

# An EU-Centric Account of the Rule of Law



**Joelle Grogan**

Oriel College

University of Oxford

A thesis submitted for the degree of

*Doctor of Philosophy*

2016



## **ABSTRACT**

The rule of law is declared to be a foundational and guiding value of the European Union in Article 2 Treaty on European Union. The European Commission claims to be the ‘guardian of the rule of law’, and the concept has been determinative in judgments in the Court of Justice of the EU. However, the EU has not defined what exactly is meant by ‘the rule of law’. This leads to the question: how can the EU claim to be guided by the rule of law, ‘common to all Member States’, but not provide an account of what that means in practice? To determine such an account, I examine contemporary accounts of the rule of law and identify the specific nature of the EU. I conclude that while the rule of law is a shared value across legal systems, distinct accounts develop within, and adapt to, each one. I advance an EU-centric account of the rule of law (EUCA) which is apt for the EU legal order. I advocate the value of EUCA first in abstract by providing reasons for why it is to the benefit of the EU Institutions, the Member States and individuals to endorse EUCA compliance. I then show the practical use of EUCA as a source of legitimacy from the perspective of Member States and individuals in the context of issues of contemporary and pressing concern in the areas of international trade, corporate taxation and the criminal law. I seek to bridge the gap between a theoretical account of the rule of law apt for the EU legal order, and the practical guidance it can provide in the resolution of crisis issues. I conclude on the essential importance of guarding, strengthening, and enhancing the rule of law throughout the EU, not just as a means of resolution in times of crisis, but as a guarantee of the future of the European Union.



To my Mum and Dad,  
who taught me my very first words,  
and have supported me with every word since.

*Go raibh mile maith agaibh go deo.*



## ACKNOWLEDGMENTS

I am deeply grateful for the family, friends and faculty who have who have supported and contributed in myriad ways to this doctorate. I thank my supervisor, Julie Dickson, for her dedication throughout this thesis, and for the many long talks involved in its development. I am fortunate to have benefited from the brilliant academic scholarship of the Law Faculty of Oxford University. This thesis has no doubt been shaped by the exceptional advice and insights of Paul Craig, Sionaidh Douglas-Scott, Alison Young, Stefan Enchelmaier, Stephen Weatherill, and Anzhela Yevgenyeva. I am especially grateful for the advice of my friend, Lucinda Ferguson, and inspired by her commitment to students and legal education.

I have had the great privilege of being a member of Oriel College, and am thankful for the work of the Academic Office, Library, and Porters. The Middle Common Room was a second home to me during my research, and I am proud of the great MCR Presidents before and after me - Caroline Knight, Mark Johnson and Peter Gent. My time Oxford was also the beginning of wonderful friendships with Sophie von der Tann, Hannah Schubert, Lauren Sosdian, Mariana Albuquerque, Hannah Noyce and Megan Roper, without whom I would not have loved my time at Oxford half so well.

My deepest gratitude goes to those friends and family with whom I shared the most challenging times - Vilija Velyvete, Laura Bramley, Elizabeth Russell, Vladimir Zamdzhiev, Justin King-Lacroix, my brother, Al Grogan, and Filipa Landeiro. I am humbled by their strength and support.

Finally, and most importantly, I thank my parents, Bernadette Buckley and Al Grogan for their constant love, support, and encouragement from the earliest moments, to the very end. Words cannot encompass my gratitude for what they do for me. No achievement is complete until I have been able to share the joy with them.



# TABLE OF CONTENTS

List of Abbreviations .....	vii
Table of Cases.....	viii
Table of Primary Legal Sources.....	xiv

## CHAPTER ONE

1 Introduction .....	1
2 The Value of the Rule of Law.....	1
3 The EU in Crisis: the Rule of law as part of the resolution .....	4
4 Overview and Chapters Summary .....	7
Chapter 2: The Many States of the Rule of Law .....	8
Chapter 3: A Complex Community - Complications of the Rule of Law at EU Level .....	8
Chapter 4: The EU-Centric Account of the Rule of Law .....	9
Chapter 5: EUCA and the EU Institutions.....	10
Chapter 6: EUCA and the EU Member States.....	11
Chapter 7: EUCA and the Individual.....	11
Chapter 8: Concluding Perspectives.....	12
5 Terminology .....	12

## PART I - IN PRINCIPLE

### CHAPTER TWO

1 Introduction .....	15
2 The Rule of [the Common] Law .....	17
2.1 Introduction.....	17
2.2 Formal Accounts of the Rule of Law .....	18
2.3 Substantive Accounts of the Rule of Law .....	22

2.4	The Rule of Law as both formal and substantive, something in between, or nothing at all	24
3	The Diversity and State-Centricity of Contemporary Accounts	26
3.1	Introduction	26
3.2	Rechtsstaat	28
3.3	État de Droit	32
3.4	État de droit, Rechtsstaat and the Rule of Law: Variations on the same theme?	34
4	The Rule of Law in Transitional States	35
4.1	Introduction	35
4.2	The Fallacy of Assuming a Single Account: Experiences of Transitional States in the Adoption of the Rule of law	36
4.3	Challenges to the Concept of the Rule of Law from Within the EU	40
5	Conclusion: Distinct Accounts of a Universal Value	43

### CHAPTER THREE

1	Introduction	46
2	Tracing the ‘Rule of Law’ at EU Level	47
2.1	Introduction: Has the EU provided an Account of the Rule of Law?	47
2.2	Rule of Law in the Treaties	48
2.3	Rule of Law and EU Administrative Law	50
2.4	‘Rule of Law’ in the Jurisprudence of the Court of Justice	55
2.5	Rule of Law and the Commission	57
3	The Specific Nature of the EU	59
3.1	Introduction: Challenges to State-centric Accounts of the Rule of Law	59
3.2	Multi-Level Governance in the EU	60
3.3	Application of EU Law in Different Legal Traditions	62
3.4	Member States’ Enforcement of EU Law	64

3.5	Conferral and Supremacy: Challenges to the Rule(s) of Law .....	66
4	Attempts to Amplify the Meaning of the Rule of Law in the EU: The New Framework to Strengthen the Rule of Law.....	71
4.1	The Threat from Inside: Measures in response to Systemic Abuse of the Rule of law in Member States .....	71
4.2	A Closer Look at the New Framework to strengthen the Rule of Law .....	73
4.3	Questioning an Account of the Rule of Law based on Common Legal Principles .....	77
4.4	The Elephant in the Room: Where are the EU institutions? .....	79
4.4.1	The Commission, as the assessor, has undermined the possibility of internal review of the rule of law.....	79
4.4.2	There is no possibility of Systemic Fault in the EU Legal System.....	80
5	Conclusion .....	81

## CHAPTER FOUR

1	Introduction .....	82
2	What are the Complications of an Account of the Rule of Law at EU Level?.....	83
3	An EU-Centric Account of the Rule of Law in Focus .....	86
3.1	Introduction.....	86
3.2	The Principle of Equality Before the Law.....	88
3.2.1	Member States and the EU Institutions: Intensity of Review.....	90
3.2.2	Member States: Derogations and Cooperation.....	91
3.2.3	Individuals: Access to Justice and Equality Before the Law in Member States ....	92
3.3	The Principle of Legal Certainty .....	93
3.4	The Principle of Legality.....	95
3.5	The Principle of Transparency .....	98
3.6	The Principle of Limited Discretion of EU Officials.....	102
3.7	The Principle of Judicial Review .....	105

3.8	The Principle of Co-operative Authority .....	107
4	EU-Centric Account of the Rule of Law in Context .....	109
4.1	EUCA in Context of Contemporary and Established Literature .....	109
4.2	Means of Monitoring and Enforcing EUCA.....	113
4.3	EUCA and General Principles of the EU .....	117
5	EUCA as a Source of Legitimacy and some Limitations.....	119
5.1	Introduction.....	119
5.2	The Rule of Law and Integration Through Law.....	120
5.3	Systems Theory: Input/Output/Throughput Legitimacy .....	122
5.4	Public and State Perception: Rule of law as Restraint.....	124
5.5	Some Limitations on EUCA as a Source of Legitimacy .....	125
6	Conclusion: A Constructive Path Forward .....	127

## PART II - IN PRACTICE

	Introduction to Framework and Methodology of Part II.....	129
	(1) Reasons for Endorsing and Ensuring EUCA Compliance .....	129
	(2) Introduction to the Case Studies: Perspectives on Legitimacy .....	130

### CHAPTER FIVE

1	Introduction .....	133
2	Why Should EU Institutions Endorse EUCA? .....	134
3	EUCA and the Transatlantic Trade and Investment Partnership .....	137
3.1	Introduction: Outline of the Case Study .....	137
3.2	The Rule of Law and the EU as an International Actor.....	138
3.3	Background to the Transatlantic Trade and Investment Partnership .....	140
3.4	The Transatlantic Trade and Investment Partnership .....	142

3.5	Evaluating the TTIP against EUCA.....	147
3.5.1	The Transparency of TTIP Negotiations.....	148
3.5.2	The Investor-State Dispute Settlement Mechanism .....	153
3.5.3	The Question of EU Competence to Agree TTIP .....	157
3.5.4	Mutual Recognition and Equivalent Standards.....	160
4	Conclusion .....	163

## CHAPTER SIX

1	Introduction .....	165
2	Why Should Member States Endorse EUCA?.....	165
3	EUCA, Tax Avoidance and Advance Tax Rulings.....	168
3.1	Introduction: Outline of the Case Study .....	168
3.2	Taxation, the Rule of Law and the EU .....	170
3.3	Background to the Case Study: Luxleaks.....	175
3.4	Advance Tax Rulings, Tax Avoidance, and Measures in Response to Luxleaks .....	179
3.5	Evaluating the EU Responses to Advance Tax Rulings.....	182
3.5.1	State Aid Proceedings against Advance Tax Rulings .....	183
3.5.2	Tax Transparency Initiative on Advance Tax Rulings.....	188
3.5.3	The Proposed Common Consolidated Corporate Tax Base.....	194
4	Conclusion .....	198

## CHAPTER SEVEN

1	Introduction .....	199
2	Why should the Individual Endorse EUCA? .....	199
3	EUCA and the European Arrest Warrant.....	201
3.1	Introduction: Outline of the Case Study .....	201

3.2	Criminal Law, the Rule of Law and the EU .....	202
3.3	Background to the European Arrest Warrant .....	203
3.4	The European Arrest Warrant.....	205
3.5	Evaluating the European Arrest Warrant against EUCA .....	210
3.5.1	Disparate Implementation of the EAW Mechanism .....	210
3.5.2	The Abolition of Dual Criminality .....	215
3.5.3	The Disproportionate Use of the European Arrest Warrant .....	220
3.5.4	Protection of Procedural Rights in the EAW.....	225
3.5.5	Transparency of the EAW System .....	232
3.5.6	Where Mutual Trust is not enough: Co-operative Authority .....	236
4	Conclusion .....	240

## PART III - IN PROSPECTIVE

### CHAPTER EIGHT

1	Introduction .....	242
2	EUCA In Retrospect: Questions, Challenges and Conclusions.....	243
3	EUCA in Perspective: the Rule of law and other Values of the Legal System.....	249
3.1	EUCA and other Values of the EU Legal System.....	249
3.2	The Mutual Enhancement of EUCA and other values.....	250
3.3	Tensions between EUCA and Other Values .....	251
4	EUCA in Prospective: What Next? .....	253
	Bibliography.....	255

## **LIST OF ABBREVIATIONS**

BEPS	Base Erosion and Profit Shifting
CCCTB	Common Consolidated Tax Base
CCP	Common Commercial Policy
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
EAW	European Arrest Warrant
EEAS	European External Action Service
ENP	European Neighbourhood Policy
EUCA	EU-centric Account of the Rule of Law
GG	Grundgesetz für die Bundesrepublik Deutschland
ISDS	Investor-State Dispute Mechanism
MEP	Member of the European Parliament
MNE	Multi-National Enterprise
OECD	Organisation for Economic Co-operation and Development
SME	Small and Medium-sized Enterprises
TTIP	Transatlantic Trade and Investment Partnership
VAT	Value Added Tax

## TABLE OF CASES

### European Union

Case 42/59 <i>Société nouvelle des usines de Pontlieue—Aciéries du Temple (SNUPAT) v High Authority</i> [1961] ECR 103 .....	93
Case 25/62 <i>Plaumann &amp; Co v Commission</i> [1963] ECR 95 .....	53
Case 26/62 <i>Van Gend en Loos</i> [1963] ECR 11 .....	6, 64, 67, 134
Case C-6/64 <i>Flaminio Costa v ENEL</i> [1964] ECR 1195 .....	6, 65, 67, 134
Case 9/70 <i>Grad</i> [1970] ECR 825 .....	6
Case 11/70 <i>International Handelsgesellschaft</i> [1970] ECR 1125 .....	53, 118
Case 4/73 <i>J Nold v Commission</i> [1974] ECR 491 .....	53, 118
Case 181/73 <i>Haegeman</i> [1974] ECR 449 .....	6
Case 17/74 <i>Transocean Marine Paint Association v Commission</i> [1974] ECR 1063 .....	51
Case 41/74 <i>Van Duyn v Home Office</i> [1974] ECR 1337 .....	64, 67, 134
Case 43/75 <i>Defrenne v Sabena</i> [1976] ECR 455 .....	64, 67, 95
Case 11/76 <i>Netherlands v Commission</i> [1979] ECR 245 .....	52
Case 33/76 <i>Rewe-Zentralfinanz</i> [1976] ECR 1989.....	63, 106
Case 45/76 <i>Comet</i> [1976] ECR 2043.....	63
Case 80/76 <i>North Kerry Milk Products Ltd</i> [1977] ECR 425 .....	94
Case C-106/77 <i>Simmenthal II</i> [1978] ECR 629.....	67, 135
Cases 117/76 and 16/77 <i>Ruckdeschel</i> [1977] ECR 1753 .....	53, 88, 118
Case 92/78 <i>Simmenthal v Commission</i> [1979] ECR 777 .....	6

Joined Cases C-212/80 to 217/80 <i>Amministrazione delle finanze dello Stato v Salumi</i> [1981] ECR 2735 .....	55, 115
Case 8/81 <i>Becker</i> [1982] ECR 53 .....	6
Case 15/81 <i>Gaston Schul BV v Inspecteur der Invoerrechten en Accijnzen</i> [1982] ECR 1409 .....	178
Case 283/81 <i>CILFIT v Ministry of Health</i> [1982] ECR 3415 .....	65, 68, 135
Case 249/81 <i>Commission v Ireland</i> [1982] ECR 4005 .....	144
Joined Cases 205-215/82 <i>Deutsche Milchkontor</i> [1983] ECR 2633 .....	6
Case 294/83 <i>Parti écologiste "Les Verts" v Parliament</i> [1986] ECR 1339 .....	49, 54, 105, 115
Case 152/84 <i>Marshall v Southampton Area Health Authority</i> [1986] ECR 723 .....	95
Cases 281, 283-285, 287/85 <i>Germany v Commission</i> [1987] ECR 3203 .....	96, 167
Case 314/85 <i>Foto-Frost</i> [1987] ECR 4199.....	64, 65
Case 374/87 <i>Orkem v Commission</i> [1989] ECR 3283 .....	51
Case C-350/88 <i>Société française des Biscuits Delacre v Commission</i> [1990] ECR I-395 .....	51
C-106/89 <i>Marleasing</i> [1991] ECR I-7321 .....	67
Case C-188/89 <i>Foster v British Gas</i> [1990] ECR I-3313 .....	95
Case C-358/89 <i>Extramet Industrie SA v Council</i> [1991] ECR 250 .....	54, 93
Cases C-6/90 and C-9/90 <i>Francovich and Bonifaci v Italy</i> [1991] ECR I-5357 .....	64, 90
Case C-91/92 <i>Faccini Dori v Recreb</i> [1994] ECR I-3325 .....	95
Case C-126/97 <i>Eco Swiss China Time Ltd</i> [1999] ECR I-3055 .....	53, 94, 118
C-202/97 <i>Fitzwilliam Executive Search v Bestuur van het Landelijk</i> [2000] ECR I-833 .....	68, 185
C-212/97 <i>Centros Ltd v Erhvervs- og Selskabsstyrelsen</i> [1999] ECR I-1459 .....	178
Case C-235/97 <i>France v Commission</i> [1998] ECR I-7555 .....	52
Case C-253/97 <i>Italy v Commission</i> [1999] ECR I-7529.....	52

Case C-278/98 <i>Netherlands v Commission</i> [2001] ECR I-1501 .....	52
Case C-285/98 <i>Kreil v Bundesrepublik Deutschland</i> [2000] ECR I-69 .....	91
Case C-376/98 <i>Germany v European Parliament and Council</i> [2000] ECR I-8419 .....	167
Case C-496/99 P <i>Commission v CAS Succhi di Frutta</i> [2004] ECR I-3801 .....	55, 96
Case C-50/00 P <i>Unión de Pequeños Agricultores v Council</i> [2002] ECR I-6677 .....	53, 55
Case C-453/00 <i>Kühne and Heitz</i> [2004] ECR I-837 .....	53, 94, 118
C-167/01 <i>Kamer van Koophandel en Fabrieken v Inspire Art</i> [2003] ECR I-10155 .....	178
Case T-177/01 <i>Jégo-Quéré et Cie SA v Commission</i> [2002] ECR II-2365 .....	53
Case C-491/01 <i>R v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd</i> [2002] ECR I-11453 .....	91, 97, 103
Case 105/03 <i>Pupino</i> [2005] ECR I-5285 .....	206
Case C-210/03 <i>R (Swedish Match)</i> [2004] ECR I-11893 .....	91, 97, 103
Case C-380/03 <i>Germany v Parliament and Council</i> [2006] ECR I-11573 .....	167
Case C-144/04 <i>Mangold v Rüdiger Helm</i> [2005] ECR I-9981 .....	53, 95, 118
C-196/04 <i>Cadbury Schweppes Plc v Inland Revenue Commissioners</i> [2006] ECR I-7995 .....	178
Case C-234/04 <i>Kapferer v Schlank &amp; Schick</i> [2006] ECR I-2585 .....	53, 94, 118
C-354/04 P <i>Gestoras Pro Amnistía and Others v Council</i> [2007] ECR I-1579 .....	55
C-355/04 P <i>Segi and Others v Council</i> [2007] ECR I-1657 .....	55
Case C-303/05 <i>Advocaten voor de Wereld</i> [2007] ECR I-3633 .....	202, 211, 216, 217, 223, 237
Case C-391/05 <i>Jan de Nul NV v Hauptzollamt Oldenburg</i> [2007] ECR I-1793 .....	94
Case C-402/05 and C-415/05 <i>Commission v Kadi</i> [2008] ECR I-6351 .....	49, 55, 56, 115
Case C-438/05 <i>Viking</i> [2007] ECR I-10779.....	126
Case C-341/05 <i>Laval</i> [2007] ECR I-11767.....	126

Case C-55/06 <i>Arcor AG &amp; Co KG v Germany</i> [2008] ECR I-2931.....	104
Case C-308/06 <i>Intertanko v Secretary of State for Transport</i> [2008] ECR I-4057.....	161
Case C-555/07 <i>Seda Kücüdeveci v Swedex GmbH &amp; Co KG</i> [2010] ECR I-365 .....	53, 95, 118
Case C-66/08 <i>Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski</i> [2008] ECR I-6041 .....	208
Joined cases C-71/09 P, C-73/09 P and C-76/09 P <i>Comitato 'Venezia vuole vivere' and Others v Commission</i> [2011] ECR I-4727 .....	53
Case C-261/09 <i>Mantello</i> [2010] ECR I-11477 .....	214
Case C-279/09 <i>DEB</i> [2010] ECR I-13849 .....	55, 63, 105
Case C-617/10 <i>Åklagaren v Hans Åkerberg Fransson</i> (26 February 2013) .....	105, 118, 227
C584/10, C-593/10 and C595/10 <i>Commission and Others v Kadi</i> (GC, 18 July 2013) .....	114, 115
Case C-280/11 P <i>Council v Access Info Europe</i> (GC, 13 October 2013) .....	153
Case C-396/11 <i>Proceedings relating to the execution of European arrest warrants issued against Ciprian Vasile Radu</i> (GC, 13 January 2013) .....	208
Case C-399/11 <i>Melloni v Ministerio Fiscal</i> (GC, 26 February 2013) .	67, 70, 208, 226, 227, 237, 238
C-501/11 P <i>Schindler Holding Ltd and others v Commission</i> (GC, 18 July 2013) .....	114, 115
Case C-583/11 P <i>Inuit Tapiriit Kanatami and Others v Parliament and Council</i> (GC 3 October 2013) .....	53, 92, 106, 167
Case C-274/12 P <i>Telefónica SA v Commission</i> (GC, 19 December 2013) .....	53
Case C-350/12 P <i>Council v Sophie in 't Veld</i> (GC, 3 July 2014) .....	153
Case C-137/13 <i>Herbaria Kräuterparadies GmbH</i> (GC, 5 November 2014) .....	144, 161
Case T-754/14 <i>Efler and others v Commission</i> (10 November 2014) .....	146

## European Court of Human Rights

<i>Soering v UK</i> App no 14038/88 (ECtHR 7 July 1989) .....	228
<i>Peers v Greece</i> App no 28524/95 (ECtHR 19 April 2001) .....	228
<i>Mamatkulov Askaron v Turkey</i> App nos 46827/99 and 46951/99 (ECtHR 4 February 2005) ...	228
<i>Saadi v Italy</i> App no 37201/06 (ECtHR 28 February 2008) .....	228
<i>Slawomir Musial v Poland</i> App no 28300/06 (ECtHR, 20 January 2009) .....	228
<i>Orchowski v Poland</i> App no 17885/04 (ECtHR 22 October 2009) .....	228
<i>Canali v France</i> App no 40119/09 (ECtHR 25 April 2013) .....	228
<i>Vasllescu v Belgium</i> App no 64682/12 (ECtHR 18 March 2014) .....	228

## Germany

BVerfGE 37, 271 2 BvL 52/71 ( <i>Solange I</i> ) .....	68
BVerfGE 73, 339 2 BvR 197/83 ( <i>Solange II</i> ) .....	68
BVerfG 1 BvR 1215/07 .....	68
BVerfG 2 BvE 2/08 ( <i>Lisbon</i> ) .....	68

## Republic of Ireland

<i>Minister for Justice v Robert Rettinger</i> (2010) IESC 45 .....	209
<i>Minister for Justice v Stapleton</i> [2007] IESC 30 .....	211
<i>Crotty v An Taoiseach</i> [1986] IEHC 3, [1987] IR 713, [1987] 2 CMLR 666 .....	69
<i>SPUC v Grogan (No 2)</i> [1993] 1 CMLR 197 .....	69
<i>Pringle v Ireland</i> [2012] IEHC 296, [2013] 1 CMLR 16 .....	69

## United Kingdom

<i>Assange v Swedish Prosecution Authority (Nos 1 and 2)</i> [2012] UKSC 22, [2012] 2 AC 471 ....	208, 214, 226
<i>Office of the King's Prosecutor, Brussels v Cando Armas</i> [2006] 2 AC 1 .....	214
<i>Bucnys v Ministry of Justice, Lithuania</i> [2013] UKSC 71, [2014] AC 480 .....	214
<i>Thoburn v Sunderland City Council</i> [2003] QB 151 .....	68
<i>R(HS2) v Secretary of State for Transport</i> [2014] UKSC 3, [2014] 1 WLR 324 .....	68

## Other Jurisdictions

<i>Re Execution of a German Arrest Warrant: Tsakas and Anor</i> [2007] CMLR 24 (Greece) .....	211
<i>Frontini v Ministero delle Finanze (No.183)</i> [1974] 2 CMLR 372 (Italy) .....	68
<i>Re Constitutionality of Framework Decision on European Arrest Warrant</i> [2007] 3 CMLR 24 (Czech Republic) .....	211
<i>Administration des Douanes v Société 'Cafés Jacques Vabre'</i> [1975] 2 CMLR 336 (France) .....	68
<i>Re Nicolo</i> [1990] 1 CMLR 173 (France) .....	68
Polish Constitutional Tribunal, judgment of 27 April 2005, P 1/05 (Poland) .....	211

# TABLE OF PRIMARY LEGAL SOURCES

## Treaties

Treaty establishing the European Coal and Steel Community (1951)

Treaty on European Union [1992] OJ C191

Treaty of Amsterdam [1997] OJ C 340

Consolidated Version of the Treaty on European Union [2002] OJ C 325

Consolidated Version of the Treaty on European Union [2012] OJ C 326

Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326

Charter of Fundamental Rights of the European Union [2012] OJ C 326

## European Union Legislation

Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision 2002/584/JHA

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347

Directive 2010/64 EU of the European Parliament and Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280

Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2014] OJ 77/95

Proposal for Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation COM (2015) 135

Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [2011] L 345/8

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142

Council Directive 2014/23/EU on the award of concession contracts [2014] OJ L 94/1

Council Directive 2014/24/EU on public procurement [2014] OJ L 94/65

Council Directive 2014/25/EU on procurement by entities operating in the water, energy, transport, and postal services sectors [2014] OJ L 94/243

Proposal for Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings [2013] COM (2013) 824 final

### **UK Legislation**

European Communities Act 1972

European Union Act 2011

Human Rights Act 1998



# CHAPTER ONE

## *Introduction*

### 1 INTRODUCTION

---

This thesis concerns the rule of law and the EU legal order. I advance, develop and defend an EU-centric account of the rule of law [EUCA] which is apt for the *sui generis*, specific nature of the EU legal order. In this chapter, I introduce the value of adherence to the rule of law by the European Union in a time of unprecedented uncertainty.

Beginning in **Section 2**, I introduce the ideal of the rule of law. I introduce the near-cacophony of voices and opinions regarding the meaning, purpose, requirements, and values of the rule of law. I suggest the best means of navigation to determine the value of the rule of law, and outline what I understand the rule of law to mean. In **Section 3**, I introduce the argument that adherence to the rule of law can be a constructive step towards the resolution of crisis in a time of unprecedented uncertainty for the EU. I then provide an overview of the structure of the thesis in **Section 4**, and outline the content of each chapter. In **Section 5**, I identify and clarify the terminology regarding the rule of law that I have adopted in the thesis.

### 2 THE VALUE OF THE RULE OF LAW

---

The Rule of Law is an ideal. The rule of law, along with human rights, equality, and democracy, forms one of the core values which a legal system ought to manifest, and which is epitomised in an ideal legal system. The rule of law has gained global appeal and recognition, and a political system based on the rule of law is considered a paradigmatic of the constitutions of western liberal states,<sup>1</sup> and called ‘the backbone of modern constitutional democracies.’<sup>2</sup> The

---

<sup>1</sup> Jeremy Waldron, ‘The Concept and the Rule of Law’ (2008) Georgia LR 1.

<sup>2</sup> Commission, ‘Communication to the European Parliament and Council, A New Framework to strengthen the Rule of Law’ (Communication) COM (2014) 158.

rule of law is considered a ‘prerequisite for any efficacious legal order,’<sup>3</sup> and principles of the rule of law form a standard against which a legal system can be evaluated. For this reason, the rule of law has been referred to as the ‘benchmark of political legitimacy’.<sup>4</sup> In even more evocative language, the rule of law is a ‘star in a constellation of ideals that dominate our political morality’.<sup>5</sup> However, for all the promise of the rule of law, it remains an elusive term:

[...] few government leaders who express support for the rule of law, few journalists who record or use the phrase, few dissidents who expose themselves to the risk of reprisal in its name, and few of the multitude of citizens throughout the world who believe in it, ever articulate precisely what it means.<sup>6</sup>

Many theorists have attempted to encapsulate the meaning of the rule of law, and to explain its purpose. Hayek stated the rule of law ‘stripped of all technicalities [...] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.’<sup>7</sup> Lon Fuller provides eight desiderata of the rule of law based on the premise that the law is ‘the enterprise of subjecting human conduct to the governance of rules’.<sup>8</sup> Habermas’ *Rechtsstaat* envisioned legality as being rooted in morality,<sup>9</sup> while Joseph Raz concludes that the rule of law aims to ‘minimize the danger created by the law itself’.<sup>10</sup> The rule of law, therefore, has instrumental value, and is not a ‘moral virtue as such’.<sup>11</sup>

Trevor Allan states that the British Constitution is founded on a concept of the rule of law which values ‘liberty as independence’<sup>12</sup> and thus ‘imposes a requirement of *justification*,

---

<sup>3</sup> Margaret Jane Radin, ‘Reconsidering the Rule of Law’ (1989) BULJ 781, 783.

<sup>4</sup> Waldron, ‘The Concept and the Rule of Law’ (n 1) 1.

<sup>5</sup> Jeremy Waldron, ‘The Rule of Law and the Importance of Procedure’ (2010) NYU School of Law Public Law Research Paper No 10-73 <ssrn.com/abstract=1688491> accessed 2 February 2016.

<sup>6</sup> Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 3.

<sup>7</sup> Friedrich A Hayek, *The Road to Serfdom* (Chicago University Press 1944) 54.

<sup>8</sup> Lon Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969) 106.

<sup>9</sup> Jürgens Habermas, ‘Recht und Gewalt: ein deutsches Trauma’ in his, *Die Neue Unübersichtlichkeit: Kleine Politische Schriften V* (Suhrkamp 1985) 109.

<sup>10</sup> Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 224.

<sup>11</sup> *ibid* 226.

<sup>12</sup> Trevor RS Allan, *The Sovereignty of Law* (OUP 2013) 12.

connecting restrictions on liberty to a public or common good, open to fearless public debate and challenge'.<sup>13</sup> Kalypso Nicolaidis and Rachel Kleinfeld envision the rule of law as freedom from the three tyrannies of fear, the few and the majority.<sup>14</sup> According to Geert de Baere, the requirements of the rule of law 'apply to states for the sake of individuals', and the purpose of law is 'not primarily the efficient attainment of governmental objectives, but the provision of a stable constitutional framework for interaction between citizens and between citizens and the state'.<sup>15</sup> Here, I would agree with Olufemi Taiwo, '[t]here are almost as many accounts of the "rule of law" as people defending it' <sup>16</sup>

Perhaps, the ambivalence regarding the exact meaning of the rule of law is a reason for its success: '*il successo del termine stato di diritto sia dato dalla sua vaghezza*';<sup>17</sup> '*Volatil – il est dans l'air du temps et sur toutes les lèvres -, le vocable se fait fuyant et insaisissable*'.<sup>18</sup> Succinctly described by Jowell, 'the rule of law has meant many things to many people.'<sup>19</sup> However, the ambiguity in the meaning of the rule of law, as well as the many (conflicting) accounts of it, has led to criticism. Judith Shklar calls the rule of law 'just another one of those self-congratulatory rhetorical devices', <sup>20</sup> and an 'unfortunate outburst of Anglo-Saxon parochialism'.<sup>21</sup> Focus solely on the rule of law, if it is narrowly defined can distract from other values of the legal system, where as a broad, all-encompassing account of the rule of law is

---

<sup>13</sup> *ibid* 91.

<sup>14</sup> Kalypso Nicolaidis and Rachel Kleinfeld, 'Rethinking Europe's "Rule of Law" and Enlargement Agenda: the Fundamental Dilemma' (2012) Jean Monnet Working Paper 12/12, 6 <[www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org)> accessed 14 June 2014: 'the tyranny of fear – no individual may be arbitrarily treated, punished nor imprisoned by the State, nor by the powerful; the tyranny of the few – no King, Minister nor Mafioso is above the law; and the tyranny of the majority – no minority group may be persecuted with impunity.'

<sup>15</sup> Geert de Baere, 'European integration and the rule of law in foreign policy' in Julie Dickson and Pavlos Eftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 358.

<sup>16</sup> Olufemi Taiwo, 'The Rule of Law: The New Leviathan?' [1999] 12 CJLJ 151, 154.

<sup>17</sup> Francesco Biondo, *Stato di Diritto o Stato di Giustizia? Osservazioni Critiche su un'Alternativa Toppo Rigida* (Diritto & Questioni Pubbliche 2004) 7. [most likely, the term 'Rule of Law' is successful due to its vagueness (my translation)].

<sup>18</sup> Luc Heuschling, *État de Droit – Rechtsstaat – Rule of Law* (Daloz 2002) 1. [Volatile, it is in tune with the times and on everyone's lips – at once elusive and fleeting (my translation)]

<sup>19</sup> Jeffrey Jowell, 'The Rule of Law Today' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (3<sup>rd</sup> edn, OUP 1994) 57.

<sup>20</sup> Judith Shklar, 'Political Theory and The Rule of Law' in A Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1.

<sup>21</sup> *ibid* 26.

meaningless. How then can I argue that the rule of law has value to the EU legal order, when there is so much ambiguity in the term?

The answer is in the common thread, or a common recognition of the *value* of the rule of law to legal systems and also the shared understanding that the value of rule of law is an essential to ensure the *legitimacy* of EU action. Adherence to the rule of law is an essential element ensuring the legitimacy of the EU legal order.

### 3 THE EU IN CRISIS: THE RULE OF LAW AS PART OF THE RESOLUTION

---

The EU is in a state of crisis. The successive series of crises have caused greater political and legal turmoil for the EU in the last decade than in the previous half century. The European Union is struggling to maintain stability under the extreme strain in the wake of the financial crisis and the ongoing conflict in the Ukraine, with concerns for systematic violations of the rule of law in Member States including Poland and Hungary, the strain of the Migrant Crisis, and the result of the 2016 ‘Brexit’ Referendum.<sup>22</sup> Confidence in the EU is falling; participation in the European Parliamentary Elections fell to a record low,<sup>23</sup> and there has been a significant rise in far-right, anti-EU parties.<sup>24</sup> Growing political and legal scepticism of the increasing extension in the scope and authority of the Union has led to a call for a rebalancing of power between the Member States and the EU, and a consequent struggle by EU institutions to maintain their claim to legitimacy.

---

<sup>22</sup> At the time of writing, the Article 50 TEU process has not been triggered by the UK Parliament, thus there is no certainty as to whether the UK will leave the EU.

<sup>23</sup> Participation was 42.61% across the EU. The European Parliament publishes the Results of the 2014 European Elections at <[www.europarl.europa.eu/aboutparliament/en/20150201PVL00021/Previous-elections](http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00021/Previous-elections)> accessed 3 September 2015. See Honor Mahony, ‘EU election turnout at record low after all’ *EUObserver* (Brussels 6 August 2014); and Martin Banks, ‘Voter turnout in May’s European elections was lowest ever’ *The Telegraph* (London, 6 August 2014).

<sup>24</sup> ‘The Eurosceptic Union’ *The Economist* (Brussels, 31 May 2014); Allister Heath, ‘Europe could be torn apart by the wrong sort of Eurosceptics’ *The Telegraph* (London, 5 February 2015); Francesco Nicoli, ‘Electoral Euroscepticism, Turnout and the Economic Crisis: Evidence from a 108-Elections Panel Study Across Europe’ (18 June 2015) <[ssrn.com/abstract=2620220](http://ssrn.com/abstract=2620220)> accessed 3 September 2015; and Douglas Murray, ‘Euroscepticism is growing all over Europe’ *The Spectator* (London, 3 October 2015).

Through years of accusations of competence creep, and ‘allegedly over-zealous’<sup>25</sup> use of Articles 114 and 352 Treaty on the Functioning of the European Union [TFEU] in contravention of the principle of conferral,<sup>26</sup> there is an argument that issues of rule of law compliance have grown worse in scale and context, and in response to current and on-going crises, there have been accusations that EU Institutions have been willing to compromise on adherence to its own binding legal obligations. In one instance, the legal measures introduced by the EU and Member States in response to the euro crisis have been identified as a threat to the rule of law and democracy, as opaque, complex and confusing measures of EU law and agreements between states serves to distance economic governance from the control of elected governments and national parliaments.<sup>27</sup> As Peers writes, it is ‘hardly acceptable that the basic rules on the EU’s coordination and control of fundamental national economic decisions are essentially unintelligible.’<sup>28</sup> I argue that in such political and legal turmoil, the rule of law, an as yet amorphous and underused concept in EU legal discourse, provides a significant part of the solution, and a constructive path forward in the development of the EU legal order.<sup>29</sup>

The rule of law is declared in Article 2(1) of the Treaty on the European Union (TEU) as one of the ‘values common to all Member States’ upon which the Union was founded, and it is an objective which EU institutions are mandated to pursue under Article 2(2) TEU. The declaration of values upon which the EU is claimed to be founded was a distinctive symbol of the EU’s evolution from economic community to political Union. The founding vision of a united Europe was to prevent war through economic co-dependence, and mutual self-interest. Initially a free-trade agreement, the Treaties have successively evolved far beyond the original intentions of the six founding members. The process of integration has accelerated over the

---

<sup>25</sup> Editorial Comments (2016) CMLR 597, 599.

<sup>26</sup> Stephen Weatherill, ‘Competence creep and competence control’ (2004) YEL 1.

<sup>27</sup> Sionaidh Douglas-Scott, *Law after Modernity* (Hart Publishing 2013) ch 8.

<sup>28</sup> Steve Peers, ‘Analysis: Draft Agreement on Reinforced Economic Union (REU Treaty)’ *Statewatch* (21 December 2011) <<http://www.statewatch.org/analyses/no-164-reu-treaty.pdf>> accessed 1 May 2015.

<sup>29</sup> The question of whether the EU is a legal system or systems is also subject to debate, and on this point, I follow Tuori in distinguishing a legal order as a ‘symbolic-normative phenomenon’ while a legal system refers to ‘legal practice, adjudication and scholarship’. K Tuori, ‘The Many Constitutions of Europe’ in K Tuori and S Sankari (eds), *The many Constitutions of Europe* (Ashgate 2010) 3-30. See also Julie Dickson, ‘Towards a Theory of European Union Legal Systems’ in J Dickson and P Eleftheiriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2013).

past few decades with the Single European Act, the Maastricht Treaty, European Citizenship, the single currency, the Lisbon Treaty, the Charter of Fundamental Rights [CFR], and the European Arrest Warrant. The consistently broad interpretation of the Treaties by the Court of Justice of the European Union since the 1960s has led to ‘the juridification of the integration process and [...] the autonomization of European law from political and administrative actors.’<sup>30</sup> Integration and the autonomy<sup>31</sup> of Union law have been secured primarily through the development of EU legal principles: direct effect,<sup>32</sup> effectiveness,<sup>33</sup> primacy,<sup>34</sup> and state liability.<sup>35</sup> The assertion of the EU as an authoritative legal order has been reflected in the constitutionalisation<sup>36</sup> of the Treaties. For some, the creation of an autonomous and authoritative legal order has been both the object and the measure of success of the EU’s development over the past sixty years.<sup>37</sup> However, the last decade of successive crises has shown the fault lines in the EU.

A rule of law crisis threatens the legitimacy and integrity of the Union, exacerbated by and on a par with the financial and refugee crises. Some Member States appear to be reforming their legal systems in a way which creates systemic breaches of the rule of law,<sup>38</sup> while, at EU level modes of governance cause concern for rule of law adherence. For example, Sionaidh Douglas-Scott identified a number of problematic areas of concern for rule of law adherence of the EU legal order including, the ‘overuse of broad, vague principles and standards engendering unpredictability’, and the confusion and opacity of law-making in the EU legal

---

<sup>30</sup> Armin von Bogdandy and Michael Ioannidis, ‘Systemic Deficiency in the Rule of Law: What is it, what has been done, What can be done’ [2014] CMLR 59, 63. See for discussion Joseph Weiler, ‘The Community System’ (1981) YEL 267.

<sup>31</sup> Case 6/64 *Costa v ENEL* [1964] ECR 1195.

<sup>32</sup> For example, of Treaty provisions (Case 26/62 *Van Gend en Loos* [1963] ECR 11); decisions (Case 9/70 *Grad* [1970] ECR 825, para 5); directives (Case 8/81 *Becker* [1982] ECR 53, para 29); and other legal obligations (Case 181/73 *Haegeman* [1974] ECR 449, paras 2 et seq).

<sup>33</sup> Joined Cases 205-215/82 *Deutsche Milchkontor* [1983] ECR 2633, para 22.

<sup>34</sup> Case 92/78 *Simmmenthal v Commission* [1979] ECR 777, para 39.

<sup>35</sup> Case 181/73 *Haegeman* [1974] ECR 449, para 2.

<sup>36</sup> Eric Stein, ‘Lawyers, judges and the making of a transnational constitution’ (1981) AJIL 1; and Joseph Weiler, ‘The transformation of Europe’ (1991) YLJ 2403.

<sup>37</sup> See Mark Dawson, ‘Soft Law and the Rule of Law in the European Union: Revision or Redundancy?’ in Antoine Vauchez and Bruno De Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart Publishing 2013) 221.

<sup>38</sup> See Chapter 2, Section 4. For the Commission’s response to growing rule of law concerns, see Chapter 3, Section 4.

order, which results in a large amount of law made by the (unelected) European Commission.<sup>39</sup> The remedy of these issues lies with observance of the rule of law.<sup>40</sup>

Adherence to the rule of law provides constructive guidance in times of uncertainty, and a source of legitimacy from the perspective of Member States and EU citizens. The EU is a *sui generis* polity still evolving.<sup>41</sup> The rule of law is an essential element of legitimacy for EU action;<sup>42</sup> it is fundamental to good governance; and provides a constructive solution to the political and legal turmoil which the EU now faces. For the rule of law to guarantee these fundamental ideals and goals, it is necessary for the EU to adhere to the rule of law. To provide a standard by which the EU can be evaluated, and to aid and guide the future development of this evolving supra-national polity, an apt standard of the rule of law which is suitable to the specific features of the EU is needed. In this thesis, I forward and advocate an account of the rule of law which is suited to the specific nature of the EU.

#### 4 OVERVIEW AND CHAPTERS SUMMARY

---

The thesis is divided in three parts, corresponding broadly to the theory of my EU-centric account of the rule of law (*Part I – In Principle*); practical application of the account (*Part II – In Practice*); and contextualisation of the account within a larger framework of values, and concluding perspectives (*Part III – In Prospective*). An outline of the content of each chapter is as follows.

---

<sup>39</sup> Sionaidh Douglas-Scott, *Law after Modernity* (Hart Publishing 2013) 283.

<sup>40</sup> *ibid*; and Sionaidh Douglas-Scott, ‘The Rule of Law in the European Union – putting the security into the “Area of Freedom, Security and Justice”’ (2004) 29 ELR 219.

<sup>41</sup> Neil Walker ‘The Philosophy of European Union Law’ in Anthony Arnall and Damien Chalmers (eds), *Oxford Handbook of European Union Law* (OUP 2015).

<sup>42</sup> The rule of law as a source of legitimacy for EU action is considered in detail in Chapter 4.

## PART I – ‘IN PRINCIPLE’

### Chapter 2: The Many States of the Rule of Law

In this chapter, I examine established and contemporary accounts of the rule of law to discern whether there is a shared value of the rule of law, and what it is. I present a critical overview of the central political and philosophical debates regarding the rule of law, and delineate the divergent conceptions of the rule of law across linguistic, cultural and national boundaries within the Member States of the EU. I critically analyse the debate in common law accounts of the ‘rule of law’ between formal and substantive accounts of the rule of law. I examine and compare *Rechtsstaat*, *État de droit* and the rule of law, and reveal the state-centricity of these concepts. I then examine the challenges of assimilating a foreign model of the rule of law in Member States including Bulgaria and Hungary, and highlight the ongoing tensions and challenges to the rule of law in these states and Poland. I conclude that while the rule of law is a universal value of a legal system, the accounts which instantiate the value of the rule of law must be apposite to the legal system: it must be adapted to the specific nature of that legal system.

### Chapter 3: A Complex Community - Complications of the Rule of Law at EU Level

In this Chapter, I consider the concept of the rule of law at EU level. I identify the genesis of the rule of law in EU law, and identify its place in the Treaties. I ask whether the EU has provided a clear account of the standard of the rule of law by which it holds itself to account. I examine EU Institutional dialogue. I also examine the development of EU administrative law as intrinsically linked to the rule of law, and examine its use as a concept in the jurisprudence of the Court of Justice. I conclude that while the rule of law has been a legitimating tool to further European integration, no clear and self-reflective account of the rule of law has been provided. I then examine the specific nature of the EU which supports the argument for the

necessity of an apt account of the rule of law at EU level. I highlight: the EU's multi-level governance; the necessity of relying on Member States to apply and enforce EU law; the application of EU law in different legal traditions; and the complicated system of conferral and doctrine of supremacy of directly effective EU law. This is of particular relevance in light of the New Framework to Strengthen the Rule of Law mechanism to monitor and investigate rule of law violations in Member States. I question why there is no equivalent mechanism for monitoring EU institutional compliance with the rule of law. Building on the arguments of this chapter, I conclude the necessity of an EU-apt account of the rule of law suited to the specific nature of the EU and a source of legitimacy for the EU legal order.

#### **Chapter 4: The EU-Centric Account of the Rule of Law**

In this chapter, I provide the EU-apt account of the Rule of Law [EUCA]. I begin by outlining the complications of positing an apt account of the rule of law which is suitable for the distinctive features of the EU. I introduce the principles of EUCA which flow from the value of the rule of law in the EU legal system, and locate them (where possible) in existing practice and jurisprudential discourse. I then address EUCA in context of contemporary literature on the rule of law. I highlight further the 'EU-centric' aspect of EUCA, and show how it is adapted to the specific nature of the EU, outlined and examined in Chapter 3. I consider some of the possible means of monitoring and enforcing EUCA, and examine the relationship between EUCA *principles* from General *Principles* of EU law. I provide an overview of how the rule of law in EUCA can provide a source of legitimacy for the EU, but also highlight some of the limitations to this argument. I conclude that EUCA is fit for purpose in providing an apt account of the rule of law for the EU, and can be a source of ensuring and enhancing the legitimacy of the EU legal order.

## PART II – ‘IN PRACTICE’

Part II focuses on the practical application of EUCA in real settings of current conflicts and difficulties experienced within the EU legal system. In this way, I seek to bridge the gap between an abstract account of the rule of law, and what adherence to the account of EUCA would mean in practice. I advance the practical application of EUCA in the context of issues of contemporary concern experienced within the EU legal order. Building on the idea of ‘stakeholder perspectives on legitimacy’ developed in Chapter 4, I adopt three perspectives to demonstrate the apt nature of EUCA as a measure of rule of law compliance and as a means of ensuring the legitimacy of the EU and by the EU legal system. These perspectives are the EU institutions (Chapter 5); the Member States (Chapter 6); and, finally, the individual (Chapter 7). In the second part of the Chapters, I argue that adhering to a high level of rule of law compliance can provide constructive solutions to crises. I analyse three case studies which are both narrow in scope, but are also representative of larger issues and tensions within the EU and reflective of the perspectives of the Chapters. The framework of the Chapters, and justification for the choice of case studies, is laid out in further detail at the beginning of *Part II – In Practice* before Chapter 5.

### Chapter 5: EUCA and the EU Institutions

In this chapter, I consider the value of EUCA from the perspective of the EU institutions. I focus on the central EU institutions with executive, legislative and judicial functions: the Commission, the Council and the Parliament, and the Court of Justice of the EU. I address the value of EUCA to the EU Institutions, and argue why it is in the best interests of the Institutions to endorse EUCA. I propose and recommend monitoring and enforcement mechanisms which would be suitable for ensuring EU compliance with EUCA.

The case study concerns the **Transatlantic Trade and Investment Partnership (TTIP)**. The TTIP is a proposed international trade agreement under negotiation between the EU and the US. This agreement has the potential to radically change the shape of the Internal

Market, and it covers areas including market access, regulatory barriers to trade, intellectual property, and foreign investment protection. I assess critical rule of law concerns as regards TTIP negotiations including the criticism that there is a lack of transparency in negotiations, and that the proposed Investor-State Dispute Settlement mechanism violates the rule of law. On the basis of EUCA evaluations, I provide guidance as to how these issues may be resolved from a rule of law perspective.

## **Chapter 6: EUCA and the EU Member States**

In this chapter, I consider the value of EUCA from the perspective of the Member States. I provide reasons to show how it is in the best interests of Member States to endorse EU compliance with EUCA.

In this chapter's case study, I critically assess EU measures regarding **Tax Avoidance and Advance Tax Rulings** in light of EUCA. Taxation in the EU is one of the most politically sensitive areas of national law. Tax is also a field of law where core concepts of the rule of law are especially pertinent as they are essential to the fair administration of taxation. This case study illustrates the use of EUCA as an apt standard of guidance in resolving some of the tensions created between EU competence to improve the functioning of the internal market and some Member States' political and legal preference for tax competitiveness.

## **Chapter 7: EUCA and the Individual**

In this Chapter, I focus on the individual and the citizen of the EU. I argue that individuals ought to endorse EUCA as it enhances and strengthens the position of the individual within the EU.

The **European Arrest Warrant** serves as the case study for this chapter. It is drawn from the intersection between national criminal law and EU law to highlight the complexities of the EU legal system when there is a criminal element as it provides a flash point between

criminal law, procedural justice, mutual trust and cooperative authority. Similar to taxation, the criminal law is an area of a high degree of political sensitivity but also an area where the core principles of the rule of law are essential. In no other area of the law is the extreme disparity of power between the state and the individual more pronounced than in the criminal law. I evaluate the European Arrest Warrant against the standard set by EUCA, and provide recommendations to resolve deficiencies found therein.

### **PART III – ‘IN PROSPECTIVE’**

#### **Chapter 8: Concluding Perspectives**

In the final Chapter, I summate the conclusions of the thesis. I also identify some of the challenges to, and limitations of, my thesis. I then place EUCA within the larger fabric of values of good governance by reflecting on the relationship between EUCA and other foundational values of Article 2 TEU. I suggest how EUCA can support and strengthen these values, but also how there may sometimes be tension between the requirements of the rule of law and the realization of other values of the EU legal system. I posit what could be next for EUCA in terms of further avenues of research and exploration. I conclude the thesis on the fundamental importance of protecting, strengthening, and realising the foundational values of the EU Treaties, not just as a means of resolution in times of crisis, but as a guarantee of the future of the European Union.

## **5 TERMINOLOGY**

---

The aim of this thesis is to provide an abstract analysis of the concept of the rule of law in the EU, and to demonstrate practical implications of an apt account of the rule of law. In this section, I introduce and define the terminology I have adopted in consideration of semantics associated with the term ‘rule of law’. I clarify the use of the following terms: the meaning of

*account*; the distinction between *concept*, *account*, and *principle*; the choice of *formal* and *substantive* as **descriptive terms** for the rule of law; and the language and translation decisions.

In terms of *account*, I distinguish between a general account of *law* (a descriptive account of the properties of law)<sup>43</sup> and an account of the *rule of law* (a normative standard against which a legal system ought to be evaluated). I recognise that there could be disagreement with this understanding: for example, Kramer presents the rule of law as a set of conditions in the creation, promulgation and application of the law which a legal system ought to fulfil in order to be considered a legal system.<sup>44</sup> However, this is a confusion of a general account of law (an identification of what law *is*), and an account of the rule of law (how law *ought* to be enacted, promulgated and applied). In Chapter 4, I develop an apt account of the rule of law for the EU, which is a normative standard of how the EU legal order *ought* to act in order to be considered rule of law compliant.

I distinguish carefully between the terms *concept*, *account*, and *principle*. I understand the *concept* of the rule of law to mean the ideal of the rule of law; whereas an *account* of the rule of law is a statement of a theorist which describes or defines the properties of the rule of law. Thus, I refer to Raz's *account*, or Fuller's *account* of the *concept* of the rule of law. I have used *principle*<sup>45</sup> to connote a foundational proposition of a concept. In Chapter 4, I describe the relationship between the principles of my EU-centric account of the rule of law, and the General Principles of the European Union.

There is a great range of **descriptive terms** used in an effort to distinguish and define the scope and meaning of rule of law, ie *formal/substantive*; *thick/thin*; *negative/positive*; *weak/strong*. For clarity, I have adopted the use of the terms 'formal' and 'substantive' as I find

---

<sup>43</sup> For the 'basic questions about the nature of law' see John Gardner, 'Law in General' in his, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) ch 5, and Leslie Green, 'Legal Positivism' in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Fall 2009 Edition) <<http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>> access 5 January 2016. And in the EU context, Walker (n 41).

<sup>44</sup> Matthew Kramer, *In Defence of Legal Positivism* (OUP 1999) 238.

<sup>45</sup> Unless otherwise distinguished for the purpose of the French (*un principe*) or German (*das Prinzip*) terms in Chapter 2.

these terms are more helpfully descriptive, and neutral in connotation. However, I highlight in the footnotes where there has been divergence or difference of opinion among theorists discussed.

Finally, as the thesis engages in a comparative analysis of accounts of the rule of law in different Member States, I have endeavoured, where possible and relevant, to use the original language. I aim to highlight the nuances of legal and jurisprudential language across Member States. For example, as is analysed in Chapter 2, the linguistic distinction between *État de droit*, *Rechtsstaat* and the rule of law are illuminative of a unique understanding of the concept localised to the system in which they developed.<sup>46</sup> Judgments of the Court of Justice of the European Union are quoted from the English versions, except for cases in which there is an interesting nuance between the original French judgments and the English translations: for example the use of *Communauté de droit* as opposed to *État de droit*.

---

<sup>46</sup> See Chapter 2, Section 2.

# PART I – IN PRINCIPLE

## CHAPTER TWO

### *The Many States of the Rule of Law*

#### 1 INTRODUCTION

---

In this chapter, I consider the concept of the rule of law. I examine established and contemporary accounts of the rule of law. I present a critical overview of the central political and philosophical debates regarding the rule of law, and delineate the divergent conceptions of the rule of law across linguistic, cultural and national boundaries within the Member States of the EU. As it is not possible to examine the unique historical development of the rule of law in all, or even most, of the Member States of the EU, I provide relevant analysis, highlighting the main debates and challenges to the rule of law, in respect of issues of ongoing contemporary importance in the EU Member States.<sup>1</sup> I analyse accounts of the rule of law in the abstract, divorced from particular national political and institutional mechanisms but within broader ‘families’ of legal systems (common, civil, transitional), in order to discover whether there is a ‘universal’ account of the rule of law applicable to all legal systems. I conclude that while the rule of law is a shared value across legal systems, unique accounts develop within and adapt to each legal system.

In **Section 2**, I examine common law accounts of the rule of law. I begin with a short introduction to the development of the concept. I then consider the central disagreement within contemporary rule of law debate in Anglo-American accounts of the rule of law. Broadly, the point of contention lies in the question of whether substantive virtues (such as

---

<sup>1</sup> For an historic, though ‘impressionistic, episodic and highly selective’ overview of the development of the rule of law in the common law world, see Tom Bingham, *The Rule of law* (Penguin 2010) ch 2. For a comparative historical study of *État de droit*, *Rechtsstaat* and the rule of law, see Luc Heuschling, *État de droit – Rechtsstaat – law* (Dalloz 2002); and Pietro Costa and Danilo Zolo (eds), *The Rule of Law* (Springer 2007).

equality, or human rights) are essential components of the rule of law. This section sets out the fundamental understandings of the meaning of the rule of law in the common law context.

In **Section 3**, I consider ‘state of law’ accounts of the rule of law which are features of civil law legal systems. I examine, then compare, accounts of the ‘rule of law’ in *État de droit* and *Rechtsstaat*. I focus on the French and German concepts as they have had significant influence on the development of other civil law legal systems. I conclude that it is impossible to escape the centrality of the State in these accounts of the rule of law, a fact which is reflected in the terms ‘*Rechtsstaat*’ and ‘*État de droit*’. The purpose of this section is to highlight the inadequacy of state-centric accounts to provide a measures of rule of law compliance at EU level. Contemporary accounts of the ‘rule of law’ are state-centric: they are defined and understood in terms of the state legal systems in which they have developed.

In **Section 4**, I outline the adoption of the rule of law, and the challenges therein, in the EU accession states of central and eastern Europe. The rule of law has been considered instrumental to the transition from communist regime to constitutional democracy, and a condition of EU membership for the accession states under (now) Article 49 TEU is adherence to the rule of law, and the other values of Article 2 TEU. I examine the challenges of assimilating a foreign model of the rule of law in Member States including Bulgaria and Hungary. I conclude in this section that it is not possible to create a common model of the rule of law which can be apposite to all legal systems.

In **Section 5**, I conclude that there is no universal or ‘common’ model of the rule of law which is apt for all legal systems. I show that even when accounts are presented in the abstract, it is still evident that contemporary accounts assume statist norms which mean they cannot be transposed to the trans-national (or post-national) European Union. However, I also argue that there is a universal value at the core of the rule of law which ought to be common to all legal systems, is the reason for the enduring support for the rule of law.

## 2 THE RULE OF [THE COMMON] LAW

---

### 2.1 Introduction

In this section, I introduce and analyse the concept of rule of law which has developed within the common law tradition. There is some irony in beginning with a common law perspective in a discussion of the rule of law which, as a concept, emphasises clarity and intelligibility in the law. The common law system has been historically marked by a plurality of sources of law: custom, judicial decisions, principles, and statutes.<sup>2</sup> Many of these sources are *not* open, clear, nor (sometimes) even knowable.<sup>3</sup> The term ‘rule of law’ was popularised in the 19<sup>th</sup> century by AV Dicey who considered it a distinction of the English constitution.<sup>4</sup> The notion that ‘all, even the most powerful, are and should be subject to [the rule of law] goes deep in the common law tradition and has not lost resonance,’<sup>5</sup> despite the acknowledgement by the House of Lords that the rule of law ‘remains a complex and in some respects uncertain concept’<sup>6</sup>

The ideal that all people and institutions – citizens, institutions, legislature, judiciary and executive branches of government – are subject to the law is an essential theme of the rule of law. However, despite an agreement on this basic understanding, there has nonetheless been a bifurcation in Anglo-American jurisprudence into ‘formal’ and ‘substantive’ accounts of the rule of law.<sup>7</sup> Sections 2.2 and 2.3 analyse each of these positions respectively. In Section 2.4, I

---

<sup>2</sup> Martin Krygier, ‘Rule of Law (and Rechtsstaat)’ (2013) UNSW Law Research Paper No 2013-52, 4 <<http://ssrn.com/abstract=2311874>> accessed 3 March 2014.

<sup>3</sup> Indeed, Krygier posits that the term ‘rule of law’ rather than ‘State of law’ (or similar) as is in other jurisdictions may be reflective of the plurality of sources of the law: *ibid*. To give an example in the UK, access to court rulings was, until 2001, only through expensive subscriber access. Since the advent of neutral citations, it is possible to read judgments for free, however, it is still necessary to cite only ‘official’ (and subscriber access only) judgments before the court. In restricting access, there is an extent to which caselaw is *not* entirely, clear, open and knowable as access to judicial rulings, which form an important part of the common law system, are restricted to those who can pay for access.

<sup>4</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, 10th edn, Macmillan 1959) 193. Dicey famously infamously misunderstood the *droit administratif* which contributed to his characterisation of the rule of law as a particular characteristic of the English system: see Paul Craig, ‘Formal and Substantive Conceptions of the Rule of law an analytical framework’ (1997) PL 467, 472. See also Richard Cosgrave, ‘The Rule of Law: Albert Venn Dicey, Victorian Jurist’ North Carolina University Press 1980) 92–100.

<sup>5</sup> Krygier, ‘Rule of law (and Rechtsstaat)’ (n 2).

<sup>6</sup> Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament* (HL 2007–2008, 151–12) para 24.

<sup>7</sup> Craig, ‘Formal and substantive conceptions of the rule of law’ (n 4) 469.

explore a possible ‘third family’ as regards rule of law theories. This third position posits that the debate between ‘substantive’ and ‘formal’ accounts of the rule of law is mistaken. This position takes one of three forms: (a) formal and substantive accounts are answers to different questions, (b) the rule of law is ‘something in-between’ the two accounts, or (c) the concept of the ‘rule of law’ is meaningless.

In this thesis, I adopt the terminology of ‘formal’ or ‘substantive’ accounts of the rule of law,<sup>8</sup> agreeing with Nicholas Barber’s view that within each category, there are ‘different but compatible conceptions of the rule of law’.<sup>9</sup> However, this categorisation comes with a methodological health warning: echoing Olufemi Taiwo, ‘[t]here are almost as many conceptions of the “Rule of Law” as there are people defending it.’<sup>10</sup> The following sections summate the central disagreements within contemporary rule of law debate, and so aim to present a comprehensive overview of ‘contemporary accounts’ of the rule of law.

## 2.2 Formal Accounts of the Rule of Law

As a starting point for the discursive and dialogical process of determining the value of the rule of law, I begin with a formalistic definition of the rule of law, ‘stripped of all technicalities’<sup>11</sup>: the rule of law embodies the idea that those who make the law should be bound by it, and those who follow the law should be able to follow it. Various principles of the rule of law follow from the premise of the need for the law to be capable of guiding action, although exactly which principles are most emphasised is a matter which varies somewhat between formal accounts of the rule of law. However, these principles almost inevitably count

---

<sup>8</sup> It should also be noted that the terms ‘formal’ and ‘substantive’ are not the limit of descriptive terminology employed in the context of debates regarding the meaning of the rule of law. Formal accounts have variously been described as ‘thin’, ‘weak’, or ‘narrow’ conceptions of the rule of law in comparison to the ‘thick’, ‘strong’ or ‘wide’ conceptions of substantive accounts of the rule of law. I do not find these terms constructive, as they diminish the points of disagreement between accounts, and conceive of the concepts as on a sliding scale. Additionally, using the terms ‘thick’ and ‘thin’, ‘weak’ and ‘strong’ to describe the rule of law shows a bias for ‘substantive’ accounts, as ‘thin’ and ‘weak’ can be understood as pejorative.

<sup>9</sup> Nicholas Barber, ‘Must legalistic conceptions of the rule of law have a social dimension?’ [2004] 17 *Ratio Juris* 474, 475.

<sup>10</sup> Olufemi Taiwo, ‘The Rule of Law: The New Leviathan?’ [1999] 12 *CJLJ* 151, 154.

<sup>11</sup> Friedrich A Hayek, *The Road to Serfdom* (Chicago University Press 1944) 54.

among them: the law must be accessible, clear, intelligible, and predictable. If the law is not capable of guiding action, then it is not normative,<sup>12</sup> as people cannot be guided by rules of which they are not aware, are excessively vague, change too frequently, are applied inconsistently with the relevant legal norm, or are created and/or applied retrospectively.

A formal conception of the rule of law views the rule of law as a political ideal, and a standard to which a legal system may adhere to a greater or lesser degree. A formal conception does not attempt to ‘propound a complete social philosophy’,<sup>13</sup> advocating, for example, support for a certain conception of equality, or a certain account of human rights to be adopted within the legal system. This is in distinction to substantive accounts of the rule of law, which can be concerned with the merit or demerit of the content of the law, or the substance of the constitutional arrangements of the State which underpin it. Theorists in the formal tradition, including Raz,<sup>14</sup> Fuller,<sup>15</sup> Hayek,<sup>16</sup> and Unger,<sup>17</sup> present accounts of the rule of law which are broadly concerned with the clarity, temporality (prospective or retrospective application) and the manner in which the law is formulated, promulgated and applied.<sup>18</sup> Formal accounts are sometimes termed ‘procedural’, or ‘instrumental’ in so far as they seek to identify the procedural properties of a legal system which can ensure an ‘efficacious legal system’.<sup>19</sup>

Joseph Raz posits a strictly formal version of the rule of law, arguing that the rule of law is premised on guidance of individual action. Raz’s conception of the rule of law argues that governmental action must be sanctioned by laws, and these must be formulated and enacted by a body which has authority to do so.<sup>20</sup> Extending from this is the requirement that laws so

---

<sup>12</sup> By ‘normative’ I mean capable of guiding behaviour, which is also in some sense justified as what ought to be done.

<sup>13</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 211.

<sup>14</sup> *ibid.* There is some argument that Raz developed a ‘middle ground’ between formal and substantive accounts of the rule of law in his later work (see Craig (n 4) 484–85), however, for his exemplary development of a formal account, I have included his work under formal conceptions of the rule of law.

<sup>15</sup> Lon Fuller, *The Morality of Law* (Yale University Press 1969) 49–90.

<sup>16</sup> Hayek (n 11).

<sup>17</sup> Roberto Unger, *Law in Modern Society* (Simon and Schuster 1977).

<sup>18</sup> Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 93–99.

<sup>19</sup> Gülriz Uygur, ‘The Rule of Law: Is the Line Between the Formal and the Moral Blurred?’ in IB Flores and KE Himma (eds), *Law, Liberty, and the Rule of Law* (Springer 2013) 103. See also Margaret Jane Radin, ‘Reconsidering the rule of law’ [1989] 69 BULR 781.

<sup>20</sup> Raz (n 13).

enacted must be *capable* of guiding individuals in such a manner as to allow them to plan their lives and further their own interests, essentially, *per* Neuman - 'for rule to be according to law, it must be possible to avoid the penalties of non-compliance.'<sup>21</sup> This premise is, in turn, inspired by a respect for human dignity. As Raz writes, '[...] observance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future.'<sup>22</sup> The essential features of Raz's account of the rule of law are deducible from the idea that dignity demands individual autonomy to plan one's own future within the constraints of the law. Thus, the principles of the rule of law which can be deduced are that law 'ought to be prospective'; 'that the law is clear and relatively stable'; that 'access to courts with an independent judiciary ought to be ensured'; that the 'minimum content of natural justice, such as fair hearing, ought to be present'; and that 'discretion of governmental agents should not undermine the purpose of the law'.<sup>23</sup>

It is important, however, not to view formal accounts of the law as only concerning the relationship between the state (as the law-making authority) and the citizen. The formal conception of the rule of law is premised upon providing the individual with guidance. Law which can guide allows the individual to avoid the strictures of the law, but can equally be used to further individuals' own interests – for example, through contracting with others. The 'predictability, certainty and security'<sup>24</sup> afforded by adherence to the rule of law is beneficial not only as between the state and the individual, but also between individuals. As Brian Tamanaha notes, knowing in advance the expected responsibilities and legal protections in case of conflict enhances trust and efficiency when engaging with strangers or acquaintances.<sup>25</sup>

Formal accounts do not include substantive elements of justice within the precepts of the rule of law. To do so, theorists claim, is to over-extend the purpose of the rule of law, making

---

<sup>21</sup> Michael Neuman, *The Rule of Law, Politicising Ethics* (Ashgate New Critical Thinking in Philosophy 2002) 151.

<sup>22</sup> Raz (n 13) 210.

<sup>23</sup> Raz (n 13) 214–18.

<sup>24</sup> Brian Tamanaha, 'A Concise Guide to the Rule of Law' (2007) Legal Studies Research Paper Series 07/0082, 9 <<http://ssrn.com/abstract=1012051>> accessed 6 April 2013.

<sup>25</sup> *ibid.*

the rule of law a ‘mantle’ to cloak other desirable attributes of a legal system.<sup>26</sup> If the rule of law is the rule of the good law, then to explain its nature is to ‘propound a complete social philosophy.’<sup>27</sup> But in doing so, the term then loses any useful function: ‘we have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.’<sup>28</sup>

The consequence of emphasising the separation of formal requirements of the rule of law with substantive values is that it is possible that morally-objectionable regimes could meet the standard of the rule of law, while morally-laudable regimes may not necessarily meet the same standards.<sup>29</sup> The rule of law does not, therefore, add positively to the moral value of governance through law.<sup>30</sup> Formal accounts of the rule of law merely allow law to negate the possibility of certain moral risks of which the law itself is the cause. This is similar to the position that Michael Neumann ultimately reaches: the rule of law is not a ‘moral concept’ and has ‘no direct moral implications’ but, ‘it does forbid certain types of law, and these prohibitions provide independent support for moral notions.’<sup>31</sup>

In its essentials, formal accounts of the rule of law state that the law can claim no moral credit nor instantiate any moral value. The value of the rule of law to the legal system is negative:<sup>32</sup> ‘[t]he law inevitably creates a great danger of arbitrary power – the rule of law is designed to minimize the danger created by the law itself.’<sup>33</sup> For some, this is not enough, and they claim the rule of law ought to instantiate substantive values. I analyse these claims in the next section.

---

<sup>26</sup> Craig (n 4) 467.

<sup>27</sup> Raz (n 13) 211.

<sup>28</sup> *ibid.*

<sup>29</sup> Craig (n 4) 469; and Daniel H Cole, ‘“An Unqualified Human Good”: EP Thompson and the Rule of Law’ (2001) *J Law Soc* 187.

<sup>30</sup> Raz (n 13) 224.

<sup>31</sup> Neuman (n 21) 6.

<sup>32</sup> Raz (n 13) 224.

<sup>33</sup> *ibid.*

## 2.3 Substantive Accounts of the Rule of Law

In this section, I consider substantive conceptions of the rule of law. Theorists advocating a substantive interpretation of the rule of law, such as Dworkin,<sup>34</sup> Allan,<sup>35</sup> Finnis<sup>36</sup> and Douglas-Scott,<sup>37</sup> argue that substantive notions of justice or fairness, principles of democracy or fundamental rights are necessary components of the rule of law. For this reason, substantive accounts of the rule of law are considered to be on the other side of the debate to formal accounts of the rule of law.

Philip Selznick argues that there is a 'larger promise' in the realisation of a substantive account of the rule of law in state legal systems, which reaches beyond concerns of abuse of power and the 'message of restraint'.<sup>38</sup> This larger promise conceives of the rule of law as a means by which values 'can be realised, not merely protected, within a legal process' including 'respect for dignity, integrity, and moral equality of persons and groups.'<sup>39</sup> Michael Neuman argues that substantive conceptions of the rule of law are not only statements of what is good in general, but rather 'express the legal structures necessary to uphold a certain set of social goals whose realization in turn imparts value to those structures.'<sup>40</sup> Jeremy Waldron advises caution, however, in the face of being carried away with enthusiasm for a substantive account of the rule of law which 'calls directly for an end to human rights abuses, [...] for free markets and respect for private property rights'<sup>41</sup> to do so could 'obscure the independent importance' of formal aspects of the rule of law.<sup>42</sup>

---

<sup>34</sup> Ronald Dworkin, *Law's Empire* (Hart Publishing 1998).

<sup>35</sup> Trevor RS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001).

<sup>36</sup> Finnis refers to thin (or formal) accounts of the rule of law as 'rather uninteresting': John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 272.

<sup>37</sup> Sionaidh Douglas-Scott, *Law after Modernity* (Hart Publishing 2013) chs 7-8.

<sup>38</sup> Philip Selznick, 'Legal Cultures and the Rule of Law' in Martin Krygier and Adam Czarnota (eds), *The Rule of Law after Communism* (Ashgate 1999) 26.

<sup>39</sup> *ibid.*

<sup>40</sup> Neuman (n 21) 6.

<sup>41</sup> Jeremy Waldron, 'Legislation and the Rule of Law' (2007) *Legisprudence* 91, 115; and Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' (6 October 2010) NYU School of Law, Public Law Research Paper No 10-73, <[ssrn.com/abstract=1688491](http://ssrn.com/abstract=1688491)> accessed 2 February 2016.

<sup>42</sup> *ibid.*

Nigel Simmonds posits that the only good reasons to follow the rule of law requirements are grounded in moral considerations.<sup>43</sup> This is a response to Matthew Kramer's assertion that the rule of law is not an inherently moral ideal. The value served by the rule of law, according to Simmonds, is the value of liberty, and is intrinsically linked to the rule of law by one of its most important aspects: 'independence from the power of others'.<sup>44</sup> While this argument is ostensibly similar to Raz' on the justification of the rule of law based on the dignity of the individual,<sup>45</sup> the distinction is that Simmonds then concludes there must be a necessary moral connection between formal conceptions of the rule of law and substantive morality. The logic of this argument is that compliance with the rule of law aims to guarantee a certain conception of freedom, and freedom is the necessary outcome of compliance with the rule of law.<sup>46</sup> However, this freedom is minimal in so far as it provides freedom from the arbitrary will of government.

The argument that the rule of law is related to substantive conceptions of freedom or human dignity would not be disputed by Raz, and even Hayek argues that, 'any [...] recognized limitations of the powers of legislation imply the recognition of the inalienable right of the individual, inviolable rights of man.'<sup>47</sup> Paul Craig quickly dispatches the apparent oversight by formal conceptions of the law. He argues that to rest the justification of accounts of the rule of law on individual autonomy, or freedom, is not to conclude that the rule of law must therefore encompass 'specific substantive freedoms such as liberty and equality,' especially when it is then necessary to adopt an entire philosophy of equality or liberty.<sup>48</sup> For Craig, this is a confusion of levels of abstraction: it is one thing for an account to aspire to an abstract value of human autonomy or dignity; and another for that account to then have to incorporate specific, substantive values of liberty or equality, which require substantive social

---

<sup>43</sup> Nigel Simmonds, *Law as a Moral Idea* (OUP 2007) 78.

<sup>44</sup> *ibid* 111.

<sup>45</sup> Raz (n 13) 210.

<sup>46</sup> Trevor RS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' [1999] LQR 221; and Simmonds (n 43) 109–11.

<sup>47</sup> Hayek (n 11) 58.

<sup>48</sup> Craig (n 4) 482.

philosophies.<sup>49</sup> Formal accounts of the rule of law do not argue that the rule of law a virtue which must be given precedence over all other values. The rule of law does not represent the full range of virtues which a legal system ought to possess. Principles of the rule of law can and should sometimes be sacrificed to achieve other goals.<sup>50</sup> These goals may include fairness, function,<sup>51</sup> or the vindication of legitimate expectations.<sup>52</sup> As Raz eloquently concludes, '[s]acrificing too many social goals on the altar of the rule of law may make the law barren and empty.'<sup>53</sup>

## 2.4 The Rule of Law as both formal and substantive, something in between, or nothing at all

A third set of theories claim that debate between formal and substantive accounts of the rule of law is mistaken, or irrelevant. This position can come in one of three forms: (a) formal and substantive accounts are **answers to different questions**; (b) the rule of law should occupy a '**middle ground**' which incorporates elements of both formal and substantive elements, but cannot be precisely categorised as either; or (c) the rule of law is a **meaningless statement**, or 'just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians.'<sup>54</sup> In refutation of point (c), the arguments of Chapters 1 and 3 show that the rule of law has importance and relevance within the context of the EU, and there is a need to determine the apt standard of the rule of law which is applicable to it. These arguments will not be repeated here.

First, I consider whether formal and substantive accounts of the rule of law can both be relevant within a legal system, in so far as they can be **understood as answers to different questions**. Grant Lamond argues that the disagreement between formal and substantive

---

<sup>49</sup> *ibid.*

<sup>50</sup> Raz (n 13) 210.

<sup>51</sup> 'Function' will be interpreted in a distinctive sense in respect of the EU-centric account of the rule of law which will be explored in Chapter 4, Section 3.1.

<sup>52</sup> See Chapter 8, Section 3.

<sup>53</sup> Raz (n 13) 210.

<sup>54</sup> Judith Shklar, 'Political Theory and The Rule of Law' in A Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1.

accounts of the rule of law is mistaken, as, in fact, two separate questions are asked: (1) what are the ‘*grounds of justification*’ for the rule of law, and (2) what are the ‘*values served by adherence to the standard of the rule of law*’?<sup>55</sup> For example, freedom is a value served by adherence to the rule of law in Simmonds account,<sup>56</sup> whereas, dignity is the justification for aiming to provide an account of the rule of law according to Raz.<sup>57</sup> The issue with the argument is that it invites confusion as to the degree that serving a value (such as liberty, or independence from the interference of others) is distinguishable from a justification (human dignity, or the ability to make one’s own decisions). Freedom or liberty to make decisions is indivisible from the dignity of a person to shape and determine life. It also does not engage with the central disagreement between formal and substantive accounts of the rule of law: should we evaluate compliance with the rule of law on the basis of principles which include protection of substantive values? This is a confusion which would, ironically, be a breach of the rule of law itself: principles of the rule of law ought to be clear, prospective and discernible.<sup>58</sup>

An alternative position is that the rule of law ought to occupy a **middle ground** between the established dichotomy of formal and substantive accounts of the rule of law. This interpretation of the rule of law is not limited to formal features nor does it embrace substantive virtues, because of this, ‘intermediate accounts’ cannot be categorised as either a formal or substantive account. An intermediate account is advocated by Grant Lamond,<sup>59</sup> who argues that ‘the value of the Rule of Law ultimately depends upon the overall moral merits of a legal system – not because the Rule of Law has only instrumental value, but because it is an inherently mixed-value good’, grounded in ‘the fundamental idea that the Rule of Law serves to promote and protect governance by law under non-ideal conditions.’<sup>60</sup> Lamond denies that the rule of law is a negative virtue, and he identifies three essential aspects of the rule of law: (1) that the legal system is effective; (2) that the state governs by and through law; and that (3)

---

<sup>55</sup> Grant Lamond, ‘The Rule of Law’ in A Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 503.

<sup>56</sup> Simmonds (n 43).

<sup>57</sup> Raz (n 13).

<sup>58</sup> Thank you to my supervisor, Dr Julie Dickson, for pointing this out to me.

<sup>59</sup> Lamond (n 55) 503.

<sup>60</sup> *ibid* 495.

it is possible to obey individual laws. It is notable that these three aspects omit aspects of standard accounts of the rule of law: independence of the judiciary and due process.

