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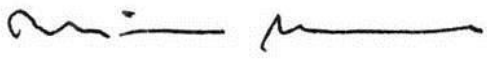
FOREWORD

ELSA has become a point of reference for law students and young professionals. It provides its members with opportunities to develop their legal research and writing skills through activities such as traineeships, essay writing contests and moot court competitions.

I hope that participation in the ELSA Law Review, featuring fellow- and peer-reviewed articles, will allow an invaluable practical experience in legal writing, which will pay dividends later in the practice of law as well as in academia.

As the Secretary General of the Council of Europe and the Patron of ELSA, I welcome ELSA's new initiative, and I look forward to many high-level and innovative contributions.



Thorbjørn Jagland
Secretary General
Council of Europe

LETTER FROM THE EDITOR

Dear Readers,

The ELSA Law Review is revived after a long absence. With such a big variety of projects and opportunities provided by ELSA, why the ELSA Law Review is back? Our wish is to contribute actively to legal education and give the chance to law students to be rewarded for their efforts. Therefore, the ELSA Law Review is the ideal platform for the youth legal authors to make their research and legal writing outcome publicly accessible. Since ELSA is an association run by and for students, the ELSA Law Review reflects the same aim: it is a source of knowledge created by and for students – and of course to anyone interested in the plethora of the published topics.

We wish you a pleasant and fruitful reading,

The Editorial Board of the ELSA Law Review

Volume VII March 2015 Issue 1

RIGHT TO DATA PROTECTION – DOES OUR BEHAVIOUR SUPPORT ITS PRACTICE?

Tihana Krajnović*

Abstract

Since 1970 European data protection norms have been evolving into a dynamic and changing legal framework. Data protection is no longer seen as a purely functional construct to be used to directly shape and influence the use of information processing technology. Instead, the focus has shifted towards the individual and his autonomy regarding the processing of his personal data. This shift in the data protection construct has had an effect on the legal framework by materialising the individual's right to data protection. The aim of this paper is to show the ways in which the right to data protection is continuously challenged by technological developments. The author has presented a few possible solutions that are to confront these challenges and a projection of the future development of the right to data protection.

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1. Introduction: Data Never Sleeps

The World Wide Web revolutionised unprecedentedly every aspect of our lives. From banking to government; from energy to education - we leave digital traces with every move we make. The decentralised attribute of the World Wide Web granted individuals a tool to instantly receive and impart information. We hear a lot about how "big data",[1] fuelled in part by the connection of an expanding array of devices to the Internet, will bring better and cheaper products and services to the market while expanding human knowledge.[2] The prospect of these benefits is exciting. On the other hand, we are living in an era in which Facebook and other social media platforms have become such a pervasive force in modern society that some employers and psychologists have stated that staying away from social media is 'suspicious'.[3] Numerous people online use both User Generated Content websites (UGCs), like YouTube and Wikipedia, and Social Network Sites (SNSs), like Facebook and Google+. However, since the success of many of these websites depends to a large extent on the disclosure of personal data by its users, some concerns about privacy issues have been raised. In the virtual world, it's easy to collect and save data, with little pressure to automatically get rid of anything. It could be said that the Internet is a near endless supply of file cabinets and individuals are often not fully (or at all) informed about how their online data is collected and processed.

2. The Need for Regulation?

The interest in privacy protection increased in the early 1960's. It was marked by the transition from the second to third generation of computers, which meant the beginning of versatile usage of information technology in processing citizens' personal data. The development of information technology and increasing concentration, usage and flow of citizens' personal data, starting with public and then private sector, together with the possibility of their misuse, instigated broader

1 "Big data is not just some abstract concept used to inspire and mystify the IT crowd; it is the result of an avalanche of digital activity pulsating through cables and airwaves across the world. This data is being created every minute of the day through the most innocuous of online activity that many of us barely notice. But with every website browsed, status shared, or photo uploaded, we leave digital trails that continually grow the hulking mass of big data. Below, we explore how much data is generated in one minute on the Internet." <http://www.domo.com/learn/data-never-sleeps-2> accessed 15 May 2014.

2 Julie Brill, 'From Regulators, Guidance and Enforcement' (The New York Times, 2013) <http://www.nytimes.com/roomfordebate/2013/09/08/privacy-and-the-internet-of-things/regulators-must-guide-the-internet-of-things> accessed 15 May 2014.

3 Daily Mail Reporter, 'Is not joining Facebook a sign you're a psychopath?' (Daily Mail , 8 August 2012) <http://www.dailymail.co.uk/news/article-2184658/Is-joining-Facebook-sign-youre-psychopath-Some-employers-psychologists-say-suspicious.html> accessed 17 May 2014.

activities on the national and international level. Along with the phenomenon of Internet, multimedia databases and e-business, came new possibilities for encroaching upon citizens' privacy, which led to the need for regulation of these new situations. The aim was to expand the protection to new areas of human work and communication and to harmonise existing and establish new, unique standards of citizens' data protection.[4]

Some of the more important personal reasons for protecting privacy can be found in Lynn Gilliam's study: Ethics, Privacy and Confidentiality[5]. Privacy is thought to be: first, a form of autonomy because it provides individuals with control over their lives, and a part of that control refers to knowing what others know about them, which enables them to work in different social surroundings and with different levels of intimacy in their relationships with other people; secondly, it is important for their personal identity, because it is necessary in its creation and in differentiation from other people; finally, privacy is important for all the relationships we make, because different relationships are characterised with different levels of intimacy. Moreover, by establishing relationships and developing them we disclose information about ourselves that we would otherwise consider private.

In the virtual world, people are less cautious than in the real world. Often we leave the "doors" of our computer wide open whilst enabling others to leave their traces on them (so called - cookies) or we are leaving our traces about our habits and interests on someone else's system. The illusory invisibility and distance creates the feeling of anonymity and safety, and therefore individuals are more inclined to disclose personal data which wouldn't necessary be the case in the real world. Collecting, connecting and analysing personal data and individuals' habits and interest with the help of new technologies and their combining with already existent data enables creation of profiles of an increasing number of people. This information can be utilised not just by the public authorities, but also by the private sector which uses this data for commercial purposes.

Today, 250 million people use the Internet daily in Europe.[6] Most people are entirely unaware that their rights are being violated when online due to what are now everyday business practices. Collected, analysed and moved across the globe, personal data has acquired enormous economic significance. Data is the currency of today's digital technology. According to some estimates, the value of European citizens' personal data has the potential to grow to nearly €1 trillion annually by 2020. In this fast-changing environment, where our society becomes more wired and

4 Dražen Dragičević, 'Privacy in the Virtual World' (2001) Zbornik PFZG, 51.
5 Lyn Gilliam, 'Ethics, Reflexivity, and Ethically Important Moments in Research' (2004) Sage Publications 10.
6 'Q&A on EU data protection reform' (European Parliament, 4 March 2014).
<http://www.europarl.europa.eu/news/hr/news-room/content/20130502BKG07917/html/QA-on-EU-data-protection-reform> accessed 1 May 2014.

connected, individuals found themselves wanting to retain effective control over their personal data.

In April 2011 a high-profile security breach at a technology company compromised the accounts of 77 million customers: names, email and postal addresses, dates of birth, passwords and login information, purchase history and credit card information.

It took nearly a week before the company acknowledged the data breach and informed the customers affected. The most profitable moment for criminals using stolen records is immediately after the theft, and before customers have been notified and had a chance to take preventative measures.[7]

According to Eurobarometer survey:[8]

- 74% of Europeans see disclosing personal information as an increasing part of modern life.
- 70 % of Europeans are concerned that their personal data may be misused. They are worried that companies may be passing on their data to other companies without their permission.
- 72% of Internet users are worried that they give away too much personal data. They feel they are not in complete control of their data. This results in diminishing trust of citizens in companies they deal with, in their governments, in supranational entities such as the European Union, in the law, and diminishing trust between countries. Last but not least, it holds back the growth of the digital economy in general.
- 92 % Europeans say they are concerned about mobile apps collecting their data without their consent.

There is obviously a clear need to close the growing rift between individuals that want control over their personal data and the companies that process their data. The restoration of this trust in relation to privacy and data protection surfaced as the most pressing challenge.

7 'How Does the Data Protection Reform Strengthen Citizens' Rights?' (European Commission, 2012) <ec.europa.eu/justice/data-protection/document/review2012/factsheets/2_en.pdf> accessed 2 May 2014

8 'Flash Eurobarometer 359: Attitudes on Data Protection and Electronic Identity in the European Union' (European Commission, June 2011) <http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_en.pdf> accessed 23 May 2014.

3. Existing Mechanisms in Protecting the Right to Data Protection

The effectiveness of legal rules in general and data subjects' rights in particular, depends, to a considerable extent, on the existence of appropriate mechanisms to enforce them. In European data protection law, the data subject must be empowered by national law to protect his or her data. Independent supervisory authorities must also be established by national law to assist the data subjects in exercising their rights and to supervise the processing of personal data. Additionally, the right to an effective remedy, as guaranteed under the ECHR and the Charter, demands that judicial remedies be available to every person.[9]

3.1 The Legislative Background

A right to protection of an individual's private sphere against intrusion from others, especially from the state, was laid down in an international legal instrument for the first time in Article 12 of the United Nations (UN) Universal Declaration of Human Rights (UDHR) of 1948 in respect for private and family life.[10] The UDHR influenced the development of other human rights instruments in Europe.

The right to protection of personal data forms part of the rights protected under Article 8 of the European Convention on Human Rights (1950) which guarantees the right to respect for private and family life, home and correspondence and lays down the conditions under which restrictions of this right are permitted.[11] The final arbiter on the Convention is the European Court of Human Rights, which hears complaints by individuals on alleged breaches of human rights by signatory states.

By the mid-1970s, the Committee of Ministers of the Council of Europe adopted various resolutions on the protection of personal data, referring to Article 8 of the ECHR.[12] In 1981, a Convention for the protection of individuals with regard to the automatic processing of personal

9 European Union Agency for Fundamental Rights, 'Handbook on European Data Protection Law' (Council of Europe, 2013), available at <www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf> accessed 25 May 2014.

10 Universal Declaration of Human Rights 1948.

11 European Convention on Human Rights 1950.

12 Committee of Ministers, Resolution (73) 22 on the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector Council of Europe, (1973) <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=589402&SecMode=1&DocId=646994&Usage=2> accessed 20 May 2014; Resolution (74) 29 on the protection of the privacy of individuals vis-à-vis electronic data banks in the public sector, Council of Europe, (1974) <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=590512&SecMode=1&DocId=649498&Usage=2> accessed 30 May 2014.

data (Convention 108) was opened for signature. Convention 108 was, and still remains, the only legally binding international instrument in the data protection field.

Convention 108 protects the individual against abuses which may accompany the collection and processing of personal data, and seeks, at the same time, to regulate the trans-border flow of personal data. As regards to the collection and processing of personal data, the principles laid down in the convention concern in particular fair and lawful collection and automatic processing of data that is stored for specified legitimate purposes and not for use for ends incompatible with these purposes nor kept for longer than is necessary. They also concern the quality of the data, in particular that they must be adequate, relevant and not excessive (proportionality) as well as accurate.[13]

In addition to providing guarantees on the collection and processing of personal data, it outlaws in the absence of proper legal safeguards, the processing of 'sensitive' data, such as a person's race, politics, health, religion, sexual life or criminal record.[14] The convention also enshrines the individual's right to know that information is stored on him or her and, if necessary, to have it corrected. Restrictions on the rights laid down in the convention are possible only when overriding interests, such as state security or defence, are at stake. Although the convention provides for the free flow of personal data between State parties to the convention, it also imposes some restrictions on those flows to states where the legal regulation does not provide equivalent protection.[15]

In 2001, an Additional Protocol to Convention 108 was adopted, introducing provisions on trans-border data flows to non-parties, so-called third countries, and on the mandatory establishment of national data protection supervisory authorities.[16]

The principal EU legal instrument on data protection is Directive 95/46/EC of the European Parliament and Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive). As the aim of adopting the Data Protection Directive was harmonisation of data protection law at the national level, the directive affords a degree of specificity comparable to that of the (then) existing national data protection laws. The Data Protection Directive is designed to give substance to the principles of the right to privacy already contained in Convention 108 and to expand them. In particular, the introduction of independent supervision as an instrument for improving compliance with data protection rules proved to be an important contribution to the effective

13 EUAFR (n 8) 16.
14 Ibid, 16.
15 Ibid, 16.
16 Additional Protocol to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Regarding Supervisory Authorities and Trans-Border Data Flows, CETS No. 181, 2001.

functioning of European data protection law. (Consequently, this feature was taken over into CoE law in 2001 by the Additional Protocol to Convention 108) The Court of Justice of the European Union (CJEU) in Luxembourg has jurisdiction to determine whether a Member State has fulfilled its obligations under the Data Protection Directive and to give preliminary rulings concerning the validity and interpretation of the directive, in order to ensure its effective and uniform application in the Member States.

The Charter of Fundamental Rights of the European Union not only guarantees the respect for private and family life (Article 7), but also establishes the right to data protection (Article 8), explicitly raising the level of this protection to that of a fundamental right in EU law. EU institutions as well as Member States must observe and guarantee this right, which also applies to Member States when implementing European Union law (Article 51 of the Charter). Formulated several years after the Data Protection Directive, Article 8 of the Charter must be understood as embodying pre-existing EU data protection law. The Charter, therefore, not only explicitly mentions a right to data protection in Article 8 (1), but also refers to key data protection principles in Article 8 (2). Finally, Article 8 (3) of the Charter ensures that an independent authority will control the implementation of these principles. This system includes the jurisprudence of the Court of Justice of the European Union, which guarantees the protection of fundamental human rights within the EU.

3.1.1 Right to Data Protection in Croatia

Article 37 of the Constitution of the Republic of Croatia stated the following:[17]

> *"Everyone shall be guaranteed the safety and secrecy of personal data. Without consent from the person concerned, personal data may be collected, processed and used only under conditions specified by law. Protection of data and supervision of the work of information systems in the Republic shall be regulated by law. The use of personal data contrary to the purpose of their collection shall be prohibited."*

The Croatian Act on Personal Data Protection,[18] has been promulgated on the grounds of the Constitutional provision related to personal data protection. This Act regulates personal data protection of natural persons and supervision over collecting, processing and use of personal data in the Republic of Croatia. Besides the above-mentioned Act there are two regulations: the Regulation on the method of maintaining records on personal data filing system and the form of

[17] The Constitution of the Republic of Croatia, Official Gazette No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10.

