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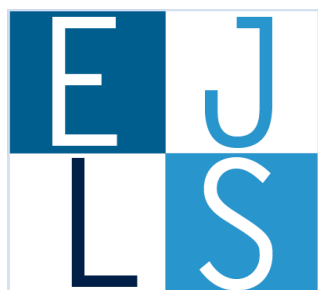
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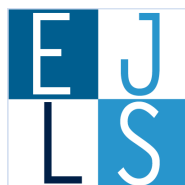
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EDITORIAL

INSIDE THE RESEARCH FACTORY

Jan Zglinski*

Being editor of a law journal is a deeply enjoyable and gratifying position, most of the time. As with most 'jobs', this has to do with the work you do and the people you do it with. A highly motivated and inspiring group of young scholars is at the heart of this journal and it has been a joy to see the EJLS family growing over the past years to more than 30 active members. What drives many of us - beyond more pragmatic concerns as career prospects - is the passion for research. If you have opened this journal and are reading these lines, chances are high that you share this passion. Being editor allows you to go beyond the status of a mere end-consumer of academic work. It grants you a privileged perspective and role. It is thrilling to be the first person to read what may become an article that changes the way we think about a certain problem. It is captivating to engage intimately with a new piece of research and ponder on the questions it poses, the approach it takes, and the conclusions it arrives at. Finally, it is greatly satisfying to watch the gradual transformation of a rough diamond - papers submitted hardly ever come polished - into its final shape. As an editor you might not be part of the *fabrique du droit*,[†] but you are actively involved in the making of legal research.

Some of the time though, being editor can be slightly less enjoyable. Running a law journal is not a frictionless exercise. The past months and years have shown two problems to appear with some regularity.

The first one regards authors, upset about their pieces being rejected. Modern academia is a demanding business and quantity is an important currency for scholars. To produce and publish one's research on a regular basis is of vital importance. This puts great pressure on academics, especially those in the early stages of their careers, a pressure that sometimes shows its ugly side during the review process. Authors protest and try to convince the editorial board of why rejecting their submission was a mistake, not always in the most polite fashion.

Receiving a negative verdict from a law journal for a piece that required months of work can be difficult (All EJLS members, young scholars themselves, are deeply sympathetic to this). Yet, it is the function of the peer review process to tell the good from the bad, the publishable from the

* Ph.D. Researcher (European University Institute), M.Jur. (Oxon).

[†] Bruno Latour, *La Fabrique Du Droit: Une Ethnographie du Conseil D'Etat* (La Découverte 2004).

unpublishable. This is not to say that a journal's peer review process cannot go terribly wrong. It can. Despite all the mechanisms which are meant to ensure an informed and objective decision, mistakes happen. Reviewers can turn out to lack knowledge in the relevant field, be unfair in their criticisms or, more commonly, deliver sloppy reviews. Yet, after so many years with the journal, I feel confident to say this happens less often than many authors would like to believe. It is deplorable, in light of all the effort put in on both sides, to see the communication between authors and journal become antagonistic sometimes.

Another event can seriously dampen the pleasure of an editor's work: to learn that an article had been submitted to multiple journals. From time to time, authors are tempted to 'keep their options open' and send their pieces to more than one law journal, a practice which not only increases the prospects of publishing at all, but also of publishing with the best journal possible. This, of course, is understandable to some extent. They have put a lot of work into their research and do not want to waste months and months waiting for a journal to eventually tell them that their piece was rejected. The EJLS has always taken this concern seriously and tried to keep the time between submission and publication decision at a minimum. Yet, for a small journal, to be informed near the end of the review process that a piece will appear elsewhere first is, to put it mildly, frustrating. Let me explain.

When submitting an article to a serious law journal, authors receive a remarkable intellectual service. I have always found it misleading to speak of it as 'peer review'. More often than not, it amounts to 'peer rework'. Just to give you a rough idea. Once a submission reaches us, it receives a first scan by our managing editors who decide whether it is in principle fit to be published. The piece is forwarded to the relevant Head of Section who will try to find two suitable editors, from either within or outside the journal, who are competent to assess the substance and quality of the paper. This may at times become a serious challenge, especially in non-mainstream areas. Both reviewers will go through the submission and closely engage with its content (research question, methodology, outcome, originality, significance for field etc.) as well as its formal dimension (presentation, structure, writing, citations). This may take the more experienced editor three to four hours; the less experienced one will easily spend double the amount of time. The suggestions for improvement are sent to the author, who will revise their piece. The implementation of these changes is supervised and critically assessed by the managing editors. It is not unusual that the article, at this point, will have to be resubmitted and the whole process, with new people, will begin anew. Finally, before going into publication, each submission receives language corrections (most of our authors are non-native speakers) and a check-up by the Editor-in-Chief.

By the end of this process, at least half a dozen of people, sometimes more, will have invested much time and effort to improve the article and make it publishable. They will have collectively turned a good paper into a publishable piece of academic work. If the journal, at this stage, is informed that a piece will appear elsewhere, this effort goes unrewarded. The prime goal of and means of competing for a law review - to be the one who first publishes an exciting and thought-provoking argument or finding - is unachieved. The loss of attention within the academic community will be a small annoyance for well-established journals. For smaller publications, it is a serious throwback.

CHANGES: TEAM, STYLE AND PAGINATION

In the world of a PhD-student-run journal little can be said to be certain, except farewells. Every one of our issues is a goodbye for some editors and a hello for others. This issue marks the departure of Cristina Blasi, Vincent Réveillère and myself. Proud of our team's accomplishments, we wish the next generation the best of luck for their projects with the journal.

Before we leave, it is my pleasure to announce some great news: the EJLS will be joining HeinOnline. This is an important achievement which will enhance the journal's searchability and, by the same token, its visibility. It has been the result of a truly collective effort, involving many journal members old and new, for whose help I am very grateful.

We have taken the cooperation with Hein as an opportunity to go over the past EJLS issues and put them into one coherent format. I would like to take this opportunity to warmly thank Loic Azoulai, Martin Scheinin and Dennis Patterson for their generous support of this endeavour. You will find, so we hope, a better legible publication that pleases the eye. Stylistic coherence comes at a price, though. It has made pagination changes of some of our previously published articles inevitable. We would like to apologize for the inconvenience this may cause, but believe this step to be in the common interest of both the journal and our authors.

IN THIS ISSUE

An excellent academic menu is awaiting our readers.

For starters, the 'New Voices' contribution by Michèle Finck takes us on a *tour de force* through the EU principle of subsidiarity. Amended by the Lisbon Treaty with a lot of hoopla, Article 5(3) TEU promised to finally grant sub-state authorities a meaningful role within the European project. Michèle challenges this position and poses the inconvenient question: is the reference to the 'local and regional level' nothing but smoke and mirrors? Has the

principle of subsidiarity, despite all great expectations, failed to render the EU polycentric?

The main course features Urška Šadl who subjects the ‘*effet utile*’ jurisprudence of the Court of Justice to a much-needed empirical analysis, debunking many myths surrounding the usage, significance and functions of the doctrine. Maciej Borowicz offers a fascinating investigation into private power and accountability in international law, drawing from a study of the International Swaps and Derivatives Association. Iris Chiu puts the EU financial regulatory architecture under the microscope, shedding light on the complexity it creates and the challenges for accountability it poses. Jaime Rodriguez Medal provides his reflections on a question that has grown increasingly complex over time: who can refer preliminary questions to the Court of Justice? The issue is rounded off with Joseph Damamme's inquiry into the handling of obesity and disability by the European and American judiciary.

Bon appétit.

**CHALLENGING THE SUBNATIONAL DIMENSION OF SUBSIDIARITY IN
EU LAW**

Michèle Finck*

This article, which forms part of the 'New Voices' series and is hence drafted as an essay rather than a proper academic article, examines the principle of subsidiarity in its application to local and regional authorities as they exist within the various Member States. While subnational authorities ('SNAs') have been studied extensively within the respective domestic contexts, their relation with other levels of public authority, such as the European Union, is less well-defined. Subsidiarity is often cast as the principle capable of recognising the existence of subnational autonomies by the EU, and guiding their interaction with the latter. This is so in particular after Article 5(3) TEU has been amended on the occasion of the Lisbon Treaty revision to include an express reference to local and regional authorities. This short essay challenges this perception of subsidiarity, putting forward that the core legal provisions that deal with subsidiarity in EU law do not allocate any meaningful role for SNAs. This is so, it is argued, because subsidiarity remains anchored in an understanding of the European Union and its legal order as composed of and shaped by the EU and the Member States to the exclusion of any other actor.

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The existence of local and regional authorities, which frequently have the competence to issue regulation, in the different Member States of the European Union is a factual truth. We know that they exist, and co-regulate with other levels of public authority, such as the Member States and the European Union. In this context the quest for a principle to guide the interaction between these multiple centres at which public authority is exercised appears to be a practical necessity. Subsidiarity is often cast as the principle capable of fulfilling that task in recognising the existence of subnational autonomies in the EU. In addition to its pre-legislative function, the principle is often presented as embodying a wider significance, a sort of

* Fellow at the London School of Economics and Lecturer in EU Law at Keble College, University of Oxford. I am grateful to Liz Fisher, Steve Weatherill, Angus Johnston and Jan Zginski for valuable feedback and discussions.

ethos for the coexistence of many centres of public authority, including those at subnational level, in the EU. This is so in particular after it has been amended on the occasion of the Lisbon Treaty revision to include an express reference to local and regional authorities.¹

My short essay challenges this perception of subsidiarity. The main argument that is developed is that the core legal provisions that deal with subsidiarity in EU law do not allocate any meaningful role for subnational authorities ('SNAs').² This is so, it is argued, because subsidiarity remains anchored in an understanding of the European Union and its legal order as composed of and shaped by the EU and the States to the exclusion of any other actor. Thus, while subsidiarity bears the promise of recognising SNAs in EU law, it is unsuccessful in doing so in practice. The conclusion this essay will accordingly reach is that the reformulation of subsidiarity to recognise SNAs is mainly a rhetorical twist, which appears incapable of bringing about substantive change.

The analysis that leads me to reach this conclusion is structured as follows. I will first briefly recall the structure of the European legal order in which regulation originates at a multitude of centres of public authority, including the local and regional scales. The analysis will then focus on subsidiarity as the posterchild of a multi-level EU and illustrate that Article 5(3) TEU was specifically designed to recognise the subnational dimension of contemporary governance patterns. It will then be seen that despite the promise subsidiarity bears in this respect, it is in fact unable to distance itself from the bi-centric spirit of EU law. Just as the European Treaties more generally, subsidiarity recognises only the Member States and the EU, not local and regional authorities, as autonomous regulators.

I. THE EU AS A POLYCENTRIC AND POROUS LEGAL SPACE

The starting point of my observations is that the EU legal order is characterised by polycentricity and porosity. The notion of *polycentricity* captures the co-existence of many levels of public authority within the complex European legal space. Due to the limited space available to me I will not explain this concept in depth, but rather limit myself to providing an overview thereof. Polycentricity emphasizes that there are many levels - international, supranational, national, regional, local - at which norms are created. According to Ostrom 'Polycentric systems are characterized by multiple governing authorities at differing scales rather than a monocentric

¹ Art 5(3) TEU.

² Such SNAs take have very different statuses, competences and names under the domestic provisions of the various EU Member States. For the sake of simplicity they will all be generically referred to as SNAs.

unit.³ Within each unit, regulation is issued independently with the advantage of using local knowledge.⁴ At the same time, however, such regulatory activity is fundamentally interdependent as the various units learn from other units that ‘are also engaged in trial-and-error learning processes.’⁵

The interaction between various scales of public authority in the EU mirrors such simultaneous independence and interdependence. On the one hand, each of these units has the capacity to regulate in some domains. On the other hand, their norm-generating capacity is limited by the regulatory competence of other units and the norms they have already created. Polycentricity thus captures that there are many levels of public authority that coexist within the EU. It comes accompanied by another phenomenon, that can be labelled as porosity, which in turn reflects that the borders dividing these various levels of public authority are permeable so that ideas and norms leak from one level to another, giving rise to a creative process of cross-fertilization. In the EU then, a multitude of levels of public authority interconnect and intertwine and their interaction generates a number of legal dynamics. This will not be outlined in depth, but an example serves to illustrate my point.

Let’s take *Omega*, one of those cases known to any student of EU law.⁶ While this decision has often been understood as concerning the relation between a national constitutional imperative and EU internal market principles, a closer look reveals that *Omega* can also be understood as an instance of polycentricity and porosity in EU law. The German city of Bonn had independently decided to ban laser games within its territory; a ban that was subsequently challenged for it conflicted with the freedom to provide services under Article 56 TFEU. The CJEU however accepted the local ban as legitimate because it aimed at the protection of public order and human dignity and even declared human dignity to be a general principle of EU law, applicable throughout the territory of the EU, thus extending its reach from the local to the supranational. A local norm hence coexists with a supranational level (polycentricity), conflicts with it, but can nonetheless stand and even influence substantive change in EU law (porosity). Polycentricity and porosity are of course merely labels that I use because I find them helpful in portraying the interaction between various scales in the EU. They are more complex in nature than indicated here and some may contest that they offer any value at all in describing the EU. That may be true, but for the purposes of this essay it should be noted that they reflect a state of

³ Elinor Ostrom, ‘Polycentric Systems for Coping with Collective Action and Global Environmental Change’ (2010) 20 *Global Environmental Change* 550, 552.

⁴ *ibid.*

⁵ *ibid.*

⁶ Case C-36/02 *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundestadt Bonn* [2004] ECR-09609.

affairs that subsidiarity seeks to capture, an argument which I outline further just below.

It is the subnational dimension of this polycentric legal order that I am particularly interested in. SNAs are an intriguing component thereof as they doubtlessly exist; yet the European Treaties largely ignore their existence. The Treaties engage at length with the relation between the Member States and the EU, but not SNAs. The bi-centric spirit of the European Treaties can for instance be perceived in the context of the rules on the division of competence in the EU, which envisage only the Member States and the EU as levels of public authority competent to craft regulation.⁷ While the existence of SNAs cannot be called into question, the Treaties remain predominantly bi-centric in nature. Such bi-centricity of course reflects the special status of the Member States as masters of the Treaties, which have created the EU and continue to determine its shape. In light of the importance of the Member States in EU integration, EU law may very well choose to only engage with these States and not SNAs - rendering any recognition of SNAs, and the search for any mechanism to fulfil that task, unnecessary. This is not, however, the route that has been chosen. Two provisions of EU law, namely Article 4(2) TEU and Article 5(3) TEU indeed express a clear intention to provide some kind of recognition for SNAs in EU law. These two provisions, expressly referring to SNAs and the EU's duty to acknowledge their existence cannot be understood in any other way as expressing a willingness to recognise subnational autonomies. Whereas the reference to subsidiarity in EU primary law did not previously mention SNAs, it was amended in 2009 with the sole purpose of including such a reference. Article 5(3) TEU now reads as follows:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Before the Lisbon Treaty revision subsidiarity existed in EU law, but applied only to the Member States and the EU. Its reformulation to include local and regional authorities witnesses an intention to recognise these autonomies in EU law, even though the exact contours of such recognition remain subject to debate.⁸ The remaining part of this paper examines whether this strategy is

⁷ See Art 3 TFEU, Art 4 TFEU and Art 6 TFEU.

⁸ The main questions are whether they are recognized directly or only indirectly through the Member State and, if the former is the case, whether they are perceived to have the

prone to success. It will undertake an analysis of the ability of subsidiarity to recognise local and regional autonomies as components of the polycentric EU and reach the conclusion that it is incapable of doing so. The essay will show that despite the attempt to move away from bi-centricity the principle remains deeply anchored in the bi-centric spirit of the European Treaties.

II. THE PRINCIPLE OF SUBSIDIARITY

Subsidiarity is a pre-legislative procedural requirement that regulates the exercise of regulatory competence (rather than its allocation) in the EU.⁹ In areas of non-exclusive EU competence the subsidiarity question unveils whether the EU should regulate or not. In addition, the spirit of the subsidiarity principle is presumed to operate on a larger scale than just the pure pre-legislative setting.¹⁰ There is indeed a common assumption that subsidiarity more widely symbolises the coexistence of various levels of public authority in the EU, making it a catchphrase used to state that European integration does not threaten the existence and regulatory competence of domestic authorities. It has also been argued that subsidiarity can be understood as ‘a way of enhancing pluralism and the diversity of national values’.¹¹

It is particularly noteworthy in this regard that subsidiarity is frequently presented as the posterchild of a multi-level EU that recognises SNAs.¹² After all the German Länder played a prominent role behind the insertion of the principle into the Maastricht Treaty.¹³ Subsidiarity has been labelled as ‘a principle constitutive of a multilevel governance in Europe’¹⁴ as well as an ‘element connecting the different levels of governance and government and as a technique of making flexible the map of competences drawn by the treaties or the constitutions’.¹⁵ Some have put forward that with the entry into force of

same importance as Member States. I examine this question at length in my doctoral thesis and there is no space to reproduce this examination in this essay.

⁹ Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union*, Robert Bray (ed) (2nd edn, Sweet&Maxwell 2005), 102.

¹⁰ See inter alia Gráinne de Búrca, ‘Reappraising Subsidiarity's Significance After Amsterdam’ (2000) Harvard Jean Monnet Working Paper 7/99.

¹¹ Paul Craig, ‘Subsidiarity: A Political and Legal Analysis’ (2012) 50(1) *Journal of Common Market Studies* 72, 73.

¹² This is not least reflected by Art 5(3) TEU, which henceforth refers also to the local and regional levels of government.

¹³ Reimer von Borries and Malte Hauschild, ‘Implementing the Subsidiarity Principle’ (1999) 5 *Columbia Journal of European Law* 369, 371-72.

¹⁴ Ken Endo, ‘Subsidiarity and Its Enemies: To What Extent is Sovereignty Contested in the Mixed Commonwealth of Europe?’ (2001) EUI Working Paper RSC 2001/24, 24.

¹⁵ Guiseppe Martinico, ‘Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union’ (2011) *European Public Law* 652.

Article 5(3) TEU, ‘subsidiarity now penetrates below the Member State level, and requires examination of the regional issues’.¹⁶ This echoes the conclusion reached above: the current formulation of the principle can only be understood as an attempt to recognise polycentricity in EU law. Cygan argued that:

Because the post-Lisbon version of Article 5 TEU explicitly refers to the legislative capacity of regional governance, this means that formal consideration of regional competences, together with the legislative capacity of regional institutions, is now an integral part of the legislative process. This ranges from the consideration of regional impact of a legislative proposal within the Commission’s Impact Assessments, to the ability of the CoR to seek judicial review of a legislative proposal for non-compliance with the principle of subsidiarity. It is perhaps the ability of the CoR to engage in subsidiarity monitoring under Protocol 2 and alongside national parliaments which offers the most effective opportunities.¹⁷

In examining whether subsidiarity manages to achieve these objectives just below, I find that despite its intention, subsidiarity remains incapable of doing so. The reason for this incapability is that the principle remains deeply anchored in the bi-centricity encountered elsewhere in the Treaties as well as the assumption that the various levels of public authority are self-contained. Subsidiarity reflects the bi-centricity inherent to the Treaties rather than the EU’s polycentric reality. This is so because Article 5(3) TEU establishes a two-part, not a three-part test. It enquires whether the goals of the proposed action can be achieved by the Member States (either at central, regional or local level). If this is not found to be the case, it is for the EU to regulate. The provision does *not* ask whether (i) the objectives can be best achieved at subnational level, (ii) if not, at national level, and that if that is not so, then (iii) the case for supranational legislation is made.¹⁸ Local and regional

¹⁶ Joxerramon Bengoetxea, ‘Autonomous Constitutional Regions in a Federal Europe’, in G De Baere E Cloots, S Sottiaux (eds), *Federalism in the European Union* (Hart 2012) 238.

¹⁷ Adam Cygan, ‘The Regions Within Multi-Level Governance: Enhanced Opportunity for Improved Accountability?’ (2014) 21(2) *The Maastricht Journal of European and Comparative Law* 265, 268.

¹⁸ This gives rise to a presumption that the Member State should in principle regulate unless there are compelling reasons for the EU to do so. As seen further below, this is not, however, how the principle operates in practice. On this see also Adam Cygan, ‘The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments’ (2011) 36 *European Law Review* 478, 481.

authorities are recognised to exist, but only in an indirect capacity as it is for the Member States to decide whether they should be classified as potential regulators - by the Member States, and not the EU.

As per Article 5(3) TEU, either the national or the supranational is considered to be the appropriate scale of regulation. In the former scenario, it is for the State to decide whether to regulate in a centralised or a decentralised manner. This maintains the monolithic conception of statehood as from the perspective of EU law the Member State is the regulating instance. While the State may internally designate SNAs as regulators, EU law does not engage directly with their regulatory capacity. Article 5(3) TEU leaves it to the Member States to 'decide according to their own constitution whether to apply the principle domestically as well'.¹⁹ From the supranational perspective it does not matter whether the Member State legislates at central, regional, or local level. Any regulatory measure originating within the Member State is considered to be that of the Member State. This sketches a division of public authority alongside two centres: the national and the supranational.

Moreover, instead of recognising the inherent interconnection between various scales of public authority, subsidiarity takes their division for granted. The EU and its Member States are often understood as 'two independent and autonomous spheres of power',²⁰ a fact echoed by the division of competence inherent to the Treaties, which recognises that States and the Union regulate, but not SNAs. It is, however, questionable whether such an assumption of division reflects reality in all cases as it is indeed well known that regional and local governments are often endowed with a law-making capacity. Subsidiarity nonetheless attempts to create the impression of a bi-centric division of public authority. As de Búrca has noted, Member States' attempt to set clear competence boundaries in the Treaties 'reflects a more fundamental wish to protect the integrity of the boundaries of the state polity'.²¹ The protection of boundaries stands very much at odds with the EU integrating the local and regional levels of government for it reinforces rather than weakens the dividing borders between them. What is more, by definition the protection of State boundaries mandates against any independent recognition of the subnational entities making up the Member State. The attachment to bi-centricity and the denial of porosity are also evident in Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality and the

¹⁹ Reimer von Borries and Malte Hauschild, 'Implementing the Subsidiarity Principle' (1999) 5 *Columbia Journal of European Law* 369, 374.

²⁰ Fernanda Nicola, 'Invisible Cities in Europe' (2012) 35 *Fordham International Law Journal* 1286.

²¹ Gráinne de Búrca, 'Setting Constitutional Limits to EU Competence?' *Faculdade de Direito da Universidade Nova de Lisboa Francisco Lucas Pires Working Paper Series on European Constitutionalism Working Paper* 2001/02, 12.

therein-enshrined Early Warning System.²² It will be seen that, just as Article 5(3) TEU itself, the corresponding Protocol bears the promise of recognising polycentricity but cannot deliver that promise.

III. PROTOCOL NO 2

The new formulation of Article 5(3) TEU is not the sole innovation brought about by the Lisbon Treaty with regard to subsidiarity. There is also a revised version of Protocol No 2 that has been said to lead to a procedural thickening of the subsidiarity principle.²³ Protocol No 2 refers, on a number of occasions, to the subnational levels of government. In the context of this essay this raises the question whether it is capable of recognising polycentricity and porosity.

Article 2 of the Protocol provides that before proposing legislative acts, the Commission ‘shall consult widely. Such consultation shall, where appropriate, take into account the regional and local dimension of the action envisaged.’²⁴ This requirement mandates that the Commission consult a number of actors, including SNAs, in the context of its own legislative activity. SNAs are, however, solely recognised as actors EU legislation impacts upon - as subjects and implementers of EU law rather than autonomous regulators. The same conclusion emerges with regard to Article 5 of the Protocol, which establishes that EU directives must contain an assessment of ‘the rules to be put in place by Member States, including, where necessary, the regional legislation.’²⁵ This requirement seeks to ascertain the impact of EU legislation on domestic authorities - in their implementing capacity - rather than in their role of autonomous regulators. The same provision further provides that EU draft legislative acts shall take account of financial and administrative burdens ‘falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimized and commensurate with the objective to be achieved.’ SNAs, just as the other actors referred to, are subject to EU law and the supranational legislative process should be sensitive towards the effects this will have on them.

Article 5(3) TEU and Protocol No 2 accordingly recognise the existence of subnational authorities - however mainly as subjects and implementers of EU law rather than autonomous regulators. This would be possible even in absence of a reference to subnational authorities in Article 5(3) TEU. The

²² Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2008] OJ C115/206 (hereinafter referred to as ‘Protocol No 2’).

²³ Sanja Bogojević and Xavier Groussot, ‘Subsidiarity as a Procedural Safeguard of Federalism’, in Loic Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014), 234.

²⁴ Art 2 of Protocol No 2.

²⁵ Art 5 of Protocol No 2.

relationship between SNAs and the EU that is envisaged is indeed of a purely indirect nature and does not elevate SNAs to be recognised as autonomous levels of public authority in their own right. Whereas Article 5(3) TEU envisages the subnational dimension as a scale of public authority at which regulation is issued, Protocol No 2 focuses on their function as implementers of EU law. Local and regional authorities are portrayed as passive outsiders rather than active insiders to EU affairs. This echoes the conclusion reached above with regard to Article 5(3) TEU, namely that while subsidiarity on its face seems to move away from bi-centricity to create space for SNAs in EU law, this does not in fact appear to be the case as the latter continue to be recognised solely in an indirect as opposed to direct manner. The next section deals with the so-called Early Warning System; a new mechanism enshrined in Protocol No 2, which on its face bears a lot of promise for the recognition of polycentricity in EU law.

IV. THE EARLY WARNING SYSTEM

Article 4 of Protocol No 2 obliges the Commission, the European Parliament and the Council to forward their draft legislative acts to national Parliaments. Article 6 of Protocol No 2 sets out the modalities of this procedure:

Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

This is commonly referred to as the 'Early Warning System' ('EWS'), a 'pre-legislative constitutional intervention device'²⁶ designed to give national Parliaments, which have lost power as a result of European integration, a say in the EU legislative process.²⁷ In its current form, the EWS allows national parliaments to issue a reasoned opinion when they believe that an EU draft legislative act violates subsidiarity. If more than one third of national parliaments raise a reasoned opinion, the proposal must be reviewed. The initiating institution can, however, decide to maintain, amend, or withdraw

²⁶ Cygan (n 17) 481.

²⁷ Philipp Kiiver, 'The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity' (2008) 15(1) Maastricht Journal of European and Comparative Law 77, 77.

the draft and must provide reasons for its decision.²⁸ If the reasoned opinions represent at least half of all votes assigned to national Parliaments, the Commission must review the draft legislative act, and may decide to maintain, amend or withdraw the draft. If it decides to maintain the draft, it must issue a reasoned opinion on the draft's compliance with Article 5(3) TEU.²⁹ The reasoned opinion is subsequently forwarded to the European Parliament and Council who have the final word on the matter. This mechanism gives force to Article 12 TEU, pursuant to which national parliaments contribute actively to the good functioning of the Union.³⁰

Article 6 of Protocol No 2's reference to 'national' parliaments triggers the question whether, and if yes, to which extent, regional parliaments participate in the operation of the EWS. Regional parliaments are indeed just as likely as national parliaments to lose some of their decision-making abilities as a consequence of European integration, so that the rationale behind the EWS would also apply to them. It will be seen that five distinct avenues exist for SNAs to contribute to the EWS. Importantly, however, none of these avenues recognises SNAs as integral components of the polycentric EU.

First, Article 6 of the Protocol provides that it is for each national parliament 'to consult, where appropriate, regional parliaments with legislative powers.' This reflects that European integration not only impacts on national, but also subnational political power. Subnational parliaments are, however, consulted through the Member State, not directly by the EU, and States have discretion whether they wish to do so. Bi-centricity stands affirmed in this regard. Second, SNAs may participate in the EWS in those Member States with a bicameral parliamentary system in which one chamber is composed of regional representatives. In such a scenario this chamber has one of the two votes attributed to each national parliament in the context of the EWS. This is for instance the case of the German Bundesrat and the Austrian Bundesrat.³¹ The EWS allows regional parliaments to intervene in the EU

²⁸ See Art 7(2) of the Protocol No 2. According to Art 6 of the Protocol, national parliaments have eight weeks from the date of transmission of a draft legislative act to send a reasoned opinion. The threshold is $\frac{1}{4}$ in the case of a draft legislative act based on Art 76 TFEU.

²⁹ Art 7(3) of the Protocol No 2.

³⁰ The first yellow card was issued in 2012 as a consequence of a EU legislative proposal on the right to strike. See Federico Fabbrini and Katarzyna Granat, 'Yellow Card, But No Foul': The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike' (2013) 50(1) Common Market Law Review 115.

³¹ See also Josu Osés Abando, 'Early Warning and Regional Parliaments: In Search of a New Model. Suggestions from the Basque Experience' (2013) 5(2) Perspectives on Federalism 74. See also Philipp Kiiver, 'The conduct of subsidiarity checks of EU legislative

decision-making and have their vote cast. However, from the perspective of EU law, they fall under the definition of ‘national’ parliament. They act on behalf of the State where this is provided for under domestic procedures. From the perspective of EU law, they however act as a Member State parliament rather than that of an SNA, affirming bicentricity rather than polycentricity. Third, regional parliaments can be considered to be national parliaments and accordingly directly participate in the EWM. Declaration 51, which only applies to one Member States, provides that:

Belgium wishes to make clear that, in accordance with its constitutional law, not only the Chamber of Representatives and Senate of the Federal Parliament but also the parliamentary assemblies of the Communities and the Regions act, in terms of the competences exercised by the Union, as components of the national parliamentary system or chambers of the national Parliament.

Belgium has created an avenue for its regional parliaments to be recognised as ‘national parliaments’. This allows regional legislatures to directly intervene in the EWS without the need to pass through a secondary chamber at national level. Declaration 51 allows the involvement of regional parliaments not in their own capacity, but representing the Member State. They are ‘national’ parliaments from the perspective of EU law, reaffirming bicentricity. Fourth, a number of procedures within the respective Member States allow SNAs to transmit their concerns concerning EU draft legislative acts to the national parliament, which may then take them into account in its own reasoned opinion. Some of the Spanish regions’ statutes of autonomy for instance include provisions concerning participation in subsidiarity control.³² Abando noted that this has allowed the Basque chamber to make ‘specific contributions’ with regard to subsidiarity monitoring, but also noted that this mechanism ‘does not guarantee the taking into account of the contributions by the regional parliaments’.³³ From the perspective of EU law, such procedures are invisible, what the EWS sees is solely the final reasoned opinion submitted by the national Parliament. The former Commission President Barroso recognised in 2012 that the Commission ‘has no information as to the involvement of the respective regions in the elaboration and adoption of these opinions.’³⁴ In 2011 already the Commissioner for

proposals by national parliaments: analysis, observations and practical recommendations’ (2012) 12(4) ERA Forum 535, 544.

³² *ibid*, 78.

³³ *ibid*, 74.

³⁴ Question for written answer by MEP Izaskun Bilbao Barandica (ALDE) on the statistics on the early warning process, no. E-5865/2010, at

Interinstitutional Relations and Administration stated that ‘the Commission does not take account of the extent to which opinions of the regions are reflected in reports forwarded by the Member States.’³⁵ This affirms bi-centricity to the extent that from the perspective of EU law any opinion originating within the Member State is considered to be that of the Member State.

Five distinct options exist that allow SNAs to indirectly contribute to the EWS, undoubtedly widening the participatory options SNAs have when it comes to EU affairs. This aspect of the subsidiarity mechanism, however, remains firmly attached to bi-centricity. It safeguards the monolithic nature of the Member State in assuming that any action originating within the State is that of the State. The analysis that has been undertaken confirms Cygan’s conclusion that Protocol 2 is a ‘state-centric process of subsidiarity review whose objective is to improve the accountability of, and inject democratic legitimacy into, what continues to be an equally state-centric legislative process.’³⁶ While the EWS offers a number of options for SNAs to indirectly participate in subsidiarity review, it continues to reflect a bi-centric spirit. As such the revised version of subsidiarity, which henceforth also refers to local and regional authorities, does not significantly alter the state of affairs that predominated under the previous version thereof that solely referred to the Member States and the EU. However, SNAs may be involved in matters of subsidiarity monitoring only by virtue of provisions of domestic, rather than EU law. This was already possible under previous formulations of subsidiarity that did not involve any reference to SNAs.

V. CONCLUSION

This essay has argued that the ability of the principle of subsidiarity, as enshrined in Article 5(3) TEU and Protocol No 2, to recognise subnational autonomies in EU law should be reconsidered. While on their face these provisions seem to directly recognise local and regional authorities as components of EU law, a second look reveals that this is not in fact the case. Even though Article 5(3) TEU was specifically amended to refer to local and regional autonomies, attempting to move away from the bi-centric spirit that otherwise characterises the European Treaties, this undertaking bears little promise of success. Despite the apparent intention, the provisions that have been examined do not provide any meaningful role for SNAs in subsidiarity

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2010-5865+0+DOC+XML+V0//EN>.

³⁵ Question for written answer E-009555/2011 on the Committee of the Regions and early warning system: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-009555+0+DOC+XML+V0//EN>.

³⁶ Cygan (n 17) 274.

control. Subsidiarity continues to apply only between the Member States and the EU, not SNAs - staying within the paradigm of bi-centricity rather than embracing polycentricity. Member States are free to implement the subsidiarity principle also on a domestic scale - extending it to local and regional authorities. This is not however mandated as a matter of EU law, where subsidiarity remains a two-part rather than a two-part test. It must thus be concluded that while subsidiarity seemed to bear the promise of recognising local and regional authorities as regulators in EU law, under its current formulation and implementation, Article 5(3) TEU limits this promise to pure rhetoric rather than actual substantive change.

THE ROLE OF *EFFET UTILE* IN PRESERVING THE CONTINUITY AND AUTHORITY OF EUROPEAN UNION LAW: EVIDENCE FROM THE CITATION WEB OF THE PRE-ACCESSION CASE LAW OF THE COURT OF JUSTICE OF THE EU

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Effet utile is one of the most contested terms in European case law. The present article empirically analyses its occurrences in the case law across time, legal fields and argumentative contexts. It thereby demonstrates that the main function of effet utile is to mitigate the entrenchment and extension of fundamental doctrines: primacy, direct effect and human rights. On this basis, the article argues that effet utile is primarily a rhetorical instrument used by the Court of Justice of the European Union to decouple legal principles from the practical effects of its decisions with the objective of persuading Member States to accept the authority of European law without compromising its normative coherence and continuity. The analysis is an important contribution to a comprehensive understanding of effet utile and offers a deeper insight into the long-term maintenance of supranational judicial authority.

Keywords: effet utile of EU law, Court of Justice of the European Union, supranational judicial authority, incrementalism, coherence.

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I. INTRODUCTION

The success of international and supranational courts hinges upon a capacity for yielding to national sensitivities and avoiding open conflict with major political actors. Yet, the authority of international and supranational courts relies on being able to demonstrate that they enforce the rule of law rather than the political interests of individual governments. Thus, effective and legitimate international and supranational adjudication largely depend on whether courts can balance the demands of law with the social, economic and political concerns of the individual states concerned.¹

The achievement of the Court of Justice of the European Union (the Court) has been extraordinary in this regard. It has experienced occasional friction with national governments and with courts in individual Member States; and it has been subjected to mounting academic criticism. However, the Court remains an influential political player that enjoys considerable interpretive (semantic) authority. Some accounts proffer it as one of the most powerful higher courts in the world.² Various scholars (largely from the fields of social and political science) have explained the remarkable success of the Court with reference to broader historic trends³ and political theory (functionalism).⁴ Others have isolated individual factors such as the mobilization of transnational legal elites;⁵ the fostering of support from EURO-associations (in particular FIDE);⁶ the manner in which legalism as an approach to the study of law has underpinned the

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¹ Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale LJ 273, 114.

² Alec Stone Sweet, 'The European Court of Justice', in P Craig and G De Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011), 121.

³ In particular the global diffusion of judicial constitutional review post World War II; see Martin Shapiro, 'The European Court of Justice' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (OUP 1999) 321.

⁴ Anne-Marie Burley and Walter Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41.

⁵ Antoine Vauchez, 'How to Become a Transnational Elite: Lawyers' Politics at the Genesis of the European Communities (1950-1970)', in Hanne Petersen and others (eds), *Paradoxes of European Legal Integration* (Ashgate 2008); Antoine Vauchez, 'Communities of International Litigators', in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (2014).

⁶ Karen J Alter, 'Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice' (1998) 52 International Organization 121, 131; Laurence R Helfer and Karen Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts' (2013) 14 Theoretical Inquiries in Law, 487; Karen J Alter, *The European Court's Political Power: Selected Essays* (OUP 2009).

(uncritical) acceptance of the case law;⁷ and the protracted passivity of national governments.⁸ From a legal point of view it has been suggested that the Court's interpretive authority has been secured by formal reasoning⁹ (tempered with majoritarian activism)¹⁰ and step by step decision making (incrementalism).¹¹ In these ways, the Court has cultivated the image of a politically neutral institution applying the *law* rather than political programs or policy agendas.¹²

The majority of explanations address the question of how the Court's jurisprudence has been received rather than particularities characteristic of it, and rarely scrutinise how societal concerns and constraints are transformed into the legal logic of the case law.¹³ There has been a notable lack of quantitative empirical studies endeavouring to systematically unpack the legal mechanisms that enable the Court to fit the law to the facts of individual cases without compromising the overall coherence and consistency of jurisprudence.¹⁴

The present article engages in this type of empirical inquiry. Its central premise is that external constraints and judicial sensitivities are reflected in judicial outcomes and in judicial language. This is particularly evident in prefabricated judicial formulas and locutions which are used to project the

⁷ Harm Schepel and Rein Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3 *European Law Journal* 165; Harm Schepel, 'The European Brotherhood of Lawyers: The Reinvention of Legal Science in the Making of European Private Law' (2007) 32 *Law & Social Inquiry* 183; J H H Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403; Antoine Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity' (2010) 16 *European Law Journal* 1.

⁸ Weiler (n 7) 2447

⁹ *ibid* 2447, Miguel P Maduro, *We, the Court : The European Court of Justice and the European Economic Constitution : A Critical Reading of Article 30 of the Ec Treaty* (Hart 1998), 10.

¹⁰ Or more specifically, formalism on the level of judicial language was mitigated with underlying policy authority in the form of majoritarian approach to the review of state regulation. See Maduro (n 9) 10.

¹¹ Trevor C Hartley, *The Foundations of European Union Law : An Introduction to the Constitutional and Administrative Law of the European Union* (7th edn, OUP 2010) See also Helfer and Slaughter (n 1) 315

¹² Burley and Mattli (n 4) 69; Maduro (n 9) 11.

¹³ See however a comprehensive analysis of the case law in term of reasoning and outcomes in Maduro (n 9).

¹⁴ For systematic qualitative empirical studies see for example Marc A Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice : Unfinished Business* (CUP 2014); Mattias Derlén and Johan Lindholm, 'Goodbye Van Gend En Loos, Hello Bosman? Using Network Analysis to Measure the Importance of Individual Cjeu Judgments' (2014) 20 *European Law Journal* 667; Loïc Azoulai, 'The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 *EJLS* 192.

autonomy, neutrality, and universality of jurisprudence.¹⁵ The article's case study is one of the most familiar formulations in European law, the so called argument of *effet utile* or the effectiveness of European law. The study unpacks the nature and the role of this term, and demonstrates that *effet utile* occurs in a specific area in a particular period and in particular argumentative contexts. Namely, it is revealed as having a distinct function: to balance the entrenchment and expansion of the fundamental doctrines of European judge-made law, primacy, direct effect and human rights. At times, this entails a full (or at least a partial) decoupling of principles from remedies or other tactics that effectively mitigate the effects of pronounced principles and doctrines either in individual cases or lines of cases. This is what scholars have described as incrementalism. Having examined the necessary empirical data concerning this, the current article argues that *effet utile* is a rhetorical instrument used to persuade Member States to accept judicial doctrines and the ensuing powers of the Court without having to compromise the coherence and continuity of law in the process.

The development of *effet utile* is usually studied as a concept of EU law within the framework of the interpretative methods and legal principles developed by the Court. This article combines such in-depth legal analysis with "citation network analysis" and "classification of cases on the basis of language use", and produces what is currently the most nuanced portrait of the Court's decision making. By underpinning qualitative legal research and a close legal reading with quantitative empirical methods, this study yields more reliable results than a purely quantitative or a purely qualitative method. The analysis seeks to broaden the legal debate on methods of interpretation and legal development, and to add to a lively but largely theoretical debate on the subject of judicial law making by international courts.¹⁶ Its main contributions stem from creating a more comprehensive understanding of *effet utile* and a more detailed portrait of the long-term process of maintaining supranational judicial authority.

¹⁵ On the latter point see Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1986-1987) 38 Hastings LJ 814, 820.

¹⁶ The creative aspect of adjudication has long been underplayed in continental legal thought. However, in recent decades it has become widely accepted that international and supranational courts make law when they interpret legal text and that they have considerable influence on international legal development. For legal debate on the subject see Ingo Venzke, *How Interpretation Makes International Law : On Semantic Change and Normative Twists* (OUP 2012); Jacob; Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice : Towards a European Jurisprudence* (OUP 1993); Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 European Journal of International Law 7.

Section Two of this work delimits the research objective and outlines the empirical materials and the approach. Section Three presents the empirical properties of the *effet utile* case law. It identifies instances of the Court's recourse to *effet utile* in the sample of historic case law,¹⁷ and contrasts them with the whole sample of historic case law, the effectiveness cases, and the entire dataset. Section Four discusses the distinct characteristics of the landmark *effet utile* cases and their influence on European law, and undertakes closer scrutiny of individual cases and groups of cases to interpret the findings qualitatively. Section Five provides a summary of the main arguments and presents the article's conclusions.

II. DELIMITING THE OBJECT OF INQUIRY

1. *Effet utile: A circle whose centre is everywhere and nowhere*

Like most international legal orders, the EU legal order has no centralised European enforcement mechanism. It must continually rely on national authorities to give it full effect. Within this framework, judicial constructs and formulas are expected to work like incantations which will trigger national compliance. Among the best known are the formulas of effectiveness of Treaty Articles and other provisions of European law, and the prohibition of unilateral measures that would damage the unity and efficacy of the common market.¹⁸

Effet utile is a familiar term in national and international law.¹⁹ It has become central in European jurisprudence: a staple in the case law of the Court of Justice for five consecutive decades, and a sturdy, constant presence in volumes of legal scholarship. Broadly speaking it is possible to paint two diverging portraits of *effet utile*, contingent on the approach taken. While the first approach can be described as more conceptual or positivist, the second is more contextual and inspired by the legal realist tradition.

¹⁷ The Court uses the term "historic case law" (in French: *jurisprudence historique*) when it refers to the important pre-accession case law, which was identified, selected and assembled for the purposes of three successive enlargements and translated into the languages of accession countries. For a detailed description please see the following section and the Court's website: http://curia.europa.eu/jcms/jcms/Jo2_14955/ (accessed 27 April 2015).

¹⁸ The paper distinguishes between *effet utile* cases and cases which deal with effectiveness in the procedural sense: namely, principle of effectiveness and equivalence cases (Rewe/Comet formula). The latter category of cases is excluded.

¹⁹ Scholars have traced the origin of useful effect back to Roman times. Anna von Oettingen, *Effet Utile Und Individuelle Rechte Im Recht Der Europäischen Union* (Nomos 2010), 25.

A large proportion of scholarship is focused on the legal nature of *effet utile* and conceptualises it as a legal principle²⁰ associated with the liberal statutory interpretation, either as a sub-category of dynamic interpretation (“the most usual functional criterion”)²¹ or as an independent method.²² Thus defined, *effet utile* is afforded a distinct and distinctive role as “*un outil indispensable*”²³ to the process of constructing the central doctrines of EU law such as direct effect, indirect effect, supremacy, and Member State liability in damages.²⁴ In this framework of understanding, *effet utile* is deemed to have wide structural effects on the European legal space.²⁵

By contrast, a narrower segment of the scholarship analyses *effet utile* from a socio-legal and more critical angle. In these accounts, *effet utile* is an empty if not a misleading rhetoric employed by the Court to “justify” innovation and divergent outcomes without substantively engaging with the goals of integration and the arguments of the parties.²⁶ This line of reasoning culminates in the definition of *effet utile* as a facade for

²⁰ *Effet utile* is often associated with the “liberal interpretation” of the Treaty. Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006), 419. The same holds for German speaking scholarship. (See the literature cited in Oettingen (n 19). See also Michael Potacs, ‘Effet Utile Als Auslegungsgrundsatz’ (2009) EuR). Recent literature broadens the legal context of *effet utile* considerably, discussing it against other principles of European law such as loyalty. For instance, Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014). Other scholars have focused on the context of justification and argumentation, for example Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP 2009) See also Jacob (n 14) 25. Nevertheless, scholarship continues to treat *effet utile* as an interpretive instrument (Klamert (n 20) 255.) either in the form of an emerging constitutional principle (Malcolm Ross, ‘Effectiveness in the European Legal Order(S): Beyond Supremacy to Constitutional Proportionality?’ (2006) 31 EL Rev 476); a meta rule of interpretation (Stefan Mayr, ‘Putting a Leash on the Court of Justice? Preconceptions in National Methodology V Effet Utile as a Meta-Rule’ (2012/13) 5 European Journal of Legal Studies 8); or a meta-policy of the Advocates General and the CJEU (Lasser (n 20) 212).

²¹ Bengoetxea (n 16) 254.

²² Sibylle Seyr, *Der Effet Utile in Der Rechtsprechung Des Eugh* (Duncker & Humblot 2008), 367.

²³ José Luís da Cruz Vilaça, ‘Le Principe De L’effet Utile Du Droit De L’union Dans La Jurisprudence De La Cour’ in Allan Rosas, Egils Levits and Yves Bot (eds), *The Court of Justice and the Construction of Europe : Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press & Springer 2012) See also Tridimas (n 20).

²⁴ See for instance Paul Craig, ‘The ECJ and *Ultra Vires* Action: A Conceptual Analysis’ (2011) 48 CMLR, 400.

²⁵ *Effet utile* is seen as the principle which more than any other structured this relationship and the European legal space more generally. Armin von Bogdandy and Michael Ioannidis, ‘Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done’ *Common Market Law Review*’ (2014) 51 *Common Market Law Review* 59, 64.

²⁶ Lasser (n 20) 236; Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012) 117.

potentially unbridled policymaking under the guise of interpretation.²⁷ Contrary to this, the present inquiry treats *effet utile* as a routine linguistic formulation in the case law of the Court rather than a rhetorical disguise or a legal principle. Its nature and role are explored in relation to the chain of argumentation (argumentative context) in which it is embedded and in relation to case outcomes.

2. *Materials and Approach*

When the new Member States acceded to the EU in 2004, 2007 and 2013 it was decided that selected, important pre-accession case-law (referred to as the historic case law) of the Court had to be translated into the languages of acceding Member States. The case law initially selected for the 2004 accession countries consisted of 948 judgments, opinions, and orders of the Court and the Court of First Instance (now General Court), dating from 1956 to April 2004. However, only 57 cases (50 decided by the Court and 7 by the General Court) were translated at the Commission's expense. The same exercise was repeated in 2007 with subsequent accessions of Bulgaria and Romania, and in 2013 when Croatia joined the EU. This assemblage of 50 cases of the Court, it has been argued, is a tribute to the judicial construction of the European legal order.²⁸

Such a selection might offer a near perfect platform for examining the tools and techniques that enabled the Court to construct the European legal order were it not for the Court's irregular and imprecise use of language and terminology. It is not possible to successfully use the standard automated search techniques employed to identify all instances where a term occurs and compile a complete sample, to arrive at a clear delimitation of the object of inquiry.²⁹ Multilingualism, often cited as the usual culprit when it comes to European terminology and concepts,³⁰ is not to blame. In French alone, the Court has referred to *plein effet*,³¹ *pleine*

²⁷ Hjalte Rasmussen, *The European Court of Justice* (Gadjura 1998); Hartley (n11) 74.

²⁸ Urska Sadl and Mikael R Madsen, 'Becoming European (Legally): Unpacking the Self-Portrait of the Eu Legal Order in the Pre-Accession Case-Law Dossiers' (Annual Conference of the Empirical Legal Studies (CELS), Berkeley November 2014).

²⁹ For instance, EurLex and Curia do not find all the usages of a term, providing an incomplete and biased sample that can best be analysed qualitatively.

³⁰ Elina Paunio and Susanna Lindroos-Hovinho, 'Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law' (2010) 16 *European Law Journal* 395; Mattias Derlén, 'Multilingual Interpretation of CJEU Case Law: Rule and Reality' (2014) 39 *European Law Review* 295

³¹ Case 14/68 *Walt Wilhelm and others v Bundeskartellamt* [1969] ECR I, para 4: "[i]f the ultimate general aim of the Treaty is to be respected, this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the common market of the Community rules on cartels and of the full effect [plein effet] of the measures adopted in implementation of those rules. Any other solution would be incompatible with the objectives of the Treaty and the character of its rules on competition."

effectivité, la pleine application, or simply *efficacité*³² while in English translations and linguistic versions the Court has used full effect, *effet utile* (in brackets after the English translation, or left untranslated), effectiveness, efficacy, practical effect and full effectiveness, often interchangeably.³³

Consequently, the selected historic case law examined in this article is first explored by looking for the following word combinations: effectiveness, practical effect, full effect, efficacy, *effet utile*, *plein effet*, *efficacité*, and *pleine application* in the full text of the judgments in English and French language versions. These instances are then recorded systematically.

Cases in which any of these formulations occur at least once are treated as “historic *effet utile* cases.” Their empirical properties such as their subject matter, reporting judges, Advocates Generals, the principles that they established, and their “importance scores” are then recorded and compared to the selected historic case law (fifty cases), to the full network consisting of 9500 judgments of the Court, and to the larger effectiveness dataset consisting of all judgments of the Court in which *effet utile*, effectiveness or *plein effet* appear in the text or the title of the document (1707 cases).³⁴

The “importance score” is assigned to cases on the basis of quantitative and qualitative criteria. In terms of the former, the article draws upon political science literature which uses Jon Kleinberg’s hub and authority scores³⁵ and adapts the method used in social and academic citation network analysis to study the structure of the case law of courts.³⁶ By way of comparison: in academic citation networks, the importance (centrality) of a scientific paper depends both on the number of citations it receives

³² Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

³³ A good example is the Court’s judgment in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

³⁴ The database is created by iCourts as a part of the project on international courts. <http://jura.ku.dk/icourts/>

³⁵ Hub and authority scores are calculated for each case by modelling the network with the adjacency matrix A of the network graph. The vectors x and y , representing all hub and authority scores in the network, can be computed as $x = ATy$ and $y = Ax$, AT being the transpose of A . Kleinberg was able to show that after a number of iterations, vectors x and y converge to x^* and y^* the principal eigenvectors of ATA and AAT , respectively. In less technical terms, hubs and authorities result from a mutually reinforcing citation setting which takes into account the number and the importance of citations. A good hub is one that points to many good authorities; a good authority is one that is pointed to by many good hubs. Jon M Kleinberg, ‘Authoritative Sources in a Hyperlinked Environment’ (1999) *Journal of the ACM (JACM)* 465, 604.

³⁶ For the first study of citation to case law see James H Fowler and others, ‘Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents’ (2007) 15 *Political Analysis*.

and on the importance of subsequent scientific papers which cite it. Similarly, the centrality of the individual case in the case citation network depends on the number and the centrality of subsequent cases that directly refer to it. Thus, in this methodology it is important to be cited; but it is more important still to be cited in important papers and cases.

The article re-works this method further to study how the influence of individual cases varied over a longer period of time, from the mid-1950s to 2013. To this end, citation graphs are constructed for each year from 1954 onwards and centrality scores for each graph are computed.³⁷ The qualitative criteria for assigning importance to cases are based on scholarly commentary (which sometimes refers to several of them as the “classics of EU law”)³⁸ and on a legal analysis of the principles which they established, expanded or reaffirmed.

III. EMPIRICAL PROPERTIES OF *EFFET UTILE* CASE LAW

This section identifies and examines the main empirical properties of the historic *effet utile* cases in a systematic manner. The first sub-section looks at the general properties of the empirical materials using descriptive statistics, the second sub-section reviews and systematises the materials on the basis of their content, and the third sub-section studies their citation patterns and the network structure using the tools of citation network analysis.

1. *Quantitative Properties of Historic Effet Utile Cases*

Of the 50 cases in the pre-accession package, 21 cases can be categorised as “historic *effet utile* cases” on the basis that they contain an express reference to either *effet utile* (9 cases), *efficacité* (6 cases), *plein effet* (1 case), *pleine efficacité* (4 cases) and *pleine application* (1 case) in the French language version. Three cases refer to two or three of these expressions interchangeably.³⁹

As a group, the historic *effet utile* cases have some general properties which must be noted at the outset. Regarding timeframe, one case was decided in the 1960s, seven cases were decided during the 1970s, eight during the 1980s, and five in early to mid-1990s. Hence, they are fairly evenly distributed between 1970s and 1990s. In terms of subject matter, according to the Court’s classification most historic *effet utile* cases are related to the internal market. In particular, they relate to the free

³⁷ This yields the charts of so-called initial authority and hub scores of 50 cases in the network, indicating the relative significance of individual cases over a more than half a century.

³⁸ Miguel Pinares Maduro and Loïc Azoulay, *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010).