In clear distinction to Kramer's assertion that the rule of law means, 'nothing more and nothing less than the state of affairs which obtains when a legal system exists and functions,'<sup>61</sup> Lamond argues that the focus of the rule of law is *governance* by law, and not the *existence* of law.<sup>62</sup> The existence of law is a question which concerns positive and natural law thinkers among others, in arguing the nature of law. The focus on *governance* of law is a more functional interpretation of the question – how can, how does, and how should law govern? On this point, I would agree, and when providing an EU-apt account of the rule of law, the principal focus is on *governance* by law, focusing on the functional element of the law. Listing the elements needed to identify the *existence* of law such that it can perform its function of guidance (such as being clear, prospective and predictable), is an element of *governance* by law. *Governance*, I will argue, is more interactive, collaborative and intentional of serving the aims of the legal system and the actors within it. I would agree that strict adherence to the division between formal and substantive accounts can be unhelpful, and detract from important questions of *how* the rule of law can be realised in a legal system.<sup>63</sup> As will be seen in Chapter 4, my account of a rule of law apt for the EU is, in a certain sense, an intermediate position, although one which differs from Lamond's in many significant respects.

### 3 THE DIVERSITY AND STATE-CENTRICITY OF CONTEMPORARY ACCOUNTS

---

#### 3.1 Introduction

In this section, I explore the ideal of the rule of law as *the State of Law* in the German *Rechtsstaat*, and French *État de droit*. I then compare *État de droit*, *Rechtsstaat* and the understandings of

---

<sup>61</sup> Matthew Kramer, *In Defence of Legal Positivism* (OUP 1999) 238.

<sup>62</sup> Lamond (n 55) 501.

<sup>63</sup> Rejection of a strict dichotomy between substantive and formal accounts of the rule of law is especially relevant when taking account of other Member State legal systems in which the dichotomy is not necessarily a feature of discourse.

the rule of law which I have analysed in Section 2. I focus on France and Germany as they have significantly determined the development of the civil law legal tradition. German legal tradition provides insight into the development of the concept as a means to justify the power of the State. The French legal culture, on the other hand, has shown an apparent reluctance to adopt and develop a 'concept' of the rule of law. The French experience provides insight into nationalistic resistance to integrating the concept as a central constitutional value.

This section presents a very important argument within the larger framework of the thesis: contemporary accounts of the rule of law are state-centric. This can be clearly evidenced by the semantic element missing in the English language concept of the 'rule of law' that is found in a host of European languages: the *State*.<sup>64</sup> *Rechtsstaat* is based on a strictly state-centric understanding of the rule of law: 'all legal norms have to reference the state.'<sup>65</sup> The evolution of the rule of law, isolated and independent of the development of *Rechtsstaat*, was 'an attempt to give a formalized interpretation of the engagement of the common law with modern ideas of constitutionalism'; *Rechtsstaat* 'evolved from the tensions between authoritarianism and liberalism in governmental practice';<sup>66</sup> and *État de droit* was introduced as 'a normative principle to highlight perceived deficiencies in post-revolutionary governing arrangements.'<sup>67</sup> The French *droit administratif* resulting in a separate structure of administrative tribunals is realisation of the *État de droit* in civil law systems throughout Europe, though, as a separate court structure, likely anathema to the English concept of the rule of law.<sup>68</sup> The rule of law acts as a limitation on state power; whereas *Rechtsstaat* acts as a

---

<sup>64</sup> As Krygier writes, 'whether it is *Rechtsstaat* (German: (state of law; law-governed state)), *état de droit* (French), *statto diritto* (Italian), *estado de derecho* (Spanish), *państwo prawa* (Polish) or *pravovoe gosudarstvo* (Russian), law is inextricably connected to the state.' in 'Rule of Law (and Rechtsstaat)' (n 2) 3. For Krygier, the absence of the 'state' in English is no accident reflecting the pluralistic conceptions of the sources of law, and the often divisive relationship between the court and the crown as head of state, a complication manifested in modern governance in the UK as parliamentary sovereignty. Krygier, 'Rule of Law and Rechtsstaat' (n 2).

<sup>65</sup> Matthias Koetter, '*Rechtsstaat und Rechtsstaatlichkeit* in Germany' in Matthias Koetter and Gunnar Folke Schuppert (eds), *Understandings of the Rule of Law in various legal orders of the World* (2010) Rule of Law Working Paper Series No 1 <[wikis.fuberlin.de/download/attachments/29556758/Koetter+Germany.pdf](http://wikis.fuberlin.de/download/attachments/29556758/Koetter+Germany.pdf)> accessed on 3 April 2014.

<sup>66</sup> See also Martin Loughlin, '*Rechtsstaat, Rule of Law, l'État de droit*' in his, *Foundations of Public Law* (OUP 2010) 322.

<sup>67</sup> *ibid* 322.

<sup>68</sup> Martin Krygier, 'The Rule of Law: An Abusers' Guide' in A Sajó (ed), *Abuse. The Dark Side of Fundamental Rights* (Eleven International Pub Co 2006).

way in which to rationally legitimise it.<sup>69</sup> The common law tradition of rule of law developed within the context of the common law system, and certain assumptions about law, constitutional order and the legal system are made within this system.<sup>70</sup> The accounts are distinct from common law accounts of the rule of law, and are also ‘state-centric’: they are rooted in the unique legal culture in which they have been developed.

### 3.2 Rechtsstaat

The concept of *Rechtsstaat* originated in the works of German jurists in the 19<sup>th</sup> century, though its genesis can be traced to the works of Immanuel Kant,<sup>71</sup> as an effort to rationalise and institutionalize liberalism against state-absolutism.<sup>72</sup> Robert von Mohl provided an account of *Rechtsstaat* which emphasised a political order based on rational, free and equal individuals, the promotion of liberty, security and property, and the rational organisation of the state through law.<sup>73</sup> The concept has since gained such international recognition that nearly all conceptions of *Rechtsstaat* in other languages in the EU are a *direct* translation of it.<sup>74</sup> The term is now stated within a large number of constitutional documents of EU states across Europe. It has become the symbol of a shared ‘western liberal heritage’.<sup>75</sup> This does not, however, lead to the conclusion that all accounts based on *Rechtsstaat* or the rule of law are interchangeable. Gianluigi Palombella suggests that *Rechtsstaat* means that ‘the law is the structure of the State, not an external limitation to it. [...] Liberty is a consequence not truly a premise of the law. The authority vested [...] protected civil liberties as a service offered by the

---

<sup>69</sup> Ernst-Wolfgang Böckenförde, ‘The Origin and Development of the Concept of the *Rechtsstaat*’ in his, *State, Society and Liberty: Studies in Political Theory and Constitutional Law* (JA Underwood (trans), Berg 1991) 48.

<sup>70</sup> Martin Krygier, ‘The Rule of Law: Legality, Teleology, Sociology’ in Gianluigi Palombella and Neil Walker (eds), *Re-locating the Rule of Law* (Hart Publishing 2009) 51.

<sup>71</sup> Immanuel Kant, *Metaphysical Elements of Justice* (John Ladd (trans), first published 1797, Hackett 1999) §45: ‘A state (*civitas*) is a union of a group of persons under the laws of justice’.

<sup>72</sup> Ernst-Wolfgang Böckenförde (1969) ‘Entstehung und Wandel des Rechtsstaatsbegriffs’ (1991) *Recht, Staat, Freiheit* 143.

<sup>73</sup> Böckenförde, ‘The Origin and Development of the Concept of the *Rechtsstaat*’ (n 69) 49–50, and 48: ‘*Rechtsstaat* is a term peculiar to the German-speaking world; it has no equivalent in any other language.... The ‘rule of law’ in Anglo-Saxon law is not in substance a parallel concept, and French legal terminology has no comparable words or concepts whatever’.

<sup>74</sup> Raoul Van Caenegem, *Legal History: A European Perspective* (Continuum 1991) 185. See also Heuschling (n 1).

<sup>75</sup> Heuschling (n 1) 3. [my translation]

state.<sup>76</sup> This is a nuance which is not directly implied by the common law conception of the rule of law, which conceives of the concept as a *limitation* on the actions of the State, not as a *product* or *characteristic* of the State.<sup>77</sup> This again illustrates the distinction between accounts of the rule of law/Rechtsstaat concepts.

In the German Basic Law, the concept of *Rechtsstaat* is explicitly stated in Art 28(I) Grundgesetz [GG], which states that the *Länder*<sup>78</sup> must conform to the principles of a ‘*republikanischer, demokratischer und sozialer Rechtsstaat*’. A condition to German participation in the EU was included in Art 23(1) GG, which allows participation so long as it upholds the principles of democracy, Rechtsstaat, the social and federal state, subsidiarity and provides protection of fundamental rights equal to that found in the *Grundgesetz*.<sup>79</sup> Rather than being limited to a duty of compliance by the *Länder* or the EU, the Constitutional Court of Germany (*Bundesverfassungsgericht*) has declared *Rechtsstaat* to be a fundamental *prinzip* of the Basic Law.<sup>80</sup> Some principles, such as the *Gleichbehandlung durch das Gesetz*<sup>81</sup> (equal treatment before the law) and the *Gewaltenteilung*<sup>82</sup> (respect for the separation of powers) are enshrined in the *Grundgesetz*. Other principles to be derived from the account of *Rechtsstaat* are wide ranging, and not explicitly stated in the Constitution (though identifiable in it). The jurisprudence of the *Bundesverfassungsgericht* has linked over 140 legal concepts to interpretations of the *Rechtsstaatsprinzip*.<sup>83</sup> These include:

- *Die Achtung der Grundrechte*: all state organs are bound by the *Grundrechte* (fundamental rights) within the constitution;

---

<sup>76</sup> Gianluigi Palombella, ‘The rule of law as Institutional Ideal’ in L Morlino and G Palombella (eds), *Rule of Law and Democracy* (Brill 2010) 11–12.

<sup>77</sup> Krygier, ‘The Rule of law (and Rechtsstaat)’ (n 2).

<sup>78</sup> The *Länder* are the federal states which constitute Germany.

<sup>79</sup> Art 23(I) *Grundgesetz für die Bundesrepublik Deutschland* [GG]: Zur Verwirklichung eines vereinten Europas wirkt die Bundesrepublik Deutschland bei der Entwicklung der Europäischen Union mit, die demokratischen, rechtsstaatlichen, sozialen und föderativen Grundsätzen und dem Grundsatz der Subsidiarität verpflichtet ist und einen diesem Grundgesetz im wesentlichen vergleichbaren Grundrechtsschutz gewährleistet.

<sup>80</sup> Katharina Sobota, *Das Prinzip Rechtsstaat* (Mohr Siebeck 1997) 471–526.

<sup>81</sup> Art 3 GG.

<sup>82</sup> Art 20(2) GG states that the exercise of power must be divided between judicial, executive and legislative powers.

<sup>83</sup> Sobota (n 80); and Loughlin (n 66) 313.

- *Die Geltung der Fundamentalrechtsnormen unabhängig von Mehrheitsentscheidungen*: the ‘validity of fundamental rights independent of majority decisions’;<sup>84</sup>
- *Der Vorbehalt des Gesetzes*: the intervention of public authorities into the freedoms and property of the citizen must be based on formal, non-retrospective law;
- *Die Verhältnismäßigkeit*: the principle of proportionality; and
- *Die Verantwortlichkeit*: accountability.<sup>85</sup>

Many of these principles are also stated in accounts of the rule of law, and to bridge the gap between rule of law and *Rechtsstaat* academic discourse, some scholars have sought to bring *Rechtsstaat* within the substantive/formal debate.<sup>86</sup> For example, Laurent Pech argued that in the post-war Basic Law (*Grundgesetz*), the concept of *Rechtsstaat* re-emerged with a ‘thick’ (ie substantive) constitutional understanding, in light of the failure of the positive law to prevent the atrocities committed under the Nazis.<sup>87</sup> *Rechtsstaat* thus values and protects ‘formal’ elements such as legality, but it also includes ‘substantive’ elements, including judicial review for infringement of constitutional rights, and proportionality.<sup>88</sup>

Pech argues that fundamental rights are both an integrated element of *Rechtsstaat* and also a consequence of it. However, he may have overstated the conclusion of German academics of the integration of formal and substantive elements of *Rechtsstaat*. Some scholars emphasise a dichotomy in the meaning of *Rechtsstaat*, likely in an effort to align it more closely with the England-language dichotomy between formal and substantive accounts of the rule of law. For example, the term *Rechtssicherheit* can be understood to connote the formal set of criteria within *Rechtsstaat*, including non-retroactivity of law and the requirement of the

---

<sup>84</sup> Sobota *ibid* §15.

<sup>85</sup> *ibid* §76.

<sup>86</sup> See eg Neil MacCormick, ‘Der Rechtsstaat und die Rule of Law’ (1984) 50 *Juristenzeitung* 65; and Krygier ‘The Rule of Law (and Rechtsstaat)’ (n 2).

<sup>87</sup> Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’ (2009) Jean Monnet Working Paper 04/09 <[www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org)> accessed 26 February 2014; and Krygier, ‘The Rule of law (and Rechtsstaat)’ (n 2).

<sup>88</sup> Proportionality as a concept in rights review is a feature of the jurisprudence of the European Court of Justice, and is becoming a feature of the UK administrative law; see Paul Craig, ‘Theory, Pure Theory and Values in Public Law’ (2005) PL 440; and Paul Craig, ‘Proportionality, Rationality and Review’ (2010) NZLR 265.

judicial review of cases involving individual freedom and property rights. This distinction is similar to the Scandinavian principles of *rettssikkerhet* and *rettsstat*.<sup>89</sup> The Scandinavian scholar, Vilhelm Aubert, suggests that the term *sikkerhet* has connotations of protection and certainty,<sup>90</sup> with the result that *rettssikkerhet* inspires the idea of protection of legal rights from interference by other citizens, and the protection against abusive or arbitrary power by the state.<sup>91</sup> Interpreting Castberg, Aubert concludes:

[T]he principal idea behind the notion of the *rettsstat* is that the constitution and the legal system as a whole should protect everybody against arbitrariness. [...] Arbitrariness is unjust, and injustice should be prevented.<sup>92</sup>

*Rechtsstaat* and *Rechtssicherheit* cannot not be equated with the concept of legality (*Rechtmäßigkeit*). The idea of *legality* as a restraint on official power is also a feature of Nordic jurisprudential discourse.<sup>93</sup> However, legality is distanced from the substance of the law.<sup>94</sup> Similar to Raz's conclusion on the limits to the justifiable use of the concept of the rule of law,<sup>95</sup> '[j]ustice is concerned with the content of rules, and too much commitment to procedural integrity may undo substantive justice.'<sup>96</sup> Neil MacCormick writes that the rule of law and *Rechtsstaat*, both '*prototypisch als Familiennamen*' for the group of concepts intended to manifest legality in the modern state, are essentially problematic to define, as:

[...] sie weder rein deskriptiver Analyse noch konventioneller Festsetzung zugänglich sind. Man muss vielmehr eine historisch tradierte Vorstellung in einem Rahmen normativer Prinzipien übersetzen, die man als angemessenen und zeitgemäßen Ausdruck der Vorstellung versteht.<sup>97</sup>

---

<sup>89</sup> Vilhelm Aubert, 'The rule of law' in his, *Continuity and Development* (Scandinavian University Press 1989); and Christoffer Eriksen, *The European Constitution, Welfare States and Democracy: The Four Freedoms vs National Administrative Discretion* (Routledge 2012) 188.

<sup>90</sup> Aubert *ibid* 68.

<sup>91</sup> Johannes Andenæs, *Grunnlov og rettssikkerhet* (Chr Michelsens Institutt 1945) 5.

<sup>92</sup> Frede Castberg, *Forelesninger over rettsfilosofi* (Universitetsforlaget 1965) 180, cited in Aubert (n 89) 68.

<sup>93</sup> Philip Selznick, Philippe Nonet and Howard Vollmer, *Law, Society and Industrial Justice* (Russell Sage Foundation 1969) 11; and Aubert (n 89) 70.

<sup>94</sup> Selznick, Nonet and Vollmer, *ibid*.

<sup>95</sup> Raz (n 13) 210.

<sup>96</sup> Selznick (n 38).

<sup>97</sup> MacCormick 'Der Rechtsstaat und die Rule of Law' (n 86) 66. [...as they are neither a purely descriptive analysis, nor conventionally accessible assessments. One must rather translate a traditionally historical idea into a

In the effort to discern the substance and limits of *Rechtsstaat*, there is one highly interesting, if controversial, position to be held on the meaning of *Rechtsstaat* which it shares with the common law concept of rule of law: it has no clearly defined limits or meaning in any system of codified law. Adopting this position, Pech argues that this lack of definition in legal systems enables it to ‘fulfil a gap-filling function as well as offer a justification for dynamic judicial interpretation’.<sup>98</sup> Justifying judicial activism on the basis of compliance with the demands of the rule of law has also been a feature of the European Court of Justice, as in Chapter 3.<sup>99</sup>

### 3.3 État de Droit

The concept of *État de droit* in France has not had the same constitutional gravity or normative currency that is evident in the German or English variants. The term is a neologism from the 19<sup>th</sup> century, when French lawyers directly translated the term from German.<sup>100</sup> Notably, unlike many of its EU Member State counterparts, and even the EU Treaties themselves, the term *État de droit* does not feature in the French constitution. It has not explicitly featured in the reasoning of the administrative courts, nor in the dicta of the *Conseil Constitutionnel* or the *Conseil d’État*.<sup>101</sup> This lack of explicit mention does not however diminish the impact that *État de droit* has had on constitutional discourse in France, especially in light of European integration.<sup>102</sup> Principles that would be associated with the rule of law: legal certainty, the separation of powers and (for substantive accounts of the rule of law) fundamental rights guarantees, have been features of the French legal system since the 1789 *Déclaration des droits de l’homme et du citoyen*. However, these principles have not been subsumed under a *Rechtsstaat*, nor categorised as formalistic rule of law. The clarity, stability and non-

---

normative framework of principles, which is an appropriate and contemporary expression of the idea. (my translation)]

<sup>98</sup> Pech (n 87).

<sup>99</sup> See Chapter 3.

<sup>100</sup> Van Caenegem (n 74) 185; and Heuschling (n 1).

<sup>101</sup> Pech (n 87).

<sup>102</sup> See Pech (n 87); and Heuschling (n 1).

retrospectivity of law in France is referred to not as a principle of *État de droit*, but rather *sécurité juridique*.<sup>103</sup>

In the characterisation of the ‘state’ as a state of law, it is likely that Rousseau’s definition of *République* as every state governed by law has meant that this term also nullified the use of the term *État de droit* to connote law-abiding state. Instead, *État de droit* has been identified in academic literature as more akin to constitutionalism, in terms of the guarantees of constitutional rights enforced by the *Conseil Constitutionnel*. However, there is debate as to the extent to which the rights guaranteed are substantive, rather than only procedural.<sup>104</sup> It appears that rather than embracing an ‘all-encompassing’ conception of the rule of law in *État de droit*, the French legal system has maintained its own legal tradition of legality, equality and conception of good governance.

The conclusion of this section is that the notion of the centrality of the guarantees of the *État de droit*, and consequently the political and normative currency of the term, is distinctly different in France than in that of other states within the EU. The maintenance of an account of *État de droit* which is linked to the ideas of constitutionalism, or the guarantees of constitutional rights, does not automatically follow in common law accounts of the rule of law. This reinforces the argument that rule of law accounts grow and develop within their own legal culture, and it would be false to assume that they are equally, or even similarly applicable in other jurisdictions.

The conclusion of this section is to highlight that *l’État de droit* and the rule of law are representative of an idea of a legal system and a state governed by the law and not by arbitrary will, but also a reflection of how these ideas can lead to different interpretations and conclusions. Within the context of the thesis, I argue that this is evidence that the EU cannot ‘adopt’ or ‘adhere’ to a universal or pan-EU concept of the rule of law of the Member States. I

---

<sup>103</sup> Dominique Soulas de Rüssel and Phillipe Raimbault, ‘Nature et racines du principe de sécurité juridique: une mise au point’ (2003) *Revue internationale de droit comparé* 101.

<sup>104</sup> For discussion, see Heuschling (n 1).

expand on this argument in the next section, as I endeavour to determine whether there are (enough) similarities between the concepts of the rule of law across Member States.

### 3.4 *État de droit*, *Rechtsstaat* and the Rule of Law: Variations on the same theme?

Having introduced and analysed the concepts of *Rechtsstaat*, *État de droit*, and the rule of law, I ask in this section whether it is possible to determine that they all represent a shared value. It is possible to identify common elements between these concepts: first, they are each concerned in some way with the limitation of arbitrary power and abuse by the state through means of the law; and second, that they are uncertain as to exactly what this aim requires. The difficulty, echoed from Section 3.1, is that each interpretation of the rule of law is tied with the legal system and legal traditions in which it has developed: translating *État de droit* to mean the *rule of law* directly, is to ignore the host of assumptions, principles, ideals and constitutional arrangements tied to each concept.<sup>105</sup> The way in which the concept is understood in each national legal order ‘cannot be determinative, as this will be conditioned by a particular legal or historical context and may vary from State to State.’<sup>106</sup> Modern democracies ‘only embrace certain elements of the concept and accord them different meanings’ writes Dimitry Kochenov, ‘it is impossible to draw parallels between national legal orders with respect to the precise meaning of the Rule of Law.’<sup>107</sup>

Certain assumptions about state governance (and the dangers of it) rooted in the common law traditions jurisprudence are not necessarily shared across the EU Member States. For example, the common law doctrine of ‘government by law’ (or governmental limitation) grounds the rule of law on the ‘superiority of the law as proclaimed by the courts of justice.’<sup>108</sup>

---

<sup>105</sup> Maria Luisa Fernandez Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International 1999) 66.

<sup>106</sup> Anthony Arnall, ‘The Rule of Law in the European Union’ in A Arnall and D Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002) 240.

<sup>107</sup> Dimitry Kochenov, ‘The EU Rule of Law: Cutting Paths through Confusion’ [2009] *Erasmus LR* 1.

<sup>108</sup> Gustavo Gozzi, ‘Rechtsstaat and Individual rights in German Constitutional History’ in Pietro Costa and Danilo Zolo (eds), *The Rule of Law* (Springer 2007) 238.

The emphasis on case law, and the principles of law to be identified within cases does not easily find a comparison within civil law jurisdictions<sup>109</sup> The doctrine of *Rechtsstaat* precludes the ‘possibility of the primacy of law over the state’.<sup>110</sup> Indeed, it is precisely in the relationship between law and state – which in the German case is settled with the primacy of the state – that the most significant feature of the doctrine of the German *Rechtsstaat* emerges.<sup>111</sup> ‘The State’ (as distinct from the legal structure) must guarantee liberty and security.<sup>112</sup> Similarly, *État de droit* ‘being a safeguard of citizens’ rights, [is] not limited to subjecting administrative authorities to administrative regulations and to laws, but aimed also to subject legislation to constitutional rules.’<sup>113</sup> In addition to this, as has been noted, both *Rechtsstaat* and *État de droit* hold a deep commitment to human rights which is understood to be inherent and inseparable from State rule of law.<sup>114</sup>

The purpose of this section is to argue that accounts of the rule of law, *Rechtsstaat* and *État de droit* are not interchangeable. Rather, each account has developed within its own legal culture. The assumption that *Rechtsstaat*, *État de droit* and the rule of law are synonymous, and more dangerously, that they are capable of transposition across national boundaries is complicated and controversial, as is evidenced in the experiences of transitional states analysed in Section 4.

## 4 THE RULE OF LAW IN TRANSITIONAL STATES

---

### 4.1 Introduction

In this section, I consider challenges to the realisation of the rule of law in a legal system, and in the EU legal system. This section has a dual purpose within the larger context of the work.

---

<sup>109</sup> *ibid* 237–39.

<sup>110</sup> Krygier, ‘The Rule of Law (and *Rechtsstaat*)’ (n 2).

<sup>111</sup> *ibid* 238.

<sup>112</sup> Franz Neumann, *Die Herrschaft des Gesetzes* (Suhrkamp 1980) 204.

<sup>113</sup> Alain Laquière, ‘*État de droit* and National Sovereignty in France’ in Pietro Costa and Danilo Zolo (eds), *The Rule of Law* (Springer 2007) 266.

<sup>114</sup> Gerald Neuman, ‘The U.S. Constitutional Conception of the Rule of Law and the *Rechtsstaatsprinzip* of the Grundgesetz’ (1999) Columbia Public Law and Legal Theory Working Paper Group 5, 4. <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=195368](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=195368)> accessed 12 April 2013.

First, in Section 4.2, I outline the challenges and experiences of transitional states in the adoption of a concept of the rule of law which was not apposite to their established legal culture. From this, I conclude that it is not possible to simply “transpose” accounts of the rule of law across national boundaries, or to assume that an account of the rule of law in one legal system is the same as that which ought to be the case in another. From this premise, in Section 4.3, I highlight the ongoing uncertainties which surround rule of law compliance in the EU, especially as regards the accession states which have transitioned from communist, controlled economy legal systems, to free market constitutional democracies. I highlight the deficiencies identified in the legal systems, and introduce the response of the EU to enhance the rule of law.

## **4.2 The Fallacy of Assuming a Single Account: Experiences of Transitional States in the Adoption of the Rule of law**

The term ‘transitional states’ is used to describe States which have (or are in the process of) transitioning from authoritarian regimes to constitutional democracies.<sup>115</sup> Constitutions adopted by these states, have incorporated strong commitments to the rule of law and the protection of fundamental rights,<sup>116</sup> and the model of democratic constitutionalism adopted by transitioning regimes post-1989 was modelled directly on the established democracies of Western Europe. The account of the rule of law was not based on the formalistic rule of law model of the UK, but rather embraced a rights-centric *Rechtsstaat*. A substantive understanding of the rule of law was seen as the way to escape the communist past.<sup>117</sup> Member States of the EU included in this definition are Hungary, the Czech Republic and Poland.<sup>118</sup> Membership of

---

<sup>115</sup> There are differences of opinion in the use of this term, for example Varga argues that there was no ‘genuine transitory’ period between Soviet mechanisms of governance, and a democratic regime based on the rule of law. He states that in post-war West Germany, the concept *Rechtsstaat* already existed in academic and political circles, and it could be adapted to embrace a legal culture founded on human dignity. This movement was especially powerful in the aftermath of the corruption of the positive law during the Nazi era: Csaba Varga, ‘Rule of Law Or the Dilemma of an Ethos: to be Gardened or Mechanicised’ in his, *Transition? To rule of Law?* (Kráter Workshop Association 2007) 86.

<sup>116</sup> Maartje de Visser, *Constitutional Review in Europe: a Comparative Analysis* (Hart Publishing 2014) 61.

<sup>117</sup> Adam Czarnota, ‘Lustration, Decommunisation and the Rule of Law’ (2009) HJRL 307.

<sup>118</sup> Germany, Italy and Spain also transitioned from authoritarian regimes, and many of the points made in this section could also be applicable to these states.

the Union under (now) Article 49 TEU demands a high level of commitment to the rule of law. The declaration of respect for, and commitment to, the rule of law in the pre-accession states was seen in academic and political discourse with hopeful optimism, and presented not only as a guarantee of good governance, but also as a precursor to liberal democracy, free market, human rights and European integration.<sup>119</sup>

However, the concept of the rule of law became *fetishized* in some Eastern European states, as Ivan Krastev writes, becoming a ‘magic phrase’, bringing investment, securing social and political development and protecting individual rights.<sup>120</sup> The temptation of fetishizing a model of the rule of law may ‘further strengthen the dependence of target countries on pattern-following, and thereby weaken their creative forces and self-esteem and self-responsibility, vitally needed for their successful recovery.’<sup>121</sup> This links and leads to a weakness that Krygier identifies in accounts of the rule of law is ‘goal displacement’ or the concentration on the *means*, rather than the *ends*, of the rule of law. This can lead to concern with ‘check lists ... and recipes, “off-the-shelf blueprints”<sup>122</sup> often modelled on alien and distant originals, quite forgetting the purpose(s) of their enterprise’<sup>123</sup> The danger, identified by a critic of the rule of law, is that the rule of law can become ‘both trivialized as the particular patrimony of one and only one national order, and formalized, by the insistence that only one set of inherited procedures and court practices could sustain it’<sup>124</sup>

A state making the transition from an authoritarian socialism to a free-market constitutional democracy based on the rule of law was at the same time ‘extraordinarily ambitious, and deliberately unadventurous’.<sup>125</sup> ‘Ambitious’ in so far as this was a fundamental

---

<sup>119</sup> Jiri Priban, ‘From “which rule of law?” to “the rule of which law?”: post-communist experiences of European legal integration’ (2009) HJRL 338, 338-39. See also Adam Czarnota, Martin Krygier and Wojciech Sadurski, *Rethinking the Rule of Law after Communism* (Central European University Press 2005).

<sup>120</sup> Ivan Krastev, ‘Corruption, Anti-Corruption Sentiments, and the Rule of Law’ in Czarnota, Krygier, and Sadurski (eds), *ibid* 323.

<sup>121</sup> Varga (n 115) 101.

<sup>122</sup> Wade Jacoby, ‘Priest and Penitent: The European Union as a Force in the Domestic Politics of Eastern Europe’ (1999) *East European Constitutional Review* 62.

<sup>123</sup> Krygier, ‘The Rule of Law: An Abusers’ Guide’ (n 68) 141.

<sup>124</sup> Shklar (n 52) 26.

<sup>125</sup> Martin Krygier, ‘Rethinking the Rule of Law after Communism’ in Czarnota, Krygier and Sadurski (eds), (n 119) 265.

transformation of the political, social and legal mechanisms of the state. It was ‘unadventurous’ as it was to be based upon what was perceived to be a ‘normal’ working democracies – those of Western Europe.<sup>126</sup> However, these approaches involve

[...] social, political, and legal transformations which have unprecedented *sui generis* aspects, aspects which cannot be captured in the simple identikit portraits we have inherited of what law, the rule of law, and constitutionalism should be like.<sup>127</sup>

Many transitioning states did not have the opportunity to locally develop a culture or concept of the State-of-law in the transition to democracy. Instead, the model of the rule of law was directly copied from the German *Rechtsstaat* as a model for democratic institutions.<sup>128</sup> A legal system which aims to adhere to the norms of the rule of law is distinctly *not* disposed towards sudden change, as the concept of the rule of law is premised on stable administration, and consistent application of clear, constant laws. In some instances, practices intended to realise the rule of law in a legal system, resulted in the opposite. For example, Krygier suggests that judicial independence and autonomy (adopted under rule of law reforms) could in fact shield ‘incompetence, political affiliations and corruption’ in several transitional states including Poland.<sup>129</sup> Quickly insulating the judiciary from political interference assumed that the ideal of judicial independence ‘would best be reached by imagining it had already been attained’.<sup>130</sup> The fault is that this insulates ‘old, incompetence, corrupt, badly-formed hold-overs from earlier times’<sup>131</sup> from changing governments. Similarly, in Bulgaria – the independence of the judiciary, guaranteed through the unavailability of removal from the bench, meant that the old political elite had allies on the bench, even if they lost at election.<sup>132</sup> In adopting a functional account of the rule of law, *per* Czarnota, a ‘double character of transformation’ was created:<sup>133</sup> one which legitimised

---

<sup>126</sup> *ibid* 266.

<sup>127</sup> *ibid*.

<sup>128</sup> *ibid*.

<sup>129</sup> Krygier, ‘The Rule of Law: An Abusers’ Guide’ (n 68) 144. See also Pedro Magalhães, ‘The Politics of Judicial Reform in Eastern Europe’ (1999) *Comparative Politics* 43.

<sup>130</sup> *ibid*.

<sup>131</sup> *ibid*.

<sup>132</sup> Krygier, ‘The Rule of Law: An Abusers’ Guide’ (n 68) 144.

<sup>133</sup> Adam Czarnota, ‘Political corruption and the law-governed post-communist state: On two dimensions of post-communist transformation and the rule of (bad) law’ in Leslie Holmes (ed), *Corruption and Terrorism* (Edward Elgar 2006).

the new regime (in a convincing enough manner for EU accession) but at the same time enabled abuse of the system through a ‘hidden network of interests’ of the old regime.<sup>134</sup>

Adopting a new system required many institutional changes beyond replacing socialist ideologies, including all the new institutions of constitutionalism: an independent judiciary and constitutional courts.<sup>135</sup> An important element of the transition has been the creation of constitutional courts, and the allocation of the power of constitutional review of the legislature, to prevent previous experiences of parties holding majorities overriding, eroding or even ignoring constitutional mandates of rights.<sup>136</sup> All post-communist or transitional states in the EU have a constitutional court, and commentators have lauded the success of these courts in securing the rule of law.<sup>137</sup> Indeed, the presence of a ‘strong, independent, separate, activist, constitutional court’ is believed to be the ‘essential protector of constitutionalism, the rule of law, and liberal values more generally’<sup>138</sup>

This success has come at a price, however, as the power of judicial review has invited its own host of conflicts in terms of transitional justice. For example, the effort to reconcile with the past in Hungary highlighted that transitional justice and transitional rule of law can be in conflict. In 1991, the Hungarian Parliament adopted an act reopening the possibility of prosecuting crimes committed during the communist regime from 1944 – 1990, which had been barred due to a statute of limitations. The *Alkotmánybíróság* (Constitutional Court of Hungary) declared the act to violate the principle of rule of legal certainty, an ‘essential component’ of the rule of law, one that cannot be trumped by partial and subjective justice.<sup>139</sup> The complicated trade-off between dealing with the past, while also providing security for the present is prevalent in academic discourse on the rule of law in post-communist states. It highlights the need for a legal system to develop a localised account of the rule of law.

---

<sup>134</sup> *ibid.*

<sup>135</sup> Leszek Balcerowicz, ‘Institutional change after socialism and the rule of law’ (2009) HJRL 215.

<sup>136</sup> de Visser (n 116) 61.

<sup>137</sup> Martin Krygier, ‘Editorial: The Fall of Communism 20 years on’ (2009) HJRL 195, 204; and de Visser (n 116) 61.

<sup>138</sup> See Krygier, ‘The Rule of Law: An Abusers’ Guide’ (n 68) 152; and Wojciech Sadurski, *Rights before Courts, A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005).

<sup>139</sup> 11/1992 (III 5) AB határozat, Decision 11/1992 of 5 March 1992. For comment see de Visser (n 114) 343.

The issue is that in the effort to declare a state based on the rule of law, pattern-following stunted the growth of a local culture of the rule of law. I conclude that each State legal system is unique, with its own cultural, social and legal history. ‘Fetishizing’<sup>140</sup> accounts of the rule of law which are well-established leads to cut and paste models which can stunt the growth of the rule of law. What is shown by the example of the transition from authoritarian to democratic states is that more is required than simply declaring the rule of law to be a constitutional principle, or to be a fact of the State’s legal order. Simply, it is ‘something to do with what the law does, rather than simply with what it is declared to be.’<sup>141</sup> I conclude that it is necessary to develop an account of the rule of law which is *apt* to the legal system. When this does not happen, the rule of law does not establish and embed itself within the local legal system, and it becomes more vulnerable to abuse. The vulnerability of an imported, and underdeveloped account of the rule of law is evidenced in recent years, as some states have come under scrutiny for concerns regarding serious violations of the rule of law, which will be discussed in the next section.

### **4.3 Challenges to the Concept of the Rule of Law from Within the EU**

In this section, I outline and describe the very concerning developments in Poland and Hungary which present challenges to rule of law from within the EU. I address these challenges in so far as they are relevant to my central thesis: an account of the rule of law is needed for the EU legal system. I argue that the ongoing rule of law crisis provides impetus to the introduction of new rule of law compliance measures at EU-level,<sup>142</sup> and shows the shared value of the rule of law and the common responsibility of ensuring a high level of compliance with the rule of law at both EU level and within its Member States. I also conclude on the necessity of developing an apt account which is suitable to respond to the unique challenges and distinctions of each legal system.

---

<sup>140</sup> See Varga (115); and Krastev (120).

<sup>141</sup> Krygier, ‘The Rule of Law (and Rechtsstaat)’ (n 2).

<sup>142</sup> Analysed in detail in Chapter 3, Section 3.

In 2015, shortly after coming to power, the far-right President of Poland, Andrzej Duda enacted measures which threaten the rule of law and democracy in Poland.<sup>143</sup> The Government appointed five judges to the 15-member Polish Constitutional Tribunal, and passed a constitutional amendment changing the procedures of the Constitutional Tribunal. In addition to other changes, the Tribunal must now make decisions on the basis of a two-thirds majority. The cumulative effect of the changes, and the forced addition of judges perceived as loyal to the ruling party, is to severely weaken the Constitutional Tribunal. The draft Opinion of the Venice Commission leaked to the Polish Press in March 2016 underscored deep concerns that the amendment would ‘seriously hamper the effectiveness of the Constitutional Tribunal by rendering decision-making extremely difficult and slowing down the proceedings of the Tribunal’.<sup>144</sup> These changes, in addition to enacted measures limiting free speech and association, caused the Commission to take the unprecedented step of launching a rule of law inquiry into Poland.<sup>145</sup>

This break-down in rule of law compliance followed earlier issues in Hungary. In April 2013, the Hungarian Parliament passed the Fourth Amendment to the Constitution. The Fourth Amendment, *inter alia*, prohibits the Court from reviewing constitutional amendments, and reverses *all* decisions made by the Constitutional Court before 1 January 2012 since the adoption of the new Constitution came into force in 1990.<sup>146</sup> The Fourth Amendment has also brought universities under increased government control,<sup>147</sup> made the recognition of religious groups dependent on governmental cooperation,<sup>148</sup> weakened human rights protections and opened the possibility of political persecution.<sup>149</sup> The concerning issue as it relates to the

---

<sup>143</sup> Venice Commission, ‘Draft Opinion on the Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland’ (2016) Opinion no 833/2015, 10–16.

<sup>144</sup> *ibid* 16.

<sup>145</sup> Commission, ‘College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers’ (Press Release) MEMO/16/62.

<sup>146</sup> Articles 12 and 19 of the Fourth Amendment to the Hungarian Constitution. See Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (2014) LSE ‘Europe in Question’ Discussion Paper Series Paper No 79/2014, 12. See also Kim Lane Scheppele, ‘Constitutional Revenge, The Conscience of a Liberal Post’ *The New York Times* (New York, 3 January 2013).

<sup>147</sup> Article 6, Fourth Amendment to the Hungarian Constitution.

<sup>148</sup> Article 4(2), Fourth Amendment to the Hungarian Constitution.

<sup>149</sup> Article 14, Fourth Amendment to the Hungarian Constitution. See Bugarič (n 140).

Fourth Amendment is that it has ‘constitutionalized a deeply problematic illiberal political order, directly dismantling basic checks and balances’<sup>150</sup> and is leading towards a Putin-esque ‘guided democracy’ in Hungary and Poland.<sup>151</sup> Grave concerns for systemic rule of law violations in Hungary were stated in the 2012 Tavares Report<sup>152</sup> and by the Venice Commission.<sup>153</sup> In 2012, the Commission initiated legal actions against Hungary, challenging new legislation enacted under the new Hungarian Constitution. After the adoption of the Fourth Amendment to the Constitution, the Commission expressed serious concern about its compatibility with ‘EU legislation and with the principle of the rule of law’.<sup>154</sup> The Commission also raised the possibility of bringing further proceedings against Hungary for violation of the rule of law.<sup>155</sup>

The Hungarian and Polish rule of law crises is happening in tandem with concerns for systemic inadequacies in the legal structures in Bulgaria<sup>156</sup> and Romania<sup>157</sup> due to corruption or weak judicial systems. Armin von Bogdandy and Michael Ioannidis consider the issue to be the willingness and ability of some Member States to uphold and respect the rule of law.<sup>158</sup> Collectively, these concerns for systematic abuse of the rule of law has led the Commission to take unprecedented legal measures to investigate the legal systems of Member States. These measures will be analysed in Chapter 3. However, even acknowledging that there are serious rule of law violations among Member States, is damaging to a Union built on mutual trust, and

---

<sup>150</sup> Bugarič (n 146).

<sup>151</sup> Jan Werner Müller, ‘Europe’s Perfect Storm: The Political and Economic Consequences of the Eurocrisis’ (2012) *Dissent* 53.

<sup>152</sup> Parliament, ‘Report on the situation of fundamental rights: standards and practices in Hungary’ (24 June 2013) 2012/2130(INI).

<sup>153</sup> Venice Commission, ‘Opinion on the New Constitution of Hungary’ (2011) Opinion no 612/2011.

<sup>154</sup> Commission, ‘The European Commission reiterates its serious concerns over the Fourth Amendment to the Constitution of Hungary’ (Press Release) IP/13/327.

<sup>155</sup> The Tavares Report does not rule out the use of the ‘nuclear option’ if the Hungarian government does not comply with the monitoring program: Parliament, ‘Report on the situation of fundamental rights: standards and practices in Hungary’ 2012/2130(INI), para 86. [2012 Tavares Report]

<sup>156</sup> Commission, ‘Report on Progress in Bulgaria under the Cooperation and Verification Mechanism’ COM (2012) 411 final, 5.

<sup>157</sup> Commission, ‘Report on Progress in Romania under the Cooperation and Verification Mechanism’ COM (2012) 410 final, 3.

<sup>158</sup> Armin von Bogdandy and Michael Ioannidis, ‘Systemic Deficiency in the Rule of Law: What is it, what has been done, What can be done’ [2014] CMLR 59, 60.

the principle of mutual recognition.<sup>159</sup> Once the presumption of common values in Article 2 TEU which are the foundation of the Union are cast into doubt, it is ‘undermining the very essence of the integration’<sup>160</sup> and highlights the relative powerlessness of the EU to enforce values internally.<sup>161</sup> Kochenov argues that addressing the ‘values emergency’ is a more immediate crisis for the EU than any other.<sup>162</sup> In the next Chapter, I consider the mechanisms available to address serious rule of law concerns in Member States, and how the EU has sought to amplify the meaning of the rule of law in the EU

## 5 CONCLUSION: DISTINCT ACCOUNTS OF A UNIVERSAL VALUE

---

The conclusion which can be drawn from this Chapter is that there exists no single, common account of the rule of law within all legal systems. Each legal system is unique, and has developed within its own unique political, philosophical, economic, social and cultural landscape. Contemporary accounts of the rule of law are state-centric: they developed in, and are defined by, the state legal system in which they are applicable. Contemporary accounts of the rule of law disagree as to the meaning, value, substance, purpose and the institutional frameworks which claim to instantiate the rule of law. However, legal systems do not exist in isolation: they are influenced, and sometimes formed by other legal systems.<sup>163</sup> When we seek to determine the apt standard of the rule of law to evaluate or to direct a legal system, we must look to the unique elements of that legal system which determine a nuanced and unique standard of the rule of law. The apt standard of the rule of law is one which recognises the

---

<sup>159</sup> See issues surrounding mutual trust and mutual recognition in the case study of the European Arrest Warrant: Chapter 7, Section 3.

<sup>160</sup> Dimitry Kochenov, ‘The EU in its most serious crisis ever (and that’s not the Euro crisis)’ 13 June 2013 *Verfassungsblog* <[www.verfassungsblog.de/en/the-eu-in-its-most-serious-crisis-ever-and-thats-not-the-euro-crisis-2/](http://www.verfassungsblog.de/en/the-eu-in-its-most-serious-crisis-ever-and-thats-not-the-euro-crisis-2/)> accessed 21 January 2015.

<sup>161</sup> See Chapter 3, Section 4.

<sup>162</sup> Kochenov (n 160).

<sup>163</sup> See Jacques Ziller, ‘National Constitutional Concepts in the New Constitution for Europe’ (2005) 1 *Eur Constit LR* 452, 480; Bélig Nabli, ‘Européanisation et Constitutionnalisation du Droit National’ (2005) *Politeia* 243; and Pech (n 87) 9.

specific nature of the legal system of which it is a standard. Succinctly posited by Julie Dickson, legal systems

cannot be studied in isolation from the political and societal organizations of which they are a part. A legal system is not some self-sufficient free-floating normative entity: it is a legal system of something, and part of the key to its identity lies in the character of that something, and in the relation of the legal system to it.<sup>164</sup>

I identify in the next chapter, the unique features of the EU legal order which render state-centric accounts inapt as regards evaluating EU compliance with the rule of law. There remains, however, an important conundrum to be settled: how can I claim that the rule of law is a universal value of a legal order, but that each legal order must develop an apt account of it?

The answer is that values of a legal order do not necessarily lend themselves to be summated in a pluralist, all-encompassing account. There is no single account which determines the meaning of justice, or the scope of human rights, or model of democracy, but this does not mean that states should not strive to respect and realise these values. The fact that there is no single account does not diminish the importance, relevance, and need for the rule of law to be realised in a legal system. Rather, we should consider the different ways in which the rule of law can be realised within a legal system, and, in the particular focus of this thesis, within the EU legal system.<sup>165</sup>

Different questions of how best to achieve a high standard of the rule of law arise in different legal systems. For example, the debate between formal and substantive accounts of the rule of law is a feature of jurisprudence in common law jurisdictions, but is an uncommon debate in continental jurisprudence.<sup>166</sup> The formal/substantive debate is not irrelevant to common law systems, nor do civil law systems miss an essential point of disagreement in the rule of law. Rather, the common law legal systems, and the development of jurisprudence in

---

<sup>164</sup> Julie Dickson, 'Towards a Theory of European Union Legal Systems' in J Dickson and P Eleftheriadiis (eds), *Philosophical Foundations of European Union Law* (OUP 2013) 38.

<sup>165</sup> See Sionaidh Douglas-Scott, *Law after Modernity* (Hart Publishing 2013) ch 7.

<sup>166</sup> Gozzi (n 108) 238.

common law legal systems has had to grapple in a different way with the duties and responsibilities of the state and individual liberties and rights.

What can be learned from the experiences of common and civil law traditions is how each have sought to comply with *Rechtsstaat*, *État de droit* and the rule of law. The lesson of rule of law reforms in transitional states is that a culture of respect for the rule of law must develop within the system. It is not enough to state that a legal system abides by the rule of law. In order to determine the apt account of the rule of law which is suitable for the legal system we must ask, following Krygier: ‘what the distinctive values are that underlie and justify the rule of law,’ and then to consider ‘in different contexts, at different times: can these values be instantiated here or there, and if so, how can they be?’<sup>167</sup> As encapsulated by Varga, beyond the question of what institutions, procedures and measures can instantiate the rule of law, it is essential to constantly and continually evaluate adherence to the concept, as:

the Rule of Law is not a ready-made end-product but a lasting endeavour. It is not a godly gift granted for once and for all but continuous cultural effort at serving human dignity also by law. It is neither finished, nor rounded.<sup>168</sup>

In the next chapter, I consider the complications and challenges of the distinct features of the EU which render state-centric accounts of the rule of law analysed in this chapter inapposite. It is, however, important to bring the lessons of this chapter forward – realisation of a rule of law system is a constant effort.

---

<sup>167</sup> Krygier, ‘The Rule of Law: An Abusers’ Guide’ (n 66) 132.

<sup>168</sup> Varga (n 115) 23. In Chapter 5, Section 2, I consider how the EU can be monitored for rule of law adherence.

## CHAPTER THREE

### *A Complex Community: Complications of the Rule of Law at EU Level*

#### 1 INTRODUCTION

---

This Chapter explores the concept of the rule of law at EU level, and identifies the specific nature of the EU. The argument of this chapter is that an EU-apt account of the rule of law is needed to adapt to the specific nature of the EU. I begin in **Section 2** by examining the place of the rule of law in the Treaties, and laterally in EU administrative law; and then continue with an analysis of how the use of the term ‘rule of law’ in the jurisprudence of the Court of Justice of the EU (‘the Court’). In the context of EU administrative law, I show that the rule of law is a value which cannot solely be realised by the imperfect (if robust) system of administrative law, while also that the ‘rule of law’ has been a legitimating tool to further European legal integration. In examining the use of the ‘rule of law’ in other Institutions of the EU, I highlight how the repeated emphasis on the importance of the rule of law to the EU has not been matched by a substantiated account of what is meant by the rule of law in practice.

In **Section 3**, I put forward the argument that the EU has a specific nature which calls for an apt account of the rule of law, and detail the aspects which influence should influence this account: multi-level governance; the need to co-opt Member States’ officials to enforce EU law; how EU law must be applied in practice in Member States’ courts in a range of different legal traditions; and the complexities which surround the doctrine of conferred powers against the assertion of supremacy of directly effective EU law.

Having established that the EU ought to be subject to rule of law monitoring, I move to the next stage of the argument in **Section 4**. I examine existing mechanisms of monitoring Member States’ compliance with the rule of law. I assess the *New Framework to strengthen the*

*Rule of Law in Europe*,<sup>1</sup> which was introduced by the Commission in March 2014 in response to concerns about serious violations of the rule of law in Member States. I question whether it is possible to base an account of the rule of law on general principles ‘common to all Member States’ as the Framework asserts. I also question the legitimacy of the Commission’s powers of monitoring Member State compliance, when there is no equivalent mechanism monitoring of EU institutional compliance with the rule of law. I conclude that it is inconsistent to emphasise the importance of the rule of law to Member States and the functioning of the Union, but not to subject EU agents to the same supervision as Member States for threats<sup>2</sup> to the rule of law.

## 2 TRACING THE ‘RULE OF LAW’ AT EU LEVEL

---

### 2.1 Introduction: Has the EU provided an Account of the Rule of Law?

The rule of law is declared in Article 2 of the Treaty on European Union [TEU] as a value upon which the Union is founded and one which is shared among the patrimony of the Member States. However, to state that the rule of law is *foundational*, and to provide an account of what it *means* are two very different acts. In this regard, an important question to be considered is whether statements from the Court and other EU institutions concerning the rule of law are merely rhetorical, or do in fact serve as evidence of the truth of their adherence to a standard of the rule of law, and represent a standard which the EU, in reality, aims to hold itself to. To discern such an answer, I trace and examine the rule of law at EU level. I critically examine the realisation of the value of the rule of law in EU administrative law, and then focus on the use of the term ‘rule of law’ (or, in the language of the Court, *Communauté de Droit*) in the jurisprudence of the CJEU. I then consider the use of the term by the Commission and ask whether a coherent account of the rule of law has been posited by EU institutions. I argue that the rule of law is a value which cannot solely be realised by the robust (if imperfect) system of

---

<sup>1</sup> Commission, ‘The New Framework to strengthen the Rule of Law’ (Communication) COM (2014) 158.

<sup>2</sup> This term is used in the New Framework to strengthen the Rule of Law, *ibid*.

administrative law and conclude that there is, as yet, no clear account of the rule of law to provide a standard by which the EU legal order can be evaluated, and by which it ought to abide.

## 2.2 Rule of Law in the Treaties

The rule of law is declared in Article 2(1) of the Treaty on the European Union (TEU) to be one of the ‘values common to all Member States’ upon which the Union was founded. It is an objective which EU institutions are mandated to pursue under Article 2(2) TEU. Under Article 7 TEU, sanctions can be imposed on Member States if they are found in ‘serious and persistent’ breach of the values stated in Article 2 TEU. Application for membership of the Union is conditional upon the commitment by candidate states to respect the values of Article 2 TEU, including the rule of law under Article 49 TEU.<sup>3</sup> The rule of law is an objective in the foreign policy goals of the EU under Article 21 TEU, and external action is to be guided by the principles ‘which have inspired [the Union’s] own creation, development and enlargement, and which it seeks to advance in the wider world’. The EU’s external policy on development and cooperation is to be guided by the objective of consolidating democracy and the rule of law, as well as respect for fundamental rights.<sup>4</sup> The rule of law is also recalled by the Preamble to the Treaty and the Charter of Fundamental Rights of the EU. However, there has been no provision in the Treaties, or EU legislation, which has defined what is meant by ‘the rule of law’ or how it can be understood in relation to the other values of the Union.<sup>5</sup>

---

<sup>3</sup> Article 49 TEU. The conditions of the legal system prior to EU membership has created what has been termed a ‘Copenhagen Dilemma’: a high degree of respect for the rule of law is demanded from candidate countries, but the EU lacks an effective means of ensuring rule of law compliance among the Member States. See Jan-Werner Müller, ‘Safeguarding Democracy inside the EU Brussels and the Future of Liberal Order’ (2013) Transatlantic Academy Paper Series, <[http://www.transatlanticacademy.org/sites/default/files/publications/Muller\\_SafeguardingDemocracy\\_Feb13\\_web.pdf](http://www.transatlanticacademy.org/sites/default/files/publications/Muller_SafeguardingDemocracy_Feb13_web.pdf)> accessed 15 April 2014.

<sup>4</sup> Art 21(1) TEU and Art 21(2)(b) TEU. The Rule of Law as a guiding principle of the external action is considered in Chapter 5, Section 3. See Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the EU’ Jean Monnet Working Paper 04/09 <[www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org)> accessed 29 April 2014.

<sup>5</sup> Amichai Magen, ‘Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU’ (2016) JCMS 1, 2.

As one of the ‘foundational values’ it is interesting to note the, relatively late, introduction of the term ‘rule of law’ into the Treaties. What is now Article 2 TEU was introduced by the Amsterdam Treaty (1997), over forty-five years after the foundational Treaty of Rome (1951). As an operative term, however, it entered the vernacular of the Court earlier than the treaties: the Court of Justice first made reference to the EU as a ‘*Communauté de droit*’<sup>6</sup> in the *Les Verts* judgment in 1986.<sup>7</sup> It was not until 1992 that the term was explicitly referenced in the Treaties. However, the ‘rule of law’ referenced in the Preamble of the Maastricht Treaty (1992) was a largely symbolic<sup>8</sup> confirmation of Member States’ ‘attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’.<sup>9</sup> It is interesting to note that the Maastricht Treaty (1992) did not adopt the language of the Court of Justice in the use of the term ‘*Communauté de droit*’<sup>10</sup> (similar to the German ‘*Rechtsgemeinschaft*’<sup>11</sup>). In the French and German versions of the Treaties, the Union is founded on the principles of *État de droit* and *Rechtsstaatlichkeit*.<sup>12</sup> The use of the term *Communauté de droit* in the Court of Justice, as distinct from *État de droit* (*Rechtsstaatlichkeit*) which emphasises the state, was likely an effort to distance the Court from the state-centric concepts of the rule of law, and inspire an EU-centric understanding of the rule of law.<sup>13</sup>

By stating that the EU is founded on *l’État de droit*, the EU aligns its legal order with established accounts of the rule of law, and emphasising the commonality of the concept across Member States. However, there is no further indication given of what constitutes ‘the rule of law’ provided in either the TFEU or the TEU. This is problematic as there is, consequently, no

---

<sup>6</sup> Case 294/83 *Les Verts v Parliament* [1986] 1339, para 23.

<sup>7</sup> *ibid* para 23.

<sup>8</sup> Pech, ‘The Rule of Law as a Constitutional Principle of the EU’ (n 4).

<sup>9</sup> *ibid*.

<sup>10</sup> See eg Case 294/83 *Parti écologiste “Les Verts” v Parliament* [1986] ECR 1339, para 23 [*Les Verts*]; and C-402/05 and C-415/05 *European Commission and Others v Yassin Abdullah Kadi* [2008] ECR I-6351, para 281 [*Kadi I*]. See also Stefan Martini, ‘Die Pluralität von Rule-of-Law-Konzeptionen in Europa und das Prinzip einer europäischen Rule of Law’ in M Kötter and GF Schuppert, *Normative Pluralität ordnen: Rechtsbegriffe, Normenkollisionen und Rule of Law in Kontexten dies- und jenseits des Staates* (NOMOS 2009) 325; and Jacqueline Neumann, *Die Förderung der Rule of Law in der Entwicklungszusammenarbeit* (LIT Verlag Münster 2013) 329–30.

<sup>11</sup> *Gemeinschaft* refers to a ‘social community’, *Rechtsgemeinschaft* translates to a community based on law. It is distinguishable from *Rechtsstaat* or *Rechtsstaatlichkeit*. See Chapter 2, Section 3.2.

<sup>12</sup> For discussion, see Pech, ‘The Rule of Law as a Constitutional Principle of the EU’ (n 4).

<sup>13</sup> Pech suggests that the aversion of the use of ‘*État*’ by the Court, is due to the sensitivity of implying the intention of creating a ‘European Superstate’: *ibid* 11.

definitive standard of rule of law compliance to be aimed at by accession states (for the purposes of Article 49 TEU on application to EU membership), or to be found in breach of by current Member States (for the purposes of Article 7 TEU). The EU institutions, and in particular the Court of Justice through development of EU administrative law, have therefore been left to determine the meaning and scope of the ‘rule of law’.

### **2.3 Rule of Law and EU Administrative Law**

Administrative law regulates the exercise of the power of the executive and administration. With the system of judicial review which establishes the legality of administrative action, administrative law is foundational to good governance.<sup>14</sup> The precepts of administrative law – such as access to justice, the fair administration of the law, and detecting and remedying the misuse of power, are means of realising the value of the rule of law in the legal system. In this section, I outline some intrinsic links between the rule of law and the development and practice of EU administrative law,<sup>15</sup> and then highlight a deficiency in the system of judicial review from a rule of law perspective.<sup>16</sup> As there is limited scope in this thesis to critically assess the system of administrative law in the EU, I have chosen to focus on: (a) grounds of review concentrating on general principles due to their commonality with rule of law principles; and (2) the contentious argument over access to justice and the restrictive rules on standing to challenge EU law by non-privileged applicants. Ultimately, I argue that while the current body of administrative law and system of judicial review is robust, I conclude that there is scope in to enhance the value of rule of law through a new narrative focus on the rule of law, and beyond the borders of EU administrative law.<sup>17</sup>

---

<sup>14</sup> Paul Craig, *EU Administrative Law* (2<sup>nd</sup> edn, OUP 2012).

<sup>15</sup> I am grateful to my DPhil examiners for identifying this important aspect of understanding the rule of law at EU level. This section is neither intended to be a complete nor exhaustive examination of EU administrative law in the EU which is far beyond the scope of this thesis. It is intended to contextualise the role of EU administrative law in assuring good governance in the EU, and with its relationship to the rule of law.

<sup>16</sup> Section 3 considers in further detail the issues of administration of EU law in Member States.

<sup>17</sup> See *Part II: In Practice*. Beyond this broad outline of the connection between the rule of law and administrative law, the thread of administrative law runs through the thesis. In Section 3, I address the specific nature of the EU, including the administration of EU law in Member States; and while in examining the principles of EUCA in

The foundations of EU administrative law and the system of judicial review are rooted in Article 33 of the ECSC Treaty, though years of ‘judicial creativity’<sup>18</sup> were needed to transform it into the now substantive and significant corpus of law. The current legal framework for the Treaties for lies in Article 298(1) TFEU provides for an open, efficient and independent European administration; and Article 41 CFR which enshrines the right to good administration. In the Courts, Article 19 TEU places a duty on the Court of Justice to ensure that the interpretation and application of the Treaties are observed, while Article 263 TFEU empowers the court to review the legality of EU acts. The preliminary reference mechanism provided for in Article 267 TFEU provides an indirect route for questions of the interpretation of primary and secondary EU norms and validity of secondary acts. Together, these articles form the basis for the system of review, and case law contributed to the development of rule of law-related values and principles, such as the right to be heard,<sup>19</sup> the duty to provide reasons in administrative decisions,<sup>20</sup> the right to a fair hearing and the privilege against self-incrimination.<sup>21</sup>

The administration of EU law now encompasses a complex system of centralised and decentralised powers, comprising of committees, national regulatory authorities, agencies, ombudsmen, shared and national administrators, which then also operates through new and hybrid forms of governance such as the Open Method of Coordination.<sup>22</sup> A paradigmatic example of shared administration is the Common Agricultural Policy [CAP], in which Member States and the Commission share legal and financial responsibilities.<sup>23</sup> However, it could also be argued that the burden of administration is held mainly by Member States: in judicial review

---

Chapter 4, I highlight the debt they owe to earlier review decisions by the Court of Justice, and outline the relationship between EUCA and General Principles.

<sup>18</sup> Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 313.

<sup>19</sup> Case 17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063.

<sup>20</sup> Case C-350/88 *Société française des Biscuits Delacre v Commission* [1990] ECR I-395.

<sup>21</sup> Case 374/87 *Orkem v Commission* [1989] ECR 3283.

<sup>22</sup> See Chapter 7, Section 3.5.2 for overview of the elements of the Open Method of Coordination.

<sup>23</sup> Arts 38-44 TFEU. Craig, *UK, EU and Global Administrative Law* (n 18) 385–87.

actions, the Courts have interpreted the relevant law in a teleologically,<sup>24</sup> holding that Member States take the financial responsibility for incorrect (even if bona fide) application of the law.<sup>25</sup>

In such a complex system of multi-level administration and governance,<sup>26</sup> efficiency, efficacy and equivalence are central to functioning of EU law in all Member States' diverse systems of administration. Such functional goals are balanced with powers of review under Article 263 TFEU (direct) and Article 267 TFEU (indirect), to 'reassure Member States that EU regulatory power would be subject to controls analogous to those exercised within the nation state'.<sup>27</sup> However, the focus on efficacy through uniform application of EU law throughout Member States led to a 'duality' in judicial review as it served

both as the vehicle through which precepts of good governance could be imposed on the administration, and also as the means through which the EU courts could interpret the regulatory norms in order to plug gaps and facilitate their efficacious implementation.<sup>28</sup>

This duality of imposing good governance and effectiveness is however curtailed to the extent to which EU action could be reviewed are limited to proscribed grounds of review. The grounds available to the Court of Justice, based on precepts of French administrative law,<sup>29</sup> have largely remained unchanged since the Treaty of Rome, and are now stated in Article 263 TFEU: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law related to their application, or misuse of powers. While three grounds of review were largely discrete,<sup>30</sup> the ground of infringement of the Treaties or 'any rule of law related to their application' provides the legal foundations to the General Principles of EU law. General principles enhance and share the value of the rule of law.<sup>31</sup> Largely

---

<sup>24</sup> Craig, *UK, EU and Global Administrative Law* (n 18) 386.

<sup>25</sup> Case 11/76 *Netherlands v Commission* [1979] ECR 245, para 6. The Court also held that it was a general duty of Member States under Article 4(3) TEU to ensure the correct implication of CAP, to recover incorrect awards or funds allocated through irregularity or fraud. Otherwise, incentive may exist for Member States to broadly interpret the relevant rules, so as to financially benefit their citizens. Case C-235/97 *France v Commission* [1998] ECR I-7555, para 45; Case C-278/98 *Netherlands v Commission* [2001] ECR I-1501, paras 39, 41, 92; Case C-253/97 *Italy v Commission* [1999] ECR I-7529, para 6. See Craig, *UK, EU and Global Administrative Law* (n 18) 386–87.

<sup>26</sup> See Section 3.

<sup>27</sup> Craig, *UK, EU and Global Administrative Law* (n 18) 405.

<sup>28</sup> *ibid* 406.

<sup>29</sup> *ibid* 341.

<sup>30</sup> *ibid* 317.

<sup>31</sup> The overlap and relationship between EUCA and General Principles is examined in Chapter 4, Section 4.3.

developed by the Court of Justice, General Principles include equality,<sup>32</sup> fundamental rights,<sup>33</sup> proportionality,<sup>34</sup> and legal certainty.<sup>35</sup> General Principles have been fashioned from ‘generally accepted normative precepts’<sup>36</sup> in national and international legal orders, and are second only to the Treaties in the normative legal hierarchy of the EU legal system.<sup>37</sup> They are superior over legislative, delegated and implementing acts, and can serve as a ground for the interpretation of Community laws, but also for the invalidation of Union measures.<sup>38</sup>

However robust the scope of review of Union measures under general principles such as legal certainty, legitimate expectations or non-discrimination, the first (and often near-insurmountable for some litigants) hurdle is standing. A flashpoint for tension in EU administrative law is the possibility to challenge the validity of EU norms as a non-privileged applicant.<sup>39</sup> The standing rules under Article 263(4) TFEU if the act in question is addressed to them, or (if not addressed to them) of ‘direct and individual’ concern. Privileged applicants (Member States, the Commission, Council and the European Parliament) may bring an action for annulment without the requirement of demonstrating an interest.<sup>40</sup> The third category in which the individual only needs to show direct (and not individual) concern is a regulatory act which does not require implementing measures. The *Plaumann*<sup>41</sup> test has remained the authority, even after the Lisbon reforms, in determining individual concern, it demands a high

---

<sup>32</sup> Cases 117/76 and 16/77 *Ruckdeschel v Hauptzollamt Hambourg-St Annen* [1977] ECR 1753; Case C-144/04 *Mangold v Rüdiger Helm* [2005] ECR I-9981; and Case C-555/07 *Seda Kücüdeveci v Swedex GmbH & Co KG* [2010] ECR I-365.

<sup>33</sup> Case 11/70 *International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125; and Case 4/73 *J Nold v Commission* [1974] ECR 491.

<sup>34</sup> See Case C-144/04 *Mangold v Rüdiger Helm* [2005] ECR I-9981; and Case C-555/07 *Seda Kücüdeveci v Swedex GmbH & Co KG* [2010] ECR I-365.

<sup>35</sup> See Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055; Case C-234/04 *Kapferer v Schlank & Schick* [2006] ECR I-2585; and cf Case C-453/00 *Kühne and Heitz* [2004] ECR I-837.

<sup>36</sup> Craig, *UK, EU and Global Administrative Law* (n 18) 323.

<sup>37</sup> Arts 289–91 TFEU.

<sup>38</sup> Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006). Craig, *UK, EU and Global Administrative Law* (n 18).

<sup>39</sup> For discussion on standing in review proceedings, see A Ward, *Judicial Review and the Rights of Private Parties in EC Law* (OUP 2007); A Arnall, ‘Private Applicants and the Action for Annulment since Codorniu’ (2001) CMLR 7; and Paul Craig, ‘Standing, Rights and the Structure of Legal Argument’ (2003) *European Public Law* 493.

<sup>40</sup> Art 263 TFEU.

<sup>41</sup> Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95. See also the confirmation in Case T-177/01 *Jégo-Quéré et Cie SA v Commission* [2002] ECR II-2365; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677; Joined cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato ‘Venezia vuole vivere’ and Others v Commission* [2011] ECR I-04727; Case C-274/12 P *Telefónica SA v Commission* (GC, 19 December 2013); and Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, (GC, 3 October 2013).

level of differentiation from all other persons such that it singles out the person in the same way as the initial addressee. This has been a source of criticism in the EU, as it limits success to a small number of retrospective cases.<sup>42</sup>

The possibility of indirect challenge under (now) Article 263 TFEU has been a judicial justification for the narrow interpretation of standing rules for direct challenge, as individuals can challenge rules through national courts.<sup>43</sup> However, indirect challenge to EU norms is an ‘imperfect substitute’<sup>44</sup> for more open standing rules for direct challenge. There are significant deficiencies in this rationale, exemplified by the disadvantages identified by Advocate General Jacobs in indirect challenge over direct challenge to EU norms:<sup>45</sup> national courts’ lack of expertise in EU law; lack of participation by Council and Commission in proceedings; the possible lack of national implementing measures to be challenged; lack of the possibility to invalidate the norm; substantial delays and significant costs; and the possibility that national courts would be unwilling to make a preliminary reference. Cumulatively, this could represent inadequate and ineffective judicial protection.<sup>46</sup> This conclusion, along with the question of access to justice and enforcement of the rule of law, is one that I will return to in analysis of EUCA in Chapter 4, Section 4.4.

The body of EU administrative law is robust, complex and nuanced beyond that found in Member States, simply by reason of the complex division of competences and shared administration between the EU and all the Member States. In highlighting some of the aspects and connections between EU administrative law, I sought to provide evidence for the argument that there is scope to enhance the value of rule of law through a new narrative focus on the rule of law. In the next section, I aim to find whether that narrative is already in place and

---

<sup>42</sup> See n 29.

<sup>43</sup> As in the seminal, Case 294/83 *Les Verts v Parliament* [1986] ECR 1339.

<sup>44</sup> Craig, *UK, EU and Global Administrative Law* (n 18) 383.

<sup>45</sup> Opinion of AG Jacobs, Case C-358/89 *Extramet Industrie SA v Council* [1991] ECR 250.

<sup>46</sup> Opinion of AG Jacobs, Case C-50/00P *Unión de Pequeños Agricultores* [2002] ECR 6677. The limitation on judicial review as a violation of the rule of law will be examined in further detail in Chapter 4, Section 3 on the principle of equality before the law; and Chapter 5 on the possible means of enforcement of EUCA.

focus in particular on the use of the term ‘rule of law’ in the jurisprudence of the Court of Justice.

## 2.4 ‘Rule of Law’ in the Jurisprudence of the Court of Justice

In this section, building from the discussion of EU administrative law, I focus on how the Court of Justice has interpreted the *term* ‘rule of law’ and how it has impacted on the development of EU law, beginning with the great declaration, ‘*l’Union est fondée sur le principe de l’État de droit*’,<sup>47</sup> which provided the inspiration and foundation for the identification of the principles including legality,<sup>48</sup> legal certainty,<sup>49</sup> and the separation of powers<sup>50</sup> in EU law. I trace the term from *Les Verts* through to the *Kadi* saga.

The ‘rule of law’ was instrumental in the reasoning in the seminal judgment of *Les Verts*. The Court reasoned that the Community is based on the rule of law ‘inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.’<sup>51</sup> In *les Verts*, the Court expanded the scope of judicial review beyond the plain reading of the Treaty on the basis of the demands of the rule of law. The decision was essentially procedural, however, characterising the rule of law as the guarantee of legality, and a complete system of judicial review proceedings and remedies.<sup>52</sup>

The question of the scope of judicial review again arose in the context of the implementation at EU level of UN Security Council Resolutions, which had the effect of

---

<sup>47</sup> Case C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union*, [2002] ECR I-6677, para 38; C-354/04 P *Gestoras Pro Amnistía and Others v Council* [2007] ECR I-1579, para 51; C-355/04 P *Segi and Others v Council* [2007] ECR I-1657, para 51; and C-402/05 and C-415/05 *Kadi I*, para 281. See Pech, ‘The Rule of Law as a Constitutional Principle of the EU’ (n 4).

<sup>48</sup> Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-3801, para 63: ‘[...] in a community governed by the rule of law, adherence to legality must be properly ensured’.

<sup>49</sup> Joined Cases C-212/80 to 217/80 *Amministrazione delle finanze dello Stato v Salumi* [1981] ECR 2735, para 10: ‘the effect of [Union] legislation must be clear and predictable for those who are subject to it’.

<sup>50</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 58: ‘EU law does not preclude a Member State from simultaneously exercising legislative, administrative and judicial functions, provided that those functions are exercised in compliance with the principle of the separation of powers which characterises the operation of the rule of law’.

<sup>51</sup> Case 294/83 *Les Verts*, para 23.

<sup>52</sup> Pech, ‘The Rule of Law as a Constitutional Principle’ (n 4) 15–16.

freezing assets of those identified as having links with a terrorist network, but without informing those concerned. Members of that list, Mr Kadi, and the Al Barakaat Foundation, challenged the EU implementing regulation, arguing that their right to a fair hearing had been violated.<sup>53</sup> The Court of Justice overturned on appeal that the regulation was immune from judicial review for breach of fundamental rights, emphasising the autonomous nature of the EU legal order, and underlining the commitment to upholding the ‘rule of law’. Following *Kadi I*, the Commission issued Mr Kadi with a summary of the main reasons for his inclusion on the list, but did not disclose evidence to support the allegations which the Commission found to be in line with the *Kadi I* judgment. Challenging this, *Kadi II* held that EU courts must ‘ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European union legal order’.<sup>54</sup> In this, there was a strong affirmation of the Court’s duty to preserve the rule of law as tied with the ‘constitutional guarantee’ of judicial review.<sup>55</sup> However, the reasoning of the Court in rule of law cases implies troubling circular logic: in order to uphold the rule of law, the Treaties must be a source of authoritative law; and because the Treaties are an autonomous source of authority, there is a duty to uphold the rule of law. This is troubling as the rule of law becomes merely a tool to further European integration or for other political ends.<sup>56</sup> This is a corruption of the term, and devalues the concept, as it is no longer essentially a standard of good governance through law. It becomes a tool to further, as Weiler writes, ‘[p]olitical messianic projects’ including European integration.<sup>57</sup> The messianic project in this instance could be to confirm the European Union as a constitutional (perhaps quasi-federal) polity, capable of autonomous decision-making authority, but governed by the shared western liberal values, such as the rule of law, which would make the exercise of these powers legitimate.

---

<sup>53</sup> Joined Cases C-402 & C-415/05 *Kadi I*.

<sup>54</sup> Joined cases C-584/10 P, C-593/10 P and C-595/10 *Kadi II*, para 97.

<sup>55</sup> Joined cases C-584/10 P, C-593/10 P and C-595/10 *Kadi II*, para 66.

<sup>56</sup> Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (CUP 2010) 77–80.

<sup>57</sup> Joseph Weiler, ‘The transformation of Europe’ (1991) YLJ 2403, 151.

## 2.5 Rule of Law and the Commission

In the State of the European Union Address 2012, the President of the European Commission, José Manuel Barroso, declared that the rule of law was one of the fundamental values of the Union, and the foundation upon which the Union is built.<sup>58</sup> This rhetoric continued in the 2013 Address. Referring again to the importance of the rule of law, Barroso declared that the safeguarding of values, explicitly the rule of law, has been the purpose of the EU since its inception.<sup>59</sup> Considering the challenges to the rule of law in Member States, he underlined the need for a ‘bridge between political persuasion and targeted infringement procedures on the one hand, and what [...] the nuclear option of Article 7 of the Treaty, namely suspension of a member states’ rights’.<sup>60</sup> A notable element of Barroso’s Address was his declaration of the Commission as ‘Guardian of the Treaty’ (2012 Address), and the assertion in the 2013 Address that the Commission was an independent and impartial referee. Following these remarks, the Vice-President, Viviane Reding, also highlighted the importance of the rule of law as a prerequisite for the protection of other fundamental values of the Union. Repeating the statement that the Commission is ‘Guardian of the Treaties’, Reding, also the Justice Commissioner, continued that it must also be ‘Guardian of the rule of law’,<sup>61</sup> and should be allowed to intervene ‘early and transparently in cases of serious and systemic threats to the rule of law in a Member State.’

The Commission acknowledged, diplomatically, that the ‘different constitutions and judicial systems of the EU Member States are, in principle, well designed and equipped to protect citizens against any threat to the rule of law.’<sup>62</sup> The presumption that Member States embrace and protect the values of Article 2 TEU is as understandable as it is essential for the

---

<sup>58</sup> President of the Commission, ‘State of the Union Address 2012’ (Press Release) SPEECH/12/596 <[http://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm)> accessed 5 May 2014

<sup>59</sup> President of Commission, ‘State of the Union Address 2013’ (Press Release) SPEECH/13/684 <[http://europa.eu/rapid/press-release\\_SPEECH-13-684\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm)> accessed 5 May 2014.

<sup>60</sup> *ibid.* The inadequacies of current mechanisms to address rule of law violations in Member States is considered in further detail in Section 3.1.

<sup>61</sup> See the speech of Vice-President Reding, EU Justice Commissioner, ‘The EU and the Rule of Law – What next?’ (Press Release) SPEECH/13/677 < [http://europa.eu/rapid/press-release\\_SPEECH-13-677\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm) > accessed 5 May 2014.

<sup>62</sup> New Framework (n 1) 2.

EU legal order: 'it allows for trust between all institutions, justifies the recognition of their decisions, legitimizes EU decision-making, and expresses Europe's self-understanding as a union of liberal democracies.'<sup>63</sup>

Consequent to the State of the Union address, there was an investigation into the rule of law in the EU, which ultimately resulted in the *New Framework to strengthen the Rule of Law* (which is analysed in greater depth in the next section). It is interesting to consider the Commission's position on the importance of the rule of law in the EU and the reasons it identified for the need to strengthen the rule of law in the EU, beyond the statement that the rule of law is a 'fundamental value' upon which the Union was founded. The rule of law has been identified as essential to almost every aspect of the Union: from a source of legitimacy for Union action,<sup>64</sup> to a key element of economic stability; from mutual trust between Member States, to EU policy on external action.

The reference to a shared value is understandable, especially in times of crisis. The Financial Crisis, and the resulting crisis in the Eurozone, has caused a period of unprecedented turbulence in the EU. The imposition of austerity measures, and the ex-ante supervision of Member State budgets caused widespread scepticism of the EU. The rise of far-right and anti-EU political movements can be seen not only as a symptom of the current economic crisis, but also the increasing opposition to the EU's integration policies. In light of this, there is an emphasized connection between the rule of law and economic recovery and stability.<sup>65</sup> An efficient and independent judicial system, and the consequent predictable, timely, and enforceable decisions, ensures trust and stability which are essential to business and investment, and economic growth at national and EU level.<sup>66</sup>

---

<sup>63</sup> Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What is it, what has been done, What can be done' [2014] CMLR 59, 60.

<sup>64</sup> See Section 2.

<sup>65</sup> There is clear evidence of the connection between rule of law compliance and economic stability: see Erik O Wennerström and Åsa Valter, 'The Rule of Law in Times of Financial Crises: How EU Rule of Law Correlates with the Market' (2015) Scandanavian Studies in Law, available at SSRN: <<http://ssrn.com/abstract=2734125>> accessed 29 August 2016. See also Chapter 5, Section 2.

<sup>66</sup> Assises de la Justice, *Discussion Paper 4: The Rule of Law* (Commission 2013).