[18] The Croatian Act on Personal Data Protection, Official Gazette No. 103/03, 118/06, 41/08.

such records,[19] and the Regulation on the manner of storing and special measures of technical protection of the special categories of personal data.[20]

The Republic of Croatia as Council of Europe's member is party to the Convention for the protection of individuals with regard to automatic processing of personal data (Convention 108), as well as to the Additional Protocol to the Convention 108 related to data protection authorities and international data exchange.

The implementation of the previously mentioned legal acts of the Council of Europe has been enabled thanks to the adoption of the Act on confirmation of the Convention for the protection of individuals with regard to automatic processing of personal data (Convention 108) and of the Additional Protocol to the Convention 108 related to data protection authorities and international data exchange.[21] The Act on Personal Data Protection has been harmonised in all important questions with the Directive 95/46/EC on the Protection of individuals with regard to the processing of personal data and on the free movement of such data.

Personal data is also protected under the Croatian Criminal Code.[22] In Article 146 paragraph 1, it states that whoever, contrary to the conditions stipulated by the law collects, processes or uses personal data shall be punished by imprisonment not exceeding one year. Paragraph 2, states that whoever, contrary to the conditions stipulated by the law, exports personal data from the Republic of Croatia with the aim of further processing or publishes them or in any other way makes them available to others or who by action from paragraph 1. obtains for himself or other significant pecuniary gain or causes substantial damage shall be punished by imprisonment not exceeding three years. Paragraph 3 states that whoever commits an act from paragraph 2 against a child or whoever, contrary to the conditions stipulated by the law collects, processes or uses personal data of natural persons related to racial or ethnic origin, political views, religious or other beliefs, syndicate membership, health or sex life and personal data of natural persons related to criminal procedure shall be punished according to paragraph 2. Paragraph 4, states that an official who commits acts from paragraphs 1 to 3 shall be punished by imprisonment from six months to five years.

19 The Regulation on the Method of Maintaining Records on Personal Data Filing System and the Form of Such Records, Official Gazette, No. 105/04.

20 Regulation on the Manner of Storing and Special Measures of Technical Protection of the Special Categories of Personal Data, Official Gazette, No. 139/04.

21 Additional Protocol to the Convention 108 related to data protection authorities and international data exchange, Official Gazette, No. 04/05, International Agreements.

22 Croatian Criminal Code, Official Gazette, No. 125/11, 144/12.

3.2 The Right to Data Protection - Judicial Practice

Article 8 of the Convention and similarly Article 7 of the Charter provide that everyone has the right to respect for his or her private and family life, home, and communications. In addition, the right to respect for private life had been and continues to be protected as a general principle of EU law, as noted in CJEU case 136/79 *National Panasonic v Commission* (1980) and CJEU case C-62/90 *Commission v Germany* (1992). However, another Article 8, namely Article 8 of the Charter, specifically addresses the fundamental right to the protection of personal data. There is no corresponding provision on data protection in the Convention, and another Convention of the Council of Europe, the Data Protection Convention or Convention 108, that specifically addresses the protection of personal data does not, in principle, fall under the jurisdiction of the Strasbourg Court. Nevertheless this Court has applied Article 8 of the European Convention on Human Rights (covering the right to privacy) to give rise to a data protection as well, for instance, in the *Amann v Switzerland* case[23] and in the *Rotaru v Romania* case.[24]

The Court of Justice of the European Union in Luxembourg in the Bavarian Lager case reasoned that compared with the right to privacy, the EU rules on data protection create a specific and reinforced system of protection.[25] Although both Courts tend to treat data protection as an expression of the right to privacy, the specifics of each right must be respected. There are considerable overlaps in the scope of both rights, but also some areas where their personal and substantive scope diverge.[26]

The European Court of Human Rights (ECtHR) has stated that the protection of personal data is of fundamental importance to a person's enjoyment of his right to respect for private and family life in the *S. and Marper v the United Kingdom* case.[27] According to the report made in 2011 by the Research Division of the European Court of Human Rights, the most recent communicated cases show that the ECtHR is being faced with new concepts such as that of data portability and the right to be forgotten, in other words, the right for the data subject to object to the further processing of his/her personal data, and an obligation for the data controller to delete information as soon as it is no longer necessary for the purpose of the processing.

In addition, according to the above mentioned report, retention of data on national and European databases is an issue which arguably will arise more frequently in the future before the European

23 *Amann v Switzerland*, no 27798/95, ECHR 2000-II, para 65.
24 *Rotaru v Romania*, App no 28341/95, ECHR 2000-V, para 43.
25 CJEU, Case C-28/08 P Commission/Bavarian Lager (2010) ECR I-6055, para 60.
26 Juliane Kokott and Christoph Sobotta, *The Distincion between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR* (Oxford University Press 2013), 222.
27 *S. and Marper v the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 41, 4 December 2008.

Court of Human Rights, given the proliferation of such databases; at the European level one could cite SIS (the Schengen Information System), the CIS (Customs Information System), and VIS (Visa Information System). This is coupled with an increasing desire to share information and co-operate, together with increased concerns over security (following major terrorist attacks) and perceived immigration problems.

4. The Value of Consent

Consent is a pivotal concept in order to safeguard the fundamental rights and freedoms of users, and especially their rights to privacy and data protection. The current models for personal data protection use the concept of informational self-determination as a basis. This concept can be traced to the work of Alan Westin,[28] who referred to privacy in terms of control over information, describing it as a person's right to determine for himself when, how and to what extent information about him is communicated to others. Reading privacy policies should be viewed as a part of a learning process that is indispensable to assuming responsibility for one's personal information and thus being able to take adequate protective measures.

For consent to be valid it must be given voluntarily and specific, there should be information before there can be consent, and data subjects must give an indication that they giving their consent. The Data Protection Directive distinguishes two types of processing data, sensitive and non-sensitive data, both are treated differently. In addition, conditions for processing sensitive data must be explicit.

Consent is one of several legal grounds to process personal data. It has an important role, but this does not exclude the possibility, depending on the context, of other legal grounds perhaps being more appropriate from both the controller's and from the data subject's perspective. If it is correctly used, consent is a tool giving the data subject control over the processing of his data. If incorrectly used, the data subject's control becomes illusory and consent constitutes an inappropriate basis for processing.[29]

The Case Study of Tagging and Facial Recognition at Facebook by Arum Tarina also shows that the rapid development of social networks has not been accompanied by an increase in awareness amongst users of the consequences of the data they provide.[30] Users show concern for privacy,

28 Adam Westin, *Privacy and Freedom* (Bodley Head 1967).

29 Article 29 Data Protection Working Party, Opinion 15/2011 on the definition of consent (2011) <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187_en.pdf> accessed 20 May 2014.

30 Arum Tarina, 'The Implementation of Consent on Social Networks-The Case Study of Tagging and Facial Recognition at Facebook' (Tilburg University 2012), available at <http://arno.uvt.nl/show.cgi?fid=127504> accessed 11 May 2014.

although there seems to be an incongruity between public opinion and public behaviour, people tend to express concern about privacy, but also routinely disclose personal data because of convenience, discounts, and other incentives, or a lack of understanding of the consequences.[31] As there may be long periods of time between a) data collection and b) actions based upon the processing or sharing of such information, the connection between such data collection and any resulting decisions may not always be transparent for individuals. For instance, when the personal data collected is used for profiling, such profiling techniques (by their nature) tend not to be visible to the individual.[32]

According to the Custers, van der Hof, Schermer, Appleby- Arnold and Brockdorff survey,[33] 72% of the respondents never, rarely or sometimes read the terms and conditions before acceptance. This indicates that users may not be well informed about their rights. This hypothesis is confirmed in other research, indicating that users are not always aware (enough) of their rights and obligations with respect to sharing (personal) data.[34] It should be noted that users might also access other sources to inform themselves about their rights, such as consumer protection websites or the media. However, it is questionable whether such general sources can fully substitute the reading of the specific terms and conditions of a particular website. The conclusion that users do not care much about the rights they can exercise, may seem to contradict the findings from many studies that citizens place a high value on their right to privacy. [35]A possible explanation for this contradiction may be that users are often unaware of or not well informed about the rights they have, making it difficult for them to 'match' the privacy policies and terms and conditions with the rights they have under the Data Protection Directive.[36] Another possible explanation is that users simply trust that social network sites have the necessary mechanisms in place for users to exercise their rights, or trust that the regulator will step in if their rights are violated.

It should be noted however that not reading privacy statements does not necessarily indicate disinterest. According to the Custers, van der Hof, Schermer, Appleby-Arnold and Brockdorff

31 Priscilla M Regan 'Privacy and Commercial Use of Personal Data: Policy Developments in the US', Rathenau Institute Privacy Conference, Amsterdam, January 2002.

32 Lee A Bygrave, *Data Protection Law; Approaching its Rationale, Logic and Limits* (Kluwer Law International 2002).

33 Bart Custers, Simone van der Hof, Bart Schermer, Sandra Appleby-Arnold, and Noellie Brockdorff, 'Informed Consent in Social Media Use - The Gap between User Expectations and EU Personal Data Protection Law' (2013) 10(4) Scripted, available at <http://script-ed.org/?p=1232#_ftnref46> accessed 8 May 2014.

34 Bibi van den Berg and Simone Van der Hof, 'What Happens to my Data? A Novel Approach to Informing Users of Data Processing Practices' (2012) 17(7) First Monday, 17.
<http://firstmonday.org/ojs/index.php/fm/article/view/4010/3274> accessed 12 May 2014.

35 Dara Hallinan, Michael Friedewald, and Paul McCarthy, 'Citizens' Perceptions of Data Protection and Privacy in Europe' (2012) 28(3) Computer Law and Security Review 263–272, 263.

36 Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995.

survey[37] only 7.4% of the respondents not reading privacy statements indicated disinterest as the main reason for non-reading. Other reasons were perceived helplessness, a more general belief in law and order or the perception that privacy statements served the protection of website owners rather than its users. These findings are confirmed by other research, showing that users are not always aware (enough) of their rights and obligations with respect to sharing personal data.[38]

5. The European Commission: A Major Reform Proposal

In Europe legislation on data protection has been in place since 1995. The Data Protection Directive guarantees an effective protection of the fundamental right to data protection. However differences in the ways that each Member State implement the law have led to inconsistencies, which create complexity, legal uncertainty and administrative costs. This affects the trust and confidence of individuals and the competitiveness of the EU economy. The current rules also needed modernising – they were introduced at a time when many of today's online services and the challenges they bring for data protection did not yet exist.

In 2012, the Commission proposed a major reform of the EU legal framework on the protection of personal data. The proposed changes will give people more control over their personal data and make it easier to access it. They are designed to make sure that people's personal information is protected – no matter where it is sent, processed or stored – even outside the EU, as may often be the case on the internet. In March this year, the draft of the Regulation was approved by overwhelming majority, with 621 member of the European parliament voting in favour, and only ten against.

5.1 How Will the Changes Help Improve Personal Data Protection for Individuals?

In 2012, Max Schremsan Austrian law student requested all the information that Facebook kept about him on his profile. The social network sent him 1,224 pages of information. This included photos, messages and postings on his page dating back several years, some of which he thought he had deleted. He realised that the site was collecting much more information about him than he thought and that information he had deleted – and for which the networking site had no need – was still being stored. Schrems argued people should be able to delete things and know that they are gone.

[37] Custers et. al. (n 34).
[38] Van den Berg and Van der Hof (n 35).

The Commissions' proposal[39] aims to reinforce the 'right to be forgotten' that will help people better manage data protection risks online: people will be able to delete their data if there are no legitimate reasons for retaining it.

Wherever consent is required for data to be processed, it will have to be given explicitly, rather than assumed as is sometimes the case now. In addition, people will have easier access to their own data and be able to transfer personal data from one service provider to another more easily.

There will be increased responsibility and accountability for those processing personal data: for example, companies and organisations must notify the national supervisory authority of serious data breaches as soon as possible (if feasible, within 24 hours). People will be able to refer cases where their data has been breached or rules on data protection violated to the data protection authority in their country, even when their data is processed by an organisation based outside the EU. EU rules will apply even if personal data is processed abroad by companies that are active in the EU market. This will give people in the EU confidence that their data is still protected wherever it may be handled in the world. Having the same rights across the EU will also boost individuals' confidence in the fact that the protection they get for their data will be equally strong, wherever their data is processed. This will improve trust in online shopping and services, helping to boost demand in the economy.

6. Conclusion

The legal regulation in the virtual world, no matter how comprehensive, is not recommended as a sole instrument of privacy protection. Information technologies and parallel with them - new possibilities for encroaching upon citizens' privacy - are developing at such speed that the law can already barely keep up. That is why it is recommended that legal protection of privacy is combined with different forms of self-regulation, technical self-help and information education - all in the aim of creating a thoughtful user of the Web.

In the current and proposed EU data protection legislation, security measures are an obligation of the data controller. But when users are careless with their data and with security measures, data controllers can do little about this. It is recommended to establish security as a joint responsibility of both users and data controllers. That does not mean that a user is always fully to blame for incidents when he or she has taken no security measures, but it does mean that users are to some extent responsible.

[39] Progress on EU data protection reform now irreversible following European Parliament vote, (European Commission, MEMO/14/186, 12.3.2014.) <http://europa.eu/rapid/press-release_MEMO-14-186_en.htm> accessed 20 May 2014.

The current models for personal data protection use the concept of informational self-determination as a basis. At the same time, the current tools for informational self-determination do not provide data subjects significant ways to control the use of their personal data. For instance, in many situations, a user does not have any rights to have data deleted.[40] Furthermore, consent is often a take-it-or-leave-it situation: when a user does not consent to all terms and conditions of an SNS or UGC, in many cases he or she is plainly denied access.

Solove argues that the current models based on informational self-determination fail to offer adequate privacy protection.[41] He mentions several cognitive problems (on how people make decisions) and several structural problems (on how privacy decisions are architected), and why people are not even close to the model of informational self-determination. Basically, he argues, the model has too many hurdles: (1) people do not read privacy policies; (2) if they do read them, they do not understand them; (3) if people read and understand them, they often lack enough background knowledge to make an informed decision; (4) if people read them, understand them and can make an informed decision, they are not always offered the choice that reflects their preferences.

In regards to specific and sufficiently detailed information, users explicitly indicated that they do not want to spend much time on reading privacy statements, 72% of the respondents never, rarely or sometimes read the terms and conditions before accepting them, indicating that users may not be well informed about their rights.[42] However, at the same time, they want to be informed properly. As straightforward solutions to this problem could be that information is offered in several layers, that summaries are offered and other tools are used to support the decision-making process of the consumer (such as machine readable privacy policies and visualisation tools, other than labels or icons).[43]

In regards to understandable information, users indicated that they do understand the information provided in privacy statements: 63.6% of the respondents of the survey indicated that they understand the privacy statements completely or at least most part of them.[44] However, for those users that do not completely understand the information provided or for those users who

40 The current Data Protection Directive mentions a right to rectify data, but not to have data erased when this data is correct.