³⁹ For instance *Simmenthal* (n 33).

movement of workers and freedom of establishment, to social provisions, and to competition, as shown in Figure 1. By comparison, the largest proportion of cases in the pre-accession package, also presented in Figure 1, concerns the freedom of movement of goods (FOG, 20.41%), followed by common agricultural policy (CAP, 10.20%), competition law (COMP, 14.29%), European institutions (EU INSTIT, 10.20%) and social policy (SP, 10.20%).⁴⁰

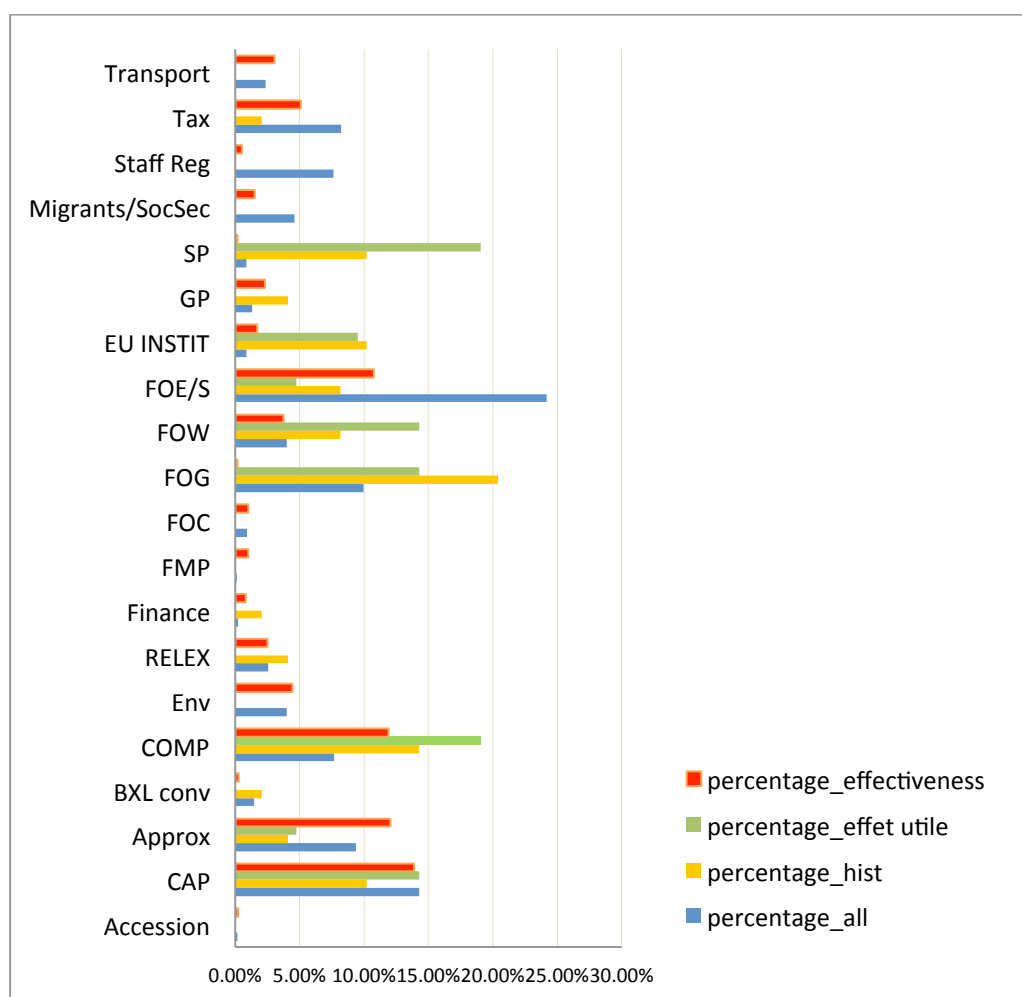


Figure 1: Subject matter (in percentages) of *effet utile* cases compared to historic case law of the Court, the effectiveness cases and all cases decided by the Court from 1954 - 2013

Lastly, historic *effet utile* cases were reported by 14 different reporting judges and accompanied by the opinions of 15 Advocates General. Thus,

⁴⁰ By comparison, in the full dataset (9581 judgments) the freedom of services and establishment (FOS/E) and common agricultural policy (CAP) are on the top of the list accounting for 24.19% and 14.26% of all cases, followed by approximation of laws (Approx, 9.37%) and the free movement of goods (FOG, 9.94%), as well as competition law (Comp) with 7.66%. Staff Regulation cases (Staff Reg), meaning the disputes initiated by the employees of EU institutions against their employers, including courts, make up 7.64% of case law and so on.

the Court's use of the term seems unrelated to the specific reporting or sitting judges or the Advocates General.

2. *Categories of Historic Effet Utile Cases Based on Qualitative Criteria*

Historic *effet utile* cases can be further systematised according to four qualitative criteria: (1) the scope of protection (the level of generality); (2) the object to which the Court's argument of *effet utile* is directed (namely, the interest it aims to protect); (3) the Court's "law-making" initiative and its practical effects (establishment of new judge-made principles and judicial consequences); (4) the argumentative context in which the term *effet utile* occurs.

The basis for the first classification (the scope of protection, or the level of generality) is the texts of individual judgments alone. The Court can either invoke the *effet utile* of the Treaty as a whole (*Reyners*⁴¹), or of European law (*Hauer*,⁴² *Factortame*⁴³), or of a specific policy area (*effet utile* of competition rules as in *Van Eycke*⁴⁴), or of a specific Treaty article (former Article 48 EC in *Bosman*⁴⁵). Most historic *effet utile* cases (13 out of 21) invoke the useful effect of Community law or norms/acts of Community law in general, while 5 invoke the effectiveness of a certain policy area, and 3 invoke the useful effect of a specific Treaty Article.

The basis for the second classification (the interest that the Court aims to protect) is not exclusively the text of the judgment but also other qualitative criteria such as the language of the Court, the subject matter assigned to the case by the Court, the keywords that accompany each judgment, and the case-law directory in which the case is placed. Concerning the object or aim of protection, *effet utile* arguments can be addressed to the (proper) functioning of the internal market (for instance *Albany*⁴⁶), the general principles of the legal order (*Hoechst*⁴⁷), the authority of EU law (*Simmenthal*⁴⁸), or the protection of the individual (*Becker*,⁴⁹ *Von Colson*,⁵⁰ or *Johnston*⁵¹). Out of 21 *effet utile* cases there are 10 cases whose

⁴¹ Case 2/74 *Jean Reyners v Belgian State* [1974] ECR 00631.

⁴² Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 03727.

⁴³ Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433.

⁴⁴ Case 267/86 *Pascal Van Eycke v ASPA NV* [1988] ECR 4769.

⁴⁵ Case C-415/93 *Union royale belge des sociétés de football association v Jean-Marc Bosman* [1995] ECR I-04921.

⁴⁶ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751.

⁴⁷ Joined cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859.

⁴⁸ *Simmenthal* (n 33).

⁴⁹ Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53.

⁵⁰ Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

main object of protection is the individual (there are 16 cases in the historic case law in this category), 1 case that deals with the authority of EU law (out of 8 cases in the historic case law), 4 cases that address the general principles of the legal order (out of 9 cases in the historic case law that can be classified as such), and 6 *effet utile* cases that concern the functioning of the internal market (out of 15 included in the historic case law).

The third classification (the law making initiative) takes into account the same factors as the second classification, as well as scholarly commentary or *notes de doctrine* (case comments) discussing individual cases as judicial contributions to the *acquis*. The vast majority of cases in which the Court relied on *effet utile* establish principles or rules that can be labelled as judge-made law (16 out of 21), a finding that holds for the majority of the pre-accession cases included in the package. In 18 out of 21 historic *effet utile* cases there are features with additional pertinence for this study. Frequently, the abstract rule or principle are disconnected from their effects (14 cases). Less often, *effet utile* appears together with a reference to the fundamental principles of the EU and common traditions (4 cases). In the aforementioned ‘disconnected’ group (14 cases), the Court delayed the effect of the principle in 4 cases and also partly or fully decoupled the principle from the remedy. In the rest of historic case law (29 cases) the Court limited the effects of the judgment only once.⁵² The 3 historic *effet utile* cases where none of the above occurs are *Cassis de Dijon*,⁵³ *Factortame* and *Becker*. *Cassis de Dijon* is a marginal case by this study’s criteria because the reference to effectiveness occurs in the context of effective fiscal supervision as a justified impediment to the internal market. *Factortame* and *Becker* are not marginal in this way. Both concerned the enforcement of directly effective rights of individuals, and the Court ruled that national courts had to protect those rights by granting a remedy, either by interim relief (*Factortame*, decided in 1990) or by directly applying EU law in cases where the Member State did not take the necessary measures to transpose the Directive (*Becker*, decided in 1982).

The fourth classification is based on the same criteria as the second classification along with a close reading of historic *effet utile* cases. The Court used the argument of *effet utile* initially in the argumentative context

⁵¹ Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

⁵² In Case 45/86 *Commission v Council* [1987] ECR 01493 concerning the legal basis for Community measures; the Court annulled the regulation in question but considered that for reasons of legal certainty its effects were to be declared definitive pursuant to Article 264 TFEU (then Article 174 EEC). As opposed to other historic effect utile cases, this mitigation of consequences was envisaged by the Treaty.

⁵³ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

of direct effect: to extend it, clarify it, or to adapt it to triangular situations. Subsequently, the Court grounded its reasoning in *Simmenthal* in the language of effectiveness to entrench primacy and link its rationale to the rationale of direct effect (*Van Duyn*,⁵⁴ *Hauer*, *Reyners*, *Commission v Belgium*⁵⁵). Lastly, the Court justified the establishment of new principles using *effet utile* (*Johnston*, *Francovich*⁵⁶), reinforced already established principles (*Hauer*), or did both (*Brasserie*,⁵⁷ *Factortame*).

3. Empirical Properties of Historic Effet Utile Cases Based on Citation Network Analysis

The above findings can be further refined using the tools of network analysis. The results indicate that as a group historic *effet utile* cases are more authoritative than other groups of cases. The average authority score of all 21 *effet utile* cases is 1.45 times higher than the average authority score of the selected pre-accession case law, 5.5 times higher than the average authority score of effectiveness cases, and ten times higher than the average authority score of all cases in the network.⁵⁸ The average hub score of historic *effet utile* cases is equivalent to the average hub score of all cases in the network.⁵⁹ This means that as a group, historic *effet utile* cases had a comparatively higher impact on EU law.

In order to illustrate which individual historic *effet utile* cases were the most influential (and in which specific periods) initial authority scores can be calculated for each case in the group. The initial authority scores chart in Figure 2 presents the relative salience of selected individual historic *effet utile* cases over a time span of 50 years.⁶⁰ We can observe that two cases in particular, *Simmenthal* and *Defrenne*,⁶¹ decided in 1978 and 1976, stand out as most authoritative. The fluctuations in their citation scores indicate that they had an uneven impact on the law over time, and the surge in initial authority scores in the early-eighties followed by another surge in the mid-

⁵⁴ Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 01337, paragraph 12.

⁵⁵ Case 149/79 *Commission v Belgium* (interim judgment) [1980] ECR 3881.

⁵⁶ Joined cases C-6/90 and C-9/90 *Andrea Francovich and others v Italy* [1991] ECR I-05357.

⁵⁷ Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-01029.

⁵⁸ For the definition and the method of calculation of hub and authority scores see (n 35).

⁵⁹ The averages of authority and scores of the groups of cases are based on the calculations of hub and authority scores using HITS algorithm.

⁶⁰ The initial authority scores for every case represented in Figure 3 are calculated from the date when the case was decided until 2013 when the last acceding nation became a full member of the EU. We take a snapshot of the network for every year and compute the initial hub and authority scores. We then extract the initial authority scores of the selected cases which are represented in the Figure.

⁶¹ Case 43/75 *Gabrielle Defrenne v Sabena* [1976] ECR 00455.

eighties means that they had the most impact on the case law in those periods.

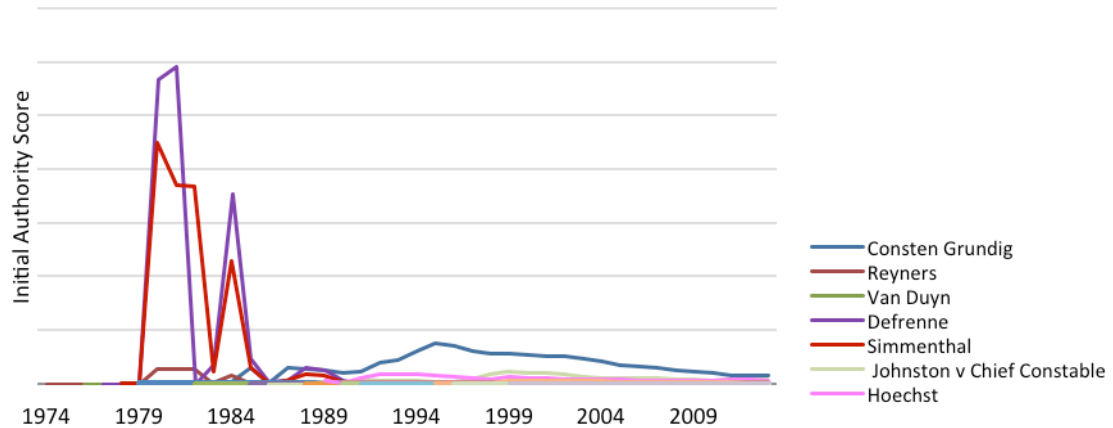


Figure 2: The chart of initial authority scores of selected influential historic *effct utile* cases

Below, Figure 3 represents a network of cases which are directly or indirectly linked to *Defrenne* and *Simmenthal*. Namely, a network encompassing cases which explicitly refer to either of these judgements, or cases linked by citation to earlier direct references to them.⁶² The network structure attests to the far-reaching impact of *Defrenne* and *Simmenthal*, especially on the law of remedies and the protection of the individual. Figure 3 also shows the proximity of *Defrenne* and *Simmenthal* to *Van Gend*⁶³ and *Costa v ENEL*,⁶⁴ which further confirms the link between historic *effct utile* cases and the cases which proclaim the distinctiveness of the legal order and its authority.

In fact, as demonstrated in Figure 4, *Van Gend*,⁶⁵ *Defrenne* and *Simmenthal* have nearly identical citation patterns. Moreover, the peaks in their

⁶² The network in Figure 3 is a sub-network of the full network, whereby the latter consists of all judgments of the Court. The sub-network in Figure 3 is built by extracting a smaller segment from the full network, concretely the *Simmenthal* and the *Defrenne* cases and their inward and outward citations using Gephi software (union of ego networks, depth 1). It is composed of all cases that *Simmenthal* and/or *Defrenne* cite, and the cases which cite *Simmenthal* and/or *Defrenne*, and cases that are directly connected to the latter cases with a citation.

⁶³ Case 26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I.

⁶⁴ Case 6/64 *Costa v E.N.E.L.* [1964] ECR 585.

⁶⁵ *Van Gend* was not cited much until the late-seventies and the early-eighties. This is partly due to the Court's practice of not referring to case law directly which changed in the late-seventies. However, other historic cases decided in the same period have higher citation scores (notably *Reyners*, Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 83, and Joined cases 56 and 58/64 *Consten and Grundig* [1966] ECR0299).

authority scores correspond to a period of integration that has been characterised as constitutional mutation in the form of expansion of Community jurisdiction and the de facto disappearance of the principle of enumerated powers.⁶⁶

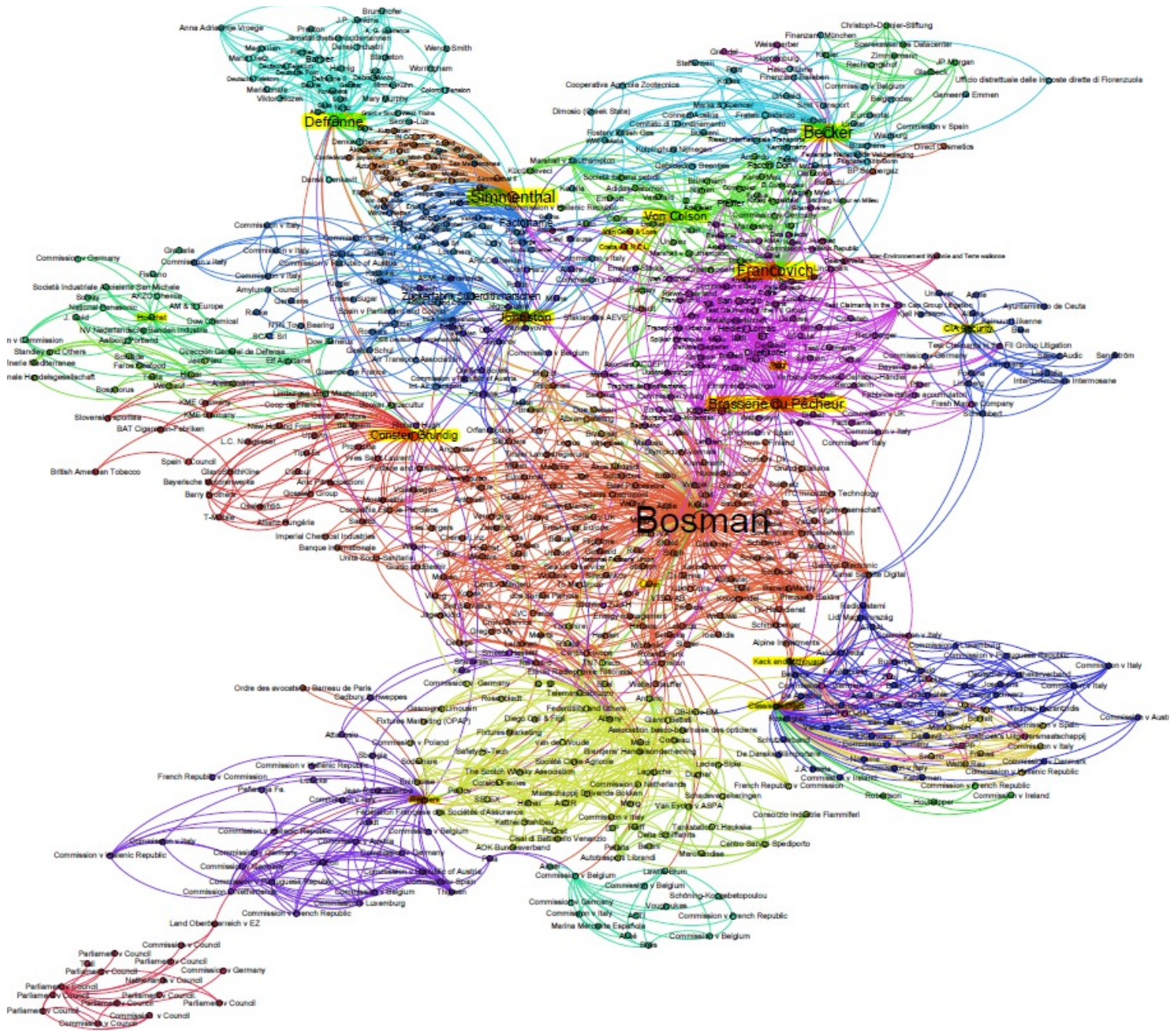


Figure 3: The sub-network of *Defrenne* and *Simmenthal*

⁶⁶ Weiler (n 7) 2435.

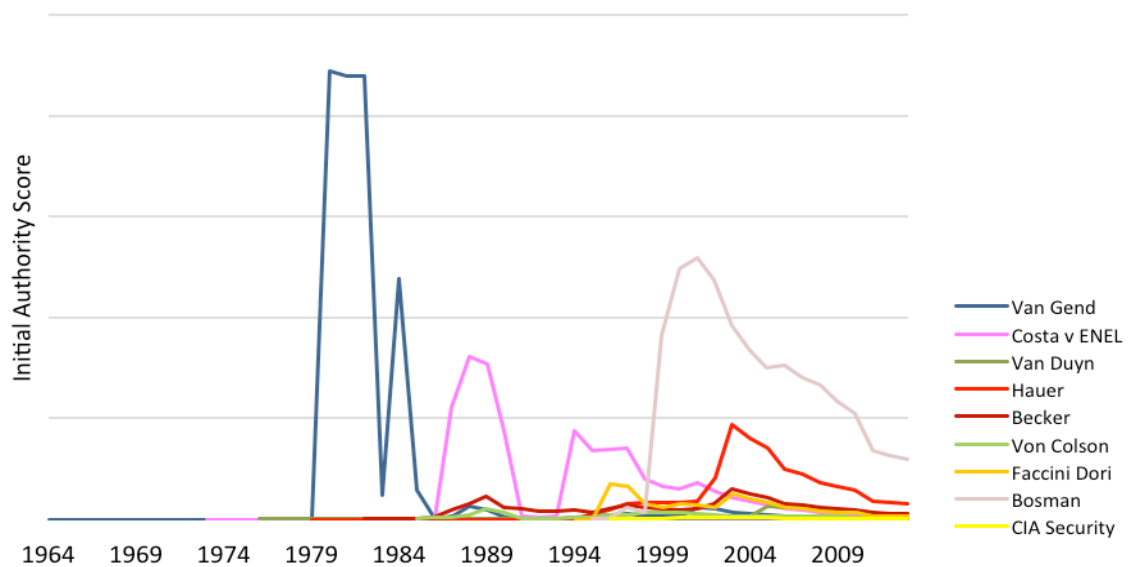


Figure 4: The initial authority scores of selected historic case law

By contrast, *Defrenne* and *Simmenthal* have a shorter incubation period compared to *Van Gend* and *Costa v ENEL*, and to similar cases in the historic case law package such as *ERTA*⁶⁷ or *Les Verts*⁶⁸ which are considered to be of fundamental importance to EU law. On average, historic cases peak about 10 years after they are handed down. These findings strongly suggest that the full effect of direct effect and primacy was delayed.

To sum up, the findings of this empirical analysis suggest that *effet utile* cases have three distinct characteristics. First, they are more authoritative. Second, their impact on the case law is considerable but uneven in terms of the object of protection and with regard to the time period. Third, they are characterised by selective application of the principles that they proclaim. In the following section these characteristics will be explored in greater detail.

IV. THE ARGUMENT OF *EFFET UTILE* IN HISTORIC *EFFET UTILE* CASES: A LEGAL ANALYSIS

The argument of *effet utile* first appeared in 1961 in the *Steenkolenmijnen Limburg*⁶⁹ case alongside the so-called retained powers formula (one of the most frequently used and well-known formulas of European law).⁷⁰ The Court used it to balance the Community of Six's interest in healthy competition against Germany's interest in giving bonuses to workers which created a competitive advantage for German companies that

⁶⁷ Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.

⁶⁸ Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339.

⁶⁹ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1.

⁷⁰ Azoulai (n 14) 192.

distorted competition. The problem was how to establish authority in the fields related to competition such as the social security and labour market to which the German bonuses were related. The Court stressed that the Community could impinge on national sovereignty (directly translated from the French: permit the incursions of Community competence) only in order to ensure that the *effet utile* of the Treaty was not *considerably* weakened and its aims and purposes were not *seriously* compromised.

The Court did not use the classical formulation of *effet utile* in *Van Gend* and *Costa v ENEL*, but referred to the executive force of Community law (*Costa v ENEL*), the effectiveness of public enforcement procedures (*Van Gend*), and to the vigilance of the individuals whose rights were at stake to *effectively* enforce European law (*Van Gend*). This may have been due to the fact that the term had hitherto only been used to negotiate the division of competences and not to refer to a special character of European law; or it may have been an indication that the Court felt encouraged by the strong support of FIDE and the Commission which rendered legal diplomacy unnecessary.⁷¹

In historic *effet utile* cases, the reasoning of *Steenkolenmijnen* is reinforced by creating links to either the rationale of *Van Gend* (the protection of the individual) or *Costa v ENEL* (the autonomous legal system which prohibits subsequent unilateral measures). However, as will be demonstrated, the concrete consequences of the judicial extensions of doctrines are rarely severe for the Member States involved. The following sub-sections present three distinct uses of the argument of *effet utile* by the Court in more detail: (1) the decoupling of the legal principle from the concrete remedy which is the most pervasive use; (2) the repeated appeal to fundamental legal principles of EU law; and (3) the evocation of common goals and unity in prefabricated formulas and locutions.

1. Principle and Practice

In several historic *effet utile* cases the Court completely or partially detached the practical effects of the judgments from the declared legal principles and newly established abstract concepts. In other cases, the consequences of particular decisions in terms of remedies for the applicants affected the concerned Member State only marginally.

In *Van Duyn* (1974) the Court used *effet utile* to extend direct effect to directives. In the concrete case in question, this also implied that in principle the Member States lost the ultimate authority for the

⁷¹ See Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity' See also Morten Rasmussen, 'From Costa V. Enel to the Treaties of Rome – a Brief History of a Legal Revolution', in Luís Miguel P Maduro and Loïc Azoulay (eds), *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010).

interpretation of the concept of public policy (which was to become subject to control by the institutions of the Community, notably the Court). Nevertheless, the Court conceded that under “particular circumstances” the competent national authorities should be granted discretion.⁷² This effectively decoupled the newly extended doctrine of direct effect of directives and the proclamation of authority of the Court from the remedy in the concrete case. The UK could effectively refuse entry to Ms Van Duyn for being a member of the church of scientology.

Reyners (1974) relaxed the conditions for direct effect in the area of freedom of establishment. Following this case, Treaty articles that required implementing measures could in principle have direct effect contrary to what was a clear requirement of the condition of unconditionality for direct effect which was set in *Van Gend*. The ruling seems bold, encroaching upon the freedom of the Member States to draw up a list of professions reserved for their nationals. Yet, while the applicant in the national court may have been a Dutch national, he was also a Belgian lawyer (a native Dutch speaker with a Belgian law degree; hardly a foreigner). While the principle was demanding, the remedy was not.

In both cases the Court renegotiated the executive force of Community law in terms of *effet utile*, and reiterated the argument from *Costa v ENEL* (“to avoid the effectiveness of the Treaty being defeated by unilateral provisions of Member States”⁷³). According to the Court, the “Community character of the limits imposed”⁷⁴ by the EU on permissible exceptions to the principle of freedom of establishment and the free movement of workers prevented the Member States from unilaterally and individually drawing up a list of professions reserved for their own nationals (*Reyners*), or unilaterally defining public policy (*Van Duyn*). The move was rhetorical in *Reyners*, but practical in *Van Duyn*. Both cases were decided in 1974. Interestingly, the Court did not extend its reasoning in *Reyners* to the free movement of workers in a subsequent case that involved professions connected to the exercise of State authority in *Commission v Belgium*.

In *Commission v Belgium* (1980) the Court’s central argument was closer to its reasoning in *Hauer* and in *Internationale Handelsgesellschaft*.⁷⁵ The Court reiterated the formulation of the unity and efficacy of Community law to balance the legitimate interests of individual Member States with a common interest in ensuring the effectiveness of the Treaty and the equality of treatment of *all* nationals of *all* Member States. Concretely, it held that as a matter of principle domestic laws of individual Member

⁷² *Van Duyn*, para 18.

⁷³ *Reyners*, para 50.

⁷⁴ *Reyners*, para 50.

⁷⁵ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

States could serve as a basis for the interpretation of the Community concept of public service. Nonetheless, the Court decoupled the principle from the remedy and softened the expansion of the autonomous legal order in practice.⁷⁶ It issued an interim judgment requesting that the Commission and the Member States draft a list of professions that would be reserved for nationals. The Court only delivered the final ruling two years later, after an extension of the deadline prompted by the disagreements between the Commission and the Member States participating in the negotiations.⁷⁷

In *Defrenne* (1976) the separation of the principle from the remedy is very evident, both linguistically and in terms of its effects in practice. The Court extended direct effect to private disputes (the so called horizontal direct effect) via effectiveness, which required a considerable re-balancing of the social and the economic objectives of the common market (in favour of the former)⁷⁸ as well as of the Court's authority to attribute different weight to these principles. The establishment of the principle (and the Court's authority to re-interpret common market objectives) was mitigated by a temporal limitation of the effects of the judgment based on the considerations of legal certainty and the importance of "affected interests."⁷⁹ This reconciliatory gesture from the Court in *Defrenne* did not escape criticism. While some gave the Court credit for accepting "the responsibility to mould constitutional doctrine in order to make more acceptable the practical effects of judicial decisions"⁸⁰ others found this type of "amnesty" unacceptable.⁸¹ Additionally, the Court did not address the entire spectrum of situations that could/would lead to discrimination, but only addressed direct and overt discrimination which could be determined by "legal means."⁸² This narrowed the potential application of the judgment to a greater extent.

In *Von Colson* (1984) the Court established the doctrine of so-called indirect effect, sometimes referred to as the principle of conform interpretation.⁸³ It relied on the useful effect of directives to stress the

⁷⁶ *Commission v Belgium*, paras 23 and 24.

⁷⁷ Case 149/79 *Commission v Belgium* (final judgment of the Court of 26 May 1982) [1982] ECR 1845.

⁷⁸ *Defrenne* (n 61) para 10.

⁷⁹ *ibid*, para 74.

⁸⁰ Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Nijhoff 1986), 438 and seq.

⁸¹ A comment by Christian Philip (1976) *Revue trimestrielle de droit européen* 529.

⁸² *Defrenne* (n 61) para 18.

⁸³ On the principle of conform interpretation as a method for finding compatibility between legal norms belonging to different but coordinated systems, or for finding coherence within the system, see Joxerramon Bengoetxea, 'Conform Interpretation

obligation of national courts to provide effective remedy in cases involving gender discrimination. The Court did not consider purely nominal compensation such as reimbursement of the expenses incurred in connection with the application as adequate, effective and deterrent, but stopped short of imposing a particular sanction and gave national courts considerable discretion. Even if in principle the national courts were to interpret all national law in the light of EU law, in a concrete case a national court could implement the newly established principle by deciding the case in accordance with - ultimately - national law.

In *CIA Security* (1994)⁸⁴ the Court was called to rule on the question of whether directives could have effect on third parties: the so called incidental effect of directives. It recognised that a Member State breach of the obligation to notify the Commission regarding technical standards could affect the rights of private parties in private disputes and impact upon the greater effectiveness of Community control over internal market regulation and compliance. However, it held that in the concrete case in question a provision such as Article 4 of the 1990 Belgian Law which provided that no one may run a security firm without approval from the Home Affairs Ministry was judged compatible with Article 30 of the Treaty.

In *Bosman* (1995), which has been the Court's most intensively cited judgment, the Court dampened its ruling against the obstacles to free movement imposed by football associations by temporarily limiting the resultant economic consequences, namely the payments of the transfer fees. By contrast, the Court refused to limit the effects of the judgment related to the nationality clauses which stemmed from its previous rulings.⁸⁵

2. *The Foundations of the Community and its Fundamental Principles*

As noted, the Court has used *effet utile* to extend the doctrine of primacy (*Costa v ENEL*) by referring to the foundations of the Community (doing so more prominently still in *Simmenthal*). A shared concern resonates here: if (directly applicable) Community law were not to take precedence over national law, the foundations of the Community would be at stake. The similarity is most evident in the French language versions of the judgements where the Court uses the same expression, namely the (legal) basis of the Community. In *Simmenthal*, to recognise any legal effect of posterior national measures would amount to the denial of effectiveness of the obligations of the Member States which "*mettrait ainsi en question les*

as a Method for Balancing Autonomy and Heteronomy: Introduction' Oñati Socio-Legal Series via <http://opo.iisj.net/index.php/osls/index> (accessed 18 April 2015).

⁸⁴ Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* [1996] ECR I-2201.

⁸⁵ *Bosman*, para 145.

*bases mêmes de la Communauté*⁸⁶ (*Simmenthal*, paragraph 18). In *Costa*, the reading is that domestic provisions which could override Community law would “*mise en cause la base juridique de la Communauté elle-même*”⁸⁷ (*Costa v ENEL*, paragraph 3, third indent).

The extension of primacy in *Simmenthal* came at the expense of the competence of national constitutional courts to police the coherence of national legal orders. To compensate for the loss of authority, as a matter of principle the Court granted the Italian Constitutional Court a de facto authority to rule on the compatibility of national measures with the national constitution. The Italian Constitutional Court had previously set aside the Italian measures deemed incompatible with European law,⁸⁸ making the ruling of the Court of Justice declaratory.

As Figure 3 illustrates, *Simmenthal* is directly linked to the liability of the Member States for breaches of European law (*Francovich* and *Brasserie*), as well as to the area of judicial remedies and judicial review (*Factortame* and *Johnston*). It is well-documented that these doctrines are based directly on the effectiveness of the legal order and the ensuing obligations of the Member States. They impinge on the autonomy of the Member States to use national remedies and procedures. Figure 3 highlights the manner in which both are linked to the liability of Community institutions (*Zuckerfabrik*⁸⁹) and individuals (*Courage*⁹⁰).

Francovich established the principle of Member State liability, but initially only in cases where directives lacked direct effect. According to the Court, the existence and scope of liability “must be considered in the light of the general system of the Treaty and its fundamental principles,” including direct applicability, primacy and the duty of national courts to protect individual rights,⁹¹ which until *Francovich* did not include the granting of EU remedy in the form of damages against a Member State. The Court relied primarily on effectiveness to stretch the reach of EU law in protecting individual rights. At the same time, the Court granted a certain leeway to the Member States in terms of procedural effectiveness, invoking the *Rewe/Comet*⁹² formula of procedural autonomy.⁹³ The case

⁸⁶ This is translated as “without the legal basis of the Community itself being called into question”.

⁸⁷ Translated as “would thus imperil the very foundations”.

⁸⁸ *Simmenthal*, paras 8 and 9 (n 33).

⁸⁹ Case 5-71 *Aktien-Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975.

⁹⁰ Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-06297.

⁹¹ *Francovich* (n 56), para 30.

⁹² Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 and Case 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043.

seemed initially to evince strong rhetorical and doctrinal positions. However, in practice *Francovich* was the sequel of a lengthy dispute between Italy and the Commission, and followed Italy's "previous conviction" by the Court in 1989 for not implementing the directive at stake.⁹⁴ In a subsequent ruling the Court accepted Italy's interpretation of Directive 80/987/EEC, limiting compensation according to national law and regulations pertaining to insolvency procedures. The compensation to the plaintiffs was ultimately denied.⁹⁵

In *Brasserie du Pecheur*⁹⁶ the Court extended the *Francovich* liability to the legislative branch. It relied on *Francovich*, paragraph 33 to stress the adverse effects of the breaches of Community law on its full effectiveness. According to the Court, this also held true in cases of directly effective provisions of Community law. In fact, it was deemed "even more so" in those cases, since damages were a "necessary corollary of the direct effect." In *Francovich*, paragraph 34, however, the Court held that the possibility to claim damages was "*particularly indispensable where [...] the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.*"⁹⁷ Again, the effectiveness argument of *Francovich*, which justified damages in the absence of direct effect, was extended to cases where Community provisions were directly effective, whereby the formulation remained basically unchanged. In both instances, the *a fortiori* argument was employed to underpin the Court's line of effectiveness reasoning.

In *Brasserie*, the extension of Member State liability was counter-balanced by the Court's conciliatory provisions. First, the Court stressed that it would take into account the "accepted methods of interpretation, in particular the fundamental principles of the Community legal system."⁹⁸ Second, the Court relied on the importance of uniform application for the Community legal order,⁹⁹ an instrument discussed in the next sub-section. Although the Court did not effectively detach the remedy (the potential payment of damages) from the principle, it relaxed the link between them by counterpoising rather concrete common guidelines for reparation with allowances for the Member States to apply the principle of Member State liability within their own statutory framework.¹⁰⁰

⁹³ *Francovich* (n 56), paras 42 and 43.

⁹⁴ Case 22/87 *Commission v Italy* [1989] ECR I43.

⁹⁵ Case C-479/93 *Francovich v Italy* [1995] ECR I-03843.

⁹⁶ *Brasserie* (n 57).

⁹⁷ *Francovich* (n 61) para 34.

⁹⁸ *Brasserie* (n 57) para 27.

⁹⁹ *ibid*, para 33.

¹⁰⁰ *ibid*, paras 83 and 90.

3. Common Interests and the Unity of EU Law

Historic *effet utile* cases gradually link the primacy reasoning of *Costa v ENEL* to the rationale of unity and efficacy of EU law. The cases that concern the development of human rights protection situate a new field's burgeoning power and influence in an appeal to the common interest and common goals. This is particularly evident in the link between the rationale of the protection of fundamental rights and the rationale to accord primacy to EU law, illustrated below.¹⁰¹

In *Hauer*, the Court did not invent a common standard for human rights protection, but rather reaffirmed that the Community standard, articulated in *Internationale Handelsgesellschaft* (1970), was autonomous.¹⁰² In order to attenuate the entrenchment of the autonomous standard of protection, the Court referred to the common constitutional traditions of the Member States and to the Convention as factors which were already binding all Member States *before* the Court's ruling.

The reference to the constitutional traditions of the Member States as indirect sources of European human rights protection in *Hauer* is taken from *Internationale Handelsgesellschaft*, while the reference to the international treaties (in particular the ECHR) is taken from *Nold* (1974).¹⁰³ Both are used to support the argument that a common (unified) system of protection is justified because the protection of human rights is a common goal of all Member States.¹⁰⁴

The Court's rationale in *Hauer* is closely related to its rationale in *Costa v ENEL*. In *Hauer*, paragraph 14, the Court reasoned that the question of a possible infringement of fundamental rights by Community institutions could only be judged in the light of Community law, namely by the Court. The introduction of special criteria stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the common market and jeopardise the cohesion of the Community. The Treaty would be deprived of its character as Community law.¹⁰⁵ The last part of the argument is repeated verbatim from

¹⁰¹ In the English language version the French formulation "l'unité et l'efficacité du droit Communautaire" is sometimes translated as "uniformity and efficacy of Community law" (*Internationale Handelsgesellschaft*, para 3) and sometimes as "unity and efficacy" (*Hauer*, para 14) or "unity and effectiveness" (Case C-399/11 *Stefano Melloni v Ministerio Fiscal* NYR, para 60).

¹⁰² Robert Schütze, *European Constitutional Law* (CUP 2012), 414.

¹⁰³ Case 4/73 *Nold v Commission* [1974] ECR 491, para 13. Judge Pescatore was the reporting judge in all three cases.

¹⁰⁴ The Court actually lists the provisions of national constitutions and Member States' national legislation in support. *Hauer*, paras 20 to 22.

¹⁰⁵ *Hauer*, para 14.

Costa v ENEL.¹⁰⁶ In the latter case, the Court held that if the Member States were allowed to adopt subsequent unilateral measures inconsistent with the EU legal system, the executive force of the Treaty would vary from one Member State to another, which would compromise the attainment of the Treaty objectives and give rise to discrimination on the basis of nationality, prohibited in Article 7 EEC (now Article 18 TFEU, included in Part II TFEU, Non-discrimination and Citizenship of the Union).

Thus, an underlying common goal of individual protection frames and informs the entrenchment of human rights as a general principle of EU law and the autonomy of the EU system of protection. The coupling of the appeal to effectiveness (*effet utile*) to the demand of the uniformity of European law allows the Court to replace the interpretation of the Treaty based on consensus (the standard common to the Member States and the ECHR) with an autonomous (European) interpretation of the standard of human rights protection. The common goal, which justifies a unified approach, does not merit an approach based on a standard common to all Member States. Hence, the cases not only declare respect for human rights, but also the primacy of EU law and supranational judicial authority. This additional effect became fully apparent decades later, in *Melloni*. The Court held that:

where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.¹⁰⁷

V. CONCLUDING DISCUSSION

In this article I have empirically investigated the role of *effet utile* in the case law of the Court. This section summarises the findings and discusses their implications. Our discussion has primarily been concerned with the Court, but the main conclusions arising from this study relate to the nature and techniques of judicial decision making and the maintenance of judicial authority in ways which invest these findings with a broader pertinence and validity.

Most importantly, the analysis strongly suggests that the law making function of *effet utile* has been narrower than commonly assumed in the

¹⁰⁶ *Costa v ENEL* (n 64), para 3.

¹⁰⁷ *Melloni*, para 60. For an analysis of the “new formula” see Leonard F M Besselink, ‘The Parameters of Constitutional Conflict after Melloni’ (2014) 39 EL Rev 531, 547.

literature: narrower in terms of time, scope, and judicial confidence.¹⁰⁸ The Court has used *effet utile* primarily to balance the developments of abstract doctrines and principles with societal concerns. This implies that *effet utile* is not merely a technique of functional (dynamic) interpretation¹⁰⁹ or a mask for unbridled policy making. Nor is it a tool of judicial innovation. Instead, it is a legal judicial means which allows the Court to develop a coherent body of case law without risking major political backlash from the Member States.

This study's data has shown that although individual historic *effet utile* cases had a long-lasting and far-reaching impact on EU law, the Court did not use *effet utile* to extend the limits of European competence in all directions, nor did it resort to it when the law was exhausted. In fact, the most authoritative historic *effet utile* cases work to mitigate the potential impact of allowing any separate, contending, entrenched realm of authority based on primacy, direct effect, and human rights. An overwhelming majority of *effet utile* cases concern the protection of the individual, either through direct effect, or an autonomous system of protection of fundamental rights. A smaller number of such cases consolidate the authority of EU law and link it to the rationale of direct effect. Both groups of cases gravitate towards the creation of a uniform system of remedies, a layer that "truly differentiates the Community legal order from the horizontality of classic public international law"¹¹⁰ and does not tolerate separate and diverging standards.

This analysis has also demonstrated that the Court counterpoises an insistence on the *effet utile* of EU law with a willingness to include limiting provisions regarding the practical effects of its judgments along with rhetorical concessions to national sensitivities.¹¹¹ It is salient that in almost all cases the Court effectively limited the practical effects of proclaimed principles. In terms of language used, the Court moderated the explicit

¹⁰⁸ "[t]he judges explained that this method of interpretation forced their hands to entrench the telos in rules of Community law that could be applied in practice. Since the union-telos was imbued with normativity, the judges professed that *effet utile* left them without any real margin of discretion." Rasmussen, *The European Court of Justice* (n 80) 31. See also Lasser (n 20).

¹⁰⁹ In fact, the *effet utile* reasoning of the Court often does not satisfy the requirements of the arguments of second order justification. When is an argument a "genuine" argument from consequences? On this issues see generally Neil McCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2005).

¹¹⁰ Weiler (n 7) 2419.

¹¹¹ As already emphasised, the approach taken is empirical. The answer to the question regarding whether this approach of the Court is normatively justified will therefore be unsatisfactory. It is unjustified if we accept the formalist definition of law and the strict separation of law from politics, which also presupposes that interpretation without law making is possible and that neutral judicial bodies follow the letter of the law.

pronouncements of supranational judicial authority and the distinctiveness of the supranational legal order by making appeals to the common goals, unity and the foundational principles of the EU legal order. *Cassis de Dijon*, *Factortame* and *Becker* are exceptions to this pattern, but their context indicates that the Court will entrench its authority only when it can safely preserve it, usually when the principles are well-established in the case law and the case is straightforward in terms of its facts.¹¹²

The above findings support the conclusion that the role of *effet utile* is to stabilise the law (the formulation remains linguistically stable over time regardless of individual case outcomes) and also to convey an impression of doctrinal continuity, effectiveness and relevance. At the same time, the rhetorical appeal to *effet utile* or the effectiveness of EU law is detached from the questions of *de facto* effectiveness in terms of compliance with the rulings.

This has broader, substantial implications for our understanding of how courts maintain their authority. In general terms, when courts settle novel questions concerning the most fundamental rules, their authority to decide such questions is accepted after the questions have arisen and the decision has been given;¹¹³ or, in Hart's famous phrase: all that succeeds is success.¹¹⁴ The success of international courts depends on the extent to which they are able to make their generalisable principles "palatable to the Member States concerned."¹¹⁵ Scholars have noted that the Court's strategy for enhancing the authority of its sphere of law and upgrading its own powers¹¹⁶ was to establish its doctrines gradually, mitigating legal innovation either by delaying the full practical effects of established

¹¹² *Factortame* was part of a long saga, beginning with the measures taken by the UK against the so-called "quota hopping," which the Court considered conditionally compatible with EU law in previous cases, giving the UK the possibility to pass compatible legislation (Case C-3/87 *Aegean Ltd* [1989] ECR 4459 and Case C-216/87 *Jaderow Ltd* [1989] ECR 4509). *Becker* was decided in 1982, when direct effect was well established.

¹¹³ Examples of such subsequent acceptance of the Court's authority to frame the fundamental doctrines of EU law, apart from direct effect, primacy, and human rights protection as general principles of EU law, include the principle of liability of the Member States for the breaches of Community law, or the principle of institutional balance (standing of the European Parliament). While some were accepted tacitly, others were explicitly written into the Treaties or Declarations (the status of the European Parliament as a privileged applicant was formalised in the Maastricht Treaty, in what is now Article 263 TFEU, and the protection of human rights culminated in the Charter). Declaration number 17 (Declaration concerning primacy) to the Treaties, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon ([2012] OJ C 326/47) explicitly refers to "the settled case law of the Court of Justice".

¹¹⁴ H L A Hart, *The Concept of Law* (3rd edn, OUP 2012), 153.

¹¹⁵ Helfer and Slaughter (n 1) 114.

¹¹⁶ Burley and Mattli (n 4) 69.

principles,¹¹⁷ or by reiterating formulas which could shift the level of discussion away from the facts and the consequences of concrete cases and decisions to the long term common goals and interests of integration.¹¹⁸

The present analysis provides empirical support for the existence of this rationale of step by step decision making by courts, also referred to as incrementalism. In addition, it adds to this discussion by making it explicit *how* the Court employs legal tools to balance the entrenchment of the authority of law with the interests of individual Member States.¹¹⁹ This study shows how courts, aware of broader societal concerns and interests, construct and extend principles and doctrines in individual cases; and it begins the process of measuring and assessing the long term consequences of this practice.

In individual cases, the relevant court will use its judicial situational sense (or judicial “horse sense”),¹²⁰ All decisions that disrupt the status quo will need to renegotiate the authority of the court by renegotiating and reconfirming the authority of the law. Thus, when deciding potentially controversial cases a court will counter-balance the proclamation of its authority: (1) in the court’s rhetoric/language, and/or (2) in effect, by not applying the principle that it established in the same case, qualifying the principle that it established in the same case, or not disclosing its full potential. This study’s scrutiny of incremental decision making reveals that its most common manifestations include decoupling the principle from the remedy, temporal delays of the effects of judgments, and repeated appeals to fundamental (and common) goals in the form of prefabricated formulas and locutions. In the long run, this practice implies that courts will develop legal doctrines over time in a series of decisions which exhibit an uneven, varying degree of vigour.

This analysis constitutes an improved picture of how courts assert power or retreat from power both on the level of outcome and on the level of

¹¹⁷ “[I]n the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed.” Hartley (n 11) 74.

¹¹⁸ Burley and Mattli (n 4) 68.

¹¹⁹ For a more recent contribution concerning the incremental decision making of the ECtHR see Shai Dothan, *Reputation and Judicial Tactics : A Theory of National and International Courts* (CUP 2015). For WTO and UN see Venzke (n 16). For a recent survey of empirical quantitative studies on how the Court considers the interests of the Member States in its decision making see Clifford Carrubba and Matthew Gabel, *International Courts and the Performance of International Agreements: A General Theory with Evidence from the European Union* (CUP 2014), 66.

¹²⁰ Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown and Co. 1960).

judicial language in potentially contentious cases. We have been able to delve more precisely into how these two levels are intertwined in individual judgments and in the building of doctrines, and examine how they sustain the authority of the Court in the long run.¹²¹

¹²¹ Incrementalism will work in the face of limited disapproval: the struggle for authority is won in debates about legitimacy and in the process of critique and defence.

**PRIVATE POWER AND INTERNATIONAL LAW:
THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION***

Maciej Borowicz[†]

International lawyers have traditionally been interested in public power, i.e. ability to influence substantive outcomes across national borders through state coercion or threat thereof. They have been (and continue to be) engaged in debates about ways in which that type of power can be limited or, at the very least, made accountable. More recently international lawyers have also developed an interest in private power, i.e. ability to influence substantive outcomes across national borders without the use of state coercion or threat thereof. This paper explains how accountability for exercise of private power is achieved using the International Swaps and Derivatives Association (ISDA) as an example. ISDA's accountability consists of a combination of procedural Global Administrative Law-like standards applicable to ISDA itself as well as legislative, regulatory and judicial recognition of the market conventions developed by ISDA. This model of accountability makes ISDA responsive to both cosmopolitan and national constituencies.

Keywords: ISDA, derivatives, accountability

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I. INTRODUCTION

International lawyers have traditionally been interested in public power, i.e. the ability to influence substantive outcomes across national borders through state coercion or threat thereof.¹ They have been (and continue to be) engaged in debates about ways, in which that type of power can be limited or, at the very least, made accountable. More recently international lawyers have also developed an interest in private power, i.e. ability to influence substantive outcomes across national borders without the use of state coercion or threat thereof. Here the debate concerns the role of international law in limiting and making private power accountable.² The argument in favor of subjecting private power to international law is particularly strong in areas where the exercise of private power across national borders causes perceived injustice and other mechanisms of accountability may be absent.

In the realm of finance activities of transnational private organizations, industry associations in particular have important implications for justice and oftentimes remain unaccounted for under domestic law. The International Swaps and Derivatives Association (ISDA) provides an example. At least two types of justice-like concerns have been articulated with regard to ISDA. First, over-representation of the so-called sell-side institutions (banks, dealers) within ISDA's governance structure.³ Second, the effects of the close-out netting provision of the ISDA Master Agreement, which privileges derivatives

¹ Cf Richard H Steinberg and Jonathan M Zasloff, 'Power and International Law' (2006) 100(1) American Journal of International Law 64, analyzing the range of stances on the relationship between power and international law that have appeared in the journals the last century.

² The use of the US Alien Torts Statue to invoke international law against private corporations is illustrative of that trend. See 28 U.S.C. § 1350 (2006). The statute states in its entirety: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. In *Kiobel v. Royal Dutch Petroleum* 621 F.3d 111, 150 (2d Cir. 2010) the U.S. Court of Appeals for the Second Circuit rejected corporate liability under ATS.. This decision has been upheld by the US Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). At the same time the trend to use international law against private parties can be seen in other jurisdictions as well. See eg Peter Muchlinski, 'The Changing Face of Transnational Business Governance' (2011) 18 Ind. J. Global Leg. Stud. 665, 687–88, discussing recent cases in continental Europe where corporations have been defendants in suits claiming the corporations are liable for environmental damage, human rights abuses and war crimes.

³ See Frank Partnoy and David A Skeel Jr, 'The Promise and Perils of Credit Derivatives' (2007) 75(3) U. CIN. L. REV. 1019, 1039. See also Gillian Tett, 'Calls for radical rethink of derivatives body' Financial Times (26 August 2010).

in bankruptcy.⁴ It is against the backdrop of these concerns that calls for greater accountability of the organization ensued.

Accountability is a measure of a certain type of legitimacy, one that testifies to the 'responsiveness' of the regime to a relevant constituency, i.e. the one that could be affected by its activities.⁵ Private organizations, such as ISDA, are not oblivious to the challenge of accountability, but they may have a difficulty in identifying the relevant constituency to which they *could* and *should* be accountable and means through which this could be done. These difficulties are compounded in the transnational context, where the relevant constituency and the means of doing that are even more difficult to conceptualize.

It seems therefore that there exists a gap, a conceptual gap, in our thinking about accountability for exercise of private power in a transnational context. This gap in our theories of accountability is the starting point for this paper. It will be argued here that this gap is problematic from a normative standpoint, because the failure to develop conceptualizations of accountability and legitimacy of private organizations limits our ability to understand how outcomes are produced and how actors are differentially enabled and constrained in global governance. The question thus arises: how to address this dimension of transnational governance?

This paper uses the Global Administrative Law approach to explain how ISDA achieves accountability. It first outlines the nature of the power exercised by ISDA (section 2), and identifies the GAL principles of accountability - transparency, rationality and legality and effective review (section 3). Section 4 explains how ISDA strives to achieve those normative standards through a combination of procedural GAL-like standards applicable to ISDA itself as well as legislative, regulatory and judicial recognition of the market conventions contained in the documentation developed by ISDA, and in particular the ISDA Master Agreement. This model of accountability makes ISDA responsive to both cosmopolitan and national constituencies.

⁴ See eg Patrick Bolton and Martin Oehmke, 'Should Derivatives Be Privileged in Bankruptcy?' (2013) *Journal of Finance*. See also Stephen J Lubben, 'Too Much Protection for Derivatives in Bankruptcy' *New York Times* (11 September 2012).

⁵ See eg Ronald J Oakerson, 'Governance Structures for Enhancing Accountability and Responsiveness', in J L Perry (ed) *Handbook of Public Administration* (1989), 114 ('[t]o be accountable means to have to answer for one's action or inaction, and depending on the answer, to be exposed to potential sanctions, both positive and negative.').

II. ISDA: A POWER ANALYSIS

It is perhaps the cornerstone feature of every legal system that it legitimates the exercise of power. Accountability is one dimension of that legitimation, one that makes those who exercise power responsive towards those against whom power is exercised.

Power is not always easily recognized. When the United States Congress enacts a massive piece of legislation such as the Dodd-Frank Act, the source, but also the limits, of its power are clear. The source, the limits and, for that matter, the nature of power of organizations like ISDA are much less straightforward. As Horatia Muir Watt recently noted in her criticism of classical approaches in public and private international law:

[t]he most spectacular convergence of denials by public and private international law concerns the forms of private power exercised in the global economy by non-sovereign entities such as multinational corporations or rating agencies. In spite of their significant role in shaping of the global market, these entities escape any credible form of public accountability or private responsibility.⁶

This is problematic – suggests Professor Muir Watt – because as long as private power is not recognized it cannot be made subject to adequate treatment under the law.⁷ Recognition of private power under the law requires a good understanding of how power operates, including how it operates in the transnational context. This section of the paper tries to enrich our understanding of the different ways in which power operates in a transnational context, relying on the contributions of literature in political science.⁸ The analysis will focus on the interactional and constitutive power that ISDA exercises.

⁶ Horatia Muir Watt, 'Private International Law Beyond the Schism', IILJ Working Paper 2012/1, referring to, *inter alia*, A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (CUP 2003), 14 and Dan Danielsen, 'How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance' (2005) 46(2) *Harvard Journal of International Law* 411-425.

⁷ *ibid.*

⁸ I rely in particular on Michael Barnett and Raymond Duvall, 'Power in International Politics' (2005) 59 *INT'L ORG. I.*, 39-75.