A related element identified for the importance of the rule of law was the promotion of trust between Member States as this is ‘essential to the Union.’ This is an interesting comment, as often analysis of the EU is binary: analysing the relationship between the EU and the Member State. This alternative implies that we should also look at the dynamics of the relationships between Member States in (and with) the Union. Trust in other Member States as upholding the same values of the Union, is understandably essential to the functioning of the Union. When one State does not abide by Union law, it also has the effect of undermining the Union as it incentivises other Member States not to follow Union law.

### **3 THE SPECIFIC NATURE OF THE EU: ARGUING THE NECESSITY OF AN APT ACCOUNT OF THE RULE OF LAW**

---

#### **3.1 Introduction: Challenges to State-centric Accounts of the Rule of Law**

The EU is a *sui generis* legal entity. State-centric concepts are not the best fit for the *sui generis* nature of the EU polity.<sup>67</sup> Existing in an unparalleled lacuna between international organisation and federation of states,<sup>68</sup> it has a specific nature which necessitates an account of the rule of law which reflects and responds to these complexities. In this section, I highlight aspects of this specific nature of the EU which call for an EU-centric account of the rule of law, and provide detail on the aspects of the EU which influence EUCA. These are: multi-level governance in the EU (Section 3.2); the application of EU law across Member states in a range of different legal traditions (Section 3.3); the enforcement of EU law by Member States’ Officials (Section 3.4); and the complexity surrounding the operation of EU law under a system of

---

<sup>67</sup> Neil Walker, *Sovereignty in Transition* (Bloomsbury 2003); and Neil Walker, ‘Multilevel Constitutionalism: Looking Beyond the German Debate’ (2009) A New Concept of European Federalism LSE ‘Europe in Question’ Discussion Paper Series LEQS Paper No 08/2009.

<sup>68</sup> There is significant discourse on the characterisation of the EU, for introduction and overview, see Laurent Pech, *The European Union and its Constitution. From Rome to Lisbon* (Clarus Press 2008) ch 1; and Ingolf Pernice, ‘Multilevel Constitutionalism and the Crisis of Democracy in Europe’ (2015) ECLR 541.

conferred powers whilst asserting the supremacy of directly effective EU law, which gives rise to conflicting sovereignty claims (Section 3.5).

### 3.2 Multi-Level Governance in the EU

Multi-level governance of the EU refers to the inextricable policy and legal network of supranational, national, regional and local governments of the Union Institutions and Member States, where competence to make decisions are ‘shared by actors at different levels rather than monopolised by state executives’.<sup>69</sup> This form of governance is exemplary of a departure from traditional characterisations of a Westphalian model of the dichotomous national law/international law,<sup>70</sup> to a more dynamic types of governance<sup>71</sup> characterised by shared administration, intergovernmental cooperation, and supranational integration delineated by complicated (and sometimes divisive) spheres of competency divided between the EU and Member States.<sup>72</sup> An exemplar of multi-level governance within the EU legal order has been the creation of the single market, which relied on the implementation of EU regulation, in addition to the self-regulation of states, and the delegation of various policy and decision-making processes to various public and private networks of actors.<sup>73</sup>

Multi-level governance in EU law and policy making presents a significant challenge for state-centric accounts of the rule of law. State-centric accounts assume a hierarchical and dichotomous mode of governance, and a unitary source of authority.<sup>74</sup> While it could be argued

---

<sup>69</sup> G Marks, L Hooghe, and K Blank, ‘European Integration from the 1980s: State-Centric v Multiple Level Governance’ (1996) *JCMS* 341, 346. See also George Pagoulatos and Loukas Tsoukalis, ‘Multilevel Governance’ in E Jones, A Menon and S Weatherill (eds), *Oxford Handbook of the European Union* (OUP 2012).

<sup>70</sup> Cormac MacAmhlaigh, ‘Pluralising Constitutional Pluralism’ University of Edinburgh Research Paper Series No 2016/10, 1.

<sup>71</sup> Gráinne de Búrca and Joanne Scott, ‘Introduction: New Governance, Law and Constitutionalism’, in J Scott and G de Búrca (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006). See also Colin Scott, ‘Governing without Law or Governing without Government? New-ish Governance’ (2009) 15 *ELJ* 160.

<sup>72</sup> As demonstrative of the specific nature of the EU, the complicated division of competences is examined in the Section 3.3.

<sup>73</sup> Pagoulatos and Tsoukalis (n 69) 68–69. See also M Egan, ‘Governing the Single Market: From Private Coordination to Public Regulation’ in I Tömmel and A Verdun (eds), *Innovative Governance in the European Union* (Rienner 2009)

<sup>74</sup> *per* Tamanaha, the rule of law serves to ‘hold government officials to the law (*vertical*)’, and ‘to resolve disputes between citizens according to the law (*horizontal*).’ Brian Tamanaha, ‘A Concise Guide to the Rule of Law’ (2007)

that multi-level governance has both vertical (ie between the CJEU and National Courts) and horizontal (ie between national courts) dimensions, the locus of authority in the EU is either rooted in national authority, the autonomous order of the EU, debatably uncertain,<sup>75</sup> or dispersed according to competence. On another characterisation of the EU Legal Order which presents a more certain challenge to state-centric dichotomous division of government, the ‘vertical’ dimension is eschewed in favour of a pluralist understanding of the multi-level dimension where there is no clear hierarchy of levels as between the EU and Member States – thus creating a significant challenge for state-centric accounts based on systemic unity, rather than interdependence, cooperation, alternative approaches, and decentralised authority. As Culver and Giudice explain, the EU ‘appears to lack the sort of systematic unity visible in the state legal system via identification of core institutions responsible for maintenance of comprehensive and supreme authority of the system.’<sup>76</sup>

Contemporary accounts of the rule of law assume a singular source of authority from which rules can be verified as legal (as in the *Grundnorm*), and from which ought to be certain and equally applied: shared governance in a multi-level polity does not fit this model. The diffusion of power away from centralised administration in the EU, or in national governments, creates a problematic situation in which it is harder to pursue legitimacy and accountability. This is the ‘Faustian bargain’ identified by Peters and Pierre, where core values (including respect for the rule of law) are ‘traded off’ for ‘accommodation, consensus and the purported increased efficiency in governance.’<sup>77</sup> The criticism of multi-level governance from a rule of law perspective is that the decentralisation of power to non-state, and public/private networks which are not subject to the same or similar administrative law controls and who have ill-

---

Legal Studies Research Paper Series 07/0082, 9 < <http://ssrn.com/abstract=1012051>> accessed 8 April 2013 [emphasis added]; the terms have also been adopted by Marcus Hahn, ‘The Distinction and Normative Interdependence between ‘Government’ and ‘Governance’: The EU as a Regime of Governance’ (2009) Europea Institute Mitchell Working Paper Series 2/2009, <<http://www.law.ed.ac.uk/mitchellworkingpapers/papers.aspx>> accessed 8 April 2013.

<sup>75</sup> See Section 3.5.

<sup>76</sup> Keith Culver and Michael Giudice, ‘Not a System but an Order: An Inter-Institutional View of European Union Law’ in Julie Dickson and Pavlos Eleftheiriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2013) 75.

<sup>77</sup> BG Peters and J Pierre, ‘Multi-Level Governance and Democracy: A Faustian Bargain?’ in I Bache and M Flinders, *Multi-Level Governance* (OUP 2004) 85.

defined or uncertain competences creates a situation of rife for uncertainty, illegality, and divided and unequal application of the law.<sup>78</sup>

### 3.3 Application of EU Law in Different Legal Traditions

The European Union is distinct in its operation through the national legal systems of its Member States. Following the current President of the Court of Justice, Koen Lenaerts,

each Member State contributes its own judicial system for the sake of ensuring the effective application and enforcement of Community law, which is indeed in line with the deeper philosophy of unity and diversity underlying the Union itself<sup>79</sup>

It is, however, in the intrinsic contradiction between unity and diversity that there is a complication for the rule of law. On the side of unity, is the expectation of the uniformity and effectiveness of EU law across all Member States, and the idea that the EU constitutes an ‘autonomous legal order’ as recently restated by the Court of Justice, most recently in Opinion 2/13 on the EU’s accession to the CJEU,<sup>80</sup> Diversity, meanwhile, represents the range of national legal identities within the EU – divided on history, language, culture, and common/civil law tradition. This is a diversity to be respected: Article 4(2), between the provisions on conferral and the principle of sincere cooperation, states that the Union shall respect, inter alia, the national identities of Member states, ‘inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.’<sup>81</sup>

The intrinsic tension between unity and diversity in the context of application lies in the conflict between ensuring the effectiveness and uniformity of EU law on the one hand, and ensuring respect for national legal identity on the other. There are two contexts which are

---

<sup>78</sup> Pagoulatos and Tsoukalis (n 69). See also TA Börzel, and T Risse, “Who is Afraid of a European Federation? How to Constitutionalise a Multi-Level Governance System,” *Jean Monnet Working Paper* 7 (New York: NYU Jean Monnet Center for International and Regional Economic Law Justice, 2000); and Peters and Pierre (n 77).

<sup>79</sup> Koen Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the European Union’ (2007) CMLR 1625, 1625.

<sup>80</sup> Opinion 2/13 on the Accession of the European Union to the ECHR (18 December 2014) para 156.

<sup>81</sup> Dorota Leczykiewicz, ‘The “National Identity Clause” in the EU Treaty: a Blow to Supremacy of Union Law?’ UK Constitutional Law Association (21 June 2012) < <https://ukconstitutionallaw.org/2012/06/21/dorota-leczykiewicz-the-national-identity-clause-in-the-eu-treaty-a-blow-to-supremacy-of-union-law/>> accessed 5 August 2016.

pertinent to examine from the perspective of highlighting the specific nature of the EU, and potential challenges to the rule of law: (1) national procedural autonomy and the effectiveness of EU law; and (2) respect for the more abstract national legal traditions to serve as derogations from EU law.

Outlining the legal framework for (unity and) the application of EU law: under Article 4(3) TEU, Member States are charged with taking any appropriate measure to ensure the fulfilment of Treaty obligations or Union institutional acts. Additionally, under the same Article, there is a duty upon Member States to refrain from any measure which could jeopardise Treaty objectives. Article 291 TFEU equally obliges Member States to adopt all measures appropriate to implement legally binding Union acts. In respect of the diversity of Member States' legal systems, the principle of national procedural autonomy<sup>82</sup> means that it is for the national legal system to detail the procedural rules which govern actions for the protection of individual rights derived from EU law. However, the principle is qualified by two duties imposed by the Court of Justice which reflects the tension between unity and diversity: (1) the principle equivalence,<sup>83</sup> or that treatment must be no less favourable than similar domestic actions; and (2) the principle of effectiveness,<sup>84</sup> or that the exercise of Union rights must not be rendered impossible or excessively difficult. The complications from a rule of law perspective with regard to unity of EU law and diversity of domestic legal systems is the tension between legal certainty and effectiveness:<sup>85</sup> in effect, the same tension between respect for national and EU rule(s) of law.<sup>86</sup>

The second context to highlight considers respect for the national identity as justification for derogation from EU law. EU law is applied in different legal traditions, which, in the protection of national identity (Article 4(2) TEU), may create issues for the realisation of the

---

<sup>82</sup> Case 33/76 *Rewe-Zentralfinanz* [1976] ECR 1989; and Case 45/76 *Comet* [1976] ECR 2043.

<sup>83</sup> Case 33/76 *Rewe-Zentralfinanz*.

<sup>84</sup> Case C-279/09 *DEB v Germany* [2010] ECR I-3849; and Case C-213/89 *Factortame (No 1)* [1990] ECR 1-2433.

<sup>85</sup> See M Ross, 'Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality?' (2006) 31 *ELRev* 476; and Dorota Leczykiewicz, 'Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection and State Liability' in Arnall and Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) ch 9.

<sup>86</sup> See Chapter 7, Section 3.5.

(EU) rule of law when in conflict with national standards of constitutional review. Following Dorota Leczykiewicz's analysis of the possibility of the Article 4(2) TEU protection and respect,<sup>87</sup> could be interpreted as a means to 'soften' EU law on the edges and enable national constitutional courts to safeguard national constitutional identity by reviewing EU secondary acts. However, the interpretation of 'national identity' is yet to be delineated by the Court of Justice, which will be unlikely to weaken effectiveness and uniformity on the basis of abstract concept of 'national identity' to the extent that it would allow review.<sup>88</sup>

### 3.4 Member States' Enforcement of EU Law

The correlative of application, is enforcement of EU law by Member States. National courts are under a duty to adjudicate EU law matters providing effective legal protection for rights from the Treaties;<sup>89</sup> to interpret national law in conformity with EU law norms,<sup>90</sup> to dis-apply conflicting national norms;<sup>91</sup> and to find Member States liable in case of breach.<sup>92</sup> In effect, Member States' officials become agents of EU law and are 'co-opted' to enforce it.

On efficiency grounds, co-opting the officials of Member States to apply, and national courts to enforce was optimal from the perspective of the limited resources available to the Commission.<sup>93</sup> EU powers to administer and implement the law are 'exceptionally weak',<sup>94</sup> and its capacity to act is 'constrained by institutional checks and balances, notably the separation for powers, a multi-level structure of decision-making and a plural executive.'<sup>95</sup> While

---

<sup>87</sup> Leczykiewicz (81).

<sup>88</sup> As emphasised in *Foto-Frost*, only the EU Court has power to invalidate EU law: Case 314/85 *Foto-Frost* [1987] ECR 4199, para 17.

<sup>89</sup> Art 19(1) TEU; and Art 47 CFR.

<sup>90</sup> Case C-106/89 *Marleasing SA v. La Comercial* [1990] ECR I-4135; and Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969.

<sup>91</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1; Case 43/75 *Defrenne v. Sabena* [1976] ECR 455; and Case 41/74 *Van Duyn* [1974] ECR 1337; and Case 314/85 *Foto-Frost* [1987] ECR 4199.

<sup>92</sup> See Cases C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357; Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029; and Case C-224/01 *Kobler* [2003] ECR I-10239.

<sup>93</sup> Craig, *UK, EU and Global Administrative Law* (n 18) 391.

<sup>94</sup> A Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 *JCMS* 603, 608.

<sup>95</sup> *ibid* 609.

Moravcsik argues that this is a compelling reason against critiques of democratic deficit and the possibility arbitrary abuse of power, it means too that the EU is reliant on national legal systems to administer and guarantee EU law rights. By enabling challenges to the non-, or incorrect application of EU law in ordinary Member States' courts, the EU has a powerful, widely-dispersed enforcement mechanism. The result is 'an interlocking system of jurisdiction'<sup>96</sup> between Union and national courts.<sup>97</sup>

This jurisdiction is qualified, however, and demarcated in one sense who can determine the (in)validity of the law: as emphasised in *Foto-Frost*, 'the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.'<sup>98</sup> The validity of EU law can only be found by the Court of Justice, equally, national law can only be held to be invalid under national law and is dis-applied, rather than invalidated under Union law.<sup>99</sup> The preliminary reference procedure (Art 267 TFEU) enables any national court in which there is a dispute on the application of EU law to refer the question to the Court of Justice on the interpretation or validity of that law. National courts thus became agents of the EU, ensuring the enforcement of EU law in Member States to the point of disapplication of contrary EU norms.<sup>100</sup> The obligation on a Court of final resort to make a reference, unless there is a prior judgment or the ruling is obvious. The Court's ruling has the force of *res judicata*, and is binding on all national courts beyond the referring national court.

Problematic from an effectiveness and uniformity perspective, and an extension of the weak powers to implement EU law, is the possibility of intentional disregard of EU obligations at national level. For example, Somek argues that EU law does not prevent national judges

---

<sup>96</sup> Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) CMLR 1625, 1625.

<sup>97</sup> Though one qualified by the complications which arise from respect for national procedural autonomy, as outlined in Section 3.3.

<sup>98</sup> Case 314/85 *Foto-Frost* [1987] ECR 4199, para 17.

<sup>99</sup> Case 314/85 *Foto Frost*; Case 143/88 *Zuckerfabrik* [1991] ECR I-415; and Case C-465/93 *Atlanta* [1995] ECR I-3761.

<sup>100</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 104/79 *Foglia v Novello 1* [1980] ECR 745; Case 244/80 *Foglia v Novello 2* [1981] ECR 3045; Case 283/81 *CILFIT* [1982] ECR 3415; Case 83/91 *Meilicke* [1992] ECR I-4871; and Case C-224/01 *Köbler* [2003] ECR I-10239.

from the adoption of decisions contrary to EU law, as (ultimately) the only consequences may be tort liability: 'it makes sense to say that Member States retain the power to have their judges adopt false decisions, at any rate, as long as States are willing to pay for it.'<sup>101</sup> Even if, as Maduro argues,<sup>102</sup> there is a similar possibility at national level, the tied nature of the application of EU law, to national procedure and remedies, complicate the guarantee of effective judicial protection, following Article 19(1) TEU. But, this leaves open the inherent risk of 'gaps' in the system of judicial protection which is dependent on the 'ability of national courts to provide an appropriate legal remedy.'<sup>103</sup>

### **3.5 Conferral and Supremacy: Challenges to the Rule(s) of Law**

A central conflict which characterises the specific nature of the EU is the complexity which surrounds the operation of the EU under a system of conferred powers, which simultaneously asserts the supremacy of directly effective EU law over countervailing national laws, ultimately giving rise to conflicting claims of authority and sovereignty. This conflict is reflected in the tensions highlighted throughout this section on multi-level governance, and the application and enforcement of EU law in Member States. In this section, I explore the specific concepts, and highlight this tension from the perspective of the rule of law.

The division of powers in the EU is distributed between Member States, and the EU Institutions in a complicated system of shared and exclusive competences. The principle of conferral determines the distribution of competences under Article 5(2) TEU and Article 7 TEU. The exercise of conferred powers in areas of shared competence is to be governed by the principle of subsidiarity under the control of National Parliaments,<sup>104</sup> and the principle of

---

<sup>101</sup> Alexander Somek, 'Monism: a Tale of the Undead' in M Avbelj and J Komarek (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

<sup>102</sup> Miguel Maduro, 'Three Claims of Constitutional Pluralism' in M Avbelj and J Komarek (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012).

<sup>103</sup> Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (n 96) 1628.

<sup>104</sup> Art 5(4) TEU, and Protocol (No 2) on the Principles of Subsidiarity and Proportionality. These principles are considered in Chapter 4, Section 3.4 on the principle of legality.

proportionality.<sup>105</sup> The rationality of conferral is that the EU will only have such competence as has been agreed to, and given, by Member States. The difficulty is in the scope and limit of those competences, especially in terms of the interpretation of broadly framed competences. The principles of conferral, rooted in the idea of limits to the areas of concern of EU law, is undermined by accusations of the over-extension of EU institutional competences,<sup>106</sup> an issue where directly effective EU norms hold primacy over national norms under the doctrine of supremacy.

The supremacy doctrine of the EU, as formed by the Court of Justice, states that any norm of EU law takes precedence over national law (even constitutional norms) in situations of conflict, and that the validity of EU law cannot be assessed with regards to national law.<sup>107</sup> The doctrine of supremacy claims the competence to determine the existence, force and effect of norms, and control the relations between EU and Member State norms. It is notable that, despite its place as a cornerstone of the EU legal order, the current statement of the primacy of EU law does not feature as an article in the Treaties, but rather as a Declaration which follows them.<sup>108</sup> According to the Court of Justice, the primacy of EU norms is founded in the Treaties and the ‘new legal order’ of the EU.<sup>109</sup> The logic of the Court of Justice reflected the need for the uniformity and effectiveness of EU law, and in this way placed the ‘corner stones’<sup>110</sup> of the EU legal order: direct effect,<sup>111</sup> supremacy<sup>112</sup> and the preliminary ruling

---

<sup>105</sup> Article 5(3) TEU, and Protocol (No 2) on the Principles of Subsidiarity and Proportionality. See Case 240/78 *Atalanta* [1979] ECR 2137; and Case 114/76 *Bela-Mühle* [1977] ECR 1211.

<sup>106</sup> See eg Paul Craig, ‘Competence, Clarity, Conferral, Containment, and Consideration’ (2004) ELR 323; and Stephen Weatherill, ‘Better Competence Monitoring’ (2005) ELR 23.

<sup>107</sup> See Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 1195; C-106/77, *Simmenthal II* [1978] ECR 629; C-106/89 *Marleasing* [1991] ECR I-7321; Case C-213/89 *R v Secretary of State ex p Factortame* [1990] ECR I-2433; Case C-314/08 *Filipiak* [2009] ECR I-11049; and Cases C188/10 and 189/10 *Melki* [2010] ECR I-5667.

<sup>108</sup> Declaration 17 concerning Primacy, which follows the TFEU, states ‘in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.’

<sup>109</sup> Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 1195.

<sup>110</sup> Antoine Vauchez ‘Integration-through-Law’ Contribution to a Socio-history of EU Political Commonsense (EUI Working Papers RSCAS 2008/10) <<http://ssrn.com/abstract=1260166>> accessed 30 August 2016.

<sup>111</sup> Case 26/62 *Van Gend en Loos* [1963] ECR 1; Case 43/75 *Defrenne v. Sabena* [1976] ECR 455; and Case 41/74 *Van Duyn* [1974] ECR 1337.

<sup>112</sup> Case 26/62 *Van Gend en Loos*; Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 106/77 *Simmenthal* [1978] ECR 629; Cases C-10-22/97 *Ministero delle Finanze v IN.CO.GE* [1998] ECR I-6307; Joined Cases C-188/10 & C-189/10 *Melki, Abdeli* [2010] ECR I-5667; and Case C-399/11 *Stefano Melloni*, (26 February 2013).

mechanism.<sup>113</sup> The mutual symbiosis and circularity of reinforcement between direct effect, supremacy and preliminary rulings is evident: the effectiveness of the Treaties demands supremacy of EU law over national norms; supremacy demands direct effect of EU norms which can be invoked by individuals; direct effect necessitates preliminary ruling to ensure the uniformity of EU law; and ‘to loop the loop’, preliminary references require the incentive of supremacy and direct effect.<sup>114</sup> This is not the first instance of a circular logic to push forward EU integration and the effectiveness of EU law,<sup>115</sup> but it can also be characterised as a conflict of differing accounts of the rule of law between Member States and the EU.

The conflict is in the disputed claim of constitutional courts of Member States which instead root the legal validity of EU legal norms in the national structures, and validate them only to the extent that they do not violate national constitutional norms.<sup>116</sup> Statements from Member State institutions, for example Germany’s *Bundesverfassungsgericht*<sup>117</sup> and the UK Supreme Court<sup>118</sup> emphasise the supremacy of national constitutional laws over EU law.<sup>119</sup>

---

<sup>113</sup> See Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 104/79 *Foglia v Novello 1* [1980] ECR 745; Case 244/80 *Foglia v Novello 2* [1981] ECR 3045; Case 283/81 *CILFIT* [1982] ECR 3415; Case 314/85 *Foto Frost* [1987] ECR 4199; Case C-188/92 *TWD Textilwerke* [1994] ECR I-833; and Case C-224/01 *Köbler* [2003] ECR I-10239.

<sup>114</sup> *Vaucher* (n 110).

<sup>115</sup> See Section 2.4.

<sup>116</sup> For example, in the UK, see European Communities Act 1972; European Union Act 2011, s 18; Poland, the *Accession Treaty Decision* Judgment of 11 May 2005, K 18/04; Germany, *Re Wuensche Handelsgesellschaft*, BVerfG decision of 22 October 1986 [1987] 3 CMLR 225 (*Solange II*); *Lisbon Treaty Ruling*, Judgment of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09; as well as the recent *OMT* ruling of the BVerfG decision 14 January 2014, Case No 2 BvR 2728/13.

<sup>117</sup> See for example the so-called *Solange* (so long as) decisions: *Solange I* BVerfGE 37, 271 2 BvL 52/71; *Solange II* BVerfGE 73, 339 2 BvR 197/83; and also *Lisbon Case*, BVerfG 2 BvE 2/08.

<sup>118</sup> For example, see *Thoburn v Sunderland City Council* [2003] QB 151 wherein it was stated that EU supremacy is based on the common law and domestic statutes. This was affirmed in the recent, and very interesting, *HS2* decision. While the European Communities Act 1972 was referred to as a ‘constitutional instrument’ at [207], the Supreme Court affirmed that ‘If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom.’ *R(HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 (*HS2*) per Lord Reed at [79]. However, this was counterbalanced by statements supporting judicial cooperation between national courts and the ECJ – affirmed especially by the reference of the Supreme Court to the German Bundesverfassungsgericht, judgment of 24 April 2013 – 1 BvR 1215/07 (para 91), that ‘decisions of the European Court of Justice must be understood in the context of the cooperative relationship (‘Im Sinne eines kooperativen Miteinanders’) which exists between that Court and a national constitutional court such as the Bundesverfassungsgericht or a supreme court like this Court.’ [202]. This aspect of judicial cooperation as an element of the EUCA Principle of Co-Operative Authority will be further analysed in Chapter 6.

<sup>119</sup> For example, Art 88-1 of the French Constitution (see *Administration des Douanes v Société ‘Cafés Jacques Vabre’ et SARL Weigel et Cie* [1975] 2 CMLR 336; *Re Nicolo* [1990] 1 CMLR 173); Article 11 of the Italian Constitution (see *Frontini v Ministero delle Finanze (No.183)* [1974] 2 CMLR 372); and Article 29.4 of the Irish Constitution (see *Crotty*

This leads to an appearance of conflicting claims of authority within the EU between Member States and the EU.

The response to this conflict has been the development of the theory of constitutional pluralism, or that each claim to authority is valid so long as it does not challenge the right to the other to exist.<sup>120</sup> The empirical claim of constitutional pluralism is a claim intending to reflect the legal reality of conflicting constitutional claims to ultimately authority.<sup>121</sup> In practice, Maduro suggests that empirical constitutional pluralism asserts that EU and Constitutional Courts resolve conflict by recognising and avoiding it: the example given for this in the instance of the European Arrest Warrant in conflict with the Polish Constitution.<sup>122</sup> Maduro also points to cases where even ‘national courts have gone further than the ECJ in extending the protection granted by EU law in cases of horizontal direct effect and discrimination against a State’s own nationals.’<sup>123</sup> Under the pluralist claims,<sup>124</sup> ‘European and national constitutional law are in many ways interwoven and interdependent; they form one system of law, a unity in substance producing, ideally, one legal solution in each particular case.’<sup>125</sup>

The problematic issue from the perspective of the rule of law is the question of ultimate authority, which in contemporary, state-centric accounts is unitary in the constitutional state. The pluralism of the EU legal order, requiring accommodation and negotiation between constitutional orders, on one claim undermines the rule of law,<sup>126</sup> as the authority to recognise, apply and enforce the law cannot be reconciled with the simultaneous acceptance that that authority should be shared or negotiated with others.<sup>127</sup> In cases of conflict with national norms, Pernice argues that it is a question of the rule of law (via the principle of effectiveness, and

---

*v An Taoiseach* [1986] IEHC 3, [1987] IR 713, [1987] 2 CMLR 666; *SPUC v Grogan (No 2)* [1993] 1 CMLR 197; and *Pringle v Ireland* [2012] IEHC 296, [2013] 1 CMLR 16).

<sup>120</sup> MacAmhlaigh, ‘Integrating Law and Politics’ (n 70) 8

<sup>121</sup> Maduro (n 102).

<sup>122</sup> See Chapter 7, Section 3.5.1.

<sup>123</sup> Maduro (n 102) 518–19.

<sup>124</sup> Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) MLR 317, 338.

<sup>125</sup> I Pernice, ‘Multilevel Constitutionalism and the Crisis of Democracy in Europe’ (2015) ECLR 541, 544–45.

<sup>126</sup> J Baquero Cruz, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’ (2008) ELJ 389.

<sup>127</sup> *ibid.*, and Somek (n 101).

equality before the law, Article 9 TEU, and Article 20 CFR) that EU norms must be given precedence.<sup>128</sup> Pernice emphasises, however, that this is not invalidation of state law, but rather non-application and it is not a question of democracy or political choice.<sup>129</sup>

However, on an alternative argument, the pluralism of the EU legal order, requiring accommodation and negotiation between constitutional orders, undermines the rule of law,<sup>130</sup> as the authority to recognise, apply and enforce the law cannot be reconciled with the simultaneous acceptance that that authority should be shared or negotiated with others.<sup>131</sup> This is linked to the criticism of theories of constitutional pluralism (and, in effect, multi-level governance in the EU) is that it does not address sovereignty issues, beyond the acknowledgment that different levels have differing claims to it.<sup>132</sup> In situations where there is a contradictory claim based on competing understandings of the demands of sovereignty, there can be no unity between the EU and national legal systems as there is no way to reconcile the lack of a common *Grundnorm*.<sup>133</sup>

The assertion of the supremacy over conflicting national norms against the differing assertion of the locus of authority and sovereignty render state-centric accounts of the rule of law unsuitable. The rule of law requirements of the certainty, consistency and non-retrospectively of the law are affected by the doctrine of supremacy, as there is often a concern for uncertainty as to when EU norms will apply in cases to the disapplication of national norms, even constitutional norms.<sup>134</sup> While there is naturally a certain level of uncertainty in law as new situations arise, or vagueness in law which arise in national legal systems, the integration

---

<sup>128</sup> Pernice (n 125) 553.

<sup>129</sup> *ibid*.

<sup>130</sup> J Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) ELJ 389.

<sup>131</sup> *ibid*, and Somek (n 101).

<sup>132</sup> For criticism of theories of multi-level constitutionalism, see M Jestaedt, 'Der Europäische Verfassungsverbund - Verfassungstheoretischer Charme und rechtstheoretische Insuffizienz einer Unscharferelation' in R Krause et al (eds), *Recht der Wirtschaft und der Arbeit in Europa. Gedachtnisschrift für W. Blomeyer* (Duncker & Humblot 2004) 638.

<sup>133</sup> Pernice (n 125) 547.

<sup>134</sup> The line of CJEU case law asserting the primacy of EU norms, even in the event of conflict with constitutional norms is confirmed in Case 11-70 *Internationale Handelsgesellschaft* [1970] ECR 1125; and Case C-399/11 *Melloni* (GC, 26 February 2013).

of EU law into Member State law leads to complications and confusions which are a particular and distinctive concern for the rule of law.

## **4 ATTEMPTS TO AMPLIFY THE MEANING OF THE RULE OF LAW IN THE EU: THE NEW FRAMEWORK TO STRENGTHEN THE RULE OF LAW**

---

### **4.1 The Threat from Inside: Measures in response to Systemic Abuse of the Rule of law in Member States**

In this section, I provide context to the measures introduced by the Commission to strengthen the rule of law in the EU. I build on the analysis of rule of law in transitional states in Chapter 2 regarding the challenges faced in ensuring rule of law compliance.<sup>135</sup> In light of the concerns for systemic violations of the rule of law in Member States such as Poland,<sup>136</sup> and Hungary,<sup>137</sup> a ‘Copenhagen dilemma’ has been identified in the EU Legal Order as regards measures to ensure compliance with the rule of law in the EU. The ‘Copenhagen dilemma’ describes the situation in which the EU demands a high level of compliance with the common values of the Union on the part of its candidate countries, but lacks the effective monitoring and enforcement tools to ensure compliance by Member States.<sup>138</sup> The dilemma represents

the discrepancy between, on the one hand, the self-understanding of the Union as founded on universal values and as the guarantor of their protection within the Union’s territory and, on

---

<sup>135</sup> Chapter 2, Section 4.

<sup>136</sup> Commission, ‘College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers’ (Press Release) MEMO/16/62. See also Paweł Lisicki, ‘Brussels has overstepped the mark by interfering in Poland’s affairs’ *The Guardian* (London 18 January 2016); and Lauren Cerulus and Jan Cienski, ‘Report: Commission to probe Poland’s rule of law’ *Politico* (1 October 2016) <[www.politico.eu/article/commission-to-inspect-poland-rule-of-law-assessment-constitutional-court/](http://www.politico.eu/article/commission-to-inspect-poland-rule-of-law-assessment-constitutional-court/)> accessed 18 February 2015.

<sup>137</sup> See Chapter 2, Section 4.3. Commission, ‘The European Commission reiterates its serious concerns over the Fourth Amendment to the Constitution of Hungary’ (Press release) IP/13/327. <[http://europa.eu/rapid/press-release\\_IP-13-327\\_en.htm](http://europa.eu/rapid/press-release_IP-13-327_en.htm)> accessed 18 February 2015.

<sup>138</sup> Parliament, ‘Report on the on the situation of fundamental rights: standards and practices in Hungary’ 2012/2130(INI). [Tavares Report].

the other hand, the limited capacities of the European Union to involve itself and intervene in the internal orders of its Member States.<sup>139</sup>

Current mechanisms are considered to be unsuitable to address systemic violations,<sup>140</sup> and the inadequacies of these mechanisms have been emphasised during the Irish Presidency of the Council of the EU,<sup>141</sup> and the EU fundamental Rights Agency.<sup>142</sup> The limited capacity of the EU to respond to systemic threats are due to the inadequacies of the infringement and preliminary references procedures,<sup>143</sup> as well as the Article 7 TEU mechanism to address systemic deficiencies in the rule of law in Member States. The existing instrument in Article 258 TFEU could only be a targeted response to a breach of a specific provision of EU law, and so is considered inadequate to address a systemic deficiency<sup>144</sup> in rule of law compliance at national institutional level.

Similarly, Article 7 TEU can only be used in a case of ‘clear risk of a serious breach’ (preventive application, Article 7(1) TEU), or ‘serious and persistent breach’ (sanctioning mechanism, Article 7(2) TEU) of the values contained in Article 2 TEU, including the rule of law. If the Council determines the existence of a ‘serious and persistent breach’<sup>145</sup> by the Member State of Article 2 values, it can vote to suspend certain rights, including voting rights, of that Member State. The Article 7 TEU mechanism is considered a ‘nuclear option’ by the Commission.<sup>146</sup> It is notable of the grave ongoing concerns in the EU that the evidence for Hungary’s violation of both rule of law and democratic principles was so blatant that the use

---

<sup>139</sup> Editorial Comments, ‘Hungary’s new constitutional order and “European unity”’ (2012) CMLR 878, 877.

<sup>140</sup> von Bogdandy and Ioannidis (n 63) 61.

<sup>141</sup> Conference A Europe of Equal Citizens: Equality, Fundamental Rights and the Rule of Law, organized by the Irish Presidency (Dublin 9–10 May 2013).

<sup>142</sup> *Promoting the Rule of Law in the EU, Fundamental Rights Agency Symposium Report*, organized by the European Union Agency for Fundamental Rights (Vienna 7 June 2013) <[fra.europa.eu/sites/default/files/fra-2013-4th-annual-symposium-report.pdf](http://fra.europa.eu/sites/default/files/fra-2013-4th-annual-symposium-report.pdf)> accessed 16 February 2015.

<sup>143</sup> The infringement and preliminary reference procedures are case specific, and are unlikely to address issues with rule of law compliance which are at a systemic level.

<sup>144</sup> *Systemic deficiency* refers to a structural or procedural dysfunction within the legal system. I do this to distinguish unique instances of violations of principles of the rule of law, to focus on persistent violations within the system. This term has also been used in the *New Framework to Strengthen the rule of law in Europe*. For example, President Barroso stated that the Framework “should be based on the principle of equality between Member States and activated only in situations where there is a serious and systemic risk to the rule of law, and triggered by predefined benchmarks.”

<sup>145</sup> Article 7(2) TEU.

<sup>146</sup> See Jan Werner Müller, ‘Safeguarding Democracy Inside the EU’ (n 3) 1.

of Article 7 TEU has not been excluded from consideration.<sup>147</sup> However, according to Bugarič, it may not represent the ‘best approach to dealing with the situations’<sup>148</sup> as the ‘punitive’ element of Article 7 TEU risks alienating political stakeholders and inhibiting the process of building democracy in Hungary.<sup>149</sup>

In light of the inadequacies of the Article 7 TEU, and Article 258 TFEU instruments to address systemic violations of the rule of law in Member States, and in addition to the apparent undermining of the rule of law in some Member States, and on the border in the Ukraine, the Commission announced the *New Framework to strengthen the rule of law* in the EU.<sup>150</sup> The adequacy of this mechanism to respond to violations of the rule of law within the EU legal order will be addressed in the next section.

## 4.2 A Closer Look at the New Framework to strengthen the Rule of Law

The New Framework to Strengthen the Rule of Law in the EU was announced by the President of the Commission in the State of the European Union Address in September 2014. It is a response to many recommendations made in 2013 by the Justice and Home Affairs Council,<sup>151</sup> the General Affairs Committee,<sup>152</sup> and the European Parliament to assess compliance with fundamental values of the EU, and to address cases of systemic<sup>153</sup> threat to the rule of law. The mechanism in the Framework is intended to provide an alternative, gap-filling mechanism, and

---

<sup>147</sup> The Tavares Report does not rule out the use of the ‘nuclear option’ if the Hungarian government does not comply with the monitoring program: Parliament, ‘Report on the situation of fundamental rights: standards and practices in Hungary’ 2012/2130(INI), para 86. See Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (2014) LSE ‘Europe in Question’ Discussion Paper Series Paper No 79/2014.

<sup>148</sup> Bugarič *ibid.*

<sup>149</sup> *ibid.* See also Jan Werner Müller, ‘Europe’s Perfect Storm: The Political and Economic Consequences of the Eurocrisis’ *Dissent* (Fall 2012) <[www.dissentmagazine.org/article/europes-perfect-storm-the-political-and-economic-consequences-of-the-eurocrisis](http://www.dissentmagazine.org/article/europes-perfect-storm-the-political-and-economic-consequences-of-the-eurocrisis)> accessed 18 February 2016. See also a comprehensive Opinion of the Council of Europe’s Venice Commission containing a harsh review of the new Hungarian Constitution: Venice Commission, ‘Opinion on the New Constitution of Hungary’ (2011) Opinion no 612/2011.

<sup>150</sup> Commission, ‘European Commission presents a framework to safeguard the rule of law in the European Union’ Press Release IP-14-237 <[europa.eu/rapid/press-release\\_IP-14-237\\_en.htm](http://europa.eu/rapid/press-release_IP-14-237_en.htm)> accessed 18 February 2016.

<sup>151</sup> Justice and Home Affairs Council, ‘Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union’ (2013) <[www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/137404.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf)> accessed 3 July 2015.

<sup>152</sup> General Affairs Council <[www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/genaff/136915.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/136915.pdf)>

<sup>153</sup> A ‘systemic’ problem is one which affects, and exists throughout the entire system.

resolve threats to the rule of law before sanctioning conditions for Article 7 TEU are met, but is not meant to prejudice targeted action on breach of EU law on the basis of Article 258.

In the Communication, the Commission emphasises the guarantee of equality of treatment between Member States as regards monitoring of rule of law compliance (though, it is important to note that neither the Commission nor other EU institutions are mentioned). This is done on the basis of application of the same benchmark as to what constitutes a threat of systemic breach of the rule of law across member states. The Framework also aims to provide clarity and enhance predictability in the Commission's actions with regard to monitoring Member States. It will be triggered in situations where

the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.<sup>154</sup>

The Commission will act where the political or institutional order, the constitutional structure, the separation of powers, the independence or impartiality of the judiciary, or the system of judicial review is threatened, for example 'as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress.'<sup>155</sup> Breaches of fundamental rights or miscarriages of justice do not trigger the mechanism, instead they are expected to be dealt with under existing national measures, or through the European Court of Human Rights, as all EU Members are party to the European Convention on Human Rights, and are members of the Council of Europe.<sup>156</sup>

---

<sup>154</sup> New Framework (n 1) 7.

<sup>155</sup> New Framework (n 1) 7.

<sup>156</sup> The separation of fundamental rights from the scope of the New Framework has interesting implications to the point to which it can be argued that a substantive account of the rule of law has been or ought to be adopted by the EU. Indeed, it seems to echo one interpretation taken in Section 2.3, that the EU institutions have sought to endorse an account of the rule of law which is neither formal nor substantive, but has elements of both. This will be further considered in Chapter 4.

The process envisaged by the Framework consists of three stages: (1) a Commission assessment; (2) a Commission recommendation, and (3) a follow-up to the recommendation given by the Commission. It is based on the following principles:

- focusing on finding a solution through a **dialogue** with the Member State concerned;
- ensuring an **objective and thorough assessment** of the situation at stake;
- respecting the principle of **equal treatment** of Member States;
- indicating **swift and concrete actions** which could be taken to address the systemic threat and to avoid the use of Article 7 TEU mechanisms.<sup>157</sup>

Throughout the process, dialogue between the Commission and the Member State is emphasized. Additionally, the Commission will seek ‘external’, third party guidance from the EU Agency for Fundamental Rights, as such expertise will ‘notably help to provide for a comparative analysis about existing rules and practices in other Member States in order to ensure equal treatment of the Member States, on the basis of a common understanding of the rule of law within the EU.’<sup>158</sup> There is provision also for the Commission to seek advice and assistance from members of the judicial network, including the Presidents of Supreme Courts of the EU, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU or the Judicial Councils.

It is interesting to note that the Commission stated that the scope of intervention is not confined to areas covered by EU law, and that the EU is empowered to intervene even in instances where the Member State is acting autonomously. Intervention is justified on the basis that a systemic threat to the rule of law, not secured by national mechanisms which have ceased to function effectively, is a threat to the functioning of the EU as an ‘area of freedom, security and justice without internal frontiers.’<sup>159</sup> This alone presents a whole host of conceptual difficulties, not least of which is the acknowledgment that interference can extend beyond the scope of EU competences. The framework has also been criticised for both

---

<sup>157</sup> New Framework (n 1) 7 (emphasis original).

<sup>158</sup> New Framework (n 1) 9.

<sup>159</sup> New Framework (n 1) 5.

substantive and procedural inadequacies as the confidential nature of Commission enquiries lack the ‘name and shame’ element of public disclosure.<sup>160</sup>

The Council criticised the Framework on the (“unconvincing”)<sup>161</sup> reason that it would breach the principle of conferral. In response, the Council proposed its own solution in December 2014, reflecting the divergence in opinion between the Council and the Commission as to how rule of law issues in the EU should be addressed. The Council’s alternative initiative<sup>162</sup> proposed an annual meeting between national governments to establish “political dialogue among Member States to promote and safeguard the rule of law within the EU”<sup>163</sup> This proposal for an annual inter-governmental dialogue can be contrasted with the detailed reporting on the ongoing efforts to secure rule of law reforms being carried out by the European External Action Service.<sup>164</sup>

What is not explicitly stated in the Communication is the account of the rule of law given by the Commission. The principles identified by the Framework to strengthen the rule of law in the EU are only included in the annexes to the Communication. These principles are:

legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.<sup>165</sup>

These principles will be critically assessed in greater detail in Chapter 4, where I develop an EU-centric account of the rule of law. What is interesting to note at this point, is that the source of these principles is attributed to the constitutional traditions of Member States and the

---

<sup>160</sup> Dimitry Kochenov and Laurent Pech, ‘From bad to worse? On the Commission and the Council’s rule of law initiatives’ (*EU Analysis Blog* 19 January 2015) <[eulawanalysis.blogspot.co.uk/2015/01/from-bad-to-worse-on-commission-and.html](http://eulawanalysis.blogspot.co.uk/2015/01/from-bad-to-worse-on-commission-and.html)> accessed 8 February 2015.

<sup>161</sup> *ibid.*

<sup>162</sup> Council, ‘3362<sup>nd</sup> General Affairs Council Meeting’ Press Release (16 December 2014) 16936/14, 20–22, <[data.consilium.europa.eu/doc/document/ST-16936-2014-INIT/en/pdf](http://data.consilium.europa.eu/doc/document/ST-16936-2014-INIT/en/pdf)> accessed 8 February 2015.

<sup>163</sup> *ibid.* 2.

<sup>164</sup> The Commission produces an annual Strategy Paper on enlargement in addition to reports on candidate countries assessing achievement in terms of reform priorities under the Enlargement Policy (see Chapter 5, fn 35). For the latest strategy report: Commission, ‘EU Enlargement Strategy’ (Communication) COM (2015) 611 final.

<sup>165</sup> New Framework (n 1) 2. (emphasis original).

jurisprudence of the Court of Justice.<sup>166</sup> However, it is pertinent to note that the ‘identification’ of principles of the rule of law was done even in the absence of an explicit mention of the rule of law in some of the cases. Based on the discussions of the previous Chapter, this position is not as tenable as implied, as will be discussed in the next section.

### **4.3 Questioning an Account of the Rule of Law based on Common Legal Principles**

In the annexes to the Communication on the New Framework, it is stated that the rule of law is a ‘source of fully justiciable principles applicable within the EU legal system’<sup>167</sup> and that these principles are ‘general principles of law stemming from the constitutional traditions common to the Member States.’<sup>168</sup> It has been a feature of the jurisprudence of the Court of Justice to support its conclusions on the legal principles of the EU by reference to ‘common’ principles held across the Member State.<sup>169</sup> The principles of proportionality, fundamental rights, legal certainty, legitimate expectations, equality and procedural justice have all been introduced into the EU legal order in this fashion.<sup>170</sup> However, contemporary state-centric accounts of the rule of law are inapt for an EU account of the rule of law based on this approach to determining legal principles.

As concluded in Chapter 2, there is no clear definition or account of the rule of law in Member States. This creates a problematic impression of the unity (or lack thereof) of rule of law accounts, and results in an impossibility of providing an EU-centric account of the rule of law based on state-centric accounts of the rule of law within Member States. This is a fact that is accepted by the Commission, acknowledging that the ‘precise content of the principles and

---

<sup>166</sup> See annexes to the New Framework. These have been identified and adopted by the Commission in the New Framework to strengthen the Rule of Law, as will be discussed below. It is interesting that the Annexes comment ‘[t]here is a reference but no definition of the Rule of law also in the preamble to the United Nations Universal declaration of Human Rights (1948)’; Annexes to the New Framework (n 1) 2, fn 10.

<sup>167</sup> Annexes to New Framework (n 1) 1.

<sup>168</sup> *ibid.*

<sup>169</sup> See Takis Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> edn, OUP 2006); and Craig, *EU Administrative Law* (n 14).

<sup>170</sup> *ibid.*

standards stemming from the rule of law may vary at national level, depending on each Member States' constitutional system.' Furthermore, buried at the end of the annexes, the Commission acknowledges that:

While not precisely or exhaustively defined by national constitutions or courts, and not always clearly and uniformly codified in written constitutions, the rule of law is a common denominator in modern European constitutional traditions.<sup>171</sup>

The Commission, through the case law of the Court of Justice, the European Court of Human Rights, the Council of Europe, and building 'on the expertise of the Venice Commission' provided 'a non-exhaustive list of [...] principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU'.<sup>172</sup> I identify two problematic issues with this approach: first, if the principles are derived from jurisprudence of international courts and institutions, then they cannot claim to be derived directly from the constitutional identities of Member States; and second, identifying principles common in national legal systems, unless on the most abstract scale, would fail to exhibit the same faults outlined in Chapter 2: state-centricity, and disagreement within and between national political and legal traditions. Furthermore, 'a universal, institution-based, answer to what the rule of law is, is implausible. And it will often mislead [...] indeed it might well lead us away from the rule of law.'<sup>173</sup> Ultimately, a pluralist, or all-inclusive account results in an unconvincing, and, likely, contradictory list of principles and institutions, which would ultimately fail to meet the real needs of the EU legal System.<sup>174</sup>

Fundamentally, however, 'identifying' a conception of the rule of law by collating accounts of Member States, would not determine the *apt* standard of the rule of law for the EU. Perhaps this is not the aim of the framework. Instead, the goal might be to strengthen the rule of law in the *Member States* of the EU, and not the EU institutions. The framework is intended

---

<sup>171</sup> Annexes to New Framework (n 1) 1.

<sup>172</sup> *ibid.*

<sup>173</sup> Martin Krygier, 'The Rule of Law: An Abusers' Guide' in A Sajó (ed), *Abuse. The Dark Side of Fundamental Rights* (Eleven International Pub Co 2006) 129.

<sup>174</sup> See Dimitry Kochenov, 'The EU Rule of Law: Cutting Paths through Confusion' [2009] Erasmus LR 1, 19.

to monitor the adherence to the rule of law which is internal to the Member State legal system. There is no indication that it is also applicable to EU legal action, or to the EU institutions.

#### **4.4 The Elephant in the Room: Where are the EU institutions?**

The Framework is aimed at addressing systemic threats to the rule of law in the EU, before they threaten the stability and functioning of the Union. These threats are envisaged to arise only from within the legal systems of Member States - *not* from the EU institutions or on a systemically within the EU legal order. However, it seems a fallacy to emphasize the fundamental importance of the rule of law to the EU, but to restrict its scope only to the actions of Member States and not to those of the EU institutions. There are two ostensible explanations for this: (1) the Commission is placed as the assessor of threats to the rule of law, and so has undermined the possibility of internal review; or (2) there is no possibility of systemic fault within the EU legal system. I will discuss each of these explanations in turn.

##### **4.4.1 *The Commission, as the assessor, has undermined the possibility of internal review of the rule of law***

Under the Framework, the Commission is the assessor of threats to the rule of law in Member States. The placement of the Commission as the arbiter of the rule of law in the EU is justified on the basis of the independence and experience of the Commission. Throughout the Communication, there is repeated emphasis on its position as ‘Guardian of the Treaties’. This language, from the point of view of a constitutional scholar is striking. In the constitutional discourse of most Member States, guardianship of the constitution and constitutional guarantees of fundamental rights, and the rule of law lie with the Court system.<sup>175</sup>

The Commission’s main roles include setting the agenda for the objective and priorities of EU action; proposing legislation to the European Parliament and Council; managing and

---

<sup>175</sup> See Maartje De Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing 2014).

implementing EU policies and the budget; and ‘jointly’ with the Court of Justice, enforcing EU law. This joint enforcement of EU law is in the form of monitoring compliance and measures taken by Member States, and taking action when there is failure to do so. The Commission is an unelected body, most often compared to a bureaucracy, or a ‘technocracy’.<sup>176</sup> While this may insulate it from electoral or popular interference, it does not qualify it for a role of impartial judge in determining abidance to the rule of law at EU level. As the Commission sets the agenda for EU action, manages and implements policy and proposes the law – all of which ought to be guided by principles of the rule of law, it would be difficult to argue that they can also be the assessor of their own abidance with the rule of law. It raises the question of *sed quis custodiet ipsos custodes?*<sup>177</sup> (who guards the guardians?) Self-assessment by the Commission does not necessarily inspire trust in citizens or Member States. While administrative review of Commission action is possible on grounds of general principles (which have intrinsic links to the rule of law),<sup>178</sup> it is limited by standing requirements, expense, and the very targeted nature of review.<sup>179</sup> The only way in which this is not an issue, is if there is no possibility of threats to the rule of law by the EU.

#### **4.4.2 *There is no possibility of Systemic Fault in the EU Legal System***

There is a deeply troubling aspect to the second explanation for the lack of clear rule of law controls on the EU institutions: either, the rule of law is not relevant to the EU institutions, or the Institutions should not be subject to the same level of supervision or assessment for threats to the rule of law as Member States. The alternative explanation of the lack of a clear, self-reflective, conception of the rule of law by the EU institutions is that it would undermine the legitimacy of the EU to admit the possibility of any systemic fault in the EU legal system. Case

---

<sup>176</sup> See Gareth Davies, ‘The Crisis of Technocracy’ [2009] 3 Amsterdam Law Forum <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1509353](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1509353)> accessed 4 May 2014.

<sup>177</sup> Juvenal, *Satires*, *Satire VI*, lines 347-78.

<sup>178</sup> See Chapter 4, Section 4.3.

<sup>179</sup> See Section 2.3.

law from the Court of Justice has indicated an incremental approach to holding EU Institutions to the standards of the rule of law in areas limited to expanding the scope of judicial review.

Fundamentally, it is inconsistent to emphasize the importance of the rule of law, and its foundational status in the EU on one hand, but not to subject the EU institutions to the same stringent benchmarks of rule of law compliance as the Member States. It should be remembered that equality of application among Member States was emphasised by the Commission in the Framework. If the EU claims to be an autonomous legal system (which it does), that proposes, implements and monitors law (which it does), and claims to protect human rights and uphold fundamental values - then it ought to be subject to the same scrutiny in terms of its compliance with the rule of law as are the legal systems of Member States.

## 5 CONCLUSION

---

The rule of law has featured prominently in institutional dialogue and in discussions concerning the foundations of the EU. The increasing attention to the importance of the rule of law by EU institutions is indicative of the need for a clear account of the rule of law in the EU, but such clarity is, to date, sadly lacking in practice. It is important to recognise the specific nature of the EU legal order, and the inadequacies of state-centric accounts of the rule of law which demand an EU-centric account of the rule of law. Abidance by the standards of an apt account of the rule of law can become a source of legitimacy for the EU. An apt standard of the rule of law is crucially needed, and it is to this account that I now turn.

## CHAPTER FOUR

### *The EU-Centric Account of the Rule of Law*

#### 1 INTRODUCTION

---

In Chapters 2 and 3, I explored various aspects of the character of the rule of law. In Chapter 2, I examined the concept in a national setting across many Member States. I continued in Chapter 3 by identifying the difficult issues faced in attempting to secure compliance with the rule of law at EU level. In this chapter, I develop an EU-centric account of the rule of law which is fit for purpose in guiding the EU towards the best standard of governance.

In **Section 2**, I provide a short summary of the difficulties we face in determining the apt account of the rule of law for the EU which were identified in Chapters 2 and 3. These include the differences between, and disputes regarding, formal and substantive accounts of the rule of law; the mutually exclusive semantic and cultural interpretations of the rule of law; and the impossibility of transposing general, or common, accounts of the rule of law to a post-national, non-state entity, such as the EU. This section concludes that an apt account of the rule of law must reflect and adapt to these complications of the EU legal order.

In **Section 3**, I introduce my EU-centric account of the rule of law [EUCA]. I begin by positing that an EU-centric account places value in having a *functional* and *accountable* guide to law-making and enforcement in the EU, and explain what is meant by these terms. Based on this position, I continue by introducing the principles which flow from the value of the rule of law. I then address what is distinct about an ‘EU-centric’ account of the rule of law. I conclude Section 3 by distinguishing EUCA *principles* and General *Principles* of EU law.

In **Section 4**, I develop the principles of EUCA in detail. I locate them within existing EU institutional practice, case law and jurisprudential discourse. I provide an explanation of the principles which incorporates two elements: (1) the content and purpose of the principle; and (3) the ‘EU-centric’ aspect, or the suitability of the principle to the specific nature of the EU legal order. This lays the foundation for discussion of the practical application of my EU-centric

account of the rule of law from the perspective of the EU Institutions (Chapter 5), the Member States (Chapter 6) and the Individual (Chapter 7).

## 2 WHAT ARE THE COMPLICATIONS OF AN ACCOUNT OF THE RULE OF LAW AT EU LEVEL?

---

The problems which arise from contemporary non-EU-centric accounts of the rule of law are sourced in, first, the state-centricity of rule of law accounts; and second, in the inadequacy of these accounts to respond to the complications of the EU legal order. In summary, the following complications arise from state-centric accounts of the rule of law:

- *Disagreements in Current and Established Literature on the Rule of Law*<sup>1</sup> There is a bifurcation in academic literature between formal and substantive accounts of the rule of law. This dichotomy is most common in Anglo-American accounts of the rule of law, however, it has also been applied to the analysis of continental European conceptions of the rule of law.<sup>2</sup> There has been equivocation at EU level as to which conception of the rule of law is endorsed.<sup>3</sup> It is important to locate an EU-apt account of the rule of law within this debate, and clarify the place of substantive ideals, such as human rights, in an apt account of the rule of law at EU-level.
- *The State-of-Law*<sup>4</sup> In non-English language accounts of the ‘rule of law’, it is impossible to escape the centrality of the State. This fact is reflected in the terms *Rechtsstaat* and *État de droit*. These terms have the literal connotation of ‘state of law’ or ‘law-abiding state’. A primary complication for the realisation of the rule of law in the EU is the fact that understandings of the concept of ‘rule of law’ change

---

<sup>1</sup> Chapter 2, Section 1

<sup>2</sup> Chapter 2, Section 3.1.

<sup>3</sup> Chapter 3, Section 2.

<sup>4</sup> Chapter 2, Section 3.

across Member States, and are often defined and understood in terms of state-centric legal systems.

- *The account must be suitable, and adaptable to the specific nature of the legal order in question*<sup>5</sup> As evidenced by the political and legal difficulties experienced by transitional states,<sup>6</sup> there is difficulty in transposing conceptions of the rule of law across national, cultural and historical boundaries. It is not possible to simply create a ‘cut and paste’ model of the rule of law which is applicable across all legal systems, as the relevant legal and political institutions must develop a local culture of respect and trust in the rule of law within the local legal system. This is even more complicated in terms of the trans-national and *sui generis* EU, which behaves neither *qua* federal state nor as a typical international organisation akin to the UN or WTO.

Due to these issues, it is not possible to conclude that national accounts of the rule of law alone can determine the apt account applicable to non-state-centric systems such as the EU. Understanding these issues in the EU context, I identify the following complications of the EU legal order:

- *The current system of judicial review is inadequate to address rule of law concerns in the EU.* EU administrative law aims to ensure the good governance of the EU, and aims to promote and realise a rule of law adherence system: to avoid the abuse of power and to promote legal certainty. However, as highlighted in Chapter 3, the system is imperfect and could be improved and enhanced by an account of the rule of law.
- *The EU has no explicit mechanism for monitoring of internal rule of law compliance equivalent to that imposed on Member States.* Despite a commitment to strengthening the rule of law in the EU in the form of the New Framework, scrutiny

---

<sup>5</sup> Chapter 2, Section 4.

<sup>6</sup> Chapter 2, Section 4.

by the EU Commission of the rule of law standards is not directed at the EU itself, but rather only at Member States.<sup>7</sup> This creates a disparity between the accountability of Member States and the EU Institutions in terms of specific evaluation of its compliance with the rule of law.

- *The EU has a Specific Nature which necessitates EUCA.*<sup>8</sup> This conflict is a result of the tension between the differing justifications for the primacy of EU law in national legal systems, and in the EU legal system, respectively, and disagreements over the appropriate division of powers between the Member States and the Union. Although this has been a topic of much discussion among academics and politicians,<sup>9</sup> it remains an issue for an account of the rule of law because such accounts of the rule of law are customarily premised on a unitary source of authority of the law. These new modes of governance include the multi-institutional, and multi-level participation in the creation and application of EU law (beyond what is expected in a state or federal system), the harmonisation of laws, and the open method of coordination. An account of the rule of law which is suitable for the EU must recognise and adapt to these new modes of governance.

The rule of law is declared to be one of the foundational values of the EU in Article 2 TEU. The importance of adherence to the rule of law is emphasised by the EU Institutions, and underscored by ongoing investigations into rule of law violations in Member States under the Framework to strengthen the rule of law in the EU.<sup>10</sup> However, there is a missing element: there is no adequately determined and substantiated account of the rule of law apt for the EU, and there is a consequent lack of monitoring of EU adherence to the rule of law, distinct from administrative law controls of judicial review. EUCA responds to these concerns, and provides appropriate resolution to the issues which have been summarised in this section.

---

<sup>7</sup> Chapter 3, Section 4.3.

<sup>8</sup> Chapter 3, Section 5.2.

<sup>9</sup> See for example George Letsas, 'Harmonic Law: the Case against Pluralism' in Julie Dickson and Pavlos Eleftheiriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2013).

<sup>10</sup> See Chapter 3, Section 3.

### 3 AN EU-CENTRIC ACCOUNT OF THE RULE OF LAW IN FOCUS

---

#### 3.1 Introduction

Contemporary accounts of the rule of law have evolved within the context of state legal systems. The rule of law has alternatively been understood as a limitation on the power of the state,<sup>11</sup> and as a way in which to rationally legitimise it,<sup>12</sup> these accounts are ‘inextricably linked to the nation-state.’<sup>13</sup> As clarified in Chapter 3, the EU has a specific nature which calls for an account of law in EUCA which is suited to the specific nature of the EU. In this section, I provide an account of the EUCA principles, framed by two elements: (1) the content and purpose of the principle; and (2) the ‘EU-centric’ element, or the suitability of the principle with regard to the specific nature of the EU legal order. I also highlight how EUCA is suited to the specific nature of the EU legal order, highlighting the elements of: multi-level governance; Member State enforcement of EU norms; the application of EU law in the Courts of different legal traditions. The Principles of the EUCA are:

1. The Principle of Equality before the law
2. The Principle of Legal Certainty
3. The Principle of Legality
4. The Principle of Transparency
5. The Principle of Limited Discretion of EU Officials
6. The Principle of Independent and Effective Judicial Review
7. The Principle of Co-Operative Authority

---

<sup>11</sup> See Chapter 2, Section 2.

<sup>12</sup> See Chapter 2, Section 3.

<sup>13</sup> Luc Hertzog, ‘The Rule of Law in the EU: Understandings, development and challenges’ [2012] 53 *Acta Juridica Hungarica* 204.

It might be thought, at first glance, that these principles would be equally apt within a state legal system, and there is no obvious 'EU-centric' element. This, however, would be to misunderstand their meaning, and also to fail to appreciate the significance of Chapters 2 and 3 which concluded on the necessity of determining an account of the rule of law which is suitable for the specific nature of the EU. In this chapter, I advance an EU-centric account of the rule of law (EUCA) which is apt for the EU legal order. The principles which form EUCA respond to the specific nature of the EU. To highlight two examples of the distinctiveness of EUCA, I consider the principles of equality before the law and co-operative authority. The principle of equality before the law is distinct in EUCA, as it must respond to situations unaccounted for in state-centric accounts of the rule of law: the relationship between Member States, the relationship between the EU institutions and Member States, and the relationship between individuals in the EU. State-centric accounts of the rule of law understand equality before the law in a binary fashion: all members of society, including government officials, ought to be subject to the law – there is no multi-lateral interpretation of the principle as it exists as a statement of equality between citizens and government officials. The unique EUCA principle of co-operative authority acknowledges the complexity of the EU legal system as it replaces a unitary source of authority, with a cooperative one representative of the pluralistic EU.<sup>14</sup>

The principles which collectively form EUCA should not be treated, as Fuller has recommended in terms of his desiderata of the rule of law, as 'separate and categorical'<sup>15</sup> statements. Rather, I envision EUCA as equiprimordial: reflecting different aspects of the value of the rule of law, which together or individually, pursue or achieve a rule of law adherent EU legal order. Consequently, if one principle is not achieved to a high standard, a higher burden may be placed on another to account for it. For example, if there is an ostensibly wide scope of discretion given to Member States in the implementation of EU law (causing uncertainty due to the inconsistent application of the law), this should be balanced (for example) by a high

---

<sup>14</sup> See Section 4.7.

<sup>15</sup> Lon Fuller, *The Morality of Law* (Yale University Press 1969) 104

degree of transparency and open to review as to the process by which that discretion is exercised.

Finally, it is important to note that, by their very nature, principles do not provide detailed answers to every situation, case or question, but rather serve to provide guidance as to the best interpretation of a rule. I also recognise that principles of EUCA will require interpretation, and that law is essentially dialogical and argumentative.<sup>16</sup> Boundaries and guidance on the interpretation and application of the principles in instances of conflict with values or other EUCA principles are shown by example in the case studies of Chapters 5-7, and in consideration of the relationship between EUCA and other values in Chapter 8.

### **3.2 The Principle of Equality Before the Law**

The principle of Equality Before the Law<sup>17</sup> is foundational to the concept of the rule of law, and it is one of the ‘fundamental principles’<sup>18</sup> of EU law. It embodies the ideal that no person is above the law, and that all ought to be subject to the law in the same way and under the same conditions: ‘[s]imilar situations shall not be treated differently unless differentiation is objectively justified’<sup>19</sup> The principle is declared in the preamble to the TEU, and in Article 2 TEU. Article 4 states the equality between Member States, while Article 9 TEU guarantees the equality between EU citizens, and Article 20 CFR restates, ‘Everyone is equal before the law’.

The principle of equality before the law is multi-faceted and multi-functional: it ensures that neither states nor non-state actors distort the fundamental freedoms of movement, and aims to guarantee equal treatment for individuals across the Member States. In administrative

---

<sup>16</sup> Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2005) 14-15.

<sup>17</sup> It is important to highlight the difference between ‘equality’ and ‘equality before the law’. Equality as a substantive value of a legal system is beyond the remit of this thesis, however, the relationship between EUCA and equality as a value of the EU is considered in Chapter 8. It is, however, interesting to note that ‘equality before the law’ is stated as a right in Article 20 of the Charter for Fundamental Rights under Title III: Equality. Stating nothing further than, “everyone is equal before the law”, this is not illuminating for the purposes of EUCA, as it is an individual right, and obligation on the Member State and EU Institutions, not necessarily a characterisation of the relationship between Individuals, Member States, and the Union.

<sup>18</sup> Joined Cases 117/76 and 16/77 *Ruckdeschel & Co v Hauptzollamt Hamburg-St Annen* [1977] ECR 1753, para 7.

<sup>19</sup> Case C-397/03 P *Archer Daniels Midland Co v Commission* [2006] ECR I-4429; and Case T-155/06 *Tomra Systems ASA and Others v Commission* [2010] ECR II-04361.

law, it serves to prevent national and EU administrators from arbitrary decisions, and also serves to fill gaps where established law does not ensure non-discrimination.<sup>20</sup> There is an especial importance of the principle of equality before the law in the multi-level and multi-state EU polity as a lack of adherence to the law threatens the legitimacy of the project as a whole. The EU is a membership of states working together for mutual benefit: one state can take the political strains, and financial and legal burdens of centralised regulation by the EU on the understanding that the other members do also, and that this is ultimately for the benefit of all Member States. An example of this is in the regulation of the free movement of goods: by accepting harmonised health and safety standards, Member States benefit from increased trade across borders, without risking the health or safety of their citizens.<sup>21</sup> What is harmful to the fabric of the Union is for one Member State not to abide by the same rules as another Member State without sanction under EU law. This creates a sense of unfairness, and incentivises the non-adherence to EU law by other states, undermining mutual trust and cooperation<sup>22</sup> between Member States, which are key elements to the functioning of the legal system as a whole.

Respect for the principle of equality before the law is ensured in conjunction with other EUCA principles: for example, the principle of transparency and access to information (in order to discern that all Members are treated equally before the law, decisions and procedures must be open and transparent); and the principle of independent and effective judicial review (which guarantees the procedures which ensure equality before the law).<sup>23</sup> Ultimately, the principle of Equality Before the Law ties the principles of EUCA together, as a rule of law compliant system

---

<sup>20</sup> Katharina Voss 'The Principle of Equality: A Limit to the Commission's Discretion in EU Competition Law Enforcement?' (2013) *Global Antitrust Review* 149, 150; Craig, *EU Administrative law* (OUP 2012); Takis Tridimas, *General Principles of the EU* (2<sup>nd</sup> edn, OUP 2007).

<sup>21</sup> For example the 'CE' (denoting *Conformité Européenne*) mark which indicates that the manufacturer guarantees that the product has meet European health, safety or environmental standards, is compliant with EU legislation, and allows free movement of the product within the EU market.

<sup>22</sup> Section 4.7.

<sup>23</sup> Section 4.6.

must abide by the principle of Equality Before the Law between all members, if it is to guarantee mutual trust in the system, and a lasting principle of cooperative authority.<sup>24</sup>

However, it is equally important to understand in terms of EUCA that the principle of Equality Before the Law is restricted in scope, and is not involved in substantive assessments of equality.<sup>25</sup> To explain and illustrate the scope of the application of equality before the law, I distinguish three categories of legal relationship which are pertinent to the understanding of this principle: (1) as between Member States and EU institutions; (2) as between Member States; and (3) as between individuals within the EU. In the following sections, I identify the nuanced and distinguishing characteristics within each of these categories, in preparation for deeper analysis in the following chapters of the potential of EUCA in terms of EU institutions (Chapter 5), Member States (Chapter 6), and individuals within the EU (Chapter 7).

### **3.2.1 *Member States and the EU Institutions: Intensity of Review***

It follows from the principle of equality before the law that in the EU legal order, no Member State ought to be above the law. However, as I have also argued, nor should the EU institutions.<sup>26</sup> Both Member States and the EU institutions ought to be equal before the law. An accusation of the inequality before the law in terms of the scrutiny of the EU institutions as compared with their national counterparts has the effect of undermining trust in the Union. If there is a perceived double standard of review as between scrutiny of the Member States institutions, and scrutiny of EU institutions, this negatively impacts on the relationship between the EU and Member States. Within the current institutional discourse, for example, there is criticism of the Court for, ostensibly, applying a higher intensity of proportionality review to the actions of Member States as compared with EU institutions.<sup>27</sup>

---

<sup>24</sup> Section 4.7.

<sup>25</sup> Discussion of equality in the EU for individuals is more suitable a discussion for non-discrimination and fundamental rights law, see Sionaidh Douglas-Scott, 'Fundamental Rights in the EU: the ambiguity of judicial review' in T Campbell, KD Ewing and A Tomkins (eds), *The Legal Protection of Human Rights: Sceptical essays* (OUP 2011); and Sionaidh Douglas-Scott, *EU Human Rights Law* (Elgar Publishing 2014).

<sup>26</sup> See Chapter 3, Section 4 on the absence of a monitoring of EU compliance with rule of law standards.

<sup>27</sup> For example, Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357; cf Case C-491/01 *R v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR

The rationale for the higher intensity of review is usually contextual: cases before the Court involving Member State action usually concerns a derogation from one of the four fundamental freedoms. The Court, in recognition of the possibility of disguised protectionism, will apply a higher intensity of review to national measures which threaten to undermine one of the four freedoms.<sup>28</sup> Comparatively, in challenges to the EU Institutions involving discretionary choices related to complex assessments or political, economic or social natures, the Court will apply a relatively low standard of review, unless the challenge involves a claim of breach of a fundamental right.<sup>29</sup>

### 3.2.2 *Member States: Derogations and Cooperation*

An ancillary question to ask is then whether derogations from the law can ever be permissible under the principle of equality before the law. As Membership of a Union of (ostensibly) equal states,<sup>30</sup> all Member States ought to be equal before the law and subject to the same restrictions and obligations as any other. However, there may be instances in which a Member State will wish to derogate from provisions of the Treaties or EU legislation.<sup>31</sup> By ‘derogation’, I mean a difference in treatment, or application of the law for one or many Members, which is agreed in advance, as part of an overall agreement, on the basis of co-operative authority, between Member States. The question which arises is whether or not derogations from the law are

---

I-11453. See also Case C-210/03 R (*Swedish Match AB and Swedish Match UK Ltd*) v Secretary of State for Health [2004] ECR I-11893; cf Case C-285/98 *Kreil v Bundesrepublik Deutschland* [2000] ECR I-69. It is unfortunately beyond the scope of my thesis to evaluate variable or invariable standards of review, however, I highlight here the ostensible inequality before the law. See further Gráinne de Búrca ‘The Principle of Proportionality and its Application in EC Law’ (1993) 13 YEL 105; and Dean Knight ‘Mapping the Rainbow of Review: Recognising Variable Intensity’ [2010] NZ L Rev 393.

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.* See Case C-331/88 R v Minister for Agriculture, *ex p Fedesa* [1990] ECR I-4023; Case C-491/01 *ex parte British American Tobacco* [2002] ECR I-11453; Case C-210/03 R (*Swedish Match AB and Swedish Match UK Ltd*) v Secretary of State for Health [2004] ECR I-11893; and C-58/08 *Vodafone* [2010] ECR I-4999.

<sup>30</sup> Some commentators have highlighted the bargaining power of Germany, or France in comparison with smaller Member States: see Andrew Moravcsik and Milada Aanna Vachudova, ‘National Interests, State Power and EU enlargement’ (2003) 17 East Eur Pol Soc 42; Stefanie Bailer, ‘Negotiation Theory and the EU: the State of the Art’ (2010) 17 J Eur Pub Pol 743; Jonas Tallberg, ‘Explaining the institutional foundations of European Union negotiations’ (2010) 17 J Eur Pub Pol 633.

<sup>31</sup> For example, Council Directive 2006/112/EC permits Member States to be authorised to derogate from the common VAT rules to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347.

permissible under EUCA, if all Member States ought to be equal before the law. Derogations are legitimate under this model as they have been agreed within the legal system. A difference in application of the law which is not permissible, is one that is not agreed within the system, falling into the category of unfairness which expects others to abide by the rules, even if one State does not. The distinction between the first scenario (which would be permissible under the EUCA standard) and the second, is the agreement of difference, which takes place within the legal system with the cooperation of all the Members. Thus, derogations from certain regulations or certain laws are permissible, only in so far as the derogations have been permitted, or accounted for, by the law itself. In this way, any deviation from the norm is within the terms and conditions set by the law itself. For example, Article 52(1) CFR contains a general derogation clause, allowing for a limitation on rights ‘provided for by law’, providing that there is a respect for those rights, and such limitations meet the requirement of proportionality.

### ***3.2.3 Individuals: Access to Justice and Equality Before the Law in Member States***

All individuals across the Union ought to be Equal Before the Law. This, in effect, expects that all citizens have equal access to the rights, services and protections guaranteed by the Treaties and EU law. Equality Before the Law as it concerns individuals also raises two important issues which have been introduced in Chapter 3. The first issue is individual access to the courts to judicially review decisions based on EU law for individuals (and other non-privileged applicants). As introduced in Chapter 3, under the Lisbon reforms, individuals, as non-privileged applicants, may now only directly challenge a legislative act which is addressed to them; or which is of direct and individual concern to them; or a regulatory act which is of direct concern, but does not entail implementing measures under Article 263 TFEU.

The high bar of standing for a direct challenge to a measure has been argued as a violation of Article 47 CFR right to effective judicial protection,<sup>32</sup> though the Court has held

---

<sup>32</sup> See Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* (3 October 2013)

that the current schema has guaranteed a full and effective system of remedies in the EU,<sup>33</sup> especially as there is a possibility for indirect challenge under Article 267 TFEU. The deficiency here, which I return to, was identified by Advocate General Jacobs:<sup>34</sup> national courts' lack of expertise in EU law; lack of participation by Council and Commission in proceedings; the possible lack of national implementing measures to be challenged; lack of the possibility to invalidate the norm; substantial delays and significant costs; and the possibility that national courts would be unwilling to make a preliminary reference. In such circumstances, Advocate General Jacobs' criterion of 'substantial adverse impact' to establish standing for individuals in cases of direct challenge, forwarded in *Unión de Pequeños Agricultores*,<sup>35</sup> would answer these concerns without substantially burdening the Court, and so I endorse this as part of EUCA. There cannot be a commitment to abide by the rule of law, if the possibility to challenge is not practicable, or rendered near-impossible by design. The second issue is the question of application of EU law across different Member States which may result in inequality as between citizens in different Member states. As this issue is best understood in context, I address the concerns for inequality of application of the law to individuals which is caused by disparate implementation of the law in the Chapter 7 case study on the European Arrest Warrant.

### 3.3 The Principle of Legal Certainty

The principle of legal certainty is essential to the rule of law: it demands that laws ought to be *clear, intelligible, predictable, and relatively stable*. The purpose of legal certainty is to guarantee with relative confidence, that everyone within the EU system will know the legal consequences of their actions, and the potential outcome of any judicial proceedings in the event of conflict. The principle of legal certainty was first acknowledged in the 1960s,<sup>36</sup> and has since been

---

<sup>33</sup> Case C-50/00P *Unión de Pequeños Agricultores* [2002] ECR 6677;

<sup>34</sup> Opinion of AG Jacobs, Case C-358/89 *Extramet Industrie SA v Council* [1991] ECR 250.

<sup>35</sup> Opinion of AG Jacobs, Case C-50/00P *Unión de Pequeños Agricultores* [2002] ECR 6677. The Court in its judgment did not follow the Opinion.

<sup>36</sup> 42/59 *Société nouvelle des usines de Pontlieue—Aciéries du Temple (SNUPAT) v High Authority* [1961] ECR 103.

recognised as a general principle of EU law,<sup>37</sup> on which ground it can serve to invalidate EU secondary law. The Court has held that the principle requires

that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.<sup>38</sup>

As highlighted in Chapter 3 outlining the specific nature of the EU, the likelihood of uncertainty in the law is heightened and intensified by EU multi-level governance: adoption of EU norms is built on the assumption of common political, linguistic and legal interpretation and application of a single text across 28 states with distinct legal systems and in 24 languages.<sup>39</sup> Focusing on the multi-lingual nature of the EU presents additional challenges: the Court has held both that divergent interpretations at national level of EU obligations would ‘undermine the objectives of the Community legislation and legal certainty’<sup>40</sup> but also that the ‘elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the concern for legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words.’<sup>41</sup>

A further example is in the soft law methods of governance in the EU employed to suit the diversity of legal systems in which EU law is applied, highlighting the difficulty finding political equilibrium between flexibility and fairness on the one hand, and certainty and predictability on the other. This difficulty is also shown in the controversial case law following

---

<sup>37</sup> See Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055; Case C-234/04 *Kapferer v Schlank & Schick* [2006] ECR I-2585; and cf Case C-453/00 *Kühne and Heitz* [2004] ECR I-837. See also Section 4.4.

<sup>38</sup> C-345/06 *Heinrich* [2009] ECR I-1659

<sup>39</sup> Jérémie Van Meerbeeck, ‘The Principle of Legal Certainty in the Case Law of the European Court of Justice: from Certainty to Trust’ (2016) ELR 275, 276.

