply imbedded in the shared knowledge of the legal community, they are difficult to reverse. Path dependency can show itself also in a slightly different manner: when faced with a new kind of problem that needs an immediate remedy, legal systems tend to choose solutions that are "familiar" to them; hence, different systems easily end up choosing different solutions.[14]

Accordingly, legal systems can evidence divergence as a result of discrete choices made differently in the past. Indeed on many issues (for instance, the relationship between contract and tort law), if one goes sufficiently far back in time, the same or very similar debates can be found in each system until a choice was made. Network effects (including tipping and path dependency) amplify the consequences of these choices. Sometimes it sufficed that a single leading author or court chose option A in one system and B in the other for these two systems to evidence "irreconcilable divergences" later on, after network effects have done their work. The choices made at that time might have been the best possible at that particular time in that particular legal system. Later on, however, this implies neither that such choices are still the best ones, nor that it pays to reverse them, without assessing the costs brought about by such change.

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[9] Hence the practice of pointing to the majority and minority views when there is a controversy.

[10] Katz and Shapiro 1994.

[11] This lies at the heart of the commercial strategy of most firms active in sectors affected by network effects.

[12] The classical example (David 1985) is the QWERTY keyboard that once established itself as a standard, could not be replaced by a more efficient alternative: the users had been trained in the QWERTY system and could not easily switch all together to the other system. See Brian 1989; Liebowitz and Margolis 1999.

[13] For earlier applications of these economic concepts to developments in legal rules, see Hataway 2001, Gillette 1988, Roe 1995. For a study of the effects of path dependency in corporate law, see Heine and Kerber 2002.

[14] Mattei 2001.

2.1.2 Divergence as a Rational, Deliberate and Benign Phenomenon

The explanations above assume that divergence does not result from deliberate action. The more classical and traditional explanation for divergence, however, involves deliberate choices made by the members of a community as regards their legal system, in other words *local preferences*. Because it is intuitive and well-researched, this explanation is only briefly summarised here, but this should not take away any of its power.

In essence, the legal system reflects the consensus of the community (or at least of the ruling class) on the balance to be reached among competing policy interests. Some trade-offs are involved, and they are not always resolved in the same manner from one community to the other. For instance, in a given community, more emphasis will be put on ensuring that injured persons receive compensation, while in another one, the need not to overburden economic actors with liability claims will prevail. The laws of these respective communities will then most likely diverge.

2.1.3 Divergence as a Rational, Deliberate but Less Benign Phenomenon

A third line of argument builds on the previous one, but adds a twist. Whereas the previous account assumes deliberate decisions taken in good faith and with a view to the public interest, *public choice* theory[15] would consider the production of law as a market responding to general economic principles, for instance demand and supply models, pricing theory and so on. Accordingly, the production of law will favour the interests who are best able to articulate their demand and offer a valuable counterpart to the producer of law. Public choice theory can be used to explain lawmaking in complex settings involving interest groups, lobbying and other features of modern-day democracies.

Public choice theory can account for divergence as a rational and deliberate phenomenon. However, the outcome in each jurisdiction might be affected by market imperfections, including the presence of market power on the part of certain interest groups vying for the production of law, or information asymmetries (the interest groups know more than the lawmakers and choose to disclose only that information which serves their interest). The outcome is thus not necessarily in line with the general public interest in that jurisdiction. It could be ventured that the presence in certain jurisdictions of very developed systems of admissibility control in public law claims, for instance, reflects success by the administration in

[15] Stigler 1971; Becker 1983; Mueller 1989; Farber and Frickey 1991.

influencing the production of law (here administrative procedure) rather than the greater general good.

One of the most powerful interest groups is the legal profession: it can be argued that it represents, in fact, the main driving force for maintaining divergences, especially under the pretence of "legal culture". The conceptual device of "legal culture" allows the legal profession to keep the tensions and debates alluded to above within its ranks, and hide behind a monolithic façade, which moreover is made opaque to outsiders by being presented as a "culture". The legal profession can then protect and perpetuate its "monopoly" on its legal "culture".[16] This also helps explaining the lawyers' asymmetric attitude towards "importing" foreign legal rules, as compared to "exporting" his or her own legal solutions.[17]

2.1.4 Concluding Note

Three different lines of argument were explored, all of which would explain why the law could be different from one place to the other, and would do so in a more convincing fashion than endless invocations of irreducible differences among legal cultures: it is inaccurate to consider that the state of a legal system at a given moment is the single and unavoidable outcome of a monolithic legal culture pertaining to that system. Rather, each legal system is rife with tensions and debates (at least at an academic level). Legal systems are open to many potential directions, and their state at a given moment is simply the outcome of certain policy choices—deliberate or not—that are neither pre-determined nor irreversible over time.

It will be noted that these lines of argument do not require a specific level of comparison. They can explain differences between legal systems, of course, but they could also explain differences within a single legal system. Their point of reference is not a geographical territory or a hierarchical entity (legal system), but rather a legal epistemic community.

More importantly, these three lines of argument can explain conceptual divergence equally well as explicit divergence. It makes no difference whether a common term is used or not.

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[16] Ogus 1999, 2002; Hadfield 2000.

[17] To be sure, if it can be argued that national lawyers prefer divergence for the sake of their own local interest, the same way and on the basis of the same public choice arguments, it can also be observed that comparatist lawyers represent another—albeit far less powerful—pressure group with the opposite interest in favouring harmonisation.

2.2 When is There Divergence?

In the light of the foregoing, there appears to be ample reason for divergence (explicit or conceptual) to appear. A foray into methodology is then necessary, to ensure that divergence will only be found where it really exists. First of all, a specific remark is made concerning conceptual divergence specifically and the "keyword trap" (2.2.1), before going more generally into the methodology used to assess divergence (2.2.2).

2.2.1 The Keyword Trap

In the case of conceptual divergence, there could be a methodological trap at work, having to do with the focus on keywords (including short key phrases of a few words). Jurists like to work with keywords, since it simplifies their task considerably by enabling them to put a shorthand label on subsets of the law in a given legal system. A whole piece of legal architecture is subsumed in one keyword: for instance, the set of rules and concepts concerning cases where a decision maker has some degree of freedom in reaching an outcome becomes "discretion". The meaning of "discretion" as a keyword can only be found by retrieving the subset of the law which it is meant to represent. Accordingly, that meaning will be linked with the rest of the legal system in question (and the broader context within which this system operates).

Unfortunately, keywords tend to take a life of their own. They then cease to be treated as shorthand labels whose meaning is to be found by looking at the underlying subset of law which the keyword is meant to represent. Instead, jurists will then believe that the keyword has an inherent meaning in and of itself, i.e. that the meaning of the keyword resides in the keyword itself.[18]

Under those circumstances, there is a fair chance that misunderstandings can occur. Two persons from different legal systems use the same keyword—or better even, what appears to be the same keyword in different linguistic versions—and expect it to mean one and the same thing, since it is assumed that the meaning is in the keyword. Yet they fail to realise that, on a proper view where the meaning is rather found by referring to the subset which the keyword represents, the same keyword can have different meanings. Conceptual divergence lurks.

It is, therefore, crucial that jurists beware of the keyword trap. The mere fact that the same keyword, the same shorthand label, is found in two different systems (or appears to be found once translated), does not imply convergence. To use the example given above, "discretion" as a keyword is found in most administrative law systems. It does not take extensive research to notice that it has significantly different meanings from one system to the other.

[18] See on this point Hart 1954; Ross 1957.

On a proper view, one must consider keywords as shorthand labels and look beyond them to the subset of the legal system which they are meant to represent. Only then can a conclusion be reached as to whether there is convergence or not. Presumably, the same keyword used in two different legal systems will often actually represent a different subset respectively in each system. Does that then necessarily imply conceptual divergence?

2.2.2 A Functionalist Methodology to Ascertain Divergence

At this juncture, it is interesting to digress briefly into a comparison with economics. Jurists work only with language, which suffers from an inherent degree of indeterminacy. Economists, on the other hand, rely on more formal tools—namely mathematical models, empirical measurements, etc.—in addition to language. Nevertheless, language remains the prime means of communication between economists, and like jurists, economists use keywords to simplify communications. When two economists differ in opinion when discussing with each other (using language), they go back to the underlying theories and models (and formal mathematical language). They check their conclusions against these theories and models, verifying that assumptions are satisfied and that the theories and models being used are really applicable to the situation at hand. In the end, perceived divergences at the so-called "intuitive" level, using language and keywords, can be tested against theories and models whose formalism enables a conclusion to be reached. Either the divergence is removed, or it is attributed to gaps or open issues in economics. These can then be addressed as such.

Coming back to law, there is no set of formal tools which could be used to reach a conclusion on a perceived divergence across legal systems. Nevertheless, jurists have developed comparative law methods to test for divergence (and, in the case of conceptual divergence, to avoid the keyword trap).

Sometimes, comparative law would take a point from within the law (typically a keyword) as a basis for comparison. Each legal system will be entered into from that point. Typically, that point will be put in context with its immediate surroundings and even with the whole legal system.[19] Very often, a finding of divergence will be returned. The conclusion will tend to be that (even if there is an apparent similarity in keywords), the underlying legal concepts and the legal reasoning differ. An even more radical approach would go further into "legal cultures" as a source for irreducible divergences. Very often, the civil law/common law divide will bear the blame for this (when the sample of legal systems under study allows for it).

[19] In the case of conceptual divergence, this amounts to looking beyond the keyword and retrieving the subset which this keyword represents.

Yet ascertaining differences in legal concepts, reasoning and "culture" should not be enough to warrant a finding of divergence. After all, such an inquiry offers no objective test to support its conclusion. A more solid methodology is needed. Such a methodology was developed in comparative law, namely functionalism.[20] Even if functionalism suffers from serious limitations,[21] for the purposes of the current discussion they are not material. Functionalism involves looking beyond the "rules and principles" layer of legal concepts and reasoning to incorporate also the "lower layer" of practical outcomes. Instead of beginning the inquiry via an endogenous point in the law, the starting point is rather found outside the law, by way of a practical problem, for instance. That practical problem is common to all legal systems under study (e.g. "two cars collide at an intersection"). The aim of the inquiry is then to ascertain whether legal systems, seen broadly with their respective three layers, produce the same or a similar outcome. Whether the legal concepts and reasoning used in doing so are similar should not be of prime relevance. Only when the outcomes differ is there a sufficient basis for a finding of divergence.[22]

Such a functionalist approach enables an objective test. Indeed the starting point is not an unreliable endogenous point within the law, but rather a constant exogenous point (a practical problem arising in each legal system). Furthermore, the conclusion is reached on the basis of outcomes, which are usually easier to quantify and compare (it is either one or the other outcome) than rules and concepts. In the end, if a difference in outcome is measured for the same starting point, then one cannot escape the conclusion that the legal systems do diverge. If they originally appeared to converge because of common or similar keywords, then we have a proven case of conceptual divergence: despite common keywords, the legal systems produce different outcomes when examined from a single common starting point.

It is true that functionalism covers a number of different and sometimes conflicting concepts, as was pointed out by Michaels.[23] Yet what is put forward here is a methodology, without any teleological element: in this sense, it falls under what Michaels describes as "equivalence functionalism", namely the idea that "similar functional needs can be fulfilled by different institutions".[24] Only through a functionalist method, which seeks to ascertain how various legal systems deal with a similar functional need, can the scope of convergence or divergence be properly assessed: if legal systems reach different outcomes (as mentioned above, often because of different policy choices), then there is truly divergence. If they do not

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[20] The functionalist method is discussed in greater detail *infra*, in Chap. 10 of this book, Sect. 10.3.

[21] Ibid., Sect. 10.3.2.

[22] As is discussed further in Chap. 10 of this book, Sect. 10.3.2.1., differences in outcome are often to be explained by policy differences, and functionalist comparative law has tended not to pay enough attention to the policies and principles underlying the law.

[23] Michaels 2006, 339.

[24] Ibid., 357.

reach different outcomes, then the systems are functionally equivalent. Differences in the path to that outcome matter of course, but they do not result in a significant divergence. Beyond enabling a more accurate assessment of convergence or divergence, the functionalist method advocated here cannot provide guidance at a more normative level, as regards what should be done about the divergence.[25] This is a weakness of functionalism, which is dealt with elsewhere in this book.[26]

Some critics deny the very possibility of defining an exogenous starting point for the comparison. According to that view, problems do not exist in the abstract. Either functionalism is circular, in that its exogenous point is not truly exogenous but actually a construct of the same community of meaning which administers a legal system to deal with that problem.[27] On that account, it is impossible to find a starting point which would be common to different communities. Alternatively, functionalism is value-laden and simply substitutes an exogenous rationality to the one which would be found within the system[28]: it is then impossible to deliver on the promise of a comparison which would allow each system to "express itself" and would separate significant divergence from functional equivalence.

On the one hand, this criticism stands as a warning to, and a challenge for, the researcher. The functionalist method must be used cautiously, and great care must be taken to ensure that the exogenous starting point is stripped as bare as possible from any influence from the legal systems to be studied. Yet on the other hand, when taken to its logical extreme, this criticism would deny functionalism and ultimately comparative law altogether.

If the methodology just described is used, we venture that the number of cases of divergence—explicit or conceptual—is likely to be lower than might appear at first sight.

2.3 What is Wrong with Divergence?

In the previous two parts, we have seen that divergence can be explained rationally, and that, on a proper methodological approach, it is probably less frequent than suspected.

Once there is a finding of divergence, the discussion is naturally drawn to the more normative question of whether it is undesirable.

In the first part of this chapter, three lines of argument were set out to explain why divergence can occur. It can be noted that of the three, only the "local

[25] A point which Michaels, Ibid., who also considers equivalence functionalism as the most robust version of functionalism, also underlines at 373 and ff.

[26] *Infra,* Chap. 10.

[27] This would be in line with the autopoeitic theory put forward by Teubner 1993 on the basis of the work of N. Luhmann.

[28] See for instance the criticism directed at Marxist functionalism by Castoriadis 1975, 159 and ff.

preference" argument—the second one—provides a stable (and strong) explanation for divergence. Still, local preferences can evolve. The first line of argument (rational but not deliberate) implies that divergence can disappear over time, if information imperfections are removed. Network effects can work in favour of one or another outcome and would not prevent divergence from disappearing.[29] The third line of argument (rational, deliberate but not benign) implies that divergence results in part from different power configurations which are not necessarily stable.

Even then, the mere fact that divergence is not stable over time does not mean that it is undesirable. Beyond purely legal arguments against divergence (2.3.1), which are not conclusive, there are some economic reasons why divergence should be addressed (2.3.2).

2.3.1 Convergence as a Value in and of Itself

Here, we jurists sometimes fall into the classical trap of thinking that convergence (and ultimately unity) in the law is a value in and of itself.

First of all, convergence has enormous intellectual appeal, but that of course is not a sufficient justification.

Secondly, jurists sometimes put forward rights-based arguments for convergence: it would be everyone's right to have similar situations be treated in the same way across legal systems or communities. Given the arguments made above to explain why there might be divergence, we do not think that a mere assertion of rights is sufficient to trump the cards.[30] In the same line of reasoning, it is equally somewhat hasty to advance the political argument that the call for a uniform law is dictated by the need to support a common European identity.[31]

A third but related argument is very present in EU law, namely the need to ensure the effectiveness of the law (here, EU law). This argument pertains more to conceptual divergence within a larger system such as EU law: it would be essential to ensure that EU law is interpreted, applied and enforced the same way

[29] In fact, in network markets, network effects can be overcome and a new solution can replace the one previously in place, not necessarily by means of a top–down intervention, but also through bottom-up provision of incentives to transition.

[30] Bhagwati 1996, 9 and ff., a survey of the arguments against diversity is presented, by highlighting (1) the philosophical arguments (basic human rights beyond national borders, distributive justice and fairness), (2) the structural arguments (globalisation), (3) the economic arguments (domestic decisions impairing international trade; distributive concerns and predation) and (4) the political arguments (protectionism and the need for a common set of standards within an integrated union).

[31] A discussion of this point with respect to drafting a European Civil Code can be found in Grundmann and Stuyck 2002.

throughout the EU, lest it lose its effectiveness. After all, the ECJ has construed the Treaties in a very purposive fashion, which naturally leads to emphasising effectiveness.

At the same time, throughout its case law, the ECJ is also willing to accept a degree of divergence in the laws of the Member States. For instance, it might appear that the case law on the internal market is naturally favourable to convergence, given the ease with which the ECJ will conclude, often without empirical evidence, that a specific provision in a given Member State constitutes a barrier to the free movement of goods, workers, services, capital or the freedom of establishment of firms and self-employed persons. At the same time, the "rule of reason" developed to save restrictions on the free movement of goods in *Cassis de Dijon*[32] and subsequently extended to other freedoms enables vast areas of law to remain divergent across Member States. Similarly, in the line of case-law including *Keck*[33] and *Gourmet International,*[34] the ECJ retreats on its earlier statements and leaves potentially divergent Member State laws outside of the realm of Article 34 TFEU.

In addition, the judgment in the *Tobacco Advertising* case[35] provides a useful reminder that convergence is not a value in and of itself. Writing about the availability of Article 114 TFEU as a legal basis, the Court stated that[36]:

> [i]f a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article [114] as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory.

In *Tobacco Advertising*, the ECJ laid down the bases for a more economic approach to the use of Article 114 TFEU as a legal basis. Indeed from an economic perspective, the mere fact of divergence is not undesirable.

In order to come to a normative conclusion, the assessment must look more broadly at the costs and benefits of divergence (and in a later step, discussed below under part IV, at the costs and benefits of removing divergence).[37]

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[32] ECJ, 20 February 1979, Case 120/78, *Rewe-Zentral* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

[33] ECJ, 24 November 1993, Cases C-267/91 and C-268/91, *Keck* [1993] ECR I-6097.

[34] ECJ, 8 March 2001, Case C-405/98, *Konsumentombudsmannen (KO)* v. *Gourmet International Products AB (GIP)* [2001] ECR I-1795.

[35] ECJ, 5 October 2000, Case C-376/98, *Germany* v. *Parliament* [2000] ECR I-8419. Following a series of cases where that judgment seemed to have been weakened, the ECJ (Grand Chamber) has reaffirmed its approach on 12 December 2006, Case C-380/03, *Germany* v. *Parliament* [2006] ECR I-11573.

[36] Ibid., at Rec. 84.

[37] An obvious point for economists. See, for example, in the context of discussions concerning harmonisation: Sun and Pelkmans 1995.

2.3.2 The Costs Associated with Divergence

2.3.2.1 Starting Point: Benefits, but No Costs

The benefits of divergence flow from the lines of argumentation put forward earlier. They are strongest when divergence is explained by local preferences. Each legal system is then better attuned to its respective reality: when they reflect differences in preferences of different communities, divergences are in principle preferable to a unified solution since the latter will not, by definition, match every community's needs equally well.[38] Since variety increases utility, social welfare is enhanced.

Moreover, since the most suitable solution is hardly, if ever, known in advance, the existence of different solutions can enable a learning process toward the discovery of the most appropriate one.[39]

In principle, divergence as such does not create costs. To be sure, in presence of a divergence among legal systems, acknowledging it and being aware of alternative solutions can help highlighting the possible costs associated with a certain legal choice within a given legal system. However, in such cases, costs are not due to divergence but are caused by unsatisfactory choices made in the past. This is especially true when divergence is explained not by local preferences but rather by non-deliberate factors (information asymmetries, network effects) or via public choice theory (pressure of interest groups).[40] In such cases, the existence of divergence does not constitute a ground for harmonisation, but may prompt a domestic revision of one's own inefficient legal choices and eventually lead to a change.

2.3.2.2 The More Realistic Case: Benefits but Also Costs

Positive costs are usually generated, however, when diverging systems are actually communicating with each other. Communication can take place through various means, be it trade in goods, movement of persons and so on. Certainly this kind of communication can be considered as an increasingly recurrent feature when markets are integrating.

More specifically, when diverging systems communicate, the following costs might arise:

1. *Externalities*: Normally, the state of the law should reflect the choices made in a given jurisdiction, in the light of the various tradeoffs involved. It is possible, however, that the choices made in a jurisdiction impose costs which are borne

[38] Save for what is discussed in the subsequent section.

[39] Hayek 1978, 179.

[40] See *supra*, Sect. 2.1.

by another jurisdiction, in which case the choice of the first jurisdiction is not based on a complete picture of costs and benefits (tradeoffs) involved. A typical example is environmental legislation in the presence of cross-border effects (water and air flows across boundaries). In the presence of externalities, there is no reason to respect divergence arising from local preferences (e.g. minimal pollution controls upstream), since they can result in sub-optimal results overall (e.g. unwanted pollution downstream). A similar problem may arise if a state has a lax competition policy that allows the formation of cartels which then negatively affect consumers in other jurisdictions to the benefit of domestic firms.

2. *Transaction costs*: When there is trade between jurisdictions, divergence creates transaction costs. Indeed participants in trade—sellers as well as buyers—must acquire knowledge about the legal situation in other jurisdictions in order to engage into trade efficiently (otherwise, they incur risks). They must incur the costs necessary to draft contracts according to each legal system in which they are doing business and they must incur the costs of possible litigation under multiple legal regimes. The risks associated with unexpected changes in each of the legal systems concerned by the transaction also represent costs for cross-border economic actors and so on.[41]
   On the seller side, for example, this means that products, terms and conditions, etc., must be adapted to meet the legal requirements of a number of jurisdictions, thereby increasing the cost of production and consequently the price. On the buyer side, not only is the price higher due to the just mentioned extra costs, but also the cost of buying can be increased; more likely, however (especially with consumers), buyers would refrain from buying outside of their jurisdiction. The same applies to business transactions other than sale and even to personal endeavours (employment, family matters). Besides these "static" effects, also dynamic ones can be identified on a macroeconomic level, namely the reduction in the international trade volume, in the level of investment, consumption and income and ultimately in the economic growth.[42]
   Transaction costs offer a very powerful argument against divergence. With respect to consumers and persons in general, transaction cost analysis can reinforce rights-based arguments: the right of a person to be treated the same way irrespective of the legal system in question can be justified because it is deemed unacceptable that persons should bear the transaction costs associated with divergent legal systems.

Externalities and transaction costs are the standard arguments used to support the conclusion that a given instance of divergence is undesirable. These arguments apply equally to conceptual or explicit divergence. Presumably, transaction costs are higher in the case of conceptual divergence, since the precise scope of the divergence is harder to ascertain.

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[41] On the costs of diversity, see Ribstein and Kobayashi 1996, 138 and ff.

[42] More extensively on this, see Wagner 2005.

In addition, a third type of cost could be associated with conceptual divergence only, namely costs arising from *information imperfections*. Indeed conceptual divergence differs from explicit divergence in that, on the surface, the same term is used, but with diverging concepts. Ideally, if acquiring information was costless, individuals and firms would dedicate sufficient resources to ascertain the legal situation and they would come across conceptual divergences as well. Since, unfortunately, obtaining information is costly, parties will invest resources in such activity only until its marginal cost equals the marginal benefit.[43] There is therefore a risk that they will not look beyond the surface and will then take decisions based on the assumption that the same term is conceptualised in the same way in every jurisdiction, only later to find out that their assumption was wrong (at their cost, but perhaps also to their benefit). They could thus be misled into taking decisions which they would not have taken with complete information on the status of the law. This can lead to inefficiencies, in the form of unsuspected losses or extra costs to undo mistakes. In the end, the uncertainty and the risk of hidden conceptual divergences arising only after the transaction has been entered into, if too extensive, could result in economic actors refraining from cross-border trade.

In sum, divergence is not undesirable as such. Yet in many cases it engenders significant costs, such as externalities, transaction costs and (in the case of conceptual divergence) costs arising from information imperfections. These costs can exceed the benefits from divergence and thus justify the conclusion that divergence should be addressed. However, the inquiry does not end here. It must still be ascertained whether change would lead to an improvement.

2.4 What can be Done About Divergence?

A number of options are available to deal with a situation in which divergence would be undesirable.

2.4.1 Do Nothing and Leave the Market to Deal with it

At the outset, it must be remembered that markets typically provide "private" solutions to deal with certain costs associated with diverging legal systems. Such solutions do not in fact eliminate divergences but constitute a way to factor them into the choices of economic actors.

[43] This is referred to as rational ignorance: I will spend on information only to the point when the last bit of information I have acquired allows me to reap net additional benefits.

First of all, if parties can influence the law through contract, they will likely do so. In commercial contracts, for one, parties can either opt for one or the other legal system (or a third one) or define the law *inter partes* themselves.

Secondly, the legal profession can assist market players in reducing the costs of divergence by providing accurate advice, thereby minimising transaction costs and the costs of information imperfections linked with conceptual divergence. In fact, through their work, legal professionals contribute to identifying cases of conceptual divergence. Over time, once these cases become common knowledge, the information imperfections are eliminated and conceptual divergence becomes equivalent to explicit divergence in economic terms.

Thirdly, in commercial but also in consumer relationships, the insurance market can offer a possibility to translate divergence into quantitative terms, i.e. an insurance premium. In the case of liability laws, in particular, insurers have superior knowledge of the state of the law in each market and can provide a lower cost alternative to endless inquiries, product modifications and so on. If a firm wants to keep relatively uniform prices, it can then equalise the cost of insurance over all of its customers.

Fourthly, large and multinational companies are generally familiar with dealing with multiple legal systems and have developed the necessary structures for cost-minimising information gathering, thanks also to economies of scale. In fact, they might find worthwhile to develop international standards for contracts and products; those standards could bring about some sort of "harmonisation".[44] In such cases, the interest of Member States (or of the European Commission) would rather lie in making sure that such standard-setting activities do not conceal competition law infringements.

These solutions can only work in certain cases: for instance, divergences in administrative procedure cannot be compensated via contract or insurance. Moreover, for SMEs[45] and consumers, such solutions might be less affordable or practicable. In situations where they are available, however, these market-based solutions can be attractive, especially if there are no externalities involved and the costs associated with divergence (transaction costs, information imperfections as the case may be) are limited in comparison with the value of the overall activity.

Market-based solutions apply equally to explicit and conceptual divergence. It can be added, however, that when parties themselves draft in the contract the law applicable to their transaction, they must be aware of the existence of a conceptual divergence and explicitly address the problem; otherwise, the contract will become itself the source of the hidden divergence, instead of removing it.

[44] In this sense, see Wagner 2005, and the references contained therein.

[45] It has been noted, however, that in the debate launched by the Commission on the harmonisation of contract law at the European level, some associations of SMEs have expressed their opposition to full harmonisation.

2.4.2 Top-Down Harmonisation

Jurists tend to be less sanguine than economists about divergence between legal systems, and they readily see it as a problem. What is more, they often propose to remedy that problem with a fairly drastic solution, namely harmonisation or even unification of the law. In such a process, the respective laws of each legal system, on the area when divergence is deemed problematic, are replaced by a single law common to all systems.

Looking back at the costs associated with divergence, as they were identified above, the case for harmonisation is most compelling when divergence leads to externalities. In such cases, given that market players and national legislators are unable to decide on the basis of a complete picture of costs and benefits, it is unlikely that an efficient outcome will be reached. Indeed, externalities are a typical form of market failure which requires intervention by public authorities.

The benefits of (successful) harmonisation, including uniform implementation, are that the costs of divergence are removed:

- externalities are addressed and removed;
- transaction costs are eliminated, since cross-border activities will be subject to the same set of rules in all the relevant legal systems;
- information imperfections disappear, since parties can rely on the common legal framework thus established.

As a consequence, cross-border activity would be boosted and so would also investment, consumption and growth.

Furthermore, there might be occasions where economies of scale are possible, thus justifying the need of a uniform solution. This might be the case of problems of complex technical nature that are more cheaply dealt with in a one-stop-shop setting.

As mentioned at the outset, however, jurists tend to ignore the benefits of the current situation and the costs associated with change. Even if divergence leads to costs, it is conceivable that harmonisation would generate even higher costs.[46]

2.4.2.1 A Superficial Cost-Benefit Analysis of Harmonisation

At a superficial level, harmonisation removes the benefits associated with divergence, first and foremost that the law is better attuned to local preferences. Presumably, if divergence was found to be a problem, it is because the costs flowing from divergence exceed the benefits it provides. Therefore, if harmonisation can remove these costs, it would still produce an overall benefit even if the benefits of divergence were removed by the same token.

[46] There is a shared presumption in the literature that full harmonisation generally brings about higher costs than those caused by maintaining diversity.

On that count, harmonisation will always be beneficial and indeed jurists would be right to focus solely on the costs of the current situation and the benefits of change.

2.4.2.2 A More Complete Cost-Benefit Analysis

The above analysis is incomplete on two accounts: harmonisation itself generates costs (as opposed to the mere removal of the benefits of the current situation), and the benefits of harmonisation must be discounted to reflect uncertainty as to realisation.

Harmonisation generates costs of its own, which must also be taken into account. First of all, the production of the harmonised legislation is costly, involving as it does extensive background studies and discussions. Costs also arise because of the need to "develop… new bureaucracies or demolish… old structures".[47] Costs are also incurred in order to adapt to the new rules, in terms of information spreading and re-training.

Secondly, and more fundamentally, it is a rare occurrence where the area to be harmonised is relatively autonomous within the law as a whole. More frequently, this area interacts with the rest of the law. For instance, product liability or State liability for breaches of EU law are part of the law of liability and more generally of private and/or public law. Ahead of harmonisation, each legal system is in an equilibrium of sorts: the various areas of the law are supposedly seamlessly integrated into the legal system. Top-down harmonisation, coming from the outside, implies a break within the legal system, i.e. the creation of a specific "harmonized area" which co-exists with other remaining areas. In the ideal situation, implementing (incorporating) the harmonised law should be done seamlessly, without distorting the legal system. For instance, under EU law, the very mechanism of the directive is meant to allow Member States some room to adapt the harmonised law to their legal system and thereby minimise distortions. The ideal being an ideal, more often than not harmonisation will generate distortions within the legal system or miss its goal because harmonisation is undone at the implementation stage (as mentioned above), or even both.

When faced with such distortions as a result of harmonisation, legal systems can react in two ways. Firstly, via a kind of ripple effect, the changes introduced in the harmonised area can induce further changes outside of the harmonised area in order to restore the system to a seamless equilibrium. There are numerous examples of Member States using the implementation of a directive as an opportunity to change a broader area of their law (often in a spirit of "cleaning up"). Such a ripple effect generates costs, but they are limited in time. Secondly, the legal system can treat the harmonised area as a form of foreign body (*Fremdkörper*) and seek to isolate it. For an example, see the reaction of German

[47] See Wagner 2005.

courts and writers to the introduction of State liability for breaches of EU law via the *Francovich* and *Brasserie du Pêcheur* judgments. The ensuing tension within the legal system generates costs on a lasting basis.

Moreover, the need to legislate in many languages—leading to often lamented inaccuracies, even within the same language[48]—may facilitate the reproduction of the divergence in the implementation phase.

The above analysis applies to explicit as well as conceptual divergences. However, given the complexity of the law, harmonisation exercises sometimes end up replacing explicit divergence with conceptual divergence or merely pushing conceptual divergence deeper, so that harmonisation does not deliver all the expected benefits. There is an illusion of convergence in terminology and presumably a fair amount of conceptual overlap, but somewhere at the conceptual level undesirable divergence remains. If this happens as the result of an harmonisation effort aiming at removing externalities and costs of an existing divergence, then it will instead merely replace such costs with new ones, perhaps adding those peculiar to conceptual divergences.

In addition to the above costs of harmonisation, by implication the benefits of harmonisation must be discounted with a higher degree of uncertainty as to the results. By the same token, it is more likely that harmonisation will induce significant distortions and thus costs.

Accordingly, top-down harmonisation efforts must be analysed as a trade-off between the benefits of harmonisation and the costs associated with inducing distortions within legal systems.

2.4.3 Bottom-Up Alternatives: "Legal Emulation" and the Marketplace of Legal Ideas

Between doing nothing and introducing top-down harmonisation, there is a third option, namely relying on bottom-up processes to bring about convergence when needed.

If legal systems diverge but they do communicate with each other through trade and other forms of exchange, they will also communicate at the intellectual level, in the proverbial marketplace of ideas. If the various legal epistemic communities are introduced to each other's ideas, one could expect that they will compare them. Over time, they might adopt the policies, concepts, reasoning or outcomes of another community if they are convinced that it is preferable. A certain amount of convergence will then result.

Of course, if divergence echoes local preferences, one could object that local law will remain in place even after the comparison. However, in many cases, the need to reduce transaction costs and improve trade will act as a counterweight and

[48] See, for example, Pozzo 2003.

will provide an incentive to move away from a law based strictly on local preferences.[49]

Law and economics scholars have tried to modelise this phenomenon, giving rise to the theory of regulatory competition.[50] Regulatory competition is discussed in greater detail in Chap. 10, but a few general remarks can be made here.

Regulatory competition makes a parallel between product markets and law making: they consider legal rules as a sort of "product" and depict law makers in the different legal systems[51] as the suppliers of such product. On a given topic,[52] different law-makers compete with each other for the provision of the legal rules that are more attractive to their "customers", intended as individuals as well as firms. Those "customers", in turn, respond by relocating in the jurisdiction whose set of rules best suits their preferences. This way, law makers are pushed to experiment and try to find out the best legal rule. This process of trial and error can lead to a certain amount of convergence, as soon as "good" rules are being discovered and can be replicated. In such case, convergence will not have been imposed by any superior authority but chosen bottom-up by the legal systems on the basis of their own costs and benefits analysis of changing an existing rule. This way, some of the costs of top-down harmonisation are avoided.

The theory of regulatory competition has been used extensively to explain developments in American corporate law,[53] as one of the topical legal fields where legislators compete to attract businesses to incorporate within the boundaries of their jurisdiction.

In practice, regulatory competition suffers from the restrictiveness of its assumptions.

Actually, as mentioned at the beginning of this section, the form of bottom-up solution suggested in this chapter is broader than "regulatory competition". It extends also to a "marketplace of legal ideas" where law is central and members of the legal community are looking for the best solution to the issues they are confronted with. It broadens the idea of regulatory competition to a more general phenomenon of legal emulation,[54] by touching directly the problem of circulation of legal ideas not among the economic actors but among the legal actors and the regulators. With legal emulation, legal rules do not evolve as a sort of "side effect" of the choices of economic actors and citizens, but they are compared and chosen directly by legal actors.

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[49] It has been remarked, however, that some areas of law might be deeply connected with local preferences and therefore less subject to "regulatory emulation" and that this might in particular be the case of "interventionist" law, as opposed to "facilitative" law. See Ogus 2002.

[50] van den Bergh 2000; Esty and Geradin 2001; Ogus 1999.

[51] Or at different levels in a single legal system with a federal structure.

[52] This is generally the case for legislators that, each within their geographical borders, have the power to regulate the same kind of situations.

[53] Romano 1985.

[54] Legal emulation is developed in greater detail *infra,* Chap. 10, Sect. 10.4.

Legal emulation can help explaining the move towards convergence in the field of competition law: Member States of the EU have very similar competition laws today but it has not always been so. This convergence was not the effect of an harmonisation effort[55] and perhaps the previous regimes were possibly better attuned to local preferences; yet the benefits of convergence in terms of reduction of transaction costs (including administrative costs) have played an important role in the drive towards change.

2.5 Conclusion

By taking the consequences of what has been said in the previous sections, we can attempt to draw some conclusions.

Bearing in mind that the mere existence of a divergence is not a problem in itself, it is worthwhile noting that none of the alternatives described above seems to be the panacea for all forms of "problematic" divergences.

If the divergence problem is, in fact one of transboundary externalities, then, as it has been highlighted, non-coordinated actions might result in failures. In such cases, therefore, both explicit and conceptual divergence is probably best cured by harmonisation. This does not necessarily imply that a uniform substantive rule be imposed upon for all the involved jurisdictions. As mentioned, there are various degrees of inter-jurisdictional cooperation that can be established, relative to the problem at hand and to the jurisdictions involved. Thus, harmonisation could also take the form of a procedural framework,[56] within which to come to an agreement, or aim at establishing an appropriate (uniform) private international law rule.[57]

If the problem is caused by the presence of transaction costs, the recipe will probably not be the same for every case. In some cases, the "do nothing" approach might work well. Full harmonisation is generally prone to bring about very high costs, without being sure of the overall result. Moreover, in the case of conceptual divergences, it might push the problem deeper, thus reinforcing the costs specific to such form of divergence.

"Legal emulation"—a broader version of regulatory competition extending to the "marketplace of legal ideas"—offers a valid alternative to the abovementioned solutions. It could bring about a certain degree of convergence without many of the costs of a top-down harmonisation and only where this appears to be desirable, because economic actors have revealed their preferences for a superior legal rule

[55] Of course this is not meant to deny that some adaptations were not the fruit of choice but rather the consequence of certain obligations, but the described convergence was certainly not a deliberate act of harmonisation.

[56] In this direction, Barnard and Deakin 2002, 220.

[57] In favour of this alternative, Alférez 1999.

or because regulators have been exposed to (or forced to take into account) a legal rule in force in a different jurisdiction.

Moving back to conceptual divergence in particular, in general, the use of economic analysis tends to reduce the sense of urgency which might be felt when conceptual divergence is detected. Indeed, by and large, the various economic analysis tools used to examine explicit divergences are applicable to conceptual divergences as well. As is the case with explicit divergence, they show that divergence can rationally be explained, that it does not really occur that often, that it may not always undesirable and that attempts to remove it can sometimes make the situation worse.

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Chapter 3
The Draft Common Frame of Reference (DCFR): A Giant with Feet of Clay

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Contents

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_3,

This chapter arises from the work of the Economic Impact Group (EIG).[1] The law and economics scholars regrouped in the EIG delivered contributions on many of the main themes of the academic DCFR, certainly as regards contract law. The first part of this chapter revisits basic principles which came through the various contributions and underpinned the work of the EIG. The second part draws more general conclusions arising from the contributions seen together.

3.1 Basic Principles

3.1.1 Function of Contract Law from an Economic Perspective

Well-functioning legal institutions are needed for a free market economy to operate properly. In order for individuals to benefit from the gains of trade, there need to be well-defined property rights that are also enforced, for example. Other aspects of the legal system need to be developed as well: liability law (for protecting individuals and ownership against intrusion), competition law (to avoid the deadweight losses associated with monopolies), bankruptcy laws, etc. Within this general system, contract law determines the rules for how sets of claims can be traded against each other.

From an economic perspective, the basic benefit of contracts is that they allow individuals and market parties to make binding commitments. Within game theory, a basic distinction is made between cooperative and non-cooperative games. In a cooperative game, individual players can make binding commitments and coalitions of players can enter into binding contracts. In a non-cooperative game, neither is possible. As the well-known prisoners' dilemma shows, in a non-cooperative game, players may end up in an outcome that is inefficient. With contracts, an efficient outcome becomes feasible and stable. Contracts thus allow players to reach more efficient outcomes. The rules of contract law govern who can sign contracts, what type of contracts can be signed, under what conditions a contract is established, which contracts will be externally enforced, and what can be done, or what will happen if one of the parties, or both, violate the contract.

Contracts may be especially useful when the exchange involves a time element. In such situations, for an efficient outcome to be reached, it may be necessary that one of the parties makes an investment first, to be followed by an investment of the second party. If the first investor cannot trust the second one to make the investment, he or she might be inclined not to make the first one, and an efficient outcome will not be reached. Again, a contract may change the incentives in such a way that it becomes in the second player's best interest to co-invest after an investment of the

[1] Larouche and Chirico 2010.

first. In this case, the investment of the first player is "protected", and an efficient outcome can result.

A similar argument applies to insurance contracts. A contract in which a risk-neutral party insures a risk-averse player against the risk of an accident can benefit both players: the insured pays a premium in return for compensation from the insurance company when the accident occurs. Since *ex post*, the insurance company may have an incentive not to pay compensation, a contract that commits the insurance company to do so may be needed in order to realize the mutual gains from trade.

In short, access to contracts induces a different game. Contract law allows the players to change the rules of the game, thereby inducing equilibrium outcomes that are to their mutual advantage, that is, are more efficient. Contract law determines in what way the game may be changed. As such, contract law influences what can be achieved and what not. Specific rules may be needed in order to reach efficient outcomes. In this respect, certain systems of contract law may perform better than others. As one system may function better than another, the inquiry then turns to finding the best contract law system, that is, that system that guarantees efficient outcomes in most of the cases, or at least in those cases that are encountered in practice.

Here, it is important to mention three considerations. First of all, unlimited "freedom of contract" (allowing parties to conclude any contract that they would want) may not be the best system. The reason is that a contract between two parties may impose negative externalities on third parties, and, as such, while being beneficial for the two parties concerned, may influence the third party negatively and reduce total efficiency instead of increasing it. Second, as stated at the outset, contract law should be viewed in the context of the entire legal and institutional system that supports trade and other forms of social interaction. The various parts of the system are interdependent: which contract law is optimal may depend on the state of liability law, property law, etc. Third, a similar remark applies to other characteristics of the environment, such as personal preferences and endowments. Contract law responds to the trading opportunities (and associated potential problems) that arise; different opportunity sets may induce different systems of contract law that are "optimal".

3.1.2 Methodology and the Efficiency Standard

Most of economics is based on "methodological individualism": the analysis starts from individual agents and their personal interests (and resulting incentives), while outcomes resulting from the interaction between these individuals are judged according to how these individuals value them. The individuals each have preferences over outcomes, and an outcome is said to be *Pareto efficient* if there is no other outcome that is preferred by all individuals. In a context of "general equilibrium", economists typically work with this Pareto efficiency criterion. It should be noted that Pareto efficiency leaves distributional issues out of consideration. Alternatively put, there are typically many Pareto efficient outcomes. For example, assume that all individuals, in addition to all kinds of other things,

also value money, and that they prefer more to less. In this case, if X is a Pareto efficient outcome and Y differs from X only in that individual 1 gives € 1 to individual 2, then also Y will typically be Pareto efficient. The two outcomes X and Y cannot be compared under the Pareto criterion: individual 1 prefers X, while individual 2 prefers Y.

In cases of "partial equilibrium" (when the emphasis is on individual transactions or on single markets), it is frequently assumed that preferences are "quasi-linear", that is, that all individuals value money is exactly the same way, hence, that money can be used to transfer utility from one individual to another. In such a case, the utility $u_i(X)$ that individual i attaches to the outcome X can be viewed as equivalent to the monetary value that i attaches to X and an outcome X is Pareto efficient if and only if there is no other outcome Y such that $\sum_{i=1}^{n} \mathrm{u_i(Y)} > \sum_{i=1}^{n} \mathrm{u_i(X)}$. In other words, for quasi-linear preferences, Pareto efficiency corresponds to maximizing the utilitarian social welfare function. This assumption of utilitarianism is maintained in most of the contributions in this volume.

A final remark is in place on whether we should look at total welfare or consumer welfare. To a certain extent, this question is misleading. In the above discussion, we looked at individuals, and in the social welfare function, we looked at *all* individuals. Hence, we looked at total welfare. The distinction between total welfare and consumer welfare appears when, in partial equilibrium, the attention turns to actual markets; it plays a specific role in discussions in competition law. In such specific cases, one distinguishes between producers and consumers, and when one looks at consumer welfare, one looks at the sum of the utilities of the latter group only. One should, however, realize that profits are paid out as dividends to shareholders as well. What would be the justification of leaving out the well-being of the shareholders? The general perspective that we have taken recognizes that consumption is the ultimate aim of all production, and that shareholders ultimately are consuming as well. Total welfare is the appropriate welfare criterion, but in a well-specified model, there is no conflict between total welfare and consumer welfare.

3.2 General Conclusions

The analysis conducted within the Economic Impact Group played out at two levels. The first one is the choice of the optimal regulatory level (whether to harmonize certain elements of the law or not); the other one is the choice of the optimal design of the rules. Economic analysis can contribute to both levels.

Starting with the first level (appropriateness of harmonization or unification at European level), contributors were generally reserved about top-down approaches (not to mention European-level codification). In this respect, the oft-cited transaction costs arising from different national legal systems in cross-border transactions are important but at the same time they are only one of the relevant concepts

used in economic analysis.[2] A full analysis takes into account the costs and benefits, both of the current situation and of any harmonization or codification. The current state may impose costs by way of cross-border externalities and transaction costs due to divergence, but at the same time it may provide benefits in respecting local preferences[3] or allowing for dynamism and experimentation in the development of the law (which benefits society as it searches for the optimal law). Similarly, while harmonization or unification may bring benefits by removing the costs of divergence or reaching economies of scale in the production of law, it can also generate costs to adapt local systems, induce distortions in the coherence of local systems, produce hidden divergence despite superficial harmonization, and ultimately fail to attain its objectives.

In the area of contract law, much depends on the legal status of the DCFR. Of course, the DCFR can be a reference tool, a restatement without binding force, in which case the discussion is moot. If the DCFR is an optional instrument—a 28th legal system in the EU—the downsides of harmonization or unification, as described above, are less likely to arise. At the same time, the benefits will probably also be smaller. In a dynamic perspective, however, an optional DCFR might contribute to creating the momentum necessary for bottom-up convergence to occur, through regulatory competition or other mechanisms whereby legal systems are subject to pressure to change and improve (impact assessments, law reform exercises, proportionality test in constitutional or EC review, etc.).

In other areas, such as non-contractual liability (Book VI), but also other areas of non-contractual obligations (Books V and VII) or in property matters (Books VIII to X), the choices are starker. These areas of law do not lend themselves so easily to optional regimes, given that they are concerned with situations where the actions of individual impose costs or provide benefits on third parties without the latter having consented. The DCFR in these areas can then either remain an invaluable reference resource, or be enacted as mandatory law. In the latter case, as outlined above, it is open to question whether harmonization or unification will truly be beneficial at this stage in the evolution of European private law.

Moving now to the substance of the DCFR, the contributions show that for a significant number of the rules and principles under study, the DCFR is in line with law and economics analysis. For instance, the rules on formation and interpretation of contracts, on performance, on termination are by and large in line with economic theory, when properly interpreted. However, the formulation of these rules may sometimes support a different interpretation, which may result in inefficient outcomes.

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[2] In its Communication on European Contract Law and the revision of the acquis: the way forward, COM (2004) 651 final (11 October 2004) at 11, the Commission concludes from available studies that "there are no appreciable problems arising from differences in the interaction between contract law and tort law in the different Member States".

[3] These local preferences must be 'genuine', in the sense that the preferences expressed by local decision-makers might be a result of path dependency or government failure (rent-seeking) at local level instead of reflecting the actual preferences of the local population.

Nevertheless, three lines of criticism remarks emerge from the contributions. The first is more benign in nature, but the last two are fundamental.

First of all, in many cases, recourse to the commentary is necessary to establish that a provision is in line with economic analysis (assuming that the provision is interpreted in line with the commentary). Only in the commentary is the rationale of the rules made explicit; in the light thereof, one can then see that it is consistent with economic analysis. Given that the commentary is less normative than the rules of DCFR, some of the insights currently in the comments could be moved into the text of the rules so as to achieve greater clarity and reduce risk of inefficient interpretation. Such was the case for Articles II.-3:101 (duty to inform), II.-7:201 (mistake), and III.-3:104 (excuse for non-performance). Article II.-3:101, in particular, is tautological on its face: parties will reasonably expect what the law tells them is indeed reasonable to expect. Of course, the comments provide more precise criteria (referring to the costs of generating the information). Greater attention to law and economics literature in the drafting groups would have allowed for these provisions to be drafted more sharply.

Second, on a number of occasions, the rules found in the DCFR seem to have been formulated without a complete assessment of their rationales, which economic analysis would have made possible. For one, the provisions on discrimination at Articles II.-2:101 and following do not distinguish between taste-based and statistically-based discrimination, whereas economic analysis shows the difference between the two forms of discrimination and why as a matter of public policy it would be advisable to treat them differently. A similar problem arises as regards liability for interference with contractual obligations, at Article VI.-2:211, where the DCFR fails to distinguish between cases of efficient breach and efficient performance. The rules of compensation for termination of long-term contracts at Article IV.E.-2:303 also ignore the distinction between general investments and relationship-specific investments. Conversely, for the control of standard terms, consumer and business contracts are subject to different tests (Articles II.-9:403 to 9:405), whereas the policy concern underlying the control of standard terms (information asymmetry) is similar. With respect to consumer-related provisions and to non-contractual liability, contributors have also noted that the DCFR does not seem to be based on a clear policy line, whereas the available policy choices were set out in the law and economics literature.

Third, the drafters of the DCFR seem to have been oblivious to the *ex ante* impact of the DCFR. Yet law and economics analysis demonstrates consistently and repeatedly that legal provisions not only enable a normative judgment on behavior *ex post*, but also (and perhaps more importantly) that they affect behavior *ex ante*, by creating expectations and shaping incentives. These expectations and incentives must be factored into the design of the law, lest the law cause more harm than good. For instance, while in principle economic analysis would support expectation damages for contractual breach (see Article III.-3:702), difficulties in monitoring performance and enforcement mean that it might be necessary to increase expectation damages in order to keep the debtor incentivized to perform the contract. Similarly, while it might seem sensible *ex post* to reduce excessive

penalty clauses (Article III.-3:710(2)), the rule is too broadly formulated and it risks depriving penalty clauses of their signaling function. The rules on termination are especially problematic in this respect. One contributor pointed out that the duty to renegotiate in good faith before requesting a court to terminate a contract (Article III.-1:110(3)(d)) could give an incentive to parties to play wasteful games. Another noted that the rules on termination with notice (Article III.-1:109) do not prevent opportunistic behavior and cheating. As regards the termination rules for long-term, relational contracts (agency, franchising, distributorship) at Article IV.E.-2:303, a third contributor found the same flaw: in the absence of any requirement that the terminating party behaved opportunistically before the other party is entitled to compensation, the incentives of the parties are distorted. A fourth one found that the distinction between fundamental and non-fundamental breaches, in the specific termination rules of Articles III.-3:502 and 3:503, was hard to justify.

In a sense, the work of the Economic Impact Group highlights and documents criticisms which have been levelled at the DCFR—and at a certain conception of private law scholarship—elsewhere in the literature. It has been said that privatists are prone to conceive of their work as 'technical' and devoid of policy and political dimension; it can be argued whether this is genuine belief or strategic positioning.[4] Privatists also tend to see private law in a vacuum, as a neutral instrument in the hands of private parties, including a few mandatory rules. The interplay between the law and the behavior of private parties, in particular the way the law influences that behavior through incentives, expectations, etc. is downplayed.

By way of response to these criticisms,[5] the drafters of the DCFR have included a separate and more elaborate section on 'principles' in the final version of the DCFR.[6] According to that section, four principles underpin the whole of the DCFR: freedom, security, justice, and efficiency. The 'principles' section reads very well, but it sometimes comes closer to an exercise in style than a real discussion of principles and policy orientations. In turn, each principle is shown to inform certain elements of contract law (Books II to IV DCFR), non-contractual obligations (Books V to VII), and property law (Books VIII to X). While it is acknowledged that the principles conflict with one another,[7] the presentation is anecdotal, noting that one principle sometimes wins, sometimes loses. So while the 'Principles' section is useful to understand the DCFR better, it paints a far too calm and rosy picture of private law, which belies that the section was written after the DCFR had been drafted, and not beforehand.

From an economics perspective, the most troublesome part of the 'Principles' section is the treatment of efficiency as a principle. While the inclusion of

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[4] See on this issue Hesselink 2006, 143–170.

[5] And also as a consequence of the work of another CoPECL group led by the *Association Henri-Capitant* and the *Société de législation comparée*: see DCFR, Introduction at para 11 and ff.

[6] DCFR, Principles at pp. 57 and ff.

[7] Ibid., para 1.

efficiency in the list is to be welcomed, the reluctance of the drafters toward 'efficiency' is unmistakable: it is "more mundane and less fundamental" than other principles, "but it is nonetheless important and has to be included".[8] When efficiency is discussed in greater detail later on, it is split between "efficiency for the purposes of the parties who might use the rules" and "efficiency for wider public purposes".[9] The former appears concerned with reducing transaction costs, as evidenced by the examples given (minimal formalities, minimal substantive restrictions, efficient default rules).[10] The latter type of efficiency is equated with the promotion of 'economic welfare'.

At the same time, efficiency concerns are present throughout the 'Principles' section without this being acknowledged explicitly. For instance, the justification for freedom of contract is based on efficiency, and externalities are invoked as the reason why contract law might intervene to restrict freedom of contract.[11] Furthermore, the principle of security as applied to contractual transactions, implies a trade-off between certainty and flexibility in the contractual rules, which is none other than the law and economics debate between rules and standards.[12] Finally, the principle of justice is said to imply that parties are not allowed to rely on their own unlawful, dishonest, or unreasonable conduct, to take undue advantage of others or to make grossly excessive demands. Here as well, the discussion would have been bolstered and sharpened by pointing to economic concepts such as market power or hold-up and opportunistic behaviour.

In sum, the 'Principles' section evidences too narrow a view of the significance of economic analysis for an enterprise such as the DCFR. Economic analysis is concentrated under a separate 'efficiency' principle, which in turn is given a subsidiary role. The real value of law and economics is not so much at the normative level, but rather at the analytical level. Irrespective of the policy objective pursued, the law can be subjected to an economic analysis: freedom, security, and justice can be more or less efficiently achieved, depending on the content of the law. It is the role of law and economics to point to inconsistencies in the design of the law and suggest how it could more efficiently reach its objectives.

The above remarks lead back to a key shortcoming of the DCFR, namely the lack of a solid methodological basis. Economic analysis was not used, and neither were the policy choices underpinning private law investigated in depth. In the absence of democratic legitimization for the drafting groups, in the end only a group of high-level legal specialists remain. Their expertise is beyond doubt, but it

[8] Ibid.

[9] Ibid., para 54.

[10] Ibid., para 55–57.

[11] Ibid., para 3. Other types of market failure (information asymmetries, prohibitive transaction costs) are not mentioned.

[12] Ibid., para 22. Including references to law and economics literature would have enhanced the discussion.

is not clear how they came to their conclusions and whether they applied the same methods consistently throughout. They produced a momentous work in putting together the DCFR, but it remains a fragile accomplishment.

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Chapter 4
The Recodification of Private Law in Central and Eastern Europe

Péter Cserne

Contents

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_4,

4.1 Introduction

In the past more than two decades, Central and Eastern European countries have experienced a rapid political, economic and social transformation. This transformation has been intertwined with the Europeanisation and modernisation of the law. This chapter analyses the different paths of the renewal of private law in Central and Eastern Europe (CEE). I discuss the role of academic and political, as well as material and symbolic interests in the drafting of new civil codes or the lack of recodification in different countries in the region. I also indicate how mechanisms of legal transplantation, legal technical assistance, regulatory competition and legal emulation impact on the structure and substance of national private law codifications. A special emphasis will be laid on the on-going codification process of the new civil code in Hungary.

Why is such an overview interesting from a theoretical perspective, apart from its eventual information value? First, it relates to debates on the harmonisation/unification of private law in Europe.[1] Second, as a report on certain legal aspects of the complex and still open-ended process of post-socialist transformation in CEE, it can be read as a case study about legal transition. Third, as a study about civil codes and their drafting, it also contributes to the discussion of codification as a legislative (regulatory) technique, a minor but important topic in legal theory.[2] Finally, the chapter contributes to the more general theme of this volume, the changing role of national legal systems in Europe and in a globalised world.

The argument is structured as follows. First, I discuss some persistent and transitory features of CEE legal culture and the impact of Western legal transplants on it (4.2). The next section gives an historical and comparative overview of national civil law codifications in the CEE region (4.3). Then I discuss the antecedents and the history of the drafting of a new civil code in Hungary in somewhat more detail (4.4). Last, I interpret the Hungarian case in a comparative perspective, relying on theoretical insights on legal transplants, regulatory competition and

[1] Cf. Chirico, van Damme, Larouche, Chap. 3 in this volume.

[2] See e.g. Canale 2009, 135–183.

legal emulation (4.5). Finally, I summarise the findings and conclude with some remarks on possible ways of further research (4.6).

4.2 Legal Transition and Persistent Patterns in Central and Eastern European Legal Cultures

Talking about post-Soviet transformation, especially about legal transition, one can roughly distinguish three groups of countries. The first group could be referred to, somewhat imprecisely, as CEE. Within this group, we can identify three historical-cultural sub-groups: Central Europe in the narrower sense (Poland, Czech Republic, Slovakia, Hungary, Slovenia), the three Baltic states (Estonia, Latvia, Lithuania) and South-Eastern European or Balkan countries (Romania, Bulgaria, Croatia, Serbia, Bosnia and Herzegovina, Albania). What brings these three sub-groups together under the common label of CEE is a legal characteristic: to a large extent these countries all opted for harmonisation with EU law, most of them in the form of EU membership.

This is much less the case in the two other groups. The second group includes the Russian Federation, Ukraine, Moldova and Belarus. As far as their recent legal reforms are concerned, they have followed a different path: besides taking some inspiration from European rules they have relied more on both pre-Soviet and American models and in certain domains, on suggestions of international organisations (IMF, World Bank, EBRD). Overall, they do not make a systematic effort to harmonise their laws with EU law.[3] The third group includes ex-Soviet republics in the Caucasus and Central Asia where Eastern and Western European models are mixed with traditional law, in some cases with Islamic law, thus producing local versions of legal pluralism.[4] In this chapter, I only discuss the development of private law in CEE, i.e. the first group.

4.2.1 Transition and Transplantation

After the fall of Soviet-type socialism, the 1990s confronted CEE countries with enormous challenges of establishing a market economy in a constitutional democracy. The so-called transition process has been a unique historical experience, with a different path for each country.[5] As far as the legal aspects of transition are concerned, it could be characterised as a grand-scale exercise in legal

[3] Dragneva and Ferrari 2006; Hobér 1997; Maggs 2009; Suchanow 2002.

[4] Ajani 2005.

[5] From there enormous literature on historical, political, legal, social, economic, cultural and other aspects of post-Soviet transformation, see, e.g. Bartlett 1997; Bönker et al. 2000; Zielonka 2001.

transplantation. CEE countries did not merely *adapt* their legal system to constitutional democracy and market economy. To a large extent, they *adopted* legal rules, techniques and institutions from foreign, i.e. Western European, American and transnational models.[6]

Post-socialist legal transformation in this region was triggered by economically and politically motivated but formally voluntary convergence to 'Europe', a non-negotiable, take-it-or-leave-it offer. It was shaped by harmonisation duties deriving from EU candidacy and membership. Arguably, in the last two decades Europeanisation has been the most significant determinant of legal changes in the region.[7]

From an historical perspective, post-socialist transition and Europeanisation look like an episode in a longer trend. At least since the second half of the nineteenth century, CEE has been a reservoir of Western political and legal ideas.[8] Legal rules have been more easily borrowed than autonomously generated, legal transplantation being a strong mechanism of legal change. This is easy to explain by the fact that the CEE region is composed of small jurisdictions[9] with 'weak' legal cultures.[10] Transplantation, of course, provides much scope for creativity in the recipient legal system. It is another issue whether the region's legal development of the last 20–25 years can be considered particularly creative. Some argue that the process was largely determined by structural constraints and necessities, while Europianisation remained superficial.[11] What matters for our purposes is to see whether the massive import of legal ideas, rules, doctrines and techniques which at first looks random, improvised and chaotic, at a second view, seems to be largely determined by developments at the European level, shows some underlying common patterns specific for the recipient systems and worth an analysis.[12]

In core areas of private law, EU regulations still leave room for diversity and national idiosyncrasies. Consequently, the drafting of civil codes represents a domain of national legal systems where characteristic cross-country and regional differences are likely to be observed. As we will see, at least as far as formal, structural and symbolic aspects of private law codifications are concerned, a significant cross-country variance persists. As I will argue below, to the extent that this variance is reduced, it is likely due to mechanisms such as regulatory competition and legal emulation.

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[6] From the extensive literature see e.g. Ajani 1994; Ajani 1995, 2005; Bussani and Mattei 2007; Frankowski and Stephan 1995; Ginsburgs 1996; Horn 2002; Jessel-Holst et al. 2010; Welser 2008.

[7] Cafaggi et al. 2010. Some of the legal changes have been triggered by conditional credit agreements with international financial institutions. These required certain structural and institutional reforms apart from EU harmonisation duties.

[8] See Ajani 2005.

[9] Davis 2006.

[10] Monateri 2006.

[11] Skala 2008, 270–71.

[12] Heiss 2006.

4.2.2 'Import' of Law: Europeanisation and the Persistence of Socialist Judicial Style

In order to better understand some general features of CEE legal transition, it is useful to distinguish demand and supply, i.e. the perspective of importers and exporters of legal patterns.[13] Looking at the importers first, one easily notices the dialectic between the rapid change of legal rules, procedures and institutions on the one hand, and the survival and persistence of certain patterns of the legal culture from socialism or even from the pre-socialist era on the other.[14] It takes relatively short time to make textual changes in law, but much longer time is necessary for old habits and practises to change. This dialectic is of course not specific to CEE countries.

In most CEE countries, transition occurred in the context of a struggle with the transposition of the EU *acquis*. Especially in the first few years, lack of time often led to word-by-word translations of directives. Later this caused much more trouble in interpretation and in system-building than a careful translation and transposition would have meant. Europeanisation has been a main driving force behind legal changes in the region, but this has only determined the substance, i.e. what to harmonise, not how it should be done.

At least formally, unless there is a regulation, Europeanisation does not have an impact on the technical legal way European rules are incorporated in national legal systems. This is the very idea behind harmonisation through directives. Idiosyncrasies of the member states, including the systematicity of their codes are respected. A general complaint in this respect is that the transposition of EU directives often means *verbatim* translation and coherence with other national rules is lacking. It seems that in today's Europe, the interaction of EU law with national private laws in general and with civil codes in particular raises special difficulties for small and less wealthy member states. This concerns translation; technical incorporation and cross-referencing; subsequent interpretation; and potential conflicts with national legal traditions. In short, the problem seems to be related to the available legal human capital.

In both practitioners' comments and the academic literature on CEE legal culture, there has been a general understanding and some occasional lament about the persistence of certain features of socialist legal thinking in the judiciary. Compared to fundamental changes in substantive law, judicial practises and culture seem to resist any rapid change.[15] The judicial style in CEE has been often characterised as 'formalistic, magisterial, terse, and deductive'.[16] In general, courts' rhetoric seems to stand closer to the traditional French judicial style than to the style of European courts (ECJ or ECHR). This applies especially to regular

[13] Ajani 1995; Dupré 2002.

[14] Hazard 1996; Manko 2005, 2007; Rudden 1996; Varady 2007.

[15] See e.g. Kühn 2004.

[16] Fogelkou 2002, 6.

courts; some Constitutional Courts in the region follow Western models more closely,[17] thereby acting as 'irritants'[18] or catalysers in their domestic legal order.

If this observation is correct, the implications for institutional reform seem obvious: for a thoroughgoing change to happen, codification and constitutionalisation should be accompanied by a re-ordering of judicial procedures and practises. This, in turn, requires the training of an entire generation of new judges and advocates.

The evaluation of this perceived conservatism of CEE judiciary is not altogether negative though. The following quote from a Czech commentator about the conflict between CEE judicial thinking and the argumentative style of the ECJ indicates that the former may even represent certain virtues which the ECJ lacks:

> Central and Eastern European judges generally display a sound degree of scepticism towards the teleological and *effet utile* style of reasoning used by the [European] Court of Justice. This might be caused by their negative historical experience. Heretical though it may sound, there are some striking similarities between the communist/Marxist and Community approaches to legal reasoning, and the requirements of judicial activism placed on national judges. Marxist law required, at least in its early (Stalinist) phase that judges disregard the remnants of the old bourgeois legal system in the interests of the victory of the working class and the communist revolution. … [Similarly,] EC Law requires national judges to set aside all national law which is incompatible with full effectiveness of Community Law, i.e. with such open-ended principles and aims as the full effectiveness of EC law enforcement, or the unity of EC law across the entire Union. In a way, both approaches are very similar: open-ended clauses take precedence over a textual interpretation of the written law. Often the desired result comes first, with a backward style of reasoning being used to arrive at it. The only visible difference is that the universal 'all use' argument has changed—from the victory of the working class to the full effectiveness of EC law.[19]

Although the analogy is unconvincing (it is highly disputable whether Marxist legal theory as such or its ideological impact on CEE legal practice, indeed, provided support for anti-formalism and teleological interpretation), this argument is a characteristic and indeed symptomatic illustration of a certain rhetoric which tries to turn historical backwardness into an advantage. In this way, it becomes possible to combine anti-Marxist and anti-European allusions with regional self-confidence as an argument to rationalise the inherited resistance to certain features of (what is taken to be) the ECJ's argumentative style. As the author explicitly argues, '[i]t is not only the vices and ragbags of an outdated post-communist legal conception which the new Member States have brought to the European Union. Some positive values and attitudes may be discovered as well, such as a greater deference to the legislature, or a more "conservative" judicial ideology'.[20]

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[17] See Dupré 2002.

[18] Teubner 1998.

[19] Bobek 2006, 297.

[20] Bobek 2006, 297.

Without over-interpreting this single quote, it seems obvious that the question of judicial reasoning and argumentative style is an issue that cannot be even described and understood, let alone evaluated in isolation from other elements of national legal culture. It is closely intertwined with cultural and ideological tensions inherent in the intellectual life of CEE countries. In a broader cultural sense, these tensions reflect the ambivalence surrounding notions such as modernisation, progress, reform and traditions, as well as different understandings of Enlightenment, self-sufficiency, parochialism and national identity. Implicitly, the quote also indicates that when it comes to discussing the flow of legal (or any other cultural) ideas between Western and Eastern Europe, the argument is *usually* about the strength and not the direction of this flow.[21] West to East seems to be the normal way: the opposite needs further explanation.

A final note on the importers' perspective is this. From this perspective, it is often a matter of pure chance which model is followed. Watson's *bon mot* on legal transplantation also applies in CEE: much depends on whether one finds 'a particular book […] in a particular library at a particular time'.[22] It also matters whether that book was written in a language accessible to particular readers. In sum, there is much truth in what the title of Ajani's informative paper suggests: transplantation was largely driven 'by chance and prestige'.[23]

4.2.3 'Export': Self-Interest and Beneficence

Looking at the supply side of legal transplants, especially in the early years of transition, much has been written about the various techniques and mechanisms of 'legal technical assistance'.[24] There is much anecdotal evidence on the influence of foreign governments, international organisations, NGOs, university institutes, semi-academic organisations and business groups on particular legal reforms in

[21] The weakness of a third type of flow is even more striking: legal transplants within the region have been rather exceptional, although the similarities among CEE countries would justify more intra-regional interaction. One of the rare exceptions of such intra-regional transplant is the use of the Hungarian Company Act of 1988 as a model for Bulgarian commercial law (Ajani 2005, 71 note 154). When looking at foreign influences and the choice of best practises to follow, intra-regional ties have been much less important than historical connections to and the perceived prestige of Western models.

[22] Watson 1996, 339.

[23] Ajani 1995. Some changes in CEE legal culture are only loosely and indirectly linked to deliberate transplantation of legal rules or institutions. For instance, there is anecdotal evidence that the presence of international law firms and legal publishers or the increasing use of electronic databases in legal practise have an impact on drafting style, legal reasoning and even on legal terminology in the region (see Horn 2002, 81–82).

[24] For an overview see Faundez 1997.

particular countries.[25] The process has been often compared with the 'law and development' movement of the 1960s in terms of methods, motivations and success. According to extreme versions of this interpretation, the key figures of this transplantation were foreign advisors who wanted to 'sell their product', i.e. blueprints for legal reforms without much care for actual needs, resources and context of the recipient system. As Sajó sarcastically put it, openness to Western influences invited 'planeloads of frustrated western law professors […] to Eastern Europe [with] their pet private draft codes that had been ridiculed back home'.[26] On the other hand, there are reports on sophisticated, circumspect and thorough reforms, assisted by leading international organisations and experts, where positive changes were brought about successfully.[27] While some general overviews about this topic verge on conspiracy theories, others on self-advertisement, the history of legal technical assistance in the CEE transition has not been assessed systematically. In terms of theoretical reflection, comparatists have started to catch up with the rapid changes only recently. Undoubtedly, certain types of influence have been deliberately kept hidden, but most participants are open about and proud of their contribution, even if not all have been equally influential or helpful. At any rate, as Schauer argued, self-interest and beneficence *can* go hand-in-hand.[28]

Putting the supply and demand sides together, the picture becomes even more complex. As the needs and the openness of importers were different, the intentions and capabilities of the exporters also varied, it is hard to draw any general picture on how transition changed the legal rules, institutions and more generally, the legal culture in CEE. Focusing on civil codes allows more meaningful intra-regional comparisons.

4.3 (Re)Codification of Private Law in Central Eastern Europe: Mapping the Scene

The technical legal task of drafting a civil code follows more specific mechanisms and is characterised by less randomness than the larger process of legal transition.[29] In this section, I look at the historical background and current features of private law codification in various CEE countries. The impact of foreign models is discussed in Sect. 4.5.

[25] See e.g. Butler 1996; Däubler 1996; Sajó 1997. Mayer 2010, 42 lists some unilateral and multilateral development agencies that have been active in legal technical assistance.

[26] Sajó 1997, 45.

[27] See e.g. Nussbaumer 2010.

[28] Schauer 2000, 19–21.

[29] Harmathy 1998.

4.3.1 Socialist Civil Codes

Historically, not all countries of the region had a civil code before the Soviet influence[30] but all did, in some form, by the end of socialism.[31] In socialist CEE, Western ideas about the crisis of codification found little resonance. During socialism, codification was linked to the idea of social progress. In fact, it promised to combine 'social engineering through law' with the idea of 'socialist normativism', i.e. a certain kind of formalism and the primacy of statutory law.

Related to this was the 'myth about the simplicity of the text',[32] reflected in the relative brevity of socialist civil codes and certain doctrinal simplifications. The latter led in some countries, but not in others, to 'semantic innovations or banalisations' and an attempt to radical doctrinal innovations, most strikingly in the 1975 civil code of the German Democratic Republic.[33]

A further characteristic of socialist civil codes was the idea (or ideology) according to which periodic recodification was preferable to piecemeal development of the law through the judiciary. To be sure, this precept could not hinder case law to become important in interpretation nor judicial creativity to play an occasional role in the development of private law. Rather, it meant that periodic recodification was not a taboo: codes were deliberately not drafted from an ahistorical perspective, their links to 'changing social and economic relations', and consequently their transitory character was openly acknowledged.[34] The new codes adopted after 1990 fit well into this trend. New or amended civil codes are expected to bring about legal certainty and stability, but they are not drafted for eternity and periodic amendments are considered as the normal course of life of a code.

As mentioned, one of the most conspicuous common features of socialist civil codes was their relative brevity.[35] For instance, while in Hungary the 1928 Private Law Act had more than 2,000 sections, the 1959 civil code less than 700. The most notable exception from this trend was the Yugoslavian law of obligations (from 1978) with its 1,109 sections. This was in part due to the introduction of separate codes in family law, labour law and in some countries, so-called economic law. In addition, certain institutions in property law or contract law (e.g. limited *in rem* rights) were simply 'not needed' in a planned economy, thus they were left unmentioned or regulated in a truncated form.

Brevity was also supported by the conviction that a short code would be accessible to citizens. Related to this, in terms of drafting style, the socialist civil codes probably stood closer to the French than to the German model, focusing on

[30] Csizmadia 1970.

[31] Eminescu and Popescu 1980; Ajani 1993a.

[32] Ajani 2005, 160.

[33] Ajani 2005, 160.

[34] Grzybowski 1961.

[35] See Ajani, 2005, Chap. 8.

regulations, i.e. rules of conduct instead of theoretical declarations, i.e. articles defining abstract doctrinal concepts. Despite the ideological taboo on judicial law making, socialist codes often used elastic general clauses referring to 'socialist values'. This left scope for political intervention, especially in the earlier period of the socialist era.

A distinctive feature of socialist codes, inspired by 'materialist' ideas, was a strong emphasis on property and the hierarchy of its 'forms', i.e. superiority and privileges of public over private property. This was also reflected in the relatively short period of prescription (adverse possession). After 1990, ideologically charged general clauses were reformulated and, in accord with constitutional changes, the 'hierarchy of property forms' was abolished.

Despite a trend towards homogenisation, some national features were present in every code, mostly determined by pre-socialist legal history. In the case of Czechoslovakia and the GDR, however, a certain strive for originality led to doctrinal 'innovations' alien to the Roman law-based European tradition of civil law. In other countries, there was no radical rupture with pre-socialist tradition. This had the consequence that towards the end of the socialist period, for instance in Poland and Hungary, liberalisation and market-oriented reforms were continuously reflected in amendments to the civil code. Paradoxically, as it will be discussed later, the traditional form of the socialist code in Poland and Hungary made it possible to 'live with' a slightly modified version of it after socialism. This adaptability slowed down recodification as well. Another reason for continuity in these countries was that the systemic locus of many characteristically socialist regulations was outside the Code.

4.3.2 Private Law Reforms: A Selective Overview

In this section I give a short country to country overview of the recodification of private law in the region, moving from north to south.

In the three Baltic states, the civil code is seen as a symbolic document. After regaining their independence in 1991, these countries viewed the period of Soviet occupation as a period of discontinuity in many respects, including private law. Still, it was not evident whether they can or will go back to pre-1940 rules. Shortly after 1991, the idea of cooperation and a common effort for private law codification was on the agenda. Finally, however, the three states took different routes.[36]

Estonia had a draft civil code from 1939 which never became valid law. It was reprinted in 1992, but it was generally agreed that it could not enter into force without change. Therefore, Estonia decided for a step-by-step codification of its socialist civil code in separate books. Thus, the 1964 Soviet Civil Code lost its

[36] Loeber 2001.

validity in Estonia step-by-step.[37] The new law of property was adopted in 1993, the general part of the civil code in 1994, the law of obligations in 2001. The reform was accomplished in 2002. As for foreign influences, the new code is very eclectic[38]: it is mainly based on the German BGB but the drafters were also inspired by Dutch, Quebec, Louisiana, Danish, French, Italian, Austrian, Russian and Swiss models.

Lithuania did not have a civil code before 1940 either. In fact, there was not even legal uniformity in the country before Soviet occupation. After its independence, the country first followed the Hungarian and Polish example of a gradual renewal of the socialist code. Later, however, they decided to adopt a complete new civil code in 2000, modelled on the Dutch, Italian and Quebec codes, with some German and French influence.[39]

In **Latvia**, the old civil code of 1937 was re-enacted in 1992, after a long parliamentary debate, by simply republishing it. This solution was exceptional in the region; as we will see, only Romania opted for a similar solution. The Latvian civil code follows the German civil code to a large extent. It consists of about 2,400 articles in four books (family, inheritance, property, obligations), starting with 25 articles of general provisions. The code leaves company law to a separate commercial code. In the 1990s and 2000s, extensive modifications were undertaken, e.g. the book on family law was renewed already in 1993.[40]

Poland was one of the few countries in the region that was able to keep its traditional civil law thinking relatively intact during the socialist era.[41] When Poland reunited after 1918, there was a lack of legal uniformity, similar to Lithuania. This was remedied in 1933 by a Code of Obligations and next year by the Code of Commercial Law, both heavily influenced by French law. The new socialist civil code was adopted in 1964, largely based on the 1933–1934 codes. It includes a general part and three parts on property, obligations and succession. Separate acts regulate family law and guardianship. The 1964 code has been constantly amended since the late 1980s. A number of rules in the code have been abolished by the constitutional court.[42]

From the 1990s, there has been much discussion whether a new code is necessary under the new political and economic circumstances. In 1996, the Minister of Justice appointed a commission for drafting a new code. The commission produced several drafts which were subsequently discussed and modified by government and parliament but none of them became law. Between both the legal profession and academia there has been resistance to a new code, as they have been satisfied with the status quo.

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[37] Varul 2000.

[38] Varul 2008.

[39] Mikelenas 2000.

[40] See Loeber 2001.

[41] See Manko 2007; Poczobut 2008.

[42] Maczynski 2008; Kempter 2007.

In 2006 the Polish Civil Law Codification Commission, in cooperation with Dutch experts of the MATRA programme prepared a so-called Green book, an 'optimal vision' on civil law in Poland.[43] This book considered whether there is a need for a new civil code or a comprehensive amendment of the existing code would suffice. The authors suggest that in an optimal civil code, commercial law and family law should be included, while labour law and intellectual property (except for basic rules on the protection of the image and privacy) should be excluded. After discussing the contents of separate books in more detail, the authors argue that if the main goals are (1) to make the civil code the central legal source of private law, and (2) to render the system of private law coherent then this can only be achieved through a new code. A further reason is that the large number of new European rules on civil law subjects can also only be systematically dealt with in a new code. Still, the Green Book argued that such a new code should reserve the terminology and legal institutions of the current code to the extent possible.

The opponents of a new code argue that the rules in the current code are not obsolete—they are, in fact, of much more recent origin than most rules of the Austrian, French or German code. Unlike Russia and other CEE states which after socialism did not have 'proper' civil codes fit for a market economy, Poland had (and still has) a workable one. Since the few remnants of socialist ideology have been deleted from it in the 1990s, the code does not differ in structure, language and style from western European codes. Its terms are general and elastic and the guiding principles and basic concepts come from Western codes and doctrine. The defenders of the status quo, to be sure, do not oppose reforms but they argue that necessary reforms should follow the German and French way, i.e. modernisation within the old framework. The argument that carries much weight in their reasoning is related to transaction (switching) costs: the longer legal practise is based on the current code, with its doctrinal categories, divisions, classifications, even the numbering of articles, the more desirable it is to keep it, *ceteris paribus*. A related argument is that a new code could not produce long-term substantive coherence, because it could not prevent that new separate acts are introduced whose provisions deviate from the Civil Code.[44] The discussion within the profession and academia on the necessity of a new civil code is still open. At the same time, the drafting committee is also at work. A proposal for the general part of the law of obligations was published in early 2011.

In Czechoslovakia, legal uniformity in civil law was introduced only in 1950 with a socialist civil code. Between the world wars, the Austrian civil code was used in the Czech, Hungarian (customary and judge-made) law in the Slovak part. The first Czechoslovak Civil Code was designated for 'the period of transition from capitalism to socialism', as a legal instrument 'to destroy the base of bourgeois civil law'.[45] In 1964, the second Civil Code was adopted. It was meant,

[43] Radwański 2006

[44] See Poczobut 2008.

[45] Jurcová 2008, 167.

in then-used terms, as 'a legal reflexion of the fact that the transition to socialism has been completed'. Generally speaking, Czech and Slovak legal culture was much more deformed by socialism than the Polish and Hungarian, as basic institutions of private law were wiped out radically in socialist Czechoslovakia, there was no functioning tradition of private law thinking to rely on.[46]

The 1964 code was far removed from the European civil law tradition in substance, structure and terminology as well. In 1991, an extensive and hasty revision was necessary in order to fulfil basic legal needs of a market economy (Act 509/1991). In the same year, a new Commercial Code was also enacted. When the country separated, the development of civil law and the discussion on a new civil code also started on separate paths. The two legal cultures are still linked together informally though, with Slovakia still looking at Czech law and legal professional discourses as model.

In the **Czech Republic**, the 1964 Civil Code is the general systemic basis of private law. It underwent numerous amendments, although none of them as important as the 1991 revision. Family law and labour law are still regulated in separate codes, and the relation to commercial law is heavily disputed. In the last 20 years, there were several drafts for a new civil code prepared by law professors. The discussion on the last one started in 2001 and continued at expert level for 10 years. In February 2011, the center-right government approved the draft and submitted the act to Parliament. Discussion in both houses took almost a year. The Chamber of Deputies passed the code in November 2011, the Senate approved it in January 2012 and the President signed it to law in February 2012. It is scheduled to come into force in 2014.[47]

The code includes over 3,000 sections in five parts: general part; family law; absolute rights, including property law and succession law; relative rights, including contracts, tort and unjust enrichment; and transitory and closing provisions. This structure, as well as the provisions on property law, largely follows the Austrian civil code (ABGB) as a model. The draft includes rules on consumer protection but the European directives are not systematically included, as consumer protection is considered as essentially public law.[48]

In the legal profession discussion has revolved around models and structural aspects of the new code: to what extent can old models (originating from before 1950) be used or how the adaptation of EU directives can be pursued in order to create systemic unity in civil law. The draft code strives at continuity with private law thinking before 1950 and radical discontinuity with current private law which is perceived as still reflecting socialism both in form and substance. Thus, the starting point for the new draft has been a 1937 Czechoslovak draft code which itself was a modernised version of the ABGB, taking also German and Swiss models also into account. Although the new code will in this sense 'return to the classics',

[46] Hurdík et al. 2009; Tichy 2008.

[47] Hurdík 2008; ČTK 2011, 2012; Ronovská 2008; Slehoferová 2011.

[48] See Tichy 2008, Slehoferová 2011.

it refers to modern foreign codes as well, thus reflecting the ambition of synchronising with legal development in both Europe (including recent changes in the Austrian and the Swiss code), and the world (e.g. the new civil code of Quebec). At some points in the discussion, even the US Constitution's reference to 'the pursuit of happiness' served as an inspiration.[49]

The American reference also indicates the symbolic, ideological and political character of the code, a topic that I will discuss in more detail below. The new code aims at an explicit and radical ideological change: instead of looking at civil law as 'an instrument to direct society', the drafters see its function as enabling citizens to 'arrange their affairs autonomously and, reach agreement among themselves'.[50] Giving more space to private autonomy includes changes such as reduction of formality requirements in contract law, revision of the rules on legal capacity or the introduction of new institutions such as the trust (based on the Civil Code of Quebec).

Along with the new civil code, a law on business corporations has been also adopted, in order to replace the 1991 commercial code.

In **Slovakia**, the drafting of a new civil code has been constantly on the agenda since the country's independence. The legal profession and legal academia as well consider the current situation as incoherent and provisional. In contrast to the Czech Republic, in Slovakia there is clearly no way back before 1950 (i.e. to the duality of uncodified Hungarian law and a Czechoslovak commercial code). In fact, the majority of the profession wants to abolish the duality of general civil law and commercial law altogether which they also consider as one of the biggest hurdles to European harmonisation in civil law.[51] Furthermore, the 1964 Czechoslovakian civil code and the 1991 commercial code have many overlaps. There is a strong felt need for coherence and finality.

The first draft for a new code was presented in 1998 but not adopted in Parliament. The next Parliament started anew, with a deadline in 2005 but it was again a failure. In 2007, a Re-codification Commission was set up, with the task to finish their work by 2010 but it has not been completed yet. In 2008, the Commission published a 'Legislative codification strategy for private law in the Slovak Republic', the conception of which is a monist system (i.e. no separate commercial code) 'with a social focus'.[52]

In **Romania**, after 1989, the nineteenth century civil and commercial codes were 'resuscitated'. This refers to the public recognition that those codes were never formally abrogated under socialism. To be sure, 'several special rules were enacted in various fields of private law: family law, labour law, regarding the status of natural persons and legal entities, the statues of limitation, and contracts'[53] and the

[49] See Tichy 2008, at 27.

[50] See ČTK 2011.

[51] See Jurcova 2008; Lazar 2008.

[52] Dulak 2009, 571.

[53] Toader 2010, 113, footnotes omitted.

old commercial law was largely inapplicable. In any case, with rules taught to students more than a 100 years old, the codes have been difficult to adapt to the needs and practices of the twenty-first century. Therefore, first, piecemeal reform statutes were enacted in many areas, relying on both European legislation and other foreign models. 'In the absence of accurate legislative coordination and in the context of an accelerating legislative pace, the courts and legal scholars were primarily in charge of ensuring the compatibility of these transplants with each other and with the principles of Romanian private law.'[54]

The drafting of a new code was decided in 1997 and the commission submitted a first draft in 2004. After 2 years of political discussion, a second commission was set up in order to coordinate the code with EU law and other statutes adopted in the meantime. The code was approved by Parliament on June 22, 2009. A separate act for the application of the New Civil Code was adopted according to which the new code entered into force on October 1, 2011.[55]

The structure of the new code largely follows the structure and system of traditional civil law textbooks. It also takes into account previous Romanian code projects and the codes of other civil law countries. In this sense, it is conservative—the structure is not disrupted by the EU directives. The main inspiration was coming from French law, with some influence of the new Quebec and Dutch Civil Codes.[56]

After **Bulgaria** regained its independence in 1879, it adopted its first civil code, inspired by the 1865 Italian *Codice civile*, in three separate statutes: persons, goods, inheritance; obligations; commercial and maritime law. This fragmentation continued under socialism when separate codes were adopted on persons and family law (1949), obligations and contracts (1950) and on property (1951). In the last 20 years, the socialist codes have been either revised or in part overwritten by new statutes. The consequence is that currently, private law in Bulgaria is increasingly fragmented. There seems to be a concern among legal scholars that a flood of EU rules and the introduction of other new market-related legal institutions result in the destruction of the coherence of private law system. Still, a new codification which would lead to a comprehensive civil code, similar to most European countries, is not on the agenda. The reasons why there is no real prospect for a systemic codification are twofold: there is still a dynamic inflow of new legislation arising from European harmonisation duties; and the legal profession is more familiar with private law as it is now, i.e. compartmentalised in a B2B, B2C, C2C trichotomy.[57]

The successor states of Yugoslavia started from a position similar to Bulgaria (civil law codification in separate books), combined with the federal system which also concerned civil law (the competence on lawmaking in civil matters was shared between the federal level and the republics). Socialist Yugoslavia was a

[54] Toader 2010, 114.

[55] Grigoras 2011.

[56] See Toader, 2010. See also Józon 2006.

[57] Ajani 2005 77; Takoff 2008a, b.

special case within CEE also in terms of its private law: there was neither legal uniformity nor a uniform civil code.[58]

After gaining independence in 1991, **Slovenia** adopted separate codes on the Law of Obligations in 2001 (with many separate statutes on contractual matters) and on the Law of Property in 2002. There has not been serious discussion in the Slovenian legal profession on adopting a new complete civil code.[59] The socialist codes on succession and family law, both from 1977, are still in force. In family law, there have been some important changes though. Following upon a constitutional court ruling that found the legal treatment of same-sex couples discriminatory, the government drafted a new bill on family law in order to virtually equalising their legal position with marriage. The new Family Code was adopted in 2011, between public controversy and heated debates. Upon the initiative of a conservative civil movement, in March 2012 a referendum was held where the majority voted against the new code.[60] Although the issue of regulating same-sex relationships is on the agenda in the entire region, this was an exceptional course of events in many respects, and probably the first case in CEE that a private law matter was decided upon in referendum.

Croatia, similar to Slovenia, refrained from adopting a uniform civil code after independence. The Croatian legislator opted instead for individual laws that draw upon Austrian models with respect of property law and German and Swiss concepts in company law and insolvency law. A new code on succession law was adopted in 2003. The new law of obligations entered into force relatively late, in 2006. A reform was not urgent because the 1978 code was considered relatively modern, i.e. adaptable to a market economy. Croatia adopted a separate consumer code in 2007, as *lex specialis* to the obligations code. In retrospect, Croatian scholars argue that this step-by-step codification was necessary because the introduction of a market economy needed a legal infrastructure quickly, although later the lack of systematicity and unity showed up. Despite such complaints about defects in coherence, similarly to Slovenia and Bulgaria, there is no professional or academic discussion on the introduction of a single uniform civil code, not the least because, it seems unclear which basic principles it would be based on.[61]

In **Serbia**, the earlier Yugoslavian law of obligations from 1978 (with a major revision in 1993) is still applicable. Between 2003 and 2005, there have been several new partial codifications in other areas of private law, including property law, family law, succession, company law and labour law.[62] Discussions on a new uniform civil code started in 2002. An important argument for codification has been a historical reference to the first Serbian civil code from 1844 which is held in

[58] Benacchio 1995.

[59] Trstenjak 2008.

[60] Krempach, 2012. See also http://en.wikipedia.org/wiki/Recognition_of_same-sex_unions_in_Slovenia, Accessed 30 April 2012.

[61] Josipovic 2008.

[62] Szalma 2008.

much reverence in public consciousness, as the 4th civil code in the world. In substance, the code was an adaptation of the ABGB.

In 2006, upon a parliamentary decision, the government appointed a commission for drafting a new civil code. Next year, the commission published a book on the general aims of the codification and a set of questions and possible answers on diverse legal issues in order to generate public debate. In 2009, a draft of book four on the law of obligations was published and further books are on their way. The Code is planned to follow the German model, including general rules and principles of private law (Book 1), family law (Book 2), the law of succession (Book 3), the law of obligations (Book 4) and property law (Book 5). Although there is a lot of symbolic reference to the 1844 code, in effect the drafting commission relies on an eclectic mix of foreign models, including European law and PECL.[63]

The status of private law in **Bosnia and Herzegovina** is even more fragmented than in other ex-Yugoslavian republics. According to the 1995 Dayton Agreement, there is no legal uniformity in the state in private law matters. The two 'entities' (the Federation of Bosnia and Herzegovina and Republika Srpska) and the Brcko district all have legislative competence and separate enactments in private law. While the main competence is with the entities, on certain issues such as housing, decentralisation goes even further and the 10 cantons, i.e. the lowest level of government, have legislative competence. Apart from this division of competences, a further reason for fragmentation is that legal reforms take different speed across the country. In both entities, previous Yugoslavian and Bosniak statutes keep to be valid unless new laws replace them.

There is no uniformity or a general tendency toward harmonisation within the state, i.e. coordination in legal reforms among entities. Up to now, the two entities have harmonised their new laws only in two particular areas (land registry, public notaries) but even this does not include the laws of the Brcko district. The new statutes have been often transplanted from West European or US laws, with no clear systemic unity even in the choice of the source of transplants. The most urgent and most complicated reforms concern property law. Currently, property law is a rather chaotic conglomerate of the remnants of socialist property rules and transplanted Austrian, German and US laws. In sum, it is clear that in the coming years the drafting of a uniform civil code is not going to figure high on the legal reform agenda in Bosnia and Herzegovina.[64]

In **Albania**, in spite of two previous codifications (the first code, adopted in 1928 was inspired by French and Italian models, the 1981 socialist code by Soviet and German models), there has not been a full transition from feudal relations in the socialist era. In consequence, at the start of the post-socialist transition in 1990, very basic legal institutions of a market-based economy such as general full legal capacity, freedom of contract and unlimited debtor's liability were still missing.[65]

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[63] Djurovic 2011.

[64] Povlakic 2008.

[65] Ajani 1993b, 1996.

In the early 1990s, there was a comprehensive and relatively quick legal reform in the country, with massive and much-needed assistance from a large number of international organisations and foreign entities.[66] The drafting of a new civil code was a long and complex process, at least compared to other statutes that were adopted with much haste.[67] In order to adapt the code to local needs, the drafters relied on both previous codes to some extent but neither could be directly used. Therefore, the code mainly follows Western European models. It entered into force on November 1, 1994.

4.4 The Hungarian Civil Code Project: A Never Ending Story?

Starting from the mid-1980s, Hungary was a forerunner in the CEE region in adopting pro-market legislation. The introduction of a two-tier banking system, a new tax system including sales and personal income taxes, liberalisation of foreign investment, adoption of the Companies Act and the Transformation Act (providing a legal framework for state-owned enterprises to convert into new forms of business), as well as the first reopening of the stock exchange in post-war Eastern Europe all happened in Hungary before 1990, in the last years of so-called reform socialism.[68] On the other hand, together with Poland, Hungary is among the last CEE countries to recodify its civil law. Although radically revised in contents, it still uses the first socialist civil code from 1959.