1. ISDA's Interactional Power

ISDA has pioneered efforts to identify various risks commonly encountered in markets and helped redistribute them more efficiently through derivatives. Derivatives are, in essence, contracts that facilitate the trading and redistribution of risk. They owe their name to the fact that their value is derived from an underlying asset, index, interest rate or another reference value. Since they redistribute risk, they can be used either to insure (hedge) oneself against a particular risk or, conversely, to take on risk (invest or speculate).⁹ They can also be used to arbitrage between different markets.

The organization emerged from discussions held in New York in the early 1980s, led by Salomon Brothers – an investment bank – and other entities that were beginning to sell derivatives, in particularly swaps.¹⁰ This group then employed the US law firm Cravath as well as the London firm Allen & Overy to advise them on how to proceed.¹¹ Over the following years the ISDA was formed. It has grown considerably and has by now become the most influential organization shaping the rules of derivatives markets. As of December 2014 it had over 800 member institutions from 67 countries.¹² These members include most of the world's major institutions that deal in privately negotiated derivatives,¹³ as well as many of the businesses, governmental entities, investment managers and other end users that rely on over-the-counter (OTC) derivatives to manage the financial market risks inherent in their core economic activities.

The mission statement of ISDA identifies the organization's role as, *inter alia*, representing all market participants globally, promoting high standards of commercial conduct and leading industry action on derivatives issues.¹⁴ The organization 'seeks to promote infrastructure that supports an orderly and reliable marketplace, as well as transparency to regulators; enhances counterparty and market risk practice; advances the effective use of central clearing facilities and trade repositories; and represents the derivatives

⁹ See Impact Assessment, Commission staff working document accompanying a proposal for regulation of derivatives, central counterparties and trade repositories, SEC(2010) 1058/2, available at http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/20100915_impact-assessment_en.pdf (accessed 17 November 2012).

¹⁰ A swap is the most basic, or "vanilla" type of a derivative traded in the so-called over-the-counter market between two private parties.

¹¹ For a discussion of the evolution of ISDA see eg Sean M Flanagan, 'The Rise of a Trade Association: Group Interactions Within the International Swaps and Derivatives Association' (2001) 6 HARV. NEGOT. L. REV. 211, 240.

¹² See <http://www2.isda.org/about-isda/> (accessed 5 November 2012).

¹³ A large portion of derivatives has been traditionally traded in the over-the-counter (OTC) markets, i.e. directly between two parties, without going through an exchange or other intermediary. Alternatively, derivatives can also be traded on exchanges.

¹⁴ See <http://www2.isda.org/about-isda/mission-statement/> (accessed 28 February 2015).

industry through public policy, ISDA governance, ISDA services, education and communication.¹⁵

ISDA's power is, in the first place, *interactional* in the sense that it is 'shaped by behavioral relations or interactions, which, in turn, affect the ability of others to control the circumstances of their own behavior.'¹⁶ Membership is the cornerstone feature that enables interactional power to be exercised.¹⁷

As Benedict Kingsbury et al suggest, in national law, private bodies such as ISDA are typically treated as clubs rather than as administrators, unless they exercise public power by explicit delegation.¹⁸ 'But in the global sphere, due to

¹⁵ *ibid.*

¹⁶ 'The funny thing about ISDA is that thousands of people think of themselves as part of the Association. One of our Board members said he counted 200 people in his firm alone who were active in ISDA committees, working groups and projects. We count all who work in the industry as part of ISDA. We represent them and like to publicize progress, regardless of which entity actually did the work – as long as it makes our markets safer and more efficient.', 'DerivatiViews, Clearing, Compression and Customization', available at <http://isda.derivativiews.org/2011-11/01/clearing-compression-and-customization> (accessed 28 February 2015).

¹⁷ ISDA provides for three types of membership: primary (mostly for sell-side institutions), associate (law firms, accounting firms) and subscribed (buy-side institutions) membership. There are two types of benefits associated with the different categories of membership. The first type, which does not discriminate between the different categories, encompasses the possibility of participating in the Association's numerous committees and task forces which serve to address issues in derivatives market, the possibility of receiving policy papers, response letters, market survey data, and communications on key business issues that ISDA and its consultants generate as well as eligibility to receive the Association's legal opinions on the enforceability of the netting provisions of the ISDA Master Agreements, which enable institutions to reduce credit risk and consequently capital requirements in jurisdictions subject to BIS capital regulations. The second type of benefits, which does discriminate between members concerns voting rights. Only primary members are entitled to vote on all matters submitted to a vote of the membership. See Section 10 of ISDA Bylaws, available at <https://www.isdadocs.org/membership/bylaws.pdf> (accessed on 28 February 2015).

¹⁸ Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 L. & CONTEMP. PROBS. 15, 23. These organizations often constitute what Hugh Collins calls 'club markets'. 'A club market is created by a group of traders for their mutual protection and to obtain efficiency gains through savings on transaction costs (...)The advantage of a club market is that it permits the expansion of membership of the trusted group and at the same time increases the potential severity of non-legal sanctions. The rudimentary form of a club market is that the members agree to be bound by the rules of the association'. Hugh Collins, *Regulating Contracts* (OUP 1999) 212. As Collins notes, 'club markets' were instrumental in creating derivatives, in particular futures markets. 'The club market can supply three essential ingredients for a futures market: first, a standardized, mandatory style of commodity description; secondly, a standardized mandatory contractual package of terms or entitlements; and third, a mechanism for creating an irrevocable and unimpeachable obligation'. *ibid.*, 213.

the lack of international public institutions, they often have greater power and importance.¹⁹ By involving powerful actors ranging from banks, through law firms to non-financial corporations, ISDA is able to influence behavior of (financial) markets through, in particular, development of standardized practices.

2. ISDA's Constitutive Power

ISDA's power is also *constitutive* in the sense that it produces the very social capacities of structural, or subject, positions in direct relation to one another, and the associated interests, that underlie and dispose action.²⁰ In other words, it is the power to constitute something new. It concerns the determination of social capacities and interests.²¹ ISDA's constitutive power manifests itself perhaps most importantly in 1) development of documentation for the derivatives market; and 2) operations of its Credit Determination Committees.

A. Close-out Netting

Consider the role of the close-out netting provisions of ISDA's Master Agreement. As a general matter, netting refers to a process through which the ongoing obligations of parties to a transaction, or number of transactions, are determined by netting or aggregating obligations, with the difference between these two aggregates then producing a single settlement figure.²² A netting agreement will in general be subject to the principle of the parties' freedom of contract, and there are no particular obstacles to its enforceability as long as both parties are solvent. However, the situation is very different in the event

To the extent that these private actors operate on the basis of delegation it has been argued that the existing administrative structures are ill suited to oversee the sound exercise of judgment and discretion. See in particular Kenneth A Bamberger, 'Regulation as Delegation: Private Firms, Decisionmaking and Accountability in the Administrative State' (2005) 56(2) DUKE L. J. 377. Cf Martha Minow, Joody Freeman (eds), *Government by Contract: Outsourcing and American Democracy* (Harvard University Press 2009).

¹⁹ Kingsbury et al, *The Emergence* (n 18), 23.

²⁰ Barnett and Duvall, 'Power in International Politics' (n 8).

²¹ Cf *ibid*.

²² This mechanism is provided for under s 2(c) of the MA, which reads:

Netting of payments. If on any date amounts would otherwise be payable: - (i) in the same currency; and (ii) in respect of the same Transaction, by each party to the other, then, on such date, each party's obligation to make payment of any such amount will be automatically satisfied and discharged and, if the aggregate amount that would otherwise have been payable by one party exceeds the aggregate amount that would otherwise have been payable by the other party, replaced by an obligation upon the party by which the larger aggregate amount would have been payable to pay to the other party the excess of the larger aggregate amount over the smaller aggregate amount.

of insolvency of one of the parties. In these cases bankruptcy law generally trumps parties' freedom of contract. This is why the special treatment of derivatives described above was needed to make netting enforceable in bankruptcy. ISDA has been very consistent that derivatives' exemptions from bankruptcy laws are entirely warranted in order to protect the health of the derivatives markets and the financial system as a whole. In particular 'ISDA posits that (...) a failure of a derivatives market player could prompt a destabilizing domino effect, threatening the positions of other market participants which might be intertwined in trades with the insolvent, ultimately generating systemic risk.'²³

According to the express terms of section 2(a)(iii) of the ISDA Master Agreement, following the occurrence and during the continuance of an event of default, the non-defaulting party is not required to terminate the ISDA Master Agreement following an event of default, and it equally is not required to perform obligations under the ISDA Master Agreement. Instead, in accordance with Section 6 of the Master Agreement the non-defaulting counterparty may elect that the transaction be terminated early and calculate and 'net' the amounts owed.²⁴

²³ See David Mengle, 'The Importance of Close-Out Netting' (ISDA Research Notes, Number 1, 2010) available at <http://www.isda.org/researchnotes/pdf/Netting-ISDAResearchNotes-1-2010.pdf> (accessed 2 December 2012).

²⁴ Section 6(a) of the ISDA MA reads:

If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions.

Section 6(f) of the ISDA MA reads:

Any Early Termination Amount payable to one party (the "Payee") by the other party (the "Payer"), in circumstances where there is a Defaulting Party or where there is one Affected Party in the case where either a Credit Event Upon Merger has occurred or any other Termination Event in respect of which all outstanding Transactions are Affected Transactions has occurred, will, at the option of the Non-defaulting Party or the Non-affected Party, as the case may be ("X") (and without prior notice to the Defaulting Party or the Affected Party, as the case may be), be reduced by its set-off against any other amounts ("Other Amounts") payable by the Payee to the Payer (whether or not arising under this Agreement, matured or contingent and irrespective of the currency, place of payment or place of booking of the obligation).

As it has been pointed out in the literature, close-out netting has complex economic implications, of both an individual and systemic nature.²⁵ From an individual perspective the potential beneficial effects are twofold: first, close-out netting can prospectively reduce counterparty risk, and, second, it can help both parties achieve a more favorable position in terms of the underlying capitalization. This is because by aggregating the amounts owed, both parties reduce their exposures towards their counterparties and thereby also reduce their need for regulatory capital.²⁶

From a systemic point of view the use of close-out netting can prevent the risk of contagion from becoming systemic, i.e. affecting the financial market in such a way that it becomes dysfunctional.²⁷ This beneficial effect is grounded in the idea that close-out netting shields systemically important market participants from the consequences of their counterparty's insolvency. It has been cited as the principal justification for the special treatment afforded to derivatives in bankruptcy.²⁸

In the past these benefits have been recognized by some of the most important global macroprudential oversight bodies, including the Cross-border Bank Resolution Group (CBRG) of the Basel Committee. In its 2010 report the CBRG mentions enforceable netting agreements in a list of mechanisms capable of mitigating systemic risk in the first place, along with collateralization, segregation of client assets and standardization and regulation of OTC derivatives transactions.²⁹ It called upon national authorities to promote the convergence of national rules governing the

²⁵ See Robert R Bliss and George G Kaufman, 'Derivatives and Systemic Risk: Netting, Collateral and Closeout' (2006) 2 J. FIN. STAB. 1, 55-70.

²⁶ As Bliss and Kaufman argue, close out netting has evolved for purposes other than reducing systemic risk reduction. 'Market participants tend to be more concerned with their own welfare in normal day-to-day business environments than with possibilities of adverse externalities in the form of systemic failures of markets. Netting, close-out, I serve the needs of market participants even when there is no systemic threat: they facilitate market risk and counterparty credit risk management; and they permit expansion of dealer activities, enhancing the depth and liquidity of the derivatives markets.' *ibid*, 57.

²⁷ *ibid*

²⁸ Compare 11 U.S.C. § 560 (2006) ('The exercise of any contractual right of any swap participant or financial participant to cause the liquidation, termination, or acceleration of one or more swap agreements because of a condition of the kind specified in section 365(e)(1) of this title or to offset or net out any termination values or payment amounts arising under or in connection with the termination, liquidation, or acceleration of one or more swap agreements shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title.').

²⁹ Basel Committee on Banking Supervision, Report and Recommendations of the Cross-border Bank Resolution Group (March 2010).

enforceability of netting agreements with respect to their scope of application and legal effects across borders.³⁰

B. Credit Event Determinations Committees

Another example of ISDA's constitutive power comes from its Credit Determination Committees (CDC). For a long time CDC were established on an ad hoc basis, whenever there arose a question as to whether a default, triggering payment on a credit default swaps, has arisen. During the 2007-2008 financial crisis they have been "hard-wired" into the market infrastructure. They played an important role in the context of swaps on sovereign bonds, and thus had major public implications, perhaps most prominently in the context of credit default swaps (CDS) purchased by investors for protection from default of Greek sovereign bonds.

In 2009, after fifteen consecutive years of economic growth, Greece entered recession. By the end of 2009, the Greek economy faced the highest budget deficit and government debt to GDP ratios in the EU. The 2009 budget deficit stood at 15.4% of GDP. This, and rising debt levels (127% of GDP in 2009), led to rising borrowing costs, resulting in a severe economic crisis.³¹ It is hardly surprising that under these circumstances many investors and banks that purchased Greek sovereign bonds also purchased Greek sovereign CDS to protect themselves against the risk of default. In a CDS, the buyer of protection pays a fee to obtain indemnification against the risk of default of a borrower (for example, Greece), and any resultant loss, from a protection seller. Payment is triggered by a "credit event", technically defined as failure to pay interest or principal, debt moratorium or repudiation or restructuring. However, around mid 2012 there was a lot of uncertainty among Greek CDS holders concerning what "restructuring" really means. The pressing question at the time was whether voluntary restructuring – entailing lenders agreeing to Greece exchanging existing bonds and loans for ones with different terms (longer maturity, different rates) – could be considered a credit event under the CDS.³²

On 9 March 2012 the European, Middle Eastern and African section of the Credit Determination Committees (DCs) announced that a restructuring event had occurred with respect to Greece.³³ As one commentator for the

³⁰ *ibid.*

³¹ http://ec.europa.eu/economy_finance/eu/countries/greece_en.html (accessed 5 November 2012).

³² Gretchen Morgenson, 'Scare Tactics in Greece', New York Times (19 November 2011), available at <http://www.nytimes.com/2011/11/20/business/credit-default-swaps-as-a-scare-tactic-in-greece.html> (accessed 5 November 2012).

³³ See ISDA (Press release), 'ISDA EMEA Determinations Committee Accepts Question Related to a Potential Hellenic Republic (Greece) Credit Event' (9 March 2012)

Financial Times remarked: 'while perfectly legal, the ability of a private body of financiers and lawyers to determine whether or not there has been "default" is unusual and legally untested.'³⁴ The DCs comprise ISDA members who, in essence, have the biggest positions in any CDS contract under examination.³⁵

available at <http://www2.isda.org/asset-classes/credit-derivatives/greek-sovereign-cds/> (accessed 5 November 2012). The Determinations Committee held that the invoking of the collective action clauses by Greece to force all holders to accept the exchange offer for existing Greek debt constituted a credit event under the 2003 ISDA Credit Derivatives Definitions. Those Definitions state that the Restructuring Credit Event is triggered if one of a defined list of events, such as bankruptcy, occurs, with respect to a debt obligation such as a bond or a loan, as a result of a decline in creditworthiness or financial condition of the reference entity. The listed events are: reduction in the rate of interest or amount of principal payable (which would include a "haircut"); deferral of payment of interest or principal (which would include an extension of maturity of an outstanding obligation); subordination of the obligation; and change in the currency of payment to a currency that is not legal tender in a G7 country or a AAA-rated OECD country. An important element of the definition of Restructuring is that the event has to occur in a form that binds all holders of the "restructured" debt. The DC found that the Greek debt restructuring plan involves a "haircut" and is binding on all holders of Greek debt. ISDA (Press release), 'Greek Sovereign CDS Credit Event Frequently Asked Questions (FAQ)' (9 March 2012) available at <http://www2.isda.org/asset-classes/credit-derivatives/greek-sovereign-cds/> (accessed 5 November 2012).

³⁴ Satyajit Das, 'Final arbiter in Greek saga is untested, private body', FT.com (22 June 2011), available at <http://www.ft.com/intl/cms/s/0/95e3131a-9bf9-11e0-bef9-00144feabdc0.html#axzz2BMvE6lyE> (accessed 5 November 2012). See also Morgenson, 'Scare Tactics' (n 32), illustrating the conflicts of interests inherent in the activity of the DCs: 'One of the money managers who attended the meetings said Ms. Yang's presence seemed to raise a conflict. Ms. Yang works for BNP, which stands to profit from the restructuring. She is also on the I.S.D.A. panel, which will determine if credit default swaps pay off. One of the money managers said he pointed out Ms. Yang's dual role at a meeting. "You're on the determinations committee, your firm is earning a big fee and trying to scare me into tendering my bonds," he said he told her. He said Ms. Yang replied: "No, I'm just trying to help tell you what could go wrong."'

³⁵ As for the sell side: 'There are separate criteria for membership on a DC depending on whether the member is a dealer or buy side member. To become a dealer member, the dealer institution must fulfill three requirements. First, the dealer must be a participating bidder in auctions. Second, the dealer must adhere to the "Big Bang" protocol. Last, the composition of dealer members will be based upon notional trade volumes as reported by Depository Trust and Clearing Corporation (DTCC) data via their Trade Information Warehouse (TIW).' As for the buy-side: 'To become a buy side member of a determination committee is a two-tier process. Buy side members of a DC will be randomly selected from a buy side pool. To qualify to be in the buy side pool, the institution must have at least \$1 billion in assets under management (or the equivalent), have single name CDS trade exposure of at least \$1 billion, and be approved by one-third (1/3) of the then-current buy side pool. The buy side members of the DC will be randomly selected from the buy side pool and serve for staggered one year terms. The buy side members on the DC must include at least one hedge fund and one traditional asset manager at all times. No institution can serve a second term until all eligible institutions have served. The proposal gives the buy side a direct voice and formal,

As such they are not independent bodies, neither institutionally nor in terms of the rules that they are bound to apply. The identity of each current (and past) CDC member for each region is made publicly available on the ISDA's website. Members tend to be chosen from among the most important actors, in particular large sell-side institutions.³⁶ They also tend to be the same across regions. Understandably, this has given rise to allegations that the members vote in a way that benefits their financial institutions rather than with regard to some objective standard.³⁷

permanent representation., The CDS Big Bang: Understanding the Changes to the Global CDS Contract and North American Conventions, Market (13 March 2009), available at http://www.markit.com/cds/announcements/resource-/cds_big_bang.pdf.

³⁶ The DC consists of 10 dealers and five buy-side firms. An 80% super-majority is needed to determine a credit event. CDC's resolutions are subsequently published on the website. The publication includes the determination itself, as well as (if appropriate) an auction timeline, a list of participating bidders, any related resolutions, a list of deliverable obligation, the particular auction's settlement terms, a cash settlement/minimum transfer amount memorandum and other related information.

³⁷ It resolves these issues by adhering to the standard of "commercial reasonableness." See ISDA Credit Derivatives Determination Committees Rules (11 July 2011), Rule 2.5(b): "DC Resolutions" (Each DC Voting Member shall perform its obligations under the Rules in a commercially reasonable manner in Resolving a DC Question and shall base its vote on information that is either public or can be published). This of course begs the question whether this is an objective or subjective standard. Consider the example of SEAT Pagine Gialle, an Italian telephone directories and street maps publisher, active also in the online advertising sector. On 28 November 2011 the EMEA DC had a very hard time deciding whether a failure to pay credit event occurred with respect to that company meaning that those who had bought protection would get a big payout from those who had sold it to them. 8 members (including Bank of America Merrill Lynch, Barclays, Credit Suisse, Deutsche Bank AG and Morgan Stanley among other) voted that it did, but 7 other members (including Goldman Sachs, JPMorgan Chase Bank, N.A., BNP Paribas and Société Générale) voted that it did not: http://www.isda.org/dc/docs/EMEA_Determinations_Committee_Decision_28112011.pdf. In the end, the payouts proved were worth some \$465m in total. Luckily for the DC, the initially ambiguous situation was resolved by the company committing a more serious infringement on its debt. Lisa Pollack (FT Alphaville), 'The conflicted Isda committee', FT.com (14 December 2011) available at <http://ftalphaville.ft.com/2011/12/14/799341/the-conflicted-isda-committee/> (accessed 19 November 2012). Admittedly, the case was complex. The Italian firm's bonds were issued by a Luxembourg-based special-purpose vehicle, which had a loan agreement with SEAT. When a payment was missed, there was debate over whether the grace period of the bonds - 30 days - should be applied to the loan (which would have otherwise have had a three-day grace period). But among the allegations concerning the bias was the fact that certain documentation that was not previously available suddenly surfaced. Chris Whittall, 'Dealers slam CDS committee', International Financing Review (9 December 2011) available at <http://www.ifre.com/dealers-slam-cds-committee-'bias'/1619550.article> (accessed 19 November 2012).

III. GAL AND PRIVATE POWER

GAL is an approach to global governance that emphasizes accountability. It has been defined in a by Kingsbury et al. as:

comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.³⁸

Since it is the goal of the GAL project to define the unique properties of accountability in the context of global governance it does not define the term *ex ante*. But its open conception of accountability informed by descriptive accounts of accountability such as the one proposed, for example, by Ronald Oakerson – '[t]o be accountable means to have to answer for one's action or inaction, and depending on the answer, to be exposed to potential sanctions, both positive and negative.'³⁹ The focus of GAL is thus on evaluating global administrative bodies from the standpoint of their accountability. These bodies include (1) formal international organizations; (2) transnational networks of cooperative arrangements between national regulatory officials; (3) national regulators under treaty, network, or other cooperative regimes; (4) hybrid intergovernmental-private arrangements; and (5) private institutions with regulatory functions.⁴⁰

Against the backdrop of this analytical outlook two things become immediately apparent. First, GAL is predominantly concerned with institutional or organizational arrangements in global governance. Accordingly, GAL scholarship develops rules and procedures that can help ensure the accountability of global administration, and it focuses in particular on administrative structures, on transparency, on participatory elements in the administrative procedure, on principles of reasoned decision-making, and on mechanisms of review. Second, the GAL approach considers at least some private bodies to be essentially functionally equivalent to public ones. Accordingly, it is argued that private regimes should conform to at least some of the same requirements that apply to public ones, most importantly in terms of accountability. It is argued that, domestically, private actors often assume

³⁸ Kingsbury et al, 'The Emergence' (n 18), 17.

³⁹ Oakerson, 'Governance Structures' (n 5), 114.

⁴⁰ Kingsbury et al., 'The Emergence', (n 18), 20.

regulatory functions, but many of them under structures of delegation from public bodies, and all are embedded in an order in which public bodies, both administrative and legislative, possess relatively effective means of intervention to control or correct private governance.⁴¹ In the global context, such a public order is largely lacking, and yet private bodies perform tasks with far-reaching consequences, often spurred by the absence of effective public regulation: as a result, mechanisms should be constructed in the global administrative space that address the realities of the roles played by private bodies.

What is the justification for considering public and (some) private bodies as functionally equivalent? Kingsbury suggests that whereas non-state norms and structures often originate as amorphous regimes of private ordering, they can have distributive consequences and do not exclusively regulate relations between private parties. As he puts it: 'they often can be understood as beginning with private ordering,' but ultimately they advance:

towards a conception of the public and of public law. Indeed, many of the central issues are about the interaction between formally public institutions and officials – and the unofficial practices. The unofficial practices are dubbed "private orderings" but in many cases they are not simply private. It is in their linkages that global administrative law operates.⁴²

Two basic dimensions of accountability can be identified in the GAL literature: procedural and substantive. Procedural accountability refers to some of the core principles associated with the GAL approach - on administrative structures, transparency, participatory elements in the administrative procedure, principles of reasoned decision-making. At the same time, GAL also suggests that accountability in global governance is also a matter of the possibility of having the decisions made by global administrative bodies effectively reviewed. I will refer to this second dimension as substantive accountability.

IV. GAL AND ISDA

ISDA falls into GAL categories of global administrative bodies, specifically those that deal with banking and financial regulation. It is a private association formed by some of the most influential financial institutions in

⁴¹ *ibid*, 54.

⁴² Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20(1) *EUR. J. INT'L L.* 1, 21, 31-33.

the world and it exercises a tremendous influence over the shape of derivatives markets across the globe through its interactional and constitutive powers. The next three subsections examine both the procedural and substantive dimensions of ISDA's accountability focusing in particular on the composition of the CDCs and the effects of close-out netting. The justification for this inquiry is to be found in the recognition that ISDA's power manifests itself both in the development of conventions for the derivatives market and in determination of social capacities and interests through quasi-administrative functions of the DCs.

1. Procedural accountability: representation and transparency

A number of problems related to ISDA's prominence and quasi-monopoly in setting, monitoring, and to a certain extent enforcing the rules for the market have been pointed out in the literature. In a 2007 article Frank Partnoy and David Skeel expressed a concern that ISDA may develop standardized documentation and approaches that benefit ISDA members at the expense of others, either because they redistribute resources among parties, create or take advantage of informational asymmetries, or create negative externalities.⁴³

The operation of the CDCs is illustrative of this problem. The CDCs are composed of ISDA members who, in essence, have the biggest positions in any CDS contract under examination and as such are not independent bodies, neither institutionally nor in terms of the rules that they are bound to apply. At the same time, their decisions affect all CDS holders.

ISDA invokes several arguments in defense of the current structure of the DCs. First, it argues that the workings of the DCs are transparent, because both the rules of the DCs and the votes cast are made publicly available. Moreover, it is argued, most of the time, the decisions of the DCs are incredibly straightforward and pose little controversy. Thirdly, everyone in the industry signed up to the Big Bang Protocol, which gave the DCs the powers that they have. In other words, ISDA suggests that the DCs are a voluntary and representative mechanism. But as Lisa Pollack of the *Financial Times* points out, these are not necessarily meaningful benchmarks of transparency and legitimacy: 'Wouldn't true transparency mean that DC members disclosed the financial interests of their firm and their votes? Wouldn't it be refreshing to see them vote against their own position? Admittedly the benefit of the doubt would then have to be given to those

⁴³ See Partnoy and Skeel Jr, (2007) 'The Promise' (n 3).

who voted in the direction of their firm's interest'.⁴⁴ She finds the ISDA's two other arguments equally unpersuasive, suggesting that the legitimacy of a governance arrangement may be better tested in "hard cases" and that not signing the Big Bang Protocol was hardly a choice for most market participants.⁴⁵

The conflicted nature of the DC mechanism is mitigated in situations in which the 80% threshold required for a DC decision is not met,⁴⁶ and the decision goes to external review. The external review panel is composed of individuals who have earlier been selected to be pool members in a region. The panelists are then selected by members of a convened DC for the same region and screened for potential conflicts of interests.⁴⁷ Five panelists must be selected by a unanimous vote of a DC. According to ISDA, the robustness of the review process derives from its reliance on independent, third-party professionals with market and/or legal expertise (such as British Queen's Counsels, academics, and other independent legal experts who specialize in the derivatives market). External review involves formal arbitration-style

⁴⁴ Lisa Pollack (FT Alphaville), More on the conflicted Isda committee (14 December 2011) available at <http://ftalphaville.ft.com/2011/12/14/799741/more-on-the-conflicted-isda-committee/> (accessed 20 November 2012).

⁴⁵ *ibid.*

⁴⁶ 'This high level of consensus safeguards against either protection buyers or protection sellers unilaterally making a determination as a single block. Similarly, to address concerns that dealer members may all be on one side of the market with respect to a given issue, the threshold is high enough to ensure that dealer members cannot reach a decision by 80% supermajority without the support of at least two non-dealer members. In practice, there have been no dealer vs. non-dealer voting splits.' ISDA, The ISDA Credit Derivatives Determinations Committees (ISDA material on file with author).

⁴⁷ 4.3 Composition of the External Review Panels

(a) Conflicts. Upon the existence of an Eligible Review Question, any Convened DC Voting Member may identify any Pool Member from the External Review Panel List for the same Region as such Convened DC for purposes of analyzing their availability and potential conflicts of interest with respect to such Eligible Review Question (each such Pool Member, a "Potential External Reviewer"). Each Potential External Reviewer shall notify the Convened DC, via the DC Secretary, by 5:00 p.m. Relevant City Time on the first Relevant City Business Day after being designated a Potential External Reviewer or such other time as the Convened DC Resolves by a Majority, of its availability and disclose to the Convened DC any conflict of interest which exists or is foreseeable with respect to either the Reviewable Question or the related DC Questions which may be deliberated by the Convened DC. Any Convened DC Voting Member or Convened DC Consultative Member may also raise an existing or potential conflict of interest with respect to a Potential External Reviewer or may ask for additional information to be disclosed.

briefing and argument, with all written arguments made public. ISDA members can submit a brief in connection with the reviewed question.⁴⁸ The review mechanism offers much of what could be expected from an effective review mechanism of decisions of a global administrative law body and its application to a wider set of cases would enhance ISDA's accountability.

2. Substantive Accountability: Legislative and Regulatory Recognition

ISDA leadership of the industry on derivatives issues is perhaps most exemplary when the organization lobbies to have its rules – such as the close-out netting provision – recognized in relevant jurisdictions. As Annelise Riles observed in her study of derivatives markets:

where the terms in ISDA's standardized documents conflict with the norms enshrined in national statutory or judge-made law, ISDA actively works to supplant or change the latter so that it conforms to the former. ISDA hires local lawyers to investigate discrepancies between the terms of ISDA documents and national law, and where necessary, to lobby national governments to change national law to either conform to the terms of the Master Agreement or explicitly declare the ISDA documents enforceable.⁴⁹

In order to facilitate recognition of close-out netting, in 2006 ISDA released the Model Netting Act (MNA). The MNA is a model law intended to set out, by example, the basic principles necessary to ensure the enforceability of bilateral close-out netting, including bilateral close-out netting on a multibranch basis, as well as the enforceability of related financial collateral arrangements.⁵⁰ As of August 2012 at least 46 countries had adopted or were considering netting legislation, which by all standards is a rather remarkable success for an initiative of a private organization.⁵¹

It is through legislative recognition of ISDA's conventions that ISDA decisions are reviewed at the domestic level. At the same time, it is, arguably, only the case where the legislative debate is actually meaningful. A legislative debate is meaningful if it produces an outcome that is not a mere result of

⁴⁸ See e.g. briefs submitted in connection with the CEMEX External Review, available online at: <http://www.isda.org/dc/view.asp?issuenum=2009100901>.

⁴⁹ Annelise Riles, 'The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State' (2008) 56 AM. J. COMP. L. 605.

⁵⁰ The MNA is available at ISDA's website under "Opinions", available at <http://www2.isda.org/functional-areas/legal-and-documentation/opinions/> (accessed 20 November 2012).

⁵¹ *ibid*, under "Netting Opinions - list by country."

legislators rubber-stamping whatever is put in front of them by those who have a direct interest in the outcome. Rather, a meaningful legislative debate should be informed by a comprehensive assessment of the effects that the adoption of a specific measure will have.⁵² There is merit to the arguments that have been made before the 2008 crisis, that at least some of the consequences of legislative recognition of enforceability of close-out netting have not been sufficiently thought through and discussed. A more comprehensive discussion of the desirability and feasibility of developing an international instrument on the enforceability of close-out netting was recently initiated by the International Institute for the Unification of Private Law (UNIDROIT).⁵³

Legislative recognition as an accountability check reaches its limitations, when certain norms become entrenched in multiple jurisdictions and their simultaneous modification may prove to be difficult. This is in fact what happened to close-out netting. Despite the modifications introduced to US, and later also European law, there existed a perceived risk on part of the regulators that some transactions may fall outside. As the Scott O'Malia put it:

...if a US financial group enters resolution, then Dodd-Frank would apply and a stay would be imposed on terminations by its derivatives counterparties – at least, those subject to US law. If that US company has traded

⁵² UNIDROIT's initiative can be instructive in how to achieve a more meaningful debate about a regulatory standard, one which would ensure that legislative recognition of the standard is in fact a way in which ex post facto accountability is achieved. UNIDROIT has commissioned a study assessing the extent of legal risk arising out of situations involving cross-jurisdictional netting and identifying the causes of legal obstacles to the proper operation of netting agreements. Additionally, the study explores possible solutions and appropriate steps to take, if any. A detailed report from the sessions is available from UNIDROIT's website. <http://www.unidroit.org/english/documents/2012/study78c/cge-01/cge-1-report-e.pdf> (accessed 2 December 2012).

⁵³ As Partnoy and Skeel wrote back in 2007: 'Although we believe there are strong policy arguments that credit derivatives should be subject to the same substantive regulation as other economically equivalent instruments, such as bonds and loans, we recognize that such changes are unlikely as a political matter.' Partnoy and Skeel, 'The Promise' (n 3), 1047. See also Bolton and Oehmke, (2011) 'Should Derivatives' (n 4): '[W]hile derivatives are value-enhancing risk management tools, super-seniority for derivatives can lead to inefficiencies: collateralization and effective seniority of derivatives shifts credit risk to the firm's creditors, even though this risk could be borne more efficiently by derivative counterparties. In addition, because super-senior derivatives dilute existing creditors, they may lead firms to take on derivative positions that are too large from a social perspective.' See also David Skeel and Thomas Jackson, 'Transaction Consistency and the New Finance in Bankruptcy' (2012) 112 Columbia Law Review 152.

with a UK counterparty under English law, however, then there is some doubt as to whether the stay would apply, potentially impeding the efforts of the US resolution authority to deal with the situation.⁵⁴

Accordingly, ISDA working with 18 largest banks and the Financial Stability Board developed a Protocol that will 'impose a stay on cross-default and early termination rights within standard ISDA derivatives contracts between G-18 firms in the event one of them is subject to resolution action in its jurisdiction. The stay is intended to give regulators time to facilitate an orderly resolution of a troubled bank.'⁵⁵

3. *Substantive Accountability: Judicial Review*

Another way through which ISDA's decisions can be reviewed is through judicial means. A case from the US Federal Court for the Southern District of New York concerning the ISDA MA can help illustrate the role played by judicial review in providing a measure of accountability for ISDA's power.

In the jointly administered bankruptcy case of Lehman Brothers Holdings International (LBHI) and Lehman Brothers Special Financing (LBSF) the New York Bankruptcy Court considered the effect of bankruptcy or insolvency on the rights of a non-defaulting counterparty under the close-out netting provision of the MA.⁵⁶ Recall that according to the express terms of the MA, following the occurrence and during the continuance of an event of default, the non-defaulting party is not required to terminate the ISDA MA, and it equally is not required to perform obligations under the ISDA MA. In essence, the non-defaulting counterparty does not have to make payments. Metavante, a counterparty in a number of swaps transactions, relied on this reading of s. 2(a)(iii) and withheld its payments.

⁵⁴ Scott O'Malia, 'Comment: Solving the too-big-to-fail puzzle', *Financial Times*, (24 October 2014).

⁵⁵ ISDA, 'Major Banks Agree to Sign ISDA Resolution Stay Protocol' (14 October 2014), available at <http://www2.isda.org/news/major-banks-agree-to-sign-isda-resolution-stay-protocol> (accessed 27 February 2015).

⁵⁶ *In re Lehman Brothers Holdings, Inc.*, Case No. 08-13555 et seq. (JMP) (jointly administered). The case concerned Metavante Corporation's interest rate swap with LBSF incorporating the terms of the 1992 ISA Master Agreement. LBHI was a credit support provider under the Master Agreement. LBHI's bankruptcy filing on 3 October 2008 constituted an Event of Default under the Master Agreement that entitled Metavante to terminate the swap. For a discussion of the case see Stephen H Moller, Anthony R G Nolan, Howard M Goldwasser, 'Section 2(a)(iii) of the ISDA Master Agreement and Emerging Swaps Jurisprudence in the Shadow of Lehman Brothers' (2011) 7 J. INT'L BANK. L. & REG.

However, due to the substantial period of time that had passed since the commencement of the US Debtors' bankruptcy cases, the Bankruptcy Court ruled that Metavante had waived its right to terminate the swap agreement under the applicable safe harbor provisions. The Bankruptcy Code's automatic stay on actions against the debtor and its prohibition against the enforcement of ipso facto clauses prohibited Metavante from enforcing s 2(a)(iii) against the US debtors. Metavante's reliance on New York State contract law for the proposition that failure of a condition precedent excuses a party's performance obligation was trumped by federal bankruptcy law.

The court noted that while the Bankruptcy Code does not specify that non-defaulting counterparties must act promptly after a filing in order to rely on the protection afforded by its safe harbor provisions, the legislative history of the Bankruptcy Code establishes that Congress intended only to shield parties to financial contracts from the systemic risk that would result from cascading losses due to a counterparty's bankruptcy filing. Because the degree of systemic risk that could result from a single filing diminishes over time, both this decision and existing precedent held that the safe harbor only protects actions that are taken reasonably promptly after the filing date.

While judicial review is an important means through which a measure of substantive accountability of private power can be ensured, it has to be pointed out that limitation of enforceability of contracts such as the ISDA MA has impact on the design of the entire market. Even if there may exist good commercial reasons that warrant a particular interpretation of contractual provisions, this same reason may not be applicable when the contract in question is a regulatory contract. It is essential that judges and decision makers more generally recognize that conventions developed by organizations such as ISDA have a special role and that by interpreting judges effectively alter the design features of particular markets.⁵⁷

V. CONCLUSION

This paper explained how ISDA meets the requirements of accountability that may be deemed to be applicable to private organizations from a GAL perspective. At least two types of justice-like concerns have been articulated with regard to ISDA. First, over-representation of the so-called sell-side institutions (banks, dealers) within ISDA's governance structure. Second, the effects of the close-out netting provision of the ISDA Master Agreement, which privileges derivatives in bankruptcy. ISDA has undergone a tremendous transformation since its inception in the early 1980s, both in terms of its

⁵⁷ Cf Stephen Choi and Mitu Gulati, 'Contract as Statue' (2004) 104 Michigan Law Review 5.

organizational and professional culture and its inclusiveness and openness. It has expanded its membership, and became much more transparent. It can arguably be said to be evolving towards a conception of the public or 'publicness' that constitutes the normative benchmark of legitimacy in GAL literature. ISDA achieves its accountability through a combination of procedural GAL-like standards as well as legislative, regulatory and judicial recognition of the standards it develops. This model of accountability makes ISDA responsive to both cosmopolitan and national constituencies.

POWER AND ACCOUNTABILITY IN THE EU FINANCIAL REGULATORY ARCHITECTURE: EXAMINING INTER-AGENCY RELATIONS, AGENCY INDEPENDENCE AND ACCOUNTABILITY

Iris H-Y Chiu*

Institutional reforms carried out at the EU level in the aftermath of the global financial crisis were purposed towards preserving the stability and well-functioning of financial markets in the EU. The European System of Financial Supervision was first created, followed by the Single Supervisory Mechanism supported by the Single Resolution Mechanism. The proliferation of European level regulatory and supervisory authorities has recalibrated the exercise of public authority over financial markets, and significant power has shifted from national to European level agencies. The creation of EU level agencies is supported by avenues of formal accountability in political, stakeholder and judicial accountability, resulting in some complex designs in power structures. The article argues that such complex designs may affect the autonomy and technocratic efficacy of institutions. However, there is potential in leveraging upon one aspect the complexity offers- inter-agency coordination, in order to promote learning for technocratic effectiveness as well as to cultivate a form of accountability that ameliorates the perception of excessive power. The paper will focus on the inter-relationships between the three European sectoral agencies, especially in the Joint Committee and Board of Appeal to illustrate the achievements of inter-agency coordination and accountability. The paper will go on to explore new challenges that arise with the introduction of the SSM and SRM into the EU financial regulatory architecture. The paper will argue that promoting inter-agency coordination in specific areas may have the potential to address some of these challenges. The broader notion of inter-agency accountability can also spawn future lines of discourse and research into improving the credibility and legitimacy of the exercise of power by EU level agencies.

Keywords: European System for Financial Supervision, Board of Appeal, Single Supervisory Mechanism, Single Resolution Board, Inter-agency accountability

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I. INTRODUCTION

Institutional reforms carried out at the EU level in the aftermath of the global financial crisis were purposed towards preserving the stability and well-functioning of financial markets in the EU, while not compromising on the integration of the internal market.¹ The European System of Financial Supervision (ESFS) was first created in 2010, followed by the Single Supervisory Mechanism² (SSM) supported by the Single Resolution Mechanism (SRM) in 2014. The ESFS comprises of three agencies, the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), the European Insurance and Occupational Pensions Authority (EIOPA), a Joint Committee of the three authorities and the European Systemic Risk Board (ESRB), a dedicated outfit to monitoring systemic risk which is situated under the umbrella of the European Central Bank (ECB). The proliferation of European level regulatory and supervisory authorities has recalibrated the exercise of public authority over financial markets, and significant power has shifted from national to European level agencies.³ National legislators and agencies have largely become administrators of EU regulation although the UK has chosen to engage in gold-plating forms of divergence in some aspects.⁴

The shift in financial regulatory power to the EU is not accepted without unease. Hence, the powers vested in the institutions comprising the ESFS and the accountability mechanisms have been subject to rather complex

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¹ Jacques de Larosière and others, *Report by the High Level Group on Financial Supervision in the EU* (Brussels, 25 February 2009) http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.

² See the Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63 ('SSM Regulation').

³ Niamh Moloney, 'EU Financial Market Regulation After the Global Financial Crisis: More Europe or More Risks?' (2010) 47 Common Market Law Review 1317.

⁴ See discussion in Mads Andenas and Iris H-Y Chiu, 'Financial Stability and Legal Integration in Financial Regulation' (2013) European Law Review 335.

designs.⁵ The EU financial regulatory architecture features a complex design of multiple institutions with different responsibilities located in delicately negotiated power and accountability structures that have to be consistent with Treaty foundations and the *Meroni* doctrine. Complex design continues to be a feature in the institution of the Single Supervisory and Single Resolution Mechanisms.

Complex design reflects the political compromises achieved in sketching the contours of power and accountability relating to the institutions in the ESFS, the SSM and SRM, but the question is whether technocratic effectiveness may be traded off against complex design. This article takes stock of the complexities in the institutional architecture for regulating financial services in the EU and argues there is a need to mediate the needs of technocratic effectiveness and respecting the rationales for the complex designs that have come about. This article argues that exploring the space for inter-agency learning and coordination provides a way for balancing both objectives. This article thus finds the silver lining in the complex designs and makes broad level suggestions to provide perspective. However, it is acknowledged that such a perspective is a starting point and more detailed work can emanate from this research, especially in empirical work, to fully realise the potential of the perspective suggested in this article.

When the ESFS was first institutionalised in 2010, inter-agency coordination was arguably legislated to be part of the institutional architecture in order to achieve the technocratic effectiveness and efficiency of joined-up thinking without amounting to creating a centralised and monolithic financial regulation agency at the EU level. Such inter-agency coordination between the three European agencies is found in the Joint Committee, the Board of Appeal that reviews any complaint regarding a decision imposed by one of the agencies, and the agencies' coordinated work in assisting the ESRB. The article notes that inter-agency coordination has flourished among the European agencies and critically explores the advantages of such coordination in terms of the development of the agencies' identities, technocratic expertise and inter-agency accountability.

This article argues that inter-agency coordination and accountability have highlighted perhaps the unintended benefits of the sectoral institutional architecture for regulating financial services in the EU. This albeit complex architecture has provided opportunities for the EU level agencies to boost their effectiveness and technocratic leadership, and offers further research possibilities into inter-agency accountability and improving the legitimacy of EU agencies as part of the 'administrative polity'. Inter-agency accountability can give rise to the development of novel indicators

⁵ Pablo Iglesias-Rodriguez, *The Accountability of Financial Regulators* (Wolters Kluwer 2014).

for accountability, and such accountability could also be made more transparent in order to engage the public in a more informed discourse on the credibility and legitimacy of the exercise of power by EU level agencies. Inter-agency accountability is also an under-explored area that should be studied to see if non-conventional mechanisms of accountability could improve perceptions of legitimacy in EU level institutions, and contribute towards determining the performance of EU level institutions.

The inter-agency model in the ESFS offers useful insights for the subsequent stage of reform in financial regulatory architecture in the EU represented by the advent of the SSM and SRM. There are a number of unresolved issues in the power and accountability structures in the SSM and SRM architecture, and this article will argue that beneficial insights can be gained from the ESFS model to develop solutions for these concerns.

Part II of the article discusses the institutional architecture of the ESFS and how its power structures and accountability mechanisms have successfully constrained power and provided for extensive multiple accountability channels for the new institutions. It however raises the concern that more institutional autonomy may be needed for institutional effectiveness on the part of the EU level agencies. Part III then discusses how inter-agency coordination and accountability provide channels for boosting agency autonomy and technocratic leadership. Part III also engages in a literature review of the concept of inter-agency accountability and its promising aspects. Part IV then turns to the SSM and SRM as the subsequent stage of institutional architectural reform in regulating EU financial services and offers some observations regarding concerns for the coherence and technocratic effectiveness of the new institutions. This Part argues that insights from the three agencies' inter-agency coordination and accountability can contribute towards consolidating the coherence of responsibilities and the achievement of technocratic effectiveness in an appropriate structure of powers in the SSM and SRM designs. Part V concludes.

II. THE INSTITUTIONAL ARCHITECTURE IN THE EUROPEAN SYSTEM FOR FINANCIAL SUPERVISION (ESFS) - THE FIRST STAGE OF INSTITUTIONAL REFORM

Since the late 1990s legal integration has been identified to be key to market integration in financial services,⁶ and a stealthy form of

⁶ European Commission, 'Financial Services Action Plan: Implementing the Framework for Financial Markets' (Communication) COM (1999) 232; Alexandre Lamfalussy and others, 'Final Report of the Committee of Wise Men on the Regulation of European Securities Markets' (Brussels, 15 February 2001) http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf; Eilís Ferran, *Building an EU Securities Market* (CUP 2004).

institutionalisation at the EU level⁷ for regulating financial services has emerged alongside regulatory convergence. The global financial crisis of 2008-9 provided an opportunity for the EU to review the state of financial regulation and reforms that may be needed to address the issues surfaced in the crisis. The European Commission established a high-level group of experts chaired by Jacques de Larosière to recommend a blueprint for financial supervision in the EU. The de Larosière report recommended extensive legal harmonisation and institutionalisation of a European System of Financial Supervision⁸ (ESFS) in order to meet the needs of financial stability and market integration.⁹

The ESFS comprises three pan-European financial regulators (the EBA,¹⁰ ESMA¹¹ and EIOPA¹²), a Joint Committee of the European Supervisory Authorities and national regulators, and a pan-European macro-prudential supervisor (the ESRB¹³) formed under the auspices of the European Central Bank.

However, hot on the heels of the creation of the ESFS, the acute problems of weak European banks in the periphery linked to weak sovereigns was threatening to overcome the EU with another series of banking crises, in euro-area countries such as Portugal, Ireland, Greece, Spain, Cyprus and even non-euro-area countries such as Bulgaria. The second wave of institutionalisation has therefore taken place to install the European Central Bank as the single micro-prudential supervisor for key banks in the euro-area and banks in voluntarily participating countries outside of the euro area. This is for the purpose of severing the links between weak

⁷ Iris H-Y Chiu, *Regulatory Convergence in EU Securities Regulation* (Kluwer Law International 2008).

⁸ See account and analysis by Eddy Wymeersch, 'Europe's New Financial Regulatory Bodies' (2011) 11 *Journal of Corporate Law Studies* 443.

⁹ Mads Andenas and Iris H-Y Chiu, 'Financial Stability and Legal Integration in Financial Regulation' (2013) *European Law Review* 335.

¹⁰ European Parliament and Council Regulation (EU) 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L331/12 (EBA Regulation 2010).

¹¹ European Parliament and Council Regulation (EU) 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L331/84 (ESMA Regulation 2010).

¹² European Parliament and Council Regulation (EU) 1094/2010 of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC [2010] OJ L331/48 (EIOPA Regulation 2010).

¹³ European Parliament and Council Regulation (EU) 1092/2010 of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board [2010] OJ L331/1 (ESRB Regulation 2010).

sovereigns and national banks,¹⁴ so that confidence can be shored up against the relevant national banks that can be nursed and regulated back to health. The Single Supervisory Mechanism¹⁵ (SSM) is supported by the Single Resolution Mechanism (SRM) for the banks overseen in the SSM. The SRM has been developed alongside regulatory convergence in recovery and resolution frameworks for financial institutions.¹⁶ In sum, the regulatory architecture for financial services has undergone major overhaul since the onset of the global financial crisis 2008-9. The first stage of the overhaul (at that time not seen as a first stage) came in the form of the ESFS in 2010, and the second stage of the overhaul relating to the SSM in place from November 2014. In view of the borderless nature of financial services and markets and the significant pan-European effects of financial fallouts,¹⁷ increased policy-making at the EU level is an inevitable development and the observed ‘transference of powers to the EU’ is a trajectory set to continue. Nevertheless, EU financial regulation is based on an ‘intervention-based’ model where much of day-to-day supervision is left to national regulators who are subject to European level purview.¹⁸ Although institutional reform at the EU level for regulating financial services is the accepted policy direction, reforms are inevitably viewed with some fear and suspicion as regulating financial services is a matter of political salience¹⁹ and of interest to EU political institutions, Member State governments and national regulators, the industry and various stakeholder groups. For example, the British attack on ESMA’s power to adopt emergency measures under the EU Short-selling regulation²⁰ partly reflects its interests in protecting the hedge fund industry which is sizeable in the UK financial services sector. Institutional reforms have thus been born out of much debate, controversy and compromises reflected in the designs relating to institutional power and accountability.

¹⁴ “Eurozone Agrees Common Bank Supervisor”, *Financial Times* (13 Dec 2012). Kern Alexander, ‘Bank Resolution and Recovery in the EU: Enhancing Banking Union?’ (2013) 14 ERA Forum 81.

¹⁵ SSM Regulation (n 3).

¹⁶ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ L 225/1 (‘SRM Regulation’).

¹⁷ See discussion in Guido Ferranini and Luigi Chiarella, ‘Common Banking Supervision in the Eurozone: Strengths and Weaknesses’ (2013) at http://ssrn.com/abstract_id=2309897.

¹⁸ Pierre Schammo, ‘EU Day-to-Day Supervision or Intervention-Based Supervision: Which Way Forward for the European System of Financial Supervision?’ (2012) 32 OJLS 771.

¹⁹ Christel Koop, ‘Explaining the Accountability of Independent Agencies: The Importance of Political Salience’ (2011) 31 Journal of Public Policy 209.

²⁰ Case 270/12 *United Kingdom v Parliament and Council* (not yet published), supported in Jacques Pelkmans and Mara Simoncini, ‘Mellowing Meroni: How ESMA Can Help Build the Single Market’ CEPS Commentary, 18 February 2014.

1. *An Outline of the Framework of the ESFS*

In the face of urgent need for reform in the immediate aftermath of the global financial crisis, the first stage of institutional reforms was based on formalising institutional structures that had already existed in a quasi-independent form. These structures were the 'Level Three' Committees i.e. the Committee of European Banking Supervisors (CEBS), the Committee of European Securities Regulators (CESR) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) formed pursuant to the Lamfalussy recommendations of 2001 to foster supervisory and regulatory convergence in the implementation of harmonised legal standards.²¹ Level Three committees forged technical guidelines to assist in the consistent implementation of harmonised legal standards and to achieve consistency in supervisory techniques and styles. The Committees' technical guidelines were not binding, but the Committees' work provided a soft framework for regulatory convergence on the books as well as in practice.²² Furthermore, the Committees²³ fostered comity and respect for peer pressure through mechanisms such as CESR's consolidated 'Questions and Answers'²⁴ and informal mediation processes facilitated by CESR for national regulators. The formalisation of structures already in existence seemed less politically controversial (as the Committees have had an evolutionary history based on their inter-governmental nature) and represented a reform step that was imminently achievable and efficient.

The graduation of the three sectoral Level Three committees to independent agencies is a logical step to take in institutionalising EU financial regulation, although the sectoral approach to regulation has, especially in the US context, been criticised for its limitations, incompatibility with developments in the financial sector and perhaps incoherence.²⁵ The EBA, ESMA and EIOPA are tasked with certain

²¹ For example, see CESR, 'Which supervisory tools for the EU securities markets?' (25 October 2004) Preliminary Progress Report No 04-333f http://www.esma.europa.eu/system/files/04_333f.pdf accessed 18 December 2012 ('Himalaya Report'), 5.

²² Iris H-Y Chiu, *Regulatory Convergence in EU Securities Regulation* (Kluwer Law International 2008), chs 2-5.

²³ Mark W Zacher and Brent A Simon, *Governing Global Networks* (CUP 1996), 13-35, for a general discussion of regime theory; James N Rosenau and Ernst Otto Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (CUP 1992, rep 2000), 219; Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004). These discussions shed light on the nature and dynamics of cooperation in networks that exert powerful and consensual governance without requiring state-based backing by sanctions.

²⁴ Majone has also argued that the platform for technical standards and developing technocracy finds less resistance to network cooperation and consensus. See Giandomenico Majone, *Regulating Europe* (Routledge 1996).

²⁵ See Jeremy W Markham, 'Super-Regulator: A Comparative Analysis of Securities and Derivatives Regulation in the US, UK and Japan' (2003) 28 *Brooklyn Journal of International Law* 319, E Wymeersch, 'The Structure of Financial Supervision in

overall responsibilities for EU financial regulation, but they oversee national regulators and are not directly involved with regulated entities, which are still subject to national regulators. The three agencies have the continuing mandate of market integration and legal convergence, and protective objectives, such as systemic stability and consumer protection. The Regulations establishing the EBA, ESMA and EIOPA have mirror provisions on the roles, functions and powers of these bodies.²⁶ In terms of furthering the market integration objective, these bodies have the power to recommend technical standards for uniform implementation of EU Directives in financial regulation and to issue binding guidelines on supervisory practices and standards.²⁷

The three agencies are responsible for achieving market integration through supervisory convergence, based on common guidelines,²⁸ and the monitoring of coherence in supervisory action. The three agencies, in forging supervisory convergence, have the power to facilitate the settling of disagreements between national regulators, or where conciliation fails, to impose a decision to resolve the disagreement.²⁹ They are also responsible for establishing colleges of supervisors for joint supervision and stress testing of financial institutions,³⁰ forging a common supervisory culture³¹ and conducting peer reviews of national regulators for convergence in supervisory measures.³²

The three agencies have the mandate to take the lead on setting policies and standards in consumer financial protection³³ and ensuring the

Europe: About Single, Twin Peaks and Multiple Financial Supervisors' at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946695; but see Joseph J Norton, 'Global Financial Sector Reform: The Single Financial Regulator Model Based on the United Kingdom FSA Experience--A Critical Reevaluation' (2005) 39 *International Lawyer* 15; Howell E Jackson, 'Regulation in a Multi-sectored Financial Services Industry' (1999) 77 *Washington University Law Quarterly* 319.