41 Daniel J Solove, 'Privacy Self-Management and the Consent Paradox' (2013) 126 Harvard Law Review 1880.

42 Noellie Brockdorff et. al,. 'Quantitative Measurement of End-User Attitudes towards Privacy, Work Package 7 of Consent' (CONSENT 2013) <http://www.consent.law.muni.cz> accessed 24 May 2014.

43 Custers et. al. (n 34).

44 Brockdorff et. al. (n 43).

overestimate themselves in this respect, there is room for improvement regarding the clarity of the information. Legal jargon should be avoided and the text should not be too long.[45]

Further clarity regarding which data are collected, used and shared and for which purposes are important to users and sufficiently supported by the legal framework. More transparency regarding the data collected, used and shared is recommended as most data is provided during the registration process and users may forget after some time which data they provided.[46]

Re-establishing consumer trust requires that we create thoughtful users of the web by raising awareness about their rights and obligations online and determining how to apply consumer privacy and data security principles to a world of increasingly ubiquitous, connected devices that are always on, that are always close at hand and that we increasingly depend on in our daily lives.

[45] Custers et. al. (n 34).
[46] Ibid.

MOVING ON AFTER VIOLENCE: AN EVALUATION OF THE TRANSITIONAL JUSTICE PROCESS IN KOSOVO

Beatrice Grasso*

Abstract

This article aims to analyse the efforts, both international and domestic, in completing a transitional process enabling the various ethnic groups in Kosovo to reconcile and co-exist peacefully. In order to achieve this objective, an overview of the various initiatives undertaken as part of the transitional process is provided, with specific focus on criminal prosecutions as the preferred method to determine accountability. The main argument of this article is that, despite the existence of some commendable efforts in the area, the process of reconciliation has been ill-managed by the international community, and is, as a result, still far from concluded.

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1. Introduction

Since the end of the 1990s, the entire Balkan region has had to come to terms with its past of widespread violence, ethnic nationalism, criminality and corruption.[1] One small ethnically-diverse area in particular, Kosovo, still attracts the attention of the international community because of its difficulties in overcoming its history as 'the region with some of the worst human rights violations in all of Europe'[2] and the devastation brought by war.

This article aims to analyse the efforts, both international and domestic, in completing a transitional process enabling the various ethnic groups in Kosovo to reconcile and co-exist peacefully. In order to accomplish this, a brief overview of the conflict itself will be provided first. The various initiatives undertaken as part of the transitional process will then be analysed, with particular focus on a possible over-reliance of criminal prosecutions to the detriment of non-legal projects. Finally, it will be submitted that, notwithstanding some commendable efforts in the area, the process of reconciliation is still far from concluded, as demonstrated even recently by violent outbursts in the run-up to local elections,[3] even though recent developments, such as the approval by the Kosovo Parliament of the creation of a special court dealing with serious abuses during and after the war,[4] present a much-awaited step towards successful reconciliation.

It should be noted that transitional justice is a relatively new area of practice.[5] As such, what exactly it entails and which measures should be adopted to guarantee a successful transition are often debated.[6] Some academics even contend that, although a consensus is starting to be reached, transitional justice remains a highly under-theorised field.[7] Notwithstanding the impact such issues have on practical implementations of transitional measures, a detailed discussion of these would fall outside the scope of this article. For this reason, here 'transitional justice' will be understood to indicate 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation', including 'both judicial and non-judicial mechanisms, with

1 Andrew Cottey, 'The Kosovo War in Perspective' (2009) 85 International Affairs 593, 594.

2 Richard Caplan, 'International Diplomacy and the Crisis in Kosovo' (1998) 74 International Affairs 745, 751.

3 'Violence Mars Kosovo Elections' The Guardian, 3 November 2013, available at <http://www.theguardian.com/world/2013/nov/03/violence-mars-kosovo-elections> accessed 30 November 2013; Mark Webber, 'The Kosovo War: a Recapitulation' (2009) 85 International Affairs 447, 457.

4 Human Rights Watch, 'Kosovo: Approval of a Special Court Key Step for Justice' (24 April 2014) available at <http://www.hrw.org/news/2014/04/24/kosovoapprovalspecial courtkeystepjustice>.

5 Paige Arthur, 'How "Transitions" Reshaped Human Rights: a Conceptual History of Transitional Justice' (2009) 31 Human Rights Quarterly 321, 326.

6 Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 Journal of Law and Society 265, 266.

7 Pablo de Greiff, 'Theorising Transitional Justice' in Melissa S Williams, Rosemary Nagy, and Jon Elster (eds), *Transitional Justice: NOMOS LI* (New York University Press 2012), 31–32.

differing levels of international involvement'.[8] Having identified the operational field, a brief account of tensions in Kosovo will now be given.

2. Historical Background

Strained relations between the two main ethnic groups, Albanians and Serbs, in Kosovo have very deep roots, arguably going back hundreds of years, and deriving mainly from the hard Serbian rule of the region.[9] It is, nevertheless, generally accepted that the conflict in Kosovo is better understood in the context of the wider Balkan crisis, leading to the collapse of the Federal Republic of Yugoslavia (FRY) in the 1990s,[10] and in particular with reference to new waves of nationalism emerging in the 1970s-80s and culminating with the rise of Slobodan Milošević in Serbian politics.[11] Under its first President, Josip Broz Tito, the FRY managed to unite six republics and two autonomous provinces, each of which incorporated several different nationalities and religions. In order to achieve its goal and establish a peaceful, multiethnic, pan-Balkan State which would invalidate the tensions of the previous century, the Titoist regime endeavoured to suppress all nationalist tendencies which could potentially lead to conflicts within the Federation.[12] After Tito's death in 1980, however, nationalist movements throughout Yugoslavia started to re-emerge.[13] One man in particular, Slobodan Milošević, was instrumental in advocating Serb nationalism, essentially by challenging the Titoist political framework and arguing for a more aggressive national policy to bring Serbian national interests to the fore.[14] Milošević's political discourse inaugurated a new phase in the history of the FRY in which the various republics openly opposed each other.[15] These tensions escalated over the following years, eventually leading to complete dissolution of the Federation.[16]

8 Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies' (23 August 2004) UN Doc S/2004/616, para 8.
9 Caplan (n 3) 747.
10 Cottey (n 2) 594.
11 Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press 2000), 33–34.
12 Bette Denich, 'Dismembering Yugoslavia: Nationalist Ideologies and the Symbolic Revival of Genocide' (1994) 21 American Ethnologist 367, 367.
13 Ibid.
14 Ibid, 371.
15 Denich (n 13) 371–372.
16 EC Arbitration Commission, 'Opinions on Questions Arising from the Dissolution of Yugoslavia' (1992) 31 International Legal Materials 1494, 1523. The matter of the dismemberment of Yugoslavia would, in light of its complexity, require a far more in-depth analysis than it is possible to provide here. For a more thorough account of the history and demise of the FRY see, for instance, Misha Glenny, *The Fall of Yugoslavia: the Third Balkan War* (Penguin 1996).

Kosovo itself played a significant role in Milošević's rise to power.[17] Taking advantage of a visit to the region, he began to promote himself as the champion for "oppressed" Serb minorities in Kosovo and, by extension, Bosnia and Croatia.[18] This emerged from claims by the Serbian community in Kosovo during the 1980s that they were being attacked and forced to emigrate by ethnic Albanians (K-Albanians) attempting to carry out some form of "genocide".[19]

In March 1989, Milošević, exploiting Serbian fears of annihilation in the region, was able to secure a constitutional amendment to take away Kosovo's autonomy, thus bringing it completely under Serbian control.[20] In what was believed to be an effort to protect their abused brothers in the region, therefore, the Belgrade government imposed a very hard line in Kosovo, essentially depriving ethnic Albanians of their civil rights, most notably by forcing them to use Serbian language, limiting their access to education and public employment and initiating a policy of arbitrary arrests.[21]

Initially, K-Albanians responded primarily through non-violent means:[22] they formed a shadow government which declared the measures adopted by Belgrade to be unconstitutional and proclaimed Kosovo independent from Yugoslavia, just as other republics were doing in the same period.[23] This measure, however, was rejected by Serbia and ignored by the international community.[24] According to the Federal government, in fact, Kosovo had no right to secede because it was not a republic like Slovenia or Croatia for instance.[25] This was mainly due to a technicality in the original formation of the FRY: only nations could receive the status of republics, whereas nationalities could not, the main difference being that nations had their primary homeland inside the Federation, while nationalities had it outside – the latter being the case for Kosovo, Albania.[26]

17 VP Gagnon Jr, 'Ethnic Nationalism and International Conflict: The Case of Serbia' (1994) 19 International Security 130, 147–148.
18 Cottey (n 2) 594.
19 Tim Judah, 'Kosovo's Road to War' (1999) 41 Survival 5, 9–10; Gagnon Jr (n 18) 147.
20 Ted Baggett, 'Human Rights Abuses in Yugoslavia: to Bring an End to Political Oppression, the International Community Should Assist in Establishing an Independent Kosovo' 27 Georgian Journal International & Comparative Law 457, 459.
21 Michael Salla, 'Kosovo, Non-Violence and the Break-up of Yugoslavia' (1995) 26 Security Dialogue 427, 430–431; Caplan (n 3) 751.
22 Gagnon Jr (n 18) 154.
23 Baggett (n 21) 461–462.
24 Stefan Troebst, 'Conflict in Kosovo: Failure of Prevention? An Analytical Documentation, 1992-1998' (1998) ECMI Working Paper No 1, 18, available at <http://www.ecmi.de/uploads/ tx_lfpubdb/working_paper_1.pdf> accessed 30 November 2013.
25 Caplan (n 3) 748.
26 Ibid.

With the spread of conflict in the region, particularly in Bosnia, Kosovo's successful policy of non-violence under the leadership of its President, Ibrahim Rugova, ultimately backfired.[27] It seems, in fact, that, absent conflict in the region, international powers decided to concentrate their efforts on resolving the Bosnian crisis, thus ignoring Kosovo and excluding it from the Dayton Peace Process.[28] This raised fears among K-Albanians that their plight would be disregarded.[29] In this context, it is therefore unsurprising that the non-violent movement was soon abandoned, while support for the bellicose Kosovo Liberation Army (KLA, or UÇK in Albanian) grew exponentially over a relatively short period of time.[30] The subsequent intensification of conflict was 'rapid, deliberate and successful'[31] as K-Albanians responded to the message passed by the international community that only widespread violence would allow their complaints to be considered.[32]

In 1996, the KLA started carrying out violent attacks, directed mainly at Serb policemen and soldiers, and gradually increased its activities until 1998, when it gained control of almost 30% of Kosovo.[33] Serb forces then decided to retaliate, in an effort to pacify the region and eradicate the KLA.[34] Their attacks, however, resulted in the destruction of entire villages and large numbers of civilian casualties,[35] the only appreciable effect of which was to increase local support for the KLA.[36] The growth of the KLA, in turn, led to a rapid escalation of the conflict between them and the Yugoslav Army, where civilians were systematically targeted by both sides, their property looted and destroyed.[37] Following international calls for a ceasefire and threats to use force,[38] at the end of 1998 most Serbian troops withdrew from Kosovo and international inspectors were sent in to monitor the situation.[39] Milošević used this time to gather further equipment to infiltrate Kosovo with FRY troops, while the KLA also rearmed and regrouped to continue provocations

27 Ibid, 751.
28 Peter Russell, 'The Exclusion of Kosovo from the Dayton Negotiations' (2009) 11 Journal of Genocide Research 487, 504; Salla (n 22) 434.
29 DL Phillips, 'Comprehensive Peace in the Balkans: The Kosovo Question' (1996) 18 Human Rights Quarterly 821, 824–825.
30 Caplan (n 3) 752.
31 Russell (n 29) 501.
32 Ibid, 500.
33 Keiichi Kubo, 'Why Kosovar Albanians Took Up Arms against the Serbian Regime: The Genesis and Expansion of the UÇK in Kosovo' (2010) 62 Europe-Asia Studies 1135, 1142-1143; Caplan (n 3) 752.
34 Ibid.
35 Ibid, 1146.
36 Ibid.
37 Ibid, 1148.
38 UNSC Res 1199 (23 September 1998) UN Doc S/RES/1199. This Resolution was adopted under Chapter VII of the Charter.
39 Kubo (n 34) 1148; Lawrence Freedman, 'Victims and Victors: Reflections on the Kosovo War' (2000) 26 Review of International Studies 335, 349.

against the Serbs.[40] The Yugoslav Army moved back into Kosovo and allegedly reprised their attacks against villages,[41] killing several civilians.[42]

As the situation on the ground continued to deteriorate, international actors were unable to make Milošević engage in peace negotiations with the KLA and the Security Council (UNSC) could not agree on what action ought to be taken.[43] Fearing another Srebrenica, on 24th March 1999, NATO took the initiative and launched air strikes against Serbia.[44] After 72 days of bombing, Milošević capitulated and agreed to sign a Military Technical Agreement (MTA) with NATO,[45] which was essentially an internationally agreed peace plan for Kosovo.[46] The MTA provided for a 'durable cessation of hostilities'[47] and immediate withdrawal of all FRY Forces,[48] and outlined the mandate of the international security force (KFOR) which would restore and maintain 'a secure environment for all citizens of Kosovo'.[49] This agreement was soon after approved by the UN,[50] which also established an international interim administration (UNMIK) to cover the transitional period[51] until democratic self-governance of Kosovo could be achieved.[52] After Kosovo's unilateral and controversial declaration of independence from Serbia in 2008,[53] UNMIK gradually reduced the purview of its mission, leaving the EU Mission (EULEX) to deal with the restoration of the rule of law, and attempting to pass more responsibility to local government institutions.[54]

40 Ibid.

41 The Serbian government repeatedly denied killing any civilians in this phase of the conflict, although international inspectors believed they did. For a more detailed discussion of the Racak incident, see OSCE, 'Walker: "KMV Is Making a Difference"', (January 1999) 6 OSCE Newsletter 1, 1–3.

42 Freedman (n 40) 349; Kubo (n 34) 1149.

43 Freedman (n 40) 349–350; Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 American Journal International Law 824, 826. For a more detailed analysis of the failed Rambouillet Peace Talks, see Marc Weller, 'The Rambouillet Conference on Kosovo' (1999) 75 International Affairs 211.

44 Tim Youngs, Mark Oakes, Paul Bowers et al, 'Kosovo: Operation "Allied Force"' (Research Paper 99/48 House of Commons Library 1999) 10.

45 Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (9 June 1999) (MTA) <http://www.nato.int/kosovo/docu/a990609a.htm> accessed 5 December 2013.