4.4.1 The 1959 Civil Code

Hungary has a long tradition of unfinished projects in general and draft civil codes in particular. When in the late nineteenth century modernisation of the legal system was on the agenda, many new codes were enacted in Hungary, largely following German and Austrian models. For instance, the 1875 Commercial Code was mainly based on the German HGB. A comprehensive civil code was also planned and several drafts were prepared starting from the mid-nineteenth century. The most serious one, written by a committee with prestigious academic and professional participants was published in 1900. After extensive Parliamentary debates and several revisions in the drafting committee, the final version was published in 1915. Within the turmoil of World War I it was not voted upon.

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[66] Ajani 1996. The 'exporters' included the IMF, the World Bank, the German, Dutch, Italian governments, the Soros Foundation, the "International Development Law Institute", the American Bar Association, and Task Force Albania set up by the Council of Europe.

[67] Ajani 1993b.

[68] Kornai 1990; Sárközy 2007.

After the war, a new initiative of the Ministry of Justice resulted in a proposal of very high quality in 1928. Based on previous drafts as well as some elements of the German and Swiss codes, this so-called Private Law Bill found general approval among academics and professionals. It was well received in the Parliament as well, as far as substantive provisions were concerned, but the legislator decided not to adopt it. The main reason seems to have been political. In a political climate where the territorial losses of the country were considered both unjust and temporary, it was argued that codifying civil law in the new smaller territory of post-war Hungary would cause disparity with the law of those 'lost territories' in north, east and south where Hungarian customary and judge-made private law was still in force.

Although never adopted formally, the Private Law Bill had a huge impact on both legal practise and legal education. Similar to constitutional law, private law was not codified until socialism. Up to 1960, most private legal relationships (contracts, tort, property, succession) were regulated by judicially interpreted customary law, although a certain number of statutes were enacted in late nineteenth and early twentieth centuries, in commercial law, company law and parts of family law.

The first civil code of Hungary was drafted in the 1950s, adopted in 1959 and came into force in May 1960 (Act IV of 1959).[69] After more than 150 amendments and revisions, it is still in force. In retrospect, the code (CC) can be seen as a compromise between socialist social engineering ideas and traditional private law thinking. On the one hand, we find much solid doctrinal work in it, originating mainly from earlier drafts (especially the 1928 Private Law Bill), again the German and Swiss codes and elements of customary law, especially in the law of succession. On the other hand, these so-called 'bourgeois' and 'feudal' elements (the latter term referred to customary law) were used tacitly or wrapped in socialist ideology, and were at any rate combined with 'genuinely socialist' rules. The actual impact of traditional rules and the role of prestigious foreign models known to academically trained drafters were in effect more marked than the influence of the 'official' model, the 1958 Soviet draft civil code.[70] However, stating this openly would have run against ideological taboos.

As discussed above in Sect. 4.3.1, socialist codifications were justified by arguments about a fundamental difference between bourgeois and socialist law. Marxists considered the former the embodiment of bourgeois ideology of formal equality, covering and sanctioning the 'exploitative production relations' of capitalism. As the very basis of a market economy, private property and freedom of contact had been almost entirely abolished in Hungary starting from 1948, by the time it was adopted, the official justification could refer to the CC as a code which serves to 'consolidate socialist development'. Indeed, the CC was a definitely

[69] For early foreign academic comments on the 1959 code see Léh 1960; Grzybowski 1961.

[70] Ajani 2005, 70. For instance, in contrast to the Soviet code (which was in this respect inspired by German pandectist ideas), the CC does not have a general part and makes no use of the concept of act-in-law (*Rechtsgeschäft*).

'socialist' civil code in the sense discussed above: it declared state property superior to private property, introduced general clauses to protect 'socialist values' and the interests of the 'people's economy', and compared to the Private Law Bill (2171 articles), it significantly reduced the length (685 articles) and doctrinal sophistication, simplified the language and the structure of the text.

The CC was drafted by law professors who were either trained before World War II and/or had an international outlook. They safeguarded and incorporated classical values of private law thinking and certain structural and semantic features of traditional and modern Western codifications in the CC. This happened mainly for technical and professional, rather than ideological or moral reasons. Although Soviet civil law was markedly present in the official motives, the CC itself was drafted more in the long shadow of previous drafts and with a watchful and critical eye on foreign models. Altogether, it is generally considered as a code of outstanding technical quality, even if different parts of the code were different in this respect.

For instance, property law reflected socialist ideological influence much more heavily than tort law or the law of succession. Supremacy, unity and indivisibility of state property were not only declared but the protection of private property was explicitly weaker than of state property and also less in absolute terms or compared to the 1928 Bill. But even in this domain, ideological precepts were not the only guides of the drafters. This can be illustrated with the following example.

The CC reduced the time period for adverse possession of real estate from 32 to 10 years. The officially stated reasons[71] referred to less commercial activity and better means of communication for justifying that there is no need to maintain legal uncertainty in favour of an absent owner for such a long time. Behind this *prima facie* reasonable argument for a reduction, there lurked a more pragmatic or even opportunistic reason which can probably explain why the new limit was set at 10 years. In the early 1960s, it was roughly 10 years after the coerced collectivisation of agricultural land. Collectivisation induced many farmers to leave their property, without formally granting title to a cooperative or the state. Thus, the reduction of the adverse possession period in this specific way helped the state and local governments to get the ownership of many abandoned land in a cheap and easy way.

While this example illustrated a combination of long-term economic rationality and short-term political rationality, the next one shows the role of socialist ideas and ideology was not confined to property law in the CC. In the official ministerial reasons, much more than in the text of the CC itself, there is constant reference to the moral superiority of socialist society and the educative role of law.[72] For instance, in succession law, the rules on intestate succession precede the rules on testamentary succession. The justification for this order was that intestate succession 'is considered the most appropriate way of inheritance, most in accord

[71] Igazságügyminisztérium 1960, 95, 100.

[72] Kulcsár 1961.

with the socialist view and family relations'. By putting it at the front, 'the law wishes to have an educative effect on those who tend to neglect their families'.[73] This reference to the educative function of socialist law seems to be mere rhetoric. One indeed wonders whether the drafters meant seriously that such a light change in the menu or default option would significantly change testamentary practises.

Such examples do not disprove the general tendency that, mainly because its rules were formulated at the right level of abstraction, large portions of the CC as well as its basic structure could survive social and technological changes for over 60 years. After a major revision in 1977, the next round of amendments and changes between 1987 and 1993 rendered the code workable in a market economy.

Still, during the last 20 years it has become generally accepted in political, professional and academic circles as well that a new civil code is necessary. The main arguments for recodification are related to the structure and the incompleteness of the CC and, to some extent, to challenges of EU harmonisation.[74] The genesis and pedigree of the 1959 code provides a further, ideological or cultural argument for a symbolic change. The strength of this argument is debatable though. Unlike constitutions that are generally considered as closely related to national identity and sovereignty, civil law *can be* looked at as a set of technical or instrumental rules.[75] Often, however, they are looked at in a non-instrumental way, i.e. civil codes are attributed a symbolic value.

4.4.2 The Drafting Process

The need of a new civil code was first officially formulated by the minister of justice in 1989[76] but it was only in 1998 that the government formally decided to set up a team within the Ministry of Justice with the task of drafting a new civil code. The three main goals have been[77] (1) to achieve comprehensiveness in the domain of private law; (2) to respond to new economic and social needs; and (3) to solve doctrinal problems that arose in the judicial application of the code. The actual drafting was put in the hands of an Expert Committee (EC), composed of academic and judicial experts. The EC was first headed by Attila Harmathy, later by Lajos Vékás, both renowned professors of civil law. Separate drafts were prepared according to the planned parts of the code (persons; family; property; general contract law; specific contracts; torts; inheritance), each assigned to one

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[73] Igazságügyminisztérium 1960, 471.

[74] Basa 2005; Gárdos 2007; Vékás 2001, 2006a.

[75] Schauer 2000, 7–11. The 1989 Hungarian constitution was formally an amendment of the 1949 communist constitution. Hungary was unique in the region with choosing amendments instead of a formal repeal of the communist constitution. This finally happened on January 1, 2012 with the new Hungarian constitution, the 'Basic Law of Hungary'.

[76] Sárközy 2007.

[77] Gárdos 2007, 3.

EC member who was assisted by a small teams recruited either from the Ministry of Justice or from legal academia.

In 2003, the EC published a detailed 'Concept and Syllabus' and in 2006 a full draft of the code. At the same time, the Ministry launched a consultation among legal professional groups and also opened a public consultation. It was expected that based on the Plan and considering the suggestions raised by stakeholders, by 2008 the EC would complete an Expert Proposal to be approved by the government and submitted to Parliament.

In September 2007, before the EC completed the draft, the Ministry discharged the EC of its commission and took over the drafting on its own. Although the reasons for this decision are still not entirely transparent, it was seen by the majority of the legal profession as a 'political intervention' and an insult to the EC. The issue was brought in a clear political context when the parliamentary opposition took sides with the legal profession in 'defending' the EC. The Ministry had two main arguments for the decision.[78] The first concerned the speed of codification. The government wanted the code to enter into force before the end of its mandate in early 2010 and was increasingly worried whether the EC would complete its work soon enough for that. The second argument concerned the substance of the EC's work. In the Ministry's view, the academic experts were irresponsive to arguments coming from certain well-defined and respectable stakeholder groups (disabled persons, Hungarian Patent Office, Banking Association) whose interests and suggestions they should have taken into consideration.

In the meantime, members of the EC, offended by their dismissal, continued their work. In March 2008 they published an unofficial EP with a commercial publisher, along with extensive explanations and comparative material.[79] The book was launched, symbolically, at the premises of the Academy of Sciences, in the presence of the acting and the previous President of the Republic (both professors of civil law).

The Ministry prepared its own draft within a few months and published it on its website in April 2008. In early June 2008 the government submitted the draft to Parliament. The draft was subject to long parliamentary debates between September and December 2008 and again in March and September 2009. This resulted in the inclusion of many elements of the EP in the text, as well as a lot of other ad hoc changes. The bill on the new civil code was adopted in September 2009. Due to the political veto of the President, however, the proposal was sent back to Parliament. The President had both procedural and substantive objections against the bill. After a short and formal discussion in Parliament, the text was reapproved and on November 20, 2009 promulgated in the Hungarian Gazette (promulgated code, PC).[80]

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[78] Antal 2008.

[79] Vékás 2008.

[80] Act CXX of 2009 on the Civil Code.

The entry into force of the PC, along with the necessary transitory rules, was left for a separate statute. This 'Law on the Implementation and Entering into Force of the new Civil Code' was adopted by the Parliament in December 2009. The President issued a political veto against this law as well, sending it back to Parliament. After a second parliamentary debate and some changes, this statute was promulgated on March 3, 2010, shortly before the end of the mandate of the left-wing majority Parliament. It provided that Books 1 (introductory provisions) and 2 (law of persons) shall enter into force on May 1, 2010, while Books 3–7 on January 1, 2011.

After the right-wing coalition won the elections in April 2010, their representatives made clear that the new Parliament would withdraw the PC. This could not have been done before the first two books entered into force though, so the question arose whether this can be done retroactively. In the meantime, the introductory statute was also challenged in front of the Constitutional Court, both on substantive and procedural grounds. A few days before the first two books of the PC were supposed to enter into force, the Constitutional Court found the statute unconstitutional and annulled it. The main reason was that because of the short transition (preparation) period and the legal uncertainty arising from the two-stage introduction of the PC, the principle of the rule of law was violated. In July, the new Parliament formally decided that books 3–7 of the PC shall not enter into force either.

The new government also issued a decree on the preparations of a new Civil Code, setting up a new drafting team. This new expert group[81] included most members of the previous EC, along with a few new members, all law professors and senior judges. The head of the previous EC, Lajos Vékás, again played a leading role in the drafting. The new EC submitted a new draft to the government by the end of 2011. In early 2012, the government published this new proposal on its website (EP2)[82] and launched a few months of public consultation. This is the current state of affairs as of April 30, 2012. It is expected that in view of the comments on the proposal, the government slightly revises and then submits the draft to Parliament mid-2012. If the code is adopted in Parliament later this year, with 1 year of preparation time, the new civil code could enter into force in 2014.

In conclusion, although in 2009 Hungary was quite close to have a new Civil Code, the drafting process started again from an early stage in 2010, with a likely but still uncertain end in sight in 2013 or 2014.

[81] More precisely, there were three committees but the internal division of labour among them does not matter for our purposes.

[82] Kodifikációs Főbizottság 2012.

4.4.3 Scope and Structure of the Code

As for the scope and structure of the new code, due to the parliamentary phase and possible last minute amendments, there is still some uncertainty. Still, it is likely that the new code will mainly follow the lines of EP2. EP2 itself is based on EP1 as a starting point but on certain issues it favoured the provisions of the PC or opted for different solutions altogether. Despite this uncertainty, it is worth briefly comparing the scope and structure of the current CC, the 2008 EP1, the 2009 PC and the December 2011 EP2. Table 4.1 shows the four versions in parallel.

Doctrinal debates on the scope and structure of private law codification usually focus on two questions.[83] First, there is an older debate about the monistic or dualistic model in private law, i.e. the issue whether a separate commercial code is desirable. Second, mainly due to the increasing number of European consumer protection rules, the desirability and technical ways of integrating consumer law in civil codes are also often discussed. Older EU member states show a great diversity in this respect. In both issues, Hungary, like other CEE countries can choose from different models. These structural choices cannot be discussed in depth in this chapter. I merely mention some structural issues about the architecture of the Hungarian civil code.

As for scope, the goal of the EC was to make the civil code reasonably comprehensive, both by integrating core areas of private law in the code and by declaring that general principles as well as provisions of the civil code are general fall-back rules for the entire private law. Compared to the current CC, the new code will include two new books: one on legal persons and one on family law. The latter 're-integration' is similar to other post-socialist countries. There are further substantive additions, mostly taken from separate acts and now integrated into the CC: product liability in tort law, the rules on commercial agency and substantive provisions on land registry. New rules on trust, leasing, factoring, franchising shall be also introduced. The code will not include labour law and intellectual property law.

4.5 Theorising the Hungarian Case in a Comparative Perspective

Even such a cursory overview of private law reforms in CEE countries indicates that there are some common and recurrent questions to be discussed. Some of them repeatedly arise in the literature as well.[84] In this section, I discuss (1) the significance of national civil codes against the background of European

[83] Vékás 2006b.

[84] A good summary is provided by Jurcová 2008, 170.

Table 4.1 The structure of Hungarian (draft) civil codes 1959–2011

Act IV of 1959 (as of Apr 2012) (CC)	**Expert proposal** 2008 (EP1)	**Act CXX of 2009** (PC)	**Draft Code** 2011 (EP2)
1. Introductory provisions Article 1–7	**1. Introductory provisions** 1:1–7	**1. Introductory provisions** 1:1–7	**1. Introductory provisions** 1:1–6
2. Persons Article 8–87 (80)	**2. Persons** 2:1–423 (includes extensive rules on company law)	**2. Persons** 2:1–98	**2. Man as a Legal Subject** [Natural Persons] 2:1–55 **3. Legal Persons** 3:1–402 (includes extensive rules on company law)
[family law in a separate code (Act IV of 1952 on Marriage, Family, and Guardianship)]	**3. Family law** 3:1–248	**3. Family law** 3:1–248	**4. Family law** 4:1–252
3. Property law Article 88–197 (110)	**4. Law of things** [Property law] 4:1–212 (includes rules on land registry)	**4. Law of things** [Property law] 4:1–193	**5. Law of things** [Property law] 5:1–186 (includes rules on land registry)
4. Law of obligations Article 198–338 (141) 'The contract' Article 338A–D (4) Securities Article 339–364 (26) Non-contractual liability, unjust enrichment Article 365–597 (233) Specific contracts	**5. Law of obligations** 5:1–32 (general rules) 5:33–194 (162) (general rules of contracts) 5:195–492 (298) (specific contracts) 5:493–508 (16) (securities) 5:509–557 (49) ('non-contractual liability': tort law) 5:558–566 (9) ('obligations arising from other facts': unjust enrichment, benevolent intervention, 'implicit conduct')	**5. Law of obligations** 5:1–29 (general rules) 5:30–185 (156) (general rules of contracts) 5:186–473 (298) (specific contracts) 5:474–495 (22) (varied) 5:496–560 (65) ('non-contractual liability': tort law) 5:561–569 (9) ('obligations arising from other facts': unjust enrichment, benevolent intervention, 'implicit conduct')	**6. Law of obligations** 6:1–57 (general rules) 6:58–215 (158) (general rules of contracts) 6:216–514 (299) (specific contracts) 6:515–562 (48) ('non-contractual liability': tort law) 6:563–576 (14) (securities) 6:577–590 (14) ('obligations arising from other facts': unjust enrichment, benevolent intervention, 'implicit conduct')

(continued)

Table 4.1 (continued)

Act IV of 1959 (as of Apr 2012) (CC)	**Expert proposal** 2008 (EP1)	**Act CXX of 2009** (PC)	**Draft Code** 2011 (EP2)
5. Law of succession Article 598–684 (87)	**6. Law of succession** 6:1–96	**6. Law of succession** 6:1–99	**7. Law of succession** 7:1–102
6. Closing provisions Article 685–689 (5)	**7. Closing provisions** 7:1–5	**7. Closing provisions** 7: 1–7	**8. Closing provisions** 8: 1–5
Originally 685; now about 700 articles	1,577 articles	1,216 articles	1,592 articles

harmonisation, (2) the regulatory vs. symbolic character of the code and the role of legal and social-scientific experts and politicians in the drafting, and (3) the various mechanisms through which national legal systems interact in the specific context of private law codification.

4.5.1 Codification and Its Discontents: Is CEE a Special Case?

What makes transition countries unique? From a narrowly legal perspective, i.e. for the purposes of a textual and structural analysis of civil codes, it can be questioned whether the special kind of path dependence identified as 'the persistent elements of CEE legal cultures' (discussed above in Sect. 4.2) is relevant at all. Likewise, from a forward-looking or functionalist perspective it can be argued that in the twenty-first century the problems and challenges of civil law codification are or will be similar in Eastern and Western Europe.[85] In most CEE countries, the transition period when the content of the law had to be changed rapidly and in large domains, seems to be over. Once EU membership is reached, this indicates that the differences between East and West are rather quantitative not qualitative.

What are then the common European challenges for civil codes? The first is whether 'it make[s] sense at all to start creating a code based on national lines?'[86] Is it not rather an unfortunate and untimely coincidence that 'the movements to unify European private law are taking place at the same time that Central and Eastern European countries begin to create their national codes'?[87] Put differently, the question can be raised whether civil codes have more than symbolic role in law in the twenty-first century. Scepticism is justified not only because of the

[85] Vékás 2006b.

[86] Vékás 2006b, 120–121.

[87] Vékás 2006b, 121.

increasing speed and volume of new legislation coming from the EU. It also relates to the changing ways lawyers and laymen get access to legal material.

For traditionally trained (Continental European) lawyers, to have a 'system' is still necessary. Such a grid or framework of reference helps them with identifying and recalling the locus of relevant legal material on a given subject. It seems that at present, in most national legal systems it is still for civil codes to fulfil this function. This conservatism is probably also related to enduring traditional features of legal education, characterised by formalism, doctrinalism and an orientation towards national law. This set of affairs is neither logically nor technically necessary. As we have seen, there are counterexamples, i.e. reasonably functional legal systems without a single civil code. A code is just one way to reduce transaction costs by structuring voluminous legal materials. Other kinds of legal material, especially case law, are structured and navigated along different lines. The increasing use of software and electronic databases has already changed the routines of both lawyers' and judges' work in this respect.

The overview of private law reforms in the CEE transition suggests that there is significant intra-regional diversity in this respect. Some countries chose a radical rupture with the socialist code; others reformed it slowly, leaving its structure almost untouched. Some countries took the existence of a unified civil code as crucial; in others the multitude of partial codes apparently does not pose insurmountable problems. As the main users of civil codes are professional lawyers, including judges, the main explanation for this divergence seems to be inertia and path-dependence, in other words, the reduction of transaction costs by sticking to well-exercised routines.

Another intra-regional difference is related to the timing of recodification. It seems that in the 2010s the tasks of civil law codification are different from what they had been in the early or mid-1990s. Those CEE countries that came to recodification relatively late (Poland, Czech Republic, Slovakia, Hungary, to some extent Serbia and Romania), have to face an increased resistance. In systems where there was no radical or revolutionary structural change in the civil law in the early 1990s, post-socialist transition (modernisation, Europeanisation) cannot provide strong arguments for recodification later. The further we get in time from the early years of transition, the stronger the resistance against any structural reform in civil law. It seems increasingly hard to justify why previous piecemeal changes were not enough. Sometimes, governments try to justify it as a symbolic start of a new era after socialism. This argument plays some role in the rhetoric of current debates in the Czech Republic. This will be discussed further below.

Resistance is especially due to the judiciary that strongly prefers the status quo with minimal reforms. Their conservative approach to civil law is the practitioner's view who has scarce knowledge about current international model laws and also not much professional interest in anything else than the coherence of the law applicable in their work. As mentioned above, the biggest challenge from their perspective is to get acquainted with European law and to use it in their everyday

practice.[88] In contrast, law professors often take pride in drafting new laws, eventually based on comparative work. These considerations support the following (empirically testable) hypothesis: in a legal system, the perceived need for a new code depends on the composition of the group of drafters. Related to this, as I discuss below, in countries where the reform of civil law is perceived as a political matter, the outcome of the drafting process is likely to be different from those where codification is looked at as a technical issue.

Historically, there has been much rationalistic optimism about the role of codification in large-scale social transformation.[89] Looking back to the last two centuries, it is not obvious how effectively civil codes can serve as instruments of social engineering. For instance, 50 years after the 1804 adoption of the Code civil, old rules of succession were still in use in some rural areas in France.[90] On the other hand, some technical legal rules for commercial transactions are changing so quickly that it would be futile to incorporate them in a civil code which is supposed to represent coherence and stability in the legal system.

It is sometimes also argued in support of new civil codes, especially in CEE countries that codification is a mechanism to make the law more accessible to ordinary citizens who want to organise their private relations. In a sober view on twenty-first century legal practice, apart from some well-defined contexts e.g. consumer's claims, this idea looks overly optimistic and hardly more than a legalistic myth. This applies equally in East and West Europe.

Despite all these reservations, most European countries maintain the idea and do not plan to abandon the practice of codification. In many countries, to have an 'old and stable' or a 'modern and comprehensive' civil code is considered an important achievement and a proper object of national pride. In the legal, and to some extent also in popular, imagination, a national civil code still has a symbolic significance beyond any instrumental value of its substantive rules and any practical usefulness of the code's systemicity. This symbolic aspect will be analysed now.

4.5.2 The Technical, Legal, Political and Symbolic Character of Civil Codes

To what extent do civil codes regulate? To what extent do drafters care how civil codes regulate? In the context of the drafting of civil codes, the typical techniques and institutional mechanisms of modern legislation, such as regulatory impact assessment[91] are almost unheard of. There are very few counter examples. In the

[88] See Bobek 2006, Cafaggi et al. 2006, Kempter 2007.

[89] Think of Bentham's ideas on codification or Napoleon's claims with regard to the French code civil.

[90] Carbonnier 2004.

[91] See Chaps. 11 and 12 in this volume.

drafting of the Hungarian civil code, some members of the Expert Committee informally but explicitly referred to potential incentive effects of some rules. This indicates some minor impact of *law and economics* scholarship on the ideas behind suggested changes, coming partly from law professors who are familiar with this literature and indirectly through the background comparative analysis which led them to borrow from international model codes. This impact, however, does not go much beyond basic objectives such as the reduction of transaction costs. The reasoning of the drafters is mainly systemic and comparative, rather then consequentialist.

Does this mean that the drafting process in CEE countries is of low quality? Or does it mean that civil codes are different from ordinary legislative and administrative measures? Can this little concern with regulatory aspects of civil codes be justified with a more sophisticated argument, namely that the substance of the rules in a civil code does not make much difference as long as they are uniformly interpreted, impartially enforced and serve as focal points for diverging expectations?

It seems that the last argument can justify the lack of concern with substance only in specific cases, viz. rules that respond to underlying coordination problems. It does not require special expertise to recognise that when the law is concerned with externalities, asymmetric information or collective action problems, regulating one way or another clearly has economic and social impact, often in terms of competitiveness of the entire national economy.

Still, it may be said that there are good reasons why such expected economic and social impact of civil codes does not figure (more than marginally) among the drafters' considerations. Drafters are experts in formulating given policy objectives into complex systems of rules. It is for other participants in the process, politicians or social scientific experts to care for regulatory aspects.

In fact, whether regulatory goals become explicit in the codification has much to do with how stakeholders are represented in the drafting process and whether codification is considered as a political or a technical matter. As the referendum on the Slovene civil code illustrates (see Sect. 4.3.2), the intensity of public attention and the zeal of politicians to take sides in particular issues can prove that both regulatory and doctrinal aspects can suddenly lose importance when the stake becomes 'political', 'moral', or 'symbolic'. But what do we mean by calling a certain matter political, moral, symbolic or technical?

As Duncan Kennedy famously argued, such distinctions are often used by participants in a self-serving manner. Even allegedly 'merely technical' issues raise political stakes.[92] What matters for our purposes is a related distinction which concerns the role of legal experts and elected politicians in civil law codification. Ideally, such experts work within a framework set by the broader regulatory aims formulated by politicians. There is scope for some feedback from legal professions, stakeholders and the general public. At the end, the draft is discussed in

[92] Kennedy 2001.

Parliament in detail. This interplay of experts, politicians and the public raises many further questions. Is the drafting process (conceived of as) a political, a legal or an academic project? Is the discussion about the new code a prominent or a marginal issue? Is the code a political document? What to do with controversial issues? Who is legitimised to decide among policy alternatives? Is there a specific expertise necessary for such a codification project which makes it a natural monopoly of law professors?

Before answering some of these questions in the CEE context, it is worth shortly referring to a parallel case which has been extensively analysed: the drafting of uniform laws in the United States.[93] In the American context, private legislation, i.e. drafting of laws by non-political actors is a widespread practise in many areas of the law. One criticism against it is that such non-representative and politically unaccountable organisations are less protected from undue influence. Therefore, their product is vulnerable to the charge of being thus influenced.[94] This suggests that for reasons of legitimacy, law should come from accountable politicians. In their case, the influence of pressure groups is not considered undue because, at least in principle, it is transparent. At least, in a constitutional democracy there are strong reasons why any such influence should be transparent. On the other hand, private legislatures typically 'believe that their function is to deal with technical problems that can be solved by legal expertise and to avoid issues whose resolution requires controversial value choices'.[95]

Coming back to the CEE context, it is noteworthy that there are significant cross-country differences in this respect as well. At least in the Hungarian case, the self-understanding of experts is similar to the American one. Typical publicly expressed views of legal professionals and scholars who take part in codification committees include the acknowledgement that when engaged in drafting, their expertise is subordinated to decisions by elected politicians. Interestingly, at least in the Hungarian debate on the PC in 2008–2009, some politicians avowed that they subject themselves to the authority of law professors qua experts and to legal professionals (judges, attorneys and public notaries) in the matter of civil code drafting. This deferential argument was an open criticism against the government for taking the drafting out of the EC's hands. The government could rightfully respond that political decisions, especially deep moral controversies and value choices should not be delegated to academic experts. Politicians should not hide

[93] Zelst 2009, 618–623.

[94] Zelst 2009, 619 note 30.

[95] Zelst 2009, 620 note 31, citing Robert Scott. To be sure, the dynamics of US private legislatures are different from the drafting of civil codes by expert committees. The drafters of uniform laws are typically motivated to achieve 'an acceptable number of adoptions', thus, they try to secure support of the interest groups through favourable drafting so that these groups promote the adoption later. In this process, adoption is a yes or no decision; interest group pressure can have an impact on the contents only in the drafting process. For a model of private legislatures see Schwartz and Scott 1995.

behind professors or other experts. In that way, they would implicitly rely on the experts' private value judgments.

A realistic view of how politicians take part in legislative decisions may suggest that relying on experts is better, nonetheless. For instance, during the Parliamentary debates on the civil code in Hungary, a large number of last minute and ad hoc changes were proposed to the final draft by individual MPs and many of them were adopted. This is likely to be repeated with the new draft code too. Here problems can be twofold. First, these punctual changes usually serve well-defined lobby interests that are channelled into legislation in a non-transparent way. Thereby, the transparency of political processes is jeopardised. Second, such punctual changes reduce the main value of a civil code, its coherence and consistence.

Normatively, it seems desirable that experts make the possible entry points of value judgments explicit. For instance, at morally controversial or otherwise politically important points they could elaborate doctrinally and systemically feasible alternatives and leave the choice between them to the legislator or eventually to public popular vote. In any case, when such alternatives are not left open, the drafters should clearly state which principles and values they followed when choosing between them.

In general, the political and moral values underlying twenty-first century European civil codes are not particularly controversial. The general principle of private autonomy and freedom of contract; the social duties attached to ownership; the role of social justice among the values of a civil code are anchored in most CEE legal systems, usually at the constitutional level, as principles and values enshrined in national and European constitutional documents. Second, there are mid-level choices in a civil code, e.g. on how 'social', 'paternalist', 'empowering' or 'business-friendly' the code should be. These choices also figure in lawyers' and legal scholars' mind in CEE when deeply rooted *dirigiste* and paternalistic views interact with ideals of private autonomy and freedom of contract. Third, there are particular substantive issues that are controversial for different reasons. New civil codes in CEE can hardly avoid becoming the playing field of a certain *Kulturkampf*, i.e. moral and ideological debates on issues such as the autonomy or incapacitation of mentally disabled persons or the legal status of same sex partnerships. In this context, it is unlikely that private law scholarship as such could solve political or moral controversies. At least in the way it is often practiced now, i.e. as a value-neutral technique which obfuscates important trade offs, private law scholarship is unlikely to contribute meaningfully to such discussions.

The academic versus political character of civil codes draws attention to a further aspect of the question raised at the beginning, i.e. whether civil codes regulate. Part of what is at stake there is the relation of experts to political actors. An important specificity of civil codes is that drafters are typically *legal* experts who are trained and expected to concentrate on doctrinal issues, coherence and systematicity. Even if they aim at substantive reforms, they assess the likely extra-juridical consequences in an intuitive way, using their common sense.

Ideally then, the drafting of civil codes would rely on both legal and social-scientific expertise but the ultimate decision remains in the hands of the political

actors. Not only in the sense that they take political responsibility (via their choice from a constrained set, a small number of simplified alternatives) but also in the sense that ultimately they are free to set aside the expert's proposal, modify it at any point as it seems best to them. In sum, through the reform of private law in CEE, fundamental problems of democracy, expertise, legitimacy and the functions of private law come to the surface. Similar dilemmas inform the on-going debate on European private law as well, complicated by an additional layer of debate on federal versus national competences.

4.5.3 *Transplantation, Emulation, Competition: Metaphors and Models*

Law rarely emerges *ex nihilo* and codifiers almost always use models: this seems to be the standard way of legal change. The interesting question is whether there is a method in such borrowing. A weak legal culture can be defined as one that is 'widely opened to foreign "cultural intruders"'.[96] It typically borrows from others but is not typically borrowed from. As mentioned above, for historical and cultural reasons CEE countries have such weak legal cultures. As long as there are economies of scale in legal drafting, small jurisdictions also have efficiency reasons for relying on foreign models.[97] In this subsection, I suggest that it is possible and fruitful to interpret the story of private law codifications in the CEE region in light of insights gained from the theoretical literature on regulatory competition and legal transplants.[98]

'Competition' as metaphor and model. The scholarly literature on comparative law uses different terms for identifying the mechanisms in which legal cultures interact. When scholars analyse such complex phenomena as the interactions among legal systems, they often recur to metaphors, such as borrowing, imitation, imposition, contamination, diffusion, inoculation, infiltration, derivation, transposition, transplantation, tree model, wave model.[99] Metaphors help us to understand one kind of thing in terms of another. Thereby, they open ways to intellectually master complex phenomena. Apart from this general consideration, this 'figurative speech'[100] often serves to mark the supposed novelty and innovativeness of theoretical efforts—with a metaphor at the meta level: it is used for product differentiation.

Along with terms from botany, epidemiology, medicine, musicology or linguistics, commercial and mercantile metaphors also abound in the literature.

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[96] Monateri 2006, 39, n.8.

[97] Davis 2006, Mattei 1994; Grajzl and Dimitrova-Grajzl 2009.

[98] Wise 1990.

[99] For an overview, see e.g. Örücü 2007.

[100] Graziadei 2009.

Table 4.2 Four types of competition between jurisdictions[103]

Mobility of	Information (practices, doctrines, theories)	Goods and services	Factors of production (capital, firms, persons)	Legal rules
(1) Yardstick competition	√	–	–	–
(2) Indirect competition via international trade	√	√	–	–
(3) Locational (inter-jurisdictional) competition	√	√	√	–
(4) Free choice of law; competition of rules	√	√	√	√

We read about import and export, supply and demand of legal rules or the market for legal ideas. A further economic metaphor that is often, and often confusingly, used in comparative law is 'competition'. Looking at the different uses of the term in this context, it appears that some uses are indeed only metaphorical while others refer to what can be properly called competition in an economic sense.[101] In an integrated framework, Kerber and Budzinski distinguish four types of regulatory competition by looking at what is mobile among jurisdictions.[102]

In case (1), competition relies on the mobility of information on rules and policies, and other parameters in foreign jurisdictions. This case encompasses several variants which all play a role in the drafting of civil codes. The mechanisms are sometimes mentioned under different names, such as yardstick competition or legal emulation (Table 4.2).

In case of yardstick competition, individuals (voters) compare regulations (e.g. tax systems) in their own and neighbouring jurisdictions to assess their performances and to vote accordingly. Individuals exert pressure on lawmakers through political mechanisms in order to achieve a desirable change in their law.[104] As in these models voters are not mobile, competition takes place among different political candidates within separate jurisdictions.[105] In this context, the political market serves as a transmission mechanism for yardstick competition. The term 'competition' can thus be also used for describing politics within a (democratic) state as a 'political market'.[106] Voters, interest and pressure groups are on the demand side, politicians on the supply side. Suppliers want to maximise the

[101] To be sure, even within economic theory, the meaning of the concept is controversial. Hayek 2002; Kieninger 2002.

[102] Kerber and Budzinski 2004. For a critical analysis of the theory of regulatory competition see Larouche, Chap. 10 in this volume.

[103] Based on Kerber and Budzinski 2004, 5, Table 1.

[104] Besley and Case 1995.

[105] Besley and Case 1995.

[106] Becker 1958.

chances of being re-elected and for that purpose offer political programme packages; demanders express their preferences in votes and/or campaign contributions.

When we focus on the mobility of information among legislators, policymakers or drafters, we can also call the process a competition of ideas (*Ideenwettbewerb*). This can be channelled into political processes when creative political entrepreneurs generate policy innovations. Innovations are imitated by followers if they promise to be successful and then implemented in practise. This suggests a Hayekian evolutionary notion of competition in the political, or public policy, domain. More broadly, any kind of legal borrowing can be interpreted as part of a competition of ideas. 'Competition' in this sense refers metaphorically to subtle mechanisms at play within and among legal communities.

Legal transplants: comparison and the 'imagined future'. It has been suggested in the theoretical literature on legal transplants that analysis should focus on the micro instead of the macro level, i.e. to look at the act of transplantation itself.[107] Transplantation is 'mediated action'. Borrowed law is an instrument for an action with regard to 'an imagined future'.[108] For the understanding of the drafters' (mediated) action, both the institutional framework of the drafting process and the preferences of the drafters matter.[109] Thus, instead of discussing whether and when transplantation is desirable, research should focus on who (the institutional players) and how (through which mechanism) borrows, transplants or emulates. In a similar vein, in the law and economics literature, the so-called private legislations in the US have been analysed in terms of the interests and the institutional setting of legislative drafting.[110]

The term 'marketplace for legal ideas' refers to a market-like process where legal ideas are central and the members of the legal community are the main actors. When we analyse these preferences and motives, we should keep in mind that drafters do not only take into account the substantive merits of foreign models. For instance, the huge influence of German models in the CEE region can hardly

[107] Graziadei 2009.

[108] Graziadei 2009, 727.

[109] Barak-Erez 2009.

[110] With the example of the American Law Institute and the NCCUSL (The National Conference of Commissioners on Uniform State Laws) in mind, Schwartz and Scott argue that although members of these bodies 'are thought to be disinterested legal experts who pursue only the public good', public choice 'theory teaches us that the form and substance of a law is significantly endogenous to the law-creating institution. Put more simply, a legislature's output is a function both of the preferences of the legislators, whether selfish or altruistic, and of the institutional structure in which the legislators perform.' The outcome of their model and analysis is that a private legislature '(a) has a strong status quo bias that induces it to reject significant reform; (b) frequently produces highly abstract rules that delegate substantial discretion to courts; and (c) produces clear, bright-line rules that confine judicial discretion commonly when and because dominant interest groups influence the process. These bright-line rules ordinarily advance the interest group's agenda.' Schwartz and Scott 1995, 597. An interesting task would be to generalise this model for expert groups drafting civil codes in CEE countries.

be explained by their substantive merits only.[111] When the actors on this market are scholars and policy advisors, competition is not primarily driven by pecuniary interests or political influence, rather by more symbolic values, related to prestige and reputation.

This version of competition has been suggested in the literature for explaining judicial uses of legal transplants (or comparative law). For instance, Slaughter[112] argues that courts refer to decisions by courts in other jurisdictions in order to enhance the persuasiveness, authority or legitimacy of their decisions. More importantly, one can observe 'cross-fertilisation': inspiration taken from a foreign solution is not always indicated by direct citation. Personal and national pride might give reasons not to disclose the origin of a novel ruling. On the other hand, the pedigree and prestige of a foreign rule might be an argument for importing it explicitly or at least formally referring to it as a model. This observation can be generalised to drafting processes that are somewhat isolated from politics and dominated by academics and experts. The drafting of civil codes in expert groups is indeed often driven by such considerations.

The theoretician who is interested in these phenomena faces an elementary difficulty here: how to observe and identify an instance of foreign influence if there is no clear trace of the 'inspiration'. Once enacted as legal rules, there is no intellectual property in legal ideas and doctrines; and they do not come with a label of origin. On the other hand, as these ideas can be simply borrowed without attribution, when drafters indicate their sources, this fact usually plays an additional role in persuasion. In the CEE context, reference to foreign, especially Western models typically serves to promote a legal reform or assure the acceptance of an existing international, European obligation for harmonisation.

In this regard, there is a certain temporal dynamics at play. In the early years of the transition, the great variety of models almost automatically, with high probability led to incoherent, fragmented and random reception of foreign models. This chaotic reception could be later systematised in the domain of civil and commercial law through codification: most countries of the region made this experience. In Poland, Hungary and Romania, during the socialist era the structure of the civil code maintained the classical models, inspired by the French, German and Swiss codes. Therefore, changes could go step-by-step, with a formal continuity upheld. Those who had an interest in *tabula rasa* argued, instead, that socialist civil law is completely useless and should be abolished. This was indeed the case in Czechoslovakia that introduced a new, transitional commercial code or East Germany where the German BGB was quickly reintroduced, with some transitory rules.[113]

The drafting process of a civil code provides ample space for interaction with foreign legal systems. In these year-long processes legal academics usually engage in some comparative legal analysis. This opportunity, however, is not always used,

[111] Schauer 2000.

[112] Slaughter 1994, 118.

[113] See Ajani 2005, 93–95.

and sometimes left unused for good reasons. The Hungarian case can again serve as an illustration. Looking at the motives and explanations of the 2008 EP1,[114] it is easy to notice that some parts are based on extensive comparative work, while others do not show any impact of it. For instance, the general contract law rules take into account recent changes in the German civil code, the Dutch civil code and international models such as the CISG, the UNIDROIT principles, PECL and the DCFR. The rules on personal securities take the respective European Principles and the Ottawa model law into account. The chapter on tort law, in contrast, largely follows the current code, adding some rules elaborated in judicial practice. It does not show any impact of the Principles of European Tort Law. The reason for this conservatism might have to do with the fact that the main drafter of tort law rules was a judge with limited international outlook. If this is so then the lack of comparative analysis is regrettable if not objectionable.

A different consideration is that reliance on comparative analysis can be problematic. For instance, the member of the EC responsible for drafting the book on property law in the Hungarian EP was a renowned academic who deliberately took a rather conservative stance with respect to legal transplants. He perceived his task as the consolidation of property law as it operates, instead of designing the best possible (sub)system. Thus, he decided to keep the current rule if it seemed workable, especially at points where it was supported by established case law, even if taken in isolation, a foreign model would have suggested a better substantive rule.

There seem to be reasons to be particularly sceptical about the direct use of international model rules and soft law instruments in drafting. First, these supranational rules often reflect compromises, instead of resting on principled justifications. Second, as most of these rules are relatively new, there is no established case law to rely on to solve practical problems in their application.

A further characteristic of the use of foreign models in the region is the virtual lack of reference to the laws of other CEE countries, although *prima facie* such intra-regional comparisons and transplants would make sense. For instance, Polish and Hungarian civil law practice and scholarship face very similar problems. Apart from prestige, this relative isolation might also have reasons in language differences and patterns of cultural closeness and distance.

Regulatory competition. Up to now, we have only discussed variants of the first case in Kerber and Budzinski's typology where only information is exchanged among jurisdictions.[115] The next two cases can be summarily called locational competition. The second is driven by international trade in goods and services which, indirectly, involves a choice of legal rules. (Goods and services are sold under the legal terms of one or another contract law regime. Consumers choose the law pertaining to these goods indirectly.) The third type involves the mobility of individuals, firms and capital, and thus allows for a direct interjurisdictional competition. Importantly, in this case legal subjects do not pick and choose

[114] See Vékás 2008.

[115] See Kerber and Budzinski 2004.

individual rules. Rather, they choose among rules in bundles, by choosing their jurisdiction. Finally, the forth type, regulatory rule competition, assumes that citizens and firms have a free choice of law, independent of their physical location.

To call a certain interaction 'competition' in an economic sense and not only metaphorically, certain further conditions need to be present. We can speak of regulatory competition in the strict sense only when the suppliers of legal rules (drafters, legislators, regulators, courts) react to changes on the demand side, i.e. to the choice of law by legal subjects, in a systematic way. In short, there must be a feedback mechanism to the supply side. Regulatory competition among jurisdictions in this narrow sense means that subjects of the law 'vote by their feet', i.e. choose either the location of their activities or the law applicable to those activities that maximise their preferences.[116] In this way, their choice gives incentives for legislators who want to attract business (taxpayers, clients for legal services, etc.) to their jurisdiction, to adopt rules that are indeed seen as attractive. For instance, a benevolent government might want to make its laws attractive in order to increase the number of business firms in its jurisdiction and thereby to collect more tax income. To note, this governmental decision usually links back to the political market as well as regulatory competition is usually considered beneficial in terms of the preferences of citizens (voters).

Some regulatory decisions are more closely linked to specific group interests. For instance, a government captured by the lawyer's craft will think about ways to attract clientele for legal counselling services or public notaries. This example is not random: among private actors and interest groups, legal professionals usually have a considerable influence on the drafting of civil codes, and thereby on legal convergence or divergence. For instance, during the drafting of the Hungarian Civil Code arguments and pressure from public notaries for stricter formal requirements for certain transactions were clearly noticeable. Lawyers whose practice typically focuses on a particular jurisdiction have an interest in maintaining their share on the local market. Therefore, they invest in rent-seeking activities to sustain divergence. It is often not clear whether lawyers' exhortative references to the integrity and coherence of the national legal culture point at real costs and drawbacks of harmonisation or these arguments just serve as cover-up for self-centred interests.[117]

Free choice of law means that in a number of contexts and under certain constraints, individuals and firms can choose the law governing or applicable to, their relationships.[118] Under certain conditions, private actors' self-interested choice of the location where to litigate, the state where to incorporate their firm, or the business standards to follow, may produce socially desirable competition among legal systems, i.e. among governments as lawmakers. In other words, regulatory competition can lead to the same socially desirable outcomes as

[116] Tiebout 1956.

[117] Ogus 1999.

[118] O'Hara and Ripstein 2009.

competition in regular commodity markets ('race to the top'). But locational competition between decentralised legal systems or regulatory rule competition in the narrow sense does not necessarily lead to desirable outcomes: it may result in a 'race to the bottom'.

In still other cases, competition in an economic sense may simply not operate, either because private actors cannot choose the law applicable to their transactions (e.g. they cannot escape their home jurisdiction in criminal law), because legal issues count only peripherally in the agents' decision over the location of their activities, or because legislators do not react to firms' and individuals' choices in any systematic way (they are not interested in attracting more or less users of their legal rules).

This last consideration is clearly relevant in the context of civil codes. As Schauer argues, 'donor countries, recipient countries, and third parties (such as NGOs) have political, economic, and reputational incentives that are likely to be important factors in determining the patterns of legal transplants' but which are 'efficacy-independent' in the sense that they are not premised on the idea that the transplant will function effectively in the recipient system.[119]

4.6 (Re)Codified Civil Law in Central and Eastern Europe: Tentative Conclusions

This chapter analysed the drafting of new civil codes in Hungary and in other Central and Eastern European countries. Based on a general regional overview and a more detailed study on Hungary, and using the theoretical concepts and tools discussed in Sect. 4.5, it is possible to make some rather tentative general observations.

While some talk about the decline of the idea of civil law codification in Continental Europe, the idea of a civil code still has some symbolic appeal. Indeed, at the turn of the Millennium, new civil codes and recodification seemed to be *en vogue* overall in the world.[120] Still, legal transition made the (re)codification of private law in the CEE region historically unique. For instance, experts were often confronted with the alternative of developing transitional civil codes or drafting more permanent legal texts.[121] Additionally, they had to find a 'workable balance between modernizing and the country's limited ability to digest the product of avant-garde or exotic legal cultures'.[122] In civil law, this balance is especially relevant because new solutions coexist with a broad set of traditional rules, often dating back to Roman law.

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[119] See Schauer 2000, 2.

[120] Remien 2008.

[121] Ajani 1996, 520.

[122] Ajani 1996.

In some countries, the idea was that a comprehensive modern civil code is the best tool to prevent chaos and provide technical guarantees for further development of both civil and commercial legislation.[123] This was seen as a complement to the political guarantees set-up in constitutions and international agreements. But a uniform comprehensive civil code is just one way to solve the problem that a market economy requires a legal framework. This task surely requires more than an *ad hoc* response to business needs but to provide legal rules of considerable complexity does not necessarily require a single systematic civil code. Thus, the design of civil law is underdetermined by economic arguments. Systematicity is rather an internal need of the legal system.

Drafters typically think that there are national traditions that should be upheld but this is not based on symbolic or aesthetic, rather on pragmatic and prudential reasons. The arguments on national legal traditions and originality versus 'imitating the West' are rather marginal. The reason for this is perhaps that although civil law is just as fundamental for a market economy and civil society as a constitution for democracy and the rule of law. Business law rules are considered as more of a technical character, not related to personal or national identity.

This chapter also analysed the interaction of academic and political interests in the drafting process. Drafters with academic or judicial background do not primarily look upon the code in a consequentialist or instrumental manner, although at certain points policy goals and the influence of pressure groups seem quite obvious. Although there would be time and expertise available, systematic estimations on extra-legal consequences (ex ante evaluation) do not seem to be part of the legislative process. Similarly, regulatory competition plays virtually no role among the explicit considerations of the drafters. For instance, they do not seem to be primarily concerned with designing rules such as to attract more foreign investments in the country. On the other hand, well-organised interest groups can draw the drafters' attention to policy issues that, in their eyes, need a doctrinal solution.

I also showed that the drafting process often relies on comparative work. Foreign national civil codes and international models, such as CISG, PECL and the DCFR are often used as source of inspiration. These transplants are very diverse in quality and depth. In sum, although the present analysis allows for some plausible generalisations, more systematic and eventually quantitative research is needed to further substantiate these conclusions and support them with more solid empirical evidence.

[123] Ajani 1996, 516.

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Chapter 5
Courts and Expertise: Consequence-Based Arguments in Judicial Reasoning

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Contents

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_5,

This chapter discusses the conceivability, feasibility and desirability of consequence-based arguments in judicial reasoning. After a brief conceptual typology and comparative overview of various ways courts appreciate the general social consequences of their decisions in the justification they provide for them, I analyse the philosophical, jurisprudential and institutional dimensions of the issue and argue that in a constitutional democracy the scope of consequence-based judicial reasoning is limited mainly by the expertise of courts, i.e. the extent they are capable of predicting and evaluating consequences of their rulings.

5.1 Legal Reasoning and the Consequences of Judicial Decisions

Experienced legal practitioners have in-depth knowledge about what kind of arguments are acceptable in particular legal contexts. However, this internal view is sometimes confused, misleading, or incomplete. It is therefore the task of legal theorists to clarify the nature of legal reasoning.

In general, legal reasoning is "an activity conducted within more or less vague or clear, implicit or explicit, normative canons. We distinguish between good and bad, more sound and less sound, relevant and irrelevant, acceptable or unacceptable arguments in relation to […] legal disputation."[1] Following Tony Honoré, I refer to these criteria as the *canon of acceptable arguments*.[2] This canon arises out of a social practice among the legal community. By way of socialisation and introduction to the skills and knowledge of the profession, members of any given legal community become enabled to deal with ordinary situations in a particular technical way, according to a specialised linguistic terminology.[3] The canon limits the decision maker both psychologically and institutionally, by requiring her to fit "within the framework".[4]

Legal reasoning, i.e. the way courts and other legal officials justify their decisions can be related to the consequences of these decisions in several ways. Not all of these are relevant for the present discussion. Courts, especially higher or

[1] MacCormick 1978, 12.
[2] Honoré 1973.
[3] Bell 1986.
[4] See MacCormick 1978, 34.

constitutional courts often take decisions which have large-scale social consequences. This does not mean that judges are necessarily aware of these consequences nor that if they are, their decisions will be motivated by what they expect to result from their decisions. Even if judges are, as a matter of psychology, influenced by expected consequences of how they decide a case, they are not always allowed or willing to refer to them as reasons for their decision.[5]

Furthermore, even if legal reasoning does not openly refer to or account for such consequences, in public political discourse court decisions are typically evaluated, welcomed or criticised in terms of their alleged consequences. For instance, constitutional courts are sometimes criticised for extending the justiciability of economic and social rights "irresponsibly", i.e. by neglecting the financial burdens on the state budget which is likely to arise from interpreting such rights as justiciable.[6] In other cases they are accused of being "irresponsive" to social and political needs and hiding behind legal formalism. Such public scrutiny sometimes amounts to a kind of pressure that judges should be made accountable for the consequences of their decisions.

This chapter is concerned with consequences of judicial decisions only as far as decision makers, especially judges and collegiate courts provide justificatory reasons for their rulings and among these reasons they are allowed or required to make explicit reference to the consequences of their decision.

5.2 What are Consequence-Based Arguments?

In order to have a clearer view of what is meant by consequence-based arguments, as a first approximation they should be contrasted with something clearly not consequence-based: rule-following. Rule-based decision making unavoidably faces the problem of over and/or under-inclusiveness.[7] Over and/or under-inclusiveness of rules *vis-à-vis* their background justification occurs when general rules are applied to heterogeneous cases or subjects. Some of those cases will be covered by the rule but not by its background justification (the rule is over-inclusive) or vice versa (the rule is under-inclusive).[8] This problem is ubiquitous in legal decision making, a *par excellence* rule-based practice.

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[5] In analogy to the distinction in the philosophy of science, this difference is sometimes referred to by juxtaposing the context of discovery and the context of justification. See MacCormick 1978, 15–16; Anderson 2009. For the original distinction in the philosophy of sciences, see e.g. Schiemann 2006.

[6] Sajó 1996.

[7] The classic reference is, of course, Schauer 1991.

[8] For instance, if a legal rule sets the age limit of full legal capacity at 18 years, the rule serves as an easily administrable way of giving capacity only to those who are mature enough to take care of their dealings. However, the rule will also grant capacity to those who are over 18 but immature and deny capacity from those who are under 18 but sufficiently mature.

Legal systems show a great variety as to how much divergence will result in the return from the rule to its background justification. They also use different doctrinal techniques to handle this divergence. In cases when the divergence is perceived to be large and important, modern legal systems usually require, allow, or at least tolerate that judges do not apply the rule as written but recur to the background justification in some way. This can be seen as the main *raison d'être* of at least some kinds of consequence-based reasoning in legal systems that rely on rule-based decision making. In other words, if judges were allowed to use rule-based arguments *only*, justifications could not be based on direct and explicit reference to consequences.

Now, we can formulate a definition of consequence-based reasoning.[9] If in deciding case C, the judge finds that there is a relevant rule *R* which has more than one plausible interpretation (*X*, *Y*, *Z*,…) the judge is said to use a consequence-based argument if she justifies her decision for rule-interpretation *X* (instead of rule-interpretation *Y* or *Z*) with the argument that rule-interpretation *X* is normatively superior to alternative rule-interpretations *Y* or *Z* because of the consequences *X* is expected to bring about. The normative standard adopted by the judge determines which features of the consequences under possible rule-interpretations are relevant for the decision making.

As this definition does not specify the normative standard on which consequences are measured and compared, there are as many logically possible versions of consequence-based reasoning as there are normative standards. An act-utilitarian decision maker would use the standard of overall social utility. A judge whose sole consideration is gender equality would choose the interpretation which promotes this latter goal better. The utilitarian needs to look at potentially all known and unknown, close and remote consequences of the alternative rule-interpretations, weight their overall consequences and choose the rule-interpretation that comes out better on an aggregate scale. To apply this standard literally in a judicial setting would make the role impossible to fulfil. Even a Herculean utilitarian judge, with unconstrained time, expertise and conscientiousness would face limits of information and foresight because of the inherent uncertainty of the future. The second judge who is solely concerned with gender equality has to perform a somewhat simpler task which can be called "single-factor consequence-based reasoning".[10] To be sure, in modern legal systems judges are constrained in their choice of normative standards. Correspondingly, the kinds of consequences that matter for their decision are also limited.

[9] To be more precise, this is a definition of consequence-based reasoning *within a system of rule-based reasoning*.

[10] Cane 2000, 41–42. In Cane's terminology, the first judge is involved in "aggregative reasoning" about consequences, "which assesses the desirability of a ruling or a rule by reference to the overall costs and benefits of the ruling." Ibid., 41.

5.3 What Kinds of Consequences Do Matter?

Having characterised consequence-based reasoning in general, further conceptual clarity can be gained by distinguishing the types of consequences that are usually taken into account as justificatory reasons. We can distinguish between individual and systemic; and among the latter, between juridical and behavioural consequences.

A judicial decision can refer to consequences for the parties involved in an individual case or alternatively to large-scale or general consequences. For instance, a judge may realise that if she decides that the conduct of the defendant is identified as the "adequate" or "proximate" cause of the harm suffered by the plaintiff, and certain other conditions are fulfilled then rules of tort law require that a large amount of damages is awarded to the plaintiff. One consequence of this ruling could be that the payment puts an extremely high financial burden on the defendant. Is the judge allowed or mandated to take such consequences into account when deciding whether the causal link between defendant's conduct and plaintiff's harm is legally established? Or is she allowed to rule that although law is on plaintiff's side, "equity" or "fairness" absolves the defendant from liability? In general, modern Western legal systems answer such questions in the negative. Sometimes, however, judges are explicitly authorised to take into account the impact of their ruling on the individual(s) involved in a particular case. For instance, judges often have to decide about the detention or otherwise of a criminal suspect based on the likelihood that the suspect will escape or commit further crimes. Importantly, when a judge is authorised to base her decision on such consequential considerations she also has the duty to justify her decision with arguments related to the expected consequences of alternative rulings.

Judicial decisions are sometimes justified with reference to a broader set of consequences. Returning to the example of "adequate" or "proximate" cause, a judge may realise that a broader or narrower construction of causation would have an impact on civil liability as an institutional mechanism of damage compensation throughout the legal system. Or she may think that different interpretations of the doctrinal concepts of causation would change the distribution of wealth between various social groups such as injurers and victims or affect the level of precaution by potential future injurers. When a judge considers the consequences of her decision on similar tort cases in the future, on the rules of civil liability or on the conduct of potential injurers and victims, *and* justifies her decision with reference to such considerations, she is said to use general or systemic consequence-based arguments.

Within this latter category one can further distinguish between "juridical" and "behavioural" consequences.[11] When a case is decided with regard to its juridical consequences, it is decided with "reference to decisions which would have to be

[11] Rudden 1979. In the German literature, Lübbe-Wolff 1981, makes a similar distinction between *Rechtsfolgen* and *Realfolgen*.

given in other cases if a particular ruling were given in the instant case".[12] In other words, the judge examines the logical implications of interpretation *X* (or *Y* or *Z*) on other rules within the legal system, by inquiring "what sorts of conduct the rule would authorise or proscribe."[13]

A typical example of such an argument from juridical consequences is the so-called "where-will-it-all-end" or slippery slope argument. This is invoked by judges or lawyers who want to convince their audience about the superiority of interpretation *X* by drawing attention to the disastrous consequences of alternative decisions. The argument goes like this: If in this case we decided *Y* or *Z*, in all similar cases we would also have to decide *Y* or *Z*. If we chose interpretation *Y* or *Z*, this would imply that other rules within the legal system would allow for or mandate something that is clearly undesirable in light of some normative standard (implicitly accepted) to be applied. As this logical implication of interpretation *Y* or *Z* is, for some reason, unacceptable, we should decide for *X*.[14]

A prominent example of this slippery slope argument was put forward by Chief Justice Marshall in *Marbury v. Madison*[15] in favour of the judicial review of statutes. Arguing in favour of the Supreme Court's competence for judicial review, Marshall conjectured that not to allow judicial review would "subvert the very foundation of all written constitutions."[16] In other words, he made an explicit reference to unacceptable systemic juridical consequences of the alternative ruling.

While juridical consequences are "law-immanent",[17] behavioural consequences refer to "what human behaviour the rule will induce or discourage"[18] outside the legal system, in society at large. When judges refer to behavioural consequences, they make a more or less educated guess about how certain groups of legal subjects would change their behaviour in response to this or that decision. When a judge decides between alternative interpretations of a rule in light of such general social consequences, she has to imagine and compare hypothetical scenarios assuming that individuals will change their behaviour in a predictable way, in expectation of how the law would regulate their dealings. Clearly, any sensible use of such an argument is based on a number of assumptions about how law influences human behaviour. In the following, I will mainly focus on legal arguments based on such behavioural consequences. One reason for this is that they have been somewhat neglected in jurisprudential literature.[19] Another reason is

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[12] See Cane 2000, 41.

[13] MacCormick 1983, 239.

[14] MacCormick 1983, 240.

[15] 5 *U.S.* (1 Cranch) 137 (1803).

[16] Quoted in MacCormick 1983, 240.

[17] Luhmann 2005, 59.

[18] See MacCormick 1983, 239.

[19] Systemic juridical consequences have been thoroughly discussed in previous literature (see MacCormick 1978, Chap. 6, MacCormick 1983; MacCormick 2005, Chap. 6). Rudden 1979, 193 argued that by focusing on juridical consequences, MacCormick "frames his case too narrowly". Cane 2000 focuses on behavioural consequences.

that the typical arguments of *law and economics* fall into this category. An efficiency-based argument, i.e. a judicial reference to improvements in efficiency or welfare the decision is supposed to bring about is an argument based on behavioural consequences.

5.4 Where Do We Find Consequence-Based Arguments in Law?

In this section, I give a short and selective overview of how consequence-based arguments figure in the respective canons of accepted arguments in various legal systems and legal areas. As a rough generalisation, it seems that adjudication is much less open to consequence-based arguments than legislative or administrative rule-setting. Within the judiciary, by comparing larger groups of legal cultures (Western vs. non-Western; common law vs. civil law) or national legal orders (American vs. English; German vs. French) one also finds apparent differences as to how open their judicial reasoning is towards consequence-based arguments.[20] Two types of consequence-based reasoning, however, seem to be accepted in a large number of jurisdictions, at least in some legal areas: purposive or teleological interpretation and references to (public) policy.

Teleological interpretation itself has two variants. It can be "subjective" when the decision maker evaluates the consequences of alternative interpretations in light of the goals and values which she identifies as the historical "legislative intent" that motivated the lawmaker in adopting the rule. Alternatively, it can be "objective" when the decision maker identifies the *ratio legis*, the purpose of the rule, independent from legislative intent and chooses the interpretation that best serves this purpose.[21]

The second well-known variant of consequence-based arguments is the judicial reference to "public policy". When judges find it appropriate to deviate from a rule of law for reasons of public policy, they evaluate the consequences of alternative rulings in light of normative standards which they identify either by evoking the function(s) of a specific domain of law to which the rule belongs or by referring to more general purposes of the law, such as the protection of legitimate expectations or the proper functioning of the judicial and political system. In some cases, they weight these values against the more direct purpose of the particular rule which they have to interpret. In this sense, public policy represents "a compromise between various values the law has to serve."[22]

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[20] Teubner 1995.

[21] On the distinction between "subjective" and "objective" teleological interpretation in German legal doctrine see Koch and Rüssmann 1982.

[22] Bell 1995, 88.

As for national differences, in the literature it has been widely acknowledged that in the United States courts have favoured an instrumental approach to legal reasoning for long, even in the absence of instrumental legislation.[23] To be sure, this does not mean that judicial decisions in today's US courts are mostly or even typically justified by consequence-based arguments. What it means is that consequence-based arguments are well-established within the canon of accepted arguments and the legal community may openly refer to them in cases which are not settled by statute or precedent. Can we observe similar tendencies in other countries?

Back in the 1980s John Bell observed a tendency that "policy arguments" were adopted more and more often in English courts. In other words, English courts, at least in some hard cases, openly justify their decisions with reference to the likely effect of their decisions on the policy purposes defined by or attributed to the legislator.[24] Other commentators stress, however, that the differences between American and English style of judicial arguments are strong, one of them being the characteristically different attitude towards instrumental or pragmatic judicial reasoning in the two legal cultures.[25]

In Germany, the current canon of arguments, as expressed in the standard doctrines on legal methodology (*juristische Methodenlehre*), attributes a key role to purposive interpretation (*objektiv teleologische Auslegung*) in statutory interpretation, although the details and the exact meaning of this method are controversial.[26] Related to this, in the last few decades a number of German legal scholars have argued that legal decisions should be, at least under certain circumstances explicitly consequence-based (*Folgenberücksichtigung, Folgenorientierung*).[27] The academic discussion on this topic is undoubtedly an integral part of the German legal culture. Still, it would be an exaggeration to see consequence-based arguments in general as part of the *accepted* canon of arguments.

Looking at the French legal culture, the first impression one gets is that the strictly formalistic style of judicial arguments is clearly unfavourable to open consequence-based justification. Arguably, France can be seen as a good example for the rejection of consequence-based reasoning: even the doctrinal discourse seems to be hostile towards such arguments.[28]

To be sure, on the basis of this very sketchy overview, and at this high level of generality, one can hardly answer the question whether there is convergence between legal cultures as to the place of consequence-based arguments in the canon. There undoubtedly are some stable differences in the argumentative style of

[23] Horwitz 1979; Ackerman 1986.

[24] Bell 1983, 1989.

[25] Atiyah and Summers 1987; Posner 1996.

[26] See Koch and Rüssmann 1982, 227.

[27] See Teubner 1975; Wälde 1979; Coles 1991; Deckert 1995; Eidenmüller 1999; Kirchner 2008. For a critique, see Hensche 1998.

[28] This, however, does not seem to apply to French competition law, see Sibony 2008.

courts in these legal cultures,[29] deeply rooted in institutional history (path dependence). Some are related to what could be vaguely called the "dominant philosophical atmosphere" of these cultures. For instance, some commentators argued that regarding the different attitudes towards pragmatism and utilitarianism, "trans-Atlantic divergence" would be a more fitting description than convergence.[30] Such macro level comparisons, however, may be misleading, exactly by conveying the false impression that national legal cultures are homogeneous and static. In fact, the canon of acceptable arguments is context-specific and dynamic.

It seems that in any thorough comparative analysis, at least three such distinctions should be drawn: between legal areas (e.g. private, administrative, criminal or constitutional law), levels of decision (low-level vs. high-level courts) and between the reasoning in judicial decisions and the doctrinal commentary thereon.[31]

For instance, one would expect that a careful comparison of the role of consequence-based reasoning in different legal areas and procedures would reveal differences within single (national) legal orders. Thus, intuitively one could think that doctrinal areas such as private or criminal law are less open towards consequence-based arguments than competition law or administrative law.[32] Private law has been traditionally contrasted with economic and social regulation as embodying two different "mentalities". The opposite hypothesis, however, also has some plausibility, especially in light of recent developments within private law.[33] As Hugh Collins convincingly argued with respect to contracts, one can observe the "productive disintegration of private law", in the sense that private law reasoning and discourse are being transformed and reconfigured through clashes with the discourses of economic and social regulation.[34] In fact, this productive disintegration of doctrinal reasoning under instrumental regulatory pressure would be the source or even an instance of the increasing role of consequence-based reasoning.

Strictly speaking, the terms "convergence" and "divergence" refer to dynamic processes, i.e. changes through which legal systems become more or less similar over time.[35] Context-specificity and the dynamic perspective together imply that any legal system can show countervailing tendencies. For instance, one legal system can be moving towards open consequence-based argumentation in administrative

[29] See MacCormick 1978, 11.

[30] Grechenig and Gelter 2008.

[31] Here I only discuss the first distinction, i.e. why some legal areas can be more open towards certain kinds of arguments than others. As to the second distinction, it seems to follow from the division of labour within the judiciary and the nature of the appeal process that high-level courts use consequence-based arguments relatively more often. The third distinction is also related to division of labour, namely between judiciary and legal academia, the latter often being highly critical towards the former.

[32] Kennedy 1976; Pfaff and Guzelian 2007; Sibony 2008.

[33] Parker et al. 2004, 5–11.

[34] Collins 1999; Collins 2004.

[35] See Larouche and Chirico, Chap. 2.

law and rigid formalism in the enforcement of human rights. Another could change in the opposite direction. It would require more systematic analysis to corroborate or reject these hypotheses. Still, it seems plausible that functional and institutional differences between legal areas imply that both the degree of openness and the way the gaps in legal rules are filled are domain specific as well.

5.5 (Why and When) Should Judges Use Consequence-Based Arguments?

Against the conceptual and descriptive background sketched in the previous sections, now I turn to the normative question whether there are good reasons for setting constraints to the use of such arguments. Analytically, one can distinguish three levels in the discussion about the proper role of consequence-based arguments in judicial reasoning: (1) philosophical (or conceptual), (2) doctrinal (or institutional) and (3) political (or pragmatic). While the audience and the terminology of these discursive levels are different, in most real-world discussions they are combined. What is important to see is that those who favour, promote or defend consequence-based judicial reasoning have to argue for it at each level, by demonstrating that consequence-based judicial reasoning is (1) conceivable, (2) feasible and (3) desirable. These questions have a logical sequence: it only makes sense to move to the next one if the previous one is answered positively, at least in part. Moving from the first to the second and third questions also implies an increase in the importance of contextual factors such as time, jurisdiction or domain of law.

These questions about consequence-based reasoning direct the attention to serious problems that can emerge when courts justify their decisions with reference to expected consequences. The gist of my argument in the following sections is that these problems are closely linked to the competence of courts. Competence is a multi-faced, technical, institutional and normative feature of adjudication. It has at least two aspects: legitimacy and expertise. These aspects are analytically separable: while legitimacy relates to judicial authority, accountability and discretion, expertise raises institutional and technical problems of judicial decision making.

5.6 Conceivability: Philosophical Objections from the Nature of Judging

Current "legal scholarship […] draws a crude distinction between two modes of reasoning within law—instrumental, forward-looking, or policy-oriented ways of thinking and backward-looking, principled or rule-based doctrinal reasoning."[36]

[36] See Parker et al. 2004, 4.

While these dichotomies obviously do not overlap completely, it is plausible to see consequence-based reasoning as an instance of the first mode: it is instrumental, forward-looking and policy-oriented legal reasoning.[37] Is this compatible with the nature of adjudication in a constitutional democracy or in other systems?

For legal philosophers the key question about legal reasoning is this: what constitutes a relevant argument in law. When they construct a theory of legal reasoning, philosophers are interested in how a practice of giving good public reasons in support of a decision works and how the practice itself can be justified. With regard to our specific topic, normative legal philosophy is interested in the following question: what is the place for consequences among the reasons judges can put forward in justifying their decisions?

For a long time the jurisprudential discussion on legal reasoning has considered judicial decision making to be faced with an alternative: legal formalism, deductive reasoning, "Formal Style" on the one hand, pragmatism, consequentialism, "Grand Style" on the other.[38] Legal scholars in the German-Austrian *Freirechtsschule*, representatives of American legal realism and many others claimed that formalism only covers or hides discretion: it makes law unpredictable, uncertain and ultimately unjust. They argued that an open recognition of the more active role of judges would make law more predictable and also substantively closer to the normative standards these writers claimed to be the proper guiding principles of adjudication.

Starting from the 1970s, it has become widely accepted that apart from distinguishing formal and substantive reasoning, within the second category one should further distinguish between "goal-reasons" and "rightness-reasons".[39] A "goal-reason" justifies a decision as a means or instrument for promoting or securing a state of affairs that is desirable. A rightness-reason justifies the decision by invoking a "sociomoral norm" that the conduct or relationship of the parties concerned is supposed to be subject to. While goal-reasons are forward-looking, rightness-reasons are backward looking.

In Ronald Dworkin's early theory[40], the same dichotomy arises as a distinction between policies and principles and the two corresponding types of argument which support two different types of social aims. Arguments of policy are meant to support decisions about collective goals and goods. Arguments of principle, in contrast, are supporting goods which are realised individually, especially as protected by individual rights. Dworkin forcefully argued that the proper task of courts of law, both in a descriptive and a normative sense, is to ascertain and

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[37] In fact, similar and related dichotomies can be multiplied. One can juxtapose output-oriented and input-oriented decisions; *ex ante* and *ex post* perspective; substantive and formal rationality; standards and rules; utility and rights; *voluntas* and *ratio*; interdisciplinarity and operational autonomy; *Lebensnähe* and *Lebensfremdheit*. See Kennedy 1976; See Koch and Rüssmann 1982; Luhmann 1995.

[38] See MacCormick 1983, 242–243.

[39] The terminology comes from Robert Summers, quoted in MacCormick 1983, 243.

[40] Dworkin 1977.

vindicate rights. He claimed that courts (should) base their decisions solely on principles and not on policies. For Dworkin, there seems to be no scope for consequence-based arguments in judicial reasoning.

Critics have argued since long that Dworkin's distinction between policies and principles is ambiguous and his arguments against policy-based adjudication are not convincing.[41] In subsequent writings, Dworkin himself made the distinction less marked, noting that "the argument that D ought to be the decision in this case in order to secure or promote aim A may just as likely be an argument of principle as an argument of policy".[42] Thus, in many cases where Dworkin would reconstruct the judge's argument as one of principle, others can justifiably reconstruct it as one of policy.

A related objection against consequence-based arguments comes from universalisability. Dworkin and MacCormick, as well as other legal theorists hold the view that the activity of judging implies justification and to justify a decision means to universalise. MacCormick's philosophical claim is that as a matter of conceptual or analytical truth, a judicial decision can only be justified with universalisable arguments. Justificatory reasons have to be universalisable in the sense that they should apply equally to any case which is sufficiently similar in relevant aspects to the one under scrutiny. According to MacCormick, this requirement follows from the concept of formal justice that like cases should be treated alike.

Now, references to juridical consequences are clearly universalised. Does this imply that behavioural consequences can not figure in legal justifications? It seems that if universalisability means that the reason given for a decision should apply not only to the particular case under scrutiny but to any case which is similar in relevant aspects, then not only juridical but also behavioural, i.e. general social consequences are able to provide such a justification. The arguments based on general social consequences explicitly show their universalisable form when it requires applying the favoured rule-interpretation in all similar future cases. In the jurisprudential literature it has been argued for quite some time that while universalisability is indeed a critical aspect of judicial decisions, "this requirement is quite consistent with reliance on policy".[43]

As an aside, it should be noted that there is no necessary logical connection between consequence-based reasoning in law and consequentialism as a substantive moral standpoint. These two neither implicate nor exclude one another.[44] It is not incoherent to reject pure consequentialism as a moral standpoint and to argue nevertheless that judges should justify at least some of their decisions in terms of certain consequences. *Vice versa*, it is a defensible (not self-contradictory) position for a legal philosopher to be a rule-utilitarian and to think that judges should not be allowed to justify their decisions in terms of their social effects.

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[41] Dworkin 1976; Greenawalt 1977, 99; See MacCormick 1983, 243–244.

[42] See MacCormick. 1983, 245, interpreting Dworkin.

[43] See Greenawalt 1977, 1010, note 51.

[44] Barnett 1989. On consequentialism in moral philosophy see Sinnott-Armstrong 2011 and references there. On rule-consequentialism see Hooker 2008.

In sum, there does not seem to be a compelling philosophical argument for rejecting consequence-based judicial reasoning *tout court* as inconceivable or clearly unsound. A limited role of such arguments is compatible with various philosophical standpoints. Furthermore, as the comparative overview indicated, there are non-exceptional cases in several jurisdictions when judges openly justify their decisions with consequence-based arguments. Hence, it is not incompatible with the institutional role of a judge in modern Western legal systems. In sum, it seems safe to say that consequence-based reasoning in conceivable.

5.7 Feasibility: Objections from Individual and Collective Expertise

A consequence-based judicial decision can be represented as a three-step procedure of optimisation under uncertainty: (1) identify the relevant normative standard(s), (2) measure the consequences of each possible decision in the dimensions indicated by the standard(s) and (3) weight and compare the possible decisions and choose the one with the highest overall value. Ideally, a fully informed rational decision maker can solve this problem in an optimal way. The objection from feasibility states that at each step real-world courts and judges run into difficulties that are so serious that they make such an exercise in rational choice and thus consequence-based legal reasoning impossible. Let us look at this argument more closely (Table 5.1).

First, the judge has to identify which consequences of her decision are relevant. Some of them are easy to identify or even to quantify, at least in theory. Others are notoriously difficult to operationalise.[45] For instance, what would be the measure of a decision's impact on such procedural values as predictability, legal certainty or coherence?

In a second step, the judge has to measure the impact of her decision in all dimensions identified and operationalised in step one. Here she faces severe information imperfections and fundamental uncertainty about relevant variables. Factual information is almost always incomplete and not always reliable or verifiable. A further difficulty arises from the institutional setting of adjudication. In civil procedures as well as in the adversarial type of criminal procedure the informational base of the judge is essentially determined by the interested parties who do not have strong incentives to present their information in an unbiased way. Judges may rely on expert witnesses but this only provides a partial improvement.[46] In addition to information problems, in judicial procedures other resources

[45] See Hensche 1998.

[46] On the use of expert evidence before the EC courts see, e.g. Barbier de la Serre and Sibony 2008.

Table 5.1 Consequence-based decision making as optimisation under uncertainty

Step	Question to be answered by the decision maker	Difficulty
1. Identification	Which consequences (effects) matter?	Operationalisation
2. Measurement	What is the impact of the decision in these dimensions?	Information
3. Evaluation	Which decision has better consequences overall?	Trade-offs

such as time and human capital are also very limited. Furthermore, cognitive limitations of judges and their lack of expertise in technical disciplines imply that available information is not processed in a systematic and theoretically sound way.

Third, when choosing between alternatives, the judge has to evaluate the overall consequences of possible decisions in light of relevant normative standards. If the relevant consequences cannot be easily reduced to one dimension, this choice involves difficult normative trade-offs. For instance, a judge may have to answer questions like the following: how much legal certainty should be sacrificed in order to promote gender equality to a given extent?

In view of these difficulties, concerns about feasibility make us ask, what is likely to happen if a real-world judge has the duty to carry out such an optimisation exercise, i.e. to assess the general social consequences of her decision in terms of rational choice theory? Undoubtedly, she would face a plethora of problems. The pessimistic conclusion would be that an across-the-board mandate for consequence-based reasoning is likely to bring about intuitive, speculative, subjective decisions, even if eventually disguised as well-founded and objective. If a decision maker is authorised to base her reasoning on consequences but she lacks information and expertise, such a mandate can backfire. Judges would enter into speculations about the behavioural consequences of their decisions without any reliance on empirical evidence.[47] One commentator comes to this conclusion: "*to the extent that sound empirical support is lacking for arguments about the likely impact of legal rules on human behaviour (i.e. we are ignorant about the likely behavioural consequences of legal rules), we need to develop criteria of good decision-making which do not depend upon knowledge of likely consequences.*"[48]

Is there a good reason to completely reject consequence-based reasoning as infeasible? Empirical research on judicial behaviour suggests that in case of radically insufficient information, time and technical expertise, judicial decisions are often still consequence-based. However, instead of assessing their task as a full-blown stochastic optimisation problem, judges rely on heuristics and rules of

[47] Cane 2000, 45. Cane provides an interesting example when discussing how English law lords speculate about the potential over-deterrent effects of extensive liability for medical malpractice without any reference to empirical data. The point here is not whether such an effect could be demonstrated or made plausible. Rather the question is whether judges should be allowed to justify their decisions in a purely intuitive way, with no reference to empirical evidence.

[48] Cane 2000, 43.

thumb.[49] In non-judicial contexts people make similarly complex decisions every day with tolerable results. At least in those domains of life where they are left free not to follow rules in a mechanical way, people adopt simple decision procedures: routines and rules of thumb and rely on heuristics which reduce complex decision-making problems into simple ones.

Do heuristics solve the problem of judges? Research suggests that in many contexts "intuitive experts"[50] reach results which are tolerably close to the theoretical optimum. While most such mechanisms operate subconsciously, judges have to justify their decisions openly with reasonable public arguments. In contrast to non-legal contexts where intuitive decisions usually do not need further explicit justification, adjudication remains in the domain of discursive rationality where arguments have to be provided. It has been suggested that public justification is not only required by political and moral principles such as the rule of law, but also leads to better decisions in substantive terms.[51] In this way, decisions which have to be justified by public reasons are more transparent and accountable and in this sense more reasonable. When the brain switches from the heuristic to the calculative mode and the decision maker is compelled to provide plausible arguments in favour of her decision, the process of thinking about consequences and collecting the necessary information has in itself a debiasing effect.[52]

Although it seems clear that consequence-based judicial reasoning faces serious problems, it is not clear what would be the reasonable "criteria of good decision-making which do not depend upon knowledge of likely consequences".[53] Especially, it is unclear why judges who would be required to follow these non-consequentialist criteria would rely less on heuristics. Before concluding that in real-world settings consequence-based reasoning, even when performed by conscientious judges, is infeasible or unavoidably leads to catastrophe, it has to be compared with feasible alternatives.[54] If we look beyond the judiciary, a reasonable comparison is with the expertise and competence of the legislator and administrative agencies in performing consequence-based decisions.

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[49] Dhami 2003; Gigerenzer and Engel 2006.

[50] On this notion, see e.g. the research of the Max Planck Research Group Intuitive Experts (Bonn, Germany), http://www.coll.mpg.de/intuitive_experts/max-planck-research-group-intuitive-experts (accessed 24.04.2012).

[51] Engel 2004.

[52] Jolls and Sunstein 2006.

[53] Cane 2000, 43.

[54] Komesar 1994.

5.8 Alternatives to Judicial Optimisation: Ex Ante Evaluation in Legislation and Administration

Compared to the judiciary, the legislator and administrative agencies are better endowed, especially as far as technical expertise, resources and information are concerned.[55] On the other hand, legislators and administrative agencies are not necessarily more receptive towards non-partisan expertise. More often than not, or at least more often than the judiciary they are subject to capture by well-organised private interests.

This suggests that *ceteris paribus*, making policy decisions less political and more technocratic leads to an improved quality of decisions. In the last decades, many developed countries introduced systematic mandatory "*ex ante* evaluation" or "regulatory impact analysis", i.e. open consequence-based control of certain legislative and administrative measures.[56] At first sight, the judicial branch seems to be subject to entirely different standards. However, if we look at the rationales for the impact analysis of regulatory measures, we find that most of them are relevant for adjudication as well.

Following Larouche, one can distinguish the following rationales.[57] (1) *Ex ante* evaluation is a mechanism for collecting evidence; (2) It improves the quality of decision making. Seen as a tool for improving quality, it follows an expert and technocratic logic: it purports to be objective, detached and possibly scientific; in the longer run, it contributes to an evaluation-oriented administrative culture; (3) It increases transparency and openness; (4) It makes decision making more democratic by allowing participation of stakeholders; (5) It contributes to justification: the process of conducting an *ex ante* evaluation is a way to explain publicly why the proposed measure is necessary and appropriate and (6) Finally, it increases accountability by highlighting the trade-offs to be made by the decision maker. While the first two rationales are result oriented, the last four are process oriented.

From a conventional view of the judicial role, *ex ante* evaluation looks strange and inappropriate. As for their internal logic, however, an *ex ante* evaluation followed by the decision of a democratically legitimised body (legislation) and a court decision supported by a consequence-based justification are very similar. What ideally happens before the decision is the same in both cases. In consequence, the result oriented rationales seem to apply equally to court decisions which have large-scale social consequences, such as in the case of highest court rulings. As for the procedural values, with the potential exception of (4), they seem

[55] It can even be argued that this should remain the case. As the expertise in assessing the systemic consequences of legal rules, i.e. the human capital of those who are knowledgeable in both legal and technical or social scientific questions, is a scarce resource, this human capital is more effectively used in legislative drafting *ex ante* than in case-by-case interpretative corrections *ex post*. See Eidenmüller 1999.

[56] See Pfaff and Guzelian 2007; Larouche, Chap. 11 in this volume.

[57] Larouche, Chap. 11 in this volume, Sect. 11.3.

to be equally relevant. While judicial decisions are not expected to be democratic neither in representative, participatory or deliberative sense, it is difficult to argue that the other rationales, especially transparency and accountability are not desirable for judicial decision making.

Ideally, a fully informed rational decision maker can solve the problem of consequence-based decision making in an optimal way. As argued above, real-world decision-makers run into serious difficulties in performing this task. In legislation and to an even larger extent in adjudication, time constraints are strict, resources, including expertise, are limited and the use of empirical research methods such as experiments is exceptional. Law as an institutional practice cannot be suspended until the best theoretical solutions are found or all relevant consequences of a decision are carefully examined.[58] In consequence, pragmatism and simple rules are used: decisions are based on various heuristics and rules of thumb. As the use of these heuristics is not always conscious and self-reflexive, this raises complex institutional and normative problems the institutional design of non-ideal judicial systems has to confront with. This leads us to the third objection against consequence-based arguments, the one related to their desirability.

5.9 Desirability and Legitimacy of Consequence-Based Adjudication

When it comes to the desirability of consequence-based reasoning, the black-letter lawyer would ask primarily doctrinal questions, usually with reference to a particular legal area and/or procedure: which consequences under what conditions should be allowed to have what weight in the judicial reasoning. In contrast, the legislator, the social critic and the informed public would be interested in pragmatic or political questions related to particular policy issues or broader problems of institutional design. Their question would be: how much role should be assigned to judges for openly evaluating the effects of their decisions and assume responsibility for them. Both kinds of questions can refer to various legal issues, ranging from the detention of a criminal suspect, through the prohibition of anticompetitive commercial practices to the interpretation of an agreement for surrogate motherhood.

As the previous sections suggested, consequence-based reasoning is not necessarily beyond the expertise of courts. This, however, does not mean that the way judges currently conduct it is satisfactory. The imperfections of judicial decision making and the biases in judicial reasoning bear normative relevance when it comes to (small-scale, marginal) legal reforms or (large-scale, total) institutional design. If judges face serious and systematic difficulties in performing their duties

[58] Epstein 1995.

in the way their role would require them to do, then these role-defined duties or normative expectations should be revised and eventually modified. If it is established that decision makers commit systematic errors in evaluating certain types of evidence (for instance, they fall prey to the hindsight bias),[59] this gives reason for a benevolent institutional designer to change the rules governing legal procedures. An ideal institutional designer would take the heuristics and biases of legal decision makers into account by both harvesting their beneficial effects, if any, and compensating the detrimental ones.

It should also be kept in mind that in real-world settings, judges who have a predominantly legal training are not in a position to undertake complex probability calculations or full-blown statistical analyses. To some extent, their work can be improved by decision support systems and artificial intelligence.[60] This does not mean that consequence-based decisions are merely technical, neutral or "objective" in the sense of being merely factual. The expected consequences have to be evaluated and whether or not this is called "balancing", value-laden trade-offs have to be made.[61]

As stressed by the regulatory perspective, modern law has to fulfil conflicting normative expectations by combining doctrinal coherence with effectiveness and responsiveness. One particular concern in this regard seems to be whether the consequentialism inherent in effectiveness and responsiveness inevitably corrupts law's non-instrumental commitments to doctrines and principles associated with values such as coherence and procedural justice.[62] This question is closely related to the institutional role of courts and judges: in this case not to the nature or "essence" of judging, rather to the normative one concerning what judges should do, in light of what they are able to do. Here the detailed answer is likely to be domain specific: as the "point", "policy purpose" or "function" of legal institutions differ, we might want to share the competence for forward-looking consequence-based decisions between legislation (rule-setting) and adjudication (rule-application) differently in case of car accidents, patent protection or freedom of speech.

Finally, it is noteworthy that the three objections from conceivability, desirability and feasibility, and the answers to them are interrelated. From the perspective of institutional design, the "feasible" sets limits to the "desirable" and all this has to be within the universe of the "conceivable". In the previous sections I have argued that the most serious objections against consequence-based judicial reasoning are related to its feasibility. Feasibility in itself is not a normative but an empirical matter but to a large extent it depends not on brute but on institutional

[59] Rachlinski 2000.

[60] Bell 1995, 73.

[61] Koch and Rüssmann 1982, 229.

[62] Parker et al. 2004, 11. Although the authors also mention distributive justice as conflicting with consequentialism, in my view, it is an evidently consequence-based consideration.

facts.[63] Namely, various legal cultures differ largely in institutional variables, their conventional understanding of the judicial role, the canon of accepted arguments and many other dimensions which determine the action space and the argumentative toolkit at the disposal of judges.

5.10 Conclusions

This chapter has analysed the concept, the variants, the institutional preconditions and the overall desirability of consequence-based judicial reasoning. Although further research on the subject is clearly necessary, the findings already suggest two observations that can be formulated in terms of convergence and divergence of legal systems. First, under different names and guises, consequence-based arguments are ubiquitous in judicial reasoning, at both national and international courts. This suggests a certain kind of convergence in judicial method. Second, the soundness and legitimacy of consequence-based arguments depend both on empirical, including institutional, facts about courts' capacity for evidence-based policymaking, and normative ideas and ideals about courts' legitimacy to get involved in it. As legal systems differ in both dimensions considerably, this suggests that substantial differences are likely to persist.

The present analysis may also have implications for law-and-economics scholarship more broadly. It indicates how a comparative analysis of legal reasoning can bring new insights to the discussion about "legal origins".[64] If we are interested in how law contributes to the welfare of society, part of the question will concern the mechanisms through which adjudication determines the quality of law. As Gillian Hadfield argued in a recent paper, "the quality of a legal regime is in part a function of its capacity to adapt to local and changing circumstances."[65] This suggests that the availability and the exact working of consequence-based reasoning in particular jurisdictions might be relevant as a determinant of the quality of law, and in this way, have an impact on social welfare. A key question in this respect is whether this adaptation of the legal regime occurs differently in systems which give judges discretion and cultivate a judicial ideology of taking social consequences into account and in those where the canon binds judges more closely to rule-based arguments but subtle and indirect ways of adaptation are available nevertheless.

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[63] Searle 1969.

[64] La Porta et al. 2008.

[65] Hadfield 2008, 45.

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Part II
New Institutions, Common Principles

Chapter 6
From a Formalistic to an Integrative Model: The Case of EU Economic Regulation

Leigh Hancher and Pierre Larouche

Contents

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_6,

This chapter highlights key trends in the evolution of EU law in the past fifteen years as regards the regulation of network industries and of services of general economic interest (SGEIs) more generally. We cannot and will not claim to make an exhaustive chronicle of all developments; this would be tedious and would vastly exceed the scope of this contribution.

Our aim is rather to take a more theoretical and critical view of the evolving relationships between the EU institutions, the market and the national state, from our perspective as legal academics with an inter-disciplinary approach and with practical experience. The focus is primarily on two network sectors which have been the subject of extensive regulation—electronic communications and energy—and on the application of Article 106 TFEU to those sectors of the economy where the tensions between Community, state and market have remained, to quote the recent Monti report, a 'persistent irritant' in the European public debate.[1]

Our central claim is that over the relevant period of time, EU regulation of network industries has been—and still is—in the process of moving from one legal paradigm to another. This is not merely a shift from State to market or indeed from State to Community. The process is more complex. It can only be understood by analyzing both the substantive rules as well as the institutional architecture as these have evolved over the past two decades.

The first paradigm, which EU regulation is moving away from, is more traditional, static, formalistic and self-contained (mono-disciplinary). Its hallmark is the use of legal definitions and concepts to create categories in which phenomena are placed, by way of pigeonholing or labeling, and to which consequences are attached. The underlying problems—including jurisdictional and enforcement problems—are thereby avoided. More specifically, that paradigm can be observed most clearly in instances where the law introduces a separation between two categories, whether in substance (liberalized or reserved services) or in the institutions (EU or Member State powers).

The second paradigm, towards which EU regulation is progressing, is more dynamic, integrative, and inter-disciplinary. Its hallmark is the use of general guidelines and principles (based on economic insights) to assess specific situations in a wider sectoral setting, with progressive refinement, until the point where a conclusion can be reached and consequences attached. In other words this paradigm is characterized not by separation, rather integration (in substance as well as institutionally). It is not mono-disciplinary or formalistic, but draws on other disciplines to inform regulatory choice as well to guide assessment of regulatory outcomes.

As this chapter will seek to explain, an analysis of the regulation of network industries, both in substantive and institutional terms, suggests that in any event

[1] Monti 2010, 73.

EU law is shifting between a traditional formalistic pigeonholing model and a more integrative model which seeks to manage competition and not just to guarantee market access.

This in turn has generated a multi-layered institutional structure in which the interaction of community and state is by no means hierarchical or even based on a gradual linear transfer of key powers. The substitution of state control of complex economic sectors with a centralized or 'one-stop' institutional structure based on far-reaching or maximum harmonization of ex ante regulation has not been the pattern of institutional reform in the network sectors.

This legal evolution is not taking place in a vacuum. Our contention is that legal formalism may be better suited to a single-minded pursuit of market opening and market access, that is to the initial task of building a single market, which drove EU policy in the 1990s. Given that the single market was all but absent in network industries, tensions were bound to arise as ambitious liberalization projects were undertaken. It would then have been appropriate to use a formalistic model to establish market opening and market access firmly among the legal categories and defuse tensions by turning them into classification exercises. Starting from the 2000s, however, market opening and access becomes settled as a central policy objective, and at the same time other policy objectives which had taken a backseat in the 1990s re-assert themselves. For instance, the need to keep the European economy competitive and innovative requires a constant stream of investment in upgrading not only electronic communications, but also energy and transport infrastructures. Environmental concerns—including sustainability and climate change—dictate that the energy and transport sectors be managed and operated differently. These changes lead to social concerns about access, inequality and exclusion as network industries and public services undergo transformations. These concerns are not antithetic to market opening, quite to the contrary; they can probably more efficiently be addressed in an open market context. Nevertheless, we are moving from a single focus on market access and market opening to a more complex policy setting—which we term 'managed competition'. At the legal level, a formalistic paradigm may prove inadequate for managed competition, where many policy objectives intersect.