<sup>40</sup> Case C-391/05 *Jan de Nul NV v Hauptzollamt Oldenburg* [2007] ECR I-1793, para 23.

<sup>41</sup> 80/76 *North Kerry Milk Products Ltd v Minister for Agriculture and Fisheries* [1977] ECR 425, para 11.

the direct effect of directives,<sup>42</sup> and general principles<sup>43</sup> in cases concerning actions between private individuals. It is a criticism on the grounds of legal certainty to create a burden on citizens to account for (and national courts to apply) principles which are so abstract, general or uncertain that they can support many different interpretations and practical implications. In apparent contradiction with the principle itself, case law on legal certainty has been ‘sprawling, confused and contradictory’.<sup>44</sup>

Locating the principle of certainty within this huge body of case law, in instances of conflict between national and EU norms, where the law is sufficiently clear, and adheres to the other EUCA principles,<sup>45</sup> there ought to be a strong presumption in favour of the effectiveness of EU law. In the instances where the applicable EU law is uncertain, vague or abstract, the principle of legitimate expectations should protect individuals who have relied on an alternative interpretation of the law.<sup>46</sup> Whilst acknowledging that legal certainty is always a matter of degree, and that the degree in question may be more appropriate in some circumstances than others, to the appropriate and possible extent, law should be as certain as possible, in order that those subject to and administering the law can be guided effectively by it. In this, the general principle of legitimate expectations can support and enforce the principle of legal certainty.

### 3.4 The Principle of Legality

---

<sup>42</sup> See for example Case 43/75 *Defrenne v Sabena* [1976] ECR 455; Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723; Case C-188/89 *Foster v British Gas* [1990] ECR I-3313; Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325. See also Paul Craig, ‘The Legal Effect of Directives: Policy, Rules and Exceptions’ (2009) 34 EL Rev 349.

<sup>43</sup> See Case C-144/04 *Mangold v Rüdiger Helm* [2005] ECR I-9981; and Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365. For an overview, see Editorial, ‘The Scope of Application of General Principles of Union Law: An Ever Expanding Union?’ (2010) 47 *CML Rev* 1589; and Koen Lenaerts and José Gutierrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) 47 *CMLR* 1629.

<sup>44</sup> Jérémie Van Meerbeek, ‘The Principle of Legal Certainty in the Case Law of the European Court of Justice: from Certainty to Trust’ (2016) *ELR* 275, 276.

<sup>45</sup> Section 3.4.

<sup>46</sup> This is considered in practice in Part II, the principle has an important role to play in the application of EUCA in terms of competences (Chapter 5); and in terms of areas of conflict in the application of EU law in Member states (Chapter 6). EUCA creates a dynamic realisation of legal certainty appropriate for a multi-lingual EU legal system (Chapter 7).

The principle of legality is intrinsic to the rule of law. Echoing the Court, ‘in a community governed by the rule of law, adherence to legality must be properly ensured.’<sup>47</sup> It epitomises the ideal that the only legitimate exercise of power is through law. In the EU, the exercise of power is regulated through law<sup>48</sup> which ought to be based on clear legal norms conferring competence,<sup>49</sup> and appropriate both in terms of proportionality and subsidiarity<sup>50</sup> which is subject to review under Article 263 TFEU. The principle of legality in EU law follows a middle ground, and, with the principles of transparency and co-operative authority, underpins the values identified by the Commission’s definition of the principle, which entails in ‘substantial terms’ a ‘transparent, accountable, democratic and pluralistic process for enacting laws’.<sup>51</sup> The importance of proportionality and subsidiarity to the principle of legality reflect and adapt to the specific nature of the EU. For EU law to be effective, there ought to be a strong presumption of the legality of EU actions, however, in a multi-level system of 28 competing conceptions of the good, this presumption of legality ought to be qualified by respect for proportionality, and subsidiarity.

Building on established doctrine, the legality of EU measures are subject to review under Article 263 TFEU, the grounds of which are: lack of competence, infringement of an essential procedural requirement; infringement of the Treaty of any rule of law relating to its application; and misuse of power. Through the third ground,<sup>52</sup> principles of administrative legality have been introduced as general principles of EU law.<sup>53</sup> In terms of lack of competence, while the Lisbon Treaty reforms sought to clarify, and contain EU powers by demarcating exclusive and shared areas, competences have been interpreted broadly and purposively to achieve Treaty objectives.<sup>54</sup> The focus of review and academic discourse has therefore been on proportionality and subsidiarity. The first, proportionality is a general principle of EU law, now stated in

---

<sup>47</sup> Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-3801, para 63.

<sup>48</sup> ie the legally binding Article 288 TFEU instruments: regulations, directives and decisions.

<sup>49</sup> Arts 3, 4 and 6 TFEU.

<sup>50</sup> Article 5 TEU.

<sup>51</sup> New Framework (n 1) 2. (emphasis original).

<sup>52</sup> See Chapter 3, Section 2.3.

<sup>53</sup> See Section 4.3.

<sup>54</sup> See Cases 281, 283-285 and 287/85 *Germany v Commission* [1987] ECR 3203; and Case 176/03 *Commission v Council* [2005] ECR I-7879.

Article 5(4) TEU. Assessment of the proportionality involves that a measure be (a) suitable to achieve the desired end; (b) necessary to achieve the desired end; and (c) questions whether the measure imposes an excessive burden in relation to the object sought to be achieved.<sup>55</sup> Challenges to the proportionality of a measure are common in administrative policy choices, though in deference to discretionary choices involving complex assessments or political, economic or social natures, the Court will likely only overturn the decision if it is manifestly disproportionate.<sup>56</sup>

Subsidiarity, on the other hand, provides an evaluative framework for limiting the exercise of power, expecting that action ought to be taken at appropriate level under Article 5(3) TEU. In areas outside of exclusive competence, the EU must only act where action cannot be sufficiently achieved by the Member States, but be better achieved at Union level.<sup>57</sup> The Protocol on Subsidiarity and Proportionality contains a duty on the Commission to consult widely before proposing legislative acts,<sup>58</sup> and envisions an enhanced role for the national parliaments. Case law on breach of subsidiarity, has centred on the intensity of review of Union action, requiring that there is a duty to provide express reasons and reference to subsidiarity in the measure, but would not further provide a higher intensity of review as to whether action could be best (or even better) achieved at national level.<sup>59</sup> The further challenge to the inclusion of subsidiarity as a measure and aspect of the principle of legality in EUCA is that it is not concerned with *legality* per se, but rather with a (political) judgment on the level at which action is best taken.

---

<sup>55</sup> See Paul Craig, 'Proportionality, Rationality and Review' (2010) NZLR 265; and Grant Huscroft and Bradley Miller, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014).

<sup>56</sup> *ibid.* See Case C-331/88 *R v Minister for Agriculture, ex p Fedesa* [1990] ECR I-4023; Case C-491/01 *ex parte British American Tobacco* [2002] ECR I-11453; Case C-210/03 *R (Swedish Match AB and Swedish Match UK Ltd) v Secretary of State for Health* [2004] ECR I-11893; and C-58/08 *Vodafone* [2010] ECR I-4999.

<sup>57</sup> Subsidiarity is not without its critics in how it has been interpreted at EU level. See Antonio Estella, *The Principle of Subsidiarity and its Critique* (OUP 2004); and Garreth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 CMLR 63.

<sup>58</sup> Art 3, Protocol on Subsidiarity and Proportionality.

<sup>59</sup> Case C-233/94 *Germany v Parliament (Deposit Guarantee Directive)* [1997] ECR I-2405, paras 24-28; Case C-491/01 *ex parte British American Tobacco* [2002] ECR I-11453, at paras 177-85; Cases C-154/04 & C-155/04 *Alliance for Natural Health* [2005] ECR I-6451, paras 99-108; and Case C-518/07 *Commission v Germany* [2010] ECR I-1885.

The pertinence of subsidiarity and proportionality to the principle of legality in the EU reflects the demands resulting from its specific nature. Proportionality can balance the competing conceptions of the good in the EU, while subsidiarity embraces the regulation of the multi-level nature of the EU. Both provide an analytical framework which limits the exercise of power, but also (reflecting an intermediate account) enables competing conceptions of the good to be deliberated and accounted for in legal reasoning and justification of legal norms. The principle of legality reflects the intermediate nature of the account: embracing an account which goes beyond a formal or positivistic understanding of the term to include within its scope the subsidiarity of a measure. It requires ‘mutual deliberative engagement’<sup>60</sup> and eschews strict positivism for determination of legal validity and instead, ‘insists on the central role of principles of political morality – principles that are not only substantive, but also procedural and jurisdictional – as an integral part of any plausible conception of law in the liberal democratic constitutional tradition’.<sup>61</sup> This also shows the clear distinction between EUCA and state-centric accounts of the rule of law, which are often limited to the requirement of the relevant polity to act in accordance with the procedures proscribed by law, connoting non-retrospective application of the law,<sup>62</sup> and also a prohibition of crime and punishment without law (*nullum crimen, nulla poena sine lege*).<sup>63</sup>

### 3.5 The Principle of Transparency

In the age of mass communication, and ease of access to information, there is a pressing need for administrations to act transparently in their decision-making procedures to secure public trust.<sup>64</sup> This is especially pressing for the EU legal order, which faces accusations of opaque

---

<sup>60</sup> *ibid* 301.

<sup>61</sup> *ibid* 268.

<sup>62</sup> It is important not to confuse the principle of legal certainty and the principle of legality, as the ‘non-retrospectivity of the law is an understanding of both. The distinction between the principles first, legality connotes the process by which law is enacted, promulgated, and applied (including the legal base, and consideration of subsidiarity, competence and proportionality upon which it was enacted); whereas legal certainty concerns the structure of the law itself (the clarity, certainty, and stability of laws).

<sup>63</sup> This is further explored in the case study on the European Arrest Warrant: Chapter 7.

<sup>64</sup> See Chapter 3, Section 2.3.

procedures, and a legal system which is so esoteric as to make it often unintelligible and inaccessible to the ordinary citizen:<sup>65</sup> the ‘Byzantine complexity of EU operations both renders injustice and lack of accountability all the more likely.’<sup>66</sup>

The inclusion of transparency as a principle of the rule of law is not common in state-centric accounts of the rule of law, though it has been considered an element of an ‘international’ account of the rule of law.<sup>67</sup> Ensuring adherence to the rule of law is reliant on a transparent system, and a rule of law compliant system assumes a transparent system of legal administration. The inclusion of the principle of transparency connects to EUCA as an intermediate account of the rule of law (Section 4.1), and to the analytical frameworks of legitimacy based ‘throughput’ legitimacy (Section 5.3) and on the public perception of adherence by the EU to the rule of law (Section 5.4). The principle of transparency adapts to the specific nature of the EU: the application and enforcement of EU law in different states must be transparent to ensure the effectiveness and uniformity of EU law; while multi-level governance requires transparency in the determination and allocation of decision-making powers in order to ensure adherence to other principles of the rule of law: legality, certainty, limited discretion, and equality before the law.

The term ‘transparency’ (like the rule of law) is polysemic, and there have been many interpretations as to its meaning and scope.<sup>68</sup> As an antonym to opaque decision-making, and closed, secret judicial proceedings, EUCA transparency connotes the idea of open and accessible information, and judicial proceedings. Following Craig, the idea of transparency connotes public meetings, the provision of information and a right of access to documents.<sup>69</sup> This could be interpreted as limiting the requirement of transparency to a right of access to relevant documentation when challenging decisions. The principle of transparency which I

---

<sup>65</sup> An explanation of horizontal indirect effect is exemplary of highly nuanced and complicated legal concepts at play in the Union legal order. See Sara Drake, ‘Twenty years after Von Colson: the impact of “indirect effect” on the protection of the individual’s community rights’ (2005) EL Rev 329.

<sup>66</sup> Sionaidh Douglas-Scott, *Law after Modernity* (Hart Publishing 2013) 282.

<sup>67</sup> S Besson, ‘Sovereignty, International Law and Democracy’ (2011) 22 EJIL 373, 385–86.

<sup>68</sup> A Buijze, *The Principle of Transparency in EU Law* (Uitgeverij BOXPress 2013).

<sup>69</sup> Paul Craig, *EU Administrative Law* (OUP 2006) 351.

draw out is not limited to the availability of information pertaining to legal action, rather – it also relates to the complexity of procedures and the quality of the legal information provided.<sup>70</sup> Upon this basis, I identify three elements to this principle of transparency which deserve attention in this section as the principle of transparency is another distinguishing feature of EUCA designed for the specific nature of the EU: (1) access to information; (2) openness of procedures; and (3) complexity of the system.

First, in terms of (1) **access to information**, I interpret this as requiring the availability of understandable and good quality information regarding the legal processes and structures of the EU. Access to relevant documents as a right of participation in the judicial proceedings was developed by the Court of Justice<sup>71</sup> before it was adopted explicitly by the Treaties,<sup>72</sup> and now the Charter of Fundamental Rights.<sup>73</sup> Access to this information should not be limited to participants in judicial proceedings, but encompasses the provision of information regarding the EU legal order to all citizens. In the accessible publication of the official journals, reports, and other documents relating to the functioning and governance of the EU, the Union recognises the duty of transparency.<sup>74</sup> In terms of understandable information to citizens, not aimed at governmental officials, the EU's official website, [europa.eu](http://europa.eu), providing an introduction to the basic information of how the EU works, latest news, information and links to other institutional websites, provides an excellent starting point for ensuring access to information regarding EU law. This, however, is not the limit of EUCA Transparency required for adherence to the rule of law.

Additionally, EUCA emphasises the importance of (2) **openness of procedures**, which is linked to the participation of the public and interested parties. This follows recognition by

---

<sup>70</sup> Buijze (n 68) 31.

<sup>71</sup> See Francesca Bignami, 'Three Generations of Participation Rights before the European Commission' (2004) 68 *Legal and Contemporary Problems* 61; and Alberto Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' [2014] *EL Rev* 72.

<sup>72</sup> Transparency and openness were first codified in the Treaty of Amsterdam.

<sup>73</sup> The fundamental right to the freedom of information is stated within Art 42 of the Charter of Fundamental Rights. However, as Alemanno points out, this implies that the right is subject to the same limitations under Art 52 of the Charter. See Alemanno (n 71) 72.

<sup>74</sup> *ibid.* See also Henri Labayle, 'Openness, transparency and access to documents and information in the European Union' (2013). For a case study example of Institutional efforts at transparency, see Chapter 5, Section 3.5.2.

the EU: following the adoption of the Lisbon Treaty, there has been increased emphasis on the idea of ‘openness’ in EU governance. Openness of decision-making is a guiding principle of the EU, and Arts 1(3) and Art 10(3) TEU guarantee that decisions are to be made as ‘openly and closely as possible to the citizen’. There is an obligation on the Institutions in Art 11(2) which states that they ‘shall maintain an open, transparent and regular dialogue with representative associations and civil society.’<sup>75</sup> Similarly, Art 11(3) TEU aims to ensure that ‘[t]he European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.’ The ‘broad consultations’ with concerned parties are not overlooked by the principle of transparency, as open publication of contacts with lobbying groups is an element of open governance.<sup>76</sup> This is further examined from the perspective of legitimacy through rule of law compliance in the Chapter 5 case study on decision-making in the EU and the Trans-Atlantic Trade and Investment Partnership, and in Chapter 6 in the case study on the Common Consolidated Corporate Tax Base.

Openness and accessible information are only two steps in the realisation of EUCA transparency, however as a key problem for the EU in promoting public trust is the apparent complexity of its organisation, procedures and regulations. The **complexity of the EU legal system** is a response to its unprecedented situation as neither a state nor a *de facto* international organisation akin to the UN or the WTO. This is perhaps the most challenging aspect of the EUCA principle of transparency, as the complicated procedures and mechanisms developed by the EU have been the result of political compromises and expediencies. For example, the EU’s economic governance rules have been criticised for failing a test of transparency, due to their complexity and confusing dispersal across a range of EU and national legal measures, encompassing a wide range of primary, secondary and soft-law

---

<sup>75</sup> Some writers have noted a distinction between the use of language between ‘openness’ and ‘transparency’ in the Treaties, despite the fact that they are often used interchangeably in EU legal discourse. For example, both of the terms ‘openness’ and ‘transparency’ are used in the treaties. In Art 11(2), both terms appear, implying that there is a distinction between the two terms. For Alemanno, openness ‘seems to normatively require various forms of active co-operation and communication between all EU institutions and the public, whose practice typically presupposes access to information’. Alemanno (n 71) 73. See also Juliet Lodge, “Transparency and EU Governance: Balancing Openness with Security” (2003) 11 J Contemporary Euro Stud 95.

<sup>76</sup> This is currently a controversial issue for the EU in light of the on-going EU-US trade talks regarding the Transatlantic Trade and Investment Partnership: see the Chapter 5 case study on TTIP.

measures.<sup>77</sup> This principle supports new measures to Better Regulation Agenda, which is a law-making policy forwarded by the Commission aiming to design and evaluate better legal regulation in the EU.<sup>78</sup>

But there is a broad range of examples of procedures and mechanisms to highlight here, including: the complicated idea of institutional balance; the preliminary reference procedure and *res judicata*; the extent to which general principles are applicable in horizontal application of EU law; a clear understanding of the competences of the EU; or the complexity of the applicability of directives. In light of these complications, it should be remembered that the EU is a relatively new legal system, and still developing its place within the structures and mechanisms of the, often long-established, legal systems of the Member States. It is clear, however, that in going forward, EUCA will provide a guide for the development of the EU legal system, as it attempts to provide solutions to the complexity of the system.

### **3.6 The Principle of Limited Discretion of EU Officials**

The concept of the rule of law aims to prevent the exercise of arbitrary power through law. It follows from this premise that there ought to be a limit to the discretion enjoyed by officials in the performance of their duties. In terms of the definition of EU ‘officials’, following *Åkerberg Fransson*, this includes any official acting with an authority based on EU law, or in the application of EU law.<sup>79</sup> The exercise of the discretion ought to be guided by clear, general rules and grounded in clear legal norms. This echoes with the view that particular laws ‘should be guided by open, stable, clear and general rules’ and thus, the stability of the general rule supports and informs the particularity of the specific rule.<sup>80</sup> As an extension of this principle,

---

<sup>77</sup> See Steve Peers, ‘Analysis: Draft Agreement on Reinforced Economic Union (REU Treaty)’ Statewatch, 21 December 2011; and Douglas-Scott, *Law after Modernity* (n 49) ch 8.

<sup>78</sup> Commission, ‘Proposal for an Interinstitutional Agreement on Better Regulation’ (Strasbourg 19 May 2015) COM(2015) 216 final; and Commission, ‘Better Regulation for Better Results – An EU Agenda’ (Strasbourg 19 May 2015) COM(2015) 215 final.

<sup>79</sup> Following established case law on ‘implementing’ EU law: Case C-617/10 *Åkerberg Fransson* (26 February 2013).

<sup>80</sup> Joseph Raz, *The Authority of Law* (Clarendon Press 1979) 215–16.

there is a consequent requirement for the accountability of officials if they act beyond their remit in not providing pre-published guidelines for the application of their discretion.

As introduced under the principle of legality, challenges to administrative policy choices, involve deference by the courts to discretionary choices involving complex assessments or political, economic or social natures, the Court will likely only overturn the decision if there is an evident misuse of power, or the exercise of discretion is manifestly in error or disproportionate.<sup>81</sup> Multi-level governance in the EU has resulted in situations where EU and national authorities exercise wide discretionary powers. For example, the Commission in the enforcement of EU competition law; and national regulatory authorities. In the first example, wide discretion afforded to Commission in the enforcement of EU competition law under Articles 101 and 102 TFEU. This discretion is argued to be justified on the basis of the need for flexibility. For example, Voss argues there is good reason against setting precedents in competition law, as the flexibility affords the Commission the possibility of judging each case on its merits, and also to adjust its enforcement mechanisms in response to ‘societal preferences’, new economic theories and new kinds of infringements.<sup>82</sup> The argument that departure from principles of equality before the law (and limited discretion, and potentially judicial review in the view that the Commission is both investigator and enforcer) is justified on these terms is questionable.

Similar to the position of the Commission, national regulatory authorities in EU regulatory framework sectors (ie energy, railway and electronic communications) have wide and far-reaching independence in the exercise of their discretionary powers. This administrative discretion is in the interpretation and application of legal rules in regulated sectors, and an accompanying large margin of appreciation in the decisions taken.<sup>83</sup> This is

---

<sup>81</sup> *ibid.* See Case C-331/88 *R v Minister for Agriculture, ex p Fedesa* [1990] ECR I-4023; Case C-491/01 *ex parte British American Tobacco* [2002] ECR I-11453; Case C-210/03 *R (Swedish Match AB and Swedish Match UK Ltd) v Secretary of State for Health* [2004] ECR I-11893; and C-58/08 *Vodafone* [2010] ECR I-4999.

<sup>82</sup> Katharina Voss ‘The Principle of Equality: A Limit to the Commission’s Discretion in EU Competition Law Enforcement?’ (2013) *Global Antitrust Review* 149, 164.

<sup>83</sup> Marek Szydło ‘Independent Discretion or Democratic Legitimation? The Relations between National Regulatory Authorities and National Parliaments under EU Regulatory Framework for Network-Bound Sectors’

supported by the experience which ‘shows that the effectiveness of regulation is frequently hampered through a lack of independence of regulators from government, and insufficient powers and discretion’.<sup>84</sup> The Court has also underlined the ‘broad discretion’ enjoyed by national regulatory networks under EU law.<sup>85</sup> The Courts have shielded and protected national regulatory authorities from any national limitation on their powers, invalidating any statutory rules concerning the exercise of their powers which goes beyond that set out in the Directives.<sup>86</sup> Without sufficient statutory rules to give direction to regulated sectors, legal certainty is undermined, as is the possibility to effectively challenge decisions in the Court.

As can be seen in these examples, the value of this principle to the specific nature of the EU is clear: it is axiomatic in a rule of law abiding system that the officials of that system do not enjoy unlimited discretion, and that there is a check on their power. In the EU law system, where enforcement and application of the law is dispersed among national authorities, there is a heightened tension in ensuring the uniform and equal application of the law in all states. Supported by the EUCA principles of equality before the law, and legal certainty, the principle of limited discretion clearly prohibits officials in Members States, when acting in the capacity of EU officials (by applying EU law) to be motivated for local or political reasons to avoid the application of the law. This argument should further strengthen calls for increased supervision, monitoring and support of the exercise of discretionary powers by EU authorities. There is a further value in the realisation of this principle from a rule of law perspective: the clarification by national EU authorities (those applying EU law at national level) of guidelines on discretion, is of use to other Member States who seek suggestion on the application of the same rules.

---

(2012) ELJ 793. For example, ‘national law implementing Community law gives national regulatory authorities considerable discretionary powers in application of the relevant rules’ Directive 2002/21/EC, recital 36.

<sup>84</sup> Recital 33 in the Preamble to Directive 2009/72/EC, and in Recital 29 in the preamble to Directive 2009/73/EC.

<sup>85</sup> Case C-55/06 *Arcor AG & Co KG v Germany* [2008] ECR I-2931, para 153; and Case C-424/07 *Commission v Germany* [2009] ECR I-11431.

<sup>86</sup> Szydło (n 83).

### 3.7 The Principle of Judicial Review

It follows from the rule of law that there ought to be independent, effective, and accessible judicial review, as without the possibility of challenge, it is not possible to guarantee the limits of the exercise of power. The independence of the judiciary is axiomatic of the rule of law,<sup>87</sup> allowing no biased or partisan opinion to determine the outcome of a case. The value of this principle is to reflect the central proposition of the rule of law embraced by the Court, that the EU 'is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.'<sup>88</sup> If the system is to be accountable and so compliant with the rule of law, there must be independent, effective and accessible judicial review. This has the clear value of inspiring trust in the system, as individuals are empowered to protect their rights. This provides mutual benefit for both the effective functioning of the legal system, but also for the interests of the individuals: 'Investing in justice should be a point of principle but also a matter of practicality. When people see and experience justice being done efficiently and fairly, they are content to abide by the rule of law.'<sup>89</sup>

Building on the outline of administrative law in Chapter 3, judicial review can, and is, used to uphold the rule of law, and, there exists significant body of law in the area. Effective judicial protection is recognised as a fundamental right guaranteed by Article 47 of the Charter.<sup>90</sup> In terms of access, the Court has taken step to extend legal aid,<sup>91</sup> and expand the jurisdiction of national courts to areas under which they would not otherwise have

---

<sup>87</sup> 'Editorial comments: The rule of law as the backbone of the EU' (2007) CMLR 875; Berteau, 'Looking for coherence within the European Community' (2005) ELJ 154, 160-161.

<sup>88</sup> Case 294/83 *Les Verts* [1986] ECR 1339, para 23.

<sup>89</sup> The idea that fair treatment is more important than a favourable outcome in legal actions, see Tom R Tyler, *Why People Obey the Law* (Princeton University Press 2006); and Gerald Postema, 'Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law' in X Zhai and M Quinn (eds), *Bentham's Theory of Law And Public Opinion* (CUP 2013). As an example of this theory applied in practice, see Tina Rosenberg, 'The Simple Idea that could transform US criminal justice' *The Guardian* (London, 23 June 2015).

<sup>90</sup> The right to effective judicial protection applies to all Member States when 'implementing' EU law (Article 51(1) CFR). This applies where national law falls within the scope of EU law: Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* (26 February 2013).

<sup>91</sup> Case C-279/09 *DEB* [2010] ECR I-13849.

competence.<sup>92</sup> The duty to give reasons is established,<sup>93</sup> while national standing requirements cannot undermine the right to effective judicial protection.<sup>94</sup> The right to effective judicial protection is not absolute, however: there is no automatic right to appeal,<sup>95</sup> nor to unconditional access.<sup>96</sup> EU law does not provide the procedural conditions for enforcement, nor create new remedies before national courts,<sup>97</sup> though procedural autonomy is limited by the principles of equivalence and effectiveness.<sup>98</sup> However, any restriction on fundamental rights must be proportionate to the objective of general interest pursued.<sup>99</sup> Additionally, the right of standing is qualified, as examined in Section 3.2.3.

The additional value in the effectiveness of judicial decisions is in terms of economic recovery in the wake of the turbulence caused by the Financial Crisis and the Banking Crisis. There is a clear connection between the rule of law and economic recovery and stability through an efficient and independent judicial system. Predictable, timely, and enforceable decisions on the law promote stability and certainty, and are essential to ‘a sound business and investment environment’ which in turn promotes confidence and growth at national and European levels.<sup>100</sup> Ultimately, judicial review of government action protects against the ‘erosion by governments of the rule-based regime’ and creates a safeguard of individual rights.<sup>101</sup>

---

<sup>92</sup> Case C-268/06 *Impact* [2008] ECR I-2483, para 54.

<sup>93</sup> Article 296 TFEU. See Also Case 222/86 *Heylens and Others* [1987] ECR 4097, para 15, and Case C-75/08 *Mellor* [2009] ECR I-3799, para 59.

<sup>94</sup> Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, para 49.

<sup>95</sup> Case C-69/10 *Samba Diouf* [2011] ECR I 7151.

<sup>96</sup> Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* (3 October 2013).

<sup>97</sup> Case C-432/05 *Unibet* [2007] ECR I-2271.

<sup>98</sup> Case 33/76 *Rewe-Zentralfinanz* [1976] ECR 1989

<sup>99</sup> Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, para 63.

<sup>100</sup> Assises de la Justice, *Discussion Paper 4: The Rule of Law* (Commission 2013).

<sup>101</sup> Raz (n 63) 216-17.

### 3.8 The Principle of Co-operative Authority

Specific to the nature of the EU legal order and a complex challenge for state-centric accounts of the rule of law is that authority remains ‘highly diffuse and fragmented’.<sup>102</sup> EUCA is apposite for the EU legal order as it adapts to the specific nature of the EU analysed in Chapter 3. The final principle of the EU-centric account is the most radical: it rejects the categorisation in legal theory of a hierarchy of state-centric, monist constitutional norms as unconvincing in the constitutional pluralism of the EU,<sup>103</sup> and creates mutual cooperation and dialogue between the Institutions and Member States of the EU as the foundation of the authority of EU action.<sup>104</sup> Following Mitchel Rosenfeld on Habermas:

the legitimacy of law can be established dialogically through communicative action among persons who recognize one another as equals and who agree to accept as legitimate only those laws to which they would all consent, both to enact as autonomous legislators and to follow as law-abiding citizens.<sup>105</sup>

In some instances, this is not far from the accepted norm in EU governance – and there is evidence of coordinated responses to crisis.<sup>106</sup> And an inter-institutional view of EU law is advocated among academics, and others commenting on constitutional pluralism within the EU.<sup>107</sup> The aim of co-operative dialogue is to replace the sentiment of ‘*l’État, c’est moi*’, with

---

<sup>102</sup> Jan-Werner Müller, ‘Safeguarding Democracy inside the EU Brussels and the Future of Liberal Order’ (2013) Transatlantic Academy Paper Series, 23, <[www.transatlanticacademy.org/sites/default/files/publications/Muller\\_SafeguardingDemocracy\\_Feb13\\_web.pdf](http://www.transatlanticacademy.org/sites/default/files/publications/Muller_SafeguardingDemocracy_Feb13_web.pdf)> accessed 12 January 2016.

<sup>103</sup> See Neil Walker, ‘The idea of Constitutional Pluralism’ (2002) MLR 317; Miguel Poiares Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003); Mattias Kumm, ‘The Moral Point of Constitutional Pluralism. Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection’ in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2013); and Klemen Jaklic, *Constitutional Pluralism in the EU* (OUP 2014); cf Letsas (n 9).

<sup>104</sup> For discussions on dialogue see Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012); cf Letsas (n 9) 91–94.

<sup>105</sup> M Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2001) *Southern California Law Review* 1307, 1336.

<sup>106</sup> As an instance of cooperation between the Union Institutions and the Member States, Chapter 6 will consider the coordinated responses to combat corporate tax avoidance. The inter-governmental responses, coordinated by the ECB, are an example of cooperative authority to the resolution of crisis, however – the responses do not escape concerns for their accountability.

<sup>107</sup> See n 71; and Keith Culver and Michael Giudice, ‘Not a System but an Order: An Inter-Institutional View of European Union Law’ in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2013).

'*l'Union, c'est nous*'. This, in effect, is the unifying principle in EUCA, as it acknowledges that '[d]espite rival supremacy claims regarding the ultimate foundation of EU law, there are extensive relations of mutual reference which demonstrate law-constituting interaction between [for example] UK institutions and EU institutions.'<sup>108</sup> In this way, rhetoric of constitutional superiority and hierarchical claims are misplaced, and should instead be supplanted by co-operative decisions towards common interest. This is not a conflict of interest but rather a functional system of law to the mutual benefit of all Member States and the EU. There are working and developing examples of cooperative authority, for example in the judicial networks,<sup>109</sup> and (to a degree discussed in Chapter 7), the working of the European Arrest Warrant. Building on Kumm's work to the principle of legality, the principle of cooperative authority supports a strong presumption in favour of the legality and effectiveness of EU law based on the ideas of mutual trust, and consent. However, this presumption is rebuttable where a fundamental value – those outlined in Article 2 TEU - is actually, or likely to be substantially undermined or violated.

This system has never been so tested as in the last years of crisis: a financial crash, concerns of systemic abuse of the rule of law in Member States and at the borders of the EU, in addition to the largest refugee crisis since the end of World War II. The core values of the European Union, solidarity and reciprocity, have been challenged as the question appears no longer to be whether all Member States will enjoy prosperity, but whether all Member States will share the economic, social and political burdens of others. In her speech concerning the vote on the third Greek bailout, the Chancellor Angela Merkel appealed to the *Bundestag* by saying, '*wir sind eine Rechtsgemeinschaft*'<sup>110</sup> - 'we are a *community based on law*'. The meaning of this appeal to the community of states within the EU legal system reaches out to the sense of reciprocity, mutual responsibility, and shared values. It is this sense of reciprocity, the cooperative approach of sharing both responsibility and decision-making that is envisioned in

---

<sup>108</sup> Culver and Giudice, *ibid* 73.

<sup>109</sup> See Maartje de Visser and Monica Claes, 'Courts. United? On European Judicial Networks' in A Vauchez and B de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart Publishing 2013)

<sup>110</sup> Speech of the Chancellor, Angela Merkel, on the zur Stabilitätshilfe for Greece before the Bundestag, 17 July 2015, <[www.bundesregierung.de/Content/DE/Bulletin/2015/07/97-1-bk-bt.html](http://www.bundesregierung.de/Content/DE/Bulletin/2015/07/97-1-bk-bt.html)> accessed 3 October 2015.

the principle of cooperative authority. It is on this idea that the EU Legal Order is founded, and through which it can survive, continue and develop.

## 4 EU-CENTRIC ACCOUNT OF THE RULE OF LAW IN CONTEXT

---

### 4.1 EUCA in Context of Contemporary and Established Literature

In developing an EU-Centric Account of the Rule of Law in this thesis, I offer an account of the rule of law which is suited to the specific nature of the EU. In this section, I critically detail how EUCA connects and relates to current and established jurisprudence in the area. I explain how EUCA is an intermediate account between formal and substantive accounts of the rule of law, and how it answers the concerns of Raz and Shklar, particularly in relation to Raz' concern for propounding a 'complete social philosophy'.<sup>111</sup> I highlight the contribution EUCA makes to the question of the rule of law at EU level, and distinguish it from state-centric accounts.

In Chapter 2, I critically summarised the dichotomy in rule of law jurisprudence between substantive and formal accounts. As shown in Section 3, EUCA iterates and echoes aspects of both formal and substantive accounts of the rule of law. The principles of certainty, legality, judicial review and transparency, are based on established jurisprudence on these principles from the Court of Justice. These principles are also shared in state-centric conceptions of the rule of law which have long been applied when evaluating state adherence to the rule of law.<sup>112</sup> Law can only be capable of guiding action, if it is (relatively) certain and clear, generally known, not subject to frequent change, and applied consistently with the relevant legal norm. The law must not be contradictory and it must be accessible, possible, and understandable. It must be capable of taking effect, and being provided with effective remedy in the event that it does not. The legal system ought to be transparent in terms of the application of the law, as well as the limited discretion of officials. EU authorities, like state counterparts, ought to be subject to the

---

<sup>111</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 211.

<sup>112</sup> See Chapter 2.

same rules as their citizens to avoid arbitrary application of the law. The law is undermined if the Courts are ineffective, and do not uphold it, or if they are biased in their decisions.<sup>113</sup> On this account, EUCA shares the features of formalistic approaches to the interpretation of the rule of law. It goes beyond this, however, and incorporates elements of substantive accounts of the rule of law in the requirement of bare formality, and embraces an intermediate view.

Substantive accounts of the rule of law go ‘beyond the formalistic and procedural perspective of the rule of law and also looks to the ideal of justice promoted by the law’.<sup>114</sup> Selznick identifies the ‘larger promise’<sup>115</sup> in the realisation of the rule of law which conceives of the rule of law as a means by which values ‘can be realised, not merely protected, within a legal process’ including ‘respect for dignity, integrity, and moral equality of persons and groups.’<sup>116</sup> Against this, I agree with Waldron, who advises caution in the face of being carried away with enthusiasm for a substantive account of the rule of law which ‘calls directly for an end to human rights abuses, [...] for free markets and respect for private property rights’<sup>117</sup> to do so could ‘obscure the independent importance’ of formal aspects of the rule of law.<sup>118</sup> EUCA does not, nor is it intended to ‘propound a complete social philosophy’.<sup>119</sup> The principle of equality before the law is central to EUCA, however it does not advocate a substantive conception of equality, or a certain account of human rights which ought to be adopted within the EU legal system. The principle of transparency is not one which is intended to be the locus of a call for democratic or political transparency, but rather stresses that the matrices of the EU legal system ought to be transparent. I envision EUCA as guidance on achieving a rule of law compliant legal system in the EU, and on which the EU can find a source of legitimacy.

---

<sup>113</sup> Armin von Bogdandy and Michael Ioannidis, ‘Systemic Deficiency in the Rule of Law: What is it, What has been done, What can be done’ [2014] CMLR 59, 63.

<sup>114</sup> K Raube, M Burnay and J Wouters ‘By way of introduction: the rule of law as a strategic priority for EU external action-conceptualization and implementation of EU law and policies’ (2015) *Asia-Europe Journal* 1, 2–3.

<sup>115</sup> Philip Selznick, *Legal Cultures and the Rule of Law* in Martin Krygier and Adam Czarnota (eds), *The Rule of Law after Communism* (Ashgate 1999) 26.

<sup>116</sup> *ibid.*

<sup>117</sup> Jeremy Waldron, ‘Legislation and the Rule of Law’ (2007) *Legisprudence* 91, 115; and Jeremy Waldron, ‘The Rule of Law and the Importance of Procedure’ (6 October 2010) NYU School of Law, Public Law Research Paper No 10-73, <[ssrn.com/abstract=1688491](http://ssrn.com/abstract=1688491)> accessed 2 February 2016.

<sup>118</sup> *ibid.*

<sup>119</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 211.

However, EUCA does not and cannot claim to provide a complete account of justice and in that does not seek to realise Selznick's 'larger promise' of the rule of law.<sup>120</sup>

Between the competing conceptions of formal and substantive accounts of the rule of law, I follow Lamond and identify EUCA as being characterised as 'intermediate' account of the rule of law, but distinguish EUCA in content. The intermediate nature of the account can also be seen in the principle of legality: I incorporate respect for proportionality and subsidiarity within the principle (eschewing strictly formal accounts of the principle), but do not endorse substantive values such as democratic legitimacy. In distinction, however, Lamond limits his account of the rule of law to three aspects: (1) that the legal system is effective; (2) that the state governs by and through law; and that (3) it is possible to obey individual laws. The absent element of judicial review is not matched in EUCA which adopts independent judicial review and the requirement of limited discretion. I also distinguish EUCA from Lamond's intermediate account through the inclusion of the principles of transparency and co-operative authority. I do this to reflect and adapt to the specific nature of the EU in the challenges which arise from the multi-level governance of the EU through the application of the law in 28 different legal systems, in addition to the complications which arise from different claims of the locus of authority and the legitimacy of the EU.

One question avoided by Lamond is whether we should evaluate compliance with the rule of law on the basis of principles which include protection of substantive values. To argue that violation of a substantive value, is *also* a violation of the rule of law inherently contains two dangers: first, the risk that it implies the value is inherent within the rule of law (which, as Craig writes, risks making the rule of law a 'mantle' to cloak other desirable attributes of a legal system),<sup>121</sup> or to simply tack the rule of law on to the end of an argument as a well-meaning, but (echoing Shklar)<sup>122</sup> ultimately meaningless phrase. The risk is that focus solely on

---

<sup>120</sup> Philip Selznick, 'Legal Cultures and the Rule of Law' in Martin Krygier and Adam Czarnota (eds), *The Rule of Law after Communism* (Ashgate 1999) 26.

<sup>121</sup> Paul Craig, 'Formal and Substantive Conceptions of the Rule of law an analytical framework' (1997) PL 467, 467.

<sup>122</sup> Judith Shklar, 'Political Theory and The Rule of Law' in A Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1.

the rule of law, if it is narrowly defined can distract from other values of the legal system, whereas a broad, all-encompassing account of the rule of law is meaningless. To echo Raz's concern of the rule of law, and his reason for objection to substantive accounts of the rule of law is that it could lead to the propounding a complete social philosophy. EUCA and other Article 2 values (human rights, democracy and equality) are related, but conceptually distinguishable, values with some overlapping boundaries. EUCA, as with other accounts of the rule of law can serve to enhance and protect other values but also, echoing Raz, should sometimes be 'sacrificed to achieve other goals'.<sup>123</sup> These goals may include fairness, or the vindication of fundamental rights.<sup>124</sup> This follows also from the conclusion that 'the value of the Rule of Law ultimately depends upon the overall moral merits of a legal system – not because the Rule of Law has only instrumental value, but because it is an inherently mixed-value good', grounded in 'the fundamental idea that the Rule of Law serves to promote and protect governance by law under non-ideal conditions.'<sup>125</sup>

While I do argue that EUCA can form a source of legitimacy for the EU,<sup>126</sup> and ultimately forms part of the foundations of a just legal system, I do not agree with Simmonds' position that the only good reasons to follow the rule of law requirements are grounded in moral considerations.<sup>127</sup> Following from the perspective that not all actors in the EU legal system will naturally agree upon nor assume the rule of law as an inherent value of a legal system, I contend too that there are also reasons for following the rule of law. The effectiveness and efficiency of EU law, achieved through adherence to the principles, are not necessarily 'moral' goods, but they fulfil an important function law as a means of promoting social planning by enabling individuals to best plan their lives in accordance with the law and to avoid arbitrariness in law-making and law-applying by EU institutions and officials.

---

<sup>123</sup> Raz (n 80) 210.

<sup>124</sup> The interaction between the rule of law and other values will be considered in Chapter 8, Section 3.

<sup>125</sup> *ibid* 495.

<sup>126</sup> See Section 4.6.

<sup>127</sup> Nigel Simmonds, *Law as a Moral Idea* (OUP 2007) 78.

In terms of criticism of the rule of law, Shklar's contention that the rule of law has been rendered meaningless by 'abuse and general over-use'<sup>128</sup> is a widely repeated criticism, reflecting the polysemic term 'rule of law'. My answer to Shklar in the context of EUCA is first, acknowledgment that the rule of law, as a panacea to all of the EU's ills contains the danger of overuse and abuse but only as an ill-defined, or even undefined concept, one used as a method of Member State intervention but without a designed metric of evaluative for what constitutes 'adherence' and 'violation' of the rule of law. In resolving to give meaning, metric and use to the rule of law in the EU, I aim to answer the sceptics of the (ab)use of the rule of law at EU level.<sup>129</sup>

EUCA is an intermediate account between formal and substantive accounts of the rule of law, though which differs significantly from Lamond's position. While it focuses on the values of good governance, it does not (as is the concern of Raz) propound a 'complete social philosophy'.<sup>130</sup> Rather, I envision EUCA as aiming to operate in space of neutrality between choices of competing conceptions of the 'good' decided political and policy choices. It does, however, seek to fit into the larger framework of good governance. In Section 5, I will show how EUCA can serve as a source of legitimacy for the EU, from the perspective of Member States and EU citizens.

## 4.2 Means of Monitoring and Enforcing EUCA

An important question to be considered in the context of EUCA is whether it requires a *distinct means of enforcement*.<sup>131</sup> Adherence to a standard ought to be monitored, and, where an action falls below an acceptable standard, there ought to be a means of enforcement. In this section, I consider possible means of monitoring EUCA compliance, and suggest possible enforcement mechanisms which could be suitable to guarantee a high level of adherence to EUCA. I begin from the presumption that EUCA would have equal footing in the hierarchy of EU legal norms

---

<sup>128</sup> Judith Shklar, 'Political Theory and The Rule of Law' in A Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1.

<sup>129</sup> In Chapter 5, I also argue that *even* in the event that the 'rule of law' is an unconvincing ideal, there are still significant reasons for rule of law adherence.

<sup>130</sup> Raz (n 80) 211.

<sup>131</sup> I am grateful to Dr Alison Young for raising this point during Confirmation of Status.

as General Principles of EU law.<sup>132</sup> EUCA could therefore function as a ground of review for the legality of EU acts and measures on the basis of Art 263 TFEU. The possible means of monitoring and enforcement of EUCA that I explore are: (1) the **Commission** (paralleling the position given to it under the *Framework to Strengthen the Rule of Law*); (2) **judicial review** as part of established EU administrative law doctrines; (3) a '**Copenhagen Commission**' similar to that suggested in context of Member State compliance; and (4) **alternate means** of monitoring and enforcement of EUCA.<sup>133</sup>

First, I consider the position of (1) the **Commission** in monitoring and ensuring adherence to EUCA. The Commission has power of legislative initiative under Article 17 TEU(2), and is empowered to oversee the implementation and application of EU law in Member States (under control of the Court of Justice) in Article 17(1) TEU. The investigatory powers of the Commission to ensure compliance with the Treaties, and thus with rule of law requirements, create a tension in the monitoring and enforcement of EUCA in the form identified in Chapter 3, Section 3.4.1 - *sed quis custodiet ipsos custodies?*<sup>134</sup> The Commission also has significant executive powers in the area of external relations including as a representative of the EU and a negotiator in international trade deals, as will be examined in detail in Section 3.2.<sup>135</sup> The exercise of judicial and investigatory powers<sup>136</sup> by the Commission has already been subject to challenges in the Court of Justice alleging on violation of principles of the rule of law.<sup>137</sup> The quasi-executive, quasi-legislative, and quasi-judicial powers of the Commission ought to be subject to close monitoring for EUCA adherence. However, self-assessment by the Commission for its adherence to EUCA would not necessarily inspire trust in citizens or Member States.<sup>138</sup> My suggestion is that adherence to EUCA by the Commission could take

---

<sup>132</sup> For discussion of the interrelationship between EUCA and General Principles, see Chapter 4, Section 4.3. For discussion of General Principles of the EU, see eg Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006); and Editorial, 'The scope of Application of General Principles of Union Law: An Ever Expanding Union?' (2010) 47 CMLR 1589.

<sup>133</sup> Consideration of damages or remedies for breach of EUCA is beyond the scope of this section. Enforcement by individuals through consideration of access to justice will be considered in Chapter 7.

<sup>134</sup> Translated as 'who guards the guardians?'

<sup>135</sup> See Section 3.2.

<sup>136</sup> Article 17(1) TEU.

<sup>137</sup> See for example, C-501/11 P *Schindler Holding Ltd and others v Commission* (GC, 18 July 2013).

<sup>138</sup> See Chapter 3, Section 3.

place through a series of regular consultations between the Commission and Member State representatives. These consultations could include reporting on adherence to the rule of law in both Member States, and at EU level. This could be aimed at proposing recommendations for reform or identification of actual or potential failings in EUCA adherence by EU Institutions.

In terms of (2) **judicial review**, EUCA could serve as a ground of review under Article 263 TFEU, which provides for judicial review of EU acts and measures through direct action to the Court of Justice. As analysed in Chapter 3, there is precedent for decisions to be reached on the basis of requirements of the rule of law (beginning with *Les Verts*)<sup>139</sup> and for challenges grounded on concerns for rule of law violations.<sup>140</sup> In this way, EUCA could enhance, and be enhanced by, the existing corpus of EU Administrative law. This would be further enhanced by changing the standing requirements of Article 263 TFEU, to adopt AG Jacobs' test of 'substantial adverse impact' as analysed under the Principle of Judicial Review. However, even if that standard were changed, court challenges to rule of law violations at EU level could have the same inadequacies as outlined in the context of Member States' violations in Chapter 3: court challenges to individual measures are targeted, and cannot ensure ongoing evaluation and compliance with EUCA at EU level,<sup>141</sup> thus, I would argue further mechanisms of monitor and control ought to be available.

An alternative means of enforcement that I explore is (3) a '**Copenhagen Commission**', as proposed by JW Müller in the context of monitoring Member State compliance with the rule of law.<sup>142</sup> Müller proposes the creation of an expert body whose duty would be to continually assess the state of democracy and the rule of law within Member States. This body would be empowered to conduct its own investigations, and have access to a limited

---

<sup>139</sup> Case 294/83 *Les Verts* [1986] ECR 1339.

<sup>140</sup> C-402/05 and C-415/05 *Commission and Others v Kadi (Kadi I)*; Joined cases C584/10, C593/10 and C595/10 *Commission and Others v Yassin Abdullah Kadi (Kadi II)*; Joined cases 212 to 217/80 *Amministrazione delle finanze dello Stato v Salumi* [1981] ECR 2735; Joined cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 02859; Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-03801; and C-501/11 P *Schindler Holding Ltd and others v Commission* (GC, 18 July 2013).

<sup>141</sup> See Chapter 3, Section 3.2.

<sup>142</sup> Jan-Werner Müller, 'Safeguarding Democracy inside the EU Brussels and the Future of Liberal Order' (Transatlantic Academy Paper Series February 2013) <[http://www.transatlanticacademy.org/sites/default/files/publications/Muller\\_SafeguardingDemocracy\\_Feb13\\_web.pdf](http://www.transatlanticacademy.org/sites/default/files/publications/Muller_SafeguardingDemocracy_Feb13_web.pdf)> accessed 20 December 2015.

range of sanctions. These sanctions would be administered by the European Commission on advice from the Copenhagen Commission, and could include fines, or the cutting of funding to Member State expenditure.<sup>143</sup> Müller argues that a Copenhagen Commission would remove the impression of some Member States ‘put more drastically, *ganging up* on’<sup>144</sup> others, by creating a non-state body. It would additionally create an equality between Member States and EU institutions, in so far as all ought to be subject to rule of law scrutiny.<sup>145</sup> My addition of expanding the scope of investigation of a ‘Copenhagen Commission’ style body to include the Commission would strengthen this position of the universal application of rule of law scrutiny to all Member States and EU Institutions. The benefit of this approach would be to normalise the rule of law monitoring in the EU, taking rule of law evaluation out of the emergency context. However, I recognise there is a flaw in this approach, which is the lack of available sanctions against EU institutions for failing to abide by EUCA. Müller’s sanctions are dependent on the Commission taking the advice of the Copenhagen Commission to carry them out, which cannot be a self-reflexive mechanism. However, perhaps the possibility of public identification of a threat or violation to EUCA is a significant deterrent for the EU institutions. The Commission has emphasised that it the ‘Guardian of the rule of law’,<sup>146</sup> it is in the interests of the Commission to address any issues of rule of law compliance, and to have a rule of law monitoring body to confirm its adherence to EUCA independently.

Finally, in terms of (4) **alternate means of monitoring and enforcement**, there are also other possible means of enforcement of EUCA, which could include: monitoring and regular reporting by an independent agency; strengthening the position of the European Ombudsman with special responsibility for monitoring adherence to EUCA;<sup>147</sup> and the

---

<sup>143</sup> *ibid* 24–25.

<sup>144</sup> *ibid* 25.

<sup>145</sup> Although, as I have argued, with the acknowledgment of the distinction of EUCA and state-centric accounts of the rule of law. See Chapter 4.

<sup>146</sup> See the speech of Vice-President Reding, EU Justice Commissioner, ‘The EU and the Rule of Law – What next?’ (Press Release) SPEECH/13/667 < [http://europa.eu/rapid/press-release\\_SPEECH-13-677\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm) > accessed 5 May 2014.

<sup>147</sup> The European Network of Ombudsmen investigates complaints concerning maladministration by EU institutions and other EU bodies: see <[www.ombudsman.europa.eu/en/home.faces](http://www.ombudsman.europa.eu/en/home.faces)> accessed 23 November 2015. In the report on Transparency and Public Participation produced by the Ombudsman, it was highlighted that few knew of the office, and more should be done to raise the profile of the Office.

development of education and training initiatives to encourage civil and popular engagement with EUCA. It is not enough for the Courts, or institutions, to be aware of the rule of law, but also for popular civil support of the concept. Support for this can be found in Chapter 3 and the experiences of Hungary: Bugarič argues that sustained civil engagement with political processes is needed to build the rule of law.<sup>148</sup> Rule of law norms can be more easily assumed to exist rather than realised within a legal system,<sup>149</sup> (for example, that the law is prospective, and there can be no punishment without crime). Educating on EUCA and rule of law norms to be expected of Member States is an important part of the process of popular civil engagement with governance at Member State and EU level, and can in turn strengthen rule of law norms across the whole EU.

This section emphasised the collective responsibility to uphold the rule of law in the EU, and to ensure ongoing commitment to ensuring rule of law compliance at EU level. I have suggested different means by which the EU can hold itself to a higher standard of rule of law adherence through diverse enforcement and monitoring mechanisms for EUCA. In this way, the EU holds itself to account, just as it aims to hold Member States to account for violations of the rule of law.

### **4.3 EUCA and General Principles of the EU**

In this section, I contextualise the relationship between EUCA and General Principles of EU law in particular. General Principles have been developed over time by the Court which drew inspiration from national administrative law doctrines. They include principles including

---

<sup>148</sup> Bojan Bugarič, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge' LSE 'Europe in Question' Discussion Paper Series Paper No. 79/2014 (July 2014).

<sup>149</sup> As is evidenced in the Chapter 7 case study on the European Arrest Warrant, in which the guarantees of procedural criminal justice in all Member States was assumed rather than proven, leading to serious issues in the functioning of the EAW mechanism. See Chapter 7, Section 2.5.

equality,<sup>150</sup> fundamental rights,<sup>151</sup> proportionality,<sup>152</sup> and legal certainty,<sup>153</sup> and legitimate expectations. General Principles function as an interpretive guide for EU norms, and also operate as a ground of review under Article 263 TFEU. They can therefore serve as grounds for annulment of EU acts and also national measures which fall within the scope of EU law.<sup>154</sup> The Court of Justice has additionally established that it has considerable discretion in the identification of new General Principles,<sup>155</sup> leading to concerns as to their scope and use in the invalidation of EU norms.<sup>156</sup>

The commonality of some principles between General Principles and EUCA does not lead to the conclusion that *all* General Principles which have been identified by the Court of Justice are also principles of the rule of law, nor that ‘the rule of law’ is interchangeable with General Principles in the EU. This would reduce the meaning ‘rule of law’ to an umbrella under which all manner of good administrative principles could be added. As analysed in Chapter 2, conflating the ‘rule of law’ with good governance weakens the normative clout of accusations of violation of the rule of law: it becomes a ‘meaningless phrase’<sup>157</sup> denoting a political judgment of poor governance or bad policy outcomes.

In further distinction to General Principles, EUCA does not embrace a substantive account of equality or fundamental rights, both of which have been recognised as elements of the General Principles of the EU. Thus, while EUCA and General Principles both seek to remedy deficiencies in the EU legal system, and share many of the same principles, it is

---

<sup>150</sup> Cases 117/76 and 16/77 *Ruckdeschel v Hauptzollamt Hambourg-St Annen* [1977] ECR 1753; Case C-144/04 *Mangold v Rüdiger Helm* [2005] ECR I-9981; and Case C-555/07 *Seda Kücüdeveci v Swedex GmbH & Co KG* [2010] ECR I-365.

<sup>151</sup> Case 11/70 *International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125; and Case 4/73 *J Nold v Commission* [1974] ECR 491.

<sup>152</sup> See Case C-144/04 *Mangold v Rüdiger Helm* [2005] ECR I-9981; and Case C-555/07 *Seda Kücüdeveci v Swedex GmbH & Co KG* [2010] ECR I-365.

<sup>153</sup> See Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055; Case C-234/04 *Kapferer v Schlank & Schick* [2006] ECR I-2585 (underscoring the legitimacy of *res judicata*); and cf Case C-453/00 *Kühne and Heitz* [2004] ECR I-837.

<sup>154</sup> For the meaning of measures falling within the scope of EU law: Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* (26 February 2013).

<sup>155</sup> Case C-101/08 *Audiolux SA v Groupe Bruxelles Lambert SA* [2009] ECR I-9823.

<sup>156</sup> See eg Editorial, ‘The scope of Application of General Principles of Union Law: An Ever Expanding Union?’ (2010) 47 CMLR 1589.

<sup>157</sup> Judith Shklar, ‘Political Theory and The Rule of Law’ in A Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1.

important not to conflate the two. EUCA and General Principles can serve as a mutual source of enrichment and enhancement, as both seek to aid the same ends of legitimacy and good governance in the EU. Ultimately, I envision EUCA as forming a new dialogue and narrative focus on realising and enhancing the rule of law in the EU legal order, complimented by and enriching the established jurisprudence on General Principles in the European Union.

## 5 EUCA AS A SOURCE OF LEGITIMACY AND SOME LIMITATIONS

---

### 5.1 Introduction

The question of the legitimacy of the EU has been a primary cause for concern and question for the EU, and the perceived lack of legitimacy is the cause of any of the caustic denunciations of the polity, particularly in terms of its democratic legitimacy.<sup>158</sup> Legitimacy concerns the justification of the exercise of power, or the justification (or sanctioning) of political authority where authority is the right to rule or exercise power.<sup>159</sup> For the EU, the multi-level governance of the EU system complicates claims of legitimacy as the locus of political authority is divided.<sup>160</sup> Traditional, state-centric conceptions of political legitimacy are premised on robust democratic participation: but, the EU lacks strong direct representation in the European Parliament, and ‘unelected’ Institutions hold more significant powers. In light of the specific nature of the EU, I argue that EUCA can serve as a source of legitimacy. I build this argument on three interrelated approaches to legitimacy: discourse on integration through law (Section 5.2); systems theory conceptions of input/output/throughput legitimacy (Section 5.3); and

---

<sup>158</sup> For a pertinent academic discussion and debate over the legitimacy of the EU see FW Scharpf, *Governing in Europe* (OUP 1999); A Moravcsik, ‘Reassessing Legitimacy in the European Union’ (2002) *JCMS* 603; A Follesdal, ‘The Legitimacy Deficits of the European Union’ (2006) *J Pol Phil* 441; S Hix, *What’s Wrong with the European Union and How to Fix It* (Polity Press 2008); and VA Schmidt, ‘Democracy and Legitimacy in the European Union Revisited: Input, Output and “Throughput”’ (2013) *Political Studies* 2.

<sup>159</sup> Peter Fabienne, “Political Legitimacy”, *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2016/entries/legitimacy/>>. On legitimacy, T Bingham, *The Rule of Law* (Allen Lane 2010); J Raz, *The Authority of Law* (Clarendon Press 1979); J Rawls, *A Theory of Justice* (Harvard University Press 1971); L Green, *The Authority of the State* (Clarendon Press 1988); L Green, ‘Law and Obligations’ in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Clarendon Press 2001).

<sup>160</sup> See Chapter 3, Section 3.

legitimacy based public perception of the rule of law as restraint on EU power (Section 5.4). In Section 5.5, I highlight in broad outline some of the limitations of EUCA in resolving the EU's legitimacy concerns, but conclude that while a high degree of adherence to the rule of law cannot provide all the answers to the problems of legitimising the EU legal order, it can still serve as an important and significant source of legitimacy for the EU.<sup>161</sup>

In choosing these analytical frameworks, I also acknowledge Schmidt who writes, 'even for the elaboration of any one legitimizing criterion, there can be contradictions and not just complementarities within, as much as between, approaches to legitimation.'<sup>162</sup> By focusing on established literature regarding integration through law; new approaches based on systems theory; and broader perspective and public-trust based ideas – I intend to show how EUCA can serve a broad spectrum of approaches to legitimising EU action, but also identify some of the limitations to each approach of legitimising the EU legal order.

## 5.2 The Rule of Law and Integration Through Law

As a goal, integration sought to bring together the Member States' disparate national legal orders under the central authority of the Community.<sup>163</sup> As identified by the project headed by Cappelletti, Seccombe and Weiler,<sup>164</sup> the impetus for integration through law was a process of logic: to coordinate national legal systems to apply the same EU law norms, those norms had to be authoritative and superior to national laws, and applied with equivalence and effectiveness in all Member States, which could also only be achieved if EU law 'acted as a credible superior law'.<sup>165</sup> Law therefore became not only a product of integration, but also an object and instrument in its attainment.<sup>166</sup> The legitimacy of action can be earned on the basis

---

<sup>161</sup> I expand on this argument for legitimacy based on a high degree of adherence to rule of law principles as viewed from the perspective of Member States and EU citizens in *Part II*.

<sup>162</sup> Schmidt (n 158) 5.

<sup>163</sup> Cormac MacAmhlaigh, 'Concepts of Law in Integration Through Law (and the Price of Constitutional Pluralism)' in D Augenstein (ed), *Integration Through Law Revisited: The Making of the European Polity* (Ashgate 2011).

<sup>164</sup> See Mauro Cappelletti, Monica Seccombe and Joseph Weiler (eds), *Integration through Law* (de Gruyter 1986).

<sup>165</sup> MacAmhlaigh (n 163)

<sup>166</sup> Cappelletti, Seccombe and Weiler (n 164) 15; and MacAmhlaigh (n 163)

of justification and rationalisation of legal norms,<sup>167</sup> though, as identified in this thesis, this was by sometimes by means of a circularity of the logic of mutual symbiosis: the effectiveness of the Treaties demands supremacy of EU law over national norms; supremacy demands direct effect of EU norms which can be invoked by individuals; direct effect necessitates preliminary ruling to ensure the uniformity of EU law; and, preliminary references require the incentive of supremacy and direct effect.<sup>168</sup> Or, further - in order to uphold the rule of law, the Treaties must be a source of authoritative law; and because the Treaties are an autonomous source of authority, there is a duty to uphold the rule of law. Law, and upholding the rule of law, became an instrument and object of legal integration of disparate systems.

Through the assertion of supremacy of EU norms, the Courts were empowered to set aside laws which hindered the uniformity and effectiveness of EU law. MacAmhlaigh identifies that the project, and the unambiguous assertion of superiority and authority of EU norms was driven by a concept of law grounded in legal positivism: the school of legal thought which broadly aims to answer questions of the formal recognition of legal validity, and typically excludes the morality of the law's content as irrelevant to its validity.<sup>169</sup> In a Community of competing conceptions of the good, legal positivism has clear benefits as it assumes law's neutrality as between differing moral and political evaluations.<sup>170</sup> In other words, EU norms are legitimate so long as they abide by a positivistic (and formal) rule of law account.

However, this proved a weakened source of legitimacy, as legal positivism and formal accounts of the rule of law require a 'clear and definitive source of authority'.<sup>171</sup> Following Kelsen's *Grundnorm* theory of the law and the state, the totality of the validity of the norms of a legal system rest on one ultimate norm from which all other norms derive their efficacy and

---

<sup>167</sup> Jurgens Habermas, *Faktizität und Geltung – Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992) 563.

<sup>168</sup> Antoine Vauchez 'Integration-through-Law' Contribution to a Socio-history of EU Political Commonsense (EUI Working Papers RSCAS 2008/10) <<http://ssrn.com/abstract=1260166>> accessed 30 August 2016. See Chapter 3, Section 3.5.

<sup>169</sup> Leslie Green, 'Legal Positivism' in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Fall 2009 Edition) <<http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>>.

<sup>170</sup> *ibid.*

<sup>171</sup> *ibid.*

validity.<sup>172</sup> Formal conceptions of the rule of law fit within this narrative, defining the scope and boundaries permissible for legal norms, and lending the legitimacy of the message of restraint through clearly defined legal norms. This weakness was especially drawn out with the rise of theories of constitutional pluralism<sup>173</sup> to explain potential conflicts between differing accounts of the locus of authority as between Member States and the EU. This meant that positivistic characterisations of Integration through Law are overshadowed in the need to involve political contestations of, for example, the subsidiarity of a measure.

Where then, does that leave the place of EUCA as a source of legitimacy for the EU? By acknowledging the intermediate account of the rule of law, and embracing principles which stretch between strictly formal and more broadly substantive elements of good governance (for example, transparency), EUCA can serve to support the EU integration aims of uniformity and effectiveness, while also adapting to the multi-level and pluralistic nature of the EU, for example, through the respect for the proportionality and subsidiarity of a measure which limits the strong presumption of legality which initially drove the integration through law project.

### 5.3 Systems Theory: Input/Output/Throughput Legitimacy

A significant analytical framework for evaluating the legitimacy of the EU is based on the systems theory concepts of input/output legitimacy,<sup>174</sup> and (as developed by Schmidt) throughput legitimacy.<sup>175</sup> Input legitimacy, or the ‘democratic participation of the citizens and their elected representatives in transparent decision-making and constitution-making

---

<sup>172</sup> Hans Kelsen, *General Theory of Law and State* (trans A Wedberg, repr. 1961, Russell and Russell 1945); and Green (n 169).

<sup>173</sup> See Chapter 3, Section 3.

<sup>174</sup> See Scharpf (n 158); Schmidt ‘Democracy and Legitimacy in the European Union Revisited: Input, Output and “Throughput”’ (n 158); and VA Schmidt, ‘Democracy and Legitimacy in the European Union’ in E Jones, E Menon, and S Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012).

<sup>175</sup> Schmidt, ‘Democracy and Legitimacy in the European Union Revisited: Input, Output and “Throughput”’ (n 158); and Schmidt ‘Democracy and Legitimacy in the European Union’ (n 172).

procedures'.<sup>176</sup> In the EU context, input legitimacy is premised on the participation and representation of the electorate in the EU decision-making processes. Output legitimacy refers to rationalising and justifying norms on the basis of the ends of governance: it evaluates effective policy outcomes, and focuses (at EU level) on the EU's capacity to solve problems based on the common interests of EU citizens.<sup>177</sup> Throughput legitimacy evaluates the accountability, efficacy and transparency of the EU's decision-making procedures in addition to the commitment to 'pluralist consultation *with* the people'.<sup>178</sup> Reflecting the multi-level governance structure of the EU, input, throughput and output legitimacy is split between EU and national levels.<sup>179</sup> Though it cannot replace democratic input, EUCA can contribute to, and enhance, this matrix of ensuring and evaluating the legitimacy of the EU.

In terms of input, EUCA can indirectly serve to enhance legitimacy. Focusing on the quality of the representative bodies, and democratic processes, the rule of law serves to ensure the procedural elements of democracy are functional: for example, in the certainty and legality of an effective electoral system; legal transparency as to the procedures and forms of the institutions; and equality in the law in the formal terms of equal participatory rights among citizens. I recognise, however, that this is a minimal and supportive role, and there are greater questions as to how to politicise EU policy and raise popular participation in the EU which are beyond the scope of EUCA.

EUCA finds more direct service in ensuring throughput and output legitimacy: adherence to the principles of the rule of law (for example legality, certainty and limited discretion) serve to guarantee effective and responsible governance. As identified by Menon and Weatherill,<sup>180</sup> the output legitimacy of the EU is in its the capacity to coordinate functions

---

<sup>176</sup> K Lenaerts and N Cambien, 'The Democratic Legitimacy of the EU after the Treaty of Lisbon' in J Wouters, L Verhey and P Kiiver (eds) *European Constitutionalism beyond Lisbon* (Intersentia 2009) 186.

<sup>177</sup> F Scharpf, *Regieren in Europa – Effektiv und demokratisch?* (Campus 1999).

<sup>178</sup> Schmidt 'Democracy and Legitimacy in the European Union' (n 172) 662.

<sup>179</sup> Here Schmidt argues that *throughput* can create a '*cordon sanitaire*' for the EU serving as a kind of reassurance of the legitimacy through processes. Schmidt 'Democracy and Legitimacy in the European Union Revisited: Input, Output *and* "Throughput"' (n 158) 3. See Section 5.

<sup>180</sup> Anand Menon and Stephen Weatherill, 'Transnational Legitimacy in a Globalising World: How the European Union Rescues its States' (2008) *West European Politics* 397.

and promote efficiency beyond the capacity of member states individually, and are served by compliance with the principles of the rule of law: the creation of the Internal Market, international trade negotiations,<sup>181</sup> and responding to financial crisis through the ECB.<sup>182</sup> The practicable use of EUCA to enhance the legitimacy of action in these contexts can be seen in practice in *Part II*.

#### **5.4 Public and State Perception: Rule of law as Restraint**

EUCA can serve to enhance the public perception of the legitimacy of EU action is based on the idea of public perception and trust. This argument is based on Weber's third source of legitimacy:<sup>183</sup> trust in legality, or pertinently the 'rationality of the rule of law'.<sup>184</sup> This third framework builds on the arguments established in Sections 5.2-5.3, and redirects the focus to the perspective upon which legality and systems legitimacy are viewed. This, in effect, is the realisation of transparency as an element of the rule of law: let the principles of the rule of law restrain the exercise of power through legitimate means, but also let that restraint be transparent to the end users and stakeholders of the EU.

When EU Courts and administrators are viewed as acting in compliance with the rule of law they can benefit from Member State and public trust and confidence. In turn, this trust and confidence can improve compliance with law and the EU legal system.<sup>185</sup> Following Kochenov, constitutionalism (of which the rule of law is a part) implies restraint through law and on law

---

<sup>181</sup> See Chapter 5, Section 2.

<sup>182</sup> See also T Beukers, 'The New ECB and its Relationship with Eurozone Member: Between Central Bank Independence and Central Bank Intervention' (2013) 50 CMLR 1579.

<sup>183</sup> Max Weber, 'Politics as a Vocation' in HH Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge 1991). The first two sources of legitimacy for Weber are tradition (faith in the established social or political order developed over a long period of time), and charisma (faith in rulers). As the EU is relatively young in political terms, and does not have widely known political leaders, these two are unhelpful sources of legitimacy for the polity.

<sup>184</sup> *ibid*.

<sup>185</sup> This is recognised by EU Institutions, which have endeavoured to improve public-perception legitimacy, for example through the Better Regulation Agenda: Commission, 'Proposal for an Interinstitutional Agreement on Better Regulation' (Strasbourg 19 May 2015) COM(2015) 216 final; and Commission, 'Better Regulation for Better Results – An EU Agenda' (Strasbourg 19 May 2015) COM(2015) 215 final

which are not democratic or political which contributes to the legal system.<sup>186</sup> As the EU cannot boast of a vibrant democratic representation and participation, the rule of law can act as a legal constraint on law: ‘preventing one dominant source of law and its unconstrained whim, from absorbing all the available normativity’.<sup>187</sup> But, this rule of law as restraint on power must equally be perceived as practiced: a source of inspiration for the rising populism directed against the EU are accusations of its illegitimacy based on unrestrained law and over-regulation.<sup>188</sup> Executives of some Member States are equally rebelling against the EU’s ‘do as I say’ approach to evaluations of adherence to the rule of law.<sup>189</sup> As perception is best perceived through the lens of practice, I expand on this point of EUCA as a means to enhance legitimacy in *Part II*, wherein the focus centres on perspective-based case studies.

## 5.5 Some Limitations on EUCA as a Source of Legitimacy

EUCA is not a complete answer to the questions of legitimacy of the EU, and there are limitations to the rule of law as a source of legitimacy. Some of the limits of EUCA which I highlight here (in broad outline) will also be echoed and further analysed in later chapters concerning the practical use of EUCA.

EUCA can serve as a source of legitimacy, however, it cannot serve as the *only* source of legitimacy. It is not designed or intended to endorse a ‘complete social philosophy’,<sup>190</sup> or to realise any substantive notion of fundamental rights, equality or any value of a legal system. Discourse on what the content and meaning of the ‘substantive good’ is beyond its remit. Legitimising EU institutional and regulatory functions based on a high degree of adherence to

---

<sup>186</sup> Dimitry Kochenov, ‘EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?’ (2015) YEL 74, 83.

<sup>187</sup> G Palombella, ‘The principled, and winding, road to Al-Dulimi. Interpreting the interpreters’ (2014) Questions of International Law 17, 18.

<sup>188</sup> ‘The Eurosceptic Union’ *The Economist* (Brussels, 31 May 2014); Allister Heath, ‘Europe could be torn apart by the wrong sort of Eurosceptics’ *The Telegraph* (London, 5 February 2015); Francesco Nicoli, ‘Electoral Euroscepticism, Turnout and the Economic Crisis: Evidence from a 108-Elections Panel Study Across Europe’ (18 June 2015) <ssrn.com/abstract=2620220> accessed 3 September 2015; and Douglas Murray, ‘Euroscepticism is growing all over Europe’ *The Spectator* (London, 3 October 2015).

<sup>189</sup> See Chapter 2, Section 4.3; and Chapter 3, Section 4.

<sup>190</sup> See Section 4.1.

the rule of law is premised on the assumption that the output of those functions is intrinsically good which is why EUCA can only be *a* source rather than *the* source of legitimacy of EU action. While EUCA can enhance existing structures and frameworks of legal regulation, it cannot replace or substitute for the lack of democratic input and popular engagement.

If assessed on the basis of systems theory, there is a further limit on how far EUCA can guarantee a 'good' outcome in terms of the legal procedures and processes of the EU legal order. Criticism of this is that it rationalises EU institutional and regulatory functions as intrinsically good,<sup>191</sup> and resulting in good policy output in the general interest, which (from a national perspective) is not always the case: for example, following Schmidt, the decisions in *Viking*<sup>192</sup> and *Laval* were not necessarily in the national interest in terms of the domestic labour and welfare systems.<sup>193</sup> Equally, however, it might be said that legitimacy based on democracy – particularly in the procedural sense of participation in elections - assumes that the outcomes of democratic procedures are intrinsically good.<sup>194</sup> Following Rosenfeld, in a pluralist society there are competing conceptions of the good, and that 'it seems inevitable that particular laws and even legal regimes taken as a whole would be bound to promote certain contested interests or conceptions of the good at the expense of others'<sup>195</sup> and, in this, it seems that the rule of law cannot be intrinsically linked with predictability and fairness.<sup>196</sup> Compliance with the rule of law cannot replace democratic engagement, nor can the principles of equality or certainty replace the importance of fundamental rights.

A further limitation is based in the subjective nature of the perception of legitimacy: the EU cannot be fully or completely justified only on the basis of rule of law adherence which, by its very nature as a legal and philosophical concept, necessarily requires a legal education or

---

<sup>191</sup> Schmidt, 'Democracy and Legitimacy in the European Union' (n 172) 664-65.

<sup>192</sup> Case C-438/05 *Viking* [2007] ECR I-10779.

<sup>193</sup> Case C-341/05 *Laval* [2007] I-11767.

<sup>194</sup> This democratic instrumentalist analytical framework for legitimacy has its critics: Joseph Raz, *thics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon 1995); Allen Buchanan, 'Political Legitimacy and Democracy' (2002) *Ethics* 689.

<sup>195</sup> Michael Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2000) *S Cal LR* 1307, 1350.

<sup>196</sup> *ibid.*

legal knowledge of its value. While absence of adherence to the rule of law is felt (for example, through the perception of arbitrary and inconsistent application of the law and a biased, unfair system of review), there is a knowledge gap: one needs to know about the concept of the rule of law in order to know that it is a violation of the rule of law.

While I have aimed to address the issues of conflict of authority, sovereignty and supremacy in regard to EUCA, a related issue to public perception is that Member States' governments serve as the representatives and agents of the EU within their respective states. Thus, the growing criticism and deeply rooted scepticism of the EU legal system cannot be fully answered by a high level of adherence to the rule of law where the content of the laws, or the sense of loss of sovereignty, are at the core issue of anti-EU political sentiment.

Ensuring the legitimacy of EU action through adherence to EUCA is *part* of the overall perception of the legitimacy of the EU by stakeholders, but it is not a complete answer as shown by the limitations broadly outlined in this section. Adherence to the rule of law is a vehicle through which other values of the legal system can be guaranteed, and it can go far in remedying current sources of crisis and objection in the EU, as will be argued in the case studies of *Part II*. Ultimately, EUCA can provide part of a solution to the crisis of legitimacy within the EU as it acknowledges the complications of the EU legal order, and the inadequacies of state-centric accounts of the rule of law.

## **6 CONCLUSION: A CONSTRUCTIVE PATH FORWARD**

---

In this chapter I presented an EU-centric account of the rule of law. This account is apt to respond to and reflect the complicated structure of the EU legal order. EUCA enables the EU to respond to complications, criticisms, and issues with the current legal system, and can in turn serve to enhance the legitimacy of the EU. In *Part II, In Practice*, I advance how EUCA can be employed in practice to provide constructive guidance to critical issues facing the EU. In Chapter 5, I focus on the potential of EUCA in terms of the practices and procedures of the EU

institutions. In Chapter 6, I focus on how the Member States can actively engage with EUCA to measure compliance of the EU with the standard set by EUCA. In Chapter 7, I focus on the individual and the citizen of the EU, and how their welfare and legal protection can be enhanced by adoption of EUCA.

## PART II – IN PRACTICE

### Introduction to Framework and Methodology of Part II

*Part II* focuses on the practical application of EUCA in settings of contemporary and ongoing conflicts within the EU legal order. In this way, I seek to bridge the gap between the abstract theory of EUCA, and practical guidance which can be provided on the basis of EUCA. I show how issues caused by deficiencies in rule of law compliance by the EU could be remedied on the basis of EUCA recommendations. I build on the discussion of legitimacy at EU level of Part I, and adopt three perspectives to demonstrate the apt nature of EUCA as a means of evaluating rule of law compliance by the EU legal order. These perspectives are: EU institutions (Chapter 5); Member States (Chapter 6); and the Individual<sup>1</sup> in the EU (Chapter 7). The framework adopted in each chapter of *Part II* divided in two parts: (1) reasons for endorsing and ensuring EUCA compliance; and (2) a case study analysis.

#### ***(1) Reasons for Endorsing and Ensuring EUCA Compliance***

In the first part of each chapter, I provide reasons why a high degree of compliance with EUCA by EU institutions is in the best interests of the EU, Member States and the individual from the perspective. I argue that adherence to EUCA can serve as a source of legitimacy for EU action from the vantage point of Member States and EU citizens. I also argue on pragmatic grounds that even if one believes that the ‘rule of law’ is unconvincing as an ideal, there are still strong policy and political reasons to advocate EU adherence to EUCA.

---

<sup>1</sup> Due to the limits of space, I interpreted the term ‘individual’ to be limited to natural persons. The relevance of EUCA to legal persons, such as corporations is considered briefly in Chapter 6 case study. However, it is beyond the scope of this thesis to consider the relevance of EUCA to specific groups of individuals, such as refugees or minorities.