46 Klinton W Alexander, 'NATO's Intervention in Kosovo: the Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval' (2000) 22 Houston Journal of International Law 403, 437.

47 MTA, art 1(4)(a).

48 Ibid, art 2.

49 Ibid, art 1(2) and Appendix B.

50 UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

51 Ibid, para 10.

52 Ibid, Annex 2 paras 5 and 8.

53 Kosovo Declaration of Independence (17 February 2008) <http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf> accessed 30 November 2013. This was subsequently deemed to be legal by the International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 [122]. See also Daniel Fierstein, 'Kosovo's Declaration of Independence: an Incident Analysis of Legality, Policy and Future Implications' (2008) 26 Boston University International Law Journal 417.

54 UNSC Presidential Statement 44 (26 November 2008) UN Doc S/PRST/2008/44; UNSC 'Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo' (10 June 2009) UN Doc S/2009/300 paras 18–21.

The legacy of the international administration and its success in facilitating inter-ethnic pacification have, however, often been called into question.

3. The Transitional Period

As soon as overt fighting stopped in Kosovo, international attention to the region faded away.[55] This was particularly problematic as, pursuant to the agreements in place and UNSC Resolution 1244, successful administration of Kosovo depended on tight cooperation between various international organisations (such as UNMIK, UNHCR, OSCE, the EU and NATO) and States, applying a new structural model that proved challenging for all those involved,[56] especially due to uncertainties regarding the allocation of responsibilities between the international community and emerging local institutions.[57] The situation was further complicated by the existence of parallel Serb and Albanian institutions on the territory and the dire economy conditions, as well as the lack of capacity in many areas.[58] The bulk of the civil service, police and administrative structures had, in fact, been constituted mainly of Serbs, many of whom had since fled or been forced to leave the country.[59]

Additionally, ethnic distinctions were emphasised by international operators seeking to legitimise their position by presenting themselves as champions for oppressed minorities, thereby entrenching the image of "good" Albanians versus "bad" Serbs.[60] In these circumstances, many Albanians felt legitimised to exact their revenge for the treatment that had been accorded to them over the past decades on all non-Albanian minorities, and were able to enjoy virtual impunity for their actions because of the existence of an enforcement vacuum which the international forces were yet unable to fill.[61]

The most critical indication of UNMIK's and KFOR's failure to improve inter-ethnic relations is clearly illustrated by the situation of the city of Mitrovica,[62] in the north of the country.[63] The town was, in fact, initially divided into a northern Serb part and a southern Albanian part, mainly as a

55 Aidan Hehir, 'Autonomous Province Building: Identification Theory and the Failure of UNMIK' (2006) 13 International Peacekeeping 200, 200–201.
56 Alexandros Yannis, 'Kosovo Under International Administration' (2001) 43 Survival 31, 32–33.
57 Independent International Commission on Kosovo (n 12) 100.
58 Yannis (n 57) 41; Laura A Dickinson, 'The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo' (2002) 37 New England Law Review 1059, 1065; Independent International Commission on Kosovo (n 12) 120.
59 Hansjoerg Strohmeyer, 'Collapse and Reconstruction of a Judicial System: the United Nations Missions in Kosovo and East Timor' (2001) 95 American Journal of International Law 46, 50.
60 Hehir (n 56) 201.
61 Yannis (n 57) 37.
62 Mitrovice in Albanian, Kosovska Mitrovica in Serbian.
63 Hehir (n 56) 203.

strategy adopted by French KFOR to maintain security.[64] This separation, however, further increased tensions between the two groups, as Albanians feared it to be the start of an unacceptable policy of partition,[65] while for Serb nationalists it provided the opportunity to undermine the creation of a new political discourse and to reinforce ethnic divides along the Ibar river.[66] Attempts at bridging this divide were further undermined by UNMIK's decision to establish a separate administration for Mitrovica (UAM) which, despite promises that it would facilitate peaceful inter-ethnic relations, in practice served as a legitimisation of the Serbian authorities in the area, particularly in light of its decision to remain status-neutral after the Declaration of 2008.[67] The situation in the city is still today unsolved; relations between Serbs and Albanians remain openly strained, as demonstrated in the run-up to the local elections in November 2013.[68]

The case of Mitrovica is an extreme symbol of the failure of the international community to establish inter-ethnic dialogue in Kosovo. The lack of attention to such issues is partly due to the great consideration given initially to the need to recreate a secure environment,[69] and partly due to the lack of capacity and inexperience of international staff.[70]

4. Prosecution of War Crimes

Once the security situation finally started to improve,[71] the international administration identified new priorities, concentrating in particular on the re-establishment of the rule of law and the administration of justice.[72] This proved particularly problematic, as there was no agreement over which legal system should be adopted and there was no longer a functioning court system in place.[73] To remedy this, the interim administration proceeded to appoint several new judges and prosecutors.[74]

64 Independent International Commission on Kosovo (n 12) 109.

65 Denisa Kostovicova, 'Legitimacy and International Administration: The Ahtisaari Settlement for Kosovo from a Human Security Perspective' (2008) 15 International Peacekeeping 631, 638.

66 Yannis (n 57) 41.

67 Kosovo Institute of Peace, *UNMIK After Kosovo Independence: Exit Strategy or 'Exist' Strategy?* (August 2013) 16–17.

68 UNSC, Verbatim Record 7064th Meeting (19 November 2013) UN Doc S/PV.7064, 2 (Mr Farid Zarif); for a more comprehensive analysis of the impact of local elections in the north of Kosovo, see Balkans Policy Research Group, *Something Completely Different in Northern Kosovo* (October 2013).

69 UNSC 'Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo' (28 March 2008) UN Doc S/2008/211 para 30; Hjortur B Sverrisson, 'Truth and Reconciliation Commission in Kosovo: a Window of Opportunity?' (2006) 8 Peace, Conflict & Development 1, 5; Hehir (n 56) 203.

70 Ibid, 209; Yannis (n 57) 43.

71 Adam Balcer, 'Kosovo: the Question of Final Status' (2003) CES Studies 48, 52.

72 Erika de Wet, 'The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX' (2009) 103 American Journal of International Law 83, 84.

73 Roger FM Lorenz, 'The Rule of Law in Kosovo: Problems and Prospects' (2000) 11 Criminal Law Forum 127, 129.

74 UNMIK Regulation 1999/7 on Appointment and Removal from Office of Judges and Prosecutors (7 September 1999) UN Doc UNMIK/REG/1999/7.

This solution, however, created even more problems, as the newly appointed officials lacked the necessary experience to carry out the delicate task at hand and tended to exclude minority communities due to fear for their own safety, thereby establishing what was essentially an Albanian judicial system.[75] Further difficulties were created by the apparent bias these judges and prosecutors displayed in the management of their cases, possibly linked with pressures from the KLA and associated groups, whereby most defendants convicted for serious crimes were Serbs, while disproportionately high numbers of Albanian suspects were systematically released.[76] This situation seriously undermined the legitimacy and credibility of the new system, particularly in the eyes of ethnic minorities.[77]

Nevertheless, the scale of human rights abuses and war crimes in Kosovo had been such that it was necessary to punish those responsible in order for the whole system to regain legitimacy.[78] The international community looked to the International Criminal Tribunal for the Former Yugoslavia (ICTY) to address this. Due to capacity issues, however, the Prosecutor made it clear that she would concentrate on those responsible for the most crimes at the highest level, namely the Serbian leadership of the FRY,[79] and that she regarded UNMIK as having primary responsibility to investigate and prosecute all other offences in Kosovo.[80] Nevertheless, due to the fact that most alleged perpetrators remained in power in Serbia,[81] and the KLA members allegedly responsible for the worst crimes, such as Ramush Haradinaj, were acquitted by the ICTY,[82] the process of reconciliation was severely hindered by appearances of impunity.[83]

In order to solve what was on the verge of becoming an accountability crisis, UNMIK proposed the establishment of a local hybrid court to deal with war crimes, other serious violations of international law and ethnically-motivated crimes: the Kosovo War and Ethnic Crimes Court (KWECC).[84] However, due to substantial budgetary constraints and political obstructions,

75 Lorenz (n 74) 133.
76 Ibid, 132–133.
77 Wendy S Betts, Scott N Carlson & Gregory Gisvold, 'The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law' (2000) 22 Michigan Journal International Law 371, 372.
78 Patrice C McMahon & Jennifer L Miller, 'From Adjudication to Aftermath: the ICTY's Goals Beyond Prosecution' (2012) 13 Human Rights Review 421, 424.
79 ICTY Press Release, 'Statement by Carla Del Ponte Prosecutor of the International Criminal Tribunal for the Former Yugoslavia on the Investigation and Prosecution of Crimes Committed in Kosovo' (29 September 1999) PR/P.I.S./437-E, para 2.
80 Ibid, para 6.
81 Betts et. al. (n 78), 382.
82 *Prosecutor v Haradinaj et al* (Judgement) IT-04-84bis-T (29 November 2012) [683].
83 Humanitarian Law Centre, *Activities and Achievements in 2012* (March 2013) 4.
84 Dickinson (n 59) 1062.

implementation of this project was repeatedly delayed and ultimately abandoned.[85] Without much publicity, it was instead decided that international judges and lawyers would be brought in to assist domestic personnel.[86] Therefore, war crimes trials commenced in local District Courts operating with insufficient equipment, security and staff.[87] As a result, very few cases made it to judgment and proceedings were tainted with allegations of bias and discriminations as well as issues of witness and judiciary protection.[88] This debacle eroded support for the international community and further deteriorated inter-ethnic relations.[89]

This situation may be set to change, as in April 2014 the Kosovo Parliament approved the creation of a special court to deal specifically with abuses committed during and after the war, which is expected to be primarily concerned with the individual criminal responsibility of KLA members.[90] Maintaining elements of the existing system, the special court will be part of the Kosovo judicial system, but international staff will continue to be appointed.[91] Whether this will be more successful than its predecessors, and whether the project will be kept alive by the newly-elected Parliament remain to be seen.

5. The Possibility of a Truth Commission

In a situation like that of Kosovo, where both major parties claim to be exclusively victims of the other without recognising their role as perpetrators,[92] the establishment of a truth commission would have been beneficial.[93] It is, in fact, recognised that truth commissions, by carrying out sanctioned fact-finding missions, help to create a shared narrative of contentious periods of history, as well as providing official acknowledgement of previously denied responsibilities.[94] As it seems accepted that people tend to be more willing to recognise someone else's suffering when their own suffering is also recognised,[95] any complete restorative process in Kosovo should therefore have contemporaneously addressed the denial of crimes committed by Serbs against

85 OSCE, *Kosovo's War Crimes Trials: an Assessment Ten Years On 1999 – 2009* (May 2010) 11.
86 Dickinson (n 59) 1062.
87 Betts et. al. (n 78) 381.
88 OSCE, *Kosovo's War Crimes Trials* (n 86) 25–27.
89 Betts et. al. (n 78) 388; Oskar NT Thoms, James Ron and Roland Paris, 'State-Level Effects of Transitional Justice: What Do We Know?' (2010) 4 International Journal of Transitional Justice 329, 338.
90 Human Rights Watch (n 5).
91 Ibid.
92 UNDP, *Perceptions on Transitional Justice: Kosovo 2012* (2012) 7.
93 Sverrisson (n 70) 16.
94 Priscilla B Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (Routledge 2010), 20–21.
95 Ibid, 21; Vesna Nikolic-Ristanovic, 'Truth and Reconciliation in Serbia' in Dennis Sullivan & Larry Tifft, *Handbook of Restorative Justice: a Global Perspective* (Routledge 2006) 374.

Albanian and other minorities and the denial of crimes committed against Serbs and other minorities by K-Albanians.[96]

Despite recognition that Kosovo could benefit from a truth commission, there have still been no significant efforts to establish one.[97] Where top-down initiatives have been lacking, civil society has attempted to fill the gap by advocating the establishment of a regional truth commission (RECOM) to investigate gross human rights violations committed on Former Yugoslav territory.[98] Despite the idea being generally well received – although there have been objections as to its limited temporal scope –[99] RECOM has not yet been formally established. Some progress may nevertheless be made in the future: in 2013, a Regional Expert Group, comprising personal envoys of Presidents in the Balkan region, was created to discuss a possible implementation of the project in the near future.[100] Plans are also under way to include other minorities, such as the Roma and Ashkali, in the initiative.[101]

6. Conclusion

In light of the above discussion, it is submitted that, in the transition from deeply divided Serbian province to multiethnic independent State, Kosovo ought to have received greater support from the international community in establishing a shared narrative of events, common to both K-Albanians and Serbs. This process should have established awareness that each side suffered at the hands of the other and enabled the population to let go of their resentment towards each other through acknowledgement of this fact. Regrettably, this did not happen. Moreover, attempts to reconcile the various groups were seriously undermined by international actors' excessive emphasis on ethnicity as a determining factor in appointing civil servants, as well as the construction of a narrative which morally privileged K-Albanians over the Serbs and all other minorities, entrenching Albanians' position of proud identification with the KLA.[102]

Excessive reliance on criminal prosecutions as a means to identify the truth and oppose impunity was also severely detrimental, as discriminations and limited capacities proceeded to delegitimise

96 Ibid.

97 Humanitarian Law Centre (n 84) 15.

98 Anna Di Lellio, 'Engineering Grassroots Transitional Justice in the Balkans: the Case of Kosovo' (2013) 27 East European Politics and Societies and Cultures 129, 130.

99 Ibid, 142.

100 RECOM, *Activities Report September 2012-October 2013* (2013) 14.

101 RECOM, 'Integrating the Roma, Ashkali and Egyptian Communities into the Process of Dealing with the Past' (19 November 2013) <http://www.zarekom.org/ news/Integrating-the-Roma-Ashkali-and-Egyptian-communities-into-the-process-of-dealing-with-the-past.en.html>.

102 Stephanie Schwandner-Sievers, 'Democratisation Through Defiance? The Albanian Civil Organisation "Self-Determination" and International Supervision in Kosovo' in Vesna Bojicic-Dzelilovic, James Ker-Lindsay & Denisa Kostovicova (eds) *Civil Society and Transition in the Western Balkans* (Palgrave Macmillan 2013), 96.

the judicial process in the eyes of the local community. Further, the security issues encountered in providing judicial and witness protection undermined NATO's perceived ability to protect minorities, thereby increasing their desire to segregate themselves as a defensive measure.