In the following pages, we will trace this process of paradigm shift, first, in relation to the substance of EU regulation of network industries, including also Article 106(2) TFEU as the central conceptual foundation for such regulation (6.1) and, second, in relation to the institutions used for such regulation (6.2).

6.1 Substantive Law

As far as the substance of the law is concerned, the evolution of electronic communications law (6.1.1) most vividly exemplifies the tension between the two paradigms exposed above, i.e., the shift from a formalistic to a more integrative approach. The existing regulatory framework, has, as recognized by the Monti

report,[2] been instrumental in market opening but has not yet created a single regulatory space for electronic communication. In the next section (6.1.2), we will compare the evolution of energy law and the extent to which a paradigm shift has occurred here also. The challenges faced in both sectors are considerable but by no means identical. The energy market, unlike the electronic communications market remains dominated by the presence of natural monopolies—i.e., the transmission system networks. Although this may indeed justify a more formalistic approach, grounded in the first paradigm, strains and cracks in the system are now evident. Both telecommunications and energy-related services and their infrastructures remain highly fragmented along national borders. Finally, we will turn to certain general substantive developments under Article 106(2) TFEU (6.1.3). As mentioned, this article remains of paramount importance for non-harmonized sectors but its interplay with secondary legislation is also reflective of the gradual paradigm shift identified in this chapter.

6.1.1 Electronic Communications Law

In the run-up to liberalization, from the 1980s through the lifting of remaining monopolies in 1998, EU regulation essentially turned around the dividing line between liberalized services and reserved services which could be kept under monopoly. The original liberalization package of Directive 90/388 kept under 'reserved services' all of the infrastructure as well as 'public voice telephony'—the latter concept being defined in a very intricate fashion in order to allow, broadly speaking, fixed telecommunications services to business customers to be liberalized.[3] Even if 'public voice telephony' might sound restrictively defined, in fact more than 80 % of the sector as it existed at the time was left in the reserved services category. In legal terms, the road to telecommunications liberalization throughout the 1990s is a story of how the borderline between reserved and liberalized services was progressively shifted until no services were reserved any longer: first came mobile and satellite communications,[4] then cable TV networks,[5] then infrastructure used to provide liberalized services (so-called 'alternative infrastructure')[6] and finally the removal of all remaining monopoly rights on 1

[2] Ibid., 44.

[3] Directive 90/388 on competition in the markets for telecommunications services [1990] OJ L 192/10, Article 1(1).

[4] Directive 94/46 amending Directive 88/301 and Directive 90/388 in particular with regard to satellite communications [1994] OJ L 268/15.

[5] Directive 95/51 amending Directive 90/388 with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services [1995] OJ L 256/49.

[6] Directive 96/19 amending Directive 90/388 with regard to the implementation of full competition in telecommunications markets [1996] OJ L 74/13.

January 1998.[7] Throughout the period, the mechanics of regulation, as laid out in the various amendments to Directive 90/388[8] and in the set of parallel directives enacted under what is now Article 114 TFEU,[9] was simple: sets of reserved and non-reserved (liberalized) services were defined, and then key regulatory issues concerning reserved services and their interface with liberalized services (interconnection, universal service) were dealt with, together with market access to the provision of liberalized services (licensing).

6.1.1.1 First Step Out of Formalism: The ONP 1998 Framework

In 1996–1997, as the EU institutions debated the regulatory framework to be applied after liberalization, as of 1 January 1998, it became clear that since the reserved/non-reserved services dichotomy would vanish, regulation would have to be articulated along different lines. Fundamentally, the issue is why regulate, or in other words, where to find the justification for regulation, if any, now that no special or exclusive rights remain. Broadly speaking, there are three possible answers to that question:

- *History*: regulation aims to mitigate the ongoing consequences of the 'original sin' of special or exclusive rights, in which case it will typically be targeted at firms which used to hold such rights;
- *Technology*: regulation aims to ensure that a technological system performs in line with expectations as they might have been formulated in policy. For that purpose, certain elements or features in the system might require regulation;
- *Economics*: regulation aims to ensure that the operation of market forces in a given sector produces the desired effects, as defined in policy. Regulation is then required when there is a risk of market failure, and it will be imposed following economic analysis, upon such firms and under such circumstances as required to address that risk.

In Directive 96/19, the full liberalization directive based on Article 106(3) TFEU, the Commission did not reflect at length on the foundation for future

[7] Ibid.

[8] Directive 90/388 *supra* note 3, as amended by Directive 94/46 *supra* note 4, Directive 95/51 *supra* note 5 and Directive 96/19 *supra* note 6.

[9] Directive 90/387 on the establishment of the internal market for telecommunications services through the implementation of open network provision [1990] OJ L 192/1 (as amended by Directive 97/51 amending Directives 90/387 and 92/44 for the purpose of adaptation to a competitive environment in telecommunications [1997] OJ L 295/23), Directive 92/44 on the application of open network provision to leased lines [1992] OJ L 165/27 (as amended by Directive 97/51), Directive 97/33 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) [1997] OJ L 199/32, Directive 98/10 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment [1998] OJ L 101/24 and Directive 97/13 on a common framework for general authorizations and individual licenses in the field of telecommunications services [1997] OJ L 117/15.

regulation, knowing that the provisions of the Directive would be superseded by the more extensive Open Network Provision (ONP) network then being debated in Council and Parliament.[10] It chose a decidedly historic approach, attaching regulation to 'telecommunications organisations', meaning those firms which once held special or exclusive rights.[11] Given that these firms are easily identifiable, regulation continued to be articulated around the formalistic paradigm described above.

In the course of preparing the ONP 1998 directives,[12] the EU institutions had to take a more forward-looking approach. So the institutions were left to choose between technology and economics as the main articulation for regulation. A choice was made in favor of the latter, but it is neither clearly worked out nor applied consistently. Heavier regulation is made to rest on firms holding Significant Market Power (SMP), but SMP is defined rigidly as a 25 % share[13] of one of a series of predefined markets.[14] The content of such regulation is already determined in the directive itself. Furthermore, the ONP 1998 framework must still bear with technical definitions such as 'telecommunications network', 'telecommunications service', including 'public' networks and services, as well as 'interconnection', 'network termination point', etc.

6.1.1.2 The 2002 Framework as the Best Example of Integration

The current regulatory framework for electronic communications (2002 framework)—often referred to as the "new regulatory framework"—resulted from the review of the ONP 1998 framework. It is embodied in four directives enacted in 2002.[15] This framework provides the best illustration so far of the integrative paradigm in the regulation of network industries in the EU.

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[10] As reflected in the text of Articles 4a, 4c of Directive 90/388 *supra* note 3, as amended by Directive 96/19, *supra* note 6.

[11] Ibid.

[12] *Supra* note 9.

[13] With the possibility to stray from the 25 % threshold either way: Directive 97/33 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) [1997] OJ L 199/32, Article 4(3).

[14] These are defined peremptorily in Annex I of Directive 97/33, ibid. as (i) fixed public telephone network, (ii) fixed public telephone services, (iii) leased lines as well as (iv) interconnection for mobile networks and services.

[15] Directive 2002/19 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) [2002] OJ L 108/7, Directive 2002/20 on the authorization of electronic communications networks and services (Authorization Directive) [2002] OJ L 108/21, Directive 2002/21 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L 108/33, Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L 108/51, to which one should add Directive 2002/77 on competition in the markets for electronic communications networks and services [2002] OJ L 249/21.

The choice for an economics-based approach is confirmed and enshrined, as reflected in two key principles of the 2002 framework, namely *reliance on economic analysis* and *technological neutrality*.

As regards reliance on economic analysis, the 2002 framework is no longer built around a set of categories to which consequences are attached, rather it relies on economic analysis. The main component, the SMP regime, mimicks competition law analysis. In a first step, markets are defined and selected for further analysis (without being predetermined in legislation[16]). Subsequently, the degree of competition on these selected relevant markets is assessed with a view to identifying firms holding SMP. SMP is defined as dominance by another name. Third, if one or more firms are found to have SMP, remedies are imposed. These remedies are chosen from a list of available remedies found in legislation,[17] however that legislation does not prescribe any specific remedy for any given case. The relationship between the 2002 framework and competition law has always been controversial. At the substantive level, the initial stance was that the 2002 framework was actually incorporating by reference key competition law concepts such as relevant market definition and dominance. Indeed the Commission seems to consider that the analysis conducted under the 2002 framework has precedent value for competition law.[18] Yet at the same time the subsequent evolution has brought some distance between the two: the recommendation on relevant markets made it clear that market selection was a crucial step in the application of the SMP regime. The 'three-criteria test' used for market selection—high and persistent barriers to entry, limited prospect for effective competition behind such barriers, comparative inefficiency of competition law—obviously entails economic analysis, but it has no equivalent in competition law.[19] It merges certain elements of relevant market and of market power analysis into a stand-alone analytical step which does capture the specificities of a network industry like electronic communications, i.e., the presence of high and persistent barriers to entry in some parts of the industry, essentially due to sunk costs or network effects. So in the end the

[16] The first recommendation on relevant markets, Recommendation 2003/311 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21 on a common regulatory framework for electronic communication networks and services [2003] OJ L 114/45, was based on a list of markets found in Annex I to Directive 2002/21, ibid. but the second one was established without prior legislative determination: Commission Recommendation 2007/879 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21 on a common regulatory framework for electronic communications networks and services [2007] OJ L 344/65.

[17] Regulatory authorities can also propose other remedies, subject to Commission approval: Directive 2002/19 *supra* note 15 Article 8(3).

[18] Larouche and de Visser 2006.

[19] Recommendation 2007/879, para 2. In fact, it can be argued that market selection is the 'triggering factor' that is most material in the outcome, much like 'abuse' is the triggering factor in the application of Article 102 TFEU (given that dominant firms will not infringe Article 102 TFEU unless they abuse their position).

2002 framework shares with competition law the reliance on economic analysis, but it does not necessarily follow the same analytical mold. After all, the 'relevant market—market assessment—remedies' trilogy, characteristic of competition law, is not the only way to incorporate solid economic analysis into law.

The universal service regime provides another example of reliance on economic analysis. According to the Universal Service Directive,[20] Member States are not obliged to impose universal service obligations, for example if market forces would suffice to ensure that a service meeting the requirements of the definition of universal service is provided. If they determine that universal service obligations must be imposed, then the addressee of the obligations must be assessed in an open, transparent and non-discriminatory procedure (including for instance an auction). Financial compensation on the addressee, if any, is limited to the net costs of providing universal service, and then only if that represents an unfair burden on the addressee (taking into account, for instance, the intangible benefits arising from providing universal service and the administrative costs of running a compensation mechanism). The financial compensation mechanism itself must be transparent and minimize distortion to the market.

Technological neutrality is often overlooked, yet central to the advances brought about by the 2002 framework. It is explained somewhat vaguely as 'neither impos[ing] nor discriminat[ing] in favor of the use of a particular type of technology'.[21] Technological neutrality can be defined in many ways.[22] A weak definition would not go much beyond a simple non-discrimination rule, but that would limit the added value of the principle, considering that non-discrimination is already a well-established legal principle. A stronger definition would entail that the law is drafted and applied in such a way as to be sustainable over time against the background of diverse and evolving technologies, i.e., that the law is not tied to a specific technological model. A third and strongest definition, with a more economic underpinning, would imply that the law avoids influencing or distorting technological choices, leaving them to market forces as much as possible. The second and third definitions are mutually reinforcing and should be preferred, as they give technological neutrality its fullest meaning. In any event, just like the reliance on economic analysis shows that the EU lawmakers chose to base regulation on economic justifications, the principle of technological neutrality evidences *a contrario* that the lawmakers did not want to build the 2002 framework on technological categories and concepts. To be sure, some of the further implementing decisions may be open to criticism as regards technological neutrality,[23] but by and large the EU and its Member States have sought to live by that principle.

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[20] Directive 2002/22 *supra* note 15, Article 3, 8–14.

[21] Directive 2002/21 *supra* note 15, Rec. 18.

[22] Van der Haar 2008, upon which the following discussion is based.

[23] See for instance the continued reluctance to include broadband networks based on cable TV, on the one hand, and on ADSL, on the other hand, on the same market for the purpose of SMP analysis: Recommendation 2007/879 *supra* note 16 and the Explanatory Note, C(2007)5406 (17 December 2007), p. 31.

Once a choice is made in favor of economics as opposed to technology as the main justification for regulation—as enshrined in the two principles discussed above—the resulting framework will unavoidably tilt towards the second paradigm. So it can be seen that the mainstay of the 2002 framework, the SMP regime, eschews pigeonholing: the definitions of 'electronic communications networks' and 'electronic communications services', for instance, have been broadened to cover all conceivable types of networks and services provided over such networks,[24] 'interconnection' has been repositioned as a subset of access,[25] the distinction between public and non-public networks and services has been downplayed, to name but the main ones. What remains is a light regulatory framework applicable across the board to all market players, plus a heavier regime for firms holding SMP. The SMP regime does not work with pigeonholes, rather it comprises a series of guiding principles,[26] with an analytical framework,[27] and offering a choice of possible remedies.[28] Throughout, the 2002 framework relies on economic concepts and therefore takes an inter-disciplinary approach; it cannot be administered using traditional legal methods only. It is meant to be applied by a specialized National Regulatory Authority (NRA), working on the basis of a Commission recommendation indicating which markets must be reviewed. The Commission recommendation and the NRA decisions are reviewed periodically, ensuring that regulation evolves in tune with the sector.[29]

6.1.1.3 Remaining Instances of Separation

Unfortunately, some remainders of the formalistic paradigm can still be found in electronic communications regulation, in the form of strict separation between two categories.

For one, the whole of EU electronic communications regulation is itself put in a box, namely that of 'networks' or 'transport' as opposed to 'content', i.e., what is carried over the networks. Content regulation is expressly left outside of the 2002

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[24] This was the outcome of one of the key policy discussions which fed into the 2002 framework, concerning the convergence between the telecommunications, media, and ICT sectors: see Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications For Regulation, COM(97)623 (3 December 1997) and the subsequent consultation rounds.

[25] This did not eliminate all game-playing around definitions, given that Directive 2002/19 *supra* note 15, Article 4 extends the obligation to negotiate interconnection only to the benefit of providers of public electronic communications networks: the ECJ became entangled in this issue in Case C-227/07 *Commission v Poland* [2008] ECR I-8403.

[26] Common to the whole of the 2002 framework: Directive 2002/21 *supra* note 15, Article 8.

[27] Directive 2002/21, ibid., Articles 14–16.

[28] Directive 2002/19 *supra* note 15, Articles 9–13, Directive 2002/22 *supra* note 15, Article 17.

[29] Indeed, when revising the first Recommendation on relevant markets *supra* note 16, the Commission removed 11 markets from the list to reflect the changes which took place between 2003 and 2008.

framework.[30] Instead, it is covered in two directives, the Audiovisual Media Services Directive (formerly 'Television Without Frontiers')[31] and the E-commerce Directive.[32] This creates an intricate system of pigeonholes, whereby services are supposed to fall under one and only one of the following: "electronic communications services",[33] "Information Society services" (falling under the e-commerce Directive)[34] or "audiovisual media services".[35] Considering the rapid rate of innovation in this sector and the efforts deployed to find the "killer application", such a pigeonholing approach can only hamper the development of the sector by forcing firms to navigate around the definitions to seek the preferred regulatory regime, instead of simply ensuring that their activities are in line with public policy objectives as they may be articulated in regulation. For instance, in the recent reform of broadcasting regulation, most energies were dedicated not to reconsidering the appropriateness and the manner of regulation in a converged environment, but rather to chiseling away at the definition of "broadcasting" (or linear) and "on-demand" (or nonlinear) audiovisual media services in order to position certain services within one or the other box, or outside of them altogether.[36] As a result of this separation between network and content (and within content between the various types of services), a key issue such as network neutrality, which involves the relationship between content providers and network operators, cannot be addressed within the SMP regime, for instance.[37] It falls to be dealt with either in specific legislation or via EU competition law.

Second, the separation between competition law and sector-specific regulation—at the systemic level—also hampers the proper evolution of the sector. Even though sector-specific regulation and competition law are closely aligned in substance as was seen above, the mainstream opinion remains that the two realms are fundamentally different: for instance, competition law would be operating ex post and would aim at preserving existing competition on the market, whereas sector-specific regulation would be imposed ex ante and would aim to increase the

[30] Directive 2002/21, Rec 5, Articles 1(3) and 2(c).

[31] Directive 89/552 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [1989] OJ L 298/23, as amended by Directive 2007/65 amending Directive 89/552 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [2007] OJ L 332/27.

[32] Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 178/1.

[33] Directive 2002/21 *supra* note 15, Article 2(c).

[34] Directive 2000/31 *supra* note 32, Article 2(a).

[35] Directive 89/552 *supra* note 31, Article 1(a).

[36] Ibid., Articles 1(a), (e) and (g), as well as Directive 2007/65 *supra* note 31, Rec. 16-25. See also Van der Haar 2008.

[37] Chirico et al. 2007.

level of competition on the market. In separate writing, one of us has sought to demonstrate that these distinctions cannot hold and that the two realms are largely overlapping.[38] In any event, a corollary of that mainstream opinion is that sector-specific regulation is bound to vanish, so that ultimately the sector would be policed through competition law alone. The evolution of electronic communications law in the past decade tends to show that, even if sector-specific regulation is withdrawn in certain areas, it appears in others.[39] Sector-specific regulation will accordingly not disappear anytime soon. A perverse consequence of the mainstream opinion, however, is that regulatory authorities behave very expansively in seeking new regulatory endeavors, in order to stave off the sunset of regulation and their own disappearance.[40] From such a public choice perspective, then, it might have been preferable to emphasize that some regulation could remain in place, as long as it was no more than necessary and closely integrated with competition law, instead of separating the realms of competition law and regulation.

6.1.2 Energy

Europe's energy sector has been radically transformed from a highly monopolistic, vertically integrated, state-owned or -controlled sector, organized on national lines and focused on national policy objectives. Although the goal of establishing a single energy market remains a complex and laborious task which is far from complete, few would disagree that the sector is now competitive, or could deny that the institutional changes that have taken place since the adoption of the first internal energy market legislation in the mid-1990s are considerable.

The first and second 'packages' of internal energy market legislation conformed to the established approach to network sectors—to ensure market access by removing formal, national regulatory, and organizational barriers which had served to privilege incumbent national energy companies. The first directives of 1996 (electricity)[41] and 1998 (gas),[42] were framework measures, leaving substantial discretion to Member States on the speed of liberalization as well as the method to accomplish it.

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[38] Larouche 2002.

[39] For instance, since the 2002 framework was enacted, regulation of mobile operators has increased, with regulatory intervention on mobile termination, international roaming, SMS termination, and international data roaming.

[40] For one, the most regarded NRA, Ofcom, has taken the habit of launching broad consultations—on the FCC model—on various topics of interest, in order to assess whether and if so, which regulatory intervention is warranted. See in recent years the Strategic Review of Telecoms or the Next Generation Access consultation round, to name but the main ones.

[41] Directive 96/92 concerning common rules for the internal market in electricity [1997] OJ L 27/20.

[42] Directive 98/30 concerning common rules for the internal market in natural gas [1998] OJ L 204/1.

Unsurprisingly, traditional market privileges enjoyed by state-dominated incumbents—including import/export rights, as well as monopolies over the production and transport of gas and electricity were removed. Ensuring access to national networks and to national markets for new players was however the principal aim of both the first and second packages. Thus a twin-track approach was first elaborated in 1996: the unbundling of the natural monopolistic functions of the 'TSOs' (transmission system operators) and the introduction of ex ante regulatory functions which were to be separated out from operational functions.[43] Whereas many national energy incumbents had been entrusted with wide-ranging public service obligations (PSOs) which included responsibility for maintaining energy security and reliability of supply as well as the provision of electricity and gas at low cost to all users, the adoption of the first directives heralded the end of that golden age. Competitive, open markets would ensure security and reliability as well as consumer choice.

6.1.2.1 The Second Regulatory Package of 2003

Subsequent regulation elaborated on this twin-track approach. In 2003 when the second package of internal market measures was adopted,[44] the concept of functional unbundling or separation was further elaborated upon and the directives required further legal separation of the transmission function, so that TSOs had to create separate legal entities to operate their networks and to put in place various 'firewalls' and compliance codes to prevent covert discrimination in favor of their own production or trading subsidiaries. Distribution companies were subject only to administrative unbundling, however. A larger group of consumers, extending to all 'non-domestic' users became eligible to choose a supplier either from another Member State or from a national competitor to the local incumbent. By July 2007 all consumers were eligible to choose their suppliers. In order to protect vulnerable consumers, additional regulatory concepts such as 'suppliers of last resort' and universal supply obligations were now introduced.

The second package of 2003 Directives also sharpened sectoral regulation to a certain extent.[45] Member States now had to designate independent national regulatory authorities (NRAs). In addition, two Regulations on cross-border trade in electricity and in gas entrusted these bodies with enhanced ex ante powers, not just

[43] Roggenkamp 2006.

[44] Directive 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L 176/37; Directive 2003/55 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L 176/57; Regulation 1228/2003 on conditions for access to the network for cross-border exchanges in electricity [2003] OJ L 176/1 and Regulation 1775/2005 on conditions for access to the natural gas transmission networks [2005] OJ L 289/1.

[45] See generally, Jones and Webster 2006.

to regulate transmission access tariff methodologies and conditions, but also to address complex technical issues, such as congestion management—that is, the allocation of capacity available in the energy networks, balancing and ancillary services. The Commission was empowered to extend and deepen this process through the comitology procedure. This in turn has allowed for the development of a further trend: the increasing harmonization of technical or so-called non-essential measures, as well as tariff methodologies, at European level, with a concomitant decrease in national sovereignty. Economic decisions, i.e., on tariff rates, remain with the Member States. Thus a further layer of separation has emerged between economic and technical regulation on the one hand, and national and European energy legislation on the other. Member States continued to enjoy considerable freedom to regulate production and supply activities, however, subject only to minimal harmonization requirements. The Directives did not confer on NRAs any powers to deal with market power or its abuse; this is left to competition law. In so far as market forces did not deliver, the remedy was to be found essentially in the application of competition law by the Commission or the national competition authorities (NCAs), as opposed to ex ante regulation The activities of TSOs, pigeonholed as natural monopolies, are the main focus of harmonized ex ante regulation. In the 2003 directives, TSOs are also deemed to be primarily responsible for guaranteeing security of supply as well as preferential access to the network for renewable energy. In so far as new investments were to be undertaken by non-TSO parties, an elaborate exemption procedure was introduced to encourage the construction of cross-border infrastructure. At the same time, however, the second package failed to provide a harmonized regulatory framework to co-ordinate national decision making on cross border issues—national legislation was harmonized but trade across national borders could not benefit from any form of joint decision-making.

Indeed, that this form of pigeonholing would soon reach its inevitable limits, is illustrated by the recent *Federutility* case,[46] where the Court was required to establish the limits of the role of the Italian NRA in imposing PSOs on the liberalized gas market in the absence of effective competition. The Italian energy regulator had elected to fix "reference prices" for the sale of gas to certain customers by way of ex ante regulation. First, the Court noted that the price for the supply of natural gas must, as from 1 July 2007, be determined solely by market forces, a requirement that follows from the very purpose of the total liberalization of the market for national gas. However, the Court also recognized that it was apparent that Directive 2003/55 is also designed to guarantee that 'high standards' of public service are maintained and the final consumer is protected.[47] Article 3(2) expressly allows Member States to impose 'public service obligations' on gas companies, which could relate to the 'price of supply'. Second, the Court also

[46] 24 April 2010, Case C-265/08 *Federutility* [2010] ECR I-3377.

[47] Ibid., Rec 20.

confirmed that—irrespective of harmonization—Member States are entitled to define the scope of their 'public service obligations' and to take account of their own national policy objectives and national circumstances'. As a result, the Court concluded that the Directive still allows Member States to assess, after 1 July 2007, whether it is necessary to impose measures to ensure that the price of the supply of natural gas to final consumers is maintained at a reasonable level. At the same time, the Court imposed several conditions in order to ensure that the national measure was also proportional. Significantly, as for the economic factors justifying intervention, the Court noted that, "it is for the referring court to verify whether … taking account in particular of the objective of establishing a fully operational internal market for gas and of the investments necessary in order to exert effective competition in the natural gas sector … such an intervention is required".[48] As a result, a more integrated, inter-disciplinary approach would have to occur at the national level. Judicial review cannot be merely confined to assessing whether the NRA has the formal power under the Directive to act—a more complex assessment of the necessity to act is also required.

6.1.2.2 The Third Regulatory Package of 2009

The third package of measures adopted in August 2009[49] now attempts to address some of the major gaps that were evident in the first stages of gas and electricity market liberalization. First, the formalistic separation between the regulation of the network and other market and related functions is perhaps breaking down, as is evidenced in part by the two new Directives, which extend the role of the NRAs into more general market supervision, aligning their powers somewhat more closely to those of competition authorities. At the same time the so-called 'Climate Change package', adopted in 2008 gives both NRAs and TSOs important tasks in accomplishing the transition to a low-carbon economy by 2050. In accordance with the new energy directives, NRAs will be given an explicit mandate to promote sustainable and renewable forms of energy.[50]

Second, the third package provides for substantive rules and joint decision making procedures on some cross-border issues, including tariffs and access to the network.

Third, the new package provides for far-reaching unbundling and requires that TSOs should be structurally unbundled from production and supply functions. The ownership as well as the management of transmission system assets should be transferred to separate legal entities although 'lighter' unbundling regimes are also

[48] Ibid., Rec 37.

[49] Directive 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54 [2009] OJ L 211/55; Directive 2009/73 concerning common rules for the internal market in natural gas and repealing Directive 2003/55 [2009] OJ L 211/94.

[50] See Directive 2009/72, ibid., Article 36 and Directive 2009/73, ibid., Article 30.

contemplated in the light of national opposition to full structural unbundling. As a result, effective control of these assets, including decisions on future investments is therefore now totally separated from production and supply interests.

Fourth, technical or non-economic regulation is subject to extensive harmonization in the form of detailed regulation of a wide range of issues, including network codes, investment plans, cross-border procedures, the collection and processing of market data, and this by means of comprehensive annexes which can be updated through the comitology procedure.

Finally, the third energy package seeks to separate national regulation from political control—NRAs must be independent not only from the industry but also from any political body. They must be fully resourced and there are strict rules on appointment and dismissal. Regulators must be appointed for a fixed term of 5 years minimum, renewable once.[51]

In accordance with the amended Renewable Energy Directive 2009/28, TSOs will have a pivotal role in meeting the EU's ambitious '20-20-20' targets in securing the development and priority dispatch of renewable energy across their networks. Albeit that the TSOs are expected to ensure that 20 % of Europe's energy supply is to consist of renewables by 2020, there is as yet little clarification as to how this task has to be realized and to what extent the Treaty rules on free movement of goods as well as the state aid regime will apply in this context.[52]

6.1.2.3 Concluding Remarks

Sector-specific energy legislation is not expected to be gradually phased out as markets mature and can be policed by general anti-trust law. Transmission systems are likely to remain natural monopolies, especially in the electricity sector. TSOs are now entrusted with extensive tasks, and must secure the promotion of renewables, reliability of supply as well as adequate investment in their networks as well as in cross-border infrastructure. The integration of competition law concepts into the sector-specific regulation of TSOs is unlikely to serve this purpose. Rather, the tradeoff is in terms of organization. A structurally unbundled TSO that is fully independent in legal and financial terms will be subject to 'lighter' regulation than the other less far-reaching options for the organization of the TSO function available under the Third Package.[53] If these alternative organizational forms are chosen, ex ante regulation is intrusive and exacting.

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[51] See Directive 2009/72, ibid., Article 34(5) and Directive 2009/73, ibid., Article 38(5).

[52] Directive 2009/28 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16, Article 16.

[53] For a detailed discussion see Cabau 2010.

6.1.3 Services of General Economic Interest and Article 106(2) TFEU

The tension between a more formalistic and a more integrative approach can also be observed in the case-law concerning Services of General Economic Interest (SGEIs) under Article 106(2) TFEU. That provision can be seen as a central conceptual foundation for sector-specific regulation in network industries, and until recently it was also a hallmark of the formalistic paradigm.

6.1.3.1 Formalistic Approach to Special and Exclusive Rights

Indeed Article 106(2) TFEU lends itself easily to an interpretation along categorical lines, for two reasons.

First of all, Article 106(2) TFEU is an exception, an escape clause from the Treaty, in particular the provisions relating to the internal market or competition law. This has allowed this provision to be played up in grand debates about 'State versus market' where politics takes front stage, and therefore to antagonize—needlessly—what remains in essence one of the countless instances where conflicting public policy objectives must be reconciled. Most directives enacted on the basis of Article 114 TFEU also involve delicate balancing between the achievement of the internal market and competing policy objectives.[54]

Second, the concept of SGEI occupies an uneasy place in EU law, since it is an EU concept, subject to the powers of interpretation and monitoring of EU institutions, with a view to ensuring a uniform application throughout the EU, but at the same time it falls within the express province of Member States to decide which services are SGEIs.[55] The Commission (as well as the Courts) sought to solve this puzzle by professing to exert only marginal control on the way Member States organize SGEIs; on a closer look at the Commission decision practice,[56] however, one can argue that the control is more than just marginal. In any event, the concept of SGEI lends itself handily to a pigeonholing game between the Commission and the Member States.

The ECJ in recent years added an extra layer of complexity to the situation through an inconsistent approach to the line between 'economic' and 'non-

[54] One needs only to think of the directives concerning the harmonization of regulation in the financial sector, be it in the banking, insurance or other financial markets.

[55] See the TFEU Protocol (No 26) on Services of General Interest [2010] OJ C 83/310, as well as Article 36 of the Charter of Fundamental Rights of the EU.

[56] See for instance in public service broadcasting—where the position of Member States is further bolstered by TFEU Protocol (No 29) on the system of public broadcasting in the Member States [2010] OJ C 83/312—where under the guise of marginal control, the Commission reviews the scope of the public mission of public broadcasters in great detail: Commission Communication on the application of State aid rules to public service broadcasting [2009] OJ C 257/1, paras 43–49 and for a good illustration, Case E-3/05, *Financing of public broadcasting in Germany* [2007] OJ C 185/1, Rec. 237-242.

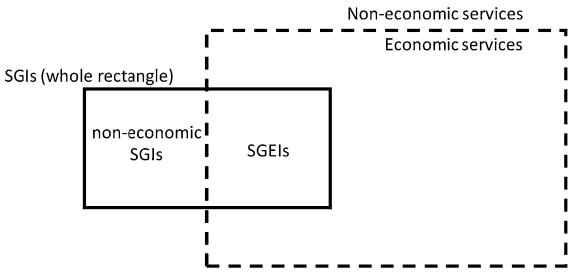

Fig. 6.1 Conceptual architecture around SGEIs

economic' services, which runs through the Treaty, including through Article 106(2) TFEU. A number of cases—including core decisions under Article 106(2) TFEU such as *Höfner*,[57] *Pavlov*[58] or *Ambulanz Glöckner*[59]—take an objective and maximalist approach, holding that any activity consisting in the offering of goods and services on a market is an economic activity, even if the activity is carried out by the public sector or under public service obligations. At the same time, other cases, such as *Poucet et Pistre*[60] and *AOK*,[61] have carved out a 'solidarity' exception via the definition of 'undertaking', or have used the definition of 'services' at Article 57 TFEU to exclude services organized by the State, such as higher education.[62] That line of case-law also suggests that the State would have the power to take certain services out of the 'economic' basket through its legislative and regulatory measures, i.e., that the concept would be subjective. Given the uncertainty surrounding the line between 'economic' and 'non-economic' services, the Commission issued a series of policy documents concerned with an overarching concept of Services of General Interest (SGIs), which would include both SGEIs as well as those services, which while of general interest, remain non-economic and therefore fall outside of the purview of the Treaty competition and state aid rules.[63] This complex conceptual architecture was completed with the Treaty of Lisbon, which adds a Protocol on SGIs, comprising two provisions applicable to SGEIs and 'non-economic services of general interest', respectively.[64] The result can be seen in Fig. 6.1.

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[57] Case C-41/90 *Höfner* [1991] ECR I-1979.

[58] Case C-180/98 *Pavlov* [2000] ECR I-6451.

[59] Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

[60] Case C-159/91 *Poucet and Pistre* [1993] ECR I-637.

[61] Case C-264/01 *AOK* [2004] ECR I-2493.

[62] Case 263/86 *Humbel* [1988] ECR 5365.

[63] Green Paper on Services of General Interest, COM(2003)270 final (21 May 2003), White Paper on services of general interest, COM(2004) 374 final (12 May 2004), Commission Communication on services of general interest, including social services of general interest: a new European commitment, COM(2007) 725 final (20 November 2007).

[64] *Supra* note 55.

Initially, the application of Article 106(2) TFEU concerned cases of monopoly rights (and primarily, market access issues).[65] Because of the nature of monopoly rights, which must be delineated, these cases fit easily within a formalist paradigm. In the original line of case-law, starting with *Sacchi*,[66] the existence of the monopoly right was not challenged, but rather whether the behavior of the holder of the right, in exercising that right, infringed the Treaty—typically Article 102 TFEU—and if so, whether Article 106(2) TFEU could apply. Starting in the late 1980s, the Commission merged Articles 106(1) and (2) together to argue that the very existence of a monopoly right ran against Article 106(1) if it was not justified for an SGEI pursuant to Article 106(2). This argument underpinned the use of Article 106(3) TFEU to liberalize the telecommunications sector, and it was endorsed by the ECJ.[67] At its most elaborate, this line of argument led to a complex inquiry under Article 106(2), as seen in *Corbeau*[68] or *Glöckner*,[69] into: (i) whether the mission entrusted to the monopolist constituted an SGEI, (ii) whether the SGEI could not be profitably undertaken without the monopoly right and (iii) whether the scope of the monopoly right was such that it delivered to the monopolist a financial stream which was sufficient to discharge the SGEI but not excessive. In theory, the second and third issues require a mix of legal and economic analysis which echoes the integrated paradigm. But in practice, given that monopoly rights are blunt instruments, the third issue could not be answered with much precision. Since analytical accounting was not yet very developed in utilities sectors 20 years ago, the second issue was also summarily handled. This left the first issue, an issue of categorization which lent itself better to the formalistic paradigm.

6.1.3.2 Public Financing and the Beginning of an Integrative Approach in Altmark

With the liberalization programme of the past 20 years, most large-scale monopolies in the utilities or network sectors are now removed. In the 2000s, the application of Article 106(2) shifted to another class of measures, public subsidies given to firms entrusted with a public service obligation. Initially, there was much confusion in the Commission practice and in the case-law of the ECJ and the General Court,[70] having to do more with divergences on the notion of State aid at

[65] See further, Hancher 1999.

[66] Case 155/73 *Sacchi* [1974] ECR 409.

[67] Case C-202/88 *France* v. *Commission* [1991] ECR I-1223 and Case C-271/90 *Spain* v. *Commission* [1992] ECR I-5833.

[68] Case C-320/91 *Corbeau* [1993] ECR I-2533.

[69] *Supra* note 59.

[70] Case C-244/94 *FFSA* [1995] ECR I-4013; Case C-53/00 *Ferring* [2001] ECR I-9067; Case T-46/97 *SIC* [2000] ECR II-2125.

Article 107(1) TFEU than with any difficulties with Article 106(2). Two approaches emerged.[71] Under the 'State aid approach', the public subsidy given to the firm is deemed to distort competition within the meaning of Article 107(1) TFEU and therefore to constitute State aid in and of itself, even if the firm is entrusted with a public service obligation. The public service obligation can however be used to argue that the conditions of Article 106(2) TFEU are fulfilled and that an exception should be made to the prohibition of Article 107(1) TFEU.[72] In contrast, under the 'compensation approach', it is assumed that competition is distorted only if the subsidy exceeds the net extra costs imposed on the firm by the public service obligation. In other words, as long as the subsidy can be seen as compensation for these extra costs, it does not constitute State aid at all under Article 107(1) TFEU. Accordingly, Article 106(2) TFEU does not even need to be relied upon.

Matters came to a head in the pivotal *Altmark* ruling[73], where the ECJ sought to find a compromise between the 'State aid' and 'compensation' approaches by adding to the compensation approach a number of safeguards which seemed to originate from the test used under Article 106(2) TFEU. It formulated the now-famous four *Altmark* criteria whereby a subsidy does not constitute State aid pursuant to Article 107(1) TFEU—and therefore does not need to be notified to the Commission—if[74]:

1. The recipient firm is actually required to discharge public service obligations and those obligations have been clearly defined;
2. The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
3. The compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; and
4. Where the firm which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation has been determined on the basis of an analysis of the costs which a typical firm, well-run and adequately provided with means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

In *Altmark*, the ECJ tries to push the treatment of public service obligations—certainly when it comes to those supported by subsidies—away from the

[71] These two approaches are best outlined in AG Jacobs' opinion in Case C-126/01 *GEMO* [2003] ECR I-13769.

[72] Of course, it is also possible that the aid would qualify for one of the exemptions set out under Article 107(2) and (3) TFEU and implementing legislation.

[73] Case C-280/00 *Altmark* [2003] ECR I-7747.

[74] Ibid., paras 88–95.

formalistic paradigm inherent in Article 106(2) TFEU towards a more integrative paradigm. In essence, *Altmark* can be seen as an attempt to shift the debate away from a pigeonholing exercise, namely whether the public service mission in question constitutes a SGEI (and therefore can be used to justify limiting market access). Accordingly, the locus of the discussion is shifted to Article 107(1) TFEU, which implies that the financing of public service obligations can be accommodated from within State aid law, without the harshness and formality of a rule/exception relationship. The *Altmark* test is both more complex, since it requires greater use of economics and accounting, and more rigorous, away from the lofty discussions on what belongs in the SGEI category. On the one hand, the concept of SGEI is evacuated—Article 106(2) TFEU does not come into play—and a vague and general idea of 'public service obligation' replaces it. Member States therefore gain some latitude as to which public service missions they want to entertain. On the other hand, the *Altmark* criteria are more severe than Article 106(2) TFEU, as regards the transparency of the public service obligation, the need to fix the rules on funding in advance and—most importantly—the assessment of the amount of funding needed, using either a public procurement mechanism or an external efficiency benchmark. The latitude on substance is balanced with stronger procedural and financial disciplines.

Despite the daring push by the ECJ to solve the conundrum of public financing for the discharge of public service missions, that judgment left many issues open. In the seven years which have lapsed since the judgment, the most remarkable developments concern, first, the relationship between the *Altmark* test and Article 106(2) TFEU and second, the fourth criterion of the *Altmark* test.

6.1.3.3 The Relationship Between Altmark and Article 106(2) TFEU

It is interesting to note that the Commission and the General Court—both of which preferred the 'State aid' over the 'compensation' approach before *Altmark*—seem to read *Altmark* in such a way as to bring it back into the fold of Article 106(2) TFEU. For one, the Commission, in its decision practice since 2003, seldom found that *Altmark* is applicable: typically, cases founder on the second (formula for calculating compensation known in advance) or fourth criterion, and the applicability of *Altmark* is dealt with expeditely in a few paragraphs.[75] For example in its first decision after *Altmark*, in *BBC Digital Curriculum*,[76] the Commission held that the fourth criterion had not been met as there had been no public procurement procedure and the UK authorities had failed to provide the Commission with any information which would have allowed it to determine whether those costs could be considered as corresponding to those of a

[75] The Guidelines on State aid to public service broadcasting *supra* note 56 aptly generalize this attitude when *Altmark* is mentioned and dealt with in a single paragraph (para 23).

[76] Case N-37/03, *BBC Digital Curriculum* [2003] OJ C 271/47.

'typical' undertaking. The Commission then went on to apply Article 106(2) to rule on the compatibility of the state aid measure. This seemed to imply that it was possible for an undertaking to receive aid that exceeded the costs of an ideal, efficient undertaking, without this resulting in overcompensation, as long as the examination was carried out under Article 106(2) TFEU. This approach has become the standard. Even though the General Court reminded the Commission to take *Altmark* seriously,[77] in practice most of the assessment continues to take place under Article 106(2) and not 107(1) TFEU.

Furthermore, the Commission has suggested that *Altmark* is about SGEIs, thereby further blurring the line between *Altmark* and Article 106(2) TFEU. Considering that the *Altmark* test remains entirely within Article 107(1) TFEU, it was no coincidence that the ECJ referred to 'public service obligations' rather than SGEIs, a concept found in Article 106(2) TFEU.[78] While the Commission tracked the language of *Altmark* in its policy statements, in its decision practice concerning subsidies for the roll-out of broadband networks, however, it considered that the *Altmark* criteria could only apply if the broadband project could qualify as an SGEI.[79] The latter point is subject to Commission review, whereby the definition of SGEI is further narrowed down to a concept which comes close to universal service as it is understood in secondary EU legislation, namely services which are provided to all citizens with specific availability, quality and affordability requirements.[80] So in the end the Commission reduces the applicability of *Altmark* by introducing SGEI instead of 'public service obligation' as the ECJ intended and by narrowing SGEI down to universal service. Accordingly, most broadband cases were treated under Article 107(3)(c) TFEU instead of *Altmark* or even Article 106(2) TFEU. Most unfortunately, in *BUPA*,[81] the General Court endorsed this trend, seemingly without in-depth examination,[82] holding that 'public service obligation' as referred to in *Altmark*, means the same as SGEI within the meaning

[77] Case T-266/02, *Deutsche Post AG* v. *Commission* [2008] ECR II-1233, para 74.

[78] Of course, one could argue that the term 'public service obligation' made sense in the specific context of *Altmark supra* note 73 which concerned the transport sector. After all, Article 93 TFEU refers to 'public service obligations'. Yet it can be seen that, in subsequent cases, the Court continued to use 'public service obligation', even outside of the transport sector: see for instance Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, para 63 (provision of tax advice to individuals) or Case T-274/01, *Valmont Nederland BV* [2004] ECR II-3145, para 132 (public use of a car park).

[79] Commission Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks [2009] OJ C 235/7, paras 20–30.

[80] This narrow reading of SGEI is put forward in the Green Paper on Services of General Interest *supra* note 63.

[81] Case T-289/03 *BUPA* v. *Commission* [2008] ECR II-81.

[82] The issue was uncontested as between the parties.

of Article 106(2) TFEU.[83] However, the Court rejects the narrow Commission reading of SGEIs as something akin to universal service.[84] Subsequent General Court cases continued to blur *Altmark* and Article 106(2) TFEU,[85] and yet other cases have underlined that the two must remain separate.[86]

6.1.3.4 The Efficiency of the Public Service Firm

The fourth *Altmark* criterion—also referred to as the 'efficiency' criterion—seems to indicate that the Court requires that public services should also be organized as far as possible on market-based lines and that Member States would have to demonstrate that the most efficient operator had been selected.[87] For the Court, the optimal policy solution is a public tender entrusting the performance of the SGEI to the most efficient bidder in the market. And of course that should not only mean the national or regional market. Given that the Court have also drawn upon the free movement rules to extend the requirements to organize some form of tender to a myriad of situations falling outside the scope of the EU public procurement regime,[88] a tender procedure would attract publicity for even the most local SGEI. At the same time, the ECJ was not prepared to stretch the limits of its own competence and require the Member States to organize tenders in all cases. Indeed to have done so might have resulted in a breach of the principle of subsidiarity (Article 5(3) TEU), especially if this had been required for areas of exclusive Member State competence, such as health care or public broadcasting. Moreover a strict requirement to hold a tender would have cast doubts on the legality of numerous existing arrangements where the operators in question had not been selected by way of a public tender.

What is of interest here is that while the introduction of the efficiency criterion opened the door to the Commission to impose a more market-based approach to public service provision, its exact degree of influence was left undefined. Rather

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[83] Ibid., Rec. 162 and ff. The Court goes on by completely collapsing the *Altmark* and Article 106(2) tests by examining, in its discussion of *Altmark supra* note 73, the extent of the Commission review power over whether the service is an SGEI and then the actual conclusion that the service if an SGEI.

[84] Ibid, Rec. 186-190.

[85] See *Deutsche Post AG supra* note 77 Rec 72-74; Case T-254/00 *Hotel Cipriani* v. *Commission* [2008] ECR II-3269 Rec 110; Case T-189/03 *ASM Brescia* v. *Commission* [2009] ECR II-1831 Rec 124 and ff.

[86] Case T-354/05 *TF1* v. *Commission* [2009] ECR II-471 Rec. 126-140.

[87] In its previous ruling in *Ferring supra* note 70, the Court had not addressed this concept at all. Its ruling was criticized for leaving a wide discretion to Member States to finance the activities of inefficient, and invariably incumbent, firms. This would not only prevent the optimal allocation of taxpayers' money but might also allow these same firms to expand their activities into neighboring, liberalized markets.

[88] Case C-231/03 *Coname* [2005] ECR I-7287; Case C-458/03 *Parking Brixen* [2005] ECR I-8585.

Altmark raised a new set of questions—what is a typical and well-run undertaking? What are the precise benchmarks—can these also be hypothetical? And most importantly, would the efficiency test limit the freedom of the Member States to define not only the scope of their public services but also their quality? Could this fourth test provide the Commission with a vehicle for substantive 'regulation' through the application of the EU state aid regime to control the quality and not just the level of public financing for SGEIs?[89]

For instance, in *Chronopost*,[90] handed down three weeks before *Altmark*, the Court had to consider whether the Commission could and should have compared La Poste to a private operator in order to establish whether a state monopoly, La Poste, had been a source of state aid to one of its subsidiaries. The ECJ effectively acknowledged that certain services and networks do not operate on purely commercial lines. Thus, La Poste was in a very different position to that of a private operator acting under market conditions as it had been entrusted with a SGEI mission, and was the only operator on the market. The Court concluded that in the absence of any possibility of comparing La Poste with that of a private group of undertakings in a reserved sector, normal market conditions which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available. Any assessment of a hypothetical market price would produce excessively abstract and arbitrary results ill-suited to determine any economic advantage'.[91] The correct method of assessment would have been to establish whether the price charged 'covers all the additional, variable costs incurred providing the logistical and commercial assistance, an appropriate contribution to fixed costs arising from the network and an adequate return on the capital investment in so far as it was used for [Chronopost's] competitive activity'.[92] Unfortunately the ECJ did not clarify the relationship between *Chronopost* and the fourth *Altmark* criterion in *Altmark* itself.[93]

BUPA,[94] which concerned public and private health insurance, could also be seen as a retreat from the strict approach set down in *Altmark*. There the CFI modified the efficiency criterion and held that it was not necessary to draw a comparison between the costs of the recipient and an efficient undertaking. Based on the purpose of the fourth *Altmark* criterion, the Commission was only required to satisfy itself that the compensation scheme did not entail the possibility that the

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[89] See in this respect, EP and Council Regulation 1370/2007 on public passenger transport services by rail and road and repealing Regulation 1191/69 and 1107/70 [2007] OJ L 315/1, Rec. 27. See also Case C16/07 *Postbus-Austria* [2009] OJ L 306/26, para 86.

[90] Case C-83/01 P *Chronopost* [2003] ECR I-6993.

[91] Ibid., para 38.

[92] Ibid., para 40.

[93] In the meantime, some commentators have contended that *Chronopost* stands for a 'lex specialis' which must be applied when no market exists for the services provided, and consequently no comparable operator can be found as a suitable comparator.

[94] *Supra* note 81.

compensation might result from inefficiencies on the part of the insurer subject to the scheme.

In the end, the Commission in fact applies a two-tier test, as expounded in is 2005 Community framework for State aid in the form of public service compensation.[95] It starts with a sometimes cursory examination of the four *Altmark* criteria, more often than not concluding that *Altmark* does not apply and that the subsidy in question constitutes State aid. Unless the aid is covered by one of the exemptions found in, or based on, Articles 107(2) and (3) TFEU, it then proceeds to assess it under Article 106(2) TFEU, with the following steps:

- The firm receiving the subsidy is entrusted with a genuine SGEI, whereby the Commission claims to test for manifest error only[96];
- An official act entrusts the firm with the SGEI, wherein the SGEI is specified in detail, including any compensation regime;
- The amount of compensation does not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations.
- Costs are assessed by reference to the costs of the firm in question, without benchmarking them for efficiency.

While the Commission has obviously drawn inspiration from *Altmark* in developing and refining its decision practice under Article 106(2) TFEU, it remains rather cautious as regards the fourth *Altmark* criterion. The Commission hesitates to introduce a stricter efficiency benchmark, on the *Altmark* model, in Article 106(2) TFEU. This is perhaps to be explained by the fact that the SGEI Decision, which exempts from notification any compensation measures meeting the first three criteria as further specified in Articles 4 and 5, was in part adopted to address concerns about the retroactive effect of *Altmark*. Thus the SGEI Decision allows compensation to cover the costs of inefficient undertakings even although it provides detailed rules on entrustment, costs and revenue and reasonable profit calculations. Furthermore it requires Member States to ensure adequate control to prevent 'over compensation', in the sense that revenues from entrusted activities should not exceed the recognized costs. A similar approach is followed in the Framework.[97]

This should not prevent the Commission, though, from paying more attention to the robustness of the compensation mechanism and to its proper implementation[98]; such a supervisory task, however, is time- and labour-intensive for a thinly-staffed

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[95] Community framework for State aid in the form of public service compensation [2005] OJ C 297/4.

[96] See *supra* note 56 and the accompanying text.

[97] For a comparison between the Article 106(2) test and the tests applied under the Decision and Framework, see Case NN-54/2009, *Financing of public hospitals in Brussels region* [2010] OJ C 74/1, para 167.

[98] See its subsequent decision in Case N-582/2008, *Health Insurance Intergenerational Solidarity Relief* [2009] OJ C 186/2, paras 41–42 and 60.

authority like the Commission. Nevertheless, in recent broadcasting cases, the General Court has chastised the Commission for not being sufficiently rigorous in verifying the actual operation of the compensation mechanism.[99]

6.1.3.5 Conclusion

Article 106(2) TFEU cannot be applied in a simple way—distinguishing a rule and an exemption to it. The formalistic paradigm, resting on a separation between the general rule that EC law applies and the exception for services falling within the SGEI category, puts Member States in a paradox. Either they insist on their competence to decide on their public services, and they remain within the SGEI exception, subject to pressure through Commission review. Alternatively, as was done in electronic communications and energy, public service obligations—in the form of universal service—can be anchored at European level in EU legislation, so as to balance them with internal market and competition policy objectives; but then Member States have to relinquish their competence. In a way, the ECJ in *Altmark* attempted to thwart this paradox by restoring a larger Member State autonomy to define public services against closer scrutiny (through EC and national institutions) of the modalities of public financing.

So under Article 106(2) TFEU as well, the formalistic paradigm seems to be under pressure and the exact dividing line between the respective roles and rights of the Member States and those of the EC are becoming blurred. The Courts seem reluctant to confer powers on the Commission to control the quality of SGEIs—this is a matter for the Member States, and may be even so where markets are extensively regulated, as the Federutility case confirms. The Courts, and now the Commission are as a result taking a tougher stance on supervisory procedures—and both ex ante and ex post controls, and demanding clearer rules and tougher sanctions.

6.1.4 Conclusion

The dividing lines between Community, state and market are and remain, despite two decades of regulation, by no means clear. The creation of an internal market is certainly not a matter of elevating 'market' at the cost of either 'state' or 'Community'. Yet much of the regulation is based on inherent separations, as explained in this section, including the now obsolete separation between reserved and liberalized sectors, the separation between various steps of the production chain (production, transmission, distribution, supply in the energy sector; content and

[99] See Case T-442/03 *SIC* v. *Commission* [2008] ECR II-1161 Rec 219-256; Case T-309/04 *TV 2/Danmark* v. *Commission* [2008] ECR II-2935 Rec. 192-223.

networks in the electronic communications sector) and the separation between competition law and sector-specific regulation. The most recent set of directives have introduced more radical lines of separation, to isolate transmission systems[100] or local networks.[101] We have concluded that looking across the substantive regulation of the sectors, there is a certain risk that there has been too much separation. Separation is no longer the remedy—it is the root of the problem. This is not merely a matter of legal conceptualism. The challenge of securing huge investments to meet the revised Lisbon objectives, to implement the Union's climate change policy and to bridge the 'broadband divide', will not be met by insisting on the old separations of roles, concepts and functions. In this respect, the 2002 regulatory framework for electronic communications represents the furthest reaching step away from the formalistic paradigm and towards the new integrative paradigm.

6.2 Institutions

As stated in the introduction, the formalistic paradigm characterized not only the substance of the law, but also the institutions. A number of lines of separation, discussed below, threaten to infuse the implementation of the law with arcane debates on matters of competence, where institutions guard the boundaries of their jurisdictions instead of cooperating with one another to achieve public policy objectives. The evolution of sector-specific regulation already shows a departure from formalism towards a more integrative institutional structure (6.2.1), which could serve as an inspiration for Article 106(2) TFEU (6.2.2).

6.2.1 Sector-Specific Regulation

While electronic communications and energy regulation might have traveled different evolutionary paths on substance, their institutional development has been more in step.

The starting point in both cases was the default institutional scheme for the enforcement of EU law, namely the reliance on Member States to implement and apply EU law in their respective jurisdictions, with various mechanisms to report

[100] Directive 2009/72 *supra* note 49 Article 9; Directive 2009/73 *supra* note 49 Article 9.

[101] Directive 2002/19 *supra* note 15 Articles 13a and 13b as introduced by Directive 2009/140 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorization of electronic communications networks and services [2009] OJ L 337/37. Contrary to energy regulation, separation is not compulsory in the electronic communications sector. It is one of the remedies at the disposal of NRAs and its use must be justified to the Commission.

to the Commission (if only about implementing measures) and the usual threat of infringement proceedings. This scheme is the institutional expression of the formalistic paradigm: EU and Member State institutions are given distinct and separate functions, with a limited amount of interaction.[102] What is more, each national jurisdiction operates in isolation from the others. Lines of separation run between the EU and national levels and between the Member States.

6.2.1.1 Away from Separation Between EU and Member State Levels

Early on, in the case of electronic communications,[103] it became clear that the default scheme would not work, if only because almost all Member States would find themselves in a conflict of interest, with a significant if not controlling interest in the former monopolist, on the one hand, and the obligation to implement EU legislation designed to introduce competition to that former monopolist, on the other hand. So the first set of directives enacted in 1990 already provided for the creation of a 'body independent of the telecommunications organizations' to administer regulation.[104] With full liberalization, in 1998, National Regulatory Authorities (NRAs) were introduced in EU legislation, in a way which already broke the separation between EU and national institutions, in that EU legislation required that Member States endow NRAs with powers to gather information and provide for a right of appeal against NRA decisions.[105] For the first time as well, EU legislation required that NRAs be separated from the rest of the administration (if Member States have ownership or control of one of the market players).[106]

EU law continued to penetrate the design and operation of Member State institutions with the 2002 Framework. Provisions were added or expanded concerning the relationship of NRAs with national competition authorities, the appeal mechanisms from NRA decisions, transparency, confidentiality, information gathering and management as well as consultations.[107] In addition, the objectives to be pursued by NRAs were set out in detail.[108] In order to ensure that NRAs would

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[102] Member States remain subject to general principles of EU law—including loyalty (now Article 4(3) TEU), effectiveness and equivalence (the two exceptions to the principle of national procedural autonomy)—when designing and operating the national-level institutions which are meant to give effect to EU law. Within the boundaries set by these principles, Member States retain a significant amount of discretion.

[103] EU energy regulation did not deal with national regulatory authorities until the 2nd generation of Directives in 2003.

[104] Directive 90/388 *supra* note 3 Article 7.

[105] Directive 90/387 *supra* note 9 Article 5a.

[106] Ibid.

[107] Directive 2002/21 *supra* note 15 Articles 3–6.

[108] Ibid. Article 8. In fact, this detailed statement of objectives has been criticized for its open-endedness: the objectives listed therein will often point in contradictory directions, i.e., the promotion of investment in infrastructure and the lowering of consumer prices.

exert their powers in the EU interest, an elaborate system of supervision was put in place, whereby NRA draft decisions concerning the SMP regime are submitted to the Commission for comment; the Commission can veto alternative market definitions or SMP assessments.[109] The notion of NRA was also introduced in the second package of Energy Directives (2003), and here as well EU law dealt with a number of key organisational aspects, including tasks, powers and resources.[110]

With the new sets of directives in 2002 and 2003, the separation between EU and Member States institutions was breached in the other direction as well. Not only did EU law specify in greater detail how Member States organize their NRAs, but these NRAs started to play a greater role in the development of EU policy. In the electronic communications and the energy sectors, NRAs were brought together in regulatory networks, respectively, ERG and ERGEG.[111] ERG and ERGEG were created to advise the Commission, but also to bring NRAs together and to force them to look beyond their borders and take a European perspective on their respective activities. And indeed these networks soon began to conduct benchmark exercises, to form study groups and to issue policy documents and non-binding guidelines on various regulatory topics.[112]

The creation of these regulatory networks marked a large step away from the formalistic towards the integrative paradigm: the Commission and the regulatory networks are working together as part of an enforcement community, with the Commission taking care of higher supervisory and policy-making functions, in consultation with the NRAs which deal with the day-to-day application of the law. Despite lingering issues as to legitimacy, by and large regulatory networks represent a robust enforcement model for EU law, with definite advantages when compared to the traditional model or to the agency model.[113]

6.2.1.2 Beyond Separation Along National Borders

While the creation of NRAs and regulatory networks broke down the separation between EU and Member State institutions, it did not address the other separation line running through the institutions in EU regulation of network industries, namely the line running along national borders. In other service sectors where

[109] Ibid. Article 7. The Article 7 procedure has given rise to a large decision body, with the Commission having so far reviewed more than 1000 draft NRA decisions (as of 1 January 2010) and issued 7 veto decisions over the years.

[110] Directive 2003/54 *supra* note 44 Article 23; Directive 2003/55 *supra* note 44 Article 25.

[111] See Decision 2002/627 establishing the European Regulators Group for Electronic Communications Networks and Services [2002] OJ L 200/38 and Decision 2003/796 establishing the European Regulators Group for Electricity and Gas (ERGEG) [2003] OJ L 296/34.

[112] Including the massive effort of the ERG to draw up a Common Position on Remedies, ERG (06) 33 (May 2006), available at http://berec.europa.eu/.

[113] See the thorough study made by de Visser 2009 and Lavrijssen and Hancher, Chap. 8 in this book.

regulatory supervision has been harmonized at EU level, such as banking, insurance or broadcasting, at least a home-country supervision system was put in place, so that firms can operate throughout the EU under a single license granted by one NRA (in the 'home country' as defined in the applicable directive). The experience with broadcasting over the years—where stricter Member States have tried to assert jurisdiction over broadcasters established in laxer Member States—already indicates the limits of this approach. Conversely, the failure of banking supervision ahead of the current crisis shows that national authorities did not fully exert supervision over the activities of the regulated banks outside of their jurisdiction.[114] In any event, EU regulation of network industries did not even make it that far: early on, it became clear that Member States wanted to retain jurisdiction over firms operating on their respective territories.

For electronic communications, the EU institutions chose a different strategy to try to minimize regulatory burdens across the EU: instead of working with an institutional solution (home-country control), a procedural solution was sought, namely making regulation (and in particular licensing requirements) as light as possible, so as to limit the regulatory burden for firms in each Member State. The 2002 framework removed any individual license requirements at national level, replacing them with a general authorization procedure.[115] Even if the administrative requirements for market entry were reduced as much as possible, the 2002 framework contains a heavier regulatory scheme applicable to specific firms, namely firms with SMP on selected relevant markets.

In the energy sector, however, the separation running along national borders was not addressed. Although the obligations on TSOs and DSOs have been increasingly harmonized and national regulation of their activities is now the subject of detailed, technical regulation, there was no attempt to deal with the regulation of cross-border infrastructure and shared regulatory responsibilities until the adoption of the recent third package in 2007.[116]

In the light of the above, it comes as no surprise that many market players and industry observers have criticized the EU for failing to realize the internal market in network industries. The main line of criticism is that even if at a general level the substantive law is harmonized, Member States and their NRAs continue to follow diverging approaches in implementing and applying EU law to the firms active in their respective jurisdictions. As a result, firms face a regulatory patchwork across the EU. The Commission has taken these criticisms to heart; it has always insisted on a high degree of convergence among NRAs. On the other hand, it is often forgotten that, on issues where there is no obvious regulatory solution,

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[114] Tridimas 2011.

[115] 'Rights of use' must still be sought by each market player, however, in order to have access to scarce resources such as frequencies, numbers or rights-of-way: Directive 2002/20 *supra* note 15 Article 5.

[116] Under Regulation 1228/2003 *supra* note 44, the relevant national authorities involved had jurisdiction over cross-border infrastructure and had a duty of cooperation but remained fully entitled to take autonomous decisions.

such as for instance how to regulate Next Generation Networks so as to foster the appropriate amount of investment in new infrastructure, it can be advantageous to allow room for experimentation; in such case, 'maverick' NRAs from smaller Member States could take the lead and follow more daring regulatory approaches, while NRAs from larger Member States would wait for a best practice to emerge.[117] In practice, such experimentation has not taken place, however.

The 2002 and 2003 directives, as well as the second energy package already contained measures to ensure sufficient coordination and convergence among NRAs, including the regulatory networks mentioned above. The ERG and ERGEG, however, did not succeed in bringing about the expected level of convergence among NRAs, at least as far as the Commission is concerned. The ERG and ERGEG decided on a consensus basis, resulting in a very inter-governmental dynamic. In response to criticism, the ERG improved its internal procedures, whereas ERGEG recommended its transformation into a fully-fledged independent agency.[118]

In addition to the 'voluntary' coordination taking place within the ERG and ERGEG, the Commission also has means to force the NRAs to follow its line, or even to override or sideline them. As mentioned above, within the 2002 electronic communications framework, the Commission first of all selects markets for NRAs to assess,[119] secondly issues guidelines as to how NRAs should conduct their assessment[120] and thirdly reviews NRA draft decisions and can veto them if they would undermine the internal market or conflict with EU law.[121]

6.2.1.3 The Use of Competition Law Powers

Beyond sector-specific regulation, the Commission can also intervene in NRA matters via its competition law powers; issues relating to the regulation of SMP firms (electronic communications) or large energy operators can typically be reframed as competition law issues, under Article 102 TFEU. In the 1990s, the Commission used its competition law powers against incumbents to 'convince' Member States to support telecom liberalization.[122] As regards the actions of NRAs in particular, the Commission intervened in pricing matters by fining incumbents for predatory pricing or price squeeze under Article 102 TFEU.[123]

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[117] Larouche and de Visser 2006.

[118] See Lavrijssen and Hancher, Chap. 8 in this book.

[119] Directive 2002/21 *supra* note 15 Article 15.

[120] Ibid.

[121] Ibid., Article 7. See also Larouche 2005.

[122] Larouche 2000.

[123] Case COMP/37.451 *Deutsche Telekom AG* [2003] OJ L 263/9 (upheld in Case T-271/03 *Deutsche Telekom* [2008] ECR II-477), Case COMP/38.233 *Wanadoo Interactive*, available on ec.europa.eu/competition (upheld in Case C-202/07 P *France Télécom* [2009] ECR I-2369), Case COMP/38.784 *Telefónica*, available on ec.europa.eu/competition.

The *Deutsche Telekom* price squeeze case is particularly relevant here, since DT relied on the regulatory approval of its wholesale and retail tariffs by the German NRA to argue against the application of competition law. The Commission replied that compliance with regulation did not absolve a firm from liability under competition law, a stance confirmed by the CFI on appeal; here EU law is at variance with US law, however.[124] Finally, in one instance concerning international roaming, the Commission, dissatisfied with the way NRAs had failed to act, simply circumvented the general regulatory scheme of the 2002 regulatory framework and proposed a separate regulation.[125]

Against the backdrop of the incomplete transition from a more formalistic to a more integrative regulatory paradigm in the substantive regulation of the energy sector, as mapped out in Sect. 6.1.2 above, the recent use of competition law powers in the energy sector is remarkable. It had as its prelude a major sector inquiry—culminating in a comprehensive report gathering extensive data on the industry and its practices.[126] As many aspects of market structure and indeed firms' conduct are beyond the scope of the energy directives, competition rules have had a vital role to play to support the transition to more competitive markets. However, recent developments in the practice of the European Commission, and in particular the development of the commitment procedure on the basis of Article 9 of Regulation 1/2003[127] alongside a significant increase in fines, indicate that competition rules have an important substantive role to play, as an effective tool for market design, and can transcend the increasingly technical focus of sector-specific energy regulation outlined above.

Increasingly, the Commission is resorting to *quasi*-regulatory measures to foster competition in the EU electricity and gas markets. Unilateral commitments by the parties involved have become a standard part of the toolbox used by the Commission to restructure the European electricity and gas market and promote competition. The commitment procedure allows the Commission to accept legally binding commitments offered by defendants if is satisfied that these sufficiently address the underlying competition problem. This procedure has the virtue of both procedural economy and speed. It allows the Commission to bring infringement procedures to an end without the parties being forced to concede that they have indeed breached the rules. Confirmation and approval of this strategy in the context of merger review was given by the General Court in the

[124] Geradin 2004; Petit 2004; Larouche 2008.

[125] EP and Council Regulation 717/2007 on roaming on public mobile telephone networks within the Community [2007] OJ L 171/32.

[126] Inquiry pursuant to Article 17 of Regulation 1/2003 into the European gas and electricity sectors (Final Report) COM(2006) 851 (10 January 2007).

[127] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

EDP/Commission cases.[128] Further examples can be found in the *EDF/EnBW* and *GDF/SUEZ* merger cases.[129] Commitments should in theory, be suitable, necessary and proportional to dealing with the underlying competition law problem to be lawful.[130]

As of 2008 the Commission also began to accept commitments of divestiture in the context of Article 102 TFEU cases in the German market, when first E.ON[131] and then RWE[132] accepted to divest their transmission networks to avoid further antitrust scrutiny when at the same time, the German government was still strongly opposing ownership unbundling during the negotiations on the Third Package. An Article 102 TFEU investigation could therefore lead to a structural remedy—the divestiture of the essential facility. The Commission was now able to address the shortcomings of the sector-specific legislation through 'ex post' antitrust control, and to realize the potential of the commitment procedure to carry through rapid changes in the market structure.

Importantly, the commitment procedure allows the Commission to bargain liberalization outcomes directly with the incumbent, without going through the interface of NRAs and Member States. This outcome is well-illustrated in the Svenska Kraftnet (SvK) decision.[133] The Commission reached the preliminary conclusion that SvK was dominant on the Swedish electricity transmission market and may have abused its dominant position by reducing interconnection capacity for trade between Sweden and its neighboring EU and EEA partners, thereby discriminating between discrimination between domestic and export electricity transmission services and segmenting the internal market. SvK had arguably only been carrying out national policy objectives, i.e., maintaining a single price area in Sweden. Nevertheless Regulation 1228/2003 also forbade these types of practices and it should have been open for the complainants to raise a challenge before the national regulator. Given the apparent lack of independence of the Swedish regulator from the government, the Commission was able to rely on Article 102 to circumvent the national level and force SvK to accept far-reaching commitments, including the building of new network infrastructure.

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[128] Case T-87/05 *EDP* v. *Commission* [2005] ECR II-3745.

[129] Case COMP/M.1853 *EDF/EnBW* [2002] OJ L 59/1; Case COMP/M.4180 *Gaz de France/Suez* [2007] OJ L 88/47.

[130] In Case C 441/07 *Alrosa* [2010] ECR I-5949, however, the ECJ subjects commitments received under Article 9 of Regulation 1/2003 to a much looser proportionality test than conditions or obligations unilaterally imposed by the Commission pursuant to Article 7 of Regulation 1/2003.

[131] Cases COMP/39.388 and COMP/39.389 *German Electricity Wholesale and Balancing Markets* [2009] OJ 36/8.

[132] Case COMP/39.402 *RWE Gas Foreclosure* (Decision of 18 March 2009), available on http://ec.europa.eu/competition.

[133] Case COMP/39.351 *Swedish Interconnectors* [2010] OJ C 142/28.

6.2.1.4 Increased Separation Between the NRA and the National Legislative and Executive Power

Despite all of the means at the Commission disposal to influence or even control to work of NRAs, the perceived need for more consistency across the EU led the Commission to propose the creation of regulatory agencies in both the electronic communications and energy sectors.

In order to fully understand such proposal, it is necessary first to look at yet another line of separation running through the institutional framework, this time between the NRAs, on the one hand, and the Legislature and the Executive, on the other hand.

As mentioned above, the starting point for this line of separation was the potential conflict of interest arising when the State both conducts the regulation of the sector and holds a significant interest in one of the players (the incumbent).[134] In that sense, the independence of the NRA from the Legislative and Executive was an extension of the separation of regulatory and operational functions.

When NRAs were originally created, most Member States were still holding a significant if not controlling share in the incumbent, so they had to give the NRA a measure of independence from the rest of the administration. Furthermore, the leading example, the British Oftel (now Ofcom), was operating largely independently. So most NRAs were created as separate authorities enjoying a measure of autonomy. Once created, these NRAs generally sought to consolidate and even increase that autonomy.

However, it soon became clear that expanding NRA autonomy beyond what is necessary to avoid conflict of interests ran into significant problems. In most Continental public law traditions, autonomous executive agencies can only be entrusted with the—presumably mechanical—implementation or application of higher-ranking norms, as opposed to policymaking.[135] Indeed the delegation of norm-making power to an autonomous body would run against the separation of powers (to the extent that such norms would otherwise be set by the Legislature) or against the political accountability of the Executive (to the extent that such norms would otherwise be set by the Executive pursuant to legislative delegation). Accordingly, NRAs could enjoy considerable autonomy as long as their tasks were limited to the mere implementation or application of law and policy. It should be apparent to the reader that the range of tasks to be performed by a NRA does not lend itself easily to formalistic categories such as 'policy-making' and 'implementation'. Rather, regulatory decisions essentially involve policy trade-offs.[136]

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[134] Directive 90/387 *supra* note 9 Article 5a; Directive 2002/21 *supra* note 15 Article 3(2).

[135] Thatcher 2007.

[136] For instance, short-term gains in consumer welfare from lower prices and increased competition routinely have to be weighed against longer-term gains from investments in new technologies and increased dynamic efficiency. Similarly, the interests of one category of customers often have to be balanced with those of another category.

It seems more accurate to model the regulatory process as a chain of decisions, each involving a further refinement in the trade-offs, always with a view to deal with uncertainty as well as possible.

While it is not accurate to shrug off the issue as a clash between a regulatory model inspired by the common law and a Continental public law tradition,[137] it remains nevertheless that some theoretical foundation must be found to explain not just the existence of NRAs, but also the division of tasks between the Legislature and the Executive, on the one hand, and the NRA, on the other. Recent developments point towards a generalization of the conflict-of-interest rationale: in short, even if Member States have no direct interest in any of the market players, regulatory matters are high-stake games where market players will deploy considerable resources to try to influence the outcome (rent-seeking behavior). Regulatory decisions must therefore be made in an environment which is shielded from undue influence as much as possible: this would imply transparency, independence of the decision-maker, openness, a duty to state reasons and the possibility of review, i.e., the characteristics of a regulatory agency.[138] By implication, the role of the Legislative and the Executive would be limited to issues where there is no clear controversy among market players, i.e., issues where a decision does not immediately make winners and losers. This would explain why, in a decision chain model, the Legislative and the Executive can deal with the highest levels—provide guidelines and set out policy objectives—but cannot go very far down the decision chain, since very rapidly market players will begin to hold diverging views on the outcome and will engage in rent-seeking behavior.[139] The justification just set out was put forward by the ECJ in a recent ruling which enshrined the position of the NRA via-à-vis the Legislature.[140] Similarly, the recent directives on electronic communications and energy invoke the need to avoid undue influence as a reason why the independence of NRAs should be strengthened.[141]

Of course, the more NRAs are independent towards the national Legislative or Executive, the more accountability becomes problematic. Many commentators argue that the NRAs are not sufficiently accountable, all the more when they act under the cloak of the ERG or ERGEG.[142] Yet a good argument can also be made

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[137] The same debate took place in common law systems when regulatory authorities were put in place, but that debate dates back from the mid-20th century.

[138] Hancher et al. 2003.

[139] This is not to say that NRAs are not vulnerable to rent-seeking behavior as well, as public choice theory argues with regulatory capture, etc.

[140] See ECJ, 3 December 2009, Case C-424/07, *Commission* v. *Germany* [2009] ECR I-11341, in particular Rec. 91 and the Opinion of AG Maduro at Rec. 63. In ECJ, 29 October 2009, Case C-274/08, *Commission* v. *Sweden* [2009] ECR I-10647 the Court also defended the position of the NRA as against the Legislature, this time in the energy sector.

[141] Directive 2009/140 *supra* note 101 Rec 13 and the new Article 3a added to Directive 2002/21 *supra* note 15; Directive 2009/72 *supra* note 49 Rec 33-34 and Article 35.

[142] Lavrijssen and Hancher, Chap. 8 in this book.

that NRAs are already subject to many measures designed to ensure accountability. First of all, ex ante, while as is clear from the above NRAs cannot be told how to decide, the Legislature and the Executive have nonetheless given them some directions, i.e., they have filled in the upper echelons of the decision chain. NRAs are not told simply to act in the public interest,[143] rather they are given specific objectives,[144] their tasks are defined[145] and their powers are also set out.[146] In the case of electronic communications, the Commission even tells them which markets to analyze and which methodology to apply.[147] Secondly, ex post, a number of mechanisms are in place. The NRAs are subject to the disciplines arising from good governance principles: transparency, openness, need to consult and give reasons, etc. Usually, they are also bound to file regular reports with the Legislature. As outlined earlier, the Commission also has means to exert pressure on them, including through its competition law powers. Within the networks, they are also accountable towards other NRAs. Last but not least, their decisions are subject to judicial review. If accountability means that the NRA must feel that it has to answer for its actions, then NRAs are accountable; of course, they are accountable to so many principals that the incentives on NRAs might be distorted.[148]

6.2.1.5 NRAs and the Commission: The Creation of ACER and BEREC

In the Commission's view, inadequate political independence at national level hampers an effective and impartial application of European law. As mentioned already, the new electronic communications and energy directives adopted in 2009 reflect at least in part, a new policy direction: NRAs must now be independent, not just from industry, but increasingly from national governments, without political interference. Their ability to do so will be strengthened through the creation of the two new institutions, the Agency for the Co-ordination of Energy Regulators (ACER) and the Body of European Regulators for Electronic Communications (BEREC). The originality of ACER and BEREC compared to other agencies in the

[143] As is the case with some US authorities, such as the FCC.

[144] Directive 2002/21 *supra* note 15 Article 8.

[145] Ibid.

[146] Throughout the Directives making up the 2002 framework *supra* note 15.

[147] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services [2002] OJ C 165/6.

[148] As was the case in *Commission* v. *Germany supra* note 140 where one principal (the German Parliament) disagreed with another one (the Commission) on the proper treatment of emerging markets.

EU regulatory landscape is that they are *"network agencies"*.[149] Of necessity, multi-level governance complicates the allocation of responsibility and the accountability of these different actors from a political as well as a legal perspective.[150] Much of the legal and political science literature has focused on the accountability deficits of the networks themselves, but in the light of the repositioning of the regulatory networks as European network agencies, their position *vis-à-vis* the Commission—and the division of competences and tasks between these new agencies and the Commission itself—is an important dimension in the new institutional paradigm. Ironically, the formalistic distinction between policy-making and implementation, which undermined the position of NRAs in many Member States, is also at work at European level under the guise of the so-called *Meroni* doctrine.[151]

Regulation 713/2009 stipulates that ACER is "to assist the regulatory authorities […] in exercising, at community level, the regulatory tasks performed in the Member States and where necessary, to coordinate their action". Its task is to provide a framework for the cooperation of NRAs, and to complement their actions at EU level to address regulatory gaps on cross-border issues and provide greater regulatory certainty. ACER will primarily have an advisory role. Its opinions and recommendations should contribute to ensuring more coordination among TSOs and among regulators of the different Member States, spread good practices and in particular contribute to the implementation of the new (non-binding) Community-wide ten-year network development plan, i.e., monitoring the work of the new European Network of Transmission System Operators (ENTSOs) for electricity and gas, an new organization also created under the third energy package. Under the third package, the powers of the Commission to adopt general technical measures through comitology procedures are greatly extended.[152] ACER will only have an advisory role in the formulation of general binding measures. At the same time, it has limited autonomous powers to take decisions on cross-border energy infrastructure projects. The new Regulation 714/2009, modifies the allocation of regulatory powers among the NRAs who can

[149] In terms of internal governance, ACER broadly follows the principles of the Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies, COM(2005)59 final (25 February 2005). It comprises an Administrative Board, a Board of Regulators regrouping the NRAs and a Director. As for BEREC, even if, for institutional reasons, it is expressly not set up as a 'Community agency' within the meaning of EU law (Regulation 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office [2009] OJ L 337/1 Rec 6), for the purposes of discussion here it will be treated as such. Its institutional structure is not far from the model set out in the Draft Interinstitutional Agreement either: it comprises a Board of Regulators on which NRAs sit, assisted by a Management Committee and a Administrative Manager. In comparison to ACER, BEREC leaves more power in the hands of the NRAs acting together as Board of Regulators.

[150] Lavrijssen and Hancher, Chap. 8 in this book.

[151] Case 9/56, *Meroni* [1958] ECR 11.

[152] These now include the network codes, the certification of TSOs, rules on the provision of information, rules for the trading of electricity and lastly, rules on investment incentives for the construction of interconnector capacity.

jointly decide to delegate their power to the new ACER; in case of sustained disagreement between the NRAs involved, ACER can even take the decision itself, subject, however to Commission veto. As the ERGEG has concluded, to its regret, in reality the ENTSO has been given more important powers than the Agency itself. This is perhaps a reflexion of the dominance of technical regulation in the energy sector, which has led to the inclusion of TSOs as key players in the regulatory framework. But the powers of the Agency vis-à-vis the Commission also remain weak. From a legal perspective, ACER has been conceived in strict compliance with the *Meroni* doctrine.[153] Its powers to define the terms and conditions for access and operational security of cross-border infrastructure are inherently technical and case-specific, and subject to close Commission scrutiny. Regulatory independence from national governments does not necessarily imply independence at the European level.

The creation of BEREC was more laborious.[154] The Commission proposal was as ambitious as in the energy sector, but in the end, as the recitals to Regulation 1211/2009 indicate, BEREC is rather a reinforced ERG. It is much less of an agency than ACER. Its governance structure is developed further than was the case with the ERG, and it is endowed with more staff (the Office).[155] It now decides by a two-thirds majority instead of consensus, which could make BEREC more efficient than ERG.[156] As with ACER, however, the relationship of BEREC with the Commission is comparatively underspecified: on the surface, BEREC is set up so as to comply with the *Meroni* doctrine, in that it is merely advising the Commission (and the NRAs), without taking any decisions, much like EMEA, for instance.[157] As the case of EMEA shows,[158] however, if BEREC ends up with a sizeable expert staff and the Commission starts to rely increasingly on its advice, then BEREC will in practice be taking decisions for the Commission, including some decisions going beyond mere implementation. In any event, if BEREC is eating away at any authority's policy-making autonomy, it is the NRA's and not the Commission's, so that no *Meroni* issue would then arise. Indeed BEREC is designed to increase 'consistency' among NRA decisions, especially as regards remedies. If the Commission retains a significant role in the matters on which it is

[153] *Supra* note 151.

[154] One need only parse the various acronyms which gained currency during the legislative procedure to see that the lawmaking institutions were at odds: the Commission proposed a European Electronic Communications Market Authority (EECMA), whereas the Council in its common position wanted a Group of European Regulators in Telecoms (GERT), and not a Body of European Regulators in Telecoms (BERT), as found in the first reading of the EP.

[155] Regulation 1211/2009 *supra* note 149 Article 6.

[156] Ibid., Article 4(9).

[157] Tridimas 2009.

[158] Pelkmans et al. 2000, 519.

advised by BEREC, then ultimately BEREC could serve as an additional lever to exert pressure on NRAs to fall into line.[159]

For both ACER and BEREC, the dividing lines between the practical competences of the Commission and ACER/BEREC on the one hand, and between ACER/BEREC and the NRAs on the other hand, are likely to evolve following continuous interactions in this new substantive and institutional regulatory space.

Even although the regulatory gaps on cross-border issues (in energy) and the perceived lack of consistency across borders (in electronic communications) will be incrementally reduced thanks to strengthened harmonization and cooperation at the EU level, it would be wrong to conclude that a definitive paradigm shift towards centralized powers has occurred with the creation of ACER and BEREC. Economic regulation will to a large extent remain a national competence, albeit that the NRAs should heed the European interest. Yet if European sector-specific regulation remains relatively weak and very partial in its coverage, there would appear to be some scope to 'fill in the gaps' in the current institutional architecture by resorting to a more imaginative use of ex post competition controls.

6.2.2 Article 106(2) TFEU

As we have explained above, in the wake of *Altmark* and the subsequent adoption of the 'Monti' package in 2005, the Commission has been confronted with the task of ensuring legal certainty for the Member States and their public service providers and at the same time ensuring sufficient flexibility to address local as well as sectoral variation in how public services are organized and operated, as well as the scope and quality of those services. This has led to some confusion as to how strictly Article 106(2) TFEU should be interpreted, and in particular its scope as an exemption to the Treaty state aid regime. As discussed above, the fourth *Altmark* criterion is not applicable in the context of Article 106(2); Member States must nevertheless ensure that public service obligations are clearly defined and entrusted through legal acts, and that the compensation for their performance is proportionate. Finally, and in accordance with the Transparency Directive,[160]

[159] The pressure for 'consistency' essentially concerns remedies, since market definition and SMP designation are already subject to Commission supervision (and ultimately veto) under Directive 2002/21 *supra* note 15 Article 7. Whether BEREC will succeed in bringing more consistency in the remedies imposed by NRAs will also depend on how the intricate review procedure of Directive 2002/21, Article 7a (as added by Directive 2009/140) works out in practice. On the face of Article 7a, NRAs may ultimately persist with their original proposal concerning remedies, but they will face considerable pressure to follow the views of the Commission and BEREC.

[160] Directive 80/723 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [1980] OJ L 195/35, as amended.

cross-subsidisation should be avoided through separation of accounts for PSO (or SGEI) activities from all other functions.

Yet these rules are not always easy to apply, let alone police in sectors where there is little or no harmonizing legislation and as a result, where sector-specific regulation and sector-specific regulators are not available to take up these tasks. The result is often an opaque situation at national level. The exact scope of the relevant PSO may only be inferred from a pot pourri of national as well as regional and local norms, while neither the modes nor the levels of compensation are defined ex ante in a transparent manner. Benchmarks for 'reasonable' levels of compensation remain elusive. Ex post control may be a potential substitute to avoid over-compensation, but this too is not assigned in a consistent or transparent manner. Accounting separation is not subject to harmonized rules and the failure to apply any sort of system at all is not subject to any effective sanction. Although, following the Monti Report of 2010,[161] the Commission has recently launched a consultation exercise on the possible reform of the 2005 Community Framework for State aid in the form of public service compensation and accompanying enactments,[162] its efforts to create legal certainty and preserve the necessary flexibility are likely to be frustrated unless it is prepared to abandon the 'market access' paradigm that has dominated its approach to date, and to embrace a more integrated paradigm which will allow not just for the development of the requisite substantive norms but also for the design of a suitable institutional architecture to supervise more closely how PSOs are entrusted, performed and policed at national or where appropriate, regional or local level.

This has to be the correct 'quid pro quo': if Member States are to enjoy the flexibility to deliver and organize these services in accordance with their own policy objectives, then they must at the same time be prepared to ensure the necessary level of supervision to ensure that those entrusted with such tasks do what is to be expected of them. This could mean a more pro-active role for national bodies such as courts of auditors, or even competition authorities or alternatively for specially created, de-centralized bodies, who are given a clear mandate to supervise PSOs in a transparent, independent and democratic manner. The institutional developments in sector-specific regulation could serve as an inspiration: conceivably national authorities could be integrated in a network and placed under the supervisory powers of the Commission. It is only in this way that a true reform can succeed in integrating the aspirations of the Union and the Member States to ensure universal access to such services for European citizens with further consensus building on the objectives of an integrated, highly competitive social market.

[161] Monti 2010, 73–75.

[162] *Supra* note 95.

6.2.3 Concluding Remarks

Just as with the developments in substantive law, the dividing lines between Community, state and market remain unclear. Although recent institutional developments have lessened the dividing lines between the EU and the national regulatory institutions, they have not resulted in a straightforward transfer of powers from Member State to the Community level. Furthermore, inherent separations remain—in particular along physical borders, so that cross-border network issues/activities are still not fully coordinated at either national or European level.

The transition to a more integrative paradigm is by no means complete. As we have argued, separation has become the root of the problem and not the remedy. It will take time to recalibrate the institutional architecture and revise the substantive rules. Given the inherent division of competences between the EU and Member States, one may also speculate on whether certain dividing lines can ever be fully eradicated.

6.3 Conclusion

We have argued in this chapter that an examination of recent trends in both substantive and institutional aspects of network regulation in two key sectors illustrate that the formalistic, 'market access' paradigm, initially relied upon by the Commission to force market access is gradually breaking down. We have explained that this paradigm is being replaced by a more integrative approach, which attempts to overcome the various separations imposed by the formalistic paradigm and which seeks to balance internal market objectives with other goals. We have traced the emergence of a more integrated institutional approach, where the dividing lines between European and national regulation are no longer clear-cut but where a choice for a more co-operative and multi-layered approach is evident. We have also argued that the substantive norms have evolved so that 'pigeon-holing' of problems is no longer the dominant perspective. Instead the latest packages of regulation adopt a more integrative approach too.

We have suggested that the original assumption that informed the design and scope of early network regulation—that sector-specific rules should give way to general competition law—has not been possible to maintain. Regulation in the electronic communications sector has become more not less intensive. In spite of the introduction of structural unbundling in the energy sector, the regulation of the TSOs and transmission functions has not become 'lighter'. Indeed the TSOs must now ensure market access and reliable supply, but must also take on responsibility for additional longer term objectives, including investment, dissemination of market information, and the promotion of renewables. Their quasi-regulatory tasks sit somewhat uneasily alongside their commercial organization and objectives, especially if they are not fully unbundled from other activities and functions within a vertically integrated firm.

As the substantive norms have become more intricate, complex and challenging, so has the institutional architecture which is now required to manage regulatory co-ordination across national boundaries. The Commission's role in the context of the realization of the internal market exercise in the network sectors has become far more complex as a result. We argue that in the light of our analysis of both the institutional as well as the substantial features of network regulation, the Commission has been gradually forced to accept, if reluctantly, a new role. It is no longer possible for the Commission to content itself with realizing market access or stimulating the creation of sustainable competition, or to correct market failures. The Commission's role has become one of 'managing competition' in the network sectors, alongside NRAs and NCAs.

The effective accomplishment of this task will require a further shift to more integrative approach—at both substantive as well as institutional levels. This is equally true with respect to Article 106(2) TFEU even in the absence of sector-specific legislation. The Commission will have to ensure that it is has the means at its disposal to ensure that all stakeholders involved can both subscribe to as well as meet its ambitious objectives in a complex policy setting. These objectives are, as we have explained, no longer limited to a single-minded pursuit of market opening and short term efficiencies. Instead complex policy trade-offs must be made across a multi-level institutional framework where sector-specific regulatory tools as well as competition law tools must be mobilized at Union and national level in pursuit of a careful balancing exercise. Managed competition involves managing and steering the continued interaction of 'Community, state and market'; it is not about drawing boundaries and dividing lines, and policing the relevant spheres of competence or elaborating formalistic 'pigeonholes' so that inherent tensions between 'state versus Community' or 'state versus market' can be conveniently side-stepped. With the coming of age of EU regulation in network industries, the end of the old formalistic approach is surely inevitable.

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Chapter 7
The Reform of EU Electronic Communications Law: Revolution or Evolution?

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Contents

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_7,

Something is rotten in the state of electronic communications.

> There is a fragmentation of regulation across the 27 Member States, lack of independent regulators in several EU Member States, sometimes also a lack of properly resourced regulators, delays in applying remedies as well as problems caused by inefficient remedies

Commissioner Reding lamented in a speech.[1] What must be done about such deficiencies?

In the field of eCommunications, change is the State-of-the-Art. First and foremost, change is fostered at the technological level, through the deployment of new networks and services. We also witness change in the substantive rules, adapting as they must do, to market and technological evolution.[2] Even at the institutional level, the relationship between the two dominant actors—Commission and national authorities—has developed in a dynamic manner. Initially, the Commission was in the driver-seat as it used Article 106(3) TFEU to achieve liberalisation.[3] The 1998 framework saw the rise of national authorities as the 'cornerstones' for enforcement.[4] Under the current regime the pendulum has swung back somewhat, evident in the Commission's powers under Article 7 of the Framework Directive.[5]

Reding's quote suggests that the time has come for another amendment to the institutional framework. This chapter considers, in Sect. 7.1, the main criticism levelled at the current model. This is to flesh out what improvements are perceived as necessary by the Commission and market participants, Having done so, we shall investigate available alternatives in Sect. 7.2. We assess their strengths and weaknesses within our understanding of the need for change. We conclude with Sect. 7.3, in which we discuss overarching questions of a more constitutional nature that warrant attention.

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[1] 'Why we need more consistency in the application of EU telecom rules' SPEECH/06/795, 11 December 2006, 3.

[2] The first legislative measures in the sector challenged existing legal monopolies to bring about liberalisation. The 1998 ONP framework was directed at the 'original sin' of the former incumbent to allow the development of a genuinely competitive market. The current 2003 framework is premised upon a fully liberalised and competitive sector. A recent example of the perceived need to adapt substantive rules to technological evolution is the discussion on next generation networks.

[3] Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment [1988] OJ L131/73 and Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunication services [1990] OJ L192/10. Further Larouche 2000.

[4] Commission (EC) *Fifth Annual Implementation Report* (1999) 9. In particular, they were in charge of applying the SMP regime.

[5] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services [2002] OJ L108/33.

7.1 Defining the Problem

A perusal of the Commission's Annual Implementation Reports[6] and the documents related to the revision process[7] reveals two main interlinking institutional deficiencies. The first relates to inconsistencies in the application and enforcement of the law. The inconsistency is believed to exist at two levels. On the one hand, national authorities are accused of choosing different remedies to address similar problems.[8] On the other hand, national courts apply heterogeneous standards when deciding whether to suspend an NRA decision pending appeal—in most cases influenced by their eagerness, or absence thereof, to grant such interim relief.[9] In both cases, the result is the same: the scope and degree of regulation in force at any point in time may differ from one Member State to the next.

The importance of consistency is intimately linked to the Internal Market. Most sectors of the economy now have a European, if not a global dimension. There are ever more pan-European undertakings, or at least undertakings operating in several Member States. Contradictory or incompatible decisions by national authorities or courts—inter-State as well as intra-State—complicate business life as compliance costs are augmented.[10] It leads to distortions of competition and predictability suffers, creating insecurity which enhances entrepreneurial risk.

Inconsistency knows various causes. Most common is a difference in regulatory capacities, resources and expertise.[11] The authority or court enforcing the law lacks the requisite personnel or financial support to do so or misinterprets the European rule due to a knowledge or experience deficit. This unintended inconsistency may be contrasted with intentional deviation. A nationalist outlook, political pressure or regulatory capture may induce the authority to deliberately misconstrue or misapply the European rule in favour of nationalist interests or undertakings.