## **(2) Introduction to the Case Studies: Perspectives on Legitimacy**

I evaluate EU legal measures taken in response to crisis issues drawn from discrete and disparate areas of law against the standard set by EUCA. The case studies are drawn from three diverse areas of law: international trade law (Chapter 5: Transatlantic Trade and Investment Partnership negotiations); corporate taxation (Chapter 6: Advanced Tax Rulings); and criminal law (Chapter 7: European Arrest Warrant), as I regard the rule of law as a constitutional principle of the EU which has, and ought to have, implications for all institutions, and branches of EU governance at every level. I have chosen the case studies as they are topical, controversial from the perspective of stakeholders in the EU, illustrative of violations in the rule of law, and reflective of larger conflicts within the EU legal system.

The case studies particularly resonate with the perspectives of the Chapter in which I present them – national tax authorities and Member States (Chapter 6); and the European Arrest Warrant and the Individual (Chapter 7). The reason I have focused on legitimacy from distinct perspectives is drawn from the conclusion that it is not enough for the EU to *be* (or *consider itself to be*) legitimate, it must instead be *seen to be* acting in a legitimate manner by the Member States and EU citizens. By engaging with case studies drawn from such diverse and disparate areas of law expanding from the field of administrative law alone, I aim to prove two arguments of EUCA: (1) from the perspectives of Member States and Individuals, EUCA can enhance the legitimacy of the EU; and (2) EUCA is apt to address and help resolve legal crises across the whole of the EU legal system.

The Chapter 5 case study, the Transatlantic Trade and Investment Partnership negotiations, considers the position of the EU as an international actor. An objective of EU common and foreign security policy is to promote the rule of law. The TTIP negotiations serve as an excellent case study for whether the EU holds itself to a standard of rule of law compliance, and gauges its response to accusations of violations of the rule of law in the Investor-State Dispute Mechanism. Evaluating EU legal action in context of TTIP developments presents interesting and illustrative examples of the value of EUCA playing a

role in ensuring the legitimacy of EU action, and in the EU's self-perception as a global, and rule of law promoting, actor.

The Chapter 6 case study, *Advanced Tax Rulings*, evaluates EU action in one of the most politically sensitive areas of the law. Pertinently, in the administration of taxation, core concepts of the rule of law – equality, certainty, legality, limited discretion, transparency, judicial review - are essential.<sup>2</sup> From the perspective of Member States' estimation of the legitimacy EU legislative intervention into the area of taxation, I argue that EUCA can navigate the complicated path between simultaneously upholding the highest possible standard of adherence to the rule of law, but also account for the competing political pressures, and legal complications of taxation in the EU.

Finally, in Chapter 7, I imagine the role of EUCA in ensuring the legitimacy from the perspective of the individual in an area of very individual concern: the European Arrest Warrant. Drawn from the intersection of national criminal law and EU law, consideration of the EAW Framework Decision highlights the complexities of the EU legal system when there is a criminal element, and the need for a high level of adherence to EUCA in the context of the execution of EAWs.

In each case study, I provide (1) an outline of the case study; (2) an analysis of the particular relevance of the rule of law to the field of study; (3) historical, legal and political background to the case study; (4) presentation of the legal measure at issue; and (5) EUCA evaluation and recommendations. I show how EUCA provides constructive guidance towards resolution and could help to ameliorate current disputes within the EU legal order. I also highlight instances in which the EU has responded positively to rule of law concerns, showing the possibility and commitment to improvement as a whole. I advocate Krygier's method to begin by first asking what the purpose of the rule of law is; second, asking what conditions must be fulfilled to achieve it; and third, what are the best institutional measures to fulfil these

---

<sup>2</sup> For discussion of taxation and the rule of law, see John Cullinane, 'Rule of Law' Taxation (11 May 2006); and Justine N Stefanelli and Lucy Moxham (eds), 'Do Our Tax Systems Meet Rule of Law Standards?' (September 2014) Bingham Centre Working Paper 2014/06.

conditions ‘in particular circumstances, with particular institutions, cultures, histories, *etc* in place?’<sup>3</sup> By adopting this method, I seek to identify the success and failings of a legal system by asking whether it succeeds in imbuing that value; we can design solutions and resolutions to failings in legal systems; and we can show how best to implement the solutions and to realise the common value of the rule of law in legal systems.

---

<sup>3</sup> Martin Krygier, ‘The Rule of Law: An Abusers’ Guide’ in A Sajó (ed), *Abuse. The Dark Side of Fundamental Rights* (Eleven International Pub Co 2006) 132–33.

## CHAPTER FIVE

### *EUCA and the EU Institutions*

#### 1 INTRODUCTION

---

In this chapter, I consider the value of EUCA from the perspective of the EU institutions. I focus on the central EU institutions with executive, legislative and judicial functions: the Commission, Council and Parliament and the Court of Justice of the EU.<sup>1</sup> I show the value of EUCA to the EU legal order from this perspective. In **Section 2**, I address the practical value of EUCA from the perspective of the EU institutions. I discuss the incentives for the adoption of EUCA as the apt standard to which the EU legal system ought to be held to account. I also consider what monitoring and enforcement mechanisms would be suitable for ensuring EU institutional compliance with EUCA.

In **Section 3**, I present the Transatlantic Trade and Investment Partnership (TTIP) case study. TTIP is a proposed international trade agreement under negotiation between the EU and the US. This agreement has the potential to radically change the shape of the Internal Market and the global market as the biggest trade deal ever negotiated. The proposed agreement will include articles on market access, regulatory barriers to trade, intellectual property, and investor protection through an international dispute settlement mechanism. I highlight potential violations of EUCA in the proposed substance of the agreement. I present recommendations on the formation of the substance of TTIP which would resolve these issues.

---

<sup>1</sup> The EU institutions are defined by Article 13 TEU to include the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors.

## 2 WHY SHOULD EU INSTITUTIONS ENDORSE EUCA?

---

In this section, I argue for reasons why EU institutions should adhere to a high level of compliance with EUCA. The reasons I present are: (1) EUCA can send a **strong signal of commitment to the rule of law** and justify the declaration in Article 2 TEU that the EU is founded upon the rule of law; (2) EUCA can **strengthen the EU legal system**; and (3) EUCA can be **instrumental to economic stability**. I acknowledge that some may not be convinced of the inherent value of the rule of law, and so I also explore adherence to EUCA as (4) a means of **enhancing authority**, building on the discussion of legitimacy in Chapter 4.

Adhering to EUCA would serve as a **strong signal of the commitment** by the EU institutions to the rule of law. In Chapter 3, I analysed how the rule of law is stated to be a foundational and transversal value of the EU legal order. However, I also identified what I consider to be an inconsistency: the EU states that it is a community based on the rule of law, and yet does not provide an account of what that means, or a mechanism by which to confirm EU compliance. Adherence to EUCA would resolve this inconsistency and prove the veracity of the statement in Article 2 TEU that the EU is founded upon the rule of law. This would be a powerful signal of commitment to the rule of law by the EU legal order to its Member States, to trading partners, and the international community as a whole.<sup>2</sup>

EUCA can **strengthen the EU legal system**. EUCA serves to guide EU law so that it may govern effectively: the law must work effectively so that those who follow the law ought to be able to follow it. Following Shapiro, the benefits of the rule of law in a legal system are ‘manifested by their absence’.<sup>3</sup> One of the many costs of non-rule of law compliant decision-making in the EU legal system is a dysfunctional system. Inconsistency in the application of EU law undermines the system as a whole. This is a familiar argument in the context of EU law: the need to ensure the consistency and uniform application of EU law was the primary motivator for the identification of the primacy of EU law over national norms by the Court

---

<sup>2</sup> See Section 3.2 for the rule of law as it relates to EU external action.

<sup>3</sup> Ian Shapiro, ‘Introduction’ in his *The Rule of Law: Nomos XXXVI* (NYU Press 1995).

of Justice.<sup>4</sup> The purpose of EUCA is to guide EU law so that it may govern effectively, consequently strengthening the functioning of the EU legal order. EUCA adherence ensures checks for the equality of application, legality, and certainty of the law; to also ensure a measure of accountability<sup>5</sup> through limited discretion, judicial review and transparency. The recognition of the principle of co-operative authority strengthens the relationship between Member States and the EU in the commitment to a functioning and accountable legal order. EUCA can strengthen the EU legal system as will be evidenced in the case studies of Chapters 5-7.

Building on the argument that adherence to EUCA strengthens the effectiveness of the legal system, adherence to the rule of law can be **instrumental to economic stability**. Compliance with the rule of law is instrumental in the creation an environment which is favourable to investors and businesses. For example, confidence in the security of investment is essential to business growth, and this is secured through legal certainty, and an effective and independent judicial system. A positive environment for investment can create market growth, while certainty and transparency can improve the efficiency of transactions, which all result in economic stability and growth.<sup>6</sup> This is an important incentive for EU adherence to EUCA: the success of the internal market in providing economic growth in the Member States is the primary driving force behind the support for, and security of, the Union.<sup>7</sup>

---

<sup>4</sup> This has a long line of case law, beginning with Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1. See also the seminal cases of Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585; Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629; and Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415.

<sup>5</sup> As considered in Chapter 4, this is a limited understanding of accountability. It does not imply or replace democratic or political accountability. See Chapter 4, Section 3.

<sup>6</sup> Erik O Wennerström and Åsa Valter, 'The Rule of Law in Times of Financial Crises: How EU Rule of Law Correlates with the Market' (2015) *Scandinavian Studies in Law*, available at SSRN: <<http://ssrn.com/abstract=2734125>> accessed 29 August 2016.

<sup>7</sup> The negative costs of a lower level of adherence to the rule of law are evidenced at national level in Poland. In light of the concerning legal reforms in violation of the rule of law (see Chapter 2, Section 4.3) Poland's debt rating was downgraded. The real financial impact on the state (and economy) is that borrowing costs are much higher. A rule of law compliant system results in higher debt ratings, and lower borrowing costs. See Henry Foy, 'S&P downgrades Poland's rating as radical policies cause concerns' *Financial Times* (Warsaw, 14 January 2016); and Piotr Skolimowski, 'Polish Rating Cut for the First Time as S&P Warns on Power Grabs' *Bloomberg Business* (15 January 2016).

A final argument in support of EUCA is that it can be a **means of enhancing authority**.<sup>8</sup> This perspective is based on the understanding that the rule of law can function as a means by which government can enhance their own authority by restraining it. Although this is, at first, counter-intuitive, it follows from the idea that by placing self-imposed constraints on power, the remaining power is more acceptable to those who are subject to it.<sup>9</sup> Maintaining and respecting the restraint on the exercise of power in turn can ‘foster the allegiance of [...] citizens, which is, in turn, power-generating.’<sup>10</sup> The argument that restraining capacity to act in certain ways is a means of enhancing power is consistent with academic commentary on the development of human rights and democracy in the EU, for example, as Pech and Egan write, ‘by making clear the EU’s commitment towards a number of key values of Western constitutionalism, it was hoped that the authority and legitimacy of the “European construct” would be enhanced.’<sup>11</sup> By advocating the adoption of EUCA, which serves to restrain EU law within the requirements of the rule of law, the power that is exercised is legitimate<sup>12</sup> in so far as it is constrained by the rule of law.<sup>13</sup>

Adherence to EUCA can result in a wide range of positive outcomes for the EU. EUCA can be instrumental in strengthening the EU legal system, and enhancing the rule of law throughout the EU. For the EU to adhere to EUCA would go far in directing the development of an EU legal culture of respect and trust in the rule of law within the EU legal system. Adherence in turn can be instrumental to the stability of the system, and provide guidance in times of crisis and uncertainty, as will be seen in the case studies of this Chapter and those of Chapters 6-7.

---

<sup>8</sup> This argument is not representative of my belief that the rule of law is an inherent value which ought to be integral to all legal systems. However, I highlight that EUCA can be supported from all sides of the political and legal spectrum, not only those who value the inherent virtue of the rule of law.

<sup>9</sup> *Declaration on the European Identity* by the Nine Foreign Ministers on 14 December 1973 in Copenhagen, Bull EC, December 1973, No 12, 118.

<sup>10</sup> Martin Loughlin, *Foundations of Public Law* (OUP 2010) 340. See also Barry Weingast, ‘The Political Foundations of Democracy and the Rule of Law’ (1997) 91 *American Political Science Review* 245.

<sup>11</sup> Laurent Pech and Annabel Egan, ‘Respect for Human Rights as a General Objective of the EU’s External Action’ in Sinoaidh Douglas-Scott, *Handbook on Fundamental Rights in the EU* (Elgar Publishing 2015).

<sup>12</sup> See Chapter 4, Section 5.

<sup>13</sup> The rule of law is only one virtue of a legal system. It is a necessary, but not sufficient, element in the consideration of the legitimacy of a legal system. See Chapter 2.

### 3 EUCA AND THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

---

#### 3.1 Introduction: Outline of the Case Study

The Transatlantic Trade and Investment Partnership (TTIP) is an agreement currently under negotiation between the EU and the US. As a free trade agreement between the two largest economic powers in the world,<sup>14</sup> TTIP has the potential to radically alter global trade and the EU Internal Market. The proposed content of TTIP has proved controversial from a rule of law perspective, and opponents have expressed the concern that TTIP is likely to negatively impact on the capacity of Member States' governments to implement policies in the public interest. The secrecy of negotiations between EU and US representatives has also led to widespread criticism of the lack of transparency in the formation of TTIP. The focus of my EUCA evaluation and guidance will be on these concerns and criticisms.

In Section 3.2, I examine the relationship between the rule of law and the external action of the EU. I highlight the relevance of rule of law compliance to international trade agreements, and outline the legal foundations for the TTIP negotiations. In Section 3.3, I outline the background to TTIP negotiations, including an overview of the incentives to the formation of the agreement. In Section 3.4, I introduce the proposed content of TTIP,<sup>15</sup> and highlight the rule of law concerns which have arisen in the context of TTIP. Finally, in Section 3.4, I evaluate TTIP and the actions of the EU against the standard set by EUCA, and provide EUCA recommendations which aim to answer the concerns voiced as regards TTIP.

---

<sup>14</sup> In 2014 world GDP was estimated to be \$77.9 trillion, of that EU GDP made up \$18.46 trillion, and US GDP \$17.42 trillion, or combined 46% of world GDP according to the World Bank Open Data source, <data.worldbank.org>. See also Dominic Webb, *The Transatlantic Trade and Investment Partnership* Briefing Paper No 06688 (House of Commons Library 2015) 3.

<sup>15</sup> This is based on the limited information published by the EU, Member States, the US Trade Representative, or available through media sources. The limited amount of information as regards the content and progress of the negotiations is an issue relevant to the principle of transparency, as will be analysed in Section 3.5.

### 3.2 The Rule of Law and the EU as an International Actor

In this section, I consider the relationship between the rule of law and EU external action. I outline the function of the rule of law as a foreign policy objective of the EU, and the emphasis the EU has placed on respecting the rule of law in the conclusion of free trade agreements. I then introduce the law with regard to TTIP negotiations, and the complications surrounding the competence of the EU to negotiate and agree international trade deals in the Treaties.

One of the first references to the rule of law within the text of the Treaties was in Article J.1 of the Treaty of Amsterdam (1997) which stated that an objective of the common foreign and security policy was to ‘develop and consolidate ... the rule of law’. Post-Lisbon, Article 21 TEU states that the ‘Union's action on the international scene shall be guided by the principles which have inspired its own creation’, among the listed principles is the rule of law.<sup>16</sup> The EU has progressively assumed the role of an international actor, as evidenced by the creation of the Enlargement Policy,<sup>17</sup> the European Neighbourhood Policy;<sup>18</sup> the role of the High Representative for Common and Security Policy in the Amsterdam Treaty (1999), and the EU's own diplomatic service, the European External Action Service (EEAS),<sup>19</sup> in the

---

<sup>16</sup> In addition to the other principles stated in Article 21 TEU which are: ‘democracy, ... the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.’

<sup>17</sup> The Enlargement Policy refers to the application and accession of candidate countries to the EU. It lays out the key requirements (which includes a commitment to the rule of law) for joining the EU set out in the Copenhagen Criteria. European Council in Copenhagen, ‘Conclusions of the Presidency 21-22 June 1993’ <[www.europarl.europa.eu/summits/copenhagen/default\\_en.htm](http://www.europarl.europa.eu/summits/copenhagen/default_en.htm)> accessed on 13 January 2016. The Commission produces an annual Strategy Paper on enlargement in addition to reports on candidate countries assessing achievement in terms of reform priorities. For the latest strategy report: Commission, ‘Communication on EU Enlargement Strategy’ (Brussels 10 November 2015) COM (2015) 611 final.

<sup>18</sup> Launched in 2003, developed in 2004 post-Enlargement, the European Neighbourhood Policy (ENP) is a framework through which the EU builds political and economic ties with 16 neighbouring states, organised in two groupings of Southern and Eastern neighbourhoods. Typically, the EU will offer Association Agreements providing financial and technical assistance, or improved or tariff-free access to certain EU markets, are agreed with the EU on condition of commitments to political, social, economic, trade or rule of law reforms in the countries. The ‘New and Ambitious European Neighbourhood Policy’ launched in 2011, outlines principles underpinning the new ENP including: supporting progress towards ‘deep democracy’ (of which the rule of law is a foundational pillar); support of sustainable economic and social development; and building effective regional partnerships through, *inter alia*, the implementation and conclusion of Association Agreements. Commission, ‘A new and ambitious European Neighbourhood Policy’ (Press Release) MEMO/11/342. The ENP Instrument 2014-2020 will provide €15.5 billion funding for programmes pursuing these aims: Regulation 232/2014 of 11 March 2014 establishing the European Neighbourhood Instrument. See also Commission, ‘Review of the European Neighbourhood Policy’ (Brussels 18 November 2015) JOIN (2015) 50 final.

<sup>19</sup> Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2014] OJ 77/95.

Lisbon Treaty (2009).<sup>20</sup> In its external action, the EU has emphasised the promotion of its core values – human rights, democracy and the rule of law,<sup>21</sup> in addition to the promotion of trade and development with the EU. The emphasis on the promotion or even ‘export’<sup>22</sup> of values (including the rule of law) through funding programmes and conditional Association Agreements.<sup>23</sup> The EU has made a mission of ‘exporting’ its values including the rule of law.<sup>24</sup>

The possibility of disaster caused by a lack of respect for the rule of law was brought into sharp relief in light of the ongoing crisis in the Ukraine,<sup>25</sup> and the agreements between the EU and the Ukraine have been framed by the principles of strengthening the principles of human rights, democracy and the rule of law.<sup>26</sup> The Agreement includes provision for the EU to provide support to ‘security sector reform and to support the constitutional reform process, including through the mobilisation of legal expertise’, on the basis of a mutual commitment to improving respect for human rights and the rule of law.<sup>27</sup>

The EEAS is not directly involved in the negotiation of TTIP. I emphasise the connection between external action, trade agreements and the rule of law to underscore the argument that there ought to be consistency between what the EU encourages in other states, and how it acts itself. If the EU ‘exports’ the ideal of the rule of law to other states through trade, then in the agreement with the US it should also strongly support and acknowledge the rule of law.

---

<sup>20</sup> Art 27(3) TEU.

<sup>21</sup> Laurent Pech, ‘The Rule of Law as a Guiding Principle of the European Union’s External Action’ CLEER Working Paper 2012/3; Gráinne de Búrca, ‘Europe’s Raison D’Etre’ in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union’s shaping of the International Legal Order* (CUP 2013); and Neil Walker, ‘The Philosophy of European Union Law’ in Anthony Arnall and Damien Chalmers (eds), *Oxford Handbook of European Union Law* (OUP 2015).

<sup>22</sup> See Kalypso Nicolaidis and Rachel Kleinfeld, ‘Can a Post-Colonial Power Export the Rule of Law? Element of a General Framework’ in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2008).

<sup>23</sup> Based on Art 217 TFEU, Association Agreements concluded by the EU provide financial or technical assistance, improved or tariff-free access to certain EU markets, or Most Favoured Nation treatment to third countries. Since 1995, these agreements have included a clause creating a condition in the third country legal system to commit to human rights, democracy, and rule of law reforms: see <eeas.europa.eu/association/> accessed 31 January 2016.

<sup>24</sup> Thomas Carothers, ‘Critical Mission: Essays on Democracy Promotion’ in Amichai Magen and Leonardo Morlino (eds), *International Actors, Democratization and the Rule of Law: Anchoring Democracy?* (Routledge 2008).

<sup>25</sup> See Section 2.3.

<sup>26</sup> EU-Ukraine Association Agreement, 21 March 2014, MEMO/14/159 European Commission's support to Ukraine.

<sup>27</sup> MEMO/14/159 European Commission's support to Ukraine.

The Commission identifies EU Free Trade Agreements as means to ‘monitor domestic reform in relation to the rule of law and governance and set up consultation mechanisms in cases of systemic corruption and weak governance.’<sup>28</sup> In trade agreements, there is an understandable emphasis on adherence to the rule of law, beyond the EU’s value-driven external action policy. The concept of the rule of law promotes certainty, and legality – both essential if an international trade agreement is to function effectively.

### 3.3 Background to the Transatlantic Trade and Investment

#### Partnership

In June 2013, the Council mandated the Commission to negotiate on behalf of the EU Member States with the United States to create the Transatlantic Trade and Investment Partnership [TTIP].<sup>29</sup> The mandate given by the European Council to the European Commission regarding the proposed content of TTIP included reference to the shared, fundamental values of the EU including, explicitly, the rule of law.<sup>30</sup> The procedure for the creation<sup>31</sup> of an international trade agreement is contained within Article 218 TFEU, subject to the conditions of Article 207 TFEU.<sup>32</sup> According to Article 218(8) TFEU, upon the conclusion of negotiations, the Commission presents a proposal to the Council which ‘shall adopt a decision’ concluding

---

<sup>28</sup> Commission, *Trade for All: Towards a more Responsible Trade and Investment Policy* (2015) <polcms.secure.europarl.europa.eu/cmsdata/upload/edd186cb-480e-46c9-8681-6ef95b15320d/Commission%20Communication.pdf> accessed 16 November 2015.

<sup>29</sup> Council, ‘Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America’ (2014) 11103/13 DCL 1.

<sup>30</sup> *ibid.* It is important to highlight that though the rule of law (as a concept) is a shared value between the US and EU legal orders, EUCA is applicable to the EU institutions in its actions, and in the ultimate agreement so far as it is applicable within the EU legal system. This does not imply that EUCA is pertinent to the US legal system, nor to the US negotiators, and the rule of law as it relates to the US is beyond the scope of this thesis. Though it is beyond the scope of this thesis, it is interesting to note that there is a lack of comparative study between European and American conceptions of the rule of law. In one example, though the rule of law is relegated to an additional feature, or add-on to the promotion of democracy: see Michael McFaul, Thomas Risse and Amichai Magen (eds), *Promoting Democracy and the Rule of Law* (Palgrave MacMillan 2009).

<sup>31</sup> This section is restricted to the EU law foundations for TTIP, as the US law regarding international trade negotiations is beyond the scope of this thesis.

<sup>32</sup> The procedure detailed in Article 218 TFEU is subject to special provisions in Article 207 TFEU, which states, *inter alia*, that the Commission ‘shall make recommendations to the Council to open negotiations, and both the Council and Commission shall be responsible to ensure that the agreement is compatible with Union rules and policies.

the agreement with the consent of the European Parliament. Article 218(8) TFEU directs that the qualified majority voting procedure applies, except where unanimity is required. It is, however, uncertain if this procedure will apply to TTIP. The uncertainty rests on the fact that it is unclear if the substance of TTIP is solely within the scope of exclusive competence for the common commercial policy based on Article 3(1) TFEU, or whether TTIP is likely to fall under mixed exclusive and shared competences under Article 4 TFEU.<sup>33</sup>

There are significant incentives for the creation of a free trade agreement between the US and the EU. The combined economies of the US and EU account for nearly half of worldwide GDP and almost a third of world trade.<sup>34</sup> The bilateral trade relationship between the EU and US is the largest in the world, and they are the others' largest exporter. TTIP has the potential to completely reshape the internal market and the regulation of products and services, as well as have a significant impact on the multilateral system of trade across the world beyond the EU and US.<sup>35</sup> The agreement is not intended to be simply an agreement of trade liberalisation, but rather a framework of permanent regulatory cooperation.<sup>36</sup>

Trade Representatives on both sides of the Atlantic advocate TTIP to citizens and businesses as opportunity through increased access to the European and American markets for the international trade of domestic products.<sup>37</sup> The economic benefits of TTIP in terms of jobs and growth have been debated. The Economic Assessment produced by the Centre for Economic Policy Research [CEPR], commissioned by the European Commission and the Department for Business, Innovation and Skills (UK), suggested that TTIP could annually be

---

<sup>33</sup> See Section 3.5.3.

<sup>34</sup> In 2014 world GDP was estimated to be \$77.9 trillion, of that EU GDP made up \$18.46 trillion, and US GDP \$17.42 trillion, or combined 46% of world GDP according to the World Bank Open Data source, <[data.worldbank.org](http://data.worldbank.org)>. See also Webb (n 14) 3.

<sup>35</sup> For example, as considered by the Commission: 'Closer regulatory cooperation between the EU and the US under TTIP could give a push to the development, update and implementation of international regulation and standards. If the US and the EU agree on an approach the chance of it being adopted by others is much higher': Commission, 'TTIP and Regulation, An Overview' (Brussels 10 February 2015) 5, <[http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc\\_153121.pdf](http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153121.pdf)> accessed 13 November 2015.

<sup>36</sup> Parliament, 'The Transatlantic Trade and Investment Partnership and the Parliamentary Dimension of Regulatory Cooperation' (2014) EXPO/B/AFET/2013/32.

<sup>37</sup> From the US perspective, see Office of the United States Trade Representative, 'Final Report on the Transatlantic Trade and Investment Partnership' (Office of the Trade Representative 2013) <[ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2013/final-report-us-eu-hlwg](http://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2013/final-report-us-eu-hlwg)> accessed 1 December 2015.

worth up to £100 billion (0.5% GDP) to the EU, £10 billion (0.35% GDP) to the UK economy, and £80 billion (0.4% GDP) to the US.<sup>38</sup> It is estimated that EU exports would increase by 28%, while the boost in trade will have consequent benefit to the EU and US labour markets. The CEPR estimated that only a small number of workers will have to change job as a consequence of labour displacement (0.2-0.5%) which is considered part of the normal trend.<sup>39</sup> However, as concluded by the House of Lords European Scrutiny Committee in their evaluative report on TTIP, it is difficult to predict with any certainty the economic benefits and costs of the deal, and any real gains would not immediately materialise.<sup>40</sup> It is recognised that the political hurdle of coming to an agreement will be that ‘potential benefits are diffuse while potential costs are concentrated’.<sup>41</sup> This, however, has not deterred Trade Representatives on both sides of the Atlantic from pursuing TTIP for the potential benefit it offers. With such significant economic incentives in terms of increased trade and revenue, it was expected, or at least hoped, that the agreement would be finalised by the end of 2014, a year and a half after its launch in July 2013. However, the negotiations and legal developments which have impacted on TTIP have resulted in ongoing, and protracted negotiations, as will be discussed in the next section which considers the legal foundations, and the progress of the TTIP negotiations.

### **3.4 The Transatlantic Trade and Investment Partnership**

While both the EU and the US are members of the WTO,<sup>42</sup> and consequently have relatively low barriers to trade between the two markets,<sup>43</sup> the aim of the partnership envisaged by TTIP is to create an open market between the US and the EU through the elimination of duties and unnecessary regulatory obstacles to trade and investment.<sup>44</sup> To further this aim, the

---

<sup>38</sup> Centre for Economic Policy Research, *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment* (March 2013).

<sup>39</sup> *ibid.*

<sup>40</sup> European Union Committee, *The Transatlantic Trade and Investment Partnership* (HL 2013-2014, 179) paras 33-36. [House of Lords Report]

<sup>41</sup> *ibid* para 226.

<sup>42</sup> The EU has been a member of the WTO since 1 January 1995, and all EU Member States are also members of the WTO in their own right.

<sup>43</sup> The average tariff is around 3% between EU and US imports: Webb (n 14) 7.

<sup>44</sup> Article 5 TTIP Directives.

agreement will be founded on three pillars of trade:<sup>45</sup> (1) market access; (2) regulatory issues and non-tariff barriers; and (3) trade rules.

- *Market access* concerns the elimination of tariffs and all other duties on bilateral trade. It also incorporates negotiations on reconciling regulations regarding rule of origin in the EU and US, and coordinating anti-dumping measures. Access to markets in services (for example, by mutual recognition of professional qualifications) and public procurement are also under negotiation. Notably, however, there is explicit exclusion of the audio-visual sector from the TIPP after lobbying by France to the European Parliament.<sup>46</sup> Access to the public contracts market on both sides of the Atlantic is also a significant goal for both EU and US negotiators. In particular, UK and EU officials have stressed the priority of opening access to federal and state public procurement. This is, however, an area of political sensitivity on both sides, rather than solely a trade issue.<sup>47</sup>
- *Regulatory issues and non-tariff barriers to trade* concern regulatory obstacles to trade between the EU and US markets. Examples of regulatory obstacles subject to TIPP negotiations include direct restrictions (such as import quotas), or different regulatory standards (for example different safety standards in cars, or health and environmental standards in food and animal products).<sup>48</sup> Possible resolutions to these obstacles

---

<sup>45</sup> Commission, 'Report of the Tenth Round of Negotiations for the Transatlantic Trade and Investment Partnership' (Brussels 13-17 July 2015).

<sup>46</sup> TTIP Directives. The European Parliament adopted a resolution exclusion of the audio-visual sector from TTIP negotiations as a 'cultural exception', or as a means of protecting cultural and linguistic expression (recognized by Art 207 TFEU). Parliament, 'Resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America' 2013/2558 (RSP). Exclusion of the audio-visual sector was met with controversy from the US counterparts. See the remarks of US Ambassador to the EU, William Kennard, 'there's a quid pro quo here, and there will be a price to pay', see Peter Spiegel, 'US warns EU against exempting film industry from trade talks' *Financial Times* (London, 11 June 2013).

<sup>47</sup> Although beyond scope of EUCA, in the US, the Buy America Act 1933 restricts the choices of government officials in preference for local produce and workers. Additionally, Federal mandates on decisions relating to States' expenditure is limited, and politically divisive. House of Lords Report (n 40) paras 128-35.

<sup>48</sup> It is acknowledged that the complexity and diversity of the field of regulatory standards mean that convergence of standards will likely take a significant period of time, and TTIP will require a 'living agreement' to set out deadlines and targets for regulatory cooperation. See Commissioner De Gucht, 'Transatlantic Trade and Investment Partnership (TTIP) - Solving the Regulatory Puzzle' (2013) SPEECH/13/801 <[http://europa.eu/rapid/press-release\\_SPEECH-13-801\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-801_en.htm)> accessed 29 October 2015.

include a scheme of mutual recognition of equivalent standards,<sup>49</sup> or the harmonisation of product standards (for example, health and safety requirements, labelling and specifications), or the elimination of regulations and standards where they are deemed unnecessary.

- *Trade Rules* considers other diverse areas pertinent to the creation of an open market between the EU and the US including: intellectual property rights; investor protections; and the trade in energy and raw resources. This section concerns incentivising small and medium businesses to benefit from transatlantic trade, and a commitment to sustainable development. Removing restrictions to the market for government procurement at national, federal and sub-federal levels in EU and US is also a goal of TTIP.<sup>50</sup>

### *Progress of the Negotiations*

The first round of negotiations took place in June 2013, and the most recent 12th round of negotiations took place in Miami, US, in February 2016. It was initially hoped that negotiations would be concluded within the lifetime of the Commission, or (from the US standpoint) within the term of the Obama Presidency. However, talks have been protracted.<sup>51</sup>

---

<sup>49</sup> See Opinion of AG Sharpston concerning the need for consideration of the legality of abiding by US standards rather than EU standards for the labelling of organic products following the mutual recognition of equivalent standards between the EU and US: Case C-137/13 *Herbaria Kräuterparadies GmbH v Freistaat Bayern*, Opinion of AG Sharpston (GC, 5 November 2014). In the final judgment, the Court did not refer to TTIP, or rule on the recognition of US standards as the question was not asked by the referring court.

<sup>50</sup> For a US example, the Buy American Act 1933 restricts US public procurement to US goods and services, unless the domestic product is more expensive by a certain percentage, unavailable, in an insufficient quantity or quality or not in the public interest. This is not the only example of an 'off set' limiting the scope of a free trade agreement in the US, see Christian Sylvain and Mehdi el Harrak, 'Free Trade Agreements and Off Sets' [2015] IBLJ 399. From the EU perspective, public procurement rules in the EU, from 2016, are set by the revised directives: Council Directive 2014/23/EU on the award of concession contracts; Council Directive 2014/24/EU on public procurement; and Council Directive 2014/25/EU on procurement by entities operating in the water, energy, transport, and postal services sectors. It is interesting to note that on the EU side, the suggestion of nationally-funded advocacy of purchasing locally violates free movement provisions. See the 'Buy Irish' case, wherein the Court of Justice held that a national publicity campaign encouraging the purchase of domestic products violated Art 34 TFEU on the free movement of goods, despite no evidence of impact on trade. Case 249/81 *Commission v Ireland* [1982] ECR 4005.

<sup>51</sup> Marise Cremona, 'Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (2015) 52 CMLR 351.

In the statement following the 11<sup>th</sup> round (October 2015), Chief Negotiator Ignacio Garcia Bercero said that ‘substantial progress’ had been made on market access,<sup>52</sup> and both sides are ‘comparable level in terms of tariff line coverage’. Public procurement and services were discussed with preparation for future rounds of negotiation, indicating that little or no progress had been made in these areas. In the statement, the Chief Negotiator highlighted two ‘key principles’ upon which the partnership ought to be based: (1) ‘cooperation is only possible if the level of protection for citizens stays the same or improves’; and (2) Any form of regulatory cooperation will not change the way we regulate on public policies such as food safety or data privacy. Nor will it affect legislative processes or the independence of our regulators.’<sup>53</sup>

The protracted nature of the negotiations is likely to be related to not only the complicated, and diverse [proposed] subject matter content of the trade agreement, but also linked to the growing domestic opposition to TTIP on both sides of the Atlantic. There has been significant opposition to TTIP in both the EU<sup>54</sup> and the US,<sup>55</sup> with opponents arguing that the agreement would have a negative impact on public services, food and product safety standards,<sup>56</sup> and employment (due to outsourcing of jobs).<sup>57</sup> It is also argued that the agreement would only be of significant benefit to large multi-national corporations, and not to small and medium business unable to compete at multi-national level.<sup>58</sup> Most controversially, opponents argue that TTIP could undermine national public interests by the

---

<sup>52</sup> Statement by EU chief negotiator Ignacio Garcia Bercero following TTIP Round 11, (Miami 23 October 2015), < [trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153910.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153910.pdf)> accessed 8 November 2015.

<sup>53</sup> *ibid.*

<sup>54</sup> For example, over 500 civil society organisations support the European Initiative against TTIP, see Stop TTIP Partner Organisations, <[stop-ttip.org/supporting-organisations/](http://stop-ttip.org/supporting-organisations/)> accessed 24 October 2015.

<sup>55</sup> While there are debates also in the US over the content of the agreement – for example, objection to EU goods and services having access to sub-federal public purchasing under the ‘Buy American’ restrictions which govern US public procurement – these are not a concern of EUCA which focuses on the actions of EU institutions and within the EU legal system. The actions and responses of EU Institutions, notably the Commission as negotiators, to the concerns outlined in this section are pertinent to Section 3.5 which proposes guidance to EU institutional action with reference to the standard set by EUCA.

<sup>56</sup> Arthur Neslen, ‘EU dropped pesticide laws due to US pressure over TTIP, documents reveal’ *The Guardian* (London 22 May 2015).

<sup>57</sup> House of Lords Report (n 40) paras 23–25, 28–32.

<sup>58</sup> Christoph Pauly, Michael Sauga, Michaela Schiessl and Gerald Traufetter, ‘TTIP Gap: How a Trans-Atlantic Trade Deal Can Still Be Fixed’ (*Der Spiegel* 8 June 2015), < <http://www.spiegel.de/international/world/how-ttip-and-an-eu-us-free-trade-deal-can-be-fixed-a-1036831.html>> accessed 5 January 2015.

protection of foreign investor interests in the Investor State Dispute Settlement proposal.<sup>59</sup> While some concerns are shared on both sides of the Atlantic, others are uniquely European – for example, EU Geographic Indications (GIs) are intellectual property rights protecting certain food and drinks (for example Parma ham, and champagne) in the EU. The current absence of protection for these indications in the US has led to concerns that (for example) US-produced Parma ham could be sold in the EU markets.<sup>60</sup> Significant opposition to TTIP has been organised in an effort to stop negotiations, including campaigns, and petitions across Member States.<sup>61</sup> During the 11<sup>th</sup> round of negotiations in October 2015, over 150,000 people protested against TTIP in Berlin.<sup>62</sup> A proposal for a European Citizens Initiative, ‘Stop TTIP’,<sup>63</sup> is currently subject to judicial review proceedings, having been rejected on formalities by the European Commission.<sup>64</sup>

In a short joint public statement in March 2015, the EU Trade Commissioner Cecilia Malmström and the US counterpart, Mike Froman, stated that EU and US trade agreements do not prevent governments from regulating public services such as water, education, health or education.<sup>65</sup> They noted the complementary nature of the private sector to ‘improve the availability and diversity of services’ to the benefit of citizens of both the US and EU – but

---

<sup>59</sup> See Section 3.5.2.

<sup>60</sup> Commission, ‘Trade and Investment Barriers Report 2015’ COM (2015) 217 final.

<sup>61</sup> For example, the organisation War on Want leads a campaign against TTIP, including a petition signed online by over 3 million people: see <[www.waronwant.org/say-no-ttip](http://www.waronwant.org/say-no-ttip)>.

<sup>62</sup> Martin von Greive, ‘Wo wart Ihr damals, als es gegen TTIP ging?’ *Die Welt* (12 October 2015); and Editorial ‘Protest gegen den Welthandel’ *Die Welt* (12 October 2015).

<sup>63</sup> Michael Efler and others, representing an organisation against TTIP, lodged a challenge to annul the decision of the European Commission to refuse registration for the European Citizens’ Initiative ‘STOP-TTIP’. The Commission considered the proposed Initiative to be legally inadmissible, as the intended recommendation to withdraw TTIP negotiating mandate was not a ‘legal act’ within the meaning of Article 11(4) TEU. The applicants argued that the proposed Initiative does not ‘manifestly fall’ outside Commission competence within the meaning of Article 4(2)(b) of Regulation 211/2011 which regulates the process of the European Citizens’ Initiative. The applicants also argue that refusing to register ECI ‘STOP-TTIP’ infringes the general principles of good administrative practice (Art 41 Charter of Fundamental Rights) and of equal treatment (Art 20 CFR). This case is awaiting hearing from the Court of Justice. Case T-754/14 *Efler and others v Commission* (10 November 2014). See Anastasia Karatzia, ‘The European citizens’ initiative in practice: legal admissibility concerns’ (2015) ELR 509, 516–18.

<sup>64</sup> Case T-754/14 *Efler and others v Commission* (10 November 2014).

<sup>65</sup> ‘Transatlantic Trade and Investment Partnership, Joint Statement on Public Services by Ambassador Froman and Commissioner Malmström’ (20 March 2015) <[http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc\\_153264.pdf](http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153264.pdf)>. Cf Ben Quinn, ‘TTIP deal poses ‘real and serious risk’ to NHS, says leading QC’ *The Guardian* (London 22 February 2016).

that the discretion to define the appropriate balance was left to the Government.<sup>66</sup> These statements have not dispelled concerns as regards health and safety standards, or the proposed ISDS mechanism as will be analysed in Section 3.5.

TTIP is ‘the most contested acronym in Europe’<sup>67</sup> The prevalence of these concerns regarding the substance of TTIP across EU Member States leading to numerous campaigns, protests and even law suits against TTIP. To a significant extent, it can be argued that these concerns have been exacerbated by the secrecy which has surrounded the content and scope of TTIP negotiations. The substantive concerns raised above have resulted in accusations which directly relate to the principles of EUCA – the legality of the actions; the certainty of TTIP; the transparency and broad discretion of the Commission negotiators; and the responsibility of the Member States with respect to the principle of cooperative authority. In the next section, I show how EUCA could provide guidance for TTIP negotiations, and provide some resolution to the problematic and concerning areas of TTIP. Even if TTIP is unlikely to be concluded in the near future,<sup>68</sup> there are important lessons concerning EUCA adherence which can be learned from the controversy which has engulfed TTIP.

### 3.5 Evaluating the TTIP against EUCA

In this section, I evaluate the ongoing TTIP negotiations against the standard set by EUCA. I address the most pressing rule of law concerns raised in objection to TTIP. The concerning aspects of the TTIP which I identify and evaluate are: the **transparency of TTIP negotiations** (Section 3.5.1); the **Investor-State Dispute Settlement** mechanism (Section

---

<sup>66</sup> *ibid.*

<sup>67</sup> Attributed to Cecilia Malmström, EU Trade Commissioner: Jennifer Rankin, ‘TTIP: EU and US vow to speed up talks on trade deal’ *The Guardian* (Brussels 26 February 2016).

<sup>68</sup> Marking the end of the 12<sup>th</sup> Round of TTIP negotiations on 26 February 2016, EU Chief Negotiator Bercero stated that they are ‘ready to seek to conclude our negotiations in 2016, provided that the substance is right.’ <[http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154325.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154325.pdf)> accessed 2 March 2016. However, the White House admitted that TTIP was unlikely to be concluded before the end of the Obama Presidency in January 2017: Adam Behsudi, ‘White House concedes TTIP conclusion unlikely under Obama’ *Politico* (Washington DC 9 February 2016).

3.5.2); the **question of EU competence** to agree TTIP (Section 3.5.3); and the potential complications regarding **mutual recognition** and **equivalent standards** (Section 3.5.4).

It is important to note that the actual content of the agreement cannot be evaluated against the standard set by EUCA, as agreement and ratification of TTIP has not been reached. However, I discuss some of the proposed elements of the agreement as they concern potential violations of EUCA, or would serve to highlight any possible deficiency in the understanding of the requirements of the rule of law by the Commission. I argue that adherence to the rule of law should not only be reflected within the content of the ultimate TTIP agreement, but also in the actions of the Commission in negotiating TTIP. The recommendations based on EUCA act as guidance to what the ultimate agreement should contain, if it is to be considered EUCA compliant.

### 3.5.1 *The Transparency of TTIP Negotiations*

In this section I consider the actions of the Commission to remedy failings in ensuring an adequate degree of transparency. I highlight two aspects of the **principle of transparency** from the perspective of EUCA: (1) *access to information* regarding TTIP agreement; and (2) the *openness of procedures* in the context of the negotiations.<sup>69</sup> In my recommendations, I also highlight the **principle of co-operative authority** as it relates to the responsibility of ensuring transparency and communicating information to the public.

Before evaluating Commission negotiations, it is important to identify the nuance of TTIP in context of transparency that it is an international trade agreement, and so distinguishable from ordinary legislation such as a regulation or a directive. This results in a tension that is not normally seen during the making of ordinary legislation. The tension of international trade negotiations is between negotiators tactical preference for the secrecy of information, and the public preference for access to information regarding the content of the proposed agreement. TTIP has caused such controversy as it could potentially reshape the

---

<sup>69</sup> See Chapter 4, Section 3.5.

internal market and global trade, and yet (as will be evaluated) there was limited access to information regarding the content of the agreement. As I consider in this section, concerns about the lack of transparency in the negotiation of TTIP have beleaguered agreement and cause serious concerns from the perspective of EUCA.

The transparency of negotiations was concerning from the outset: the mandate from the European Council to the Commission to open TTIP negotiations was given in June 2013, and was not made available to the public until 9 October 2014. It was the decision of the Council to keep the negotiation mandate out of the public domain.<sup>70</sup> In the June 2013 Commission Press Release announcing the TTIP Mandate, the Commission explicitly clarified that it would not be made available to European citizens, stating that '[w]hen entering into a game, no-one starts by revealing his entire strategy to his counterpart from the outset: this is also the case for the EU.'<sup>71</sup> However, this lack of dissemination of information concerning the content and progress of TTIP is a serious primary concern as regards the transparency of the TTIP agreement. For the public, there is a need to know what agreement is being negotiated on their behalf, especially as it directly relates to environmental standards, workers' rights, the lobbying power of corporate interests, and health and safety standards.

During the initial stages of negotiations beginning in 2014, draft texts of the agreement were not made public, even if select parts of the agreement are 'closed' (unlikely to be subject to further negotiation), as the negotiation is not complete until there is a final agreement. Under Lisbon Reforms, Art. 218(6) and (10) TFEU, the EU parliament has a right to be informed on the progress of all negotiations. However, Member State governments, and only select members of the European Parliament's Committee on International Trade have had access to all EU texts, but not to US texts (at the 'insistence' of the US).<sup>72</sup> This access was reported to be severely restricted, as MEPs could only view the documents in a closed room for an hour,

---

<sup>70</sup> House of Lords Report (n 40) paras 197–198.

<sup>71</sup> See Commission, 'Member States endorse EU-US trade and investment negotiations' (Press Release) MEMO/13/564 <europa.eu/rapid/press-release\_MEMO-13-564\_en.htm> accessed 3 January 2016.

<sup>72</sup> House of Lords Report (n 40).

and could not take notes.<sup>73</sup> It was also reported non-English speaking MEPs found the unexplained trade jargon especially difficult and inaccessible. This seems apparently at odds with available draft proposals of the text of TTIP, wherein it is stated by the Commission that it will consult with Member States in Council, and discuss the proposal with the Parliament before presenting the text to the US. This consultation, especially with MEPs, is limited to a concerning degree and represents a failing in adherence to the principle that information regarding TTIP ought to be as transparent as possible.

In July 2014, the European Ombudsman opened inquiry into transparency and public participation in relation to TTIP negotiations on its own initiative.<sup>74</sup> The report highlighted information which should/could be shared with the public to address transparency concerns. The information included:<sup>75</sup> the **mandate** given to the Commission negotiators to open negotiations; EU **position papers**, and **negotiating positions** ahead of negotiation rounds; draft offer proposals (acknowledging that this could be released after they have been tabled to the US, so as to diminish the risk of revealing negotiation strategy); **consolidated texts** as soon as there is a basic level of agreement, especially where the text relates to matters of significant public interest including fundamental rights, public health, and the environment; both **draft** and **final versions of chapters** of the agreement; **detailed agendas** and **reports of the negotiating rounds**; and the **final text** of the agreement. Another area of concern highlighted by the Ombudsman's report was the disproportionate representation of corporate interests acting in an advisory capacity to EU negotiators, and the lack of transparency regarding the interventions of corporate stakeholders.<sup>76</sup>

---

<sup>73</sup> Sven Giegold, 'The Promised "Transparency" around TTIP has been a sham' *The Guardian* (London 31 August 2015). Wikileaks offered €100,000 for secret information regarding TTIP: Liat Clark, 'Wikileaks crowdfunding 100,000 reward for TTIP secrets' *Wired* (12 August 2015) <[www.wired.co.uk/news/archive/2015-08/12/wikileaks-ttip-reward-crowdfund-assange](http://www.wired.co.uk/news/archive/2015-08/12/wikileaks-ttip-reward-crowdfund-assange)> accessed 16 November 2015. See the Wikileaks site: <[wikileaks.org/pledge/](http://wikileaks.org/pledge/)> accessed 16 November 2015.

<sup>74</sup> European Ombudsman, 'Report on the European Ombudsman's public consultation' (6 January 2015) OI/10/2014/RA, <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58643/html.bookmark#hl21> accessed 16 November 2015.

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.* The Ombudsman's 2014 TTIP Report highlighted a concern that there was unbalanced representation of different interests, as corporate interests outnumbered trade union members by a factor of 4.

The Commission has variously tried to respond to the criticism of the lack of transparency. In the new strategy, ‘Trade for All’, Cecilia Malmström outlined a new approach to trade policy taken by the European union, aiming for it to become ‘more responsible, meaning it will be more effective, more transparent and will not only project our interests, but also our values.’<sup>77</sup> This has resulted in two open consultations, the first with all interested parties (for example, citizens, civil societies, industries and other stakeholders), and the second, completed in January 2015, targets small and medium sized businesses.<sup>78</sup> The Commission now publishes information pertaining to TTIP online<sup>79</sup> including factsheets (in plain language), EU textual proposals, and EU position papers. Marise Cremona argues that there has been a respect for transparency by the EU negotiators in TTIP negotiations, concluding that the ‘publication of the EU’s positions at different stages of elaboration and thinking, together with openness to consultation and debate, helps to fill a gap which is becoming evident as international agreements are increasingly quasi-legislative in nature.’<sup>80</sup>

As part of the latest Transparency Initiative from February 2015, the Commission publishes 2-page factsheets on the chapters and areas of agreement in the TTIP. Also published online are the negotiating texts shared with US counterparts, including proposals on Part 2 (Regulatory Cooperation) and Part 3 (Rules), and the EU’s positions papers. The Commission has also stated that it will make the whole agreement available to the public upon the conclusion of negotiations – ‘well in advance of its signature and ratification’.<sup>81</sup> While this represents a very welcome commitment to the principle of transparency, there remain concerns regarding corporate stakeholder influence, and the degree to which

---

<sup>77</sup> Commission, *Trade for All* (n 28) 5.

<sup>78</sup> See Commission, ‘SME Survey in the context of the Transatlantic Trade and Investment Partnership (TTIP)’ (5 January 2015) <[trade.ec.europa.eu/consultations/index.cfm?consul\\_id=181](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=181)> accessed 8 December 2015.

<sup>79</sup> Commission, ‘Transatlantic Trade and Investment Partnership: In Focus’ <[ec.europa.eu/trade/policy/in-focus/ttip/](http://ec.europa.eu/trade/policy/in-focus/ttip/)> accessed 5 December 2015.

<sup>80</sup> Marise Cremona, ‘Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP) Context and Scope of TTIP’ (2015) CMLR 351, 362.

<sup>81</sup> Commission, ‘EU Negotiating Texts in TTIP’ (Brussels 10 February 2015) <[trade.ec.europa.eu/doclib/press/index.cfm?id=1230](http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230)> accessed 22 February 2016.

negotiating texts are available to be read by Members of the European Parliament and national parliaments.

### **EUCA recommendations:**

As highlighted in this section, there have been severe and ongoing concerns regarding the opacity of TTIP negotiations, which collectively represent a violation of the principle of transparency. Even in light of the drive to improve transparency at EU level in the course of negotiations, it is evident that this has made progress, but still falls below an acceptable standard of adherence to EUCA. The clear violation of the principle of transparency has caused significant damage to public trust, and has been a significant and ongoing criticism of Union action in this area. The violation of the principle of transparency highlights also an essential disconnect between the EU as an external actor which is mandated to promote the rule of law abroad, and the EU in trade negotiations, ostensibly holding itself to a high standard of compliance with the rule of law.

The decision of the Council to keep the negotiation mandate out of the public domain<sup>82</sup> highlights an aspect of the principle of cooperative authority – it is the mutual responsibility of EU institutions (Council, Commission and Parliament) and Member States to participate in the formation of international agreements and the promulgation of information to the public. The House of Lords European Committee recognised that the Commission alone does not have the capacity to advocate the benefits of TTIP in Member States, and it is the mutual responsibility of EU Institutions and Member States to ensure the transparency of the negotiations and ultimate agreement, and to communicate to the public and other interested parties the relevance and impact of TTIP.<sup>83</sup> For example, the House of Lords, in their report on TTIP, commented that concerns have not been equally well-founded, stating that while product safety standards are directly under negotiation, specific

---

<sup>82</sup> House of Lords Report (n 40) paras 197–198.

<sup>83</sup> House of Lords Report (n 40) para 198.

employment rights are not – and this it is the responsibility of the UK Government to inform the public.<sup>84</sup> The wider recommendation is that it is the mutual responsibility of Member States and the EU to inform the public as regards TTIP. However, in order for Member States and EU officials to be able to communicate with the public, the information must be made available. Negotiating texts ought to be made as widely available, and with translation and explanation of legal terms if necessary.

However, it is important to highlight that the EU has adopted a self-reflective or self-critical attitude over the course of the developments of TTIP. The EU institutions have responded to concerns through initiatives to improve the volume and accessibility of information available to the public. The drive towards increased transparency has been reflected in recent case law on transparency in international relations at EU level from the Court of Justice.<sup>85</sup> While still lacking in many significant areas, this shows that the EU can be responsive to rule of law concerns, and can improve its systems and institutional frameworks accordingly.

### 3.5.2 *The Investor-State Dispute Settlement Mechanism*

In this section, I evaluate one of the most controversial elements of TTIP, the Investor State Dispute System (ISDS).<sup>86</sup> I consider the ISDS as it concerns the **principles of equality before the law, transparency, and judicial review**.

---

<sup>84</sup> *ibid*. This also highlights the concern of transparency of the negotiations, evaluated in Section 3.5.2.

<sup>85</sup> In two 2015 judgments, Case C-280/11 P *Access Info Europe* and Case C-350/12 P *In 't Veld* on Regulation 1049/01 regarding public access to European Parliament, Council and Commission documents, the Court held that, even in the area of international relations, EU institutions (in these cases, the Council) are obliged to provide an explanation for how disclosure of a requested document 'could specifically and actually undermine' a protected interest (Case C-280/11 P *Council v Access Info Europe* (GC, 13 October 2013) para 31; Case C-350/12 P *Council v. Sophie in 't Veld* (GC, 3 July 2014) para 52). The Court also held that all documents which pertain to legislation must be open to the public, and the identity of politically accountable decision-makers must also be available. This, and the efforts of the Commission to alleviate concerns for the opacity of negotiations, reflects the essential characteristics of what it means to adhere to the principle of transparency: the availability and accessibility of information, and the need for openness of procedures to ensure the accountability of the law, and as a check on the limits of discretion open to law-makers. See VigiJilencu Abazi and Maarten Hillebrandt, 'The legal limits to confidential negotiations: Recent case law developments in Council transparency: *Access Info Europe* and *In 't Veld*' [2015] CMLR 825, 825.

<sup>86</sup> See for example Peter Davies, 'Trade secrets: will an EU-US treaty enable big business to gain a foothold?' (2013) *BMJ* 346; Webb (n 14) 8; George Monbiot, 'This Transatlantic trade deal is a full-frontal assault on democracy' (*The Guardian* 4 November 2013); and Pauly et al (n 58).

The ISDS mechanism enables foreign investors<sup>87</sup> to bring proceedings against national governments for loss of investment in the event of a decision or change in public policy which has a negative impact on their enterprise. The design of the ISDS mechanism is an international arbitration tribunal, where proceedings would take place outside the domestic court system. The concern about the ISDS mechanism is that it could undermine the power of national governments to regulate in the public interest as multi-national investors would be given the power to challenge decisions made by governments, and to claim compensation in the event that these decisions impacted on profits.<sup>88</sup> Reasons for the ISDS mechanism are that it encourages investment, prevents national bias, and protects the property rights of non-domestic investors.<sup>89</sup> It has been argued in defence of the ISDS mechanism, that the mechanism itself is only an enforcement provision, and that the substance of investor protections are of superior importance as they will define the limits of investment protections and grounds of violations.<sup>90</sup>

The ISDS represents a violation of the principle of equality before the law. The creation of an arbitration system limited to non-domestic investors with the (very significant) power to directly challenge states discriminates between domestic and non-domestic investors to the extent that they can be subject to different systems of arbitration and review. Domestic investors will only be able to bring proceedings within national court systems, while non-domestic (ie US) investors will *also* be able to challenge governments directly through the ISDS mechanism without resorting to national procedures. Challenging the relevance of an ISDS mechanism, Cremona argues that it would be difficult ‘to see the added

---

<sup>87</sup> A foreign investor, also called a non-domestic investor, is a person, company or entity which is not resident in a state that it chooses to invest in. For example, a US company investing in Spain would be a non-domestic investor.

<sup>88</sup> Webb (n 14) 8.

<sup>89</sup> Commission, ‘Commission draft text TTIP – Investment: Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce’ (16 September 2015) <[trade.ec.europa.eu/doclib/press/index.cfm?id=1364](http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364)> accessed 28 November 2015. See also Commission, ‘Concept paper ‘Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court’ (Brussels 5 May 2015); and Parliament, ‘Resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)’ 2014/2228(INI).

<sup>90</sup> House of Lords Report (n 40) para 167.

value of investment protection, especially as by definition it will not be targeted at all those doing business in the EU or USA, but only at non-domestic investors.<sup>91</sup> The Commission has not justified the necessity of an ISDS mechanism where the domestic court systems of both the EU and US would be unable to resolve disputes related to non-domestic investors based on the exclusion of private enforcement of international treaties based on discrimination, bias, or violation of property rights.<sup>92</sup>

The design of the ISDS mechanism violates the principle of independent judicial review and transparency. Typically, international arbitrators are private lawyers, rather than state officials, and the MNEs are involved in the choice of judges. Proceedings are secret, and there is no appellate review, or publication of decisions. The consequent threat to the rule of law is that proceedings and decisions made by the international tribunal would be opaque, vulnerable to bias and conflict of interests, and not subject to any review mechanism. In similar ISDS mechanisms in other states, there are examples of the significant costs of litigation to states through challenges to the change of policy, even in the event that the state won.<sup>93</sup>

These concerns were noted by the Commission, which suspended negotiations on the Investment Pillar of TTIP in January 2014,<sup>94</sup> and launched a public consultation in March-July 2014.<sup>95</sup> The Commission aimed to respond to the concern regarding the tension between the right of governments to regulate and the establishment and functioning of the ISDS tribunals.

---

<sup>91</sup> Cremona (n 51) 358.

<sup>92</sup> In one study commissioned by the EU Parliament, it was considered ‘doubtful whether there is a need for such [ISDS] clauses in an agreement between two highly evolved rule-of-law legal orders’ Directorate General for Internal Policies, ‘Legal implications of the EU-US trade and investment partnership (TTIP) for the *Acquis Communautaire* and the ENVI relevant sectors that could be addressed during negotiations’ (October 2013) IP/A/ENVI/ST/2013-09.

<sup>93</sup> Tobacco company Philip Morris brought proceedings against Australia challenging the plain packaging law under an ISDS mechanism, and although the challenge failed, an estimated A\$50 million (£26 million) was spent on legal defence. Daniel Hurst, ‘Australia wins international legal battle with Philip Morris over plain packaging’ *The Guardian* (London 18 December 2015).

<sup>94</sup> Commission, ‘Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement’ (Press release) IP/14/56 <[http://europa.eu/rapid/press-release\\_IP-14-56\\_en.htm](http://europa.eu/rapid/press-release_IP-14-56_en.htm)> accessed 2 October 2015.

<sup>95</sup> Commission, ‘Online public consultation on the investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)’ <[http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179)> accessed 5 January 2016.

According to the Citizens' Guide to TTIP (published by the Commission), the EU has 'put forward several proposals for safeguarding the right to regulate', and 'proposals that would ensure full transparency and further guarantees for impartiality and the ethical conduct of arbitrators', as well as flagging the need to review decisions through an appellate mechanism.<sup>96</sup>

The EU presented a new proposal (which will still require negotiation) for the creation of a public Investment Court System, which will consist of a tribunal of first instance, and an appeal tribunal which would operate on similar principles to the WTO Appellate Body, and adjudications which would be made by qualified judges (comparable to the International Court of Justice and the WTO Appellate Body). The aim of these proposals is to respond to many of the concerns earlier identified, fundamentally – proceedings in the new Investor's Court will be transparent: hearings will be open to the public, and 'comments' made available online. The right to intervene by interested parties would also be provided, while multiple and parallel proceedings would be avoided.<sup>97</sup> However, the Court System proposal has not been welcomed by US counterparts,<sup>98</sup> and the US Chamber of Commerce has endorsed a strong criticism of the proposal.<sup>99</sup>

### **EUCA Recommendations:**

It is clear that the ISDS mechanism represents a clear and substantial violation of EUCA. While the creation of an Investment Court System as proposed by the EU would be some improvement towards adherence to the principle of independent judicial review, this is only in comparison to the ISDS mechanism. The EU has not established the need for an ISDS mechanism which would convincingly negate the concerns of EUCA violations. However, if

---

<sup>96</sup> Commission, Inside TTIP: An Overview and Chapter-by-Chapter guide in plain English (EU Publications Office 2015) 42.

<sup>97</sup> There is also an assertion in the text that the distinction between domestic and international law would be maintained, see Principle of Certainty for consideration of this separation from the perspective of EUCA.

<sup>98</sup> Hans von der Burchard, 'EU faces tough sell on TTIP compromise' *Politico* (7 February 2016).

<sup>99</sup> Peter Close, 'TTIP, Investor-State Dispute Settlement and the Rule of Law' (2015) *European View* 217.

an ISDS mechanism would be to go ahead, it ought to involve transparent proceedings with published decisions naming MNEs, States and conclusions. The impartiality of the system ought to be guaranteed by the nomination of expert judges, and not the nomination of private litigators.

### ***3.5.3 The Question of EU Competence to Agree TTIP***

In this section, I consider the question of EU competence to agree TTIP. I consider the **principles of legality, transparency, and cooperative authority**. In the context of TTIP, uncertainty as to the competence of the Commission to negotiate has led to important questions of what the final ratification procedures will require. The division of competences in terms of international trade have also changed significantly following the Lisbon Treaty reforms: for example, the inclusion of foreign direct investment and intellectual property now fall under the exclusive competence of the EU under Article 207 TFEU, and both are likely to feature as part of TTIP agreement. Conversely, the Investor-State Dispute Settlement [ISDS] mechanism is unlikely to fall under the exclusive competence of the Union. Whether or not TTIP is an agreement of exclusive or ‘mixed’ competence is a highly significant issue. If the former, TTIP would not need to be ratified individually by the Member States, except by their governments acting in Council. The alternative would be for TTIP to fall under mixed competence, and so require the ratification of the agreement by each Member State individually according to their constitutional requirements.<sup>100</sup>

The question of competence has yet to be resolved by the Court of Justice. Under Article 218(11) TFEU, a Member State, the Council, Parliament or Commission can request an opinion of the Court of Justice as to whether the agreement is compatible with the Treaties. In the event that the Court concludes it is not, the agreement may not enter in force until (or the Treaties) are revised. However, an Opinion on TTIP cannot take place until

---

<sup>100</sup> Arts 2(2) and 4 TFEU. For example, In the UK, procedures for the ratification of international treaties are determined by Part 2 Constitutional Reform and Governance Act 2010.

negotiations have been concluded. A number of Member States, including France,<sup>101</sup> Ireland,<sup>102</sup> Germany,<sup>103</sup> and the UK,<sup>104</sup> have expressed the expectation that the ultimate agreement would be based on mixed competence, and so require ratification at national level.<sup>105</sup> In June 2014, the representatives of 20 Member State Parliaments submitted a statement to the Commission requesting the consideration of comprehensive trade agreements (such as TTIP) as mixed competence, thus requiring the ratification of national parliaments.<sup>106</sup> In response, the Vice President of the Commission, Maroš Šefčovič, stated that the ‘consistent position is that the nature of every international agreement, and hence every trade agreement, and whether it is to be concluded as an EU-only or as a mixed agreement, depends on its content’, and that ‘[t]he nature of these agreements can only be fully determined at the end of the negotiations.’<sup>107</sup> The EU Trade Commissioner, Cecilia Malmström, has also stated that TTIP would be likely to contain elements of mixed competence, but that this would require more ‘institutional discussion’ and likely a legal opinion from the Court of Justice.<sup>108</sup> However, the Commissioner expressed that the conclusion that the agreement is mixed competence would be unfortunate, as the requirement

---

<sup>101</sup> Sénat Session of 23 October 2014, Journal Officiel de la République Française, No 95 S(CR) (24 October 2014).

<sup>102</sup> Oireachtas Joint Committee on European Union Affairs, *Transatlantic Trade and Investment Partnership Discussion* (27 March 2015) <[oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/committeetakes/EUJ2015032700002?opendocument](http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/committeetakes/EUJ2015032700002?opendocument)> accessed 15 November 2015.

<sup>103</sup> Response by the German Government to an enquiry of 22 January 2014, German Bundestag; see also the website of the German Ministry of the Economy and Energy: [www.bmwi.de/DE/Themen/Aussenwirtschaft/Handelspolitik/Europaeische-Handelspolitik/freihandelsabkommen.did=630990.html](http://www.bmwi.de/DE/Themen/Aussenwirtschaft/Handelspolitik/Europaeische-Handelspolitik/freihandelsabkommen.did=630990.html) accessed 15 November 2015.

<sup>104</sup> House of Lords Report (n 60).

<sup>105</sup> This debate concerning competence will be discussed under the EUCA principles of Equality Before the Law and Cooperative Authority in Section 3.4.

<sup>106</sup> Tweede Kamer der Staten-Generaal, ‘Letter to EU Commissioner for Trade Karel De Gucht in the framework of the political dialogue: the role of national parliaments in free trade agreements’ (25 June 2014) <[ec.europa.eu/dgs/secretariat\\_general/relation/relation\\_other/npo/docs/poland/own\\_initiative/oi\\_role\\_of\\_national\\_parliaments\\_in\\_free\\_trade\\_agreements/oi\\_role\\_of\\_national\\_parliaments\\_in\\_free\\_trade\\_agreements\\_sejm\\_opinion\\_en.pdf](http://ec.europa.eu/dgs/secretariat_general/relation/relation_other/npo/docs/poland/own_initiative/oi_role_of_national_parliaments_in_free_trade_agreements/oi_role_of_national_parliaments_in_free_trade_agreements_sejm_opinion_en.pdf)> accessed 16 November 2015.

<sup>107</sup> Commission, ‘Response to Opinion of 24 June 2014 on the role of national parliaments in free trade agreements (FTAs)’ COM (2014) 757 final.

<sup>108</sup> European Parliament Committee on International Trade, ‘Hearing of Cecilia Malmström Commissioner-Designate (Trade)’ (29 September 2014) <[www.europarl.europa.eu/hearings-2014/resources/library/media/20141022RES75823/20141022RES75823.pdf](http://www.europarl.europa.eu/hearings-2014/resources/library/media/20141022RES75823/20141022RES75823.pdf)> accessed 17 November 2015.

of unanimity among all Member States Parliaments would risk ‘not being able to achieve anything.’<sup>109</sup>

### **EUCA recommendations:**

It is not possible to conclude whether TTIP is an agreement of mixed or exclusive competence as the content of TTIP is uncertain. The fact that there is uncertainty regarding the content of TTIP, and the consequent uncertainty as to the competence upon which it is legal, as pointed out by Bernhard Kempen,<sup>110</sup> is concerning. The fact that it cannot be said with certainty if the EU has exclusive or shared competence to agree TTIP again highlights the lack of transparency in the negotiation of agreement. Transparency in terms of the negotiations has been an issue doggedly following the progress of negotiations, and potentially revealing a shortcoming in adherence to the rule of law as will be considered in the next section. This is further complicated by sheer scale when the two sides of the table are, collectively representing the interests and rights of 29 countries, and nearly 820 million consumers. The huge range of interests to be represented, and concerns to be answered, reveals the need for a high degree of certainty as to the content of the agreement.<sup>111</sup> From the perspective of the principle of cooperative authority, building on the recommendations of Section 3.5.1, I would argue that TTIP should be considered by the parliaments of Member States. Collective agreement, even if it delays the progress of the agreement, is necessary to

---

<sup>109</sup> *ibid.*

<sup>110</sup> Bernhard Kempen, Legal Opinion regarding the Admissibility of a European Citizens' Initiative against TTIP (Transatlantic Trade and Investment Partnership) and CETA (Comprehensive Economic and Trade Agreement (30 April 2014) <[stop-ttip.org/wp-content/uploads/2014/09/EBI-Gutachten\\_EN.pdf](http://stop-ttip.org/wp-content/uploads/2014/09/EBI-Gutachten_EN.pdf)> accessed 29 October 2015. This Opinion was commissioned by Mehr Demokratie eV, a Germany-based NGO advocating direct democracy, and opposed to TTIP.

<sup>111</sup> This can especially be seen in instances where there is not a shared position among all Member States, for example in the regulation of financial services. For the UK, the inclusion of financial services regulatory matters in TTIP negotiations was a matter of priority, whereas the US administration (from concerns for a lowering of the current regulatory standards in place after the Financial Crash) maintains an opposition to its inclusion. Other EU Member States have not strongly campaigned for its inclusion, distinguishing the UK and other Member States in terms of their position with regard to the sector. See House of Lords Report (n 40) paras 122–123. Interestingly, in the House of Lords Report, the Committee criticized the position of the UK Government for its lack of clarity, stating it ‘struggled to understand what the UK Government's objectives were [...] The shroud of secrecy around UK and EU objectives thus far has been unhelpful, and stokes unnecessary suspicion.’

ensure both the functioning of TTIP within Member States, but also key to ensuring that the agreement best represents the collective interests of Member States, enterprises and citizens.

#### 3.5.4 *Mutual Recognition and Equivalent Standards*

In this section, I consider future issues with regard to potential breaches of TTIP with the **principle of legal certainty**. Laws ought to be *clear, intelligible, predictable, and relatively stable*, acknowledging that legal certainty is always a matter of degree, and that the degree in question may be more appropriate in some circumstances than others. In this section, I consider the issues which may arise consequent to the creation of a mechanism aiming at regulatory convergence across the US and EU.<sup>112</sup> The proposed ‘living agreement’ element of TTIP is an institutional framework designed to incrementally regulate divergence between EU and US product standards. It would require ongoing exchanges between regulators across the EU and US, and legal provision for the amendment of the regulatory annexes of TTIP.

Two concerns about the ‘living’ agreement raised by the Corporate Europe Observatory are first that the Commission was proposing a ‘very complicated’ system which would open policy decisions early to US interests (stakeholders and US regulators) and which would introduce US input in EU standards earlier than ‘any Parliament in Europe.’<sup>113</sup> This could effectively create a situation where policy is made in ‘the pre-democratic sphere, the pre-public sphere, to bureaucracies’ and have the effect of ‘disempowering’ Member States’ Parliaments. The second concern which follows from this would be that compulsory provision of information to industry stakeholders at early stages of policy making could result in ‘very early opportunities for industry to water down, to delay or even to kill legislation, providing strong consumer protection, for example, that they dislike’.<sup>114</sup> A similar question was

---

<sup>112</sup> House of Lords (n 40) paras 189–193. Cooperation towards regulatory convergence between the EU and the US is not a recent development, for example: the establishment of the Transatlantic Economic Council in 2007, which aimed to advance regulatory cooperation and the removal of barriers to trade. Initiatives were met with different levels of success, see Raymond J Ahearn, *Transatlantic Regulatory Cooperation: Background and Analysis* (DIANE Publishing 2010).

<sup>113</sup> As reported in the House of Lords Report (n 40) para 193.

<sup>114</sup> *ibid.*

highlighted by AG Sharpston: whether EU products meeting the standards of US equivalent guarantees on labelling could suffice for marketing in the EU market in the instance that the product did not meet EU standards.

It has been queried whether mutual recognition of US and EU products (requiring equal treatment of products imported with equivalent guarantees) for example, will result in a lowering of standards.<sup>115</sup> A further concern is the perceived threat to product, notably food safety standards. In one example, EU directives prohibiting the sale of meat treated with growth hormones, or washed in chlorine on the basis of concern for human health, have been unsuccessfully challenged by the US before the WTO.<sup>116</sup> There is a possibility that the TTIP will, by seeking common ground, change the high levels of protection in the EU. Similarly, while products containing GM crops are strictly regulated in the EU market, their use is widespread in the US. The Commission has responded to these concerns by reiterating that common regulatory decisions are based on ‘clear principles’ and ‘mutual interests’ led by domestic regulatory frameworks, which will not ‘reduce any [...] high standards of consumer, health, labour or environmental protection’.<sup>117</sup>

According to the jurisprudence of the Court of Justice, international agreements can have primacy over EU secondary legislation provided, ‘the Community must be bound by those rules’, and ‘only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty’s provisions appear, as regards their content, to be unconditional and sufficiently precise’.<sup>118</sup> In terms of a claimant relying in national courts on international treaty provisions which are binding on the EU, if they are ‘capable of conferring rights on

---

<sup>115</sup> This has already been averted to, see the Opinion of AG Sharpston in Case C-137/13 *Herbaria Kräuterparadies* (GC, 5 November 2014) is the labelling of ‘organic foodstuffs’. The Advocate General queried whether it would also be possible for products produced in the EU to be marketed as ‘organic’ which meet the requirements of the equivalent US guarantees, rather than EU rules. The General Court, noting that this was not part of the question asked for the preliminary ruling, declined to consider it.

<sup>116</sup> DISPUTE DS389: European Communities – Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States. See Chris Downes, *The Impact of WTO SPS Law on EU Food Regulations* (Springer 2014).

<sup>117</sup> Statement by Chief Negotiator Ignacio Garcia Bercero, TTIP Round 10, 17 July 2015, <[trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153651.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153651.pdf)>.

<sup>118</sup> Case C-308/06 *Intertanko v Secretary of State for Transport* [2008] ECR I-4057, para 45.

citizens of the Community'<sup>119</sup> and has considered situations in which the provision involved an 'unconditional and precise obligation'<sup>120</sup> However, it is likely that private enforcement of TTIP through domestic courts will be explicitly excluded by TTIP, as shown by the similar agreement recently negotiated with Canada, CETA.

Article 14.4 of CETA (Canada EU Trade Agreement) states that '[n]othing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.' As many commentators have argued, the denial of direct effect could diminish or weaken the long-term impact and success of the trade agreement,<sup>121</sup> notably in the context of non-tariff barriers.<sup>122</sup> Echoing the experiences of the tackling of non-tariff barriers to trade in the internal market, where broadly formulated rules depend on the availability of enforcement mechanisms and 'continued political will' to remove barriers.<sup>123</sup> The position of TTIP which would both undermine certainty by the likelihood of inconsistent interpretation by national institutions, and a lack of domestic private enforcement results in an uncertainty likely to undermine the potential successes of TTIP in opening up markets to trade and removing financial and other barriers.

### **EUCA recommendations:**

The question of safety and the protection of health in the EU and the US is not only a matter of different standards which could be harmonised or regulated, but also a question of very

---

<sup>119</sup> Joined Cases C-21 to 24/72 *International Fruit Company NV* [1972] ECR I-1219, para 8.

<sup>120</sup> C-104/81 *Hauptzollamt v Kupferberg* [1982] ECR 3641, para 20; and Joined Cases C-120/06 P et C-121/06 P *FIAMM et al* [2008] ECR 6513, para 110.

<sup>121</sup> Alik Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) CMLR 1125; Marco Bronckers, 'Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements' [2015] J Intl Econ L 655; and Daniel Thym, 'The Missing Link: Direct Effect, CETA/TTIP and Investor-State Dispute Settlement' *Verfassungsblog* (7 January 2015) <[www.verfassungsblog.de/en/verhinderte-rechtsanwendung-deutsche-gerichte-cetatiip-und-investor-staat-streitigkeiten/](http://www.verfassungsblog.de/en/verhinderte-rechtsanwendung-deutsche-gerichte-cetatiip-und-investor-staat-streitigkeiten/)> accessed 1 December 2015;.

<sup>122</sup> Thym, *ibid.*

<sup>123</sup> *ibid.*

different perspectives on the approaches to evaluation of what constitutes a risk, and the appropriate response to that risk. EU law requires that the protection of human, animal and plant health, consumer and environmental policy be driven by the precautionary principle. The principle is enshrined in Article 191(1) TFEU, allowing preventative decisions to be taken in the event of risk to human, animal, or plant health and in order to protect the environment. In the event that an action is taken on the basis of the principle, the burden of proof rests with the manufacturer, producer or importer to prove the absence of danger in the product. Conversely, in most US states, the approach is based on a risk assessment, which effectively reverses the burden of proof: it is necessary to prove that the product is *unsafe*, rather than *safe* to be placed on the market. This has proven to be a significant roadblock in the progress of the agreement reflecting essential differences in ‘legal and cultural traditions’ across the Atlantic.<sup>124</sup> The aim of TTIP mandate given to negotiators was for ‘more compatible regulations’ to aid industries in the reduction of costs associated with transatlantic trade.

The only answer to these concerns is clear, intelligible and defined provisions within TTIP defining the contexts for the interpretation of provisions, for the extent of stakeholder engagement in policy formation, and for the constitution of equivalent guarantees in the long process towards regulatory convergence. This is likely to require ongoing political will, and apt enforcement mechanisms – lest the preference for open, discretionary terms creates a situation of a low standard of adherence to the principle of certainty.

#### 4 CONCLUSION

---

In this Chapter, I considered the value and incentives for the adoption and adherence of the EU institutions to the standard set by EUCA. Adherence to EUCA ought to be at all levels and areas of the EU legal system and its processes.<sup>125</sup> I have argued for the practical values and benefits of adherence to EUCA from the perspective of the EU institutions. I highlighted how

---

<sup>124</sup> Pauly et al (n 58).

<sup>125</sup> Though to a varying extent, as seen by the case studies of Chapters 5-7.

EUCA can serve as a clear signal of commitment to the rule of law which could balance the proposed increased monitoring of Member States' compliance with the rule of law. I identified that EUCA can foster a dialogue between Member States, as it (by virtue of being *EU-centric*) implicitly recognises the diversity and distinction of constitutional identities as regards the rule of law. I posited the benefits of adherence in terms of functionality and economy, and the potential for the consequent strengthening of support for the Union. I outlined possible means of enforcement of EUCA through the Courts, by the Commission, and through alternative means of monitoring and (soft) enforcement through independent agencies, the European Ombudsman and through educational initiatives to establish that adherence to the rule of law is the responsibility of all to ensure, and everyone to expect.