Having examined all the above, it is submitted that, in order for the situation in Kosovo to improve, the international community and local actors should have invested more in non-judicial processes of transitional justice, and especially on the establishment of a truth commission, given that the existence of competing "truths" is one of the most significant factors hindering the reconciliation process. Other positive initiatives could include governments, both Serbian and Kosovar, recognising the harm done and issuing public apologies or paying reparations.[103]

None of the above have been attempted so far, although some progress may be possible as Serbia and Kosovo engage in EU-facilitated dialogues,[104] and as the RECOM initiative shows, the Kosovar civil society is determined to take reconciliation into its own hands. The creation of a special court prosecuting war crimes committed by the KLA is also a welcome development and one with great potential. With a little more support from the international community, it may become possible in the future for governments and civil society to engage local communities, so as to finally bring about a much-awaited reconciliation.

TRADE SECRET PROTECTION IN EU LAW WITH A SPECIAL EMPHASIS ON RELATED ISSUES IN SOCIAL NETWORKING

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103 Di Lellio (n 99) 140.

104 European Commission, 'Kosovo Progress Report 2013' (October 2013) 5; see also International Crisis Group, 'Serbia and Kosovo: the Path to Normalisation' (February 2013) Europe Report No. 223.

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1. Introduction

Due to the constant development of the market relations, commercial activity in the European Union (EU) is permanently facing instability and enduring dependence of the other EU countries. This means that there is always uncertainty in achieving the expected result and consequently the risk and danger of the economic instability of another Member State.

Businesses put big efforts to create advantages over each other, often through developing exclusive know-how and establishing strict confidentiality. Protection of commercial secrets is of an interest to all enterprises, independent of size, location or purpose. Secret knowledge enables companies and enterprises to achieve competitive advantages and ensure prevalence over other market players. Failure to protect know-how may result in loss of attractiveness and significant costs, because this information often makes up the most of the firm market value.

Many issues of commercial activities are regulated by civil, labour, administrative or criminal law. In the light of the day it is however not possible to say that the legal systems provide an overall protection for commercial confidentiality, and this does not seem to be achievable in EU law in the nearest future either, particularly due to the growing number of Member states and therefore increasing number of various national laws to deal with.

Keeping in mind the Internet expansion throughout the world, it can be stated that commercial confidentiality is exposed to serious dangers. Online data exchange is significantly easier and faster than in real-life and therefore often almost impossible to follow up. The growing popularity of social networking in private and business spheres also lets significant data protection issues arise. Often users disclose know-how or lose possession and control over it, without realising that. On the other hand, certain information provided to the networks might become its' trade secret, resulting in user losing ownership over it.

2. The Content of Trade Secrets

Trade secrets have to some extent received the recognition as a part of intellectual property and are considered to be an effective mean of legal protection of commercial economic interests[1] From the perspective of risk management it is possible to define trade secret protection as

[1] Lex Digital Blog, *Know-how protection in Europe* <http://lexdigital.ru/2012/041/> accessed 4 November 2013.

protection against the loss of the company internal knowledge.[2] Building and implementing an extensive know-how- risk-based knowledge management in the company should prevent this loss, therefore, the central position in the protection concept is given to company based or produced knowledge and possibilities of its loss.

Commercial Know-how of an enterprise promotes creation and strengthening of competitive advantages. Trade secrets commonly embrace confidential information that has commercial value due to its secret nature and that has been a matter to reasonable steps under the circumstances by the person legitimately in control of the information to keep it secret. There is no single universally applied legal definition of trade secret. A rather broad and yet precise definition may be the following:

> *"A trade secret is information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known, and not being readily ascertained by proper means, by other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."*[3]

3. Relationship to Patents[4]

An often-arising issue to be examined is the preference of trade secret over a patent. There are advantages and disadvantages of patents in comparison to trade secrets. First, patents only protect inventions that are new and can be used in industry, while a trade secret may potentially include all information, which has a value of its secrecy. Subsequently, patents provide the owner with a far-reaching exclusivity right, whereas the status of a trade secret owner is usually not legally defined and does not grant its owner explicit rights. On the other side, trade secret validity is not limited, whereas patent protection is usually only applicable during a certain period of time.[5] Under the conditions of the economic competition companies might struggle for rush protection; trade secrets protection is applicable from the point of the secret creation onwards, while patents require a registration procedure that can last over years. An essential difference is the obligation of the patent owner to reveal the information behind his invention. Contrary, trade secret protection requires full confidentiality. Patent registration is connected with high costs, while trade secret owner does not have to bear any legal expenses. A further advantage of patent is its commercial

2 Jürgen Ensthaler and Patrick Wege, *Management geistigen Eigentums* (Springer 2013), 112.
3 Anthony D'Amato and Doris Estelle Long, *International Intellectual Property Law* (Kluwer Law International 1997), 5.
4 Ensthaler and Wege (n 3) 122.
5 EU patent validity is limited to 20 years. European Patent Office <http://epo.org> accessed 27 November 2013

value, due to its possible assessment. It is therefore often making a significant part of the whole company value.

3.1 Relationship to other IPRs

Before the invention is patented or other IP right is registered, it has to be treated like a trade secret. At this stage the information is exceptionally vulnerable; in case of leakage it would be possible for a third party to submit an application for a registration of the IP right and obtain a "priority", disabling the real inventor or owner from protecting his right. These thoughts are applicable to copyright, trademarks and designs, at the stage between creation or invention and receiving an IP right. The essential difference is the scope of protection; while an IP right holder has an exclusive right on his IP to use it and prevent others from misusing it, trade secret rights may only grant a possibility to acquire compensation in case of a law breach.

3.2 Necessity of Legal Protection

The protection of secret information hasn't achieved equal importance as the other intellectual property laws. The roots for this are based on historical and philosophical reluctance to limit the access and use of ideas and information without any cultural reason to do so.[6]

Trade secrets are critical for innovation to add value to the products and services of the companies. While patents and trademarks are connected with significant time and financial propositions, trade secrets are a valuable alternative to protect a legitimate competitive advantage.[7] Unlike in U.S. law or some other foreign law systems, the uncertainty of the EU IP law harmonisation is a threat for the European industry that often ranks it behind foreign competitors. Especially in the last years, resulting from the higher population mobility and developing tourism, European industrial technologies have been significantly threatened by the rapidly developing Asian economies.

The main reasons recently provided were: growth in the information economy, growth in the outsourcing manufacture, and development of information technology, enabling storage, transmission and download of large quantities of information within an insignificant period of time.[8] Economic development in the world results in the growth of competitiveness, which endorses new ideas, and techniques of "stealing" information and the general trend of economic

6 D'Amato and Long (n 4) 96.

7 Charles *Cronin and Claire Guillemin*, "Trade secrets: European Union Challenge in a global economy" <http://www.ifraorg.org/view_document.aspx?docId=22900> accessed 25 November 2013.

8 *Hogan Lovells International LLP*, Study on Trade Secrets and Parasitic Copying (Look-alikes) MARKT/2010/20/D <http://ec.europa.eu/internal_market/iprenforcement/docs/parasitic/201201-study_en.pdf> accessed 21 October 2013.

and industrial espionage. The number of trade secret cases is constantly increasing, particularly in the industrially developed countries. Furthermore, know-how is essential for the existence of pharmaceutical, biotech and software industries.

According to a Study,[9] on the importance of trade secret protection in the business relations carried out up to a request of the European Commission, the vast majority of companies involved in a survey, especially in the motor vehicle, chemical and wholesale sectors evidenced the need for a common legislation on trade secret protection.

4. Legal Protection

Legal protection is important in order to grant businesses and enterprises confidence and security about their rights. One has to be able to gain advantages through complying with the law. This chapter will take a look at trade secret protection in the level of International as well as European law.

4.1 International Law

4.1.1 TRIPS

4.1.1.1 Background Information

There has for a long time been no legal regulation concerning trade secrets. The first legislative document appeared to be the TRIPS Agreement,[10] (The Agreement on Trade-Related Aspects of Intellectual Property Rights). It has been concluded as a World Trade Organization (WTO) agreement during the Uruguay Round negotiations and has brought a major shift in this matter.[11] The purpose was to intensify the progressive harmonisation of national policies of the WTO member countries. All EU member states are members of the WTO and therefore should have promoted the harmonisation of the law systems on that issue.

4.1.1.2 Definition of Protected Information

Although TRIPS refers to trade secrets as "undisclosed information" it had brought clarification of the legal standing of the issue. Such information is defined in the Article 39,[12] as information that:

9 *Baker & McKenzie*, Study on trade secrets and confidential business information in the internal market 11.07.2013 Contract Number: MARKT/2011/128/D <http://ec.europa.eu/internal_market/iprenforcement/trade_secrets/index_en.htm> accessed 21 October 2013.
10 Agreement on Trade-Related Aspects of Intellectual Property Rights 15.4.1994 (TRIPS Agreement).
11 UNCTAD-ICTSD, *Resource book on TRIPS and development* (Cambridge University Press 2005).
12 TRIPS Agreement, Part 2, Section 7, Article 39.

> (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
> (b) has commercial value because it is secret; and
> (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Trade secrets could be defined as undisclosed information with special commercial value due to its secrecy. Undisclosed information is one of the categories of "intellectual property" as referred to in Article 1.2 of TRIPS.[13] Yet, it does not provide an exact definition of the term, which leaves the interpretation autonomy to the legislative bodies. Generally it can cover any valuable secret information referring to technical know-how or data of commercial value. The scope broadens from designs and formulas up to pharmaceutical test data.[14]
First it is necessary to prove the information to be secret, meaning not generally known or commonly accessible out of the confidentiality sphere. Secondly, it must have a commercial value and commercial interest for it to be kept confidential. This is decided either through national laws or by looking at whether acquiring such information may create an advantage of the possessor over the competitors. The last condition is there must have been reasonable steps taken to keep the information secret.[15]

4.1.1.3 Scope of Protection

Protection is aimed against "unfair competition",[16] as defined in the Paris Convention.[17] It is said to be *"any act of competition contrary to honest practices in industrial or commercial matters",*[18] which may include any act that is aimed to mislead the customer to make an unusual decision or to bring the other competitors into disrepute. However, TRIPS provides its own explanation of unfair competition, such as:

> *"at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition."*[19]

13 TRIPS Agreement, Part 1, Article 1.
14 UNCTAD-ICTSD (n 12) 521.
15 UNCTAD-ICTSD (n 12) 530.
16 TRIPS Agreement, Article 39.
17 Paris Convention for the Protection of Industrial Property 20.3.1883.
18 Paris Convention, Article 10bis.
19 TRIPS Agreement, Article 39, Footnote 10.

Furthermore, the Paris Convention provides a further list of forbidden practices:

(i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

(ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

(iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.[20]

Summing up "unfair competition" in the light of TRIPS and the Paris Convention, is any act of a competitor on the market, which affects or harms the public or the other competitor. The complication about protecting information lies in the nature of ownership. Although undisclosed information is a type of intellectual property, a secret cannot be defined as ones property, it can only be possession or control of information.[21] Therefore there can be no exclusive right granted to the possessor of the knowledge, unlike to the owner of a trademark or a patent. Due to this, article 39 only encourages member states to "have the responsibility of preventing",[22] damages, but does not grant absolute protection against non-authorised use. Furthermore it distinguishes between two types of protection: for "breach of confidence" and "misuse of trade secrets".[23] Special attention is given to pharmaceutical and agricultural products, where "*Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use."*[24] This can be based on the thought that the public has a certain demand for transparency and information about products of crucial everyday life importance.

4.1.2 WIPO[25]

Also WIPO has made an attempt to make a model provision,[26] for the protection of secret information although it based its content on the TRIPS definitions. WIPO adds industrial and commercial espionage to the list of unfair competition practices. Secret information as defined as

20 Paris Convention, Article 10bis.
21 UNCTAD-ICTSD (n 12) 527.
22 TRIPS Agreement, Article 39.
23 Trevor Cook, *EU Intellectual Property Law* (1st edn, Oxford University Press 2010) 683.
24 TRIPS Agreement, Article 39.
25 World Intellectual Property Organization.
26 Model Provisions on Protection against Unfair Competition 1996, World Intellectual Property Organization International Bureau (Geneva).

information that is not generally known or really publicly accessible, that has a commercial value of its secrecy and that has been subject to reasonable steps by the holder to keep it secret.[27]

4.2 European Law

4.2.1 Background Regulations

Within the European Union the issue of industrial secrets protection has been dealt with only briefly, on the basis of Directive 65/65,[28] on medicinal products and Directive 81/851/EEC,[29] for veterinary products. Both are based on the idea of exclusivity, and granting exclusivity for certain data and marketing strategies within a specified time limit. EU legislation also includes a Directive,[30] on unfair competition, but it only covers business to consumer relationship and does not mention issues related to undisclosed information or trade secrets.

There is no commonly applicable legal definition of trade secrets on the EU level. A possible interpretation is found in the Commission Regulation 556/89,[31] which addresses the technical trade secrets as "know-how" and defines it as *"a body of technical information that is secret, substantial and identified in any appropriate form".*[32]According to the Regulation, substantiality refers to the importance of know-how for a manufacturing process, for a product or service or for the development of thereof. This does however not cover the scope of trade secrets related to other topics.

Other legislation has been quite ambiguous in nature and trade secrets as such have not been addressed in any of it. Contrary to this EU had been endorsing greater transparency for manufacturers and producers as well as introducing the REACH-System,[33] for chemical products, that requires manufacturers to provide a broad range of production related information, which has led to even a bigger demand for secrecy regulations.

27 Model Provisions on Protection against Unfair Competition, Article 6.

28 Council Directive 65/65/EEC of 26.01.1965 on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products [1965] OJ L22/369.

29 Council Directive 81/851/EEC of 28.9.1981 on the approximation of the laws of the Member States relating to veterinary medicinal products [1981] OJ L317/1-15.

30 Directive 2005/29/EC of the European Parliament and of the Council of 11.5.2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/0022-0039.

31 Commission Regulation (EEC) No 556/89 of 30 November 1988 on the application of Article 85 (3) of the Treaty to certain categories of know-how licensing agreements [1993] OJ L021/0008-0011.

32 Commission Regulation (EEC) No 556/89 [1993] OJ L021/0008-0011, Article 1, 1(7).

33 Commission Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18.12.2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) [2006] OJ L396/1-849.

One of the first harmonisation attempts was made by the Enforcement Directive on intellectual property rights,[34] in 2004, which only uses the term industrial property and does not provide a clarification. In 2005 the Commission has clarified the terms in a further document,[35] without addressing trade secrets. In view of the fact that these attempts have not satisfied the demand of the public, the EU Commission has issued calls for studies on the economic significance of trade secrets along with a study on the necessity of harmonisation.

4.2.2 Study on the Legal Treatment of Trade Secrets in EU

The study by Hogan Lovells,[36] was objected to *"carry out a comparative law assessment of the legal protection against infringement"* and it concluded about the importance of trade secrets for the industry and the need of adequate protection to the technological development. The study took a closer analysis of the legal systems of 27 EU States,[37] and focused mainly on national civil laws.