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[6] The Reports are available at DG INFSO's website.

[7] <http://ec.europa.eu/information_society/policy/ecomm/tomorrow/index_en.htm> Accessed 14 May 2012.

[8] Commission (EC) 'Consolidating the internal market for electronic communications' (Communication) COM(2006)28 final, 6 February 2006; Commission (EC) '2nd Report on Consolidating the internal market for electronic communications' (Communication) COM(2007)401 final, 11 July 2007; Commission (EC) *Twelfth Annual Implementation Report* COM(2007) 155, 29 March 2007, 15; Reding (note 1); V Reding 'The Review of the EU Telecom rules: Strengthening Competition and Completing the Internal Market' SPEECH/06/442, 27 June 2006; V Reding 'Towards a True Internal Market for Europe's Telecom Industry and Consumers—the Regulatory Challenges Ahead' SPEECH/07/86, 15 February 2007; Hogan & Hartson and Analysis *Preparing the Next Steps in Regulation of Electronic Communications* (July 2006) accessible at the website of DG INFSO and numerous responses to the Commission consultation process, accessible at the same website.

[9] Eg Commission (EC) *Eleventh Annual Implementation Report* COM(2006)68 final, 20 February 2002, 10.

[10] Larouche 2005.

[11] Majone 1996, 277.

The current regime comprises three instruments to counter this unwanted behaviour.[12] Article 7 of the Framework Directive mandates that NRAs consult the Commission and their peers on draft decisions.[13] The notifying NRA must take the utmost account of any comments received. In some cases, the Commission holds a veto right over draft decisions concerning the first two steps of the SMP procedure—market definition and SMP analysis.[14] We note that in these two steps the NRAs are guided by the Commission Recommendation on relevant markets[15] and the Commission Guidelines on SMP.[16] Then there is the European Regulators Group (ERG).[17] Providing an interface between the NRAs and the Commission, the ERG is meant to contribute to the consistent application of the eCommunications rules in particular as regards the third stage of the SMP procedure—remedies.[18] Finally, Article 4 of the Framework Directive stipulates a right of appeal against NRA decisions. To ensure meaningful control, national courts are charged to take 'the merits of the case duly into account'.[19] The Article also specifies that NRA decisions must, in principle, remain intact pending the outcome of the appeal. On the one hand, systematic suspension would induce unnecessary delays in the implementation of regulatory decisions. On the other hand, the

[12] Of course, these are complemented by the generalist consistency tools laid down in Articles 267 and 258 TFEU, cf Case C-478/93 *Kingdom of the Netherlands v Commission* [1995] ECR I-3081 [38].

[13] Article 7(3) Framework Directive.

[14] Article 7(4) Framework Directive. The Commission must consider that the measure would create a barrier to the single market or have serious doubts as to the measure's compatibility with EU law. Thus far, five veto decisions have been adopted: Commission Decision of 20 February 2004 C(2004)527final in Cases FI/2003/0024 and FI/2003/0027, Commission Decision of 5 October 2004 C(2004)3682final in Case FI/2004/0082, Commission Decision of 20 October 2004 C(2004)4070final in Case AT/2004/0090, Commission Decision of 17 May 2005 C(2005)1442final in Case DE/2005/0144 and Commission Decision of 10 January 2007 C(2006)7300final in Cases PL/2006/0518 and PL/2006/0514.

[15] Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services [2003] OJ L114/45.

[16] Commission Guidelines of 9 July 2002 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services [2002] OJ C165/6.

[17] Commission Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services [2002] L200/38 amended by Commission Decision 2004/3445/EC of 14 September 2004 [2004] OJ L293/30. The ERG's website can be found at <http://erg.eu.int/> Accessed 14 May 2012.

[18] Article 7(2) Framework Directive. National courts are left out of this network for obvious constitutional reasons.

[19] Further: Article 10(7) Framework Directive and Article 2 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (Consolidated Services Directive) [2002] OJ L249/21.

special expertise of the NRA and the extensive public consultation process that precedes most regulatory decisions[20] warrant a presumption of legality.

The second deficiency relates to the lack of independence of some NRAs.[21] Independence can be jeopardised through excessive government interference or through close ties with market participants. An example of the former is unlimited discretion for the executive to dismiss the head of the NRA.[22] The concentration of regulatory tasks and responsibilities relating to the control of the incumbent within the same Ministry serves as an example of the latter situation.[23] A lack of independence allows for decisions based on considerations other than those listed in the eCommunications framework. As with the inconsistency deficiency, market operators would be faced with different regulation in different Member States.

The need for independence is compelling. It guarantees the credibility of the regulatory function as it ensures that the authority can act without reference to political or other volatile interests.[24] Similarly, it operates as a barrier to regulatory capture. This means that regulatory outcomes will be more consistent and neutral as between different interests and over time.[25] This, in turn, will quite likely positively influence the legitimacy of the authority and its output as well as the degree of regulatory compliance. In relation to the causes of inconsistency outlined *supra*, we observe that the emphasis on independence is primarily directed against intentional misbehaviour.

Article 3 of the Framework Directive prescribes the legal and functional independence of NRAs from undertakings active in the eCommunications field.[26] Member States are hence barred from entrusting regulatory responsibilities to such undertakings. There must further be no possibility whatsoever for market participants to unduly influence, or interfere with, the regulatory work of NRAs.[27] This

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[20] Article 6 and Recital 15 Framework Directive and paras 144, 145 of the Commission Guidelines on market analysis.

[21] Eg Commission (EC) *Twelfth Annual Implementation Report* COM(2007) 155, 29 March 2007, 14; Reding (note 1).

[22] IP/06/1798, MEMO/06/487, IP/07/888, MEMO/07/255.

[23] IP/05/430, IP/05/875, IP/05/1296, MEMO/05/372, MEMO/05/242, MEMO/05/478, IP/06/464, IP/06/948, IP/06/1798, MEMO/06/158, MEMO/06/271, MEMO/06/487.

[24] Independence as a solution to the 'commitment problem' has been advocated strongly by Majone 1997; Marjone 2000; Majone 2002. Baldwin and Cave 1999 also note that independence allows the authority to develop a high level of expertise necessary to make decisions on complex questions.

[25] Maher 2004, 228.

[26] Article 3(2) first sentence Framework Directive.

[27] Also Case C-91/94 *Criminal Proceedings against Thierry Tranchant and Téléphone Store SARL*[1995] ECR I-3911, Joined Cases C-46/90 and C-93/91 *Procureur du Roi v Jean-Marie Lagauche and others* [1993] ECR I-5267, Case C-69/91 *Criminal Proceedings against Francine Gillon, née Decoster* [1993] ECR I-5335 and Case C-92/91 *Criminal Proceedings against Annick Neny, née Taillandier* [1993] ECR I-5383.

is commonly achieved through strict rules on conflicts of interests.[28] Under certain conditions, the law demands structural separation between NRAs and undertakings.[29] The scenario is that of a Member State which has maintained the former incumbent under public ownership or control. The State is then responsible for regulatory functions, through the NRA, and economic activities, through an active interest in the performance of the public undertaking(s).[30] In such a case, the State must ensure that the latter interest does not affect the exercise of regulatory responsibilities. For instance, the combination of both functions in the hands of the same Ministry is not tolerated. European law does, however, not insist upon a full separation between the executive and the NRA. There is no requirement that the authority must be given a special status in the administrative organisation of the Member States.

7.2 Assessing the Alternatives

We can roughly distinguish three models for the administration of EU law. Of course, many variations and combinations of the models are possible and indeed occur in practice. Our aim, however, is not to provide an exhaustive account of the workings of specific sectors such as the CAP or fisheries. Instead, we intend to offer a general survey of available alternatives to the current regime in eCommunications law with particular emphasis on their strengths and weaknesses in relation to the deficiencies identified.

7.2.1 Centralised Enforcement

When we talk about centralised enforcement, we refer to the situation where legislation elaborated at the European level is also applied and enforced by the EU institutions, in particular the Commission. Textbook examples are the regulation of

[28] Eg § 4 Gesetz über die Bundesnetzagentur (Germany), Article L.131 Code des postes et des communications électronique (France), Article 4(1)(c) Wet OPTA (the Netherlands), Members' Code of Conduct (Ofcom), available at <http://www.ofcom.org.uk/about/csg/ofcom_board/code/> Accessed 14 May 2012.

[29] Articles 3(2) second sentence and 11(2) Framework Directive.

[30] Stevens and Valcke 2003, 169, submit that the trigger should be interpreted to encompass not only a majority, but also a minority interest in, or control over, an undertaking active in the eCommunications field.

anti-competitive conduct from the 1960s until the millennium,[31] State aid,[32] merger control[33] and trade law.[34]

Regulation theorists accept that centralised governance is the most effective tool to bring about homogeneity in regulatory approaches.[35] A single enforcer may be expected to ensure internal consistency in its decision making. In the European context, if that authority is the Commission, we can further assume that it will interpret, apply and enforce the law correctly, thereby eliminating unintentional inconsistency.

The Treaty stipulates that Commissioners must be independent.[36] Reality is, however, not as black-and-white as the law might lead us to believe. Admittedly, the Commission will, overall, be less susceptible to regulatory capture than an NRA might be.[37] It can, however, be vulnerable to political pressure. On the one hand, the Commission is dependent on the cooperation of Member States to fulfil its mission, thereby opening up the possibility of undue leveraging and bargaining.[38] On the other hand, veto decisions are made by the full Commission, allowing for pressure from other Directorates-General to take account of considerations other than those related to the eCommunications policy when deciding.

It is axiomatic that the success of the Commission is the *sine qua non* of centralised governance. The experience with competition law reveals, however, that this enforcement model puts a vast strain on the typically limited resources of the Community. The Competition Directorate-General had only a handful of

[31] Council Regulation (EEC) No 17 (First Regulation implementing Articles [101] and [102] of the Treaty) [1959–1962] OJ Spec Ed 87, now replaced by Council Regulation No 1/2003/EC on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty [2003] OJ L1/1. For a detailed examination of the origins of the competition rules, Goyder 2003. For an explanation of the substance and procedure of the competition rules inter alia Whish 2003; Motta 2004; Kerse and Khan 2004.

[32] Articles 107–109 TFEU. See eg Hancher et al. 2006; Biondi et al. 2004.

[33] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations among undertakings [2004] OJ L24/1. In addition to the references *supra* note 31, e.g. Cook and Kerse 2005; Varona 2005.

[34] Articles 206, 207 TFEU. See eg Eeckhout 2005; Dashwood and Hillion 2000.

[35] Baldwin and Cave 1999, Chap. 5.

[36] Article 245 TFEU.

[37] Although one could argue that it is certainly more cost-efficient for an undertaking to lobby a single authority as opposed to 27 different ones. Even so, it is not certain to what extent lobbying at the EU level would exert the desired effect. Indeed, capture requires a relationship of information asymmetry which makes the authority dependant on the information coming from one source. At European level, there is no single entity on the other side of the Commission: industry groups are not united or powerful enough given the divergence in the interests of their members and individual firms are too small.

[38] Mainly due to the doctrine of national procedural autonomy and the need for implementation of directives. If the Commission was to become the sole enforcer of the eCommunications rules, it would in all likelihood remain dependent on the Member States for the supply of local information.

senior officials during its first year of operations, gradually rising to about 20 by the end of the second year and increasing steadily to 78 by April 1964 and to just over a 100 by 10 years later.[39] Yet, as early as 1967 the Commission was faced with the daunting total of 37,450 cases that had accumulated since the entry into force of Regulation 17 just four-year prior. Only 222 decisions were ever adopted.[40] These were often so far apart in time that their internal consistency was difficult to assess. More fundamentally, the inability to enforce the law with a high frequency has repercussions for its perceived effectiveness and, in the long term, credibility. Rules lacking in credibility will have a similar impact on the incentives of the business community to take entrepreneurial risks as inconsistently enforced rules. Centralised enforcement also suffers from political constraints. Member States are commonly hesitant to transfer enforcement competences to the European level for sovereignty reasons, and invoke the principles of subsidiarity and national procedural autonomy in support.

7.2.2 Decentralised Enforcement

Centralised enforcement is, however, the exception. As a general rule, Member States are in charge of bridging the gap between general EU legislation and individual cases. They carry out the application and enforcement of EU law, for instance in the fields of customs, agricultural policy, banking and insurance. When the legislation takes the form of directives, Member States already take over from the EU level at a fairly high stage of generality, when they have to implement the directives in their respective systems. Furthermore, sometimes extra layers of legislation are issued at EU level to further develop the original legislation. The power to issue such extra legislation is usually delegated to the Commission, in a comitology setting.[41] The literature is split on the merits of the comitology system. The committees have been praised as:

> a fruitful collaboration between [the Commission] services and those Member State administrations which are most often faced with having to apply, on the ground, the implementing measures adopted at Community level.[42]

Yet, they are also critiqued for their obscurity, lack of accountability and transparency, the corporatist nature of their processes as well as the exclusion of Parliament from the system.

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[39] Goyder 2003, 31.

[40] Forrester 2003, 80.

[41] Comitology committees are forums for discussions, consist of representatives from Member States and are chaired by the Commission. Consider Bergström 2005; Joerges and Vos 1999; Craig 2006; Andenas and Turk 2000.

[42] Joerges and Vos 1999, 53, Bergström 2005, 10.

To the extent that there are no common rules in the matter[43] and subject to compliance with general obligations deriving from the Treaty,[44] the Member States act in accordance with their own constitutional traditions, procedural and substantive rules when administering EU law. This feature, coupled with the absence of a sustainable relationship between the national actors and with the Commission, exerts a clear negative impact on the consistent and independent application of the EU rules. Xénophon Yataganas argues this succinctly.

> There is an institutional vacuum between EU legislators and the implementation of European laws by the national authorities at the Member State level. The absence of adequate features of conflict resolution and an unequal expertise and independence of the national regulators further undermines the efficiency of the system. The lack of a European administration infrastructure makes cooperation among the national administrations essentially depend on their mutual trust and loyalty. In the perspective of enlargement, this situation becomes clearly insufficient to ensure the credibility and legitimacy of the European rule-making processes.[45]

Take, for example, the prohibition on restrictions on the free movement of goods. Following the Court's seminal judgment in *Cassis de Dijon*, national authorities must recognise out-of-State standards as equivalent to their own, unless they can show a good reason why their own rules should apply.[46] Commission reports on the application of mutual recognition, however, reveal that the application of the principle of mutual recognition is often hindered by 'the practical decisions made by the authorities that are in direct contact with citizens or economic operators'.[47] Reasons cited for the behaviour include a wish to favour national producers, mistrust of acts adopted by out-of-State authorities and ignorance.[48]

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[43] The EU lacks the competence to directly legislate on, let alone harmonise, national procedure. Indeed, Member States have strong national traditions in the field and will be loathe to accept too many intrusions, Schwarze 1996.

[44] Member States must adopt rules that are effective and equivalent to domestic laws, Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989. For an example, in telecommunications Case C-462/99 *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission and Mobilkom Austria AG* [2003] ECR I-5197. Also, they must behave loyally towards the European institutions pursuant to Article 4(3) TEU.

[45] Yataganas 2001. This is referred to by Nicolaides et al. 2003 as 'the implementation deficit' and by Majone 2000, 279 as 'the institutional deficit'. In a way, we can, of course, also qualify the main problem of centralised governance as an implementation/institutional deficit. After all, the insufficiency of resources also resulted in defective implementation of the relevant legal rules. Keeping in with normal European parlance; however, we will reserve references to the implementation deficit to discussions on decentralised governance.

[46] Case 120/78 *Rewe-Zentrale v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649.

[47] Commission (EC) 'First Report On the Application of the Principle of Mutual Recognition In Product and Services Markets' SEC(1999)1106, 13 July 1999, 6. Note that this report followed 20 years after the judgment was delivered.

[48] Ibid.

A certain contribution to consistency is made by Articles 267 and 258 TFEU and the threat of Member State liability.[49] These suffer from a number of drawbacks, however. For infringement proceedings to commence, the Commission must first detect and collect evidence of the distortive behaviour, which is far from easy for the non-blatant cases. It must, then, decide whether it wishes to use its resources to actually prosecute the matter—a decision which is heavily influenced by political reasons relating to the dependence of the Commission on the Member States in the adoption and execution of EU law. As far as preliminary references are concerned, national courts might be overly confident in asserting that they understand the European rules and that there is hence no need for a reference. Furthermore, all three procedures are slow and cumbersome, sporadic and operate on an ex post basis.

Yet, decentralised enforcement also exhibits more positive features. It yields access to a regulatory capacity far greater than that available to the EU. Also, it brings the benefits of proximity, flexibility and diversification. Policies are executed at the same level as where the beneficiaries of that policy, or those subject to it, are located. Member States are able to adopt solutions that match local preferences. In particular, they can experiment with rules, processes and enforcement allowing the emergence of 'better' solutions than those currently in place. Finally, the default nature of decentralised enforcement model renders this the politically most acceptable model—a feature that must not be underestimated in a time when observance of the subsidiarity principle is taken ever more seriously.[50]

7.2.3 The Agency Model

The agency model holds the middle between centralised and decentralised enforcement. While the Member States retain an important role in the enforcement stage, there is a heavier EU-level presence through agencies: European bodies that are distinct from the European institutions and have their own legal personality.[51] The precise extent of this presence is dependent on the type of agency involved.

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[49] Cases C-6 & 9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357, Cases C-46/93 & C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029, Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239, Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica Italiana* [2006] ECR I-5577.

[50] Also Scott and Trubek 2002.

[51] For a full list of existing agencies. <http://europa.eu/agencies/community_agencies/index_en.htm> Accessed 14 May 2012.

We identify three broad categories.[52] The first, information agencies, itself comprises two categories. Some agencies collect, analyse and disseminate information relating to their specific policy area.[53] Others also create and coordinate expert networks.[54] Expert networks comprise National Focal or Reference Points required to cooperate with the agencies and, at national level, coordinate the activities related to the agencies' work programme. The second, management agencies, assist the Commission in the management of EU programmes inter alia through the execution of budgetary implementation tasks. The third, regulatory agencies, is in some way involved in regulating economic and social policies, for instance, by monitoring implementation of the relevant regulatory framework.[55]

Agencies generally function under the authority of an administrative, governing or management board, which lays down the general guidelines and adopts the work programme of the agency. Agency boards commonly include one or two representatives from each Member State and one or several Commission representations.[56] Each member of the board has one vote, and the norm is to require a two-third majority for board decisions. It is clear that Member States can exert strong national influence through the agency board. The executive director is responsible for oversight of the day-to-day work of the agency, drawing up the work programme, implementing that programme and preparing the agency's annual report. He is appointed either by the board on a proposal from the Commission or by the Commission on the basis of candidates suggested by the board.

The contribution of the agency model to consistency surpasses that made by the decentralised model, but remains below the level achieved under centralised enforcement. On the one hand, the agency structure allows for regular contact between the European and the national level as well as—albeit on a smaller scale—between the Member States. This helps to mitigate unintentional inconsistency and might make it more difficult for intentional inconsistency to be practiced for fear of detection and punishment.[57] On the other hand, the model is characterised by a multitude of actors, which is shown to compromise absolute consistency.[58] There are no specific control mechanisms and faulty behaviour must

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[52] The typology followed here derives from 2003, 119. Other taxonomies are proposed by inter alia the Commission in 'The operating framework for the European Regulatory Agencies' (Communication) COM (02)718 final, 11 December 2002; Craig 2006, 154 et seq and Geradin and Petit 2005, Vos 2003.

[53] Eg CEDEFOP, EUROFOND, ETF.

[54] Eg EEA, EU-OSHA, EMCDDA.

[55] Eg OHIM, CPVO, EMEA, EFSA.

[56] They may also include members appointed by the European Parliament or representatives of the social partners or other relevant stakeholder groups. These members commonly do not have the right to vote.

[57] Here, we must not think solely of the threat of infringement proceedings or perhaps even Member State liability, but also—and arguably primarily—of a loss of face towards other Member States or the Commission.

[58] Cf note 24.

accordingly be sanctioned under Articles 267 or 258 TFEU, with their attendant weaknesses. Also, in certain cases, the addition of another layer of administration—the agency—might raise search and administration costs to a level where consistency suffers.

The agency model could exert some noteworthy positive effects on the independence of national actors when compared to decentralised enforcement. The links between the two governance levels may provide incentives for national actors to adhere to Commission and peer beliefs and hence make them less prone to undue political or market interference.[59] As the agency model facilitates the use of experts, it contributes to a reduction in information asymmetries between the market and the administration. With national actors less dependent on the market for information, their independence will be strengthened.

However, the agency model suffers from legal-political limitations. The Treaty is read to prevent the creation of fully fledged regulatory agencies, i.e agencies with real decision-making competences that would function as a centralised enforcer, but mainly staffed with Member State representatives. In a high-profile ruling in 1958, the Court of Justice stipulated that the delegation of broad discretionary powers by European institutions to *ad hoc* bodies not envisaged by the Treaty on the European Coal and Steel Community was not permitted.[60] This *Meroni*-doctrine is generally held to be applicable to the Treaty of Rome as well.[61] Despite severe academic criticism,[62] a Court ruling declaring the doctrine inapplicable is unlikely to come about; however, if only for the scant evidence of a practice of overruling in the European judicial system.

The Commission continues to reaffirm that *Meroni* prevents it from proposing 'meaningful' agencies.[63] A cynic's view would be that the Commission simply uses the *acquis communautaire* to avert a reduction in its own powers. The Commission advocates the 'unity and integrity of the executive function' which it locates in the Commission and its President.[64] The executive function includes all that occurs after the passage of primary regulations and directives. According to Paul Craig, real agencies with discretionary powers would challenge the unity and integrity of the Commission's executive function.[65]

The Commission's sentiments are echoed by the Member States. They too fear a loss of control. The tradition of decentralised enforcement means that Member States will not look kindly upon what they perceive as a transfer of their

[59] Further the text between notes 99 and 100.

[60] Case 9/56 *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1957] ECR 133.

[61] Eg Lenaerts 1993.

[62] Eg Dehousse 2002; Everson 1995; Geradin and Petit 2005.

[63] Commission (EC) 'European Governance' (White Paper) COM(01) 428 final 8, 25 July 2001, Commission (EC) 'The operating framework for ERAs' (noteote 52). There are, however, tensions within the Commission regarding the topic, with some members wishing to move beyond *Meroni* and create true regulatory agencies, cf Majone 2002.

[64] Commission (EC) 'The operating framework for ERAs', ibid., 1.

[65] Ibid., 163.

'prerogatory' competences and role in the enforcement stage to an European body. According to Majone, the lack of a European tradition of regulation by independent agencies further fuels Member States' reluctance: why should they grant European agencies powers that they were unwilling to delegate to domestic institutions?[66]

7.2.4 Comparing and Contrasting the Alternatives

Applying our findings to the eCommunications sector, we note the following. It is clear that the decentralised model is inappropriate as it would exacerbate the consistency and independence problems. This was, in fact, the institutional structure under the 1998 framework and discarded precisely for those reasons.[67] This leaves centralised or agency enforcement. Both models, it has been shown, have apparent credentials to address—and in the case of centralised enforcement: eradicate—the identified deficiencies. Yet, we also saw that political realities act against the actual implementation of either of these models.

As regards centralised enforcement, the Treaty itself endows the Commission with independent enforcement powers in competition law and State aid.[68] In the former case, Member States believed that the rules would play a marginal role and would not be seriously enforced.[69] They were, hence, not opposed to a strong role for the supranational Community institutions. In the latter case, the rules are addressed to the Member States and allowing 'self-regulation' would in all likelihood not lend the desired results. Matters are radically different in the eCommunications field. Member States were in accord that telecommunications belonged to the 'hard core' of their national sovereignty[70] and the Treaty was accordingly silent on this sector.[71] We further recall the strenuous resistance against the liberalisation policy of the Commission under Article 106(3) as

[66] Majone 1997, 3.

[67] Eurostrategies/Cullen International Report 'Draft Final Report on the Possible Added Value of a European Regulatory Authority for Telecommunications' ECSC-EC-EAEC Brussels-Luxembourg 1999, Forrester Norall & Sutton 'The Institutional Framework for the Regulation of Telecommunications and the Application of the EC Competition Rules' ESSC-EC-EAEC Brussels-Luxembourg [1996], Commission (EC) *Annual Implementation Reports* (website DG INFSO).

[68] Articles 101(1) and 107–109 TFEU.

[69] In large part because competition rules and institutions in the then Member States were in a primitive state, Gerber 1994, 103; Goyder 2003, 28.

[70] The importance of telecommunications for the economic development of national sovereign states required, or so it was believed, political control. The need to ensure complete national coverage at equal and affordable prices was used as an additional argument.

[71] In 1992, the Treaty on European Union (TEU) introduced a Chapter on Trans-European networks (TENs). Article 170 TFEU (as it now is) states that the Community has the task of contributing to '[T]he establishment and development of trans-European networks in the areas of (..) telecommunications (..) infrastructures'. This has never taken off in the field of telecommunications.

epitomized in the well-documented challenges against the first two directives promulgated under that provision.[72]

Turning to the agency model, the European Parliament has strenuously campaigned for a European Regulatory Authority for Telecommunications. At its instigation, two of the Telecommunications Directives comprising the 1998 framework mandated the Commission to investigate the added value of such a creature.[73] The Commission's opinion, set forth in the 1999 Review, broadly followed the study it had commissioned on this issue.[74] It considered that 'the creation of a European regulatory authority would not provide sufficient added value to justify the likely costs'.[75] The outcome was much to the satisfaction of the Council, who had, for reasons outlined earlier, initially rejected the Parliament amendments. In her earlier speeches during the revision process, Commissioner Reding floated the idea of a European Telecommunications Agency and remarked that similar proposals are made in another network industry, namely energy.[76] The extent to which extent her sentiments are shared by the rest of the Commission is not clear. In any event, Member States' reactions indicate that the political climate is as unwelcoming now as it was in 1999 towards the creation of an agency.

We may criticise this state of play: particularly where the agency model is concerned, should effectiveness in enforcement not trump such sovereignty claims? These claims, however, reflect deeply ingrained beliefs about competence questions and it is notoriously difficult to address such questions from a purely logical or rational perspective.[77]

From a more pragmatic viewpoint, we recall that from the inception of European regulation of the eCommunications sector, decentralised enforcement was practiced.[78] Member States have often spent considerable time and resources putting in place a national enforcement infrastructure and they are understandably loathe to see their efforts rendered relatively meaningless.

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[72] Case C-202/88 *France v Commission (Terminal Equipment)* [1991] ECR I-1223 and Joined Cases C-271/90, C-281/90 and C-289/90 *Spain v Commission* [1992] ECR I-5833, directed at Dir 88/301/EEC and Dir 90/388/EEC.

[73] Article 8 Dir 97/51 and Article 22 of Directive 97/33 of the European Parliament and of the Council on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) [1997] OJ L199/32.

[74] Eurostrategies/Cullen International Report (noteote 67). This study followed two earlier reports dealing at least partially with the issue of the establishment of an ERA: Forrester Norall & Sutton (noteote 67) especially 51–82 and NERA/Denton Hall 'Issues Associated with the Creation of a European Regulatory Authority for Telecommunications' ECSC-EC-EAEC Brussels-Luxembourg [1997].

[75] Commission (EC) 'Towards a new framework for Electronic Communications infrastructure and associated services' (Communication) COM(1999)539, 9.

[76] Reding see notes 1 and 8 above.

[77] As the debates on the Constitutional Treaty, its successor and voting arrangements so vividly demonstrate.

[78] Dir 88/301/EEC.

7.2.5 Sustaining the Status Quo

This leaves us with the status quo or, as we will call it, 'network-based enforcement'. This name is derived from the close relationships between the Commission and the NRAs and the key position accorded to the ERG in this respect. A cursory glance reveals clear positive features inherent in network-based enforcement. As with the agency structure, it strikes a balance between the uniformity characteristic of centralised enforcement and the subsidiarity benefits intrinsic in decentralised enforcement. The existence of special control mechanisms almost certainly allows for even greater consistency than the agency model would. Crucially, unlike the agency structure, network-based enforcement is politically acceptable, because it leaves both the Commission and the Member States with a feeling of control over the enforcement process. The special control mechanisms allow for an important role for the Commission in recognition of its position as guardian of the Treaty. At the same time, the Member States remain in charge of the daily administration of the European rules in accordance with the national procedural autonomy and subsidiarity doctrines. This is not to say that there is but one construction of the network model. Other famous examples include the European Central Banks System (ECBS),[79] the Committee of European Securities Regulators (CESR)[80] and the European Competition Network (ECN).[81]

But where does that leave the identified consistency and independence deficiencies? It is proper to begin with setting out the recent initiatives of the ERG to address inconsistencies.[82] To assist in the SMP procedure, it will develop case studies of regulatory 'best practices'[83] as well as adopt more Common Positions in identified priority areas. The ERG has also identified NRAs with relevant experience and knowledge in relation to particular regulatory issues or areas which will make themselves available to other ERG member for practical advice ('knowledge centres'). Further, it has agreed to the automatic establishment of Article 7 expert groups to advise affected NRAs whose notifications have entered a Phase II procedure, or in respect of which the Commission proposes to issue a serious doubts letter. The Expert Group would provide the affected NRA with a full expert

[79] <http://www.ecb.int/ecb/orga/escb/html/index.en.html> Accessed 14 May 2012.

[80] <http://www.cesr-eu.org/index.php?page=home&mac=0&id=> Accessed 14 May 2012.

[81] <http://ec.europa.eu/comm/competition/ecn/index_en.html> Accessed 14 May 2012.

[82] Annex 1 to the ERG advice to the Commission in the context of the Review. See the entire process of correspondence between the Commission and the ERG (accessible through the DG INFSO and ERG website) for other institutional proposals notably an enhanced role for the ERG in existing regulatory and legislative processes or its transformation into an agency-like body.

[83] These are aimed, in particular in fleshing out the 'proper' application of the ERG Common Position on remedies, ERG(06)33.

analysis and enable it to amend a notification.[84] Finally, the ERG undertakes to monitor NRAs' compliance with Common Positions.

The Commission's proposal to extend its veto power to cover remedies must be evaluated in the light of these recent ERG initiatives and the premise behind network-based enforcement.[85] The Commission should explicitly consider why these initiatives should be complemented by an extended veto power and the costs this option would entail, in terms of Commission resources as well as the damage this could do to the good working relationships between the NRAs and the Commission.[86] Here, it must also be emphasised that absolute consistency will, as under the decentralised or agency model, not be achievable. Nor is this desirable: as with technologies, policy innovation arguably requires a certain degree of regulatory emulation among the NRAs.

Another proposal could be to make the Commission an ERG member. The Commission currently provides the Secretariat of the Group and is able to attend and participate in its meetings.[87] As regards the collaboration between the Commission and the NRAs, the 2004 ERG Report notes that

> A very positive evolution was the increasing and deepening cooperation with the Commission services. It has become visible that the EC and the NRAs in the ERG are partners, often with the same objectives.

And that

> As can, clearly, be seen from ERG documents, the cooperation between the ERG and the Commission Services was very productive. Many issues and work items were discussed extensively between the ERG and the Commission.[88]

Membership in the ERG would acknowledge this practice. For case-based interactions, the ERG could develop—more so than is currently the case and in

[84] The ERG gives the example of the Bundesnetzagentur who requested such a group for its leased line market notification. The group's recommendation was for the Bundesnetzagentur to withdraw its notification. NRAs can also seek informal peer review of their analysis prior to finalisation and notification.

[85] Commission 'Review of the EU Regulatory Framework for electronic communications networks and services' (Communication) COM(2006)334 final, 29 June 2006, 9 and accompanying Staff Working Document SEC(2006)816. For a more elaborate version of this argument, Larouche and de Visser 2006.

[86] The recent process of correspondence between the Commission and the ERG (note 82) indicates that the Commission is willing to also give consideration to enhancing or transforming the ERG—without, however, abandoning its proposal to extend veto rights.

[87] Article 4 fourth al. ERG Decision ERG (03)07 Articles 1.4 and 5.6.

[88] ERG (05)16 1. This much is also evident from the language used in the Conclusions of ERG Plenary Meetings, referring eg to 'complementarity of activities' or 'that there will be close coordination with Commission services'. In addition, the Commission reports its efforts on the same matters as NRAs are dealing with and gives information on its activities, COCOM meetings and policy proposals.

line with its recent initiatives—into the natural forum for discussions with the Commission and between the NRAs in the context of the Article 7 procedure.[89] For general policy work, Commission membership could add more clout to ERG output—again in keeping with the new approach. In addition, the NRAs would still have access to a forum where they might meet without Commission presence: the Independent Regulators Group (IRG).[90] Making the Commission an ERG member in this respect helps differentiate the two bodies, as they currently display great overlap in terms of mandate, chairmanship and work programme.[91]

The current position of national courts leaves ample room for improvement. The eCommunications regime conceives these actors as a control instrument vis-à-vis the NRAs; and the legislature therefore, it seems, saw no reason to include specific consistency devices addressed to the courts. This is, however, misconceived. On the one hand, in certain situations national courts act on a par with the NRAs, rendering consistency tools immediately relevant.[92] On the other hand, it is of little help to synchronise the decisions of the NRA, only to see their actions wrongly undone by national courts. The formalistic case law under the 1998 regime and the overly frequent suspension of NRA decisions by some courts or the difference in standards applied, attests that the threat to consistency at the judicial review stage is not a mere theoretical teaser.

Inspiration may be drawn from the current competition law model. This regime knows three special consistency tools.[93] First, national courts are given the express competence to ask the Commission for information or assistance in the face of uncertainty in the application of the law. Secondly, they must notify their judgments applying the EU competition rules to the Commission, who enters these into a publicly accessible database. Thirdly, the Commission and the national competition authorities may make amicus curiae submissions to the national court. These formal measures are complemented by an informal one: the Association of

[89] Akin to what the ECN is for the Commission and the national competition authorities (noteCAs) for the notification of draft decision and possible ousting of jurisdiction under Article 11 Reg 1/2003 (note 31). Consider the ERG's comments in Annex 1 of its advice to the Commission (note 82 above) 2.

[90] <http://irgis.anacom.pt/site/en/irg.asp> Accessed 14 May 2012. ERG(06)03. The IRG is an unofficial forum of NRA heads, established in 1997 and used for informal strategic discussions which do not involve the Commission.

[91] For instance, the IRG could issue separate documents where the views of the NRAs and the Commission do not align or take over the advisory tasks of the ERG.

[92] E.g. under dispute settlement, Articles 20 and 21 Framework Directive or where competitors institute damage actions for an undertaking's failure to comply with an NRA decision.

[93] Article 15 Reg 1/2003, Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles [101 and 102 TFEU] [2004] OJ C101/54.

European Competition Law Judges. All four mechanisms deserve to be seriously examined for possible parallel application in the eCommunications regime.

It may be objected that the first tool is already available pursuant to Article 4(3) TEU[94] and that the second tool is operated on a voluntary basis.[95] It can also be argued that experience to date under the competition regime shows that none of these mechanisms is applied very often. Both claims are true. Nevertheless, not all courts will be aware of their power under Article 4(3) or the existence of the possibility of notification and consultation of the database. Formal inclusion in the law does offer this awareness. Indeed, consistency tools have a clear educational value. They alert national courts that they find themselves within the realm of European law and the concomitant need for a Europe-friendly perspective.[96] National courts must appreciate the special institutional characteristics of the national authorities[97] and their relationship with the Commission through the notification and veto procedure. This facet, more so than its direct effects, is the real contribution of the specific tools to consistency. Here we must also note that, unlike national authorities, national courts are not grouped in a formal network, for obvious constitutional reasons. Information structures and distribution platforms for case-sharing thus acquire even greater importance.

If we accept this reasoning, then the introduction of special consistency tools should positively impact on courts' behaviour in relation to suspension of NRA decisions. Nevertheless, harmonisation of the conditions which must be met before a decision may be suspended is a worthwhile exercise. The Commission has proposed just this in the revision documents.[98] Alignment can be sought with the case law of the ECJ, which requires that applicant prove the existence of *fumus boni iuris*, or a solid prima facie case, and *periculum in more*, or the risk of serious

[94] C-2/88 *Criminal Proceedings against JJ Zwartveld and Others* [1990] ECR I-3365 [17]-[22]. Examples of assistance mentioned by the Court include the production of documents and having Commission officials give evidence in national proceedings.

[95] The non-confidential versions of those judgments that have been voluntarily submitted can be found at <http://ec.europa.eu/information_society/policy/ecomm/article_7/national_judiciaries/index_en.htm> Accessed 14 May 2012. In terms of scope and accessibility, contrast with those sent under the competition regime: <http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/> Accessed 14 May 2012.

[96] The fact that the eCommunications regime is laid down in directives arguably exacerbates matters, as it obscures its European origins and Internal Market imperatives.

[97] In particular, their broad and discretionary competences.

[98] Commission Review Documents (note 85 above). A proposal to this effect was already made during the negotiations on the current regulatory framework: European Parliament, Committee on Industry, External Trade, Research and Energy A5-0053/2001FINAL amendment 22, Committee on Industry, External Trade, Research and Energy A5-0435/2001/FINAL amendment 27.

and irreparable harm to the applicant that, in the balance of interests, outweighs any harm that would result from suspending the decision.[99]

The contribution of the network structure to the independence of national authorities can be explained as follows. Imagine a scenario in which there are two authorities, A and B. In the absence of any links between A and B, we may expect a fair number of A's decisions to be influenced by national—political or economic—considerations. This is because A will be dependent on its government and/or the market for resources as information, advice, legitimacy and authority. Further, the immediacy of the gains of acceptance and reputation within A's national context outweigh the far more distant and uncertain costs of non-acceptance or punishment by B within the European context. Now suppose that A and B are both members of a transnational network, and under a duty to cooperate with each other. This will quite likely induce A to adopt EU-conform decisions independent of national considerations. First, resource dependency on the government and the market is largely replaced by resource dependency on B through these cooperation duties—particularly the Article 7 procedure. Secondly, if A were to adopt non-independent decisions, these would be detected by B (again through the Article 7 procedure) who could then punish A by denying it prestigious positions within the network—such as chairmanship of a working group or project team, or a position as a knowledge centre—or by limiting cooperation with it. In sum, network membership creates powerful incentives for a high degree of independence in decision making.[100]

These effects could be supplemented by the inclusion of provisions outlawing the overturning of NRA decisions by the Minister or the issuance of (specific) instructions to the authority.[101] Basic elements for personal, financial and instrumental independence of national authorities can already be found in other parts of European law.[102] A similar proposal has been made at the level of content

[99] E.g. Case 71/74 *Nederlandse Vereniging voor de Fruit en Groenten-importhandel, Nederlandse Bond van Grossiers in Zuidvruchten en ander Geimporteerd Fruit v Commission* [1974] ECR 1034; Case 97/85 *Union Deutsche Lebensmittelwerke GmbH and others v Commission* [1985] ECR 1031. These conditions have also been extended to the award of interim relief by national courts against European measures, e.g. Case C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] ECR I-415; Case C-465/93 *Atlanta Fruchthandelsgesellschaft and others v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761.

[100] Majone 1996, Chap. 12 arrives at a similar conclusion, albeit from a different premise. His starting point is the 'commitment problem' of national governments towards regulatory policies, and the credibility of national agencies to address this problem. Majone argues that the credibility of these agencies, and their commitment to regulatory policies can be strengthened through teamwork.

[101] As with the conditions for suspension, suggestions to this effect were already made by Parliament in the negotiations on the current version of the Framework Directive, (note 98 above) amendment 10.

[102] Reding (note 8 above) 7.

regulation during the revision of the Television Without Frontiers Directive.[103] Since some NRAs are also responsible for content regulation, alignment with this proposal at the network level would be prudent.

7.3 The Challenge of Constitutionalisation

On the assumption that the network model will remain in existence after 2010—the presumed date of entry into force of the revised framework—some key questions must be asked that go beyond the need for consistency and independence.[104] In particular, we must deal with the legitimacy and accountability of this institutional blueprint. Baldwin and McCrudden put it thus:

> Is it supported by legislative authority? Is it otherwise accountable? Does it carry out its tasks with due process? Is the body expert? Is it efficient? These five criteria constitute the limited vocabulary of the language of legitimacy.[105]

The first criterion is obvious and may be dealt with quickly. An affirmative answer can be found in ERG's founding documents—the Framework Directive and the special Commission Decision. Legislative authority creates top-down legitimacy. It is a minimalist form of legitimacy for two interlinking reasons. On the one hand, the legislature is constrained by its limited knowledge of the particularities of the sector, time and foresight. On the other hand, the legislative mandate often provides for broad discretion because polycentric policy-making is seen to necessitate judgment.

The clearest example of bottom-up legitimacy is through the ballot-box. For our purposes, since neither the ERG nor its component members are directly elected, we shall take its relationship with Parliament as a proxy for this element. The argument can be made that the NRAs' accountability to their respective parliaments bestows indirect legitimacy on the ERG. In this respect, it would be akin to the Council, whose accountability derives, in part at least, from its members having to answer to the national parliaments. Yet, as the law requires NRAs to be independent, this could considerably dilute the link with the national parliaments. The ERG is also accountable to the European Parliament through the submission of Annual Reports.[106] This is currently indirectly fashioned, because the

[103] Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1997] OJ L202/60. The proposal can be found at Article 23b(2) of the Commission proposal of 24 May 2007.

[104] Admittedly, the Commission mentions some of these in its letter of request to the ERG (note 82), but seems to perceive their relevance only in relation to the far-reaching institutional scenario of transforming the ERG into some sort of regulatory agency. It is argued here that these questions are also relevant if the current state of institutional play remains in place.

[105] Baldwin and McCrudden 1987, 33.

[106] Article 8 ERG Decision. The Annual Report is also sent to the Council.

Commission transmits the Reports on the ERG's behalf. From an accountability perspective, it would be proper to establish a direct connection between the ERG and Parliament. Mirrored on the practise of many NRAs, the ERG could further be required to submit its Annual Work Programme to Parliament—in particular given its practice to use the Annual Report to reflect whether the objectives set out in the Work Programme have indeed materialised.[107] The intermittent nature of Parliamentary involvement, however, means supplementary controls are required.

Accountability can also be ensured through the judiciary. Here we run into a series of obstacles. For a court to have jurisdiction to exercise legality control, the relevant act must be challengeable or justiciable—it must bring about a distinct change in the legal position of the applicant.[108] ERG Common Positions are clearly highly influential in practice—for both NRAs and national courts when reviewing NRA decisions.[109] Yet, in law, they qualify as soft-law tools: rules of conduct that lack formal binding effect.[110] We may argue that market parties are thus left empty handed: NRAs decide in accordance with Common Positions, but protection is only available against the relevant national decision—which largely follows a Common Position a court is unwilling to question. The argument can also be framed in economic terms: it is surely wasteful to challenge 27 national decisions if the real bone of contention is a wrong or inefficient Common Position and a single set of proceedings against that document could arguably have solved the problem.

Thus, one might argue, the solution is simple: ERG documents ought to be made reviewable or, in other words, hard law.[111] The reality is, however, not so straightforward. Given that the ERG lacks legal personality, how could it be seen to promulgate binding rules? If the ERG is given legal personality, it would not be much different from an agency, ensuring guaranteed political opposition from the Member States and perhaps also the Commission. Even more fundamentally, 'hard law' ERG output could jeopardize its continued existence.[112] On the one hand, if

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[107] ERG Work Programmes are currently available through the body's website and subject to public consultation, ERG(06)03 7.

[108] Joined Cases 8-11/66 *Cimenteries and others v Commission* [1967] ECR 75 [91].

[109] Although the Commission argues in the revision documents that the soft law nature of ERG documents hinders the body's ability to achieve an acceptable degree of consistency, see Commission-ERG consultation process (note 82). ERG documents are followed by NRAs for any of the following reasons: they state that 'ERG members shall be recommended to take the utmost account of them. They commit to provide reasoned regulatory decisions by reference to the relevant ERG Common Position(s)'; peer pressure and reputational enforcement; the fact that, leaving aside Commission guidelines, they have no other source of informational assistance and co-authorship. National courts may be expected to show a certain amount of deference towards ERG documents, probably because of a lack of expertise or respect towards a document agreed upon by representatives of all 27 NRAs.

[110] Senden 2004; Snyder 1994, 198.

[111] If ERG documents are made reviewable, they will have to become hard law, i.e. binding, as no court would accept jurisdiction to assess the legality of a document that does not produce binding effects.

[112] It would also radically alter the premise of network-based enforcement.

future Common Positions are binding, agreement on their content will not be easy to achieve.[113] On the other hand, NRAs might not be so eager to adopt Common Positions if they know that once adopted, they must be followed. Clearly, the underlying attitude toward an obligation is remarkably different from that of a desire. Finally, justiciability might very well result in an explosion of litigation and thereby also exert a chilling effect on the future promulgation of ERG documents.

For argument's sake, let us, nevertheless, assume justiciability of ERG output. This leaves a second question: which court would entertain the challenges? A brief overview of the possibilities, advantages and disadvantages is presented immediately below.

The national courts would be convenient and easily accessible from the perspective of potential applicants. However, due to their perceived non-expertise it is not certain that they will render right or efficient outcomes. Further, applying *per analogem* the Court's reasoning in *Foto-Frost v Hauptzollamt Lübeck-Ost*, this approach could result in a Swedish court upholding a Common Position and a Greek court striking it down.[114] Finally, the costs of devising the appropriate legislative proposal and of adjudicating these cases might render this option economically unacceptable.[115]

The European Courts may be expected to ensure consistent, right and efficient outcomes. Locus standi would pose a serious problem, however. Under Article 263 TFEU, undertakings must demonstrate that the act they wish to challenge concerns them directly and individually. Applicants are regarded as individually concerned by a measure if it:

> affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[116]

The general nature of Common Positions—more akin to regulations or directives than decisions—almost certainly prevents a finding of individual concern. Turning to the second limb of the test, the Court interprets direct concern to require a direct causal link between the contested act and the situation of the

[113] They could also end up reflecting the lowest common denominator and hence jeopardise the ERG's tasks of achieving consistency in law enforcement.

[114] Case 314/85 [1987] ECR 4199.

[115] The latter costs are incurred by market parties, NRAs (as they would arguably have to defend the ERG document and use resources otherwise dedicated to enforcement activities) and national courts. On the other hand, the costs would be decentralised, i.e. spread over the 27 legal systems, which might increase acceptability (although we cannot completely rule out a certain degree of forum-shopping).

[116] Case 25/62 *Plaumann & Co. v Commission* [1963] ECR 95, confirmed in Case C-50/00P *Unión de Pequeños Agricultores (UPA) v Council* [2002] ECR I-6677. For an eloquent critique of this approach, Jacobs AG in *UPA*.

claimant.[117] Implementation must be automatic. In our scenario, even if Common Positions were binding, they would arguably not negate completely the NRAs' discretion in decision making. This feature, coupled with the considerable higher costs for undertakings to bring the challenge at European, as opposed to national level, could result in too few challenges to ensure effective judicial control.

A third option could be to create an appellate body attached to the ERG for review purposes. Like the European Courts, such a body would ensure a high degree of consistency and correctness in its judgments. Its creation will, however, be very costly in legal, political and economic terms. There is, further, a risk of regulatory capture. If the ERG as a whole or its members are captured, and the people on these bodies are responsible for the staffing of, or themselves staff, the appeal body, an undue influence on the judicial process cannot be ruled out.[118]

We must finally remember that obtaining access to the court is but one determinant of obtaining judicial protection. Much also depends on the intensity with which a court would control ERG documents and hence the chances of a successful outcome—from the undertakings' perspective, that is. We may speculate that the ERG's discretionary mandate and the polycentricity and technical nature of matters within its purview will induce a relatively lax standard.[119] Thus, even if market parties succeed in obtaining access to the court, it is far from certain that they will be greeted by a judiciary eager to strictly review and hence control ERG Common Positions. Nevertheless, the symbolism of a court ruling would be a compelling reason for judicial involvement. At the same time, the threat of an unfavourable ruling, even if only slight, could function as a powerful incentive for the ERG to maintain and further improve the quality of its documents.

Bringing the focus on legitimacy through due process, a modern trend is the participation of the public in decision making. This is seen as desirable because such involvement is believed to increase the level of voluntary compliance with the outcome of the process. The ERG organises wide consultations on proposed Common Positions, Annual Work Programmes and other documents.[120] There do not seem to be any restrictions on eligibility to participate in ERG consultations, although it cannot be ruled out that only well-organised and well-financed interests will actually participate. Consultations received are published on its website—subject to confidentiality claims—and the ERG has begun issuing documents

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[117] Joined Cases 41–44/70 *NV International Fruit Company and others v Commission* [1971] ECR 411 [24]–[27], Case 11/82 *SA Piraiki-Patraiki and others v Commission* [1985] ECR 207, Case T-172/98, T-175 to 177/98 *Salamander AG and others v Parliament and Council* [2000] ECR II-2487.

[118] Even if the body would in fact render independent decisions, the appearance of influence or bias could amount to an infringement of the right to effective judicial protection, consider e.g. the case law of the European Court of Human Rights under Article 6 ECHR: *Piersack v Belgium* (Appl no 8692/79) (1982) Series A no 85; *Procola v Luxembourg* (Appl no 14570/89 (1995) Series A no 326.

[119] Baldwin and McCrudden 1987, 63 et seq. This could be justified with reference to the principle of separation of powers or institutional balance.

[120] ERG(06)03 7, ERG website (note 17 above).

outlining the content of the consultations and indicating why it does or does not agree with submissions received.[121] Meetings of the ERG Plenary are followed by public debriefings which are announced through the website, press releases and its email alert service.

Turning finally to the last two criteria identified by Baldwin and McCrudden—expertise and effectiveness—we note that its membership and organisational structure make the ERG an expert body. It acts as a repository for the knowledge and experience of the NRAs, in particular through its Expert Working Groups and Project Teams who do the groundwork for the documents adopted by the ERG Plenary.[122]

In terms of effectiveness, ERG meetings and output are seen to make a positive contribution to the level of consistency between, and quality of, NRA decisions. Still, there are doubts as to whether this contribution is sufficiently meaningful. A conclusive affirmative answer on the efficiency of the network structure would thus necessitate a thorough cost-benefit analysis to see to what extent the costs incurred by NRAs as a result of ERG membership are offset by the benefits they derive from participation in the network.[123]

Ultimately, existing accountability mechanisms appear inadequate. Legislative and parliamentary accountability are weak. The level of output legitimacy is unclear. Avenues for judicial control appear non-existent. One could argue that participation could fill the void. It is geared towards the same end as the 'objective' view on court involvement—the desire to ensure the legality of government actions—as distinct from the 'subjective' view which is focused on the protection of citizens' rights against the State. Indeed, the judicial process can be seen to provide ex post participation in rule making. Through the courts, undertakings have a 'voice' to air their grievances against the network. They thus gain access to, and participate in rule-making, albeit in an extremely costly and indirect manner. On this view, ex ante review should be favoured, because it succeeds in achieving the desired objective in an exceedingly cheaper, more efficient and direct manner. Yet, participation does not necessarily eradicate the judicial accountability deficit—it might actually render it more pronounced. The courts would be the natural forum to safeguard meaningful participation by providing redress for citizens or undertaking alleging that their participation rights have been infringed.[124] It is the prerogative, even obligation, of the European legislature to attend to this conundrum. It may very well decide that existing legal, political and economic obstacles prevent fully fledged judicial accountability for ERG documents. Nevertheless,

[121] Eg ERG (07)20 for ERG(06)67 and ERG(06)68.

[122] Article 5 second al. ERG Decision and Articles 5.4, 5.5, 6 and 7 ERG (03) 07.

[123] In terms of cost, we can think of preparation and participation in meetings and opportunity costs, i.e. the resources that are spent on ERG work as opposed to SMP analysis, dispute resolution etc. In terms of benefits, we can think of a higher quality of decisions and consequently perhaps a decrease in the number of judicial challenges on that ground or the fact that NRAs need not reinvent the wheel for every new issue that crops up.

[124] Eg Craig 2006, Chaps. 10, 11.

such a decision ought to be clear. It would also mean that we ought to seriously consider other means by which to ensure an acceptable degree for the ERG-based enforcement structure.[125]

7.4 Conclusion

The utopian model of enforcement does not exist. This realism is a sobering call for tempered expectations by undertakings, institutions and the public. We saw that all available alternatives—centralised, decentralised and agency-based enforcement—incorporate trade-offs between positive and not-so-positive features. In the final analysis, the current network-based model should be strengthened and supplemented, but certainly not replaced.

Recent efforts of the ERG may be expected to make an important contribution to increasing the level of consistency. They may indirectly further enhance NRAs' independence. From the Commission's perspective, the best way forward would seem a closer association with the network and hence the NRAs on a footing of trust and equality—rather than increasing the hierarchical element in their relationship through an extended veto power.

Legislative attention should focus on two matters. The first concerns the role of national courts, where material consistency gains can be achieved. The second concerns the overall legitimacy and accountability of the ERG—in particular in view of its heightened status—to allow it to evolve into a mature structure for the regulation of the eCommunications sectors in the years to come.

Non-traditional bodies or institutions are, sooner or later, plagued by legitimacy and accountability questions. Think of the NRAs,[126] comitology committees[127] or the EU structure as a whole.[128] Reliance on the perceived or proven effectiveness of these new creatures is typically not enough to silence the critics. It is imperative to adopt a pro-active approach in this respect to allow the body or institution to devote its resources to where they matter: the efficient exercise of its responsibilities. This should be the institutional future for EU communications law.

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[125] For instance, if it is decided that more emphasis should be placed on participation, it would do to tighten the conditions for consultation for the ERG. Currently, Article 6 ERG Decision only requires that consultation must be extensive and at an early stage. Support could be derived e.g. from Article 6 Framework Directive—the national consultation procedure for NRAs, inter alia stipulating time limits and that account must be taken of comments received or the United States' Administrative Procedure Act 1946 with its notice and comment procedure.

[126] On the Continent, a number of legal systems do not readily admit that independent authorities be given wide, discretionary powers, usually for reasons of a constitutional nature. Under the 1998 framework, it could, thus, be noted that the status of NRAs was often dubious, that Ministries tended to keep important competences to themselves and that the court was overly strict in reviewing NRA decisions, focusing too much on competence, e.g. Eurostrategies/Cullen International Report (note 67 above), Commission (EC) *Annual Implementation Reports*.

[127] Consider the text between notes 41 and 43 above.

[128] Eg Anderson and Eliassen 1996; Craig and Harlow 1998; Snyder 1996; Weiler 1999.

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Chapter 8
Networks of Regulatory Agencies in Europe

Saskia Lavrijssen and Leigh Hancher

Contents

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_8,

8.1 Introduction

Recent legal and political science literature is increasingly critical on the accountability of what are generically referred to as European administrative networks, in which national administrative authorities co-operate with the EU institutions in a myriad of formal and informal ways in the development as well as the implementation of secondary EU legislation.[1]

This article deals with two specific regulatory networks—the European Energy Regulators Group (ERGEG)[2] and the European Regulators Group for Communications Networks and Services (ERG).[3] Within these European regulatory networks, the national regulatory authorities (NRAs) in the various Member States must co-operate with each other and with the Commission to guarantee uniform application of European law. The networks of national regulatory authorities are hybrid in nature. Their lack of legal personality means they do not have the status of 'EU independent agencies' which, established on the basis of European

[1] See e.g. Hofmann and Türk 2007; Curtin 2007; Papadopoulos 2007; De Visser, Chap. 7 in this book.

[2] Commission Decision 2003/796/EC of 11 November 2003 establishing the European Regulators Group for Electricity and Gas, OJ 2003 L 296/34.

[3] Commission Decision 2002/727/EC of 29 July establishing the European Regulators Group for Electronic Communications Networks and Services (ERG), OJ 2002 L 200/38, as amended by Commission Decision 2004/3445/EC of 14 September 2004, OJ 2003 L 296/34, as amended by Commission Decision 2007/804/EC, OJ 2007 L 323/43.

regulations, do have legal personality and are able to carry out their daily tasks at one remove from the European institutions.[4] Neither are the European networks national agencies.

In 2007, the Commission tabled legislative proposals with the aim to formalise and strengthen the existing networks in the energy and electronic communications sectors by conferring on them independent agency status: it has proposed the creation of a European Agency for the Co-operation of Energy Regulators (ACER)[5] and a European Electronic Communications Market Authority (EECMA).[6] While EU independent agencies are the subject of a growing literature,[7] the novel feature of the ACER and the EECMA would be that they are in reality "network agencies". The existing European regulatory networks are incorporated in the agencies as Boards of Regulators, that will, together with the newly created Directors and Administrative Boards of the agencies, cooperate with the Commission and the NRAs to further the completion and to ensure the functioning of, respectively, the internal electricity and gas markets and the electronic communications market. The proposed energy and electronic communications legislation, if adopted, will also acquire a greater political and indeed legal independence for the members of the networks—the NRAs—from their national governments. In the opinion of the Commission, inadequate political independence at national level hampers an effective and impartial application of European law.

The re-positioning of the networks as network agencies raises particular accountability issues, not only in relation to the powers and duties of the Commission, but also in relation to accountability of the individual NRAs at national level, as the role of European regulatory networks moves beyond formal co-ordination of procedures and the exchange of information towards fostering closer regulatory convergence.[8] This article argues that the gradual emergence of these network agencies requires focussing on a triangular, multi-level situation with different lines of responsibility for policy and legal input and output running between the Commission, the regulatory network agency, the Member States and their NRAs. Necessarily, this complicates the allocation of responsibility to, and the eventual accountability of these different actors from a political as well as a legal perspective.

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[4] Van Ooik, 134.

[5] Proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators (ACER), COM(2007)530 final. The Commission has also put forward proposals for the amendment of the energy directives and regulations: See http://ec.europa.eu/energy/electricity/package_2007/index_en.htm. Accessed 14 May 2012.

[6] Proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Markets Authority (EECM), COM(2007)699rev2. The Commission has also put forward proposals for the amendment of the electronic communications directives. See: http://ec.europa.eu/information_society/policy/ecomm/library/proposals/index_en.htm. Accessed 14 May 2012.

[7] See Majone 2005; Vos 2003, 113; Thatcher and Coen 2008; Dehousse 2002, 218; 2008.

[8] For a detailed conceptual analysis of the notion of accountability, see Bovens 2007.

It is submitted that much of the legal and political science literature on 'new governance' has focussed on the accountability deficits of the networks themselves, but in the light of the repositioning of the regulatory networks as European network agencies, it remains equally important to consider not only their accountability to the Commission in the future, but also the accountability of the Commission itself once these network agencies have indeed assumed independent powers. The accountability of the individual NRAs may raise equally complex issues albeit at national level and as such is beyond the scope of this article.[9]

In the light of this evolving institutional context, the main aim of this article is to identify the legal and political accountability gaps in the present model of European regulatory networks and the proposed model of European regulatory network agencies. In analysing accountability issues, we will concentrate on the types of acts that can be adopted. Those acts will either be binding or non-binding. Some of them will be subject to judicial review and some not. If the acts are not subject to judicial review it will be analysed to what extent other forms of accountability, and especially political accountability, may serve as alternatives.

8.2 Background and Characteristics of Regulatory Co-Ordination

From the perspective of analysing accountability gaps, Sect. 8.2 first explains the background and the main characteristics of the regulatory networks and the network agencies. Their respective tasks and powers are analysed and compared in detail in Sects. 8.3, 8.4, 8.5 and 8.6.

8.2.1 Regulation and the Development of European Regulatory Networks

European regulatory networks (ERNs) have been created by the Commission to co-ordinate the application of European regulations and directives by NRAs at national level to ensure a consistent interpretation and effective application of European law in the 27 Member states. Moreover, the ERNs have a general role to advise and assist the Commission in consolidating the internal energy market or the internal electronic communications market, especially by advising the Commission on the exercise of its power to adopt binding measures or non-binding measures (Sects. 8.3.1 and 8.3.2).

The NRAs were often created by the Member States in order to implement the relevant European sectoral market liberalisation directives. Their task is to supervise

[9] Lavrijssen-Heijmans 2006.

and regulate the relevant markets and to this end, they should be entrusted with various powers to regulate certain matters, including tariffs and access rights as well as to settle disputes. Extensive ex ante regulatory powers are considered necessary to ensure what is referred to as the introduction and promotion of 'controlled competition' in markets where national monopolists—also referred to as incumbents—traditionally enjoyed exclusive rights and privileges to supply goods and services and to operate energy and communications networks. Even after the abolition of these formal rights, many incumbents continue to enjoy significant market power, not least because they own essential infrastructure, which cannot be easily duplicated. This in turn requires regulatory solutions to ensure competition in the market.[10]

The first package of European telecommunications directives entailed an obligation for the Member States to ensure that each of the relevant tasks assigned to the NRAs in the directives are undertaken by a competent body.[11] It was mainly left to Member States to decide upon the form and powers of their NRAs, but the directives required that their independence from the industry was secured and that there were independent appeal mechanisms available for interested market parties affected by decisions of the NRAs.[12] The energy directives merely stipulated that the Member States shall create appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of dominant position.[13] In addition the Member States had to designate a competent body, independent of the market parties, to settle disputes concerning network access.[14]

Inevitably, substantial divergence across the Member States emerged. This stimulated the Commission to initiate further substantive harmonisation of the powers of the NRAs as well as to include common principles for fair and transparent decision making in a second package of European directives.[15] Moreover,

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[10] See for electronic communications, Cave 2007, 405–424.

[11] Article 5a of Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, OJ 1997 L 295/23.

[12] Articles 21 and 22 of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ 1998 L 204/1 and Articles 20 and 22 of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ 1996 L 27/2.

[13] Article 22 of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ 1998 L 204/1 and Article 22 of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in gas, OJ 1996 L 27/2.

[14] Article 21 of Directive 98/30/EC and Article 20 of Directive 96/92/EC.

[15] Articles 3–8 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ 2003 L 108/33, Article 23 of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ 2003 L 176/37 and Article 25 of Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market in gas and repealing Directive 98/30/EC, OJ 2003 L 176/57.

the Commission spurred into an early effort to co-ordinate the work of the different NRAs in implementing European legislation, via informal agreements and working groups.[16] Nevertheless, the Commission was confronted with the problem of establishing regulatory norms and best practice, given that the NRAs differed in terms of their maturity, the scope of their powers and constitutional positioning at national level. Given continued resistance by the Member States to the creation of European regulatory agencies, and in line with broader moves to encourage open methods of co-ordination, and subsidiarity, European regulatory harmonisation was essentially fostered through the formation of formal and informal horizontal networks of regulators. The network approach was also a convenient way for the Commission to gather expertise to identify new problems and potential solutions in what after all was often unexplored territory from a technical as well as an economic and legal perspective.

Currently, the ERNs consist of representatives of NRAs that are charged with the day-to-day application of European law and may act to some extent independently from their governments.[17] With the exception of the European Competition Network (ECN), the Commission is not formally a member of the networks.[18] In most cases, the Commission established the networks and their powers pursuant to a decision.[19] In the light of their tasks to promote competition in liberalised national markets, the individual NRAs are entrusted with substantial powers. For example, the NRAs in the energy sector have the power to implement ex ante forms of regulation on tariffs and on the terms and conditions for third party access to the energy networks. The NRAs in the electronic communications sector have powers to impose specific remedies on a market party having Significant Market Power; a position which equals a dominant position within the meaning of Article 102 TFEU. The NRAs must co-operate with the national competition authorities (NCAs), having concurrent powers to enforce competition law in regulated sectors.[20]

As such the networks have contributed to the efficient and effective application of existing EU policy and legislation by the NRAs, e.g. through the exchange of best practices, information and mutual education. However, due to their limited resources and the absence of the power to take binding decisions as well as their dependency on the European Commission for the adoption of their advices, from a formal point of view it would seem that these regulatory networks essentially function as an adjunct to the Commission.[21] Moreover, as a consequence of the

[16] Hancher 1996, 60.

[17] In most Member States, NRAs should follow the policy lines formulated by the legislator and the government, but they are independent in applying European law in an individual case. The actual and formal independence of the NRAs of their governments may vary across the different Member States. See e.g. the several articles in: Caranta et al. 2004.

[18] However, the Commission does attend all meetings, plays an active part in them and provides the secretariat for the ERG, the ERGEG and the ECN.

[19] European legislation leaves the detailed design of the networks to the Commission.

[20] ECJ, Joined Cases C-359 and C-397/95P, Ladbroke ECR [1997] I-62225.

[21] Coen and Thatcher 2008.

informal and consensus-based character of the ERNs, there are limits to the degree of regulatory convergence they can achieve (Sect. 8.2.2).

8.2.2 Towards European Networks Plus

The European Commission is of the opinion that in their current form, ERNs cannot guarantee a uniform and effective application of European law in the Member States, partly because of the consensus-driven decision-making process and the lack of enforcement powers, and partly because of the differences between the powers of the NRAs and/or the differences in independence from politics at national level.[22] Drawing on the recommendations of the ERNs themselves,[23] the Commission considered three possible options to strengthen regulatory convergence: to expand its own monitoring powers vis-à-vis the national authorities, to create an independent European Regulatory Agency and lastly, to strengthen the role and powers of the existing European regulatory networks. The NRAs (and the Member States) have taken a sceptical stance on the first two options, because they would lose their powers to the Commission and/or to an EU independent agency.[24] However, there is guarded support among the national authorities for the further development of the role and powers of European regulatory networks, in the form of a sort of 'European network plus'.[25]

Although the proposed 'network plus' approach varies depending on the sector involved, in essence it entails that the formal position of the current ERNs would be strengthened, by explicitly recognising in the relevant secondary legislation their main roles of advising the Commission and co-ordinating the application of European law by the NRAs. Another alternative is that the ERNs would be given formal powers to co-ordinate the application of European law by the national authorities, for example through the adoption of binding measures, as was proposed by the European Energy Regulators Group. In this latter model, the ERN would have to be granted legal personality, and would in fact be an independent

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[22] See e.g. European Commission, *Communication from the Commission on Prospects for the Internal Gas and Electricity Market*, COM(2006)841 final and European Commission, *Communication from the Commission on the Review of the EU Regulatory Framework for Electronic Communications Networks and Services*, COM(2006)334 final.

[23] See the letter from Commissioner Reding to the Chairman of the ERG, Request for advice of the European Regulators Group in the context of the Review of the Regulatory Framework for Electronic Communications Networks and Services, D(2006)2685, Brussels, 20 November 2006.

[24] ERG, Advice in the context of the Review of the Regulatory Framework for Electronic Communications Networks and Services, 27 February 2007 and ERGEG's response to the European Commission's Communication "An Energy Policy for Europe", ref. C06-BM-09-05, 6 February 2007. See also Thatcher and Coen 2008.

[25] ERGEG, '3rd Legislative Package Input, Paper 2: Legal and Regulatory Framework for a European system of Energy Regulation, An ERGEG public document', Ref: C07-SER-13-06-02-PD, 5 June 2007 and ERG 2006.

agency in disguise. As discussed in Sect. 8.2.3, the European Commission has partly followed the advice of the networks, in proposing that the role of the European Energy Regulators Group (ERGEG) and the European Regulators Group (ERG) be strengthened, through the founding of the ACER and a European Electronic Communications Market Authority (EECMA).

8.2.3 Commission Proposals for European Regulatory Network Agencies

The proposed agencies in the energy sector and the electronic communications sector will not have a legal base in the TFEU nor will the NRAs cease to exist or be made subordinate to the proposed agencies. The NRAs will play a complementary role vis-à-vis the European regulatory network agencies. In addition to their national responsibilities, the NRAs are obliged to respect the European interest and to co-operate with the Commission, the EU agencies and their fellow NRAs in exercising their powers.[26] To ensure that they promote the European interest objectively, the independence of the national authorities within their respective political system must be strengthened in a harmonised way.[27]

8.2.3.1 Proposed Powers

As will be discussed in Sect. 8.4, the proposed agencies will have the power to provide advices to the Commission and the NRAs, through the adoption of opinions or recommendations, on how the Commission or the NRAs should exercise their powers to adopt binding or non-binding acts, which may be general or specific in scope.[28]

According to the original Commission proposals, the agencies will only be attributed the power to take specific decisions on technical issues in an individual case that are binding for the NRAs and/or the market parties. The idea is that the agencies will not be granted discretionary powers, such as powers to adopt decisions involving policy choices and powers to adopt general binding measures.

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[26] See Articles 7 and 8 of the proposal for the amendment of Directive 2002/21/EC, Article 22b of the proposal for the amendment of Directive 2003/54/EC and Article 24a of the proposal for the amendment of Directive 2003/55/EC.

[27] Article 3 of the proposal for the amendment of Directive 2002/21/EC, Article 22a of the proposal for the amendment of Directive 2003/54/EC and Article 24a of the proposal for the amendment of Directive 2003/55/EC.

[28] In this contribution, the term general measures refers to measures that have general applicability and that apply to an unidentified group of cases/persons. The term specific or individual measures refers to measures that relate to a specific situation and that have specific addressees.

Section 8.4 discusses that in its first readings of the Commission proposals the European Parliament proposed substantial amendments, amounting to an expansion of the powers of the energy agency and a limitation of the powers of the electronic communications agency.

8.2.3.2 Structure

According to the Commission proposals, a Board of Regulators will be the main body responsible for the agencies' decisions, opinions and recommendations. It will consist of representatives of the NRAs and of one non-voting representative of the Commission. The Board of Regulators should act independently and should not seek or take instructions from any government of a Member State or from any public or private interest. All decisions, opinions and recommendations of the agency should be approved by the Board of Regulators, acting by a majority of two-thirds of its members.[29]

The Director, charged with the day-to-day management and representation of the agencies in legal proceedings, enjoys a key role as he or she will prepare and formally adopt the acts of the Board of Regulators. The Director, in turn, is appointed by the Administrative Board, after consulting the Board of Regulators, and on the basis of a list of nominees drawn up by the Commission.[30] Without prejudice to the respective powers of the Administrative Board, the Board of Regulators and the Commission, the Director shall not seek or accept any instruction from any government or from any other body. The Administrative Board is composed of six representatives drawn from the Member States and six from the Commission. It is responsible for the general management of the agency, including the adoption of the draft budget, the annual report, the work programme and the determination of staff salaries.[31]

In principle, a petition for the annulment of binding decisions of the agencies can be lodged with the European Court of Justice, provided that the admissibility criteria of Article 263 TFEU are met.[32] However, owing to the length of time such procedures can take and the technical nature of the problems that may be involved,

[29] See Article 11 of the proposed Regulation on ACER and Article 27 of the proposed Regulation on EECMA.

[30] Article 13 of the proposed Regulation on ACER and Article 29 of the proposed Regulation on EECMA.

[31] Article 9 of the proposed Regulation on ACER and Article 29 of the proposed Regulation on EECMA.

[32] See Articles 17 of the Regulation on ACER and 35 of the Regulation on EECMA. The admissibility conditions are stricter than the admissibility conditions for locus standi against actions of the Office for the Harmonization of the Internal Market, where individuals have locus standi to challenge decisions in case their interests are adversely affected. See Curtin 2005. There are also wider possibilities for locus standi for third parties against actions of the Community Plant Variety Office (CPVO) on the basis of the basic regulation (see ECJ, T-95/06, Anecoop, n.y.r.).

an appeal to the Court will be preceded by an internal appeals procedure held before an independent Board of Appeal.[33]

In its first reading on the proposal for the energy agency, the European Parliament has adopted several amendments strengthening the role of the Board of Regulators in relation to the Director. The Board of Regulators has to agree with the appointment of the Director by the Administrative Board. Moreover, the Board of Regulators shall provide its assent to the Director before the adoption of decisions, opinions and recommendations and the Director shall act in accordance with decisions adopted by the Board of Regulators.[34] Furthermore, the Parliament wants to strengthen its control on the energy agency in several ways, for instance by proposing to limit the membership of the Administrative Board to six members, two of which shall be appointed by the Commission, two by the Member States and two by the European Parliament (Sect. 8.9.1).[35]

The European Parliament has also adopted amendments with regard to the agency in the electronic communications sector, simplifying its structure and strengthening the position of the Board of Regulators in relation to the Member States and the Commission.[36] The new body will be given the name the European Body of Regulators in Telecom (BERT). It has abolished the Administrative Board and the Board of Appeal. The Board of Regulators will be the main decision-making body and will also decide on the work programmes, annual reports, draft budgets and staff salaries. The Board of Regulators appoints the managing director, which may be subject to a non-binding opinion of the Commission and the European Parliament. The director will prepare the work of the Board of Regulators and will be accountable to and act on the instructions of the Board.

8.3 A Closer Look at the European Regulatory Networks

The ERNs do not have legal personality and do not have the power to take decisions which are binding for the NRAs and/or the market parties. The next sections analyses in detail the tasks and powers of the ERNs and investigate how they may influence the powers of the Commission and the individual regulatory powers of the NRAs, such as the ex ante regulation of network access in the energy sector and the regulation of parties with Significant Market Power in the electronic communications sector.

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[33] See Article 15 of the proposed Regulation on ACER and Article 35 of the proposed regulation on EECMA.

[34] EP legislative resolution of 18 June 2008, Amendments 61, 62, 64 and 65.

[35] EP legislative resolution of 18 June 2008, Amendment 44. The Council has reached a political agreement on the establishment of ACER (Council, 15 October 2008, inter-institutional file 2007/0197, document 1414208) and does not support the EP's involvement in the appointment of members of the AB.

[36] EP legislative resolution of 24 September 2008, Amendments 47, 107, 108, 114, 131.

8.3.1 Advice on Adoption of Binding Measures by Commission

A key task of the ERNs is to advise the European Commission on the adoption of binding measures, which may either be general or specific in scope and which have to be applied by the NRAs when exercising their powers.[37]

Unlike the European Regulators Group (ERG), the Energy Regulators Group (ERGEG) has an important role in advising the Commission on the adoption of general binding measures. In the energy sector, recent directives and regulations have enhanced the Commission's power to update, supplement and amend non-essential elements of these same measures through the adoption of general binding measures, pursuant to the politically supervised regulatory procedure provided under the Comitology Decision.[38] These binding measures flesh out the basic principles of the European directives and regulations in detailed technical rules which are in turn binding on the NRAs. The ERGEG provides important input into this process and although its opinions on the draft general measures are not binding on the Commission, in practice deviation from the ERGEG's advice, in turn formulated on the basis of extensive stakeholder consultations, is unlikely. Self-evidently, if the Commission endorses the advice of the ERGEG and incorporates it in general binding measures, the substance of the advice acquires binding force.

An example of adoption by the Commission is the advice of the ERGEG relating to an amendment of the general binding measures (so called guidelines) for congestion management which were appended to the Electricity Regulation.[39] At the request of the Commission, and after extensive consultation of the stakeholders, the ERGEG officially published its advisory report in 2005. The Commission adopted the ERGEG recommendations and submitted the proposals to the comitology procedure by seeking the advice of the Comitology Committee, which unanimously approved the proposal.[40] The measures were then sent to the European Parliament, which raised no objections. Subsequently, they were adopted by the Commission.[41]

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[37] See *supra* note 30.

[38] See for a discussion of the characteristics of comitology: Curtin 2007, 529–531. See also Article 8 of Regulation 1228/2003/EC, OJ 2003 L 176/1, Article 9 of Regulation 1775/2005, OJ 2005 L 289/1, and Articles 5, 7 and 8 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, *OJ* 1999 L184/023 as amended by Council Decision 2006/512/EC of 17 July 2006, *OJ* 2006 L200/11.

[39] ERGEG, 'Guidelines on Congestion management', 18 July 2005. These guidelines flesh out the Regulation principles and guidelines in relation to the management and allocation of transport capacity in the cross-border electricity networks (interconnectors).

[40] This Committee consists of representatives of the Member States. Depending on the topic, the responsible ministries can decide whether a representative of a ministry or a representative of the national authority takes part in the Committee.

[41] Decision 2006/770/EC of 9 November 2006 amending the Annex to Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity, OJ 2006 L 312/59.

The ERG does not have an advisory role as regards the adoption of general binding measures by the Commission. It may advise the Commission on a specific binding measure, i.e. the adoption of decisions that identify transnational markets, obliging the competent NRAs to jointly conduct a market analysis of the relevant market concerned and decide on any imposition of regulatory obligations (or the withdrawal or amendment thereof) on parties having Significant Market Power.[42]

8.3.2 Advice on Adoption of Non-binding Measures by Commission

Unlike the ERGEG, the ERG has an important advisory role on the adoption of general non-binding measures by the European Commission, including the 'Recommendation on Relevant Markets' and the 'Market Analysis Guidelines'.[43] Although the measures are non-binding, they may have legal effects for the NRAs and the market parties, because the NRAs are required to take these measures into account when exercising their powers on the basis of Article 4 TEU (formerly Article 10 EC) as well as the specific provisions in Directive 2002/21/EC.[44] Hence, if the Commission endorses an ERG opinion, its substance may have indirect legal effect on the basis of the general and specific legal duties of the NRAs, to take into account the policy recommendations of the Commission.[45]

8.3.3 Policy Co-ordination and Co-operation Between the NRAs

The ERNs also have an important role to play in the horizontal co-ordination of the application of existing European legal norms by the individual NRAs. As discussed below, three types of horizontal co-ordination can be distinguished, including more substantive co-ordination (regulatory convergence), procedural co-ordination (supervisory convergence) and monitoring.[46]

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[42] Article 15, para 4 and Article 16, para 5 Directive 2002/21/EC.

[43] Article 3 of Commission decision 2002/727/EC.

[44] See Articles 15 and 16 of Directive 2002/21/EC.

[45] In the Grimaldi case, the Court considered that the national courts must take account of Commission recommendations which clarify and supplement European law in order to settle disputes placed before the Court. ECJ, Case C-322/88, Grimaldi [1989] ECR I-4407. See Senden 2004, 386–393. Also relevant is that the obligation for loyal cooperation between the Commission and the national authorities, now found at Article 4 TEU, is worked up into specific provisions in the European directives and in Council Regulation 1/2003. See also Lavrijssen-Heijmans 2006, 343–344.

[46] Here inspiration is drawn from CESR, 'The Role of CESR at 'level 3' under the Lamfalussy Process, Action plan for 2005', CESR/04-527b, October 2004.

8.3.3.1 General Non-binding Measures

The constitutive decisions for the ERGEG and the ERG explicitly encourage the European networks to promote regulatory convergence, that is to foster the uniform and effective decentralised application of European legislation through the formulation of general non-binding measures, such as common positions and best practices relating to the application and interpretation of European law.[47] The ERNs are increasingly involved in this process.[48] An example is the Common Position of the ERG on the imposition of appropriate remedies on undertakings which are designated as having Significant Market Power (Remedies Position).[49] The content of the Common Position reveals important legal and economic choices in this process.

Article 7 of Directive 2002/21/EC provides a legal basis for the ERG to agree on the remedies that may be imposed on undertakings that are designated as having Significant Market Power,[50] but more usually EU legislation does not contain an explicit and clear basis for the formulation of general non-binding measures by the networks themselves.[51] Hence, the legal status of these types of measures has not yet fully crystallised in European and national law. In principle, they are non-binding for the NRAs and cannot impose obligations on market players. Nevertheless, they can give rise to indirect legal effects; the national authorities are in principle bound by European and national principles of good governance, in particular the principle of legitimate expectations, the principle of due care and the principle of equality of treatment, to act in accordance with published European positions to which they have agreed.[52] The situation may be different if some national authorities have expressly distanced themselves from (certain elements of) the European measures, for example by negotiating an opt-out to acceptance of the measures.

The weight that should be given by the NRAs to such non-binding norms also depends on the intensity of the specific co-operation obligations imposed by European legislation. Specifically and clearly phrased co-operation obligations, such as Article 7, para 2 of Directive 2002/21/EC, should carry more weight than

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[47] See *supra* note 30.

[48] See e.g. ERGEG, 'Obstacles to Switching in the Gas Retail Market, Guidelines of Good Practice and Status Review', Ref: E06-CSW-05-03, 18 April 2007, ERGEG, 'Guidelines for Good Practice and Open Season Procedures (GGPOS)', Ref: C06-GWG-29-05c, 21 May 2007, ERG, 'Common Position on Best Practice in Wholesale Unbundled Access (including shared access)' and ERG (06)70Rev1, ERG, 'Common Position on Best Practice in Bitstream Access Remedies'.

[49] ERG, 'Revised ERG Common position on the Approach to Appropriate Remedies in the ECNS Regulatory Framework', ERG (06)33.

[50] Article 7, para 2, Directive 2002/21/EC.

[51] The decisions of the Commission formulate the tasks of the networks very broadly. See e.g. Article 2 of Commission Decision 2003/796/EC and Article 3 of Commission Decision 2002/627/EC.

[52] Compare e.g. ECJ, Case C-189/02P, Dansk Rorindustri A/S [2005] ECR I-5425.

loosely formulated cooperation obligations.[53] However, it is submitted that the national authorities may deviate from the ERNs' non-binding measures if specific national circumstances so require for an effective and proportionate application of European law, if the measures are vague or if they are contrary to European law.[54] Moreover, the European non-binding measures of the ERNs can only relate to the way in which the national authorities interpret and apply existing powers; they cannot lead to the delegation of new powers to the national authorities.

8.3.3.2 Specific Non-binding Measures

The NRAs are also involved in supervisory convergence through the ERNs, in terms of implementation and enforcement of European rules in matters of mutual importance, both through the exchange of information and the coordination of national procedures. For instance, in a dispute between an electricity producer and the owner of a cross-border energy network on third party access conditions, more than one NRA is likely to be involved. In order to ensure an efficient and effective application of European law, the NRAs may agree within the ERGEG on a division of tasks, and on the exchange of information. The members of the ERG can comment on draft decisions by fellow national authorities, which those authorities must take into account.[55] The European Commission may eventually endorse the comments of the members of the ERG, and veto a draft decision of a NRA, if it is of the opinion that it violates European law and frustrates the realisation of the internal market.[56]

8.3.3.3 Monitoring

Finally, the ERNs fulfil an important monitoring function with regard to the operation of the market, the functioning of European legislation and its implementation and execution by the Member States. For instance, they monitor whether individual NRAs comply with the non-binding European measures of the ERNs by carrying out peer reviews and by producing detailed comparative assessments and reports. Although, the networks do not have the power to impose their decisions upon, let alone sanction an NRA, they may exert peer-group

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[53] See for a more loosely formulated co-operation obligation: Article 23, para 12, of Directive 2003/54/EC.

[54] Compare Senden 2004, 434–436 and 448.

[55] Article 7, paras 3 and 5 of Directive 2002/21/EC.

[56] See Article 7 of Directive 2002/21/EC. Currently, the veto power of the Commission only relates to the definition of the relevant market and the market power assessment. The Commission proposes that its veto power will also cover the imposition of regulatory remedies.

pressure, through the benchmarking of performance, asking explanations for non-compliance and naming and shaming in order to persuade individual NRAs to abide by the agreements made in the networks.[57] These monitoring reports may also serve as an important source of information for the Commission; they may give impetus to the Commission to initiate Article 226 procedures against non-complying states, or to table proposals for new legislative or implementing measures to deal with regulatory gaps and inconsistencies in the application of European law hampering market integration.

8.4 A Closer Look at the European Regulatory Network Agencies

8.4.1 Power to Adopt General Binding Measures for the Energy Agency?

In its first readings, the European Parliament supports the creation of a "true" regulatory network agency in the energy sector (ACER). Unlike the ideas of the Commission (Sect. 8.2.3), it would give the energy agency discretionary powers, such as the power to adopt general binding measures, so- called guidelines, which are, contrary to what the name may suggest, binding for the European network of transmission system operators when drafting the technical and economic conditions (network codes) governing the rights to network access for market parties.[58] On the contrary, the European Parliament has proposed that the agency in the electronic communications sector will not be granted any powers to adopt binding measures and has amended the Commission proposal at this point.[59] Taking into account the amendments of the European Parliament, the next sections discuss in more detail the tasks and powers of the energy agency and the electronic communications agency to the extent they differ from those of the current European regulatory networks (Sect. 8.3).

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[57] See also CESR, 'A proposed evolution of EU Securities supervision beyond 2007', REF 07-783.

[58] European Parliament legislative resolution of 18 June 2008 on the proposal for a regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, A6-0226/2008, Amendment 76. The Council is not in favour of giving the power to adopt general binding measures to ACER, see note 37.

[59] European Parliament legislative resolution of 24 September 2008 on the proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority, A6-0316/2008, Amendment 57.

8.4.2 Powers to Take Adopt Individual Binding Measures

The ACER will have autonomous powers to take specific binding decisions on technical issues; they are not subject to approval by the Commission.[60] For instance, it will have the power to decide on the regulatory regime for infrastructure connecting at least two Member States, upon a joint request from the competent NRAs.[61] Moreover, the European Commission may delegate to the ACER powers to take binding technical decisions in specific cases on the basis of general binding measures that will be adopted by the Commission via the Regulatory Procedure with Scrutiny of the Comitology decision (Sect. 8.9.1). At this moment, the proposals do not specify the subjects which the technical decisions may cover.[62]

The ACER also has been granted powers that may involve policy choices, i.e. powers to grant an exemption for new infrastructures from the third party access rules, involving a balancing of the interest of ensuring free competition in the short term with the interest of safeguarding sufficient investments in infrastructure that will enhance competition in the energy sector in the long term. Therefore, these powers are subject to approval by the Commission.[63]

8.4.3 Continuation Tasks of the Current European Regulatory Networks

Both the energy agency and the electronic communications agency will continue the current tasks of the European regulatory networks (Sect. 8.3), but their activities will be given a formal basis in the European directives and regulations.

First, the agencies will take over the current horizontal co-operation (regulatory convergence, supervisory convergence and monitoring) between the NRAs within the ERNs (Sect. 8.3.3). Compared to the current situation of the networks, it is new that the energy agency may issue specific opinions to the NRAs with regard to the compatibility of draft decisions of the NRAs with the European directives and regulations.[64] The European Parliament has proposed that also the electronic communications agency may formulate opinions on draft decisions of the NRAs,

[60] See footnote 30.

[61] Article 7, para 7 of the proposed Regulation on ACER. See also Von Rosenberg 2008.

[62] Article 7, para 1 of the proposed Regulation on ACER. See Von Rosenberg 2008, 6.

[63] Article 8 of the proposed Regulation on ACER.

[64] See Article 7 of the proposed Regulation on ACER.

of which the NRAs should take the utmost account.[65] Taking into account the opinions of the agencies, only the Commission may take a binding decision vetoing the draft decisions of the NRAs.

Second, like the current ERNs, the proposed agencies will have a general advisory role by formulating opinions to the Commission on the exercise of its powers to adopt binding or non-binding measures, which may be either general or specific in scope (Sects. 8.3.1 and 8.3.2).[66] The Commission proposes that the new directives and regulations will extend the Commission's powers to adopt general binding measures, amending or updating non-essential elements of the European directives and regulations, via the Regulatory Procedure with Scrutiny from the Comitology Decision (Sect. 8.9.1) in both the energy and electronic communications sector.[67] The ACER may also adopt recommendations, recommending that the Commission takes a certain type of action, such as the adoption of network codes governing the conditions for network access to the cross-border energy networks.[68] In its first readings, the European Parliament has adopted amendments clarifying that the agencies may also (be requested to) advice the EP on all matters within the scope of their competences.

The agencies also advise the European Commission on the adoption of specific binding market review decisions relating to draft decisions of the NRAs, such as veto decisions.[69] A core task of the electronic communications agency will be to formulate opinions to the European Commission on the assessment and vetoing of draft national measures concerning the designation and regulation of undertakings with Significant Market Power on the basis of the Article 7 Directive 2002/21/EC. Only the Commission has the power to take binding veto decisions, but it has to take the utmost account of the opinion of the agency in exercising its powers.[70]

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[65] Resolution of the EP of 24 September 2008, Amendments 52 and 53. The involvement of BERT differs depending on the type of measure of the NRA. The EP creates a prominent role for BERT in supervising the remedies that NRAs want to impose on market parties. The text of the EP amendments seems to indicate that a NRA may only adopt a remedy if BERT (and in the case of functional separation also the Commission) has confirmed the appropriateness and effectiveness of the draft measure.

[66] See Article 5 of the proposed Regulation on ACER and Article 4 of the proposed Regulation on EECMA.

[67] Article 5 of the proposed Regulation on ACER and Article 4 of the proposed Regulation on EECMA. The EP has proposed amendments to limit the extension of the Commission's power to adopt general binding measures in both the energy and the electronic communications sector.

[68] Articles 2a–2h of the proposal for the amendment of Regulation 1775/2005 and Articles 2a–2h of the proposal for the amendment of Regulation 1228/2003. See also amendment 32 of the EP resolution of 18 June 2008 on the proposal for amending Regulation 1228/2003, A6-0228/2008.

[69] See for energy: Article 7, para 4 of the proposed regulation on ACER.

[70] See Article 4 of the proposed Regulation on EECMA, in conjunction with Article 7 of the proposed Directive amending Directive 2002/21/EC and amendment 52 of the EP resolution of 24 September 2008.

8.4.4 Energy Agency and Electronic Communications Agency Compared

The proposed agencies are characterised by some important similarities, but, especially after the amendments of the European Parliament, there are also some striking differences due to the different market structures of the energy sector and the electronic communications sector. The integration of the energy sector is highly complicated and requires uniform technical rules for a smooth functioning and interconnection of the (cross border) energy networks. Therefore, the Commission proposals and the amendments of the European Parliament suggest that ACER will have an important role in the regulation ex ante of the energy sector, amongst others by its involvement in the adoption of technical and economic rules applied by the network operators for the operation of their networks (Sects. 8.4.1 and 8.4.2). The electronic communications sector is characterised by deregulation; the gradual abolition of sector-specific regulation and the growing importance of the application of European competition law to deal with market distortions. This explains why the electronic communications agency will have no or limited powers to adopt binding measures and its central task seems to be the ex post control of draft measures of the NRAs applying the electronic communications directives.

8.5 The 'Meroni' Ruling and European Regulatory Agencies

From Sects. 8.2.3 and 8.4 it follows that the European Commission is lukewarm towards granting discretionary powers, such as powers to adopt decisions involving policy choices and powers to adopt general binding measures, to the proposed agencies. In this respect, the Court's judgment in *Meroni* in 1958 is invoked by the Commission to defend a restrictive approach to the delegation of powers involving discretion in policy or in interpretation, to independent agencies.[71] The delegation of these types of powers to European regulatory agencies would upset the balance of powers between the European institutions. As an analysis of subsequent case-law reveals, the ECJ continues to invoke the *Meroni* case as a legal constraint preventing the delegation of discretionary powers to European regulatory agencies nowadays.[72] Therefore, the question rises whether the proposal of the European Parliament to confer on the ACER the power to take general binding measures violates the Meroni principle?

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[71] ECJ 1958, Case 9/56, Meroni [1958] ECR-1, ECJ, joined Cases C-154/04 and C-155/04, The Queen on the application of Alliance for Natural Health [2005] ECR I-6451. See Lenaerts and Verhoeven 2002, 44–45 and Communication from the Commission, 'European Agencies—The way forward', SEC (2008) 323, Com (2008) 135 final, 11.3.2008.

[72] See Joined Cases C-154/04 and C-155/04. For an analysis of the case-law: Griller and Orator 2007.