²⁶ See analysis in Niamh Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Parts 1 and 2' (2011) 12 *European Business Organisation Review* 43 and 178 respectively.

²⁷ EBA, ESMA and EIOPA Regulations, arts 8, 10, 15-16. However, the power to make such delegated legislation is revocable by the European Council and Parliament (see arts 12 and 13) and is subject to review by the Commission (art 11). The substantive technical standards may also be vetted and objected to by the Commission (art 14), providing layers of checks and balances to the exercise of such legislative power. The status of successfully passed standards and guidelines are however binding on Member States and non-compliance would amount to a breach of Union law (art 17).

²⁸ EBA, ESMA and EIOPA Regulations, art 16.

²⁹ EBA, ESMA and EIOPA Regulations, arts 18, 19.

³⁰ EBA, ESMA and EIOPA Regulations, art 21.

³¹ EBA, ESMA and EIOPA Regulations, art 29.

³² EBA, ESMA and EIOPA Regulations, art 30.

³³ EBA, ESMA and EIOPA Regulations, art 9.

consistent application of financial guarantee schemes.³⁴ They are also tasked to deal with systemic risk mitigation,³⁵ provide support for the work of the ESRB and facilitate coordinated crisis management by national regulators.

The sectoral approach is arguably insufficient for dealing with pan-European perspectives and cross-border issues. Pan-European solutions to banks which have extensive cross-border operations proved to be challenging in the crisis as national governments and regulators engaged in self-interested actions, some to a greater degree than others.³⁶ Hence, there is a need for the institution of a European level architecture that is able to engage with pan-European perspectives and develop capacity to deal with problems of that scale. In the absence of a single financial services regulator and/or supervisor for the EU, the creation of the ESFS includes a Joint Committee of the three sectoral agencies that could provide joined-up perspectives in the financial sector. Further the Joint Committee and the three agencies would support the work of the European Systemic Risk Board (ESRB). The ESRB is the pan-European body that is tasked with macro-prudential oversight.³⁷ It is a body with a governing Board³⁸ independent of the European Central Bank but nevertheless nested within the European Central Bank. The ESRB has the power to collect and request information from the three European authorities mentioned above, from national central banks and from regulators³⁹ in order to carry out its analytical responsibilities to determine whether systemic risk warnings should be sounded. The ESRB's role is to issue warnings and/or recommendations to the EU as a whole or to individual Member States or national regulators⁴⁰ but these warnings and recommendations are not strictly binding. A number of commentators⁴¹

³⁴ EBA, ESMA and EIOPA Regulations, art 26.

³⁵ EBA, ESMA and EIOPA Regulations, arts 22, 23, 32.

³⁶ For example, the German and British unilateral actions in freezing Icelandic banks' assets in their jurisdictions upon failure of those banks; the unilateral unlimited deposit guarantee offered by Ireland to save its banks, the national lines taken in the resolution of Fortis bank. Post-crisis pan-European solutions in the resolution of Dexia, Cyprus banks, Bankia and Banco Espirito Santo of Portugal have however been dovetailed into coordinated European resolutions. See Jean Pisani-Ferry and Andre' Sapir, 'Banking Crisis Management in the EU: An Early Assessment' (2010) *Economic Policy* 341; Mark Rhinard, 'European Cooperation on Future Crises: Toward a Public Good' (2009) 26 *Review of Policy Research* 439; Joel P Trachtman, 'The International Law of Financial Crisis: Spillovers, Subsidiarity, Fragmentation and Cooperation' (2010) *Journal of International Economic Law* 719.

³⁷ ESRB Regulation, art 3.

³⁸ ESRB Regulation, art 6.

³⁹ ESRB Regulation, art 15.

⁴⁰ ESRB Regulation, art 16.

⁴¹ Eilis Ferran and Kern Alexander, 'Can Soft Law Bodies Be Effective? Soft Systemic Risk Oversight Bodies And The Special Case Of The European Systemic Risk Board' (2010) *European Law Review* 751; Alexandra Hennessy, 'Redesigning Financial Supervision in the European Union' (EUSA conference, Boston, 3-6 March 2011).

have noted that although the power of the ESRB is limited to such ‘soft law’ warnings, these measures are unlikely to be ignored. Indeed, they are likely to facilitate a form of economic governance that may be adapted to suit both boom and crisis times.

It is noteworthy that institutional reform did not go along the lines of creating one centralised financial regulator and/or supervisor for EU financial markets.⁴² Wymeersch⁴³ opines that the creation of one single financial services regulator and/or supervisor would have entailed difficult political discussions about the structure, governance and location of the single integrated body. In fact, the creation of such a body may require Treaty change as it is unlikely that such a body could be founded upon the narrow *Meroni* doctrine.⁴⁴ The ESFS is arguably the subject of painstaking design to ensure adequate constraints of power within the confines of the *Meroni* doctrine and multiple accountability channels.⁴⁵ These aims have arguably been achieved in the institutional architecture of the ESFS, but this Section raises the questions of whether institutional effectiveness and autonomy have been traded off. This Section argues that the power and accountability structures have succeeded in bounding the ESFS within certain constraints, but may pose handicaps to institutional effectiveness.

2. Critically Exploring the Complex Designs in Power and Accountability in the ESFS and Technocratic Effectiveness of the Institutions

In view of the pan-European powers and responsibilities vested in the three agencies, a complex design of power and accountability structures has come about to ensure that the three agencies fall within appropriate parameters of political constraints. Commentators are of mixed opinions whether the three agencies should be regarded as ‘powerful’ agencies. One school of opinion views the three agencies as limited and constrained in power as (a) the agencies do not have law-making power as such; they assist the Commission in providing first drafts of supporting technical standards to primary legislation; (b) they largely do not have direct relationships with regulated entities, except in the case of credit rating agencies and central counterparties under the purview of ESMA; (c) they rely on national

⁴² See M Andenas, ‘Who is Going to Supervise Europe’s Financial Markets?’ in M Andenas and Y Avgerinos (eds), *Financial Markets in Europe - Towards a Single Regulator?* (Kluwer Law International 2003) at xv.

⁴³ Eddy Wymeersch, ‘The Institutional Reforms of the European Financial Supervisory System, An Interim Report’ (2010) at <http://ssrn.com/abstract=1541968>.

⁴⁴ Case 9/56 *Meroni v High Authority* [1957-58] ECR 133 which provides that EU institutions can only delegate well-defined executive powers but not broad discretionary powers. This has lasting implications for the creation of EU agencies, and the Commission’s White Paper on European Governance (2001) arguably reinforces the need for technocratic expert-led independent European agencies with specific powers to implement policies made by the Commission and take individual decisions pursuant to those policies but not to have broad regulatory powers.

⁴⁵ Herwig CH Hofmann, ‘Agency Design in the European Union’ (2011) at <http://ssrn.com/abstract=1823231>.

regulators to implement and enforce regulatory rules and in the collection of information;⁴⁶ and (d) even in emergency situations where they wish to exercise the power to address a specific decision to a regulated entity, the approval of the European Council needs to be sought. Other commentators however view the three agencies as immensely powerful as they have quasi-regulatory powers distinguishing them from the other established types of agencies in the EU that are advisory in nature or implementers of policy without own discretion.⁴⁷ In particular the three agencies are powerful as supranational supervisors of national regulators in terms of imposing implementing standards for regulation, supervisory convergence, settlement of disputes and mandating information conveyance. ESMA uniquely enjoys direct regulatory powers over credit rating agencies although specific powers and enforcement actions are set out in such a way as to meet the *Meroni* constraints against delegating broad discretionary powers.⁴⁸

The diverging perspectives on the three agencies' powers possibly reflect a general uncertainty towards their position in the regulatory space. Such uncertainty has arguably arisen due to the complex arrangements over decision-making. The complexity is due to the need to keep within the *Meroni* parameters while effectively empowering the agencies to carry out tasks appropriate for their technocratic expertise. Thus, on the one hand, the agencies are regarded as 'powerful' in light of the loss of regulatory discretion on the part of national regulators in terms of policy and law-making and supervisory practices. On the other hand, the agencies may not be regarded as 'powerful' because many of their key responsibilities are not undertaken independently, such as developing regulatory standards and addressing emergency decisions. Both perspectives of the agencies are valid if the agencies are looked at as bound up with the EU political institutions, particularly the Commission.⁴⁹ The agencies could be viewed as extensions of ever-increasingly EU political power while not being autonomously powerful themselves.

⁴⁶ Elaine Fahey, 'Does the Emperor Have Financial Crisis Clothes? Reflections on the Legal Basis of the European Banking Authority' (2011) 74 *Modern Law Review* 581; Nicolette Kost de Sevres and Lorenzo Sasso, 'The New European Financial Markets Legal Framework: A Real Improvement? An Analysis of Financial Law and Governance in European Capital Markets from a Micro and Macro economic Perspective' (2011) *Capital Markets Law Journal* 30.

⁴⁷ Pierre Schammo, 'The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers' (2011) 48 *Common Market Law Review* 1879; Michelle Everson, 'A Technology of Expertise: EU Financial Services Agencies' (June 2012) LSE Research Paper; Pablo Iglesias-Rodriguez, *The Accountability of Financial Regulators* (Wolters Kluwer 2014).

⁴⁸ Niamh Moloney, 'Reform or Revolution? The Financial Crisis, EU Financial Markets Law, and the European Securities and Markets Authority' (2011) 60 *ICLQ* 521.

⁴⁹ Noted in DG for Internal Policies, *Parliament's Review of the ESFS* (2013) as many stakeholders' views.

The complexity in the design of power structures is due to a pre-occupation with keeping within the *Meroni* parameters, and with ensuring that accountability mechanisms are constructed comprehensively in order to dispel fears and suspicions against the three new agencies. In this process, the independence of the agencies which is an important attribute towards effectiveness seems relatively neglected.⁵⁰ The independence of these technocratic and expert-led agencies is a key attribute believed by the European Parliament⁵¹ to be important for sound financial regulation in the EU, un-entangled from political interests and regulatory capture. In general, commentators support the independence of agencies as agencification is intended to achieve the purposes of de-politicisation and the forging of technocratic and objective solutions to regulatory issues.⁵² The roles of the three agencies could indeed provide a mediating platform between political and national interests given their inter-governmental background, and yet forge an objective and expert-led position on the final shape of policy and regulation.⁵³ This article notes Everson's concerns⁵⁴ for excessive de-politicisation of policy-making in financial regulation by framing these issues as subject to technocratic regulation, but is more optimistic about the three agencies' roles. This article is of the view that the three agencies can act as suitable platforms to mediate the technocratic aspects of financial regulation and the more politically-charged aspects. The UK and Germany's responses to the Icelandic bank failures in 2009 for example, have demonstrated the precedence of politically-charged actions over technocratically efficient solutions. Hence, there may be a case for arguing the contrary to Everson's concerns - that

⁵⁰ Although the agencies are tasked to act independently, EBA, ESMA and EIOPA Regulations, art 1, and national regulator representatives, the Chairperson of the governing body, the Board of Supervisors and the Executive Director of the administrative organ, the Management Board, are tasked to exercise their judgment independently of political and national interests, arts 42, 46, 49 and 51, the Regulations feature overwhelmingly substantive provisions on control and accountability that may affect independence.

⁵¹ DG for Internal Policies, *Parliament's Review of the ESFS* (2013); Pablo Iglesias-Rodriguez, *The Accountability of Financial Regulators* (Wolters Kluwer 2014), 217.

⁵² Madalina Busuioc and Martijn Groenleer, 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives' in M Everson, C Monda and E Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International 2014 forthcoming); Damien Geradin, 'The Development of European Regulatory Agencies: What the EU Should Learn from American Experience' (2004) 11 *Columbia Journal of European Law* 1.

⁵³ One notes Everson's critique of this position as technocratisation could be a way to evade addressing the political nature of some issues and hence mute the voices concerned with political implications, see Michelle Everson, 'A Technology of Expertise: EU Financial Services Agencies' (June 2012) LSE Research Paper.

⁵⁴ It is noted that Everson warns against de-politicisation of issues in the EU by technocratisation of these as regulatory areas. She is sceptical of the effectiveness of such an approach and she is concerned for the marginalisation of democratic voice in policy-making, see Michelle Everson, 'A Technology of Expertise: EU Financial Services Agencies' (June 2012) LSE Research Paper.

there is a need to de-politicise policy-making in financial services regulation.

The path towards achieving greater de-politicisation and technocratisation of financial regulation involves the recalibration of the political hold over financial regulation itself. The design of the three agencies' power and accountability structures thus reflects this challenge, and has resulted in the institution of significant controls on the three agencies' exercise of powers. The author of this article is of the view that policy-makers have become too pre-occupied with designing appropriate controls to the extent of insufficient consideration for the importance of the independence of the three agencies for the purposes of their technocratic effectiveness. This Section will argue that although the three agencies are subject to extensive channels of political and stakeholder accountability in their exercise of powers, designed to please the relevant constituents who are concerned with the powers vested in the agencies, these mechanisms could pose handicaps to supporting the development of technocratic and objective work on their part. Some of these mechanisms are more in the nature of 'control' mechanisms directly cutting down the level of autonomy the agencies could enjoy.

In terms of control, certain EU political institutions have rights of control over the agencies' decisions, such as Commission's final say on draft technical standards⁵⁵ and implementing technical standards⁵⁶ submitted by the three agencies as part of their work in developing the single rulebook, the Council's power to revoke a decision addressed by the three agencies to Member State regulators,⁵⁷ the Council's power to determine whether an emergency situation has arisen for the three agencies to take particular decisions addressed to specific financial institutions,⁵⁸ and the Commission's oversight of the three agencies' budgets⁵⁹ and staff employment policies.⁶⁰ The Commission has the power to review the delegated power to the three agencies in drafting technical standards and may recommend extension of such delegation. The Council or Parliament may exercise the power to revoke such delegation.⁶¹ The power of EU political institutions to instruct the three agencies to undertake certain tasks is also a form of control over the agencies' powers. For example, the Parliament, Council or Commission could ask the agencies for advisory opinions on any matter of their competence,⁶² the Commission could issue an opinion on a Member State's breach of Union law and ask the agencies

⁵⁵ EBA, ESMA and EIOPA Regulations, art 10.

⁵⁶ *ibid*, art 15.

⁵⁷ *ibid*, art 38.

⁵⁸ *ibid*, art 18.

⁵⁹ *ibid*, arts 63-65.

⁶⁰ *ibid*, art 68.

⁶¹ *ibid* art 11, 12.

⁶² *ibid* art 34.

to address decisions directly to financial institutions concerned,⁶³ and the ESRB could ask the agencies for information to assist in its systemic risk oversight.⁶⁴

In terms of political accountability, the three agencies are subject to *ex ante* forms of accountability such as Commission representation on the governing body, the Board of Supervisors, albeit in non-voting capacity. The governing body is dominated by Member State regulators alongside non-voting representatives from the Commission, ECB, ESRB and the other ESAs.⁶⁵ Furthermore, the European Parliament has the power to veto the appointment of the Chairperson of the Board of Supervisors,⁶⁶ and its approval is required for the appointment of the Executive Director⁶⁷ of the Management Board, which is the administrative organ of the agencies supporting the work of the Board of Supervisors.

The three agencies are also subject to extensive reporting accountability to the EU political institutions in respect of certain decisions. Although such reporting may be carried out after the decision is taken, it is unclear if such reporting is *ex post* for information only or whether intervention may indeed be carried out by the political institutions. For example, where the three agencies consider that there is a need to restrict or prohibit certain types of financial activity, such as short-selling to preserve the financial stability of the EU, the Commission needs to be informed in order 'to facilitate the adoption of any such prohibition or restriction'.⁶⁸ It is not clear if the Commission has the final say, but it would seem that the Commission's acquiescence is a pre-condition to such a decision made by the agencies, and the legislative wording suggests Commission control rather than *ex post* accountability to the Commission. The three agencies also need to inform the Commission, Council and Parliament of the informal guidelines and recommendations they issue to Member State regulators,⁶⁹ report on market developments, risks, trends and vulnerabilities twice a year to the Commission, Parliament and Council,⁷⁰ submit annual work programmes⁷¹ and annual reports⁷² to the Commission, Parliament and Council. The Parliament or Council could also invite the Chairpersons of the agencies to appear in person to answer any questions.⁷³

⁶³ *ibid*, art 17.

⁶⁴ *ibid*, art 36. The agencies are tasked with the general role of developing systemic risk indicators and stress testing regimes in order to assist the ESRB in its systemic risk oversight, see arts 22-23.

⁶⁵ *ibid*, art 40.

⁶⁶ *ibide*, art 48.

⁶⁷ *ibid*, art 51.

⁶⁸ *ibid*, art 9.

⁶⁹ *ibid*, art 16.

⁷⁰ *ibid* arts 23 and 33.

⁷¹ *ibid*, art 43.

⁷² *ibid*, art 44.

⁷³ *ibid*, art 50.

The control and accountability channels designed for the three agencies are rather extensive in nature, and the agencies really only have their own discretion in the areas of supervisory convergence,⁷⁴ settlement of disagreements between national regulators,⁷⁵ and to certain extent, work undertaken in the Joint Committee.⁷⁶ Although the Commission is represented at Joint Committee meetings, it is less certain how much influence and control such a representative has, and it is noted that the Joint Committee establishes its own sub-committees and decision-making procedures. Iglesias-Rodriguez⁷⁷ considers the main accountability mechanisms for the three agencies to lie in political accountability and control. Political accountability and control meet the immediate need of supporting the legitimacy of the three agencies. However, the longer term effects on the autonomy and technocratic leadership of the agencies need to be considered.⁷⁸

The power, control and accountability structures discussed so far are premised on a need to usher in the institution of financial regulation in the EU within politically acceptable parameters for the EU political institutions and Member States. The author of this article is of the view that the autonomy, independence and technocratic leadership of the agencies, although formally endorsed, are relatively more neglected attributes, and could be undermined by the extensive control and accountability mechanisms. Commentators argue that accountability is not contrary to independence,⁷⁹ as independence gives rise to accountability for legitimacy purposes, and the lack of independence makes accountability an irrelevant issue. In the context of the three agencies however, the features of control discussed above are relatively extensive and should give rise to concerns as to the extent of independence really enjoyed by the agencies. The above has also discussed the nebulous nature

⁷⁴ *ibid*, arts 21, 29-31.

⁷⁵ *ibid*, arts 19-20. Even then such needs to be reported to Parliament in annual reports, but annual reporting is routinely received by the Parliament in relation to so many agencies in the EU that Curtin argues that such a form of accountability does not particularly attract scrutiny, see Dierdre Curtin, 'Delegation to EU Non – Majoritarian Agencies and Emerging Practices of Public Accountability' in *Regulation through Agencies: A New Paradigm of European Governance* 87 (2005) at <http://ssrn.com/abstract=1349771>.

⁷⁶ EBA, ESMA and EIOPA Regulations, arts 54-56.

⁷⁷ Pablo Iglesias-Rodriguez, *The Accountability of Financial Regulators* (Wolters Kluwer 2014), ch 6.

⁷⁸ *ibid* 241.

⁷⁹ Madalina Busuioc and Martijn Groenleer, 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives' in M Everson, C Monda and E Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer Law International 2014 forthcoming); Eva Hüpkes, Marc Quintyn and Michael Taylor, 'Accountability Arrangements for Financial Sector Regulators' (IMF Economic Issues 2006) via <http://www.imf.org/external/pubs/ft/issues/issues39/ei39.pdf>.

of *ex ante* forms of political accountability which could act as ‘controls’. It may be argued that such control is necessary as falling within *Meroni* parameters, as the agencies cannot have law-making powers and are not in a position to determine breach of Union law. However, one queries why implementing technical standards that involve no strategic decision cannot be decided independently by the agencies, why the agencies should be subject to a threat of revocation in their standard-setting roles and why annual work programmes have to receive *ex ante* approval from political institutions? In other words, the article doubts that the extent of control, or control in the form of *ex ante* accountability, gives proportionate importance to the autonomy, independence and technocratic leadership of the agencies.

The three agencies are also subject to accountability in terms of the reviewability of their decisions. Any natural or legal person including national regulators to whom a binding agency decision is addressed may appeal to the Board of Appeal constituted jointly by the three agencies.⁸⁰ The three agencies would appoint, from a Commission shortlist, four representatives each (two members and two alternates) from their Management Boards to sit on the Board of Appeal alongside other experts openly recruited.⁸¹ The Board of Appeal would consist of 6 members and 6 alternates and every member is expected to act impartially and independently in deciding any appeal, with interested members refraining from sitting on the appeal.⁸² The Board of Appeal is required to provide resolution in an expeditious manner⁸³ and is also required to make its procedures and its reasoned decisions public.⁸⁴ The Board’s decisions are subject to appeal to the European Court of Justice and access to the Court is also available under Art 263 of the Treaty of the European Union where an Authority’s decision cannot be appealed⁸⁵ to the Board of Appeal.⁸⁶

The three agencies are also subject to stakeholder accountability. The agencies are mandated to set up Stakeholder Groups of 30 individuals each,⁸⁷ represented by the industry, users of financial services, employees’ representatives, consumers and at least five top-ranking academics in the field. These stakeholder groups are consulted upon in the processes leading up to drafting technical standards, implementing technical

⁸⁰ EBA, ESMA and EIOPA Regulations, art 60.

⁸¹ *ibid*, art 58.

⁸² *ibid*, arts 58 and 59.

⁸³ Within two months of lodging an appeal.

⁸⁴ EBA, ESMA and EIOPA Regulations, art 60.

⁸⁵ *ibid*, art 61.

⁸⁶ However, Pieter Van Cleynenbreugel, ‘Judicial Protection against EU Financial Supervisory Authorities in the Wake of Regulatory Reform’ (2012) at <http://ssrn.com/abstract=2194172> criticises that the judicial accountability is too narrow as being confined to persons directly affected by agency decisions and that the grounds in Art 263 may not encompass all possible grievances against the agencies.

⁸⁷ EBA, ESMA and EIOPA Regulations, art 37.

standards, and guidelines and recommendations, providing a form of input legitimacy to the agencies' responsibilities. Iglesias-Rodriguez⁸⁸ however notes that stakeholder groups tend to be industry-dominated and not well-represented by consumer groups. At the moment no signs of regulatory capture have emerged in relation to industry participation in the agencies' deliberations and in fact the Parliament review of the ESAs suggests that the ESAs have been taking care to refrain from being overly engaged with stakeholders.⁸⁹

Where the ESRB is concerned, although its powers are non-binding in nature, it is subject to extensive input legitimacy mechanisms in terms of its accountability structure. Its General Board will be assisted by a Steering Committee⁹⁰ made up of an even spread of representatives from the ESRB, the European Central Bank, the ESMA, EBA and EIOPA, the European Commission, the Economic and Financial Committee of the European Council, and the two advisory committees of the ESRB. The ESRB's work will be assisted by an Advisory Scientific Committee⁹¹ which comprises of experts from across a wide range of fields and skills and the Advisory Technical Committee⁹² which consists of representatives from national central banks and EU-level representation. The representation feeding into the ESRB's decision-making includes EU-level political interests, national interests as well as technocratic expertise. The design for representation internalises any potential contests between EU-level and national objectives, as well as political and technocratic objectives under the ESRB. However, this complex representation structure does in itself promise that effective mediation of contests of interests.

In sum, the ESFS may appear to be an institutional set-up that is powerful and autonomous, but is actually underpinned by extensive inter-governmentalism and controls by EU political institutions. The challenge for the ESFS is arguably to establish its identity and credibility in EU financial services regulation, and such a challenge may become more acute with the advent of the SSM that brings about a differentiated form of supervision for certain euro-area banks.

The article argues that the very complexity of design in the ESFS could be used to overcome the weakness discussed above. The ESFS could leverage upon its inter-agency features to boost its autonomy, independence and credibility in becoming a technocratic, expert-led system for EU financial services regulation. The advantage of not being a single financial services regulatory institution is that the sectoral boundaries separating the

⁸⁸ Pablo Iglesias-Rodriguez, *The Accountability of Financial Regulators* (Wolters Kluwer 2014), ch 7.

⁸⁹ DG for Internal Policies, *Parliament's Review of the ESFS* (2013).

⁹⁰ ESRB Regulation, art 11.

⁹¹ *ibid*, art 12.

⁹² *ibid*, art 13.

agencies promote non-homogenous approaches while inter-agency coordination and interactions foster crucial joined-up thinking. Inter-agency coordination can be fostered for holistic perspectives in financial regulation, and develop the technocratic competence and credibility of individual institutions, overcoming the limitations that agencies face in view of controls over power. Over time, a sustained pattern of inter-agency coordination can even develop forms of inter-agency accountability that could be important in underlining the agencies' legitimacy. The development of inter-agency accountability can even go towards reducing the need for extensive political controls over agencies.

Part III will now go on to explore the inter-agency coordination of the three agencies in the Joint Committee and the Board of Appeal. Part III will discuss how inter-agency learning and coordination is developing in the ESFS and how such can help secure agency technocratic credibility and improve agency autonomy and independence at the same time. The potential for development of inter-agency accountability will also be highlighted.

III. INTER-AGENCY LEARNING, COORDINATION, ACCOUNTABILITY AND ACHIEVEMENTS

This Part argues that the three agencies EBA, ESMA and EIOPA have not merely succumbed to the limitations in their power structures and accountability mechanisms in carrying out their mandates. They have taken steps to develop those areas of their responsibilities where they may act relatively more independently, such as in consumer protection,⁹³ and are developing their technocratic credibility as autonomous agencies in EU financial regulation.⁹⁴ In particular, the article argues that the three agencies are augmenting their fields of independence by developing expertise in areas under the purview of the Joint Committee. Inter-agency coordination has arguably provided a platform for increased learning, accountability and fostering of independence of the agencies as technocratic expert-led outfits. This is a form of inter-dependence that reinforces the three agencies' scope of work and the development of their technocratic expertise. Such inter-dependence boosts the autonomy, independence and technocratic leadership of each agency, and also has the potential of enhancing accountability through inter-agency transparency

⁹³As commended by the European Commission's review of the ESFS, see European Commission, *Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)* (7 August 2014).

⁹⁴Observed by stakeholders in DG for Internal Policies, *Parliament's Review of the ESFS* (2013), and also commended in European Commission, *Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)* (7 August 2014).

and coordination. This Part explores the dynamics and achievements of such inter-agency learning and accountability.

1. Joint Committee

The Joint Committee of the three agencies is to comprise of the Chairpersons of each agency and the Executive Directors of each agency, a representative from the Commission and ESRB respectively, who would be observers at the meetings.⁹⁵ The Joint Committee is established to ensure cooperation and cross-sectoral consistency in policy areas such as financial conglomerates, accounting and auditing, micro-prudential analyses of cross-sectoral developments, risks and vulnerabilities for financial stability, retail investment products, measures combating money laundering, and information exchange with the ESRB and developing the relationship between the ESRB and the agencies.⁹⁶ In particular, the Joint Committee may establish sub-committees dedicated to technocratic leadership in the above areas, but a mandatory sub-committee on Financial Conglomerates must be established.⁹⁷ The Joint Committee is also the forum for joint decisions and positions to be adopted among the three agencies.⁹⁸

This Section argues that the Joint Committee has developed to be a platform for the three agencies to develop inter-agency coordination and learning that further enhances each agency's autonomy, independence and technocratic leadership. Furthermore, inter-agency interactions promote transparency between the agencies. Although such transparency is not necessarily publicly visible, such interactions can promote enhanced accountability for each agency's technocratic development and performance. This Part will mention a few examples gathered from the publicly available documents of the Joint Committee, although a comprehensive trawl and analysis of all Joint Committee documents has not been conducted for the purposes of this article.

First, the Joint Committee has established a procedure of decision-making that involves consensus of the three Chairpersons.⁹⁹ Disagreements would result in reconsiderations of issues which would then be subject to decision-making again. This procedure fosters inter-agency transparency, sharing, learning and negotiation and can contribute towards enhancing the technocratic development in each agency. The coordination and interaction between the agencies pursuant to Joint Committee work has

⁹⁵ EBA, ESMA and EIOPA Regulations, art 55.

⁹⁶ *ibid*, art 54.

⁹⁷ *ibid*, art 57.

⁹⁸ *ibid*, art 56.

⁹⁹ Decision of the Joint Committee of the European Banking Authority, European Insurance and Occupational Pensions Authority, and European Securities and Markets Authority adopting the Rules of Procedure of the Joint Committee of the European Supervisory Authorities (21 June 2011).

led to greater cross-sectoral training that could enhance each agency's technocratic expertise.¹⁰⁰

Next, the three agencies have established increased numbers of sub-committees under the purview of the Joint Committee, suggesting that they are increasingly taking a stake in providing technocratic leadership in policy development, and not merely doing the minimal to cooperate in the matters set out in their instituting legislations. Besides the mandatory Financial Conglomerates sub-committee, the Joint Committee established a sub-committee on Cross-sectoral Developments, Risks and Vulnerabilities, a sub-committee on Money Laundering, a sub-committee on Consumer Protection and Financial Innovation, which has formed three sub-groups to deal specifically with cross-selling and complaints-handling,¹⁰¹ product governance and oversight and draft technical standards for packaged retail investor products (PRIIPs).¹⁰² The sub-committee on Financial Conglomerates has championed¹⁰³ for wider supervisory remit over groups of financial institutions that may pose cross-sectoral and systemic risks, positioning its technocratic leadership on one of the Joint Committee's fundamental remits. It has also developed standards for supervisory convergence in the oversight of financial conglomerates.¹⁰⁴ The sub-committee on Cross-sectoral Developments, Risks and Vulnerabilities is responsible for delivering the bi-annual report on cross-sectoral market developments, risks and vulnerabilities in the EU which the three agencies are tasked to prepare for the Commission, Parliament and Council. The Joint Committee notes its increasing expertise as a risk intelligence gatherer and monitor, and the usefulness of the reports feeding into the Council's ECOFIN Financial Stability Table.¹⁰⁵

¹⁰⁰ Joint Committee *Work Programme* (2013) at <http://www.esma.europa.eu/sk/system/files/jc-2013-002.pdf>; and Joint Committee *Work Programme* 2014, via http://www.esma.europa.eu/sk/system/files/jc-2014-051-2014_work_programme_of_the_joint_committee_of_the_esas.pdf.

¹⁰¹ See Joint Committee, *Joint Committee Consultation Paper on Guidelines for Cross-Selling Practices* (22 December 2014) at http://www.esma.europa.eu/system/files/jc_cp_2014-05_consultation_paper_on_cross_selling.pdf.

¹⁰² Joint Committee *Work Programme* 2013 at <http://www.esma.europa.eu/sk/system/files/jc-2013-002.pdf>.

¹⁰³ EBA, EIOPA and ESMA's *Response to the European Commission's Call for Advice on the Fundamental Review of the Financial Conglomerates Directive* (2012) at http://www.esma.europa.eu/sk/system/files/jc_2012_88.pdf;

¹⁰⁴ Joint Committee, *Joint Guidelines on the Convergence of Supervisory Practices Relating to the Consistency of Supervisory Coordination Arrangements for Financial Conglomerates* (22 December 2014) at http://www.esma.europa.eu/system/files/jc_gl_2014-01_joint_guidelines_on_coordination_arrangements_for_financial_conglomerates.pdf.

¹⁰⁵ Joint Committee *Work Programme* 2014, at http://www.esma.europa.eu/sk/system/files/jc-2014-051-2014_work_programme_of_the_joint_committee_of_the_esas.pdf.

This Section also observes that significant strides have been taken by the Joint Committee in consumer protection, and these establish the technocratic expertise of all three agencies in developing EU-wide standards in leading consumer protection agendas and policies. The Parliamentary review¹⁰⁶ of the agencies has pointed out that the EBA is relatively weaker than ESMA in developing consumer protection thinking, but the work in the Joint Committee has facilitated inter-agency learning in this regard. The Joint Consumer day in 2014¹⁰⁷ allows inter-agency cross-fertilisation of ideas and exchange with stakeholders too. EIOPA has also significantly benefited from ESMA's leadership in consumer protection thinking and policy development.¹⁰⁸ ESMA's and EIOPA's annual reports in 2013¹⁰⁹ for example reflect a largely similar position on focusing on improving consumer protection in retail financial services. Furthermore, the EBA and ESMA have also learnt from EIOPA in developing a common consumer complaint-handling policy¹¹⁰ which is relevant across the sectors due to cross-selling activities in the financial sector.

The three agencies are also taking technocratic leadership on new issues that have arisen in the regulatory sphere that are cross-sectoral in nature although not specifically mandated in the instituting legislations, such as in reviewing mechanistic reliance on credit ratings,¹¹¹ and the review of benchmark setting and regulation of the relevant processes.¹¹² In particular, in the review of mechanistic reliance on credit ratings, the three agencies have laid down in a single comparable document references in rules and guidelines under their respective purview which could be a form of mechanistic reliance on credit ratings. This tabling and comparative approach forces each agency to consider objectively the purpose and consequences of the relevant rules and guidelines in order to determine the best way forward. The agencies have noted learning from ESMA in the process, as ESMA provides for discretion to be exercised on the part of the regulated entities to consider the impact of rating changes and therefore does not mandate a mechanistic approach.¹¹³

Although these developments are rather specific in nature, one notes that the Joint Committee has pursued technocratic leadership eagerly within its express remit and beyond, where new issues arise. Such inter-agency

¹⁰⁶ DG for Internal Policies, *Parliament's Review of the ESFS* (2013).

¹⁰⁷ Joint ESAs consumer protection day 4 June 2014.

¹⁰⁸ Discussed in relation to consumer protection day, above.

¹⁰⁹ ESMA *Annual Report 2013*, EIOPA *Annual Report 2013*.

¹¹⁰ Joint Committee, *Final Report on Guidelines for Complaints-handling for the Securities (ESMA) and Banking (EBA) sectors, and CP* (November 2013).

¹¹¹ *Joint Consultation Paper on Mechanistic References to Credit Ratings* (November 2013), *Final Report* (February 2014).

¹¹² Joint Committee, *Letter on Possible Framework for the Regulation of the Production and Use of Indices Serving as Benchmarks in Financial and other Contracts* (November 2013).

¹¹³ *Joint Consultation Paper on Mechanistic References to Credit Ratings Final Report* (Feb 2014).

coordination has fed into the technocratic development of each agency, such as the EBA and EIOPA in consumer protection, ESMA in financial stability oversight, overall strengthening the autonomy and effectiveness of each agency.¹¹⁴ Furthermore, inter-agency coordination compels transparency, sharing and learning amongst agencies and such can add to inter-agency accountability which supports the autonomy and technocratic effectiveness of the agencies. Inter-agency accountability would serve a different purpose from the political and stakeholder channels of accountability that serve the purposes of ‘perception legitimacy’. Inter-agency accountability can be a promising development in improving agency effectiveness in terms of autonomous and objective decision-making in technocratic expertise that is depoliticised and neutral.

2. *Inter-agency Learning and the Board of Appeal*

The Board of Appeal is also a forum for inter-agency learning to take place, and this article argues that the three decisions that have been issued by the Board to date provide many constructive points of feedback and learning for the three agencies. Inter-agency coordination on the Board provides opportunities for scrutiny into agency processes and practices and constitutes a form of inter-agency accountability which is also available for public scrutiny. The author is not aware of any appeal to the CJEU against the Board of Appeal’s decisions yet, but any such appeal would also provide learning opportunities not only for the agencies but also for inter-agency coordination and accountability.

The first decision concerns the complaint made by SV Capital Oü against the EBA.¹¹⁵ In this case, SV Capital had been assigned a claim by Instmark Oü which raised a matter to the EBA regarding the suitability of persons directing the Estonian branches of Finnish Bank Nordea in Estonia. The original claimant operated a current account at a Nordea branch in Estonia which was frozen due to money laundering concerns. The Estonian court subsequently decided that the action taken by Nordea was illegal and that the declarations made by two governors of the Nordea branch regarding the non-existence of certain documents between Instmark and Nordea were untrue. SV Capital raised a concern to the Estonian financial regulator that the two governors of the Nordea branch ought to be removed if their credibility had been doubted in court. The Estonian authority directed SV Capital to the Finnish home authority with supervisory powers and jurisdiction over the Nordea branch. The Finnish home authority rejected SV Capital’s complaint. SV Capital brought the matter to the EBA to allege that the Finnish authority had breached

¹¹⁴ Inter-agency learning is still nevertheless in an early stage as the Parliamentary review notes that the EBA and EIOPA are inundated with their respective draft technical standards work in micro-prudential regulation and Solvency II respectively and EBA’s stress testing developments have also pre-occupied the EBA significantly. See DG for Internal Policies, *Parliament’s Review of the ESFS* (2013).

¹¹⁵ Decision of the Board of Appeal in SV Capital Oü v EBA (Frankfurt, 24 June 2013).

Union law by not removing unsuitable persons from directing the Nordea branch in Estonia. The EBA's response was not to take the matter further as it regarded itself as having no jurisdiction to intervene in matters of corporate governance other than in the parent credit institution. On appeal to the Board of Appeal, the Board considered that the EBA had interpreted its remit too narrowly and that the EBA could intervene in matters regarding the corporate governance of key branches such as the Estonian branch of Nordea, in relation to key function holders that could include persons directing the branches. The matter was remitted to the EBA. However, the EBA ultimately decided not to investigate into the matter as a breach of Union law as it considered the Finnish regulator's explanation that the two persons concerned were not key function holders in the branch to be adequate. SV Capital raised an appeal to the Board regarding the EBA's decision, alleging that the EBA refused to investigate the matter due to its fears of damaging relations with national regulators, that it was not pursuing its responsibilities robustly, and that the EBA should always prefer to investigate than otherwise. The Board of Appeal reviewed the EBA's decision and was of the view that the decision not to investigate was based on a reasoned reliance on the Finnish home authority's assessment of the importance or otherwise of the two persons to the Estonian branch.¹¹⁶ The conclusion made that those two were not key function holders was one that could be upheld by the EBA and the Board did not find blind reliance or a less than robust culture at the EBA dealing with national regulators.

The two appeals brought by SV Capital against the EBA provided opportunities for high level scrutiny of the EBA's understanding of its remit, its relations with national regulators and the division of regulatory responsibilities between them. The first case demonstrated the EBA's tentativeness in assuming a wide remit and this may highlight the hesitation experienced in the first steps of a new agency. The conclusion made by the Board of Appeal in interpreting the EBA's remit in overseeing corporate governance matters is important in consolidating the identity of the EBA and its understanding of its scope of responsibilities and powers. Furthermore, the Board of Appeals' scrutiny into the EBA's rationale for its decision not to investigate and its decision-making processes helps the EBA in consolidating its independent decision-making capacity, neither to be captured by national regulators nor to be compelled by the industry.

The second appeal¹¹⁷ is in relation to ESMA's decision not to register a Ukrainian credit rating agency incorporated in the UK as an authorised credit ratings provider that could disseminate ratings in the EU. Global Private Ratings Company 'Standard Rating' Ltd (GPRC) was suspected by the UK Financial Services Authority to be undertaking credit rating

¹¹⁶ Decision of the Board of Appeal in SV Capital Oü v EBA (Frankfurt, 14 July 2014).

¹¹⁷ Decision of the Board of Appeal in Global Private Rating Company 'Standard Rating' Ltd v ESMA (Frankfurt, 10 January 2014).

activities without authorisation in 2013 and ESMA was duly informed. ESMA then wrote to GPRC to require registration or cessation of activities. GPRC submitted an application to ESMA after a few correspondences and provided an application that was notified as 'complete' by ESMA. However, GPRC was denied registration after ESMA's compliance team took the view that GPRC was not in compliance with the substantive requirements of the Annex to the Credit Rating Agencies Regulation. GPRC contested 12 grounds of ESMA's decision. The Board of Appeal held that only one ground of ESMA's decision was not well-founded. Based on the appellant's failure to convince the Board that much of ESMA's grounds of decision were not well-founded, the Board dismissed GPRC's appeal.

Although the Board of Appeal upheld ESMA's decision not to register GPRC, the criticism made by GPRC against ESMA's grounds of decision highlighted the challenges for ESMA as a new regulatory body and the lessons that ESMA needed to learn. A number of ESMA's requirements for registration were in a qualitative manner that allowed ESMA to decide in its discretion whether an applicant satisfied the substantive requirements in question. Hence, the GPRC alleged that such requirements were unclear or opaque and did not provide adequate guidance on what was expected. For example, the applicant had to demonstrate that the applicant had adequate systems, resources and confidentiality safeguards. GPRC did not in ESMA's view demonstrate that it had adequate IT systems. GPRC contended that IT systems were being finalised and were constantly evolving anyway and that ESMA did not engage in adequate dialogue with GPRC to make an informed determination. The Board held that GPRC had the onus to satisfy ESMA of such adequacy and this was not done. The author of this article is of the view that the Board's conclusion is sound, but this example highlights the need for ESMA to learn from its experience of being scrutinised as it steps into the role of directly regulating credit rating agencies, and there is perhaps need to develop more precise guidelines and criteria to bridge the expectations between the regulator and the regulated, even if the empowering legislation is in favour of the regulator exercising a widely worded form of discretion. Overall, the author is of the view that ESMA rightly exercised the discretion not to register GPRC as its objective to safeguard the credibility of ratings issued in the EU would likely be compromised if it approved of an applicant while not being sufficiently satisfied that the latter was demonstrating a robust set-up, governance and work procedures. The author agrees that the onus lies on the applicant to satisfy ESMA of its eligibility under the published legislative standards, albeit widely worded, although this is no excuse for ESMA not to develop clarity in its criteria and to make transparent its decision-making processes.

The Board also stated that 'the registration of a credit rating agency is a new process, and recognises that the procedures will to an extent take time

fully to work out.’¹¹⁸ The decision of the Board is measured and provides a constructive learning opportunity for ESMA to consider whether it can do more to provide guidance in terms of how its discretion may be exercised, so that any perceived opacity in terms of ESMA’s expectations in the eyes of the regulated community may be addressed.

The two decisions have provided a good measure of insight into the inter-agency scrutiny, learning and feedback that could be carried out at the level of the Board of Appeal. Such decisions also go some way towards supporting the consolidation of agency identity, understanding of scope of responsibilities and powers, development of robust and credible practices and reinforcing agency autonomy and effectiveness generally. This Part has so far argued that the Joint Committee and Board of Appeal have provided the platforms for inter-agency learning and accountability to become an avenue for the consolidation of autonomy and effectiveness on the part of the three agencies. The next section reviews the literature and general arguments for inter-agency learning and accountability.

3. Inter-agency Coordination and Accountability Generally

Seidman and Gilmour, scholars of public administration, have likened inter-agency coordination to ‘the twentieth-century equivalent of the medieval search for the philosopher’s stone’ that would answer all the problems of public administration’.¹¹⁹ Inter-agency coordination is necessary for government and the administrative state, but is fraught with challenges from the political, organisational and behavioural points of view.

The rise of the administrative state is often viewed as a necessary form of ‘regulatory capitalism’,¹²⁰ but the institution of agencies with specific remits may create a cluster of over-specialised administrative bodies with myopic visions and insular cultures, lacking in joined-up thinking. Li and Chan¹²¹ suggest that inter-agency coordination could promote information sharing, increased capacity and joined-up thinking to deal with unexpected contingencies and large-scale problems, as well as mutual reinforcement of each agency’s responsibilities. They advocate this form of public administration in solving China’s vast problem of urban pollution. Freeman

¹¹⁸ *ibid*, para 188.

¹¹⁹ Harold Siedman and R Gilmour, *Politics, Position, and Power: From the Positive to the Regulatory State* (OUP 1986), 219ff.

¹²⁰ David Levi-Faur, ‘The Global Diffusion of Regulatory Capitalism’ (2005) 598 *The ANNALS of the American Academy of Political and Social Science* 12, Giandomenico Majone, ‘The Rise of the Regulatory State’ (2007) 17 *Western European Politics* 77; Damien Geradin, ‘The Development of European Regulatory Agencies: What the EU Should Learn from American Experience’ (2004) 11 *Columbia Journal of European Law* 1.

¹²¹ W Li and Hon S Chan, ‘Clean Air in Urban China: The Case of Inter-Agency Coordination in Chongqing’s Blue Sky Program’ (2009) 29 *Public Administration and Development* 55.

and Rossi¹²² also argue that inter-agency coordination holds much promise for pooling of resources and overall better and more transaction-cost efficient decision-making. Ongoing inter-agency coordination may promote the construction of a better information matrix, mutual trust between agencies and greater willingness to cooperate. Each agency can then pull its weight and develop more effective solutions especially in unexpected emergency situations.¹²³ This could be especially relevant for the ESFS entities in their roles to safeguard financial stability in the EU.

Although fears and suspicions could be directed at inter-agency coordination as being potentially a form of agency collusion and consolidation of administrative power over regulated entities, the individual identities and purposes of agencies may counteract those tendencies, and instead produce an effect of inter-agency accountability. Freeman and Rossi,¹²⁴ as well as Di Noia and Gargantini¹²⁵ suggest that inter-agency accountability, a form of horizontal accountability, is useful for promoting better technocratic solutions as agencies may be less likely to succumb to regulatory capture, insular culture or regulatory arbitrage by the regulated entities.

Erkkilä¹²⁶ also argues that networked entities are in relationships of mutual accountability vis-a-vis each other as their technocratic nature allows them to act as peers in monitoring each other's discharge of responsibilities. Due to the technocratic nature of agencies,¹²⁷ inter-agency accountability may also be more effective in scrutinising the quality of professional performance of the agency than popular channels of accountability.

Although inter-agency accountability is not as well-studied as popular channels of accountability such as political, judicial and stakeholder accountability, it is important to explore this channel of accountability as it serves a complementary and important purpose to popular channels of

¹²² Jody Freeman and Jim Rossi, 'Agency Coordination in Shared Regulatory Space' (2012) 125 Harvard Law Review 1134.

¹²³ Naim Kapucu and Vener Garayev, 'Collaborative Decision-Making in Emergency and Disaster Management' (2011) 34 International Journal of Public Administration 366.

¹²⁴ Jody Freeman and Jim Rossi, 'Agency Coordination in Shared Regulatory Space' (2012) 125 Harvard Law Review 1134.

¹²⁵ Carmine Di Noia and Matteo Gargantini, 'The European Securities and Markets Authority: Accountability towards EU Institutions and Stakeholders' (2013) at <http://ssrn.com/abstract=2350194> and in Pablo Iglesias Rodriguez (ed), *Building Responsive and Responsible Financial Regulators in the Aftermath of the Financial Crisis* (Intersentia 2013).

¹²⁶ Tero Erkkilä, 'Governance and Accountability – A Shift in Conceptualisation' (2007) Public Administration Quarterly 1.

¹²⁷ Arndt Wonka and Berthold Rittberger, 'Perspectives on EU Governance: An Empirical Assessment of the Political Attitudes of EU Agency Professionals' (2011) 18 Journal of European Public Policy 888.

accountability. Dubnick et al.¹²⁸ argue that multiple channels of accountability for agencies are important as they are located in networks, and function like organic systems that seek to respond to the needs in the regulatory space.

In the EU context, particularly in new institutional architecture such as the ESFS, the SSM and SRM, it is important to explore how the design of such architecture meets the needs of credibility, effectiveness and legitimacy. This article has observed that due to concerns for appropriate restraint of power and popular accountability, the ESFS has been subject to complex design. However, such complex design poses potential handicaps to the technocratic development of the ESFS. The author acknowledges the necessity of those constraints such as in line with Treaty parameters and the *Meroni* doctrine, but suggests that the inter-agency nature of the institutional architecture can be exploited to enhance the technocratic leadership and effectiveness, as well as the accountability of the ESFS entities. It is submitted that further empirical research should be carried out on the nature of inter-agency accountability so that indicators can be developed for the maturation of this area of study. Such indicators can provide a roadmap for the development of more formal mechanisms in inter-agency accountability in order to enhance the purposes served by this form of accountability in ensuring agency effectiveness and output legitimacy.

The article now turns to the second stage of institutional development in the EU's financial regulation framework, the SSM and SRM. The SSM and SRM are also complex designs that reflect the compromises made allocating the power in micro-prudential supervision and the crisis resolution of key banks in the euro-area. These complex designs raise issues regarding how the balance of technocratic effectiveness and power structures can be achieved. Section 3 will argue that the inter-agency model in the ESFS provides useful insights for the SSM and SRM. These perspectives may be a starting point but can be used to develop future institutional design changes to secure an optimal balance in technocratic effectiveness and power structures.

IV. THE SSM, SRM AND LESSONS THAT CAN BE LEARNT WITH RESPECT TO INTER-AGENCY COORDINATION

The SSM and SRM may be regarded as the second stage in reforming financial regulatory architecture in the EU. The continued weakness of many European banks post the global financial crisis affected market confidence and economic recovery in the EU, and the SSM was introduced

¹²⁸ Melvin J Dubnick and H George Frederickson (eds), *Accountable Governance: Problems and Promises* (2010) Schillemann and Boven, reviewed by Thomas J Grietens, 'Moving the Study of Accountability Forward' (2012) 44 *State and Local Government Review* 76.

to sever the links between weak sovereigns and national banks with poor balance sheets, in order to provide a more credible system of supervision and backstop for those banks.¹²⁹ Troeger,¹³⁰ however, argues that this is a poor reason for the SSM as it would only focus the SSM's attention on the most weakly disciplined banks to rectify their problems. In other words, he views the institution of the SSM as created not for reasons of coherence in regulatory ideology or architecture, but for fire-fighting the excesses due to poor national oversight. It remains to be seen if the priorities of the SSM may affect the inter-relationships between the SSM and the ESFS.

The SSM is a network comprising the ECB and national regulators. Certain responsibilities and tasks are conferred on the ECB, and national regulators are to act as the ECB's assistants and delegates. The ECB is empowered in the SSM to undertake microprudential supervision of banks that are not 'less significant'¹³¹ in the euro area and banks of countries that have entered into close cooperation with the SSM.¹³² Such supervisory tasks include authorisation of credit institutions, ensuring compliance with micro-prudential legislation, stress testing and supervisory review, overseeing recovery plans and carrying out early intervention. To this end, the ECB may adopt guidelines and recommendations issued by the EBA or may issue its own to the end that is necessary for its responsibilities, subject to public consultation before the adoption of any such guidelines or recommendations.¹³³ However, as the ECB will not have responsibility over all banks in the euro area, national regulators remain responsible for those banks, subject to a reporting duty to the ECB.¹³⁴

The SSM is to be independent of the ECB's monetary function.¹³⁵ It is to be governed by a Board of Supervisors¹³⁶ comprising a Chair and Vice-Chair, four ECB representatives and a representative of each national regulator in the Member States subject to the SSM. The Chairperson is to

¹²⁹ Guido Ferranini and Luigi Chiarella, 'Common Banking Supervision in the Eurozone: Strengths and Weaknesses' (2013) at http://ssrn.com/abstract_id=2309897.

¹³⁰ Tobias H Troeger, 'The Single Supervisory Mechanism – Panacea or Quack Banking Regulation?' (2013) at <http://ssrn.com/abstract=2311353>.

¹³¹ ie banks with assets totalling 30 billion euros or more, or ratio of total assets over the GDP of the relevant Member State exceeds 20 %, unless the total value of its assets is below 5 billion euros, an institution regarded by the national regulator as significant, an institution regarded by the ECB on its own initiative as significant, any institution receiving public financial assistance, and at least the three key banks in every euro area jurisdiction or member state in close cooperation. SSM Regulation, art 6.

¹³² SSM Regulation, art 7.

¹³³ *ibid*, art 4.

¹³⁴ This seems to be a balanced form of necessary centralisation according to what may be most efficient and proportionate, see Jean-Edouard Colliard, 'Monitoring the Supervisors: Optimal Regulatory Architecture in a Banking Union' (2014) at <http://ssrn.com/abstract=2274164>; SSM Regulation, art 6.

¹³⁵ SSM Regulation, arts 19 and 25.

¹³⁶ *ibid*, art 26.

be appointed by open selection with Parliament and Council duly informed, while the Vice-Chair is to be appointed from the Board. The appointments are not particularly subject to political control, in line with the fierce boundaries of independence hitherto maintained by the ECB. Due to Treaty constraints, however, the Board of Supervisors is not able to adopt decisions for the SSM as such or the institution of the SSM may require Treaty change. Hence, the Board will send draft decisions to be adopted by the Governing Council of the ECB, which would be deemed to have accepted if no objection is raised in a maximum of 10 days.¹³⁷

The introduction of the ECB's leadership in the SSM as part of the financial regulation fabric at the EU may result in a marked power imbalance between the ESFS institutions and the ECB. Such institutional 'imbalance' has been observed and raised by a number of commentators.¹³⁸ In contrast to the three agencies in the ESFS, the ECB has been an established and independent institution in the EU and the fear is that the maturing ESFS institutions may be adversely affected, especially the EBA. A number of commentators are concerned that the SSM will introduce a form of differentiated integration¹³⁹ in euro area banking regulation and undermine the EBA's work in this area.¹⁴⁰ Although the SSM is a member of and subject to the EBA, the ECB has the power to adopt its own supervisory guidelines and recommendations, and in carrying out national supervision, it would be applying nationally transposed versions of the Capital Requirements Directive IV which could reinforce certain national peculiarities. The leadership of the ECB in the SSM may result in the bifurcation of regulatory approaches for the euro area and the non-euro area. Such bifurcation or differentiation is not exactly ideal as cross-border banking in the EU is not so starkly divided along those lines, and the regulation of banks with pan-European footprint would benefit from joined-up thinking, the need for which formed the basis for the de Larosière recommendations for instituting the ESFS in the first place. The

¹³⁷ *ibid*, art 26. Ferran and Babis argue that this is adverse to non-euro area Member States in close cooperation as those Member States would not have a representative in the Governing Council, see Eilis Ferran and Valia SG Babis, 'The European Single Supervisory Mechanism' (2013) JCLS 255.