In the second half of this chapter, I presented the ongoing TTIP negotiations. TTIP raises important questions as to the process of negotiations of Free Trade Agreements by the EU on behalf of Member States and their citizens. While there are outstanding uncertainties concerning the legalities of the trade deal still in process, the controversies associated with the negotiations serve to illuminate important elements of EUCA, and also show how EUCA may guide practice. The case study of TTIP highlights the considerations in substantive content which ought to be taken account of in the agreements (for example, the principles of certainty, legality, and judicial review), but also, and always, in the actions of the Commission in the creation (through negotiation) of agreements which become part of the legal and political fabric of the Union. The principles of equality before the law and cooperative authority, as well as transparency and the limited discretion of commission officials are integral to this. It is essential to the realisation of the agreement, that the rule of law be respected, adopted, adhered to, and enforced.

## CHAPTER SIX

### *EUCA and the EU Member States*

#### 1 INTRODUCTION

---

In this Chapter, I consider EUCA from the perspective of Member States. I begin in **Section 2** by presenting arguments for why Member States should endorse EUCA. I argue that EUCA can highlight deficiencies in legal practice which negatively impact on Member States, as well as providing a practical limit on the power of the EU in areas which are politically sensitive to Member States.

**Section 3**, I demonstrate how EUCA might be helpful in practice through an example drawn from corporate tax law in the EU. The case study is the EU's measures taken in response to advanced tax rulings, and intended to ensure fair tax and transparency in corporate taxation measures. Taxation in the EU is one of the most politically sensitive areas of law, but also, conceptually, a field of law where core concepts of the rule of law – equality, certainty, legality, limited discretion, transparency, review, are especially pertinent as they are essential to the administration of taxation.

#### 2 WHY SHOULD MEMBER STATES ENDORSE EUCA?

---

In this section, I argue why it is in the best interests of Member States to endorse EUCA. The arguments presented in this section mirror those presented in Chapters 5 and 7, and are presented first in the abstract, before moving on to consider more concrete examples of the benefits and consequences of EUCA explored in the case study in Section 3. The reasons I present are (1) EUCA can serve as a **balance to the monitoring of rule of law compliance in Member States**; (2) EUCA **fosters a rule of law dialogue** which can **enhance and**

**strengthen the rule of law** throughout the EU; (3) EUCA can act as a **limit on EU power**; and (4) EUCA is **instrumental to good governance and stability** which is in the best interests of all Member States.

EUCA would serve as a **balance to the monitoring of rule of law compliance in Member States**. In light of the measures taken against Member States for their (alleged) violations of the rule of law, adherence to EUCA would act as a balance to the increased monitoring by the Commission of Member States compliance under the proposed Framework to Strengthen the rule of law. Ongoing monitoring of EUCA adherence by the EU institutions would act as a balance to the proposed increased monitoring under the *New Framework*<sup>1</sup> of Member States compliance with the rule of law. This would remove the apparent disparity between levels of rule of law scrutiny between the EU and Member States. From the perspective of Member States, however, I add an additional element identified by Müller: endorsing EUCA would remove the rhetoric of being ‘singled out’ and ‘treated as second class’ by virtue of being subjected to scrutiny for rule of law compliance.<sup>2</sup> By monitoring the EU legal order for its compliance to EUCA, the monitoring of Member States’ systems could be made more acceptable to national authorities.

By extension, EUCA **fosters a rule of law dialogue** between Member States and EU Institutions, which can serve to **enhance and strengthen the rule of law** throughout the EU. My argument for the necessity of EUCA is premised on the idea that while the rule of law has universal value to all legal systems, the principles and means by which it is instantiated vary in each legal system. The focus of EUCA is in developing an account of the rule of law which is suitable for the EU legal system. By acknowledging the distinction between state-centric and EU-centric accounts of the rule of law, it is possible to have a nuanced dialogue on suitable measures, means and instruments needed to enhance rule of

---

<sup>1</sup> Commission, ‘New Framework to strengthen the Rule of Law’ (Communication) COM (2014) 158.

<sup>2</sup> Jan-Werner Müller, ‘Safeguarding Democracy inside the EU Brussels and the Future of Liberal Order’ (Transatlantic Academy Paper Series, February 2013) <[http://www.transatlanticacademy.org/sites/default/files/publications/Muller\\_SafeguardingDemocracy\\_Feb13\\_web.pdf](http://www.transatlanticacademy.org/sites/default/files/publications/Muller_SafeguardingDemocracy_Feb13_web.pdf)> accessed 15 April 2014.

law compliance at national and EU levels.<sup>3</sup> It is important to point out, as others have,<sup>4</sup> that the relationship between national and EU concepts is not static or one-directional: legal principles and methodologies evolve as they interact with one another. The dialogical and argumentative<sup>5</sup> aspect of the law enhances national concepts of the rule of law, while also respecting evolving dialogue concerning the Union mandate to respect the ‘national identity’ of Member States.<sup>6</sup> EUCA can enhance and strengthen rule of law compliance throughout the EU without compromising national legal identity.

EUCA is a **limiting factor on the exercise of EU power** and could potentially answer concerns regarding competence creep. The lack of competence has been rarely accepted by the Court as a ground for the annulment of a measure, which has interpreted powers broadly to achieve Treaty objectives.<sup>7</sup> By endorsing EUCA, the Member States advocate a standard which places limits on the powers of the EU. EUCA equates subsidiarity and proportionality to aspects of the principle of legality, as well as the principles of equality before the law (as between Member States and the EU, as well as each other), limited discretion, and the principle of co-operative authority. Each principle acts as a limit on power. The principle of co-operative authority enhances and protects the interests of Member States, while also strengthening the Union. The principle emphasises the co-operative element necessary to the functioning of the EU. In sensitive areas of the law (for example, taxation<sup>8</sup>

---

<sup>3</sup> This also strengthens evolving dialogue concerning the Union mandate to respect the ‘national identity’ of Member States, see Article 4 TEU.

<sup>4</sup> See for example Bélig Nabli, ‘Européanisation et Constitutionnalisation du Droit National’ (2005) *Politeia* 243; Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the EU’ Jean Monnet Working Paper 04/09 <[www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org)> accessed 29 April 2014, fn 27; and Luc Heuschling, *État de Droit – Rechtsstaat – Rule of Law* (Dalloz 2002).

<sup>5</sup> Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2005) 14-15.

<sup>6</sup> Article 4(2) TEU. On the national identity clause, see Dorota Leczykiewicz, ‘The ‘national identity clause’ in the EU Treaty: a blow to supremacy of Union law?’ *UK Constitutional Law Association* (21 June 2012) <[ukconstitutionallaw.org/2012/06/21/dorota-leczykiewicz-the-national-identity-clause-in-the-eu-treaty-a-blow-to-supremacy-of-union-law/](http://ukconstitutionallaw.org/2012/06/21/dorota-leczykiewicz-the-national-identity-clause-in-the-eu-treaty-a-blow-to-supremacy-of-union-law/)> accessed 3 January 2016.

<sup>7</sup> See *Germany v Commission* [1987] ECR 3203; Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419; C-58/08 *Vodafone* [2010] ECR I-4999; C 281, 283-285, 287/85 Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573; and Case C-583/11 P *Inuit Tapiriit Kanatami v Parliament and Council* (GC, 3 October 2013) [2014] CMLR 14. See further Stephen Weatherill, ‘Competence Creep and Competence Control’ (2004) 23 *YEL* 1; and Stephen Weatherill, ‘The limits of legislative harmonisation ten years after Tobacco Advertising: how the Court’s Case law has become a “drafting guide”’ (2011) 12 *German LJ* 827.

<sup>8</sup> See the case study of this chapter, Section 3.

and criminal<sup>9</sup> law), where harmonisation is unattainable, due to the lack of EU competence to legislate, or there is a no political will nor consensus among Member States, the Court has sometimes had to assume a quasi-legislative role, ‘filling in the gaps’ through case law.<sup>10</sup> As will be shown in the case study example in Section 3, this can have the negative impact of poorly designed negative integration.

A final argument I present is that EUCA is **instrumental to good governance and the stability** of the EU, which is in the best interest of all Member States. The arguments I have so far given for why Member States should endorse EUCA at EU level have focused on the interests of checking EU power, balancing rule of law monitoring in Member States. Ultimately, however, it is in the best interests of all Member States to ensure good governance at EU level and throughout the EU. The EU is a membership of states working together for the common benefit of all members. Ensuring a rule of law compliance at EU level in tandem with strengthening rule of law norms at national level enhances and strengthens all Member States at the EU by providing a sound environment for investment and business; the protections of the rule of law for the citizens; and a firm foundation to mutual trust and mutual recognition between member States.

### 3 EUCA, TAX AVOIDANCE AND ADVANCE TAX RULINGS

---

#### 3.1 Introduction: Outline of the Case Study

In this chapter, I evaluate the EU’s **measures to tackle tax avoidance through use of advanced tax rulings**. Advance tax rulings are confirmations or assurances issued by tax administrations to taxpayers in advance of certain transactions, confirming the tax treatment

---

<sup>9</sup> See the European Arrest Warrant case study: Chapter 7, Section 3.

<sup>10</sup> In the particular example of direct taxation, see Rita de la Feria and Clemens Fuest, ‘The Economic Effects of EU Tax Jurisprudence’ (2016) ELR 44, 52

the transaction would (or will)<sup>11</sup> be given.<sup>12</sup> The nature of advance tax rulings can have a significant impact on competition and the functioning of the Internal Market, as many Multi-National Enterprises (MNEs) will make transactional decisions on the basis of the lowest tax rates or most favourable tax treatment to be guaranteed among Member States. The practice of advanced tax rulings by tax authorities of Member States became a crisis issue in the EU following ‘Luxleaks’, through which it was revealed that the net effect of advance tax rulings issued by the Luxembourgish tax authority was to reduce global tax bills of a significant number of MNEs, (including Apple, Amazon and Starbucks) to less than 1% of non-dividend income, as compared with an average 25% corporate tax rate across the EU. The EU has responded with an array of measures, three of which are evaluated in this section: the **Commission’s state aid investigations** into Member States’ tax rulings practices; the **Tax Transparency Initiative** which aims to make advance tax rulings available between tax authorities; and the proposed **common consolidated corporate tax base (CCCTB)**.

In Section 3.2, I outline the connections between principles of tax law and rule of law principles. I show how the principles of the rule of law are essential to the fair administration of taxation. I then highlight the particular complexity of the regulation of taxation at EU level, and outline the relevant Treaty articles and legislation in the area. In Section 3.3, I contextualise the case study by providing background detail on the advance tax practices revealed by Luxleaks. In Section 3.4, I explain the nature and effect of advance tax rulings. I then examine the relationship between advance tax rulings, corporate tax avoidance and harmful tax practices. I highlight in this section how this is a flashpoint issue, highlighting the tension between the EU competence to regulate the internal market, and Member State preference for corporate tax sovereignty. I conclude that the lack of political consensus among Member States to legislate in the area has resulted in ineffective and unsuitable EU measures to tackle corporate tax avoidance, which cause a host of EUCA issues. In Section 3.5, I evaluate

---

<sup>11</sup> Whether or not an advance tax ruling is binding on the tax administration varies from state to state: see Section 3.4.

<sup>12</sup> Commission, ‘Combating corporate tax avoidance: Commission presents Tax Transparency’ (Press Release) MEMO/15/4609.

these EU measures to tackle tax avoidance: Commission's state aid investigations into Member States' tax rulings practices; the Tax Transparency Initiative; and proposed future common consolidated corporate tax base (CCCTB) designed to tackle tax avoidance.

### 3.2 Taxation, the Rule of Law and the EU<sup>13</sup>

In this section, I outline the connections between tax law, and the rule of law. I then explain the tension which arises between national taxation authorities and any EU legal intervention in the field of taxation due to the high degree of political sensitivity in the area. I detail the relevant EU law with regard to corporate taxation and focus on the legal provision as regards the case study.

What makes taxation particularly interesting as regards EUCA, is that is a field of law where core concepts of the rule of law – equality, certainty, legality, limited discretion, transparency, judicial review - are especially pertinent as they are essential to the administration of taxation.<sup>14</sup> The operation of taxation demands a high degree of certainty in determining the taxes owed so that taxpayers are able to plan their affairs effectively.<sup>15</sup> By extension, the capacity to plan would be undermined if the law is applied retrospectively.<sup>16</sup> This certainty in knowing what tax is owed, demands in parallel the limited discretion of tax inspectors to apply or dis-apply the law. The legal certainty of knowing what tax liabilities

---

<sup>13</sup> I am very grateful to Dr Anzhela Yevgenyeva for her help and advice on this chapter.

<sup>14</sup> For discussion of taxation and the rule of law, see John Cullinane, 'Rule of Law' Taxation (11 May 2006); and Justine N Stefanelli and Lucy Moxham (eds), 'Do Our Tax Systems Meet Rule of Law Standards?' (September 2014) Bingham Centre Working Paper 2014/06.

<sup>15</sup> House of Commons Treasury Committee, *Principles of Tax Policy* (2010-2011, HC 753). Reservations and concerns are expressed in the case of apparent breaches or weakening of the rule of law at national level, for a recent example in the UK, see The Law Society, *Tax and the Rule of Law Position Paper* (Law Society, April 2015) <[www.lawsociety.org.uk/policy-campaigns/consultation-responses/tax-and-the-rule-of-law-position-paper](http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/tax-and-the-rule-of-law-position-paper)> accessed 3 February 2016.

<sup>16</sup> The principle of certainty is fundamental in western thought on taxation, rooted in Adam Smith's canons of taxation, *An Inquiry into the Wealth of Nations* (1776) Book 5. See also Ben Terra and Peter Wattèl, *European Tax Law* (Kluwer Law International 2005); and Francesco Forte, *Principles of Public Economics: A Public Policy Choice Approach* (Elgar Publishing 2010) 314. The certainty and intelligibility of taxation codes are central to tax planning, although – it might be argued that this is not necessarily the case, as some might argue that taxation codes are esoteric, unknown and unknowable except to the initiated tax lawyers and accountants. For an interesting jurisprudential perspective, see Bret Bogenschneider, "Wittgenstein on why tax law is comprehensible" (2015) BTR 252.

are owed would be defeated if tax administrators could apply the law as they thought fit with unlimited discretion. On a similar line of reasoning, the administration of tax demands the equal application of the law. As introduced above, and examined under the principle of equality before the law in Chapter 4, selective or deferential treatment in the application of the law has the potential to lead to a large range of negative consequences including: unfair distortions in competition and the market; and undermines the system of trust which is essential to the administration of taxation.<sup>17</sup> To ensure this trust, a high degree of transparency is needed to ensure that tax administrators are applying the law correctly and evenly, and tax payers are abiding by the law. As a consequence, the possibility of independent review of tax decisions is necessary.

Taxation is one of the most politically sensitive areas of law in the EU.<sup>18</sup> Control over domestic revenue is considered the ‘ultimate expression of national sovereignty’.<sup>19</sup> Revenue from taxation provides funds needed for governments to function. The choices made by states in the area of taxation are directly tied to public policy choices in matters of expenditure: for example, in the provision of national health services, public education, and pensions. Taxation is also closely linked with representation, or the idea that everyone who makes use of the public services and infrastructure funded by taxes, ought to also contribute to its upkeep in the form of taxes. The perception of fairness in the collection of taxes is essential to trust in the system. As will be examined in Section 3.3, selective or deferential enforcement can have a damaging impact on the degree of trust necessary for the effective functioning of the tax system.<sup>20</sup>

---

<sup>17</sup> OECD, *Citizen-State relations. Improving governance through tax reform* (2010) 33 <[www.oecd.org/dac/governance-peace/governance/docs/46008596.pdf](http://www.oecd.org/dac/governance-peace/governance/docs/46008596.pdf)> accessed 10 December 2015. See also Lars P Feld and Bruno S Frey, ‘Trust breeds Trust: How Taxpayers are Treated’ (2002) *Econ Gov* 87; Benno Torgler, ‘Tax Morale, Rule-Governed Behaviour and Trust’ (2003) *Constit Pol Econ* 119; John Hudson, ‘Institutional Trust and Subjective Well-Being across the EU’ (2006) *Kyklos* 43; and Benno Torgler, ‘Tax Morale, Eastern Europe and European Enlargement’ (2012) *Communist and Post-Communist Stud* 11.

<sup>18</sup> ‘Joint statement by European Council President and European Commission President after the G8 Summit in Lough Erne (UK)’ MEMO/13/582.

<sup>19</sup> William J Craig and Ajay Kumar, ‘Tax Harmonisation for Europe and the World: Could the ECJ show the Way?’ (2007) *ICCLR* 341, 341.

<sup>20</sup> See Anthony Thomas, ‘Selective Enforcement and Equal Treatment’ in Justine N Stefanelli and Lucy Moxham (eds), ‘Do Our Tax Systems Meet Rule of Law Standards?’ Bingham Centre Working Paper 2014/06, September 2014: ‘Complex laws applied in an oppressive manner results in lower, not higher tax revenues’, 40. ‘

At EU level, the exigencies of the internal have meant that taxation cannot be considered an exclusively internal mechanism of economic and social control limited by the boundaries of the state (if it ever could be). The creation of the Single Market as an area without internal barriers to trade necessitated the abolition of customs duties<sup>21</sup> and charges having equivalent effect.<sup>22</sup> The application of taxation in Member States can have significant impact on the Single Market. For example, selective or discriminatory taxation can impact on the free movement of goods, and create distortions in the market by giving an unfair competitive advantage to some products over others. Similarly, and at issue in my case study, selective and favourable taxation agreements between national taxation authorities and business enterprises can result in a host of negative impacts on the internal market, including an unfair competitive advantage for companies able to benefit from free movement and favourable tax agreements over those who cannot,<sup>23</sup> and the erosion of Member States' tax base<sup>24</sup> due to artificially shifting profit from one Member State to another. For this reason, the decisions of national taxation administrations can fall under the purview of EU law.

EU competences in the area of taxation are governed by Chapter 2 TFEU. The division of competences reflects the political tensions in the field of taxation – which also makes it a pertinent case study for EUCA. As taxation is one of the most politically sensitive fields of law in the EU,<sup>25</sup> it has been divided by spheres of competence into areas solely within the purview of Member States (*direct taxation*), and those to be shared with the EU (*indirect taxation*). Indirect taxes are imposed on transactions (for example VAT), sales of goods and services, and excise duties on alcohol, tobacco and energy products (such as gas or oil). Direct taxation (paradigmatically, income tax) is the responsibility of the Member State.

---

<sup>21</sup> Arts 28-30 TFEU.

<sup>22</sup> Arts 34-37 TFEU.

<sup>23</sup> For example, small and medium-sized enterprises who do not engage in cross-border trade.

<sup>24</sup> The Tax Base is the total amount of assets or revenue which can be taxed by authorities. Tax base erosion, also referred to as 'Base Erosion and Profit Shifting (BEPS)', refers to the tax avoidance strategies employed by multi-national companies to artificially shift profits from one state to another to take advantage of favourable tax rates and arrangements. See OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD 2013).

<sup>25</sup> Joint statement by European Council President and European Commission President after the G8 Summit in Lough Erne (UK) on June 17–18, 2013 MEMO/13/582.

In matters of direct taxation, Member States control and administer the taxation rates, and collection. There is no explicit provision within the Treaties for direct taxation, and there is very limited (if any) legislation in the area.<sup>26</sup> The only legal base upon which direct tax measures have been proposed is Article 115 TFEU for improvement of the functioning of the internal market which requires unanimity voting.<sup>27</sup> National direct taxation was initially intended (and assumed) to be beyond the scope of EU law, as control over direct taxation has been considered an essential element of national sovereignty.<sup>28</sup> However, direct taxation in the form of corporate tax can have a clear impact on cross-border trade, creating, for example, issues including discrimination,<sup>29</sup> and double taxation.<sup>30</sup> MNEs claim that direct corporate taxation can result in the additional administrative burdens of tax refund claims, and the need to obtain information on foreign tax rules, which can impact on cross-border trade.<sup>31</sup> Even though it is within the sphere of national direct taxation, directly or indirectly discriminating through imposition of taxes on products of other Member States is forbidden on the basis of Articles 110-113 TFEU. The Court of Justice has been pro-active in assessing whether national fiscal measures are discriminatory or violate fundamental freedoms,<sup>32</sup> although also cautious in applying the full scope of free movement law to national taxation regimes in cases of non-discriminatory tax measures due to the political sensitivity of the area.<sup>33</sup> State aid law (Article

---

<sup>26</sup> de la Feria and Fuest (n 10) 51; and Michel Aujean, "Tax Policy in the EU: Between Harmonisation and Coordination" (2010) 16 *Transfer: European Review of Labour and Research* 11.

<sup>27</sup> The requirement of unanimity means that legislation in a politically sensitive area is highly unlikely. This has caused issues in terms of the case study: see Sections 3.5.1 and 3.5.3. See Rita de la Feria and Clemens Fuest (n 10) 51–52.

<sup>28</sup> See Suzanne Kingston, 'The Boundaries of Sovereignty: The EJC's Controversial role Applying Internal Market Law to Direct Tax Measures' (2006-2007) 9 *CYELS* 287; Axel Cordewener, Georg Kofler, Servaas Van Thiel, 'The Clash between European Freedoms and National Direct Tax Law: Public Interest Defences available to the Member States' (2009) 46 *CMLR* 1951; and Sjored Douma, *Optimization of Tax Sovereignty and Free Movement* (IBFD 2011) ch 2.

<sup>29</sup> For example, by discriminately taxing wine with respect to beer, a national industry was indirectly advantaged. Case 170/78 *Commission v United Kingdom* [1983] ECR 2265. Discriminatory taxation is prohibited under Article 110 TFEU.

<sup>30</sup> Double taxation refers to the situation in which the same income, asset (in the instance of capital taxes), or financial transaction (in case of sales tax) is taxed in two (or more) different jurisdictions. The effects of double taxation are usually mitigated by double taxation treaties. The converse of double taxation is the practice of tax avoidance called double non-taxation: MNEs exploit disparities in the tax laws of states to avoid paying any taxes. Tax avoidance and harmful tax practices are discussed in Section 3.4.

<sup>31</sup> Commission, 'Taxation: Removing Cross-Border Tax Obstacles for EU Citizens' (Press Release) IP/10/1751.

<sup>32</sup> Rita de la Feria and Clemens Fuest (n 10) 71.

<sup>33</sup> See Suzanne Kingston, 'A Light in the Darkness? Recent Developments in the ECJ's Direct Tax Jurisprudence' (2007) 44 *CMLR* 1321; and Cordewener et al (n 28).

107 TFEU) has become the foremost tool used by the Commission to address advance tax rulings, and this area will be addressed in particular in Sections 3.4 and 3.5.

The Commission has encouraged co-ordination between taxation authorities of Member States, and is working towards the elimination of tax obstacles to all forms of cross-border activity, in the form of soft law approaches.<sup>34</sup> Prior to the Luxleaks scandal beginning in November 2014, this approach of encouragement towards co-ordination reflected Commission concerns for the probable political rejection of any possibility of a harmonised taxation regime in Member States, despite potential benefits a single tax policy might have for the Internal Market.<sup>35</sup> An example of co-ordination rather than harmonization is the Europe 2020 Strategy,<sup>36</sup> which emphasised that the goal of smart, sustainable and inclusive growth in the Single Market would be helped by increased co-ordination of tax policies across the Member States.<sup>37</sup> The push towards co-ordination, rather than harmonisation, is likely a response to the strong objection in some Member States to any suggestion of a harmonised approach towards taxation. For some Member States, notably Ireland,<sup>38</sup> a low corporation tax rate has been seen as a key strategy to attract business and make the country competitive in the EU market and the perceived threat to the low corporation tax rate from the Lisbon Treaty

---

<sup>34</sup> See Commission Communication, 'Tax policy in the European Union - Priorities for the years ahead' COM (2001) 260. See also H Gribnau, 'Improving the Legitimacy of Soft Law in EU Tax Law' (2007) 35 *Intertax* 30; and Pasquale Pistone, 'Soft Tax Law: Steering Legal Pluralism towards International Tax Coordination' in D Weber (ed), *Traditional and Alternative Routes to European Tax Integration* (IBFD 2010) 97–116.

<sup>35</sup> *ibid.*

<sup>36</sup> Commission, 'Europe 2020: A strategy for smart, sustainable, and inclusive growth' (Communication) COM (2010) 2020 final.

<sup>37</sup> For example, Section 4.3 "Pursuing smart budgetary consolidation for long-term growth" states "The revenue side of the budget also matters and particular attention should also be given to the quality of the revenue/tax system. Where taxes may have to rise, this should, where possible, be done in conjunction with making the tax systems more "growth-friendly". For example, raising taxes on labour, as has occurred in the past at great costs to jobs, should be avoided. Rather Member States should seek to shift the tax burden from labour to energy and environmental taxes as part of a "greening" of taxation systems.' Commission, 'Europe 2020: A strategy for smart, sustainable, and inclusive growth' (Communication) COM (2010) 2020 final.

<sup>38</sup> In the period of 2010-2014, the Irish corporate tax rate remained 12.5%, compared with the EU average of 22.93%. This can be also compared with, in the same period, the highest average corporate income tax rates of France (35.8%), Malta (35%), Belgium (34%), Italy (31.4%), and Germany (30.2%). This rate rivals the lowest corporate taxation rates found in Bulgaria (10%), Cyprus (12.5%), Latvia (15%), and Lithuania (15%). For further comparison, the UK has been steadily decreasing corporate taxation rates since 2008 (from 30%), and for the 2010-2014 period had an average of 24.4%. See Eurostat, 'Taxation Trends in the European Union: Data for the EU Member States, Iceland and Norway 2014 Edition' (EU Publications Office 2014).

was a key reason for its (initial) rejection during the 2008 Irish Referendum.<sup>39</sup> Such protectionist policies relating to fiscal measures led to the Commission abandoning plans for the common consolidated corporate tax base (CCCTB) in 2011, and are also reflected in inconsistent statements on the value of tax competition between Member States by the EU institutions.<sup>40</sup>

With this in mind, it is clear that we can find a reflection of the on-going tensions latent within the EU in the field of taxation, culminating in the current state of uncertainty and political crisis across Europe as both Member States and the EU struggle to maintain control on taxation, markets and the economy. In the next section, I detail the Luxleaks scandal which has resulted in a spate of measures intended to ensure fair tax and transparency in corporate taxation measures in the EU.

### **3.3 Background to the Case Study: Luxleaks**

The Luxleaks scandal and its aftermath reflects the debates which surround and exemplify the importance of the rule of law principles which substantiate EUCA. Additionally, the ongoing conflict between Union and Member State institutions in regards to the sharing of information related to the deals shows the conflict between the competence of the EU and authority of the Member State in terms of the regulation of national measures which have the potential to have a significant impact on the internal market. The Luxleaks scandal concerns the revelations published by the International Consortium of Journalists.<sup>41</sup> It followed the leak of over 28,000 pages of confidential, official documents concerning 'Advance Tax Rulings' (or

---

<sup>39</sup> Jamie Smyth, 'Treaty does not Threaten Ireland's Corporate Tax Rate' *The Irish Times* (Dublin, 24 September 2009).

<sup>40</sup> There appears to be a certain inconsistency in the Commission's approach towards tax competition and harmonisation: in one document, the Commission argued that tax competition ought to be 'welcomed' as an incentive towards public efficiency: Commission, "One Market, One Money" (1990) 44 *European Economy* 29. Conversely, the Commission later argued that tax competition results in locational inefficiencies, see Commission Working Paper, "Company Taxation in the internal market" COM (2001) 582 final, 26.

<sup>41</sup> The ICLJ is a global network of journalists collaborating on international investigations, focussing on cross-border crime, corruption and the accountability of power. Publication of the LuxLeaks investigations was partnered with *Süddeutsche Zeitung* (Germany), *Le Monde* (France), *The Irish Times* (Ireland), *Tagesanzeiger* (Switzerland), *The Guardian* (UK), and many others. Further information [www.icij.org/](http://www.icij.org/).

advance tax deals)<sup>42</sup> afforded by the Duchy of Luxembourg to over 340 major multi-national companies based (often only in name) in Luxembourg between 2002-2010.<sup>43</sup> These Tax Rulings enabled MNEs to obtain legal guarantees in advance about how their tax position would be treated by the Luxembourgish tax administrators.<sup>44</sup>

The advance tax rulings would involve the companies, often through the intermediary of auditing firms, in arranging highly complex systems of hybrid-loans with subsidiaries.<sup>45</sup> The documents revealed by Luxleaks showed a 'rare glimpse of a tax system so complex that some of its purposes are impossible to understand without extensive expertise or inside political knowledge.'<sup>46</sup> These arrangements benefitted from the implementation of the 'Parent-Subsidiary Directive' which relaxed the conditions for exempting dividends from withholding tax and eliminated double taxation for subsidiaries whose parent company is headquartered in a different EU state from the subsidiary.<sup>47</sup> Negotiations on these complex arrangements were conducted in private meetings between company representatives and Ministry officials, and written proposals were often approved the same day as they were submitted to the Ministry of Finance of Luxembourg.<sup>48</sup> The net effect of these rulings was to

---

<sup>42</sup> The language surrounding the LuxLeaks scandal is also an interesting aspect in terms of the implications: variously called advanced tax 'deals', and advanced tax 'rulings' in terms of taxation – one carries the implication of a negotiated agreement (deal) which has been the term used by the ICLJ in discussion of LuxLeaks; while 'rulings' implies application of the law, and this term has been used by the Luxembourg authorities, and the Commission. Cf Leslie Wayne et al, 'Leaked Documents Expose Global Companies' Secret Tax Deals in Luxembourg' (ICLJ, 5 November 2014, <[icij.org/project/luxembourg-leaks/leaked-documents-expose-global-companies-secret-tax-deals-luxembourg](http://icij.org/project/luxembourg-leaks/leaked-documents-expose-global-companies-secret-tax-deals-luxembourg)> accessed 13 December 2015; and Commission Press Release, 'State aid: Commission investigates transfer pricing arrangements on corporate taxation of Amazon in Luxembourg' IP/14/1105 (7 October 2014).

<sup>43</sup> During the publication of documents related to LuxLeaks, it was revealed that in one instance over 1,600 companies were registered at just one address in Luxembourg: Bastian Obermayer, 'Dieser Briefkasten ist sechs Firmen' Süddeutsche Zeitung (6 November 2014).

<sup>44</sup> *ibid.*

<sup>45</sup> For example, see R Benckiser, '12 LuxLeaks diagrams that will make your head spin' (The Guardian, 7 November 2014, <[theguardian.com/business/gallery/2014/nov/07/12-luxleaks-diagrams-that-will-make-your-head-spin](http://theguardian.com/business/gallery/2014/nov/07/12-luxleaks-diagrams-that-will-make-your-head-spin)>).

<sup>46</sup> Allison Christians, in writing about the LuxLeaks documents, is even more strongly condemnatory of the regime, writing, this 'confronts the viewer with the likelihood that written laws are wrongly perceived or interpreted by the public, and maybe even intended to deceive them.' Allison Christians, 'Lux Leaks: Revealing the Law, One Plain Brown Envelope at a Time' (2014) Tax Notes International.

<sup>47</sup> Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [2011] L 345/8.

<sup>48</sup> Wayne et al (n 42).

reduce global tax bills in some cases to less than 1% of non-dividend income, a substantial difference where the average corporate income tax rate across the EU is about 25%.<sup>49</sup>

Defending the existence of ‘advance tax decisions’, Luxembourg’s Ministry of Finance stated that they were well established in many EU member states, such as Germany, France, the Netherlands, the UK and Luxembourg, and do not conflict with EU law on condition that ‘all taxpayers in a similar situation are treated equally.’<sup>50</sup> While it is not clear how common<sup>51</sup> advance tax rulings of the kind discussed above are across Member States, it is clear that it is an ongoing practice.<sup>52</sup> The Luxembourgish taxation authorities also highlighted that advance Tax Rulings regimes are common across Member States. This implicitly argues that the Luxembourg regime ought not to be treated differently from other states,<sup>53</sup> and that Tax Rulings are perfectly acceptable. Luxembourg began an appeal against the Commission for what appeared like a ‘fishing expedition’, arguing that it was being ‘singled out’ for investigation.<sup>54</sup> However, once the Commission asked for the release of rulings from all EU Member States at the end of 2014, Luxembourg dropped its appeal.<sup>55</sup>

Appearing before the European Parliament’s extraordinary debate on the practice of tax avoidance, the President of the Commission, (and former Luxembourgish Prime Minister during the period concerned by Luxleaks) Jean-Claude Juncker concluded that ‘there probably was a certain amount of tax avoidance in Luxembourg, as in other EU countries. We find this

---

<sup>49</sup> For example, New York based Coach Inc, in 2012, paid €250,000 in taxes on €36.7 million in earnings made from the Asian market, channelled into Luxembourg, which is a rate of well under 1 percent. Wayne et al (n 42).

<sup>50</sup> Ministre des Finances, ‘The ministry of Finance comments on the practice of advance tax decisions’ Press Release (6 November 2014) <[www.mf.public.lu/actualites/2014/11/lux\\_fisc\\_eng\\_061114/index.html](http://www.mf.public.lu/actualites/2014/11/lux_fisc_eng_061114/index.html)> accessed 6 December 2015.

<sup>51</sup> The availability of information concerning advance tax rulings is discussed in Section 3.5.2 on the Tax Transparency Initiative.

<sup>52</sup> As part of an investigation on state aid, the Commission is currently gathering information on advanced tax rulings practices in the EU, see European Commission, “State aid: Commission extends information enquiry on tax rulings practice to all Member States” Press Release 17 December 2014, IP/14/2742 <[europa.eu/rapid/press-release\\_IP-14-2742\\_en.htm](http://europa.eu/rapid/press-release_IP-14-2742_en.htm)>. In a 2015 comparative study, it was found that most revenue bodies (51/56 of OECD and non-OECD states) operated a private rulings service, and about 90% of rulings produced are binding on these tax administrations. OECD, *Tax Administration 2015 Comparative Information on OECD and Other Advanced and Emerging Economies* (OECD Publishing 2015) 290.

<sup>53</sup> It follows from the principles of equality before the law that EU institutions in the performance of their duty to investigate the non-adherence to EU law by Member States, ought not discriminately bring proceedings against one Member State only, in the instance of widespread practice.

<sup>54</sup> Raymond HC Luja ‘Will the EU’s State Aid Regime Survive BEPS?’ [2015] BTR 379, 380.

<sup>55</sup> *ibid* 380.

everywhere in Europe because there is insufficient tax harmonisation in Europe',<sup>56</sup> and that the 'current system of corporate tax rules is unfit for purpose and unjust, with some companies losing out while others win by hiding behind a variety of national rules'.<sup>57</sup>

The Luxleaks reveals the political divisiveness which surrounds any consideration of national taxation regimes by the EU. It reflects the latent tensions between national and EU authority, and the levels of competition between Member States tax administrations. In one interpretation of the situation which favours the promise of legal certainty, this is a natural consequence of the normal operation of the internal market: the companies benefitted, not simply from Luxembourg's taxation arrangements, but rather from the interaction of many different taxation systems. It is pertinent to note that under EU law, the Court of Justice has repeatedly held that companies moving between Member States in order to benefit from a tax disparity is a protected exercise under EU free movement law.<sup>58</sup> 'Lawmakers should set the legal framework while accepting that companies will always seek to pay no more tax than they can get away with – legally or in terms of reputation'.<sup>59</sup> And, if tax authorities respect the principle of legal certainty as regards the application of tax law then 'taxation should not be a question of moral exhortation'<sup>60</sup>

While beyond the of scope of this thesis which focuses on EU legal measures, the Luxleaks scandal raised serious concerns from a rule of law perspective:<sup>61</sup> for example, the secrecy of the rulings, and the opaque taxation regime which enabled the rulings, is linked to

---

<sup>56</sup> Parliament, 'MEPs call for tax harmonisation and transparency on national tax rulings in 'Lux leaks' debate" (Press Release) <europarl.europa.eu/news/en/news-room/content/20141112IPR78502/html/MEPs-call-for-tax-harmonisation-and-transparency-in-%27Lux-leaks%27-debate> accessed 3 March 2016. This perceived insufficiency was the impetus for the re-launched plans for the Common Consolidated Corporate Tax Base [CCCTB].

<sup>57</sup> 'Juncker Attacks current Corporate Tax Rules' (2015) Comp Law 367.

<sup>58</sup> Brady Gordon, 'Tax competition and harmonisation under EU law: economic realities and legal rules' [2014] ELR 790, 796–97. See 15/81 *Gaston Schul BV, Douane Expiditeur BV v Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, para 33; C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, para 27; C-196/04 *Cadbury Schweppes Plc v Inland Revenue Commissioners* [2006] ECR I-7995, paras 36–51; and C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art* [2003] ECR I-10155, para 96.

<sup>59</sup> Editorial, 'Britain in an age of uncertainty' *Financial Times* (London, 13 October 2013)

<sup>60</sup> *ibid.*

<sup>61</sup> It is important to note that the Luxembourgish taxation regime, though reliant on EU law, was a national taxation framework and so beyond the scope of EUCA which aims to provide an apt standard of the rule of law to EU legal measures (or national measures implementing EU law such as directives) and not purely national norms.

a lack of certainty in the application of the law. Tax deals which depart from the letter of the law, and which vary according to the deal struck between taxation authorities and the companies concerned can result in unfair competitive advantages, and are examples of a violation of the principle of equality before the law. Across all Member States, the corporate tax approximates to between 12%-36%, however, the documents released as part of the Luxleaks investigation reveal that major corporations including Amazon, Apple and GE Foods enjoy global tax rates in the low single digits.<sup>62</sup> The reason this was so damaging is that “corporate tax avoidance not only eats into Member States' much-needed revenues, but it also damages public morale and creates competitive disadvantages for companies that cannot, or will not, engage in abusive tax practices.”<sup>63</sup> The ongoing conflict between Union and Member State institutions in regard to the sharing of information related to the deals shows the conflict between the competence of the EU and authority of the Member State in terms of the regulation of national measures which have the potential to have a significant impact on the internal market.

### **3.4 Advance Tax Rulings, Tax Avoidance, and Measures in Response to Luxleaks**

In this section, I explain the nature and effect of advance tax rulings, and consider the relationship between advance tax rulings, tax avoidance,<sup>64</sup> and harmful tax practices<sup>65</sup> which create distortions in the internal market. I then outline the tensions between the

---

<sup>62</sup> Christians (n 46).

<sup>63</sup> Commission, ‘Combating corporate tax avoidance: Commission presents Tax Transparency’ (Brussels 18 March 2015) Memo/15/4609 <europa.eu/rapid/press-release\_MEMO-15-4609\_en.htm>.

<sup>64</sup> Tax avoidance is the legal means by which taxpayers can make use of the law to avoid or reduce the taxes owed. In the EU, cross-border taxpayers can use existing disparities between the tax law of Member States to reduce or remove tax liabilities.

<sup>65</sup> Harmful tax practices are tax treatments or actions which can, according to the European parliament, lead to a wide range of negative effects including: the creation of an uneven playing field within and outside the internal market; unfair competition between Member States; undermining the single market and the fairness, stability and legitimacy of national tax systems; the erosion of national tax base; in addition to ‘social dissatisfaction, mistrust and a democratic deficit.’ Parliament, ‘Report on Tax Rulings and Other Measures similar in Nature and Effect’ (5 November 2015) A8-0317/2015, Section aa.

Commission's new 'priority'<sup>66</sup> to tackle corporate tax avoidance in the EU and the political sensitivities of corporate taxation.

Advance tax rulings are assurances issued by tax authorities to taxpayers in advance of certain transactions, confirming the tax treatment of the transaction. Before considering the relationship between advance tax rulings and tax avoidance, it is important to note that the rulings fulfil an important function in tax administration systems. Tax authorities are able to provide companies with clarity on how corporate tax liability will be calculated, and the use of special tax provisions. In this way, advance rulings have an important function in as a means to ensure legal certainty. In addition to legal certainty, there are many reasons for tax administrations and tax payers to support the practice of advance tax rulings. For example, advance tax rulings create a cooperative relationship between taxpayers and administrations through the exchange of information.<sup>67</sup> Tax administrations are also able to obtain information in advance that otherwise would only be received during a tax audit, and so may be able to advise the legislator on any loopholes or inconsistencies in tax legislation.<sup>68</sup> Importantly, as Michael Lang points out, tax rulings can 'harmonise administrative practices on specific legal issues before legal disputes end up before a court'.<sup>69</sup>

Generally, advance tax rulings do not, and are not intended, to create tax benefits.<sup>70</sup> The effect of advance tax rulings is meant to confirm a tax treatment that is already foreseen by the law and provide tax authorities with detailed information on the firms' tax structures.<sup>71</sup> Whether or not an Advance Tax Ruling is binding on the tax administration which administered it varies from state to state.<sup>72</sup> For example, as noted above, Advance Tax Rulings are now binding in Luxembourg, whereas they are not binding in the Republic of Ireland.

---

<sup>66</sup> Commission, 'The Anti-Tax Avoidance Package – Questions and Answers' (Press Release) MEMO/16/160 <[http://europa.eu/rapid/press-release\\_MEMO-16-160\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-160_en.htm)> accessed 15 February 2016.

<sup>67</sup> Michael Lang, 'Tax Rulings and State Aid Law' (2015) BTR 391, 391.

<sup>68</sup> *ibid* 391.

<sup>69</sup> *ibid* 391.

<sup>70</sup> Inga Hardeck and Patrick Wittenstein, 'Achieving Tax Certainty and Avoiding Taxes? – Evidence from Luxembourg Tax Rulings' (2016) <<http://ssrn.com/abstract=2709629>> accessed 25 February 2016.

<sup>71</sup> *ibid*.

<sup>72</sup> Lang (n 67).

However, where they are binding, these advance tax rulings ‘often remain unpublished, and are only known to the two parties to the proceedings.’<sup>73</sup> The secretive nature is key to the issues of the transparency of tax administration, and use of tax rulings as a very effective tool of corporate tax avoidance.<sup>74</sup> As evidenced by Luxleaks, MNEs can use advance tax rulings to gain special tax benefits, which are protected from public scrutiny (and the scrutiny of other Member States’ tax administrations) through the secrecy of these rulings. However, it is a fallacy to assume that *all* tax rulings are aimed at tax avoidance, and it is important to remember that these rulings fulfil an important function of providing legal certainty to tax payers. For example, in their examination of the evidence provided by Luxleaks, Inga Hardeck and Patrick Wittenstein found that ‘some rulings show less tax avoidance potential and seem to be exclusively driven by seeking legal certainty.’<sup>75</sup> They concluded, however, that ‘findings suggest that requesting a Luxembourg ruling is on average part of a tax avoidance strategy’<sup>76</sup> In the fallout of Luxleaks, the Commission has it a priority to effectively tackle corporate tax avoidance<sup>77</sup> and the larger issue of Base Erosion and Profit Shifting (BEPS).<sup>78</sup>

It is here that we find the grey area of advance tax rulings, corporate tax avoidance, and harmful tax practices, which also highlights the latent tensions between the EU, large and small Member States, and taxpayers. Advance tax rulings are legal instruments, and fulfil an important function of providing legal certainty to taxpayers (though, as I have highlighted, raise other rule of law concerns as regards violations of equality before the law, limited discretion and transparency). Tax avoidance is also legal practice, though it can cause harmful effects on the internal market, Member States’ tax base, and public perceptions of the legitimacy and fairness of the tax system. Tension therefore arises between EU competence to improve the functioning of the internal market and Member States’ political preference for

---

<sup>73</sup> *ibid* 392.

<sup>74</sup> Luja, ‘Will the EU’s State Aid Regime Survive BEPS?’ (n 54) 380; and Hardeck and Wittenstein (n 70).

<sup>75</sup> Hardeck and Wittenstein (n 70).

<sup>76</sup> Hardeck and Wittenstein (n 70).

<sup>77</sup> <[ec.europa.eu/taxation\\_customs/taxation/company\\_tax/transparency/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/transparency/index_en.htm)>.

<sup>78</sup> ‘Base Erosion and Profit Shifting (BEPS), refers to the tax avoidance strategies employed by multi-national companies to artificially shift profits from one state to another to take advantage of favourable tax rates and arrangements. See OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing 2013).

tax sovereignty and tax competitiveness. This is, in effect, the crux of the issue: corporate taxation is such a sensitive issue of national concern, that Member States are unwilling to give up sovereignty to the EU to allow any measure of harmonisation or legislation in the area.<sup>79</sup> The consequence is that measures adopted by the EU are ill-suited to tackle the large-scale issue of corporate tax avoidance, and (as evaluated in Section 3.5) cause a host of EUCA concerns.

In effort to respond to concerns of wide-scale tax avoidance across the EU brought to light by Luxleaks, one of the first actions of the EU was for the Council amended the Parent-Subsidiary Directive, in a move to ban the tax loop hole which prevented the double non-taxation of dividends distributed within corporate groups which have been derived from ‘hybrid-loan’ arrangements.<sup>80</sup> The European Parliament set up a Special Committee on Tax Rulings (TAXE) in February 2015 to investigate corporate tax practices in Member States, as well as the instruments and impact of aggressive tax planning.<sup>81</sup> The work of the TAXE Committee was continued under a new six-month mandate, starting December 2015. Much of the TAXE Committee’s scrutiny has been directed at the practice of Advance Tax Rulings across Member States, and these have been the target of the Commission’s actions. In the next section I evaluate three primary legal measures aimed at tackling tax avoidance: the Commission’s state aid investigations into advance tax rulings; the Tax Transparency Initiative; and proposed future measures to tackle tax avoidance.

### **3.5 Evaluating the EU Responses to Advance Tax Rulings**

In the following sections, I demonstrate how EUCA can provide a source of guidance in times of political uncertainty and crisis, by applying the principles of EUCA in the context of EU legal measures taken in response to Luxleaks to ensure fair tax and transparency in corporate

---

<sup>79</sup> See Section 3.5.3.

<sup>80</sup> Council Amendment to Directive 2011/96/EU.

<sup>81</sup> See TAXE, ‘Report on tax rulings and other measures similar in nature or effect’ (5 November 2015) 2015/2066 (INI) <[www.europarl.europa.eu/committees/en/taxe/home.html](http://www.europarl.europa.eu/committees/en/taxe/home.html)> accessed 22 February 2016.

taxation measures in the EU. The measures which I evaluate are: **state aid proceedings** against Member States' advance tax rulings (Section 3.5.1); the **Tax Transparency Initiative** (Section 3.5.2); and proposed future measure to tackle corporate tax avoidance in the **Common Consolidated Corporate Tax Base** (Section 3.5.3).

### 3.5.1 *State Aid Proceedings against Advance Tax Rulings*

In this section, I evaluate the Commission's actions in investigating Tax Rulings in a number of Member States. I consider these actions under the principles of **legal certainty, equality before the law, and transparency.**

The Commission has opened preliminary (which are confidential), and formal (public) investigations into the tax ruling practices of all Member States.<sup>82</sup> In the event that rulings are found to be in breach of state aid rules, companies could face revised tax assessments of up to the last 10 years. These investigations have been wide-ranging: in December 2014, the Commission extended its preliminary investigation to all Member States, requesting a general description of the practice of advance tax rulings, and *all* rulings provided to tax payers from 2010–2013.<sup>83</sup> The Commission also began formally investigating whether advance tax rulings in Luxembourg, the Netherlands, Belgium, and the Republic of Ireland constitute illegal state aid, violating Article 107(1) TFEU.<sup>84</sup> In the case of Starbucks' coffee in the Netherlands, and Fiat in Luxembourg, the Commission has identified the Tax Rulings to be illegal, as they endorsed 'artificial and complex methods to establish taxable profits' which was achieved by setting prices for goods and services sold intra-group which 'did not reflect economic reality'.<sup>85</sup>

---

<sup>82</sup> Luja 'Will the EU's State Aid Regime Survive BEPS?' (n 54) 379.

<sup>83</sup> *ibid* 383–84.

<sup>84</sup> Commission, 'State aid: Commission investigates transfer pricing arrangements on corporate taxation of Amazon in Luxembourg' (7 October 2014) IP/14/1105.

<sup>85</sup> Commission, 'Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules' (21 October 2015) IP/15/5880. Transfer pricing is a regulated exercise as it concerns the setting of price for goods or services provided between legal entities which are controlled within the same enterprise. Overpricing or under-pricing goods can be an effective tool of tax

In the case of Starbucks Coffee,<sup>86</sup> this was done by setting prices for intra-group transfer of goods and services which did not correctly correspond to the market prices. As a result, profits were shifted to different Member States where they were not taxed, and where tax was paid, it was done on underestimated profits. According to the Commission, this is a violation of state aid rules in the EU: ‘Tax Rulings cannot use methodologies, no matter how complex, to establish transfer prices with no economic justification and which unduly shift profits to reduce the taxes paid by the company’.<sup>87</sup> In both cases, the Commission ordered Luxembourg and the Netherlands to recover between €20-30 million in unpaid tax, the exact amount to be determined based on the methodology provided within the Commission decision in order to remove the unfair competitive advantage enjoyed as a result of the tax ruling. This was followed by further and significant cases, for example: in August 2016, the Commission found that Ireland was violating state aids in its tax agreement with Apple, and ordered tax to be paid in the sum of €13 billion.<sup>88</sup>

According to the Commission, advance tax rulings are not *per se* illegal, except where they artificially reduce the tax burden of a company. In this case, the Commission considers these rulings to constitute illegal state aid under Article 107 TFEU.<sup>89</sup> The Court’s criteria for determining whether there has been a violation of state aid are: ‘(i) the financing of that measure by the State or through State resources; (ii) the selectivity of that measure, and; (iii) the effect of that measure on trade between Member States and the distortion of competition resulting from the measure.’<sup>90</sup> With regard to tax provisions, *selectivity* is essential in order to lead to a state aid violation. A measure can and should only be considered state aid if it

---

avoidance to hide profits, which can have harmful effects as 60% of world trade is intra-group transfer: OECD, ‘Transfer pricing: Keeping it at arm’s length’ *OECD Observer* 230 (corrected 2008, first published January 2002).

<sup>86</sup> *Starbucks* (Case SA.38374) Commission Decision of 11 June 2014 [2014] OJ C460/11.

<sup>87</sup> Commission, ‘Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules’ Press Release (Brussels 21 October 2015) IP/15/5880 <[http://europa.eu/rapid/press-release\\_IP-15-5880\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-15-5880_en.htm?locale=en)> accessed 5 January 2016.

<sup>88</sup> Commission, ‘State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion’ Press Release (Brussels, 30 August 2016) IP/16/2923 <[http://europa.eu/rapid/press-release\\_IP-16-2923\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2923_en.htm)>.

<sup>89</sup> Article 107(1) TFEU states in full: ‘Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.’

<sup>90</sup> Joined Cases C-78/08 to C-80/08 *Paint Graphos* [2011] ECR I-07611, para 43.

constitutes an exemption,<sup>91</sup> or a violation of national law. However, the Court of Justice noted this approach did not result in ‘satisfactory’ results.<sup>92</sup> Advance tax rulings can only be ‘selective’ if there is some element of unequal treatment, where tax administrators have discriminately exercised discretion to grant a favour to one taxpayer over another.<sup>93</sup>

However, the crux of this issue is that there naturally exist disparities between taxation systems. The issue is that disparities and mismatches between taxation systems can and do result in double non-taxation of MNEs, leading to the question of ‘whether rulings that facilitate tax avoidance by confirming mismatches should, as such, be scrutinised under the State aid framework.’<sup>94</sup> Under EU law, ‘barriers to the internal market are those which *prevent* access to competitive differences in tax systems, not the differences themselves.’<sup>95</sup> There is a misinterpretation of the protections of tax competition,<sup>96</sup> and the protection of the free movement of companies to find the most favourable taxation system within Member States.<sup>97</sup> Raymond Luja argues, and I would agree, that it is incorrect to try and address disparities between taxation systems through the state aid mechanism, as mismatches cannot be attributed to a single Member State.<sup>98</sup> Correcting for, or addressing disparities in different taxation frameworks ought to be done through legislation at EU level in order to ensure transparency and cooperation between Member States, and also certainty for taxpayers.

This should be an issue for legislation at EU level, not through Court and Commission intervention.<sup>99</sup> Luja argues that advance tax rulings should only be at issue for state aid

---

<sup>91</sup> Lang (n 67) 393.

<sup>92</sup> Joined Cases C-106/09P and C-107/09P *Commission and Spain v Gibraltar and United Kingdom* [2011] ECR I-11113

<sup>93</sup> Lang (n 67) 394.

<sup>94</sup> Pierpaolo Rossi-Maccanico, ‘Fiscal Aid, Tax Competition, and BEPS’ [2014] *Tax Notes International* 857.

<sup>95</sup> Brady Gordon, ‘Tax competition and harmonisation under EU law: economic realities and legal rules’ [2014] *ELR* 790, 796.

<sup>96</sup> See Section 3.1. Also, there appears to be a certain inconsistency in the Commission’s approach towards tax competition and harmonisation: in one document, the Commission argued that tax competition ought to be ‘welcomed’ as an incentive towards public efficiency: Commission, “One Market, One Money” (1990) 44 *European Economy* 29. Conversely, the Commission later argued that tax competition results in locational inefficiencies, see Commission Working Paper, “Company Taxation in the internal market” COM (2001) 582 final, 26.

<sup>97</sup> C-202/97 *Fitzwilliam Executive Search v Bestuur van het Landelijk* [2000] ECR I-833, Opinion of AG Jacobs, para 42.

<sup>98</sup> Luja ‘Will the EU’s State Aid Regime Survive BEPS?’ (n 54) 387.

<sup>99</sup> *ibid* 387.

violations if they are in violation of national law, or case law not simply if they are confirming the application of the law in a manner which is not preferential.<sup>100</sup> The fact that the problem of disparities between tax systems cannot easily be resolved by secondary legislation under Articles 115 or 116 TFEU due to a lack of political will needed for unanimity does not mean that the Commission should fall back on its independent and ex officio powers of review for state aid violations.<sup>101</sup>

An interesting question is whether the Court of Justice will uphold the Commission decisions with regard to state aid violations. On one argument, the application of state aid law to tax rulings is beyond the intended scope of application. The law of state aid was not intended to act as substitute to secondary legislation to fix the mismatches and disparities between legal systems.<sup>102</sup> This question also links to the question of the judicial capacity with regard to advance tax rulings. Despite the increasing number of legal disputes, the co-rapporteurs, Elisa Ferreira and Michael Theurer, for the European Parliament Report on tax rulings note that there are no efficient mechanisms of dispute resolution at EU level.<sup>103</sup> The length of time needed for resolution of a settlement under the EU arbitration convention is up to eight years, which significantly contributes to legal uncertainty for both companies. Many Member States have created separate tax courts with specialist judges and accountants to understand complex taxation disputes. Luja points out that the General Court is not a specialist Court, and could find it a difficult task to understand the technical issues of taxation in order to determine whether a selective benefit has been given.<sup>104</sup>

Advance tax rulings fulfil an important function in tax systems, and the doctrine regarding recovery in state aid violations can be considered quite 'harsh'<sup>105</sup> especially in the

---

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid* 388.

<sup>102</sup> *ibid* 388.

<sup>103</sup> Parliament, 'Report on on tax rulings and other measures similar in nature or effect' (5 November 2015) 2015/2066(INI) <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0317+0+DOC+PDF+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0317+0+DOC+PDF+V0//EN)> accessed 26 February 2016.

<sup>104</sup> Luja 'Will the EU's State Aid Regime Survive BEPS?' (n 54) 388.

<sup>105</sup> Raymond HC Luja, 'State Aid Recovery & Investor Protection for US Taxpayers Before and After TTIP: How Back Taxes might lead to an Inequitable Treat...' *Draft – 15 January 2016 – To be included in the 10th GREIT Conference Reports.*

absence of legitimate expectations (which can only be raised by EU institutions, and not national institutions)<sup>106</sup> recovery of unlawful aid can be awarded against the previous decade.<sup>107</sup>

In terms of the principle of equality before the law, two objections have been raised against the Commission's state aid investigations regarding an alleged violation of the principle. As outlined in Section 3.4, Luxembourg objected to what it considered unfair targeting by the Commission,<sup>108</sup> dropping the appeal once the Commission asked for the release of rulings of all Member States at the end of 2014.<sup>109</sup> The second objection came from American MNEs who felt they were being unfairly targeted by the Commission's investigations.<sup>110</sup> In a strongly worded response, Commissioner Margrethe Vestager stated that she hoped the US understood that profits generated in Member States ought to be taxed, and that State aid investigations were complementary to legislative initiatives aimed at combatting BEPS and 'aim a proper, non-discriminative, application of tax laws in Europe'.<sup>111</sup>

### **EUCA Recommendations:**

The Commission's investigations into state aid violations of Member States has created a situation of legal uncertainty. The fact the Commission has requested a vast amount of information regarding advance tax rulings of Member States, and has begun an unknown quantity of preliminary investigations creates a climate of uncertainty as regards the legality of previous advance tax rulings. It is likely to cause pressure among tax administrations to reassess advance tax rulings. One interpretation is that aggressive action of the Commission

---

<sup>106</sup> *ibid.*

<sup>107</sup> Council Regulation 1999/659/EC of March 22, 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union of the EC Treaty, Articles 14(1), 14(2) and 15(1) [1999] OJ L83/1 of March 27, 1999 as amended (Regulation 1999/659/EC).

<sup>108</sup> Luja 'Will the EU's State Aid Regime Survive BEPS?' (n 54) 380.

<sup>109</sup> *ibid* 380.

<sup>110</sup> US Senate Finance Committee, 'Finance Committee Members Push for Fairness in EU State Aid Investigations' Press Release (15 January 2016) <<http://www.finance.senate.gov/chairmans-news/finance-committee-members-push-for-fairness-in-eu-state-aid-investigations->> accessed 4 March 2016.

<sup>111</sup> Letter from Margrethe Vestager (Member of the Commission) to Secretary Jacob Lew (Department of the Treasury) (29 February 2016) Ares(2016)957325.

in opening (and keeping confidential) preliminary investigations for state aid violations links back to larger issues of the difficulty of legislating in sensitive areas of the law. The Commission is unable to find the political consensus needed to support harmonisation in the area to tackle tax avoidance,<sup>112</sup> and so uses the law regarding state aids as an instrument to attack advance tax rulings perceived as harmful tax practices. The issue as regards EUCA is that this violates the principles of certainty and transparency.

Speculating, the state aid investigations by the Commission have likely led to a panic of the uncertainty of the legality of advance tax rulings in Member States. The fact of the investigations has led to an awareness of the possibility of state aid violation which, according to Luja, could lead to improved behaviour towards ‘aggressive’ tax avoidance structuring.<sup>113</sup> It is clear that there is some degree of uncertainty across the EU as to the legality under state aid law, in addition to the pressure caused by increased public demand for transparency, which is evidenced in the tax announcements made by Google<sup>114</sup> and Facebook<sup>115</sup> in early 2016. In January 2016, the Commission has indicated that it would consider investigation into the £120 million tax deal between Google and the UK.<sup>116</sup>

### **3.5.2 Tax Transparency Initiative on Advance Tax Rulings**

In this section, I evaluate whether the Tax Transparency Initiative proposed by the Commission against the standard set by EUCA. I consider it under the **principles of transparency, equality before the law, and cooperative authority**. The principle of transparency serves to guarantee the accountability, consistency and functioning of the legal

---

<sup>112</sup> The issues regarding harmonisation (through the example of the CCCTB) will be discussed in Section 3.5.3.

<sup>113</sup> Luja ‘Will the EU’s State Aid Regime Survive BEPS?’ (n 54) 388–89.

<sup>114</sup> See Committee of Public Accounts, *Corporate Tax Settlements* (HC 788, 2015–2016); and Kamal Ahmed, ‘Google agrees £130m UK tax deal with HMRC’ *BBC News* (23 January 2016) <<http://www.bbc.co.uk/news/business-35381130>> accessed 18 January 2016.

<sup>115</sup> James Titcomb, ‘Facebook to pay millions in UK tax after abandoning controversial structure’ *The Telegraph* (London 4 March 2016); and Kamal Ahmed, ‘Facebook to pay millions of pounds more in UK tax’ *BBC News* (4 March 2016) <<http://www.bbc.co.uk/news/business-35724308>> accessed 6 March 2016.

<sup>116</sup> Karen Hoggan, ‘Google Tax: European Commission to consider tax complaint’ *BBC News* (London, 28 January 2016).

system through the availability of information to the taxpayers regarding decisions made about the interpretation and application of the relevant tax rules. Following to the OECD:

Awareness and transparency are basic requirements for building public engagement and trust; without some degree of both, taxation is likely to be characterised by conflict rather than co-operation. Citizens must be aware of the taxes they are paying and be educated about the system of taxation and budgeting, while government must be transparent about tax collection and public spending.<sup>117</sup>

The outrage caused by Luxleaks was in part due to the discovery of the sheer scale of global tax avoidance uncovered. The advance tax rulings were entirely private to the Luxembourgish Ministry and the taxpayer involved. In response, the Commission has proposed the Tax Transparency Package (March 2015), a series of measures aimed at providing a fair and efficient corporate tax system in the EU. It includes the proposal for a directive on the automatic exchange of information between national tax authorities;<sup>118</sup> and a communication on tax transparency to tackle tax evasion and avoidance made possible by the EU.<sup>119</sup> The Communication detailed a number of plans on tax transparency including reviewing a Code of Conduct for Business Taxation; and a cooperative plan to quantify the scale of tax evasion and tax avoidance across the EU.<sup>120</sup> An Action Plan for a Fair and Efficient Corporate Tax System in the EU<sup>121</sup> was introduced in June 2015, which includes provisions aimed at reforming the corporate tax framework in the EU with aims of ‘combatting tax abuses, ensuring sustainable revenue and supporting an improved environment for business in the Single Market’. Council Directive 2011/16/EU which establishes procedures for administrative cooperation in the field of taxation (2011 Directive). Post Lux-Leaks, the 2011 Directive was amended to extended to include the mandatory automatic exchange of financial account

---

<sup>117</sup> OECD, ‘Citizen-State relations. Improving governance through tax reform’ (2010) 33 <[www.oecd.org/dac/governance-peace/governance/docs/46008596.pdf](http://www.oecd.org/dac/governance-peace/governance/docs/46008596.pdf)> accessed 2 March 2016.

<sup>118</sup> Proposal for Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (Brussels 18 March 2015) COM (2015) 135.

<sup>119</sup> Commission, ‘Communication on tax transparency to tackle tax evasion and avoidance made possible by the EU’ (Brussels 18 March 2015) COM (2015) 136.

<sup>120</sup> *ibid.*

<sup>121</sup> Commission, ‘Action Plan for a Fair and Efficient Corporate Tax System in the EU’ (Brussels 17 January 2015) COM (2015) 302.

information,<sup>122</sup> and cross-border tax rulings and advance pricing arrangements.<sup>123</sup> The information exchanged would include: (a) the name of the taxpayer or group; (b) a description of transactional issues addressed; (c) a description of the criteria establishing the agreement; (d) identification of potentially affected Member State(s); and (e) identification of other likely impacted taxpayers. The administrative burden intended to be kept minimal.

The amendments to the 2011 Directive are not designed to have retroactive effect, a decision which was criticised by the European Parliament in their opinion, and diverged from the Commission's recommendation.<sup>124</sup> According to the Commission, the mandatory exchange of Tax Rulings information should apply to all Tax Rulings issued within the ten years before it enters into force. The MEPs argued it should apply to all valid rulings on the day it enters into force. Whereas the Council agreed that the directive would only apply to rulings, as well as amendments and renewals after 31 December 2016. A further criticism of the Amendment as agreed by the Council is that the Commission has only limited access to the information in order to oversee conformity with, and proper application of, the amended 2011 Directive, and is explicitly not allowed to use any information for any other purpose. This rules out any litigation on the basis of information obtained through the instrument.

MEPs criticised the limited scope of the directive, which only applies to advance tax rulings with a cross-border element, and advance pricing arrangements. This criticism is based on the fact that national arrangements can still have a (negative) cross-border impact,<sup>125</sup> and could also represent a violation of the principle equality before the law. The decision to restrict the scope of the Directive could likely be administrative workability, and the clear EU

---

<sup>122</sup> Council Directive 2014/107/EU amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [2014] OJ L 359/1.

<sup>123</sup> Council Directive of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

<sup>124</sup> Parliament, 'Mandatory exchange of tax rulings proposal: a "missed opportunity" say MEPs' Press Release (13 October 2015) <<http://www.europarl.europa.eu/news/en/news-room/20151013IPR97373/Mandatory-exchange-of-tax-rulings-proposal-a-missed-opportunity%E2%80%9D-say-MEPs>> accessed 6 February 2016.

<sup>125</sup> *ibid.*

institutional competence to regulate the functioning of the internal market as regards cross-border trade.<sup>126</sup>

If the Council Directive is adopted, automatic exchanges of information will start on 1 January 2017, a later start than was envisioned by the European Parliament.<sup>127</sup> This was one of the criticisms directed at the amendment as regards timing. Additionally, the MEPs criticised the Directive for enabling a delay in communication of Tax Rulings between tax administrations. The Council directs that information on Tax Rulings should be provided ‘within three months following the end of the half of the calendar year during which the ruling was issued.’ In practice, this could translate to nine months.<sup>128</sup>

It is important, in consideration of EUCA transparency, to distinguish between transparency in terms of procedure (what agencies and institutions can and cannot do and access); and transparency in terms of public access to private information. This has been recognised by the Commission, concerned that there is currently a low level of transparency in terms of corporate taxation can enable and incentivise aggressive taxation planning,<sup>129</sup> as the lack of shared information on administrative taxation practice means that taxation authorities are unable to identify aggressive tax planning.<sup>130</sup> The Commission has made a priority of improving ‘corporate tax transparency, in order to re-establish the link between taxation and real economic activity, and effectively tackle corporate tax avoidance.’<sup>131</sup> There are concerns, however, that ‘transparency’ has been misinterpreted to mean the access by state authorities to personal data relating to the taxpayers violating rights to privacy.<sup>132</sup>

---

<sup>126</sup> Article 115 TFEU.

<sup>127</sup> *ibid.*

<sup>128</sup> *ibid.*

<sup>129</sup> For example, by exploiting legal loopholes, and mismatches between the tax rules of different Member States to artificially shift or move profits to jurisdictions of low or no taxation. See <[ec.europa.eu/taxation\\_customs/taxation/company\\_tax/transparency/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/transparency/index_en.htm)>.

<sup>130</sup> Commission, ‘Combating corporate tax avoidance: and Commission presents Tax Transparency Package’ (Press Release) IP/15/4610; Commission, ‘Proposal for a Council Directive amending 2011/16/EU as regards mandatory exchange of information in the field of taxation’ COM(2015) 135 final.

<sup>131</sup> *ibid.*

<sup>132</sup> European Commission, “Combating corporate tax avoidance: Commission presents Tax Transparency”, Memo 18 March 2015 Memo/15/4609 <[europa.eu/rapid/press-release\\_MEMO-15-4609\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4609_en.htm)>. J Freedman and G Macdonald, “The Tax Base for CCCTB: The Role of Principles” (n 73); Luís Eduardo Schoueri and Mateus Calicchio Barbosa, ‘Transparency: From Tax Secrecy to the Simplicity and Reliability of the Tax System’ (2013) BTR 666.

According to one of the major auditing companies, criticised the plans as creating a 'potentially significant administrative burden' and that it 'could result in divulgence of commercially sensitive information'.<sup>133</sup> A system which protects taxpayers' financial privacy also serves to 'protect governments' political autonomy and flexibility in administering their own tax laws. As Christians writes, '[l]awmakers must constantly balance the protection of their own policy space, the rights of specific taxpayers, and the need to preserve the public's trust in the system they have created.'<sup>134</sup>

The Commission's proposal for tax transparency directives aim to balance competing interests between Member States' tax administrations, corporate privacy interests, and the public's interest in ensuring the fair administration of taxation. Many of the criticisms raised by the Parliament are legitimate, as the proposal seems to have been scaled back to only apply to rulings, amendments and renewals after the date the directive comes in to force. This appears to be in contrast with the aggressive state aid investigations undertaken by the Commission, where a finding against a Member State can result in the recovery of 10 years of back taxes. This is likely to make the Directive more appealing and workable to Member States.

Tax administrations will need to cooperate fairly, with mutual trust as to the fair administration of tax principles. The complication, and one needing to be addressed by best practices and further communication between authorities, is that there exists natural disparities and mismatches between tax systems as to the definition and identification of what tax is owed by whom, when. In identifying Member States likely to be affected, there lies to an expectation of mutual trust. The oversight of the Commission, with the caveat that information gleaned cannot be used for another purpose (ie state aid violations), is perhaps the best method to ensure some degree of transparency in the exchange of advance tax ruling information.

---

<sup>133</sup> Ernst and Young, 'Tax Transparency: Seizing the Initiative' (2015) <[http://www.ey.com/Publication/vwLUAssets/Tax\\_Transparency\\_-\\_Seizing\\_the\\_initiative/\\$FILE/EY\\_Tax\\_Transparency.pdf](http://www.ey.com/Publication/vwLUAssets/Tax_Transparency_-_Seizing_the_initiative/$FILE/EY_Tax_Transparency.pdf)> accessed 28 January 2016.

<sup>134</sup> Christians (n 46).

The further step in the guarantee of transparency, is what information ought to be made available to the public. Prior to Luxleaks, advance tax rulings and tax avoidance were not mainstream topics but the scandal offered a 'rare glimpse of a tax system so complex that some of its purposes are impossible to understand without extensive expertise or inside political knowledge.'<sup>135</sup> Even now, the esoteric nature of explaining hybrid-loan agreements, and double non-taxation, creates distance between the public and the transparency (through intelligibility) of tax systems in the EU. In order to ensure public trust in the fair administration of tax, which as cited above is essential to the tax system,<sup>136</sup> there ought to be information made available regarding MNEs who operate in the EU, benefiting from the custom of EU consumers and EU trade rules. Large MNEs are appreciating this fact, as Google<sup>137</sup> and Facebook<sup>138</sup> are publically declaring tax deals made with Member States. However, this could be a return to the value of reputation, rather than respect for the rule of law and the fair administration of taxation: as cited above, 'companies will always seek to pay no more tax than they can get away with – legally or in terms of reputation'.<sup>139</sup>

### **EUCA recommendations:**

If we go back to the first principles of advance tax rulings, their purpose is to guarantee certainty for the taxpayer, and not to provide any further benefit or special treatment. Advance tax rulings are designed as instruments which detail the application of the law. If advance tax rulings are simply application of the relevant law of the Member State (which, under any account of the rule of law ought to be intelligible, accessible, and equal in

---

<sup>135</sup> Allison Christians, in writing about the LuxLeaks documents, is even more strongly condemnatory of the regime, writing, this 'confronts the viewer with the likelihood that written laws are wrongly perceived or interpreted by the public, and maybe even intended to deceive them.' Christians (n 46).

<sup>136</sup> See Section 3.2. See also n 18.

<sup>137</sup> See Committee of Public Accounts, *Corporate Tax Settlements* (HC 788, 2015–2016); and Kamal Ahmed, 'Google agrees £130m UK tax deal with HMRC' *BBC News* (23 January 2016) <<http://www.bbc.co.uk/news/business-35381130>> accessed 18 January 2016.

<sup>138</sup> James Titcomb, 'Facebook to pay millions in UK tax after abandoning controversial structure' *The Telegraph* (London 4 March 2016); and Kamal Ahmed, 'Facebook to pay millions of pounds more in UK tax' *BBC News* (4 March 2016) <<http://www.bbc.co.uk/news/business-35724308>> accessed 6 March 2016.

<sup>139</sup> Editorial, 'Britain in an age of uncertainty' *Financial Times* (London, 13 October 2013).

application) then it follows that there should not be an issue of exchange, in so far as sensitive information is not divulged where unnecessary. However, as established by Inga Hardeck and Patrick Wittenstein on the basis of information obtained from Luxleaks, advance tax rulings have been used as tools of tax avoidance, and many Member States will consider it in their interest to provide incentives to large MNEs to do transactional business within their borders.<sup>140</sup>

Though the Tax Transparency Initiative goes a long way to improving the state of transparency of tax arrangements made with MNEs and to tackling large scale tax avoidance, there remains issues as to the extent to which the public will be informed; the information will be shared fairly and in a timely fashion between authorities; the non-application of the Directive to enterprises operating within borders; and whether and how the information can be used at Member State and EU levels. The principle of transparency and cooperative authority means more than ‘a mere path towards exchange of information.’<sup>141</sup> This can only be achieved, however, on the basis of legislation at EU level, and one such proposal will be considered in the next section.

### ***3.5.3 The Proposed Common Consolidated Corporate Tax Base***

In this section, I consider a possible future measure to tackle corporate tax avoidance in the EU: the Common Consolidated Corporate Tax Base (CCCTB). I consider in the recommendation the **principle of co-operative authority**.

In June 2015, the EU commissioner for Tax, Pierre Moscovici re-launched plans for the common consolidated corporate tax base (or CCCTB).<sup>142</sup> The Common Consolidated

---

<sup>140</sup> Hardeck and Wittenstein (n 70).

<sup>141</sup> Schoueri and Calicchio Barbosa (n 131).

<sup>142</sup> See European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, COM (2011) 121/4; See <[ec.europa.eu/taxation\\_customs/taxation/company\\_tax/common\\_tax\\_base/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/common_tax_base/index_en.htm)>. Policy work towards the creation of a CCCTB began in 2001 (COM (2001) 582 of 23 October 2001), and was confirmed in 2003 (COM(2003) 726 of 24 November 2003). The Commission proposed the CCCTB in March 2011 (Proposal for a Council Directive on a Common Consolidated Corporate Tax Base COM (2011) 121/4) which failed to gain support among Member States.

Corporate Tax Base<sup>143</sup> is a single system of calculating tax liability for companies operating across borders within the EU. Companies would be able to consolidate all profits and losses across the Member States, and not have to follow (and determine) different rules for each Member State. The CCCTB does not affect the corporate tax rates in the EU, which would still be set by the Member States. The CCCTB would mean in practice that (1) companies would apply a single set of tax rules when calculating their tax base; (2) the tax of a group (parents and subsidiaries) would be consolidated such that profits and loss will be automatically offset; (3) transfer price fixing rules would no longer be relevant; and (4) the risk of double [non-]taxation will be minimised.

Considering the 2011 CCCTB proposal ‘too ambitious to be adopted in a single step’,<sup>144</sup> the new proposal will be implemented in a step-by-step basis. The 2016 proposal will be mandatory for multinational companies. The argument in favour of a mandatory CCCTB is that an opt-in system would be unlikely to be adopted by companies intending to utilise aggressive tax planning to avoid taxes. The mandatory aspect of the CCCTB represents a shift in attitude towards the CCCTB from a tool for simplifying taxation for companies to promote EU trade, to a potential anti-tax avoidance mechanism.<sup>145</sup> The CCCTB would work through existing administrative framework in each Member State, which are customised to accommodate this new approach to corporate taxation in the EU.

The arguments proposed in favour of the CCCTB are that it would improve the business environment of the Internal market as costs of operating cross-border would be simplified; and additionally it would tackle tax avoidance by removing current inconsistencies between national taxation systems to the benefit of companies practicing tax avoidance. When questioned about support for the CCCTB in the European Parliament, a majority of MNEs objected to the administrative burden of country-by-country reporting, especially if

---

<sup>143</sup> A tax base refers to the total assessed value of income, assets, and investments which are subject to taxation.

<sup>144</sup> Commission, ‘Questions and Answers on the CCCTB Re-Launch’ (Press Release) MEMO/15/5174 <europa.eu/rapid/press-release\_MEMO-15-5174\_en.htm> accessed 1 November 2015.

<sup>145</sup> See European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, COM (2011) 121/4; See <ec.europa.eu/taxation\_customs/taxation/company\_tax/common\_tax\_base/index\_en.htm>.

the reports were to be made public.<sup>146</sup> However, the MNEs stated the CCCTB would be welcome if it ensured consistency and clarity in tax rules, and some also advocated for a binding mediation mechanism for tax disputes.<sup>147</sup>

These arguments, however, do not have universal acceptance across EU member states. For example, the UK Chancellor of the Exchequer voiced strong objections to proposals for a common European Tax base, based on unwanted interference with tax competitiveness in certain EU Member States. Ultimately, it is highly unlikely that the 2016 proposals will gain the unanimous support needed for Article 115 TFEU. Harmonisation in the politically sensitive area of taxation where there is no political consensus is unattainable.<sup>148</sup>

### **EUCA Recommendations:**

The lack of support for the CCCTB highlights the tension between smaller and larger Member States, or those with preference for ensuring a high degree of tax competition, and those with preference for tax harmonisation. The case study provides a fascinating insight into a wider debate within the EU in the microcosm of advance tax rulings: the lack of legislation in the area has meant that the Commission and Court, through investigations and proceedings, act as quasi-legislators, filling the gaps in the area through case law. From the perspective of EUCA adherence, the case study highlights many concerns as regards the EU's commitment to many principles of the rule of law including legal certainty, limited discretion, and equality before the law. As seen in the state aid investigations, when there is no political consensus to tackle a large scale issue which impacts across the EU, the resulting EU action can cause uncertainty and inequality in the application of the law.