It may be argued that the Meroni principle could be loosened by the European institutions and the ECJ, by allowing the delegation of powers involving a certain degree of discretion in interpretation or in policy to European regulatory agencies.[73] It is worth remembering at this juncture that at the heart of the Meroni judgment lies the fact that European institutions may not disrupt the institutional balance through the delegation of powers.[74] Furthermore, it is relevant that, although the TFEU does not provide an explicit legal base for the delegation of powers to EU agencies, the ECJ has sanctioned their creation.[75] Seen in this light it may be argued that the legislator could delegate the power to take binding discretionary decisions to an EU regulatory agency, provided that the prerogatives of the legislator and the Commission are preserved and as long as the European regulatory agencies are made politically and legally accountable in a manner comparable to the Commission.[76] Thus, a system in which an agency is granted powers to adopt individual decisions implying policy choices and even general binding measures may well be perfectly in line with the spirit of the Meroni principle, for instance in case the agency's decisions may be disallowed by the Commission and/or are subject to judicial review by the General Court.[77] Indeed, the exemption power of the ACER discussed in Sect. 8.4.2, shows that the European Commission actually proposes to confer such powers on the ACER. It recognizes there is no infringement of the Meroni principle, because the exemption power of the ACER, implying policy choices, is subject to approval by the Commission and to judicial review by the General Court. Sections 8.7, 8.8 and 8.9 will analyse in detail the possibilities for making the proposed agencies politically and legally accountable for the tasks and powers that have been discussed in Sect. 8.4.

8.6 The European Regulatory Networks and European Regulatory Network Agencies Compared

If one considers the link between the ERNs activities and the formal powers of the Commission, it transpires that the possible influence of the networks depends heavily on whether the Commission is willing to endorse their opinions and recommendations and goes on to adopt general (non-) binding measures or specific decisions (Sect. 8.3). In practice, however, the ERNs generate a substantial output in terms of opinions, recommendations and general non-binding measures, in the form of best practices, common positions or codes of conduct. On the basis of these

[73] See for a discussion of this argument Craig 2006, 183–190 and Griller and Orator 2007.

[74] Lenaerts and Verhoeven 2002, 39–44.

[75] See also ECJ, Case C-217/04, ENISA [2006] ECR I-3771 and joined Cases C-154/04 and C-155/04.

[76] Griller and Orator 2007, 17.

[77] Craig 2006, 185–190. See also Curtin 2005, and Vos 2005.

'soft-law norms', the ERNs increasingly contribute to a consistent and effective application of European law by the NRAs and may exercise a substantial influence on the way the Commission and the individual NRAs exercise their powers.

In contrast to the ERNs, the European network agencies as proposed by the Commission, will have legal personality and the power to take specific binding decisions. They will enjoy a certain amount of autonomy from the EU institutions in the day-to-day performance of their tasks, but they are not fully independent.[78] The proposals of the Commission are based on the idea that there are clear and strict limits on the conferral of independent powers on regulatory agencies in the current Community legal and political order—they cannot be given the power to adopt binding measures implying policy choices (Sect. 8.5).[79] Considering the amendments of the European Parliament and the first reactions of the Council, it is likely that in the future the energy agency will have powers to adopt specific and possibly even general binding measures, whereas the electronic communications agency will not be granted such powers (Sect. 8.4).[80]

If one compares the proposed tasks and powers of the agencies with those of the ERNs, even after the amendments of the EP, it is striking that there are still many similarities between their powers. Moreover, in the light of the Meroni principle, the influence and powers of the agencies will depend to a large extent on the Commission endorsing their advice when adopting general or specific (non-) binding measures. In addition, the Commission enjoys certain default powers to control the activities of the individual national regulatory authorities beyond its control over their functions within the network agency itself. In particular, the new Directives and regulations expand its ex ante regulatory powers to supervise and regulate the activities of the national authorities, such as the power to adopt general binding measures on the basis of the Comitology decision and to veto draft decisions of the NRAs.[81] Furthermore, it has an important default power—the power to formalise the 'soft-law' measures of the agencies in European legislation (e.g. in the form of Regulations), if it considers that compliance by the NRAs is deficient.[82] The Commission can rely upon these default powers to ensure compliance with the soft law rules generated through the agencies.

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[78] Compare: Van Ooik 2005, 134.

[79] European Commission, COM (2008) 135 final.

[80] The Council has reached political agreement on the establishment of ACER, notes 37 and 60.

[81] Of course the Commission can also exercise its traditional Treaty powers (Article 258 TFEU, Articles 101 and 102 TFEU and Article 106(3) TFEU) to force the MS, their NRAs and the market parties to respect European law. See Larouche 2000, 295 ff.

[82] The seventh Madrid Forum for example, encouraged by the Commission and following extensive stakeholder consultation, adopted the revised version of the 'Guidelines on Good Third Party Access Practice' (Conclusions of the 7th meeting of the European Gas Regulatory Forum, Madrid, 24–25 September 2003). Although these guidelines cannot impose binding obligations on market players, the Commission and the ERGEG verified whether network administrators were complying with them. Owing to the deficient application in practice, the Commission ultimately embedded the guidelines in Regulation 1775/2005.

But once operational, the role of the agencies is also likely to evolve and these institutions may well become more autonomous in practice.[83] Depending on the technicality and complexity of the subject matter, as well as the quality of the opinions and recommendations of the agencies, the Commission will have to give them due weight, and should provide good reasons for not endorsing them before the Comitology committees, and eventually the European courts. Furthermore, and in so far as they are based on sound reasoning and analysis by the individual Boards of Regulators, the Commission may be tempted to rely on the general non-binding measures, such as common positions, produced by the agencies themselves as an alternative to engaging in lengthy deliberations with the Member States, and competing stakeholders, for the adoption of new legislation.

8.7 Public Accountability Gaps

On the basis of the foregoing analysis it may be observed that even in the event of limited formal powers, both the ERNs and the proposed network agencies can provide substantial input into the Commission's own legislative and decision-making processes, and their recommendations and opinions, as well as codes of good practice and other non-binding measures, may have indirect legal effects on market parties (Sects. 8.3 and 8.4). The intensity of these legal effects at the national level can vary depending on the type of acts of the ERNs or the agencies, and the extent to which the individual NRAs are obliged to incorporate them into their own individual decisions at national level. This in turn raises the question to whom the networks or the agencies should be accountable, and by what means.

The ERNs and the European regulatory network agencies have been characterised as hybrids—as the product of a process of 'double delegation' of tasks and powers of the NRAs and the European Commission.[84] On the one hand, the Member States have delegated the powers of their NRAs to interpret European law and to co-operate with NRAs from other Member States in cases with cross-border aspects, upwards to the ERNs. On the other hand, the Commission has delegated (limited) powers downwards to oversee the correct and uniform application of European law by the NRAs, and to take informal measures to foster consistency. National authorities and the Commission had in turn acquired delegated power at national and European level, respectively, to execute European legislation. Double delegation can complicate the allocation of political responsibility for the activities of the networks as well as the

[83] Krapohl 2004, 534; Dehousse 2002, 223, 2008, 799.

[84] This concept is used by Coen and Thatcher 2008. In a strict legal sense, delegation often does not occur because the European legislation does not contain explicit principles for the delegation of powers of the NRAs and the Commission to the European networks. However, the founding of the networks leads to the de facto delegation of powers. In case, the European regulatory agencies will be founded, the European legislator will formalise the delegation of powers and tasks of the Commission and the NRAs to the network agencies.

monitoring of the exercise of delegated powers. As a result, traditional checks and balances at both European and national level become difficult to operationalise.

The following sections analyse the possibilities for ensuring both the political and legal accountability of the ERNs in the present institutional context and compare them with the possibilities for the political and legal accountability of the proposed European network agencies. It is submitted that, the greater the intensity of the legal effects of the acts of the agencies and the networks, the stricter the accountability requirements should be.

Political accountability here refers to the political monitoring of the networks and the agencies by the European Parliament and/or the national parliaments at the European and national level respectively and the political processes by which the networks and the agencies can be held accountable for their activities.[85] Parliamentary control instruments may be supplemented by administrative processes through which the agencies and networks account for their activities to the interested market parties (stakeholders) in a more direct way, e.g. by imposing duties to organise stakeholder consultation procedures on draft general binding measures and transparency duties. These accountability mechanisms are also categorised as social or stakeholder accountability mechanisms.[86] Legal accountability here refers to the processes to control the legality of the acts of the regulatory networks and agencies, including the duty to provide reasons and adequate judicial protection for the market parties, other EU institutions and the Member States against actions, which affect their interests.[87]

8.7.1 Legal Accountability

Non-judicial and judicial remedies are both of relevance to the activities of the ERNs and the European regulatory network agencies. Non-judicial protection encompasses the right of interested parties to lodge a complaint with the European Ombudsman in the event of maladministration—a right which in principle does not exist in the present situation since the networks are not EU institutions.[88] In contrast, the proposed agencies may be made subject to legal, non-judicial

[85] Compare Bovens 2007, 455–457.

[86] Bovens 2007, 457. See also Lavrijssen-Heijmans 2006, 100–101. Usually, the stakeholders have limited means to force the networks/agencies to render account, because the possibility of judgment and sanctioning often are lacking. Therefore, it remains the question whether these mechanisms can be full accountability mechanisms (Bovens 2007, 457).

[87] Bovens 2007, 456.

[88] Article 228 TFEU. Of course any citizen of the EU or any legal person residing or having its registered office in a Member State may lodge a complaint with the Ombudsman dealing with the alleged maladministration of the Commission regarding the cooperation with the European regulatory networks.

control by the European Ombudsman as well as to the anti-fraud control function of OLAF (European Anti-Fraud Office).[89]

Access to adequate judicial protection at the European and/or national level against acts of the ERNs or of the European network agencies which directly impinge on market parties' interests and rights is the most important form of legal accountability. The intensity of the (legality) review by the courts will vary depending on the types of measures at stake. In so far as general measures are subject to political control, generally speaking, courts tend to exercise only a marginal review of the substance of the measures,[90] focussing on whether the procedural rights of the interested parties have been respected, and whether conflicting interests have been balanced in a proportionate way. In the light of the increasingly intensive review of individual administrative decisions by the ECJ and the General Court, it is argued that where such measures are adopted by the ERNs, and the network agencies, these should be subject to a more intense review, including the safeguarding of substantive and procedural rights.[91]

8.7.2 Judicial Control of ERNs

As discussed in Sect. 8.3.3, the activities of the ERNs, such as non-binding common positions like the Remedies position of the ERG, may affect the interests of the market parties in case they are applied by the NRAs when exercising their powers at national level. As these common positions, unlike the advices to the Commission, do not have to be endorsed by the Commission by means of a formal decision, the market parties may want to lodge an appeal against the common positions of the ERNs at the ECJ.

However, a direct appeal to the ECJ against acts of the networks is complicated, given the strict admissibility conditions set out in Article 263 TFEU. Given that the networks' output generally takes the form of non-binding acts, many measures may not be subject to review as they will not qualify as 'acts' intended to produce legal effects within the meaning of Article 263 TFEU.[92]

Even if the activities of the ERNs could be qualified as legal acts, however, interested parties seeking to challenge such measures must still surmount the two remaining admissibility requirements of Article 263 TFEU. Formally, the actions of the networks do not originate from an EU institution. Nevertheless, under

[89] See Articles 23 and 27 proposed regulation on ACER and Articles 40 and 47 proposed Regulation on EECMA. The EP has however deleted the provision which makes the electronic communications agency subject to control by the European Ombudsman.

[90] Hofmann and Türk 2007, 268.

[91] Hofmann and Türk 2007, 268. See e.g. ECJ case C-12/03P, Tetra Laval [2005] ECR I-987.

[92] See also Lavrijssen-Heijmans 2006, 413 ff.

certain circumstances it could be argued that these 'acts' can be attributed to the European Commission in cases where the Commission has been closely involved in the drawing up of certain documents and/or has delegated some of its tasks.[93]

Although the European Courts are notoriously restrictive in their interpretation of standing requirements for private actors, and especially of the 'individual concern criterion', in respect of certain types of measures the doctrine of what is characterised by Scott and Sturm as the 'participation exception' has been developed.[94] On the basis of this doctrine, the Courts have developed a rights-based approach, recognising locus standi for private parties who enjoy specific procedural guarantees to participate in the decision-making process on the basis of European law.[95] Although uncertainties remain as to how the ECJ will develop the 'participation exception' in the area of energy and electronic communications regulation, the case-law in any event suggests that the presence of procedural gaps in the European legislation governing the activities of the networks is currently a complicating factor in granting locus standi to interested private parties against general measures, or specific measures where they are not addressees.[96]

If the market parties want to challenge a Commission decision incorporating common positions of the European networks, they will face the same admissibility hurdles.[97] For instance, some Commission documents, such as comments on draft decisions of the NRAs do not qualify as legal acts within the meaning of Article 263 TFEU, because they are not intended to produce legal effects vis-à-vis third parties.[98] For interested parties, the only remaining possibility will, therefore, often be to lodge an appeal with the national courts against the national decisions ultimately incorporating the advices or the common positions of the networks (Sect. 8.8).

8.7.3 Judicial Control of European Regulatory Network Agencies

As suggested, the agencies' output will take to a large extent the form of general and specific non-binding measures (Sect. 8.4.3). Consequently, a major part of their activities will not be within the scope of Article 263(1) TFEU, because they do not qualify as 'acts' within the meaning of this article. Unlike the ERNs, the

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[93] Compare also General Court, Case T-133/03, Schering Plough, n.y.r. and General Court, Case T-123/00, Thomae [2002] ECR II-05193, in which the General Court imputed certain acts adopted by the EMEA to the Commission on the grounds that the basic Regulation No 2309/93 only provides for advisory powers for the EMEA.

[94] Scott and Sturm 2007, 14.

[95] Scott and Sturm 2007, 14. See e.g. General Court, Case T-13/99, Pfizer [2002] ECR II-3305, para 101.

[96] This is also confirmed by General Court, Case T-326/99, Olivieri [2003] ECR II- 6053.

[97] Lavrijssen-Heijmans 2006, 350 ff.

[98] General Court, Case T-109/06, Vodafone, [2007] ECR II-5151.

energy agency will probably also have the power to take binding specific decisions, that may affect the interests of the market parties and that are not subject to approval by the Commission (Sect. 8.4.2). For instance, the interests of a market party in the energy sector (and its competitors) may be affected by the decision of the energy agency that its cross-border infrastructure will be subject to the rules of a certain country. In the proposed model for the energy agency, appeal to the General Court against the binding acts of the agency is envisaged. However, the 'individual concern criterion' is likely to remain an obstacle for private parties to appeal the binding specific decisions of the agency of which they are not the addressees. It will also remain an obstacle for the private parties to appeal the general binding measures of the energy agency that are proposed by the European Parliament (Sect. 8.4.1).

If private parties have met the admissibility requirements of Article 263 TFEU, the European courts must play a crucial role in reviewing whether procedural rights have been respected, that the measures concerned are based on adequate scientific or technical evidence and sound economic and legal reasoning as well as whether conflicting interests are weighed in a proportionate way.[99] In deciding on the legality of Commission acts, the European courts may take into consideration whether the agencies' opinions on which the measures are based respect the principles of excellence, independence and transparency. These principles were elaborated by the General Court in the *Pfizer* case.[100] Should the Commission deviate from this advice, it must base its decision on dissenting or supplementary expert advice whose probative value is at least commensurate with the advice concerned.[101] The latter case confirms that the European courts tend to impose high procedural and evidentiary standards on the Commission, even if decisions concern highly technical matters.[102]

8.8 The Role of the National Courts

Formally, national courts are only competent to review national decisions of the NRAs in which the binding and non-binding acts of the ERNs or the network agencies are applied. Here the crucial question is to what extent the national courts are bound by the acts of the ERNs and the network agencies, and to what extent they can afford legal protection to third parties affected by those acts.

Pursuant to Article 4 TFEU (formerly Article 10 EC), in assessing national regulatory decisions, the national courts must interpret national legislation in the

[99] Scott and Sturm 2007 refer in this regard to the catalyst function of the courts.

[100] Case T-13/99, para 159.

[101] Case T-13/99, para 199.

[102] Scott and Sturm 2007. See e.g. also ECJ, Case C-269/90, Technische Universität München-Mitte [1991] ECR I-5469.

light of the relevant directives and must apply directly effective European law, such as directly effective provisions of the Treaties and European regulations.[103] Given the predominantly non-binding or 'soft-law' status of the majority of the ERNs' or agencies' output, the obligation for the national courts is not so far-reaching that they must either apply general non-binding measures, such as common positions or best practice codes, directly or must interpret national legislation as far as possible in conformity with those non-binding measures. They are at best, a tool for the interpretation of European law (and national law which implements European law).[104] If the NRAs explain adequately why they have or have not taken account of these type of measures in their final decision, this should be sufficient for the national courts.

Furthermore, in an appeal against decisions by the national authorities, the national courts cannot rely on the non-binding measures of the networks or of the agencies as an interpretation tool in the event of a conflict with directly effective European law.[105] However, it is submitted that courts may feel they are not in a good position to rule on the legality of general soft law measures, such as common positions, that relate to highly complicated technical and economic matters and that are adopted after extensive public consultations, by the networks or the agencies.[106] In addition, the European Commission may eventually take a binding decision, such as a veto decision, forcing the NRAs to apply certain non-binding acts of the networks or of the agencies. In that case, the *Masterfoods* judgment confirms that the national courts must in principle respect Commission decisions.[107] If they doubt the validity of those decisions, the national courts must submit a reference for a preliminary ruling on their validity to the European Court of Justice. However, due to the time these proceedings may take and the dynamics of the energy and electronic communications market, the lower national courts may not be prepared to suspend national proceedings and to submit preliminary validity questions to the ECJ.

Although the national courts have powers to review national decisions of their NRAs, and to rule on the reliance by the latter on European non-binding measures, the foregoing shows their function faces practical and legal limits. Therefore, it may be doubted whether they can provide a sufficient degree of legal protection against measures of the networks or the agencies for which there is no legal protection available at the European level. Nevertheless, some national courts have recently

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[103] See e.g. CBB 30 November 2006, AWB 05/758 and 05/815, Gas Transport Services versus NMa, LJN:AZ3365.

[104] Cf. Senden 2004, 386–392. This path was also followed by the Dutch Trade and Industry Appeals Tribunal (CBB) in the so-called LUP case with regard to the significance that the DTe (Dutch Energy regulator) could attach to the arrangements made in the Florence Forum, CBB 2 August 2002, AWB 00/641, Electrabel et al. versus DTe, LJN:AE7773.

[105] When reviewing national administrative decisions the courts should judge that the NRAs cannot rely on the non-binding measures of the networks or the agencies in the event of a conflict with directly effective European law and on that basis annul the national decision.

[106] See also Larouche and de Visser 2005.

[107] ECJ, Case C-344/98, Masterfoods [2000] ECR I-11369.

demonstrated that they are not averse to conducting an extensive review of national decisions and have annulled NRAs' decisions, despite the fact they were implicitly approved by the Commission.[108] The national courts could also be encouraged by these rulings to look critically at soft law acts of the European networks or European agencies dealing with specific cases in the assessment of national decisions.

In the event that the European regulatory network agencies evolve on the lines of the current proposals of the Commission, the role of the national courts will inevitably change. National courts will not only be confronted with general and specific non-binding measures from the agencies, but also with specific binding decisions of the energy agency (Sect. 8.4.2). The national courts will in principle be required to recognise the direct application of binding norms and decisions. However, on a substantive level the courts could be faced with conflicts between the European interest and the national interest (see Sect. 8.9.2). It will be of crucial importance for the uniform application of European law in the future how the national courts will deal with these potential conflicts and whether they will be willing to submit references for preliminary rulings to the ECJ.

8.9 Political Accountability

Since the output of the proposed agencies will continue to a large extent to be non-binding, market parties will be confronted with the same obstacles for judicial protection as under the present situation, as long as the activities of the agencies cannot be qualified as legal acts within the meaning of Article 263 TFEU. This implies that alternative forms of checks and balances become crucial. The next sections examine the potential for, as well as the limits to, the political accountability of the ERNs and assess whether the proposed European regulatory network agencies could be subjected to stricter political control.

8.9.1 Political Accountability of the ERNs

As explained in Sect. 8.3, the ERNs advise the European Commission on the adoption of general binding measures as well as non-binding measures. The European Parliament can at least indirectly supervise the substance of the advices

[108] CBB (Dutch Trade and Industry Appeals Tribunal) 11 May 2007, AWB 06/125, 06/127, 06/128 and 06/129, Tele2 et al. versus OPTA, LJN: BA4880 and CBB 29 August 2006, AWB 05/903 and 05/921 to 05/931, KPN et al. versus OPTA, LJN: AY7997, CAT (Competition Appeal Tribunal) 29 November 2005, Hutchinson 3G UK Limited versus OFCOM, [2005] CAT 39 and ECAP (Irish Electronic Communications Appeals Panel), decision No: 03/05 of the ECAP in respect of Appeal numbers ECAP6/2005/03,04,05, Vodafone, O2 and Meteor versus Comreg. See also Lavrijssen-Heijmans 2006, 355 ff.

of the networks by holding the European Commission accountable for (not) endorsing them.[109] The powers of the European Parliament to subject general measures to scrutiny are the most far-reaching in the regulatory procedure, as provided for under the Comitology Decision. Currently, this procedure is only applied in the energy sector, however.[110] Following the entry into force of the 'Regulatory Procedure with Scrutiny', the EP may now exercise true political supervision on the adoption of general implementing measures that amend, supplement or delete non-essential elements of a basic act that was adopted under the co-decision procedure.[111] It now enjoys the power to veto draft implementing measures of the European Commission on the grounds that the measures exceed the implementing powers provided for in the basic instrument, or that the draft is not compatible with the aim or the content of the basic instrument or does not respect the principles of proportionality and subsidiarity.

The Commission does not have to officially endorse general non-binding measures of the ERNs, such as codes of good practice or common positions (Sect. 8.3.3.1). Therefore, these measures are not subject to Parliamentary scrutiny, even if they can have significant implications for the market parties if they are applied by the NRAs when exercising their national powers (Sect. 8.3.3.1). Unlike the Commission, the ERNs are not politically accountable at the European level at all. Eventually, the European Parliament can call a Commissioner before an EP committee and require an explanation of the way in which the Commission has co-operated with the national authorities through the ERN.[112] National parliaments can also summon the responsible ministers (and sometimes, the head of the NRA), but they cannot call European Commissioners to account. In this connection, a background study by the Netherlands Court of Audit on economic regulation refers to an 'accountability vacuum'.[113] It suggests that the appropriate national Minister should be aware in advance of the arrangements that the NRAs make with each other within the networks, and if necessary, should be in a position to issue instructions to secure national policy goals.[114] Given the consensus-driven nature of the co-ordination process within the networks, any single set of national preferences or instructions can have but a limited influence on the actual output of the ERNs.

[109] On the basis of Articles 230 and 234 TFEU.

[110] See Articles 2, paras b, 5, 7 and 8 of Decision 1999/468/EC.

[111] See Decision 2006/512/EC amending Decision 1999/468/EC. See also Bradley 2008.

[112] Article 230 TFEU.

[113] Netherlands Court of Audit, 'Toezicht op markten', *Kamerstukken II*, 2004–2005, 29960, no 1–2, p. 32.

[114] See also Ministry of Economic Affairs, 'Visie op markttoezicht', June 2004, p. 4.

8.9.2 *European Regulatory Network Agencies: Solution or New Political Accountability Problems?*

An advantage of the proposed agencies is that their legal personality offers opportunities to the legislator to better regulate political accountability, including activities that are not governed by the 'Regulatory Procedure with Scrutiny'. The latter procedure will continue to apply and will be extended to an important part of the work of the agencies when preparing opinions on draft general binding measures for the Commission.

Notably, the Directors of the agencies are made politically accountable to the European Parliament in several ways. The EP and the Council may call upon the Director to submit a report on the performance of his duties and before appointment the director may have to appear before the EP committee. The agencies' work programmes and annual report have to be transmitted to the EP, the Commission and the Council. Moreover, the EP may exercise budgetary authority in relation to the activities of the proposed agencies, giving it the ability to block funding or to refuse to discharge the implementation of the budget in case it does not agree with the way they perform their tasks. Moreover, as mentioned by Sect. 8.2.3, both the Commission and the Member States may influence the policy input of the agencies via their membership of the Management Boards and their involvement in the drawing up of the budgets, annual reports, work programmes and the appointment and the evaluation of the Directors. In addition, the Commission has a non-voting member on the Regulatory Boards. The EP has proposed several amendments that strengthen its supervisory powers with regard to the energy agency, which is related to its proposals to give this agency powers to adopt general binding measures (Sect. 8.2.3). For instance, it has proposed that it will appoint two members of the Management Board and, that it will, upon the proposal of the Commission, decide on the removal of the Administrative Board and approve the appointment of the Director. The amendments of the EP to simplify the structure of the electronic communications agency, by abolishing the Administrative Board and the Board of Appeal, are linked to its proposals to limit the powers of this agency (Sect. 8.2.3).

8.9.2.1 Assessment

Despite the proposed institutional reforms to the present network arrangements, the regulatory network agencies remain hybrids. The main reason for this hybridity is, that there will be unclear dividing lines between the competences of the Commission and the agencies on the one hand and between the agencies and the NRAs on the other hand.

First, the formation of European network agencies, and in particular in the energy sector, at first sight appears to create a shift towards centralised powers for the adoption of binding technical decisions and/or decisions with potential cross-border implications. Importantly, however, economic regulation will to a large extent

remain a national competence, albeit that the NRAs, should respect the European interest when regulating on matters such as tariffs or access conditions.[115] Ensuring a clear-cut separation distinction between technical and economic norms (or between those which have cross-border or pure "internal" aspects) may prove elusive in practice. The regulation of Europe's gas and electricity markets will involve an intricate process of shared competences. The picture is further complicated by the fact that in the current proposals the Commission makes virtually no effort to explain in detail what the obligation on NRAs to respect the European interest when exercising economic regulatory powers, should be taken to involve. It cannot be ruled out that NRAs will be confronted with a substantive conflict between the European interest, for example to promote large-scale infrastructure projects of common European interest, and the interests of national end-users in holding tariffs down.[116] This also begs the question of who decides which interest should prevail: the Commission, the European network agency, the NRA, the European Parliament and/or the national ministries and parliaments? How should the NRAs deal with such a substantive conflict of interest? The Commission itself is in favour of a further extension of its ex ante monitoring powers, which enable it to block national decisions that frustrate the completion of the internal market. However, it may be doubted whether the Commission's proposals leave sufficient flexibility to the NRAs to adjust their regulatory solutions to specific national conditions as well as to take into account national non-competition interests, such as the affordability and accessibility of essential services.

Procedural uncertainties may further cloud the dividing line between the powers of the Commission and those of the European regulatory network agencies, given the attempts by the Commission to circumvent the 'Meroni doctrine' (Sect. 8.5) by making a distinction between policy-making and policy-implementation. However robust the distinction between policy-making (Commission) and policy-implementation (agencies) may sound in theory, in the practice of economic and social regulation this divide is difficult to make.[117] Even where decisions appear to be purely concerned with implementation, the complexity of the economic and legal analysis that must be carried out prior to adopting a decision on, for example, a tariff code, and the potentially conflicting interests of the different market parties, means that an implementing authority will often have to make difficult socio-economic choices.

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[115] For example, in the energy sector the NRAs will retain the power to regulate the tariffs for access to the national energy networks.

[116] The example of the 'gas roundabout affair' of the Dutch Energy Regulator (DTe), for instance, showed that it can on the one hand be in the European interest for the transit of gas through the Netherlands to be encouraged as far as possible and that the Dutch consumer connected to the energy networks should help pay for the investments in the transport network needed to achieve this. On the other hand, however, it may be in the national public interest for the consumer not to be confronted with increases in end user tariffs leading to unaffordable energy prices. See DTe 22nd September 2006, Informele zienswijze uitbreiding H-gas transportsysteem, kenmerk 102259/39.B828.

[117] Dehousse 2002, 209 and Everson 2005, 150–153.

In addition, whereas executive agencies now have a relatively clear place in the European Union's institutional framework and are governed by a single legal base, the position of regulatory agencies, and by implication regulatory network agencies remains vague.[118] Rules on the size and composition of their Administrative boards vary, and even if the Commission is normally represented, it is always in a minority, sometimes even without a right to vote.[119] Furthermore, according to the EP amendments, the Administrative Board may even be absent in the electronic communications agency and the Commission has only a non-voting representative on the Board of Regulators of the proposed agencies.

This in turn raises issues about the extent to which the Commission can be held accountable for acts taken by agencies. The issue of accountability is also further complicated by the Commission's involvement in other aspects of the agencies' work, including the appointment of the Director and its rights to be consulted on, or approve work programmes and its responsibility for conducting evaluations of the Director and the agency. If an Administrative Board is present, the Commission is also involved in the appointment of the other members of this Board and may participate in the latter. In addition, the Member States and possibly the EP have rights to participate in the Administrative Board and to decide on the adoption of the budget, annual reports and work programmes. As a consequence of the different lines of accountability, there is a risk that accountability becomes diffuse or that the different accountability fora have conflicting views.

Finally, certain accountability gaps that result from double delegation and are present under the current situation will remain (Sect. 8.9.1). The European Parliament, but not the national parliaments can in principle call the Commission and the Director of the European regulatory agencies to account. This problem is further exacerbated by the uncertainties as to whether comitology committees, where they are involved, function as a control device in relation to the work of the Commission and eventually the proposed agencies, or whether in actual practice, as some have argued on the basis of the General Court's ruling in *Rothmans*,[120] they are also part of the bureaucratic machinery. The dividing lines between the different roles national and Community actors play have become inherently vague.[121]

8.9.2.2 Transparency

Given the weak political constraints on the activities of the present networks as such and the difficulties that may arise when establishing the political accountability of

[118] See Council Regulation 58/2003 of 19 December 2002, laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ 2003 L 11/1 and Commission, Com(2008) 135 final, 11.3.2008.

[119] Commission, Com(2008) 135 final, 11.3.2008.

[120] General Court, Case T-188/97, Rothmans [1999] ECR II-2463.

[121] Dehousse 2002, 227 ff.

the proposed European regulatory network agencies, it becomes even more important that the actions of the networks and the agencies are couched in clear procedural rules to ensure a fair hearing to all sides and on the transparency of their activities.[122] Transparency is not a substitute for political accountability.[123] However, transparency can promote accountability, in the sense that politicians and interested market parties will be able to monitor the actions of the networks and the agencies and demand an explanation of them.

Whilst it is to be applauded that the present European regulatory networks act in a transparent manner in practice and consult extensively with stakeholders on draft positions and advices, beyond imposing general duties of consultation, the European legislation setting up the networks contains virtually no procedural rules for the activities of the networks.[124] In addition, the hybrid status of the networks means there is a considerable lack of clarity about the right of stakeholders to gain access to the workings of the European regulatory networks.[125] Neither the EU directives nor the Transparency Regulation 1049/2001 give citizens a right to access information on EU-related activities held by the (national authorities of the) Member States.[126] Therefore, from the perspective of furthering the transparency of the EU-related activities of the Member States, it is important that the ECJ has rejected in *Sweden* a strict interpretation of Regulation 1049/2001 by the Commission and the General Court, effectively conferring on the Member States a general and unconditional right of veto to the disclosure by the Commission of documents originating from them.[127] The ECJ considered that the Member States cannot refuse, without giving reasons and without referring to the substantive exceptions provided in the Regulation, to allow the Commission to release documents originating from them, including documents which have been exchanged within a European regulatory network.[128]

The agency model offers the advantage that with the entry into force of the proposed regulations on the energy agency and the electronic communications

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[122] See Curtin 2007, 532.

[123] Bovens 2007, 13.

[124] See e.g. the ERGEG Rules of procedure (Ref: E05-EP-08-03). A separate document outlines the consultation process followed by ERGEG (Ref: E07-Ep-16-03). See www.ergeg.org. Accessed 14 May 2012.

[125] With regard to the ERG and the ERGEG, for example, the question rises to what extent Regulation 1049/21/EC applies to their activities (Regulation 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/53). See also Lavrijssen-Heijmans 2006, 409–410.

[126] Response of the European Ombudsman, P. Nikiforos Diamandouros, to the Commission's Green Paper 'Public Access to Documents held by Institutions of the European Community: A Review', 11 July 2007.

[127] Article 4, para 5 of Regulation 1049/2001 offers a MS the possibility of requesting an institution not to publish a document originating from that MS without its prior permission, and the option of refusing to give that permission.

[128] ECJ, Case C-64/05P, Sweden [2007] ECR I-11389. See also General Court, Case T-237/02, TGI v. Commission [2006] ECR II-5131 and ECJ, Case C-266/05 Sison [2007] ECR I-1233.

agency, Regulation 1049/21/EC will become applicable to workings of the agencies. Moreover, the agencies are made subject to more explicit and specific procedural duties, including public stakeholder consultations.[129]

8.10 Improving Political and Legal Accountability

Despite the fact that from a formal perspective, the political accountability of the proposed network agencies seems to be improved, the process of establishing de facto political accountability for the new mixed arrangements may still prove complex (Sect. 8.9). The actual functioning of the political accountability mechanisms will depend on how they are operated in practice, and on the ability of the different accountability fora to respect each others' roles as well as being transparent on their own. In the next sections, we will put forward several additional recommendations to improve the political and legal accountability of the proposed agencies. Taking into account the similarities between the tasks and powers of the current networks and the proposed agencies, these proposals may also serve as a source of inspiration for strengthening the accountability of the networks in the present form or any other network (plus) model that may be adopted to promote regulatory convergence.

8.10.1 Full Disclosure of Relevant Evidence and Procedural Innovations

The proposed regulations on the European network agencies provide for improved procedural rules, including stakeholder consultations. However, as the European courts will take into consideration the existence and actual exercise of procedural rights in conferring locus standi on market parties, it is advisable not only to strengthen the position of the regulated market players, such as suppliers and network operators, but also to put in place procedural safeguards so that other stakeholders, including consumers, can be heard in the course of the preparation of any act of the Agency, and subsequently are guaranteed access to adequate legal protection against binding agency or Commission measures affecting their interests (Sects. 8.7.2 and 8.7.3). The creation of sector-specific European consumer organisations, with procedural rights in relation to the adoption of acts that may affect the interests of a considerable group of consumers in the EU, may be a useful option.[130]

[129] Compare Article 27 of the proposed regulation on ACER with Articles 42, 45 and 47 of the Regulation on EECMA.

[130] Stakeholder is a broad notion which refers to different parties with divergent interests (competitors, consumers and the regulated market players). It would go beyond the scope of this

Despite being generally lauded for conducting transparent stakeholder consultation procedures, both existing European regulatory agencies, such as EMEA, and indeed many NRAs are often criticised for not fully disclosing all the evidence they have considered, including minority opinions, in motivating decisions.[131] The transparency of the decision-making process could be considerably enhanced if the proposed legislation was to include a specific provision requiring both the Commission and the proposed European regulatory agencies to make a full disclosure of the evidence on which their acts are based and not just pick and choose the evidence that is most favourable to their final position. The duty to publish minority opinions within the regulatory agencies could also be made mandatory. A confrontation between majority and minority opinions allows stakeholders, and eventually courts, to make a fuller assessment of the value of majority opinions.[132]

8.10.2 Accountability Networks

Additional mechanisms for strengthening the political and legal accountability of the European regulatory network agencies may be necessary to deal with the specifics of double delegation. In a situation of double delegation the European legislator should look beyond the traditional European and national political and legal accountability mechanisms to ensure a legitimate exercise of tasks and powers; it should design accountability mechanisms that are aligned with the transnational co-operation between European institutions and NRAs and the mixed exercise of European and national powers.[133] The recommendations put forward by Harlow and Rawlings, namely that a partial answer to the acknowledged problems of network governance may lie in the construction of 'accountability networks', could serve as a source of inspiration here.[134]

A useful innovation in this respect could be the creation of a mixed parliamentary commission consisting of members of the European Parliament and the national parliaments, to which the Commissioners and the Directors of the European regulatory network agencies are accountable for the exercise of the tasks and powers delegated to them. This parliamentary commission can hold the Commission and the European agencies accountable for establishing clearer lines of allocation of duties and responsibilities between the Commission, the European

(Footnote 130 continued)
chapter to set out in detail what the interests of all stakeholders are and how those interests can be accommodated in terms of representation and legal protection.

[131] See for criticism on the practice of EMEA: Garattini and Bertele 2010. See also the memorandum of G. Shuttleworth, submitted to the House of Lords Select Committee on Economic Regulation, 20 May 2007.

[132] Scott and Sturm 2007, 18.

[133] Hofmann and Türk 2007, 267.

[134] Harlow and Rawlings 2007.

agencies and national authorities. This will enable the parliamentary commission to control and monitor the activities of the Commission and the agencies to ensure that the exercise of complementary competences do not result in conflicting competences, frustrating both political and legal accountability on the part of the agencies. Moreover, the mixed commission can monitor whether the Commission and the agencies leave sufficient flexibility to the NRAs to attune regulatory solutions to specific national conditions.

Also the competent national courts in the liberalised sectors could form a 'network of accountability' and intensify their co-operation by exchanging information on rulings and organising joint training initiatives. Moreover, the national courts could aim for a uniform approach to the weighing of European and national interests in assessing national decisions as well as to weight that should be given to the various soft law documents adopted by the Commission and the European regulatory network agencies.[135] Harlow and Rawlings also point to the co-operation between the European Ombudsman and the national ombudsmen in a developing European network of ombudsmen which is striving to develop standards of good governance, information exchange, the setting up of a European complaints system and, in future, the carrying out of joint investigations of maladministration in the co-operation between European and national organisations.[136]

8.11 Conclusion

Given the alleged restrictions on the delegation of powers resulting from the Meroni judgment, the proposals to set up European regulatory network agencies for the energy sector and electronic communications sector appear at first sight as a revolution. A closer inspection, however, suggests that the establishment of European regulatory network agencies can be seen more as the formalisation of a trend towards hybrid new governance structures. The creation of these agencies transforms decentralised co-ordination, already fostered through the European regulatory networks, into a more centralised approach to regulatory convergence, which in turn can impinge directly or indirectly on the rights and obligations of the market parties. Although formally these networks and agencies have only limited formal powers, this article has shown that they may have a substantial output. Depending on the quality and technicality of their advices, recommendations and common positions, they may gain an autonomous position in influencing the way the Commission and the individual NRAs exercise their powers.

We have examined whether the creation of the proposed agencies and the formalisation of the networks' tasks and duties may well enhance legitimacy and engender clarity, strengthening the political and legal accountability of the

[135] Harlow and Rawlings 2007, 546 ff.

[136] Harlow and Rawlings 2007, 558 ff.

European regulatory co-ordination between the NRAs and the Commission. In reality, due to the strict admissibility conditions of Article 263 TFEU, and, especially in the electronic communications sector, the limited powers of the agencies to adopt legally binding acts, legal accountability at the European level can only contribute to the legitimacy of the European regulatory network agencies to a limited extent.

Although, from a theoretical point of view, the political accountability of the proposed agencies has been improved in several ways, by strengthening the ex ante and ex post control of the Commission, the European Parliament and the Member States, in practice political accountability has become more diffuse because of the different lines of accountability. Moreover, as a consequence of the double delegation of powers of the Commission and of the NRAs to the proposed agencies and the apparent restrictions imposed by the Meroni doctrine, the agencies and their actions will continue to be characterised by a certain hybridity regarding the demarcation of European and national powers as well as of European and national interests (Sect. 8.9).

In the light of the Court's concern in Meroni to maintain the institutional balance—then the interplay between the European and national levels which result from double delegation of powers to the ERNs and the European network agencies—requires a more elaborate system of checks and balances. The European legislator should look beyond traditional mechanisms to secure political and legal accountability; more attention to the creation and detailing of mixed or complementary accountability mechanisms, in which representatives of the European and/or national accountability forums have a secure role to play is urgently required. In this respect, this article has put forward a number of concrete recommendations to respond to accountability issues arising out of the process of double delegation and the resulting mixed exercise of European and national powers, such as the creation of a mixed parliamentary commission consisting of members of the European parliament and the national parliaments to monitor the activities of the Commission and the agencies (Sect. 8.10.2).

Furthermore, the legal position of stakeholders also needs to be strengthened in this respect along the lines set out in this article (Sect. 8.10.1). Procedural and evidentiary stipulations may stimulate the European courts to grant locus standi to stakeholders that actively made use of their procedural rights. They may be stimulated to effectively review acts of the agencies or of the Commission that are based on a sound and comprehensive evidentiary base. At their turn, all the European and national fora which are responsible for holding the Commission, the agencies or the NRAs legally accountable, may improve their functioning by forming a network of European and national accountability fora, such as a European network of ombudsmen or a European network of national courts, to deal with the legal complexities of reviewing acts that are produced by a network of European and national administrative authorities.

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Chapter 9
Reinventing Accountability: Judicial Control Versus Participation

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Contents

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_9,

9.1 Introduction

Journals these days are full of articles that grapple with new modes of governance. Initially, the aim was to map the terrain: chart their emergence, compare and contrast them against conventional processes for making and enforcing European law and tease out their characteristic attributes. Put differently, we needed to define what we meant when we referred to an institutional or procedural arrangement as a 'new form of governance'. Much of the discussion in these early contributions focused on new governance's ability to better achieve the EU's ambitions. More recently, the tone of the debate has changed. Realisation has dawned that what matters is not just whether say, the Open Method of Coordination is politically or economically expedient, but also—and arguably even more so—whether the use of these new modes of governance produces a Rule of Law deficit. This article seeks to examine this question in relation to one such new mode of governance: the networked system for the application and enforcement of European competition and electronic communications law. Few papers have focused squarely on the challenges posed by novel forms of governance used for the administration of legal rules and this article aims to start redressing this gap.[1] As for the choice of legal fields, competition law is one of the key pillars of Europe's bid to create and maintain an internal market and electronic communications law is often seen as the front runner for developments in other liberalised sectors. Further, the analysis will concentrate on one particular aspect of the Rule of Law that strikes a most familiar chord with European law scholars, namely the amenability of practices to judicial control. Consider in this respect of the words of the Court of Justice in its most famous of pronouncements on the matter, *Parti écologiste "Les Verts" v European Parliament*:

> It must first be emphasised in this regard that the European Economic Community is a community based on the Rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.[2]

Indeed, anyone at least marginally familiar with the case law emanating from Luxemburg will know that the requirements of access to court and effective judicial protection feature prominently in that body of work.[3] At the same time,

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[1] It should, however, be acknowledged that the distinction between law making and law enforcement is becoming increasingly blurred.

[2] *Parti Ecologiste 'Les Verts' v European Parliament* (294/83) [1986] ECR 1339 [23].

[3] See e.g. *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (11/70) [1970] ECR 1125 [3]–[4]; *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* (4/73) [1974] ECR 491 [13]; *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) [1986] ECR 1651 [17]–[20]; *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Heylens* (222/86) [1987] ECR 4097 [14]–[15]; *Unibet (London) Ltd v Justitiekanslern* (C-432/05) [2007] ECR I-2271.

adherence to this aspect of the Rule of Law is not problem free as is illustrated by the fierce debate on rules of *locus standi* for non-privileged applicants in relation to direct actions.[4]

This article first introduces the reader to the networked mode of governance in place for the enforcement of European competition and electronic communications law. The aim here is to flesh out the nature and scope of the judicial accountability deficit in relation to one particular type of network activity: the adoption of soft law instruments aimed at influencing individual decisions taken by the relevant national authorities. In part two, the various obstacles that would have to be overcome to correct any deficit are considered. We shall also deal with the feasibility and desirability of introducing judicial oversight, and in this regard, reliance will be placed not only on legal, but also on economic arguments. Thirdly, we examine the possibility of relying on participation to achieve the ends pursued by judicial review.

9.2 A New Form of Governance for EU Competition and EU Electronic Communications Law

This section presents networked governance as it is currently practiced for the enforcement of European competition and European electronic communication law and the reasons for its introduction. It will clarify one prominent scenario where judicial accountability issues manifest themselves and why the *status quo* may be considered objectionable.

9.2.1 Tracing Changes in Enforcement Paradigms

From the 1960s to the turn of the century, European competition law was enforced in a centralised fashion, with the Commission occupying pride of place. For restrictive agreements to escape the prohibition found under Article 101(1) TFEU, they had to be notified to the Commission, which institution also had the exclusive competence to grant exemptions under Article 101(3).[5] While national competition authorities and courts could also decide on infringements of the primary

[4] Consider e.g. Ward 2001; Arnull 2001; Neuwahl 1996; Craig 1994, 507; Harlow 1992, 213; Rasmussen 1980, 114; Barav 1974, 191. The root cause of the debate is the judgment of the ECJ in *Plaumann & Co. v Commission of the European Communities* (26/62) [1963] ECR 95, confirmed in *Unión de Pequeños Agricultores (UPA) v Council of the European Union* (C-50/00P) [2002] ECR I-6677.

[5] Council Regulation (EEC) No 17 (First Regulation implementing Articles [101 and 102] of the Treaty) [1952–62] OJ Spec Ed 87, Articles 4 and 9(1).

prohibition,[6] they were denied the competence to apply Article 101(3) TFEU. As the years went by, it became painfully apparent that the Commission lacked sufficient resources to properly acquit itself of this enforcement task. The Commission attempted some adjustments to keep the system up and running, such as the adoption of *de minimis* notices,[7] the issuance of comfort letters[8] and notices encouraging the participation of national authorities and courts in competition enforcement.[9] While these had certain undeniably positive effects on the Commission's workload, by the millennium a consensus had emerged that the existing approach was untenable and in need of a thorough overhaul. This resulted in the adoption of Regulation 1/2003, which abolished the notification system and put an end to the exclusive competence of the Commission over Article 101(3) TFEU.[10]

The overall thrust of the reform is to shift the burden of enforcing Articles 101 and 102 from the Commission onto national authorities and courts, so as to enable the Commission to free its resources for the most important cases. Regulation 1/2003 marked the end of four decades of traditional, centralised enforcement of EU law. The changes brought about were thus the subject of intense debate in the run-up to its adoption.[11] Practitioners and academics alike were especially worried that the uniform application of the European competition rules would be jeopardised by the injection of more decentralisation in the enforcement system. To alleviate these concerns, the Regulation provides for close cooperation between all the authorities on matters such as information exchange and case allocation.[12] It also

[6] For national competition authorities, this was laid down in Article 9(3) of Reg 17 and Article 104 TFEU. For national courts, see *Belgische Radio en Televisie v SV SABAM* (127/73) [1974] ECR 51 [16], where the ECJ ruled that only Article 101(1) TFEU had direct effect.

[7] *De minimis* notices exempt market operators whose market share does not exceed a certain threshold from the notification requirement, Notice concerning agreements, decisions and concerted practices of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community [1970] OJ C64/1 as amended.

[8] Comfort letters informed firms that after a first perusal of their agreement the Commission saw no cause for concern.

[9] Notice on cooperation between national courts and the Commission in applying Articles [101 and 102 TFEU] [1993] OJ C39/6 and the Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles [101 and 102 TFEU] [1997] OJ C313/3.

[10] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [101 and 102] [2003] OJ L1/1.

[11] See e.g. the contributions in Ehlermann and Atanasiu 2001; Hawk 2002; Geradin 2004; Ehlermann 2000, 537; Forrester 2001, 173; Idot 2001, 1370; Jaeger 2000, 1062.

[12] Regulation 1/2003 Articles 11–12 and Notice on cooperation within the Network of Competition Authorities (ECN Notice) [2004] OJ C101/43. In addition, the Regulation also addresses the relationship between the Commission and national courts, notably in Articles 15 and 16, further fleshed out in Notice on the cooperation between the Commission and national courts [2004] OJ C101/54. The Commission-courts liaison will not be further discussed here.

incorporates a number of procedural consistency mechanisms.[13] National competition authorities must consult with the Commission before taking decisions in application of the EU competition rules.[14] The Commission may submit observations and can even prevent the authority from finally adopting the measure, usually because the proposed measure would unjustifiably impede the homogeneity of European law. This is done by the Commission taking over the case from the national competition authority, whose jurisdiction is thereby terminated.[15] To allow these coordination procedures to work effectively, and to foster horizontal relationship among national competition authorities, a European Competition Network (ECN) has been established.[16]

The developments in the enforcement regime in the area of electronic communications have taken a somewhat different trajectory, yet the concerns and institutional solutions are largely similar. In the wake of the liberalisation of the sector, the Commission called for the establishment of independent regulatory authorities that would be charged with the daily application of this new body of rules.[17] It soon transpired that Member States used the procedural and institutional autonomy still available to them to thwart the diligent execution of the European rules. Many essential competences remained with the Ministry, leaving the regulatory authority with a patchwork of limited powers, meaning that challenges against their decisions on formalistic grounds had a high success rate. In addition, a number of authorities also deliberately misconstrued the European rules in favour of domestic interests or national firms.[18] Confronted with a pandemonium of diverging or even incompatible decisions, stakeholders appealed to the Commission to improve the effectiveness and consistency with which the European rules were applied.[19]

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[13] These are complemented by more substantive devices that seek to 'harmonize' the law to be applied by the national actors, such as the Commission's notices on the 'effect on trade' concept and the application of Article 101(3) TFEU.

[14] Regulation 1/2003 Article 11(3) and (4).

[15] Regulation 1/2003 Article 11(6) and ECN Notice (note 12) [50]–[57].

[16] <ec.europa.eu/comm/competition/ecn/index_en.html> Accessed 14 May 2012. Established by the ECN Notice (note 12) and the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, 15435/02 ADD 1. For the sake of completeness, mention should here also be made of the European Competition Authorities (ECA), founded in 2001 as a forum for discussion of the competition authorities of the EU and EFTA Member States.

[17] Directive 88/301 on competition in the markets in telecommunications terminal equipment [1988] OJ L131/73, affirmed by the Court in *Régie des télégraphes et des telephones v GB-Inno-BM SA* (C-118/88) [1991] ECR I-5941. The Community term 'national regulatory authority' was officially coined in Directive 92/44 on the application of open network provision to leased lines [1992] OJ L96/35.

[18] This is a recurring concern in the Commission's annual reports on the implementation of the telecommunications regulatory package between 1997 and 2000.

[19] Commission (EC), 'Seventh Report on the Implementation of the Telecommunications Regulatory Package' (Communication) COM(01) 706 final 13.

The new 2002 Regulatory Framework for Electronic Communications strengthens the position of national regulatory authorities as the centre of gravity for the daily application of the European rules.[20] In order to counter the undesirable enforcement behaviour that was hitherto practiced, the Regulatory Framework subjects the work of the national authorities to a number of control mechanisms to ensure consistency of enforcement across Europe.[21] These function in a largely similar way to the tools incorporated in Regulation 1/2003. Thus, national regulatory authorities are also required to notify their draft decisions to the Commission, who can make comments or, if it does not consider this to be sufficient to guarantee a satisfactory decision, adopt a veto decision, imposing a duty on the national authority to re-do the entire procedure.[22] As with the regime under Regulation 1/2003, it is foreseen that a network will be created: the European Regulators Group (ERG), which should provide an interface between the national authorities and the Commission and contribute to the consistent application of the Regulatory Framework.[23]

9.2.2 The Significance of 'Soft Law'

Our interest for present purposes lies with the ECN and the ERG and, in particular, with one of their practices. Both networks adopt non-binding legal instruments that seek to guide national authorities in the exercise of their responsibilities, and thereby introduce more homogeneity in the scope and degree of regulation across Europe. This section explains how the ECN and the ERG go about this.[24]

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[20] The regime is made up of the following instruments: directive 2002/21 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108/33; Directive 2002/20 on the authorisation of electronic communications networks and associated services [2002] OJ L108/21; Directive 2002/19 on access to, and interconnection of, electronic communications networks and associated facilities [2002] OJ L108/7; Directive 2002/22 on universal service and users' rights relating to electronic communications networks and associated services [2002] OJ L108/51; Directive 2002/77 on competition in the markets for electronic communications networks and services [2002] OJ L249/21; Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L201/37.

[21] The electronic communications regime also knows substantive tools for consistency in the form of, inter alia, a Commission recommendation on relevant markets and guidelines on the key regulatory concept, namely that of 'significant market power' (see below).

[22] Framework Directive (note 17), Article 7.

[23] <erg.ec.europa.eu/> Accessed 14 May 2012. Established by Decision 2002/627 establishing the European Regulators Group for Electronic Communications Networks and Services [2002] L200/38 as amended by Decision 2004/641 [2004] OJ L293/30 and Decision 2007/804 [2007] OJ L323/43.

[24] In addition, both networks—and the ECN in particular—have a role to play in facilitating cooperation among network members during the course of a single decision-making procedure through, for instance, the exchange of information or the (re) allocation of cases.

The ECN's most notable soft law instrument to date is the ECN Model Leniency Programme.[25] Leniency programmes reward firms that report cartels to the competition authorities and cooperate during the course of the investigation. These whistle blowers are rewarded by offering them full immunity or a reduction in the fines that would otherwise have been imposed. They have enjoyed overwhelming popularity in recent years as one of the most effective tools to uncover hard-core cartels. Regulation 1/2003 does not require that a national competition authority operates a leniency programme nor specify when, and under what conditions, an application for leniency should be accepted. Also, there is no one-stop-shop, as under the European Merger Control Regulation,[26] whereby an application to one authority would also commit the others. This state of affairs was not very efficient: firms would have to incur transaction costs in discovering whether a certain competition authority operated a leniency programme, as well as the applicable procedures and rules of that particular programme and it further meant multiple filings, which was burdensome for firms and authorities alike. In the long run, firms could thus very well decide to refrain from using the leniency programme, which would be the death knell for this favoured cartel-buster instrument. The ECN Model Leniency Programme aims to trigger a soft convergence of existing leniency programmes across Europe and to facilitate the adoption of such programmes by the few authorities that do not yet operate one. It includes the principal elements that are considered essential for any leniency programme, such as the type of information the applicant must provide and the evidentiary threshold that must be crossed before leniency may be granted.

Turning to the ERG's documents, so-called 'Common Positions', we notice that these vastly outnumber the amount of available ECN soft law instruments.[27] Some Common Positions are abstract and address issues of general concern. The best example is the common position on remedies.[28] Under the 2002 Regulatory Framework, one of the core tasks of the national regulatory authorities is to analyse electronic communications markets, select firms that enjoy significant market power[29] on those markets, and impose one or more remedies on these

[25] Available at the ECN's website (note 12).

[26] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

[27] It should be mentioned here that the ECN's working groups and sectoral subgroups frequently agree 'common approaches' or 'mutual understandings' on a more informal basis. In addition, both the ECN and the ERG are also involved in benchmarking exercises, culminating in official overviews (ECN) or principles of implementation and best practice or reports (ERG).

[28] ERG(06)33 'Revised ERG Common Position on the Approach to Appropriate Remedies in the ECNS Regulatory Framework' [2006], replacing ERG(03)30 'Common Position on regulatory remedies' [2003].

[29] Article 14 of the Framework Directive (note 17) defines significant market power in a way equivalent to the notion of dominance within EU competition law. According to standing case law, an undertaking is considered to have a dominant position if it is able to behave to an appreciable extent independently of its competitors, customers and ultimately consumers: *United Brands Company v Commission of the European Communities* (27/76) [1978] ECR 207.

operators. A Commission recommendation and notice map out how the national authorities should exercise their discretion in relation to the first two steps.[30] No provision is made, however, for a Commission instrument in relation to the third step (i.e. remedies). The ERG common position on remedies seeks to fill that gap. It analyses at a general level issues on remedies, and is structured to follow the logic of the remedy selection process. It first identifies and categorises the standard competition problems that obtain in the electronic communications sector and lists the catalogue of available standard remedies. This is followed by a set of overarching principles that the regulatory authorities should observe in making their selection. Lastly, the standard competition problems are matched to the available remedies. Other common positions are exceedingly specific and practical, relating, for instance, to the best way to apply a certain regulatory remedy in a certain market.[31]

The salient point to note is that these above mentioned harmonising interventions exert a powerful influence on the individual decisions of the national competition and regulatory authorities. This should not come as a surprise. After all, we have seen that the creation of these networks was inspired in large part by the wish to enhance the consistency with which national actors apply European rules. It is clear that consistency is of utmost importance for the creation and maintenance of an Internal Market. From a legal perspective, we can point to the principle of equality, which gives one a right to have similar situations treated in the same way across the Member States that make up the European Union. From an economic perspective, divergences in legal regimes complicate business life as they generate transaction costs, creating insecurity which enhances entrepreneurial risk.[32]

In practice, networks documents are adhered to for a variety of reasons. Most obviously, in these documents the national authorities expressly agree to observe them in their decision making. Thus, the ECN's Model Leniency Programme states that

> The ECN members *commit to using their best efforts*, within the limits of their competence, to align their respective programmes with the ECN Model Programme. (emphasis added)

[30] Recommendation 2003/311 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation [2003] OJ L114/45, now replaced by Recommendation 2007/897 [2007] OJ L344/64 and Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services [2002] OJ C165/6.

[31] Eg ERG (07)54 'ERG Common Position on Best Practice in Remedies Imposed as a Consequence of a Position of Significant Market Power in the Relevant Markets for Wholesale Leased Lines' [2007].

[32] Wagner 2005.

The ERG's rules of procedure are even more demanding:

> The positions or opinions of the Group shall *not be binding* on its members, but members shall *take the utmost account* of such positions or opinions. Where national circumstances prevent individual members from applying one of those positions or opinions, their reasoning for not following that position or opinion shall be published. Otherwise, parties to a collective position or opinion would be *expected to take all appropriate steps to abide by that position or opinion*, except in circumstances which could not be foreseen at the time when the position or opinion was agreed.[33] (emphasis added)

For all intents and purposes, a national authority, in fact, accepts an obligation towards its peers to respect these commitments. Insights from political science teach us that failure to live up to these expectations can moreover be sanctioned—rendering this self-commitment all the more effective. Here one can think of exclusion of the maverick authority from the realms of influence of the network: its views could be ignored during face-to-face meetings or it could be denied chairmanship of a working group. Applying the logic of the prisoners' dilemma, we may speculate that a national authority will be sensitive to reputational enforcement, because cooperation with the others is premised on repeated interactions.[34] The authorities' incentive to follow network documents can also be conceived in more positive terms. The adoption process, involving as it does all the national authorities, fosters a sense of ownership of the resultant document. Further, network documents serve an extremely useful purpose. The legal rules that national competition and regulatory authorities must apply are technical, not particularly precise and allow for broad discretion. To be sure, this is understandable and appropriate in dynamic policy fields, such as competition law and electronic communications law, as it avoids the need for continuous amendment of the legal rules to keep up with changing regulatory conditions. However, for the national authorities that must apply these legal rules, open legal rules mean search costs and the risk of type I or type II errors in their decision making. Network documents seek to minimise these costs and reduce those risks.

At this juncture it is good to briefly reflect on the position of national courts. These actors are expected to hold the national authorities to account, by ruling on the compatibility of their decisions with Community law, where necessary with the help of preliminary rulings from the ECJ.[35] In doing so, their approach to network documents is likely to be characterised as deferential. On the one hand, this could be due to a lack of specialised expertise to assess the merits of such documents. On the other hand, national courts may believe that they ought to respect a document

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[33] ERG(03)07 'Rules of Procedure for ERG' [2003] Article 4.4. Confirmed in ERG(06)52 'ERG 18th Plenary Meeting, Madeira: Conclusions' [2006].

[34] Mankiw and Taylor 2006, 329–336.

[35] Under the electronic communications regime, Article 4 of the Framework Directive expressly stipulates a right of judicial review against decisions taken by the national regulatory authority. A similar provision does not appear in Regulation 1/2003, which leaves the modalities of judicial review to national law.

agreed upon by representatives of the 27 competent national authorities and the Commission (as far as ECN output is concerned).

The above scenario would leave market parties in a rather unenviable position. They are faced with an ever growing list of network documents propounding a common approach to issues such as leniency or remedies. These documents would moreover feature prominently in the decision practice of the relevant national authorities, for the reasons explained earlier. Yet, when it comes to judicial protection, market parties can only seek legal redress against the individual decision taken by the national authority—even where that decision largely follows a network document which may have endorsed a legally wrong or economically inefficient solution.

The argument can also be framed in economic terms: it would be wasteful to challenge 27 national decisions if the real bone of contention is a flawed network document and a single set of proceedings against that document could have arguably solved the problem. If other accountability mechanisms are absent or defective, market parties could further incur the potentially high cost of being constrained in their commercial activities by national decisions relying on network documents that embody a suboptimal regulatory solution.

More generally, the proliferation of soft law in the EU and its ramifications from a rule of law perspective have also been remarked upon by the European Parliament in its resolution on the topic of September 4, 2007, which mentions the unhappy consequences of 'potentially undermining the Community legal order, avoiding the involvement of the democratically elected Parliament and legal review by the Court of Justice and depriving citizens of legal remedies'.[36]

Against this backdrop, the next section assesses whether it would be advisable—and practicable—to introduce some measure of judicial oversight in relation to ECN and ERG documents.

9.3 Judicial Accountability and Review of Soft Law

If we accept that the considerable practical significance of the network's soft law instruments renders the question of the availability of judicial oversight particularly acute, then the next step is to consider how one would go about organising this. To that end, this section inquires into the variables that the law uses to shape the process of judicial review and assesses to what extent the introduction of judicial accountability for network documents would result in legal complications. Attention will also be devoted to the costs and benefits associated with a change in the legal framework.

[36] European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments [2007] OJ C187 E/75.

9.3.1 The Need for a Challengeable Act

In order to provide legal accountability for network documents, a first prerequisite is that there must be a court with competence to entertain a request for judicial review. That competence is, in turn, premised first of all on the existence of a challengeable act. Normally, to be challengeable, the act must be of a binding character, produce legal effects and be definitive.[37] Courts usually adopt a purposive approach in deciding these matters, looking beyond form to the substance of the act.[38] It is immediately apparent that as far as network documents are concerned, a contradiction seems to exist between the formal nature of these documents and the substantive effects that they produce. Since they officially lack formal binding authority, conventional analysis dictates that network documents qualify as soft law, defined by Linda Senden as

> General rules of conduct laid down in instruments which have not been awarded legal force as such, but which, nevertheless, may have certain legal effects and which are directed at and may produce practical effects.[39]

However, while they do not, in theory, prevent national authorities from adopting a divergent position, in reality we may expect that network documents are followed in the great majority of cases. Notwithstanding their formal qualification, in substance they would thus produce effects for the regulated like only 'hard law' is expected to do. According to Francis Snyder

> Exercising its power of judicial review, the Court of Justice may decide that the putatively soft law has hard legal consequences, and thus transgresses the boundary between negotiation and legislation.[40]

On previous occasions, the ECJ has, indeed, been persuaded to reclassify soft law as hard law and inquiry into its legality.[41] Extending the logic of the Rule of Law argument it made in *Les Verts*, the Court has moreover ruled that the need to review all acts intended to produce legal effects extends beyond those produced by the two categories of actors mentioned in that case (the EU institutions and the

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[37] In EU law confirmed in e.g. *International Business Machines Corporation v Commission* (60/81) [1981] ECR 2639.

[38] Under Community law, e.g. *Confédération nationale des producteurs de fruits et légumes v Council of the European Union* (16/62 & 17/62) [1962] ECR 471; *Zuckerfabrik Watenstedt GmbH v Council of the European Union* (6/68) [1968] ECR 409; *Vereniging van Exporteurs in Levende Varkens v Commission of the European Communities* (T-481/93 & T-484/93) [1995] ECR II-2941 [86]; *French Republic v Commission of the European Communities (Kali und Salz)* (C-68/94 & C-30/95) [1998] ECR I-1375 [63].

[39] Senden 2004.

[40] Snyder 1993, 36.

[41] The best known example is probably *French Republic v Commission* (C-303/90) [1991] ECR I-5315.

Member States) to other Community bodies vested with legal personality.[42] Litigants could present the Court with the opportunity to similarly reclassify network documents through one of two avenues. First, a party can rely on a network document in domestic proceedings and persuade the national court to refer a question to Luxembourg regarding the document's validity by means of Article 267 TFEU. Second, it could be attempted to seize the Court directly by means of an action for annulment directed at the network document.[43] Neither avenue seems destined for success. In the first scenario, the Court will decline to give a ruling and in the second scenario it will declare that the action for annulment is inadmissible, in both cases because the networks lack the status of Community institution or body.

The transformation from soft to hard law can alternatively be effected by the European legislature. At the moment, the ECN and the ERG do not possess legal personality or autonomous powers. In light of these institutional characteristics, it is highly questionable whether they are currently able to promulgate general acts that have binding force. It seems reasonable to believe that the answer must be in the negative and that the Community legislature must intervene via formal legislation in order to also give the networks legal personality. This leads us to consider another institutional issue, namely whether conferring the ECN and ERG legal personality is tantamount to making them agencies. On the assumption that this is indeed the case, one must contend with the infamous *Meroni* doctrine,[44] which casts serious doubts on the ability of the networks to promulgate 'hard law' versions of the ECN Model Leniency Programme or the ERG's Common Positions.[45] Ultimately, this could detract from the utility of the networks as instruments to achieve higher levels of consistency in the application of European rules.

Adopting a more practical perspective, network documents might no longer be adopted if they were to be reclassified as 'hard law'. On the one hand, if future documents have binding force, agreement on their substance will be more difficult to achieve. The resultant document could also end up reflecting the lowest common denominator[46] and hence jeopardise the network's task of ensuring consistency. On the other hand, the national authorities might be less eager to

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[42] *Commission of the European communities v European Investment Bank* (C-15/00) [2003] ECR I-7281 [75]; *Société Générale d'Entreprises Electro-Mécaniques SA (SGEEM) v European Investment Bank* (C-370/89) [1992] ECR I-6211 [15]–[16].

[43] It appears that one could conceivably also rely on Article 277 TFEU, cf *LR af 1998 A/S v Commission of the European Communities* (T-23/99) [2002] ECR II-1705 [272]–[276].

[44] *Meroni & Co v High Authority* (9/56) [1957] ECR 133.

[45] Following Case C-217/04 *United Kingdom v European Parliament and Council* [2006] ECR I-3771, it is possible for Community bodies to adopt non-binding supporting and framework measures in order to facilitate the uniform implementation of a process of harmonisation. However, this would leave unaffected the issue with judicial review discussed here.

[46] The ECN and ERG typically act by consensus, although in the case of the ERG its internal rules allow for the adoption of common positions by a two-thirds majority.

adopt network documents if they know that once adopted, they must be followed. Clearly, the underlying attitude towards an obligation is remarkably different from that of a desire.

9.3.2 The Need for a Court Willing to Entertain the Legal Challenge

Let us nevertheless, if only for the sake of the argument, assume that network documents are open to judicial challenge. This leaves a second question: which court will review the legality of these acts? An overview of the available options, their advantages and disadvantages follows immediately below.

A first option is to entrust the national courts with this task. From the perspective of potential litigants, this enables them to secure protection of their legal rights in a convenient and easily accessible forum. They will be familiar with the legal system and their physical closeness to the courts significantly lowers the threshold to bring a legal action. However, the expertise of national courts has often been called into question as far as perceived technical fields are concerned, casting doubt on the ability of these courts to render correct or efficient outcomes.[47] There will also be disquiet as to unity and legal certainty: it is a very real prospect to have national courts arriving at different outcomes when they assess the validity of any particular network document.[48] This, in turn, can fatally compromise the impact of these documents on the overall level of consistency in the application of the relevant European rules. Finally, it is necessary to briefly reflect on the likely costs this option would entail. The legislative costs associated with the drafting of this proposal, in particular addressing the expertise and consistency concerns just mentioned, will be considerable. These are moreover supplemented by the costs attendant upon the exercise of judicial control. Consider the expenses incurred by market parties in preparing and bringing a lawsuit, the expenses for the national authority that will arguably have to defend the network document on behalf of the ECN or ERG[49] and the expenses for the judiciary who

[47] Here we must note that this argument does not hold for specialsed courts, such as the UK Competition Appeal Tribunal (CAT). The CAT is a purposively created court that has the monopoly to hear challenges to decisions by the UK competition authority and regulatory authority for electronic communications. To become a CAT member, the prospective appointee must show to possess appropriate knowledge and expertise in competition law, economics, business or regulation, Schedule 2(1) Enterprise Act 2002.

[48] Precisely this reasoning led the ECJ to reserve for itself the monopoly over the validity of acts adopted by the EU institutions also in the context of preliminary references in *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* (314/85) [1987] ECR 4199, especially [15]–[17].

[49] The alternative would be to have the chair of the network as defendant in the national court. This requires that national legal systems recognse this possibility and for the network itself, that resources are allocated for this purpose. Which of the two options would be preferable would require a cost-benefit analysis.

must hear and decide the case. A relevant consideration here is the relationship between the cost of review and the stakes at issue. If the stakes exceed the costs by a considerable magnitude (for instance where the costs are 1 and the stakes are 10), then we should, nevertheless, opt in favour of judicial review and accept that it could amount to a second-best solution in terms of the contribution of network documents to consistency. Further, under this option the costs would be decentralised, i.e spread over the 27 legal systems that make up the EU, which might increase its acceptability.[50]

The obvious alternative is to make the European Courts responsible for judicial review of network documents. They may be expected to deliver internally consistent rulings. The General Court in particular can also be assumed to have the requisite knowledge to judge network documents expertly and arrive at the correct outcome as to their validity. The legislative cost attendant on this option will therefore be lower compared to the previous one. That said, from the perspective of firms, it will typically be more costly to initiate judicial review proceedings at the European as opposed to the national level. In any event, potential litigants will experience severe difficulties in accessing the Luxembourg Courts. As network documents are addressed to the national authorities, litigants must demonstrate that they are directly and individually affected by the act they wish to challenge. To this day, *Plaumann* is still the authority for the meaning of 'individual concern', which exists when a measure

> [A]ffects [applicants] by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[51]

The general nature of network documents—more akin to regulations or directives than decisions—almost certainly prevents a finding of individual concern. Turning to the second limb of the test, direct concern requires a direct causal link between the contested act and the situation of the claimant.[52] Implementation must be automatic.[53] That is not the case. Even if network documents would be binding, they would arguably not negate completely the national authority's discretion in decision making to enable it to reflect local circumstances. It would thus not be the network document that brings about a distinct change in the legal position of the applicant—this would rather result from the decision by the national authority.

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[50] Although we cannot rule out a certain degree of forum-shopping.

[51] *Plaumann* [1963] ECR 95 (note 4), confirmed in *UPA* [2002] ECR I-6677 (note 4).

[52] *NV International Fruit Company v Commission of the European Communities* (41–44/70) [1971] ECR 411 [24]–[27]; *SA Piraiki-Patraiki v Commission of the European Communities* (11/82) [1985] ECR 207; *Société Louis Dreyfus v Commission of the European Communities* (C-386/96P) [1998] ECR I-2309 [43]; *Salamander AG v European Parliament and Council of the European Union* (T-172/98, T-175 to 177/98) [2000] ECR II-2487.

[53] That is the case in particular where the possibility that the addressee will not give effect to the EU measure is purely theoretical and their intention to act in conformity with it is not in doubt.

The excessively restrictive rules on *locus standi* work as a disincentive for potential litigants. Rational claimants calculate the chances of success before embarking on costly litigation. If these are slim, or non-existent, judicial challenges will not be brought. In the end, the problems of standing at the European level could result in too few challenges to be able to speak of effective judicial control.

A third option would be to attach a review body to the network, akin to what increasingly happens with agencies, whereby an appeal board is added onto the traditional institutional structure of these bodies.[54] A specialist appellate body should ensure a particularly high degree of consistency and correctness in its judgements. Creating a new body will, however, bring with it significant sunk costs. This will also include the legislative costs of securing political agreement among the Member States in favour of this scenario. We must further beware of the danger of regulatory capture.[55] If the network as a whole or its members are captured, and these actors are responsible for the staffing of, or themselves staff, the appellate body, an undue influence on the judicial process cannot be ruled out.[56] This risk can, however, be accommodated. Legislation can require that the appeal body and its members are independent, through the inclusion of provisions on eligibility criteria, the manner and duration of appointment and the conditions, if any, for removal from office. Additionally, or alternatively, legislation can introduce a right of appeal from the appeal body to the European Courts.[57] If the latter suggestion is taken up, we will be faced with a further institutional layer and a longer duration of the judicial process, which adds to the costs of this scenario.

9.3.3 The Court's Mandate

Whichever of the three scenarios outlined above is chosen, one must remember that access to the court is only one determinant of obtaining effective judicial protection. There must also exist a real possibility of a successful outcome from the claimant's perspective—in other words, a quashing order must be actually

[54] See e.g. Regulation 40/94 on the Community trade mark [1994] OJ L11/1, Title VII; Regulation 1592/2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency Articles 31–40 [2002] OJ L240/1.

[55] Pioneered by Stigler 1971.

[56] Even if the body would in fact render independent decisions, the appearance of influence or bias could amount to an infringement of the right to effective judicial protection, consider eg the case law of the European Court of Human Rights under Article 6 ECHR: *Piersack v Belgium* (Appl no 8692/79) (1982) Series A no 85; *Procola v Luxembourg* (Appl no 14570/89 (1995) Series A no 326.

[57] E.g. Regulation 40/94 on the Community trade mark Article 63 [1994] OJ L11/1; Regulation 1592/2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency Articles 41–42 [2002] OJ L240/1.

attainable. Much will thus depend on how the competent court will dispose of a certain case once it has been properly seized. This, in turn, will depend on the reference standards the court will use, and crucially on the intensity with which it will control the act placed before it. It brings to the fore fundamental normative questions concerning the proper relationship between courts and the administration, in particular the degree of deference the former should accord the latter. We may speculate that in reviewing network documents the competent court will adopt a relatively lax approach, with reference to the following considerations. First, the networks' discretionary mandate and the reluctance to have the courtroom become an administration office. Secondly, the expertise of the networks and the polycentric and technical nature of the matters within their purview. Thus, even if market parties succeed in accessing the courts, it is far from certain that they will be greeted by a judiciary eager to strictly review and hence control network documents.

One may very well consider such an outcome to be objectionable. From the claimant's perspective, judicial proceedings can be an important catharsis and a court ruling is appreciated for its considerable symbolism under this view. It has also been said that the threat of an annulment ruling acts as a pre-emptive incentive for the networks to maintain and further improve the quality of their output,[58] although the precise impact of judicial control on the shaping of policy is disputed.[59] It is further axiomatic that courts traditionally play an important part in the system of checks and balances and that they, by imposing constraints on the initial rule maker, can contribute to the legitimacy of the resultant norms. Yet, an honest assessment requires one to admit that the impact of judicial accountability is not necessarily or unequivocally positive. Justiciability might very well result in an explosion of litigation and thereby exert a chilling effect on the future promulgation of network documents. The following is symptomatic of the bleak view on judicial intervention:

> Trial-type procedures are not tailored to the decision of polycentric issues in which judgements have to be made simultaneously on a number of interconnected issues. Nor do trials, which involve sporadic (and often unpredictable) sallies that impose high costs on regulators and regulatees, offer ideal conditions for developing regulatory policies. They produce not merely an increase in the judicialisation of processes and a greater use of lawyers but defensiveness in regulation and consequently regulatory lag. Judicial review may also distort regulatory processes by inducing a bias towards less reviewable modes of operation.[60]

Ultimately, whether judicial review on the whole has a negative or positive impact and should therefore be encouraged or discouraged, is a difficult question to answer, and responses will depend in part on one's persuasions as to the role of the courts in our modern society.

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[58] Scott 2000, 55.

[59] Harlow and Rawlings 2007, 565; Baldwin and McCrudden 1987.

[60] Baldwin and Cave 1999, 302.

This normative perspective is usefully complemented by an economic one. The litigation route is costly. As mentioned earlier, firms and consumers incur expenses in preparing and bringing a lawsuit directed at a network document, the national authority must dedicate financial and personnel resources to defending the act and the judiciary must make available judges and time to hear and decide the lawsuit. Let us assume that the competent court will indeed practice judicial restraint in scrutinising network documents, for whatever reason. Then, as all actors (firm, authority and court) possess finite resources, and on the assumption that they behave rationally in allocating these, available resources should be spend on their core activities (innovation, law enforcement, case law development)—not on unsuccessful litigation. Making network documents challengeable and designating a judicial forum could distort the rational cost-benefit calculus of potential applicants, by wrongly signalling that seeking judicial recourse is a promising route to pursue. While this might not be overly problematic in any individual case, we should extrapolate to consider the impact on a system-wide basis, which is significant.

9.4 Participation as an Alternative Solution?

The above analysis has revealed that ensuring judicial review of network documents seems beset with legal difficulties and creates considerable economic costs. We should thus consider whether it is possible—and perhaps more desirable—to achieve the ends pursued by judicial review through some other mechanism.

A modern trend is the injection of participation by affected interests in decision-making processes.[61] There are good reasons for doing so.[62] From an instrumentalist perspective, it is hoped that this will produce better quality decisions. Here the concept of 'regulatory space' is key.[63] The regulator represents the institutional rule-making structure. It embodies all things formal and stable. Yet this is only one facet of regulatory space. Another major occupant relates to informational resources within the command of private actors. Inviting these actors to partake in the formal decision-making structures allows for the accumulation of these various facets of regulatory space, and for their interaction in a symbiotic and mutually reinforcing fashion. Approaching the issue from a non-instrumentalist perspective, participation enhances the involvement of private actors with the policy practised by the

[61] For a detailed discussion of participatory or deliberative democracy, consider Black 2000, 2001 drawing on Habermas 1996.

[62] Cf. Craig 2006, 320; Mashaw 1985; Galligan 1996.

[63] Hancher and Moran 1989. For use of the regulatory space concept in telecommunications regulation, Hall et al. 2000. This approach to the regulatory process in devising accountability structures has been used inter alia by Scott, "Accountability in the Regulatory State".

regulator. With individuals viewed as essentially motivated by self-improvement and development, their direct role in decision making is valued as desirable because the resultant decisions have a direct impact on their development.[64] Not only would this 'dignitarian' approach benefit the developmental individualist, it should also positively impact on the effectiveness of the regulator and its output. Although one might not agree with the outcome, one recognises the validity of the process through which it was reached and one is therefore more inclined to view this outcome as acceptable and comply with it.

To understand why participation could function as an alternative to judicial review, it is necessary to inquire into the rationales for court scrutiny. Under the subjective theory, the courts are there to ensure effective judicial protection. They must offer redress for grievances suffered by the citizenry that are inflicted by the government. Judicial review is thus defined in terms of the private rights of the litigant. Conversely, the objective theory sees courts as an instrument to ensure effective judicial control. They must safeguard legality by ensuring that public authorities act only within the limits of their powers and by guaranteeing that decisions are more or less accurate.

We can say that participation is geared toward the same end as the objective theory of judicial review—the desire to ensure the legality of government actions. The judicial process can be seen to provide *ex post* participation in decision making.[65] Through the courts, individuals have a 'voice' to air their grievances against the government. Judicial review functions as a tool by which government has to improve its decision-making process. In doing so, citizens and firms hold the government accountable for the exercise of public discretion. They also gain access to, and participate in rule making, albeit in an extremely costly and indirect manner.[66] On this view, *ex ante* review should be favoured, because it succeeds in achieving the desired objective in a decidedly cheaper, more efficient and direct manner.

Bringing the focus on the current practice of the two networks, we observe that Regulation 1/2003 does not stipulate any due process requirements for the ECN and that such rules are also absent from self-authored soft law documents. We may speculate that the explanation for this is because this network was intended to prioritise case-based interactions over the development of common approaches. Indeed, at the time of writing the ECN has produced only three such general documents: the Model Leniency Programme, an overview of advocacy and enforcement activities in the area of professional services and the results of a

[64] The 'dignitarian' approach has been propounded by inter alia Hart 1994; Rawls 1973. Christian Joerges and Jurgen Neyer have applied a deliberative democracy framework to analyse and legitimise comitology committees, eg Joerges and Neyer 1997. On enhancing accountability through participation: Manin 1998; Rosenau and Fagen 1997.

[65] For critical reflection, Craig 2006, 321.

[66] Cotterell 1961.

questionnaire on the reform of national competition laws following the adoption of Regulation 1/2003.[67] Neither of these was preceded by a public consultation, in all likelihood because of confidentiality concerns.

Matters are radically different for the ERG. According to Article 6 of the ERG Decision, it must 'consult extensively and at an early stage with market parties, consumers and end users in an open and transparent manner'.[68] The ERG has given effect to this obligation as follows. The consultative document is made available on the ERG's website and responses are invited in one, or both, of two modalities: written submissions or public hearings. Which of these modalities is used for a particular consultation is determined on a case-by-case basis.[69] Consultations are in principle restricted to a single round of comments. The time scale for responses is minimal 15 working days in case of a public consultation and maximal 20 working days when a public hearing is organised.[70] The ERG reflects the input of contributions received in its final document, by indicating why it does, or does not, agree with the observations made.[71] The final document and the contributions by stakeholders also appear on the ERG's website, unless confidentiality has been requested.[72] The ERG most frequently invokes the 'normal' consultative procedure as opposed to a public hearing.[73] An analysis of past

[67] Available on the ECN's website. In addition to these formal documents, there are also a number of informal approaches agreed upon within the meetings of the ECN's working and subgroups, which remain internal to the competition authorities.

[68] Provision is further made for meetings between the Group and interested parties to discuss matters of common interest, should the ERG be so inclined, ERG(03)07 Article 9.6.

[69] On the basis of ERG(03)05 rev 1 'ERG and Transparency in Practice' [2003] point 1.D it may be expected that the ERG looks to factors such as the nature of the specific subject, possible alternatives for consultations, confidentiality issues, the interests of third parties and the urgency of the matter in making this determination.

[70] If a public hearing is organsed, such a hearing will be held no later than 12 working days after the start of the consultation procedure and will be concluded within the timeframe of 20 working days. Public hearings will take place in Brussels. The time scale and procedure applicable in any one instance will be made available on the ERG website.

[71] Eg ERG (07)20 'Consultation summary on harmonisation' [2007] for ERG(06)67 'Harmonisation—The Proposed ERG Approach' [2006] and ERG(06)68 'Effective Harmonisation within the European Electronic Communications Sector: a consultation by the ERG' [2006].

[72] ERG(03)07 'Rules of Procedure for ERG' [2003]Article 9.4. For examples, consider ERG(04)24 'Note on the hearing on cost accounting and accounting separation' [2004]; ERG(04)34 'Executive Summary on Consultation Responses "Draft ERG Opinion on the revision of the Commission Recommendation98/322 on Cost Accounting and Accounting Separation"' [2004]; ERG(05)03 'Explanatory Note on the 2005 Work Programme consultation and hearing' [2005]; ERG(05)26 'Summary of ERG Responses to the consultation of the ERG Working Paper on the SMP concept for the new regulatory framework' [2005]; ERG(07)20 'Consultation summary on harmonisation' [2007].

[73] At 1 November 2008, there had only been 3 hearings: on remedies; accounting separation and cost accounting; and on the 2006 draft work programme.

consultations reveals that the response rate is quite high, averaging around 18 contributions per consultation.[74] Still, a few exceptions notwithstanding,[75] the great majority of these are produced by market parties and major trade organisations such as the ETNO and ECTA.[76] One may venture that consumers and end users do not care to make their views known to the ERG. Alternatively, it could well be that these interests are simply not sufficiently well-organised or well-financed enough to deliver an opinion. If this is indeed the case, one must contend with the threat of regulatory capture.[77] If the ERG is systematically informed only of the concerns and pressures of market parties, to the exclusion of other interests, its documents could come to embody a certain bias in favour of these market interests. Recall that 'regulatory space' presupposes a certain dependence on the informational resources held by these private actors for the public authority to survive and prosper. Thus we query how the ERG can mobilise consumer and end-users interests to arrive at balanced participation.[78] Should it be required to actively seek their contribution, for instance by contacting (European) consumer organisations? Would it be an idea to attach a consumer group to the ERG?[79]

In addition to concerns relating to how best to promote participation, we should also realise that participation does not necessarily eradicate the judicial accountability deficit. It might actually make it more pronounced. Individuals and firms would quite naturally turn to the courts to secure respect for their participation rights.[80] This could be problematic in view of the current status of participation rights in the European context. Although the Luxembourg Court has recognised

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[74] The consultation on the draft ERG Common Position on best practice in remedies imposed as a consequence of a position of significant market power in the relevant markets for wholesale leased lines received the least responses (4) and the consultation on the draft joint ERG/EC approach on appropriate remedies in the new regulatory framework the most (50).

[75] E.g. the contribution by the Japanese Government to the consultation on FL-LRIC modelling or the response of the Romanian Government to the consultation on broadband market competition and country case studies.

[76] ETNO stands for European Telecommunications Network Operators' Association and ECTA is the European Competitive Telecommunications Association.

[77] It may be objected that it will be difficult to capture the network as such, as it operates primarily in virtual form and firms are denied access to ERG meetings. Capture would thus come about indirectly, by lobbying the ERG's component members, the national authorities.

[78] There is a wider trend within EU law to promote the involvement of civil society in decision making, e.g. White Paper 'European Governance' COM (01) 428 final 8, and Communication on general principles and minimum standards for consultation of interested parties by the Commission COM (2002)704 final.

[79] On the up- and down-sides of consumer panels, Baldwin and Cave 1999, 206–208.

[80] This is recognsed in the case law of the European Courts, who adopt a more liberal approach to standing for private parties that have participated in the procedure that culminated in the adoption of the contested measure, e.g. *Metro-SB-Großmärkte GmbH v Commission of the European Communities* (26/76) [1977] ECR 1875 [13]; *Société Anonyme à Participation Ouvrière Compagnie Nationale Air France v Commission of the European Communities* (T-3/93) [1994] ECR II-121 [82]; *Metropole télévision SA v Commission of the European Communities* (T-528/93, T-542/93, T-543/93 and T-546/93) [1996] ECR II-649 [61]–[62].

the right to be heard as a fundamental principle of EU law, it has only done so in relation to individual determinations[81] and has thus far consistently refused to admit of a similar right as far as norms of a more general nature are concerned.[82] In relation to measures belonging to the latter category, plaintiffs are only admitted to court if they can rely on a legally enforceable participation right expressly provided for in the rules governing the procedure in question. The European legislature has shown itself disinclined to do precisely that. Although interested parties are increasingly encouraged to share their views with the lawmaker, the applicable rules are generally stated not to be judicially enforceable. This, according to the Commission, is because

> A situation must be avoided in which a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties. Such an overly legalistic approach would be incompatible with the need for timely delivery of policy, and with the expectations of the citizens that the European Institutions should deliver on substantive rather than concentrating on procedures.[83]

One will readily agree that these are persuasive arguments. Yet, the Commission also acknowledges the instrumental and non-instrumental rationales in support of participation:

> Good consultation serves a dual purpose by helping to improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties and the public at large.[84]

Ultimately, thus, the difficult issue is rationalising two not necessarily congruent interests—safeguarding the expediency of government action by minimising the disruption caused by frivolous legal actions brought by ingenious litigants; and the importance of meaningful participation of private interests, which may well necessitate some form of protection of participation mechanisms.

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[81] *Transocean Marine Paint Association v Commission of the European Communities* (17/74) [1974] ECR 1063; *Hoffmann-La Roche v Commission of the European Communities* (85/76) [1979] ECR 461; *Air Inter SA v Commission of the European Communities* (T-260/94) [1997] ECR II-997, now codified in the Charter of Fundamental Rights of the European Union Article 41(2) [2000] OJ C364/1. This right must thus be guaranteed even in the absence of an express provision. Individual determinations are those decisions that are either addressed to the plaintiff or of direct and individual concern to him. Further on participation rights: Craig 2006, Chap. 10; Lenaerts and Vanhamme 1997; Bignami 2004; Harlow 1992.

[82] *Bureau Européen des Unions de Consommateurs (BEUC) v Commission of the European Communities* (C-170/89) [1991] ECR I-5709 [19]; *Atlanta AG v Commission of the European Communities and Council of the European Union* (C-104/97P) [1999] ECR I-6983 [31]–[38]; *Pfizer Animal Health SA v Council of the European Union* (T-13/99) [2002] ECR II-3305 [487]; *Union Européenne de l'artisanat et des petites et moyennes enterprises (UEAPME) v Council of the European Union* (T-135/96) [1998] ECR II-2335 [81]; *Asociación Española de Empresas de la Carne (Asocarne) v Council of the European Union* (C-10/95P) [1995] ECR I-4149 [39].

[83] Communication on general principles and minimum standards for consultation of interested parties by the Commission COM (2002)704 final.

[84] Ibid., 5.

It remains to be seen whether Article 11 EU could perhaps forge some manner of change in the current legal position:

1. The institutions shall, by appropriate means, give citizens and their representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

9.5 Conclusion

To many legal analysts, accountability presupposes at least a certain measure of judicial oversight. This article has directly addressed the appropriateness of this belief in the context of new governance. Taking the networked system for the enforcement of European competition and electronic communications law as a case study, we saw that it is at present characterised by a judicial accountability deficit as regards the soft law instruments adopted by the networks. The enormous practical significance of these instruments for national authorities and market parties alike appeared to make the need for some measure of control by the courts particularly acute. Yet, upon closer analysis, the feasibility and desirability of introducing judicial control are far from uncontested. By unpacking the notion of judicial review, it was revealed that there are numerous legal obstacles that would have to be overcome to make judicial review a reality—ranging from the transformation of soft law into a challengeable act to the identification of a competent court to more lenient rules on locus standi. Considerable legislative activity would be required to minimise these legal complications, which in and of itself entails legislative and administrative costs of a considerable magnitude. At the same time, one must be careful in distinguishing access to the court from success before the court. It is by no means clear that a court would strictly control network documents and even if the current legal framework would be amended along the lines just described, this does not in and of itself increase the likelihood of the court actually rendering a verdict of invalidity. Some might object that judicial review always ought to be available, regardless of whether the applicant will be victorious—as a matter of constitutional principle. The point here is not to dismiss that claim out of hand. Rather, it is that such a view embodies a certain policy decision, and intellectual honesty requires one to point not only to the benefits a change in legal framework is expected to bring about, but also to acknowledge the costs and disadvantages associated with this approach. Generalising, before advocating legal change, we can say that it is imperative to carefully assess the—legal *and* economic—costs and the benefits of the existing framework and compare the results with the advantages and disadvantages of alternative scenarios. The

increasing use of regulatory impact assessments by the Commission bears witness to the acceptance of this proposition in the wider European context.

Second, a plea was made for a more functional understanding of the Rule of Law. This means that we should take that notion as comprising a set of essential functions which can be performed through a variety of institutional or procedural devices, operated by a variety of actors. Instead of executing a simple copy-paste exercise of Rule of Law devices from old to new modes of governance, one should inquire into the purpose of that particular device and assess how that purpose may be best achieved. When it comes to judicial review, we saw that an alternative approach favours participation of affected interests to secure the acceptability, quality and correctness of the resultant documents. This is not to say that participation and judicial review are perfect substitutes or that the former is without problems of its own. Still, between participation and judicial review it does not seem too far fetched to say that in the new governance setting we have looked at, it has good prospects of realising the more desirable, because efficient, outcome. It should be clear that the argument presented here has a validity that extends beyond our case study, given that one of the distinctive features of new governance generally is the proliferation of soft law instruments. In the end, the challenge of new forms of governance should probably be seen not so much in terms of difficulties in ensuring adherence to the Rule of Law, but more in terms of re-thinking and re-conceptualising the Rule of Law itself.

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Part III
New Models for National Legal Systems in a Global World

Chapter 10
Legal Emulation Between Regulatory Competition and Comparative Law

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Contents

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_10,

10.1 Introduction

Globalization is affecting law just as it is other elements of society. We understand globalization here in a broad sense, including not just the increasing linkage between the economies of the world and the rise of global economic actors, but more broadly the ever-increasing mobility and communication of individuals and ideas across the globe.