¹³⁸ Some queries have been raised in Benedikt Wolfers and Thomas Volland, 'Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank' (2014) 51 Common Market Law Review 1463.

¹³⁹ Donato Masciandaro, Maria J Nieto and Marc Quintyn, 'Will They Sing the Same Tune? Measuring Convergence in the new European System of Financial Supervisors' (IMF Working Paper 2009) at <http://ssrn.com/abstract=442244> suggests that central bank leadership in microprudential supervision generally fragments regulatory architecture in financial regulation.

¹⁴⁰ Eilis Ferran and Valia SG Babis, 'The European Single Supervisory Mechanism' (2013) JCLS 255; Klaus Lackoff, 'The Framework Regulation (FR) for the Single Supervisory Mechanism (SSM) - An Overview' (2014) 29 JIBLR 498, 'How will the Single Supervisory Mechanism (SSM) Function? A Brief Overview' (2014) 29 JIBLR 13; Concetta Brescia Morra, 'From the Single Supervisory Mechanism to the Banking Union: The Role of the ECB and the EBA' (2013) at <http://ssrn.com/abstract=2448913>.

potential of the ECB to undermine the regulatory convergence role of the EBA would arguably be due to its relatively more established and powerful profile, the internalisation of an array of supervisory arrangements that could become insular vis à vis the ESFS, and the relatively lesser demands in accountability that reinforce its power.

The SSM is subject to no discernible *ex ante* political controls as even the appointment of the Chairperson of the Board of Supervisors is not subject to political control. The SSM is accountable to the Council and Parliament¹⁴¹ via annual reporting and the Chairperson may be asked to appear before the euro group in the Council or committees of the Parliament. The annual reports are also to be laid before national parliaments¹⁴² of the Member States subject to the SSM, and national parliaments may request for the ECB's written explanations on matters raised by them. The ECB is also subject to accountability to regulated entities to whom it addresses its decisions. It has established an Administrative Board of Review¹⁴³ to deal with requests to review its decisions, to comprise of five independent banking and finance experts appointed by the ECB. The Board's decisions also need to be adopted by the Governing Council in the same way mentioned above. The largely *ex post* reporting accountability for the SSM highlights the extent of ECB independence and discretion in the discharge of its tasks, very distinct from the institutions in the ESFS. The incentives for the ECB to engage in inter-agency accountability are arguably low as inter-agency accountability may be seen as an impediment to the wide berth of discretion enjoyed in its power and accountability structures.

There are certain junctures of inter-relationships between the SSM and ESFS. In the discharge of its responsibilities, the SSM is required under its instituting legislation to work with the institutions in the ESFS¹⁴⁴ to consider how financial regulation may be effectively administered in the EU as a whole, put in place a system of coordination and delegation with participating Member State regulators¹⁴⁵ and conclude memoranda of understanding with non-participating Member State regulators and with all Member States' securities regulators.¹⁴⁶ The ECB would also be a

¹⁴¹ SSM Regulation, art 20.

¹⁴² *ibid*, art 21.

¹⁴³ *ibid*, art 24.

¹⁴⁴ *ibid*, art 3.

¹⁴⁵ *ibid*, art 6.

¹⁴⁶ *ibid*, art 3. It is uncertain yet how such coordination would work out but the European Commission is decisively of the view that 'The establishment of a Banking Union, and notably of the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) as its key components, will impact the functioning of the ESFS, but does not call into question its existence and necessity.' See European Commission, *Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)* (7 August 2014), 4.

participating member of the EBA.¹⁴⁷ In order to address the concerns of Member States that are not subject to the SSM, readjusted voting rights for these Member States¹⁴⁸ (i.e. to have these Member States' votes count in a separate class) have been introduced in the structure of decision-making in the EBA. However, this article predicts that institutional imbalance between the SSM and the ESFS could entail the following consequences: (a) the lack of synergies in micro-prudential regulation may ensue if the coordination between the ECB and the EBA does not take off, and the EBA could reassert its identity and authority by focusing more on areas that do not overlap with micro-prudential regulation, such as conduct regulation and the areas of inter-agency coordination in the Joint Committee; or (b) the EBA could compel the ECB to fall in line with its standards for convergence where it has the mandate to ensure such convergence, e.g. supervisory convergence, stress-testing and recovery and resolution plans,¹⁴⁹ but it remains to be seen if boundary issues between the ECB and EBA may impede the effectiveness of either agency's discharge of responsibilities. Furthermore, it is questioned if the ESRB may be relegated in view of the SSM,¹⁵⁰ as the ECB has certain specific macro-prudential powers¹⁵¹ in respect of requiring extra capital buffers to be put in place, although the CRD IV¹⁵² designates the ESRB as the body that recommends whether any counter-cyclical buffer for any Member State should be introduced.

In sum, the imbalance between power and accountability structures of the SSM and the ESFS institutions may result in uncertain prospects for the achievement of technocratic effectiveness by all institutions concerned. Commentators do question the necessary superiority of central banks in micro-prudential supervision,¹⁵³ and the ECB's role in the episode regarding the rescue of Cyprus' banks in 2013 was not a particularly applauded one.¹⁵⁴ This article suggests that some lessons can be learnt from the ESFS in order to secure some of the advantages in relation to enhancement to technocratic effectiveness, accountability and legitimacy

¹⁴⁷ *ibid.*

¹⁴⁸ Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013 [2013] OJ L 287/5, amendment to art 44 of the EBA Regulation.

¹⁴⁹ Francesco Guarracino, 'Role and Powers of the ECB and of the EBA: In the Perspective of the Forthcoming Single Supervisory Mechanism' (2014) at <http://ssrn.com/abstract=2319136>.

¹⁵⁰ Eddy Wymeersch, 'The Single Supervisory Mechanism or "SSM", Part One of the Banking Union' (2014) NBB Working Paper.

¹⁵¹ SSM Regulation, art 5.

¹⁵² CRD IV Directive, arts 125-126.

¹⁵³ Donato Masciandaro and Maria J Nieto, 'Governance of the Single Supervisory Mechanism: Some Reflections' (2013) at <http://ssrn.com/abstract=2384594>.

¹⁵⁴ 'Cyprus plans capital controls and bank restructuring as ECB sets ultimatum - as it happened', *The Guardian* (21 March 2013).

as discussed earlier. In particular, the SSM could be subject to more overt inter-agency learning and coordination with the ESFS. For example, where there may be boundary contests between the SSM and EBA such as in micro-prudential standard setting, the express institution of inter-agency coordination and learning in those respects may provide opportunities for joined-up thinking in both the setting of micro-prudential regulatory and supervisory standards. This article is not advocating that joined-up thinking necessarily means uniform thinking or one-size-fits-all standards across the EU. Such joined-up thinking is necessary so that issues of convergence or uniformity, or differentiation, where it is warranted, are considered holistically and coherently. Such formal inter-agency coordination could mitigate the risk of inefficient bifurcation in the regulatory regimes for euro-area and non euro-area banks.

It may, however, be argued that a new form of inter-agency coordination and accountability that checks on the ECB's powers in the SSM is instituted in the form of the Single Resolution Mechanism (SRM). A number of commentators have at the early discussions regarding the institution of the SSM voiced concerns regarding the lack of a supporting single resolution mechanism which is necessary to complete the picture for effective centralised micro-prudential supervision.¹⁵⁵ Ferran argues that the SRM together with the SSM is necessary to make the integrated market in banks work and to prevent re-nationalisation of banks in the EU.¹⁵⁶ The SRM has been finalised in July 2014.¹⁵⁷

The SRM establishes a single resolution mechanism for banks subject to the SSM. The SRM is to be directed by a Board (SRB), which is an independent agency with separate legal personality independent of the ECB,¹⁵⁸ and will be responsible for drafting resolution plans, adopting early intervention measures imposed under the SSM, adopting resolution decisions and carrying out the administration of resolution.¹⁵⁹ The Board will comprise a Chair, Vice-Chair, and four other full-time members to be appointed by the Parliament based on a shortlist recommended by the Commission, and the representatives of the national resolution authorities of participating Member States.¹⁶⁰ A representative of each of the ECB and the Commission may attend at the plenary¹⁶¹ and executive sessions of

¹⁵⁵ Kern Alexander, 'Bank Resolution and Recovery in the EU: Enhancing Banking Union?' (2013) 14 ERA Forum 81; Daniel Gros and Dirk Schoenmaker, 'European Deposit Insurance and Resolution in Banking Union' (2014) 52 JCMS.

¹⁵⁶ Eilis Ferran, 'European Banking Union: Imperfect but it can Work' (2014) at <http://ssrn.com/abstract=2426247>.

¹⁵⁷ SRM Regulation.

¹⁵⁸ SRM Regulation, art 42.

¹⁵⁹ *ibid*, art 7.

¹⁶⁰ *ibid*, arts 43, 53.

¹⁶¹ The plenary sessions are annual in nature and deal with important issues such as adoption of work programme and budget, SRM Regulation, arts 46-48. The executive sessions are relevant to the Chair, Vice-Chair and four full-time members

the Board as permanent observers.¹⁶² The Parliament's role in appointment may constitute a form of input control of the constitution of the Board that countervails the relatively autonomous ECB in its SSM leadership.

The SRM is structured in such a way as to offer opportunities for inter-agency coordination and accountability with the SSM. The discussion below explores the junctures of possible inter-agency coordination and learning. However, at the moment, these are framed as divisions of responsibilities and it is unclear how inter-agency coordination may take place. This article suggests that the overt framing of inter-agency coordination can mitigate boundary issues and promote more technocratic effectiveness through inter-agency learning and coordination. More informal guidelines can be agreed upon between the SSM and SRM in due course to foster inter-agency coordination and the ESFS should be also more overtly drawn into the inter-agency coordination and learning relationships.

The interface between the SSM and SRM is as follows. The SRM is responsible for drawing up resolution plans in dialogue with the ECB and national regulators,¹⁶³ and determining whether a bank faces impediments to its resolvability.¹⁶⁴ The SSM is responsible for implementing the resolution plans adopted by the SRB or removing impediments to resolvability according to the SRB's instructions. As the SSM becomes an implementer of the SRM's decisions on resolution plans, this provides a check on the SSM's micro-prudential supervisory role and feedback from the SRM could provide learning opportunities for the SSM. However, depending on the power dynamics between the SSM and the SRM, it remains to be seen if the SRM is able to take technocratic leadership on its tasks and not be overwhelmed by ECB expertise, and whether the SSM and SRM would engage in such feedback and dialogue. Furthermore, the SRM is tasked to monitor early intervention measures taken by the SSM, which need to be informed to the SRM. The SSM has leadership in managing the run-up to any bank crisis in the form of early intervention, but the SRM and Commission would monitor the early intervention measures to ensure that there would be a seamless transition to resolution if that becomes necessary.¹⁶⁵ It remains open to observation how such coordination would work out.¹⁶⁶ The dividing line between early intervention and crisis resolution is a shifting one and there is ample opportunity for the SSM and SRM to coordinate on this and share

only and deal with the executive management of the Board's tasks including preparatory work for the plenary sessions, SRM Regulation, arts 51-52.

¹⁶² *ibid*, art 43.

¹⁶³ *ibid*, art 8.

¹⁶⁴ *ibid*, art 10.

¹⁶⁵ *ibid*, art 13.

¹⁶⁶ Remarks by Rosa Lastra on Charles Goodhart and M Sevagiano, 'The Determination of Bank Recovery' at the 'Law and Monetary Policy' Conference, University of Sheffield, 10 September 2014.

information. These interfaces provide opportunities for inter-agency coordination and learning and this article suggests that such opportunities can be framed into more overt inter-agency frameworks instead of being regarded as boundaries of responsibility division. Such overt frameworks may go some way towards mitigating institutional imbalance between the ECB in the SSM and the SRM, and could allow inter-agency learning and coordination to strengthen each agency's technocratic expertise and effectiveness.

However, could it be argued that the SRM is nevertheless weak as an institution as it is tightly subject to political control and accountability, and so does not provide institutional balance to the powerful ECB in the SSM? There is a danger that the ECB could still dominate the SRM's role as the ECB plays the part of determining (upon consultation with the Board) if an entity is failing or likely to fail and in need of resolution.¹⁶⁷ However, the SRM still determines if a resolution decision should be proposed according to the objectives and principles governing resolution.¹⁶⁸ Furthermore, the SRM needs to submit a resolution decision to be adopted jointly by the Commission¹⁶⁹ within 24 hours of notification by the SRM, and by the Council¹⁷⁰ within 12 hours of notification by the Commission. The decision-making mechanism for the crucial resolution decision involves extensive political control. This is possibly warranted as resolutions of national banks are matters of key national interest in many bank-based economies in the EU. The political control over the SRM could provide an indirect political check on the ECB's dominance in financial stability oversight in general. In that vein, the SRB's power to determine that the Single Resolution Fund needs to be called upon to financially assist any ailing bank is checked by the Commission which has powers to assess the appropriateness of State aid.¹⁷¹ The political control and accountability structures for the SRM could even act as countervailing forces against ECB dominance at the juncture of the inter-relationships between the SSM and SRM. Hence, the author supports more overt framing of the SRM-SSM inter-agency coordination to mitigate institutional imbalance introduced by the SSM.

The SRM also interacts with the ESFS in terms of its coordination with the EBA. The SRM has the power to notify the EBA of any institutions it views as unresolvable,¹⁷² and so the EBA is brought into the dialogue. Furthermore, the EBA remains responsible for drafting the technical standards, implementing technical standards and guidelines for the Recovery and Resolution Directive that applies to all SSM and non-SSM

¹⁶⁷ SRM Regulation, art 18(1)(a).

¹⁶⁸ *ibid*, arts 14, 15.

¹⁶⁹ *ibid*, art 18.

¹⁷⁰ *ibid*.

¹⁷¹ *ibid*, art 19.

¹⁷² *ibid*, art 10.

Member States. Thus, there is potential for inter-agency coordination and accountability between the SRM and the EBA. This article suggests more overt framing of inter-agency coordination between the SRM, SSM and the EBA so that a multiple-agency architecture can arise for specific areas of coordination. This not only helps to check ECB dominance in the SSM, but would also help consolidate the SRM's and EBA's burgeoning identities and technocratic leadership.

That said, the author is mindful that the dynamics of the new inter-relationships remain uncertain. A differentiation may occur between the SRM-SSM which are responsible for the euro-area financial institutions and the ESFS which may focus on the non-euro area if marginalised by the SSM-SRM domination in the case of euro-area financial institutions. Such differentiation would arguably be lamentable as certain advantages may be foregone - the benefits of joined-up thinking in EU financial regulation and the mutual strengthening of the relatively new institutions in the financial regulation architecture. The author is concerned about the prospect of agency-led differentiation in EU financial regulation for the euro area and non-euro area, and argues that the suggestions made above regarding how inter-agency coordination may work between the ESFS, SSM and SRM could go some way towards mitigating the prospect of such differentiation.

In sum, the second stage of institutional reform in the financial regulatory architecture in the EU has brought about more complexity in the multiple-agency structure. Such complexity, as discussed in the context of the ESFS, could work towards boosting agency independence, effectiveness and inter-agency accountability. However, the ESFS has an overall coherent structure, identical mandates and comprises of entities at similar stages of development and maturity. The new complexity brought about by the SSM and SRM may introduce confusion in power dynamics in terms of institutional imbalance and lack of clarity in the boundaries of responsibilities. Furthermore, synergies in joined-up thinking in EU financial regulation may be lost if institutional dynamics veer towards a differentiation between SSM-SRM led oversight for euro-area financial institutions and the ESFS for the rest. This article suggests that insights from inter-agency coordination may provide a roadmap towards promoting better institutional balance, inter-agency learning and the consolidation of burgeoning agencies' responsibilities, identities and competence. Such roadmap would also mitigate against the trajectory towards differentiated integration between financial regulation in the euro and non-euro areas. Inter-agency learning and coordination could also in due course enhance inter-agency accountability and the overall accountability and legitimacy of the EU financial regulatory architecture.

V. FINAL OBSERVATIONS AND CONCLUSIONS

This article first addresses the multiple-agency regulatory architecture in the ESFS which comprises of an oft-criticised sectoral approach. It argues that in the context of the EU, the three agencies and the Joint Committee and ESRB could provide a viable and sound approach to EU financial regulation as inter-agency learning and coordination, as well as accountability could help enhance each of the ESFS institutions' growth, maturity and development in technocratic leadership, and could be perceived to be more legitimate and effective than a centralised and monolithic entity. The concepts of inter-agency coordination and accountability are explored and observations are provided on how they work in the Joint Committee and Board of Appeal. The experiences of the Joint Committee and Board of Appeal provide useful lessons for inter-agency learning and accountability and further empirical research on these concepts could be useful for developing a concept of legitimacy for EU agencies.

The article then examines potential ramifications for the inter-agency architecture in EU financial regulation with the introduction of the SSM and SRM. The inter-agency framework has become more complex and there are concerns regarding the SSM becoming differentiated and monolithic, undermining the rest of the ESFS especially the EBA and ESRB. This is largely due to the dominance of an already powerful and autonomous ECB in the SSM, and the ECB would hardly need to consolidate its identity and leadership through greater inter-agency coordination and accountability with the rest of the ESFS. Would the SSM and EBA be able to coordinate in terms of supervisory convergence in micro-prudential supervision? Would the SRM and SSM be able to work with each other in the shift from early intervention to crisis resolution; and with the EBA in a single rulebook for recovery and resolution? The SSM is placed in a position where opportunities to coordinate with the SRM and EBA occur, but such interfaces are not framed as opportunities for inter-agency learning and coordination but as divisions of responsibility at present. This article advocates more overt framing of inter-agency coordination and learning between the SSM, SRM and EBA in order to achieve better institutional balance and secure greater consolidation of the burgeoning institutions' technocratic leadership and identities. The promotion of inter-agency accountability could greatly enhance the new and more complex financial regulatory architecture, and perhaps prevent inefficient forms of differentiated financial regulation from occurring between the euro area and non-euro area. Furthermore, in light of the comparatively more powerful ECB in the matrix, the Parliament review's call to boost the three agencies' Chairpersons' peer status vis-a-vis the Commission may be useful.¹⁷³

¹⁷³ DG for Internal Policies, *Parliament's Review of the ESFS* (2013).

A multiple-agency approach at the EU may seem complex and anachronistic, but this article has pointed out the potential for making inter-agency coordination and accountability work. These observations may help in the outworking of the SSM and SRM and in the wider context of EU agencies, their effectiveness and legitimacy.

CONCEPT OF A COURT OR TRIBUNAL UNDER THE REFERENCE FOR A PRELIMINARY RULING: WHO CAN REFER QUESTIONS TO THE COURT OF JUSTICE OF THE EU?

Jaime Rodriguez Medal

Who can refer a question on the interpretation and validity of EU law to the Court of Justice of the EU (CJEU)? The most evident answer is a court or tribunal from a Member State, as it is established in the EU Treaties. The CJEU has developed a European concept of a court or tribunal through case law, but the EU Member States have diverse legal systems and there is no uniformity on the consideration of some bodies as a court or tribunal. Furthermore, the CJEU has had some problems with the interpretation of what a court or tribunal is, has added new criteria and has departed from some positions. On top of that, the EU has been growing and each enlargement has brought and will bring countries with more diverse legal systems. Because of that, the case law of the CJEU should be firm in order to avoid legal uncertainty about who is truly empowered to use the procedure. The aim of this study is to analyse the concept of a court or tribunal through the relevant case law where the criteria have been set and where certain particular bodies which do not exercise a pure judicial function have been considered competent to raise questions.

Keywords: Reference for a preliminary ruling, court or tribunal, Court of Justice of the EU, admissibility, interpretation, article 267 TFEU.

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I. INTRODUCTION

The EU Treaties provide that only courts and tribunals from Member States may raise a question on the interpretation and validity of EU law to the Court of Justice of the EU (hereinafter CJEU). The reference for a preliminary ruling is an important procedure whose aim is to foster dialogue and cooperation between judges at national and European level in order to ensure uniform application of EU law. Instead of leaving it to each Member State to decide which judges can make use of this procedure, the CJEU has opted for developing a concept of a court or tribunal through case law, clarifying which court or tribunal is competent to make a reference. The aim of this study is to analyse this concept through the relevant case law where the criteria have been set and where certain particular bodies which do not exercise a pure judicial function have been considered competent to raise questions.

The preliminary ruling procedure has been very important for the CJEU to develop its doctrine and it has significant effects. Consequently, it is essential to know exactly who can make a reference for a preliminary ruling. The EU Member States have diverse legal systems. This may lead to problems because there might be bodies that are perhaps not entirely judicial, but are still competent for legal purposes on some issues. Thus,

there may be no uniformity on the consideration of some bodies as a court or tribunal. Moreover, the EU has been growing and each enlargement has brought and will bring new countries with more diverse legal systems. For that reason, there is a need for greater soundness on the concept of a court or tribunal in order to avoid legal uncertainty about who is truly empowered to use the procedure. Otherwise, the CJEU will waste time and effort examining competence before admitting or rejecting a reference, thereby having a negative impact on the length of the procedure and on the jurisdictional protection of citizens. In this sense, problems concerning the concept of a court or tribunal have been ongoing for many years, as it will be proven by this article. It could be argued that the issue has never been entirely resolved. To this end, the author remains confident to be able to provide some input and new ground by analysing the relevant case law as well as by pointing out problems, needs and solutions.

It is a very sensitive and extremely complex issue due to the differences amongst Member States' legal systems. Considering the aforementioned importance of the reference for a preliminary ruling (commonly known as a dialogue between judges), the article aims to show how wide the concept of court or tribunal under article 267 TFEU is. This is important for references to the CJEU to be admitted. The criteria developed by the CJEU to establish the concept of court or tribunal will be seen through the analysis of the historic case law. From selected case law it will be observed how the CJEU has admitted references from bodies, courts or tribunals which do not exercise a pure judicial function, which have a dubious judicial function or which do not have a judicial function at all in their own legal systems. The aim is not only to show the casuistic case law that has admitted references from non-judicial bodies, but also to highlight the CJEU's enormous effort to assess the criteria on a case-by-case basis and its effects. For that reason the article attempts to demonstrate the need for a firmer concept.

The study has been divided into six parts. It begins with an introduction that is followed by an explanation of the importance of the reference for a preliminary ruling procedure. Then, it reviews the concept of a court or tribunal through the classic EU case law which has outlined the concept. The fourth part deals with some problematic considerations by analysing those cases where the CJEU considered whether some specific courts, bodies and authorities could be considered a court or tribunal. The fifth section tackles the need for the concept. Finally, the closing section provides the conclusions.

II. THE IMPORTANCE OF THE REFERENCE FOR A PRELIMINARY RULING

Articles 19(3)(b) of the Treaty of the European Union (TEU)¹ and 267 of the Treaty on the Functioning of the European Union (TFEU)² lay out the contours of the procedure for the reference for a preliminary ruling. Whereas article 19(3)(b) TEU simply mentions the procedure, article 267 TFEU further explains it. The articles stipulate that the CJEU is competent to give preliminary rulings concerning the interpretation of the EU Treaties and the validity and interpretation of acts of the European institutions, bodies, offices or agencies. Although article 256(3) TFEU foresees the competence of the General Court of the EU to deal with the reference for preliminary rulings in certain matters, there has been no development at all of that provision so far.³ Thus, it is the Court of Justice within the CJEU that is the sole competent authority to give preliminary rulings. In this procedure, which may also be found in the legal systems of some Member States such as Germany or France,⁴ only courts and tribunals are empowered to use it before the CJEU.⁵

The preliminary ruling procedure is one of the main legal mechanisms used to settle disputes arising from EU law.⁶ It is an essential mechanism to enable national courts to ensure uniform interpretation and application of EU law in all Member States.⁷ As an instrument of cooperation between judges, it provides national courts with an interpretation of EU law by the CJEU in order to give a judgment in cases where they have to adjudicate.⁸ This cooperation implies a distribution of tasks between the national court – which is competent to apply EU law to a case – and the CJEU, which is in charge of ensuring a uniform interpretation of EU law in all the Member

¹ Consolidated version of the Treaty of the European Union (TEU) [2008] OJ C 115/15.

² Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

³ Recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings OJ 2012 C-338/01, point 3.

⁴ In the German law for the organisation of courts (*Gerichtsverfassungsgesetz*) and in the *saisine pour avis* of the French legal system, according to Carlos Divar Blanco, *Seguridad jurídica, igualdad ante la ley y aplicación uniforme del derecho*. Crónica de la jurisprudencia del Tribunal Supremo 2008-2009, Tribunal Supremo, Madrid [2009].

⁵ Carl Otto Lenz, 'The role and mechanism of the preliminary ruling procedure', (1994) 18(2) *Fordham International Law Journal* 393.

⁶ Antonio Herrero García, 'Cuestión prejudicial en el derecho de la Unión Europea' (2001), 23, via http://www.recercat.net/bitstream/handle/2072/152108/TFC-HERRERO_SP-2011.pdf?sequence=1 (accessed 17 January 2014).

⁷ René Barents, *Directory of EU case law on the preliminary ruling procedure* (Kluwer Law International 2009), 278.

⁸ Regina Valutyte, 'State liability for the infringement of the obligation to refer for a preliminary ruling under the European Convention on Human Rights' (2012) 19(1) *Jurisprudence* 8.

States.⁹ It is the national judge who is competent to decide if a preliminary ruling is needed on the basis of the existence of a problem coming from an interpretation of EU law.¹⁰

Being a fundamental institution for the construction of EU law,¹¹ the CJEU has also been a driving force behind European integration where the preliminary ruling has played a critical role.¹² This is because the CJEU has primarily developed and constructed its doctrine through case law arising from the preliminary ruling procedure.¹³ When a national judge decides to send a preliminary reference, the CJEU has the opportunity to expand EU law through clarification and to enforce it because its ruling dismantles national legislation which is not compatible with EU law.¹⁴ The supremacy and direct effect of EU law impacts relationships between individuals and it has made national courts raise more frequently the preliminary ruling procedure to the CJEU, which has the monopoly on interpretation of questions of EU law in order to ensure its uniform application.¹⁵ As such, the preliminary ruling constitutes a very useful tool in order to allow the CJEU to guarantee such uniformity, while leaving the effective application to national courts.¹⁶ Thus, the preliminary ruling procedure is designed to uphold the legal order and to give a far-reaching guarantee that EU law will remain uniform in all Member States.¹⁷

A distinction must be made between the reference for a preliminary ruling and other judicial procedures before the CJEU. In this sense, it must be stressed that this procedure is not an appeal against a law, but an inquiry into its interpretation or validity.¹⁸ As the aim of this procedure is to foster cooperation between national and European judges in order to facilitate the uniform application of EU law, any national court dealing with a dispute where such law poses doubts of interpretation or validity is enabled to refer to the CJEU with the aim of clarifying those concerns.

⁹ Isaac Ibáñez García, 'Tres notas de actualidad sobre la cuestión prejudicial comunitaria' (2011) *Diario La Ley* n° 7591, 3.

¹⁰ *ibid.*

¹¹ *ibid.*, 4.

¹² Clifford J Carubba and Lacey Murrah, 'Legal integration and use of the preliminary ruling process in the European Union' (2005) 59 *International Organization* 399.

¹³ Rachel A Cichowski, 'Litigation, compliance and European integration: The preliminary ruling procedure and EU nature conservation policy' Paper presented at the Biennial meeting of the European Community Students Association, Madison, Wisconsin, 31 May-2 June 2001, 2.

¹⁴ *ibid.*

¹⁵ Lenz (n 5) 389.

¹⁶ Joaquín Sarrión Esteve, *El planteamiento de la cuestión prejudicial ante el Tribunal de Justicia por parte del órgano jurisdiccional español*. Los retos del Poder Judicial ante la sociedad globalizada. Actas del IV Congreso Gallego de Derecho Procesal (I Internacional), A Coruña, 2 y 3 de junio de 2011, (2012), 680.

¹⁷ Lenz (n 5) 391.

¹⁸ Sean Van Raepenbusch, *Droit Institutionnel de l'Union Européenne* (Larcier, 2011), 540-541.

There are two types of references for a preliminary ruling: when the national judge raises a question about how to interpret a European law in order to correctly apply it, or in the event that a national judge asks for the review of the validity of a European law. In either case, the characteristic feature is that it is a dialogue between judges since the question is directed by a national judge to a European one.¹⁹ This means that the decision about the referral of the question is incumbent on the national judge. While one of the parties in the legal dispute may also suggest it, it will be up to the national judge to determine whether to raise it or not. There is one exception where judges are always obliged to make use of the reference for a preliminary ruling; that is the case when the issue is being dealt with at a Member State's court or tribunal against whose decisions there is no judicial remedy under national law.²⁰

Another important thing to bear in mind is that the reference for a preliminary ruling does not transfer the competence to deal with the dispute to the CJEU. In fact, the CJEU can only pronounce on the elements of the question referred to it. Thus, the national court stays competent to adjudicate on the dispute and the CJEU simply clarifies the interpretation or validity of the European law which is relevant for the original case. At the end of the process, the CJEU makes a decision about the interpretation or validity of the EU law or an act of the European institutions, bodies, agencies and offices.²¹

In the first situation, the decision of the CJEU is binding for all courts and tribunals of the Member States.²² However, this does not prevent any court or tribunal to request a preliminary ruling concerning the interpretation of the same issue if there are new elements or difficulties.²³ In the context of a reference for a preliminary ruling concerning validity, there are two different effects depending on whether the CJEU considers the EU law to be valid or invalid. On the one hand, if the EU law is not considered invalid, the CJEU simply says that the 'examination of the questions referred to the Court reveals no factor capable of affecting the validity of the said Decisions.'²⁴ On the other hand, if the EU law or act is considered invalid, then it is declared invalid.²⁵ It also has the consequence

¹⁹ *ibid*, 540; Opinion of AG Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 76.

²⁰ Art 267 TFEU.

²¹ Art 267 TFEU.

²² *Van Raepenbusch* (n 18) 574.

²³ *ibid*, 575.

²⁴ See Joined Cases C-73/63 and C-74/63 *Internationale Crediet- en Handelsvereniging* [1964] ECR I.

²⁵ It is invalid not only for the court or tribunal which launched the procedure, but also for the tribunals in other Member States, as stated by the CJEU in Case C-66/80 *International Chemical Corporation v. Amministrazione delle Finanze dello Stato* [1981] ECR II-91 para 13: 'It follows therefrom that although a judgment of the Court given

that all the instruments which were adopted based on it are similarly invalid. However, the CJEU does not annul the act; it simply confirms its invalidity.²⁶ By analogy with article 266 TFEU, it shall be up to the competent European institutions to adopt a measure to execute the ruling of the CJEU and to rectify the situation.²⁷

Moreover, the CJEU has an obligation to answer a question unless it falls outside its scope of competence.²⁸ This may happen when the act questioned is not subject to this procedure or more likely, when the referral is done by a court or tribunal which is not considered to have jurisdiction in the sense of article 267 TFEU. The acts which are subject to the procedure include not only the list established in Article 288 of TFEU (regulations, directives, decisions, recommendations and opinions), but also the atypical acts provided and not provided by the Treaties.²⁹ Nevertheless, article 267 of the TFEU stipulates that the CJEU can only give preliminary rulings on the validity of acts adopted by the EU institutions, bodies, offices or agencies, whereas it allows the CJEU to interpret not only those acts, but also the Treaties of the EU.³⁰

III. THE CONCEPT OF A COURT OR TRIBUNAL DEVELOPED THROUGH EU CASE LAW

Only a court or tribunal from a Member State can launch the reference for a preliminary ruling before the CJEU. Thus, third countries' and international courts and tribunals, such as the International Court of Justice or the European Court of Human Rights, are not entitled to use this procedure.³¹ However, it is interesting to note that the Benelux Court of Justice is competent to make use of the procedure because its task is to ensure the uniform application of law in three Member States.³² Delimiting the concept of a court or tribunal is important because some Member States have a unique judicial function, whereas some others have a much

under Article 177 of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give'.

²⁶ Van Raepenbusch (n 18) 576.

²⁷ *ibid.* Art 266 TFEU stipulates that: 'The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.'

²⁸ Van Raepenbusch (n 18) 545.

²⁹ *ibid.*, 560.

³⁰ Art 267 TFEU says that: 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union'.

³¹ Van Raepenbusch (n 18) 547.

³² *ibid.*

more diverse system whose principles are different. To address that issue, two options were considered: deferring to the national law of each Member State to decide what a court or tribunal is or to develop a European concept.³³ The second option was chosen since it is more consistent with the principle of uniform application of EU law.³⁴ This concept has been developed through EU case law and the purpose of this section is to analyse those judgments.

The concept of a court or tribunal has been considered on the basis of two criteria: an organic one, which considers that the question may be referred by a judge engaged by a public order in the framework of a legal competence and; a functional one, which stipulates that a court or tribunal must settle disputes and shall comply with certain characteristics consolidated by EU case law.³⁵ Therefore, the organic aspect would refer to the statutory position of the body, with the content and nature enabling it to secure its independence and impartiality, whereas the functional one has to do with the specific task of an authority when settling a conflict and imposing its decision on the parts in the dispute.³⁶ It seems that the CJEU is more favourable to the functional aspect rather than to the other one when considering what a court or tribunal is.³⁷ Nevertheless, the CJEU has never clarified what a court or tribunal is under article 267 TFEU.³⁸ However, it ruled on the criteria to determine which bodies are competent to use the procedure.³⁹

1. The Criteria to be Considered as Having Jurisdiction: the Vaassen-Göbbels Case.

The position of the CJEU towards the organic and functional criteria of the concept of a court or tribunal is strongly echoed in the *Vaassen-Göbbels* case.⁴⁰ This is a historical judgment for several reasons. First of all, the CJEU confirmed the European character of the concept of a court or tribunal in that ruling.⁴¹ Moreover, it is the judgment in which the CJEU first laid out the criteria for considering what such a concept is.⁴² From

³³ Antonio Herrero García, 'Cuestión prejudicial en el derecho de la Unión Europea' (2011), 23; via http://www.recercat.net/bitstream/handle/2072/152108/TFC-HERRERO_SP-2011.pdf?sequence=1, (accessed 11 February 2014).

³⁴ Van Raepenbusch (n 18) 548.

³⁵ Herrero García (n 33) 23.

³⁶ *ibid.*, 23-24.

³⁷ Van Raepenbusch (n 18) 548.

³⁸ Morten Broberg and Niels Fenger, *Preliminary references to the European Court of Justice* (OUP 2014), 72.

³⁹ Lenz (n 5) 393-394.

⁴⁰ C-61/65 *Vaassen-Göbbels* [1966] ECR 377.

⁴¹ Van Raepenbusch (n 18) 548.

⁴² *ibid.* Fernando M Mariño, Víctor Moreno Catena and Carlos Moreira, *Derecho procesal comunitario* (Tirant Lo Blanch 2001), 238; Marie-Cécile Lasserre, 'Le droit de la procédure civile de l'Union européenne forme-t-il un ordre procédural?' (2013) Université de Nice Sophia-Antipolis 66; Timothy Dayton Maldoon, 'A court or tribunal within the meaning of Article 234 of the Treaty. The Court's jurisprudence

this ruling, the predisposition of the CJEU towards the functional aspect of the concept can also be perceived. In this case, the *Scheidsgerecht van het Beambten- fonds voor het Mijnbedrijf* – a Dutch Court of Arbitration⁴³ – was dealing with an issue which required interpretation of Regulation No 3 of the Council of the EEC concerning social security for migrant workers.⁴⁴ This Dutch arbitration court brought a preliminary ruling before the CJEU.

The applicant in the action before the Dutch court was the widow of a miner who received a pension from the Dutch Worker Fund of Mining (BFM in Dutch). The applicant went to live in Germany on 31 August 1963 and because of that, was removed from the list of members of a sickness fund for pensioners. The widow asked to be reinserted on the list, but was refused under Article 18.1 of the Rules of the BFM, so she decided to complain to the *Scheidsgerecht van het Beambten- fonds voor het Mijnbedrijf*.⁴⁵

The CJEU admitted the request for interpretation. Despite not being so considered under Dutch law, it found that the *Scheidsgerecht van het Beambten- fonds voor het Mijnbedrijf* should be considered a court or tribunal within the meaning of article 267 TFEU because of several reasons:⁴⁶

- First of all, the CJEU considered that the *Scheidsgerecht van het Beambten- fonds voor het Mijnbedrijf* was an arbitration court, constituted under the law of the Netherlands and provided for by the *Reglement van het Beambten-fonds voor het Mijnbedrijf* (RBFM, Official Rules of the Fund for Mining Company) which governs the relationship between the *Beambtenfonds* and those who are insured by it.⁴⁷ The CJEU also acknowledged that the RBFM and any subsequent amendment to it must be approved not only by the Dutch Minister responsible for the mining industry, but also by the Minister for Social Affairs and Public Health.⁴⁸ Furthermore, the CJEU took note that it was the duty of the Minister responsible for the mining industry to appoint the members of the

from Vaassen (née Göbbels) to Syfait' (2005), 10, via <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1560047&fileId=1565184>, (accessed 29 April 2014).

⁴³Although the name of the court may confuse, the case had nothing to do with arbitration. Some authors maintain that it was indeed a case of pseudo-arbitration. Paul Storm, *Quod Licet Iovi.... The precarious relationship between the Court of Justice of the European Communities and Arbitration on Essays on International and comparative Law in honour of Judge Erades*. (T.M.C. Asser Instituut 1983), 146.

⁴⁴ [1958] OJ L 30, 561–596.

⁴⁵See the facts of the case C-61/65 *Vaassen-Göbbels* [1966] ECR 377, 263.

⁴⁶*ibid.* The reasons are stated in the subsection Facts in the main action under the Issues of fact and of law of the judgement.

⁴⁷*ibid.*, 272–273.

⁴⁸*ibid.*

Scheidsgerecht (Court of Arbitration), to designate its chairman and to lay down its rules of procedure.⁴⁹ Hence, the CJEU recognised and accepted the public character of the *Scheidsgerecht van het Beambten-fonds voor het Mijnbedrijf* since it was created by law, its members and President were appointed by the Dutch Government and its rules of procedure were established by national law.⁵⁰

- Secondly, the CJEU took into account that the *Scheidsgerecht* was a permanent body whose aim was to exclusively settle certain disputes under the RBFM.⁵¹ Besides, the CJEU perceived that the *Scheidsgerecht* was also bound by rules of adversary procedure similar to those used by other ordinary courts of law.⁵² Thus, the CJEU deemed that this was a permanent institution, complying with the requirements of adversary proceedings and whose competences were established by the RBFM to deal exclusively with certain issues.⁵³
- Thirdly, the CJEU noted that the persons referred to in the RBFM were compulsorily members of the *Beambten-fonds*⁵⁴ and they were bound to take any disputes between themselves and their insurer to the *Scheidsgerecht* as the proper judicial body.⁵⁵ Consequently, the CJEU argued that the *Scheidsgerecht* was bound to apply rules of law.⁵⁶

Therefore, the *Scheidsgerecht van het Beambten-fonds voor het Mijnbedrijf* was recognised as a court or tribunal because it was a permanent body of statutory origin, reference to it was compulsory, and it gave its rulings after a proper hearing and in accordance with legal rules.⁵⁷ However, this recognition received some criticism based on the fact that the powers of the Dutch arbitration court did not rely on any agreement between the parties.⁵⁸

⁴⁹ibid.

⁵⁰ibid.

⁵¹ibid, 273.

⁵² ibid.

⁵³ibid.

⁵⁴ This was done due to a regulation laid down by the *Mijnindustrieraad* (Council of the Mining Industry), a body established under public law.

⁵⁵C-61/65 *Vaassen-Göbbels* [1966] ECR 377, 273.

⁵⁶ibid.

⁵⁷ Opinion of Advocate-General Darmon in Case C-24/92 *Corbiau* [1993] ECR I-0000, para 5.

⁵⁸ W L Haardt, 'Widow Vaassen-Gobbels v. Board of the Beambtenfonds voor het Mijnbedrijf ("Tund of Employees in the Mining industry")', Case 61/65. Preliminary ruling given on June 30, 1966' (1967) 4 Common Market Law Review, 443-444; Storm (n 43) 146.

As a result of this judgement, the characteristics relevant for being considered a court or tribunal for the purposes of the reference for a preliminary ruling before the CJEU were laid out.⁵⁹ This has been a very important ruling because subsequently, the CJEU has verified the compliance with such criteria, which have obviously been shaped and completed.⁶⁰

2. No Need for an Adversarial Process: the *Politi* Case

The next problem was to consider whether a court or tribunal should comply with all those requirements in order to be considered competent to launch the procedure. This was answered in *Politi*.⁶¹ This case raised a question whether all the criteria from *Vaassen-Göbbels* should be met in order for a body to be competent to make a reference. In particular, the case was useful to examine whether the court or tribunal had to conduct an adversarial process (i.e. a contest between two opposing parties before a judge who moderates) in order to be entitled to make use of the reference for a preliminary ruling.

Politi was an Italian undertaking importing pig meat from different countries (Sweden, Belgium, France and Ireland).⁶² For each importation, *Politi* was required to pay a duty and a statistical levy according to Italian law.⁶³ The company considered that the charges for importations should not have been imposed since they were not compatible with Regulation No 20 of the Council of 4 April 1962 on the gradual establishment of the common organisation of the market in pig meat and Regulation No 121/67/EEC of the Council of 13 June 1967 on the common organisation of the market in pig meat.⁶⁴ Thus, it brought interlocutory proceedings before the President of the *Tribunale di Torino* against the Ministry of Finance of the Italian Republic with the aim of obtaining a refund.⁶⁵

The *Tribunale di Torino* wanted to obtain an interpretation from the CJEU concerning the Regulations.⁶⁶ Before hearing the other party (the Ministry of Finance of the Italian Republic), it decided to launch the procedure for the preliminary ruling before the CJEU.⁶⁷

⁵⁹ Maldoon (n 42) 11. Besides, all those characteristics have been confirmed in later case-law such as: C-14/86 *Pretore di Salò v Persons unknown* [1987] ECR 2545; C-54/96 *Dorsch Consult v Bundesbaugesellschaft Berlin unknown* [1987] ECR 2545, para 7; C-109/88 *Danfoss* [1989] ECR 3199, paras 7-8, and; C-393/92 *Almelo and Others* [1994] ECR I-1477.

⁶⁰ See Opinion of Advocate General Jarabo Colomer (n 19) para 17.

⁶¹ C-43/71 *Politi SAS v Italian Ministry of Finance* [1971] ECR 1039.

⁶² *ibid*, 1041-1042.

⁶³ *ibid*.

⁶⁴ *ibid*.

⁶⁵ *ibid*.

⁶⁶ *ibid*, 1042-1043.

⁶⁷ *ibid*.

The Italian Government maintained that the *Tribunale di Torino* lacked competence needed to make a reference due to the fact that it had been launched on a unilateral basis without any hearing to appreciate the adversarial aspect of the process.⁶⁸ Besides, it argued that there was a new Italian law changing the legal context of the case, although the CJEU considered it irrelevant by noting that the case was brought by a court or tribunal for the purposes of Article 267 TFEU.⁶⁹

The judgment clarified that the *inter partes* condition stipulated in *Vaassen Göbbels* is not a decisive factor to consider a body a court or tribunal under article 267 TFEU.⁷⁰ This ruling made it clear that the CJEU only needs to confirm that the tribunal launching the procedure exercises a judicial function and that an interpretation on EU law is needed for the national proceedings.⁷¹ Thus, even if the procedure of the body in question did not involve a proper hearing, the reference to the CJEU could still be allowed as long as it was performing a judicial function and considered that an interpretation on EU law was needed.⁷² The same position was maintained by the CJEU in *Birra Deber*.⁷³

Even though in *Simmenthal*⁷⁴ and *Ligur Carni*⁷⁵ the CJEU stressed that the preliminary ruling should be requested only if there is an adversarial process, the truth is that the CJEU did not reject its previous argument.⁷⁶ For example, in *Pretore di Cento*⁷⁷ and *Pretura Unificata di Torino*,⁷⁸ the CJEU approved without any doubt the admissibility of references in cases without parties. Therefore, this particular requirement has lost ground.⁷⁹

3. Independence and Impartiality as Essential Characteristics: the Corbiau Case

The judgment in *Politi* raised another concern related to the judicial function exercised by a court or tribunal. Could any court exercising such a judicial function make a request for a preliminary ruling before the CJEU at any time? The question was answered in the *Corbiau* case.⁸⁰ Since *Vaassen Göbbels*, the CJEU has checked that the requirements laid out in that

⁶⁸ *ibid*, 1044.

⁶⁹ *ibid*.

⁷⁰ Maldoon (n 42) 23.

⁷¹ C-43/71 *Politi* [1971] ECR 1039, para 5.

⁷² *ibid*, para 5; Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 30.

⁷³ C-162/73 *Birra Dreher v Amministrazione delle Finanze dello Stato* [1974] ECR 201.

⁷⁴ C-70/77 *Simmenthal v Amministrazione delle Finanze dello Stato* [1978] ECR 1453.

⁷⁵ Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni Srl and Genova Carni Srl v Unità Sanitaria Locale n. XV di Genova and Ponente SpA v Unità Sanitaria Locale n. XIX di La Spezia and CO.GE.SE.MA Coop a r.l.* [1993] ECR I-6621.

⁷⁶ See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 31.

⁷⁷ C-110/76 *Pretore di Cento* [1977] ECR 851.

⁷⁸ C-228/87 *Pretura unificata di Torino* [1988] ECR 5099.

⁷⁹ Maldoon (n 42) 23.

⁸⁰ C-24/92 *Corbiau* [1993] ECR I-1277.

ruling are complied with. However, some other requirements have appeared in subsequent judgments. That was the case with the requirement of independence, firstly mentioned in *Pretore di Salò*,⁸¹ but later further considered in *Corbiau*. In fact, it could be argued that *Corbiau* gave fundamental meaning to the criterion of independence⁸².

In *Corbiau*, the Director of Taxation and Excise Duties Directorate of Luxembourg⁸³ made a request for a preliminary ruling with the aim of interpreting the former article 48 of the Treaty establishing the European Economic Community (EEC Treaty).⁸⁴ According to former article 48 EEC Treaty (current article 45 TFEU), the freedom of movement of workers ‘shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.’⁸⁵

Mr Corbiau had made an application to the *Directeur des Contributions* of Luxembourg under article 131 of the Luxembourgish Tax Code.⁸⁶ He relied on the judgment of the CJEU in *Biehl*.⁸⁷ In that case, the CJEU had ruled that article 48(2) of the EEC Treaty:

precludes a Member State from providing in its tax legislation that sums deducted by way of tax from the salaries and wages of employed persons who are nationals of a Member State and are resident taxpayers for only part of the year because they take up residence in the country or leave it during the course of the tax year are to remain the property of the Treasury and are not repayable.⁸⁸

Mr Corbiau had been working at the Paribas Bank in Luxembourg.⁸⁹ He lived in Luxembourg until 25 October 1990, when he transferred his residence to Belgium while remaining employed in Luxembourg.⁹⁰ From 1 January 1990 to 25 October 1990, the employer of Mr Corbiau had deducted income tax from his salary at the rate applicable to a taxpayer resident in Luxembourg.⁹¹ The refund of overpaid tax was denied under

⁸¹ Case C-14/86 *Pretore di Salò v Persons* [1987] ECR 2545.

⁸² Maldoon (n 42) p 18.

⁸³ This is the current *Administration des contributions directes* of the Grand Duchy of Luxembourg, which is a tax service whose main tasks aim to set and cover direct taxes, to establish the basis on which the property tax will be charged and finally, to set and collect taxes. See <http://www.impotsdirects.public.lu/>, (accessed 11 January 2014).

⁸⁴ C-24/92 *Corbiau* [1993] ECR I-1277, para 1.

⁸⁵ Art 48(2) EEC Treaty.

⁸⁶ C-24/92 *Corbiau* [1993] ECR I-1277, para 7.

⁸⁷ Case C-175/88 *Biehl vs Administration des Contributions* [1990] ECR I-1779.

⁸⁸ *ibid*, para 19.

⁸⁹ C-24/92 *Corbiau* [1993] ECR I-1277, para 3.

⁹⁰ *ibid*.

⁹¹ *ibid*, para 4.

Article 154 of the Luxemburgish Income Tax Law that established that those excesses would benefit the Treasury.⁹²

Thus, the Director of Taxation and Excise Duties Directorate decided to request from the CJEU a preliminary ruling to interpret Article 48 of the EEC Treaty in order to clarify his doubts regarding the application of the judgment in *Biehl*.⁹³ In this case, the CJEU wanted to determine whether the Director of Taxation and Excise Duties Directorate could be considered a tribunal or court for the purpose of the preliminary ruling.⁹⁴ That was a key point for the case, since the CJEU would admit the question or not depending on the answer.

The first problem arose due to the fact that the State Council of Luxembourg had recognised its status as a court in some contentious and non-contentious matters.⁹⁵ Nevertheless, Advocate-General Darmon issued an opinion arguing that the concept of a court or tribunal was autonomous and it has been defined by the case law of the CJEU.⁹⁶ Thus, the Advocate General claimed that the recognition by the State Council of Luxembourg was not enough to confer the status of a court or tribunal to the Director of Taxation and Excise Duties Directorate.⁹⁷

Eventually, the CJEU did not admit the reference.⁹⁸ However, it did so not on the grounds provided by the Advocate General, but by considering that the expression 'court or tribunal' is 'a concept of Community law, which can only mean an authority acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings.'⁹⁹ In this sense, the CJEU could not consider the Director of Taxation and Excise Duties Directorate as a third party because he was the head of the Taxation and Excise Duties Directorate.¹⁰⁰ Taking this fact into account, he could not be regarded as being impartial in relation to this authority, having been the head of the very authority that had made the appealed decision.¹⁰¹ Therefore, the CJEU concluded that the Director of Taxation and Excise Duties Directorate was not a court or tribunal for the purposes of the reference for a preliminary ruling.¹⁰²

⁹² *ibid*, paras 5-6.

⁹³ C-175/88 *Biehl vs Administration des Contributions* [1990] ECR I-1779.

⁹⁴ C-24/92 *Corbiau* [1993] ECR I-1277, para 14.

⁹⁵ As pointed out in the opinion of Advocate General Darmon in C-24/92 *Corbiau* [1993] ECR I-0000, that recognition was given in *Caisse hypothécaire du Luxembourg* No 5833 on the Court Roll and in *Toussaint v Administration des contributions*, No 5516 on the Court Roll.

⁹⁶ *ibid*, para 4.

⁹⁷ *ibid*.

⁹⁸ C-24/92 *Corbiau* [1993] ECR I-1277, para 17.

⁹⁹ *ibid*, para 15.

¹⁰⁰ *ibid*, para 16.

¹⁰¹ *ibid*.

¹⁰² *ibid*, para 17.

From this judgment, it can be deduced that impartiality and independence are two essential characteristics to consider a body a court or tribunal under article 267 TFEU. Hence, in order to be recognised as competent to make a reference for a preliminary ruling, courts and tribunals must act as third parties in the original litigation process. The the *Corbiau* judgment was later confirmed in *X*,¹⁰³ a case in which the CJEU did not admit a request for a preliminary ruling because the petitioner did not fulfil the requirement of independence.¹⁰⁴ Nevertheless, the CJEU has departed from the consideration of that requirement and this has led to criticism.¹⁰⁵ In a series of cases - starting with *Dorsch Consult*¹⁰⁶ the Court referred to the exercise of the function in an independent way and under own responsibility.¹⁰⁷ This has been later confirmed in *Köllensperger and Atzwanger*.¹⁰⁸

IV. PROBLEMATIC CONSIDERATIONS ON THE CONCEPT OF A COURT OR TRIBUNAL

Now that the characteristics for being considered a court or tribunal have been laid out, it is time to assess this concept with some examples of bodies or authorities that the CJEU has considered to fall within or outside article 267 TFEU. The following section will outline some case law in which the CJEU used functional criteria to examine whether several types of different courts, authorities and bodies could be considered a court or tribunal for the purposes of a preliminary ruling procedure.

It should be highlighted that the selected cases deal with references for preliminary rulings requested by bodies which do not carry out a pure judicial function or which do not even exercise it within their legal systems. The cases have been selected to show the CJEU's wide range of interpretations of the criteria, sometimes leading to the admission of references that are not made by judges. This is done on a case-by-case basis because the nature and functions of bodies may vary between countries, which makes CJEU's task more difficult. Admission of references from non-judicial bodies creates controversy and also legal uncertainty for bodies that would like to question the Court on the interpretation or validity of European law.

I. Can Arbitration Courts be Competent for the Preliminary Ruling? The Nordsee Case

¹⁰³ Joined cases C-74/95 and C-129/95 *X* [1996] ECR I-6609.

¹⁰⁴ See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 20.

¹⁰⁵ *ibid*, 19-28; Maldoon (n 42), 22.

¹⁰⁶ C-54/96 *Dorsch Consult v Bundesbaugesellschaft Berlin* [1987] ECR 2545.

¹⁰⁷ See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 21.

¹⁰⁸ C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551.

The judgment in *Corbiau*¹⁰⁹ could have brought with it a question of arbitration bodies as courts or tribunals entitled to launch the reference for a preliminary ruling. Arbitration is an alternative dispute resolution mechanism where parties decide to submit their dispute to a third person (“arbitrator”) who will make a legally-binding decision or otherwise as if s/he was a judge. Since it has rapidly evolved as a method of resolving international trade disputes where EU law must be taken into consideration, arbitration has also increased the significance of referring questions to the CJEU about the application and interpretation of EU law.¹¹⁰ Besides, *Vassen Göbbels*¹¹¹ recognised a Dutch arbitration court as a court or tribunal for the purposes of article 267 TFEU. Some authors considered that *Vassen Göbbels* had indicated that the CJEU would later admit references from private arbitration tribunals.¹¹² Moreover, the CJEU had strengthened the condition of third party impartiality for courts and tribunals wishing to make a request for a preliminary ruling in *Corbiau*.¹¹³ Then, could arbitration courts and tribunals be considered a court or tribunal for the purposes of the reference for a preliminary ruling? The answer came in *Nordsee*,¹¹⁴ where the CJEU ruled that arbitration courts are not courts or tribunals.