It has been proven that there is neither a harmonised system for the protection of trade secrets within the EU nor a uniform definition of the term. Although all EU member countries are simultaneously WTO members, only few of them appear to apply the TRIPS definition of "undisclosed information", therefore the range of protectable information varies from State to State. Nonetheless, most member states do not view trade secrets as intellectual property, unlike stated in TRIPS. As a consequence, most of them have not applied the Enforcement Directive,[38] to trade secret issues, which results in misinterpretations on an national as well as on an international level.

The table presents a summary of the study results on the legal treatment of trade secrets in the Member States (as of 2010):

Applicability of the Enforcement Directive,[39] to trade secrets (also partially)	Finland, Italy, Portugal, Romania, Slovak Republic, Slovenia, United Kingdom
TRIPS applicability	Czech Republic, Spain
Specific legislation on trade secret protection is provided	Austria, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden

34 Directive 2004/48/EC of the European Parliament and of the Council of 29.04.2004 on the enforcement of intellectual property rights, [2004] OJ L95/16-25.

35 Statement 2005/295/EC by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights [2005] OJ L94/37.

36 Hogan Lovells International LLP, *Study on Trade Secrets and Parasitic Copying (Look-alikes) MARKT/2010/20/D* <http://ec.europa.eu/internal_market/iprenforcement/docs/parasitic/201201-study_en.pdf> accessed 21 October 2014.

37 The study was carried out in 2010, when Croatia was not a Member State.

38 Intellectual Property Rights Directive.

39 Intellectual Property Rights Directive.

No legislation on trade secrets provided	Belgium, Bulgaria, Cyprus, Finland, Republic of Ireland, Luxembourg, Malta, Netherlands, United Kingdom

Figure 1 Table on trade secret laws in EU member states

4.2.3 Compatibility of National Laws and International Agreements

The result may appear to be astonishing in connection with TRIPS applicability. Only Czech Republic and Spain consider trade secrets to be intellectual property in the light of Article 1.2 of TRIPS, although WTO Agreement states TRIPS to be *"binding on all members".*[40] A later study,[41] carried out in 2011 extends this list adding Greece and the Netherlands, which is however still an unsatisfactory outcome. Consequently the question arises, as to what extent is EU bound to TRIPS rulings. There is a European Commission case,[42] dealing with this issue, where Microsoft Inc. was ordered remedies, which it claimed to infringe the minimum IP protection standards set up by TRIPS. The European Journal on International Law speaks about the doctrine of "consistent interpretation", saying that the requirement for EU states to make their national laws consistent with the TRIPS regulations *"can only be a reservation to prevent an excessive application of domestic competition rules by bringing the regular exercise and exploitation of IP rights within the ambit and control of competition authorities."*[43] Under such terms the purpose of TRIPS can be interpreted as to set up extensive borders for freedom of national legislative bodies. TRIPS has however failed to give precise guidelines for implementing the rulings, which left an open area for national interpretation. The current opinion states that the extent to which Paris Convention and TRIPS require protection of undisclosed information is open to question, but it has to be so regarded for the purpose of TRIPS.[44]

Nevertheless, states are generally considered to be obliged to follow the provisions of the international agreements that they are a part of. This can be proven by looking at the Article 26 VCLT,[45] which follows the theory of pacta sunt servanda : *"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."* The next article states that the states may not justify their failure to perform a treaty on the ground of its incompatibility with national law.[46]

40 Marrakesh Agreement Establishing the World Trade Organization 15.4.1994, *The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations 4* (1999).

41 Baker & McKenzie*, Study on trade secrets and confidential business information in the internal market 11.07.2013* Contract Number: MARKT/2011/128/D,
<http://ec.europa.eu/internal_market/iprenforcement/trade_secrets/index_en.htm> accessed 21 October 2013.

42 CFI 17.9.2007, T-201/04, Microsoft/Commission.

43 Sujitha Subramanian, 'EU Obligation to the TRIPS Agreement: EU Microsoft Decision' (2011) 21(4) European Journal of International Law, 1009.

44 Cook (n 24) 682.

45 Vienna Convention on the Law of Treaties 23.5.1969.

46 Vienna Convention on the Law of Treaties, Article 27.

Unlike the general TRIPS provisions on undisclosed information, Art. 39 Section 3 has been subject of an extensive sector-specific harmonisation in the EU, which lead to well structured protection in the national law.[47] It covers pharmaceuticals and agrochemicals in respect of TRIPS provisions, but also extends to other highly regulated areas. Following significant provisions were met:

— Directive 2001/83/EC,[48] for medical products for human use
— Directive 2001/82/EC,[49] for medical products for veterinary use
— Directive 91/414/EEC,[50] for plant protection products

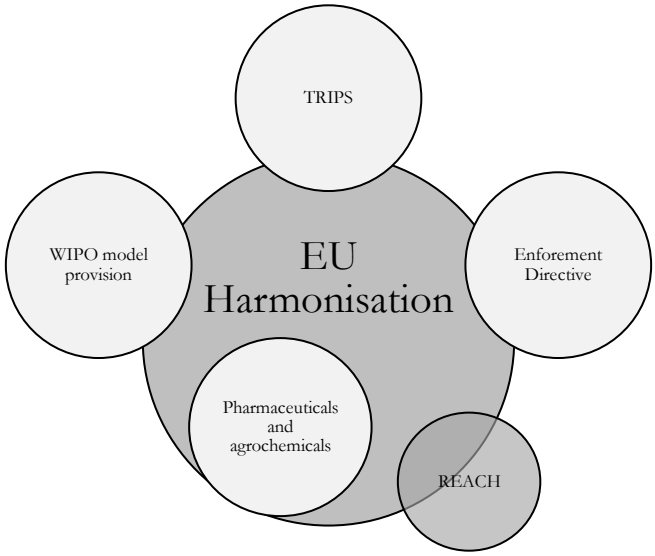

Figure 2 EU Harmonisation of trade secret laws

Figure 2 creates an overview of the legal protection of trade secrets in the EU. One can see that there is no overall covering EU legislation system of protection, yet only partially the international agreements like TRIPS, WIPO model provisions and the EU Enforcement Directive are applicable. The only fully regulated areas are agrochemical and medical products productions. A further factor breaching the attempts of protection is the REACH transparency system.

47 Cook (n 24) 683.
48 Directive 2001/83/EC of the European Parliament and of the Council of 6.11.2001 on the community code relating to medicinal products for human use [2004] OJ L311/67-128.
49 Directive 2001/82/EC of the European Parliament and of the Council of 6.11.2001 on the community code relating to veterinary medical products [2001] OJ L311/1.
50 Council Directive 91/414/EEC of 15.7.1991 concerning the placing of plant protection products on the market [1991] OJ L230/1.

4.3 Current Issues in the EU Law

4.3.1 Debate on the Protection Necessity

At a recent Congress in London (see IAM Magazine)[51] plans on EU trade secret harmonisation have been discussed. The debate was based on the EU Commission study on trade secrets. Yet, there has been no consensus on the topic, whilst some participants followed the opinion of the lack of necessity of such law development, basing arguments on the statistical results of the Study. The achieved conclusion states that businesses should carry their own responsibility for protecting their trade secrets, yet a harmonised system would be helpful to design compliance regimes around them.

4.3.2 Proposed Directive on the Protection of Undisclosed Know-how and Business Information (trade-secrets) against their Unlawful Acquisition, Use, and Disclosure

A proposal for a Directive on trade secret protection has been issued in November 2013. The draft directive shall assign a definition of trade secrets and define the terms under which redress can be obtained in case of law breach. It shall furthermore include provisions for national courts. It shall bring by a boost of confidence of European businesses, manufacturers and researchers by guaranteeing an adequate level of protection.

The proposal includes a desired definition of trade secrets. These are described as information, which meets following requirements:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret;

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.[52]

This definition follows the definition in the TRIPS agreement and it is a broad one, enabling almost anything within a company to be deemed as trade secret A significant fact is that the Commission clearly declines trade secret to be an intellectual property right and makes it complementary to the IPRs. Resulting from this, the holder of a trade secret does not have an exclusive right over it, and

51 IAM Magazine, *Doubts raised over benefits of EU's trade secret harmonization plans* <http://www.iam-magazine.com/blog/Detail.aspx?g=7712877f-1c40-4f20-8383-e0ebb029f43bm> accessed 25 November 2013.

52 Proposal COM/2013/0813 for a Directive of the European Parliament and of the Council of 28.11.2011 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

he/she can only get legal protection "in instances where someone has obtained the confidential information by illegitimate means (e.g. through spying, theft or bribery). Nevertheless, the Commission addresses the importance of trade secrets for business investments though being the currency of the knowledge economy. Commission furthermore acknowledged the existing threat of innovative businesses being often exposed to dishonest practices aiming at trade secrets and the lack of the protection offered by TRIPS at the moment.

4.4 Trade Secrets in the Light of TTIP

Intellectual property rights have been one of the subjects of given focus in the Transatlantic Trade and Investment Partnership (TTIP) negotiations. Even though the content of an agreement is not yet certain, it appears very probable for trade secrets to be addressed to. The negotiating parties have recognised the necessity of enabling protection of unpatented knowledge in order to secure information about the privacy and security of global digital products and serviced that consumer use. However, inclusion of trade secrets in the TTIP agreement is expected to set a new global standard, which could have devastating consequences for the intellectual property owners, but also for the governments.

5. Leakage

It is hard to protect information. There are numerous possible ways of information leakage, whereas the human factor is frequently prevailing. Most often occurring leakages of trade secrets are connected with confidentiality breach, espionage, online information processing and many others.

5.1 Employees

The employer in the main has two possibilities to protect trade secrets and know-how, either through law rulings or through contractual agreements with employees. Most of the national laws with enable protection through civil or criminal law, often combining both.

5.1.1 Post-Employment Covenants

Contractual protection may include obligation to keep a secret during the existence of the contract, or after the end of contractual agreement. Such post-employment covenants usually include an agreement to not work for a competitor for a certain period of time after the end of the employment, and often has a purpose of protecting the legitimate business interests of the

employer, including trade secrets and other confidential information. The law in almost all EU and US jurisdictions provides for enforceability of such agreements.[53] It is usually seen in the form of a Non-Disclosure Agreements (NDAs). The popularity of such covenants is rising throughout the last years, primarily because of the elevation of employee mobility due to the freedom of movement of persons as a part of the EU economic freedoms. Besides, it has to be taken into consideration that a company does not only share their confidential information with employees, but also with free workers, project participants, researchers etc., who might be interested in its usage.

5.1.2 NDAs

A company's information is extremely vulnerable during the processes of mergers and acquisitions. Particularly in the documentation of due diligence there might be an obligation to uncover certain confidentialities. Given that there is never a guarantee of the deal taking place, the seller company will be interested in handling out carefully detailed confidentiality and non-disclosure agreements. In addition, company cooperation models are also connected with the permanent risk of information loss. Given as examples strategic alliances, franchise agreements, monitory investments and licensing include the ability of the partner to gain access to the other's skills, products and markets, which results in limited control, the need to share information and potential loss of trade secrets and skills to competitor.[54] There is however, rarely a detailed contract clause about know-how protection, which leads to complications in collecting proof in case of a leakage. An example of such a clause, showing the lack of specification*:*

> *"The Company and its Subsidiaries have taken commercially reasonable measures to protect the Owned Intellectual Property, and to protect the confidentiality of all Trade Secrets that are owned, used or held for use by the Company and its Subsidiaries. The Company and each of its Subsidiaries maintains a policy requiring that upon their hire, employees of the Company and its Subsidiaries execute confidentiality and intellectual property assignment agreements which prohibit such employees from disclosing the Company's and its Subsidiaries' Trade Secrets and confidential (…) which assign to the Company all Intellectual Property rights developed by such employees during the course of their employment with the Company or its Subsidiaries. "*[55]

53 (Excluding the state of California) Elisabetta Ottoz/Franco Cugno, 'Choosing the Scope of Trade Secret Law When Secrets Complement Patents' MPRA No. 27195 (2010).

54 Donald DePamphilis, *Mergers and Acquisitions Basics: All You Need to Know* (Academic Press 2010), 20.

55 Stock Purchase Agreement by and between Deutsche Telekom AG and AT&T INC. 20.3.2011 <http://www.univie.ac.at/aicher/dateien/M&A%20Int%202013-2014%20-%20documents/AT&T%20Stock%20Purchase%20Agreement.pdf> accessed December 2013.

An efficient NDA should include: precise description of secret information, description of the recommended usage of the information, an indication of the significance of the confidential nature of the information, an obligation of the other party to apply the NDA to the possible third parties, description of the penalties in case of breach. [56]

5.2 The Internet

The cyberspace in the 21st century opens eternal possibilities. Companies can use Internet for numerous purposes, for example for marketing, promotion, information access and storage, communication etc.

5.2.1 Social Networks

One of the most favourite online business tools are social networks, which allow one to advertise goods or services, gain potential clients, communicate with the audience and gain attraction, often without any costs. Those networks offer the chance to reach immense number of people, which is often not possible with usual advertising. Some examples of Facebook statistics: the platform has over 1 billion users, while for example in the US, 83% are aged 18 up to 29. This age group's attention is very profitable for firms, since young people are rather open to experiments and are innovation-friendly.[57]

Yet, there are certain dangers connected to the use of cyberspace. Networking requires delivering certain information to the public. This may contain things that the company wants to be public, as well as private or confidential information, which has to be shared under the terms of use of the certain network. The consequence is often the misuse of this information, and lack of privacy protection in cyberspace, due to the deficiency of possible control. Due to the widespread use of mobile devices by employees and the increase in social media and cloud computing networks, the risks for employers have significantly increased. In many cases it is not even clear for the user of the social platform what he has just disclosed. Under these circumstances trade secrets are extremely vulnerable, mainly due to the lack of definition of the scope of protection.

Moreover, the data you disclosed to the social network might become their trade secret and create their IP asset, resulting in user losing control over such information's usage and exploitation.

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[56] Ensthaler and Wege (n 3) 133.

[57] Cooper Smith, *7 Statistics About Facebook Users That Reveal Why It's Such A Powerful Marketing Platform* <http://www.businessinsider.com/a-primer-on-facebook-demographics-2013-10> accessed 3 December 2013.

One of the most endangered trade secrets in the Internet are customer lists. They usually appear in form of friends list, page subscriptions or followers etc. According to the networks privacy settings, the owner of the page has a possibility to keep this information hidden from public. There is legislation in the US,[58] which places login information for company's profiles, lists of friends, lists of personal phone numbers and email addresses under the scope of trade secrets.