Conventional wisdom holds that globalization puts pressure on national legal orders—as we know them since the rise of the Nation State—to converge toward one another, with a concomitant loss of autonomy for such systems. In a previous chapter, Filomena Chirico and I sought to look at the convergence and divergence between legal orders from a neutral perspective (or at least without a bias in favor of convergence), in order to understand better if and how divergence can be explained, when there truly is divergence, when divergence is not desirable and how it could be removed.[1] We used the tools of law and economics and of comparative law in so doing.

In this chapter, I address a more specific question, namely how legal orders interact with each other, or put otherwise, how legal ideas circulate between legal orders. My contention is that the models found in the current literature have shortcomings, and that they are not adequate to deal with the challenges raised by globalization. Section 10.2 of this chapter discusses the model of regulatory competition coming out of law and economics, while Sect. 10.3 discusses how comparative law tries to account for interaction. Against that background, Sect. 10.4 introduces an alternative model of 'legal emulation' which corresponds to much of the interaction observed in practice but has not yet been generalized as such.

10.2 Regulatory Competition

10.2.1 Starting Point

Charles Tiebout's 1956 article "A Pure Theory of Local Expenditures" is usually seen as the first step in the development of the model of regulatory competition.[2] In his article, Tiebout was reacting to an earlier article by Paul Samuelson, wherein Samuelson pointed to a market failure regarding expenditure on public goods by authorities.[3] Samuelson's model assumed that expenditure was carried out by a central public authority. Tiebout sought to show that such failure does not occur when public goods are supplied by local authorities. In the latter case, according to

[1] Chapter 2 of this book.

[2] Tiebout 1956.

[3] Samuelson 1954.

Tiebout's model, local authorities will set their policies according to the combination of supply of public goods and level of local taxes which is preferred by the local constituency. Citizens are then free to choose the local community which best matches their individual preferences.

It is worth noting that Tiebout's model does not have a dynamic element. It is a static model, where an equilibrium is reached whereby a number of different preference patterns as to public expenditure coexist, and consumer-voters are drawn to the one that matches their preferences best. Even then, the assumptions for this model to work are quite restrictive: consumer-voters are assumed to be perfectly mobile, fully informed, and unaffected by differences in employment opportunities. Furthermore, there must be a large number of local communities and their choice of preference patterns should not give rise to externalities. Finally, it is assumed that there is an optimal size for each community, given its preferences, so that communities will seek to attract or lose residents in order to reach that optimal size.

In subsequent economic literature, Tiebout's model was further studied and developed, but it is fair to say that it did not have a lasting impact in its original form.[4]

10.2.2 Addition of a Dynamic Element

Over the following decades, the original Tiebout model was further developed and augmented with an element of dynamism. First of all, it was applied more specifically to law as opposed to public expenditures, and to firms as opposed to consumer-voters: market players seek the jurisdiction with the law that best matches their preferences. Second, instead of leading to an equilibrium with different local outcomes, choices made by market players exert pressure on local jurisdictions to change their law in order to retain market actors within their jurisdiction (to the extent that this is deemed desirable). There is therefore competition among jurisdictions to attract and retain market players by offering them the law[5] that they desire, hence the name "regulatory competition". As a consequence of that competition, changes take place in the law of the various competing jurisdictions; if the preferences of market actors are similar then one could expect the law of the various jurisdictions to converge. Regulatory competition models were developed first in the area of corporate law and corporate governance, in particular the choice of jurisdiction in which to incorporate a firm and its impact on the relationship between shareholders and other stakeholders. Quite a lively debate

[4] See for instance Epple and Zelenitz 1981a, b.

[5] Including not just substantive law, but also procedure and institutions, and even the expertise and quality of the local legal community; see Romano 1985.

erupted in the literature. Some authors ventured that regulatory competition would produce a race to the bottom, as jurisdictions compete in progressively lowering the protection offered to shareholders against management, so as to draw management to reincorporate there.[6] Others argued the opposite: market forces—especially the threat of takeovers—provide a counterweight and ensure that the best law for shareholders ultimately wins what is then a race to the top.[7] More recent scholarship has argued that regulatory competition for corporate governance leads to either a race to the top or a race to the bottom, depending on the topic.[8] Others have argued that 'top' and 'bottom' are essentially constructs and therefore that this debate is not all that meaningful.[9]

The following quote from Easterbrook illustrates well how the theory had evolved by the 1980s; the first two sentences refer to Tiebout's original model[10]:

> It is possible to demonstrate, albeit with some simplifying assumptions, that the goa[l] of competition to avoid exit leads jurisdictions to enact that set of laws most beneficial to the population. It is hard to place too much weight on this demonstration; the assumptions are so unrealistic that they could not be satisfied, and its predictions are not perfectly confirmed in practice. Laws surely are not optimal. But allowing for all of the difficulties with interjurisdictional competition, one can still show that exit causes a powerful *tendency* toward optimal legislation to the extent four conditions are satisfied: (1) people and resources are more mobile; (2) the number of jurisdictions increases; (3) jurisdictions can select any set of laws they desire; and (4) all of the consequences of one jurisdiction's laws are felt within that jurisdiction. The closer one comes to fulfilling these conditions, the more likely is competition among jurisdictions to be effective. If people are perfectly mobile or if there are very many jurisdictions, then the competition leads to optimal legislation; to the extent people are less mobile and jurisdictions fewer, or the other conditions less well satisfied, competition is less effective [footnotes omitted].

While regulatory competition has attracted some attention in US academic circles, its practical impact is more limited: besides the now famous Delaware story of regulatory competition for corporate charters (and more broadly for corporate governance), there are few instances where regulatory competition was actually observed in the USA.

In her recent work, Barbara Gabor points out that regulatory competition can take other channels than the movement of firms across jurisdictions or the free choice of law.[11] For instance, through international trade, jurisdictions can be pressured to seek to improve the competitiveness of the firms within their territory

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[6] The leading contribution remains Cary 1974.

[7] See the contributions of Winter 1977, Easterbrook 1984 and Fischel 1982.

[8] See Bebchuk 1992, leading to a series of articles on why takeover regulation is subject to a race to the bottom.

[9] Radaelli 2004, 9–10.

[10] Easterbrook 1983, 34–35.

[11] Gabor 2010, 15.

by changing laws and regulations to their advantage.[12] Such regulatory competition can occur without the need for factor mobility. Second, another channel for regulatory competition is the mobility of production factors, namely capital and labor.[13] In this case, jurisdictions are under pressure to attract these production factors, even if firms themselves do not move.[14] Considering these three channels—international trade, production factor mobility, and firm mobility—regulatory competition should also be observable within a large internal market such as the EU.

10.2.3 Regulatory Competition in the EU

In the wake of the 1993 Single Market effort,[15] regulatory competition theories attracted academic attention in the EU. It seemed to fit well within the 'new approach' to the internal market, with its emphasis on mutual recognition as a basis for free movement, in the absence of harmonization. When in 1993 the Maastricht Treaty enshrined the principle of subsidiarity,[16] in part to act as a damper on overly ambitious harmonization plans, one could argue that regulatory competition had found its room in Europe.

The first to make this connection was Roger Van den Bergh, in a string of articles where he sought to develop an economic analysis of the principle of subsidiarity.[17] Van den Bergh presented regulatory competition as an alternative to EU-driven, top-down legislative harmonization, and argued that harmonization should only be envisaged if and once it is clear that regulatory competition cannot work. He proposed a set of policy-making guidelines that seek to facilitate regulatory competition as much as possible.[18] Yet as Van den Bergh himself acknowledged, policy makers in the EU so far had not taken regulatory competition seriously in the Single Market programme in the 1980s and 1990s,[19] even in areas which should be amenable to it, such as banking and insurance regulation, product standards, and product liability, etc.

There was one specific area where some regulatory competition took place in the 1990s: broadcasting regulation. Following some disappointing rulings from the

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[12] As Gabor, ibid., points out, even though typically subsidies are used to try to improve the competitiveness of local firms, there are also cases where regulatory reform is used instead of public funds.

[13] Ibid., 18.

[14] As Gabor, ibid., acknowledges, the difference between regulatory competition through the mobility of production factors and through the mobility of firms themselves can be slight.

[15] As driven by the Single European Act [1987] OJ L 169/1.

[16] Inserted at Article 3b of the EC Treaty, as it then was, and now to be found at Article 5 TEU.

[17] Van den Bergh 1994, 2000.

[18] Van den Bergh 2000, 463.

[19] See also Pelkmans et al. 2000, 261, and Radaelli 2004, 4–5.

ECJ[20] and long negotiations among the various interests,[21] the famous 'Television Without Frontiers' Directive was enacted in 1989.[22] As concerns regulatory competition, the TWF Directive ushers in an almost textbook example, with broadcasting firms having a large influence in determining under which Member State jurisdiction they fall.[23] Next to that, the Directive contains a series of regulatory provisions which every Member State is bound to enforce—on matters such as European content, advertising, and the protection of minors—in order to prevent a race to the bottom on these matters. Beyond that, each Member State is free to impose more stringent regulation on broadcasters under its jurisdiction,[24] but it cannot prevent the circulation of broadcasts from another Member State.[25] As could be predicted, a number of broadcasters chose to organize their business so as to fall under jurisdiction of more 'liberal' Member States,[26] even though their broadcasts were aimed at other, more restrictive Member States. Some Member States were dissatisfied with the turn of events,[27] but the ECJ upheld the scheme of the Directive.[28] Over time, it could be observed that, through the choices of

[20] ECJ, Judgments of 18 March 1980, Case 52/79, *Debauve* [1980] ECR 833 and Case 62/79 *Coditel* v. *Ciné-Vog* [1980] ECR 881. In these cases, the ECJ easily accepted that Member States could invoke intellectual property protection or even different advertising regulation to prevent broadcasts from other Member States from circulating on their territory, thereby severely hampering the prospects for the internal market in broadcasting.

[21] The interests involved in these discussions cannot be easily summarized. Besides public service broadcasters and private broadcasters, whose positions were the sharpest, the European content producers also had a stake, as well as the advertising sector. Member States were divided. In the European institutions, both the liberal, pro-internal market and the 'European identity' constituencies were involved. Much of the discussion took place within the Council of Europe, whose 1989 Convention on Transfrontier Television, CETS No. 132, prefigured Directive 89/552 of 3 October 1989 [1989] OJ L 298/23, the Television Without Frontiers (TWF) Directive.

[22] Ibid., now Directive 2010/13 of 10 March 2010 (Audiovisual Media Services Directive or AMSD), codifying wide-ranging amendments through Directive 2007/65 of 11 December 2007 [2007] OJ L 332/27.

[23] Article 2(2) and ff. AMSD contain a complex set of rules to determine which single Member State has jurisdiction over a broadcaster. The main relevant criteria are the location of the head office and of the main editorial decisions, both of which can be influenced by the broadcaster. Note that the location of the target audience is *not* a relevant criterion.

[24] Ibid. Article 4(1).

[25] Ibid. Article 3(1). In the case of broadcast programs, the only exception is in cases where the foreign broadcast would infringe public order or be injurious to minors, and even then a specific procedure must be followed before a Member State can prevent the circulation of broadcasts: Article 3(2).

[26] Traditionally, the UK and Luxembourg. For instance, from its Luxembourg base, RTL built very successful broadcasting operations in France, Belgium, the Netherlands and Germany.

[27] In particular Belgium and the Netherlands.

[28] It is interesting, on this point, to compare ECJ, 5 October 1994, Case C-23/93, *TV10 SA* v. *Commissariaat voor de Media* [1994] ECR I-4795, with ECJ, 5 June 1997, Case C-56/96, *VT4 Ltd* v. *Vlaamse Gemeenschap* [1997] ECR I-3143. The first case relates to a set of facts occurring before the entry into force of the TWF Directive, the second, after that entry into force. In the first case, the ECJ effectively allowed the Netherlands to exert jurisdiction over TV10 (established in

broadcasters, more restrictive Member States were put under pressure to reform their broadcasting regulation, at least to the point where broadcasters were no longer tempted to seek to place themselves under the jurisdiction of a more liberal State.[29]

The discussion of regulatory competition in Europe really took off with a string of ECJ rulings concerning the freedom of establishment of firms, starting with *Centros* in 1999.[30] In that case, Danish nationals had set up a company in the UK (Centros) for the sole purpose of doing business in Denmark. They chose the UK because UK company law allowed them to avoid the minimum capital requirements of Danish law. The ECJ held that Danish authorities could not prevent Centros from doing business in Denmark, even though Centros was a vehicle to avoid Danish law.[31] *Centros* created room for regulatory competition on corporate charters, much like in the USA. *Centros* and its progeny led to academic debates,[32] but their practical impact has been modest: while start-ups definitely have benefited from the ability to choose the jurisdiction in which to incorporate,[33] existing companies still face obstacles in moving from one jurisdiction to another.[34]

10.2.4 Limitations of the Regulatory Competition Model

10.2.4.1 In the Literature

In the end, the situation in practice has not changed much in the decade since Daniel Esty and Damien Geradin published their collection of essays *Regulatory*

(Footnote 28 continued)
Luxembourg), invoking the abuse of rights doctrine (Case 33/74, *Van Binsbergen* [1974] ECR 1299). In the second case, the ECJ interpreted the Directive as preventing Belgium from claiming jurisdiction over VT4 (established in the UK). In 2007, when the Directive was revised and renamed, Article 3(2) to 3(5) were added to deal with so-called 'circumvention', but it is not clear how these provisions fit within the overall scheme of the Directive.

[29] Indeed, for a broadcaster to seek to fall under the jurisdiction of liberal Member State A while aiming its program at the audience in restrictive Member State B, some organisational and transaction costs are incurred. This leaves Member State B with some margin to be more restrictive than A before broadcasters serving B contemplate seeking to fall under the jurisdiction of A.

[30] ECJ, 9 March 1999, Case C–212/97 *Centros* [1999] ECR I–1459; 5 November 2002, Case C-208/00 *Überseering* [2002] ECR I–9919 and 30 September 2003, Case C–167/01, *InspireArt* [2003] ECR I–10155.

[31] Unless of course Danish authorities had concrete evidence of fraudulent conduct on the part of the company or its shareholders.

[32] See among others Heine and Kerber 2002, or Hertig and McCahery 2003.

[33] See Ringe 2011, 107.

[34] See the study of Bratton 2011. For example, the ECJ allowed Member States that follow the real seat theory to deny their firms the ability to move their head office without changing their governing law: ECJ, 16 December 2008, Case C-210/06, *Cartesio* [2008] ECR I-9641.

Competition and Economic Integration: Comparative Perspectives, in 2001.[35] For all the academic discussion, regulatory competition has not been observed very often outside of the limited area of corporate governance.

It seems indeed that regulatory competition, even in its looser, dynamized Easterbrook version, operates under such restrictive conditions that the model, however attractive, will rarely work in practice.[36] Esty and Geradin provide a good overview of the limitations of the regulatory competition model[37]:

- In the presence of *externalities*, the choices of one jurisdiction would inflict costs upon another, so that the legal outcome chosen by the first jurisdiction would not be efficient[38];
- Actors may only have *imperfect information*, so that their choices are not optimal and would not reflect their true preferences;
- Actors may not enjoy enough *mobility*, i.e., they may not be in a position to choose another set of laws or move to another jurisdiction;
- Public authorities may not respond to the signals given by private actors, for various reasons found in *public choice* literature (capture, shirking, and other principal/agent failures, etc.).

The limitations listed above are all directly linked with the assumptions underpinning regulatory competition, and as such one could argue that they do not add much to the discussion.[39]

Esty and Geradin introduce other limitations which do not flow directly from the assumptions, however:

- Because of *economies of scale*, some regulatory issues are better dealt with in a centralized fashion, without regulatory competition. In fairly complicated and technical areas (food safety, public health, etc.), the cost of deciding the issues are such that it might be preferable for one single authority to take charge.[40]
- In certain cases where trade is significant and diverging laws generate significant compliance costs for traders, *transaction costs* might make regulatory competition prohibitively expensive for the gains it would generate.[41]

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[35] Esty and Geradin 2001a, b. This collective work contains contributions on regulatory competition in various sectors in the USA, in the EU and globally.

[36] See also Radaelli 2004, 7–8

[37] Esty and Geradin 2001a, b, 33–40. See also Geradin and McCahery 2004, 90.

[38] Garcimartín Alférez 1999 argues that private international law can help to solve externality problems. Note that externalities could also be present at firm level, i.e., the choice of a firm for its preferred law inflicts costs on others, without the firm being forced to bargain with the persons bearing those costs.

[39] See also Barnard 2000, 65–66.

[40] Esty and Geradin 2001a, b, speak of a 'natural legal monopoly'. Sykes 2000, 263 recognizes this category but gives it a limited ambit.

[41] Chapter 2.

- If they perceive that their actions do influence the choices of public authorities, private actors will no longer simply choose between available laws, but they might engage into *strategic behavior*, whereby their choice would be motivated by the hope of producing a given legal or regulatory outcome.

These limitations represent the boundaries of regulatory competition, i.e., cases where the model reaches its limits and can no longer be assumed to deliver optimal results.

10.2.4.2 Fundamental Limitations: The Role of Law

In addition, the regulatory competition model seems to rely on a number of basic misconceptions regarding its very subject-matter, law. It both overestimates the impact of law on the decision of firms and takes an impoverished view of law.

On the one hand, regulatory competition assumes that law takes an excessive, if not exaggerated place in the decision making of economic actors.[42] Indeed, regulatory competition can only work if the outcome of the decisions made by firms and other actors provides a meaningful signal of their legal preferences. If other, non-legal considerations loom larger in the decisions of the firms than their preference as to the law that should govern them, then any attempt to derive useful information as to law from such decisions is misguided. In the textbook case of regulatory competition, namely the competition for corporate charters and governance, firms decide both (i) essentially on legal considerations, without non-legal aspects playing a crucial role, and (ii) in relative isolation, with the knowledge that the decision will not affect the firm beyond the range of interests directly concerned by the decision, i.e., wherever it may be incorporated, the firm will still be able to do business through the larger area within which regulatory competition is taking place, be it the USA or the EU. Under these conditions, it is possible for a firm to take a decision driven mostly if not entirely by legal considerations,[43] which means in turn that that decision can provide a meaningful signal to the public authorities. It should be readily apparent that these two conditions will rarely be met, which can explain why regulatory competition is not often observed in practice.

As to the first condition (*law is crucial to the decision*), if one leaves the realm of corporate governance to look at decisions relating to production, for instance, one sees that law is but one factor in the decisions of firms, and often a minor one at that. That is because firms must take broad, strategic decisions whose legal component, if any, cannot be isolated. It is known that firms might accept to locate their production in a jurisdiction with relatively unfavorable labor or environmental laws,[44] to name

[42] In addition, as pointed out by Radaelli 2004, 12–14, regulatory competition models posit a very simple and linear behavior on the part of firms.

[43] Unless there is also an issue of prestige or standing—global or local—in choosing the jurisdiction to which the firm will be subject as regards corporate governance.

[44] Assuming that they cannot escape the application of such laws.

but these, if they otherwise benefit from access to inputs, a qualified workforce or a favorable geographic location, for instance. Under these circumstances, it would be wrong to draw conclusions on the law based on the decisions of the firms, if the law was not determinative.[45]

As to the second condition (*isolation from other decisions,* a form of *rebus sic stantibus* condition), corporate governance is actually quite exceptional. In most other legal areas, the decision of the firm can lead to drastic consequences, which can also be taken to mean that the firm actually does not enjoy that much mobility.[46] For instance, if a firm decides to produce to its preferred product safety standard, which does not happen to meet the requirements of the USA or the EU, then it will not be able to sell its products on these markets. Even if the firm can locate its production anywhere, it cannot escape the product standards of its target markets. There is therefore no room for regulatory competition on product standards, even it may appear that differing standards from different jurisdictions are competing with one another.[47] In other cases, the rules of private international law effectively prevent regulatory competition. For instance, as regards product liability, given that in most cases the damage will occur close to the end-user, the plaintiff victim will be allowed to claim under the law of the *loci delicti*, of the place where the damage occurred, which is likely then to be the local law of the place where the end-user lives. Here, firms can either refrain from selling in a jurisdiction at all or accept that the local law will apply to product liability. Their choice is very limited. More often than not, other factors will prevail over product liability concerns in the decisions of firms.

10.2.4.3 Fundamental Limitations: An Impoverished View of Law

On the other hand, regulatory competition takes an impoverished view of law. For one, law is brought back to a set of rules (including the way they are applied and

[45] This is a central flaw in a line of argument often used by lobbyists: the law of a given jurisdiction should be changed because firms find it detrimental. This argument only holds if the law is crucial to the location decisions of firms. Otherwise, it is perfectly understandable that the authorities in a jurisdiction would make a tradeoff and conclude that, given the overall attractiveness of the jurisdiction, firms will accept that the law is not as favorable as they would desire.

[46] As pointed out as well by Radaelli 2004, 15–16.

[47] Unless of course there is a mutual recognition obligation which binds the various jurisdictions to accept each others' standards. Given that mutual recognition is usually bound with some form of agreement on the content of the standards (or at least on their objectives), what remains in the end is a fairly edulcorated form of regulatory competition. Another, more remote possibility is that a jurisdiction could be put under pressure, presumably from its own citizens, as a result of the decisions of firms not to market products perceived by citizens as essential or desirable, because the firm considers that the product standards in that jurisdiction do not enable it to achieve its business objectives.

implemented). Regulatory competition is then about firms choosing the rule which they prefer.

In addition to reducing law to a set of rules, regulatory competition downplays their substance. In the end, it does not really matter what the rule entails, since the process of regulatory competition will ensure an efficient outcome. That trust in process at the expense of substance lies at the core of the 'race to the bottom' line of criticism leveled at regulatory competition. The original Tieboutian model assumed that different rules would coexist, so as to reflect the different substantive preferences of various local communities. The Easterbrook version ignores all matters of policy and turns regulatory competition into a mechanism to pick a winning rule.

Finally, regulatory competition assigns an essentially passive and reactive role to the legal actors, to those who actually shape the law (legislatures, courts, members of the legal community, etc.). Their role is to respond to the pressure exerted by market actors through the various channels (firm mobility, international trade, investment and production factor mobility). When they respond, they are meant to take notice of what the market players signaled through their decisions and act accordingly. While in line with public choice theory (which sees legal actors as mere suppliers of rules), this role does not account for the day-to-day activity of legal actors: debates and discussions within parliaments, governments, agencies, etc., go far beyond merely trying to ascertain the demands of market players and supplying law in response thereto. As will be seen further below,[48] some critical voices have tried to add an institutional dimension to regulatory competition models.

10.3 Comparative Law

In comparison to regulatory competition, comparative law is a larger endeavor with a longer pedigree. In its modern form,[49] it started at the beginning of the twentieth century, after the eighteenth and nineteenth centuries had witnessed the birth of national legal orders in Europe and elsewhere. The early comparatists sought to react to the nationalization of law by advocating the study of other legal orders.[50]

It is beyond the scope of this piece to provide an account of the evolution of comparative law.[51] Rather, the emphasis is put on the mainstream current in comparative law today, namely functionalism (10.3.1), before considering some of its limits (10.3.2).

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[48] Heading 10.4.1.

[49] For historical background, see Zweigert and Kötz 1998, 48 ff.

[50] See David 1982, 4.

[51] For an account of the evolution of comparative law in the last decades, see Reimann 2002.

10.3.1 Functionalism in Comparative Law

In the second half of the last century, an attempt was made to put comparative law on a more articulate and—it was hoped—sounder theoretical footing. This started with the work of Max Rheinstein at the University of Chicago (himself building on Ernst Rabel), later picked up and expanded by Konrad Zweigert and Hein Kötz in their *Introduction to Comparative Law*.[52] Rheinstein's vision was informed by other social sciences, where functionalism was at its heyday when he wrote.[53] For Rheinstein, functionalism was more than a method; it was the essence of comparative law.[54] Comparative law is about unearthing the social function of legal rules and institutions, and ultimately of law itself.

Writing somewhat later, Zweigert and Kötz built upon Rheinstein's work, yet also strayed from it on two important points. First of all, they do not envisage that comparative law relates so closely to other social sciences.[55] The idea that comparative law helps legal research rise to the same level of 'scientificity' as other social sciences, central to Rheinstein's vision, is absent in Zweigert and Kötz. Second, they see functionalism specifically as a method, and not as the essence of comparative law. The functionalism of Zweigert and Kötz is therefore not necessarily linked with that of other social sciences. Rather, it is a stand-alone comparative law methodology: "The basic methodological principle of all comparative law is that of *functionalism*."[56]

10.3.1.1 From Rules to Functions

Put simply, Zweigert and Kötz's functionalist method points to a fundamental weakness of early comparative law and attempts to remedy it. As they put it,[57] early comparative law posited the legal categories of the researcher, and went on from there to find the corresponding rules in foreign legal orders, before comparing them. For instance, if a researcher wants to study vicarious liability, he or she would look into 'tort law', '*responsabilité civile délictuelle*' or '*Schuldrecht—Besonderer Teil*' for rules concerning the liability of employers for the conduct of their employees. This venture is fraught with risks: the researcher's own categories

[52] Zweigert and Kötz 1998, 48 ff.

[53] See also Schlesinger 1970, 35. For an exploration of the various concepts of function and functionalism, see Mahner and Bunge 2001. Similarly, Michaels 2006, 343–363 provides a thorough account of the various concepts of functionalism used in social sciences.

[54] See Rheinstein 1937–1938, 617 and ff. See also Rheinstein 1987, 25 and ff.

[55] They situate comparative law primarily in relation to other parts of legal science: Zweigert and Kötz 1998, 6–12.

[56] Ibid., 34.

[57] One can argue whether early comparative law really overlooked the issues raised by Zweigert and Kötz, ibid., 35.

are of course linked to his or her own legal order, and may not correspond to any categories in the other legal order(s). Even if they do, the researcher might miss the corresponding categories, or wrongly identify these. Furthermore, comparing rules might not necessarily give an accurate result: these rules might be interpreted or applied in a peculiar fashion, or other rules left outside of the observation might be relevant and affect the outcome.

In order to avoid these perils, Zweigert and Kötz advocate functionalism. As they put it, "the problem must be stated without any reference to the concepts of one's own legal order."[58] As shown by the examples put forward by the authors, the best way to formulate a problem outside of one's legal order is to try to formulate it as free from legal considerations as possible, i.e. to mentally step outside of the law. The question is then no longer "What is the law of State *X* on legal category *C*?" but rather "How does the law of State *X* deal with issue *I*?". Typically, issue *I* would be formulated as a fact pattern, e.g., a car accident, a trade, a dispute between neighbors, etc.[59] Very importantly, that fact pattern is assumed to arise across all legal orders under study. In that sense, one could brand the method 'functionalist', in that it looked at the law through the prism of how it fulfilled the function of dealing with a specific issue. Nevertheless, there is room to discuss whether Zweigert and Kötz's functionalism has anything to do with functionalism within the meaning of social sciences.[60]

Leaving aside whether the label 'functionalist' is proper, functionalism brought comparative law a significant step forward by instilling more rigor in the process of comparing. If and when the starting point for the comparison is truly common and external to the legal orders under comparison, then the comparatist knows that the comparison will be meaningful. The outcome of the exercise is a statement about the legal orders under comparison, as opposed to a reflection of a failure in the process of comparison. If and once the functionalist method is seen in that light—namely as an inquiry into legal orders from a common and external point of comparison—it should follow that the point of comparison need not be restricted to fact patterns, real or imaginary. Comparative legal research could also bear upon, for instance, how an EU directive was received in EU Member States, going of course beyond the mere legislative implementation—often perfunctory and formalistic—to include as well the 'digestion' of the changes brought about by the directive in administrative and legal practice.[61] A similar exercise could be conceived on the basis of international law commitments.

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[58] Ibid., 34.

[59] Zweigert and Kötz themselves did not push their idea of standing outside of one's own system as far as to say that one should try to stand outside of the law. That step was taken by subsequent large-scale comparative law endeavors, such as the Common Core Project (see Bussani and Mattei 1997–1998) or the Ius Commune Casebooks Project (see Larouche 2000).

[60] See Michaels 2006, 343–363.

[61] For example, see the study of product liability and Directive 85/374 on product liability [1985] OJ L 210/29 in van Gerven et al. 2000, 598 and ff.

10.3.1.2 Vantage Point: From Within National Law to Above National Legal Orders

When it began, modern comparative law was carried out from a given national legal order: it was the study of 'foreign law', aiming at enriching the understanding of one's own system. In short, comparative law takes place from the inside looking out. Within each national legal order, the comparatists were inquisitive spirits who broke with predominant nationalism and ventured beyond the borders. As is known from discussions in Germany in the nineteenth century,[62] it was not immediately obvious to the various national legal communities that studying 'foreign' law was a valuable endeavor.

Progressively, comparative law scholars began to form an international community, which led them to take some distance from national legal communities. The perspective of comparative law then evolved, from the study of foreign law, toward the study of the various legal orders set next to another, i.e., a proper comparison of legal orders. Historically, authors point to the Paris Congress of Comparative Law in 1900 as the key moment in the emergence of this approach to comparative law as an exercise in classification and categorization of legal orders, with the aim of ascertaining their commonalities.[63] From there, it is only a small step to the idea of 'legal families', whereby legal orders are linked using concepts of parentage or filiation.[64] Since comparative law was primarily a European venture at the time, the distinction between common law and continental European (civil law) systems soon took center stage. It was further refined by subdistinctions between, on the common law side, English and American families and, on the civil law side, Romanistic and Germanic families.[65] Non-Western legal orders[66] were always summarily dealt with, sometimes on the assumption that they were constructed under the influence of Western legal orders and could thus be analyzed by reference to Western systems. It is only in more recent times that non-Western legal orders were given a greater place in comparative law.[67]

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[62] Zweigert and Kötz 1998, 53–54.

[63] Ibid., 59. It is no coincidence that this approach coalesced at the same time and in the same location as the Paris Exhibition of 1900.

[64] Legal families are central to twentieth century classical works such as Zweigert and Kötz, ibid., Schlesinger 1970 or David 2002. This idea is still found in the current line of the literature on 'legal origins', discussed *infra*, Heading 10.4.6.1.

[65] As put forward by Zweigert and Kötz, ibid.

[66] We leave aside here the communist family of legal orders, which used to be treated separately but is now of mostly historical interest.

[67] See for instance the recent work of Glenn 2010. As long as comparative law focused on the formal law, mostly on legislation, the influence of the colonial era was unmistakable and it was possible to subsume non-Western systems under the main Western families. That assumption becomes untenable as soon as comparative law takes a broader perspective and looks at 'law in context', so that the specificities of non-Western legal traditions come much more strongly to the fore.

Functionalism opens the path to go one step beyond and anchor comparative law not within national law, nor at the level of the various national legal orders, but above these systems. The latter are then viewed not so much as objects of comparison, but as concrete applications of a higher, more abstract corpus of knowledge about law. To some extent, this is no longer comparative law, in the sense of a comparison of legal orders (or *Rechtsvergleichung*, as the Germans put it), but rather a study of how this abstract corpus of knowledge about law manifests itself in the various national legal orders. For instance, knowing what options and choices are available in the design of liability law (including the degree of relevance of conduct, various conceptions of wrongfulness—if needed—and illegality, devices to limit the ambit of liability, etc.), one can study how different legal orders have made similar or different design choices and how this affects the quality of liability law.[68] Of course, the options and choices are not known a priori; they are identified either as result of a comparative study of the type described in the previous paragraph or otherwise (through economic analysis, for instance). Functionalism makes such a vantage point possible, yet at this point in time comparative law scholarship does not yet rise above national legal orders as a matter of course.

10.3.1.3 Descriptive, Analytical, or Normative

In addition, comparative law scholarship also pursues many objectives. It is sometimes conceived of, or at least undertaken, as a descriptive venture, sometimes as an analytical endeavor, and sometimes even as a normative exercise.

Even if describing the state of the law within a given legal order may seem trite to other social sciences, it is never an easy task. The difficulty is compounded if the legal order in question is one with which the researcher and its readership are not entirely familiar, where the sources of law—formal and informal—might not be the same and where these sources are couched in another language. A significant part of comparative law scholarship is therefore concerned with describing the law of different legal orders.[69]

No description is ever entirely neutral, and thus even avowedly descriptive works always contain the seeds of analytical scholarship. Especially, if the author is writing about a legal order where he or she is not at home, the process of description (and the translation, when necessary) will unavoidably impose some structure upon the legal order being described. From there on, especially when a functionalist approach is followed, it is only a small step to turn comparative law scholarship into an analytical endeavor. Legal orders are restated, they are set side by side for the purpose of comparing them and drawing conclusions as to similarities and differences. Still to this day, the stereotypical comparative law research project follows

[68] Quality can be measured according to many parameters, be it efficiency, effectiveness, satisfaction of the parties, etc.: see, Heading 10.4.4.

[69] As Reimann 2002, 675–676.

this pattern: on a given issue, 'national reports' are prepared on a series of legal orders, and a conclusion is then added, building upon these national reports.

Beyond that, comparative law scholarship could also pursue normative aims. In that case, building upon the analysis of a number of legal orders, normative conclusions are drawn. Typically, one legal order would be presented as superior or optimal, but normative conclusions can also be more nuanced (e.g. a combination of features from the systems under study would be preferable). Yet, it has been noted that comparative legal scholarship tends to stay at the descriptive or analytical level.[70] As Michaels remarks, while functionalism improves the analytical quality of comparative law, by allowing for more robust comparisons to be made, it "provides surprisingly limited tools for evaluation".[71]

10.3.1.4 Static or Dynamic Perspective

Traditionally, comparative law takes a static perspective, comparing legal orders as they are at the point in time where the comparison is made. It might even be more accurate to characterize that perspective as atemporal; the law is compared as it is, without any specific time reference. Historical references are informative, meant to highlight how the law came to rest in the state it is reported to be. The traditional perspective is therefore also static in the sense that it assumes that the law is in a stable state. Comparative analysis would then return findings such as that the law of jurisdiction X suffers from gaps on issue *a*, or that the law of jurisdiction Y is more developed as regards issue *b*.

Functionalism makes it possible to take a more dynamic perspective, which includes the evolution of legal orders over time. This opens the door to many interesting research questions, such as how legal orders reacted to an exogenous shock, the speed at which legal orders have dealt with certain issues, etc. Most significantly, a dynamic perspective allows the researcher to delve into the relationship between legal orders over time, to inquire into whether and how legal orders give to, and take from, one another over time. Ultimately, this leads to the most tantalizing question, namely whether legal orders tend to converge over time or not.[72]

10.3.1.5 Method or Field

Many of the earlier comparatists saw comparative law as a field of law or a subdiscipline of its own.[73] This view is certainly consistent with a vantage point

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[70] Mattei 1997, 97.

[71] Michaels 2006, 373–376.

[72] Convergence can be measured in different ways: around an outcome, around substantive rules, etc.: see, Headings 10.3.2.1 and 10.4.3.

[73] As was pointed out by Schlesinger 1970, 1, the English designation lends itself easily to this view, whereas the German one (*Rechtsvergleichung*) and to some extent the French one (*droit comparé*) point more in the direction of a method rather than a field of law.

anchored in a specific law ('comparative law from the inside looking out'). It would imply, for instance, that comparative law is presented as a separate topic in the legal curriculum, next to contract or property law, for instance. Comparative law is then a subdiscipline encompassing all the knowledge about foreign legal orders. Today, a number of comparative law scholars still see comparative law as a field.[74]

With the onset of functionalism, however, comparative law becomes more of a method than a field.[75] It is then not so much a body of knowledge than a way to attain knowledge, by comparing legal orders. Accordingly, there would be no room for a separate comparative law course in the legal curriculum, beyond teaching how to carry out comparative legal research (a non-obvious question, as will be seen below). Since it is a method, comparative law can in principle be applied to any legal research endeavor, irrespective of the research question. A weak version of this proposition would hold that any legal research can benefit from using the comparative method: even the most practical research questions—about the state of the law in a given system—can be better answered by placing the answer within a broader comparative context. A stronger version would go as far as to claim that any meaningful legal research must be carried using a comparative method[76]: academic legal research that refers to a single legal order only would be incomplete or superficial.

10.3.2 The Limits of Functionalism

Functionalism offers a solid method by which to venture outside of national law and take a vantage point among or even above legal orders. It also establishes a basis upon which to reach valid analytical conclusions, while however not indicating how these could then feed into a normative analysis. It has become the standard method for comparative legal research, so much so that the methodological choice facing comparatists now is whether or not to espouse functionalism.[77]

Still, a number of comparatists are critical of functionalism—at least as expounded by Zweigert and Kötz. There are two broad lines of criticism.

10.3.2.1 The Praesumptio Similitudinis

The first one stems from what could be considered an overreach on the part of the two authors. In their *Introduction to Comparative Law*, they posit their

[74] See Riemann 2002 or Sacco 1991a, 4–6.

[75] For instance, see the clear statement made at the outset of Schlesinger 1970, 1.

[76] In addition to any other method which might be used, and in particular to interdisciplinary methods such as law and economics.

[77] Michaels 2006, 340–343, who adds that functionalism has almost become synonymous with comparative law, and as such that its conceptualization shows a significant amount of variation among authors. See also Adams and Griffiths 2012, to be published.

'*praesumptio similitudinis*', namely that "different legal orders give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation".[78] They even go as far as to claim that[79]

> [T]he comparatist can rest content if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same of similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he has posed his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough.

It is worth noting that the authors do not frame their presumption in dynamic terms. Their claim is static: at any given point in time, different legal orders should evidence similar solutions to similar problems. Nonetheless, subsequent authors added a dynamic element to the presumption, thereby turning it into a so-called 'convergence hypothesis', which states that legal orders—at least those of EU Member States—are bound to converge over time.[80] The 'convergence hypothesis' provided the intellectual underpinning for much of the academic efforts to draft a European Civil Code, including the more concrete extension into a an academic Draft Common Frame of Reference.[81]

In reaction to the convergence hypothesis, some comparatists denied the possibility of convergence altogether, arguing that law was so steeped in culture that legal orders could not converge, or more precisely that any convergence claim is a mere pretense, papering over irreconcilable differences.[82] Leaving aside how culture is so reductively articulated solely along national lines, this line of argument, pushed to its limits, leads to a nihilist dead-end. Ultimately, no comparative law would be possible. Suffice to say that, under a veneer of humanist eclectism, this line of argument vastly exaggerates the significance of law. By ignoring that national laws can also evolve toward one another if the political or economic situation so dictates, this scholarship contradicts its own call for comparatists to pay more attention to the broader social context against which national laws play out. While law surely cannot be seen without reference to that broader context, the influence of that context can go in both directions: keeping national legal orders autonomous or bringing them closer together.

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[78] Zweigert and Kötz 1998, 39. A similar idea underpins the work of Schlesinger 1970, 30–35.

[79] Ibid., 40.

[80] Indeed, in the introduction to von Bar et al. 2009, the authors write, regarding the private laws of Europe, that the purpose of the DCFR is to "sharpen the awareness of the existence of a European private law and also […] to demonstrate the relatively small number of cases in which the different legal systems produce substantially different answers to common problems." (at 7).

[81] Ibid.

[82] The most vocal and radical proponent of that line of criticism remains undoubtedly Pierre Legrand. See for instance Legrand 1996.

In the end, that criticism would have been more successful if it had been less radical, for it does point to a weakness of functionalism.[83] For all the rigor it brought to comparative law, functionalism remains an essentially legal, monodisciplinary method. It can improve the quality of comparative legal research by broadening the inquiry beyond positive law, to include outcomes (the way in which law is applied to reach a given result in dealing with the issue under study) and, by the same token, other means than positive law, through which an outcome can be reached.[84] The scope of inquiry is extended to facts and to the gray zone between positive law and facts, but somehow what is above the law—i.e., higher fundamental principles and policy choices—remains outside of the inquiry. This shortcoming can perhaps be attributed to the piecemeal nature of functionalism, investigating each legal order as it does, from the point of view of a narrow, exogenous starting point. In that sense, functionalism was faulted for failing to see the forest for the trees, for obscuring the *génie* of legal orders through a micro approach.[85] Yet, Zweigert and Kötz advocated that the comparatist 'avoid all limitations and restraints'[86]; surely this also implies that the comparatist should be free to venture beyond and behind the law to look at the underpinning principles and policy choices. It seems more likely that the failure to include principles and policy choices within functionalist inquiries stems from the still prevalent propensity of private lawyers to believe that law—read private law—is free from such principles and policy choices.[87] If law was only about finding the 'right' rule for a given case, then perhaps one could expect a *praesumptio similitudinis.*

The *praesumptio similitudinis* ignores that legal orders can very well settle on different solutions. In an earlier piece,[88] my co-author and I put forward three main explanations for divergence between legal orders.

First of all, different policy preferences can prevail within different jurisdictions, leading to different solutions. State A prefers to ensure that victims are fully compensated, while State B is ready to accept less compensation for victims, for the sake of reducing the cost of compensation schemes. Accordingly, their liability laws might differ. This is the classical local preference phenomenon, well known in economic literature.

Second, differences might stem from less explicit choices, which were influenced by information imperfections or by previous choices, via phenomena associated with network effects, such as tipping or path dependency.[89]

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[83] See also Michaels 2006, 369–372.

[84] Including not just other areas of law than the one which the researcher would spontaneously consider, but also devices perceived as non-legal, such as soft law instruments, customs, etc.

[85] To borrow the terminology used by Zweigert and Kötz 1998, 4-5.

[86] Ibid., 35.

[87] As noted in Chap. 3 of this book, referring to Hesselink 2006, 143. Indeed, as Michaels 2006 , 364–365 points out, functionalism does not need to be rule-centered.

[88] Chapter 2.

[89] See also Mattei 1997–1998. As pointed out by Watson 1982–1983, 1134–1146, the law is often dysfunctional, i.e. in conflict with the interests of society or its leaders (referring Watson 1977).

Third, differences might reflect the will of vested interests (including the local legal community), which are served by the current state of the law and oppose any change.[90]

These three explanations cannot be treated in the same fashion: local preferences should be respected unless there are good reasons not to do so, information imperfections or network effects must be factored in, but may not deserve the same respect as local preferences, and finally vested interests should be exposed for what they are. Of course, it is difficult to identify which of the three explanations prevails in a given case. Brushing them all under the carpet of 'legal culture', however, is of no help at all: 'legal culture' cannot be invoked to prevent a thorough investigation of the reasons why a legal order became as it is.

10.3.2.2 The Lack of Interdisciplinarity

A second line of criticism against functionalism is more recent and more fruitful, coming from interdisciplinary scholarship.[91] Here as well, functionalism is faulted for a shortcoming, for a failure by its proponents to embrace the full implications of their method. This time, the shortcoming lies not in the scope of inquiry, but in the formulation of the starting point. While the requirement to find an exogenous starting point marks a progress, functionalist theory does not otherwise specify how that starting point is to be found.[92] Presumably, the researcher is trusted to be able to correctly identify an exogenous starting point. Common sense and everyday experience can only reach so far: yes, car accidents happen in every developed country, but cars are not used under the same circumstances everywhere. There is no convincing argument to support the presumption that a researcher can identify a starting point, as the critics point out. Since that starting point is meant to be exogenous to law as much as possible, in all likelihood law and legal theory will be of limited help. The critics suggest using other social sciences in order to have a more robust method of identifying a proper starting point.[93] One can argue whether this criticism is really a fundamental repudiation of functionalism or rather a call to develop functionalism further and devote more attention to how the starting point is determined.

10.3.2.3 Conclusion

In the end, despite the undeniable advances made in comparative law over the last decades,[94] especially with the development of the functionalist method, the two

[90] This point is well expounded in Ogus 2002.

[91] See De Coninck 2010.

[92] See also Michaels 2006, 367–369.

[93] For instance, De Coninck 2010, illustrates her argument by using behavioral economics to find the starting point for her comparative research.

[94] As chronicled in Riemann 2002.

lines of criticism just discussed do expose the limitations of comparative law as it is conducted now.

First of all, comparative law remains for all intents and purposes a monodisciplinary, legal pursuit. It is carried out by legal scholars and for other legal scholars. Especially when it comes to private law, comparative law remains impervious to the principles and policy underpinning the law, which are typically emanating outside of the law (from political processes or socio-economic realities). It is still too focused on rules, as major recent exercises such as the DCFR show. Even if its scope of inquiry, when a functionalist method is used, extends beyond positive law, comparative law pays little regard to other social sciences.

Second and consequently, unless one is satisfied with the *praesumptio similitudinis* or with the incommensurability of 'legal cultures', comparative law lacks a dynamic dimension. It does not offer a satisfactory account of how the relationship between legal orders evolves over time.[95]

Third and again as a consequence of the previous points, because comparative law remains mostly monodisciplinary and static, its purpose is fuzzy, at best. It can certainly serve to enlighten and educate lawyers, but the issue remains what comparative law can achieve beyond the confines of the legal academic community. While comparatists typically state that their discipline serves to support the legislative power and to help the judiciary in interpreting the law, no convincing theory has yet been put forward as to how comparative law can achieve these purposes despite its monodisciplinarity and its staticness.

10.4 Legal Emulation

10.4.1 Beyond Regulatory Competition or Comparative Law: The Literature

In recent years, a number of authors, in the regulatory competition literature and comparative law scholarship, pointed to the shortcomings identified above and attempted to overcome them.

Following their review of the regulatory competition literature, set out above, Esty and Geradin add another line of criticism, this time touching not so much a limitation of the regulatory competition model, but rather a lack of complexity and ambition. The two authors fault regulatory competition for entertaining "too narrow a set of competitors". It is implicit in their view that regulatory competition models are overly inspired by US institutions. Indeed as pointed out before, Tiebout wrote his article in order to show that the 'tragedy of the commons' would be averted through regulatory competition among local authorities (as opposed to a

[95] Schlesinger 1970 offers a good account of migration of legal ideas at 8–14, and hints at dynamic explanations at 28, without developing this point much further.

single central authority). What is more, the Easterbrook, Chicago-school version of regulatory competition has an obvious US constitutional undertone, since it is used to argue in favor of State level against federal-level jurisdiction.[96] This relatively simple choice between, on the one hand, a federal-level intervention, unitary and uniform across space and time, and, on the other hand, regulatory competition at State level, might correctly render US constitutional processes, but it cannot necessarily be extended outside of the USA. Esty and Geradin argue that competition also takes place between the various levels of a federal (or multi-level) structure, between the various entities making up the State,[97] and between the State and non-State actors (such as NGOs).[98] This leads them to formulate a model of 'regulatory co-opetition', which combines competitive and cooperative relationships at the intergovernmental, intragovernmental, and extra-governmental level. They claim that this model is more appropriate to describe the reality of, among others, the EU, the transatlantic relationship or the WTO.

By introducing institutional elements in the model, Esty and Geradin move away from the exogeneity and the resulting passivity of legal actors, which characterizes regulatory competition. Similarly, Claudio Radaelli criticizes the regulatory competition models for their lack of institutional dimension.[99] Beyond competitive races to the bottom or top, Radaelli introduces the concept of 'side-ways races' or policy transfers, where jurisdictions actively seek to learn from each other.[100] This concept can also be found in Gabor (as 'yardstick' regulatory competition).[101] Neither Radaelli nor Gabor fully fleshes out those concepts. Their writings point in the direction of the legal emulation model, which is developed in greater detail here.

In the comparative law and economics literature, a number of authors have sought to bring insights from law and economics into the discussion. Ugo Mattei noted that in the literature on legal transplants, which seeks to provide an account of how law is carried over from one legal order to the other, even leading authors such as Watson or Sacco do not seek to answer the question why such legal transplants occur.[102] They are content to rely on inchoate concepts such as prestige: the law from the most prestigious legal order would be taken over by others.[103] In contrast, law and economics offers a cogent explanation for legal

[96] Although Easterbrook 1983, Easterbrook ends up arguing for a moderate form of federal intervention via a revised State action doctrine under the Sherman Act.

[97] I.e. between the branches of government, but perhaps more even between departments within one of the branches of government, namely the executive.

[98] These other competitive relationships are also present in the USA.

[99] Radaelli 2004, 5–7.

[100] Ibid., 10–12 and 16–18.

[101] Gabor 2010, 15–17, 23–24.

[102] Watson 1978 does put forward a theory of legal change, but it does not seem to be picked up by other authors. Sacco 1991b ventures his theory of why legal systems change (at 397 and ff.). In his view, it comes down to imposition or prestige.

[103] Mattei 1994, 4. See also Mattei 1997a, b, 123 and ff.

transplants. Typically, law and economics scholars—now strengthened by the Law and Finance literature—argue that the common law is taken over by other systems because it is more efficient.[104] As Mattei remarks, 'efficiency' is not defined that precisely in the literature, and here comparative law can in return contribute to a better understanding of the grounds which lead to a finding that a given legal order is more efficient on a given issue. Similarly, comparative law can better explain why, despite the efficiency justification, some legal transplants fail.[105]

Ogus, alone and with Garoupa, took this reasoning further. In a first piece,[106] Ogus put forward a distinction between facilitative law and interventionist law. The former is the law which aims to foster mutually desired outcomes as between parties, typically contract law, corporate law, etc., where the preferences of the parties can be expected to be reasonably uniform across legal orders. The latter comprises the law that seeks to protect one party or one public interest as against the will of other parties, for instance tort law, regulation, etc., where the law is more likely to reflect local preferences.[107] Ogus surmises that interplay between legal orders can lead to convergence in the case of facilitative law, but is unlikely to do so in the case of interventionist law.

In a later piece with Garoupa,[108] the authors investigate further the incentives for convergence. They make a simple two-jurisdiction model, where each jurisdiction may or may not want to change their law by taking inspiration from other jurisdictions. There are thus four possibilities: both jurisdictions might want to change, only one of them might do so (and then either *A* or *B*), or none of them does. There is a payoff for change, in the form of increased ability to trade with other jurisdictions, but it is bound with cost, in order to absorb the new law.[109] If both jurisdictions change to an agreed state of the law, they both reap the benefits and incur some cost. If only one jurisdiction changes to the law of the other, both reap the benefits, but only the first one bears costs. Finally, if no jurisdiction changes its law, then both reap no benefits but incur no costs either.

The authors model this as a non-cooperative game.[110] The outcome of the game will depend on the size of the costs of changing one's legal order relative to the benefits. If the cost to each jurisdiction is high relative to the benefits, no change

[104] Ibid., 5.

[105] Ibid., 18–19.

[106] Ogus 1999.

[107] The distinction between facilitative and interventionist law seems to run along the same lines as the civil law distinction between suppletive and imperative law (typically found in contract law, especially), albeit for different reasons.

[108] Ogus and Garoupa 2006.

[109] The range of costs envisaged by the authors is quite broad and complete, including (i) the cost of learning the new law to be introduced, (ii) rent-seeking by entrenched interests, (iii) loss of consistency in the receiving legal order as a consequence of the change, (iv) private adjustment costs and (v) loss of innovativeness flowing from the removal of variation: ibid., 345–46.

[110] Ibid., 346–48.

will occur. If there is an imbalance, i.e., one jurisdiction faces a low cost relative to the benefit and the other, a high cost, then the low-cost jurisdiction will adopt the law of the high-cost jurisdiction. This is the case of a legal transplant, with one origin and one transplant jurisdiction. If the costs to each jurisdiction are relatively low compared to the benefits, then the two jurisdictions might enter into a Chicken game, where each hopes that the other will make the first move, with the ensuing risk that no one moves.

Ogus and Garoupa then consider whether the Nash-equilibrium outcomes of the game are also welfare-maximizing (Pareto-efficient), or whether some intervention might be required to correct the outcome. They conclude that intervention might be warranted, either because of a discrepancy in the division of costs and benefits as between the two jurisdictions (positive externality) or because the free-riding inherent in the Chicken game prevents the optimal outcome from being reached.[111] Of course, the authors caution against the risk of government failure, because of an inaccurate assessment of the situation or a failure to take into account private efforts (leading to duplicative waste).

With their work, Ogus and Garoupa shed more light on why legal orders might or might not move toward one another. In particular, as compared to the traditional regulatory competition literature, they take a more realistic view of the process of changing the law, by factoring in a realistic assessment of the costs associated with changes. Nevertheless, they retain some element of the exogenous vision of law which characterizes regulatory competition: the assumption is that legal orders are changed in the sole hope of increasing welfare through trade,[112] and the actual content of the law is not so material.

10.4.2 Legal Emulation

At the risk of oversimplification, the result of the foregoing discussion of regulatory competition and competition could be summed up in Table 10.1.

Legal emulation provides a model for the interaction between legal orders which would combine the strengths, and if possible remedy the weaknesses, of regulatory competition and comparative law. Accordingly, this account should:

- have a purpose going beyond the legal community, i.e., be applicable to real situations, but without suffering from so many limitations as regulatory competition;
- be based on theoretical vision that includes a richer understanding of law than regulatory competition, while opening up to the policy context and avoiding the monodisciplinarity of comparative law;

[111] Ibid., 48–53.

[112] Ibid., 345.

Table 10.1

	Regulatory competition	Comparative law
Nature	*Model*	*Academic exercise*
Purpose	Describe reality	Uncertain beyond legal education
Limitations	Limitative assumptions (no externalities, perfect information, mobility, responsive authorities)	No limitations
	Counter-indications (economies of scale, transaction costs, strategic behavior)	
	Law must be essential to firm decisions and impact isolated	
Theoretical vision	Law as rules (including interpretation and implementation)	Goes beyond rules to include outcomes
	Substance of law immaterial	Policy context ignored
	Multidisciplinary (without much law)	Monodisciplinary
Driver	*Exogenous*	*Endogenous*
	Driven by non-legal actors, outside of the law	Carried out by legal community
	Legal community passive	Non-legal actors irrelevant
Time dimension	Dynamic model	Static model, lacks solid dynamic account

- be primarily driven within the law by the legal community, or at least allow the legal community to play a central role;
- have a well-developed dynamic dimension, i.e., be able to explain the evolution of legal orders over time.

Legal emulation starts from the observation that, within legal orders, one finds an increasing number of instances where interaction between legal orders is a direct consequence of the legal order (at least potentially, if not in reality). In other words, the impetus for interaction is *endogenous*. In comparison, regulatory competition models assume that outside pressure (from market actors) drives the interaction between legal orders, and that the legal community reacts to such pressure. Some of these instances are surveyed further below, including constitutional and EU review, impact assessment exercises or networks of authorities. One might ask whether these are not just isolated instances, or whether a broader principle can help to explain them. In my view, they all reflect a concern with the quality of the law, which can be associated with good governance. The more law achieves its objectives and the less expense and disruption it generates in so doing, the better its quality. Such a principle of quality has not yet reached the status of hard law, although it is starting to be relatively widespread throughout legal orders.

For instance, the EU Treaty contains a generally applicable proportionality principle at Article 5(4), which covers much the same ground as the quality principle discussed here.[113]

Based on that concern for the quality of the law, legal emulation involves a number of concrete steps, which are formulated in very general terms in the following paragraphs.

First of all, the framework of reference for the inquiry must be fixed. As a starting point, one must know what the object of the inquiry is (here the functionalist method is useful): which issue is to be examined? Next to that, the normative standard for assessment must also be known. Which criteria will be used to look at legal orders and compare them? As is explained in greater detail further below, in order to set the normative standard, account must be taken of the objectives that the law should fulfill on the issue in question and of substantive and institutional constraints that may exist outside of the issue in question.

Second, against that framework of reference, a number of legal orders are analyzed, to see how they deal with the issue at stake. Typically, the number of legal orders to be analyzed does not need to be so high, since there might not be so many different options as to how to deal with the issue at stake. At the end of this step, a number of choices (each with a number of options to be chosen from) are identified and articulated.

Third, the options identified in the second step are compared, on the basis of the normative standard set out in the first step. Depending on how well defined the normative standard is, the result might be a strict ranking among the options (a sort of benchmarking exercise) or a relative ordering, depending on certain tradeoffs to be made.

Fourth, a conclusion is drawn and, as the case may be, changes are brought to the legal order(s) in question.

If the exercise is a one-shot operation, it can already lead to some interaction between legal orders. If it is repeated at regular intervals or within a number of legal orders, the dynamic effects can be much more significant.

The next headings elaborate on two aspects of legal emulation, in order to explain better how it meets the requirements set out above for improving over regulatory competition or comparative law.

[113] For a representative application of Article 5 TEU (formerly Article 5 EU), see ECJ, 8 June 2010, Case C-58/08, *Vodafone (Roaming Regulation)* [2010] ECR I-4999, at para 51–71. For a sharper application of proportionality (without expressly framing the reasoning in such terms), see ECJ, 24 November 2011, Case C-70/10, *Scarlet*, nyr.

10.4.3 Theoretical Perspective: The Tree Metaphor and Law as Choice

Legal emulation rests on a specific theoretical view of law, where the emphasis is not so much on the actual state of the law (the rules as they may be), but on the law as it is, could be or might have been. The positive law of any jurisdiction is the outcome of a series of choices, and legal science is the study of the law as a set of possible options and of choices to be made between these.

By way of metaphor, we could think of legal orders as a group of trees (oak trees, for instance), where each legal order is a tree. On a nice summer day, these trees will appear to have similar shapes, covered in leaves. The trees are next to each other, of the same species and face the same environment and weather. Accordingly, they are bound to look alike from the outside. At the same time, when looking under the foliage, it is immediately clear that no single tree is like the other. Their branches grew along different paths, even if they seem to fill similar volumes and support similar leaf covers.

So, it is that the law in each jurisdiction needs to deal with a number of social, economic and political issues, which show some variation from one jurisdiction to another, but not that much (certainly among developed countries). In dealing with these issues, there are only a few reasonable outcomes.[114] This the leaf canopy in the metaphor.

In order to arrive at those outcomes, however, a number of explicit or implicit choices have been made: these correspond to the branches of the tree in the metaphor. These choices relate to each other, just like the shape of the lowest forks influences how the upper branches will develop. No tree is exactly like another, and indeed no two legal orders are identical. Each legal order would then be a function of a set of interrelated choices, some of which have a fundamental influence on others. Legal science investigates the total set of interrelated choices (i.e. the tree structure that would result if all trees were considered together), and legal emulation rests upon that set.

Among these choices, some distinctions can be drawn. Some choices concern the substance of the law: what should be the conditions for contracts to be formed? What should be the conditions for liability to occur? Other choices rather bear on institutions: Who sets the law? Who implements and enforces it? How?

The substantive choices are often referred to as policy choices, since they usually involve compromises between various objectives, such as legal certainty, welfare, growth, efficiency, equality or fairness. In contemporary democracies, these choices are made through democratic processes, either primary or delegated. Some of these choices are so central and have become so entrenched that they are considered established principles, such as democracy itself or the protection of

[114] Hence the quick decrease in marginal utility when piling up country reports, in large-scale comparative law efforts. For instance, in the 27-member EU, it is hard to imagine that a given issue would be dealt with in 27 equally different and relevant ways.

fundamental rights.[115] Without wanting to elaborate at length on this, these substantive choices are typically not those that lawyers can claim to master on their own: this is the realm of policy, where other sciences can provide much useful information to guide choices. Based on this theoretical perspective, legal emulation thus makes more room for other disciplines to be considered than comparative law.

In contrast, lawyers are often expert and competent for making institutional choices, which are largely reflected in the legal order. In that sense, law is an applied endeavor, which translates substantive choices into a normative realm, incorporated in the relevant institutions. Some of these choices are very ancient, such as for instance the balance of power between legislative organs, the judiciary and the academia, in the development of law, where differences can be observed both over time and between English, French, or German law, for instance. Because of how deeply imbedded these choices are, it is tempting to present them as an immutable feature of a given 'legal culture'. Yet such deep imbeddedness should rather be seen as a challenge for the researcher, in that the choices are harder to ascertain and explain (especially if they have been made over a longer period of time, in small incremental steps). Upon proper examination, one can often find evidence of the choice, in that different options are put forward[116] and a decision is more or less explicitly made between them. As a consequence, even such deep-seated choices can be changed if necessary; no choice is immutable. 'Legal culture' can best be pictured as the legacy of choices past, which can of course create strong path dependency.[117] Going beyond that to endow 'legal culture' with eternal and incommensurable properties is not appropriate.

Substantive and institutional choices are not hermetic categories. In fact, they mix and interact. Some choices can be framed as either substantive or institutional, for instance whether to qualify a question as fact or law. More importantly, some of the fundamental institutional choices discussed above may have a bearing on substantive choices. For example, creating a new regime of compensation might be easier if there is already a set of institutions and procedures to handle that regime, as opposed to a situation where institutions and procedures must be created anew.

In the end, legal emulation can best be understood against the background of the tree metaphor, as explained above. Legal emulation treats legal orders as the

[115] These principles can also be seen as objectives in and of themselves, which have however acquired a higher status such that tradeoffs involving these objectives are not carried out in the same fashion as tradeoffs between 'ordinary' objectives. For the purposes of this chapter, the issue can be left open.

[116] It always comes as a surprise to a researcher to find, within a given legal order, ancient traces of options which were not chosen, which correspond to the chosen options in other legal orders. In general, most options are presented in most legal orders: differences arise from the choices made, not from the options available. A similar point is made by Sacco 1991a, 21–24, where he insists that legal systems contain 'legal formants' which point in different directions.

[117] In that sense, the concept of legal culture put forward by Watson 1982–1983, 1151–1157 for example, is much more fruitful than that of Legrand. See also Michaels 2006, 365.

outcome of a series of choices, substantive and institutional, fundamental or more fleeting, and allows for dialog and interaction between the orders against the background of those choices.

10.4.4 The Policy Dimension

Seen against the background of that theoretical perspective, legal emulation fills a gap in both regulatory competition and comparative law, regarding policy. It will be recalled that regulatory competition takes an external perspective on law. Efficiency is seen as the driving force for changes in legal orders. Yet unless efficiency is taken to be an end in itself, regulatory competition literature does not and cannot explain how efficiency is measured. Presumably regulatory competition aims to promote the most efficient rule from the perspective of the interests of the market players which are 'voting with their feet', but that is not a satisfactory account from a welfare perspective.[118] Similarly, we saw that comparative law—even using a functionalist method—does not sufficiently take policy choices into account, if at all. This is how Zweigert and Kötz could come to their *praesumptio similitudinis*.

The legal emulation model factors in the policy choices that regulatory competition and comparative law leave outside. By the same token, it gives a stronger account of the purpose of comparison. Why would a legal order be perceived as preferable to another? The theoretical perspective sketched above does not answer that question in the abstract, but it offers a way to produce a credible and sound answer to that question. Indeed, it can be argued that the normative standard by which legal orders are measured is a function of which of the choices (from the whole set of choices) are held constant for the purposes of the assessment, and which ones are actually submitted to the assessment. By way of illustration, let us look at product liability. At the highest level of generality, one could for instance assume merely the most general choices made regarding liability—that liability law exists, that compensation is an objective and that the cost–benefit ratio of a compensation system should be optimized—and conduct an inquiry into the best way to deal with end-user damage caused by industrial products. In that inquiry, presumably, relying on the general law of liability without having a specific regime would be one of the options. The assessment could also be more specifically framed, assuming for instance that specific product liability regime is desirable.[119] The issue would then be which specific product

[118] As mentioned *supra*, note 38, the regulatory competition literature ignores the 'local' externalities potentially caused by firm-level decisions upon other market players and other members of society. Even if the conditions for the model to work are met, the authorities could thus receive signals that are distorted by externalities.

[119] Therefore bringing the choice 'specific regime or not' out of the purview of the inquiry and into the range of choices held constant.

liability regime performs best in the light of the choices held constant. In that case, legal orders where no specific product liability regime has been put into place[120] would either have to be left out or would have to be studied in a specific way, to take into account how the inquiry is framed. The assessment could be even more specifically framed, by removing yet another choice from the inquiry, if for example one would assume that a fault-based regime is not an option.

Accordingly, the normative standard of assessment would be which legal order performs best, within the range of choices that are not held constant for the purposes of the inquiry. Against that background, regulatory competition could be thought of as a relatively extreme case where the only constant choices would be efficiency and the unstated preferences of the non-legal actors whose behavior creates pressure for change. A functional comparative analysis could be conceived of as a case where all fundamental substantive policy choices are deemed to be constant,[121] and only the more ancillary substantive choices[122] and the institutional choices are at stake.

Legal emulation can apply in both practical and academic settings. In a practical setting, the set of constant choices is likely to be larger, resulting in a more focused inquiry. Furthermore, the issue might be formulated by a reference to a specific legal order, i.e., do other legal orders offer a better solution to the issue in question? In a more academic setting, fewer choices are constant, and the inquiry would be formulated more generally, i.e., which is the best solution or what are the tradeoffs involved? This makes the inquiry more challenging, but perhaps also less immediately applicable.

10.4.5 Endogenous Pressures to Change the Law

As mentioned above, there are a number of examples of endogenous pressures, within legal orders, which can lead to changes in the law in the light of other legal orders. These are usually ignored by regulatory competition as well as comparative law.

10.4.5.1 Constitutional, EU and Human Rights Review

First of all, over the past decades, judicial review has been introduced in European legal orders. It comes from a number of angles. Most European constitutions now allow constitutional review, whereby national law is measured against constitutional provisions concerning basic democratic principles, human rights or

[120] Either legislatively or judicially.

[121] Which happens less frequently than comparatists would like to believe.

[122] Such as the choice of legal criteria or the formulation of legal definitions.

federalism (where applicable). In addition, the European Court of Human Rights also reviews national law against the human rights guarantees of the ECHR. Moreover, the European Court of Justice can also assess the conformity of Member State law with EU law, especially with provisions concerning the internal market or fundamental rights.[123] It is not the purpose of this chapter to chronicle the various means of judicial review available across Europe; what they have in common, however, is the principle of proportionality. That principle implies—among other things—an inquiry into whether the impugned measure represents the best compromise between the achievement of the aim pursued and the constitutional or EU law guarantees which are at stake.[124] In order to carry out this part of the proportionality test, one natural avenue is to look at how other legal orders are dealing with the same issue. Presumably, other legal orders will show a range of solutions, within which the impugned measure can be situated, with a view to establishing whether it is an outlier compared to others. Proportionality tests are especially prevalent in the EU—where they feature in national, EU and ECHR review regimes—but they are also present in other legal orders.[125]

By way of illustration, construing EU review as an instance of legal emulation can help shed light on recent controversial rulings of the ECJ regarding the principle of proportionality, including *Commission* v. *Italy (motorcycle trailers)*.[126] The ECJ faced criticism for holding that "[s]ince that degree of protection may vary from one Member State to the other, Member States must be allowed a margin of appreciation and, consequently, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate".[127] The ECJ indicates that it considers that the degree of protection should be left outside of the inquiry, i.e., that it should be one of the constant choices. However, as the ECJ itself adds, Member States do not seem to agree on the appropriate level of protection. Accordingly, it is impossible for legal emulation to take place on the ECJ's terms, since the level of protection varies, yet it is not part of the scope of inquiry. A preferable alternative formulation might have been to put the level of protection within the scope of inquiry, while holding the policy objectives (free movement of goods, safety of road users) constant. At the same time, the test could have been formulated more loosely, in the sense that the proportionality test would not require the least limitative measure, but rather a measure that falls within a set of reasonable measures whereby a tradeoff is made between these objectives. This

[123] The ECJ can also review the conformity of EU law with the Treaties and fundamental rights guarantees, now enshrined in the EU Charter of Fundamental Rights.

[124] This is often referred to as the 'minimal impairment' test. Some significant variation can be observed, however, as to how strictly the test is carried out, i.e., whether the measure in question must truly be the least restrictive of all possible measure, or whether it must simply strike a reasonable compromise.

[125] For instance, in the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, 1982, c. 11, Article 1.

[126] ECJ, 10 February 2009, Case C-110/05, *Commission* v. *Italy* [2009] ECR I-519.

[127] Ibid. at 65.

would have left room for a finding, for instance, that the measure at stake was too one-sided in favor of one objective.[128]

10.4.5.2 Impact Assessment

Second, also in the last decades, impact assessment was introduced in most legal orders.[129] Typically, impact assessment is found by way of *ex ante* assessment of new legislative or regulatory proposals. Such assessment must be carried out by the proponent of the new legislation or regulation, or by an independent unit, and tabled with the proposal. A similar exercise can be carried out as well when legislative measures are subject to a review or sunset clause.[130] Furthermore, at the administrative level, review exercises in the nature of impact assessments are also carried out in some systems, with a view to improve the quality of administrative action.[131] Impact assessments usually comprise the following steps[132]: (i) identify the problem giving rise to the proposal, (ii) define the objectives to be attained, (iii) develop the main policy options, (iv) analyze their respective impact, and (v) compare the options. By and large, therefore, impact assessments follow the structure of legal emulation. In the light thereof, it is surprising to find that, in a representative sample of impact assessments carried out at EU level, very few seem to make comparisons between the legal orders of EU Member States in the course of identifying policy options.[133] Apparently, that work is left to officials and consultants who primarily use non-legal sources to identify those options, thereby ignoring the useful information coming from the rich experience of Member States' legal orders.

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[128] As was done recently in *Scarlet*, *supra*, note 113.

[129] See Meuwese 2008 and Verschuuren 2009.

[130] It depends on the extent of the review that the clause mandates. The review can be limited to measuring the effectiveness of the measure under review within the legal order in question (i.e. were the objectives achieved? did the measure work?), or it can be more ambitious, extending also to a comparison of the effects of the measure with those of comparable measures in other jurisdictions. In the latter case, such review comes very close to an *ex ante* impact assessment, for the purposes of this chapter.

[131] C.f. the *beleidsdoorlichting* exercise in the Netherlands.

[132] European Commission, *Impact Assessment Guidelines*, SEC(2005) 791 (15 June 2005). For the purposes of this chapter, the newer *Impact Assessment Guidelines*, SEC(2009) 92 (15 January 2009) will be used (see pp. 21 et seq.). They do not differ from the 2005 Guidelines as far as the scope of this chapter is concerned.

[133] See Chap. 12.

10.4.5.3 Networks of Authorities

Third, a more recent development in the EU also evidences internal pressures to orient the development of the law by reference to other legal orders. In a number of areas, typically concerning economic regulation and involving EU-level frameworks to be implemented or applied by Member States, the authorities of the Member States have regrouped into networks. These networks have generally come into existence on the authorities' own motion, and they have often then been formalized at EU level.[134] They exist in the areas of competition law,[135] financial services regulation,[136] electronic communications regulation,[137] energy regulation,[138] postal regulation[139] and rail transport regulation.[140] In these areas, even courts have also created European networks, in order to share their experiences.[141] While significant differences exist in the make-up, the status, the functioning and the

[134] Formalization at EU level is typically fraught with tensions, since the authorities which originated the network tend to resist what they perceive as a takeover by the EU institutions.

[135] The European Competition Network (ECN) regroups the Commission and all national competition authorities (NCAs) from the Member States. It is the forum for cooperation between the Commission and the NCAs pursuant to Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] [2003] OJ L 1/1. It finds its basis in a Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, attached to Regulation 1/2003, as well as a Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/43. Prior to the creation of the ECN, the authorities had already launched an International Competition Network (ICN) out of their own motion: see www.internationalcompetitionnetwork.org. Accessed 14 My 2012.

[136] Following the 2010 reform, a European Supervisory Authority has now been put in place, comprising a European Banking Authority (Regulation 1093/2010 [2010] OJ L 331/12), a European Insurance and Occupational Pensions Authority Regulation (Regulation 1094/2010 [2010] OJ L 331/48) and a European Securities and Markets Authority (Regulation 1095/2010 [2010] OJ L 331/84). These authorities bring together the respective supervisory authorities of the Member States.

[137] After the national regulatory authorities (NRAs) for electronic communications formed the Independent Regulators Group (IRG) in 1997 (www.irg.eu), the Commission created a European Regulators Group for Electronic Communications Networks and Services (ERG) by Decision 2002/627 [2002] OJ L 200/48. Following the reform of the regulatory framework in 2009, the ERG was replaced by the Body of European Regulators for Electronic Communications (BEREC), as created by Regulation 1211/2009 [2009] OJ L 337/1.

[138] In 2003, the Commission created the European Regulators Group for Energy and Gas (ERGEG), through Decision 2003/796 [2003] OJ L 296/34. Following the reform of the regulatory framework in 2009, the ERGEG was replaced by the Agency for the Cooperation of Energy Regulators (ACER), created by Regulation 713/2009 [2009] OJ L 211/1.

[139] A European Regulators Group for Postal Services (ERGP) was created by a Decision of 10 August 2010 [2010] OJ C 217/7.

[140] In the case of rail transport regulation, a number of regulatory authorities took the initiative to create an Independent Regulators Group—Rail in 2010, see www.irg-rail.eu. Accessed 14 May 2012.

[141] See Chap. 13 of this book.

tasks of these networks, they do display some common features: among others, they all aim to promote communication and dialog between regulatory authorities, so as to learn from each other's experience. Recent reforms in the financial services, electronic communications and energy sectors responded to a frequent criticism leveled against the first-generation networks (CESR, ERG, ERGEG), namely that they were content with a mere exchange of views and failed to derive lessons from a comparison of their respective experiences, in the form of best-practice solutions.[142] The newer incarnations of these networks are meant to be tighter and less hesitant to reach conclusions about the practices entertained by their respective members.

10.4.5.4 The Open Method of Coordination

Finally, still at EU level, it could be argued that the Open Method of Coordination (OMC) also creates pressures from within legal orders to examine other legal orders. Introduced in 2000, the OMC involves the setting of goals and objectives at EU level, whereupon Member States elaborate action plans, and then compare their respective experience in order to establish best practices and assess their performance.[143] Because the OMC is typically used in areas where the EU has limited or no competence and it mostly involves soft-law instruments, the OMC has received less attention from legal academics than from political scientists.

10.4.6 Implications of Legal Emulation

After having set out the broad lines of legal emulation and explored a few illustrations, this heading looks at two implications (among others) of legal emulation.

10.4.6.1 Legal Emulation and the Civil Law/Common Law Divide

By giving substantive policy choices a place in the model—whereas comparative law literature typically downplays or ignores them—legal emulation can contribute to the overthrow of the age-old common law versus civil law divide which still guides much comparative law thinking.[144]

The opposition between common law and civil law (Continental) legal orders has the advantage of simplicity, in its binary nature. Even when refined by

[142] Referring back to the discussion of comparative law Heading 10.3.1.2, these networks failed to move to a vantage point above the national legal orders and failed to develop an analytical or even normative discourse.

[143] See Szyszczak 2006.

[144] See the criticism made by Mattei 1997a, b 69 and ff.

subdividing the Continental systems between Romanic and Germanic families,[145] it remains fairly manageable. From the theoretical perspective set out above,[146] the common law and civil law paradigms could be seen as useful summations of a series of choices made essentially on the institutional, as opposed to the substantive, side.[147] Seen against that background, it is not surprising that these paradigms would emerge from legal science, given that institutional choices are typically the purview of lawyers. Yet, even without detailed evidence to that effect,[148] it should be apparent that broad substantive policy choices will not necessarily be pre-ordained by institutional choices which are mostly privy to the legal community (certainly in this day and age where the domination of lawyers over politics has been broken). To claim otherwise would be to fall in the trap of the 'legal culture' writings.[149] On a more balanced view of law as the outcome of substantive and institutional policy choices, the common law versus civil law distinction becomes only one of the possible ways of explaining divergences or convergences between legal orders.

By and large, legal academics are coming around to that view. Unfortunately, the raw and simple common law versus civil law divide is still very much alive—under the guise of 'legal origins'—in the law and finance literature, in economics.[150] That literature has evolved in step with the large-scale studies conducted by the World Bank into the 'best' legal environment for doing business.[151] It is to be hoped that it will also move to a more sophisticated understanding of the interaction between legal orders.

10.4.6.2 Legal Emulation and Harmonization efforts

Legal emulation also holds the promise of a better understanding of efforts explicitly directed at bringing about the convergence of legal orders. Without wanting to get into sophisticated distinctions between harmonization, unification, coordination, etc.[152] these various efforts are regrouped under the heading of 'harmonization'.

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[145] Common law systems can also be subdivided between English (and Commonwealth) and American families, but in the comparative law literature, that division is not made so often and so clearly as that between Romanic and Germanic families on the civil law side.

[146] Heading 10.4.3.

[147] The distinction between institutional and substantive choices is introduced ibid.

[148] The work of Van Gerven et al. 2000 certainly showed, on a number of substantive issues, a greater alignment between the English and German legal orders than between the French and German legal orders.

[149] Heading 10.3.2.1.

[150] The seminal article is La Porta et al. 1998. See also the review made by the main authors 10 years later: La Porta et al. 2008. For a solid critique of Law and Finance, see Berkowitz et al. 2003. Hadfield 2008 presents a far more nuanced analysis than the Law & Finance literature; that analysis would fit well within the theoretical perspective sketched out in this chapter.

[151] See the 'Doing Business' project website at www.doingbusiness.org. Accessed 14 May 2012.

[152] As they are made in the model of Ogus and Garoupa 2006 for instance.

They include, among others, harmonization within the EU context (via directives), international efforts within the WTO, UNCTAD, or UNIDROIT or more informal recommendations made by international organizations such as the World Bank or the IMF. They have in common that they represent deliberate ventures designed to lead to change in legal orders, with a view to bringing these systems in closer alignment with one another. They are therefore 'top-down' efforts, as opposed to spontaneous or 'bottom-up' phenomena, whereby legal orders would converge of their own endogenous motion (deliberate or not), as a result of uncoordinated efforts within each system.

Since the 1990s, comparatists have underlined the risks attached to such 'top-down' harmonization.[153] Essentially, unless harmonization is very broad-based, the harmonized law is bound to clash with the rest of the legal order once it is introduced in national/domestic law. This phenomenon has been studied extensively in the literature on 'legal transplants'.[154] Even if on its face the harmonized law is carefully designed for an optimal fit within national legal orders, tensions may appear under the surface, in the form of 'conceptual divergence', whereby interpretations would differ as between the various harmonized systems, for instance.[155] From a political perspective, harmonization often creates a clash between the strong political will expressed at the superior level within the narrow scope of the harmonization effort,[156] and the weaker and more diffuse political will reflected in the broader legal order.[157] Many legal orders do not adequately channel this tension and fail to resolve it ahead of harmonization. As Ogus and Garoupa pointed out, these costs of harmonization—going beyond learning and adapting, to include also risk of failure—can be considerable and are often neglected. Indeed, Berkowitz et al. show that the success of harmonization efforts depends on the ability to reduce what they call the 'transplant effect', i.e., the tension between the harmonized law and the surrounding and pre-existing national law. The transplant effect is even a greater determinant of success than the substance of the harmonized law[158].

As a consequence thereof, a more strategic use of comparative law was advocated.[159] In order to improve the quality and the chances of success of top-down

[153] See among others Sacco 2001.

[154] This line of literature stems from the work of Watson 1993. The transplant effect is well described and studied in Ogus and Garoupa 2006 and Berkowitz et al., *supra* note 150. In "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 Mod L Rev 11, Günther Teubner explores this effect in greater depth, leading him to rebrand transplants as irritants.

[155] See the contributions in Sacha Prechal et al., eds., *The Coherence of EU Law* (Oxford: OUP, 2008).

[156] Leading to the conclusion and enactment of a harmonization instrument, such as a directive.

[157] As embodied in the prior choices, some ancient, which could have ossified and could be relying only on inertia and path dependency for their legitimation.

[158] Berkowitz et al. 2003.

[159] As formulated by Van Gerven 1996, 539–542.

harmonization efforts, they should be based on solid comparative law work. Such work would ensure a better fit between the harmonized law and the national laws, i.e., it would reduce the 'transplant effect'.[160] To some extent, these calls were echoed in the largest and latest comparative law endeavor in the EU, namely the preparation of a Common Frame of Reference (CFR). The CFR was meant to provide a point of reference for EU harmonization efforts, so as to ensure that they are firmly grounded in the laws of the Member States.[161] In order to ensure the quality of the CFR, a large-scale EU-wide group of comparatists was entrusted with the preparation of a Draft CFR (DCFR), from which the CFR would ensue. However, as chronicled elsewhere,[162] the DCFR project followed a traditional comparative law approach, as set out earlier, with the attendant shortcomings. The DCFR does not sufficiently account for substantive policy differences between the Member States. These differences do exist in some areas of private law, even if Member States by and large follow similar policies. As a result, the DCFR suffers from the same overreach as the *praesumptio similitudinis*.

Legal emulation offers a way to correct those shortcomings. By bringing policy choices into the inquiry in the early preparatory stages, for instance, where authorities are not necessarily looking for the best legal order but rather trying to ascertain what the tradeoffs are, a legal emulation approach would allow harmonization efforts to take place against a better understanding of what is achievable or not. In the end, legal emulation could deter ill-advised efforts and help to reduce the costs of harmonization in situations where it is advisable.

10.5 Conclusion

This chapter sought to explore legal emulation, as an alternative path to regulatory competition models and comparative law endeavors.

Regulatory competition suffers from its very restrictive assumptions (mobility of actors, choice among many jurisdictions, ability of jurisdictions to select the laws they desire, no externalities), which make it a relatively rare occurrence in practice. In addition, regulatory competition, being exogenously driven, requires that firms take informed decisions, where law is crucial to the decision and the decision can be taken in isolation from other decisions. It also takes an impoverished view of law as rules (including the context of their interpretation and application), where the substance of the law matters little for the outcome and legal actors are essentially passive.

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[160] The more strategic use of comparative law also implies that legal education is changed, so as to make the national legal community less apprehensive toward foreign law and more familiar with comparative law. Legal emulation also gives greater coherence to those efforts.

[161] See the discussion of the purposes of the DCFR, referred to von Bar et al. 2009.

[162] Chapter 3 of this book.

The use of a functionalist method—however ill-defined it may be—potentially enables comparative law to rise above national legal orders, to become analytical and even normative (as opposed to merely descriptive) and to gain a dynamic perspective. Yet, functionalist comparative law has remained mostly monodisciplinary, as shown by the commonly accepted *praesumptio similitudinis*, the assumption that legal systems should be similar, which ignores the broader policy context. It also lacks a dynamic dimension, a solid account of how and why legal systems interact with one another over time.

Legal emulation builds on more recent literature, including comparative law and economics. It tries to combine the more dynamic perspective of regulatory competition, with the endogeneity of comparative law, all the while taking better account of the policy context. Legal emulation rests on a theoretical perspective whereby the law is conceived as the outcome of a series of choices—substantive or institutional, fundamental or transient—made between different options (legal science would then be the investigation of the set of those choices). As a model, legal emulation involves the following steps: first of all, the framework of reference for the inquiry is fixed, together with the normative standard. Second, a number of legal orders are analyzed, in order to identify the choices made in the law (each with a number of options to be chosen from). Third, the options identified in the second step are compared, on the basis of the normative standard set out in the first step, so that in a final stage, a conclusion can be drawn. Depending on whether choices are held constant (as part of the normative standard) or instead left open within the framework of reference, the inquiry can be narrow or broad. The chapter argues that legal emulation is already present in many legal orders, through instances such as constitutional, EU or human rights review; impact assessment; peer review within networks of authorities; or the open method of coordination. These instances can be seen as illustrations of an emerging principle of quality of law, which would rest on a legal emulation model.

Finally, the chapter outlines some consequences of adopting a legal emulation model. For instance, legal emulation allows to relativize, and even sidestep, the civil law/common law divide which is still entrenched in comparative law (and law and finance) literature. It also provides a more solid basis to ascertain whether top-down harmonization efforts are necessary and justified, and what they can achieve.

Undoubtedly, more research is needed to work out the legal emulation model and explore its consequences further. As a starting point, it is useful to have an alternative to the regulatory competition model and the comparative law approach, which is conceptually sound and can tie together and explain a number of existing phenomena in the various legal orders.

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Chapter 11
Impact Assessment: Theory

Pierre Larouche

Contents

This chapter seeks to enrich the debate by bringing economic theories to bear on the discussion of impact assessment (IA). To the extent the rationale for IA is investigated in the literature, the analysis is usually based on political science or

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_11,

public administration. The economic literature on IAs assumes one rationale for IAs,[1] without more. This contribution takes the more open starting point of the former disciplines and combines it with insights from the latter.

Through his teaching and research, this author has been exposed to the literature and policy discussion concerning IAs and has often come across IAs regarding various legislative or regulatory initiatives. It has always struck him how IA seems to mean all things to all people. One of the main difficulties in dealing with IA is that while a broad consensus exists that IA is desirable, that consensus is based on a wide range of rationales, which may not always coincide with each other. Most everyone agrees on the main elements of IA, but views seem to differ on why IAs are carried out. Few authors, with the notable exception of Meuwese,[2] investigate the rationale(s) behind IAs, as opposed to the practice of IAs or their broader effects.

Of course, this matters little if the various rationales/functionalities do not imply any practical difference in how IAs are conducted and used. Unfortunately, that is not necessarily the case.

Hence, this chapter tries to structure the discussion of IAs by starting with the fundamentals, that is to say the rationales for introducing IAs in the first place. Why do we have IAs? What is their purpose? This chapter is concerned with IAs as an institution or regime, and not with individual IAs in specific instances. Furthermore, EU law is usually referred to, but the discussion is framed as much as possible in general terms which should apply to any jurisdiction.

After briefly setting out a descriptive definition of IAs (11.1), this chapter examines a series of potential rationales for IAs, trying to ascertain how useful they are to explain IAs and to work some of their main implications for the conduct of IAs. A number of mainstream rationales, typically alluded to in the literature and in policy documents, come first (11.2). They are followed by more complex rationales based on specific strands of economic theory (11.3) and so-called deviant rationales, which have explanatory force but are not necessarily desirable (11.4). The conclusion pulls all of these rationales together and sees if they can co-exist or not (11.5).

11.1 A Working Definition of Impact Assessment

In this chapter, the description set out in the Commission's Impact Assessment Guidelines will be used as a working description of an IA.[3] If the EU-level Impact Assessment is used as a model, an IA

[1] Namely quality improvement, see *infra*, Sect. 11.2.2.

[2] See her recent work: Meuwese 2008. This chapter builds on the work of Meuwese (which was of invaluable help) and seeks, with the help of economic analysis, to broaden the range of rationales beyond what Meuwese took into account on the basis of law, political science and public administration.

[3] European Commission, *Impact Assessment Guidelines*, SEC (2009) 92 (15 January 2009) at 21 et seq.

(i) takes place ahead of the legislative action
(ii) comprises the following analytical steps:

1. Identify the problem.
2. Define the objectives.
3. Develop main policy options.
4. Analyse their impacts.
5. Compare the options.
6. Outline policy monitoring and evaluation; and

(iii) Includes stakeholder consultation and collection of expertise.

For the purposes of this chapter, the above definition and working description are sufficient; it is assumed that the working description covers most if not all instances of IA. The various rationales surveyed in the rest of this chapter all fit this working description. They often also imply certain additional characteristics or elements, which will be presented together with the rationale in question.

11.2 Mainstream Rationales

On the basis of the policy documents on IA and of the literature, a number of recurrent rationales can already be distinguished. For instance, in one short paragraph in its Impact Assessment Guidelines, titled "Why is Impact Assessment important?", the Commission managed to collapse no less than four distinct rationales together[4]:

> All policy decisions should be based on sound analysis supported by the best data available. The Commission's impact assessment system: helps the EU institutions to design better policies and laws; facilitates better-informed decision making throughout the legislative process; ensures early coordination within the Commission; takes into account input from a wide range of external stakeholders, in line with the Commission's policy of transparency and openness towards other institutions and the civil society; helps to ensure coherence of Commission policies and consistency with Treaty objectives and high level objectives such as the Lisbon and Sustainable Development Strategies; improves the quality of policy proposals by providing transparency on the benefits and costs of different policy alternatives and helping to keep EU intervention as simple and effective as possible; helps to ensure that the principles of subsidiarity and proportionality are respected, and to explain why the action being proposed is necessary and appropriate.

That paragraph sets out four distinct rationales for IAs:

- *Improvement in quality* of decision making: this is the main rationale coming through this paragraph, with references to "better-informed decision-making", "coherence and consistency", "improv[ing] the quality of policy proposals";

[4] Ibid., 6.

- *Democracy* via participation in decision making, through the "input from a wide range of external stakeholders";
- *Transparency*, which is mentioned as such together with openness Commission policies;
- *Justification*, as put forward in the last sentence of the excerpt.

A survey of the literature such as conducted by Meuwese[5] allows for other mainstream rationales to be added to the list, namely:

- *Accountability*, in that the IA "highlights the trade-offs" to be made by the decision maker and enables it to be held accountable for its choices;
- Another variant of *democracy*, where the IA complements representative democratic mechanisms by offering a forum for deliberation.

In addition, a basic rationale is often simply assumed, namely the *collection of evidence* concerning the matter to be decided. It is dealt with first (A), followed by the main rationale featured in the economic literature, namely quality improvement (B) and then the rationales that appear to rest on legal principles, namely justification, transparency, accountability and democracy (C).

11.2.1 Collection of Evidence

Under this rationale, the IA serves as a device to gather and order all relevant evidence on which decision making is based. This is a more 'notarial' function, where the IA is a convenient and structured repository for all the input that went into a decision.

This rationale is not very useful, since it is neither powerful nor distinctive. Indeed, it does not explain many of the specific features of IAs outlined above, Furthermore, it equally applies to other documents such as preparatory works, explanatory memoranda, interpretive notes, etc., which are commonly tabled alongside draft legislation or regulation.

It is worth mentioning, however, because it highlights one of the key issues relating to IAs, namely whether they can be used later as evidence in judicial or other proceedings. IAs could be used in order to shed light on certain provisions, although their interpretive value as evidence of intent is probably limited since they are not prepared by the decision maker itself.[6] IAs have a greater role to play

[5] Meuwese 2008, 44–53. The two rationales set out in the main text correspond to the "highlighting trade-offs" and "structuring the discourse" models set out by Meuwese.

[6] Especially if they are deemed to be a mere "aid to political decision-making, not a substitute for it": Impact Assessment Guidelines, *supra* note 3 at 4. On that account, the decision maker forms its own opinion and the IA does not necessarily reflect what went on in the mind of the decision maker. As discussed *infra*, notes 17–20 and the accompanying text, that quote might however give too little significance to IAs.

in proceedings where the validity of an enactment (judicial or constitutional review) or the liability of the State is at stake. There an IA provides useful evidence of the background to the enactment, which can be used to attack its necessity, its proportionality, its impact on fundamental rights, to name but the main ones.

If the function of the IA is to collect evidence, it would seem logical that the IA would be available in subsequent proceedings where the enactment for which the IA was prepared is debated. So far at European level, the ECJ has not yet used an IA as evidence in assessing EC law. In the only notable case where the ECJ mentioned IA,[7] the court noted that the impugned EC regulation[8] was not preceded by an IA, which did not lead to any immediate legal consequence.[9] At the same time, the lack of an IA clearly hampered the efforts of the Community institutions to prove that they had correctly exercised their legislative powers, and the regulation in question was partly annulled because it was disproportionate in the light of the available evidence.

11.2.2 Quality Improvement

This is the mainstream rationale put forward for IAs in the economic literature: the purpose of the IA is to improve the quality of decision making and by the same token of the resulting measures.[10]

This is a very rich rationale, which ties together a number of strands. First of all, it builds upon the first rationale (collection of evidence) by giving it a more distinctive meaning: the function of the IA is to provide a framework to ensure that all available evidence is gathered and then analysed in such a way as to improve its usefulness for decision making. Secondly, it also has an institutional strand, as indicated in the above quote from the Commission Guidelines: the IA enables the various institutions involved in the decision making to coordinate their actions by providing a common point of reference for their analysis. Thirdly, it can have a substantive flavour, where the Commission, in the same quote, links IAs with subsidiarity and proportionality, two key principles applying to decision making in

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[7] Case C-310/04, *Spain* v. *Commission*, 7 September 2006, ECJ, [2006] ECR I-7285, paras. 95 ff. This case is discussed in Meuwese 2008, 172–175.