In *Nordsee*, a dispute submitted for arbitration arose from a contract signed by German shipbuilders.¹¹⁵ The arbitrator used the reference for a preliminary ruling procedure to ask for an interpretation of a series of three Regulations concerning aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund.¹¹⁶ In this case, the CJEU had first to consider whether the arbitration tribunal was a court or tribunal for the purposes of the procedure. In order to solve this issue, the CJEU analysed the nature of the arbitration tribunal in question.

The CJEU perceived certain similarities between the activities of the arbitration tribunal in question and an ordinary court or tribunal.¹¹⁷ This was mainly because the arbitrator had to decide according to law and his decision had the force of *res judicata* between the parties and had to be

¹⁰⁹ C-24/92 *Corbiau* [1993] ECR I-1277.

¹¹⁰ Joseph H H Weiler and Martina Kocjan, 'The law of the European Union. Teaching material. The Community System of judicial remedies: jurisdiction examined: article 234' NYU School of Law 2004/05, 11.

¹¹¹ C-61/65 *Vaassen-Göbbels* [1966] ECR 377.

¹¹² W Paul Gormley, 'The Future Role of Arbitration within the EEC: The Right of an Arbitrator to Request a Preliminary Ruling Pursuant to Article 177' (1968) 12St. Louis University Law Journal 550-563.

¹¹³ C-24/92 *Corbiau* [1993] ECR I-1277.

¹¹⁴ C-102/81 *Nordsee v Reederei Mond* [1982] ECR I-1095. For an analysis of the case see Broberg and Fenger (n 38), 84-86; and Storm (n 43) 150.

¹¹⁵ *ibid*, para 2.

¹¹⁶ Regulation No 17/64/EEC of the Council of 5 February [1964] OJ No 34/586, Regulation (EEC) No 729/70 of the Council of 21 April [1970] OJ No L 94/13 and Regulation (EEC) No 2722/72 of the Council of 19 December [1972] OJ L 291/30.

¹¹⁷ C-102/81 *Nordsee* [1982] ECR I-1095, para 10.

enforceable.¹¹⁸ Nevertheless, the CJEU considered that those characteristics were not enough to make an arbitration court become a court or tribunal in the sense of article 267 TFEU.¹¹⁹

In contrast to *Vassen-Göbbels*, the CJEU pointed out that the parties were not obliged to refer their dispute to arbitration.¹²⁰ In fact, it was underlined that, when signing the contract ‘the parties were free to leave their disputes to be resolved by ordinary courts or to opt for arbitration by inserting a clause to that effect in the contract.’¹²¹ Furthermore, the CJEU stated that the German public authorities were neither involved in the decision to refer the matter to arbitration nor requested to intervene in the arbitral proceedings.¹²² On top of that, the CJEU stressed that the arbitral tribunal lacked the public character criteria laid out in *Vaassen-Göbbels* since it ‘was established pursuant to a contract between private individuals.’¹²³ It also stated that the German State was responsible ‘for the performance of obligations arising from’¹²⁴ EU law within its territory and it had ‘not entrusted or left to private individuals the duty of ensuring’¹²⁵ the compliance of the obligations in this particular case.

Thus, the CJEU refused to consider it as a court or tribunal and it did not accept the reference.¹²⁶ Nevertheless, the judgment did not exclude the possibility of accepting questions raised in an arbitration process through national courts or tribunals which examine them in a context of a collaboration or in the course of a review of an arbitration award.¹²⁷ In any case, it is up to the national court or tribunal to consider making a reference since they are courts or tribunals under article 267 TFEU.¹²⁸

The CJEU has followed the *Nordsee* judgment.¹²⁹ It has made it clear that a conventional arbitration court cannot make a reference for a preliminary ruling.¹³⁰ The reason is that arbitral tribunals lack compulsory jurisdiction,¹³¹

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*, para 13.

¹²⁰ *ibid.*, para 11.

¹²¹ *ibid.*

¹²² *ibid.*, para 12.

¹²³ *ibid.*, para 7.

¹²⁴ *ibid.*, para 12.

¹²⁵ *ibid.*

¹²⁶ *ibid.*, paras 13 and 16.

¹²⁷ *ibid.*, para 14.

¹²⁸ *ibid.*, para 15.

¹²⁹ C-125/04 *Guy Denuit and Betty Cordenier. v. Transorient – Mosaïque Voyages et Culture SA* [2005] ECR I-923, para 13.

¹³⁰ The CJEU has recently confirmed it in C-555/13 *Merck Canada Inc v Accord Healthcare Ltd, Alter SA, Labochem Ltd, Synthron BV, Ranbaxy Portugal - Comércio e Desenvolvimento de Produtos Farmacêuticos, Unipessoal Lda* [2014] (not published yet), paras 16-17. By analogy, the same could be said for mediation; the author was expecting an opinion of the CJEU in C-492/11 *Ciro Di Donna v Società imballaggi*

which is one of criteria established in *Vaassen Göbbels*. There are scholars who have a different opinion and consider that arbitral courts should be able to refer questions to the CJEU.¹³² Despite the fact that there might be arguments for reconsidering the situation,¹³³ the case law of CJEU concerning preliminary rulings and arbitration courts is very consistent.

However, it has also been clarified that there are situations where arbitration courts can be considered as having jurisdiction entitling them to make use of the reference for a preliminary ruling procedure. For example, that was the case in *Danfoos*¹³⁴ whereby:

the reference for a preliminary ruling was made by a Danish arbitration court granted final jurisdiction by law in disputes relating to collective agreements between employees' organisations and employers, where the jurisdiction did not depend on the agreement between the parties since either might bring a case before it despite the objections of the other, and the decision was binding on everybody.¹³⁵

This has been confirmed very recently in *Merck Canada Inc.*¹³⁶ Therefore, the CJEU admits questions from an arbitral court with a legal origin, whose award is binding for the parties and whose jurisdiction does not depend upon the parties' agreement.¹³⁷ Furthermore, in *Almelo*¹³⁸ the CJEU has also 'accepted jurisdiction to reply to the questions referred for a preliminary ruling by a judicial body determining, according to what appeared fair and reasonable, an appeal from an arbitration award, because it was required to observe the rules of Community Law.'¹³⁹

metallici Salerno srl (SIMSA) [2013] ECR I-00000 but, due to the derogation of the legislation applicable to the dispute, it did not give a ruling.

¹³¹ *Maldoon* (n 42) 24; *Van Raepenbusch* (n 18) 549, and; *Broberg and Fenger* (n 38) 84-85.

¹³² Xavier de Mello, 'Arbitrage et droit communautaire' (1982) *Revue de l'arbitrage* 395; *Van Raepenbusch* (n 18) 549, fn 67.

¹³³ *Terkildsen and Lysholm* argued that arbitral courts should be considered court or tribunal under article 267 TFEU: Dan Terkildsen and Sebastian Lysholm Nielsen, 'Arbitral Tribunals and Article 267 of the Treaty on the Functioning of the European Union – The Danish By-Pass Rule' (2012) *Austrian Yearbook on International Arbitration* 195-206.

¹³⁴ C-109/88 *Danfoss* [1989] ECR 3199, paras 7-9.

¹³⁵ See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 50.

¹³⁶ C- 555/13 *Merck Canada Inc*, not published yet.

¹³⁷ C-109/88 *Danfoss* [1989] ECR 3199, para 7; C- 555/13 *Merck Canada Inc*, not published yet, para 18.

¹³⁸ C-393/92 *Almelo and Others* [1994] ECR I-1477.

¹³⁹ See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 51.

2. Can Economic and Administrative Courts be Competent for the Preliminary Ruling? The *Gabalfrisa* Case

The *Gabalfrisa* case¹⁴⁰ dealt with the consideration of economic and administrative courts as courts or tribunals entitled to raise questions to the CJEU. Previously, the CJEU had already admitted a reference from the Spanish economic and administrative court in the *Iberlacta* case.¹⁴¹ The *Gabalfrisa* case involved a determination whether a Spanish regional economic and administrative court (Catalonia) would fall under article 267 TFEU. In Spain, these courts are not judicial, but administrative in nature.¹⁴² Despite preceding the *Gabalfrisa* case, the ruling in the *Iberlacta* case did not set any precedent for *Gabalfrisa* since it did not argue how economic and administrative courts could meet the criteria to be considered a court or tribunal under article 267 TFEU.¹⁴³ Thus, it was in the *Gabalfrisa* case that such an examination took place.¹⁴⁴ In this case, there was an important division of opinions between the Advocate General and the CJEU.¹⁴⁵ The former claimed that it was an administrative court that not entitled to refer questions, whereas the latter decided that it fell under article 267 TFEU.

In the original proceedings, various departments of the Spanish Tax Agency had refused several entrepreneurs and professional practitioners the deduction of value added tax (VAT) paid in respect of transactions carried out prior to the commencement of their activity.¹⁴⁶ The Spanish Tax Agency argued that it was done on the grounds of infringement of the requirements laid down in national law, more specifically Article 111 of Law No 37/1992 and Article 28 of Royal Decree No 1624/1992.¹⁴⁷

However, those entrepreneurs and professional practitioners considered that Article 111 of Law No 37/1992 was contrary to Article 17(1) and (2)(a) of

¹⁴⁰ Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577.

¹⁴¹ Joined Cases C-260/91 and C-261/91 *Diversint SA and Iberlacta SA v Administración Principal de Aduanas de la Junquera* [1993] ECR I-1885.

¹⁴² Pilar Charro Baena and Carolina San Martín Mazzucconi, 'Derechos sociales y tutela judicial efectiva en la Constitución Europea' (2005) *Revista del Ministerio de Trabajo e Inmigración* n° 57, 57.

¹⁴³ Francisco M. Carrasco González, *El planteamiento de cuestiones prejudiciales al TJCE por los Tribunales Económico-Administrativos. Necesidad de un nuevo examen*. Ministerio de Hacienda: Instituto de Estudios Fiscales (2009), 99.

¹⁴⁴ *ibid.*

¹⁴⁵ Some authors maintain that Advocate General Saggio was very belligerent against considering this court to fall under article 267 TFEU. See: Clemente Checa González, 'Crítica del carácter obligatorio de la vía económico-administrativa en la nueva ley general tributaria española' (2004) 16(1) *Revista de Derecho* [2004] 154.

¹⁴⁶ Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, para 10.

¹⁴⁷ *ibid.*

the Sixth VAT Directive.¹⁴⁸ Thus, they appealed the decision of the Spanish Tax Agency before the *Tribunal Económico-Administrativo Regional de Cataluña*, which is the regional economic and administrative court of Catalonia. That court had doubts about the compatibility of Law No 37/1992 with Article 17 of the Sixth Directive and referred a preliminary ruling to the CJEU.¹⁴⁹

Advocate-General Saggio considered that the regional economic and administrative court of Catalonia did not meet the criteria to fall under what is currently article 267 TFEU.¹⁵⁰ He insisted on the lack of independence of this court. He also rejected an argument that not admitting references from economic and administrative courts would put the uniform application of EU law at stake because those courts issue resolutions which can be subject to judicial review.¹⁵¹ Thus, the Catalanian economic and administrative court should not be empowered to refer a preliminary ruling. Nevertheless, the CJEU did not follow the Advocate-General's opinion and considered that the court met the criteria developed by EU case law in order to qualify as a court or tribunal competent to request preliminary rulings.¹⁵²

The CJEU considered that the economic and administrative courts were of statutory origin and permanent since their tasks were defined and their procedure for fiscal complaints was organised by Spanish legislation.¹⁵³ It also acknowledged that the jurisdiction of those tribunals was compulsory since national legislation provided that they were able to rule on complaints in order to challenge decisions of the Spanish Tax Authority.¹⁵⁴

¹⁴⁸ Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment OJ L 145/1.

¹⁴⁹ Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577, para 13.

¹⁵⁰ Opinion of Advocate General Saggio in Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-01577.

¹⁵¹ Francisco M Carrasco González, 'El planteamiento de cuestiones prejudiciales al TJCE por los Tribunales Económico-Administrativos. Necesidad de un nuevo examen' (2009) Ministerio de Hacienda: Instituto de Estudios Fiscales 100.

¹⁵² Case *Vaasen Göbbels* [1966] ECR 377; Case *Pretore di Salò v Persons* [1987] ECR 2545; Case *Dorsch Consult* [1987] ECR 2545, para 7; Case *Danfoss* [1989] ECR 3199, paras 7-8; Case *Almelo and Others* [1994] ECR I-1477.

¹⁵³ Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577, para 34. The tasks were defined by Law No 230/1963 and Legislative Decree No 2795/1980 whereas the procedure for fiscal complaints was organised by Royal Decree No 391/1996, Law No 230/1963, Legislative Decree No 2795/1980 and Royal Decree No 391/1996.

¹⁵⁴ In accordance with Article 35(1) of Legislative Decree No 2795/1980, Article 163 of Law No 230/1963, Article 40 of Legislative Decree No 2795/1980, and Articles 4(2) and 119(3) and (4) of Royal Decree No 391/1996. C-147/98 *Gabalfrisa* [2000] ECR I-1577, para 35.

According to national rules, the final decisions of the tribunals were also binding.¹⁵⁵

Concerning the *inter-partes* nature of the procedure, the CJEU clarified that this was not an absolute criterion as it was laid out in previous case law¹⁵⁶ and the Spanish legislation¹⁵⁷ allowed the parties concerned to lodge submissions and evidence in support of their claims and request a public hearing.¹⁵⁸ For the CJEU, the economic-administrative tribunals may also apply rules of law since the relevant provisions in the Spanish legislation¹⁵⁹ establish that they are competent to give reasons in fact and in law for their decisions and it is in these tribunals' power to rule on fiscal complaints.¹⁶⁰ Unlike in *Corbiau*,¹⁶¹ the CJEU also held that the economic-administrative tribunals did indeed meet the criteria of independence. As such, they were a clear third party in the process since national laws established and ensured a clear separation of functions between the departments of the tax authority responsible for management, clearance and recovery and the economic-administrative courts which independently deal with complaints against decisions of the tax authority's department.¹⁶²

The CJEU's judgment in *Gabalfrisa* has been very much criticised. In his conclusions for *De Coster*,¹⁶³ Advocate-General Ruiz-Jarabo Colomer raised some concerns about that ruling. Ruiz-Jarabo called into question the impartiality and independence of the members of the economic and administrative court because they are officials of the public administration and are appointed by a minister who can dismiss them whenever he or she wants to do so.¹⁶⁴ Moreover, the Advocate-General stressed the fact that complaints before those courts are just administrative appeals.¹⁶⁵

The Advocate-General also pointed out that economic and administrative courts must reply within a year following the appeal; otherwise that appeal is rejected and the complaint may go for contentious administrative proceedings.¹⁶⁶ In order to strengthen his arguments, he also mentioned that the economic and administrative courts may inhibit themselves in

¹⁵⁵ Arts 55, 110 and 112 of Royal Decree No 391/1996. C-147/98 *Gabalfrisa* [2000] ECR I-1577, para 36.

¹⁵⁶ C-54/96 *Dorsch Consultsee* [1987] ECR 2545, para 31.

¹⁵⁷ Articles 30 and 32 of Legislative Decree No 2795/1980 and Articles 90 and 91 of Royal Decree No 391/1996.

¹⁵⁸ Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577, para 37.

¹⁵⁹ Arts 20 and 35(2) of Legislative Decree No 2795/1980 and Arts 1 and 40(2) of Royal Decree No 391/1996.

¹⁶⁰ Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577, para 38.

¹⁶¹ C-24/92 *Corbiau* [1993] ECR I-1277.

¹⁶² Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577, paras 39-40.

¹⁶³ Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445.

¹⁶⁴ *ibid*, para 28.

¹⁶⁵ *ibid*.

¹⁶⁶ *ibid*.

those cases considered important or whose amount is remarkably high and leave the decision for the Ministry of Finance.¹⁶⁷ For Ruiz-Jarabo, the *Gabalfrisa* case showed confusion between administrative and judicial bodies.

Besides, Ruiz-Jarabo argued that these courts do not follow an entirely adversarial process since the pleas and evidence admitted have a limited character and the public hearing is settled discretionarily by the body itself without any possibility of appeal.¹⁶⁸ The Advocate General also highlighted that administrative structures which decide under legal criteria do not need to be composed of jurists.¹⁶⁹ To support his position, he pointed out some cases where preliminary rulings were accepted despite the fact that their members were not jurists.¹⁷⁰

The Advocate-General claimed that the admission of 'references for preliminary rulings from administrative bodies seriously hinders the dialogue between courts established by the Treaty, distorts its aims and undermines the judicial protection of the citizen.'¹⁷¹ Even though the CJEU considered the Catalan economic and administrative courts as competent to request a preliminary ruling, many scholars do not agree with this condition.¹⁷² In this sense, the ruling in *Gabalfrisa* has been considered 'a gradual relaxation of the requirement that the body should be independent.'¹⁷³ However, some Spanish scholars have argued over time that economic and administrative courts would be competent to refer questions to the CJEU.¹⁷⁴ This lack of unanimity is a problem when determining who can make use of the reference for a preliminary ruling.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*, para 39.

¹⁶⁹ *ibid.*, para 77.

¹⁷⁰ *ibid.* See fn 97 where Advocate General Jarabo-Colomer provides examples of the three members of the *Maaseutuelinkeinojen Valituslautakunta* (Rural Businesses Appeals Board), Finland, which led to the reference being accepted in Joined Cases C- 9/97 and C-1W97 *Jokela and Pitkäranta* [1998] ECR I-6267, one was a non-legal specialist. In Case C-7/97 *Oscar Bronner v Mediaprint* [1998] ECR I-7791, the *Kartellgericht* (Court of First Instance in Competition Matters of Austria), which made the reference was composed of three members, two of whom were lay assessors.

¹⁷¹ *ibid.*, para 79

¹⁷² *ibid.* See fn 28, where Ruiz Jarabo-Colomer quotes all the doctrine which is against the judgment.

¹⁷³ Maldoon (n 42) 22.

¹⁷⁴ See for example: Antonio Martínez Lafuente, 'Hacienda Pública y cuestión prejudicial' (1985) Noticias CEE, núm. 11, 91-95; Juan José Zornoza Pérez, 'Notas sobre el concepto de impuestos sobre el volumen de ventas en la Sexta Directiva' (1986) Noticias CEE, núm. 19, 31-37; Ramón Falcón y Tella, *Introducción al Derecho financiero y tributario de las Comunidades Europeas* (Civitas 1988); Clemente Checa González, 'Aspectos controvertidos en relación con las actuaciones de los órganos económico-administrativos: algunas cuestiones' (1992) Revista de Derecho Financiero y Hacienda Pública, núm. 222, 1225-1246; César García Novoa, 'Los Tribunales

3. Can Competition Authorities be Competent for the Preliminary Ruling? The Syfait Case

As courts which do not exercise a pure juridical function have been considered as falling under article 267 TFEU by the CJEU, it leaves open the possibility of accepting other bodies which make decisions with legal implications, but whose function is not entirely juridical. That is the case for competition authorities. National competition authorities are bodies which have a regulatory mandate over competition issues covering all sectors of the economy in their country.¹⁷⁵ As such, they make decisions and sanction market actors that infringe on competition rules.¹⁷⁶ The CJEU had already considered that the former Spanish Competition Authority was allowed to request preliminary rulings.¹⁷⁷ The *Syfait* case again raised the question about whether national competition authorities could be considered a court or tribunal in the sense of article 267 TFEU.¹⁷⁸ The ruling in this case was largely awaited due to reasons which had to do with competition law.¹⁷⁹ Nevertheless, the CJEU rejected the positive opinion of the Advocate General and did not admit the reference for a preliminary ruling. Thus, those expectations were never satisfied.

In this case there was a conflict between GSK plc and its Greek subsidiary GSK AEVE - a company distributing medicinal products - and several of its clients (*Syfait* and others, *PSF*, *Interfarm* and *Others*, and *Marinopoulos* and *Others*); all of them were wholesalers or represented associations of wholesalers to whom GSK AEVE had refused to supply three pharmaceutical products (*Imigran*, *Lamictal* and *Serevent*) on the Greek market in order to avoid parallel imports.¹⁸⁰ GSK AEVE based its decision to change its distribution system supplying directly to hospitals and pharmacies on a serious economic situation.¹⁸¹

The wholesalers reported to the Greek competition authority (*Epitropi Antagonismou*) alleging the non-attention of the orders that had been requested of GSK AEVE, claiming that this attitude could constitute an

Económico-Administrativos como jueces de lo comunitario en materia tributaria' (1995) *Revista de Derecho Financiero y Hacienda Pública*, n° 236, 415-447.

¹⁷⁵ Cornelius Dube, 'Competition authorities and sector regulators: What is the best operational framework?' (2008) CUTS International, October #2, 1.

¹⁷⁶ Ashurst, 'Sanctions in Competition law' (2006), DTP/2987 August 2006.

¹⁷⁷ C-67/91, *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and others* [1992] ECR I-04785, paras 25-26. However the CJEU followed the organic criteria and did not examine whether the criteria established in the *Vassen Göbbels* case were fulfilled. Thus, it simply assumed it was a judicial national body.

¹⁷⁸ C-53/03 *Syfait and Others v GlaxoSmithKlineAEVE* [2005] ECR I-4609.

¹⁷⁹ Carl Johan Björnram *Parallel trade in pharmaceutical products within the EEA: From first to final marketing. - Balancing the need to protect and promote public health and safety with the EC treaty objective of establishing a common market*, Durham theses, Durham University (2007), 54-55, via <http://etheses.dur.ac.uk/2135/>, (accessed 5 May 2014).

¹⁸⁰ *ibid*, para 2.

¹⁸¹ *ibid*, para 12.

abuse of dominant position within the meaning of Article 2 of Greek Law No 703/1977 and article 102 TFEU (former art 82 TEC).¹⁸² On 3 August 2001, the Greek competition authority requested that GSK AEVE temporarily comply with the orders.¹⁸³ The competition authority compelled both GSK plc and GSK AEVE to comply with a circular adopted on 27 November 2001 by the Greek Organisation for Medicines, which provided that all participants in the distribution of prescribed medicines ‘must supply to the domestic market quantities at least equal to current prescription levels ... plus an amount (25%) to cover any emergencies and changes of circumstance.’¹⁸⁴

Then, GSK AEVE appealed to the Administrative Appeal Court in Athens – which confirmed that measure – and afterwards it applied to the Greek competition authority for negative clearance under Article 11 of Law No 703/1977 in respect of its refusal to cover more than 125% of Greek demand.¹⁸⁵ The Greek competition authority decided to make a reference to the CJEU for a preliminary ruling in order to know to what extent the refusal by GSK plc and GSK AEVE to fully meet the orders placed by the complainants constituted an abuse of a dominant position within the meaning of article 102 TFEU.

Advocate General Jacobs considered that there were no grounds for refusing the condition of a court or tribunal to the Greek competition authority.¹⁸⁶ He argued that the authority met the criteria needed to be considered a court or tribunal.¹⁸⁷ However, the CJEU did not follow his opinion. In fact, it stressed the fact that the competition authority was not a court or tribunal since it did not meet the conditions established by EU case law in order to be considered so.¹⁸⁸ Thus, the CJEU had no jurisdiction to answer the questions.¹⁸⁹

The CJEU stressed the facts that the Greek competition authority was supervised by the Greek Minister for Development;¹⁹⁰ its personnel were not free from removal;¹⁹¹ its president was responsible for the coordination and general policy of the secretariat, which investigates and proposes the decisions later adopted by the authority, and; he was the immediate

¹⁸² *ibid*, para 14.

¹⁸³ *ibid*, para 15.

¹⁸⁴ *ibid*, para 17.

¹⁸⁵ *ibid*, paras 15 and 18.

¹⁸⁶ Opinion of Advocate General Jacobs of 28 October 2004 in Case C-53/03 *Syfait and Others v GlaxoSmithKline AEVE* [2005] ECR I-4609. For a detailed analysis of the opinion, see: Maldoon (n 42) 31-37.

¹⁸⁷ Opinion of Advocate-General Jacobs in Case C-53/03 *Syfait and Others v GlaxoSmithKline AEVE* [2005] ECR I-4609, paras 17-46.

¹⁸⁸ Case C-53/03 *Syfait* [2005] ECR I-4609, para 37.

¹⁸⁹ *ibid*, para 38.

¹⁹⁰ *ibid*, para 30.

¹⁹¹ *ibid*, para 31.

superior of the secretariat's personnel.¹⁹² Consequently, the CJEU considered that the Greek competition authority did not meet the criteria of independence since it was not a clear third party 'in relation to the State body which, by virtue of its role, may be akin to a party in the course of competition proceedings.'¹⁹³

Finally, the CJEU highlighted that national competition authorities have to cooperate with the European Commission and consequently, may be relieved from their competences to apply articles 101 and 102 TFEU by a Commission's decision.¹⁹⁴ The CJEU also held that, according to the relevant case law,¹⁹⁵ a body having a pending case which requires giving a judgment in proceedings intended to lead to a decision of a judicial nature may refer a question.¹⁹⁶ However, if the Commission can relieve the national authority from its competence, then any proceedings initiated before that authority will not lead to a decision of a judicial nature.¹⁹⁷ This judgment tightens up the requirements to use the preliminary ruling¹⁹⁸ and it could be inferred from it that no national competition authority may be considered a court or tribunal under article 267 TFEU.

On this point, it could be argued that there are advantages and disadvantages of considering competition authorities courts or tribunals under article 267 TFEU.¹⁹⁹ These authorities exist in each Member State and they apply articles 101 and 102 TFEU in their territories. Those provisions are anything but easy to apply and concern many actors on the market. On top of that, each national competition authority has a different experience when using those provisions. As a result, there may be a risk to uniform application of the competition provisions which could be remedied by allowing national competition authorities to refer questions to the CJEU. That being said, this could increase the workload of the CJEU if it had to admit references from 28 national competition authorities. This could in turn result in delays for justice as the CJEU rulings take a significant amount of time. Competition authorities should wait for the CJEU to rule before issuing their decision, which is subject to judicial review and could later lead to another reference for a preliminary ruling.

¹⁹² *ibid*, para 32.

¹⁹³ *ibid*, para 33. See also Maldoon (n 42) 36-37, where the author argues that Advocate-General Jacobs was wrong when considering that the Greek competition authority was independent.

¹⁹⁴ Art 11(6) of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 001.

¹⁹⁵ C-134/97 *Victoria Film* [1998] ECR I-7023, para 14; and C-195/98, *Österreichischer Gewerkschaftsbund* ECR [2000] I-10497, para 25.

¹⁹⁶ See C-53/03 *Syfait* [2005] ECR I-4609, para 35.

¹⁹⁷ *ibid*, para 36.

¹⁹⁸ Broberg and Fenger (n 38) 91.

¹⁹⁹ Maldoon (n 42) 38-40.

Nevertheless, it is clear that this judgment is a reaction of the CJEU to criticism from scholars and Advocates General against previous and soft case law.²⁰⁰ This argument is supported by the fact that the criterion of independence, as explained in the judgment, becomes more difficult to liberally apply as in the past.²⁰¹ It seems that the conclusions of Ruiz Jarabo in *De Coster* have made the CJEU analyse the criteria more severely, especially the condition of independence.²⁰²

4. *Can Administrative Bodies be Competent for the Preliminary Ruling? The Belov Case*

In *Belov*²⁰³ the CJEU examined whether certain administrative bodies or agencies with quasi-judicial functions could be considered a court or tribunal for the purposes of article 267 TFEU. In this case, Valeri Hariev Belov had made a complaint to a Commission of protection against discrimination created under Bulgarian law (*Komisia za zashtita ot diskriminatsia*, KZD).²⁰⁴ The reason the complaint was that Chez Elektro Balgaria (CEB) had placed meters to measure electricity consumption at a height of seven meters on posts in two areas of the city of Montana (Bulgaria) mainly inhabited by the Roma community.²⁰⁵ The KZD considered that the measure constituted indirect discrimination on grounds of ethnicity within the meaning of Articles 4.3 and 37 of the Bulgarian Law on protection against discrimination.²⁰⁶ This law had been adopted in order to transpose Directive 2000/43/EC, which implements the principle of equal treatment irrespective of racial or ethnic origin. Consequently, the KZD thought that an interpretation of EU Law was necessary before deciding on the claim.²⁰⁷ For that reason, the KZD referred several questions to the CJEU for a preliminary ruling.²⁰⁸ It is interesting to note that not only KZD itself but also the Bulgarian Government and the European Commission were convinced that it was a court or tribunal under article 267 TFEU.²⁰⁹ However, that is irrelevant since it was up to the CJEU to determine if it is a body entitled to make use of the procedure.²¹⁰

²⁰⁰ Carrasco González (n 143) 103.

²⁰¹ Manuel Cienfuegos Mateo, 'Independencia judicial y planteamiento de cuestiones prejudiciales. Comentario a la sentencia Syfait (C-531/03), de 31 de mayo de 2005, del Tribunal de Justicia' (2006) Unión Europa Aranzadi n° 3, 12.

²⁰² Carrasco González (n 143) 103.

²⁰³ C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others European* [2013] ECR I-00000.

²⁰⁴ *ibid*, para 23.

²⁰⁵ *ibid*, para 19.

²⁰⁶ *ibid*, para 31.

²⁰⁷ *ibid*, paras 32-34.

²⁰⁸ *ibid*, para 36.

²⁰⁹ *ibid*, para 37.

²¹⁰ The French Government also considered the *Prud'homie de pêche de Martigues* (Martigues Industrial Tribunal for Matters relating to Fishing) as a court or tribunal under art 267 TFEU. However, the assessment carried out by the CJEU rejected

In the analysis of KZD, the CJEU insisted on the fact that 'a national body may be classified as a court or tribunal within the meaning of Article 267 TFEU, when it is performing judicial functions, but when exercising other functions, of an administrative nature, for example, it cannot be recognised as such.'²¹¹ By giving several reasons, it concluded that KZD was similar in substance to a national administrative body which makes administrative decisions. The CJEU explained that there were four factors which made it believe that the procedure before the KZD was going to lead to a decision of an administrative nature.²¹²

First of all, the CJEU considered that KZD may bring similar proceedings by way of application, complaint or even of its own motion whose results are very much the same.²¹³ In the second place, the CJEU realized that the KZD may join persons other than those appointed by the party to the proceedings of its own motion when it considers it necessary.²¹⁴ Thirdly, in case of an action brought against a KZD decision, the CJEU explained that this body has the status of defendant before the competent administrative court. Furthermore, if that decision is annulled, KZD may appeal before the Supreme Administrative Court of Bulgaria.²¹⁵ As a fourth factor, the CJEU found that KZD may revoke any action brought against its decision if the party to whom the decision is addressed is favorable.²¹⁶ All these factors made the CJEU decide that KZD has no jurisdictional function and it would not fall under the concept of a court or tribunal in article 267 TFEU. However, the assessment by the CJEU was exclusive to KZD and should not be extended to other administrative bodies, which will require separate specific analysis in order to consider them as a court or tribunal under article 267 TFEU.

5. Can Courts of Audit be Competent for the Preliminary Ruling? The *Elegktiko Synedriou Case*

The *Elegktikou Sinedriou* case²¹⁷ dealt with the consideration of a court of auditors as competent to refer questions to the CJEU. In some Member States, like Portugal, the Court of Auditors is considered to be a true

such condition and it did not admit the reference. See C-109/07 *Jonathan Pilato v Jean-Claude Bourgault* [2008] ECR I-3503, paras 25 and 31.

²¹¹ C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others European* [2013] ECR I-00000, para 40.

²¹² *ibid*, paras 46-51.

²¹³ *ibid*, para 47.

²¹⁴ *ibid*, para 48.

²¹⁵ *ibid*, para 49.

²¹⁶ *ibid*, para 50.

²¹⁷ C-363/11 *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou* [2012] ECR I-00000.

financial court by the Constitution of the country.²¹⁸ In this country, it is a sovereign, independent and constitutional body which is not included in the public administration.²¹⁹ In Spain, the Court of Auditors is said to have fiscal and judicial functions. The judicial function would consist of prosecuting the accounting liability incurred by those who are responsible for managing assets, public funds or effects.²²⁰ Thus, the *Elegktikou Sinedriou* case was a good opportunity to assess the judicial functions of those courts for the purposes of the reference for a preliminary ruling procedure.

In this case, the Greek Court of Auditors (*Elegktikou Sinedriou*) made a reference to the CJEU in the context of a dispute between *Epitropos tou Elegktikou Sinedriou sto Ipourgio Politismou kai Tourismou* (the Commissioner of the Court of Auditors at the Ministry of Culture and Tourism) and *Ipourgio Politismou kai Tourismou - Ipiresia Dimosionomikou Elenchou* (The Audit Service of the Ministry of Culture and Tourism). This dispute concerned the Commissioner's refusal to approve the payment order issued by the audit service relating to the remuneration of a member of the staff of the Ministry of Culture and Tourism, who was employed on a private law fixed-term contract.²²¹

The Commissioner had refused the approval by stating that workers employed by the state on private law fixed-term employment contracts are entitled to unpaid leave for trade union business, while the same workers with contracts of indefinite duration are entitled to paid leave for trade union business.²²² The Audit Service resubmitted the payment order for the Commissioner's approval. His refusal and the matter were brought before the first section of the Greek Court of Auditors, which decided to halt proceedings and to refer some preliminary questions to the CJEU.²²³

Before answering, the CJEU had to determine whether it constituted a court or tribunal within the meaning of Article 267 TFEU and whether it

²¹⁸ Art 214 of the 1976 Constitution of the Portuguese Republic states that it is 'the supreme body which examines the legality of public expenditure and rules on the accounts which the law has ordered to be submitted to the Court'. The Portuguese Constitution also stipulates that the Court of Auditors follows the principles of independence and exclusive subjection to the law (art 203) and its decisions are grounded, obligatory and must prevail (art 206).

²¹⁹ *The Tribunal do Contas (Court of Auditors) today*, <http://www.tcontas.pt/en/today/ca-today.pdf> (accessed 28 January 2014), 3.

²²⁰ Javier Medina Guijarro and José Antonio Pajares Giménez, 'La función de enjuiciamiento contable del Tribunal de Cuentas como su <<propia jurisdicción>> en la historia y en la Constitución Española' (2005) *Revista Española de Control Externo* no 21, 44-45.

²²¹ C-363/11 *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou* [2012] ECR I-00000, para 2.

²²² *ibid*, paras 9-10.

²²³ *ibid*. paras 11-13.

was entitled to make use of the reference for a preliminary ruling.²²⁴ Firstly, it analysed whether the Court of Auditors met the criteria of independence established by previous case law.²²⁵ In this case, the CJEU found that the Commissioner was a member of the Court of Auditors, who is attached to each Ministry to carry out a priori auditing of orders for expenditure made by the Ministry concerned.²²⁶ Therefore, the CJEU argued that there was a clear organisational and functional link between the Court of Auditors and the Commissioner attached to the Ministry of Culture and Tourism.²²⁷ Thus, the CJEU explained that it was impossible to consider the Greek Court of Auditors as a third party in relation to the Commissioner.²²⁸

Furthermore, the CJEU claimed that the decision of the Court of Auditors was not part of proceedings intended to lead to a decision of a judicial nature.²²⁹ That lack of *res judicata* force made it impossible for this body to qualify as a court or tribunal under article 267 TFEU.²³⁰ Even though it combined a judicial function with other ones, the CJEU has jurisdiction only to answer those preliminary rulings requests which are referred on the basis of the judicial function.²³¹ It is clear that in this case, the Greek Court of Auditors was not exercising a judicial function. Consequently, it would not meet another requirement to be considered a court or tribunal within the meaning of Article 267 TFEU. On top of that, the CJEU stated that the beneficiary of the expenditure in question in the main proceedings was not a party to the proceedings before the Court of Auditors.²³² That beneficiary would only be a party in proceedings brought afterwards before an administrative court deciding on the issue of remuneration.²³³ It would be up to that administrative court to decide to make use of the reference for a preliminary ruling.²³⁴ Considering all of these facts, the CJEU did not find that the Greek Court of Auditors was acting in a judicial capacity and it did not admit the reference for a preliminary ruling.²³⁵

That being said, the CJEU should assess whether other courts of auditors from different Member States might be considered courts or tribunals for the purposes of a reference for a preliminary ruling. This is because the

²²⁴ *ibid*, para 17.

²²⁵ *ibid*, para 20.

²²⁶ *ibid*, para 23.

²²⁷ *ibid*, para 24.

²²⁸ *ibid*, para 25.

²²⁹ *ibid*, paras 26-28.

²³⁰ Broberg and Fenger (n 38) 82.

²³¹ C-363/11 *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou* [2012] ECR I-00000.

²³² *ibid*, para 29.

²³³ *ibid*, para 31.

²³⁴ *ibid*.

²³⁵ *ibid*, paras 32-34.

analysis of this case only focused on the specific features of the Greek Court of Auditors. In spite of such specific analysis of the Greek Court of Auditors, the judgment helps to conclude that bodies combining judicial and other functions may fall under article 267 TFEU, provided that they refer the question on the basis of their judicial functions and they fulfill other criteria.

6. Can a Professional Body be Competent for the Preliminary Ruling? The De Coster Case

The *De Coster* case²³⁶ examined whether a professional body which has been tasked to implement legal provisions could be considered a court or tribunal for the purposes of article 267 TFEU. In this case, there was a dispute between Mr De Coster and *Collège des bourgmestre et échevins de Watermael-Boitsfort* in Belgium because the *Collège* levied a municipal tax on Mr De Coster's satellite dishes.²³⁷ He lodged an appeal before the *Collège juridictionnel de la Région de Bruxelles-Capitale* (Judicial Board of the Brussels-capital region) on the grounds of a restriction of free movement of services (more specifically, a restriction on the freedom to receive television programmes from other Member States).²³⁸ The Judicial Board of the Brussels-capital region decided to launch the reference for a preliminary ruling before the CJEU.²³⁹

By analysing national legislation, the CJEU found that the Judicial Board of the Brussels-capital region exercised similar judicial functions to the permanent deputation in the rest of the provinces of Belgium.²⁴⁰ On top of that, it discovered that the members of the Board had the same rules on ineligibility as the members of the permanent deputations in provinces and that the same rules must be respected in proceedings before them when exercising judicial functions.²⁴¹ Because of that, the CJEU concluded that the Board was 'a permanent body, established by law, that it gives legal rulings and that the jurisdiction thereby invested in it concerning local tax proceedings is compulsory'.²⁴²

Despite the fact that the CJEU had doubts about the criteria of *inter partes* procedure, independence and impartiality, it finally concluded that the Board met them. The CJEU found several elements that made it consider that the procedure before the Board was *inter partes* (the defendant receives a copy of the application to reply within 30 days, the preparatory inquiries are adversarial, the file may be consulted by the parties and oral

²³⁶ C-17/00 *François De Coster v Collège des bourgmestres et échevins de Watermael-Boitsfort* [2001] ECR I- 09445.

²³⁷ *ibid*, para 2.

²³⁸ *ibid*, paras 5-6.

²³⁹ *ibid*, para 8.

²⁴⁰ *ibid*, para 11.

²⁴¹ *ibid*.

²⁴² *ibid*, para 12.

observations may be presented by the parties at a public hearing).²⁴³ It also explained that the Board was independent and impartial because of the status of its members.²⁴⁴

It is interesting to note that Advocate General Jarabo Colomer had argued in his Opinion that this body did not meet the criteria to be considered a court or tribunal under article 267 TFEU while asking the CJEU to provide a stricter concept.²⁴⁵ Although the CJEU did not follow his advice, it was somehow sensitive to Ruiz Jarabo's Opinion in the sense that it provided a thorough analysis of the criteria to consider the Board as a court or tribunal for the purposes of the reference for a preliminary ruling.²⁴⁶

The question arises as to whether this judgment could be applied by analogy to consider other similar bodies as having competence under article 267 TFEU. Nevertheless, it is worthy to point out that the examination by the CJEU was very specific to the particular situation of the Judicial Board of the Brussels-capital region. Consequently, it is not possible to determine any possible extension. The CJEU will need to analyse the circumstances of each professional body in light of the criteria which determine the condition of jurisdiction.

7. Can an Ombudsman be Competent for the Preliminary Ruling? The Umweltanwalt von Kärnten Case

In principle, ombudsmen only issue recommendations and critical assessments which are not legally binding.²⁴⁷ As such, they should not be competent to make use of the reference for a preliminary ruling.²⁴⁸ Public authorities are not obliged to comply with the ombudsmen's opinions and complainants cannot require national courts and tribunals to enforce such opinions.²⁴⁹ However, some argue that ombudsmen should be entitled to make use of the procedure on the basis that these institutions work in a similar way to administrative courts and that public authorities generally comply with their opinions.²⁵⁰ In a similar way to administrative appeal

²⁴³ *ibid*, paras 15-16.

²⁴⁴ *ibid*, paras 17-21. In this sense, it is interesting that the CJEU does not only talk about independence but also impartiality: Carrasco González (n 143) 101.

²⁴⁵ Conclusions of Advocate-General Ruiz Jarabo in Case C-17/00 *De Coster* [2001] ECR I-9445.

²⁴⁶ Carrasco González (n 143) 101.

²⁴⁷ Broberg and Fenger (n 38) 94.

²⁴⁸ David W K Anderson and Marie Demetriou, *References to the European Court* (2nd edn, Sweet & Maxwell 2002), 45.

²⁴⁹ The only remedy will be to start legal actions against the public authority before the national court or tribunal. See Broberg and Fenger (n 38) 94-95.

²⁵⁰ *ibid*, 95; Morten Broberg, *Preliminary References by Public Administrative Bodies: When Are Public Administrative Bodies Competent to Make Preliminary References to the European Court of Justice?* (2009) 15(2) European Public Law 207-221.

bodies, which are considered to be competent,²⁵¹ 'ombudsmen have a legitimate need for authoritative advice on the correct interpretation of EU law.²⁵² For that reason, it is interesting to analyse the case in the present subsection.

In *Umweltanwalt von Kärnten*,²⁵³ the CJEU dealt with the consideration of an Environmental Ombudsman under article 267 TFEU. The case concerned a reference for a preliminary ruling about an interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.²⁵⁴ There was a dispute between the *Umweltanwalt von Kärnten* (Environment Ombudsman of Carinthia) and the *Karntner Landesregierung* (Government of the Province of Carinthia) related to the absence of environmental impact assessment for the construction of a cross-border power line between Italy and Austria.²⁵⁵ Directive 85/337 did not contain any provision for trans-boundary projects and the Government of the Province of Carinthia argued that no impact assessment was required since the length of the project on the Austrian territory did not reach the minimum threshold stipulated in national legislation.²⁵⁶

The CJEU ruled that the Environmental ombudsman met the criteria to be considered a court or tribunal entitled to refer questions. After analysing Austrian Federal Laws on the Constitution and on the *Umweltanwalt* 2000,²⁵⁷ the CJEU concluded that it was a legally-established, permanent and independent body with compulsory jurisdiction which applies rules of law.²⁵⁸ It also found that the proceedings before the Environmental Ombudsman had *inter partes* nature.²⁵⁹ The CJEU determined not only that the Environmental Ombudsman's decisions had the force of *res judicata* but also that they were reasoned and delivered in an open court.²⁶⁰

Unfortunately, the judgment should not be extended by analogy to all ombudsmen. The evaluation carried out by the CJEU is confined to the specific circumstances of the Environmental Ombudsman in question.

²⁵¹ See Case C-407/98 *Katarina Abrahamsson and others v Elisabet Fogelqvist* [2000] ECR I-5539.

²⁵² Broberg and Fenger (n 38) 95.

²⁵³ C-205/08, *Umweltanwalt von Kärnten v Karntner Landesregierung* [2009] ECR I-II525. For an analysis of the case, see also: Klement Jan Henrik, *On the Dispensation of Justice by Public Authorities* (2010) 2 *The European Journal of Risk Regulation* 195-199.

²⁵⁴ C-205/08, *Umweltanwalt von Kärnten v Karntner Landesregierung* [2009] ECR I-II525, para 1.

²⁵⁵ *ibid*, paras 2 and 26.

²⁵⁶ *ibid*, paras 27-31.

²⁵⁷ *ibid*, paras 11-25.

²⁵⁸ *ibid*, para 36.

²⁵⁹ *ibid*, para 38.

²⁶⁰ *ibid*, para 37.

Thus, the CJEU will need to examine future cases involving ombudsmen on a case-by-case basis.

8. *Can an Appeal Committee be Competent for a Preliminary Ruling? The Abrahamsson Case*

The *Abrahamsson* case²⁶¹ concerned a request for a preliminary ruling by the Swedish Universities Appeals Board (*Överklagandenämnden*). Similarly to an appeal committee, this body deals with appeals against decisions made by higher education authorities in Sweden. The case involved a claim alleging discrimination by the Swedish University Boards of Appeal against a decision of the University of Gothenburg's selection board for a position of professor.²⁶² The vacancy notice had laid out the intention to use the appointment to promote gender equality and announced that positive discrimination might be utilised, as stipulated in national legislation which gave priority to candidates of an under-represented gender with sufficient qualifications for public posts.²⁶³

The selection board finally chose Ms Fogelqvist, but two candidates appealed the decision before the Swedish University Boards of Appeal - Mr Anderson and Ms Abrahamsson.²⁶⁴ Whereas the first of them argued that the decision was contrary to national legislation and to case law of the CJEU,²⁶⁵ the second one based her appeal on the fact that her merits were better than those of the selected candidate.²⁶⁶ The Boards of Appeal directed several questions to the CJEU concerning the preclusion of national legislation by Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.²⁶⁷

By analysing the relevant national legislation,²⁶⁸ the CJEU considered the Swedish Universities Appeals Board a court or tribunal under article 267 TFEU and admitted the reference.²⁶⁹ The CJEU explained that despite being an administrative authority, it was a permanent body invested with

²⁶¹ C-407/98 *Katarina Abrahamsson and others v Elisabet Fogelqvist* [2000] ECR I-5539.

²⁶² *ibid.*, para 16. For analysis of the case from the point of view of discrimination, please see: Paul Hodapp, Thomas Trelogan and Steve Mazurana, 'Positive action and European Union Law in the year 2000' (2010) 8(1) *Annual Survey of International & Comparative Law* 33-51.

²⁶³ *ibid.*

²⁶⁴ *ibid.*, paras 20-21.

²⁶⁵ C-450/93 *Kalanke v Bremen* [1995] ECR I-3051.

²⁶⁶ C-407/98 *Abrahamsson Katarina Abrahamsson and others v Elisabet Fogelqvist* [2000] ECR I-5539, para 21.

²⁶⁷ *ibid.*, para 27.

²⁶⁸ *ibid.*, paras 30-34.

²⁶⁹ *ibid.*, para 38.

judicial functions, applying rules of law and following an *inter partes* procedure while deciding independently and impartially.²⁷⁰

This case proves that some administrative appeal boards in the EU may be considered a court or tribunal under article 267 TFEU, despite the fact that they are administrative bodies under national law.²⁷¹ However, the analysis of the CJEU is specific to the Swedish University Boards of Appeal. In fact, it was based on the national laws that secure the decisive independence of the Swedish Universities Appeals Board. Thus, it is not possible to extrapolate this case to other appeal committees as courts or tribunals entitled to make references to the CJEU. Such consideration should be individually assessed under the criteria laid out by *Vaassen Göbbels*.²⁷² If such a committee meets the criteria, it will be a court or tribunal for the purposes of article 267 TFEU. However, it will not qualify as such if it does not comply with the criteria. Therefore, it is not feasible to infer general conclusions from this case as to whether appeal committees are courts or tribunals under article 267 TFEU since it will depend on a case-by-case analysis made by the CJEU.

9. Can a Patent Court be Competent for the Preliminary Ruling? The *Haüpl* Case

Some Member States have courts dealing with patent issues and also covering other intellectual property law problems arising from copyright and trademark. That is the case of the Supreme Patent and Trade Mark Adjudication Tribunal of Austria (*Oberster Patent-und Markensenat*). The *Haüpl* case²⁷³ considered the question whether a court like that could fall under article 267 TFEU. In a case like this, the CJEU also needs to verify that there is a real independence of the body.²⁷⁴ This condition is determined on the basis of the national laws ensuring it.²⁷⁵

The *Haüpl* case dealt with a reference for a preliminary ruling from the Supreme Patent and Trade Mark Adjudication Tribunal of Austria concerning an interpretation of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks.²⁷⁶ Mr Haüpl was the applicant in the original proceedings and claimed that a trademark used by Lidl Stiftung & Co. KG should be cancelled in Austria due to a lack of use in the five-year period stipulated by the national legislation (1970 Austrian Law on the protection of trademarks).²⁷⁷ The Cancellation Division of the Austrian Patent Office had ruled that the trademark was no longer protected, but Lidl appealed against that finding before the Supreme Patent and Trade Mark

²⁷⁰ *ibid*, paras 35-37.

²⁷¹ Broberg and Fenger (n 38) 91.

²⁷² C-61/65 *Vaassen-Göbbels* [1966] ECR 377.

²⁷³ C-246/05 *Armin Haüpl v Lidl Stiftung & Co. KG* [2007] ECR I-04673.

²⁷⁴ Broberg and Fenger (n 38) 91.

²⁷⁵ *ibid*.

²⁷⁶ C-246/05 *Armin Haüpl v Lidl Stiftung & Co. KG* [2007] ECR I-04673, para 1.

²⁷⁷ *ibid*, paras 2, 7 and 10-12.

Adjudication Tribunal of Austria.²⁷⁸ The Tribunal raised two questions before the CJEU asking whether the date of the completion of the registration procedure is the start of the period of protection and what may constitute proper reasons excusing the non-use under the First Council Directive 89/104/EEC.²⁷⁹

The CJEU determined whether this court was entitled to refer questions by analysing the 1970 Austrian Law on Patents.²⁸⁰ It found that the Supreme Patent and Trade Mark Adjudication Tribunal of Austria was a court or tribunal under article 267 TFEU. It argued that it satisfied the criterion related to the establishment by law since the aforementioned law set out its jurisdiction.²⁸¹ This law also provided the independence of the tribunal because it established that its members were to perform their duties autonomously and their mandates could be extended every five years and could finish earlier if justified.²⁸² The CJEU also found that the tribunal had a permanent nature due to the fact that the Austrian Patent Law provided no time limit for its jurisdiction to deal with appeals against decisions of both the Cancellation Division of the Austrian Patent Office and the Opposition Division of the Austrian Patent Office.²⁸³ It also claimed that the tribunal had compulsory jurisdiction on the grounds that the law established its competence to deal with appeals.²⁸⁴ By referring to the procedural rules contained in the Austrian Patent Law, the CJEU also considered that the tribunal applied rules of law and had an *inter partes* procedure. Once again, the analysis of the CJEU was very specific to this tribunal since it was based on the national rules governing it. Consequently, similar tribunals in other Member States should be subject to an assessment by the CJEU in order to determine whether they satisfy the conditions to fall under article 267 TFEU.

V. THE NEED FOR A CONCEPT OF A COURT OR TRIBUNAL UNDER ARTICLE 267 TFEU

This section explains why there is a need to introduce a firmer concept of a court or tribunal under article 267 TFEU. The importance of preliminary rulings for the CJEU to develop EU law has already been outlined. It should be taken into account that only courts or tribunals from Member States are empowered to lodge preliminary rulings. However, the concept of a court or tribunal is not made on the basis of national legal systems, but through the case law of the CJEU. It has also been highlighted that the reasons for such consideration are based on the persuasiveness of the idea

²⁷⁸ *ibid*, para 13.

²⁷⁹ *ibid*, para 14.

²⁸⁰ *ibid*, para 17.

²⁸¹ *ibid*, para 18.

²⁸² *ibid*.

²⁸³ *ibid*, para 19.

²⁸⁴ *ibid*.

of consistency and uniformity in the application of EU law. In fact, the EU Treaties do not define what a court or tribunal is. This definition has been created through the criteria developed by the CJEU over the years. However, these cannot be considered absolute requirements, but only mere guidelines.²⁸⁵ The case law of the CJEU suggests that some of those criteria are more important than others. Moreover, it is unclear whether those criteria are an exhaustive list or whether further additions may be made.²⁸⁶ Thus, the result up to this moment does not suggest that there will be a precise definition of who can make use of the preliminary ruling procedure and how it may be applied.²⁸⁷ As an area marked by disagreements between the Advocates General and the CJEU, it should be stressed that this problem has been raised within the CJEU.²⁸⁸ Therefore, there are several reasons to advocate for a firmer concept of a court or tribunal under article 267 TFEU.

First of all, the relevant case law is very casuistic. Several Advocates General have maintained that the case law on the subject is elastic, non-scientific and vague.²⁸⁹ It is difficult to extract general conclusions that could be valid for similar courts since the Court's reasoning is always very specific to the national body which made the reference. Thus, not even similar bodies in other Member States could get the same result by analogy because they would need their own analysis in order to be considered empowered to make a reference. On top of that, the CJEU has never expressed its position on the relative weighting of the relevant criteria to be considered a court or tribunal.²⁹⁰ As a result, it is not possible to derive an unambiguous definition of a court or tribunal under article 267 TFEU.²⁹¹

Secondly, there is legal uncertainty because the case law does not contain clear and precise components to define the concept.²⁹² The framework is anything but certain as proven by the fact that the CJEU and the

²⁸⁵ Xavier Groussot, 'Spirit, are you there? - Reinforced judicial dialogue and the preliminary ruling procedure' (2008) Eric Stein Working Paper No 4, 12.

²⁸⁶ Broberg and Fenger (n 38) 73.