5.2.2 Facebook

5.2.2.1 User's Confidential Information

Facebook is well known for its rather questionable privacy issues. While there is more legislation in the US, the EU law seems to have gaps in dealing with online privacy. Certain abstracts of the Terms of Use and Privacy Agreement are provided below.

First, Facebook stores all the information uploaded to the platform, adding

> *"data from or about the computer, mobile phone, or other devices you use to install Facebook (…)This may include network and communication information, such as your IP address or mobile phone number, and other information about things like your internet service, operating system, location, the type (including identifiers) of the device or browser you use, or the pages you visit. For example, we may get your GPS or other location information (…).* "[59]

Furthermore, the platform also gains access to other information, such as *"data from our affiliates or our advertising partners, customers and other third parties that helps us (or them) deliver ads, understand online activity, and generally make Facebook better. For example, an advertiser may tell us information about you (like how you responded to an ad on Facebook or on another site)…*"[60]

Under these terms, having a Facebook page would mean uncovering certain trade secrets for a company, such as friends lists and possibly contact information, as well as the geographical location and Web surfing history. According to TRIPS, in order to be a trade secret information cannot be generally known and must be subject to reasonable steps to keep its secrecy. These conditions are still given, in case the user chooses to keep this information confidential from other users. Yet, the platform itself has a right to make use of it: *"We use the information we receive about you*

58 Case *Christou v Beatport*, LLC. Trade Secrets Institute, <http://tsi.brooklaw.edu/cases/christou-v-beatport-llc> accessed 2 December 2013.

59 Facebook Data Use Policy, Section "Other Information" <https://www.facebook.com/full_data_use_policy> accessed 29 November 2013.

60 Facebook Data Use Policy, Section "Other Information" <https://www.facebook.com/full_data_use_policy> accessed 29 November 2013.

(...) *to protect Facebook's or others' rights or property".*[61] In the light of this statement, it is highly questionable to what extent does the confidentiality remain upright after usage.

Furthermore, the user agrees to the following term: *„For content that is covered by intellectual property rights (...) you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License)."*[62] On the EU level, this brings by the consequence of trade secret losing its protection, given that trade secret falls under the definition of IP (according to TRIPS and the Enforcement Directive).

5.2.2.2 Facebook's Trade Secrets

"If you are a resident of or have your principal place of business in the US or Canada, this Statement is an agreement between you and Facebook, Inc. Otherwise, this Statement is an agreement between you and Facebook Ireland Limited",[63] also FB-I. As for an Irish company, EU law is therefore applicable to issues of European users. As a matter of this, the European personal data protection directive (DPD),[64] is applicable. It regulates the processing of personal data, however only recounting to natural persons. This brings by the consequence, that a company whose trade secret has been violated by or on the platform is not granted any protection through the EU law.

However, there is another perspective of the applicability of the DPD on Facebook's privacy issues. Generally, the platform offers different options for the user to collect the information the platform has about him. The most comprehensive one is the "personal data request",[65] which under its definition has to include all the data ever published by the user or data connected to him. This service seems to correspond with the DPD, which states that *"any person must be able to exercise the right of access to data relating to him which are being processed".*[66] Furthermore, it is compatible with Data Protection Acts 1988 and 2003 of Irish law, which gives individuals the right to access their information in Section 4 (1). Yet the Europe-v-Facebook initiative,[67] has proven the contrary, demonstrating FB-I failing to deliver complete data upon request, referring to specific user data becoming their trade secret: *"We have not provided any information to you which is a trade secret or intellectual*

61 Facebook Data Use Policy, Section "How we use the information we receive" <https://www.facebook.com/full_data_use_policy> accessed 4 December 2013.

62 Facebook Statement of Rights and Responsibilities, Section 2.
<https://www.facebook.com/legal/terms> accessed 5 December 2013.

63 Facebook legal terms, Section 19, <https://www.facebook.com/legal/terms> accessed 5 December 2013.

64 Directive 95/46/EC of the European Parliament and of the Council of 24.10.1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/0031-0050.

65 Facebook, 'Questions about Our Privacy Policy' <https://www.facebook.com/help/323540651073243/> accessed 5 December 2013.

66 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Section 41.

67 Europe versus Facebook: an initiative of Austrian students to bring up Facebook privacy issues to the Irish Data Protection Commissioner <http://europe-v-facebook.org/EN/en.html> accessed 3 December 2013.

property of Facebook Ireland Limited or its licensors".[68] FB-I refers to Section 4 (12) of the Acts,[69] which allows the refusal of data release, in case the data is a company's trade secret or intellectual property.

The matter is how does the user lose the rights over his private information; in order to be a trade secret according to TRIPS, information has to be 1) secret, meaning not commonly known or readily accessible, 2) have commercial value due to its secrecy, 3) it must have been subject to reasonable steps to keep its secrecy. First, the users' data is known and has been at a certain time accessible by himself, or possibly by third parties, who he has granted access to it. Additionally, the platform cannot offer proof of the exclusivity of knowledge of the information. Besides, as a matter of logical sequence, such a vast social network cannot provide proof of the commercial value that the data of single users brings it. The third criteria arouses no questions, because the platform puts best efforts to protect the data and refuses to provide it even to the user himself. Summing up, the user data does not fulfil the criteria needed in order to belong to FB-I as a trade secret.

Additionally, according to the Irish Data Protection Acts, the data *"shall not be kept for longer than is necessary for that purpose or those purposes",*[70] which is again controversial to identifying users' data as trade secret or intellectual property, as it is unfeasible for FB-I to clarify the purposes of storage of specific data.

5.2.2.3 FB-I Audit

These gaps were mentioned in the report of a FB-I audit,[71] which however only issued rather general recommendations on the future terms development of FB-I. Particularly data retention and refusal of data access were not dealt with appropriately, which is seen in the following passage*: "From a transparency perspective, it is desirable that most, and ideally all, of a user's data should be available without having to make a formal request."* The audit does however, not cover the topic of IP and trade secrets at all.

68 Letter of response from FB-I to Max Schrems, the initiator of the Europe-v-Facebook initiative 28.09.2011, <http://www.europe-v-facebook.org/FB_E-Mails_28_9_11.pdf> accessed 3 December 2013.

69 Irish Data Protection Acts 1988 and 2003.

70 Irish Data Protection Acts, Section 1 (1)(c).

71 Data Protection Commissioner, 'Report of Audit on Facebook Ireland Ltd.' (2011). <http://www.dataprotection.ie/documents/facebook%20report/final%20report/report.pdf> accessed 20 November 2013.

5.2.2.4 Conclusion

Under these observations, it may be concluded that the FB-I's terms are incompatible with European law, particularly due to the disability of a user to gain access to his data as well as due to mistreating the definition of a trade secret. The users that have been violated in their access rights according to the DPD may therefore base their claims on the DPD with support of the TRIPS provisions on trade secrets.

5.2.3 Twitter

General privacy and data sharing terms are similar over all social networks. However, Twitter gives more concise definitions and explanations of the terms of use, avoiding leaving less user-friendly terms to interpretation. For e.g., it warns and puts down the fact of the possible data transfer:

> *"You understand that through your use of the Services you consent to the collection and use (as set forth in the Privacy Policy) of this information, including the transfer of this information to the United States and/or other countries for storage, processing and use by Twitter."*[72]

Certain company data published in the network may be trade secret (when the TRIPS conditions are fulfilled), namely friends and contact lists or synchronised address and phone books, given that the publisher uses the option of not making information publicly accessible. While under these conditions such data may be interpreted as trade secret in outer relation to the public, it loses its secrecy in the inner relation between Twitter and the publisher, as he agrees to processing and the usage of his data, which means revealing the data to a certain extent.

Yet, there are common dangers in the outer relation too. Unfortunately, no legislation could be found on this topic in the European law, but a US case,[73] may be discussed, which places the list of Twitter followers under the trade secret protection. In this case, a former employee had used the company's Twitter login data in order to keep communicating with the followers. The judgment stated that the login data was a trade secret, belonging to the employer, as it allows gaining access to the company's customers. The court evaluated each page follower worth a certain amount of money, leading to the possibility of evaluation of the trade secret (through summing up the values of each follower).

Unlike Facebook, Twitter points out that:

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[72] Twitter Terms of Service, <https://twitter.com/tos> accessed 29 October 2013.

[73] *PhoneDog v Noah Kravitz* (N.D., Case No. C11-03474-MEJ).

Plamondon, *Is your Twitter account a trade secret?* <http://www.theiplawblog.com/archives/-trade-secrets-is-your-twitter-account-a-trade-secret.html> accessed on December 2013.

> *"You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed)."*[74]

This clause states that the publisher retains his IP rights over the data he uploads; yet the platform obtains equal rights. This model is incompatible with the nature of a trade secret, as the owner of the information fails to make best attempts to keep the confidentiality upright.

5.2.4 LinkedIn

Another similar agreement term is found on the LinkedIn platform:

> *"You grant LinkedIn a nonexclusive, irrevocable, worldwide, perpetual, unlimited, assignable, sublicenseable, fully paid up and royalty-free right to us to copy, prepare derivative works of, improve, distribute, publish, remove, retain, add, process, analyze, use and commercialise, in any way now known or in the future discovered, any information you provide, directly or indirectly to LinkedIn, including, but not limited to, any user generated content, ideas, concepts, techniques and/or data to the services, you submit to LinkedIn, without any further consent, notice and/or compensation to you or to any third parties. Any information you submit to us is at your own risk of loss."*[75]

This is the most extensive term regarding sharing of the information, in comparison to other social networks. Yet again, the term is not compatible with the legal nature of trade secret in the EU law. Additionally, the agreement refers to gaining rights and licenses for the user-provided content, which contradicts to the general understanding of trade secret as unique know-how knowledge, which cannot be granted rights.

6. Conclusion

In the light of market orientated relations and competition in the EU over the last years, know-how and trade secrets are crucial instruments for companies or enterprises in order to create advantages over competitors. Yet, the necessity of protection has not been clearly decided upon. While some businesses are ready to bear the costs for extensive protection measures in order to

74 Twitter Terms of Service < https://twitter.com/tos> accessed 29 October 2013.

75 LinkedIn User Agreement, Section 2.2, <http://www.linkedin.com/legal/user-agreement?trk=hb_ft_userag> accessed 4 December 2013.

shield their company's knowledge, others feel that overall protection of know-how would affect the competition disadvantageously. In the state of ongoing market competition, every business is striving for leading position and is ready to undertake different steps in order to achieve projection. This may as well include illegal actions, such as economic or industrial espionage. Yet, in order to make legal system serve its purpose, the law has to prevent and punish such handlings, independently from the commercial debates.

As it may be concluded from the analysis of laws and agreements on trade secrets applicable in the EU, there is still no harmonised law to protect such information. Each EU Member State interprets international agreements such as TRIPS or WIPO in its own, most profitable way, which results in the failure to create a unified legal system. As of today, the TRIPS agreement offers the most extensive terminology and coverage of trade secret issues, yet only four Member States refer to it in their national laws.

Summing up the analysis of Terms of Use of social networks, it can be concluded that most of the clauses are almost fully incompatible with TRIPS and other trade secret provisions in Europe. The most outstanding pronouncement is FB-I's violation of European laws. The paradox lies within FB-I relating to Irish law in its communication about its trade secrets and IP, and simultaneously failing to comply with the Irish Data Protection Acts.

The European Commission should invest more effort into working on transparency of the laws on trade secrets, specifically on such issues in the Web, possibly taking US legislation as an example. Latest attempts of the European Commission to issue a Directive dealing with trade secrets have to be continued. A widespread law system over know-how information will grant European businesses certain confidence and security and should reduce the tendency of Asian and other foreign companies and producers gaining advantages through stealing European know-how.

RANKING THE INTERPRETIVE ARGUMENTS: PROBLEMS AND POSSIBILITIES: SPECIAL ATTENTION TO THE PRINCIPLE OF SEPARATION OF POWERS

Ola Linder[1]*

Abstract

Legal reasoning and how cases are decided are aspects that affect the materialisation of the separation of powers doctrine. This article describes types of interpretive arguments that are often used to explain or justify a decision. When they are used by a judge adjudicating a case, it is held that they imply promotion of different values. Different legal theories focus on interpretive arguments and how they should be used by a judge. The ranking of the interpretive arguments gives an indication of which values are being promoted by that specific theory. This is implicitly relevant to the overall idea of the separation of powers. It is important for the legislature and monitors of state to be aware of this, despite, and because of, the indefinite implications of such legal application. The main concern of this article is to illustrate that it is valuable to allow judges, when deciding cases before them, certain discretion within at least relatively clear frameworks. The interpretive arguments therefore, if used according to different theories and rankings, may have different implications for the separation of powers doctrine.

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1 Torben Spaak, *Guidance and Constraint* (Iustus Förlag 2007), 43–44.

1. Introduction

Within legal reasoning and the scope of the legal method, despite its degree of indeterminacy, legal issues often reach a point where interpretation of some kind is needed for guidance. When deciding a case a judge gives motivation for or justifies his decision. Within the scope of what the judge has to consider (knowingly or not, willingly or not) is the weight of the different types of interpretive arguments.[2] These give an explanation of what a judge does when he is faced with a task which requires his interpretation in the giving of a motivation for a decision or justifying it. The interpretive arguments are traceable in many cases and they evidently carry different weight in different opinions and situations. This article looks at four types of interpretive arguments, and a general consequentialist approach, and how they may be "ranked" as having the most weight in legal motivation or justification of adjudication. Following from that, an analysis is attempted of possible implications in the light of the principle of separation of powers and whether this issue changes the view of how a "ranking" of the interpretive arguments may be conceived.

2. The Interpretive Arguments

Within legal reasoning, the interpretive arguments play a significant part. In particular when the judge interprets statutory provisions or similar authoritative texts. In the role of a judge, it is inherent to consider the law and the facts of an instant case to settle the issues and determine the case. Beyond this, little remains universal for a judge. However, as we will note in section 3, elements of reasoning and justifying decisions come into the role of a judge, at least within the civil and common law systems that were encountered within the scope of this study. The legal method and its indefinite definition leave much room for debate. The attempt is not to define the legal method, nor its' strengths and weaknesses concerning legal reasoning and argumentation. This section summarises the types of interpretive arguments, in addition to a brief note on the general consequentialist approach, to cover a sufficient ground for the cases which will be discussed throughout the article.

It should be noted here that the legal doctrine will not be overlooked or its place within legal reasoning, but it is not focused upon. I tend to agree with MacCormick,[3] on the issue that legal doctrine may guide a judge when finding a general concept within the legal system, and then forged into in the statutory provision in question. Sometimes, legal doctrine may also help finding support

[2] Torben Spaak, *Guidance and Constraint* (Iustus Förlag 2007), 43–44.
[3] Neil MacCormick, 'Argumentation and Interpretation in Law', [1993] 6 Ratio Juris 16, 23.

for other types of interpretive arguments. For the scope of this article I will not develop thoughts on legal doctrine further.