Member States ought to embrace the principle of cooperative authority and acknowledge what is good for the group, is good for the Member. The principle of cooperative authority expects that in the creation, promulgation and application of the law within the

---

<sup>146</sup> 'MEPs debate with multinationals on corporate tax practices' (2016) Comp Law 81.

<sup>147</sup> *ibid.*

<sup>148</sup> de la Feria and Fuest (n 10) 51

scope of EU competences, there ought to be co-operative decision making in the common interest. Within the internal market, there is necessarily a co-operative element in the operation and administration of tax law. With regard to tax avoidance, this means legislating at EU level. It is impossible to now argue the autonomy of taxation systems, immune from all other systems or from the decisions made by other system in regard to MNEs. This does not advocate the creation of common tax rates or the elimination of tax competition between Member States, rather – it is to acknowledge that large scale tax avoidance (which erodes the tax bases of all Member States, though to varying degrees) can only be tackled through transparent communication and mutual cooperation between tax authorities. To echo the words of Algirdas Šemeta, Commissioner for Taxation:

Fair tax competition is fundamental for a healthy Single Market and our common economic prosperity. As we work together to restore growth and competitiveness, it is essential to tackle the harmful tax practices which erode the tax bases of EU Member States. Fair play in taxation must be the rule.<sup>149</sup>

The degree to which Member States and the EU will work together to restore competitiveness (to the degree that it is ‘restoration’<sup>150</sup>) is still uncertain. The question remains as to whether the instability caused by the Commission’s aggressive approach to investigating into state aid violations will incentivise Member States to compromise and create a measure of harmonisation to tackle tax avoidance through use of advance tax rulings, and in my opinion, will likely be answered within the next two years. While this is a positive outcome in terms of returning to a state of legal certainty, the method is perhaps not in the spirit of the principle of cooperative authority and fair play, and could ultimately be detrimental to the Union.<sup>151</sup>

---

<sup>149</sup> Commission, ‘State aid: Commission investigates transfer pricing arrangements on corporate taxation of Amazon in Luxembourg’ (Press Release) IP/14/1105 <europa.eu/rapid/press-release\_IP-14-1105\_en.htm> accessed 18 February 2015.

<sup>150</sup> See Section 3.5.1.

<sup>151</sup> Luja ‘Will the EU’s State Aid Regime Survive BEPS?’ (n 54) 389.

## 4 CONCLUSION

---

In this Chapter, I have examined the relevance, and practical use of EUCA from the perspective of Member States. There are incentives from the perspective of Member States for the adherence of the EU to the standard set by EUCA, not least of which is that EUCA provides a standard for assessing adherence to the rule of law by the EU, which would act as a balance to the increased monitoring of Member States compliance.

In the case study presented, it is evident that in any taxation regime, clear, stable and prospective rules are fundamental to guarantee that an individual may best plan for the future. At an EU level, the consequent importance of the principles of EUCA become apparent: any coordinated measure of harmonisation or policy must abide by the principles of equality, certainty, legality and transparency. There ought to be limited discretion, and the availability of judicial review, while efforts of the Commission to co-ordinate policies through a wide-level of input and discussion are to be lauded under the principle of co-operative authority.

## CHAPTER SEVEN

### *EUCA and the Individual*

#### 1 INTRODUCTION

---

In Chapters 5 and 6, I examined the value of EUCA from the perspectives of the EU Institutions, and the Member States. In this Chapter, I place the individual's perspective at the centre of analysis. In **Section 2**, I argue that it is in the best interests of the individual that the EU legal order adopt and adhere to the standard set by EUCA.

In **Section 3**, I evaluate the European Arrest Warrant against the standard set by EUCA. The EAW mechanism enables the surrender of accused or sentenced persons from one Member State to another for the purpose of prosecution or the carrying out of a sentence. The European Arrest Warrant aimed to enable the free movement of judicial decisions between judicial authorities in matters of criminal law. The EAW mechanism provides an excellent case study for EUCA from the perspective of individuals in the EU, as the EAW is a flash point between national criminal law and procedural justice, free movement law, mutual trust obligations, and cooperative authority between the EU and Member States.

#### 2 WHY SHOULD THE INDIVIDUAL ENDORSE EUCA?

---

In this section, I consider what the interests of the individual<sup>1</sup> are in terms of EU compliance with EUCA, and also what the consequent benefits of adherence would be for the individual in the EU. I argue that adherence to EUCA by the EU legal order enhances and strengthens: (1) the **protection the individual through restraint of power**; (2) the **formal legal**

---

<sup>1</sup> Due to the constraints of space, it is not possible to consider how EUCA acts in the interest and to the benefit of specific and distinct categories of individuals in the EU – for example, migrants, minority groups, refugees and asylum seekers, and legal persons (such as corporations).

**equality of the individual** as disparate application of the law is challenged; (3) the **position of the rule of law** in transitioning states; and (4) **good governance across the EU legal order**, which is in the best interest of all individuals as well as Member States and the EU institutions.

The rule of law **restrains the exercise of power to the benefit of the individual**. For the individual in the EU, the value of the EU legal system maintaining a high standard of rule of law compliance, is the consequent levels of certainty and legal security, and the improved capacity to make decisions accordingly.

EUCA can serve to strengthen the **formal legal equality of the individual** across the EU. The EUCA principle of equality before the law directly challenges inequalities between individuals across the EU which arise from disparate application of the law. This is important in real terms, as challenges to directly discriminatory practices only go so far in ensuring fairness and equality for all citizens and residents of the EU. As I explore in the case study of this chapter, disparate application of the law can result in severe consequences for the individual – for example, through incorrect, or poorly implemented law regarding procedural safeguards resulting in a lack of access to information to challenge decisions directly impacting on the individual. The requirement of equal application of the law across Member States serves as an important protection of the individual in the EU.

There are important benefits for the individual in terms of citizens and residents of states which are systematically violating the rule of law, as the investment in the rule of law at EU level through EUCA could in turn lead to the **strengthening of national rule of law norms across the EU**. Efforts to enhance and strengthen the rule of law at EU level (for example, under the recommendations provided in the case studies of Chapter 5-7) complement and support the strengthening of rule of law norms at national level. As I have argued in Chapter 6, EUCA can enhance rule of law norms across the EU - this in turn benefits the individual as national legal systems enhance the protections of the rule of law.

Ultimately, it is in the interest of the individual to **promote good governance at EU level**. Good governance is premised on the rule of law, and for the EU – this means the apt account of the rule of law in EUCA. The guarantees of equality before the law, legality, certainty, transparency, limited discretion, judicial review and cooperative authority are the foundations of a well-functioning the legal system. A high level of adherence to the standard set by EUCA will provide a path towards the resolution of many issues which impact the individual directly, as I will show in the case study on the European Arrest Warrant.

### **3 EUCA AND THE EUROPEAN ARREST WARRANT**

---

#### **3.1 Introduction: Outline of the Case Study**

The case study for EUCA and the individual is the European Arrest Warrant.<sup>2</sup> The European Arrest Warrant [EAW] requires the surrender of an individual from one Member State to another for the purpose of prosecution or the carrying out of a sentence. The case study of the EAW is drawn from the intersection of national criminal law and EU law. Consideration of the EAW Framework Decision highlights the complexities of the EU legal system when there is a criminal element, and the need for a high level of adherence to EUCA in the context of the execution of EAWs.

In Section 3.2, I underscore the fundamental importance of adherence to a high standard of the rule of law in the criminal law, and especially in criminal justice systems. In Section 3.3, I outline the background and impetus for the introduction of the European Arrest Warrant Framework Decision. In Section 3.4, I provide an account of the operation of the EAW in practice. In Section 3.5, I consider the controversial elements of the EAW against the standard set by of EUCA, and provide recommendations as to how the EAW mechanism can achieve a higher standard of adherence to EUCA.

---

<sup>2</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision 2002/584/JHA. [EAW Framework Decision]

### 3.2 Criminal Law, the Rule of Law and the EU

In no other area of the law is the disparity of power between the state and the individual so pronounced as in the criminal law. State institutions have the power to investigate, arrest, prosecute, judge, and incarcerate an individual. Criminal justice is framed by principles of the rule of law which are encapsulated in the maxim, *nullum crimen, nulla poena sine lege*.<sup>3</sup> There can be no crime and no punishment without law – the offence and its consequences must be certain and legal in nature. All other things being equal, two individuals committing the same offence ought to be treated equally before the law. The process by which an individual is arrested, prosecuted and judged should be transparent, allowing that individual access to information regarding the case against them. The procedures ought to be open and transparent, so that the individual can understand how best to defend herself. Equally, the judgment ought to be fairly and independently decided. When the law can determine control over the property, liberty and life of individuals, it is essential that the criminal law abide by these essential aspects of the rule of law.

The boundaries and content of the criminal law in the Member States of the EU, similar to the law of taxation,<sup>4</sup> are a matter of a high degree of political sensitivity. The determination of what a crime is, and how it ought to be punished is linked to the core of national sovereignty.<sup>5</sup> In the context of extradition, it is politically contentious for a citizen of a state to be extradited to another for the purposes of prosecution, and many states (including some

---

<sup>3</sup> This maxim has featured centrally in the criminal justice systems of both the civil law and the common law. It was also cited in the reasoning of the Court of Justice in the case concerning the legality of the EAW Framework Decision: Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633, para 49.

<sup>4</sup> For consideration of politically sensitive nature of national measures of taxation, see Chapter 6, Section 3.2.

<sup>5</sup> Succinctly, '[c]riminal law is fundamental in a society governed by the rule of law, as it contains rules delineating the relationship between the individual and the state ... Criminal law and the limits that it sets must be openly negotiated and agreed via a democratic process, and the citizens must be aware of exactly what the rules are. However, mutual recognition challenges this framework... mutual recognition does not involve a commonly negotiated standard...' in Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the European Union' (2006) CMLR 1277, 1286.

EU Member States<sup>6</sup>) have expressly forbidden this possibility.<sup>7</sup> The constitutional ban on extradition of citizens resulted in a series of legal challenges to the EAW in some Member States which will be analysed in Section 3.5.1. The political sensitivity of criminal law is reflected in its long absence from Community law. Until the Maastricht Treaty (1993), there was little or no legal base in the Treaties for cooperation in terms of criminal matters as regards the Member States. Post-Lisbon, Article 3(2) TEU states that the Union

shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

The extent to which the area of freedom, security and justice is provided and protected by the European Union will be analysed in context of the European Arrest Warrant in Section 3.4 and 3.5. First, I provide a background to the European Arrest Warrant mechanism in Section 3.5.

### **3.3 Background to the European Arrest Warrant**

In this section, I provide an overview of the legal and political developments which led to the introduction of the European Arrest Warrant Framework Decision 2004 [EAW Framework Decision]. I highlight the aftermath of the September 11<sup>th</sup> attacks as the particular impetus for introducing coordinated extradition proceedings among Member States in the form of the EAW mechanism.

---

<sup>6</sup> 13 (of then 25) Member States had provisions which forbade or limited the extradition of citizens. It was constitutionally forbidden in: Austria (Art 12, para 1); Czech Republic (Art 14(4), Charter of Fundamental Rights and Freedoms); Cyprus (Art 11.2); Finland (Art 9.3); Germany (Article 16, para 2); Latvia (Art 98); Poland (Art 55); Portugal (Art 33, para 3); Slovakia (Art 23, para 4); and Slovenia (Art 47). The Constitutions of Estonia (Art 36.2), Italy (Art 26.1) and Lithuania (Art 13) permits an exception to the prohibition of the extradition of citizens based on international treaty obligations.

<sup>7</sup> For example, Brazil (1988 Constitution, Art 5), Japan and Russia (Constitution, Art 61(1)), forbid the extradition of their citizens. Often, legal provision in these cases for individuals to be tried for crimes committed abroad in their home jurisdiction.

Prior to the Maastricht Treaty (1993), the Treaties did not account for, or conceive of, any cooperation or coordination in terms of criminal matters to be within the purview of an economic community. However, almost inevitably, the side effect of introducing free movement provisions in the Treaties was an increase of cross-border criminal activity. The cross-border element necessitated co-ordinated efforts by Member States to respond to the free movement of crime and criminals. The Treaty on European Union (1993) established the Third Pillar on cooperation in the field of justice and home affairs, which provided for judicial cooperation in the area of criminal law as a matter of common interest to the Union.<sup>8</sup> The creation of the Third Pillar gave institutional recognition to intergovernmental, inter-police, and inter-judicial networking, without subjection to supranational controls by the EU.<sup>9</sup> In the Treaty of Amsterdam (1999), the Third Pillar became the Police and Judicial Co-operation in Criminal Matters, and provided a new objective of the Union in the creation of an Area of Freedom, Security and Justice.<sup>10</sup> The Pillar structure was abolished under the Lisbon Treaty (2009), when the EU became a consolidated entity, and was replaced with Article 3(2) TEU.

Prior to the EAW Framework Decision, there were initiatives aimed at promoting judicial cooperation, and expediting the extradition processes between Member States. Member States have been parties to either all or a number of extradition conventions, for example, the European Convention on Extradition (1957), and the European Convention on the Suppression of Terrorism (1977). The Tampere European Council (1999) recommended the abolition of formal extradition procedures among the Member States in respect of individuals who have fled following final sentencing, and that procedures for individuals suspected of committing an offence should be expedited.<sup>11</sup> The Tampere European Council recommended in its conclusions that the Council and Commission adopt a programme of

---

<sup>8</sup> Article K(1), Treaty on European Union.

<sup>9</sup> Libor Klimek, *European Arrest Warrant* (Springer 2014) 15.

<sup>10</sup> Art 2 Treaty on EU, as amended by the Treaty of Amsterdam.

<sup>11</sup> European Council, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, para 35, [www.refworld.org/docid/3ef2d2264.html](http://www.refworld.org/docid/3ef2d2264.html) accessed 13 June 2015.

measures to implement the principle of mutual recognition of criminal decisions, explicitly a European Enforcement Order.<sup>12</sup>

While the Tampere Council laid the foundation for the European Arrest Warrant, the pressing impetus for the creation of the EAW were the national security concerns raised in the aftermath of the 9/11 terrorist attacks.<sup>13</sup> Only a few months after the attacks, the EAW Framework Decision passed through national parliaments and the European Parliament with relatively little debate.<sup>14</sup> The speed with which the EAW was introduced, and the relatively little scrutiny the Framework Decision was afforded, are likely causes of the rule of law concerns evaluated in Section 3.5.

### **3.4 The European Arrest Warrant**

The European Arrest Warrant [EAW] was designed to replace the many systems of extradition with a single coordinated system of surrender of individuals between Member States. It was the first ‘concrete measure in the field of criminal law’ which implemented and was based on the principle of mutual recognition.<sup>15</sup> It was a step towards the achievement of the objective of the Union to become an area of freedom, security and justice.<sup>16</sup> The EAW aimed to simplify the process of surrender of accused or sentenced persons. It targeted the complexities which might otherwise cause a delay in the process, and aimed to create a ‘system of free movement of judicial decisions in criminal matters’ between Member States’ judicial authorities.<sup>17</sup>

---

<sup>12</sup> *ibid* at 37.

<sup>13</sup> Jan Wouters and Frederik Naerts, ‘Of arrest Warrants, Terrorist Offences and Extradition Deals: an Appraisal of the EU’s Main Criminal Law Measures against Terrorism after “11 September”’ (2004) CMLR 909; and Cian Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Bloomsbury 2012).

<sup>14</sup> Mitsilegas (n 5); and Oreste Pollicino, ‘European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems’ (2008) German LJ 1314, 1319.

<sup>15</sup> EAW Framework Decision.

<sup>16</sup> *ibid*.

<sup>17</sup> Recital (5) of the Preamble to the EAW Framework Decision.

The European Arrest Warrant is a decision issued by a judicial authority of a Member State with the intention of the arrest and surrender<sup>18</sup> of a requested person by another Member State ‘for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.’<sup>19</sup> The Council Framework Decision of 13 June 2002, establishes and governs the operation of the EAW.<sup>20</sup> The legal basis for the Framework Decision was Article 34(2)(b) Treaty on European Union,<sup>21</sup> and it was adopted by the Council, on proposal of the Commission and with opinion of the Parliament. The EAW Framework Decision replaces all previous extradition instruments between Member States.<sup>22</sup> Similar to the legal position of directives, the Framework Decision is binding as to the result to be achieved, but leaves decisions regarding the method and form of implementation to the legislatures of the Member States. The Framework Decision does not have the benefit of direct effect in Member States. However, under the *Pupino* judgment, there is an obligation on national courts to interpret national legislation in a manner that is consistent with the Framework Decisions.<sup>23</sup> The EAW operates on the basis of the mutual recognition of judicial decisions,<sup>24</sup> and to this extent it is reliant on mutual confidence in the judicial systems of all Member States as it requires recognition of the decision without enquiry into the facts or circumstances which

---

<sup>18</sup> It is notable that nowhere in the European Arrest Warrant Framework Decision is the term ‘extradition’ featured, instead – the drafters have chosen the term ‘surrender’. The term could likely have been taken from international criminal tribunals, which called for the ‘surrender’ of nationals, where there were otherwise constitutional bars on extradition of citizens: Michael Plachta, ‘European Arrest Warrant: Revolution in Extradition?’ (2003) Eur JCLCJ 178; Murphy (n 13) 188–90. Some Member States (notably the UK) have not chosen to use the term ‘surrender’, favouring ‘extradition’ in the implementing legislation. See n 6 for Member States which constitutionally barred the extradition of citizens.

<sup>19</sup> Art 1(1), EAW Framework Decision.

<sup>20</sup> EAW Framework Decision.

<sup>21</sup> The legal basis for the EAW Framework Decision was Art 34(2)(b) Treaty on European Union which explicitly excluded the direct effect of Framework Decisions. This Article was repealed under the Lisbon Treaty, and transitional arrangements were made under Article 9 of the Protocol on Transitional Provisions, which gives continued legal status to the Framework Decisions until the ‘acts are repealed, annulled or amended in implementation of the Treaties’.

<sup>22</sup> Recital (11) of the Preamble to the EAW Framework.

<sup>23</sup> Case 105/03 *Pupino* [2005] ECR I-5285. The only limits to the obligations of interpretation are the general principles of legal certainty and non-retroactivity (para 44). See Eleanor Spaventa, ‘Opening Pandora’s Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*’ (2007) Eur Const LR 5.

<sup>24</sup> Art 1(2), EAW Framework Decision.

give rise to the warrant. This mutual recognition of judicial decisions was referred to by the European Council as the ‘cornerstone’ of judicial cooperation.<sup>25</sup>

An EAW may be issued for acts which are punishable by a custodial sentence (or detention order) for at least 12 months, or, at least four months in instances in which a custodial sentence or detention order has been made.<sup>26</sup> The EAW procedures are designed to be expeditious and straightforward. The form of the EAW has been transposed by all Member States, and the Council reports that all judicial authorities accept this is the sole acceptable form upon which the EAW can be made.<sup>27</sup> This may be overstated however, as there have been reported issues of translation of EAWs. For example, Bulgaria, France and Poland only accept EAWs submitted in their national language.<sup>28</sup>

There is provision for a decision to be made by the executing judicial authority in the event of multiple requests for surrender of a requested person, ‘with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order.’<sup>29</sup> If the arrested person does not consent to his or her surrender under the EAW, they are entitled to a hearing according to the law of the executing Member State.<sup>30</sup> Discretion to refuse the execution of an EAW is limited. There is, however, scope for the mandatory,<sup>31</sup> and optional,<sup>32</sup> refusal of the execution of a European Arrest Warrant. Mandatory refusal to execute an EAW includes situations where: amnesty is granted by the executing Member

---

<sup>25</sup> Commission, ‘Report on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States’ (Brussels 11 April 2011) COM (2011) 175 final. [2011 Commission Report]

<sup>26</sup> Art 2, EAW Framework Decision.

<sup>27</sup> Council, ‘European Handbook on How to Issue a European Arrest Warrant’ No. 8216/2/08, REV 2, 11. [EAW Handbook] The form can be filled in and printed from the European Judicial Network (EJN) website: <[www.ejn-crimjust.europa.eu/ejn/EJN\\_EAWWizard.aspx](http://www.ejn-crimjust.europa.eu/ejn/EJN_EAWWizard.aspx)>, accessed 19 July 2015.

<sup>28</sup> Micaela Del Monte, *European added value of revising the European Arrest Warrant* (European Parliamentary Research Service March 2014) <[www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN\\_ET%282013%29510979\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET%282013%29510979_EN.pdf)> accessed 19 July 2015.

<sup>29</sup> **Art 16(1), EAW Framework Decision.** There has been criticism with regard to the vague formulation of this article, resulting in inconsistent implementation among Member States. Del Monte (n 28).

<sup>30</sup> Art 14, EAW Framework Decision.

<sup>31</sup> Art 3, EAW Framework Decision.

<sup>32</sup> Art 4, EAW Framework Decision.

State; the Member State has jurisdiction to prosecute; the person has been judged, sentenced or is serving time in the Member State for the acts; or where the person is not above the age of criminal responsibility.<sup>33</sup> Optional grounds for refusal include, for example, instances of where the person is being prosecuted in the Member State for the act; or where the executing Member State undertakes to execute the sentence in accordance with their own domestic law. Additionally, the Court has upheld its jurisdiction to control the instances in which a state can refuse to execute an EAW under Article 4 EAW Framework Decision.<sup>34</sup>

The Framework Decision states explicitly that it does not prevent a Member State from the application of its own constitutional rules as they relate to due process, the right of association, and the freedom of expression.<sup>35</sup> The EAW was designed with a ‘respect for fundamental rights’, and it contains an obligation to observe the principles of Article 6 TEU, and the Charter of Fundamental Rights (Chapter VI).<sup>36</sup> The EAW ‘shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU].’<sup>37</sup> This has not necessarily been a convincing assurance to sceptics of the procedural and human rights provisions of the EAW, who are concerned that the expediency of surrender is unjustifiably prioritised above the rights of individuals. Critics of the EAW have highlighted that the treatment of detainees subject to an EAW must reach a high level of severity in order to fall within the scope of Article 3 of the ECHR, and Article

---

<sup>33</sup> Some Member States have included additional grounds for the mandatory refusal of an EAW, including some which correlate with Article 4 optional grounds for refusal of surrender. For example, the Lithuanian Criminal Code refuses surrender of an individual where it ‘would be in breach of fundamental rights and (or) liberty’ see Commission, ‘Annex to the Report on the Implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States’ COM(2007) 407 final, 8–11.

<sup>34</sup> Case C-66/08 *Proceedings against Szymon Kozłowski* [2008] ECR I-6041; and Case C-396/11 *Proceedings against Ciprian Vasile Radu* (GC, 13 January 2013).

<sup>35</sup> EAW Framework Decision 2004.

<sup>36</sup> Recital (6) of the Preamble to the EAW Framework Decision. For discussion of the extent that this is true, see below section 3.4.4. See also C-399/11 *Melloni v Ministerio Fiscal*, judgment of 26 February 2013, [2013] QB 1067.

<sup>37</sup> Art 1(3), EAW Framework Decision. This has been an important justifying factor for the exclusion of consideration of the possible violation of fundamental rights by the judicial authorities of requesting states in case law: for example, see *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22, [2012] 2 AC 471.

4 of the Charter.<sup>38</sup> It has also been established as near impossible for an individual to cancel an EAW against them, even when they have proved their innocence.<sup>39</sup>

An important element of the EAW mechanism is that it aimed at abolishing double criminality<sup>40</sup> for 32 categories of crime which are listed in the Framework, including terrorism, human trafficking, illegal weapons trade and corruption.<sup>41</sup> Outside of this list, the requirement of dual criminality for the offence in both the requesting and executing Member State still applies. This caused considerable concern in some Member States and was challenged before national courts and the Court of Justice.<sup>42</sup>

After a series of constitutional and legal challenges to the EAW in some Member States,<sup>43</sup> the Commission has declared the EAW to be a success,<sup>44</sup> citing the reduced administrative costs of surrender in terms of time and resources.<sup>45</sup> Delays in the surrender of an individual to another Member State have decreased from a year to on average 14 to 17 days (with consensual surrender) and 48 days (without consent).<sup>46</sup> The success of the EAW as a feat of judicial cooperation and increased mutual trust between Member States is, I argue, marred by a concerning lack of regard for the rule of law in some areas of the design and implementation of the EAW which I evaluate in the next section.

As I established in Section 3.2, a high degree of compliance with the rule of law serves to moderate the significant disparity in power between the State and the individual in administration of the criminal law. Echoing Raz, and the analysis of the concept of the rule of

---

<sup>38</sup> Commission, 'Green Paper on Strengthening mutual trust in the European judicial area' (Brussels 14 June 2011) COM(2011) 327 final, 4–5. This has, however, been an important consideration of some national courts in considering whether to surrender individuals. See *Minister for Justice v Robert Rettinger* (2010) IESC 45.

<sup>39</sup> Sarah Wolff, 'The Rule of Law in the Area of Freedom, Security and Justice: Monitoring at Home what the European Union Preaches Abroad' (2013) HJRL 119, 121–122.

<sup>40</sup> Double or dual criminality refers to a situation in which a person can only be extradited from one state to another if there is an equivalent offence punishable by law in both countries. In the UK, it was considered to be an important safeguard for the accused: see Select Committee on Extradition Law, *The European Arrest Warrant Opt-in* (HL 2014–2015, 63).

<sup>41</sup> Art 2, EAW Framework Decision. See Section 3.5.2 for discussion concerning the implementation and issues which surround the abolition of dual criminality in the EU.

<sup>42</sup> See Section 3.5.1.

<sup>43</sup> See Section 3.5.1–2.

<sup>44</sup> 2011 Commission Report (n 25) 2.

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.* 3.

law in Chapters 1 and 2, the rule of law aims to ‘minimize the danger created by the law itself’.<sup>47</sup> This disparity in power can be characterised as even more extreme in cases involving the European Arrest Warrant, as individuals are surrendered across national borders, and (often) into unfamiliar language and legal cultures. Linked with the concern that the expediencies of surrender have been prioritised above the rights of individuals, it is paramount that the EAW adhere to a high standard of EUCA.

### 3.5 Evaluating the European Arrest Warrant against EUCA

In this section, I evaluate the identified issues of the EAW against the standard set by EUCA. While the individual nuances, and use of EAWs in each Member State is beyond the scope of this thesis, I highlight issues concerning the implementation of the EAW as they relate to the Framework Decision itself. I continue to develop and deepen the discussion in previous chapters, by showing how EUCA principles interrelate and interact when evaluating and analysing issues through the lens of EUCA.

The concerning aspects of the EAW which I identify and evaluate are: the **disparate implementation of the EAW Mechanism** (Section 3.5.1); the uncertain **abolition of dual criminality** (Section 3.5.2); the **disproportionate (ab)use of the EAW Mechanism** (Section 3.5.3); the concerning level of **protection of procedural rights** (Section 3.5.4); issues with regard to the **transparency of the EAW system** (Section 3.5.5); and concerns regarding the assumption of universal criminal justice standards upon which **mutual trust** is based (Section 3.5.6).

#### 3.5.1 *Disparate Implementation of the EAW Mechanism*

In this section, I consider instances of disparate applications of the EAW Framework Decision in Member States. I consider whether this has violated EUCA **principles of certainty** and

---

<sup>47</sup> Joseph Raz, *The Authority of Law* (2<sup>nd</sup> edn, OUP 2009) 224.

**equality before the law.** Due to the constraints of space, I focus on two exemplars of how the design and implementation of the Framework has resulted in inconsistent and disparate application: (a) the legislative responses in Member States to legal challenges; and (b) the lack of direction as to the meaning of ‘judicial authority’. The problem, as identified by the Court of Justice, is that ‘differences of interpretation between courts with regard to the validity of Community measures and the validity of the legislation which constitutes the implementation of those measures in national law jeopardise the unity of the Community legal order.’<sup>48</sup> I conclude that the disparate implementation violates the EAW principles of legal certainty and equality before the law.

*(a) Constitutional Challenges to the EAW resulting in Inconsistent Implementation: Germany and Poland*

A primary aim of the EAW was to end political involvement in extradition decisions. Member States are not permitted to refuse to surrender their citizens to the custody of another Member State, as there is no distinction made between citizens and residents of Member States for the purposes of the EAW. This proved to be a highly contentious point when the Framework Decision was adopted as 13 of the (then) 25 Member States had constitutional provisions prohibiting (or otherwise limiting) the extradition of citizens.<sup>49</sup> Member States, including Latvia,<sup>50</sup> Portugal,<sup>51</sup> Slovakia,<sup>52</sup> and Slovenia,<sup>53</sup> made revisions to their constitutions in advance of the implementing legislation. However, the implementing legislation was successfully<sup>54</sup> challenged in the Constitutional Courts of Germany, Cyprus, and Poland.<sup>55</sup> In

---

<sup>48</sup> Case C-303/05 *Advocaten voor de Wereld*, para 13.

<sup>49</sup> See n 6.

<sup>50</sup> Revised Art 98, Latvian Constitution.

<sup>51</sup> Amended Art 33, para 3, Portuguese Constitution.

<sup>52</sup> Following the 2001 amendment, Art 23(4), Slovakian Constitution.

<sup>53</sup> The revised Art 47 of the Slovenian Constitution exempts the EAW from the ban on the extradition of citizens.

<sup>54</sup> It was unsuccessfully challenged in Greece (Re Execution of a German Arrest Warrant: *Tsakas and Anor* [2007] CMLR 24), the Czech Republic (Re Constitutionality of Framework Decision on European Arrest Warrant [2007] 3 CMLR 24), and Ireland (Minister for Justice v Stapleton [2007] IESC 30).

<sup>55</sup> Polish Constitutional Tribunal, judgment of 27 April 2005, P 1/05, available in English at <[www.trybunal.gov.pl/eng/summaries/summaries\\_assets/documents/P\\_1\\_05\\_full\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf)>; German Federal Constitutional Court, 2 BvR 2236/04, available in English at:

this section, I highlight the cases of Poland and Germany as, in order for the EAW to be held constitutionally valid under national law, a significant departure from the EAW Framework Decision in the implementing legislation was made by the national legislature. The first challenge to the constitutionality of the national legislation implementing the EAW came before the Polish *Trybunał Konstytucyjny* (Constitutional Tribunal), wherein it was held that the EAW was incompatible with Art 55 of the Polish Constitution which prohibited the extradition of citizens. The binding effect of this judgment was delayed until after the revision of Art 55, which allows the extradition of citizens upon condition of determining dual criminality.<sup>56</sup> Though this ostensibly avoided the constitutional conflict between national and EU legal orders,<sup>57</sup> the revised article is contrary to the EAW Framework Decision, which sought to abolish the test of dual criminality for 32 listed offences.<sup>58</sup>

In Germany, the implementing act for the EAW was challenged before the Constitutional Court.<sup>59</sup> A revision to the Basic Law had been made in order to allow the extradition of a German citizen to an EU state or an international court ‘*soweit rechtsstaatliche Grundsätze gewahrt sind*’.<sup>60</sup> However, the implementation of the EAW was held by the *Bundesverfassungsgericht* to be unconstitutional as a violation of the basic law unless each EAW was examined on a case-by-case basis to ensure that the individual was not deprived of their constitutional rights and liberties.<sup>61</sup> In light of this, a second version<sup>62</sup> of the EAW

---

[www.bundesverfassungsgericht.de/en/decisions/rs20050718\\_2bvr223604en.html](http://www.bundesverfassungsgericht.de/en/decisions/rs20050718_2bvr223604en.html); Supreme Court of Cyprus, judgment of 7 Nov. 2005, Ar. No. 294/2005. The decision in Greek with a short English summary is available as a Council document No 14281/05 of 11 Nov. 2005. See Elspeth Guild, *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers 2006); Jan Komárek, ‘European Constitutionalism and the European Arrest Warrant: In Search of the Limits of “Contrapunctual Principles”’ [2007] CMLR 9; and Oreste Pollicino, ‘The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?’ [2010] YEL 65.

<sup>56</sup> Article 55(2)(2) 1997 Constitution of Poland. See also Adam Lazowski, ‘Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005’ (2007) *EuConst* 148, 160; and Richard Ball, *The Legitimacy of the European Union through legal rationality: Free Movement of third country nationals* (Routledge 2014).

<sup>57</sup> See Chapter 3.

<sup>58</sup> The abolition of dual criminality is considered in Section 3.5.2.

<sup>59</sup> Re Constitutionality of German Law implementing the Framework Decision on a European Arrest Warrant 2 BvR 2236/04, [2006] 1 CMLR 16.

<sup>60</sup> In the English version, ‘provided that the rule of law is observed’. For observations on the terminology surrounding the rule of law in Germany, see Chapter 2, Section 3.2.

<sup>61</sup> Re Constitutionality of European Arrest Warrant 2 BvR 2236/04, decision of 18 July 2005, [2006] CMLR 16.

<sup>62</sup> European Arrest Warrant Act 2006 [2004] BGB1.I 1748.

implementing act was introduced in 2006 which incorporated the recommendations of the *Bundesverfassungsgericht*. The provisions were upheld by the Constitutional Court.<sup>63</sup> The incorporation of a test for protection of constitutional liberties and fundamental rights, again, marks an instance of departure from the framework. The Commission is unable to bring proceedings against Member States for a failure to comply with obligations under the Council Framework.<sup>64</sup>

*(b) Inconsistent Implementation: the meaning of ‘Judicial Authority’ in the UK*

The determination of a ‘competent judicial authority’ is established by the law of the Member State, and Member States are required to inform the General Secretariat of the Council.<sup>65</sup> There is no other direction as to the meaning of ‘competent judicial authority’ For example, in Spain, the *Autoridades competentes para la emisión* (judicial authorities for issuing an EAW) are limited to courts and tribunals,<sup>66</sup> whereas public prosecutors are recognised judicial authorities in Sweden. The naming of public prosecutors as competent judicial authorities within the meaning of the act, caused significant litigation in the UK. The European Parliament has also stated that the lack of definition of the term ‘judicial authority’ within the Framework Decision resulted in a disparate and varied practice across Member States ‘causing uncertainty, harm to mutual trust, and litigation’.<sup>67</sup>

The UK provides an excellent example of the confusion and litigation resulting from a lack of guidance as to the meaning of judicial authority with regard to the EAW mechanism. There is disagreement in the UK Courts over the meaning of the term ‘judicial authority’

---

<sup>63</sup> *Decision of German Constitutional Court 2* BVR1667/05 24 November 2005. See Florian Geyer, ‘A Second Chance for the EAW in Germany: The System of Surrender after the Constitutional Court’s Judgement of July 2005’ in E Guild and L Marin (eds), *Still not resolved? Constitutional Issues of the European Arrest Warrant* (Wolf Legal Publishers 2009).

<sup>64</sup> Klimek (n 9) 204.

<sup>65</sup> Art 6, EAW Framework Decision.

<sup>66</sup> See ‘Cooperación Jurídica Internacional: Orden Europea de Detención y Entrega’ (International Judicial Cooperation: European Arrest Warrants), from the Spanish Ministry of Justice website, <[www.mjusticia.gob.es/cs/Satellite/es/1215197995954/Tematica\\_C/1215198003700/Detalle.html?param1=1](http://www.mjusticia.gob.es/cs/Satellite/es/1215197995954/Tematica_C/1215198003700/Detalle.html?param1=1)> accessed 25 July 2015.

<sup>67</sup> European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant, 2013/2109(INL).

within the context of the Extradition Act 2003 (which implements the EAW in the UK).<sup>68</sup> Lord Hope in *Cando Armas* held that the correct approach to the interpretation of the Extradition Act 2003 was to give effect to the EAW Directive. The exception is where there are differences between the EAW and the Extradition Act 2003, and in that case to assume these were regarded by Parliament as necessary for protection of the right to liberty.<sup>69</sup> In *Assange*,<sup>70</sup> the Supreme Court relied heavily on the Vienna Convention on the Law of Treaties on the understanding of differing European traditions to hold that it could give effect to an obligation under international law and Section 2 of the European Communities Act 1972 and allow a 'public prosecutor' to constitute a judicial authority within the meaning of the act.

There is further confusion, however, as in *Bucnys v Ministry of Justice, Lithuania*<sup>71</sup> the UK Supreme Court held that the term 'judicial authority' had autonomous meaning, independent of the practices of Member States.<sup>72</sup> Lord Mance rejected the position of *Assange*,<sup>73</sup> and held that it was not for the Member States to determine the meaning of 'judicial authority' through either consensus or mutual recognition, but rather for the Court of Justice. However, as the UK had not accepted Court of Justice jurisdiction in relation to the EAW Framework Decision, it was not possible to make a preliminary reference to the Court. In absence of this, the Supreme Court determined the autonomous meaning. The autonomous meaning of terms in the Framework Decision was affirmed by the Court of Justice in *Mantello*,<sup>74</sup> though, evidently, the jurisdiction regarding the determination of the autonomous meaning was reserved to the Court of Justice.

The issue as regards EUCA in this section is that the consequences of these conflicts have resulted in disparate, and sometimes conflicting application of the law, violating the

---

<sup>68</sup> See n 36.

<sup>69</sup> *Office of the King's Prosecutor, Brussels v Cando Armas* [2006] 2 AC 1.

<sup>70</sup> *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22, [2012] 2 AC 471.

<sup>71</sup> *Bucnys v Ministry of Justice, Lithuania* [2013] UKSC 71, [2014] AC 480.

<sup>72</sup> This interpretation meant that the Framework Decision does not operate as a typical international treaty subject to consideration under the Vienna Convention on the Law of Treaties, and so practices of Member States, and the acceptance of that practice (either explicitly, or through a lack of objection) by other Member States, was not pertinent to the understanding of the term 'judicial authority'. See further Veronika Fikfak, 'Case Comment: The Meaning of Judicial Authority after Assange' [2015] LQR 223, 227.

<sup>73</sup> [2012] UKSC 22, [2012] 2 AC 471.

<sup>74</sup> Case C-261/09 *Mantello* [2010] ECR I-11477.

principle of certainty. Disparate application risks the uniformity risks violating the principle of equality before the law, as a person could be surrendered to face criminal charges which they would not have otherwise faced in another Member State.

### **EUCA Recommendation:**

There are two alternative methods of remedying the deficiencies in adhering to a high standard of EUCA compliance: the first is through amendment of the Framework Decision; and the second through soft law approaches encouraging coordinated convergence. In the next section, I will focus on the particular issue of the abolition of dual criminality (and the consequent efforts to reintroduce a form of it in some Member States). I would recommend investigation by the Commission of implementation of the EAW Framework Decision, highlighting divergent practices and recommending best practices. Based on this, I would recommend amendment of the Framework Decision to include definition of the term ‘judicial authority’ based on what is now considered best practice across Member States.<sup>75</sup>

### **3.5.2 *The Abolition of Dual Criminality***

In this section, I evaluate the aim of the EAW to abolish the requirement of dual criminality for 32 listed offences. I consider whether this has violated **EUCA principles of equality before the law** and **legal certainty**. Dual criminality refers to the legal test whereby a state will extradite an accused person to another state only in the event that the action is unlawful according to the law of both states. Dual criminality is a procedural safeguard, ensuring the necessity of offences being criminal in both the requesting and executing countries. Under Article 2 of the EAW Framework Decision, dual criminality is abolished for 32 listed offences in order to promote efficiency and expedite the surrender of individuals under an EAW. The issue as regards EUCA, in the specific context of the principles of equality before the law and

---

<sup>75</sup> See the EUCA recommendations of Sections 3.5.3, 3.5.5, and 3.5.6 as presenting peer-pressure review as a means of encouraging convergent interpretation and implementation of the EAW.

certainty, is that the 32 offences listed in Article 2(2) are stated in significantly under-defined and ambiguous terms: for example, ‘participation in a criminal organisation’, ‘corruption’, ‘computer-related crime’ and ‘swindling’.

The Framework Decision does not include guidance, outlines, or any form of legal definition of the offences listed. The threat to EUCA is that, in the vague formulation of the offences listed, the resulting application of the law will be disparate and unequal between individuals across Member States, as judicial authorities have ‘insufficient information to determine effectively whether the offences for which the person sought is being charged, or in respect of which a penalty has been imposed on him, come within one of the categories mentioned’.<sup>76</sup> As established in Section 3.5.1, divergent implementation of the EAW undermines the uniformity of application of the EAW, it creates uncertainty in the application of law, and negative consequences for individuals: a person could be surrendered to face criminal charges which they would not have otherwise faced in another Member State. The vague formulation of offences led to the Belgian Court of Arbitration referring the EAW Framework Decision to the Court of Justice for a preliminary ruling as to its validity in *Advocaten voor de Wereld*.<sup>77</sup> The challenge to the legality of the EAW was based on the argument that in the absence of clear and precise definitions, the judicial authorities of Member States would decide what constituted the criminal offence in a way which would lead to disparate practices risking the non-uniform application of the law, and the unequal application and enforcement of an EAW.<sup>78</sup> Indicating the importance of the case, ten Member States, the Commission and Council submitted observations to the Court of Justice.<sup>79</sup>

The Court of Justice held in *Advocaten* that the EAW did not violate the General Principles<sup>80</sup> of equality and non-discrimination, nor legal certainty, as its objective was not,

---

<sup>76</sup> Case C-303/05 *Advocaten voor de Wereld* VZW, para 19.

<sup>77</sup> Case C-303/05 *Advocaten voor de Wereld*.

<sup>78</sup> Annex to the 2011 Commission Report (n 25) 8.

<sup>79</sup> The intervening Member States were Belgium, the Czech Republic, Spain, France, Latvia, Lithuania, the Netherlands, Poland, Finland, and the UK.

<sup>80</sup> See Chapter 4, Section 4.3 for the distinction between General Principles and EUCA principles.

and could not be, harmonisation of laws.<sup>81</sup> Showing deference to the Council, the Court held that ‘on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States,’ the Council had determined that the categories of offences feature ‘among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality.’<sup>82</sup> This conclusion is not convincing, and concerning from the perspective of EUCA. In instances where crimes are more serious, and thus carry more severe penal consequences, it is more important that those crimes be (relatively)<sup>83</sup> certain, legal and subject to the requirement of equal treatment.<sup>84</sup>

The dilemma in the abolition of the ‘traditional safeguard’ of dual criminality is that ‘either it is accepted that there will be variations between Member States... or one concedes a need to harmonise the scope of the offences across the EU.’<sup>85</sup> It was held by the Court of Justice in *Advocaten*, and this is agreed among the Member States, that it is not the objective of the EAW Framework Decision to harmonise substantive criminal laws of Member States, and that there was ‘nothing in Title VI of the EU Treaty makes the application of the European arrest warrant conditional on harmonisation of the criminal laws of the Member States within the area of the offences in question’<sup>86</sup> Therefore, the consequence of the *Advocaten* decision is that it shifts attention away from the form of the Framework Decision, to its implementation and the ‘actual functioning and operation’ of the EAW in Member States.<sup>87</sup> The uncertainty of the definition of the offences listed is clear in the disparate interpretations and implementations of the law across Member States, in violation of the principle of certainty. For example, Greece and France have considered some categories to be the same as others,

---

<sup>81</sup> Case C-303/05 *Advocaten voor de Wereld*, paras 49–50, 52–54, 57–60.

<sup>82</sup> Case C-303/05 *Advocaten voor de Wereld*, para 57.

<sup>83</sup> This includes the important caveat that it is neither desirable nor possible to harmonise the definition of criminal offences across Member States. Rather, as is suggested in EUCA Recommendations, there should be efforts at making available the information regarding the definition of the crimes listed across the EU.

<sup>84</sup> Additionally, as will be discussed in Section 3.5.6, reliance *solely* on the basis of mutual trust can be a thin argument, which is ultimately damaging to the principle of cooperative authority.

<sup>85</sup> House of Lords Report (n 40) para 16.

<sup>86</sup> Case C-303/05 *Advocaten voor de Wereld*, para 57.

<sup>87</sup> Elspeth Guild and Luisa Marin, ‘Still not Resolved? Constitutional Challenges to the European Arrest Warrant: A Look at Challenges ahead after the Lessons learned from the Past’ (Wolf Legal Publishers 2009) 2.

while the categories listed under Polish law do not correspond with those listed in the Framework.<sup>88</sup> Poland further (re-)introduced the dual criminality requirement into its constitutional amendment allowing the surrender of Polish citizens.<sup>89</sup>

This was not unique to Poland as in Ireland,<sup>90</sup> and Italy,<sup>91</sup> the implementation of the EAW effectively recreated the control of double criminality. Italy disregarded the list of crimes and instead introduced legislation which listed corresponding crimes already existing within national law.<sup>92</sup> In Estonia, the judicial authorities will consider each EAW on merit, applying a proportionality test before reaching a decision.<sup>93</sup> Decisions to execute and EAW on the merit of the case are beyond the grounds stated in Articles 3 and 4 EAW Framework Decision permitting the optional or mandatory refusal of a warrant, and are contrary to the EAW Framework Decision.<sup>94</sup>

The Framework Decision was intended to abolish the dual criminality requirement for a list of 32 ambiguously termed offences throughout the EU, however, it is clear from this section that both in form and effect, the undefined and ambiguous list of offences fall below a reasonable standard expected for the principles of legal certainty, and the expectation of the principle of equality before the law.

### **EUCA Recommendations:**

The EAW Framework Decision to abolish the dual criminality requirement falls below a reasonable standard of EUCA, and is not justified by deference to the Council, mutual trust, or the concern for the seriousness of offences. The lack of certainty of the definition of

---

<sup>88</sup> Klimek (n 9) 212-13.

<sup>89</sup> Art 55(2)(2) of the Polish Constitution.

<sup>90</sup> Under s 32, European Arrest Warrant Act 2003 (Ireland), the Minister of Justice may specify by order the offences under Irish law which constitute offences under Art 2(2) of the Framework Decision.

<sup>91</sup> Legge No 69 of 22 April 2005, Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri. See also Klimek (n 9) 212.

<sup>92</sup> *ibid.* See also Luisa Marin, 'The European Arrest Warrant in the Italian Republic' (2008) Eur Const LR 251.

<sup>93</sup> 2011 Commission Report (n 25); and Klimek (n 9) 212.

<sup>94</sup> Annex to the 2011 Commission Report (n 25) 8.

offences in the Framework Decision has resulted in disparate implementation of the law, which consequently violates the principle of equality before the law. It might be suggested that the remedy to uncertainty in the EAW framework would be to harmonise the definitions of the offences listed. However, it is clear that under the current legal framework of the EAW, harmonisation of criminal laws across Member States for 32 of the most serious crimes is legally implausible, constitutionally questionable, and politically impossible. The absence of mandate and competence in the Treaties in this area is testament to the Member States will to have sovereign control of the content of their criminal laws,<sup>95</sup> and it was also strongly confirmed by the Court of Justice in *Advocaten*.<sup>96</sup>

This raises an important question in the context of EUCA: is it inconsistent to argue that the EU violates EUCA, when there is no apparent resolution due to a lack of political will or legal competence to do so?<sup>97</sup> I argue it is not inconsistent, but rather reveals an instance of conflict between the rule of law and other values of the legal system. Measuring adherence to the principle of certainty is not to consider legal competence, political support, or any other value. The only question to be asked is: does this law reach an appropriately high degree of certainty? The question of legal competence is a different measure under EUCA, and aims to guarantee a different aspect which collectively forms part of the value of the rule of law. As will be discussed in greater detail in Chapter 8, when I consider the relationship between EUCA and other values of the legal system,<sup>98</sup> the necessity of reaching a high degree of adherence to EUCA is not absolute, and not always possible or preferable. EUCA is not the only value of a legal system.

Consequently, my recommendation on the basis of EUCA is a soft-law approach, utilising Open Method of Coordination [OMC] or a similar framework for judicial authorities. Already familiar in the areas of labour law and education, the OMC involves: (1) jointly

---

<sup>95</sup> See Section 3.2.

<sup>96</sup> Case C-303/05 *Advocaten voor de Wereld*, para 59. Though it is beyond the scope of this thesis, I would also consider it undesirable to harmonise criminal laws across the EU.

<sup>97</sup> For parallels in context of taxation, see Chapter 6, Section 3.2.

<sup>98</sup> See Chapter 8, Section 3.2.

identifying and defining objectives to be achieved (adopted by the Council); (2) jointly established measuring instruments (statistics, indicators, guidelines); and (3) benchmarking, ie comparison of EU countries' performance and the exchange of best practices (monitored by the Commission).<sup>99</sup> A first step would be to consolidate accounts of the interpretations of the listed offences as understood in each of the Member States and circulate these among all judicial authorities.<sup>100</sup> This would not resolve the current uncertainties in the law, but would provide guidance to judicial authorities. Guidelines on best practices, and providing easy access to information on the definitions of criminal offences in other Member States would go far towards resolving some of the uncertainties in the law, disparate application (through benchmarking), and (though the peer-pressure of mutual monitoring) aid the equal application of the law across Member States. Monitoring and evaluation of the enforcement of EAWs can have a very positive effect as a 'persuasive instrument capable of putting pressure on member states to improve their national systems'<sup>101</sup>

### 3.5.3 *The Disproportionate Use of the European Arrest Warrant*

In this section, I consider whether the use of EAWs in some Member States has been disproportionate and uncontrolled by limited discretion, and whether it consequently violates the **EUCA principles of legality**<sup>102</sup> and **limited discretion**. Proportionality in this context refers to the cost of instances in which EAWs are issued for minor offences, where the case is not ready for prosecution,<sup>103</sup> or in instances where other means of obtaining information

---

<sup>99</sup> Europa, 'Glossary of Summaries: The Open Method of Coordination' <eur-lex.europa.eu/summary/glossary/open\_method\_coordination.html?locale=en> accessed 1 August 2015.

<sup>100</sup> See 3.4.4 for how this could be an element of a centralised, and coordinated database.

<sup>101</sup> Paola Fiore, 'The Fourth Round of Mutual Evaluation Carried out by the Council of the European Union of the Practical Application of the European Arrest Warrant' (2007) *ERA Forum* 225; and Wolff (n 39) 123.

<sup>102</sup> The legality of the EAW Framework as regards its constitutional validity in Member States, and its validity under the Treaties, has been considered in Sections 3.5.1–3.5.2, and will not be repeated here.

<sup>103</sup> In these instances, it would be more appropriate for video-conferencing, or other means of holding a hearing without resorting to an EAW.

about or from the requested person are more suitable. In these circumstances, the consequent cost on an individual level, and at a State, and EU level, is disproportionately high. I argue that a proportionality test is a requirement of adherence to the EUCA principle of legality. The EUCA principle of discretion in this context relates to the limits (or lack of them) placed on officials issuing EAWs. EAWs ought to be issued in situations where they are proportionate to the offence in question. It is clear that the drafters did not envision a situation in which minor offences, or cases where other more appropriate means of obtaining information, would come under the minimum requirements of Article 2 EAW Framework Decision. In this section, I consider proportionality as a EUCA concern, and also explore the nuances of the principle of limited discretion as it relates to the (dis)proportionate application of EAWs in some Member States.

At an individual level, arrest and surrender to another Member State can have a severe impact on the life and liberty of the individual. For example, many states regard pre-trial detention as necessary, resulting in an average length of 5.5 months in detention before trial for EU nationals subject to EAWs.<sup>104</sup> EAWs for minor offences may also serve as a violation of Article 49 of the Charter of Fundamental Rights, if the severity of a penalty is disproportionate to the level of the offence.<sup>105</sup> As regards impact on the individual, it should be noted that the EAW Framework Decision does not provide for compensation, or Member State liability for damage.<sup>106</sup>

On Member State and EU levels, the EAW system is costly in terms of resources and administration.<sup>107</sup> The proportionality of EAWs issued and executed has been raised as a point of concern by practitioners based on numerous reports that EAWs have been used to surrender individuals across borders to be prosecuted for disproportionately minor offences.

---

<sup>104</sup> 2006 Impact Assessment accompanying Commission proposal for European Supervisory Order.

<sup>105</sup> There is an obligation to observe the Charter of Fundamental Rights under Art 1(3) EAW Framework Decision.

<sup>106</sup> Anne Weyembergh, 'Judicial control in cooperation in criminal matters: the evolution from traditional judicial cooperation to mutual recognition' in K Ligeti (ed), *The Future of Prosecution in Europe* (Hart Publishing 2012).

<sup>107</sup> del Monte (n 28) 9; and Sergio Carrera, Elspeth Guild and Nicholas Hernanz, 'Europe's most wanted? Recalibrating trust in the European Arrest Warrant System', Centre for European Policy Studies, Paper in Liberty and Security in Europe No 55, March 2013.

<sup>108</sup> In a 2012 Report, the UK-based NGO, JUSTICE, found that EAW requests from certain Member States have remained high compared with most other Member States, even in the event that the suspected person is only required to return for a few days custodial sentence or a fine.<sup>109</sup> For example, the ratio of EAWs issued per million inhabitants was 30 times higher for Polish authorities when compared to their UK counterparts.<sup>110</sup> Trust in and support of the system by national authorities is undermined when it is overused in the pursuit of trivial offences, or where little efforts have been made by issuing authorities to locate the suspected individual, or to determine alternative, appropriate means of investigation.

It is interesting to note that the highest number of refusals to execute arise from judicial authorities in Germany, and the highest number of EAWs issued come from Poland.<sup>111</sup> This revealed the troubling conclusion that there are different ‘unwritten’ conventions<sup>112</sup> on the application of the EAW in different Member States, but also very different conventions in criminal law in general.<sup>113</sup> To some extent this is inevitable in the degree of discretion afforded to national authorities in the implementation of the EAW. As the Framework Decision is only binding as to the result to be achieved, it leaves the method and form to the discretion of the legislatures of the Member States. It should be noted again that the Commission is unable to bring proceedings against Member States for a failure to comply with obligations under the Council Framework.<sup>114</sup> As a result of this, the disparate criminal law justice systems produce different interpretations of the appropriate use of EAWs, utilising the wide degree of discretion afforded by the EAW Framework.

In response to a disproportionate number of EAW requests arising from certain Member States, the European Commission stated that ‘confidence in the application of the

---

<sup>108</sup> JUSTICE, *European Arrest Warrants: Ensuring an Effective Defence* (JUSTICE 2012) 36. [JUSTICE 2012 Report]

<sup>109</sup> *ibid* 36–37.

<sup>110</sup> Guild and Marin (n 86) 4.

<sup>111</sup> 2011 Commission Report (n 25). Between 2005–2011, Germany and the UK received 75% of all EAW requests: Carrera, Guild and Hernanz, (n 107).

<sup>112</sup> By ‘convention’, I mean the way or form in which the EAWs are habitually issued according to local standards and measures.

<sup>113</sup> Carrera, Guild and Hernanz (n 107).

<sup>114</sup> Klimek (n 9) 204.

EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences.<sup>115</sup> It was the conclusion of the Commission report that ‘it is essential that all Member States apply a proportionality test, including those jurisdictions where prosecution is mandatory.’<sup>116</sup>

The Justice and Home Affairs Council recommended an amendment to the EAW Handbook,<sup>117</sup> which was included in the Revised Handbook.<sup>118</sup> It is recommended, and expected, that judicial authorities would consider the proportionality of issuing an EAW with regard to the seriousness of the offence, the likely length of any sentence, and other costs and benefits of execution. Factors which ought to be considered include assessment of the seriousness of the offence; the possibility the person is already in detention; the likely penalty to be imposed if the requested person is held to be guilty of the offence; protection of the public; and the interests of the victims of the offence.<sup>119</sup> Focusing on the efficiency of the EAW, it is recommended that judicial authorities also consider alternative, non-custodial, measures such as videoconferencing; and use of the Schengen Information System to establish a place of residence; and use of the Framework Decision on mutual recognition of Financial Penalties.<sup>120</sup> While the Handbook emphasises that the decision on interpretation is for the national authorities, it concluded with a recommendation to have regard to the judgment in *Advocaten voor de Wereld*, as well as Annex VII and Article 49 of the EU Charter on Fundamental Rights concerning the severity of punishment as a consideration of proportionality.<sup>121</sup> However, the Joint Committee on Human Rights (UK) was ‘not convinced that informal guidelines, bilateral discussions with the authorities of other Member States or a public interest test operated by the authorities in the requested country would be

---

<sup>115</sup> 2011 Commission Report (n 25).

<sup>116</sup> Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy*, HL Paper 156, HC 767, 22 June 2011, para 149. See also, Commission, *Report on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2011) 175.

<sup>117</sup> Council, ‘Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the European Arrest Warrant – Draft council Conclusions’ 8436/2/10 REV 2.

<sup>118</sup> EAW Handbook (n 27) 14.

<sup>119</sup> *ibid.*

<sup>120</sup> *ibid.*, 14-15.

<sup>121</sup> EAW Handbook (n 27).

operationally practical or successful in the long-term.<sup>122</sup> This raises a key issue: the EAW Framework Decision does not obligate Member States to apply a proportionality analysis when issuing EAWs.<sup>123</sup> A proportionality bar has been adopted by a number of Member States<sup>124</sup> to mitigate concerns, and they have introduced legal tests before a requested person is surrendered to another Member State. For example, the UK has legislated<sup>125</sup> to introduce a proportionality test, which must be considered by the judiciary before the execution of an EAW.

The disproportionate use (and consequent abuse) of the EAW system undermines trust in the system, resulting in severe costs both for the individual and for the administrative bodies tasked with executing the EAWs.<sup>126</sup> I conclude that it violates the principle of legality which demands proportionate application of EAWs, and transparency to provide access to information regarding the issuance and execution of EAWs.

### **EUCA Recommendation:**

The Framework Decision ought to be amended under Article 82 TFEU to provide for a proportionality test considering the seriousness of the offence, and whether there are less intrusive or alternative measures available. Proportionality is a well-established principle within the EU legal order, and it would be unlikely to undermine the efficiency, or efficacy of the EAW. A proportionality test would also remedy concerns related to the (un)limited discretion of officials in the issuing of EAWs by outlining a clear frame of reference as to when it is appropriate and proportionate to issue an EAW, and, (in appendix, or reference to the Handbook) suggesting alternative means of contact with the requested person. The

---

<sup>122</sup> Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy*, HL Paper 156, HC 767, 22 June 2011, para 159.

<sup>123</sup> The EAW Framework Decision makes no reference to assessment of the proportionality of the issuing of an EAW. See EAW Handbook (n 27) 14.

<sup>124</sup> 2011 Commission Report (n 25).

<sup>125</sup> A proportionality test under s 21A was introduced to the Extradition Act 2003, by the Anti-social Behaviour, Crime and Policing Act 2014. It applies to EAW accusation cases only.

<sup>126</sup> Almost three quarters of EAWs between 2005 and 2009 were not executed, resulted in administrative costs estimated to be in the region of €215 million: del Monte (n 28) 7.

inclusion of a proportionality test in the Framework Decision ought to provide the consequent incentive to implement a system which filters cases, and removes the concern of some states that there was an ongoing practice of the automatic issuing of EAW requests.<sup>127</sup> Best practice guidelines should be circulated, as for example, some Member States do not have a system which filters cases based on the most suitable method of dealing with the requested individual.<sup>128</sup> Ending the system of automatic issuing of EAWs has the net benefit of reducing administrative costs associated with executing EAW requests which are not possible, or disproportionate to the accused offence. The effect of publishing and monitoring the issuance and execution of EAWs could put Member States ‘in a logic of collective learning by mutually observing each other and learning from different practices and experiences’.<sup>129</sup> This could provide a net benefit to the system as a whole.<sup>130</sup>

#### **3.5.4 Protection of Procedural Rights in the EAW**

In this section, I consider whether the EAW mechanism has violated the **EUCA principles of judicial review, transparency and co-operative authority**. The principle judicial review in the context of the EAW demands that the process is independent, effective and accessible. In the context of the EAW, the guarantee of mutual recognition of judicial decisions is premised on the trust that each system will guarantee independent judicial review. Judicial cooperation in the issuing and execution of EAWs across the EU are premised on the assurance that the criminal justice systems of all Member States meet the standards stated in the EAW Framework Decision, namely the protection of procedural rights as laid out in the ECHR and the EU Charter of Fundamental Rights (specifically the recognition of effective judicial protection as a fundamental right guaranteed by Article 47 of the Charter). Recital 12

---

<sup>127</sup> Scott Baker, A Review of the United Kingdom’s Extradition Arrangements (September 2011) para 5.5.

<sup>128</sup> *ibid.* See Section 3.4.5 on how this could be adopted into a centralised system available to judicial authorities, practitioners and all interested parties.

<sup>129</sup> Wolff (n 39) 122; and Olivier de Schutter, ‘The Role of Evaluation in Experimentalist Governance’ in Charles F Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010) 262.

<sup>130</sup> See the recommendations of Section 3.5.6.

of the Preamble states respect for fundamental rights obligations, but, *prima facie*, only recognises refusal on the basis of direct discrimination against the individual.<sup>131</sup> However, I would argue this is significantly undermined by the fact that there is no explicit reference to a respect for fundamental rights under either Articles 3 or 4 EAW Framework Decision which governs the mandatory and optional refusal of an EAW by an executing Member State.

In *Melloni*,<sup>132</sup> the Spanish *Tribunal Constitucional* made its first (and so far only) request for a preliminary reference to the Court of Justice, asking whether there was a conflict between the constitutional and Charter right to a fair trial of a person convicted *in absentia* and the obligation of executing an EAW, and direction on how to resolve this conflict (if there was one).<sup>133</sup> The Court of Justice held that the Framework Decision precluded the execution of an EAW conditional upon a conviction *in absentia* being reopened to review in the issuing Member State. The Court further held that this did not violate fundamental rights, declaring that ‘casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.’<sup>134</sup> However, in *Jeremy F*, a case similarly concerning the

---

<sup>131</sup> Recital (12) of the Preamble states in full: ‘This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced for any of these reasons.’

<sup>132</sup> C-399/11 *Melloni v Ministerio Fiscal* (GC 26 February 2013). See also *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22, [2012] 2 AC 471. It is interesting to note that at issue also from a rights perspective was whether the case ought to be reopened in the event that the foreign judgment was given on the basis that defending counsel was given inadequate or unfair opportunity to address the charges. The Supreme Court held that while removal of executive interference by virtue of mutual recognition of judicial decisions was a virtue of the act, it also abolished ‘significant safeguards’ though this, it was recognised, was counterbalanced by the entire process being now ‘intra-judicial’ (at [479]). The emphasis within the judgement, though without explicit analysis, is that the EAW system is assumed to be rights-compliant, citing Recital 12, and Article 1(3) Framework Decision. Similarly, this conclusion was supported by the fact that all Member States are also contracting states to the ECHR.

<sup>133</sup> C-399/11 *Melloni v Ministerio Fiscal*. See also Nik De Boer, ‘Addressing rights divergences under the Charter: *Melloni*, Case note on Case C-399/11’ (2013) CMLR 1083, 1088.

<sup>134</sup> C-399/11 *Melloni v Ministerio Fiscal*, para 63. See Section 3.5.6 on the evaluation of this reasoning against the principle of cooperative authority. The German *Bundesverfassungsgericht* departed from the *Melloni* judgment, declaring that the protection of fundamental rights must be ensured as part of identity review: 2 BvR 2735/14.

requirement of reviewing a criminal conviction in *absentia*, the Court held that the EAW Framework Decision does not prevent Member States from providing a right of appeal with suspensory effect on condition that the application of the EAW is not for that reason frustrated.<sup>135</sup> A joint reading of *Melloni* and *Jeremy F* suggests that both executing and issuing judicial authorities may offer superior judicial protection, *up to* the point that this does not impair the EAW mechanism.

The *Melloni* decision, Daniel Sarmiento argues,<sup>136</sup> when read with *Åkerberg Fransson*,<sup>137</sup> presents a ‘principled reading of the Charter’<sup>138</sup> which is defensible in its division of authority in decisions concerning fundamental rights between the Court of Justice and the constitutional courts. The contrary argument is that the decision represents concerns for the primacy of EU law being held to be superior to fundamental rights protection, national and Charter.<sup>139</sup> Turning to EUCA to seek a resolution on grounds of adherence to the rule of law, the principle of judicial review demands the effective knowledge of the requested person of their procedural rights, and the case made out against them. In the EAW procedures, other identified deficiencies in another area of EUCA are: access to information for requested persons regarding the EAW request against them, the consequences of an EAW, the legal options available as regards appeal and review, and their procedural rights with regard to the whole process. Criticism of the practice of EAWs are based on the concern that often requested persons are not provided with legal representation in either the issuing or executing state.<sup>140</sup> Article 11 of the Decision sets out general ‘rights of a requested person’, which include the right to be assisted by legal counsel and an interpreter ‘in accordance with

---

See Federal Constitutional Court, ‘Protection of Fundamental Rights in Individual Cases is Ensured as Part of Identity Review’ Press Release 4/2016 (26 January 2016).

<sup>135</sup> Case C-168/13 *PPU* (30 May 2013).

<sup>136</sup> Daniel Sarmiento, ‘Who’s Afraid of the Charter?’ (2013) CMLR 1267.

<sup>137</sup> Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* (26 February 2013).

<sup>138</sup> Craig, *UK, EU and Global Administrative Law* (2<sup>nd</sup> edn, OUP 2012) 503; and Daniel Sarmiento, ‘Who’s Afraid of the Charter?’ (2013) CMLR 1267.

<sup>139</sup> L. Besselink, ‘The Parameters of Constitutional Conflict after Melloni’ (2014) ELR 531.

<sup>140</sup> Fair Trials International, *The European Arrest Warrant: Time for Reform?* (May 2011).

the national law of the executing Member State.’ The Framework Decision does not set minimal standards as to this legal assistance.

Some Member States have been held in violation of the ECHR for many aspects of their criminal justice systems. For example, Poland, which issues the highest number of EAW requests,<sup>141</sup> has been held in violation of Article 3 ECHR by the European Court of Human Rights for the state of its prisons.<sup>142</sup> In Greece, the ECtHR held there was a violation of Article 3 ECHR for the poor hygienic condition of cells,<sup>143</sup> with violations on similar grounds in France,<sup>144</sup> and Belgium.<sup>145</sup> The Court of Human Rights has previously held that surrender or extradition of an individual to a state where they fear degrading or inhuman treatment is contrary to Article 3 ECHR.<sup>146</sup> This is a point of real concern for Member States, and could impact on the execution of EAWs as states will be less willing to extradite to other Member States.

In light of all the above, and as observed by the 2012 report by JUSTICE,<sup>147</sup> the EAW requires urgent attention for this reason in order to the guarantee of minimum standards of procedural safeguards in Member States, in order for the system to function efficiently.<sup>148</sup> A proposal by the Commission for a Council framework decision concerning procedural rights in criminal proceedings<sup>149</sup> did not go forward, despite support from the Parliament.<sup>150</sup> In its place, ‘The Roadmap’, a resolution adopted by the Council,<sup>151</sup> sought to strengthen procedural rights of accused individuals in light of concerns regarding the differing standards of

---

<sup>141</sup> Annex 1, 2011 Commission Report (n 25). See also Guild and Marin (n 86).

<sup>142</sup> *Slawomir Musial v Poland* App no 28300/06 (ECtHR, 20 January 2009).

<sup>143</sup> *Peers v Greece* App no 28524/95 (ECtHR 19 April 2001).

<sup>144</sup> *Canali v France* App no 40119/09 (ECtHR 25 April 2013).

<sup>145</sup> *Vasilescu v Belgium* App no 64682/12 (ECtHR 18 March 2014).

<sup>146</sup> *Soering v UK* App no 14038/88 (ECtHR 7 July 1989). See also, *Mamatkulov Askaron v Turkey* App nos 46827/99 and 46951/99 (ECtHR 4 February 2005), para 71; *Saadi v Italy* App no 37201/06 (ECtHR 28 February 2008), paras 128-33; and *Orchowski v Poland* App no 17885/04 (ECtHR 22 October 2009), paras 119-22.

<sup>147</sup> JUSTICE 2012 Report (n 107).

<sup>148</sup> JUSTICE, European arrest warrant: a solution ahead of its time (2003) 76.

<sup>149</sup> Commission, ‘Proposal for a council framework Decision on certain procedural rights in criminal proceedings throughout the European Union’ COM (2004) 328 final.

<sup>150</sup> Parliament, Text adopted by Parliament, single reading (15 March 2006) 2005/2175(INI), <[www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=527407](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=527407)> accessed 20 August 2015.

<sup>151</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings 2009/C 295/01.

treatment given across Member States through individual, and step-by-step measures. The Roadmap identifies six priorities:

1. the right to interpretation and translation;
2. the right to information about rights;
3. the right to pre-trial legal advice and at-trial legal aid;
4. the right of a detainee to communicate with family members, employers and consular authorities;
5. greater protection for vulnerable subjects;
6. the publication of a green paper on pre-trial detention.

Directives which have followed the Roadmap include: the 2010 Directive on the right to interpretation and translation,<sup>152</sup> the 2012 Directive on the right to information,<sup>153</sup> and the proposed 2013 Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings.<sup>154</sup> With regard to the apparent prioritising of efficiency and effectiveness of EAWs over the rights of individuals, it is clear that more must be done to remedy the identified deficiencies.

In terms of the **principle of co-operative authority**, the *Melloni* decision highlights important point of conflict between competing state-centric and EU-centric accounts of the rule of law, in addition to potential conflicts between EUCA and human rights.<sup>155</sup> For both the Spanish Constitutional Court and the CJEU, the rule of law is served by the requirement of no punishment without law. However, for the Spanish civil court, the rule of law is only upheld if the individual is present at trial, whereas for the CJEU, there is no breach of the rule of law if the individual is tried *in absentia* though with a lawyer present at trial. The resolution

---

<sup>152</sup> Directive 2010/64 EU of the European Parliament and Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280.

<sup>153</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142.

<sup>154</sup> Proposal for Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings [2013] COM (2013) 824 final.

<sup>155</sup> I am grateful to my DPhil examiners, Dr Alison Young and Dr Cormac MacAmhlaigh, for identifying this point.

which EUCA provides for this conflict is in the principle of mutual cooperation: in this instance, the CJEU's judgment is based on the Framework directive which was, in turn, adopted by Spain and agreed to by all the Member States. There must be a strong presumption in favour of the effectiveness of EU law on the basis of co-operative authority, which should only be rebuttable in the situation where the substance of a fundamental right, or value, is significantly undermined or violated.<sup>156</sup>

In terms of the conflict between human rights and EUCA, it is important to highlight a tension in the application of EUCA: in Section 3.5.1, I identified the dangers to the rule of law in the differential and disparate implementation and administration of the EAW in Member States. However, in refusing to accept that different countries can unilaterally place higher standards of protection than are already provided in the EAW, the Court is trying to ensure uniformity and mutual and reciprocal surrender. The CJEU in *Melloni* was specifically trying to avoid threats to uniformity resulting in national disparate interpretation of the EAW. But, here I argue that the Court's insistence on uniformity in application, and refusal to allow unilateral disparate interpretation of the Member States is itself a violation of EUCA. The resolution to this question is to cite this as an example of a situation in which EUCA comes into conflict with other values (for example, constitutional values, and fundamental rights) of the legal system, or with itself. Consideration as to the resolution of conflict between EUCA and other values of the legal system is discussed in Chapter 8. However, for the purposes of this section, I proceed on the basis that there is a violation of EUCA, and suggest recommendations as to how it can be remedied.

### **EUCA Recommendations:**

In addition to the ongoing drive to strengthen procedural rights on a step-by-step basis, driven by *The Roadmap*, additional measures must be made to guarantee the principle of

---

<sup>156</sup> See Chapter 4, Section 3.

independent, accessible and effective judicial review, as well as the linked aspect of access to information for requested persons. These measures should include:

- the amendment of the Framework Decision to include an explicit ground of refusal based on ‘substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State’s obligations in accordance with Article 6 TEU and the Charter of Fundamental Rights of the European Union’;<sup>157</sup>
- the inclusion in this ground of refusal of a burden of proof with a rebuttable presumption of respect for fundamental rights, respecting the principle of mutual recognition;<sup>158</sup>
- the inclusion of minimum standards for the protection of procedural rights which are properly implemented and applied, led by the proposals outlined in *The Roadmap*;<sup>159</sup>
- and the inclusion of legal remedies and compensation in cases of miscarriages of justice, including (for example) mistaken identity.<sup>160</sup>

However, as has been outlined in section 3.4.1, there is only so far that the EU can remedy EUCA violations. Strengthening and enhancing respect and adherence to fundamental rights is an issue for the legislatures, courts and other institutions of Member States. Cooperative authority implies also cooperative responsibility to ensure the mutual respect of both judicial decisions, and also the rights of individuals. As Bogdandy writes, ‘if fundamental rights violations are not sanctioned, that has severe repercussions for the fundamental values of

---

<sup>157</sup> This has been adopted from the European Parliament, ‘Resolution of 27 February 2014 on the review of the European arrest warrant’ 2013/2109(INL).

<sup>158</sup> As suggested by del Monte (n 28).

<sup>159</sup> This was proposed by the European Commission, ‘Green Paper on Strengthening mutual trust in the European judicial area’ (Brussels 14 June 2011) COM (2011) 327 final.

<sup>160</sup> For example, see *Symeou v Public Prosecutor’s Office* [2009] 1 WLR 2384. See also Fair Trials International, ‘Outline proposal for European Parliament own initiative legislative report’ (Fair Trials International, 1 February 2012).

European integration, including also the principle of mutual confidence and the premise that the Union can rely on the functioning of institutions of the Member States.’<sup>161</sup>

### 3.5.5 *Transparency of the EAW System*

The **EUCA principle of transparency** as regards the EAW system<sup>162</sup> connotes the idea of an intelligible and accessible system of issuance and execution of EAWs. It also requires access to information and open proceedings in the issuance, execution and any challenge to EAWs. In the previous section, I considered access to information in terms of individual rights. In this section, I consider the system as it relates to judicial authorities, and show how a lack of shared information undermines the system and violates EUCA. I evaluate the EAW system for violation of the EUCA principle of transparency under the following: (a) the complexity of the EAW system; (b) judicial authorities’ access to information; and (c) access to information regarding the Issue, Execution and Refusal of EAWs.

#### *(a) The Complexity of the EAW System*

The implementation of the EAW system has marked a significant improvement from the previous state of extradition and surrender in the EU. As Bureš states, the EAW mechanism ‘clearly makes the EU legal process of extradition and surrender more legible and transparent than the previous myriad of extradition conventions and bilateral agreements.’<sup>163</sup> While there remain issues with the (lack of) definition of certain terms,<sup>164</sup> and concern for omitted issues,<sup>165</sup> the EAW mechanism has succeeded in providing an intelligible legal framework,

---

<sup>161</sup> Armin von Bogdandy et al, *A Rescue Package for EU Fundamental Rights-Illustrated with Reference to the Example of Media Freedom* (18 February 2012) <ukconstitutionallaw.org/2012/02/18/a-rescue-package-for-eu-fundamental-rights/> accessed 28 July 2015.

<sup>162</sup> It is important to note that this is limited in scope to the transparency of the EAW system, and relevant legal mechanisms which are related to the working of the EAW system, and not to the transparency of criminal justice systems as they operate as a whole in Member States.

<sup>163</sup> Oldrich Bureš, ‘European Arrest Warrant: Implications for EU Counterterrorism Efforts’ (2009) *Central Eu JISS* 21.

<sup>164</sup> See for example, Section 3.4.2 on the abolition of dual criminality for 32 ambiguous offences.

<sup>165</sup> For example, the issue of compensation in case of fault, state liability for damages, and pre-trial detention time-limits. See del Monte (n 28).

providing a high degree of transparency as to the surrender procedures applicable across Member States. The EAW mechanism is not designed to be complex. The intention of efficient and effective administration would be defeated if it were. As outlined in Section 3.3, the process by which the EAW ought to be issued is clear, and all Member States have accepted the form by which EAWs are issued.<sup>166</sup> However, just because a system is not complex, does not necessarily mean that it is transparent. This is why it is important to consider access to information as pertinent to the principle of transparency.

*(b) Access to Information: Judicial Authorities*

The principle of mutual recognition of the judicial decisions of other Member States is premised on the mutual trust of the criminal law justice systems of other Member States,<sup>167</sup> and in the conviction of Member States' 'shared commitment to the principles of freedom, democracy, and respect for human rights, fundamental freedoms and the rule of law.'<sup>168</sup> It is not possible to trust in a system without transparency as to the processes which effectuates it. Unfamiliarity with the criminal law justice of other Member States can lead to distrust in the systems of other Member States, and can often serve as a reason for the invalidation of EAWs in national courts. For example, the report for the European Arrest Warrant Judicial Network Project<sup>169</sup> concluded that (1) delays were caused by information requests from executing states;<sup>170</sup> (2) there is a lack of a 'comprehensive, reliable and up to date source of information on procedural differences between Member States' available to judges, which

---

<sup>166</sup> EAW Handbook (n 27).

<sup>167</sup> For the concerns over the level of deference afforded to 'mutual trust' see Section 3.5.6.

<sup>168</sup> del Monte (n 28).

<sup>169</sup> UK Judicial Office, *The European Arrest Warrant: Judicial Recommendations European Arrest Warrant Judicial Network Project Just/2011-2012/JPen/AG/2986*. The European Arrest Warrant Judicial Network Project was a two-year project, part-financed by the EU, and headed the Judicial Office (UK) with assistance from the Spanish General Council and the Lithuanian Judicial Office. It includes input from over 160 judicial authorities across 24 Member States.