[8] Regulation 864/2004 of 29 April 2004 amending Regulation 1782/2003 establishing common rules for direct support schemes under the CAP [2004] OJ L 161/48.

[9] *Supra* note 7, para 103. As the Advocate General points out in her Opinion in this case, the Community institutions were not obliged to carry out an IA: Opinion of 16 March 2006, para. 82.

[10] For instance, one of the leading independent studies on IAs in Europe, Renda 2006, does not discuss at much length the reason why IA has been introduced in Europe, other than to mention briefly that it was meant to improve the quality of EU legislation (43–44), as if it was obvious. Indeed his whole book relies on the assumption that IAs are there to improve legislative quality. See also Pelkmans et al 2000, 461.

the EU (and also elsewhere, at least as regards proportionality): the IA makes it easier to comply with these two principles, since it provides a sound analytical basis on which to apply them. Fourthly, in the longer run, IAs can also become ingrained in the administrative culture—what Renda calls an 'evaluation-oriented culture'[11]—so that the quality of the work of the administration in general is increased.

Through all of the above strands, the quality improvement rationale unmistakably follows an expert, technocratic logic. The IA is then the province of the expert—whether he or she comes from the public authorities, from a consultancy, from politics or from one or the other interested parties. The experts gather to conduct the IA according to the established framework as set out in the working description above. They deliver a detached, objective and scientific assessment of the matter at hand.

The quality improvement rationale connects closely with a number of well-established elements of economic science. These are reflected directly in the IA framework. For one, the idea that as a first step the problem must be clearly identified comes from the traditional public interest theory of regulation, whereby public authorities intervene to remedy market failures, i.e. instances where markets do not work as expected.[12] Once the market failure has been identified, one or more options are open to correct it and this is what the IA is meant to study. At the same time, the IA also incorporates elements from the rival public choice theory of regulation, whereby the actors involved in deciding upon public intervention (i.e. the decision makers) are also subject to the same behavioural assumptions as the market actors, i.e. wealth maximisation and cognitive limitations. They are therefore also on the lookout for their private interest. Accordingly, next to market failures, government failures can also occur, i.e. situations where public intervention is driven by private interests rather than the public good and where the intervention ends up being more harmful than the market failure which it sought to address.[13] It is implicit in public choice theory that not every market failure can be solved, and hence that some market failures might be better left alone for lack of a solution which would enhance welfare overall. This explains why an IA should always consider a base scenario of no intervention.[14] More generally, in the presence of both market and government failures, decision making is very likely to involve some trade-offs between the two: the identified problem should be solved to the greatest extent possible without thereby creating a larger problem

[11] Renda, ibid., 22, when drawing lessons from the US experience.

[12] See for instance Baumol 1952. See *infra* notes 21–22 and accompanying text for a discussion of how these expectations should be defined.

[13] See for instance the fundamental contribution of Stigler 1971, 3.

[14] If intervention has already taken place and further intervention is contemplated, then the baseline scenario would be "staying with the current level of intervention", although "no intervention whatsoever" could also be envisaged: see Impact Assessment Guidelines, *supra* note 3, 29.

somewhere else. This leads naturally into the cost-benefit analytical model which lies at the core of the IA.

The IA can even be presented as an antidote to those flaws in the legislative and regulatory processes which are exposed by the theory of public choice. By providing a "rational" basis to the decision makers, the IA can force them to decide in view of the public interest and not of their private interest only. Meuwese presents this as "speaking truth to power",[15] and in her analysis highlights one key issue arising when economics provide the rationale for IAs, namely the link between the IA and the final decision making.[16]

Indeed, as far as the substance of the decision to be taken is concerned, economics-based rationales for IAs are more exacting than other, law-based rationales examined below.[17] Even if there might not be a single truth to be pursued in decision making, i.e. a single best decision which the decision maker should be bound to take, nevertheless not all possible decisions are equal. If the aim of the IA is to improve the quality of decision making, in line with the above, then the IA is bound to narrow down the range of possible decisions. Moreover, the IA enables trade-offs to be identified, and the possible decisions can then be hierarchised according to the objectives which the decision maker would like to pursue: If the maximisation of short-term welfare has priority, then decision *x* would be preferable, if the avoidance of long-term risk[18] is the main objective, then decision *y* should be taken instead. The IA cannot be dissociated from the substance of the decision which it is meant to support, and the value of the IA can be directly measured by looking at the result achieved. The mere fact that an IA took place, on the other hand, does not suffice: even if the procedure was properly followed, the IA could still have failed to improve the quality of the decision making if it, for instance, left some issues unexplored, failed to consider certain options or did not properly identify trade-offs. The 'improving quality' rationale would therefore be more result-oriented and not merely process-oriented.

At the same time, the Commission is its Guidelines—much like other authorities that carry out IAs—is very adamant that "impact assessment is an aid to political decision making, not a substitute for it".[19] In other words, decision-making remains in the hands of the political actors. Yet this statement can be interpreted in many ways, which we simplify to two for the sake of argument:

(i) The experts who prepare the IA cannot themselves take the decision, because only political actors can assume the political responsibility that goes with decision making. With the IA, these experts essentially distill the matter down to a relatively manageable decision before political actors intervene to complete the work;

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[15] Meuwese 2008, 45–47.

[16] Which Meuwese also identified as a key problem in the discussion of IAs, ibid., 8–9.

[17] *Infra*, Sect. 11.2.3.

[18] Properly discounted and in the light of the significance of potential consequences.

[19] Impact Assessment Guidelines, *supra* note 3, 4.

(ii) Irrespective of the IA, political actors remain free to take the decision that seems best to them. Of course, political actors will peruse and perhaps even use the IA, but their freedom remains intact.

Under the first interpretation, the IA and the decision are closely linked in substance: political actors are constrained by the IA. As a result of the IA, not every outcome is possible. Political actors take the necessary political decisions concerning the trade-offs outlined in the IA. Once these trade-offs have been politically arbitrated, political actors proceed to follow the IA as far as the outcome is concerned. Only the first interpretation is truly compatible with the quality improvement rationale. Under the second interpretation, if political actors do not work with and within the constraints arising from the IA, then the IA cannot fulfill its purpose.[20]

It must be noted, however, that the extent to which political actors are constrained by IA is not determined only by their own statements, including that of the Commission quoted above. It crucially depends on courts, and hence on the value of IAs in subsequent judicial or constitutional review proceedings, already mentioned above. If IAs can be introduced as evidence in such proceedings—and even more strongly if a legal principle would emerge whereby decision makers must take IAs into account and address them in their decision-making—then the practice will conform to the first interpretation set out in the previous paragraph.

At the same time, the role and scope of economic analysis must be properly understood, especially if as just discussed the IA is meant to impose a constraint on the decision maker. If the economic analysis includes a normative dimension, then the constraint on the decision maker would be too strict. Such would be the case if the IA assumed, for instance, that maximisation of total welfare is the sole valid policy objective, leaving no room for other economic or non-economic objectives. By the same token, this would reflect on the early stages of the IA, since no problems would arise unless the market did not work so as to maximize total welfare. In such a case, the balance between the expert rationality of the IA and the democratic rationality of the decision making would be upset, unless the decision maker is free to ignore the IA.[21] If the IA is to constrain the decision maker, then the use of economic analysis should not venture into the normative; rather, the polity should provide the IA with

[20] That problem is further compounded at the EU level, where a number of institutions hold a real power to influence the outcome of legislative procedures (and to a lesser extent, regulatory procedures as well). Contrary to most Member States, where government proposals escape relatively unscathed from the legislative procedure (as long as the government holds a stable majority in Parliament), in the EU Commission proposals can be modified significantly by the Council and the EP (at least when the co-decision procedure is applicable). The IA is carried out by the Commission ahead of its proposal, but the other institutions have been under pressure to carry out their own IAs when they introduce modifications to the Commission proposals which go beyond what was investigated in the original IA. See Meuwese 2008, 99 et seq. for a study of the practice of the EP and Council.

[21] On the balance between the polity and the economy in economic regulation, see Larouche 2003.

the policy objectives against which the IA is conducted. At the early stage of problem identification, "market failure" would then be construed more broadly as a failure of the market—established on the basis of economic analysis—to attain the policy objectives set by the polity.[22] Similarly, at the later stage of analysis, the policy options would also be analysed and compared—using tools from economic analysis—as against those policy objectives.

As the previous paragraphs demonstrate, the quality improvement rationale is very rich and powerful. It provides a strong justification for a number of characteristics sought in an IA:

- The IA should begin without any a priori bias in favour of or against legislative or regulatory intervention. An IA could just as well end up finding that no serious problem exists or recommending that no action be taken.
- The IA should be conducted with an open mind. In particular, the choice of the options to be investigated—besides the baseline scenario(s)[23]—should include all options which at first sight appear worthy of investigating.
- The IA should be carried out early on, before any proposal has been formulated, so that it can improve the quality of the proposal while it is still in the hands of "expert" drafters and before it starts to be politically debated.

11.2.3 Law-Infused Rationales

Alongside the more economics-infused rationale set out above, a number of rationales emanate rather from well-established legal principles. Economic analysis remains, nevertheless, relevant in understanding them.

11.2.3.1 Justification

First of all, the purpose of the IA could be to provide a coherent *justification* for legislative or regulatory action.[24] This is a stronger version of the first rationale—collection of evidence—since it implies that the IA also presents a case to support the measure in question. At the same time, the justification rationale is weaker than the quality improvement rationale and should not be confused with it. The IA as justification does not have strong implications for the substance of the decision; the

[22] And thus of the well-known causes of market failure, including market power, information asymmetries, externalities or public goods.

[23] If the IA bears on an issue where the public authorities have not intervened before, the baseline scenario is "no intervention". If the IA takes place as part of a legislative or regulatory review, presumably two scenarios should be investigated in any event, namely "no change in current legislation or regulation" (the actual baseline in a review context) and "removal of legislation or regulation".

[24] In line with the general obligation incumbent on public authorities to provide reasons for their action: see for instance Article 296 TFEU.

IA will have fulfilled its purpose as long as it provides a justification, irrespective of what that justification is. The justification rationale does not have much explanatory force nor is it very distinctive.[25]

11.2.3.2 Transparency

Secondly, *transparency* can also provide a rationale: the IA sheds lights on the decision-making process by presenting the evidence, setting out the problem and the policy options and then analyzing and comparing these options. By following the IA process or reading the IA report, stakeholders, other interested parties and more generally citizens can observe legislative and regulatory decision making. While interesting and relevant, the transparency rationale remains fairly weak and it is subsumed under the accountability and democracy rationales which follow.

11.2.3.3 Accountability

Building on transparency, the IA can aim to increase *accountability*. As a starting point, we can rely on principal/agent theory[26]: there is a principal and an agent, and the agent should act in the interests of the principal. Yet the agent might shirk, i.e. put its own self-interest above that of its principal, without being detected, because the agent tends to possess more or better information than the principal (information asymmetry problem). Mechanisms must be put in place to ensure that the agent does not shirk, i.e., that it has incentives to act in the interests of the principal. Accountability mechanisms, among others, force the agent to answer for its actions.

The IA, if well conducted (complete and transparent), contributes to accountability by enabling the principal to check upon the work of the agent. Actually, the IA intervenes in two distinct principal/agent relationships. First of all, the legislative power taken as a whole is an agent of the polity (people). Secondly, within the legislative power, the administration is an agent of the actual decision maker (be it the Legislature or the executive on the basis of delegated powers), since it usually carries out all the groundwork for the enactment of legislation or regulation, including carrying out the IA. The latter relationship corresponds most closely to the principal/agent theoretical model: the administration must work in the interest of the decision maker, and the IA forces the administration to spell out its knowledge and its assessment of the various options, so that the decision maker is not only well informed, but can also control the work of the administration and

[25] And indeed Meuwese 2008, 49 dismisses it as "too simplistic a goal for the impact assessment procedure".

[26] For an overview of principal/agent theory, see Sappington 1991, 45–66.

hold it accountable.[27] Within the former relationship, the purpose of the IA is more subtle: it can give the polity the necessary information to judge whether the legislative power is acting in the interest of the polity, i.e., in the general interest.

When the two principal/agent relationships are put together, it becomes apparent that through the IA, the administration is actually supplying the polity with a means to check on the Legislature and the executive. Here as well, the link between the IA and the decision maker is crucial. Earlier, we saw that the quality improvement rationale could only work if somehow the decision maker was constrained by the IA. From the reverse perspective, the accountability rationale provides a strong justification for that link: if the IA is presented as an expert, objective inquiry into policy options, then the decision maker should answer for any departure from the IA. So the administration, when carrying out the IA, fosters both its own accountability toward the Legislature and the executive as well the accountability of the Legislature and the executive towards the people (the polity).

11.2.3.4 Democracy in its Many Versions: Representative, Participatory, Counter Majoritarian

A *democratic* rationale could also underpin IAs. Interestingly, a number of potentially competing democratic models are served by IAs. First of all, the IA can be seen from a more classical *deliberative* democratic perspective, as a forum where the actors officially involved in *representative* decision making come to discuss and deliberate about policy in a structured fashion, with the help of the analytical framework of the IA.[28] The IA would then enhance the quality of democratic debate (in line with the quality improvement rationale set out above, but from a different angle). Of course, the IA could also produce a shift in the political balance among these actors. The IA can also have a *participatory* purpose, i.e., to foster participation by stakeholders and other interested parties in the decision making. The IA would allow these parties to have a formal input into the decision-making process.[29] A different take on the participatory purpose of IAs, based on game theory, is presented further below.[30] Finally, the IA could even have a *counter-majoritarian* purpose, in that it would enable the whole plurality of views and opinions held in society to be brought to the table, as opposed to the majority perspective which might prevail in the absence of an IA exercise.

While noble, these democratic rationales are lacking in explanatory force. In general, they tend to be too process-oriented: the purpose of the IA would reside in its process, and not in the result it achieves. That would be selling the IA short.

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[27] The Council and EP seem to use IAs against the Commission for that purpose: see Meuwese 2008, 116–118, 121–125 (EP) and 136–139, 142–143 (Council).

[28] See also Meuwese, ibid., 51–52.

[29] As opposed to less open methods of exerting influence, such as lobbying.

[30] *Infra*, Sect. 11.4.2.

The first one, relying on a classical representative model, does not add much; after all, the actors are supposed to deliberate when reaching decisions, so the IA would be redundant (if representative democracy worked as it should). The last two ones are based on "alternative" theories, and they could position the IA as a democratic complement to legislative and regulatory procedures. Leaving aside the issue of how participatory or counter-majoritarian elements can be meaningfully introduced in a decision-making procedure based on representative democracy,[31] it is not clear why an IA (with the whole analytical framework as defined at the outset of this chapter) is actually needed for that purpose. A simple consultation procedure might already suffice. Finally, democratic rationales are difficult if not impossible to reconcile with the more expert technocratic rationales such as quality improvement or even accountability: either the IA is meant to analyse policy options as objectively as possible, or it is a forum for more subjective debates among decision makers, stakeholders and other interested parties. This might explain why, in the model of the draft Guidelines, consultation of interested parties takes place at an early stage in the process, so that the expert, technocratic logic can re-assert itself afterwards. As seen further below,[32] under certain circumstances, consultation might be better explained via information asymmetries and game theory than democracy.

One interesting implication of the democratic rationales could be that the IA should be carried out by the public authority itself, if not by the decision maker directly. It is difficult to see how the democratic purpose of an IA could be fulfilled if it is outsourced to a private party, such as a consultant, unless that private party is bound to respect certain rules in holding consultations and other forms of contacts with stakeholders and other interested parties. In the latter case, it might be preferable to leave the matter in the hands of a public authority, which enjoys greater legitimacy and greater expertise in political matters.

11.3 Complex and Specialised Rationales

In the previous section, the mainstream rationales put forward for IAs have been introduced and briefly analysed. We now turn to another set of rationales which are typically not found in the mainstream literature: they rely on more sophisticated

[31] This brings us back to the all-important link between the IA and the decision maker. If the IA is to add a representative or counter-majoritarian element to legislative procedures, the decision maker should somehow be bound or at least constrained by the result of the IA. Yet this would potentially clash with the representative democratic model underlying lawmaking. In her work, Meuwese discusses in great depth the constitutional implications of IAs, finding that the status of the IA is currently in a state of flux at the EU level (Meuwese 2008, especially the conclusions at 265–270, 272–274, 280–281). The main representative institutions (Council, EP) seek to give some value to the IA, but they are careful to preserve their decision-making prerogatives. The Commission papers over the clash in its Guidelines, by stating that the decision maker has the final say; as was seen above, this statement is open to discussion.

[32] *Infra*, Sect. 11.3.

theory and might not be generally applicable to all IAs. In certain cases, IAs could serve to remedy information deficiencies (11.3.1) or secure commitment (11.3.2).

11.3.1 Information Deficiencies

A number of rationales considered previously focus on information, namely collection of evidence, quality improvement, justification, transparency or accountability. So far, in line with the mainstream discussion, it has been assumed that the required information was available, even if perhaps only to the agent (in the accountability rationale). This assumption is, however, inaccurate in the many cases where some information is missing.

If the missing information is *not available but can be generated*, the IA could be seen as a learning process, whereby the requisite information is first identified and then produced. Among others, the IA could then serve to correct cognitive biases.[33] Such biases can occur when probabilistic judgements are made on the basis of limited data which is subject to a bias from the observer: a well-known instance is the base-rate bias, where probabilities are assessed according to the representativeness of available data against prior stereotypes, without regard to the basic probabilities of these stereotypes.[34] One of the early steps in the IA would then be to try to identify cognitive biases which could affect rational decision making and seek the requisite information to correct or at least counter-balance them.

Going one step further, the missing information could also be *unavailable and impossible to generate*. This is likely to occur where some long-term risks come into play, for instance as regards innovation policy, health and safety regulation, etc. Typically, a strong element of uncertainty surrounds matters such as the behaviour of investors, the future preferences of customers, the strength of demand, research achievements or harmful effects of new products. In such cases, the purpose of the IA could be not so much to remedy the information deficiency, but rather to manage the uncertainty to the greatest extent possible.

The two information deficiencies rationales provide the strongest explanation for a feature of IA which is implicit in a number of the previous rationales (quality improvement, accountability, democracy), namely circularity. The IA becomes a

[33] The seminal work on cognitive biases remains Kahneman et al. 1982.

[34] Tversky and Kahneman, in the introductory chapter to their work, ibid., 4–5, describe this bias by reference to an experiment where subjects are asked to assess the probability that someone is a lawyer or engineer by reference to a description of the person. The subjects were also told of the distribution of lawyers and engineers in the sample (the base rate). In contradiction with rational statistical analysis, the subjects in the experiments returned the same assessments irrespective of the base rate.

discovery process. If, in the process of analyzing policy options (step 4 in the working description), a new policy option turns out which was not previously envisaged, then the IA must go back to Step 3 and feed that option into the analysis. Better still, it could be that the analysis of policy options leads to a refinement in the problem definition, in which case the IA is back at Step 1. Moreover, it is conceivable that additional consultations would be held if the IA loops back. This is all perfectly normal if the purpose of the IA is to generate missing information and deal with the consequences of uncertainty. The circularity of IA is a feature of the IA process, which unfortunately is not always apparent in the IA report which results from that process. The reports tend to picture IAs in a more linear fashion.[35]

What is more, even if by definition a search for the purpose of IAs implies that IAs are instrumental, the two rationales based on information deficiencies give perhaps the most intrinsic value to the IA.

Especially where the information deficiency cannot be remedied, the IA can be seen as part of a larger work-in-progress, where risk management under conditions of uncertainty is the main task. The legislative or regulatory intervention will then typically involve layered decision making (with a regulatory authority at the lower end of the decision-making chain, in order to enable flexibility and responsiveness) and built-in review mechanisms, where the current IA feeds into *ex post* review and the next generation of IA arising from such reviews. Decision making then becomes a complex game involving public authorities and private actors,[36] which leads to game theory and the next rationale for IAs.

11.3.2 Commitment

Game theory offers some useful insights which can enrich our understanding of IAs in situations of uncertainty. In broad terms, an IA can be conceived as one step in a multi-period game involving the decision maker and private actors.[37] In every period, the actors decide on their move depending on the prevailing conditions (including of course the legal framework). If the actors expect conditions to change in the next period, that expectation will affect their move in the current period. For instance, as regards investment in infrastructure, if actors expect that regulatory change might affect them adversely in the next period, they will refrain from investing as much as they could in the current period.

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[35] It is also possible that the IA is conducted in a purely linear fashion, in which case it is of doubtful usefulness: see the discussion of legislative entrepreneurship, *infra*, Sect. 11.4.2.

[36] The "regulatory space" paradigm set out by Hancher and Moran 1989 is based on the same idea.

[37] I.e. the individuals and firms which are concerned by the decision to be taken (the "civil society" in governance literature).

Against that background, the IA could contribute to provide a measure of certainty or predictability to private actors by laying out fully the background to a certain decision and thereby somehow committing the decision maker to that decision. Indeed if the IA contains a solid analysis of the consequences of the various options available to the decision maker, it can be assumed that the decision maker is aware of these consequences, takes them into account and therefore will stay the course with its decision. The IA highlights and sharpens the choices open to the decision maker, so that it is easier for the private actors to understand what the decision maker wants to achieve. Accordingly, an element of uncertainty (uncertainty regarding regulatory change from one period to the other) is removed from the game or at least significantly reduced, so that the moves of private actors are not hampered by that element of uncertainty. By the same token, the IA would also foster acceptance of the resulting decision in the public at large. In legal terms, the IA would contribute to legal certainty and predictability.

The reverse might also apply: the IA could also be used by the public authorities to elicit the information privately held by the actors. This can be seen as a further development of the participatory and information deficiency rationales outlined above. Participation of stakeholders and other interested parties is then desirable not just for its own sake as a form of democratic exercise, but also because it forces these private actors to disclose useful information to the public authorities. That information includes of course background data which feeds into the IA, but also—and perhaps more crucially—private preferences. If all possible options are on the table in the course of an IA, private actors cannot afford to limit themselves to posturing, as they might in an unstructured lobbying scenario where they can inform selectively in order to nudge authorities toward their preferred outcome. Rather, private actors must explain how their preferred outcome fits in the analytical framework of the IA (i.e. against the various public policy objectives and the general interest). They must also reveal what other outcomes might also be acceptable if the decision maker did not follow their preferred outcome. In game theoretical terms, the private actors commit themselves more clearly and thereby decrease the uncertainty on the side of the decision maker as to their expected behaviour (in response to legislative or regulatory action). This allows the decision maker in turn to commit itself more decisively that it might otherwise have, which strengthens the rationale described in the previous paragraph (commitment from the decision maker towards the private actors).

11.4 Deviant Rationales

All of the rationales covered so far cast IAs in a positive or at least benign light: the IA serves a useful purpose. This contribution would not be complete if "deviant" rationales were not also surveyed, i.e. rationales under which the IA would play a more controversial, if not outright counter-productive role. They concern raising decision-making costs (11.4.1) and legislative entrepreneurship (11.4.2).

11.4.1 Raising Decision-Making Costs

Using neo-classical economics, the IA could be intended to raise decision-making costs. In simple terms, if the cost of decision making is c_0, the IA adds to this cost and brings it to c_{IA}. Note that the cost increase originates not merely from the actual cost of carrying out the IA, but also from the delay caused by the IA or from the increased political visibility brought about by the IA, which makes certain decisions more expensive politically. Assuming a linear and downward-sloping demand for legislative or regulatory intervention, the effect is visualised in Fig. 11.1.

Through the increase in cost from c_0 to c_{IA}, the quantity supplied is reduced from q_0 to q_{IA}. In other words, if decision making is more expensive, then the supply of decisions will dwindle.

Under this rationale, the IA is no longer a neutral process. It acquires a specific political bent, as part of a deregulation drive. The IA puts a brake on an overly enthusiastic legislative or regulatory power.

Historically, in the US, the UK and even at European level, IAs were introduced as part of a larger movement towards "better regulation", which also had a strong deregulatory flavour.[38] In the specific case of the EU, IAs are part of a broader Better Regulation programme,[39] which includes measures to simplify and reduce EC legislation,[40] and more recently a programme for reducing administrative burdens.[41] For the latter, a quantitative target of 25 % reduction in burdens has even been set. That target is more realistic than the typical political statements that "red tape will be cut by *x* %", and it has some methodological support.[42] Nevertheless, it proceeds from the same top-down vision: regulation is a burden which must be cut back, irrespective of the merits of individual instances of regulation.

In all honesty, while the Commission claims significant success for its Better Regulation programme,[43] that programme has yet to catch the attention of the general public.[44] In the meantime, the EU continues to produce legislation. The situation is perhaps not markedly different in other jurisdictions which have introduced IAs. So there might be some merit to the proposition that the deregulatory rhetoric is necessary merely in order to ensure that IA works neutrally, i.e. to provide a

[38] See the historical reviews made by Renda 2006, 8–25 (US), 26–42 (UK) and 43–56 (EU).

[39] European Commission, *Better Regulation for Growth and Jobs in the European Union* COM (2005) 97 final (16 March 2005).

[40] European Commission, *Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment* COM (2005) 535 final (25 October 2005).

[41] European Commission, *Action Programme for Reducing Administrative Burdens in the European Union* COM (2007) 23 final (24 January 2007).

[42] European Commission, *Measuring administrative costs and reducing administrative burdens in the European Union* COM (2006) 691 final (14 November 2006).

[43] See the latest report: European Commission, *Second strategic review of Better Regulation in the European Union* COM (2008) 32 final (30 January 2008).

[44] In political debates, it still sells to paint the EU as a regulatory Leviathan, as the Irish referendum on the Treaty of Lisbon showed.

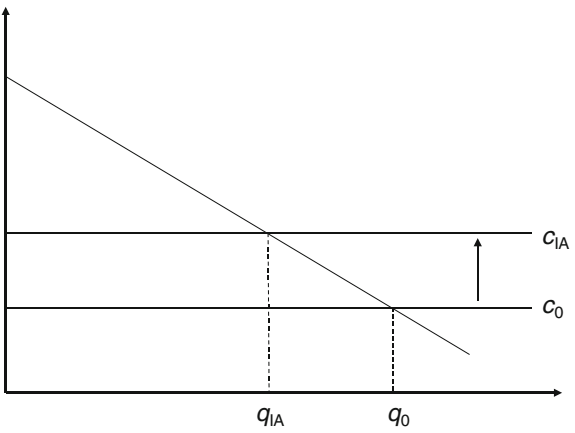

Fig. 11.1 Raising Decision-Making Costs

counter balance to the natural propensity of the public authorities to expand their activities.

Nevertheless, if the IA is openly given a deregulatory rationale, some dangers are lurking. Firstly, an IA which would begin with an a priori bias in favour of one or the other option (here in favour of not intervening or removing existing law or regulation) is not compatible with any of the rationales set out previously. The IA cannot be conducted openly and calmly under these circumstances. Secondly, a deregulatory rationale for IA opens the door to capture by conservative special interests. In the end, the IA could become a platform for political ends.

In any event, using an abstract level of regulatory output as a measure of the effectiveness of an IA regime might miss the point. It is true that, in theory, a number of IAs should lead to a finding that no legislative or regulatory intervention is needed. Still, few of these instances can be found. At the same time, IAs are expensive and time consuming, so that in practice the IA requirement could produce its effects upstream. One would then observe an improvement in the quality of legislative or regulatory initiatives, so that they pass the IA muster.[45] As Renda points out, the introduction of an IA requirement did lead to a change in culture in the US administration. It might still be too early to observe the same in the EU.[46] In a further step, if the quality of legislation and regulation improves as a consequence of IA, then the demand curve (the demand for intervention) might also shift, cancelling out the effect of the increase in costs.

[45] Whether the number of initiatives is actually reduced depends also on exogenous factors, i.e. whether socioeconomic circumstances have evolved so as that legislative or regulatory intervention would be needed.

[46] Renda 2006, 22–23.

11.4.2 Legislative Entrepreneurship

The second "deviant" rationale is in many ways the mirror side of the first. The IA could also be conceived as the business plan of the legislative or regulatory entrepreneur. Using a basic public choice model, the public authorities supply legislation and regulation, while the general public demands it. On the demand side, it is well established by now that there is a measure of competition among different interest groups in demanding legislation and regulation; the best organised interest groups—even if they might not be representative of the general interest—have an advantage. Similarly, on the supply side, public authorities cannot be seen simply as a monolithic entity. Within the public authorities, there are entrepreneurs who drive the supply of legislation and regulation. These entrepreneurs can act either out of a sense of vision in meeting pent-up demand[47] or more prosaically because they stand to make personal gains by satisfying demand. These gains can consist in either election (if the entrepreneur is a politician) or career advancement (if the entrepreneur is a civil servant).

The entrepreneur must work within the confines of the rules governing the production of law or regulation; however, so typically he or she will have to convince others within the public authorities of the need to adopt a certain measure. The IA could then be the business plan of the entrepreneur. Like any business plan, the purpose of the IA would then be to convince potential partners (i.e., the other actors needed to enact legislation or regulation) to work with and support the entrepreneur.

This rationale, more even than the previous one, does not reflect well on IAs. If legislative entrepreneurship was the only reason why IAs are conducted, the desirability of IAs should be questioned. Nonetheless, it is interesting to work out the implications of this rationale further. As a starting point, the IA would have the opposite effect when compared to the previous rationale: instead of hampering initiatives, the IA would support them. Consequently, the cost of the IA should be kept to a minimum; in order to do so, some corners might be cut short in the process. As a business plan, in any event, the IA should aim to convince more so than analyse objectively. This would imply for instance that:

- There is an a priori bias in favour of intervention, and more specifically in favour of a specific option;
- The set of policy options under study is pre-determined, so that the favoured option would already appear to have the best chances of success. In particular, for complex problems raising many issues, options are bundled across issues, so that the IA compares packages of options across issues instead of comparing the available options for each issue separately;

[47] I.e., the entrepreneur is ahead of the rest in seeing the need for legislative or regulatory intervention.

- The IA proceeds essentially in a linear fashion, without any need to step back to redefine the problem or add new options;
- The IA does not need to analyse all possible implications, as long as it appears reasonably complete;
- The IA can be conducted in parallel to the drafting of proposals.

On all these points, the IA as business plan is at variance with some of the key implications flowing from the rationales studied before. Accordingly, this rationale does not fit with the others and should be excluded.

Unfortunately, it is not possible to conduct an empirical study within the scope of this contribution to detect how often IAs appear to be mere business plans for the legislative entrepreneur. Nevertheless, this author has come across a number of such IAs, in areas such as competition law or electronic communications regulation. The same could probably be said in other areas of the law and in other jurisdictions. The business plan rationale for the IA appears alive and well.

11.5 Conclusion

The previous sections can be summarised like in Table 11.1. The numbers in brackets refer to the section number where each rationale is discussed.

In the light of the summary in this table, the following rationales can be ignored because of their weakness: collection of evidence, justification and transparency.

At least from an economics perspective, the richest and most powerful rationale remains quality improvement. It explains a large number of features of the IA. A number of other rationales are complementary to quality improvement and compatible with it. Accountability, for instance, provides a powerful justification for constraining the decision maker on the basis of the IA. Rationales based on information deficiencies provide an elegant added explanation for the more complex IAs, presenting them as discovery processes and emphasising the circularity of the IA. The commitment rationale, based on game theory, explains the consultation requirement convincingly.

The democratic rationale, with its three variants, is somewhat more difficult to bring into the picture, since it does clash with the expert, technocratic logic which runs through the rationales listed in the previous paragraphs. Nevertheless, that is not an impossible feat. Furthermore, given that the political science and public administration literature emphasises this rationale, it cannot be ignored.

The review of the various rationales has highlighted a number of open issues in the current understanding of IA which should be investigated in greater depth:

- The link between the IA and the decision maker should be specified further. The position taken by the Commission ("aid to, but not substitute for decision") seems to downplay that link more than a number of rationales would require.
- The availability of IA as evidence in subsequent judicial proceedings should be explicitly acknowledged.

Table 11.1 Overview of the various rationales for IA

Rationale	Strengths and weaknesses	Specific implications
Collection of evidence (11.2.1)	Weak explanatory power Not distinctive	IA available in subsequent proceedings
Quality improvement (11.2.2)	Based on mainstream public interest and public choice theory Rich rationale Strong explanatory power for a number of IA features	Expert, technocratic rationality IA follows the working description IA constrains decision maker Policy objectives to be specified by polity No a priori bias Openness towards all options IA carried out before elaboration of proposal
Justification (11.2.3.1)	Weak explanatory power Not distinctive	
Transparency (11.2.3.2)	Weak explanatory power Subsumed under accountability and democracy	
Accountability (11.2.3.3)	Rests on principal/agent theory (two relationships at stake) Strong explanatory power for link between IA and decision maker	IA available in subsequent proceedings Decision maker must answer for departures from IA
Democracy—Representative, participatory or counter majoritarian (11.2.3.4)	Contradiction amongst democratic rationales Too process oriented Limited added value of IA Limited compatibility with quality improvement rationale	Political rationality Outsourcing of IA to private party hard to justify
Information deficiencies—Generation of information or management of uncertainty (11.3.1)	Rests on behavioural economics (cognitive biases) and game theory Not applicable to all IAs Rich rationale Least instrumental rationale	IA must be circular (step back if necessary) IA part of larger discovery process

(continued)

Table 11.1 (continued)

Rationale	Strengths and weaknesses	Specific implications
Commitment (11.3.2)	Rests on game theory Not applicable to all IAs Strong explanatory power for consultation procedures	Consultations in order to elicit information
Raising decision-making costs (11.4.1)	Rests on public choice theory "Deviant" rationale Backed by historical context IA openly politicsed for deregulation	A priori bias against intervention
Legislative entrepreneurship (11.4.2)	Rests on public choice theory "Deviant" rationale IA totally instrumentalsed Matches some observations	A priori bias in favour of intervention Choice of policy options rigged Linear IA IA in parallel with proposals

- The relationship among the expert, technocratic and political rationalities should be precise. On the one hand, the policy objectives which are central to the IA should be determined by the polity and not by a normative economic perspective. On the other hand, the actual analysis of market failures and of the impact of policy options should be carried out objectively, without biases or prejudices.

In closing, this leaves the two "deviant" rationales, where IA is politicised either against intervention (raising costs) or in favour of it (legislative entrepreneurship). They have been included in this chapter not because they are desirable; in fact, they arguably pervert IA and create politically motivated resistance against IA as an institution. Furthermore, they contradict the other rationales squarely. Some individual IAs, however, do fit these "deviant" models. It is useful to keep these rationales in mind when studying individual IAs, if only to be able to identify sub-par IAs.

One can doubt whether the IA can be conceptualised with only one of these rationales. Leaving aside the "deviant" ones, it seems more appropriate to picture the IA as a multi-purpose instrument, following a number of strong and mutually reinforcing rationales. Once this rather dry but fundamental issue is dealt with, the life and practice of IAs, in all its colour and diversity, can be more fruitfully and profitably investigated.

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Chapter 12
Impact Assessment: Empirical Evidence

Angela Maria Noguera

Contents

12.1 Introduction

Good quality of legislation is one of the main concerns of the European Union. As the EU system is not a single structure but coexists with the legislative systems of its Member States, there is a need to have a Community legislation system which

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_12,

is adaptable to the particular conditions of its Member States and which contributes to the consolidation of the Internal Market.

With the purpose of achieving this goal in a sustainable way, in 2001 the European Commission issued its White Paper on European Governance. It stated the necessity of a better and simpler regulatory system involving the participation of all the relevant actors—central governments, regions, cities and civil society. It also declared that "[t]o improve the quality of its policies, the Union must first assess whether action is needed and, if it is, whether it should be at Union level. Where Union action is required, it should consider the combination of different policy tools. When legislating, the Union needs to find ways of speeding up the legislative process. It must find the right mix between imposing a uniform approach when and where it is needed and allowing greater flexibility in the way that rules are implemented on the ground. It must boost confidence in the way expert advice influences policy decisions."[1]

The impact assessment procedure for legislative initiatives is one of the tools created by the EU to contribute to the better law-making strategy. It was created as a technical tool that could serve as aid for the political decision-making process of a legislative initiative and it has become a powerful instrument for the improvement of the quality of legislation. It has had a dynamic development and has created a detailed methodology, with constant revisions and changes that aim to make of it an efficient instrument.

Convinced of the importance of this tool for the well functioning of the EU regulatory system, in the present chapter I analyse the current methodology of the Commission's impact assessments. In particular, my objective is to analyse the way in which the delineation of policy options is conducted in the impact assessments and to what extent the previous experience of the Member States in the regulation of a determined issue is taken into account for the design of the different policy options.

As object of study, I use the impact assessments prepared by the Directorates-General during 2008, and I intend to show that the way in which these impact assessments are conducted is not complying with the principle of proportionate analysis, and hence does not sufficiently contribute to the achievement of the EU Better Regulation objectives.

I begin this research by setting a definition of impact assessment and providing the evolution of the institutional framework related to the impact assessment procedure, in order to give a general scenario for the analysis (12.2). In Sect. 12.3, I describe in detail the methodology set by the Commission in its 2005 Impact Assessment Guidelines for the elaboration of the impact assessment reports. Section 12.4 includes the analysis of the 2008 impact assessment reports and the results of the analysis. The last section draws the conclusions of the research.

[1] COM(2001)428, *European Governance. A White Paper*, p. 5.

12.2 Definition of Impact Assessment and Institutional Framework

For the purpose of this document, I will use the term Impact Assessment (IA) to identify the methodological analysis of legislative proposals. "Impact assessment (IA) is a process aimed at structuring and supporting the development of policies. It identifies the main options for achieving the objectives and analyses their likely impacts in the economic, environmental and social fields. It outlines advantages and disadvantages for each option and examines possible synergies and trade-offs".[2]

As it will be explained below, the concept of impact assessment in the Community context has been associated to different procedures over the last two decades, and has been denominated in diverse ways. Among others, we find Regulatory Impact Assessment or Regulatory Impact Analysis (RIA), Business Impact Assessment (BIA), Extended Impact Assessment (ExIA) and *Ex Ante* Evaluation of Legislation (EEL). These concepts refer to particular procedures and contexts, but at the same time they are related to each other.

With the aim of contextualising my object of study, in this section I will briefly illustrate the evolution of the European institutional framework of IAs from its formation in 1986 up to the present, and I will explain the way in which the different definitions of impact assessment have been applied.

12.2.1 Institutional Overview

Following a chronological order, perhaps the first time the concept of impact assessment was widely used in the European Community context was in 1986, when the UK took its turn in the Presidency of the Council. The impact assessment procedure introduced—Business Impact Assessment (BIA)—closely reproduced the UK model of Compliance Cost Assessment.[3] The rationale behind this concept was to assure that the Commission's new legislative instruments would not imply excessive burdens to business, especially small and medium-sized enterprises (SMEs). In this context, BIA can be defined as "[…] a comprehensive analysis of the impact of a legislative proposal on business with particular reference to SMEs. […] The main objective of the system is to ensure that proposals for legislation to be made by the Commission do not add unnecessarily to the compliance costs and administrative burdens of business. This means DG XXIII[4] has to encourage wide consultation procedures with business organisations, including European SME business organisations who represent many millions of small businesses throughout the European Union."[5]

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[2] http://ec.europa.eu/governance/impact/index_en.htm. Accessed on 24 April 2009.

[3] Renda 2006, 45.

[4] Now DG Enterprise.

[5] Schulte-Braucks 1998, 207–208.

During the 1990s, the OECD stressed the importance of good quality of regulation for the improvement of the economic performance and life standards of their citizens. Thus, it established parameters for the improvement of the quality of government regulation[6] and developed the concept of regulatory impact assessment (RIA) as part of this plan. For the OECD, "RIA is an evidence-based approach to policymaking where the decision is based on fact finding and analysis that define the parameters of action according to established criteria. It has the potential to strengthen regulation by systematically examining the possible impacts arising from government actions and communicating this information to decision makers in a way that allows them to consider (ideally) the full range if positive and negative effects (benefits and costs) that are associated with a proposed regulatory change."[7]

During the same period, a variety of Community initiatives was set up in order to evaluate the possible impact of legislative proposals[8]; however, the introduction of these initiatives was not optimal on providing the desired improvement on the quality of legislation. For that reason, in 2001 the Commission issued a White Paper on European Governance[9] aimed to provide a new integrated method for impact assessment. Along with the White Paper, an advisory group was formed (the 'Mandelkern Group') which contributed to the issuance of the Action Plan for Better Regulation in 2002.[10] As part of the Action Plan and the strategy on better law-making, the Commission issued a communication on Impact Assessment[11] and six additional documents.[12]

In this new context, the Commission decided to combine various forms of impact assessments. This new integrated model "[…] contains an in-depth evaluation of the expected social, economic and environmental impact of the various policy options associated with the proposal and a summary of the consultation activity, which should be estimated in qualitative, quantitative and possibly monetary terms. The alternative policy options are to be evaluated according to criteria

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[6] Organisation for Economic Co-Operation and Development—OECD, *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation*, OCDE/GD(95)95, adopted on 9 March 1995. Available at: http://www.olis.oecd.org. Accessed 14 May 2012. See also Popelier and Verlinden 2009.

[7] Kirkpatrick 2006, 237.

[8] For instance, the SLIM Project (Simplification of the Legislation on the Internal Market) for the *ex post* assessment of the quality of regulation; the creation of the Business Environment Simplification Task Force (BEST) and the creation of the Business Test Panel as a consultation body for firms affected by EU regulations: Renda 2006, 47.

[9] White Paper on European Governance, *op. cit*.

[10] COM(2002)278 final, Communication from the Commission. *Action Plan: "Simplifying and improving the regulatory environment"*.

[11] COM(2002)276 final, *Communication from the Commission on Impact Assessment*.

[12] (a) General principles and minimum standards for consultation (COM(2002)704); (b) Collection and use of expertise (COM(2002)713); (c) Proposal for a new comitology decision (COM(2002)719); (d) Opening framework for the European Regulatory Agencies (COM(2002)718); (e) Framework for target-based tripartite contracts (COM(2002)709); and (f) Better monitoring of the application of community law (COM(2002)725). See Renda 2006, 52.

such as the relevance of the problem, the effectiveness in achieving the objectives, the coherence with wider economic, social and environmental objectives, the interaction with other existing and planned Community interventions, the cost of resources required and the user-friendliness of the regulatory option at hand."[13]

As a result, the whole procedure became much more complete, but also more complex to follow, which held back its immediate start.[14] The Commission needed to issue additional documents to strengthen the basis for the elaboration of impact assessments. Thus, in 2005 it issued the Impact Assessment Guidelines illustrating the parameters and procedure of impact assessments, and in 2006 created an independent Impact Assessment Board (IAB)[15] to ensure the consistency and high quality of impact assessments.

In the 2005 Guidelines, the Commission defined impact assessment as "[…] a set of logical steps which structure the preparation of policy proposals".[16] As it will be explained in detail in the next section, these guidelines define procedural rules, analytical steps and clarify the expected outcome of an impact assessment, emphasising the fact that it is only an aid to political decision-making and not a substitute for the political process.

With respect to the IAB, it aims to improve the quality of the Commission's impact assessments by strengthening quality control and providing advice and support. It works under the direct authority of the Commission President and its members are high-level officials from the Commission departments most directly linked with the three aspects of the impact assessment: economic, social and environmental impacts. The members have been appointed in their personal capacity and on the basis of their expert knowledge.[17]

Finally, in January 2009, the Commission issued new Impact Assessment Guidelines which replace the 2005 Guidelines. In the new document, the Commission has made an effort to clarify the objectives of impact assessment, its importance for the overall quality of legislation, and also explain in more detail the interaction of the different institutions in the impact assessment procedure. This will be explained in more detail in the next section.

As it has been described, the impact assessment procedure has widely evolved in the past decade and has been subject to constant evaluation and improvement. Given that it is a relatively new methodology, there is still need for improvement. Nonetheless, during the past 5 years the Commission has made great efforts to

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[13] Renda 2006, 54.

[14] See Meuwese and Senden 2009, 142.

[15] The Commission initiative for the creation of an Impact Assessment Board was presented in the Commission Communication "A strategic review of Better Regulation in the European Union" COM(2006) 689 final, 14 November 2006 and in the note from the President of the Commission: "Enhancing quality support and control for Commission Impact Assessments—The Impact Assessment Board" SEC(2006)1457.

[16] Impact Assessment Guidelines, SEC(2005)791, 4.

[17] http://ec.europa.eu/governance/impact/docs/key_docs/iab_mandate_annex_sec_2006_1457_3.pdf. Accessed on 25 April 2009.

consolidate the process, and evidence shows that it has become an indispensable tool for the improvement of the quality of legislation in the European Union.

12.2.2 Definitions of Impact Assessment

Currently, in the European Union, the impact assessment procedure requires the interaction of several institutions and the use of diverse analytical and economic instruments of evaluation, which makes impact assessment a complex tool for policy makers. Along with the evolution of impact assessments, various ways to define it have emerged, some of them broader than others depending on the elements that they take into consideration.

Probably, the most general definition related to this procedure is *ex ante* evaluation of legislation (EEL) since it includes all the studies that are made before a legislative proposal is subject to a political procedure. Verschuuren and Van Gestel define EEL as the "[f]uture oriented research into the expected effects and side-effects of potential new legislation following a structured and formalised procedure, leading to a written report. Such research includes a study of the possible effects and side-effects of alternatives, including the alternative of not regulating at all".[18] This definition contemplates both the external and internal assessments in connection with a legislative proposal, and assesses the impact on a whole range of interests. As it is the broadest definition, it comprises the concepts of Impact Assessment (IA) and Regulatory Impact Assessment (RIA).[19]

A more specific definition of impact assessment, directly related to the function of aid to policy-making, is Regulatory Impact Assessment (RIA), also denominated as Regulatory Impact Analysis. It is "[…] a method of policy analysis which is intended to assist policymakers in the design, implementation and monitoring of improvements to regulatory systems, by providing a methodology for assessing the likely consequences of proposed regulation and the actual consequences of existing regulations. […] *Regulatory impact assessment* (alternatively referred to as *regulatory impact analysis*) provides a methodological framework for undertaking this systematic assessment of benefits and costs of regulation, and for informing decision makers of the consequences of a regulatory measure".[20]

Among the proposed policy options subject to analysis under RIA is the option of no-intervention, meaning no further regulation of a determined situation by the competent authorities would be needed.

Another definition emerged in the context of the evolution of the European institutional framework of impact assessment, as it has been presented in the previous section. In 2001, when the Commission decided to launch the 'Better

[18] Verschuuren 2009, 5.

[19] Ibid., p. 6.

[20] Kirkpatrick 2006, 232–233. Italics in the original text.

Regulation' Programme and to integrate various impact assessment instruments, the new methodology received the name of integrated impact assessment model, which led to denominate the procedure as Extended Impact Assessment (ExIA).

An illustrative description of this model is presented by Andrea Renda, who states that: "All Commission initiatives proposed for inclusion in the Annual Policy or the Commission Legislative and Work Programme and requiring some regulatory measure for their implementation—thus including not only regulations and directives, but also white papers, expenditure programmes and negotiating guidelines for the international agreements—must undergo a 'preliminary impact assessment'. Moreover, a selected number of proposals with large expected impact are subjected to a more in-depth analysis called 'extended impact assessment'. […] "The extended impact assessment (ExIA) contains an in-depth evaluation of the expected social, economic and environmental impact of the various policy options associated with the proposal and a summary of the consultation activity, which should be estimated in qualitative, quantitative and possibly monetary terms. The alternative policy options are to be evaluated according to criteria such as the relevance of the problem, the effectiveness in achieving the objectives, the coherence with wider economic, social and environmental objectives, the interaction with other existing and planned Community interventions, the cost of resources required and the user-friendliness of the regulatory option at hand".[21]

Finally, the Commission has adopted another definition of Impact Assessment to identify the methodological analysis of legislative proposals. It includes the types of impacts that should be analysed and clarifies the purpose of the instrument as an aid for the political process: "Impact assessment (IA) is a process aimed at structuring and supporting the development of policies. It identifies the main options for achieving the objectives and analyses their likely impacts in the economic, environmental and social fields. It outlines advantages and disadvantages for each option and examines possible synergies and trade-offs".[22]

Referring specifically to impact assessment in the context of the Commission 2005 guidelines, "[i]mpact assessment is the common term for *ex ante* analysis conducted in an early stage of policy and/or legislative processes, with a view to making a more informed decision about the content and the type of the intervention. The actual procedure as it is currently in place in the European Commission policy cycle, consists of a series of analytical steps to be carried out at the bureaucratic level: problem identification, definition of the objectives, development of the main policy options, impact analysis, comparison of the options in the light of their impact and an outline for policy monitoring and evaluation".[23]

Having presented the various definitions of IA, the present document will mostly use the definitions of impact assessment used by the Commission in its Guidelines.

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[21] Renda 2006, 53–54.

[22] http://ec.europa.eu/governance/impact/index_en.htm. Accessed on 24 April 2009.

[23] Meuwese and Senden 2009, 139.

Nevertheless, I do not intend to exclude the additional theoretical approaches that have been described above, as all of them are related in one or other way.

With a clear illustration of the development of the institutional framework in the Community context, in the next section I will describe the methodology that has been used to elaborate impact assessments, its principal elements and objectives.

12.3 Impact Assessment Methodology

The Commission defined the general IA methodology in its 2005 Guidelines,[24] and more recently and in further detail in the new Guidelines issued in January 2009.[25] The Guidelines are written for the Commission staff in charge of preparing policy proposals; they set the procedural rules for IA in the Commission and explain how to practically conduct the analysis.

In this section, I will explain in detail the objectives of the Commission's IA, when should IAs be prepared, the procedure they should follow and the results they shall report. In Sect. 12.3.1, I will address the objectives of the IA and its conjunction with the Commission's legislative programme; in Sect. 12.3.2, I will concentrate on the preparatory stage that the different Commission Directorates-General (DGs) should follow—the IA Process, which is fundamental for the further development of the IA report. In Sect. 12.3.3, I will analyse the elaboration procedure and the contents of the IA report, in order to contextualise and simplify the further analysis of the IAs elaborated by the Commission in 2008.

12.3.1 General Aspects

The core objective of Commission's IAs is to be a support for policy-making decisions, by means of the analysis of the effects of a proposed policy based on the best data available and the consideration of different options for a determined policy problem.[26] It is then a technical tool which intends to give systematic fundaments to the further political process, but which is not meant to make a decision towards a determined policy. The Commission has been emphatic when stating that IAs are a complementary instrument for policy-making and in any sense pretend to replace the political process to which a regulatory proposal should be submitted. The Commission has also explained that the IA report should not be considered a substitute or a synonym of the explanatory memorandum preceding a proposal.

Not all the regulatory proposals are required to have an IA. Some of them are exempted, especially if they do not have major economic, environmental or social

[24] Commission (EC), *Impact Assessment Guidelines*, SEC(2005)791, 15 June 2005.

[25] Commission (EC), *Impact Assessment Guidelines*, SEC(2009)92 of 15 January 2009.

[26] See, for instance, Meuwese 2008, 8.

impact. In the 2005 Guidelines, the Commission stated that "[a] formal IA is required for items in the Commission's Work Programme (WP).[27] All regulatory proposals, White Papers, expenditure programmes and negotiating guidelines for international agreements (with an economic, social or environmental impact) put on the WP are concerned. Green Papers and proposals for consultation with Social Partners are exempted. […] The following are also normally exempted: periodic Commission decisions and reports, proposals following international obligations and Commission measures deriving from its powers of controlling the correct implementation of [EU] law and the executive decisions".[28] In the 2009 Guidelines, the Commission mentions that the Secretariat General, the Impact Assessment Board and the DGs are the ones in charge of defining each year which of the Commission's initiatives should be accompanied by an IA, but maintained the same general rule set in the 2005 Guidelines.[29]

IAs are integrated into the Commission's Strategic Planning and Programming (SPP) cycle in which the annual priorities and strategic objectives of the Commission are defined.[30] They are a key element on the whole legislative programming; therefore, it is crucial to use the correct mechanisms and data in the IA in order to contribute to the improvement of the quality and accuracy of Community regulation.

An underlying principle in the overall impact assessment process is the principle of proportionate analysis, which states that the analytical depth must be proportional to the supposed impacts of a regulatory proposal. "The impact assessment depth and scope will be determined by the likely impacts of the proposed action. The more significant an action is likely to be, the greater the effort of quantification and monetisation that will generally be expected".[31] The Commission Guidelines state that depending on the type of regulatory proposal, some aspects of analysis should be given more importance than others, for example in the definition of the problem for new proposals, or revision of flexibility of the existing instruments in the case of proposals for amending existing legislation. This will be analysed in more detail in Sect. 12.3.2.

As the IAs form part of the early legislative planning of the Commission, it is important to initiate the impact assessment with sufficient time and to take into consideration the possible effects of a legislative measure. As it will be explained in the next sections, the elaboration of an impact assessment is compounded of two phases: the impact assessment process which approximate duration is of one year, and the presentation of the results by means of an Impact Assessment report. Both phases have specific futures and shall comply with certain parameters set by the Commission.

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[27] Now called Commission's Legislative and Work Programme (CLWP).

[28] Commission Impact Assessment Guidelines 2005, Section II.1, p. 6.

[29] Commission Impact Assessment Guidelines 2009, Section 1.4, p. 6.

[30] More details about the SPP can be found at http://ec.europa.eu/atwork/strategicplanning/index_en.htm. Accessed on June 4 2009.

[31] Commission Impact Assessment Guidelines 2005, Section II.5, p. 8.

12.3.2 Impact Assessment Preliminary Process

The preliminary stage of IAs has two fundamental elements: for one part, the elaboration of a roadmap; and for the other, the selection and launching of the consultation plan which will be used for the IA.

For the staff in charge of IAs in the DGs, it is necessary to elaborate a roadmap of each IA, in order to facilitate the inclusion of the IAs in the Annual Policy Strategy[32] (APS) and the Commission's Working Programme.[33] The roadmaps are basically an outline of the IA report and they must provide several elements: First, they should estimate the time needed for completing the whole IA process; in addition, each roadmap must contain a brief abstract of the policy options which will be proposed and their potential impacts, including a remark on the impacts that would require further analysis; they should also provide an outline of the consultation plan (see below) and decide whether an Inter-Service Steering Group is going to be conformed with other DGs or explain why is it not going to be conformed in a particular case.

On the other hand, the consultation process is a fundamental source of information for the IA process and it is considered as a way of involving stakeholders in the decision-making process.[34] It may contribute to determine how should the IA be conducted, to identify some sensible issues that may have not been taken into account, and even to provide technical tools for the further analysis of the policy objectives and options. Given the administrative burden of conducting a consultation process, the Commission highlights several issues that should be taken into account.

First, the topic of consultation must be defined. It varies depending on the type of proposal under study and it may look for opinions on diverse issues such as the causes of the problem subject to analysis, the objectives of the regulatory measure, the possible economic, social or environmental impacts or the proposed policy options. In order to know how many consultation processes should be launched it is necessary to take into account the length and scope of the analysis giving application to the proportionate analysis principle defined above.

It is also important to consider the target groups, and depending on the case, general consultation processes may be launched, but also the DG staff can decide to consult specific groups of individuals or companies, on the awareness that in every case the responses will be biased to some extent by the particular interests of the consulted groups. On top of the consultation process it can also be decided—as

[32] The APS gives an annual strategic framework at Commission level and defines, early in the previous year, political priorities and key initiatives for the following year. More details of the APS are found at http://ec.europa.eu/atwork/synthesis/index_en.htm. Accessed 14 May 2012.

[33] The Commission's annual work programme translates the APS into policy objectives and an operational programme of decisions to be adopted by the Commission. More details regarding the CWP are found at http://ec.europa.eu/atwork/programmes/index_en.htm. Accessed 14 May 2012.

[34] Larouche considers this 'democratic' rationale as a noble but deficient objective of impact assessment, given that the process-orientation of IA does not really focuses on the achievements of these results in practice. See Chap. 11 of this book.

it generally is the case—to consult to an ad hoc external technical consultant, who will provide data and analysis that will be then used as part of the analysis and justification in the elaboration of the IA report.

In addition, the timing of the consultation has to be defined and 'the sooner, the better' principle generally applies. In many cases, the consultation process does not limit to only one consult, but it may include several topics over an extended period. In relation to the consultation tools, the staff must decide the applicable method of consultation depending on its objectives, the target group and the available resources.

A synthesis of the required elements for the elaboration of the roadmaps and the consultation process is illustrated in Fig. 12.1.

As it is has been remarked, the preliminary process is a fundamental piece of the IA apparatus because it delineates the scope of the IA, the potential sensible points and affected sectors, as well as the way in which those issues will be addressed (if decided they will) in the consultation process.

As to the time in which these processes should be initiated, with respect to the roadmap, it is necessary to publish them in parallel with the Commission's Working Programme (CWP), although a preliminary version must be ready with sufficient time before the issuance of the CWP as it should ideally has to be circulated between the different DGs in order to make it more complete and integral.

12.3.3 Impact Assessment Report

Once the consultation process has been completed, the DG in charge has to prepare the IA report, which constitutes the final step of the IA process. It is elaborated on the basis of the roadmap, and condensates the formulation and analysis of the economic, social and environmental impacts of the proposal under discussion. The IA report must include a data-supported analysis of the issues raised in the roadmap and an evaluation and comparison of the different policy options that have been put into consideration as potential solutions to the regulatory problem, in order to accomplish their aim of being a technical and analytical tool for the further political process on the adoption of a legislative proposal and therefore being an element for the improvement of the quality of regulation.

With the purpose of granting uniformity and simplicity to the IA reports, the Commission Guidelines established specific steps and contents which have to be followed by the DGs. In the 2005 Guidelines, the report is divided into several analytical steps, as it is illustrated in Fig. 12.2.

The first step entails the definition of the problem. The IA report must illustrate the causes of the problem, the reasons why it is considered a problem and the extent to which the certain industrial or demographic sectors, regions, or the Community as a whole are affected with it.

The second analytical step of the report, which is closely related to the definition of the problem, refers to the objectives of the proposed policy instrument. It is

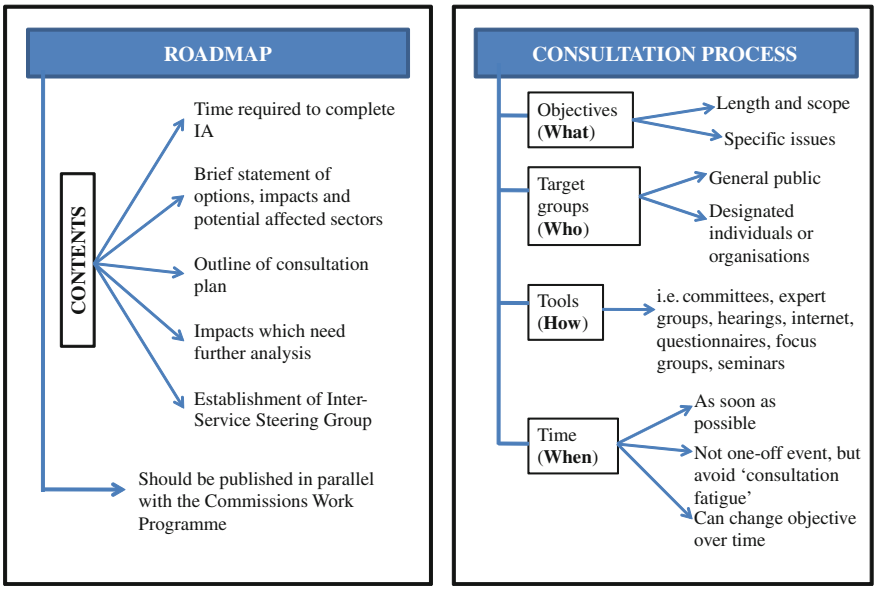

Fig. 12.1 Impact Assessment Preliminary Process

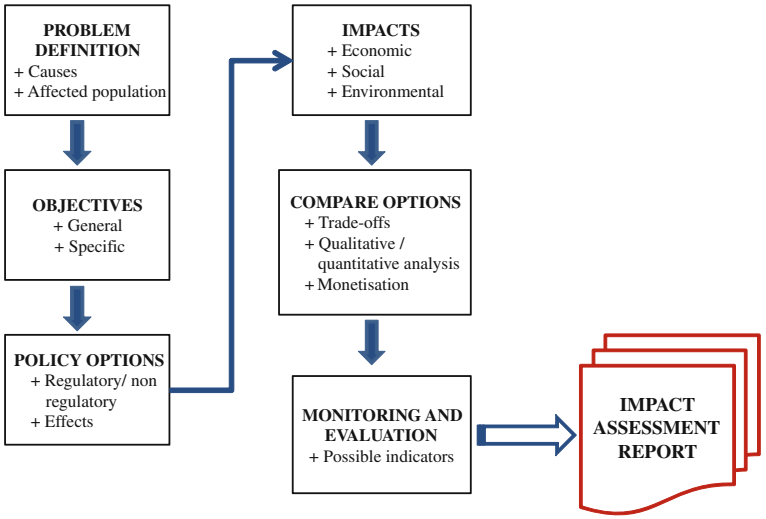

Fig. 12.2 Analytical steps of an IA report

desirable to specify the general, specific and operational objectives, and they should be formulated in a way that reflects an understanding of what the legislation is supposed to achieve; for that reason, the Commission set the 'SMART' criteria as a parameter and therefore the objectives must be Specific, Measurable, Accepted,

Realistic, and Time-dependent.[35] In addition, the objectives cannot be seen in isolation, but in the EU context, and thus they have to be consistent with the rest of EU instruments and objectives.

The third and fourth elements in the IA report are the description and impact analysis of the different policy options. The Commission encourages the DGs staff to 'think out of the box' and suggest non-conventional policy options as well as the option of no regulation. All the policy options taken into consideration have to be determined in terms of **effectiveness**—the extent to which options can be expected to achieve the objectives of the proposal—**efficiency**—the extent to which objectives can be achieved for a given level of resources/at least cost—and **consistency**—the extent to which the options are likely to limit tradeoffs across the economic, social and environmental domain.[36] These should apply to the policy options in two levels: the delineation of the possible instruments to be used to tackle the identified problems—and the ideal contents of such instrument.

As regards to the possible instruments, the IA report should reflect the analysis of the regulatory—or non-regulatory—instruments that could be used to accomplish the policy objectives. Depending on the topic at hand and the intended objectives, the Commission can use binding legislative instruments (regulations, directives or decisions), non-legislative instruments (communications, guidelines or recommendations), self-regulation, co-regulation, or even the option of not regulating at all. In the analysis and comparison of these options, the DG in charge must take into account the benefits and drawbacks of each option and the feasibility, all in accordance with the principle of proportionate analysis and to the Treaty principles of proportionality and subsidiarity of the measures.

In relation to the ideal contents of the policy instrument, and in line with the objectives, the IA report should reflect the data analysis, the results of the consultation process and other relevant findings in analytical terms and, if possible, quantitative and monetary terms. According to the 2005 Guidelines, this is the most important element of the report, and hence the data and analytical tools play here a crucial role. "The ultimate aim of the impact analysis is to provide sufficient and clear information on the impacts of the various policy options that can then be used as a basis for comparison of those options against each other and against the 'no policy change' option or 'baseline scenario' elaborated as part of the problem analysis".[37] The impact analysis requires taking into account short and long-term effects, inside and outside the EU, and all the possible economic, social and environmental impacts, which should be analysed separately and in detail.

Regardless of the analytical approach adopted (qualitative and/or quantitative), the results must aim to be transparent (it must be clear to others how were the impact estimated), reproducible (others must be able to arrive at the same results, using the same data and approach) and robust (if using different methods or

[35] Commission 2005 Guidelines, p. 20.

[36] Ibid., 25.

[37] Ibid., 26.

assumptions to estimate the impacts gives very different results, this may call into question the reliability of your analysis).[38]

In order to assure the serious analysis of the impacts, the Commission set some guidelines as to the economic models that can be used, such as cost–benefit analysis, Computable General Equilibrium models or microsimulation models.[39] The seriousness of the analysis appears to be a core element of the IA report as a technical element to support the further decision-making process. Although this is a positive characteristic of IAs, it also has important drawbacks in terms of the loss of importance of the legal analysis that should also be done and this is reflected in the way IAs have been conducted, as it will be analysed in the next heading.

Once the analysis of the impacts is done, the next step in the report is to make an overall comparison of all the policy options remarking the strengths and weaknesses of each option, regardless of whether they are expressed in qualitative, quantitative or monetary terms. It is possible and desirable to draw a conclusion on the preferred policy option, although this is not binding in any way for the further political process.

Finally, the report should set some possible ways of conducting future monitoring and evaluation of the policy, by defining some general indicators of the measurement of the accomplishment of policy objectives.

In addition, since the creation of the Impact Assessment Board (IAB) in November 2006, the IAB has the mission of controlling the quality of the IAs by revising them before they are published. In the revision, the IAB is entitled to ask for the modification of the report in issues such as the definition of the problem or the delineation of policy objectives and options. The IA report must include a synthesis of the IAB opinion, and show that the suggestions for improvement of the IA have been implemented in the analysis and in the report.

12.4 Impact Assessments Conducted by the Commission in 2008

So far, the institutional framework and the Commission IA methodology have been described and analysed. In this section, I will focus on the analysis of the way in which the previous experience of the Member States is taken into consideration in the IA reports when identifying the problems and defining the policy options for a determined issue. In Sect. 12.4.1, I describe the 2008 panorama and the justification of the research. The Sect. 12.4.2 deals with the definition of the object of study, the categorisation of the IAs that will be analysed and an explanation of the methodology. The Sect. 12.4.3 is dedicated to the detailed analysis of the selected IA reports, and the final Sect. 12.4.4, shows the results of the analysis.

[38] Ibid., 38.

[39] For this purpose, some qualitative models are explained in Annex 7 of the 2005 Guidelines.

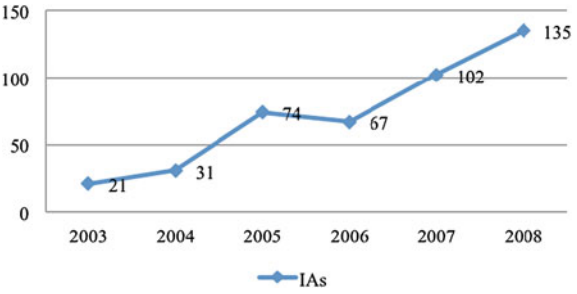

Fig. 12.3 IAs conducted between 2003 and 2008

12.4.1 Justification

As it has been analysed in the previous headings, the IA procedure has evolved in the past decades and has become a structured and complex process. This institutional development has come along with a more frequent use of IAs as an aid for the policy-making process, and an improvement in terms of quality. Some factors have contributed to this development. On the one hand, the Commission Directorates-General (DGs) have appointed staff with exclusive dedication to IA related issues, and this has a positive effect in the quality of the reports as well as to their consistency. In addition, the number of proposals included in the Commission Work and Legal Programme (CLWP) has also increased over time. Given that, the 2005 Guidelines state that the majority of legislative proposals contained in the CLWP are subject to IA, the amount of IAs has also increased. The growth of the conducted IAs is illustrated in Fig. 12.3.[40]

On the other hand, the quality of IAs has improved since the constitution of the Impact Assessment Board (IAB) in 2006. The IAB is in charge of revising the IA reports before their publication, and it has increased its activities over time, up to the point of revising 135 impact assessments in 2008, and all the roadmaps for initiatives which were included in the CLWP for 2009.[41] The existence of a single body for quality support in charge of the revision of all the IAs is an effective mechanism to achieve a more consistent and uniform application of the Commission Guidelines, but there is still a long way before achieving complete efficiency and consistency on the IA process and reports.

[40] The graph was generated using the data from 2003 to 2006 available in the Commission's Impact Assessment webpage (http://ec.europa.eu/governance/impact/practice_en.htm. Accessed 14 May 2012), which I take as the official data for those years. There is no official data for the number of IAs carried on in 2007 and 2008. The number of published IAs is inferior to the number of revised reports by the IAB according to the Impact Assessment Board Reports for 2007 and 2008; therefore, I use the number of revised reports (without taking into account the resubmissions) as data for these years.

[41] Commission (EU) "Impact Assessment Board Report for 2008 accompanying the Third Strategic Review of Better Regulation in the European Union" SEC(2009) 55, p. 2.

Table 12.1 2008 IA reports chosen for analysis

DG	Full name	IAs
AGRI	Agriculture and rural development	3
COMP	Competition	1
EAC	Education and culture	5
EMPL	Employment, social affairs and equal opportunities	8
ENTR	Enterprise and industry	13
ENV	Environment	20
INFSO	Information society and media	2
JLS	Justice, freedom and security	11
MARE	Maritime affairs and fisheries	3
MARKT	Internal market and services	12
RTD	Research	4
SANCO	Health and consumers	12
	Total	94

Taking into account the abovementioned factors, it is possible to believe that the IA process will soon be reaching a stable point, which may—hopefully—be achieved with the application of the new dispositions set in the Commission 2009 Guidelines. For this reason, an analysis of the 2008 IA reports is justifiable as there has been sufficient time for the process to evolve—3 years applying the parameters set in the 2005 Guidelines— for the DGs to get used to the application of the IA procedures and for the IAB to become an important player in the assurance of the IA quality. In addition, 2008 can be seen as a breaking point between the 2005 and 2009 Guidelines and gives an opportunity to conjecture on the future development of the IA process in the EU.

12.4.2 Object of Study and Methodology

According to the Impact Assessment Board Report of 2008, the IAB revised 135 IA reports in 2008 carried out by 15 DGs. Out of these 135 reports, I chose for the analysis a significant sample of 94 reports[42] prepared by 12 DGs as it is illustrated in Table 12.1.

[42] Three IAs could not be included in the analysis although they were elaborated by the DGs that are taken into account in the analysis. As to April 2009, the proposal for a Communication "Towards a European e-Justice Strategy" of DG JLS (SEC(2008) 1947 of 30/05/2008) was only available in French; the proposal for a Decision "establishing an audiovisual cooperation programme with professionals from third countries MEDIA Mundus" of DG INFSO (01/09/2009) and the Proposal for a Regulation "establishing a multi-annual plan for the stock of herring distributed to the West of Scotland and the fisheries exploiting that stock" of DG MARE (06/05/2008) had not been published yet.

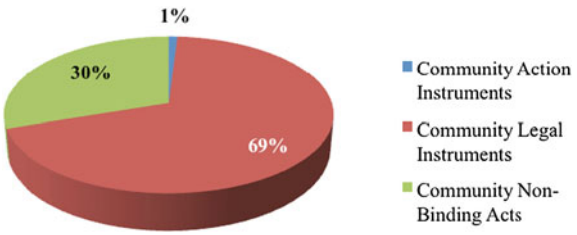

Fig. 12.4 Types of regulatory proposals

The set of regulatory initiatives of 2008 is highly diverse in the IAs studied and also in relation to the type of legislative proposals. For instance, there are proposals for Community intervention in topics as diverse as seal hunting, security of toys, financial collateral, roaming in mobile telephone networks, ship dismantling and asylum for third-country nationals. As it will be analysed latter, it is worth questioning if the design of the IA reports as a one-size-fits-all instrument is adequate for the purpose of improving the quality of legislation.[43]

In relation to the legislative initiatives included in the IAs, the vast majority of the IA reports include the proposal for the adoption of one regulatory instrument. However, some of the reports include more than one initiative—for instance the proposal for the amendment of a regulation by another regulation and the issuance of a new directive in the same report. There are 103 regulatory initiatives on the 94 reports, and therefore the categorisation of the initiatives and the analysis will take into account the number of initiatives as well as the number of IA reports.

As for the type of instrument, the analysed IAs are related to various types of regulatory initiatives. As it is illustrated in Fig. 12.3, a large number of IA reports (71) are related to proposals of a legally binding nature; there is one Community action instrument, and 31 non-binding instruments.

In the particular case of the White Paper, I consider it is relevant to have an example of the way in which these types of IA reports are developed. Thus, I decided to include it in the present analysis even if it is the only example of a proposal for a Community action instrument; however, it is to say that the findings in this regard cannot be considered as conclusive due to the lack of comparison with other similar instruments.

As regards to the rest of Community instruments subject to this study, the complete scenario of the analysis is summarised in Fig. 12.4. In the case of the legislative binding instruments there are proposals for regulations, directives and

[43] In the evaluation of the IA system conducted in 2007, this was raised as an issue of concern to achieve the objectives of IAs: "The quality of many IAs suffers from the fact that IA is applied to a great number of very diverse items, while the system does not provide for enough differentiation to allow IAs to add value in the way that is best adapted to the specific proposal and its circumstances. The resulting suboptimal quality of many IAs limits their potential for achieving all of their key objectives, in particular those of improving the quality of the proposals they accompany and, and of serving as an effective aid to decision-making". The Evaluation Partnership, *Evaluation of the Commission's Impact Assessment System*, 2007, p. 4.

decisions. In relation to the non-binding acts, the cases under analysis include recommendations and communications.[44]

As it is shown, the IA reports include regulations, directives and decisions aimed to regulate issues that have already been brought up by the Commission (by means of action plans, white papers or communications) but which have not yet been regulated. Some IA reports also propose to amend an existing instrument with a legislation of the same type. In the case of regulations and decisions, they are also used to propose amendments in other legislative binding instruments but of different kind (regulations and decisions amending directives). In the particular case of communications (non-binding acts), they are used to suggest Community intervention both in previously regulated issues, and in issues that have not been subject to Community intervention. As it is explained below, this categorisation is relevant for the further analysis of the way in which the policy options are set in the IA reports.

The analysis of these IA reports aims to evaluate the extent to which the IAs take into consideration the particular experience of Member States as examples of what should—or should not—be done in dealing with a particular issue, both for defining a policy problem or for proposing regulatory options, to determine to what extent is this aligned with the principle of proportionate analysis and how does this contribute in the achievement of the Better Regulation objectives.

I intend to show that the efforts of the Commission—DGs and the IAB—are not sufficient in this respect. In many cases, the delineation of policy options in the IAs is based in high degree on technical arguments and theoretical solutions instead of on reality, and there is not enough emphasis on the legal reasoning that should underline the whole report, especially in terms of the evaluation of the optimal policy instruments that will regulate a determined issue.

Having in mind that the IAs are related to very diverse subjects and various types of instruments, the analysis will be divided into five categories of reports. The first category includes legislative binding instruments (regulations, directives and decisions) amending other legally binding instruments. The second category contains the proposals for new legally binding instruments both in topics which have and have not been subject to Community intervention. The third and fourth categories consist of non-binding instruments dealing with previously regulated and non-regulated issues, respectively. And finally, the last category is for the White Paper.

For each category the reports were classified in three groups. The first group includes the reports that fall under the criteria of either lacking legal analysis or not using experience of the Member States as a tool to delineate policy options—*null*

[44] I included recommendations and communications in this category adopting a non-exhaustive interpretation of Article 288 TFEU, in which only recommendations and opinions are included as non-binding declaratory instruments. As there is a current debate on whether communications can be considered as soft-law instruments, I will refrain from the use of the term 'soft-law' to identify communications, guidelines, recommendations and opinions and will instead use the more general term of non-binding acts or non-binding instruments.

hypothesis (*Ho*); the second group contains the good-quality reports which include empiric and legal analysis on the definition of problems, objectives and proposals of policy options—*alternative hypothesis* (*Ha*); and the third group contains the reports which I considered not to need the analysis of specific experience from Member States —*Non applicable* (*N/A*).

In the analysis, two elements of the IA reports are of particular interest in terms of the inclusion of Member States experience. The first is the problem definition, by means of which the respective DG analyses the situation that leads to a concern in relation to the need of Community intervention, either because of (a) an inappropriate application of an existent instrument by (some of) the Member States; (b) given to changes in the social, economic or environmental situation; or (c) as a consequence of the evolution or of changes in Community objectives following an action plan, a communication or other instruments.

Of core importance is also the analysis in two levels of the delineation of policy options to tackle a defined problem. One level corresponds to the analysis and selection of different—binding, not binding, self-regulatory or combined—policy instruments to correct the detected problems and the analysis of which may be the most appropriate. The other level involves the analysis of the proposed or desirable contents of such policy instrument as to solve the defined problems and achieve the proposed objectives.

These two elements are going to be analysed in light of the principle of proportionate analysis, which, according to the 2005 Guidelines, is an underlying principle that should be taken into account in all IAs, as it has been discussed in the previous heading.

In relation to the evaluation of economic, social and environmental impacts, and the comparison of the different policy options, the analysis will deal in general terms with the employed methodology (qualitative or quantitative analysis), but will not focus on the contents of the different reports or in the way in which such comparison is presented.

Given the limited scope of the present analysis, no discussion will be held in terms of the proposals for future evaluation and monitoring of the proposed instruments, or in relation to the power to act that the EU has in each particular case.

12.4.3 Analysis

The vast majority of the analysed IA reports follow the step-by-step methodology proposed in the 2005 Guidelines, illustrated in Fig. 12.1 above. Almost all of them show that they have been prepared as consequence of a previous roadmap included in the 2007 or 2008 CLWPs, have conformed an inter-service steering group and that there has been a preliminary consultation process. The types of consults vary from report to report, but very frequently include general internet consultations,

specific questionnaires addressed to the Member States and consultations to stakeholders.

In addition, many of the reports include a study from an expert external consultant. This is in general a technical study of data analysis and of prediction of the behaviour of a determined sector or people, as a consequence of the introduction of changes in the regulatory framework regulating such sector. Those studies are very useful in many cases and facilitate the accomplishment of policy-making decisions based on robust and reliable data. However, as it will presented further in the analysis, they can lead to erroneous perceptions of what should be considered as optimal policy options as those studies do not take full account of the legal situation affecting the studied sector or of the legal consequences of choosing one or other option of Community intervention to regulate the matter.

In relation to the way in which the reports reflect the analysis that is done in terms of the problem definition and the proposal of policy options, two problems arise in a similar way through the reports, however with different implications in each of the categories.

The first problem relates to the inclusion of data from the Member States in all the phases of the report. In several reports, the data of the Member States is analysed in the problem definition step, but it is not included at the moment of delineating the policy options. The design of the policy options seems to be based on the results of the technical studies that have been prepared during the preliminary IA phase. Thus, the reports appear to be consistent given that they are based on robust data, with economic projections of the possible economic, social and environmental impacts, and hence they could be catalogued as complying with the objectives of the Guidelines. However, it seems to be that they leave important elements of analysis behind.

The second problem relates to the deficient analysis of the policy options. In several cases, the design of policy options is limited to the 'non-action' option, another option of full and direct regulation, and a third option that will be the selected. This is clearly what is trying to be avoided with the parameters of the Guidelines, which are emphatic in requesting the analysis of various feasible options and not a set of absurd options in addition to the preferred. In other cases, there is insufficient analysis in relation to the legal limits of choosing one or other options, the problems on the transposition of law—in the case of directives—or the suitability of a determined instrument on a particular setting. Some IA reports simply say that an instrument should be implemented in order to reach the set objectives, but do not give any clue respect to the way in which that could be done in practice.

In order to see the different problems that arise in each of the categories, I will start the analysis with the categories related to the legislative binding instruments, followed by the study of the categories concerning non-binding acts, and finally I will analyse the White Paper.

12.4.3.1 Legally Binding Instruments Amending Other Legally Binding Instruments

This is the largest category and includes 49 IA reports for amendments of regulations, directives and decisions commanded by nine DGs.[45] The Commission Guidelines suggest that for this type of instrument, attention should be paid to the changes on the objectives.[46] Therefore, it is important to analyse the situation in the Member States, and some types of questions may be asked, for instance: is the problem detected everywhere? Have the Member States applied the legislation in a correct way and if not, why?

Without any doubt, the best example in this category is given by the IA on the amendment of the Settlement Finality and the Financial Collateral Directives.[47] This IA incorporates all the necessary elements of a serious and proportionate analysis of the problem and the optimal solution to tackle the defined problems by using the best policy instruments available.

First, the identified problems are related to the deficiencies on the application and lack of uniformity of the instrument. The characterisation of the problems is based on the current situation of the Member States as a result of the consultation process. There is quantification of the problem and comparison of figures of all the Member States. In addition, the report includes an analysis of the economic situation, for example the increasing demand for financial collateral. The combination between general data and specific situation of the Member States' situation consequently lead to an adequate definition of the general, specific and operational objectives, which are described in the report in terms of the problems they intend to deal with.[48]

Second, with respect to the selection of the optimal policy option, this report presents a conscious, clear and detailed analysis of the available policy instruments both in theoretical and in practical terms. It started by listing all the available policy instruments and then analysed to what extent those instruments were applicable. Once the non-legislative instruments were discarded, the report discussed the feasibility of applying legislative instruments. Finally, it decided between a directive and a regulation in an analytical and legal way that is worth reproducing: "A Regulation, could, in theory, give the highest level of harmonisation. However, in view of the fact that (i) a Directive and a Regulation have different effects on the national legal orders, and (ii) the current proposals concern the amendment of rules already contained in two Directives, the use of a Regulation would cause unnecessary confusion on the exact effects of its rules and would make the incorporation of the proposed amendments within the existing national implementing legislation difficult to envisage. A Directive is the preferred option in that respect. In our

[45] DGs AGRI, ENTR, ENV, INFSO, JLS, MARE, MARKT and SANCO.

[46] See Commission Guidelines 2005, Section 5, p. 8.

[47] DG MARKT—SEC(2008)491, April 23 2008.

[48] See for instance Table 1 of the report. Section 4.1, p. 26.

opinion, it provides the right balance between harmonisation and flexibility in implementation and it allows the seamless incorporation of the proposed changes into the national legal regime. It is therefore considered as the preferred policy instrument as to achieve the desired objectives".[49]

Following a serious and rigorous analysis, the report uses efficiency and effectiveness criteria to compare and decide on the most adequate policy instrument.[50] Finally, the policy options are studied not only in terms of the optimal instrument, but also in terms of the desirable content. To support the proposal, in this part the report is also based on the Member States' experience.

All these factors make of the above described IA report a good example of what should be done when analysing the amendment of an existing legislative binding instrument. There are other 19 examples in this category of IA reports in which the evaluation of policy problems and potential solutions are based on the real situation of Member States and supported with credible data. Nevertheless, good-quality reports are not the rule. They actually represent less than a half of the reports in this category, and of the remaining 29 reports, more than 85 % belong to the *Ho* group.

In relation to the use of Member States' experience, and taking into account that the policy instrument at stake relates to the amendment of an existing instrument—for example due to deficient application or lack of uniformity— it sounds logical to look at what has been done in the Member States, both to identify the application problems, and to learn how—if it is the case— in some Member States the existing instrument is being applied more effectively than in others. If there is one 'model' Member State, it seems coherent to make an effort to align the other Member States in the same direction. Why then try to come up with a new model when a possible first-best could be already in application? In my opinion, this appears to be contrary to the principle of proportionate analysis professed by the 2005 Guidelines. Examples of this can be found in the three reports of DG ENTR related to the regulation of medical products,[51] and to the amendment of the regulation on timber and timber products.[52]

The second problem is related to the design of policy options. Taking into account that this category contains the IA reports related to amendments in legislative binding instruments, one of the fundamental issues of the reports should be the analysis of the most adequate policy instrument, especially in the cases in which the problems involve lack of application of the existing instrument by Member States, or when the application is not uniform. In these cases, even if the technical aspects and objectives are addressed and the Member States' experience is considered, it is crucial to have an assessment of the desired type of instrument to achieve the proposed objectives. Illustrative examples of this problem can be found in the IA report on the proposal for a regulation on the marketing of

[49] Ibid., 32.

[50] See, for instance, Table 2 on Section 5.3.2, p. 33.

[51] DG ENTR—SEC(2008)2667; SEC(2008)2670; and SEC(2008)2674 of December 10 2008.

[52] DG ENV—SEC(2008)2615 of October 17 2008.

construction products,[53] and in the report for the amendment of the regulation on eco-management and audit scheme.[54]

If both elements are deficient or lacking in the IA reports, meaning that there is no inclusion of factual data of the Member States and no deep analysis of the policy options, a question arises in relation to the whole point of the IA. If the content of the report is going to be exclusively based on the analysis of an external report or on the technical findings of the DG, then the objectives of the IAs set in the 2005 Guidelines are not being fulfilled and the administrative burden of the IA process would be disproportionate.

An exception to this last statement appears in the last group—*N/A*—comprised four cases. They do not contain an extensive analysis of policy instruments or a policy option based on the experience of Member States, but they do not require them either. All these cases are related to amendments of instruments for reasons differing from an inadequate application of the instrument or undesired effects of its application. The amendments are proposed on the basis of changes of general economic and social conditions,[55] the change in the scope of the eco-design in energy related products,[56] and the repealing of some directives that are now in disuse.[57] In opposition to the first two groups, in this case the fact that these IA reports do not contain any of those elements can be seen as a correct application of the principle of proportionate analysis given that the depth and scope of the IA is adequate to the needs.

In conclusion, for the first category of IA reports, it is clear that there is lack of uniformity on the required parameters of analysis, and that in the majority of cases, a deep and detailed analysis of the policy instruments and its desirable content are important elements of the IA reports. The existence of several reports containing a complete analysis both in legal and in quantitative terms is a sign of the unexploited potential of IAs, and constitutes a challenge for the IAB reviewing procedure, in terms of the alignment of the quality of this type of reports.

12.4.3.2 New Legally Binding Instruments

This category comprises 15 IA reports elaborated by eight DGs.[58] It includes IAs both on topics that have already been subject to Community regulation, and those which have been already brought in a Community contents (by means of i.e. action plans, Green Papers, White Papers) but not yet concretely regulated. Given that the IAs included in this category are related to the introduction of a new instrument,

[53] DG ENTR—SEC(2008)1900 of May 23 2008.

[54] DG ENV—SEC(2008)2121 of July 16 2008.

[55] DG EMPL—SEC(2008)2166 of July 2 2008 and SEC(3066) of December 16 2008.

[56] DG ENTRE—SEC(2008)2115 of July 16 2008.

[57] DG ENTR—SEC(2008)2910 of December 3 2008.

[58] DGs EMPL, ENV, INFSO, JLS, MARE, MARKT, SANCO and RTD.

the analysis of the adequacy of the selected binding instrument is crucial and it is closely related to the Treaty principles of proportionality and subsidiarity.[59]

The distribution of the cases among the three groups—*Ho, Ha and N/A*—is similar to the previous category. Most of the cases are equally divided between the two first groups, and few cases belong to the third group.

A remarkable example of a very complete IA report is the proposal for a directive on the standards of quality and safety of human organs intended for transplantation.[60] It is based on external studies and data from the Member States to determine both the problems and the potential solutions that may be adopted by means of the directive. In the delineation of policy options, it takes into account the current transplantation practices in the Member States, and chooses the best one—the Spanish case—as the optimal point at which the new instruments should try to reach.

It is a very good example of the way in which the introduction of a new instrument can be optimised by the experience of a Member State instead of creating a new model which has not been previously applied and which could possibly have some implementation difficulties that could be reduced with the adoption of an existing standardisation practice. In addition, this IA report presents an analysis of the policy options and their implications, although not as detailed and deep as in the case of the amendment of the Financial Collateral directive presented in the previous section.

In relation to the second group of IA reports with deficiencies in the analysis of policy options or inclusion of the Member States' experience, the seven reports make use of the data from the Member States as a support for the problem definition, and almost all of them use it in the design of the policy options. Hence, the major problem in this category is related to the poor definition of the policy options in legal terms.

For example, the IA on the package of implementation of measures for the EU's objectives in climate change[61] takes into account the experience from the Member States to both define the problems and propose policy solutions; and in addition, gives a general explanation of the implications of the policy options. However, everything is presented in a very technical way that impedes the comprehension of the report, to the point that it is difficult even to differentiate among the different steps of the report in terms of its contents. The proposal for a directive on geological storage of carbon dioxide[62] also includes relevant data from the Member States but has a poor legal analysis of the policy options. These examples give the impression that in some cases the focus of the IA report is on the demonstration of the existence of robust and reliable data but not on the fundamental issues as the proper design of the policy options taking into account the advantages and limitations of the available instruments.

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[59] See Commission 2005 Guidelines, Section 5, p. 8.

[60] DG SANCO—SEC(2008)2956 of December 8 2008.

[61] DG ENV/TREN—SEC(2008)85/3 of January 23 2008.

[62] DG ENV—SEC(2008)54 of January 23 2008.

Finally, as regards the two reports belonging to the third group, it is clear that no Member States' experience is required in the proposal for a decision in relation to a Convention on choice-of-Court agreements.[63] This is a decision concerning an issue that will be regulated in the long run and which will have a large-scale impact. The proposal for a regulation on European Research Infrastructure is also a general issue which analysis is supported in equally general EU data given that no particular Member State experience is required. These two IAs, despite being general, comply with the principle of proportionate analysis given that they limit the scope and length of the report in accordance with the need of detailed analysis and prediction of impacts.

In sum, the second category of reports is also problematic in terms of consistency of the accomplishment of the objectives set in the 2005 Guidelines. The general impression in relation to the reports of this category is that too much attention is paid to the technical support of the analysis, leaving behind one of the principal objectives of the IA reports which is to be an aid for the further political decision-making process.

12.4.3.3 Non-Binding Acts on Regulated Issues

This category includes 28 reports elaborated by six DGs.[64] The situation in this category is different with respect to the two previously analysed categories. As the policy instruments included in this category are non-binding acts, the studied issues tend to be more general and this facilitates the task of defining the objectives of the policies, which will also need to be delineated in more general terms. Given the nature of the non-binding instruments, the parameters to choose one or other instrument are more flexible than in the previous categories, where the application of the different policy instruments by the Member States has considerable differences.

In this category, eight IAs are considered not to require detailed data from Member States' experience or a rigorous analysis of the policy options. For instance, the proposal for a communication on a future development of an agency for the management of the external borders of the EU[65] deals with a subject that is aimed to be launched in the long run and in relation to which no immediate action will be taken; hence, in terms of the principle of proportionate analysis it is sufficient to have general EU data to contextualise the regulatory aim to the current Community scenario. All the IAs included in this group are related to issues that are of the interest of the EU and do not necessarily require particular action from the Member States. That is the case, for example, of the proposal for a

[63] DG RTD—SEC(2008)2278 of July 15 2008.

[64] DGs EAC, EMPL, ENTR, ENV, JLS and SANCO.

[65] DG JLS—SEC(2008)148 of February 3 2008. See also DG JLS SEC(2008)151 and SEC(2008)153 of February 3 2008.

recommendation of mobility of young volunteers across Europe,[66] where the problems identified are not related to a lack of action of the Member States, but are related to the insufficient cohesion of the policies in the EU context, in which case is the EU and not the Member States who has to take some coordination actions.

However, other proposed instruments are aimed to have a more immediate application and certain—voluntary—actions of the Member States. As they are intended to deal with topics that have already been regulated in some way by the Commission, for this type of measures, if it is the case, it is then important to take into consideration the way in which the Member States have adopted actions towards the accomplishment of the existing instruments, and how such implementation—or lack of it—affects the analysed situation. An example of this situation can be illustrated with the proposal for a recommendation and a communication on the European action in the field of rare diseases.[67] In this case, there is no mention to the Member States situation or experience, and there is also no legal analysis of the policy options and the justification to select some instruments over others.