²⁸⁷ Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445; Broberg and Fenger (n 38) 72-74.

²⁸⁸ Opinions of Advocate General Ruiz-Jarabo Colomer in Cases C-17/00 *De Coster* [2001] ECR I-9445; C-195/06 *Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ORF)* [2003] ECR I-4989; and C-205/08 *Umweltanwalt von Kärnten v Kärntner Landesregierung* [2009] ECR I-11525; Groussot (n 285) 13.

²⁸⁹ Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 14; Opinion of Advocate General Sharpston in Case C-363/11 *Epitropos tou Elektikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou* [2012] ECR I-00000, para 32.

²⁹⁰ Broberg and Fenger (n 38) 73.

²⁹¹ *ibid.*

²⁹² Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 58.

Advocates General often do not agree.²⁹³ At times the CJEU has admitted references from bodies whose judicial functions may raise doubts without explaining the reasons why it considered them courts or tribunals under article 267 TFEU.²⁹⁴ It is clear that this lack of legal certainty has disadvantages.²⁹⁵

On the other hand, a wider approach towards admitting references from bodies with a doubtful judicial function also has its advantages. For example, those bodies have been able to rely on the CJEU's interpretation instead of having to come up with their own interpretation of the EU law; EU law has been clarified in cases which otherwise might not have made it to the CJEU, and; this might have reduced the number of appeals at the EU level.²⁹⁶

However, it is important to remember that being considered a court or tribunal under article 267 TFEU provides an essential mechanism to guarantee the uniform application and interpretation of EU law. In fact, preliminary rulings constitute about one half of the CJEU's case load, and they have been responsible for the declaration of several fundamental principles of EU law.²⁹⁷ References for preliminary rulings are lodged in the course of legal proceedings where the judge needs an interpretation or to clarify the validity of European law in order to solve the dispute between the parties. Once a case is referred to the CJEU to resolve the questions, the process in the national court is paralysed waiting for the response. For this reason, anybody considering making a reference to the CJEU should know more or less in advance whether they can use it or not. The same goes for the parties in a legal procedure, who may consider referring questions to the CJEU as part of their procedural strategy to settle a dispute. In order not to slow down the legal proceedings, it is important that judges making use of the preliminary ruling know in advance if they are empowered to do so. Otherwise, there is a risk of improperly delaying a

²⁹³ *ibid*; see also C-54/96 *Dorsch Consult* [1987] ECR 2545; Joined Cases C-110/98 to C-147/98 *Gabalfria* [2000] ECR I-01577; and C-407/98 *Abrahamsson* [2000] ECR I-5539.

²⁹⁴ C-166/91 *Gerhard Bauer v Conseil National de l'Ordre des Architectes* [1992] ECR I-2797; C-447/93 *Dreessen v. Conseil national de l'ordre des architectes* [1994] ECR I-4087; C-67/91 *Dirección General de Defensa de la Competencia v. Asociación Española de Banca Privada (AEB) and Others* [1992] ECR I-4785; C-243/95 *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance* [1998] ECR I-3739; C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag. GmbH & Co. KG and Other* [1998] ECR I-7791; Joined cases C-260/91; and C-261/91 *Diversint SA and Iberlacta SA v Administración Principal de Aduanas de la Junquera* [1993] ECR I-1885.

²⁹⁵ See, Lionel Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* (Sweet Maxwell 1994), 209-213; Maurice-Christian Bergerès, *Contentieux communautaire* (Presses Universitaires de France 1994), 247-248; Mar Jimeno Bulnes, *La cuestión prejudicial del artículo 177 TCE* (Bosch 1996), 189.

²⁹⁶ Tony Storey and Chris Turner, *Unlocking EU Law* (4th edn, Routledge 2014), 114.

²⁹⁷ Herbert A Johnson, 'Judicial Institutions in Emerging Federal Systems: The Marshall Court and the European Court of Justice' (2000) 33(4) *The John Marshall Law Review*, 1072.

legal process while waiting for a response from the CJEU whose final answer might not admit the reference on the basis of lack of competence from the body who raised the question. This obviously has a negative impact on the efficacy of legal proceedings and justice as well as it creates false expectations for the parties, who are waiting for a ruling that will resolve their dispute.

In the third place, it must be highlighted that at the beginning the idea was to encourage the use of the reference for a preliminary ruling.²⁹⁸ Thus, references were generally admitted for that purpose. However, once EU law becomes an integrated reality in the legal systems of the Member States, perhaps there is no longer a need for a wide concept. The wider the concept is, the more references will have to be admitted. That will in turn increase the CJEU's workload. This outcome not only has negative consequences in terms of judicial economy, but also concerns the uniform application of EU law and the judicial cooperation foreseen by article 267 TFEU, as well as it somehow endangers the European space of freedom, security and justice. To increase the CJEU's workload may continue to delay in time its responses, thereby dissuading references for a preliminary ruling from national courts or tribunals that need a response in a reasonable time or that do not want to be exposed to a long and tiresome waiting time. Therefore, the risk stands in the possibility of each Member States' court or tribunal deciding to create its own interpretation leading to the dispersion in the application of EU law.²⁹⁹

In the fourth place, the General Court has competence, but has never dealt with references for preliminary rulings. If it is ever to exercise it, it is clear that there is a need for solid guidance from the CJEU about who exactly is empowered to make references. Otherwise, there is a risk that the General Court creates confusion by admitting references from bodies which should not be entitled to use the procedure enshrined in article 267 TFEU.

In the fifth place, the aim of the EU is not only to integrate the existing Member States, but also to enlarge by admitting new ones. These potential countries will always have their own judicial structure comprised of bodies of a different nature. They need to know if they can make use of the reference for a preliminary ruling.

When talking about the need for a concept of a court or tribunal, it is clear that this concept must obviously be developed within the CJEU in order to ensure the uniformity of EU law. Besides, the concept should allow judicial bodies to be considered a court or tribunal under EU law.

²⁹⁸ Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 75.

²⁹⁹ *ibid*, para 97.

A good and logical solution would be to as a general rule include under this concept all bodies belonging to the national judicial structure.³⁰⁰ In fact, they always qualify as a court or tribunal under article 267 TFEU, but their references should only be admitted when exercising a judicial function.³⁰¹ As a principle, references should not be admitted from bodies outside this structure, unless they are made by bodies outside of that structure whose decisions are final and undisputable.³⁰² It does not seem convenient to admit references from bodies whose decisions might be later ignored in their legal system, but it is indeed wise to admit references from bodies whose decisions are final. The reason is always to ensure the uniform interpretation and application of EU law. In any case, the criteria laid out in *Vaassen Göbbels* may be perfectly applied to assess whether a court or tribunal is empowered or not to make the reference.

This approach should reduce the workload of the CJEU. This is because it would receive fewer references, in which case it could focus on developing a much firmer doctrine.³⁰³ If the body making the reference is part of the national judicial structure, then the CJEU should only verify whether or not it is exercising judicial functions.³⁰⁴ If it is not part of such a structure, then the analysis on the basis of the *Vassen Göbbels* criteria should be applied. However, those bodies that are outside the judicial structure would already know that they have to undergo such an analysis, thereby considering it beforehand if they meet the criteria or not.

As a consequence of the CJEU having fewer references, there would also be lower risk of delaying the procedures and discouraging bodies to refer because of a fear of getting a late reply. The more references are admitted, the more work for the CJEU and the longer the processes will be. Thus, national judges might be pessimistic about referring to the CJEU if they believe that it will only extend the procedure in time. It is clear that nobody wants to be waiting in a long process, therefore alternative solutions are always being sought. However, in this particular case, there is a risk that the alternative solution is to not go to the CJEU in order to avoid a long and uncertain process where there is no legal certainty that the reference will be admitted.

One criticism to this approach is that it is very restrictive and would impede the possibility of making a reference for a preliminary ruling for administrative bodies.³⁰⁵ Moreover, the effects of a wider approach towards the concept of court or tribunal in the European legal order and in the national legal system of each Member State should be considered. To admit references from bodies that do not belong to the judicial branch

³⁰⁰ *ibid*, paras 83-86.

³⁰¹ *ibid*, para 85.

³⁰² *ibid*, para 87.

³⁰³ *ibid*, para 97.

³⁰⁴ *ibid*, para 96.

³⁰⁵ Groussot (n 285) 13.

means conferring powers not recognised at the national level. This could even alter the constitutional order in the Member State concerned. National judges are competent to apply EU law; they must ensure its efficacy and stop applying those provisions from national legislation that are contrary to EU law.³⁰⁶ Admitting references from bodies that do not belong to the judicial branch of a Member State makes them somehow European judges. The question is what happens when a judge carries out such a task, but does not have full competences within his national legal system? It is difficult to determine how somebody outside the Member State's judicial branch can have the aforementioned competences. In fact, it is more likely that he cannot undertake them in a complete and effective way, thereby compromising the efficacy of EU law. A clear example is the revision that a court or tribunal could make about the decision taken by an administrative body after receiving the response from a reference to a preliminary ruling lodged before the CJEU. Decisions by administrative bodies can afterwards be reviewed by courts or tribunals. Thus, a court revising the decision would be constrained by the ruling of the CJEU, but that does not prevent it from considering the reference unnecessary or considering that it should have been written in a different way. This creates a possibility to revise a reference which has already been dealt with. All of this is said without forgetting another important point: the potential lack of independence and immobility of the members of an administrative body depending on how they are appointed or dismissed.³⁰⁷ Another problem with considering administrative bodies courts or tribunals under article 267 TFEU is that they are governed by the rule of administrative silence, which may have consequences if there is no reply within a concrete period of time. As previously mentioned, a wider concept of a court or tribunal can increase the number of references and create more delays in the responses from the CJEU. It may lead to problems if an administrative body does not provide a reply within a specific period of time because it is waiting for the CJEU to answer its questions.

For all the reasons explained above, it is clear that there is a need for a firmer concept of a court or tribunal under article 267 TFEU. Taking into consideration the idiosyncrasies of the administrative and judicial systems of each Member State, in order to provide an effective and efficient response the solution would be to provide assistance to facilitate, reinforce and simplify the important task of the CJEU when using the reference for a preliminary ruling to continue developing EU law and ensuring its uniform application in all the Member States.

³⁰⁶ C-70/77 *Simmenthal v Amministrazione delle Finanze dello Stato* [1978] ECR 1453.

³⁰⁷ See the example of Joined Cases C-110/98 to C-147/98 *Gabalfrija* in the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 28.

VI. CONCLUSIONS

The reference for a preliminary ruling is an important procedure which can be exercised by national judges. The aim of this procedure is to foster cooperation between national and European judges when interpreting and checking the validity of EU law. Depending on what the reference is seeking (either an interpretation or an assessment of the validity of EU law), the effects are significant but also different because an interpretation is binding for all courts in the Member States, whereas a declaration of invalidity obliges the relevant European institution to remedy the situation, which extends to all acts adopted based on the invalid law.

The judgments of the CJEU have been very important for developing EU law³⁰⁸ and the reference for a preliminary ruling procedure has become an essential tool to clarify doubts and concerns as well as to serve as the ultimate examiner of the validity of the acts.³⁰⁹ That is why it is essential to clarify who exactly is empowered to make use of it. Only national judges are authorised to do so, but each Member State has its own legal system and not all the judicial courts are considered as such in other countries.

The CJEU has preferred to establish the criteria for a European concept of a court or tribunal itself, rather than leaving the issue to the Member States. This makes sense since uniform interpretation and application of EU law is at stake. Despite the fact that the CJEU ruled on the criteria to be considered a court or tribunal along time ago, there have been some additions, clarifications and departures from those original requirements.

It is interesting to note that the criteria were established in 1965 in the *Vaassen Göbbels* case. However, the important criterion of independence was added in the *Corbiau* case in 1987, which seems a long time for not having considered it. Judges are said to be independent, impartial and immovable. Thus, it is surprising that it took so much time to take that particular requirement into account.³¹⁰ However, the CJEU seems to have relaxed this criterion, as seen in later cases.³¹¹

Some of the criteria established in *Vaassen Göbbels* remain unchanged (establishment by law, continuity and decision in law) whereas some others have received a much more confused interpretation. The problem is that those other criteria are independence, adversarial process or juridical

³⁰⁸ Van Raepenbusch (n 18) 313.

³⁰⁹ Case C-66/80 *International Chemical Corporation v. Amministrazione delle Finanze dello Stato* [1981] ECR I191, para 13.

³¹⁰ See Opinion of Advocate General Jarabo Colomer [2001] ECR I-9445, para 17.

³¹¹ See C-54/96 *Dorsch Consult v Bundesbaugesellschaft Berlin unknown* [1987] ECR 2545; and, Case *Köllensperger and Atzwanger* C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551.

nature of the decision, which all seem to be more essential for a correct judicial function than the unaltered criteria.³¹²

In this sense, more clarity is needed in the concept of a court or tribunal as established for the purposes of the reference for a preliminary ruling since lack of a firm concept and the hesitation in the judgments are capable of creating legal uncertainty. The *Gabalfriša* case has been especially eloquent, whereas other ones such as *Nordsee* and *Syfait* are characterised by their soundness. On top of that, the issue is ongoing since there are always cases where the CJEU rejects the admissibility of the reference from courts which are not authorised, but where they would not have made use of it if the concept were more precise.³¹³ The CJEU should not waste time considering the admission or non-admission of references based on the competence of the national court. If it does so, it introduces the risks of slowing down justice and creating legal uncertainty.³¹⁴ Furthermore, the EU is composed of 28 Member States whose judicial systems deserve to know exactly who may or may not pose a question to the CJEU. Besides, the trend is towards the enlargement of the EU, with more countries whose systems are even more diverse. For that purpose, the concept of a court or tribunal should be firmer for national courts to have a sound reference. That would be an advantage for the CJEU since references would then only come from bodies which already knew that they are competent to make a reference. Thus, the CJEU would just need to verify that the circumstances of the case allow such bodies to refer the question.

The CJEU has a key task of interpreting and guiding the development of EU law. In that responsibility, the reference for a preliminary ruling is very useful. It should not be forgotten that EU law has been formulated through the judgements of the CJEU. The wider the concept of a court or tribunal, the higher the number of bodies that will be empowered to make use of the reference for a preliminary ruling and thus, the more references will be made. This will mean more work for the CJEU. As the reference

³¹² See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster Coster* [2001] ECR I-9445, para 18.

³¹³ See cases C-363/11 *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou* [2012] ECR I-00000; and C-394/11 *Valeri Hariev Belov v CHEZ Elektro Bulgaria AD and Others European* [2013] ECR I-00000, C 222/13 *TDC A/S v Erhvervsstyrelsen* [2014] ,not yet published, and; Opinion of Advocate General Niilo Jääskinen in Case C-203/14 *Consorti Sanitari del Maresme* [2015], not yet published.

³¹⁴ See Opinion of Advocate General Nils Wahl in Case C-497/12 *Davide Gullotta and Farmacia di Gullotta Davide & C. Sas v Ministero della Salute and Azienda Sanitaria Provinciale di Catania* [2015], not yet published, para 90, where he states:

Every case dismissed on procedural grounds results in a significant waste of resources for both the national court making the reference and the EU judiciary (in particular, because of the required translation of the order for reference into all official languages of the European Union). The administration of justice is also delayed vis-à-vis the parties in the main proceedings, without producing any benefits.

for a preliminary ruling is a dialogue between judges with the aim of fostering the uniform interpretation and application of EU law, there is a risk of undermining such uniformity in the case that non-judicial bodies in a strict sense are allowed to make use of the procedure³¹⁵. Therefore, it seems logical that the CJEU further develops a much clearer European concept of a court or tribunal.

Moreover and as aforementioned, the CJEU should not waste time assessing whether a certain body meets the criteria to be considered as meeting the concept of a court or tribunal. It should already know in advance who is authorised, or at least have a clear idea beforehand. Only those cases where there are doubts on the exercise of the jurisdictional function by a judicial body should be evaluated. This problem would be solved if it were up to the Member States to decide what national courts, tribunals and bodies are considered jurisdiction; however, that solution was considered and rejected in favour of the development of a European concept, which makes more sense for the purposes of uniform application of EU law. This is important since it should be noted that legal disputes involve parties who expect to settle their disputes by litigating. Those parties aim for quick decisions because even if courts rule in their favour, any delay threatens to harm their interests by fulfilling the legal maxim “justice delayed is justice denied”. From the moment that a national judge refers to the CJEU, the litigation procedure at national level stops until it decides. Thus, there is an issue at stake and the CJEU should be expected to provide an answer within due time.³¹⁶ Consequently, the consideration of the admission of the reference threatens to delay a process that could be expedited if the concept of a court or tribunal was much clearer than it is currently.

³¹⁵ See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster Coster* [2001] ECR I-9445, paras 76-77 and 79.

³¹⁶ The Court has ruled that failure to adjudicate within a reasonable time constitutes a procedural irregularity. See Case C-185/95 *P. Baustahlgewebe v Commission* [1998] ECR I-08417 para 48.

HOW CAN OBESITY FIT WITHIN THE LEGAL CONCEPT OF 'DISABILITY'?

A COMPARATIVE ANALYSIS OF JUDICIAL INTERPRETATIONS UNDER EU AND US NON-DISCRIMINATION LAW AFTER *KALTOFT*

Joseph Damamme*

The recent change of the concept of 'disability' by the Court of Justice of the European Union (CJEU) in HK Danmark (Ring and Skouboe Werge) represents a valuable progress in the pursuit of consistency between the social model of disability and the corresponding concept of disability under non-discrimination law. However, even under the new concept, there may be disagreement to qualify certain conditions as a 'disability'. Recent CJEU's case of Kaltoft dealing with obesity reflects this difficulty. The purpose of this paper is to assess the relevance and the impact of including obesity in the scope of 'disability' as a discrimination ground. To that end, a comparative approach will be followed by confronting the Kaltoft ruling with judicial interpretations under the law of the United States of America. It will also be combined with an integrated approach considering the multi-layered nature of disability discrimination law from a European standpoint.

Keywords: Discrimination, Obesity, Disability, Weight, Appearance, Employment Equality Directive, Americans with Disabilities Act.

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I INTRODUCTION

On December 18th, 2014 the Court of Justice of the European Union (CJEU) held in *Kaltoft*¹ that obesity can, under certain conditions, fall under the concept of 'disability' within the meaning of the EU Employment Equality Directive (EED).² The facts of the case, as presented by the referring court and set out by Advocate General (AG) Jääskinen,³ are as follows: Mr Kaltoft worked as a child-minder for the municipality of Billund (Denmark) since 1996 and was in charge of taking care of people's children in their own homes. He was dismissed in 2010 following an official hearing process during which his obesity was mentioned. On behalf of Mr Kaltoft, a workers' union (the applicant) sued a national association of Danish municipalities, acting on behalf of the municipality of Billund (the respondent) to challenge the dismissal. Before the national Court, the parties disputed whether Mr Kaltoft's dismissal was motivated by his obesity. Indeed, the only official reason given by the employer was the decrease in the number of children. However, it remains unclear why Mr Kaltoft was the only dismissed employee among all the child-minders working for the concerned municipality. Before the national court, Mr Kaltoft asserted that he was discriminated on the grounds of his obesity. Against this background, the national court referred several questions for a preliminary ruling, asking notably whether obesity can be qualified as a disability for the purposes of EU law (particularly under the EED).

¹ Case C-354/13 FOA acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund [2014] ECLI:EU:C:2014:2463.

² Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

³ Opinion of AG Jääskinen, Case C-354/13 (n 1) paras 8-10.

Under EU law and policy, tackling ‘obesity’ through the lens of non-discrimination is a novelty. Up to that point, EU institutions had addressed obesity only as a public health issue, by developing a strategy to ‘combat’ it.⁴ At national level, some Member States have been seeking for different means to eradicate the so-called ‘obesity-epidemic’, such as the imposition of ‘food taxes’ (also called ‘fat taxes’).⁵ Contrastingly, obesity is tackled in *Kaltoft* as a feature to protect, here against alleged discrimination, rather than to eradicate. Ironically, the same definition of obesity is used in both of these contexts (public health and non-discrimination). As stated by several health authorities such as the World Health Organisation (WHO)⁶ and taken over by AG Jääskinen in *Kaltoft*,⁷ obesity is identified with reference to the ‘Body Mass Index’ (BMI). BMI is a formula that consists in dividing an individual’s weight (in kilogrammes) by square of his/her height (in metres).⁸ The obtained numeric result determines whether the individual is overweight or not (respectively BMI above or below 25) or obese (BMI equal to or above 30). Obesity is commonly classified into three categories: ‘mild’ (BMI ranging from 30 to 34.99) ‘moderate’ (from 35 to 39.99) and ‘severe’, also called ‘morbid’ or ‘extreme’ (BMI of 40 or more).⁹

Discrimination due to obesity, or generally being overweight, had not been a matter of great interest in Europe.¹⁰ Contrastingly, and as the reader will see along this paper, the issue has been massively discussed in the American legal literature. This is partly due to the substantial number of cases where obese claimants have sought legal redress before US courts against unfavourable treatment (eg refusals to hire or dismissals) allegedly based on their weight. More generally, a study of 2008 found that ‘weight

⁴ See eg European Commission, ‘A strategy for Europe on Nutrition, Overweight and Obesity related health issues’ (White Paper) COM (2007) 279 final.

⁵ See Alberto Alemanno and Ignacio Carreño, ‘Fat Taxes in the European Union between Fiscal Austerity and the Fight Against Obesity’ (2011) 4 *European Journal of Risk Regulation* 97.

⁶ World Health Organisation (WHO), ‘Obesity: preventing and managing the global epidemic: Report of a WHO consultation’ (Report) WHO Technical Report Series 894, 2000, 9, via <http://apps.who.int/iris/handle/10665/42330> (accessed 6 June 2015).

⁷ Opinion of AG Jääskinen (n 3) para 50.

⁸ If weight is measured in pounds and height in inches: $BMI = 703 \times \frac{Weight}{Height^2}$.

⁹ This categorisation is found in the WHO Report (n 6) 9 and referred to by AG Jääskinen in his Opinion (n 3) para 50.

¹⁰ See, for an exception, Stuart W Flint and Jeremé Snook, ‘Obesity and discrimination: The next “big issue”?’ (2014) 3 *International Journal of Discrimination and the Law* 183 (focusing on UK law).

or height’¹¹ discrimination was the fourth most common form of discrimination experienced by Americans (after gender, age and race).¹²

The purpose of this paper is to assess the relevance (in terms of reasons and suitability) and the impact of including obesity in the scope of ‘disability’ as a discrimination ground. For the relevance, legal arguments for qualifying, and conversely refusing to qualify, obesity as a disability will be analysed. The impact will be discussed with respect to two situations: the one of individuals who are ‘regarded as’ disabled, albeit they are not, and, although to a lesser extent, the one of those who have conditions often compared to obesity because allegedly ‘self-inflicted’ (eg alcoholism). The paper’s argument can be summarised as follows: ‘disability’ is a valuable discrimination ground for obesity considering how this concept has been clarified. This should result in including the two aforementioned situations.

To this end, a comparative approach will be combined with an ‘integrated one’. The comparative approach will consist in confronting judicial interpretations of ‘disability’ under EU and US non-discrimination law (‘disability’) in ‘obesity-as-disability cases’. The integrated approach consists in taking into account all human rights provisions that are relevant to disability from a European standpoint. Both will be further explained.

As said, the comparison will focus on judicial interpretations of ‘disability’ under EU and US non-discrimination law in ‘obesity-as-disability cases’. This means cases where an obese claimant alleges that he/she was discriminated against or that the employer failed to provide reasonable accommodation and seeks redress under disability discrimination law. More precisely, the *Kaltoft* ruling and EU non-discrimination law (‘EU law’), will be compared with case law under US disability non-discrimination federal legislation, ie the Americans with Disabilities Act of 1990 (ADA),¹³ as amended in 2008 (ADAAA)¹⁴ and their predecessor, the Rehabilitation Act.¹⁵ An EU-US comparative analysis¹⁶ is justified for three

¹¹ For specific discussion on height discrimination in the US context, see Isaac B Rosenberg ‘Height Discrimination in Employment’ (2009) 3 Utah Law Review 907.

¹² Rebecca M Puhl, Tatiana Andreyeva, Kelly D Brownell, ‘Perceptions of Weight Discrimination: Prevalence and Comparison to Race and Gender Discrimination in America’ (2008) 32 International Law Journal of Obesity 992, 998.

¹³ Americans with Disabilities Act of 1990, Pub. L. No 101-336, § 12102(4)(A), 104 Stat 328 (1991).

¹⁴ ADA Amendments Act of 2008, Pub. L No 110-325, 112 Stat. 3553.

¹⁵ Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § (West Supp. 1994).

¹⁶ The comparative approach between US and EU disability non-discrimination law has been the subject of several academic works. See generally the recent issue of the American Journal of Comparative Law (2012, Vol 60, Issue No 1) dedicated to the ‘Evolutions in Antidiscrimination Law in Europe and North America’. More specifically on the concept of ‘disability’ under US and EU law, see eg Vlad E Perju, ‘Impairment, Discrimination, and the Legal Construction of Disability in the

reasons further discussed throughout the paper. Firstly, and as already said, the question asked in *Kaltoft* has been numerously handled by US courts. Secondly, and as we argue, ‘disability’ is similarly shaped under EU and US law because of the sub-concepts supposed to clarify it. Thirdly, a similar phenomenon has been observed under both jurisdictions. In short, strong criticism towards judicial interpretations of disability has been expressed and changes have occurred to enhance a broader understanding of ‘disability’. On the basis of both US courts and CJEU’s jurisprudence, one can imagine a disability discrimination suit as a succession of doors, where meeting one of the suit’s specific condition represents passing each door. Indeed, facing the respondent’s refutation that a certain condition can be qualified as a ‘disability’, courts of both jurisdictions have tended to focus on this question, rather than on whether the alleged behaviour (or failure to act) has occurred.¹⁷ Applicants proved blocked at the ‘disability door’ very often before the US courts¹⁸, including in obesity cases as addressed along the paper. Before the CJEU, the ‘closed-door’ scenario occurred twice¹⁹ out of six cases where the qualification of disability was debated between the parties.²⁰ We will assess whether the jurisprudence in obesity-as-disability cases bear witness of the same evolution from a narrow to a broad interpretation. We submit that courts of both jurisdictions have an interest in ‘borrowing’²¹ from each other, with respect to the conditions imposed for qualifying obesity as a disability.²² On the one hand, *Kaltoft* leaves at least one question unanswered, potentially answerable in light of US experience (the ‘regarded as’ issue). On the other hand, it is worth noting that the US Supreme Court has not ruled on the matter yet, leaving discrepancies in the lower courts’ jurisprudence on the question of under

European Union and the United States’ (2011) 44 Cornell International Law Journal 101.

¹⁷ Problem pointed out by authors like Lisa Waddington, eg in ‘Not disabled enough: How European Courts filter non-discrimination claims through a narrow view of disability’ (2015) 1 European Journal of Human Rights 11 and Vlad E Perju (n 16).

¹⁸ See eg Vlad E Perju (n 16) 134.

¹⁹ See Case C-13/05 *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-06467 and case C-363/12 (Grand Chamber) *Z v A Government department, The Board of management of a community school* [2014] ECLI:EU:C:2014:159.

²⁰ In addition to these two cases and *Kaltoft*, see Case C-356/12 *Wolfgang Glatzel v Freistaat Bayern* [2014] ECLI:EU:C:2014:350 and joined cases C-337/11 and C-335/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S* [2013] ECLI:EU:C:2013:222.

²¹ Expression employed (with respect to disability discrimination law) by Gerard Quinn and Eilíonóir Flynn. See ‘Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability’ (2012) 60 American Journal of Comparative Law 23.

²² Some attempts have already been made in this direction before the CJEU by referring to jurisprudence under US law to influence the interpretation of ‘disability’. See Opinion of AG Kokott in *HK Danmark (Ring and Skouboe Werge)* (n 20), para 34, fn 17 (reference to the US case on AIDS to highlight the broad understanding of disability) and Opinion of AG Jääskinen in *Kaltoft*, (n 3) (quoting the applicant’s argument) para 52, fn 48 (reference to the US case qualifying obesity as a disability).

which conditions can obesity be a disability under US federal law. In contrast, the solution adopted in *Kaltoft*, as well as the reasoning thereunder, holds for courts of all EU Member States as the judgment was delivered in the context of a preliminary ruling. This could be inspiring for the US Supreme Court, which might have to handle an obesity-as-disability case in the future.

The comparative approach will be combined with an integrated one,²³ considering the multi-layered nature of disability discrimination law from a European standpoint. In concrete terms, it will be assessed whether the interpretation (under EU law) of 'disability' with respect to obesity is influenced by the United Nations Convention on the rights of persons with disabilities (UNCRPD),²⁴ to which the EU is a party²⁵ and by the European Convention of Human Rights ('ECHR') whose requirements have been recognised to be of particular significance to EU law by the CJEU.²⁶

What is more, the analysis will be enhanced by cases at national level we are aware of (in some EU Member States) to determine how national courts and equality bodies have handled obesity-as-disability cases, and whether *Kaltoft* should imply a change in their jurisprudence. Without ignoring the fact that obesity raises equality issues in numerous spheres of

²³ Such an approach notably consists in highlighting convergences, divergences in different courts' jurisprudence, as well as mutual influences between them. This approach is advocated, inter alia, in the framework of the IAP project 'The Global Challenge of Human Rights Integration: Toward a Users' Perspective' (2012-2017), via <http://www.hrintegration.be/>. As Eva Brems puts it, 'An integrated view requires taking into account all human rights provisions that are relevant in a particular situation and hence a maximum widening of the range of human rights sources that are on the tab', see E Brems, 'Should Pluriform Human Rights Become One ? Exploring the Benefits of Human Rights Integration' (2014) 4 *European Journal of Human Rights*, 447, 452. For illustrative work, see the Columnist coordinated by Pr Bribosia and Pr Rorive since 2013 in the *European Journal of Human Rights*. For the last issue, see E Bribosia, I Rorive and J Damamme (coll), 'Droit de l'égalité et de la non-discrimination' (Equality and Non-Discrimination) (2015) 2 *European Journal of Human Rights* 223.

²⁴ United Nations, Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) (UNCRPD).

²⁵ Council of the EU, 'Decision 2010/48/EC concerning the conclusion, by the European Community (now European Union), of the United Nations Convention on the Rights of Persons with Disabilities' [2010] OJ L 23/35.

²⁶ European Network of Legal Experts in the non-discrimination field to the European Commission, Report, Olivier de Schutter, 'The Prohibition of Discrimination under European Human Rights Law, Relevance for the EU non-discrimination directives - an update', 2011, 9, with references to CJEU's jurisprudence, http://ec.europa.eu/justice/discrimination/files/the_prohibition_of_discrimination_under_european_human_rights_law_update_2011_en.pdf (accessed 6 June 2015).

life,²⁷ the scope of this paper is limited to employment because EU disability non-discrimination law is confined to this sector to date.²⁸

The paper is divided into three sections. It examines first the reasons for connecting obesity to disability as a ground of discrimination (Part II). Then, it argues that judicial interpretations under EU and US law acknowledge a lowering of focus on the causes of disability, including in obesity-as-disability cases (Part III). Finally, it contemplates the shift of this focus from the causes to the effects of ‘disability’, with respect to obesity (Part IV). It ends with concluding remarks (Part V).

II CONNECTING OBESITY TO GROUNDS OF DISCRIMINATION

1. Obesity is Not a Stand-alone Ground

US federal law and EU law do not erect ‘obesity’ as an explicit ground of discrimination. Seemingly, the same holds true for sub-entities of both systems²⁹ under their own non-discrimination law.

At statutory level, US federal non-discrimination law is construed as offering protection only for explicitly listed characteristics³⁰ so that no protection can be granted on the grounds of obesity alone.

Under EU law, the legal basis allowing EU institutions to take action to combat discrimination contains an explicit list of discrimination grounds³¹

²⁷ For adverse treatment in the sector of access to services, see eg the US case of *Hallowich v. Southwest Airlines* BCo35389 (Cal. 1991) (obese woman required to purchase a second seat in a plane).

²⁸ Pending the adoption of the ‘Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation’ COM (2008) 426 final (see for its scope, art 3). The scope of the EED is confined to employment and occupation (see its scope, art 3).

²⁹ For the EU (sub-entities being here states and regions), we can reach this conclusion by reviewing all the country reports on measures to combat discrimination of the national experts of the European Network of Legal Experts in the non-discrimination field, see part 2.1 of each report. To accede to all the reports, see its website: <http://www.non-discrimination.net> (accessed 30 March 2015). For the US and at least for state level, we draw on a research on the NOLO’s database, see ‘Employment Discrimination in Your State’, via <http://www.nolo.com/legal-encyclopedia/employment-discrimination-in-your-state-31017.html> (accessed 6 June 2015).

³⁰ For the distinction between constitutional and statutory law in this respect, see European Network of Legal Experts in the non-discrimination field, ‘Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India’, 2012, 32-36, via http://ec.europa.eu/justice/discrimination/files/comparative_study_ad_equality_laws_of_us_canada_sa_india_en.pdf (accessed 6 June 2015).

³¹ We follow here the distinction between ‘the use of the principle of non-discrimination law within internal market and citizenship law and the separate field of non-discrimination law’ as an ‘autonomous objective’. See for this distinction and

composed of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.³² In *Kaltoft*, the CJEU was questioned on whether there is, under EU law, a general principle of non-discrimination in the labour market covering all grounds of discrimination, including obesity.³³ This echoes to the case of *Mangold*, where the CJEU found that such a principle exists with respect to age.³⁴ To support his allegation, the claimant in *Kaltoft* relied on several national Constitutions, Article 14 of the ECHR and Article 1 of Protocol n°12 to the ECHR.³⁵ The ‘national’ sources have not been addressed by the CJEU’s judges and the AG alike. We can note that some national Constitutions indeed have an open-ended list of discrimination grounds. However, this is not assuredly synonymous to a general prohibition of discrimination based on all grounds. Illustratively, the Constitutional Court of Spain (*Tribunal Constitucional*) established that Article 14 of the Spanish Constitution, albeit open-ended, encompasses only those grounds that have been historically linked to forms of oppression and segregation towards determined group of persons.³⁶ Based on this jurisprudence, a regional court refused to recognise that obesity is a discrimination ground.³⁷ Concerning Council of Europe’s sources quoted by the applicant in *Kaltoft*, both provisions contain an open-ended list of discrimination grounds.³⁸ Accordingly and contrary to the attitude of the Constitutional Court of Spain, the European Court of Human Rights (ECtHR)³⁹ has numerously expanded the list offered by Article 14 ECHR. In spite of all these references, the CJEU refuted that the alleged principle exists and refused to expand the list available under EU law. The judges relied on the sole absence of mention of obesity in EU (primary and secondary) law.⁴⁰ The AG had a more sophisticated reasoning. Up to now, non-listed grounds had experienced an unpleasant fate before the CJEU, as illustrated by *Chacón Navas*⁴¹ where dismissal on account of ‘sickness’ was found to be out of the scope of the EED.⁴² This judgment was, however, delivered before the entry into force of the EU Charter of Fundamental Rights (CFR) whose

explanation thereof, Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, Ius Commune Casebooks for the Common Law of Europe* (Hart Publishing 2007), 3.

³² Article 19 (1) of the Treaty on the Functioning of the EU (‘TFEU’).

³³ Case C-354/13 (n 1) para 31.

³⁴ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981.

³⁵ Adopted on 4th November 2000, entered into force on 1st April 2005.

³⁶ *Tribunal Constitucional* (Constitutional Court of Spain), STC 166/88.

³⁷ *Tribunal Superior de Justicia, Valencia*, 9 May 2012, Ar. 1843. I thank Pr. María José Gómez-Millán Herencia for making me aware of this case.

³⁸ Specifying that the enjoyment of the rights and freedoms set forth in the Convention (for the ECHR) or in national law (for the Protocol) ‘shall be secured without discrimination on any ground *such as* sex, (...) *or other status*’ (emphasis added).

³⁹ See for the list of grounds and corresponding case law, Report (n 26) 15.

⁴⁰ Case C-354/13 (n 1) paras 33-35.

⁴¹ Case C-13/05 (n 19).

⁴² *ibid*, para 47.

Given that ECHR law is free from the ‘exhaustiveness hurdle’, appropriate redress can be obtained in employment cases (eg refusal to hire because of weight), through eg a claim based on Article 8 (right to private life) in conjunction with Article 14 ECHR.⁴⁸ To date, neither obesity nor weight has been tackled by the Strasbourg Court as a discrimination ground.⁴⁹ When such a suit would be brought, special attention should be paid to the choice of the discrimination ground (eg between ‘weight’ and

⁴⁹ We draw on a 'hudoc' search with keywords 'obesity' (we also did with 'overweight'), in combination with 'Article 14 ECHR' or 'Protocol no 12 to ECHR'. <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%7B%22documentcollectionid%22%3A%22JUDGMENTS%22%2C%22DECISIONS%22%7D> (done on 10 March 2015).

'disability'). Indeed, the ECtHR has identified several grounds that warrant a higher level of scrutiny, further labelled in the literature as 'suspect'.⁵⁰ Disability is one of them.⁵¹ Concretely, it means that the State would have more difficulty to justify a different treatment based on this ground because the ECtHR leaves a narrower margin of appreciation to the concerned State in this case.⁵² Therefore, an obesity case may have more chances to prevail if based on 'disability' than on 'weight' or 'obesity' within the ECHR realm.

2. *Connecting Obesity with Available Grounds*

An array of grounds can be mobilised in an obesity case. We will focus in this part on all grounds except disability (examined below in section 3 in this Part). Some grounds can be the medium for a non-discrimination claim involving weight (and by extension obesity), even if apparently strayed from it. This is clear from the US experience, notably when courts faced weight restrictions in the professional context. In this respect, 'disparate treatment' (US law equivalent of 'direct discrimination' under EU law) to gender has been found in cases where weight restrictions were imposed only on women,⁵³ or enforced at a higher rate against them.⁵⁴ Other grounds are more straightforward for obesity. We can divide them into two categories: non-medically and medically related.

A. Non-medical Grounds: Appearance and Weight

Discrimination based on appearance is explicitly prohibited in a few jurisdictions within the US (at state⁵⁵ or sub-state level⁵⁶) and the EU.⁵⁷ 'Appearance' may be a difficult concept to grasp. Illustratively, the *District of Columbia Human Rights Act* defines it as the 'outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner style of personal grooming (...)'.⁵⁸ This definition could easily encompass physical traits such as weight. On the other side of the Atlantic, the French Equality Body

⁵⁰ See eg Janneke Gerards, 'Discrimination grounds' in Dagmar Schieck, Lisa Waddington and Mark Bell (n 31) 35-39 (the author borrows the expression from the jurisprudence of the US Supreme Court).

⁵¹ In *Glör v Switzerland* App no 13444/04 (ECtHR, 30 April 2009), para 84.

⁵² Gerards (n 50) 35-39.

⁵³ See eg *Gerdon v Continental Airlines, Inc*, 1982.

⁵⁴ See eg *Union of Flight Attendants v Pan American World Airways, Inc*, 1987.

⁵⁵ Michigan seems to be the only US State in this respect, see Elliott-Larsen Civil Rights Act, Section 37.2202 (2004).

⁵⁶ At least Santa Cruz (Santa Cruz Cal., Mun., § 9.83, 1995) and District of Columbia (District of Columbia Human Rights Act, D.C. Code Ann. S 2-1402.11, 2002).

⁵⁷ France (possibly Belgium through 'physical characteristics'); See European Network of Legal Experts in the non-discrimination field to the European Commission, Report prepared by Isabelle Chopin and Catharina Germaine-Sahl, 'Developing Anti-Discrimination Law in Europe', 2013, 12-13, http://ec.europa.eu/justice/discrimination/files/comparative_analysis_2013_en.pdf (accessed 6 June 2015).

⁵⁸ District of Columbia Human Rights Act (n 56).

(*Défenseur des droits*) has exemplified ‘appearance discrimination’ with a job refusal to an obese individual based on his/her sole physical outward without an assessment of his/her merits.⁵⁹ We can connect this with the institution’s investigation against the famous clothing retailer *Abercrombie and Fitch*. The investigation deals with the company’s recruitment methods used to hire sales staff on the sole basis of their physical appearance⁶⁰ (discrimination ground under French law)⁶¹. The link between appearance and weight has not been made in the decision of the *Défenseur des droits*. We argue that the link could be made as in nowadays’ society a requirement of a certain appearance often goes hand-in-hand with selecting slim workers and, as a matter of fact, with excluding job candidates who are considered to be overweight. In a recent anonymous decision of the institution associated with the investigation against *Abercrombie and Fitch*,⁶² it concluded on appearance discrimination because the company placed a crucial importance on physical appearance.⁶³ Bearing in mind that appearance discrimination is not prohibited at the EU level and in many EU Member States, we will address whether this type of claims could be captured through ‘disability’ (discussed below in Part 4, section 2 B).

Discrimination based on weight is neither prohibited in the EU⁶⁴ nor at the US federal level,⁶⁵ but is in some US sub-entities.⁶⁶ In Michigan, this recognition was justified by the link between weight and ‘certain ethnic groups or to women’.⁶⁷ ‘Weight’ can have an added value to ‘appearance’ in certain cases. This is especially true when it is targeted as a quantifiable

⁵⁹ See on the website, <http://www.defenseurdesdroits.fr/fr/theme/lutte-contre-les-discriminations/discrimination-liee-lapparence-physique> (accessed 6 June 2015).

⁶⁰ See in the press, The Business of Fashion, ‘French Watchdog Probes Abercrombie for Discrimination’ <http://www.businessoffashion.com/articles/news-analysis/french-watchdog-probes-abercrombie-for-discrimination> (accessed 6 June 2015).

⁶¹ Article L 1132-1 of the French Labour Code (*Code du travail*).

⁶² *Défenseur des Droits*, MLD No 2014-147, 3 November 2014, http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision/decision-mld-2014-147-du-3-novembre-2014-relative__ (accessed 6 June 2015), for the facts and company’s presentation see points 1-15.

⁶³ *ibid*, point 96 (*une valeur déterminante*). See for the association made between the investigation against *Abercrombie and Fitch* and the decision <http://www.defenseurdesdroits.fr/fr/actualites/abercrombie-and-fitch-grace-au-defenseur-la-societe-annonce-la-fin-de-recrutements> (accessed 6 June 2015).

⁶⁴ See Report (n 57) 12-13.

⁶⁵ Despite calls from several scholars. See eg Paula B Stolker, ‘Weigh my job performance, not my body: extending title VII to weight-based discrimination’ (1992) 10 New York Law School Journal of Human Rights 223.

⁶⁶ For the full list of sub-federal entities recognising weight as a discrimination ground, see ‘Weight discrimination laws’ on the website of the National Association to Advance Fat Acceptance, via <http://www.naafaonline.com/dev2/education/laws.html> (accessed 6 June 2015).

⁶⁷ See Sondra Solovay, *Tipping the Scales of Justice, Fighting Weight-Based Discrimination* (Prometheus Books 2000), 245.

reality (ie when weight standards are imposed) rather than a visible one.⁶⁸ Illustratively, in US case of *Tudyman v United Airlines*,⁶⁹ an airline steward was refused a flight attendant position because his weight exceeded the airline's weight standards. Ironically, this was due to the candidate's excessive muscle tissue, which was the result of bodybuilding. Here, 'appearance' would have proved useless, unlike 'weight' because the candidate actually looked very fit.

B. Medically-related Grounds

Medical disorders are, under various labels⁷⁰ ('sickness', 'genetic risks'...), recognised as a discrimination ground in some EU Member States, but not under EU law.⁷¹ In the US, it seems that this holds true only for genetic disorders, under the larger concept of 'genetic information' in the Genetic Information Nondiscrimination Act ('GINA').⁷²

We see four avenues allowing the connection between medical disorders and obesity: 'causation', 'effect', 'association' and 'equation'. We will also use these avenues later on with respect to 'disability' because this concept is identified under both EU and US law with reference to an 'impairment', a concept often associated with medical disorder.

Causation. This leads us to determine how one becomes obese. As we can read from medical research relayed by the WHO⁷³, obesity is due to an energy imbalance, which occurs when energy intake exceeds energy expenditure over a considerable amount of time. In simple terms, the regulation of energy balance may be disturbed by medical disorders such as of physiological⁷⁴ or genetic⁷⁵ kind. However, discrimination linked to 'causation' seems to be rather a textbook case as an unfavourable treatment (eg dismissal) against an obese individual is more likely due to other reasons (eg effects) than the medical disorders causing obesity. Still and as we will see (in Part III, section 1), obesity's causation may prove of significant importance for the purpose of interpreting 'disability' or 'impairment'.

⁶⁸ Jeffrey Garcia, 'Weight-Based Discrimination, Is There an End in Sight?' (1995) 13 Hofstra Labor and Employment Law Journal 209, 235.

⁶⁹ *Tudyman v United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984), ruled under the Rehabilitation Act.

⁷⁰ Also eg 'health condition' and, more narrowly, 'chronic disease', see Report (n 57) 12-13.

⁷¹ See case C-13/05 (n 19) and joined cases C-337/11 and C-335/11 (n 20). However, the CJEU made it clear in the latter case that a sickness can amount to a 'disability', and then fall under the EED protection, see para 47.

⁷² Pub. L. No 110-233 § 102(b)(1)(B) 122 Stat. 881 (2008). The accurate provision is 42 U.S.C § 2000ff (4).

⁷³ WHO Report (n 6) 101.

⁷⁴ *ibid*, 105.

⁷⁵ One may be more likely than others to become obese because some genes result in poor appetite control, leading to obesity; *ibid*, 135-136.

Effect. The ‘effect’ link works the other way around: obesity results *in* rather than *from* medical disorders.⁷⁶ This targets the situation where side effects of obesity (eg shortness of breath and cardiovascular problems) lead an employer to do a different treatment (eg dismissal) against his/her obese employee because these effects impact on the employee’s job performance.

Association. This consists in focusing on medical disorders associated to (accompanying) obesity,⁷⁷ regardless of whether obesity results *in* or *from* medical disorders. In this case, courts would rather focus on the whole medical situation, including obesity but not exclusively on it. Illustratively, in a case under UK disability law,⁷⁸ the claimant was obese and suffered from a wide range of symptoms including asthma, dyslexia, knee problems, diabetes and chronic fatigue syndrome, compounded by obesity.⁷⁹ Herein, focus was not put on obesity but on all these symptoms, which were qualified as ‘impairment’ (also part of UK’s non-discrimination law definition of ‘disability’).

Equation. This consists in classifying obesity as a medical disorder per se. There are several examples of this approach, whilst not before courts. For instance, ‘obesity’ is inscribed in the WHO ‘International Statistical Classification of Diseases and Related Health Problems’ (CIM 10).⁸⁰ Similarly, the American Medical Association House of Delegates has explicitly classified obesity as a ‘disease’.⁸¹ Arguably, these statements could support a legal claim stating that obesity is a disease per se. ‘Equation’ has been followed by the Dutch Equality Body (*Commissie Gelijke Behandeling*), albeit not with respect to obesity in general, but to its most severe stage (morbid obesity). Indeed, it labelled ‘morbid obesity’ as a ‘chronic disease’

⁷⁶See Christine L Kuss, ‘Absolving a deadly sin: a medical and legal argument for including obesity as a disability under the Americans with Disabilities Act’ (1996) 12 *Journal Contemporary Health Law & Policy* 563, 574-576.

⁷⁷ According to several medical studies relayed by lawyers, obese persons have, in general, increased risk of diabetes, hypertension and various cardiovascular conditions. See eg Abigail Kozel, ‘Current Public Law and Policy Issues: Large and in Charge of Their Employment Discrimination Destiny: Whether Obese Americans Now Qualify as Disabled Under the Americans with Disability Act Amendments Act of 2008’ (2009) 31 *Hamline Journal of Public Law & Policy* 273, 279.

⁷⁸ Disability Discrimination Act 1995, now replaced by the Equality Act 2010.

⁷⁹ *Walker v Sita Information Networking Computing Ltd* [2013] UKEAT/0097/12.

⁸⁰ WHO, ‘International Statistical Classification of Diseases and Related Health Problems’ (CIM 10) (Code E66), see <http://apps.who.int/classifications/icd10/browse/2008/en#/E66> (accessed 6 June 2015).

⁸¹ American Medical Association House of Delegates, Resolution 420 (A-13), 16 May 2013, <http://media.npr.org/documents/2013/jun/ama-resolution-obesity.pdf> (accessed 20 March 2015).

or a 'disability' in a case concerning a job refusal based on the applicant's weight.⁸² As we will see (in Part I, section 3), discrimination was found. Still, disability proves more interesting than all these grounds in certain cases.

3. *Connecting Obesity to the Adequate Ground(s)*

This part aims at showing that disability can be considered as a magnet, including for obesity cases. It will then examine what is meant by 'disability' under US and EU law and who are the actors playing a role in interpreting it.

Among all grounds connectable to obesity, some are *better* than others from the claimant's perspective. This paves the way to a 'ground-shopping' exercise. Three factors influence the choice for the adequate ground(s): availability, suitability and advantages. Firstly, a ground may not be available under the concerned jurisdiction (eg 'weight' across the EU). In contrast, disability is a very widespread ground because it is recognised at the US federal and EU level. Consequently, an individual allegedly discriminated against his/her disability can seek for legal redress, no matter where on the EU or US territory the alleged facts occurred. Secondly, even if available, a ground may not suit the situation at hand. As previously illustrated, 'appearance' may not always suit a situation of different treatment based on weight as a quantifiable reality. Thirdly, disability is a privileged ground. Indeed, if the prohibition of discrimination (direct or indirect) applies to all grounds of discrimination, the imposition of the 'reasonable accommodation' duty on employers (under US⁸³ and EU law⁸⁴) is vested only to disability under EU law⁸⁵ and to disability and religion under the US one.⁸⁶ The duty requires, within the limits of 'reasonability',⁸⁷ to 'accommodate' the needs of persons with disabilities who can then carry out their professional duties. To that end, the conditions under which a job must be performed may have to be adjusted. The aforementioned case before the Dutch Equality Body illustrates that the concept is useful to some obesity cases. In this case, an obese woman applied to a postman job

⁸² Both chronic disease and disability are discrimination grounds under the Dutch non-discrimination legislation. For the decision, see *Commissie Gelijke Behandeling*, Opinion n°2011-78, 13 May 2011, <https://mensenrechten.nl/publicaties/oordelen/2011-78/detail> (accessed 6 June 2015). It stressed that it is not important whether morbid obesity is the result of a chronic disease. Rather morbid obesity must be considered as a chronic disease (§ 3.17). I thank Dick Houtzager for having made me aware of this case.

⁸³ 42 U.S.C. §§ 12101-12117, 12201-12213 (1994) (codified as amended).

⁸⁴ EED (n 2) Article 5. No other ground was granted reasonable accommodation under EU law.

⁸⁵ Lisa Waddington, Mark Bell, 'More Equal than Others: Distinguishing European Union Equality Directives' (2001) 38 Common Market Law Review 587.

⁸⁶ Civil Rights Act of 1964, title VII, equal employment opportunities, 42 US Code Chapter 21, §701(j).

⁸⁷ The employer exonerates from the duty if the accommodation would create an 'undue hardship' (ADA) or 'disproportionate burden' (EED, n 2, art 5).

that consisted in delivering the mail by bicycle.⁸⁸ The company refused as it deemed that she would not be able to carry out the required professional duties because of her overweightness. The Dutch institution emphasised that the company did not consider other accommodation options: for instance delivering the mail by foot or car. Thus, it concluded that the decision was based on general assumptions and therefore discriminatory.⁸⁹

Now, what is meant by ‘disability’? Reading both US and EU versions of ‘disability’, we submit that they are construed in a similar way, namely endorsing a causal relationship formula. Under US law, disability has been defined by the legislator (Congress) in the successive Acts on disability discrimination (with respect to an individual) as: ‘(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; (C) being regarded as having such an impairment.’⁹⁰ Each prong tackles a different situation, usually referred to as, respectively, ‘actual’, ‘past’ and ‘perceived’ disability.⁹¹ Impairment appears in each prong of the definition. The causal relationship is particularly obvious for the actual and the past one, as the ADA states that an individual has a ‘disability’ when he/she has (or used to have) an impairment (causal element) that limits (or used to limit) a major life activity (consequence element). For the ‘regarded as’ prong, the origin of the disability lies in others’ reaction to the impairment.

In contrast with US law, EU non-discrimination law does not have a written definition of ‘disability’, which led the CJEU to construe this concept. Importantly, it has been recently reframed⁹² in the case of *HK Danmark (Ring and Skouboe Werge)*.⁹³ On the basis of this ruling, AG Jääskinen identified six constituting elements of ‘disability’. In his own words, the concept

must be understood as referring to limitations which result, in particular, from (i) long-term [...] (ii) physical, mental or psychological impairments (iii) which in interaction with various barriers [...] (iv) may hinder (v) the full and effective participation of the person in professional life (vi) on an equal basis with other workers.⁹⁴

⁸⁸ See *Commissie Gelijke Behandeling* (n 82).

⁸⁹ *ibid*, point 3.18.

⁹⁰ 42 U.S.C. §§ 12102(1)(A-C).

⁹¹ Jane B Korn, ‘Too Fat’ (2009) Arizona Legal Studies Discussion Paper, No 09-27.

⁹² The CJEU changed the definition of its ruling *Chacón Navas* (n 19).

⁹³ Joined Cases C-335/11 and C-337/11 (n 20) para 38. For an analysis of thereasons and the impact of the redefinition, see Joseph Damamme, ‘La socialisation de la notion de handicap en droit de la non-discrimination’ (2013) 5 European Journal of Human Rights 836.

⁹⁴ Case C-354/13 (n 3), Opinion of AG Jääskinen, para 30.

Out of all these elements, the causation element of ‘disability’ is worded as a ‘limitation’, itself resulting (in the CJEU’s words) from an impairment, which interacts with ‘various barriers’ (points (i) to (iii)). The consequence element emerges from points (iv) and (v). The remaining points (eg the long-term character) will not be addressed in this paper. The fact that the components of ‘disability’ are preceded by ‘in particular’ has unknown potential.