<sup>170</sup> The report suggested this could be due to the lack of specific information on the warrant, or differences of information for procedural reasons.

results in information requests; and (3) issuing states would benefit (and want) information on refusals to improve future applications.<sup>171</sup>

*(c) Access to information: Data Regarding the Issue, Execution and Refusal of EAWs*

A related issue to the need for information for judicial authorities, is access to information directly relating to the number of EAWs issued, executed and refused, across Member States, in order to provide insight into the working mechanics of the system, to establish the norm and identify divergent trends among the judicial authorities of Member States. There is an identified lack of reliable statistical and comparable data in the area of EU criminal justice.<sup>172</sup> The last published data on the issue and execution of EAWs by the EU was the 2011 Report on the implementation of EAWs.<sup>173</sup> However, even within this report, there were major concerns with this data which was acknowledged by the Commission as having ‘considerable shortcomings’.<sup>174</sup> This resulted in the call for ‘a sound statistical method allowing qualitative assessment and impartial evaluation of the use of the EAW’<sup>175</sup> While it is true that some states, for example the UK<sup>176</sup> and Ireland,<sup>177</sup> publish information relating to the number of EAWs requested and executed, there is no centralised or coordinated action to track and evaluate

---

<sup>171</sup> UK Judicial Office (n 161) 3.

<sup>172</sup> Commission, ‘Developing a Comprehensive and Coherent EU Strategy to Measure Crime and Criminal Justice: An EU Action Plan 2006-2010’ COM (2006) 437.

<sup>173</sup> Annex 1, 2011 Commission Report (n 25). A promised annual reporting mechanism in the area of EU internal strategy has not been delivered: Commission, ‘Communication. The EU Internal Security Strategy in Action: Five Steps towards a More Secure Europe’ (Brussels 22 November 2010) COM (2010)673 final.

<sup>174</sup> *Report On the implementation on the European arrest warrant*, states ‘There are considerable shortcomings in the statistical data available for analysis. Not all Member States have provided data systematically and Member States do not share a common statistical tool. Moreover, different interpretations are to be found in the answers to the Council’s yearly questionnaire’, 10. See also del Monte (n 28).

<sup>175</sup> del Monte (n 28). See also Carrera, Guild and Hernanz (n 106).

<sup>176</sup> EAW Statistics for the UK are available to the public at <[www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics](http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics)>.

<sup>177</sup> The Central Authority with responsibility for EAWs publishes an annual report to the Oireachtas (Irish Houses of Parliament) on the operation of the warrants, including publishing details on the origins of EAW requests. See Report on the operation of the European Arrest Warrant Act 2003 (as amended) in the year 2014 made to the Houses of the Oireachtas by the Central Authority in the person of the Minister for Justice and Equality pursuant to section 6(6) of the European Arrest Warrant Act 2003 (October 2015) <[www.justice.ie/en/JELR/JUQEAWReport2014.pdf/Files/JUQEAWReport2014.pdf](http://www.justice.ie/en/JELR/JUQEAWReport2014.pdf/Files/JUQEAWReport2014.pdf)> accessed 29 July 2015.

the use of the EAW across Member States. This information is relevant to all stakeholders: judicial authorities, lawyers, academics, policy-makers, politicians, and individuals.

### **EUCA Recommendations:**

In the interests of working towards a transparent EAW system, I would recommend the creation of a centrally accessible database<sup>178</sup> (preferably available in all official languages) which consolidates, publishes and tracks the following information which is highly relevant to the transparency of the system and judicial coordination between authorities:<sup>179</sup>

- the Framework Decision, with links to pertinent case law of the Court of Justice;
- Key judgments, and links to criminal codes and legislation of Member State; \*
- explanations of the criminal procedures and court systems of Member States; \*
- consolidated accounts of the interpretations of the listed offences under Article 2(2) EAW Framework Decision;
- detailed accounts of proportionality tests undertaken and adopted in Member States, with multiple examples of what constitutes ‘serious’ and ‘minor’ offences;
- a deposit for anonymous refusal judgments;<sup>180\*</sup>
- the numbers of EAW requests issued, and executed in the EU;

This could be further aided under the Commission’s current commitment to support the development and functioning of the EAW system through funding of training, the provision of good practice guidelines, and judicial networking projects. This commitment has been

---

<sup>178</sup> Potentially as part of Eurojust, the EU’s Judicial Cooperation Unit which already has the advantage of familiarity among judicial authorities. See the website at <[www.eurojust.europa.eu/Pages/home.aspx](http://www.eurojust.europa.eu/Pages/home.aspx)>.

<sup>179</sup> Recommendations in this section have been adapted from UK Judicial Office, *The European Arrest Warrant: Judicial Recommendations European Arrest Warrant Judicial Network Project*. Recommendations which mirror those proposed by the project have been marked with an asterisk (\*).

<sup>180</sup> Anonymity is considered important from the perspective of encouraging participation among judicial authorities.

shown through the publication and revision of the EAW Handbook (2011).<sup>181</sup> Ultimately, however, adherence to the principle of transparency is not merely having a straightforward framework, but rather by having intelligible procedures, and access to information regarding the application of the law. Judicial cooperation is strengthened and enhanced through shared information regarding the laws and practices of the EAW across Member States. A lack of information creates an opaque system, undermining the functioning and effectiveness of the EAW system, and violating EUCA.

### 3.5.6 *Where Mutual Trust is not enough: Co-operative Authority*

The **principle of co-operative authority** supports and enhances mutual trust among the Member States. Mutual trust is both necessary to and the result of a well-functioning system. Mutual trust in the context of the EAW refers to the judicial cooperation between Member States, and the trust in the judicial decisions, and criminal justice systems in other Member States. One of the concerns of the EAW is the difficulty in reconciling the variable criminal justice standards within Member States with the concept of mutual trust which underlies the EAW system. Ultimately, mutual trust is not enough:<sup>182</sup> the EAW mechanism relies on a ‘high level of confidence between Member States’ in the functioning of Member States’ criminal justice systems.<sup>183</sup>

Despite the declarations of its success by the Commission,<sup>184</sup> studies have confirmed concerning issues with regard to the standards of protection of fundamental rights, which is more often assumed than realised.<sup>185</sup> Throughout the analysis of Section 3.4, it has been

---

<sup>181</sup> EAW Handbook (n 27).

<sup>182</sup> Sarah Wolff, ‘The Rule of Law in the Area of Freedom, Security and Justice: Monitoring at Home what the European Union Preaches Abroad’ (2013) HJRL 119, 122.

<sup>183</sup> EAW Framework Decision, para 10.

<sup>184</sup> 2011 Commission Report (n 25) 2.

<sup>185</sup> Sophie Bot, *Le Mandat d’Arrêt Européen* (Larcier 2009); and Gisèle Vernimmen-Van Tiggelen, Laura Suano and Anne Weyembergh, *L’avenir de la reconnaissance mutuelle en matière pénale dans l’Union européenne* (Ed. de l’Université de Bruxelles, 2009) 67. See also Franco Impalà, ‘The European Arrest Warrant in the Italian legal system. Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice’, (2005) Utrecht LR 56; Gisèle Vernimmen-Van Tiggelen and Laura Surano, *European Criminal Law Academic Network, Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union* (November 2008) EC DG JLS.

shown that ‘mutual trust’ has been used as a justifying factor in decisions concerning the validity of the EAW system, often dismissing significant and identified deficiencies in the system including the abolition of the protection of the test for dual criminality; upholding (ostensibly) disproportionate EAW requests at national level;<sup>186</sup> and the ostensibly weak legal safeguards and protection of rights. In this section, I consider the particular problem posed by deference to the principle of mutual recognition, and show how the principle of cooperative authority provides direction towards a resolution of consequent deficiencies in EUCA. The Council found that there ought to exist pan-EU standards for the protection of procedural rights, which are ‘properly implemented and applied’ in the Member States.<sup>187</sup> This was considered to be complementary to the ECHR and to the Charter, and necessary as a means of enhancing mutual trust within the EU.<sup>188</sup> Operation of the EAW can only be suspended in the event of serious and persistent breach by a Member State.<sup>189</sup>

The high degree of deference shown to the principle of mutual recognition in the analysis and evaluation of a Member States’ criminal justice system is clearly evident in the case law of both national<sup>190</sup> and EU courts.<sup>191</sup> In *Advocaten*, the Court of Justice held, ‘the Council was able to form the view, on the basis of the mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, [...] the categories of offences in question feature among those the seriousness of which [...] justifies dispensing with the verification of double criminality’.<sup>192</sup> Despite the uncertainty in the definition of these terms, and the issue with regard to the disparate interpretations of these terms across the EU (and even within Member States),<sup>193</sup> the Court chose not to give further analysis or direction. The conclusion to be drawn from these cases, supported by the dicta of the Court

---

<sup>186</sup> See for example, in the UK, *Sandru v Government of Romania* [2009] EWHC 2879, [2009] All ER 282.

<sup>187</sup> Council of the European Union, ‘Initiative for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings: Explanatory memorandum’ (2009) No 16801/09 ADD 1, 3.

<sup>188</sup> *ibid.*

<sup>189</sup> This is based on the principles set out in Article 6(1) TEU, as determined by the Council under Article 7 TEU.

<sup>190</sup> See for example: *Sandru v Government of Romania* [2009] EWHC 2879, [2009] All ER 282, [14].

<sup>191</sup> Case C-303/05 *Advocaten voor de Wereld VZW*; and C-399/11 *Melloni*.

<sup>192</sup> Case C-303/05 *Advocaten voor de Wereld VZW*, para 57.

<sup>193</sup> Carrera, Guild and Hernanz (n 107).

in *Melloni*,<sup>194</sup> is that even casting doubt on uniformity of standards of protection (which is certainly at issue across Member States), the mechanism would fail.<sup>195</sup>

The effective functioning of the EAW system is reliant on mutual trust and mutual recognition. Mutual trust in the criminal justice systems of other Member States is weakened by ineffectiveness and low levels of rights-compliance. This has been recognised by the Commission which has prioritised the strengthening of procedural rights in Member States, as the establishment of minimum standards of protection of procedural rights for individuals would not only benefit individuals but would also serve to ‘promote the mutual trust the is the necessary counterbalance to judicial co-operation measures that enhance the powers of prosecutors, courts and investigating officers.’<sup>196</sup> Condemning the inadequate protection of basic procedural rights, the NGO Fair Trials International submitted to a House of Lords enquiry the conclusion that ‘there is not a sound basis for mutual trust, not least because basic fair trial rights are not protected adequately in many EU countries’.<sup>197</sup> Rather than strengthening mutual recognition through blind trust, the system reliant upon it is weakened.

### **EUCA Recommendations:**

Mutual trust and judicial cooperation between Member States is premised on the high standards of criminal procedures across all Member States. As I have shown, these are rooted in abundance with EUCA: a commitment to equality before the law through equal application of the law; resolution of the current uncertainties in the definition of terms; the protection of procedural rights; and access to information regarding criminal law and proceedings in all Member States. Confidence in mutual trust in the national and EU courts as a bar to consideration and remedy of deficiencies in the rule of law in the EAW system only weakens

---

<sup>194</sup> C-399/11 *Melloni v Ministero Fiscal*, para 63.

<sup>195</sup> See Sections 3.5.1, and 3.5.4.

<sup>196</sup> Commission, ‘Green Paper’ (n 151).

<sup>197</sup> Fair Trials international submission to House of Lords Select Committee on the European Union Inquiry into the UK’s 2014 Opt-out Decision (Protocol 36) <[www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-sub-committee-f/inquiries/parliament-2010/protocol-36-follow-up/](http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-sub-committee-f/inquiries/parliament-2010/protocol-36-follow-up/)> accessed 1 August 2015.

the system, and creates further conflicts and litigation. The principle of cooperative authority assumes responsibility for the EAW to be shared between Member States and the Union. Recommendations based on the EUCA principle of cooperative authority are:

- Adopting all proposed recommendations within Sections 3.4.1-3.4.5 of this Chapter – all aimed at remedying the deficiencies which undermine mutual trust in the criminal law justice systems of Member States;
- Promoting cooperation ‘in strengthening contact networks of judges, prosecutors and criminal defence lawyers to facilitate effective and well-informed EAW proceedings, and to offer relevant training at national and Union level to judicial and legal practitioners in inter alia languages, the proper use of the EAW and the combined use of the different mutual recognition instruments’<sup>198</sup>
- The creation of an annual report including statistical data on EAWs issued and executed across Member States. This report, coordinated by the Commission, could monitor and evaluate Member States implementation and use of the EAW Framework Decision.<sup>199</sup> Operating on the principle of co-operative authority, such a peer-review mechanism could identify and resolve issues of implementation, and could enhance and strengthen mutual trust amongst Member States’ enforcement and judicial authorities.<sup>200</sup>

The recommendations on the basis of EUCA that I have developed in this Chapter cannot solve all the issues arising from the implementation and use of EAWs across the EU, as it is not possible for everything to be solved at EU level. This is why the principle of cooperative authority is essential to the working of the EU: Member States must assume mutual responsibility to ensure the effective, just and proportionate use of EAWs, and fulfil the expectations of mutual trust. While the EAW does seek to provide an efficient means by

---

<sup>198</sup> This has been adopted from European Parliament Resolution of 27 February 2014 on the review of the EAW.

<sup>199</sup> A similar mechanism was promised by the Commission: Commission, ‘Communication. The EU Internal Security Strategy in Action: Five Steps towards a More Secure Europe’ (Brussels 22 November 2010) COM (2010)673 final.

<sup>200</sup> Wolff (n 39) 123; Fiore (n 100) 225-32; and de Schutter (n 128) 272.

which suspected persons can be surrendered across Member States, there remains much to be remedied from the perspective of EUCA. Adopting the EUCA recommendations would go far in strengthening mutual trust between judicial authorities and Member States across the EU, but also serve as safeguards and protections for the individual in the EU.

#### 4 CONCLUSION

---

The rule of law exists to protect the individual against arbitrary rule, and to ensure that no man, state or transnational Institution is above the law. Adherence to a high standard of EUCA can lead to many benefits for the individual in terms of the assurance of certainty in navigating sometimes complicated processes, and the protections of legal safeguards which ought to be guaranteed by the legal order. On a more hopeful, and optimistic note, I have also argued that a commitment to EUCA by the EU could lead to a consequent enhancement and strengthening of the rule of law across the EU and its Member States, as discussion and networking could lead to joint commitments on the realisation of the rule of law. The ways in which the rule of law are determined is through a discursive and dialogical process. However, as highlighted in this chapter, there is still much development to be done by the EU legal order in order to realise a higher standard of rule of law compliance.

The EAW is stated to be the ‘cornerstone’ of judicial cooperation,<sup>201</sup> and evidence of the realisation of mutual trust in the EU across judicial authorities. The EAW, enabling the surrender of individuals (both citizens and residents) in a timely and efficient manner serves as a flashpoint between the criminal law, EU law, mutual trust and judicial cooperation. I have highlighted that there are outstanding concerns in the implementation and functioning of the EAW across Europe, and have proposed recommendations based on a greater compliance with the standard set by EUCA. While these recommendations are for the benefit of the individual, and could go far in protecting and enhancing the legal welfare of the individuals

---

<sup>201</sup> Recital (6) in the preamble, EAW Framework Decision states ‘The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the “cornerstone” of judicial cooperation.’

in the EU, it is ultimately the responsibility of the EU and the Member States to ensure a higher standard of EUCA compliance.

# PART III – IN PROSPECTIVE

## CHAPTER EIGHT

### *EUCA in Perspective*

#### 1 INTRODUCTION

---

In this final Chapter, I summate the conclusions of the thesis. I place EUCA within the context of other values of the EU legal system, and provide a prospective on future directions of research. Beginning in **Section 2**, I return to the central question of why EUCA is important and relevant, and synthesize the arguments which advocate the necessity and appropriateness of EUCA. I also identify some of the challenges to, and limitations of, the conclusions of my thesis.

In **Section 3**, I place EUCA within the larger fabric of good governance by reflecting on the relationship between EUCA and other values of the EU legal system. As considered in *Part I*, the rule of law is only one value of a legal system, and is not the only value to which the legal system should aspire. To contextualize the relationship between EUCA and those other values, I consider how EUCA can mutually support and enhance other values of the EU legal order.<sup>1</sup> I also consider that there can sometimes be tension between the requirements of the rule of law and other values.

Finally, in **Section 4**, I ask what could be next for EUCA, and suggest important avenues of research in terms of how the rule of law can be realised in the EU and beyond. I conclude on the fundamental importance of protecting, strengthening, and realising the ‘foundational’

---

<sup>1</sup> The other values are drawn from Article 2 TEU, which states in full: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’ While it is beyond the scope of my research to consider whether or not this represents all values of good governance, I narrow the scope of consideration of values to the ones to which the EU itself claims to aspire.

values of the EU Treaties, not just as a means of resolution in times of crisis, but as a guarantee of the future of the European Union.

## 2 EUCA IN RETROSPECT: QUESTIONS, CHALLENGES AND CONCLUSIONS

---

The central question of this thesis arose from what I identified as an apparent contradiction in the reasoning of EU institutions: the EU claims to be founded on and guided by the rule of law, and also to have competence to police Member States' compliance with the rule of law, and yet the EU has never defined what is meant by 'the rule of law'. In aiming to resolve this apparent puzzle, I aimed to provide an answer to the question of what an account of the rule of law which is suitable for the EU legal system should be. In this thesis, I do not present a unique conception of the rule of law, but rather define and elaborate on an account of the rule of law which is apt for the specific nature of the EU legal order.

As a project, the study of the rule of law in the EU intersects the fields of legal philosophy and (what could be termed) 'black letter' EU law. I reflected this intersection in the division of the thesis in two: *Part I - In Principle*, and *Part II - In Practice*. In *Part I*, I resolved the ostensibly contradictory, argument that the rule of law is both a universal value but also distinctive to each legal system; alternatively, EUCA is necessary, but it is also distinctive from state-centric accounts of the rule of law. I aimed, first, to provide a strong theoretical foundation and context to my account of the rule of law for the EU, and then to show its practical relevance in the resolution of contemporary problems facing the EU. In this way, I aimed to bridge the gap between a theoretical account of the rule of law, and its application to contemporary issues.

One challenge which arose in this regard stemmed from the ubiquity of the rule of law in legal philosophy, and its relevance to all areas of law. In *Part I*, for example, it was not possible to examine the diverse historical development of the rule of law in all, or even most, of the Member States of the EU. I therefore focussed on providing relevant analysis, and

highlighting the main debates and challenges to the rule of law, in respect of issues of ongoing contemporary importance in the EU Member States. Similarly, in *Part II*, I selected and developed case studies which were both narrow in scope, but also were representative of larger issues and complexities within the EU and could clearly show the possibilities of EUCA for providing a source of legitimacy for the EU from the perspective of Member States and individuals in the EU.

In *Part I*, I aimed to develop and defend an account of the rule of law which is EU-centric, and apposite for evaluating the EU legal order with regard to rule of law compliance. I intended to show how EUCA is distinctive as an apt account of the rule of law for the EU legal system, but also reflective of the value of the rule of law. I began by examining contemporary accounts of the rule of law across the EU, and considered how other theorists have aimed to answer this question across Europe. In Chapter 2, I analysed contemporary accounts of the rule of law, *Rechtsstaat*, and *État de droit*. It quickly became evident that it is not possible to assume that there is one ‘common’ account of the rule of law which is shared even between these three states – the UK, France and Germany. All contemporary accounts of the rule of law which I analysed disagreed as to the meaning, value, substance, purpose and the institutional frameworks which claim to instantiate the rule of law. I concluded that advocating a single, universalizing account of the rule of law which is applicable to the EU and all its Member States risks denigrating the unique and diverse legal cultures across the EU. I also determined that arguing a pluralist, or all-inclusive account results in an unconvincing, unquantifiable and, likely, contradictory list of principles and institutions, which would ultimately fail to meet the needs of the EU legal System. The essential point which emerged was that contemporary accounts of the rule of law are *state-centric*: they developed in, and are defined by, the state legal system in which they are applicable. The answer to the question of what account of the rule of law should be endorsed by the EU and for the EU legal system is an *EU-centric* one.

In Chapter 3, I underlined the need for an EU-centric account of the rule of law by highlighting the lack of an account provided at EU level, and the complexities of the EU legal

order which render state-centric accounts inapposite. Legal information and jurisprudence from the Courts on the meaning and content of rule of law at EU level proved sparse, and sometimes inconsistent. The term ‘rule of law’ is a foundational value under Article 2 TEU, and is ubiquitous in speeches, press releases, and reports published by the Council and Commission. I examined EU administrative law, which is intrinsically linked with compliance with the rule of law. However, even in the jurisprudence of the Court of Justice which has relied on the rule of law (or the *Communauté de droit*) to expand the scope of its powers of review, there is no account of what is actually meant by ‘the rule of law’ within the context of the EU legal order. I argued that it is even more concerning that the *New Framework* does not provide an account of what is meant by ‘the rule of law’, and yet creates a mechanism for the Commission to monitor Member States’ compliance with the rule of law *even* in areas beyond the scope of EU law. I highlighted that there is a notable absence of scrutiny of the EU’s compliance with the rule of law, and determined that it is inconsistent to supervise Member States’ compliance, but not to subject the EU to a similar expectation of a high degree of compliance with the rule of law. I concluded that the EU ought to be subject to a similar degree of scrutiny, and expectation of compliance with the rule of law.

Having established the need for an account of the rule of law, I then identified some of the distinctive and specific features of the EU which rendered state-centric accounts of the rule of law inapt. One of the challenges of this question was to consider how the EU is different from a state. It seemed to be self-evident at first: the EU is a treaty-based politico-economic Union of 28 Member States. The boundaries, governance, and population of the EU are defined by its constituent and sovereign Member States. However, as a legal system which ought to adhere to the rule of law, the EU has (intentionally<sup>2</sup>) adopted many of the features and institutions of state legal systems, for example – the supremacy of the ‘constitutional’ norms in the Treaties and directly effective secondary law, as well as judicial review of national norms for their consistency with EU law, and the creation of EU citizenship. The specific features

---

<sup>2</sup> Keith Culver and Michael Giudice, ‘Not a System but an Order: An Inter-Institutional View of European Union Law’ in J Dickson and P Eleftheriadiis (eds), *Philosophical Foundations of European Union Law* (OUP 2013) 75.

which I identified and examined are the multi-level governance of the EU; the need for the officials of Member States to apply and enforce EU law; the application of EU law in different legal traditions; and the complications of rival claims of authority, which cumulatively and individually create concerns over the legitimacy and necessitate an EU-centric account of the law which is adjusted to fit the distinct EU polity.

In developing my understanding of an EU-centric account of the rule of law [EUCA] which is apt for the EU, I returned to the conclusions of Chapter 2. I followed and adapted Krygier's understanding of determining the value of the rule of law,<sup>3</sup> – and asked what are the distinctive values which instantiate the rule of law, and how can they be realised in the EU legal order? To determine the principles of EUCA, I asked which principles reflect the value of the rule of law, and how they can be instantiated in the specific context of the EU polity. I concluded that these were the principles of equality before the law, certainty, legality, transparency, limited discretion, judicial review, and cooperative authority. I explored the meaning of each of the EUCA principles, showing the distinctive EU-element in each of them. Each principle of EUCA instantiates, what I argue to be, a different aspect of the rule of law which ultimately reflects the value of the rule of law. A high degree of adherence to these principles of EUCA can enhance and strengthen the legitimacy of the EU legal system.

*Part II – In Practice* advanced the practical application of EUCA in the context of issues of contemporary concern experienced within the EU legal order. The Framework of the Chapters sought to address two questions: first, why should the key actors of the EU – the EU Institutions, the Member States, and (ultimately) individuals – support and advocate EUCA in the EU legal order? The second question asked how EUCA can provide practical guidance in problematic areas of the law which are of current and ongoing concern to the EU, and could form a source of legitimacy for the EU.

With regard to the first question, I examined the value of EUCA from the perspectives of the EU Institutions, the Member States and the individual in the EU, in order to show how

---

<sup>3</sup> Martin Krygier, 'The Rule of Law: An Abusers' Guide' in A Sajó (ed), *Abuse: The Dark Side of Fundamental Rights* (Eleven International Pub Co 2006) 132.

all sides and stakeholders should support a high level of adherence to EUCA. I showed that, even if the ‘rule of law’ is unconvincing as an ideal, that there are still pragmatic arguments for sceptics of the rule of law to support EUCA in the EU legal order. Reasons to support EUCA in the EU include the strengthening and enhancement of good governance in the EU, sending a strong signal of commitment to the rule of law to Member States and international actors, and enhancing and strengthening the formal legal position and equality of the individual in the EU.

In the second part of Chapters 5-7, I provided case studies on topical issues of EU law and regulation which are of current and ongoing concern in the EU. I sought to show how the theoretical account of EUCA could provide practical and effective guidance towards resolutions of current issues caused by low levels of adherence to the rule of law revealed in case study analysis. I aimed to remove the ‘honorifics, hurrah’<sup>4</sup> or ‘self-congratulatory’<sup>5</sup> elements of the rule of law and argue that a high level of rule of law compliance can provide constructive solution to crises. In the case studies of *Part II*, I engaged with ostensibly very disparate fields of law: corporate taxation, international trade law, and European criminal law.

This decision to engage with such different fields of law, which required extensive background research, was premised on the reasoning that if EUCA can provide real and beneficial guidance to the conflicts and tensions which are both ongoing and representative of larger issues within the EU legal system – then it should also be apposite for all areas of EU law. I argued that deficiencies in rule of law adherence by the EU in these fields of law could be remedied on the basis of EUCA recommendations.

Each of the case studies presented its own challenges and limitations. The Chapter 5 case study on TTIP was complicated by the uncertainty which still surrounds the content of the agreement, and the degree of opacity exhibited by the EU and US representatives early in the negotiations. However, these issues raised concerns from a rule of law perspective. The

---

<sup>4</sup> *ibid* 136.

<sup>5</sup> Judith Shklar, ‘Political Theory and The Rule of Law’ in A Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1.

lack of information regarding the content and progress of the international trade deal violates the principle of transparency. Additionally, the initial proposals for an Investor-State Dispute Mechanism clearly violated EUCA principles of judicial review, certainty, and equality before the law. Though perhaps more challenging than other avenues of research I could have chosen, this case study proved very relevant and insightful as it provided evidence of the EU's self-reflective attitude towards remedying rule of law violations. The commitment of the EU to become more open about the negotiations, to release more information, and to develop an ISDS mechanism which is (at least to a higher degree) rule of law compliant, is evidence that the EU *can* and *could* develop under the guidance of EUCA.

One purpose of the case studies was to show the possibilities of EUCA to provide guidance in difficult and technically complicated areas of EU law. For example, the legal measures taken in response to the Luxleaks Scandal proved to be a highly relevant and fascinating case study in Chapter 6. I realise that corporate taxation, legal philosophy, and EU law do not often feature in the same sentence, let alone thesis, I showed the strong interconnections between taxation and the rule of law. Core principles of the rule of law (certainty, legality, equality) are at the foundation of fair administration of taxation. Taxation is also one of the most politically sensitive areas of law in the EU, and the EU's efforts at regulation have been met with scepticism and opposition. I examined the Commission decisions on state aid violations and the Tax Transparency Initiative. One of the most interesting conclusions of this case study was an echo of what has been determined in other sensitive areas of EU law: even at risk of violating the principle of legal certainty, the Court will become a quasi-legislator filling gaps that EU legislators cannot due to lack of competence, or lack of political will among Member States.

I chose the European Arrest Warrant [EAW] as the case study for Chapter 7. The EAW is a flash point between national criminal laws, EU free-movement law, procedural justice, mutual trust and cooperative authority. From an individual perspective, it is important to ensure a high degree of adherence to the rule of law in the application of the criminal law, as their surrender to another Member State can have a severe impact on their life. The EAW was

introduced very quickly in the aftermath of the September 11<sup>th</sup> attacks, and, is deficient in some parts of its formulation and application in Member States. In so far as is possible, I suggested guidance on the best means to remedy deficiencies, for example, in the disparate implementation of the EAW across Member States, and the concerns regarding the (non-)abolition of dual criminality.

I set out to develop and defend an account of the rule of law which is an apt standard for the EU legal system. Whilst acknowledging the limitations of scope, and the challenges which I identified, I nonetheless strongly maintain that abidance by the standard set by EUCA is essential to the legitimacy and the future of the Union: it can provide guidance in the resolution of legal conflict, and a constructive path forward in the development of the EU legal order. Increased compliance with an apt EU standard of the rule of law is not, however the complete answer to all problems which now face the EU. Rather, improving compliance with an EU-apt standard of the rule of law should be understood in the context of the larger fabric of good governance and the other values which the EU legal order ought to live up to.

### **3 EUCA IN PERSPECTIVE: THE RULE OF LAW AND OTHER VALUES OF THE LEGAL SYSTEM**

---

#### **3.1 EUCA and other Values of the EU Legal System**

EUCA is only one value which ought to be upheld by the EU legal system. It is the purpose of this section to introduce the interaction between EUCA and other values of the EU legal system. I have chosen to focus on the values stated in Article 2 TEU: the respect for human dignity, freedom, democracy, equality, and respect for human rights. These values are stated to be ‘foundational’ to the EU, and will serve to illustrate some aspects of the relationship between EUCA and other values of the EU legal order.

The rule of law can be a powerful tool which enhances and strengthens other values of the legal system. However, following Raz, the rule of law is ‘not itself an ultimate goal’ but

rather can make the law ‘a good instrument for achieving certain goals’.<sup>6</sup> There can also be instances in which there is tension between the expectations of the rule of law, and the vindication of other values. In Section 3.2, I outline how EUCA can be mutually supportive of other values of the EU legal system, and in Section 3.3, I speculate on instances in which there may be tension between EUCA and other values. In both, I refer back to examples of mutual enhancement, and potential tension in the case studies of Chapters 5-7.

### **3.2 The Mutual Enhancement of EUCA and other values**

EUCA can enhance and strengthen the other Article 2 TEU values in the EU legal system. The inter-dependency of the ‘foundational’ values of fundamental rights, democracy, and the rule of law has been emphasised by the EU Institutions. Following to the Commission, there ‘can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.’<sup>7</sup> The emphasis on the link between the protection of fundamental rights, democracy, and the rule of law is evidence of the Commission’s understanding of the interconnection and interdependency of these values. This is ‘consistent with the enshrinement of these foundational values as transversal principles that cut across all EU institutions, which must guide EU action across policies and at all levels [...] spanning from security and crisis management to development, good governance and enlargement.’<sup>8</sup>

EUCA could enhance the protection of rights through the monitoring the discretion of officials, and enforcement of rights in independent and efficacious courts, thus contributing to the legitimacy of the EU. EUCA expects an independent and effective judicial system, which can support and enhance the justiciability of rights, and the protection of civil and political liberties. These rights and liberties are essential to a functioning democracy, and can enhance and support participation and accountability. The practice of democracy can be strengthened

---

<sup>6</sup> Joseph Raz, ‘The Rule of Law and its Virtue’ in his *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 229.

<sup>7</sup> Commission, ‘Communication on the New Framework to strengthen the Rule of Law’ COM (2014) 158 final.

<sup>8</sup> Isabelle Ioannides, ‘Rule of Law in European Union External Action: Guiding Principles, Practices and Lessons Learned’ (International IDEA 2014) 9.

and enhanced EUCA which aims to ensure the role of the judiciary, the fundamental rights of freedom of expression, and the rules which govern the political and electoral process.

An example of how EUCA can enhance and support other values can be shown in the TTIP Case Study. The TTIP has the potential to create the biggest free trade area in the world, and the contents of the agreement will have major impact on the regulation of products and services across the EU, with significant consequent effect on the economies, markets and citizens of all Member States. There have been accusations as to the undemocratic nature of the negotiations and agreement. Transparency demands openness as to information and procedures. Certainty, legality and limited discretion begin to address the concerns of a violation of human rights – as the law must be clear, accessible and knowable – and, consequent to judicial review, accountable through challenge in the courts. These considerations highlight the interrelationships and interdependencies between the rule of law and other virtues of a legal system, and the way in which EUCA could enhance and strengthen other values of the legal system.

### **3.3 Tensions between EUCA and Other Values**

As I have outlined in the sections above, the rule of law is not the only value of the legal system, and it is not the only value which the EU legal system ought to realise to a high standard. There can be situations in which there is apparent tension between the realisation of a high standard of EUCA, and the realisation of other values of the EU legal order. Principles of the rule of law ought sometimes to be ‘traded off’ in order to achieve other goals, or in consideration of other values. As Raz succinctly states, and has been echoed in Chapters 2 and 4, ‘[s]acrificing too many social goals on the altar of the rule of law may make the law barren and empty.’<sup>9</sup> There are many other situations in which departure from a high standard of compliance with EUCA could be justified in pursuit of superior goals. For example, fairness, or the vindication of legitimate expectations are examples of when the law should depart from a high degree of

---

<sup>9</sup> Raz (n 6) 210.

adherence to the principles of the rule of law.<sup>10</sup> The exact instances in which it is right to depart from a high level of adherence to the rule of law are, by the nature of competing values and social goals, indeterminate. Echoing the analysis of Chapter 4, EUCA principles do not by their nature provide detailed answers to every situation, case or question, but rather serve to provide guidance. The determination of when and how it is appropriate to prioritise the realisation of other values of the legal system is a discursive and dialogical process, and cannot be stated with certainty in abstract. However, I highlight some instances of tension that have arisen in the course of this thesis.

In consideration of the specific nature of the EU, I outlined some tensions which are latent within the EU legal order: the rival claims of authority, resulting in conflicting claims of sovereignty, and the potential for the EU doctrine of supremacy to conflict with democracy or other constitutional essentials of Member States. I acknowledged that EUCA cannot resolve the issues arising from the (actual or potential) democratic deficit of the EU, but it can serve to enhance and support efforts to encourage democratic participation and engagement.<sup>11</sup> Where the question of national sovereignty arises, these are best understood in context of conflict between perceived constitutional norms and EU norms. In these situations, in line with the principle of co-operative authority: there ought to be a strong presumption in favour of the legality and effectiveness of EU law based on the ideas of mutual trust, and consent through legislating and decision-making. However, this presumption ought to be rebuttable where a fundamental value – those outlined in Article 2 TEU - is actually, or likely to be substantially undermined or violated.

An example of a situation of tension between values can be found in discussion of the European Arrest Warrant in Chapter 7. The European Arrest Warrant Framework Decision aimed to abolish the dual criminality requirement for a list of 32 ambiguously termed offences, resulting in the disparate implementation and unequal application of the law across Member States. I concluded that the Framework's aim to abolish the dual criminality requirement

---

<sup>10</sup> *ibid* 229.

<sup>11</sup> See Chapter 4, Section 5.

violates the principles of certainty and equality before the law, and therefore falls below a reasonable standard of EUCA. I also concluded that this violation of EUCA could not be justified under the Court of Justice's deference to the Council, by mutual trust obligations, or by the concern for the seriousness of offences. I noted the suggestion that harmonisation of the 32 listed offences would ensure a high degree of certainty, and (if implemented correctly in all Member States) would remedy the violations of EUCA. Beyond the legal barriers to harmonisation in the lack of competence and the absence of Treaty mandate, the determination of the criminal law is at the core of the national, constitutional and legal identity of Member States.

It is also possible that in the immediacy of the crisis (be it financial, political, or concerning threats to security), lawmakers might determine that the normal expectations of a high degree of adherence to the rule of law could be suspended, or delayed. For example, in response to the Eurozone crisis, both the EU and Member States introduced a large number of complex, confusing, and opaque legal measures in an effort to control the escalating financial and market uncertainty. I contend that, even in the event of crisis, the EU should aim to secure a high standard of compliance to EUCA. It is important to assess, reassess and then (if needed) amend law created in response to crisis in light of EUCA, in order to secure more long-term revisions and amendments to legal measures. I would contend that there is no event too serious, or crisis too pressing, where EUCA should be ignored.

#### **4 EUCA IN PROSPECTIVE: WHAT NEXT?**

---

I have developed and advocated the necessity and value of the EU-centric Account of the Rule of Law, and contextualised it within the larger framework of values which the EU claims to uphold within its legal system. The final question is – what next for EUCA? One path of exploration I would like to consider in future work is to build on the examples set by the case studies in international trade law, corporate taxation and criminal law, and to consider further areas of EU law in light of EUCA principles in greater depth. For example, in this thesis, I

connected themes and conclusions with important issues of access to justice, free movement, competence creep, and the regulation of the Internal Market. Another important area to explore is the relationship between EUCA internally with Member States' accounts of the rule of law, and beyond the borders of the EU as part of the Union's external account policy.

Ultimately, it is important to conclude on the necessity of engaging with the foundational Article 2 values of the EU, both in academia, and in the political arena. The last decade has been wracked by years of successive and unresolved crises: the Financial Crisis; conflict in the Ukraine; the probability of systemic rule of law violations in Hungary and Poland; Brexit and the Refugee Crisis. The future of the EU is in doubt. Maintaining strong commitment to the fundamental values of the Union as stated in Article 2 TEU – the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities – has never been so important. EUCA cannot provide all the solutions to the crises which face the EU, but adherence to EUCA can support, protect, and strengthen the EU legal system, the values which it espouses, and the rule of law in the EU and beyond.

## BIBLIOGRAPHY

— ‘Editorial: The Scope of Application of General Principles of Union Law: An Ever Expanding Union?’ (2010) 47 CMLR 1589

—, ‘Editorial Britain in an age of uncertainty’ *Financial Times* (London, 13 October 2013)

— ‘The Eurosceptic Union’ *The Economist* (Brussels, 31 May 2014)

— ‘Juncker Attacks current Corporate Tax Rules’ (2015) *Comp Law* 367

— ‘Protest gegen den Welthandel’ *Die Welt* (12 October 2015)

‘Editorial comments: The rule of law as the backbone of the EU’ (2007) CMLR 875;

“Throughput” (2013) *Political Studies* 2

ABAZI V and Hillebrandt M, ‘The legal limits to confidential negotiations: Recent case law developments in Council transparency: *Access Info Europe* and *In ‘t Veld*’ [2015] CMLR 825

ACCETTO M and Zleptnig S, ‘The Principle of Effectiveness: Rethinking Its Role in Community Law’ (2005) EPL 375

AHEARN RJ, *Transatlantic Regulatory Cooperation: Background and Analysis*

ahmed ‘Facebook to pay millions of pounds more in UK tax’ *BBC News* (4 March 2016)  
<<http://www.bbc.co.uk/news/business-35724308>>

AHMED K, ‘Google agrees £130m UK tax deal with HMRC’ *BBC News* (23 January 2016)  
<<http://www.bbc.co.uk/news/business-35381130>>

ALEMANNIO A, ‘Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy’ [2014] *EL Rev* 72

ALLAN TRS, ‘The rule of law as the rule of reason: consent and constitutionalism’ [1999] *LQR* 221

— *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001)

— *The Sovereignty of Law* (OUP 2013)

ANDENÆS J, *Grunnlov og rettssikkerhet* (Chr Michelsens Institutt 1945)

ARNULL A, 'Private Applicants and the Action for Annulment since *Codorniu*' (2001) 38 CMLRev 7

— 'The Rule of Law in the European Union' in A Arnall and D Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002)

AUBERT V, 'The Rule of Law' in his, *Continuity and Development in Law and Society* (Norwegian University Press 1989)

AUJEAN M, 'Tax Policy in the EU: Between Harmonisation and Coordination' (2010) 16 Transfer: European Review of Labour and Research 11

BAILER S, 'Negotiation Theory and the EU: the State of the Art' (2010) 17 J Eur Pub Pol 743

BALCEROWICZ L, 'Institutional change after socialism and the rule of law' (2009) HJRL 215

BALL R, *The Legitimacy of the European Union through legal rationality: Free Movement of third country nationals* (Routledge 2014)

BANKS M, 'Voter turnout in May's European elections was lowest ever' *The Telegraph* (London, 6 August 2014)

BAQUERO Cruz J, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) ELJ 389

BARBER N, 'Must legalistic conceptions of the rule of law have a social dimension?' [2004] 17 Ratio Juris 474

BEHSUDI A, 'White House concedes TTIP conclusion unlikely under Obama' *Politico* (Washington DC 9 February 2016)

BENÖHR I, *Consumer Rights and Fundamental Rights* (OUP 2013)

BERTEA, 'Looking for coherence within the European Community' (2005) ELJ 154, 160-161

BESSON S, 'Sovereignty, International Law and Democracy' (2011) 22 EJIL 373

BEUKERS T, 'The New ECB and its Relationship with Eurozone Member: Between Central Bank Independence and Central Bank Intervention' (2013) 50 CMLR 1579

BIGNAMI F, 'Three Generations of Participation Rights before the European Commission' (2004) 68 Legal and Contemporary Problems 61

BINGHAM T, *The Rule of law* (Penguin 2010)

BIONDO F, 'Stato di Diritto o Stato di Giustizia? Osservazioni Critiche su un'Alternativa Toppo Rigida' (Diritto & Questioni Pubbliche 2004)

BÖCKENFÖRDE EW, 'The Origin and Development of the Concept of the *Rechtsstaat*' in his, *State, Society and Liberty: Studies in Political Theory and Constitutional Law* (JA Underwood (trans), Berg 1991)

BOERGER-DE SMEDT A, 'Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome' (2012) Contemporary European History 339

BOGENSCHNEIDER BN, 'Wittgenstein on why tax law is comprehensible' (2015) BTR 252

BOT S, *Le Mandat d'Arrêt Européen* (Larcier 2009)

BRONCKERS M, 'Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements' [2015] J Intl Econ L 655

BUGARIČ B, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge' (2014) LSE 'Europe in Question' Discussion Paper Series Paper No 79/2014

BUIJZE A, *The Principle of Transparency in EU Law* (Uitgeverij BOXPress 2013)

BUREŠ O, 'European Arrest Warrant: Implications for EU Counterterrorism Efforts' (2009) Central Eu JISS 21

CAROTHERS T, 'Critical Mission: Essays on Democracy Promotion' in A Magen and L Morlino (eds), *International Actors, Democratization and the Rule of Law: Anchoring Democracy?* (Routledge 2008)

CARPANO E, *État de droit et droits européens: L'évolution du modèle de l'État de droit dans le cadre de l'eupéanisation des systèmes juridiques* (L'Harmattan, 2005)

CARRERA S, Guild E and Hernanz N, 'Europe's most wanted? Recalibrating trust in the European Arrest Warrant System', (Centre for European Policy Studies, Paper in Liberty and Security in Europe No 55, March 2013)

CASTBERG F, *Forelesninger over rettsfilosofi* (Universitetsforlaget 1965)

CENTRE FOR ECONOMIC POLICY RESEARCH, *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment* (March 2013)

CERULUS L and Cienski J, 'Report: Commission to probe Poland's rule of law' *Politico* (1 October 2016) <[www.politico.eu/article/commission-to-inspect-poland-rule-of-law-assessment-constitutional-court/](http://www.politico.eu/article/commission-to-inspect-poland-rule-of-law-assessment-constitutional-court/)>

CHRISTIANS A, 'Lux Leaks: Revealing the Law, One Plain Brown Envelope at a Time' (2014) *Tax Notes International*

CLARK L, 'Wikileaks crowdfunding 100,000 reward for TTIP secrets' *Wired* (12 August 2015)

CLOSE P, 'TTIP, Investor–State Dispute Settlement and the Rule of Law' (2015) *European View* 217

COLE DH, "An Unqualified Human Good": EP Thompson and the Rule of Law' (2001) *J Law Soc* 187

CORDEWENER A, Kofler G and Van Thiel S, 'The Clash between European Freedoms and National Direct Tax Law: Public Interest Defences available to the Member States' (2009) 46 *CMLR* 1951

COSGRAVE R, 'The Rule of Law: Albert Venn Dicey, Victorian Jurist' North Carolina University Press 1980)

CRAIG P, 'Formal and substantive conceptions of the rule of law: an analytical framework' [1997] *PL* 467

— 'Competence, Clarity, Conferral, Containment, and Consideration' (2004) *ELR* 323

- ‘Standing, Rights and the Structure of Legal Argument’ (2003) 9 EPL 493
- ‘Theory, Pure Theory and Values in Public Law’ (2005) PL 440
- ‘The Legal Effect of Directives: Policy, Rules and Exceptions’ (2009) 34 EL Rev 349
- ‘Proportionality, Rationality and Review’ (2010) NZLR 265
- *EU Administrative Law* (2nd edn, OUP 2012)
- *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015)

CRAIG WJ and Kumar A, ‘Tax Harmonisation for Europe and the World: Could the ECJ show the Way?’ (2007) ICCLR 341

CREMONA M, ‘Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)’ (2015) 52 CMLR 351

CULLINANE J, ‘Rule of Law’ Taxation (11 May 2006)

CULVER K and Giudice M, ‘Not a System but an Order: An Inter-Institutional View of European Union Law’ in J Dickson and P Eleftheiriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2013)

CZARNOTA A, ‘Political corruption and the law-governed post-communist state: On two dimensions of post-communist transformation and the rule of (bad) law’ in Leslie Holmes (ed), *Corruption and Terrorism* (Edward Elgar 2006).

- ‘Lustration, Decommunisation and the Rule of Law’ (2009) HJRL 307

DAVIES G, ‘Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time’ (2006) 43 CMLR 63

- ‘The Crisis of Technocracy’ [2009] 3 Amsterdam Law Forum, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1509353](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1509353)>

DAVIES P, 'Trade secrets: will an EU-US treaty enable big business to gain a foothold?' (2013) BMJ 346

DAWSON M, 'Soft Law and the Rule of Law in the European Union: Revision or Redundancy?' in Antoine Vauchez and Bruno De Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart Publishing 2013)

DE BAERE G, "European integration and the rule of law in foreign policy" in J Dickson and P Efthymiadis (eds) *Philosophical Foundations of European Union Law* (OUP 2012)

DE BOER N, 'Addressing rights divergences under the Charter: *Melloni*, Case note on Case C-399/11' (2013) CMLR 1083

DE BÚRCA G, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 YEL 105

— 'Europe's Raison D'Être' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's shaping of the International Legal Order* (CUP 2013)

DE LA FERIA R and Fuest C, 'The Economic Effects of EU Tax Jurisprudence' (2016) ELR 44

DE SCHUTTER O, 'The Role of Evaluation in Experimentalist Governance' in Charles F Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010)

DE VISSER M and Claes M, 'Courts. United? On European Judicial Networks' in A Vauchez and B de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart Publishing 2013)

— *Constitutional Review in Europe: a Comparative Analysis* (Hart Publishing 2014)

DEL MONTE M, *European added value of revising the European Arrest Warrant* (European Parliamentary Research Service March 2014)

DICEY AV, *Introduction to the Study of the Law of the Constitution* (1st edn 1885, 10th edn, Macmillan 1959)

DICKSON J, 'Towards a Theory of European Union Legal Systems' in J Dickson and P Eleftheriadi (eds) *Philosophical Foundations of European Union Law* (OUP 2013)

DOMINICZAK P and Barrett D, 'Commons Chaos over European Arrest Warrant Vote' *The Telegraph* (10 November 2014)

DOUGLAS-SCOTT S, 'The Rule of Law in the European Union – putting the security into the "Area of Freedom, Security and Justice"' (2004) 29 ELR 219

—'Fundamental Rights in the EU: the ambiguity of judicial review' in T Campbell, KD Ewing and A Tomkins (eds), *The Legal Protection of Human Rights: Sceptical essays* (OUP 2011)

—*Law after Modernity* (Hart Publishing 2013)

—*EU Human Rights Law* (Elgar Publishing 2014)

DOUMA S, *Optimization of Tax Sovereignty and Free Movement* (IBFD 2011)

DOVI S, 'Political Representation' in EN Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Spring 2014 Edition <<http://plato.stanford.edu/archives/spr2014/entries/political-representation/>>

DOWNES C, *The Impact of WTO SPS Law on EU Food Regulations* (Springer 2014)

DRAKE S, 'Twenty years after Von Colson: the impact of "indirect effect" on the protection of the individual's community rights' (2005) EL Rev 329

DWORKIN R, *Law's Empire* (Hart 1998)

ERIKSEN C, *The European Constitution, Welfare States and Democracy: The Four Freedoms vs National Administrative Discretion*, (Routledge, 2012)

ESTELLA A, *The Principle of Subsidiarity and its Critique* (OUP 2004)

EUROSTAT, 'Taxation Trends in the European Union: Data for the EU Member States, Iceland and Norway 2014 Edition' (EU Publications Office 2014)

FABIENNE F, "Political Legitimacy", *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/sum2016/entries/legitimacy/>

FAIR TRIALS INTERNATIONAL, *The European Arrest Warrant: Time for Reform?* (May 2011).

FAVOREU L, 'Cahiers du Conseil constitutionnel n° 3 - novembre 1997' at [www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-3/legalite-et-constitutionnalite.52858.html](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-3/legalite-et-constitutionnalite.52858.html)

FELD LP and Frey BS, 'Trust breeds Trust: How Taxpayers are Treated' (2002) *Econ Gov* 87

FERNANDEZ ESTEBAN ML, *The Rule of Law in the European Constitution* (Kluwer Law International 1999)

FIKFAK V, 'Case Comment: The Meaning of Judicial Authority after Assange' [2015] *LQR* 223

FINNIS J, *Natural Law and Natural Rights* (Clarendon Press 1981)

FIORE P, 'The Fourth Round of Mutual Evaluation Carried out by the Council of the European Union of the Practical Application of the European Arrest Warrant' (2007) *ERA Forum* 225

FOLLESDAL A, 'The Legitimacy Deficits of the European Union' (2006) *J Pol Phil* 441; S Hix, *What's Wrong with the European Union and How to Fix It* (Polity Press 2008);

FORTE F, *Principles of Public Economics: A Public Policy Choice Approach* (Elgar Publishing 2010)

FULLER L, *The Morality of Law* (2nd edn, Yale University Press 1969)

GARDNER J, 'Law in General' in his, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012)

GEYER F, 'A Second Chance for the EAW in Germany: The System of Surrender after the Constitutional Court's Judgement of July 2005' in E Guild and L Marin (eds) *Still not resolved? Constitutional Issues of the European Arrest Warrant* (Wolf Legal Publishers 2009)

GIEGOLD S, 'The Promised 'Transparency' around TTIP has been a sham' *The Guardian* (London 31 August 2015)

GORDON B, 'Tax competition and harmonisation under EU law: economic realities and legal rules' [2014] ELR 790

GORDON M and Dougan M, 'The United Kingdom's *European Union Act 2011*: Who Won the Bloody War Anyway?' (2012) 37 ELR 3

GOZZI G, 'Rechtsstaat and Individual rights in German Constitutional History' in Pietro Costa and Danilo Zolo (eds), *The Rule of Law* (Springer 2007) 238

GREEN L, *The Authority of the State* (Clarendon Press 1988);

— 'Law and Obligations' in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Clarendon Press 2001)

GRIBNAU H, 'Improving the Legitimacy of Soft Law in EU Tax Law' (2007) 35 Intertax 30

GUILD E, *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers 2006)

— and Marin L, 'Still not Resolved? Constitutional Challenges to the European Arrest Warrant: A Look at Challenges ahead after the Lessons learned from the Past' (Wolf Legal Publishers, 2009)

HABERMAS J, *Die Neue Unübersichtlichkeit: Kleine Politische Schriften V* (Suhrkamp 1985)

HAHN M, 'The Distinction and Normative Interdependence between 'Government' and 'Governance': The EU as a Regime of Governance' (2009) Europea Institute Mitchell Working Paper Series 2/2009, <<http://www.law.ed.ac.uk/mitchellworkingpapers/papers.aspx> >

HARDECK I and Wittenstein P, 'Achieving Tax Certainty and Avoiding Taxes? – Evidence from Luxembourg Tax Rulings' (3 February 2016) < <http://ssrn.com/abstract=2709629>>

HAYEK F, *The Road to Serfdom* (Chicago University Press 1944)

HEATH A, 'Europe could be torn apart by the wrong sort of Eurosceptics' *The Telegraph* (London, 5 February 2015)

HERTZOG L, 'The Rule of Law in the EU: Understandings, development and challenges' [2012] 53 Acta Juridica Hungarica 204

- HEUSCHLING L, *État de droit – Rechtsstaat - Rule of Law* (Dalloz 2002)
- HINAREJOS A, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015)
- HOGGAN K, ‘Google Tax: European Commission to consider tax complaint’ *BBC News* (London, 28 January 2016)
- HUDSON J, ‘Institutional Trust and Subjective Well-Being across the EU’ (2006) *Kyklos* 43
- HURST D, ‘Australia wins international legal battle with Philip Morris over plain packaging’ *The Guardian* (London 18 December 2015)
- HUSCROFT G and Miller B, *Proportionality and the Rule of Law : Rights, Justification, Reasoning* (CUP 2014)
- IMPALÀ F, ‘The European Arrest Warrant in the Italian legal system. Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice’ (2005) *Utrecht LR* 56
- JACOBS F, ‘The Evolution of the European Legal order’ (2004) *CMLR* 303
- *The Sovereignty of Law: The European Way* (CUP 2007)
- JACOBY W, ‘Priest and Penitent: The European Union as a Force in the Domestic Politics of Eastern Europe’ (1999) *East European Constitutional Review* 62
- JAKLIC K, *Constitutional Pluralism in the EU* (OUP 2014)
- JOWELL J, “The Rule of Law Today” in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (3rd edn, OUP 1994)
- JUSTICE, *European arrest warrant: a solution ahead of its time* (2003)
- *European Arrest Warrants: Ensuring an Effective Defence* (2012)
- JUVENAL, *Satires, Satire VI*
- KANTI I, *Metaphysical Elements of Justice* (John Ladd (trans), first published 1797, Hackett 1999)

KARATZIA A, 'The European citizens' initiative in practice: legal admissibility concerns' (2015) ELR 509

KEMPEN B, *Legal Opinion regarding the Admissibility of a European Citizens' Initiative against TTIP (Transatlantic Trade and Investment Partnership) and CETA (Comprehensive Economic and Trade Agreement)* (30 April 2014) <[stop-ttip.org/wp-content/uploads/2014/09/EBI-Gutachten\\_EN.pdf](http://stop-ttip.org/wp-content/uploads/2014/09/EBI-Gutachten_EN.pdf)>

KINGSTON S, 'The Boundaries of Sovereignty: The EJC's Controversial Role Applying Internal Market Law to Direct Tax Measures' (2006-2007) 9 CYELS 287

— 'A Light in the Darkness? Recent Developments in the ECJ's Direct Tax Jurisprudence' (2007) 44 CMLR 1321

KLIMEK L, *European Arrest Warrant* (Springer 2014)

KNIGHT D, 'Mapping the Rainbow of Review: Recognising Variable Intensity' [2010] NZLR 393

KOCHENOV D 'The EU Rule of Law: Cutting Paths through Confusion' [2009] Erasmus LR 1

— 'The EU in its most serious crisis ever (and that's not the Euro crisis)' 13 June 2013 Verfassungsblog <[www.verfassungsblog.de/en/the-eu-in-its-most-serious-crisis-ever-and-thats-not-the-euro-crisis-2/](http://www.verfassungsblog.de/en/the-eu-in-its-most-serious-crisis-ever-and-thats-not-the-euro-crisis-2/)>

— and Pech L, 'From bad to worse? On the Commission and the Council's rule of law initiatives' (*EU Analysis Blog* 19 January 2015) <[eulawanalysis.blogspot.co.uk/2015/01/from-bad-to-worse-on-commission-and.html](http://eulawanalysis.blogspot.co.uk/2015/01/from-bad-to-worse-on-commission-and.html)>

— 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) YEL 74

KOETTER M, '*Rechtsstaat und Rechtsstaatlichkeit in Germany*' in Matthias Koetter and Gunnar Folke Schuppert (eds), *Understandings of the Rule of Law in various legal orders of the World* (2010) Rule of Law Working Paper Series Nr 1 <[wikis.fuberlin.de/download/attachments/29556758/Koetter+Germany.pdf](http://wikis.fuberlin.de/download/attachments/29556758/Koetter+Germany.pdf)>

KOMÁREK J, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles" [2007] CMLR 9

KRAMER M, *In Defence of Legal Positivism* (OUP 1999)

— *Objectivity and the rule of law* (CUP 2007)

KRASTEV I, 'Corruption, Anti-Corruption Sentiments, and the Rule of Law' in A Czarnota, M Krygier and W Sadurski (eds), *Rethinking the Rule of Law after Communism* (Central European University Press 2005)

— 'The Rule of Law: An Abusers' Guide' in A Sajó (ed), *Abuse. The Dark Side of Fundamental Rights* (Eleven International Pub Co 2006)

— 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds), *Re-locating the Rule of Law* (Hart Publishing 2009)

— 'Rule of Law (and Rechtsstaat)' (2013) UNSW Law Research Paper No 2013-52 <<http://ssrn.com/abstract=2311874>>

KRYGIER M, 'Editorial: the Fall of Communism 20 years on' (2009) HJRL 195

KUMM M, 'The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2013)

LABAYLE H, 'Openness, transparency and access to documents and information in the European Union' (European Parliament 2013)

LAMOND G, 'The Rule of Law' in A Marmor (ed) *The Routledge Companion to Philosophy of Law* (Routledge 2012)

LANG M, 'Tax Rulings and State Aid Law' (2015) BTR 391

LAQUIÈZE A, 'État de Droit and National Sovereignty in France' in Pietro Costa and Danilo Zolo (eds), *The Rule of Law* (Springer 2007)

LAZOWSKI A, 'Conformity of the Accession Treaty with the Polish Constitution: Decision of 11 May 2005' (2007) *EuConst* 148

LECZYKIEWICZ D, 'The 'national identity clause' in the EU Treaty: a blow to supremacy of Union law?' *UK Constitutional Law Association* (21 June 2012) <[ukconstitutionallaw.org/2012/06/21/dorota-leczykiewicz-the-national-identity-clause-in-the-eu-treaty-a-blow-to-supremacy-of-union-law/](http://ukconstitutionallaw.org/2012/06/21/dorota-leczykiewicz-the-national-identity-clause-in-the-eu-treaty-a-blow-to-supremacy-of-union-law/)>

LENAERTS K and M Desomer, 'New Models of Constitution-Making in Europe: The Quest for Legitimacy' (2002) *CMLR* 1217

— 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) *CMLR* 1625

— and N Cambien, 'The Democratic Legitimacy of the EU after the Treaty of Lisbon' in J Wouters, L Verhey and P Kiiver (eds) *European Constitutionalism beyond Lisbon* (Intersentia 2009)

— and Gutierrez-Fons J, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *CMLR* 1629

— 'EMU and the EU's Constitutional Framework' (2014) *EL Rev* 753

LETSAS G, 'Harmonic Law: the Case against Pluralism' in J Dickson and P Eleftheiriadis (eds) *Philosophical Foundations of European Union Law* (OUP 2013)

LODGE J, 'Transparency and EU Governance: Balancing Openness with Security' (2003) 11 *J Contemporary Euro Stud* 95

LOUGHLIN M, *Foundations of Public Law* (OUP 2010)

LUJA RHC, 'Will the EU's State Aid Regime Survive BEPS?' [2015] *BTR* 379

KELSEN H, *General Theory of Law and State* (trans A Wedberg, repr. 1961, Russell and Russell 1945)

MACAMHLAIGH C and A Glencross, 'Sovereignty in the EU Constitutional Order: Integrating Law and Political Science' University of Edinburgh Research Paper Series No 2009/20

— 'Pluralising Constitutional Pluralism' University of Edinburgh Research Paper Series No 2016/10

MACCORMICK N, 'Der Rechtsstaat und die Rule of Law' (1984) 50 *Juristenzeitung* 65

— *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (OUP 2005)

MADURO M, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed), *Sovereignty in Transition* (OUP 2003)

MAGALHÃES P, 'The Politics of Judicial Reform in Eastern Europe' (1999) *Comparative Politics* 43

MAGEN A, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' (2016) *JCMS* 1

MAHONY H, 'EU election turnout at record low after all' *EUObserver* (Brussels, 6 August 2014)

MARIN L, 'The European Arrest Warrant in the Italian Republic' (2008) *Eur Const LR* 251

MARTINI S, 'Die Pluralität von Rule-of-Law-Konzeptionen in Europa und das Prinzip einer europäischen Rule of Law' in M Kötter and GF Schuppert, *Normative Pluralität ordnen: Rechtsbegriffe, Normenkollisionen und Rule of Law in Kontexten dies- und jenseits des Staates* (NOMOS 2009)

MCFAUL M, Risse T and Magen A (eds), *Promoting Democracy and the Rule of Law* (Palgrave MacMillan 2009)

MENON A and Stephen Weatherill, 'Transnational Legitimacy in a Globalising World: How the European Union Rescues its States' (2008) *West European Politics* 397

MITILEGAS V, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the European Union' (2006) *CMLR* 1277

MONBIOT G, 'This Transatlantic trade deal is a full-frontal assault on democracy' *The Guardian* (4 November 2013)

MORAVCSIK A, 'Reassessing Legitimacy in the European Union' (2002) *JCMS* 603

— and Vachudova MA, 'National Interests, State Power and EU enlargement' (2003) 17 *East Eur Pol Soc* 42

MÜLLER JW, 'Europe's Perfect Storm: The Political and Economic Consequences of the Eurocrisis' (2012) *Dissent* 53

— 'Safeguarding Democracy inside the EU Brussels and the Future of Liberal Order' (2013) *Transatlantic Academy Paper Series*, <[http://www.transatlanticacademy.org/sites/default/files/publications/Muller\\_SafeguardingDemocracy\\_Feb13\\_web.pdf](http://www.transatlanticacademy.org/sites/default/files/publications/Muller_SafeguardingDemocracy_Feb13_web.pdf)>

MURPHY C, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Bloomsbury 2012)

MURRAY D, 'Euro scepticism is growing all over Europe' *The Spectator* (London, 3 October 2015)

NABLI B, 'Européanisation et Constitutionnalisation du Droit National' (2005) *Politeia* 243

NESELEN A, 'EU dropped pesticide laws due to US pressure over TTIP, documents reveal' *The Guardian* (London 22 May 2015)

NEUMAN G, 'The US Constitutional Conception of the Rule of Law and the Rechtsstaatsprinzip of the Grundgesetz' (1999) *Columbia Public Law and Legal Theory Working Paper Group* 5, 4 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=195368](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=195368)>

NEUMAN M, *The Rule of Law, Politicising Ethics* (Ashgate New Critical Thinking in Philosophy 2002)

NEUMANN F, *Die Herrschaft des Gesetzes* (Suhrkamp 1980)

NEUMANN J, *Die Förderung der Rule of Law in der Entwicklungszusammenarbeit* (LIT Verlag Münster 2013)

NICOLAIDIS K and Kleinfeld R, 'Can a Post-Colonial Power Export the Rule of Law? Element of a General Framework' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart, 2008)

— and Kleinfeld R, 'Rethinking Europe's "Rule of Law" and Enlargement Agenda: the Fundamental Dilemma' (2012) Jean Monnet Working Paper 12/12 <[www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org)>

NICOLI F, 'Electoral Euroscepticism, Turnout and the Economic Crisis: Evidence from a 108-Elections Panel Study Across Europe' (18 June 2015) <[ssrn.com/abstract=2620220](http://ssrn.com/abstract=2620220)>

NIELSEN R, 'Towards an Interactive Comparative Method for Studying the Multi-Layered EU Legal Order' in U Neergaard and R Nielsen (eds), *European Legal Method, in a Multi-Level EU Legal Order* (DJØF Publishing 2012)

OBERMAYER B, 'Dieser Briefkasten ist sechs Firmen' *Süddeutsche Zeitung* (6 November 2014)

OECD, *Citizen-State relations: Improving governance through tax reform* (2010) 33 <[www.oecd.org/dac/governance-peace/governance/docs/46008596.pdf](http://www.oecd.org/dac/governance-peace/governance/docs/46008596.pdf)>

— *Action Plan on Base Erosion and Profit Shifting* (2013)

PAGOULATOS G and Loukas Tsoukalis, 'Multilevel Governance' in E Jones, A Menon and S Weatherill (eds), *Oxford Handbook of the European Union* (OUP 2012)

PALOMBELLA G, 'The principled, and winding, road to Al-Dulimi. Interpreting the interpreters' (2014) *Questions of International Law* 17

PALOMBELLA G, 'The rule of law as Institutional Ideal' in L Morlino and G Palombella (eds), *Rule of Law and Democracy* (Brill 2010)

PAULY C, Sauga M, Schiessl M and Traufetter G, 'TTIP Gap: How a Trans-Atlantic Trade Deal Can Still Be Fixed' (*Der Spiegel* 8 June 2015), <<http://www.spiegel.de/international/world/how-ttip-and-an-eu-us-free-trade-deal-can-be-fixed-a-1036831.html>>

PECH L, *The European Union and its Constitution: From Rome to Lisbon* (Clarus Press 2008)

— ‘The Rule of Law as a Constitutional Principle of the EU’ Jean Monnet Working Paper 04/09 <[www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org)>

— ‘The Rule of Law as a Guiding Principle of the European Union’s External Action’ CLEER Working Paper 2012/3

— and Egan A, ‘Respect for Human Rights as a General Objective of the EU’s External Action’ in Sionaidh Douglas-Scott, *Handbook on Fundamental Rights in the EU* (Elgar Publishing 2015)

PEERS S, ‘Analysis: Draft Agreement on Reinforced Economic Union (REU Treaty)’ *Statewatch* (21 December 2011)

PERNICE I, ‘Multilevel Constitutionalism and the Crisis of Democracy in Europe’ (2015) ECLR 541

PISTONE P, ‘Soft Tax Law: Steering Legal Pluralism towards International Tax Coordination’ in D Weber (ed), *Traditional and Alternative Routes to European Tax Integration* (IBFD 2010)

PLACHTA M, ‘European Arrest Warrant: Revolution in Extradition?’ (2003) Eur JCCLCJ 178

POLLICINO O, ‘European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems’ (2008) German LJ 1314

— ‘The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?’ [2010] YEL 65

POSTEMA G, ‘Law’s Rule: Reflexivity, Mutual Accountability, and the Rule of Law’ in X Zhai and M Quinn (eds), *Bentham’s Theory of Law and Public Opinion* (CUP 2013)

PRIBAN J, ‘From "which rule of law?" to "the rule of which law?": post-communist experiences of European legal integration’ (2009) HJRL 338, 338-39

QUINN B, ‘TTIP deal poses 'real and serious risk' to NHS, says leading QC’ *The Guardian* (London 22 February 2016)

RADIN MJ, ‘Reconsidering the Rule of Law’ (1989) BULJ 781

RANKIN J, 'TTIP: EU and US vow to speed up talks on trade deal' *The Guardian* (Brussels, 26 February 2016)

RAUBE K, Burnay M and Wouters J 'By way of introduction: the rule of law as a strategic priority for EU external action-conceptualization and implementation of EU law and policies' (2015) *Asia-Europe Journal* 1

RAWLS J, *A Theory of Justice* (Harvard University Press 1971)

RAZ J, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979)

REICH N, *General Principles of EU Civil Law* (Intersentia 2014)

ROSENBERG T, 'The Simple Idea that could transform US criminal justice' *The Guardian* (London, 23 June 2015)

ROSSI-MACCANICO P, 'Fiscal Aid, Tax Competition, and BEPS' [2014] *Tax Notes International* 857

SADURSKI W, *Rights before Courts, A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005)

SCHARPF FW, *Governing in Europe* (OUP 1999)

SCHEPPELE KL, 'Constitutional Revenge, The Conscience of a Liberal Post' *The New York Times* (New York, 3 January 2013)

SCHIFF BERMAN P, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012)

SCHMIDT VA, 'Democracy and Legitimacy in the European Union' in E Jones, E Menon, and S Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012)

SCHØNBERG S, *Legitimate Expectations in Administrative Law* (OUP 2000)

SCHÜTZE R, 'Subsidiarity after Lisbon: reinforcing the safeguards of federalism?' (2009) *CLJ* 525

SELZNICK P, Nonet P and Vollmer H, *Law, Society and Industrial Justice* (Russell Sage Foundation 1969)

— Legal Cultures and the Rule of Law’ in M Krygier and A Czarnota (eds) *The Rule of Law after Communism* (Ashgate 1999)

SEMERTZI A, ‘The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements’ (2014) CMLR 1125

SHAPIRO SJ, *Legality* (Harvard University Press 2011)

SHKLAR J, ‘Political Theory and The Rule of Law’ in A Hutchinson and P Monahan (eds) *The Rule of Law: Ideal or Ideology* (Carswell 1987)

SIMMONDS N, *Law as a Moral Idea* (OUP 2007)

SMITH A, *An Inquiry into the Wealth of Nations* (1776)

SMYTH J, ‘Treaty does not Threaten Ireland’s Corporate Tax Rate’ *The Irish Times* (Dublin, 24 September 2009)

SOBOTA K, *Das Prinzip Rechtsstaat* (Mohr Siebeck 1997)

SOMEK A, ‘Monism: a Tale of the Undead’ in M Avbelj and J Komarek (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart 2012)

SOULAS DE RÜSSEL D and Raimbault P, ‘Nature et racines du principe de sécurité juridique : une mise au point’ (2003) *Revue internationale de droit comparé* 101

SPAVENTA E, ‘Opening Pandora’s Box: Some Reflections on the Constitutional Effects of the Decision in Pupino’ (2007) *Eur Const LR* 5

SPIEGEL P, ‘US warns EU against exempting film industry from trade talks’ *Financial Times* (London, 11 June 2013)

STEFANELLI JN and Moxham L (eds), ‘Do Our Tax Systems Meet Rule of Law Standards?’ (September 2014) Bingham Centre Working Paper 2014/06

STEIN E, ‘Lawyers, judges and the making of a transnational constitution’ (1981) *AJIL* 1

- SYLVAIN C and el Harrak M, 'Free Trade Agreements and Off Sets' [2015] IBLJ 399
- TAIWO O, 'The Rule of Law: The New Leviathan?' [1999] 12 CJLJ 151
- TALLBERG J, 'Explaining the institutional foundations of European Union negotiations' (2010) 17 J Eur Pub Pol 633
- TAMANAH B, *On the Rule of Law: History, Politics, Theory* (CUP 2004)
- 'A Concise Guide to the Rule of Law' (2007) Legal Studies Research Paper Series 07/0082, 9 < <http://ssrn.com/abstract=1012051>>
- TERRA BJM and Wattèl PJ, *European Tax Law* (Kluwer Law International 2005)
- THE LAW SOCIETY, *Tax and the Rule of Law Position Paper* (Law Society, April 2015) [www.lawsociety.org.uk/policy-campaigns/consultation-responses/tax-and-the-rule-of-law-position-paper](http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/tax-and-the-rule-of-law-position-paper)
- THOMAS A, 'Selective Enforcement and Equal Treatment' in Justine N Stefanelli and Lucy Moxham (eds), 'Do Our Tax Systems Meet Rule of Law Standards?' (2014) Bingham Centre Working Paper 2014/06
- THYM D, 'The Missing Link: Direct Effect, CETA/TTIP and Investor-State Dispute Settlement' *Verfassungsblog* (7 January 2015) <[www.verfassungsblog.de/en/verhinderte-rechtsanwendung-deutsche-gerichte-cetatiip-und-investor-staat-streitigkeiten/](http://www.verfassungsblog.de/en/verhinderte-rechtsanwendung-deutsche-gerichte-cetatiip-und-investor-staat-streitigkeiten/)>
- TITCOMB J, 'Facebook to pay millions in UK tax after abandoning controversial structure' *The Telegraph* (London, 4 March 2016)
- TORGLER B, 'Tax Morale, Rule-Governed Behaviour and Trust' (2003) *Constit Pol Econ* 119
- 'Tax Morale, Eastern Europe and European Enlargement' (2012) *Communist and Post-Communist Stud* 11
- TRIDIMAS T, *The General Principles of EU Law* (2nd edn, OUP 2006)
- TUORI, K 'The Many Constitutions of Europe', in K Tuori and S Sankari (eds), *The many Constitutions of Europe* (Ashgate 2010)

TYLER TR, *Why People Obey the Law* (Princeton University Press 2006)

UNGER R, *Law in Modern Society* (Simon and Schuster 1977)

— ‘The Rule of Law: Is the Line Between the Formal and the Moral Blurred?’ in IB Flores and KE Himma (eds), *Law, Liberty, and the Rule of Law* (Springer 2013)

VAN CAENEGEM R, *Legal History: A European Perspective* (Continuum 1991)

VAN MEERBEECK J, ‘The Principle of Legal Certainty in the Case Law of the European Court of Justice: from Certainty to Trust’ (2016) ELR 275

VARGA C, ‘Rule of Law Or the Dilemma of an Ethos: to be Gardened or Mechanised’ in his, *Transition? To rule of Law?* (Kráter Workshop Association 2007)

— ‘Towards a transition to rule of law’ in C Varga, *Transition? To rule of Law?* (Kráter Workshop Association 2007)

VENICE COMMISSION, *Opinion on the New Constitution of Hungary*, 87th Plenary Session (Venice, 17-18 June 2011) <[www.venice.coe.int/webforms/documents/CDL-AD\(2011\)016-E.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2011)016-E.aspx)>

VERNIMMEN-VAN TIGGELEN G and Surano L, European Criminal Law Academic Network, *Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union* (November 2008) EC DG JLS

— Suano L and Weyembergh A, *L'avenir de la reconnaissance mutuelle en matière pénale dans l'Union européenne* (Ed de l'Université de Bruxelles, 2009)

VON BOGDANDY A and Ioannidis M, ‘Systemic Deficiency in the Rule of Law: What is it, What has been done, What can be done’ [2014] CMLR 59

VON DER BURCHARD H, ‘EU faces tough sell on TTIP compromise’ *Politico* (7 February 2016)

VON GREIVE M, ‘Wo wart Ihr damals, als es gegen TTIP ging?’ *Die Welt* (12 October 2015)

WALDRON J, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ (2002) 21 Law & Phil 137

- ‘Legislation and the Rule of Law’ (2007) *Legisprudence* 91
- ‘The Concept and the Rule of Law’ (2008) *Georgia LR* 1
- ‘The Rule of Law and the Importance of Procedure’ (2010) NYU School of Law Public Law Research Paper No 10-73 <[ssrn.com/abstract=1688491](http://ssrn.com/abstract=1688491)>
- WALKER N, ‘The idea of Constitutional Pluralism’ (2002) *MLR* 317
- *Sovereignty in Transition* (Bloomsbury 2003)
- ‘The Rule of Law and the EU: Necessity’s Mixed Virtue’ in G Palombella and N Walker (eds) *Relocating the Rule of Law* (Hart Publishing 2009)
- ‘Constitutionalism and Pluralism in Global Context’ RECON Online Working Paper 03/2010
- ‘Opening or Closure? The Constitutional Intimations of the ECJ’ in MP Maduro and L Azoulay (eds) *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010)
- ‘Philosophy of EU law’ (2014) Edinburgh School of Law Research Paper No 2014/29, <<http://ssrn.com/abstract=2457809>>
- ‘The Philosophy of European Union Law’ in Anthony Arnall and Damien Chalmers (eds), *Oxford Handbook of European Union Law* (OUP 2015)
- WAYNE L et al, ‘Leaked Documents Expose Global Companies’ Secret Tax Deals in Luxembourg’ (ICLJ, 5 November 2014, <[icij.org/project/luxembourg-leaks/leaked-documents-expose-global-companies-secret-tax-deals-luxembourg](http://icij.org/project/luxembourg-leaks/leaked-documents-expose-global-companies-secret-tax-deals-luxembourg)>
- WEATHERILL , ‘Competence Creep and Competence Control’ (2004) 23 *YEL* 1
- ‘Better Competence Monitoring’ (2005) *ELR* 23
- ‘The limits of legislative harmonisation ten years after Tobacco Advertising: how the Court’s Case law has become a “drafting guide”’ (2011) 12 *German LJ* 827

WEBB D, *The Transatlantic Trade and Investment Partnership* Briefing Paper No 06688, 6 July 2015 (House of Commons Library)

WEILER J, 'The community system' (1981) YEL 267

— 'The transformation of Europe' (1991) YLJ 2403

WEINGAST BR, 'The Political Foundations of Democracy and the Rule of Law' (1997) APSR 245

WENNERSTRÖM EO and Åsa Valter, 'The Rule of Law in Times of Financial Crises: How EU Rule of Law Correlates with the Market' (2015) Scandanavian Studies in Law Available at SSRN: <http://ssrn.com/abstract=2734125>.

WEYEMBERGH A, 'Judicial control in cooperation in criminal matters: the evolution from traditional judicial cooperation to mutual recognition' in K Ligeti (ed), *The Future of Prosecution in Europe* (Hart Publishing 2012)

WILLIAMS A, *The Ethos of Europe: Values, Law and Justice in the EU* (CUP 2010)

WOLFF S, 'The Rule of Law in the Area of Freedom, Security and Justice: Monitoring at Home what the European Union Preaches Abroad' (2013) HJRL 119

WOUTERS J and Naerts F, 'Of arrest Warrants, Terrorist Offences and Extradition Deals: an Appraisal of the EU's Main Criminal Law Measures against Terrorism after "11 September"' (2004) CMLR 909

ZILLER J, 'National Constitutional Concepts in the New Constitution for Europe' (2005) 1 Eur Constit LR 452