Nonetheless, in this category almost half of the reports (12) include a reasonable level of analysis of the selection of policy instruments and a mention of what has been done in the Member States with respect to a determined issue. In the majority of these cases, the analysis of impacts is done in a qualitative way, which is adjusted to the principle of proportionate analysis as long as it complies with the aims of the 2005 Guidelines.

12.4.3.4 Non-Binding Acts on Non-Regulated Issues

Five IA reports are included in this category, elaborated by four DGs. It involves reports on issues that have been left to the Member States, such as the policies for ship dismantling,[68] which is aimed to be regulated in the midterm by an international Convention.

None of the cases were classified as to be deficient in legal analysis or inclusion of the Member States' experience, so they follow into the two remaining groups. In some of these cases it seems reasonable to find some mention to the Member States' experience in dealing with the issue at stake, and that is the case of the ship dismantling, in which the report uses some data to illustrate the percentage of European ships and the Member States' current policies of dismantling. However, in other cases in this category where there is no mention to the Member States' experience, the reports also appear to be complete because they are dealing with general policies of wide-range impact in the long run.

Therefore, it can be concluded that the use of the Member States' experience—at least in this type of IA reports—should not have an axiomatic application, but

[66] DG EAC—SEC(2008)2174 of July 3 2008.

[67] DG SANCO—SEC(2008)2712 of November 11 2008.

[68] DG ENV—SEC(2008)2846 of November 19 2008.

should be considered in a case-by-case situation and in light of the principle of proportionate analysis. This, however, does not imply that the aim of having a well-supported report with analysis of impacts based on reliable data should be discarded. On the contrary, it means that for such objectives to be accomplished there is not only one way, and that it depends on the type of policy proposal under study.

12.4.3.5 White Paper

The IA report for the White Paper on damages actions for breach of the EU competition rules[69] reflects an example of an action instrument intended to correct a problem that has been detected in the Member States practice. In this case, the report is strongly based on an external study undertaken under the preliminary phase of the IA. The study includes a detailed description of the application of actions for damages in the Member States and identifies problems related to the underdevelopment of these actions and the diverse application in the Member States. In line with this reasoning, the report identifies the policy objectives and delineates the policy options.

However, in the latter step of describing and comparing the different policy options, it does not make any additional reference to the Member States (lack of) development of the action, but just analyses the possibilities that were set in the external study without adding any legal analysis of the implication of introducing one or other policy instrument. Besides the particularities of the case, it would have been useful to take into account the experience from the Member States at least to identify what should not be done, or in case of having an example of good practices of one of the Member States, maybe the policy instrument could have been designed in relation to that practice.

It seems then that the IA report is just a transcription of the external study, which raises concerns with respect to the validity of this kind of reports and of the way in which they seem to be elaborated only in order to comply with the Commission Guidelines but without adding much value and being a useful aid for the further political decision-making process. Nevertheless, this is only one example of this type of instrument and therefore the observations raised here should not be taken as conclusive or general.

12.4.4 Results

As it has been explained, the analysed 2008 IA reports were divided into five categories and were classified in three different groups according to their usefulness to support or reject the research hypothesis—*Ho, Ha* and *N/A*. As it is shown

[69] EC COMP—SEC(2008)405 of April 2 2008.

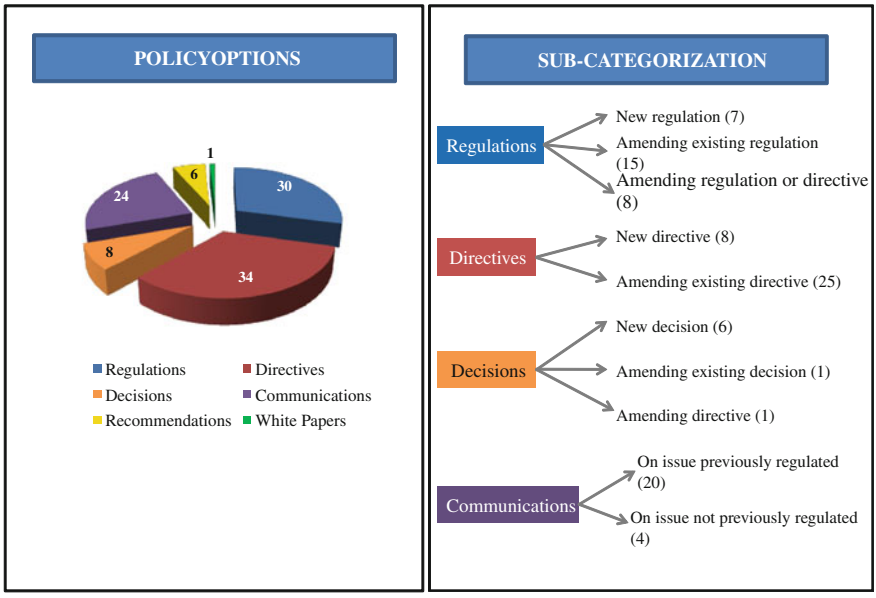
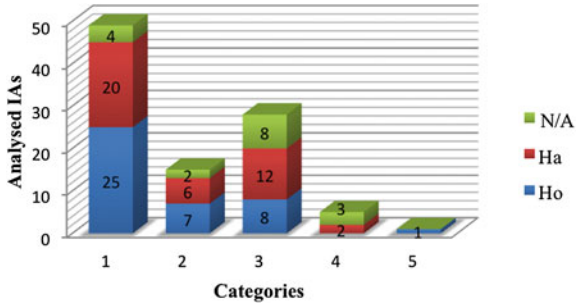


Fig. 12.5 IA reports 2008—Composition of policy options

Fig. 12.6 Classification of IA reports by category



in Fig. 12.5, the composition of the groups varies in each category. In relation to the cases that fit the proposed hypothesis, these are more numerous in the two first categories related to legally binding instruments.

This may be due to two main factors. First, it may indicate that in the future much more attention needs to be paid to the IA reports associated to legally binding instruments, both when they are related to amendments of existing legislation and when they deal with the issuance of a new instrument. As it has been analysed, these are the most problematic categories in which most of the *Ho* cases are concentrated and therefore shows the highest degree of inconsistency in the IA reports (Fig. 12.6).

In my opinion, the IAs related to the introduction or amendment of legally binding instruments require a detailed legal analysis and justification of the policy instrument that is chosen as the preferred to tackle the identified problems, given that the policy options (regulations, directives, decisions) differ in scope and way of application in the Member States. Thus, the selected instrument has to serve as the best option to address a problem and issues like the lack of uniformity in the application or the transposition period in the case of directives have to be balanced with the direct an immediate intervention by a regulation.

In addition, the analysis of the Member States' experience is crucial both to define the problems and to determinate the policy options. The reports should analyse the current practices in the Member States to see if the optimal option can be taken from the current practice of a Member State, avoiding thus the uncertainty of creating a theoretical and technical-based policy model which may or may not work. If there is a practice of a Member State that can be considered as optimal and replicable in the rest of Member States, it is ideal to incorporate it into the policy options. This practice is aligned with the principle of proportionate analysis and, if followed, would incentivise the Member States to adopt good policy practices and would save future administrative burdens both for the Commission and for the Member States.

Second, the results of the analysis may be a signal towards the fact that the model of IA described in the 2005 Guidelines cannot be considered as a one-size-fits-all instrument and that it may not be totally appropriate to elaborate IA reports in all the categories. The reports on the proposal of non-binding instruments seem to adjust to the IA model in a much better way. However, from the analysis of the reports it is not clear why. Perhaps, the reports related to legally binding instruments are much more complex and require a better trained staff and more detailed guidelines, as well as a more detailed revision by the IAB.

In relation to the IAB, a general remark must be made in relation to the role it plays in the quality of the IA reports. As it has been previously stated, the principal task of the IAB is to provide independent quality support and control for the impact assessments which are prepared by Commission services.[70] However, despite the fact that all the analysed IA reports were previously revised by the IAB, it is concerning to see that uniformity has not been achieved among the quality of the reports. As it was illustrated in the previous section, although most of the reports follow the analytical steps suggested in the Guidelines, there are IA reports that deal with proposals of the same type of instruments but which have very dissimilar quality.

This raises questions on the parameters that are currently being used by the IAB to assess the good or bad quality of an IA report. The results of the present analysis tend to show that the legal design of policy options has not been used as parameter of quality evaluation by the IAB. In addition, it seems that the specific criteria of the application of Member States' experience to the analysis are not taken into

[70] Commission, Impact Assessment Report 2008, p. 2.

consideration either. It may be that the quality level is evaluated in relation to the data support of the reports, the utilisation of economic methods of evaluation, quantification and monetisation of impacts, as it seem to be the emphasis given by the Commission in the 2005 Guidelines.

Furthermore, after having analysed the 2008 reports, there are no conclusive facts on the possible causes of the disparity in quality. One possibility could be that some DGs have staff that is better trained in the mechanics of the IA reports than others, causing differences in the quality of the IA reports. However, reality shows different. The only case in which all the IA reports from a DG were classified as to reject the research hypothesis is the case of the reports prepared by DG AGRI. The three of them concerned amendments of legislative binding instruments, and all took into account the Member States' experience to suggest political options in a simple way, taking into account projections of costs and impacts, and also including legal analysis of the options.

Several of the remaining DGs have reports that fall under more than one of the groups. An illustrative example can be seen in the reports prepared by DG MARKT. As it has been pointed out above, the IA for the proposal of the amendment of the financial collateral directive is possibly the best model of what should be done in an IA in terms of legal analysis of the policy options considered. It would be logical—and desirable—that all the reports prepared by DG MARKT followed the same methodology. However, at least four of their reports have clear deficiencies in the analysis of the policy options,[71] thus falling into the *Ho* group. This shows that there are quality inconsistencies even at the interior of the Commission's DGs, which is alarming and seems to have no obvious explanation.

Despite the mentioned deficiencies in the uniformity and quality of the IA reports, the analysis also shows that a considerable number of reports actually achieve the objectives of the Commission as they follow the procedure set in the 2005 Guidelines and combine the legal and technical analysis to propose instrument for the introduction or amendment of policy instruments. This is a positive sign of the potential of this tool as an aid for the political decision-making process and for the accomplishment of the Better Regulation objectives.

12.5 Conclusions

The present research has illustrated the importance of IA in the European context for the past two decades, and how it has become a crucial element since the beginning of the twenty-first century when the Better Regulation strategy was launched.

The Guidelines issued by the Commission in 2005 introduced a more structured methodology for the preparation of IA reports, which led to establish the

[71] See DG MARKT, SEC(2008)2263 and SEC(2008)2287 of June 25 2008; SEC(2008)2573 of October 9 2008 and SEC(2008)2745 of November 12 2008.

elaboration of IAs as a common and desired practice for a large number of public policy initiatives. Moreover, an independent body—the IAB—was created in 2006, with the task of controlling the quality of the IA reports prepared by the Commission's Directorates-General, thus conforming a complete and complex system towards the IA procedure.

This has resulted in an increasing number of IA reports elaborated every year, an improvement in the application of the methodology proposed in the Commission Guidelines and a consequent improvement in the quality of many reports. Nevertheless, despite the efforts made by the Commission, the institutional framework seems to be still insufficient to fully accomplish the objectives of good quality and well-supported reports.

The analysis of the 2008 IA reports shows that despite the fact that all the IAs were previously revised by the IAB, the quality of the reports is still disparate. Many of them comply with the methodology and objectives proposed by the Commission, but many others—especially the ones related to the initiatives of legally binding instruments—make a superficial legal analysis of the different policy options both in terms of the type of instrument and the desired content; in addition, several reports do not make an efficient use of the Member States' experience to delineate policy options, but instead continue to design the contents of policy options on the sole basis of theoretical options and general data.

The Commission, conscious of the importance of consolidating the IA methodology, and in view of the existing difficulties in the achievement uniformity in the IA reports, issued new IA Guidelines in January 2009. The question that arises is whether this new Guidelines will contribute in correcting the deficiencies that have been found in the present research.

Given the short period of application of the Guidelines, it is too soon to try to evaluate the effectiveness of the reforms, but nonetheless something can be said about the reform itself. In general terms, the Guidelines reflect an effort of the Commission to make of the IA process a better aid for the further political decision-making process.

First, in terms of the principle of proportionate analysis underlying the whole IA process, the Guidelines make now a more specialised differentiation of the types of policy initiatives and categorise them in five types: non-legislative initiatives (communications, recommendations and white papers); "cross-cutting" legislative action (regulations and directives addressing broad issues); "narrow" legislative action (such as decisions addressed to a specific field or sector); expenditure programmes and comitology decisions. For each of the categories, the Guidelines that each type of IA needs to focus on different steps of the analysis. For instance, for the "cross-cutting" legislative action, the Commission assesses that the analysis should be focused to the detailed description of problems and challenges that necessitate EU legislation, and how they are likely to evolve.[72]

[72] See Section 3.3, pp. 14–16.

With respect to the findings of the analysis, this more detailed division of initiatives by categories and the differences on the way the reports should be conducted seem to be a positive evolution of the methodology, and could lead to a higher level of accomplishment of the IA procedure by the DGs, given that the scope and depth of the analysis seems to be more clear for the different types of initiatives.

Second, with respect to the policy objectives, the Guidelines also complement what they have stated in the 2005 Guidelines, and emphasise in the importance of linking the policy objectives with the other parts of the analysis such as the problem analysis and the identification of the policy options. If this is taken into account in the forthcoming IAs, the reports would be internally more consistent.

Third, in relation to the delineation of policy options, the new Guidelines assess that, where applicable, the policy options should be divided into two levels: one regarding to the contents of the intervention, and the other related to the type of intervention. They also make explicit the need to analyse the policy options in accordance to the principle of proportionate analysis both in relation to the scope and to the nature of the instrument.[73] This change, again, seems to be adequate to achieve better results in the depth of the IA. In addition, it reflects that more emphasis is intended towards the legal analysis of the options, which is also very positive in terms of the findings of the present research.

Finally, the 2009 Guidelines give some discretion to the IAB in relation to the initiatives that need to be accompanied by an IA report. Contrary to what is established in the 2005 Guidelines, the new Guidelines state that: "These guidelines do not define which Commission initiatives need to be accompanied by an IA. This is decided each year by the Secretariat General/Impact Assessment Board and the departments concerned".[74] However, it maintains the same criteria of considering as necessary for IA the proposals contained in the CLWP and the non-legislative proposals with important economic, social or environmental impacts. This change could be an effective measure to avoid the exponential growth of initiatives with requirement of an IA, and could contribute to the overall achievement the proportionality of the IA process.

In consequence, it seems that the new Impact Assessment Guidelines may be a correct instrument in the Commission's aim to improve the quality of the IA reports and the achievement of the Better Regulation objectives. Time will tell if these changes contribute to the amendments of the current deficiencies in the IA process; but for sure they will not be the last step in the way for the improvement of the system, given that the coordination between the political decision-making process and the technical assessment behind it is a very challenging task that may take a long time to be achieved.

"The development of the European Commission's impact assessment procedure is characterized by the attempt to find a balance between retaining political

[73] See Section 7, pp. 28–30.

[74] Section 1.4, p. 6.

discretion and enhancing objectivity in policy-making. Below the surface of the multiple objective the Commission attributes to IA, there seems to be an understandable preference for 'highlighting trade-offs' as the core of the IA regime. However, implementation of this model will not make the tensions inherent in policy-making disappear. IA is an iterative process, but it has got to stop somewhere. IA should genuinely explore various policy options including no action, but at the same time it is there to serve concrete policy-making."[75]

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[75] Meuwese 2008, 91.

Chapter 13
Judicial Networks

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Contents

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_13,

13.1 Introduction

Courts are increasingly pursuing partnerships with foreign counterparts by organising themselves in networks—at their own initiative or at the instigation of the European legislature. This chapter adopts a critical approach to this phenomenon to highlight its advantages and drawbacks. Section 13.2 explores the wide variety of judicial networks currently in existence, with specific attention to the composition and the mandate of these networks. In Sect. 13.3, we survey traditional patterns of dialogue between national courts and the Court of Justice of the European Union, in particular the preliminary reference procedure. Finally, Sect. 13.4 addresses the ways in which judicial networks can—and do—affect the traditional relationships between the European courts and national judges.

13.2 Surveying the Landscape

It is axiomatic that judges in different jurisdictions 'look different and behave differently'[1]: training, staffing, jurisdiction, powers, impact and stature differ a great deal. Nevertheless, judges relate better or more naturally to their brethren in other countries than to other domestic bodies and institutions which they do not want to intrude in judicial business.[2] This is especially so for those judges sharing a common position or role in their legal system. This is captured by the idea of transnational judicial communities: judges share common beliefs, values and a self-perception and understanding of their role in the legal system and in society.[3] Judges may share a common interest in the intrinsic value of legal concepts, in the quality of the legal argument, and hence, also trans-national dialogues may flow naturally.[4] As will be explained further below, we will focus the discussion on more or less *institutionalised* networks, and not on the 'judicial communities' or 'epistemic communities' underlying them, or on informal and occasional contacts between judiciaries and their members. It should be pointed out, however, that the formal networks, especially those set up by the judiciaries themselves, build on pre-existing judicial communities, while the latter are reinforced by the well-functioning of these networks.

In the remainder of this chapter, we will focus on 'horizontal' networks, i.e. networks which bring together judges which are more or less at the same level and have similar functions in different legal systems or different regimes.[5] In addition,

[1] Bell 2006, 1.

[2] Rosas 2008, 187.

[3] To be clear, we are talking here about judicial communities across legal systems, while not denying that judicial communities also exist within legal systems and even within a single court.

[4] Timmermans 2004, 399.

[5] Other types of more or less formal networks and relations exist between international courts among themselves and between courts belonging to the same (national) legal order.

we will limit the discussion to European networks. One reason for this is that membership of the European Union and the development of a European mandate for national courts in EU Member States increases the similarities in functions, and the need for cooperation and even the further promotion of mutual trust.

Europe is home to an ever-increasing number of judicial networks and this section aims to bring some order to the chaos by introducing the reader to the most important of these creatures. We will organise our discussion by maintaining a broad distinction between networks created by the European legislature and those that have been set up at the initiative of its component members.[6] Typically, the networks set up by the European legislature aim to improve the functioning of the European judicial system, and to increase mutual trust, which is necessary for systems of mutual recognition to work. Networks which are created by the judiciaries themselves, start from pre-existing mutual trust and mutual (self-) perceptions as belonging to the same trans-national judicial community. These networks generally aim to share and discuss common problems, to learn from foreign experiences and to tackle common challenges.

13.2.1 Networks Created by the European Legislature

The European Judicial Network (EJN)[7]

The European Judicial Network has its origins in Joint Action 98/428/JHA.[8] Its aim is to facilitate judicial cooperation in the fight against serious crimes such as corruption, drug-trafficking or terrorism. To that effect, Member States are called upon to appoint contact points to the EJN from among the central authorities responsible for international cooperation as well as the judicial and prosecuting authorities active in this field.[9] These contact points act as intermediaries between the competent local authorities by enabling direct trans-national contacts where appropriate; providing information concerning the judicial and procedural system of other Member States; and offering practical assistance in preparing and implementing requests for cross-border judicial assistance (such as the execution of a European Arrest Warrant).[10] In addition, there are periodic meetings between the contact points during which they are further acquainted with the particularities of each contact point's legal system and debate how to overcome remaining obstacles to judicial cooperation.[11]

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[6] Networks created under the aegis of the Council of Europe, such as the Consultative Council of European Judges, will not be considered in this chapter. See generally Potocki 2007, 141.

[7] http://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx. Accessed 14 May 2012.

[8] Joint Action of 29 June 1008 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network [1998] OJ L19/14.

[9] Article 1.

[10] Article 4.

[11] Article 5.

Eurojust[12]

Established in 2002, the mandate of Eurojust is to enhance cooperation between the competent authorities responsible for investigation and prosecution of cross-border and organised crime.[13] It comprises one national member per State which may be, but need not, a judge: a Member State can also send a prosecutor or a policy officer as its representative.[14] More precisely, Eurojust's objectives are to stimulate and improve the coordination between the competent authorities of the Member States; to improve cooperation between these authorities by facilitating the execution of international mutual legal assistance and the implementation of extradition requests; and to offer other support that will render the investigations and prosecutions by the competent authorities more effective.[15] The most important tools of which Eurojust can avail itself in implementing these objectives are the provision of information (related to individual cases as well of a more general nature) and practical assistance to ensure the best possible coordination between competent authorities (for instance by offering logistic support or by setting up joint investigation teams[16]).[17] Finally, Eurojust is enjoined to maintain privileged relations with the European Judicial Network.[18]

European Judicial Network in Civil and Commercial Matters (EJNCCM)[19]

As can be inferred from its nomenclature, this network is charged to facilitate judicial cooperation between the Member States in civil and commercial matters.[20] It must do so, in particular, through the development of two elaborate information systems: one intended for internal use by its members and the other available to the public at large as a useful point of reference when individuals become embroiled in litigation with a cross-border impact.[21] The EJNCCM's members fall into four categories: contact points designated by the Member States; central bodies active

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[12] <http://eurojust.europa.eu/index.htm>.

[13] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L63/1. Article 4 specifies that Eurojust has competence in respect of all types of crimes that fall within Europol's remit of jurisdiction and in relation to computer crimes, fraud and corruption, money laundering, environmental crimes and participation in a criminal organisation.

[14] Article 2.

[15] Article 3.

[16] Further: Council Document 11037/05 of 8 July 2005, available at http://register.consilium.europa.eu/pdf/en/05/st11/st11037.en05.pdf. Accessed 14 May 2012.

[17] Articles 6 and 7.

[18] Article 26(2).

[19] http://ec.europa.eu/civiljustice/index_en.htm. Accessed 14 May 2012.

[20] Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters [2001] OJ L174/35. See also Proposal for a decision of the European Parliament and of the Council amending Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters COM(2008) 380 final.

[21] Articles 3, 14 and 15. The public website offers information on the state of the law in the Member States and at Community level in relation to inter alia legal aid, access to the courts,

in this field pursuant to European or international legal instruments; liaison magistrates and other judicial authorities involved in transnational cooperation in civil and commercial matters.[22] The contact points will assist the other members in ensuring sound cross-border cooperation inter alia by supplying them with the information needed to prepare operable requests for cooperation; seeking solutions to difficulties arising on the occasion of a request for judicial cooperation; and facilitating coordination of the processing of such requests.[23] Provision is further made for periodic meetings of the contact points where they can exchange experiences; discuss practical and legal problems and identify best practices.[24]

13.2.2 Networks Created by the Judiciary Itself

This section introduces, in chronological order, the most important networks set up by the judiciaries themselves.

The Conference of European Constitutional Courts (CECC)[25]

The CECC brings together judicial bodies that exercise constitutional jurisdiction,[26] in particular reviewing the conformity of legislation.[27] Its principal task is the organisation of a triennial congress, where members share experiences as regards constitutional practice and case law in relation to a selected theme.[28] The ECJ typically attends these congresses as an observer and also presents a report on

(Footnote 21 continued)
procedural time limits, interim measures, simplified and accelerated procedures and compensation to crime victims.

[22] Article 2.

[23] Article 5.

[24] Article 10.

[25] http://www.confcoconsteu.org/. Accessed 14 May 2012. See also http://www.lrkt.lt/conference.html. Accessed 14 May 2012. Note the name 'conference' instead of 'association' or 'network' commonly used by other networks. This is probably due to the specific role of these courts, and aims to stress their continuing independence and neutrality.

[26] The French Conseil constitutionnel, the Belgian Cour constitutionnelle as well as the Bulgarian and Czech constitutional courts are also members of the Association des Cours Constitutionnelles ayant en Partage l'Usage du Français, see http://www.accpuf.org/. Accessed 14 May 2012.

[27] Article 6 Statute of the Conference of European Constitutional Courts. Membership is not limited to courts of the EU Member States. The same article also stipulates the various documents that must accompany an application for membership. Required are the legal instruments governing the establishment and composition of the applicant institution as well as the appointment and status of its judges; texts stating the nature and scope of the jurisdiction as well as documents that demonstrate jurisdiction actually exercised.

[28] Article 3 Statute of the Conference of European Constitutional Courts. For instance, the 2002 congress considered 'the relations between the constitutional courts and other national courts, including the interference in this area of the action of the European courts', while the 2008 conference focused on Constitutional Problems of Legislative Omission in Constitutional Jurisprudence. Interestingly, the four official languages for debate during the congress are French, English, German

the specific theme of the congress.[29] In addition, the CECC will take steps to promote the independence of constitutional courts, as an essential element in securing observance of the Rule of Law. Further, constitutional courts have also gathered at the invitation of one constitutional court, outside the framework of the triennial congresses. By way of example, the president of the Italian Corte costituzionale invited the presidents in Rome to discuss the relationship between European and national law.[30] In 1997, the French Conseil constitutionnel hosted a meeting on the issue of the constitutionality of secondary EU law.[31]

Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union[32]

Formally established in 1998,[33] the purpose of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union is to promote the exchange of ideas and practical experience in relation to how its members exercise their national mandate, with special attention for matters concerning EU law.[34] To this end, the Association may commission studies; foster interpersonal relations between the various Councils of State and other supreme administrative jurisdictions; organise biannual colloquia and encourage the sharing of information. In order to attain this last goal, the Association's website hosts two databases: Dec.Nat, which comprises national case law, annotations and comments regarding EU law from 1959 to the present day and JuriFast, which contains preliminary references, the ECJ's reply and the final decision by the national court.[35] Interestingly, the Association in early 2005 set up an intranet, which allows members—both judges and staff—to enter in direct contact and ask concrete questions.[36]

(Footnote 28 continued)
and Russian, Article 12(1) Conference Regulations of the Conference of European Constitutional Courts and Article 9(2) Statute of the Conference of European Constitutional Courts.

[29] Article 5 Conference Regulations of the Conference of European Constitutional Courts and Articles 5 and 9(2) Statute of the Conference of European Constitutional Courts.

[30] Corte Costituzionale, *Diritto Comunitario Europeo e Diritto Nazionale: Atti del seminario internazionale, Roma 14-15 luglio 1995* (Dott. A Giuffrè Editore, Milan 1997).

[31] The meeting is well documented in the cahiers of the Conseil constitutionnel, no 4, see www.conseil-constitutionnel.fr. Accessed 14 May 2012.

[32] http://www.juradmin.eu/en/home_en.html. Accessed 14 May 2012.

[33] It should be noted, however, that there has been a much longer tradition of regular meetings. The first meeting, between the Belgian and the Italian Councils of State, was held in 1964, and the first colloquium involving the then six members of the EC, took place in 1968. Since then, colloquiums were held bi-annually, on various themes of common interest, sometimes, but not always, relating to European issues. The ECJ joined in later.

[34] Article 3 Statutes of the Association.

[35] The information contained in this database is entered into it directly by the Association's members. The Association then coordinates this input and offers translations of descriptions and summaries.

[36] This forum enjoys considerable popularity. According to the Association's website, at 15 October 2009, 230 members had registered and had posted 406 messages on 141 topics.

European Judicial Training Network (EJTN)[37]

Created as a non-profit organisation under Belgian law, the European Judicial Training Network promotes training programmes for members of the European judiciary and comprises national bodies with responsibility in this field.[38] Thus, it compiles an annual catalogue listing available training opportunities open to all judges in the EU, which is accessible through its website.[39] The EJTN itself is also actively involved in designing a variety of programmes and methods for judicial training that foster cross-border cooperation and mutual learning.[40] The European institutions fully endorse the work of the EJTN and have given it exclusive responsibility to implement the Exchange Programme for judicial authorities, which aims to breed understanding of the legal systems of other Member States.

The Association of European Administrative Judges (AEAJ)[41]

The AEAJ is a European apex organisation, grouping national associations of administrative courts.[42] It seeks to encourage improvements in the availability of legal redress for individuals vis-à-vis public authorities and promote the legality of administrative acts, while respecting the legal cultures in the various national legal systems. As such, the AEAJ contributes to the dissemination of knowledge on legal redress in administrative matters by means of an intensive exchange of information regarding pertinent case law and legislation. Other objectives of the AEAJ are to strengthen the position of administrative judges in Europe and to advance their interests at the national and European level. To achieve its various objectives, the Association will defend the interests of European administrative judges vis-à-vis the institutions of the European Union and the Council of Europe; organise meetings and publish a regular newsletter.

The Association of European Competition Law Judges (*AECLJ*)

Established in 2001, the AECLJ groups national judges working in the area of European competition law.[43] It provides them with a vehicle to exchange views and experiences, to ultimately establish 'best practices' for the swift and correct application of the European competition rules. The AECLJ pursues these goals through

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[37] http://www.ejtn.net. Accessed on 14 May 2012.

[38] Articles 6 and 7 Consolidated Articles of Association.

[39] Article 4 Consolidated Articles of Association.

[40] See eg EJTN Strategic Plan 2007–2013 available at the network's website. Mention should in particular be made here of e-learning tools, the drawing up of judicial training curriculum guidelines and a focus on improving language skills to ensure meaningful cross-border participation in judicial training programmes.

[41] http://www.aeaj.org/. Accessed 14 May 2012.

[42] Statutes of the association of European administrative judges from 24th of March 2000 in the version from 19th May 2006 and 23rd May 2008, Article 2.

[43] The English Competition Appeal Tribunal (CAT) played a leading role in establishing the AECLJ (and has also provided its secretariat) and it is thus no surprise that the president of the CAT, Sir Christopher Bellamy, was elected as the Association's first president. He was succeeded by Joachim Bornkamm of the German Bundesgerichtshof in 2005.

annual conferences, regular seminars and training projects.[44] It is interesting to note that the Association actively participates in public consultations organised by the European Commission in the field of European competition law.[45]

Other specialist networks, with a focus on a particular area of national and/or European law include the EU Forum of Judges for the Environment,[46] the European Association of Labour Court Judges,[47] the European Association of Judges, Magistrats européens pour la Démocratie et les Libertés (MEDEL),[48] the Forum des juges commerciaux européens and the Groupement Européen des Magistrats pour la Médiation (GEMME).[49]

Network of the Presidents of the Supreme Judicial Courts of the EU (NPSJC)[50]

The presidents of the supreme judicial courts of the European Member States make up this network, which aims to foster debate and promote knowledge of other legal systems amongst its members.[51] According to its website, 'The Network of the Presidents provides a forum through which European Institutions are given an opportunity to request the opinions of Supreme Courts and to bring them closer by encouraging discussion and the exchange of ideas. The members gather for colloquiums to discuss matters of common interest'. The Network's principal objective is to 'promote and develop a common legal culture'.[52] Regular conferences are organised and stages are foreseen—implemented under the auspices of the European Judicial Training Network. Perhaps most importantly from a perspective of knowledge dissemination and cross-fertilisation of ideas, the NPSJC has developed a common portal of case law that allows its members (including the European Commission and the ECJ) to search all the national case law databases. An online translation tool greatly enhances the usability of the portal. The general

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[44] Often co-financed by the European Commission, Report from the Commission to the European Parliament and the Council on the Final Evaluation of the Community's action programme to promote bodies active at European level and support specific activities in the field of Education and Training COM(2008) 337 final, 11.

[45] For instance, see its comments on Commission (EC) 'Damages actions for breach of the EC antitrust rules' (White Paper) COM(2008) 165 final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments/judges_en.pdf. Accessed 14 May 2012.

[46] http://www.eufje.org. Accessed 14 May 2012.

[47] http://www.ealcj.org/. Accessed 14 May 2012.

[48] www.medelnet.org. Accessed 14 May 2012.

[49] http://www.gemme.eu/. Accessed 14 May 2012.

[50] http://www.network-presidents.eu/. Accessed 14 May 2012. The inaugural conference was held on 10 March 2004 in Paris, at the Cour de cassation with the financial support of the European Commission (under the AGIS programme, which ran from 2003 until 2006 and sought to help police, the judiciary and professionals from the EU Member States and candidate countries cooperate in criminal matters and the fight against crime).

[51] The Presidents of the Community Courts and the European Court of Human Rights participate in the general assemblies and colloquiums organised by the network.

[52] See Newsletter No 6, July 2008, available at the Network's website.

public is able to access the free national case law databases, although the possibility of translations is not provided for.

European Judges and Prosecutors Association (EJPA)[53]

The European Judges and Prosecutors Association was established in March 2004 by trainee judges and prosecutors from the French National Judiciary School. Made up of magistrates, judges and prosecutors, the EJPA aims to improve the knowledge of its members of the legal systems of the Member States so as to enable meaningful legal cooperation on a daily basis.[54] In common with many of the networks discussed thus far, it organises symposia and conferences; exchanges and meetings between its members[55] and works as a partner with the European Judicial Training Network to arrange training courses with the European institutions. The EJPA currently has members from nine European States.[56]

European Network of Councils for the Judiciary (ENCJ)[57]

The ENCJ is not strictly speaking a judicial network, as it is not composed of judges, but of national institutions which are independent of the legislature and the executive and which must support the judiciary in the independent delivery of justice.[58] As not all EU Member States have these institutions, there are fewer ENCJ members than there are Member States. That said, for those countries that do not have a council for the judiciary, their Ministry of Justice may participate in the work of the ENCJ as observer.[59] The ENCJ has accorded itself the task of acting as a mediator between the European institutions and the national judiciaries to improve cooperation and mutual understanding. In addition, it fosters cooperation between its members on the organisation, jurisdiction, functioning and independence of the judiciary. More specifically, there are working groups on such issues as mutual confidence; liability of judges; e-justice; quality management; public confidence and criminal justice in the European Union.

It is clear, then, that courts and judges are literally talking to one another all over Europe,[60] and that it is fair to speak of a growing trend. It is equally clear, that the world of trans-national judicial networks is characterised by a high degree of fragmentation. By way of example, the Conference of European constitutional courts will only accept as members 'Constitutional Courts and similar European institutions which exercise constitutional jurisdiction, in particular reviewing the

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[53] http://www.amue-ejpa.org/index.php?lang=uk Accessed 14 May 2012.

[54] Articles 1 and 2.1 Statute.

[55] Of particular relevance in this respect are the Association's chatting list and judicial phone book.

[56] France, Spain, Italy, Portugal, Germany, the Netherlands, Czech Republic, Hungary and Romania.

[57] http://www.encj.eu. Accessed 14 May 2012.

[58] Article 6 Statutes of the international not-for-profit association European Network of Councils for the Judiciary.

[59] A similar status is granted to candidate states and to the European institutions.

[60] After Slaughter 2004.

conformity of legislation and which conduct their judicial activities in accordance with the principle of judicial independence, being bound by the fundamental principles of democracy and the rule of law and the duty to respect human rights',[61] thus excluding various supreme courts and highest administrative courts, which do not have jurisdiction to review primary legislation and are not perceived as having a similar 'stature'. They can, and do, in turn join other networks. The existence of a multitude of networks also demonstrates that 'the national courts' can hardly be considered one monolithic homogenous group, as is common in the discussion of the EU judicial architecture, made up of the European Courts in Luxembourg and 'the national courts' (*infra*).

13.3 Traditional Patterns of European 'Judicial Dialogues'[62]

It has become customary to speak of the relations between the ECJ and the national courts in terms of 'judicial dialogues'.[63] These dialogues (or multi-logues) are conducted in various ways. The *formal, direct* channel for dialogue in the European Union is the preliminary reference procedure. National courts feed in questions and issues which they encounter when acting as European courts,[64] and the ECJ answers, whereupon the national courts, on the basis of the judgement from Luxembourg, apply it to the facts of the case before them. Several points should be made in the context of this paper with respect to the preliminary reference procedure.[65]

First, it has been pointed out that the functioning of the procedure has transformed the relationship between the ECJ and the national courts from a *horizontal* and *bilateral*, to a *vertical* and *multilateral* relationship. Thus, the development of precedent, the *acte clair* doctrine, the ECJ's control over the cases it will hear, and the blurring of the line between interpretation and application, along with the principle of supremacy emphasise the evolution of a judicial hierarchy in which the ECJ sits at the apex, as the ultimate constitutional court for the EU, assisted by

[61] Article 6 (1) (a) of the Statute of the Conference of European Constitutional Courts.

[62] We will limit the discussion to European dialogues, focussing on the EU and leaving aside other forums of judicial dialogue, such as the dialogue between international courts among themselves, see e.g. Shany 2003; Baudenbacher and Busek 2008, or the dialogue between the ECJ and the ECtHR, see interestingly Scheeck 2007. We will also not address global judicial dialogues, and dialogues organised by academia, such as Kirby 2006 or the Global Constitutionalism Seminar (Yale Law School).

[63] For an illuminating discussion of two different conceptions of the term 'dialogue', consider Tremblay 2005, 630–633.

[64] These questions are often raised at the instigation of the parties and hence, the role of the bar in the judicial architecture should not be underestimated.

[65] Generally on the preliminary reference procedure: Craig and de Búrca 2008; Weatherill 2007.

national courts[66] Yet, while the relationship may have become 'multilateral' *in its effects*, in that the judgments of the ECJ on reference affect all courts in the Union, only the referring court 'converses' with the ECJ in any given case. The procedure is such that other courts do not participate in it, while only governments of other Member States may intervene in the case. As such, the procedure remains bilateral. Also, verticality is not complete, in the sense that the ECJ cannot annul or quash national law and remains dependent on the cooperation of the national courts to refer questions and pass the final judgments in accordance with the ECJ decision.

Second, not all courts participate in this direct dialogue. Most constitutional courts have never made a reference (while there have been cases where a reference would have been appropriate).[67] In fact, only the Austrian, Belgian, Lithuanian and most recently the Italian constitutional courts have sent questions to the Kirchberg. Also several of the (highest) courts are notorious for using the procedure only in exceptional cases,[68] by extensive use of the doctrine of *acte clair*, by ducking the European issues or deciding the case before them on other grounds.

Third, the preliminary reference is generally perceived as 'victim of its own success',[69] with the average time for answers to come back from Luxembourg remaining at just under two years (while the Due Report in 2000 targeted at 1 year). In addition, the ECJ's judgments on preliminary reference are not always helpful for national courts: some questions are rephrased to the point of sidestepping the issue, other questions are not answered or simply ignored. The element of delay which the sending of preliminary references entails, combined with the sometimes limited usefulness of the judgments of the ECJ for the referring court, litigant desistment and pressure to close the case[70] may affect the willingness of courts to engage in a direct dialogue with the ECJ.

Fourth, and related to the previous point, the system remains vulnerable, because of its dependence on the national courts' willingness to make a reference, and it is almost impossible to enforce. Infringement actions against Member States (represented by their governments) under Article 258 TFEU are hardly apt to enforce an obligation imposed on independent courts, and are, moreover, only at the disposal of the Commission.[71] Since *Köbler*, there is a theoretical possibility of liability claims against the State for infringement of EU law attributable to courts, which

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[66] Craig and De Búrca 2008, 500.

[67] Claes 2008, 432–451.

[68] For a critique of this behaviour, see Baquero Cruz 2005), 241–266.

[69] It should be pointed out however, that the situation does not compare that of the ECtHR, which is collapsing under its case load and lack of financial means.

[70] See Nyikos 2003, 397.

[71] Case C-129/00 *Commission v Italian Republic* [2003] ECR I-4637. Note that, strictly speaking, Italy was not held in breach for the activities of its courts and administrative authorities, but for failing to amend relevant provisions of national legislation. The Commission has opened proceedings against Sweden in 2004 alleging that the number of references made by Swedish highest courts was insufficient, and in particular expressed its dissatisfaction with the fact that these courts did not consider the referral of a case to the ECJ when deciding whether to hold an

may include refusals to refer,[72] but the very existence of *Köbler* liability itself threatens to spoil the goodwill of national courts to participate in the dialogue.[73]

Fifth, a preliminary reference made by one court, is relevant for all courts in the Union: judgments interpreting a norm of EU law are considered to form part of the norm, and hence, bind all courts across the Union, and absolve them from the obligation to refer where relevant.

Finally, it should be stressed that the preliminary reference procedure, as explained by the ECJ in its guidelines, does indeed constitute a channel for veritable judicial dialogue.[74] Rather than a system whereby the national courts ask and the ECJ answers, the ECJ invites courts making references to state their views on the answer to be given to the questions referred. Also, while judgments of the ECJ are final and cannot be appealed, national courts are allowed to refer the same question again, in the same case or another, and may explicitly ask the ECJ to distinguish or reconsider previous cases. Nevertheless, once the reference has been made, the national court mostly 'disappears' from the proceedings, until the judgment is handed by the ECJ: so much for 'dialogue' then.[75]

Another type of 'judicial dialogue' is the referencing to or citing of case law of courts in other jurisdictions, which may or may not belong to different regimes. In the context of ECJ and national courts case law, we see an asymmetrical pattern. Some national courts will cite ECJ judgments approvingly or as a source of authority. There is a wide variety in the referencing practice of national courts depending mostly on the national traditions of citing. The Belgian and Spanish constitutional courts, for instance, regularly cite ECJ case law, as does the House

(Footnote 71 continued)
appeal admissible and that decisions on admissibility were given without reasons, so that the fulfilment of the obligations under now Article 267 TFEU could not be checked objectively, see Commission docket No 2003/2161, C(2004) 3899 of 13 October 2004.

[72] Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239. The refusal to refer *per se* will not amount to a sufficiently serious breach of Community law, but it may contribute to an incorrect application of Community law which may. It will then be difficult, however, to establish a causal link.

[73] See the furious reaction to the *Köbler* judgment, written by an Advocate General of the Netherlands' Hoge Raad, P Wattel, 'Köbler, Cilfit and Welthgrove: we cannot go on meeting like this' (2004) 41 CML Rev 177.

[74] The Court of Justice 'Information Note on references from national courts for a preliminary ruling' [2005] OJ C143/1.

[75] ECJ can ask the referring court for further clarifications (Artilce 104 (5) Rules of Procedure), but it is not a party in the proceedings before the ECJ. The Court of Justice 'Information Note on references from national courts for a preliminary ruling' [2005] OJ C143/1 contains the following explanations: 'The order for reference and the relevant documents (including, where applicable, the case file or a copy of the case file) are to be sent by the national court directly to the Court of Justice, by registered post. (..) [at 29]. The Court Registry will stay in contact with the national court until a ruling is given, and will send it copies of the procedural documents [at 30]. The Court will send its ruling to the national court. It would welcome information from the national court on the action taken upon its ruling in the national proceedings and, where appropriate, a copy of the national court's final decision. [at 31]'.

of Lords. The French *Conseil constitutionnel* has never quoted the ECJ.[76] In contrast, the ECJ will never explicitly make reference to the case law of national courts, though its Advocate General may at times cite national court decisions.

National courts also at times cite case law of their brethren in other Member States dealing with the same or similar issues of European law. This has certainly been the case when the grand doctrines of EU law—direct effect, primacy, fundamental rights protection—were being developed. So the *Bundesverfassungsgericht* in *Solange I* made reference to the decision of the *Corte costituzionale*, and the *commissaire du gouvernement* in *Nicolo* urged the *Conseil d'État* to accept the primacy of European law over conflicting legislation, now that all courts in all other Member States had done so.

But these transnational references to case law, from a court in one Member State to one in another Member State are still rather scarce. It can however be argued that in a mature system, the coherence and uniform interpretation and application of European law by national courts should not depend solely on the vertical relations between national courts and the ECJ. In an intertwined and interlocked system such as that of the European Union, courts should be informed of the manner in which their brethren in other Member States interpret and apply European law. There is an increased need for more horizontal dialogue,[77] which could, in turn, relieve the system of preliminary references. This could complete the judicial system of the European Union as it currently exists.

The alleged underdeveloped state of the transnational horizontal debate is due to the fact that with the exception of some of the large Member States with languages which are easily accessible, these decisions may be difficult to access and interpret by courts in other countries. In addition, it is believed that the acceptance of the foundational doctrines, as well as the application and enforcement of European law requires a level of adaptation to local circumstances and national law. Yet, as already stated, it is clear that in some cases, such as the general conception of the relationship between legal orders, or in the case of the EAW, there has been influencing from one system to the other. In addition, it is undeniable that in highly specialised areas, where courts and judges dealing with a very specific set of issues know each other, referencing is much thicker.[78]

The third phenomenon sometimes referred to as 'dialogue' is more indirect and concerns the real or perceived 'messages' and 'signals' sent by both the national courts and the ECJ in their case law: 'dialogue-through-case-law'.[79] By way of example, it is generally accepted that the fundamental rights jurisprudence of the ECJ was developed in answer to the case law of several national courts, most

[76] It has only on one occasion referred to a decision of the ECtHR, i.e. to the Chamber decision in *Leyla Sahin v Turkey*.

[77] See on this also Poiares Maduro 2008, 218–219.

[78] See for instance the work of Emmanueal Lazega, who examines social mechanisms of cooperation in a variety of settings, e.g. Lazega 2009.

[79] See e.g. Timmermans 2004, 396–399.

prominently the German *Bundesverfassungsgericht* refusing to accept the primacy of EU law, as long as fundamental rights were not sufficiently protected. In a similar vein, the ECJ's decision in *Ratti*,[80] drawing on a *nemo auditur* type of reasoning, is generally understood as an answer to the German *Bundesfinanzhof* in *Kloppenburg*[81] and the French *Conseil d'État* in *Cohn-Bendit*,[82] denying any direct effect of directives.[83] And it is hard to miss the message of the majority of the Bundesverfassungsgericht on the validity of the German law implementing the EAW Framework Decision,[84] which in the words of the dissenting judge Lübbe-Wolff is to be read as a 'dark signal' to the ECJ.[85]

Fourth, judges converse through other means and channels also. Judges and Advocate General from the ECJ as well as senior national judges in many Member States, participate in the academic debate. Many European judges and Advocate General play 'on both sides of the fence'.[86] The tale of how the ECJ 'constitutionalised' the Treaties, and developed an autonomous legal order for the Union, was skilfully spread and propagated in the judges' extra-judicial scholarly writings.[87] Remarkable in many of these contributions, has been what has been called the 'degree of self-celebration (…) about the Court's achievements'.[88] Some of their national counterparts too, writing as law professors, have explained and developed their own court's positions with respect to European law, addressing academic as well as judicial audiences. This has happened more in some countries than others, depending on legal culture and perceived appropriateness of such extra-judicial writing. In some cases, (former) judges also use the press to explain their positions, or channel their views. A recent example is the comment by former president of the *Bundesverfassungsgericht* Roman Herzog, explicitly repeating the Federal Court's position in the *Maastricht Urteil*, and warning the ECJ that if it continues to 'act as a legislator' and that if it 'abuses this confidence [of the Member States assigning it comprehensive rights of decision-making, that it could

[80] Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629.

[81] Decision of 16 July 1981, BFHE 133, 470; [1982] 1 CML Rev 527 and Decision of 25 April 1985, BFHE 143, 383; [1989] 1 CML Rev 873.

[82] Decision of 22 December 1978, Rec. 524; RTDeur., 1979, 168.

[83] It is interesting to note that it was the Bundesverfassungsgericht which ultimately convinced the Bundesfinanzhof that the ECJ had not overstepped the boundaries of the judicial function when granting direct effect to directives, Decision of 8 April 1987, BverfGE 75, 223; [1988] 3 CML Rev 1.

[84] Decision of 18 July 2005, 2 BvR 2236/04.

[85] See in particular paragraph 159-160 of the judgment. The ECJ did not seem to respond to this 'dark signal' in Case C-303/05 *Advocaten van de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633, in which it held that the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 was valid.

[86] Vauchez 2008.

[87] Due 1992; Lecourt 1991; Donner 1974; Rodriguez Iglesias 1996; Slynn 1984; Mancini 1989; Schockweiler 1995. Further: Stein 1981; Schepel and Wesseling 1997; Vauchez 2008.

[88] Schepel and Wesseling 1997, 178.

be trusted to take this responsibility in an unbiased way and in compliance with the rules of the judiciary], it need not be surprised when it [the trust put in it] breaks down'.[89]

Also, ECJ judges and (senior) national judges have, from the outset, invested in inter-personal contacts and dialogues. The ECJ at regular intervals welcomes delegations from senior national courts to Luxembourg. These visits allow the national courts to become better informed about the ECJ and to improve mutual understanding 'under the mellowing influence of wine and good cheer'.[90] They may help create trust and a sense of belonging to a particular judicial community: that of 'European courts'. This was confirmed by Lord Denning's account of his visit to Luxembourg: 'I would pay tribute to the work of the European Court at Luxembourg. I have been there. I have met the judges. They are of the highest quality'.[91] In contrast to the networks under review in this chapter, the visits remain fairly 'bilateral': only the senior national justices of a single highest court are invited at any one time, and the ECJ thus invests in good relations with each national court separately. National judges generally do not meet each other in Luxembourg.

To conclude this section, the discourse of 'judicial dialogues' in Europe mostly contains, in some way or another, a vertical element, or perhaps, many vertical lines: between the ECJ and each national court or judiciary separately. To a certain extent, they do narrate a certain 'relationship of cooperation' based on a give-and-take, and a clear division of labour between the ECJ and the national courts. More importantly however, these vertical dialogues demonstrate a process of hierarchisation and containment. The ECJ behaves as the 'primus inter pares', claiming a role of 'supreme' or 'constitutional' court, superimposing itself over and above the national courts, transforming what might have been a horizontal relationship in a vertical one. The case law of the ECJ has sought to transform the national judges into European judges,[92] drawing 'the' national courts (taken as a whole) in a tight epistemic community that surrounds the ECJ,[93] a 'community of European judges', with, apparently, a view to establishing the rule of European law in Europe.[94] At the same time, however, we also observe a process of containment, whereby the ECJ is put under pressure especially by certain highest (constitutional) courts.

The horizontal relationship, of national courts among themselves, is less well developed and mainly consists of courts referring to each other's case law (generally under the heading of 'cross-fertilisation').[95] National courts are, on the

[89] Herzog and Gerken 2008.

[90] Brown et al. 2000, 401.

[91] Denning 1982.

[92] Including Claes 2008; Slaughter et al. 1998.

[93] On the concept of epistemic communities see Haas 1992.

[94] Alter 2001.

[95] Markesinis and Fedtke 2005.

whole, not systematically informed of the functioning of the courts in other Member States as European judges. Indeed, the decisions handed after the ECJ judgment on a preliminary reference are not systematically made public, even though the ECJ keeps record of these final decisions.[96] There are exceptions: the 'battle over supremacy' is well documented and analysed in scholarly writings, and it is clear that courts have made references to decisions of their brethren in other Member States on the issue.[97] Yet, this is the exception, and there was, until recently, no systematic reporting on European cases decided by national courts. The ECJ may well have good reason not to make these decisions public: it may feel that it is not in a position to publish or spread national courts' decisions. In addition, some of these decisions do not apply the ECJ's decision correctly, or misinterpret the Court's judgments, and the ECJ may thus not be willing to publicise them without comments or corrections, while explaining or criticising them may damage the relationship with the referring courts, and jeopardise future references.[98] Also, the decisions are, obviously, handed in the official language of the court in the case, and their publication may not seem useful for other courts, while translation raises other issues, including financial.

13.4 How Can, and Do, Judicial Networks Affect Existing Dialogues Between National and European Courts?

The preceding discussion has made it clear that there is a host of inter-judicial relationships. The section considers how these existing 'dialogues' could be affected by the emergence of judicial networks.

Let us begin by considering the preliminary reference procedure. From the perspective of the ECJ, judicial networks could be seen to perform a valuable role as educational interlocutor. In particular networks created by the judiciaries themselves provide their members with information concerning the various ways in which national courts apply and enforce European rules—possibly with a view to developing a benchmark or best practice. Information may be exchanged as to the existence, meaning and implications of European rules for judicial practice, with a focus on the contribution of the ECJ's case law. Consider, for instance, the

[96] The ECJ asks judges to send the final decision to Luxembourg, see Court of Justice 'Information Note on references from national courts for a preliminary ruling' [2005] OJ C143/1 [31].

[97] So, for instance, the Bundesverfassungsgericht in Solange I (decision of 29 May 1974, *Internationale Handelsgesellschaft (Solange I)* BverfGE 37, 271) made reference to the Frontini judgment of the Corte costituzionale (Decision n. 183/73 of 27 December 1973, 18 Giur. Cost. I 2401). Also, in Nicolo (decision of 20 October 1989, RTDeur. 1989, 771) commissaire du gouvernement Frydmann pointed out to the Conseil d'État that all other courts, 'even the House of Lords', had accepted review powers under the primacy principle.

[98] The Commission, in its annual reports on the application of Community law, does report judgments 'that were noteworthy as setting good or bad examples'.

guide to the Article 267 TFEU procedure drawn up by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, which offers practical suggestions to the Association's members on when and how to make a reference to the ECJ,[99] the colloquium it organised on the 'consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in the Member States'[100]; or the training it provided to courts in the ten new Member States around the time of their accession to the EU. Judicial networks would thus *supplement* the work of the ECJ. It could be said that this contribution is not just useful, but in fact necessary. We have already alluded to the mounting workload of the Court of Justice, implying that the demand for assistance and information on the part of national courts exceeds the supply of these resources on the part of the European Courts. An additional information outlet, networks can help redress this imbalance and reduce the pressure on the scarce resources of the Luxembourg Courts.

Second, any student of European law will have been taught that national courts act as *juges communs de droit communautaire* when they apply European law, yet whether judiciaries indeed conceive themselves as such, and behave accordingly, has yet to be firmly established. Membership of a trans-national judicial network may properly Europeanise the outlook of national courts, and raise (further) awareness of the role they are expected to play in the European judicial system.

Judicial networks could incentivise the European Courts to improve their functioning. By way of example, we have seen that the ECJ did not use to publish national decisions handed down following its judgment on a preliminary reference. Considering that this information would be rather useful for its members, the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union decided to take matters into its own hands and set up a database called JURIFAST, which offers access to preliminary references, the ECJ's reply as well as the judgment by the national court.[101] Interestingly, if one now pays a visit to the Court's website, one will see that under the heading 'European Union Law in Europe' there is now a link to this database. Also in relation to a number of other topics the Association has not been afraid to call upon

[99] This guide was drawn up under the auspices of the Dutch Eurogroup, which is an informal working Group of the Netherlands Association for the Judiciary.

[100] The topic was inspired by the judgments in Case C-224/97 *Erich Ciola v Land Vorarlberg* [1999] ECR I-2517; Case C-201/02 *The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723; Case C-453/00 *Kühne & Heitz NV v Productschap voor Pluimvee en Eieren* [2004] ECR I-837; Case C-234/04 *Rosmarie Kapferer v Schlank & Schick GmbH* [2006] ECR I-2585; Joined Cases C-392/04 and C- 422/04 *i-21 Germany GmbH and Arcor AG & Co. KG v Bundesrepublik Deutschland* [2006] ECR I-8559. The Association also provided assistance—in the form of seminars and working visits—to the ten new Member States around the time of their accession to the EU.

[101] JURIFAST has been operational since 1 February 2004 and as at 15 July 2008, counted 466 judgments.

the European Courts to change their practice.[102] In 2002, it proposed that the ECJ publish the references made by the national courts on its website. The Court of Justice welcomed this suggestion and asked the Member States whether there were any obstacles that would prevent the implementation of this proposal. The Spanish Government, for unknown reasons, objected to the publication of the full text of the references. As a result, only the text of the question sent by national courts is currently available on the ECJ's website. This situation does not meet with the approval of the Association:

> As long as the Court of Justice has not introduced an adequate system for rapid publication, the national courts of final instance should make their own arrangements. The working group [on the preliminary rulings procedure] advises the following good practices to the courts:
>
> (a) national supreme courts should publish immediately the full text of all references for preliminary ruling on the national level; and
> (b) national supreme courts should cooperate to publish, as soon as possible, all references for preliminary rulings on the international level.[103]

Here as well, the Association's online database plays a key role:

> The working group recommends all members of the Association to publish on JURIFAST the whole text of every reference for a preliminary ruling (not the text of the questions only!) immediately after the reference is made, together with a brief indication of its contents in English or French in case the questions are in a less widely known language.[104]

Another fascinating example of bottom-up guidance to the Court is the invitation to 'seize a suiting opportunity to clarify its position [on a relaxation of the *CILFIT* test, especially in the light of *Köbler*] in a judgment, taking into account that since *CILFIT* the number of member states and languages has increased'.[105] It will be interesting to see how, if at all, the Court responds to such 'encouragement'.

More in general, judicial networks could be welcomed as a means to improve the effective application and enforcement of EU rules. This holds in particular for networks created by the European legislature. For European rules to achieve their objectives, it is increasingly necessary to practice mutual recognition or to work together with foreign judiciaries—think, for instance, of the execution of a European Arrest Warrant. For these processes to work, it is essential that there exist mutual trust and loyalty between the various judiciaries, as experiences with mutual recognition in the realm of free movement of goods so clearly illustrate. There, the Court's judgment in *Cassis de Dijon* instructs national administrations to recognise out-of-State standards as equivalent to their own, unless they can

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[102] See in particular the Report of the Working Group on the Preliminary Rulings Procedure (2008). Note that representatives of the Network of Presidents of the Supreme Courts of the EU joined the working group and that the ECJ sent an observer to the Working Group in the person of Christiaan Timmermans.

[103] Ibid, 11.

[104] Ibid, 12.

[105] Ibid, 15.

show a good reason why instead their own rules should apply.[106] Commission reports on the application of mutual recognition however revealed that the application of the principle of mutual recognition was often hindered by 'the practical decisions made by the authorities that are in direct contact with citizens or economic operators'.[107] Reasons cited for the behaviour included a wish to favour national producers, mistrust of acts adopted by out-of-State authorities and ignorance.[108] By allowing for regular and meaningful interaction between courts, networks disseminate much-needed information on the workings of other national legal systems and thereby allow each network member to grow more confident in its peers, which we may in turn expect to translate into more frequent and better use of European legal rules. In short, the networks can provide the missing link in the European judicial architecture.

It could be objected that this narrative paints too rosy a picture. To label judicial networks as the European Courts' associates is misleading and also ignores the threat these networks could pose for the ECJ's superiority in 'having the last word' on questions of EU law. Judicial networks could become a tool for sharing 'erroneous' information regarding the interpretation and application of European rules—erroneous, that is, from the perspective of the European Courts. Such *mis*information may be inadvertent. The weaknesses of the preliminary reference procedure could very well account for such an occurrence: national courts may be disappointed with the quality or usefulness of the ECJ's answers, or unwilling to incur a two-year delay, and decide to trust their own appraisal (or that of their brethren) instead, in resolving the case before them. Here mention should specifically be made of specialist networks, such as the Association of Competition Law Judges. Members of these networks could have the feeling that their specialisation has allowed them to acquire the knowledge necessary to dispose of complicated cases without the help of the 'generalist' ECJ being required.[109]

More seriously however, we cannot exclude instances where networks are used to 'orchestrate' EU-wide disobedience by national courts of the enforcement of European law. Such use—or abuse—of networks can occur because national courts reject the propositions that underlie the European case law. It is a well-known fact that there have been occasions where national courts have ignored or

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[106] Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649.

[107] First Report on the Application of the Principle of Mutual Recognition In Product and Services Markets SEC (1999) 1106, 13 July 1999, 6. Note that this report followed twenty years after the judgment was delivered.

[108] Ibid.

[109] This view is based (at least partly) on the division of jurisdiction between the ECJ and the CFI of competition cases: since judicial challenges to Commission decisions under Article 101 or 102 TFEU must be brought before the Court of First Instance, it is considered that this has denied the ECJ the opportunity to familiarise itself with the technicalities and complexities that competition law cases bring with them, with in turn believed to compromise its ability to give 'correct' or satisfactory answers to competition questions that come before it via Article 267 TFEU.

even expressly contradicted ECJ rulings in their own judgments and we have also seen that such national disobedience has proven contagious: think of the Solange-domino for instance,[110] or the judicial opposition to the European Arrest Warrant.[111] Now, while judicial networks presumably did not play a role in this respect (in all likelihood given their non-existence or under-development at the time when most of this process took place), it is clear that they constitute an ideal channel to allow a more rapid spread of future cases of judicial recalcitrance.

One may also be wary of the rise of judicial networks for reasons related to the uniformity of EU law. The mushrooming of networks means that there may be overlaps in mandates, with the concomitant risk of inconsistencies between the activities of the networks *inter se*.[112] This danger of legal fragmentation is particularly acute when national courts indeed decide—for whatever reasons—not to engage in a dialogue with the ECJ through the preliminary reference procedure, but instead turn to their brethren in other Member States.[113]

Let us now turn to the dialogue-through-case-law. Over the past years, the circumstances for an increasing dialogue-through-case-law have dramatically improved. Ever more courts, especially highest courts, publish their landmark decisions in foreign languages. This may have advantages in terms of accountability and legitimacy. What is most striking is that these courts specifically address an external audience, consisting among others of courts in other Member States. Judicial networks could encourage this type of dialogue by breeding familiarity with the case law of the other network members, and making this case law accessible. The Court of Justice also participates in an information exchange by publishing, on its website, the bulletin *Reflets*.[114]

Additionally, or alternatively, the networks could have an effect on the nature and timing of the dialogue-through-case-law. As explained, the debate at present is 'open', conducted through the publication of judgments that are publicly accessible and available for (academic) comment and reflection. One could liken this process to a game of ping-pong, with every action provoking a reaction. The networks could however also affect this ex-post dialogue by removing the dialogue from the open, conducting ex ante negotiations 'behind closed doors', so to say. One example could be the conference hosted by the *Conseil constitutionnel* on

[110] See eg Sadurski 2006.

[111] Consider e.g. Komarek 2007, and Kühn 2007.

[112] We leave aside the question of whether we would observe competition among the various networks in response, and what the possible consequences of such competition, were it indeed to develop, would be.

[113] But see the praiseworthy initiative of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, who invited representatives of the Network of the Presidents of the Supreme Judicial Courts of the European Union to participate in its working Group on the preliminary rulings procedure.

[114] Remarkably, the bulletin is published only in French, which is the Court's working language, but hardly the most widely used language in the European Union. An English and German language edition would be most welcome.

judicial review of the constitutionality of secondary EU law. After a bilateral meeting between the *Conseil* and the ECJ in 1996, the *Conseil* one year later organised a conference bringing together delegations of all courts having constitutional jurisdiction of the EU-15.[115] The starting point was that it would be impossible for the constitutional courts to comply fully with the primacy requirements imposed by the ECJ. Said a member of the *Conseil constitutionnel:*

> Pour ma part, il me semble que rien ne saurait être pire, pour de Conseil constitutionnel, que d'encourir—d'ailleurs injustement—le reproche d'avoir tant soit peu accepter de prêter, même indirectement, la main à une opération de retardement de la construction européenne.[116]

The solution to this conundrum, in his eyes was to work together as 'une grande réunion familiale européenne'.[117] This meeting prepared the *Conseil's* decision on the review of the constitutionality of secondary EU law.[118] To be sure, an important factor in determining whether the scenario sketched here will actually become reality is the presence of, and role played by, the ECJ in the relevant network. In the case of the conference hosted by the *Conseil constitutionnel*, members of the ECJ reassured the constitutional courts that they understood the difficult position in which the latter found themselves, and that they would take this into consideration:

> Une grande responsabilité incombe à la Cour de justice, celle d'interpréter l'ensemble du droit communautaire en conformité avec ces principes, qu'elle doit identifier et formuler de façon suffisamment ouverte et en tenant compte, en particulier, de la jurisprudence des cours constitutionnelles.[119]

To be sure also, if and when we would observe that this judicial dialogue is being internalised, there will be important questions of transparency and perhaps even accountability to consider.

Finally, we may expect judicial networks to boost existing inter-personal contacts and dialogues. They provide a more structured context for these types of interaction and increase their frequency, thereby enhancing their impact. These personal contacts in turn strengthen the epistemic community of 'European courts', and generate further trust as they breed familiarity and mutual respect. Importantly, so too will networks foster the development of personalised relationships of a horizontal nature, of national courts among themselves, to complement the current set of predominantly vertical relations. Note that it is thus no longer the ECJ that exclusively decides whether, when and how judicial interaction should take place, but that national courts too have a significant part to play in this respect.

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[115] Thus including the United Kingdom and the Netherlands, who were later refused membership of the Conference of European Constitutional Courts!.

[116] Robert 1996.

[117] Ibid.

[118] Décision n° 98–399 DC concerning the *Loi relative à l'entrée et au séjour des étrangers en France et au droit d'asile*, recueil 245, Journal officiel du 12 mai 1998, p 7092.

[119] Rapport de la Cour de Justice de Communautés Européennes.

13.5 Conclusion

Initially, judicial networks used to debate questions whose relevance was primarily assessed with reference to the national context. This has changed considerably. The topics for discussion are increasingly Europeanised and networks do not seem afraid to address fundamental issues of EU law. This development will only serve to enhance their influence, which, as we have seen, they in turn use to make suggestions to the ECJ on the direction of its case law—recall the call for a relaxation of *CILFIT* and clarification of *Köbler*. In any event, judicial networks can and do provide the missing link in the European judicial system, linking national courts with one another. In addition, they can contribute to improving the interaction between the European Courts and their national counterparts.

It is clear that networks are here to stay, and that they will change the judicial field, both at the European and at the domestic level, contributing to the development of a 'transnational community or communities of European judges'. This of course evokes fundamental questions, some of which we have sought to address in this chapter. For instance, will the ECJ be able to remain the primus inter pares in the European judicial system? The answer will depend on factors endogenous to the various networks (their membership—is a role foreseen for the European Courts—as well as objectives and activities), but also exogenous developments will have a part to play here—for instance the future amount of EU litigation. One should further realise that the various effects of judicial networks—for instance, their potential role as educational interlocutor or as leader of a judicial revolt—are not alternatives, but may be situated along a continuum. Whether our assessment of the impact of judicial networks on the relationship between the European courts and national judges should be positive or negative remains to be seen and will depend on the type of judicial system one believes should exist in the European Union.

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Part IV
Conclusions

Chapter 14
Conclusions

Pierre Larouche and Péter Cserne

Contents

Among other things, globalisation refers to political and legal processes where complex multi-level governance structures emerge. National legal systems, losing their central position, interact with a large number of public and private actors on both supra and sub-national levels in regulating individual and business conduct. The aim of this project has been to analyse the various ways national legal systems cope with the challenges of globalisation. The starting hypothesis has been that while globalisation does not seem to eliminate or override the national level of governance, it induces crucial changes in both the internal functioning of and the interactions between national legal systems. Against the background of an

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9_14,

extensive academic literature on this topic, the distinct contribution of this research project has been to identify three key elements of the new role of national legal systems: (i) a more functional view of the law, based on law and economics and comparative law literature, helps to understand how the phenomena of convergence and divergence play out for national law, (ii) a recasting of fundamental constitutional principles, divorced from specific institutional settings, gives them a new life in the era of new governance forms and (iii) legal emulation provides a rich and fruitful model to explain the interplay between legal systems. Together with these theoretical insights, the project also included research on legal developments in particular areas.

The expertise and specialisation of the research team allowed combining theoretical innovation with in-depth studies of particular legal areas and topics. In particular, while the papers engage with theoretical issues discussed in current comparative legal scholarship at a higher level of abstraction, a number of the chapters can also be read as case studies on market regulation and competition law in European legal systems or as contributions to private law scholarship. Methodologically, all chapters of the project go beyond traditional doctrinal and comparative research, especially by including economic analysis and regulatory theory in their approach.

In this concluding chapter, we begin by providing a brief summary of the findings of each chapter, part by part, before setting out some more general conclusions arising from the work carried out on the project.

14.1 Convergence and Divergence: The Continuing Relevance of National Legal Systems

While the dialectic of uniformity and diversity of laws has fascinated legal scholars for many centuries, in the past few decades the harmonisation of various legal domains has become a highly debated issue on both European and global political agendas. Convergence and divergence are two opposing dynamic processes that bring about uniformity and diversity of law. Behind these processes there are interactions of key players in legal systems: political, legal and academic. In Chap. 2, "Convergence and divergence in law and economics and comparative law", Filomena Chirico and Pierre Larouche address the convergence and divergence of legal systems from a functionalist comparative and economic perspective.

While convergence or divergence between legal systems is often easily perceptible, this is not always the case: the same words may mean different things to different people and within different conceptual schemes. The first case, i.e. when divergence springs to the eye and, in a number of cases, reflects a deliberate choice for diversity, can be called *explicit divergence*. In contrast, *conceptual divergence* often lurks behind the surface and is neither immediately perceptible nor entirely deliberate. In the latter case, agents might believe that they are using

the same concept, since they deal with the same label, while in fact they are using diverse concepts.

Chirico and Larouche address the reasons for and the consequences of divergence. When black-letter law in jurisdiction *A* is different from black-letter law in jurisdiction *B*, this can be either because (1) lawmakers in *A* and *B* have different policy preferences, or (2) *A* and *B* may be following different legal "paths", using different legal terms (doctrines, constructs) to achieve the same goal ("path dependence"). Both cases imply explicit divergence, but in the second case different legal instruments serve the same purpose ("functional equivalence"). On the other hand, it may also be the case that while black-letter law uses the same term in both jurisdictions *A* and *B*, the meanings attached to it are different. This is the case of conceptual divergence.

Comparative law scholars have been aware of these different possibilities. However, they have been less successful in finding a metric or an operational way to measure diversity and to characterise its dynamics and consequences in a rigorous manner. Moreover, legal academia seems ambivalent about the evaluation of divergence. Some argue for its suppression by unification, others refer to the irreconcilable uniqueness of national legal cultures, which makes convergence not only undesirable but also practically impossible. Chirico and Larouche argue that while the functionalist method allows identifying and measuring divergence, the economic analysis of multiple and multi-level legal systems (regulatory competition, federalism) provide a solid basis for both explanation and evaluation. They analyse when the diversity of laws is detrimental and cannot be eliminated through spontaneous harmonisation. They also identify alternative mechanisms through which convergence can be achieved and evaluate them in terms of their relative costs and benefits.

The next chapters develop the themes of Chap. 2 further, in more specific contexts. Chapter 3, "The Draft Common Frame of Reference: A giant with feet of clay", by Filomena Chirico, Eric van Damme and Pierre Larouche, looks at the Draft Common Frame of Reference (DCFR), an EU-wide large-scale academic enterprise designed to restate European Private Law in a code-like format. By setting the basic rules of property protection, contract enforcement and liability for wrongdoings, private law provides the basic legal infrastructure of market economies. Apart from their general economic impact, and in contrast to regulatory public law, in many national jurisdictions private law rules are also considered to have historical value and symbolic significance, especially on the European continent where in the past two centuries they have been codified in national civil codes.

Compared to the public law instruments of market governance discussed in later chapters, globalisation has had a different impact on private law. In the past decades, the opportunities for choice of law by private parties have increased dramatically, thus creating a "law market".[1] Simultaneously, one can observe numerous efforts for harmonisation and unification at both regional and global levels. These two

[1] Ribstein and O'Hara 2009.

tendencies run against the traditional static and systemic character of the core areas of private law; still, civil codes are alive and well, being central referential elements of most national legal systems. More specifically, in many countries we can observe a renaissance of codification, as evidenced in Chap. 5.

Partly motivated by the central importance of private law in market integration, partly related to the revision of the increasing body of consumer law within the EU, the past decade has seen a heated academic and political debate about the pros and cons of harmonisation in European private law and the necessity of a European civil code. Parallel to this, impressive scholarly efforts have been made to design uniform rules or principles in particular legal domains, including contract law, tort law, insurance law, etc., culminating in the DCFR.

The reception of the DCFR has been highly controversial. As an academic input to this controversy, a set of lawyers and economists called the Economic Impact Group has investigated some of the main parts of the DCFR from an economic perspective. The work of the EIG served as a basis for Chap. 3.

Although at first sight the DCFR takes the format of a civil code, throughout the entire drafting process its legal status (regulatory toolkit, optional code, or harmonisation instrument) has remained unclear. In Chap. 3, the authors argue that any proper analysis of the DCFR should distinguish two issues: the choice of the optimal regulatory level (whether to harmonise certain elements of the law or not) and the question of the desirable substance or content (the optimal design) of the rules. In particular, in the course of drafting the DCFR, neither an explicit discussion of the policy goals behind the rules was held, nor was empirical research about the likely effects of the rules conducted. In the end, while a commendable achievement, the DCFR suffers from a deficient methodology, which undermines any claim that it represents the state of European private law.

In Chap. 4, Péter Cserne looks at "The recodification of private law in Central and Eastern Europe" (CEE). Since 1989, CEE countries have experienced a rapid political, economic, social and legal transformation. The legal transformation has been intertwined with the Europeanisation and modernisation of the law. In this respect, old and new member states of the EU with traditional national civil codes face similar challenges: while private law is becoming available and responsive for new regulatory needs, a flood of European regulations and directives are sometimes seen as threatening or destructing the coherence of national private law systems. The chapter analyses the different paths of the twenty-first century renewal of private law in a number of CEE countries, with a special emphasis on the ongoing recodification of the civil code in Hungary. It shows how this drafting process combines top-down harmonisation with European directives, academic and political ambitions, material and symbolic interests and a minor role of regulatory competition. It also discusses how mechanisms such as legal technical assistance, legal transplantation, and the marketplace for legal ideas operate within this context. Overall, the impact of foreign laws, international and soft law instruments is much stronger on the substance of rules than the structure of national private laws or the adjudicative style of CEE courts applying the new codes.

In Chap. 5, "Courts and expertise: Consequence-based reasoning in judicial reasoning", Péter Cserne analyses how and to what extent courts in different national legal systems become open to consequence-based arguments. Rule of law principles require that judicial decisions be explicitly and publicly justified by arguments. If in deciding a legal case, the judge finds that there is a legal rule which is relevant for the case but has more than one plausible interpretation, the judge is said to use a consequence-based argument if she justifies her decision for a particular rule-interpretation with the argument that this interpretation will bring about consequences which are normatively superior to the consequences of alternative rule-interpretations. A paradigmatic case of consequence-based reasoning is when a judge chooses the interpretation which she expects to maximise social welfare.

From a comparative perspective, Cserne looks at the role of consequence-based reasoning in the canon of acceptable arguments in the main European jurisdictions and in the United States. He argues that under different names and with a varying degree of openness, most of these legal systems allow for consequence-based considerations. On the other hand, he argues that with the possible exception of some rulings of highest courts, the epistemological character and the institutional setting of judicial decision making make it rather unlikely that judicial decisions meet the standards of empirical testing. Courts are less amenable to the technocratic rationality that characterise impact assessments in legislative and administrative contexts. Using the term of psychological decision theory, judges are intuitive experts. An increasing openness towards consequence-based arguments, however, contributes to the same procedural values which support the ex ante evaluation of legislation.

14.2 New Institutions, Common Principles

Whereas Part I is more concerned with private law,[2] Part II explores how the well-known constitutional principles found in national legal systems do not vanish in the face of globalisation, but rather gain additional significance as more abstract 'principles of good governance', for instance, which are held to be applicable to new forms of governance, i.e. new multi-level institutional structures.

In Chap. 6, "From a formalistic to an integrative model: the case of EU economic regulation", Leigh Hancher and Pierre Larouche take stock of the evolution of European law in three core areas of substantive law between 1990 and 2010: the regulation of electronic communications, energy and services of general economic interest. In the past two decades, EU economic regulation has taken a

[2] Although the analytical model of Chap. 2 can very well be applied to public law, for instance competition law.

long route from market liberalisation to managed competition not only in substantive terms but in institutional aspect as well.

The authors argue that European Union law is moving from a traditional formalistic pigeonholing model towards a more integrative model, which seeks to manage competition and not just to focus on a single policy objective, *in casu* guarantee market access. In turn, this has generated a multi-layered institutional structure in which the interaction of the EU and its Member States is by no means hierarchical or even based on a gradual linear transfer of key powers. Through a detailed analysis of this development, the authors argue that one can observe the emergence of new characteristics of market regulation, which have theoretical interest well beyond particular sectors. The paper demonstrates that major interrelated changes have taken place on three levels. First, privatisation and market liberalisation strengthened the role of private initiatives and competition. Second, the division of competences between Community and member states has become more complex, especially with the set up of independent national regulatory agencies and the increasingly institutionalised cooperative networks of these agencies (a topic analysed in more detail in Chap. 8 by Lavrijssen and Hancher). Finally, the analysis of the regulation of network industries suggests that the functioning of law as a regulatory technique is experiencing a paradigm shift. European law has moved from a formalistic and legalistic "pigeonholing" approach towards a goal-oriented multiple-player interdisciplinary model of regulation and enforcement (especially in electronic communications regulation). The driving force behind this latter integrated approach seems to be the key players' recognition that in all areas of market regulation, such as network industries and services of general economic interests, and arguably in the domain of competition law as well, the task for Community and Member States requires an intricate coordination of decisions within a regulatory space. There is and should be a "decision chain" in operation.

On a more normative note and with reference to previous research,[3] the authors argue that the principles of good governance require a particular division of labour between legislative and executive power, on the one hand and NRAs on the other. Only those decisions should be taken on higher echelons of the decision chain that can expect wide or even full support (consensus) by regulatees. On lower echelons, decisions should be taken by NRAs, which should be independent and accountable, thereby enjoying more protection from rent-seeking activities.

Chapter 6 shows that, in the face of globalisation—here in the form of associated phenomena such as privatisation and liberalisation—attempts to achieve a co-existence between the old and the new through separation devices are bound to fail or become obsolete. Whether it be separation lines drawn in the operations of firms, between areas of law, between levels of decision, between geographical areas of jurisdiction, the consequences of globalisation are difficult to deal with using the arch-legal method of definitional constructions that turn debates into

[3] Hancher et al. 2003.

pigeonholing exercises. Rather, openness and integration (across separation lines, across disciplines) should be the key design features of contemporary legal and regulatory frameworks. This does not spell the end of fundamental legal principles, rather, as the following chapters show, they are needed in the new governance structures. A key challenge is to abstract the core of these principles, so as to be able to fit them fully within novel institutional forms.

Indeed, as Maartje De Visser notes in Chap. 7, "The reform of EU electronic communications law: revolution or evolution?", issues of legitimacy and accountability were central to the debates surrounding the revision of the institutional elements of EU electronic communications regulation. At the outset, the author identifies two main deficiencies in the enforcement of the Electronic Communications Framework: the lack of independence of national regulatory agencies and, related to this, their inconsistent practices in the application of European rules. She discusses three institutional models of law enforcement otherwise available in EC law in order to see which of them is best able to address these deficiencies. Examining centralised governance, decentralised enforcement and a combined model with a central independent agency coordinating with the Member States, she argues that theoretically, the latter seems most appropriate to overcome deficiencies in enforcement. Member States' strong sovereignty claims, however, do not make the institution of such a European independent agency a viable alternative. In practice, the *status quo* has been retained where national regulators coordinate their enforcement activities through a network. In the chapter, the institutional setup and operation of this network-based model is examined in detail, with a particular emphasis on the legitimacy and accountability of the ERG.

Looking at the same debates, Saskia Lavrijssen and Leigh Hancher, in Chap. 8, "Networks of regulatory agencies in Europe" analyse the emergence of a new network-based mode of governance in a number of areas where network of national regulatory agencies (NRAs) have been created, such as energy regulation, electronic communications regulation, competition law or financial regulation. The main rationale for these networks is to ensure that national regulatory authorities cooperate with each other and with the European Commission in order to guarantee uniform application of European law. The networks should enable NRAs to operate in accordance with the principles of good governance, in a transparent, open, independent, responsive and predictable manner, in effective cooperation with other agencies. Even after their creation, the legal status of the networks and the role of the Commission therein have been undefined. As the paper notes, in founding the European networks, the Commission was formalising an existing practice of informal cooperation between NRAs. The idea behind the legal formalisation of this network model was to provide further institutional and procedural guarantees.

A further step in the institutional development of the network model has been the establishment of so-called network agencies. As also discussed in Chap. 6, the 2009 reforms saw the creation of two new institutions, the Body of European Regulators for Electronic Communications (BEREC) in the electronic

communication sector and the Agency for the Co-ordination of Energy Regulators (ACER) in the energy sector. These new institutions should ensure first, more effective decision making at the European level, second, a development and learning framework for NRAs and third, more independence for regulators from industry interests and undue influence from national governments. With these additions the institutional architecture of these regulatory networks is becoming increasingly complex. Understanding and evaluating their working requires the joint expertise of lawyers, political scientists and economists.

From a normative legal perspective the question arises as to how the fundamental legal principles traditionally associated with the idea of the rule of law are maintained in this new setting. Network-based regulation generates accountability gaps. As the legal status of these regulatory networks is uncertain, it is also a pressing and highly controversial question whether and how their decisions should be subject to judicial review.

That question is picked up by Maartje de Visser in Chap. 9, "Reinventing accountability: judicial control versus participation". As she argues, providing judicial review of the decisions of a regulatory network is neither practicable nor advisable. As long as the networks adopt non-binding legal instruments, these are unlikely to be directly challengeable in court. Moreover, judicial review is a costly and time-consuming remedy which, in this context, should only be available in exceptional circumstances. De Visser suggests that at least one of the ends pursued by judicial review, namely accountability, could be more easily and effectively achieved by participation. Participation does not only mean the involvement of interested parties in decision making. It can also be instrumental in improving the quality of the policy outcome. At any rate, relying on *ex ante* participation of affected interests is expected to change the character of regulatory networks crucially, from expert bodies to deliberative forums.

It is noteworthy that this dual concern for and the tension between accountability and decision quality, participation and expertise also plays a key role in other areas of the law and in all three branches of government. This tension brings into focus further issues where core assumptions and traditional understandings of national legal systems have to be rethought. Fundamental principles such as accountability must then be abstracted (what is the essence of accountability?) so that they can be applied in new institutional forms (is judicial review always needed to ensure accountability? are there other mechanisms, perhaps more appropriate to the new institutional form?).

14.3 New Models for National Legal Systems in a Global World

In the course of preparing the contributions described in the previous paragraphs, the researchers were drawn to a number of instances where national legal systems interact, whether through the work of a high-level expert group such as the drafters

of the DCFR, law reform committees examining other legal systems in the course of reforming the civil codes of Central and Eastern Europe or NRAs exchanging on each other's experience so as to find out regulatory best practices. These interactions produced changes in national legal systems, in ways that were not entirely accounted for by available theoretical models.

In Chap. 10, "Legal emulation between regulatory competition and comparative law", Pierre Larouche puts forward an alternative path, next to regulatory competition models and comparative law endeavours, called legal emulation.

Regulatory competition suffers from its very restrictive assumptions, which make it a relatively rare occurrence in practice. It is also exogenously driven, ignoring legal change brought about from within the law and it takes an impoverished view of law. As for comparative law, it has tended to remain mostly monodisciplinary. It usually lacks a dynamic dimension.

Legal emulation tries to combine the more dynamic perspective of regulatory competition, with the endogeneity of comparative law. It rests on a theoretical perspective whereby the law is conceived as the outcome of a series of choices—substantive or institutional, fundamental or transient—made between different options (legal science would then be the investigation of the set of those choices). Chapter 10 provides an outline of the legal emulation model. It involves the following steps: first of all, the framework of reference for the inquiry is fixed, together with the normative standard. Second, a number of legal systems are analysed, in order to identify the choices made in the law (each with a number of options to be chosen from). Third, the options identified in the second step are compared, on the basis of the normative standard set out in the first step, so that in a final stage, a conclusion can be drawn. Depending on whether choices are held constant (as part of the normative standard) or instead left open within the framework of reference, the inquiry can be narrow or broad.

In Chap. 10, it is argued that legal emulation is already present in many legal orders, through instances such as constitutional, EU or human rights review; impact assessment; peer review within networks of authorities; or the open method of coordination. These instances can be seen as illustrations of an emerging principle of quality of law, which would rest on a legal emulation model.

Some of these instances are covered in previous chapters. In Chaps. 11 and 12, closer attention is given to one of them, the practice of Impact Assessments (IAs), whereby legislative and administrative measures are subject to consequence-based control. IA takes place ahead of a legislative action, comprises an analysis and comparison of available policy options in light of the policy objectives and includes stakeholder consultation and collection of expertise. In Chap. 11, "Impact Assessment: Theory", Pierre Larouche searches for the reason why IAs are used, among many rationales offered in the literature. Larouche distinguishes six rationales for such endeavours. IA (1) is a mechanism for collection of evidence, (2) improves the quality of decision making, (3) increases transparency and openness; (4) makes decision making more democratic by allowing for participation of stakeholders; (5) contributes to the justification of legislative action by explaining publicly why the action which is being proposed is necessary and

appropriate; (6) increases accountability by highlighting the trade-offs being made by the decision-maker. The first two rationales are result-oriented, follow a technocratic logic and focus on the role of experts. The last four are process-oriented. Larouche argues that to a large extent, substantive and procedural rationales mutually support each other. He also distinguishes more complex rationales which can provide additional justification for IA under specific circumstances. From an explanatory perspective he also accounts for perverse or parasitic uses of IA. In these cases, this technique is used strategically or opportunistically, in order to promote partisan interests.

In Chap. 12, "Impact Assessment: Empirical evidence", Angela Maria Noguera reviews the official statements made in Commission documents as to the procedure and methodology of impact assessments. She then studies a year's worth of IAs to ascertain whether the practice of IAs by the Commission matches the statements. Her analysis of the IA reports shows that despite the fact that all the IAs were previously revised by the Impact Assessment Board, the quality of the reports is still variable. Many of them comply with the methodology and objectives set out by the Commission, but many others—especially the ones related to initiatives for legally-binding instruments—make a superficial legal analysis of the different policy options both in terms of the type of instrument and the desired content; in addition, several reports do not make an efficient use of the Member States' experience to delineate policy options, but instead continue to design the contents of policy options on the sole basis of theoretical options and general data.

Another instance where legal emulation potentially takes place is the networks of regulatory authorities, as discussed in Chaps. 7–9. In addition, and not unlike the network model of regulatory agencies, the formal and informal interplay between courts has also undergone significant changes. In Chap. 13, "Judicial networks", Maartje de Visser and Monica Claes analyse these changes by providing a systematic overview of various types of inter-judicial relationships within the European Union. Formal or informal, small-scale or comprehensive, created by the judiciary itself or by the European legislature, these judicial networks show a high degree of heterogeneity. In particular, the paper discusses how the existing dialogues between national and European courts, especially the preliminary reference procedure, can be affected by the emergence of judicial networks. They argue that as "educational interlocutors", judicial networks are expected to Europeanise the outlook of national courts, by raising awareness of their role as the enforcers of European law. The networks also have an impact on the work of the European Courts, by critically evaluating and improving their functioning or by orchestrating a 'revolt' of national courts. The authors see the various roles not as alternatives but as situated along a continuum; they are beneficial or detrimental ultimately depending on the type of judicial system one believes should exist in the European Union.

14.4 General Conclusions

A general underlying assumption of the project concerns our understanding of the functioning of the law. In this moderately instrumental view, the law is seen as a specific regulatory technique which serves legitimate public purposes while respecting the private goals of individuals and certain overarching normative principles. The advantages of looking at the law from this perspective are several.

First, this view emphasises that there is no necessarily link between law and the nation State. As law is becoming increasingly transnational and privately set, this makes the stereotypical association of it with particular nation States and their legal culture loose and contingent. Legal outcomes are more and more determined through formal and informal processes that are at most indirectly linked to traditional legislative, executive and judicial powers of particular nation states. This, however, does not necessarily imply that the complex institutionalised regulatory techniques of national law lose their theoretical or practical significance. Rather, the institutional picture becomes more complex: additional actors and layers of rules emerge, with an increasing need for meta-rules in the co-ordination of the multi-layered set of rules and practices.

Several studies of the project expressly address the related question of the optimal level of regulation. The economic theory of federalism formulates this question as one of the vertical allocation of competences in a multi-level legal system. As discussed in Chap. 2, this theory provides criteria for determining the optimal vertical allocation of regulatory competencies and the optimal extent of choice of law by private parties. From these criteria, economic analysis can deduce some *partial* normative conclusions with regard to the desirability of uniformity (centralisation) in particular regulatory areas. To be sure, the theory does not provide answers to specific policy questions; rather, it suggests an analytical framework for an in-depth analysis of the optimal degree of harmonisation or uniformity in different contexts. Many chapters also put a special emphasis on the bottom-up (as opposed to top-down) mechanisms of harmonisation. For instance, Chaps. 6–9 all discuss to what extent regional (European) regulatory networks require a uniform legal framework.

Second, while law is not conceptually attached to the nation state, it does not follow that the fundamental legal principles embedded in the laws of modern constitutional democracies necessarily have to lose ground against uncontrollable and unregulated global markets; nor is it unavoidable that they get sacrificed for technocratic or bureaucratic rationality. Our research has found that the procedural guarantees embodied in fundamental principles of the rule of law and constitutional democracy are not abandoned although the institutional practices that carry them have been subject to changes. As several contributions to this project argue, these traditional guarantees have been increasingly combined with the requirements of

good governance and stakeholder participation in providing for procedural safeguards of legitimacy. In light of these reinterpretations, the appropriate legal instruments for controlling conformity with fundamental principles have also changed towards participatory and deliberative forms of accountability.

Furthermore, looking at the law as a regulatory technique allows us to focus on the specificities of new legal mechanisms of transnational market governance. Although the exact views of individual team members might differ on this issue, throughout this project old and new regulatory techniques have been seen primarily in light of policy objectives. These objectives are in their turn understood as the outcome of deliberation and bargaining between stakeholders, as articulated or at least approximated by the regulatory measures. The relative efficiency of various regulatory mechanisms can be compared in light of these policy objectives. In addition, as Chaps. 11 and 12 on impact assessment and Chap. 5 on consequence-based reasoning stress, to the extent that legislative, administrative or judicial measures explicitly refer to the policy purposes they promote, regulation becomes more transparent and more in line with the interests it is meant to serve.

Third, along with and linked to substantive legal changes the research has identified new patterns in the interactions of national legal authorities, regulatory agencies and courts. These interactions can be either competitive or cooperative in nature and they can be located on a scale in terms of degree of institutionalisation. Relying on a number of in-depth case studies on communications and energy regulation and private law, our research demonstrated why and how regulatory networks and network agencies emerge in various economic sectors, how these fit in the already complex regulatory landscape of European law and how they exemplify practices of good market governance.

Indeed, regulators have developed new legal instruments and informal techniques for improving market governance. An important new insight of the research in this respect has been a theoretical characterisation of legal emulation as a distinct form of cooperation between national and supra-national regulatory agencies. Legal emulation can be characterised as a bottom-up mechanism of political yardstick competition. In a number of sectors, the complexity of the subject matter of the regulation has induced policy makers to design mechanisms for information pooling, learning, stakeholder participation and benchmarking. In other sectors, although such redesign of the regulatory framework seems commendable, vested interests stand in the way of rapid changes.

Finally, the project has analysed a number of new tendencies which concern legal systems at an even more fundamental level: legal decision making and legal reasoning. The increasing role and acceptance of policy analysis in legislative and administrative processes and the use of consequence-based arguments in judicial reasoning seem to reflect and express an important common feature of both national and European law in the global legal arena.

In sum, the view or rather vision of the law that emerges from this analysis is this: a regulatory technique in the service of transparent policy objectives, increasingly detached from national legal cultures, legitimised by stakeholder participation and constrained by procedural guarantees of good governance.

Against that background, it becomes apparent that faced with globalisation, national legal systems have already proven flexible in adapting to challenges. We are therefore optimistic that, as long as they adapt to their new role in the midst of this more complex globalised world, national legal systems will continue to remain very relevant to the development and the enforcement of law.

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P. Larouche and P. Cserne (eds.), *National Legal Systems and Globalization*,
DOI: 10.1007/978-90-6704-885-9,