By carving up the concept into distinguished elements, the AG suggests that each of them constitutes a necessary piece of the puzzle. Supposedly, this means that each one is a potential deadlock on the disability door (to stay on the image of a disability discrimination claim as a series of doors).

As a consequence of the multi-layered nature of disability law, the CJEU has made it clear that the EU concept of ‘disability’ must be interpreted in a manner consistent with the UN one.⁹⁵ Pursuant to its article 1(2), (under ‘purpose’):⁹⁶

(P)ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

There are some differences between the UN and the EU concept, even though the former has been built upon the latter. These differences are further addressed below.

It is also important to highlight the institutional actors fulfilling functions with respect to the interpretation of ‘disability’. The first function consists in interpreting this concept and deciding on a case where ‘disability’ is discussed. This function lies with the courts and equality bodies, as we have already seen. Without deciding on a case in the strict sense, other actors may play a role in influencing courts or equality bodies in the interpretation of ‘disability’. Illustratively and concerning the CJEU, AGs have given their opinion on the issue in several cases. In the US, Congress has expressly delegated to the US Equal Employment Opportunity Commission (EEOC) the administration of the ADA’s relevant provisions.⁹⁷ Accordingly, this agency issued several documents, where we can find detailed guidance on how ‘disability’ should be interpreted. As we will see, US courts often rely on them. In addition, the EEOC can bring

⁹⁵ Joined Cases C-335/11 and C-337/11 (n 20), para 32. In contrast, the USA does not have such constraint as they have not ratified the UNCRPD.

⁹⁶ As suggested by Lisa Waddington this concept is meant to bring guidance rather than a definition (in the strict sense) (n 17) 27–28.

⁹⁷ 42 U.S.C. § 12205(A).

cases to courts on behalf of aggrieved individuals⁹⁸ and plead that a given condition (eg obesity) qualifies as a ‘disability’. Under the EU institutional framework, the European Commission (Commission) is vested with fewer powers than the EEOC in this respect. Accordingly, it has not provided general guidance on how to interpret ‘disability’ (and sub-concepts composing it).⁹⁹ However, and as illustrated in *Kaltoft*,¹⁰⁰ the Commission can give its opinion in a preliminary reference procedure by submitting written submissions to the CJEU and plead before it.

III. LOWERING FOCUS ON DISABILITY’S CAUSATION IN OBESITY CASES

1. (Ir)Relevance of Obesity’s Causation

As referred above, ‘impairment’ is part of the causation element of disability under both the ADA and EED. But what does ‘impairment’ mean? It is not clear under EU law as there is no guidance in this respect (including from the UNCRPD and jurisprudence thereunder)¹⁰¹.

Generally, this concept is associated with a medical disorder or medical condition.¹⁰² More guidance is provided in EEOC regulations under the ADA. Therein, physical and mental impairment are separately defined. Thus, physical impairment is:

[A]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs),

⁹⁸ 42 U.S.C. §§ 12117(A) which incorporates by reference sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 as amended §§2000e-5(f)(1) and (3).

⁹⁹ This is typified by its Joint Report of 17 January 2014 on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (‘Employment Equality Directive’) COM (2014) 2 final, as well as the annexes to this report (see respectively point 4.5 and Annex II-5).

¹⁰⁰ Commission’s written submissions are not accessible but there are some insights of it in the AG’s opinion (n 3) paras 39, 43, 46 and 53.

¹⁰¹ The UN Committee on the Rights of Persons with Disabilities is entitled to ‘receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention’, see Optional Protocol to UNCRPD (entered into force with the UNCRPD on 3 May 2008), Article 1 § 1) provided that the concerned State has ratified it, (Article 1 § 2 of the same Protocol). For the full Committee’s jurisprudence: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Jurisprudence.aspx> (accessed 6 June 2015).

¹⁰² See eg Lisa Waddington when she states, commenting *Kaltoft*, ‘impairment, understood as an underlying medical condition [...]’ (n 17) 22.

cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine.¹⁰³

Before the US courts, obesity has been addressed rather with respect to ‘physical’ impairment, but could also have been a mental or psychological one.¹⁰⁴ Indeed, and as William C Taussig suggests, compulsive overeating is rather a psychological disorder than a physical one.¹⁰⁵ In addition to this definition, the regulations clearly exclude from the scope of ‘impairment’ characteristics ‘such (...) weight (...) that are within ‘normal’ range and are not the result of a physiological disorder’.¹⁰⁶

In the first version of these regulations, the EEOC stated that ‘except in rare circumstances, obesity is not considered a disabling impairment’.¹⁰⁷ Before the US courts, the interpretation of this concept has often been disputed in obesity cases, unlike in cases dealing with other conditions.¹⁰⁸

Two topics have often been subject of dispute. The first is common to both EU and US jurisdictions, whilst the second has been tackled by the US courts (and not by the CJEU in *Kaltoft*).

A. Irrelevance of One’s ‘Contribution’ to Obesity

At times, certain conditions are labelled before courts or in the literature as ‘voluntary disabilities’ endorsing the premise that they are caused, continue to exist, or are worsened by the individual’s conduct.¹⁰⁹ In several US obesity cases and in *Kaltoft*, the defendant typically argues that obesity is voluntary¹¹⁰ and therefore does not amount to an ‘impairment’ or a ‘disability’.¹¹¹ This argument is framed under two different facets. The first one, ‘action’, attributes obesity to certain behaviours (eg lifestyle, eating

¹⁰³ 29 C.F.R. § 1630.2(h)(1). Phrased the same way as in the Rehabilitation Act’s regulations, see 45 C.F.R. § 84.3(j)(2)(i)(A)–(B).

¹⁰⁴ Here, the definition takes the form of an illustrative list, and is therefore potentially broader. Indeed, mental or psychological disorder includes ‘mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities’ (45 CFR 1181.103).

¹⁰⁵ See William C Taussig, ‘Weighing In Against Obesity Discrimination: Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans With Disabilities Act’ (1994) 35 Boston College Law Review 927, 958.

¹⁰⁶ 29 C.F.R § 1630 app to § 1630.2(h).

¹⁰⁷ 29 C.F.R § 1630.2(j).

¹⁰⁸ For conditions such as diabetes, the focus was laid on their effects rather than on their causes, see Jane B Korn, ‘Fat’ (1997) 77 Boston University Law Review 25.

¹⁰⁹ See eg Lisa E Key, ‘Voluntary Disabilities and the ADA: A Reasonable Interpretation of “Reasonable Accommodations”’ (1996) 48 Hastings Law Journal 75.

¹¹⁰ Lucy Wang, ‘Weight Discrimination: One Size Fits All Remedy?’ (2008) 117 Yale Law Journal 1900, 1919.

¹¹¹ At times, judges on their own motion assert that voluntary disabilities do not deserve disability discrimination protection, see *Missouri Commission on Human Rights v Southwestern Bell Telephone Co.* (699 S.W.2d at 79) (plaintiff denied protection because she took ‘no steps to treat and control her impairment’).

habits...). The second, 'inaction', posits that obesity is 'mutable' meaning that it can be eliminated or reduced thanks to different remedies (eg physical exercise, medical therapy, surgery). In the case of *Tudyman*, the court emphasised that weight was 'self-imposed and voluntary' because it resulted from 'avid bodybuilding' and not from 'physiological disorder', 'cosmetic disfigurement' or 'anatomical loss'.¹¹² With respect to obesity, courts have rather relied on the 'inaction' facet. Several have found obesity to be a 'mutable' condition that had to be distinguished from 'immutable condition such as blindness or lameness'.¹¹³ In this respect Lisa Key proposed to make a distinction between 'immutable impairments' that may originally be caused by voluntary conduct and those that persist or are exacerbated by voluntary conduct.¹¹⁴ This would lead to distinguish between an individual who became obese (supposed this can be qualified as a voluntary conduct, which is arguable) because of bad eating habits and an obese individual who does not follow the wellness programme advised by his/her doctor to lose weight.¹¹⁵

In *Cook*,¹¹⁶ the court foreclosed the voluntary argument, in both its facets (action and inaction). It particularly emphasised that US federal law 'contains no language suggesting that its protection is linked to how an individual became impaired, or whether an individual contributed to his or her impairment'.¹¹⁷

The CJEU ruled in the same way holding that 'disability' 'does not depend on the extent to which the person may or may not have contributed to the onset of his disability'.¹¹⁸ Particularly, the AG opined that the alternative would lead to the exclusion of 'physical disabilities resulting from conscious and negligent risk-taking in traffic or in sports'.¹¹⁹ This solution is to be welcome as the contrary would have led to adding another condition to the ones already required. What is more, the voluntary

¹¹² See *Tudyman v United Airlines* (n 69).

¹¹³ *Greene v. Union Pac. R.R. Co.*, 548 F. Supp. 3 (W.D. Wash. 1981).

¹¹⁴ Lisa E Key (n 109) 75. The author however concludes that excluding 'mutable impairments' from the definition of 'disability' is 'not practical' and proposes as an alternative to make the distinction when analysing the reasonability of an accommodation, see 93-103.

¹¹⁵ These programmes often include fitness and physical training sessions, as it was the case for Mr Kaltoft (see Opinion of AG Jääskinen (n 3) para 8). Their efficiency for losing weight is challenged for obese individuals. Some researchers contend that physical activity does not promote weight loss, see A Malhotra, T Noakes and S Phinney, 'It is time to bust the myth of physical inactivity and obesity: you cannot outrun a bad diet' (2015) *British Journal of Sports Medicine*, Editorial published online <http://bjsm.bmj.com/content/early/2015/05/07/bjsports-2015-094911.full> (accessed 6 June 2015).

¹¹⁶ *Cook v Rhode Island, Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (1st Cir. 1993).

¹¹⁷ *ibid.*

¹¹⁸ Case C-354/13 (n 1) para 56.

¹¹⁹ Opinion of AG Jääskinen (n 3) para 58.

character of these conditions is arguable.¹²⁰ As was the case in *Kaltoft*, the respondent often stresses that accepting to qualify obesity as ‘disability’ would run the risk of expanding this concept to conditions such as alcoholism or drug abuse.¹²¹ This argument was discussed by the AG, unlike by the CJEU’s judges. Recognising that these conditions can be a ‘disease’ in medical terms, he shifted the discussion from whether these conditions can be embodied in ‘disability’ to the practical consequences of this embodiment. In his own words, ‘[t]his does not, however, mean that an employer would be required to tolerate an employee’s breach of his contractual obligations by reference to these diseases’, stressing that the EED requires only ‘reasonable’ accommodation to be provided.¹²² Focusing on reasonable accommodation rather than on ‘disability’ may imply that the AG admits that these conditions can be qualified as a disability within the meaning of the EED. Interestingly, alcoholism has been qualified as a protected disability under US law.¹²³ In this respect, US experience shows that the link between alcoholism and breach of professional obligations is not as straightforward as the AG in *Kaltoft* seems to suggest. Indeed, some US courts have imposed accommodations for alcoholism¹²⁴ on employers in several cases. The case is slightly different for ‘current drug abuse’, which is explicitly excluded from the scope of ‘disability’ under the ADA.¹²⁵ CJEU’s judges failed to address this sensitive question, with respect to both alcoholism and drug abuse. This probably lies in the political discomfort towards potential consequences that the alternative solution would expose. We opine that the CJEU should equally refute the voluntary argument for alcoholism or drug abuse as it did for obesity in order to ensure consistency.

B. Relevance of ‘Physiological’ Cause of Obesity

In the US, obesity can result from ‘physiological’ disorders, which is precisely one of the concepts referred to in EEOC regulations to interpret ‘impairment’. Against this background, the question whether claimant’s obesity was physiologically-based or not was discussed in several cases.

In *Cook*, the court found that morbid obesity was, in this case, a physiological disorder as the claimant’s obesity involved ‘a dysfunction of

¹²⁰ Terry S Hyman, ‘Voluntary Handicaps – Should Drug Abuse, Alcoholism and Obesity be Protected by Pennsylvania’s Anti-discrimination Laws?’ (1980-1981) 85 Dickinson Law Review 475 and n 115.

¹²¹ Opinion of AG Jääskinen (n 3) para 60.

¹²² *ibid*, para 59.

¹²³ See for the evolution of US federal law, Judith J Johnson, ‘Rescue the Americans with Disabilities Act from Restrictive Interpretations: Alcoholism as an Illustration’ (2007) 27 North Illinois University Law Review 169.

¹²⁴ For a discussion and references of cases where the concept of reasonable accommodation was addressed with respect to alcoholism and drug abuse see *ibid*, 235-237.

¹²⁵ 42 U.S.C. § 12114(a) (1994). See for a concrete case, where the court endorses the exclusion, *Shafer v Preston Mem’l Hosp. Corp.*, 107 F.3d 274 (4th Cir 1997).

both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems.¹²⁶ This reasoning was based on an expert's testimony. In subsequent cases, however, the 'physiological requirement' turned to be a deadlock. Indeed, in several landmark rulings (*Andrews*, *Watkins* and *Francis*),¹²⁷ courts dismissed obesity-as-disability claims where the physiological disorder was not proved, relying on *Cook* and EEOC regulations. According to the reasoning thereunder, the alternative solution would make of 'disability' a 'catch-all clause'.¹²⁸ In addition, the court found in *Andrews* that the physiological requirement applied to all stages of obesity, including morbid one.

This jurisprudence resulted in several drawbacks. First, by requiring obesity to be physiologically-based, the courts indirectly reintroduced the 'voluntariness argument', as the individuals whose obesity was caused by non-medical factors (labelled as voluntary conduct or lack of action) were excluded. Second, the physiological requirement was applied not only when the claimant alleged to be 'actually' disabled, but also to be 'regarded' as such (see below Part IV, section 2). This gave rise to denying protection to obese individuals who, albeit able to perform required professional duties, had received unfair treatment on the basis of stereotypes (eg an obese individual not hired because presumed to be less motivated at work).

Against this background, an alternative solution has been found in some instances, thereby relaxing scrutiny on 'impairment'.

2. Obesity as a *per se* 'Impairment'?

In contrast to its peers from the 2nd and 6th circuits, a court seated in Louisiana (5th circuit) established in *EEOC v Resources for Human Development*¹²⁹ (quoted by the applicant in *Kaltoft*)¹³⁰ that there was no need for a 'physiological disorder' in case of morbid obesity. Interestingly, the court came to this conclusion, even though the EEOC provided an expert testimony showing that the claimant's obesity resulted from a physiological disorder. In subsequent cases, courts of some circuits followed the same solution, equally confined to morbid obesity.¹³¹

One of the justifications given under this alternative line of cases was built on Congress' general message when adopting the ADAAA in 2008

¹²⁶ *Cook v Rhode Island* (n 116)..

¹²⁷ Respectively *Andrews v State of Ohio*, 104 F.3d 803; *EEOC v Watkins Motor Lines, Inc*, 463 F.3d 436; *Francis v City of Meriden*, 129 F. 3d 281.

¹²⁸ *Andrews v State of Ohio* (n 127).

¹²⁹ *EEOC v Resources for Human Dev., Inc*, 827 F. Supp. 2d 688, 693-94 (E.D. La. 2011): '[I]f the charging party is severely obese- there is no explicit requirement that obesity be based on physiological impairment'.

¹³⁰ See Opinion of AG Jääskinen (n 1) para 53 and fn 48.

¹³¹ See eg *Lowe v American Eurocopter, LLC*, 1:10CV24-A-D, WL 5232523 (N.D. Miss. Dec. 16, 2010).

(amendment of the ADA). Therein, Congress urged the courts to construe disability ‘in favor of a broad coverage to the maximum extent permitted.’¹³² By the same token, it rejected cases where federal courts had ‘narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom [it] intended to protect.’¹³³ Although targeted cases did not concern obesity,¹³⁴ some courts found in this message a justification for departing from the case law requiring a physiological cause.¹³⁵ The EEOC followed these dynamics by removing from its regulations that obesity is rarely an impairment¹³⁶ and inserting in its Compliance Manual that morbid obesity is clearly one.¹³⁷

Duntworth’s observation in 1999 that ‘(...) obesity discrimination remains a fluctuating and non-cohesive area of law’¹³⁸ still holds true today. Indeed, there is a significant split among federal circuit courts on whether a physiological disorder is necessary to meet the impairment condition. Under the initial line of cases, all stages of obesity must be physiologically-based to be qualified as an ‘impairment’. Under the alternative line, stages of obesity are treated differently (no need to show a physiological cause for morbid obesity).

In the EU context, the fact that Mr Kaltoft was morbidly obese has seemingly not played any role when interpreting ‘disability’. Further, neither the judges, nor the AG, have questioned whether obesity qualifies as an ‘impairment’. There may be two reasons for this. The first one is that the defendant in *Kaltoft* has not asserted before the CJEU that obesity does not qualify as an ‘impairment’ for the purposes of the EED. Indeed, he only refuted that obesity was a disability from a general standpoint. This significantly distinguishes *Kaltoft* from the US cases we addressed. Additionally, one must recall that *Kaltoft* was delivered in the framework of a preliminary ruling. Accordingly, the CJEU held that it is incumbent on the national court to determine whether the different conditions arising when interpreting ‘disability’ are met in the present case.¹³⁹ It would be interesting to see whether this issue will be discussed or not by the

¹³² 42 U.S.C. § 12102(4)(A).

¹³³ *ibid.*

¹³⁴ *Sutton v United Air Lines, Inc.*, 527 US 471 (1999); *Toyota Motor Manufacturing, Kentucky, Inc v Williams*, 534 U.S. 184 (2002); *Murphy v United Parcel Service, Inc.*, 527 US 516; *Albertson's, Inc v Kirkingburg*, 527 US 555 (1999) were mentioned by the Congress as illustrations of narrow understanding of ‘disability’. See note to 42 U.S. Code § 12101 <http://www.gpo.gov/fdsys/pkg/PLAW-110publ325/html/PLAW-110publ325.htm> (accessed 6 June 2015).

¹³⁵ *Lowe v. American Eurocopter* (n 131).

¹³⁶ 29 C.F.R. pt 1630 app § 1630.2(j) (2008).

¹³⁷ EEOC Compliance Manual § 902.2(c)(5)(ii), 2011.

¹³⁸ Kimberley B. Duntworth, ‘Cassista v. Community Foods, Inc.: Drawing the Line at Obesity?’ (1994) 24 Golden Gate University Law Review 523, 537.

¹³⁹ Case C-354/13 (n 1) para 64.

referring court's in its final judgment.¹⁴⁰ The second reason for the court not to examine 'impairment' with respect to obesity is that it considered that obesity met the impairment (medical element of 'disability') requirement.¹⁴¹ This would follow an 'equation' approach, whereby obesity equates to an 'impairment' in the sense of a medical disorder. This could be inferred from both the AG's opinion¹⁴² and the judgment.¹⁴³ The CJEU may also want to focus less on the medical element of disability, although recognising that obesity generally raises medical issues. This would indeed be a manifestation of the shift from the so-called 'medical' model of disability to the 'social' one that it recently realised. Indeed, after having stated in *Chacón Navas*¹⁴⁴ that disability is a limitation caused by an 'impairment' (exclusively by the 'medical element') it changed its approach in *HK Danmark (Ring and Skouboe Werge)*,¹⁴⁵ holding that disability results from the interaction between the impairment and 'various barriers' ('social element').¹⁴⁶ As observed by AG Wahl in *Z.*, commenting on this shift, disability 'arises from a failure of the social environment to adapt to and accommodate the needs of people with impairments.'¹⁴⁷ By endorsing the social model, less scrutiny may therefore be put on the medical element of 'disability', which would be arguably less difficult to prove (a deadlock less difficult to open) than under the medical model. Under US law, the lowering of focus, when observed, is limited to morbid obesity, where it is a per se impairment.

To conclude this section, we note that under US law, the scrutiny of 'impairment' (part of the causation element of disability) has decreased with respect to obesity. *Kaltoft* goes in line with the evolution of US law and may go even further by presumably equating obesity to impairment.

¹⁴⁰ On 27 March 2015, this judgement had not yet been delivered. We draw on a phone call to the clerk authorities to the referring Court on that date.

¹⁴¹ Alternatively Lisa Waddington remarks that the CJEU has simply not explored the meaning of impairment with respect to obesity and that obesity may be caused by an impairment. This reasoning differs from qualifying obesity as a per se impairment. See Lisa Waddington (n 17), 23.

¹⁴² In the opinion, obesity is presented as 'growing problem in modern society' with reference to the already mentioned Commission's White Paper (n 4), see Opinion of AG Jääskinen (n 3) para 1 and fn 2.

¹⁴³ Where it is mentioned that obesity is registered in the 'International Statistical Classification of Diseases and Related Health Problems' of the WHO (ICD-10), see Case C-354/13 (n 1) para 18.

¹⁴⁴ Case C-13/05 (n 19), see for a criticism for embracing the medical model of 'disability' in this case, Lisa Waddington, 'Case C-13/05, *Chacón Navas v Eures Colectividades SA*' (2007) 44 Common Market Law Review 487.

¹⁴⁵ See Joined Cases C-337/11 and C-335/11 (n 20).

¹⁴⁶ This shift of approach was justified by the ratification of the UNCRPD by the EU to which the CJEU makes explicit reference, *ibid*, para 37.

¹⁴⁷ Opinion of AG Wahl in Case C-363/12 (n 19) para 88, quoting Lisa Waddington, 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences' (2011) 18 Maastricht Journal of European and Comparative Law 431, 436.

It is difficult to predict whether this evolution would be applied to conditions such as alcoholism or drug abuse. This may give rise to tensions between EU and some national laws on a very delicate issue. Indeed, at least in the UK, alcoholism and drug abuse have been expressly excluded from the scope of 'impairment' (and consequently disability) by the legislator.¹⁴⁸ Contrastingly, alcoholism has been qualified as a disability under Irish non-discrimination law by the Irish Equality Body, albeit not in the employment context.¹⁴⁹ Consequently, there are discrepancies between at least two Member States on this question and there may be more in the future now that the concept of disability is expanding. One could argue that the CJEU should leave a certain margin of appreciation to EU Member States in this regard. This would, however, run counter to the CJEU's statement¹⁵⁰ that 'disability' under the EED must be given a 'uniform' interpretation throughout the Union.

IV. SHIFTING THE FOCUS ON DISABILITY'S EFFECTS IN OBESITY CASES

1. *Obesity's Limiting effects on the Employee (Actual Disability)*

The interpretation of 'disability' will be still disputed before the US and EU courts, despite less scrutiny on the causation element. Indeed, it seems that the courts' focus of attention is shifting from the causation element (what originates in disability) to the consequence one (how disability manifests itself).

Recall that the basic idea of disability is that it involves a limitation and, for our purpose, an individual's limitation in relation to his/her professional activity. This is the 'consequence element'. We see two approaches to the assessment of the limitation: a general and a contextual one. Under the general approach, the limitation is assessed with respect to various activities. By contrast, under the concrete one, a certain condition may be limiting in some contexts and not in others. Illustratively, colour blindness is not limiting (at least in principle) for an array of jobs (eg lawyer, writer, computer programmer...), but may be for others (eg painter). Thus, in employment cases, the concrete perspective would lead to determining whether obesity has limiting effects in consideration of a specific job's functions. On the basis of judicial interpretations, it seems that the US and the EU have followed divergent paths.

¹⁴⁸ See Equality Act 2006. Note, however, that the effects of alcoholism (eg liver diseases) are not precluded from qualifying as an 'impairment' (therefore potentially as a 'disability'), see 'Guidance on matters to be taken into account in determining questions relating to the definition of disability', A7, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85010/disability-definition.pdf (accessed 6 June 2015).

¹⁴⁹ Irish Equality Officer has found it to be included within 'disability' under the Equal Status Act 2000 (*A Complainant v Cafe Kylemore*, DEC-S2002-024 of 2 May 2003) (alcoholic customer refused access to a restaurant).

¹⁵⁰ Case C-13/05 (n 19) para 42.

A. The General Approach to the Worker's Limitation (US)

To recall, the 'actual' prong of disability in the ADA (the 'regarded as' prong is addressed below in section 2) requires an 'impairment', '(...) that substantially limits one or more major life activities of such individual.'¹⁵¹ The expression 'major life activities' was clarified in the EEOC implementing regulations by means of a non-exhaustive¹⁵² list of 'activities'. Several of those are relevant to obesity such as 'walking', 'standing', 'sitting', 'lifting', 'bending' and 'breathing',¹⁵³ as they may be affected by it. When interpreting the expression, courts endorsed in several cases a general perspective.

*Swam v Commonwealth of Virginia Department of State police*¹⁵⁴ typified this approach. In this case, an obese woman was hired as a State trooper. She exceeded maximum weight allowable under the personnel guidelines of the Virginia Department of State Police and was hired with the understanding that she would reach the appropriate weight during the course of her employment. After having received numerous warnings because of not reaching the prescribed weight, she was terminated from her employment as a trooper. Basing its reasoning on EEOC regulations and case law, the court found that 'working' could be an 'activity' within the meaning of 'major life activities'. However, it stressed that this expression could not be interpreted with respect to one particular job.¹⁵⁵ Thus, the court found that the skills required for a trooper (eg protecting oneself from assault, pursue, confront or capture offenders) were 'job-specific', and therefore, could not qualify as 'major life activities'.

This general approach has at times been applied with reference to an abstract standard when interpreting 'substantially' (the impairment must be *substantially* limiting). Illustratively, in *Hill v Verizon Maryland*¹⁵⁶ the claimant was originally employed for installing and repairing customers' telephone service and making cross connects. Because of his weight, he was unable to work aloft and was reallocated because he exceeded the company's weight standards. Ultimately, his salary was reduced, a development that Mr Hill claimed to be discriminating. The court found he was not 'substantially' disabled because he could still do a handful of activities despite his obesity (eg 'walking', 'cooking', 'doing laundry', 'caring

¹⁵¹ 42 U.S.C. § 12102(1)(A).

¹⁵² Recognised by the Supreme Court in *Bragdon v Abbott*, 524 US 624 (1998).

¹⁵³ See for the full list, 42 U.S.C § 12102(2)(A).

¹⁵⁴ *Swam v Commonwealth of Virginia Department of State Police*, 862 F.Supp. 1469 (E.D.Va.1994).

¹⁵⁵ This approach was also subsequently followed by the US Supreme Court, see *Toyota Motor Manufacturing v Williams* (n 134) where it held that the worker's ability to do the required manual work (having to use hands and arms extended at and above shoulder for extended periods of time) were not central 'in most people's daily life' and therefore she was not substantially limited in performing tasks'.

¹⁵⁶ *Hill v Verizon Maryland, Inc*, WL 2060088 (D. Md. July 13, 2009).

for himself...). The Court came to this conclusion by using an abstract standard of reference as it noted that the worker was ‘able to perform all of the normal activities that the average person performs, even if a bit slower, or to a lesser degree.’¹⁵⁷ This contrasts with the contextual approach.

B. The Contextual Approach to the Worker’s Limitation (EU)

On the basis of its jurisprudence and of several AG’s opinions thereunder, we can assert that the CJEU has endorsed the contextual approach, at least at first glance. To recall, under the *HK Danmark (Ring and Skouboe Werge)* definition, disability refers to a ‘limitation’ that ‘may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers’ (‘the consequence element’).¹⁵⁸ Importantly, the CJEU has not taken verbatim the consequence element as in the UNCRPD, which refers to participation ‘in society’ (article 1). This has had an impact in the case of *Z*.¹⁵⁹

Notwithstanding this consideration and as stressed by AG Wahl,¹⁶⁰ ‘disability is context-dependent and situational: for instance, a long-term illness such as diabetes or indeed an allergy may, depending on the surrounding environment, constitute a disability.’ This has also been illustrated by AG Bot in *Glatzel*¹⁶¹ (dealing with visual impairment for truck drivers) with the historical example of Admiral Nelson, who led his men and won the Battle of Trafalgar in 1805, whilst he had lost one eye at the siege of Calvi in 1794. In the AG’s words: ‘although objectively suffering from a visual deficiency, that deficiency did not constitute a disability in those circumstances.’¹⁶² Therefore, the limitation is assessed with respect to participation in professional life in a given context. In *Kaltoft*, AG Jääskinen endorses the same approach at first glance, stressing that ‘the applicability of the concept of disability depends on the concrete circumstances of the work’.¹⁶³ However, two elements suggest that his reasoning is characterised by the general approach. First,¹⁶⁴ he opined that the consequence element can be met if the impairment ‘causes limitations in full and effective participation in professional life *in general* on equal

¹⁵⁷ *ibid.*

¹⁵⁸ Case C-354/13 (n 1) para 38.

¹⁵⁹ As illustrated by case C-363/12 (n 19). In this case a disabled mother, having had recourse to a surrogacy arrangement, was refused a maternity leave, what she alleged to be discrimination based on disability. The CJEU refuted that the mother had a ‘disability’ for the purposes of the EED as ‘the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment’, para 81. As remarked by Lisa Waddington, this amounted to denying the mother access to an ‘employment-related benefit’. See Lisa Waddington (n 17) 21.

¹⁶⁰ Opinion of AG Wahl (n 147) para 84.

¹⁶¹ Case C-356/12 (n 20), Opinion of AG Bot, ECLI:EU:C:2013:505.

¹⁶² *ibid.*, fn 19.

¹⁶³ Opinion of AG Jääskinen (n 3) paras 42–43.

¹⁶⁴ I thank Prof Lisa Waddington for making this point.

terms with persons not having that condition.¹⁶⁵ He illustrates the idea with a wheelchair worker (travel bound agent) whose participation in professional life is not affected by his condition.¹⁶⁶ Even if in this concrete case, this participation is not limited, the worker could be qualified as having a 'disability' 'because of the physical difficulties that inevitably arise in performing tasks, even if it does not affect the capacity of the person concerned to carry out the specific work in question.'¹⁶⁷ In other words, some individuals, like those in a wheel chair would always be 'disabled' within the meaning of EU law. The approach runs counter to the contextual one enhanced by the social model of disability. Indeed, if, according to the social model, disability arises because of the interaction between the impairment and the environmental barriers (eg inaccessible buildings) it would disappear (or at least be reduced) thanks to the removal of these barriers. One hint suggests that the AG wanted to include both situations, contextual and general, when he says that the general limitation is 'sufficient', meaning it could also include a contextual one. Another element characterising a general approach lies in the reasoning's application to obesity. Indeed, the AG tackled the consequence element with a strong emphasis on morbid obesity, stating that 'most probably only (...) morbid obesity will create limitations, such as problems in mobility, endurance and mood, that amount to a 'disability' under the EED.¹⁶⁸ As for individuals in a wheel chair, this suggests that some medical conditions are more likely than others to endorse functional limitations. Possibly true from a statistical and medical point of view, the approach runs afoul of the social-based approach in our view. Indeed, he addressed this condition with respect to the consequences that morbid obesity *generally* has, rather than on focusing on Mr Kaltoft's case. In addition, his statement suggests that 'moderate' obesity is less likely to be a disability than 'morbid' obesity.

In contrast, CJEU's judges have not drawn a distinction between morbid and other stages of obesity. Indeed, they emphasised that obesity can be a disability 'under given circumstances' for the concerned worker, stressing that it can limit his participation in professional life 'on account of reduced mobility or the onset in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity.'¹⁶⁹ This examination is left to the concrete examination of the referring court.

Therefore, limiting effects of obesity on the individual participation in professional life are taken into account by both the US courts and the CJEU to determine whether obesity amounts to a disability or not in a different manner.

¹⁶⁵ Opinion of AG Jääskinen (n 3) para 47.

¹⁶⁶ *ibid*, para 39.

¹⁶⁷ *ibid*, para 45.

¹⁶⁸ *ibid*, para 56.

¹⁶⁹ Case C-354/13 (n 1) para 58-59.

What was not addressed in *Kaltoft* by the CJEU is whether ‘disability’ covers the case of obese individuals who are perceived as not able to perform professional duties, whilst they are (or may be able to, but have not been given the opportunity to show it). This is especially relevant for obesity cases, as obesity may endorse limiting effects, not in reality, but in minds.

2. *Obesity’s Effect on Minds (Perceived Disability)*

A. Coverage of Obese Individuals ‘Regarded as’ Disabled

Under US law, individuals who are perceived as disabled, albeit they are not, are included in the definition of ‘disability’ (under the ‘regarded as’ prong) and may therefore be entitled to protection under US law. As Justice William J Brennan stated ‘Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.’¹⁷⁰ Under EU law, it is still unsure whether these individuals fall under ‘disability’.¹⁷¹ *Kaltoft* represents a missed opportunity in this respect, whilst obesity raises this question as a matter of fact.

Indeed, it has been noticed in the US¹⁷² and beyond¹⁷³ that obese individuals are subject to a handful of stereotypes. To give some examples, they are often perceived as ‘less motivated’ or ‘lazy’¹⁷⁴ and ‘having health problems’. Illustratively, in *Cook*,¹⁷⁵ the employer refused to hire an obese candidate believing obesity heightened the risk of a heart disease. As already discussed, obese individuals are indeed likely to have medical problems (see above Part II, section 2). However, and as found by the court in *Cook*, applying this general statement to a concrete case, without further examination, is discriminatory.¹⁷⁶

Another ‘regarded as’ case is worth mentioning. *Texas Bus Lines*¹⁷⁷ concerned an obese woman who was denied a bus driver job, although she had good references and successfully passed a road test. The bus company based its refusal on a doctor’s opinion who concluded after an examination lasting five to six minutes that the job applicant ‘can’t move swiftly in case

¹⁷⁰ *School Bd. of Nassau County v Arline*, 480 US 273 (1987).

¹⁷¹ See eg Lisa Waddington (n 17) 24 and (n 144) 497.

¹⁷² See eg Jane B Korn (n 91) and (n 108).

¹⁷³ Tamar Kricheli-Katz, ‘Choice-Based Discrimination: Labor-Force-Type Discrimination Against Gay Men, the Obese, and Mothers’ (2013) 10 *Journal of Empirical Legal Studies* 670, 677.

¹⁷⁴ See eg Stuart W Flint and Jeremé Snook (n 10) 189: ‘Obesity may lead to the stigmatizing of obese persons as less productive, lazy and feckless’ and Jane B Korn (n 91) 14.

¹⁷⁵ See eg *Cook*, (n 126).

¹⁷⁶ *ibid*, para 27.

¹⁷⁷ *EEOC v Texas Bus Lines*, 923 F. Supp. 965 (S.D. Tex. 1996).

of an accident.¹⁷⁸ The court concluded that the blind reliance on a limited doctor's examination led to the perception of disability.

Under EU law, the discussion is only beginning to take shape. Among all disability cases before the CJEU, none concerned a 'regarded as' situation,¹⁷⁹ whilst the EED is silent on this point. In *Kaltoft*, the AG did refer to it unlike CJEU's judges (calling it 'falsely presumed' disability),¹⁸⁰ but opined that it was not necessary for the case at hand.¹⁸¹ However, he referred to a report of the Commission,¹⁸² where the institution stated that EU directives (including the EED) cover direct discrimination 'on the basis of a wrong perception or assumption of protected characteristics.'¹⁸³ In the report, the institution illustrates the idea only with 'ethnic origin' and 'homosexuality'.¹⁸⁴ With respect to disability, it addresses the question in the annexes of this report in a rather cautious manner stating that '[t]he same reasoning would appear to apply, mutatis mutandis, to all other grounds of discrimination protected under the two Directives.'¹⁸⁵

Considering that the CJEU may recognise 'disability' to cover individuals 'regarded as' disabled, it is worth examining what kind of situations could be captured under this expression. The US experience is again relevant. Three situations have been identified by the EEOC in this regard.¹⁸⁶ Each of them is illustrated with a general example (from S Parott)¹⁸⁷ that we then transpose to obesity.

First, it covers those who have an impairment that does not substantially limit 'major life activities' but is treated as constituting such limitation such as an employee with controlled high blood pressure. Such a situation was met in aforementioned Dutch case on mail delivery by bicycle.¹⁸⁸ Herein, the Equality Body noted that the post company refused to hire the obese candidate, on the basis of general assumptions, instead of actual facts, to conclude that this candidate was not suitable for the concerned job. Importantly, it stressed that the Dutch equality legislation aims at

¹⁷⁸ *ibid.*

¹⁷⁹ There is only one case where a claimant was protected under the EED against discrimination without having the protected characteristic (discrimination by association of mother discriminated against because of her having a disabled child), see Case C-303/06 *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.

¹⁸⁰ Opinion of AG Jääskinen (n 3) para 48.

¹⁸¹ *ibid.*, para 49.

¹⁸² European Commission (n 99).

¹⁸³ *ibid.*, point 4.5.

¹⁸⁴ *ibid.*

¹⁸⁵ Annexes to the Joint Report (n 99) Annex II-2-c.

¹⁸⁶ 29 C.F.R. § 1630.2(l)(1)-(3) (2005).

¹⁸⁷ Sarah J Parrot, 'The ADA and Reasonable Accommodation of Employees Regarded as Disabled: Statutory Fact or Bizarre Fiction?' (2006) 67 Ohio State Law Journal 1509, 1512, fn 59.

¹⁸⁸ *Commissie Gelijke Behandeling* (n 82). See for the company's full reasoning, point 3.14.

preventing employers from basing their recruitment practices on 'stereotypical expectations and assumptions'¹⁸⁹ and concluded that the candidate was directly discriminated against on the grounds of 'disability' or 'chronic illness'.

The second situation is when an individual has an impairment that substantially limits major life activities only as a result of others' attitudes towards such impairment. It can happen when a worker's prominent facial scarring or obesity (provided that it is qualified as an impairment) prompts clients' or colleagues negative reactions and that consequently, the worker's employer decides to dismiss him/her. Such a case was handled by the ECtHR, even if it did not mention 'disability'. *I.B. v Greece*¹⁹⁰ concerned an employee whose contract was terminated following exerted pressure by his colleagues on their employer to do so after they found out that he was HIV-positive. The Court noted that HIV-status was the basis of the dismissal and concluded that the employee had been directly discriminated on the grounds of his health.¹⁹¹ We think it would be covered under the 'regarded as' prong of disability as the stigmatised worker was perfectly able to do his job, but was limited in his participation in professional life because of his colleagues' reactions to his impairment.

In the third situation, an individual is treated as having a substantially limiting impairment: an employee rumoured to have AIDS although it was not true for instance. This appears to be a less useful situation for 'obesity' as it seems unlikely that an individual is rumoured to be obese, while he/she is not.¹⁹²

B. Capturing Appearance Discrimination through Disability?

At least one other deadlock could, however, be put on the way to the finding of 'disability' when addressing the 'regarded as' avenue. We will address it with respect to different treatment based on appearance. Recall that appearance discrimination is not prohibited under EU and US federal law. Direct discrimination ('adverse treatment' under US law) based on appearance would arise if a company refuses to hire an obese (or overweight) candidate (or to systematically hire slim individuals), unless this different treatment is justified by the fact that a certain appearance (such as slimness, which would exclude obesity) is under EED's language a 'genuine and determining occupational requirement' (EU law)¹⁹³ or, under US law, a 'bona fide qualification'.¹⁹⁴ Indeed, this argument is at times

¹⁸⁹ *ibid*; 'De Commissie wijst erop dat één van de doelstellingen van de WGBH/CZ nu juist is om te voorkomen dat werkgevers zich bij hun aannamebeleid laten leiden door stereotype verwachtingen en vooronderstellingen' (point 3.18).

¹⁹⁰ *I.B. v Greece* (n 48).

¹⁹¹ *ibid*, para 91.

¹⁹² As remarked by Jane B Korn, '(obesity) is apparent to all and impossible to hide' (n 91) 14.

¹⁹³ Article 4 (1), EED (n 2).

¹⁹⁴ See 42 U.S.C. § 12113(A).

brought to justify that bearing certain physical characteristics is essential for the company's image. We could also imagine that a company asserts that fitting with its image is a competence or an essential function. This would justify a refusal to hire.¹⁹⁵

Against this background, we will address two questions. To which extent can a different treatment based on appearance be justified under the guise of image? Can a worker considered by an employer as not fitting with this image be 'regarded as' disabled?

In our view, the appearance requirement is not justified for jobs such as restaurants' or cafés' waiters as the essential function of such jobs is rather taking customers' orders and serving them accordingly in a courteous and efficient manner. This issue is even more difficult in sectors where obesity may contradict a company's image based on the opposite profile of the obese individual. Two French cases can be mentioned in that respect. The first one involved the famous company *Weight Watchers*. On its website, the company presents itself as dedicated 'to helping (customers) lose weight'.¹⁹⁶ In a case brought before a civil court (ruling is dated 2007),¹⁹⁷ one of the company's animators was dismissed because she exceeded the weight prescribed by the maximum weight clause contained in her employment contract. The court found the dismissal not to be discriminatory relying on the company's image. We personally opine that too much reliance on a company's image leads to unfair differential treatment, whilst a worker may be perfectly capable of performing the required duties. Indeed, the employee was in charge of helping customers to lose weight by providing advice. Why would a *Weight Watcher* coach not be able to give valuable advice for losing weight only because he/she is obese? Interestingly, and this comes back to our discussion on the relevance of obesity's causes (Part III, section 1), the court held that it would have found the dismissal discriminatory (on the basis of appearance), if overweightness of the person concerned would have been immutable because in that case it would be a 'disability'.

The second case, already mentioned, was recently handled (2014) by the French Equality Body in an anonymous decision and concerned a clothing retailer (probably Abercrombie and Fitch),¹⁹⁸ which clearly argued that appearance is an 'essential genuine and determining occupational requirement', on the basis of the French domestic legal Act¹⁹⁹ that

¹⁹⁵ Neither EU nor US law requires recruiting or prohibits dismissing an individual who is not competent or capable. See, respectively, 42 U.S.C. § 12112 and EED (n 2) Recital 17.

¹⁹⁶ For more information on this company, see its website 'who we are': <https://welcome.weightwatchers.com/who-we-are/> (accessed 6 June 2015).

¹⁹⁷ CA de Douai 29 September 2004 n° 00-523, ch.soc., *Dalle-Lepers c. Sarl Weight Watchers Operations France*.

¹⁹⁸ See n 63.

¹⁹⁹ See Article L.1133-1 of the French Labour Code (*Code du travail*).

transposed the EED.²⁰⁰ Indeed, the company argued that the physical representation of the clothing brand thanks to one's 'body, charm, attractiveness and youth' is essential and determining.²⁰¹ In this respect, prioritising recruitment of managers with an 'exceptional outward appeal' (*un attrait personnel exceptionnel*) was deemed disproportionate to the objective of promoting the brand's image.²⁰² Addressing the recruitment of managers, the institution put the focus on the concerned job's functions highlighting that it consists, for managers, in leading a team.²⁰³ Interestingly, the French institution stressed in its reasoning the importance that appearance is not a changeable characteristic (*une caractéristique manipulable*).²⁰⁴ This would imply a distinction between medically-caused obesity (and being overweight) and other types and it takes us back again on obesity's causation (Part III, section 1).

Could these cases be tackled through the 'regarded as' avenue? We can see two directions. The first consists in putting focus on other questions than 'disability' (eg if being slim, or not obese, is a 'genuine and determining occupational requirement' or a 'bona fide qualification'), leaving aside the question whether there is a 'disability' or not. The second direction is to integrate the 'regarded as' avenue, as existing in the US, into the EU concept of 'disability'. An argument supporting such step would be the shift from a medical to a social model of disability, seemingly realised in *HK Danmark (Ring and Skouboe Werge)*, as well as the fact that the EU is a party to the UNCRPD. Indeed, as recognised by the CJEU in that case, which made a reference to the UNCRPD, the social model argues that 'various barriers' play a role in causing disability. Quoting the UNCRPD, AG Wahl specifies that 'barriers' can be of attitudinal nature,²⁰⁵ suggesting others' reaction (including stereotypes) towards one's characteristic. In our view and as we draw from the US experience, these barriers would cover the situation of a worker deemed not to be able to work for a company because his/her obesity does not fit with its image. In turn, this would open the 'disability' door, leading to other ones such as whether there has been a direct or indirect discrimination or whether a reasonable accommodation has not been provided (unless appearance is considered in this case as a 'genuine and determining occupational requirement' or a 'bona fide qualification'). Therefore, under this framework, and through the 'regarded as' avenue, disability could cover appearance cases.

V. CONCLUSION

²⁰⁰ Loi n°2008-496, 27 May 2008, *portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*.

²⁰¹ See *Défenseur des Droits*, MLD n° 2014-147 (n 62) point 83.

²⁰² *ibid*, point 95.

²⁰³ *ibid*, point 89.

²⁰⁴ *ibid*, point 64.

²⁰⁵ Opinion of AG Wahl (n 147) para 96.

On both sides of the Atlantic, litigation practice shows that the interpretation of 'disability' within the contemplation of non-discrimination law is not only a question of semantics. It has also legal repercussions as the interpretation can either include or exclude an individual from the scope of disability discrimination. The different sub-concepts (eg impairment) or elements (causation and consequence) mobilised to construe 'disability' can be subject of more or less strict judicial scrutiny. In the US, we have seen that courts, at least in some circuits, tend to interpret 'impairment' less strictly than before. If our assumption that the CJEU equates obesity with 'impairment' proves true, its jurisprudence would be more inclusive than the US courts' most lenient one that equates only morbid obesity to disability if obesity is not physiologically-based. The paper has shown that disability is a valuable discrimination ground with respect to obesity. The consequence element is still interpreted by the US courts from a general (and sometimes abstract) perspective. This has proved to exclude individuals who would have been included under a contextual understanding of 'disability' that the CJEU seems to have embraced.

Kaltoft is an important step. However, as shown in the paper, the CJEU should have borrowed (and could in the future) the 'regarded as' prong of 'disability' from US law. The AG and the Commission both touched upon this issue, but failed to clearly admit that 'regarded as' disabled could be covered under the EED. In this regard, we argued that appearance cases could be captured under the 'regarded as' avenue. Consequently, some companies would have to show that their recruitment policy based on appearance is not discriminatory.

BOOK REVIEW

**MAREK ZIRK-SADOWSKI, BARTOSZ WOJCIECHOWSKI, AND
KAROLINA M CERN (EDS), TOWARDS RECOGNITION OF MINORITY
GROUPS: LEGAL AND COMMUNICATION STRATEGIES**

(Ashgate 2014) ISBN: 9781472444905. 294pp. 70 GBP.

Emma Nyhan*

Much has been said and written about minorities and the question of their recognition implying that there is little left to add. *Towards Recognition of Minority Groups: Legal and Communication Strategies* suggests and proves otherwise, however. As the title suggests, this edited volume delves deep into the complex question of minority recognition by focusing on two spheres: law and communication. To achieve this ambitious goal, it introduces a novel twist to the existing common ground on minority groups and their recognition.

Acknowledging the literature that exists already, it is fair to ask what this study accomplishes. In outlining new trajectories in ways to read, think and write about the topic, this volume marks a pivotal contribution to the field for several reasons. Firstly, it offers a consequential insight that builds upon and problematizes previous philosophical and legal debates on minorities, which are placed in the context of minorities in the 21st century. Secondly, and most significantly, the contributors represent an eclectic mix of scholars who transcend disciplinary tunnels and geographic boundaries. Excavating the literature with unorthodox or less commonly-expressed views, the Eastern European contributions bring us up to speed with contemporary minority group issues in an enlarged, and enlarging, Europe. Thirdly, in light of trends of globalization this volume sees minorities not in isolation, but embedded in a pluralist landscape that spans local and global realms. In sum, by taking stock of minority recognition from a vantage point that is retrospective and prospective, inclusive and exclusive and global and local, it sets in motion a renaissance of ideas about recognition of minorities and how it plays out in theory and practice.

With nineteen contributions, each chapter contributes to how we understand minorities and their recognition. Prefaced by a comprehensive introduction, the volume is broken into four parts: (i) Philosophical Approach to Human Rights (ii) The Fight for Recognition in the Sphere of Law (iii) Human Rights Legal Protection and (iv) The Problem of Legal Consensus and Legal Identity.

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While each can be read in isolation, it is also possible to view each section as a building-block that starts with philosophy, moves to law and concludes with analysis of a problem.

More concretely, Part I - Philosophical Approach to Human Rights - lays down the philosophical roots and development of human rights, and minority rights more specifically. The old conventional debate on individual/collective rights appears at the outset to serve as a gentle reminder that this issue remains unresolved and contentious. In this section and throughout the book, we see thinkers preoccupied with questions on minorities or recognition inform the volume, with weight given to the works of Isaiah Berlin, Emmanuel Levinas, Jürgen Habermas, and Paul Ricoeur to name but a few. This philosophical approach, backed up by the contemporary case study is well executed in “Value Pluralism and Legal Philosophy: The Impact of Isaiah Berlin and John Gray,” where we see Beata Palanowska-Sygulska employ the work of Berlin, as interpreted by Gray, for her point of departure to study value pluralism, according to which “human values are objective and knowable, but they are irreducibly plural” (p 23). After laying down the arguments in support of value pluralism, which lies in opposition to legal liberalism, Palanowska-Sygulska makes concrete their philosophies. To do so, the author places them in dialogue with the current practice of the European Court of Human Rights (ECtHR). Focusing on the right to education (Article 2 of Protocol No. 1) in connection with the right to freedom of thought, conscience and religion (Article 9), it is in the judicial setting that the judges are left with the task of reconciling these rights, which generate conflict, incoherence and incommensurability. In short, this chapter sees legal philosophers encounter ECtHR judges, the latter amounting to something of ‘active politicians’ rather than ‘practising philosophers’ (p 4).

A factor that has become paramount when dealing with minorities is context. Context, spatio-temporal context in particular, is a running theme that underlies the volume. Taking context in an unprecedented direction, which reflects the virtual and digitalizing era we live in, and tying in with the nature of rights that straddle legal and non-legal realms, Anna Maria Andersen Nawrot in “On the Human Right to Science and Culture” examines the interplay of reason and myth in the intellectual property, which gives rise to the Commons, “a resource shared by a group of people” (p 30). From a philosophical and human rights approach and building on the metaphors of Eric Raymond in *The Cathedral and the Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary*, Andersen Nawrot argues that myth (as captured by the metaphor of the Bazaar representing creativity and chaos) plays an equal role as reason (as captured by the metaphor of the Cathedral representing structure) in creating and achieving the *ideal* right to science and culture.

Part II - The Fight for Recognition in the Sphere of Law - shifts from philosophy to law, where the minority's voice is articulated in law. Recognition, in all forms - mutual recognition, its social practice, its relationship with reciprocity, and the obligation to recognize - is discussed and debated at length. Substantiating its coherence and legibility, these chapters are especially well integrated. In the final chapter of this part, "Should There Be an Obligation to Recognize an Individual's Ascription? On the Margins of the 'Right to Exit' Debate" sees Michal Dudek unpack a particular phenomenon: internal recognition. Providing insight on questions of internal recognition (minorities within minorities) and concentrating on the right to exit, Dudek comes up with a three-tiered model of group ascription and the terms "name-keepers", who have partially exercised their right to exit and "name-givers," who have fully exercised their right to exit. Such binary categories are useful to help better understand this complicated phenomenon, but it also runs the risk of oversimplification, which the author himself acknowledges in a detailed footnote.

Following from the question of raising a voice in law, Part III - Human Rights Legal Protection - deals with how the voice is heard in law. Largest in length and scope, what is most notable is the selection of topics (domestic violence, slavery, self-determination and transitional justice) the diversity of locations (Brazil, the US, Greece and Central-Eastern Europe); and the range of individuals (victims of domestic violence, the Roma, Muslims and judges). Tatiana Machalová, in "The Principle of Self-Determination and Rights of National Minorities: A Legal and Philosophical Analysis of the Problem Using an Example from the Czech Republic," captures the essence of making the minority voice heard in law. Roma students in the Czech Republic and their rights claim in judicial processes are made heard not only domestically, but also regionally. The lens of self-determination principle and national minority rights set against the national principle, which are interconnected but conflictual, reveals how the Czech judiciary and European judiciary diverge, the former closing off their rights while the latter opening up their rights, and converge, as domestic and European decisions are shrouded in legal ambiguity.

Coming full circle and translating these legal issues into philosophical questions, Part IV - The Problem of Legal Consensus and Legal Identity - concludes this edited volume with an analysis of the problems encountered when minority voices are heard in law. Developments in the European context reveal the problem of legal consensus and legal identity. In "Flexible Normative Space between the European Law and the Member State Law as a Source of Constitutional Identity," Marek Zirk-Sadowski employs Poland as the object of inquiry and tries to reconcile Poland's constitutional identity,

specific to a Polish society and nation, with Europe, which arguably is making strides, however small, in creating a European “constitutional-like” identity despite the absence of a European constitution.

Based on the foregoing, this contribution is geared towards scholars in the fields of philosophy and legal theory. It is a worthwhile read for those preoccupied with collectives on the margins. However, this recommendation comes with a caveat for potential readers. While at first blush, the title - *Towards Recognition of Minority Groups: Legal and Communication Strategies* - amounts to a universal invitation, it is somewhat misleading. Several contributions have a core commitment to philosophy and legal and political theory, and those unfamiliar with these disciplines may find some chapters somewhat abstract and less accessible. The contributions, which are accompanied by a practical counterpart, in the form of a legal situation or case study, go some way to aid reader unfamiliar with the fields of philosophy and legal and political theory.

On the whole, this volume is a stark reminder that the recognition of minority groups remains a critical issue today. Capturing the essence of the challenges and concerns, Victor Tsilonis in “Les Misérables of Thessaloniki in 2011: A Practical Case Study of Human Rights and Human Abuse” provides an anecdotal account of his legal representation to three Muslims on a charge of theft of three-metres of copper wire in the Greek legal system, underscoring the tension and friction experienced by minorities when they encounter the law. While old philosophical and normative paradigms continue to steer the direction of these debates discursively, theoretically and legally, this volume marks a significant shift. Minorities, through the use of strategies in law and communication, have set in motion new ways to think about their issues, specifically concerning recognition that goes on to shape and reshape the philosophical and legal discourse. This edited volume attests to such trends and makes a noble attempt to address them.