2.1 Textual Arguments

Textual arguments are aimed at the literal meaning of a text in a provision, statute or constitution or, if stretched a bit, any authoritative legal source. If such an argument is considered decisive, a textual approach is favoured in the instant case. This means that the text is read without considering its context within the legal system or social policy at large.[4]

It is interesting that such an argument may be construed to consider the ordinary meaning of the words or a legal-technical meaning.[5] When speaking of legal technicalities and literal meanings, we are getting closer to a systemic approach. If the legal technicality is construed contextually, it may be a strong argument, but I see such reasoning often trying to cohere to a larger context. In respect of abandoning the element of non-isolation, or contextualising the concept, I find it hard to maintain its context-independency. The reason I mention this detail is because depending on how you place a textual argument, it may have consequences for weighing the argument against others for the benefit of one type of argument trumping another, see below in section 3. In Summary, if you interpret the literal meaning of the statutory provision, it is a textual argument.

2.2 Systemic Arguments

The systemic arguments look at the consistency and coherence of the interpretation within the legal system as a whole. If a provision is applied in a coherent manner, it "makes sense together".[6] Also, a consistent legal system does not contradict itself. I aim at what MacCormick calls "normative coherence", as in intelligibility with regard to common values or principles.[7] Closely related to this phenomenon lay the value of predictability and foreseeability. If similar cases are treated alike, it becomes easier to predict the lawfulness of one's actions or omissions. In summary, if an argument aims at reaching coherence or consistency within the legal system, including case law application, it is a systemic argument.

4 Torben Spaak, *Guidance and Constraint* (Iustus Förlag 2007), 45.
5 MacCormick, 'Argumentation' (n 3) 23.
6 Spaak (n 4) 46.
7 Neil MacCormick., 'Coherence in Legal Justification', in Kraweitz et al., *Theorie der Normen*, 39–41.

2.3 Intentionalist Arguments

This type of argument aims at convincing a judge to apply a statutory provision as the legislative power had intended it to be applied. Therefore, the intention of the legislature is decisive when an intentionalist approach is favoured. Historic background or legislative history often seems to play a significant role in determining the legislative intent. In Sweden, the legislative intent is not mentioned explicitly with much emphasis, as the legislative preparatory works are seen as the substitute. Legislative preparatory works seem to be relevant, especially when the act is new,[8] perhaps for reasons similar to those of Eskridge, see below 3.2. In countries, such as the United States, where the legislative history is concerned more with the individual members of parliament, it can be argued whether or not legislative history can carry as much weight.

Further, Dworkin suggests that if there is a strong competing "political principle", it may be conceived that it is not clear what the legislative intent is. The relevant question is: what theory best justifies the provision? By asking this, the judge approaches what moral grounds or which competing justification has a greater weight. In summary, the intention of the legislature is leading when an intentionalist argument is used.

2.4 Teleological Arguments

The teleological interpretive arguments aim at finding the purpose of the statutory provision. The action guiding capacity in these arguments lay in convincing the judge to interpret the statutory provision's purpose. They relate much to consequences and the outcome of an application in a case, and therefore they are a form of consequentialist argument.[9] Subjective-teleological arguments consider what the judge sees as the legislator's purpose for enacting the provision. Finding the legislative purpose is best done by looking at the legislative history of the provision and tracing the overall purpose. For, as Hart and Sacks affirm:

> *"[e]very statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the law."*[10]

It should not be forgotten that a main issue is determining the overall purpose of the provision. If the subjective-teleological approach is not enough, it is possible to look into objective-teleological arguments. The objective-teleological arguments ask the judge to look at the overall purpose of

8 Ulf Bernitz, et al, *Finna Rätt*, (10th edition, Norstedts juridik 2008), 29.
9 Spaak (n 4) 49.
10 H Hart and A Sacks, cited in William Eskridge Jr, Philip Frickey, and Elizabeth Grant, *Legislation and Statutory Interpretation (Concepts and Insights)* (Foundation Press 2007), 333.

the rationality within the legal system. In summary, the teleological interpretive arguments can be seen as a means to an end argument. They aim at finding the purpose of a provision or larger legal context and it guides the judge in many cases to apply the rules in light of this purpose.

2.5 General Consequentialist Arguments

It is important to point out that when none of the types of interpretive arguments discussed above give the judge guidance, it has been argued in justifications for decisions that general consequences are taken into account.[11] Without going into much depth, not even legal positivists apply a rule when justice would become absurd and "self-defeating in terms of presumed objectives of public policy pursued through legislation."[12] The general consequentialist arguments may in some exceptional cases come close to an application of the Radbruch formula; if a rule is sufficiently unjust, it loses its legal validity. For the scope of this article I end the reasoning here, and refer to Brian H. Bix for further reading.[13]

3. Ranking the Interpretive Arguments

Why rank the interpretive arguments? The legal method does not implicitly or inherently do it. However, all rankings seem to imply the advantage of giving an indication how to act when in doubt. Supposing you have to solve a case and there are strong arguments within all types of interpretive argument approaches, and there is no theory of how to weigh these, where do you seek guidance? Below I briefly examine some aspects of the legal method historically, some approaches to legal reasoning and how they may affect the outcome.

3.1 The Legal Method and Legal Theories as an Aid

The indefinite legal method gives no definite answer to what a judge, or any person dealing with legal matters, has to consider when examining an issue or a case. This is especially true when it comes to weighing the interpretive arguments. Until we define a method or a theory, we have little guidance on the types of argumentation. The idea of a legal method and its implications has been a subject of discussion for centuries. Loosely translated, Gerber wrote in 1848 that:

> *"the essential was for me to analyse and construe the purely judicial element in the legal institutes, the opposite of the purely factual and irrelevant parts, in which the German law so often hide the legal*

11 Spaak (n 4) 52.
12 MacCormick, 'Argumentation' (n 3) 27.
13 Brian H Bix, 'Radbruch's Formula and Conceptual Analysis' (2011) 56 American Journal of Jurisprudence, 45–57.

> *substance. Further, an attempt to consistently separate the historic from the dogmatic and particularly the constitutional and political from the law regarding private law."*[14]

This however does not solve today's questions, rather it confirms the basic considerations of awarding different weight to certain types of argument, albeit not yet of the same developed sense as the types of interpretive arguments. Theories of the legal method or legal reasoning may however give us guidance on how to make a decision when there is doubt. The quote distinguishes between matters of legal dogmatism and factual considerations. Perhaps it is a stretch to compare this particular distinction to the distinction of principled and pragmatic theories of legal reasoning. Developments have been made since 1848, but a main issue remains unsolved - in what arguments lay the action-guiding capacities when a judge has to decide a hard case.

3.2 Outline of Three Legal Theories

Both MacCormick and Dworkin are advocates of theories that concern all legal reasoning. The section below on Eskridge's theory focuses only on statutory interpretation, thus not case-law analysis etc. To begin the outline, the first distinction is to divide them into principled and pragmatic theories of legal reasoning. The two former may be considered principled theories of legal reasoning, and the latter pragmatic.[15] They tend to lean towards either a more casuistic approach when looking at instant cases, or a more general or systemic approach. In other words, it matters how general or specific a norm is to be considered in similar cases. In pragmatic thinking, the context and law as an instrument is key, while in principled theories, the concept of universalisability is.[16] The main difference is how broad the generality that is given in precedents are to be understood; pragmatists want specific generality, while advocates of principled theories tend to draw a conclusion that either a norm is universalised, or not. Relating to Gerber's statement, it clearly leans towards a dogmatic point of view, in the sense that precedents are binding to a larger extent than pragmatic theories, which consider facts and their context as the decisive consideration. Thomas Grey describes legal pragmatism as often characterised by utilitarianism.[17] In the fashion of Posner's pragmatism, "judges should consider the consequences of not considering consequences before deciding whether or not to consider consequences".[18] What this

14 Gerber, *System der Deutchen Privatrechts*, 12 ed., 1875, p. XI, cited in W Vilhelm, *Zur juristischen Methodenlehre im 19. Jahrhundert*, (Swedish translation, printed 2009), 90.
15 Spaak (n 4) 77.
16 Ibid, 78.
17 Thomas Grey, *What is Good in Legal Pragmatism* in M. Brint and W. Weaver, 'Pragmatism in law and society' (1991).
18 Edward Cantu, *Posner's Pragmatism and the return toward fidelity*, [2012] Lewis and Clark Law Review 69, 84.

implies is a move toward a consequentialist approach to choosing your approach. If ignored, utilitarianist goals may be lost, even though the author Cantu does not say so explicitly in his article. In summary, utilitarianism seems to be close to pragmatist reasoning, however not a necessary trait.

MacCormick ranks the interpretive arguments in the following simplified way: textual arguments carry most weight, followed by systemic arguments and finally (subjective) teleological arguments. Dworkin approaches things rather differently. The core is to ask what theory best justifies the norm. Therefore, I find it difficult to really find a ranking of the interpretive arguments in a simple way.

Eskridge takes a pragmatic view, not only on how to consider the level of generality of norms, but also the way to go about finding the right answer. His theory and the illustrative "funnel of abstraction,"[19] inclines me to identify his method to start out with the statutory text, to continue with a variant of systemic reasoning and to weigh intentionalist reasoning quite highly in representative democracies (when the legislature has a majority supporting a certain interpretation). He also looks at teleological arguments. His main addition to legal reasoning is putting the general changes in society into legal reasoning, the evolution of statutes, even though the legislature has not yet changed the statute. He also looks at current values as a last normative source of law. He does not necessarily do this in the same way every time, he "slides up and down the funnel."[20]

3.3 Evaluation of the Different Interpretive Arguments

To simplify the exercise of looking at the implications of ranking the interpretive arguments, I will briefly note what the different interpretive arguments imply when examined separately. Textual arguments ought to promote predictability, and thereby foreseeability for the individual. In the likely event that the legislature and its' will is seen in the literal meaning of the statute, democracy is promoted by applying the statute in a literal way, provided that the legislature is a function of democratic election. Systemic arguments promote intelligibility by consistency, which in turn promotes predictability of norms. Like the textual approach, the intentionalist arguments promote a democratic materialisation of legislative intent in law application, as is the case of subjective-teleological arguments if correctly construed. Teleological arguments promote efficiency, as they look for means to achieve an end, which if rightly construed is the purpose of the norm in question. Finally, the evolutive approach advocated by Eskridge in statutory interpretation, takes into

19 William Eskridge Jr, Philip Frickey, and Elizabeth Garrett, *Legislation and Statutory Interpretation (Concepts and Insights)* (Foundations Press 2007), 353.
20 Ibid, 354.

account social changes that the legislature has not expressed in new or updated statutes, at least the way the statute is at the point of interpretation is to be read after that consideration. This could be said to promote the incorporation of long term social dynamics and change into law, and a new perspective on overall intention may be gained.

The advocates of different theories define the types of interpretive arguments differently in their texts.

From McCormick's theory of legal reasoning, the conclusion to be drawn is that by weighing textual arguments heavily his theory is clearly inclined to promote predictability and foreseeability. This is enforced by his ranking of the systemic followed by the teleological arguments. Therefore, in a simplified way democratic values are promoted, if they do not contradict the elements of predictability and intelligibility. It should be noted that he positions legislative intent under the mentioned three types of arguments. Therefore he doesn't overlook intent, but considers it as integral and not a separate or isolated concern.[21]

Dworkin seeks the legal principle in the case or which explanation that best justifies the statutory provision. He would not overlook the literal meaning without strong support in other arguments. At the same time, he gives weight to systemic and purposive or intentionalist arguments. However he gives little guidance as to how the arguments should be weighed in the end, and therefore this is where his ranking ends. By serving to find the best justification for the statutory provision, he finds this the most authoritative reasoning rather independently of the interpretive arguments. This leads to a theoretically more pragmatic end than MacCormick's theory. It could be argued that Dworkins theory promotes democratic or at least intelligible purposive values if the judge succeeds in finding that the intent or purpose of the provision is the best justification for it.

Eskridge's theory only considers statutory interpretation.[22] It must be inherent that legislative intent, and especially preparatory works etc., lose value over time provided that society evolves and that the intent was aimed at social phenomena. Eskridge seems to argue in terms of legislative intent giving strong guidance if the statutory provision is applied close in time to its enactment. Problems may arise if some time passes, as the intent of the legislator stays the same, it is "frozen in time" at the moment of enactment. Discrepancies must therefore arise and in such cases that the evolution of society must be considered in the evaluation of the normative arguments. The lack of guidance in Eskridge's theory, in a general sense, when ranking interpretive argument leads me to end the evaluation here. It could be stated that instead of ranking the interpretive arguments

21 MacCormick, 'Argumentation' (n 3) 21.
22 Spaak (n 4) 47.

in a strict sense, the fact that social change is normative, and looking at the "funnel" for inspiration, he is concerned with finding the best fit for present day developments and conditions, if no interpretive argument stands out as convincing without much room for doubt.

4. Problems and Possibilities Relating to the Separation of Powers Doctrine

This section aims to relate the legal theories and reasoning to the principle of separation of powers. It is an attempt to clarify some correlations and further questions which need further research and scope.

The role of the judge is *primarily* to decide the case. Few will deny that there is no discretion in the hands of the judge, but the amount of discretion will differ, and notably so between different legal systems. He also has to give reasons for the decision. So, does argumentation before him and especially during deliberation have effect on the discretion? As I have found no is no general legislation on how the interpretive arguments are (supposed to be) ranked, it becomes almost impossible to determine the intent of the legislator in this respect of constructing the legal system and the state at large. Cheryl Saunders explains that "[i]n a system that recognises constitutional rather than Parliamentary supremacy, the doctrine [of Separation of Powers] thus precludes conferral on courts of non-judicial power, requiring some fine lines to be drawn".[23] In other words, if the constitution is the ultimate source of limitations for the courts, only legal considerations may be accepted in the forum. If this is held, it is equally true that if the parliamentary power is the supreme normative force, then there exists more room for other considerations.

The last statement is bold and I take full responsibility for any shortcomings. However, when comparing the legal theories and their scope in terms of acceptable legal reasoning and argumentation, it seems less unfounded. For example, the purposive is a large part of the "dynamics" in Eskridge's theory. Therefore, the intent of the legislator concerning that specific provision may lose its value as legislative intent as time passes. A key problem is pointing out when a legislative intent is no longer understood as normative, and therefore not the prevailing interpretive argument. In other words, when is social evolution overriding legislative intent as it is seen as the framed intent of the social context at the time of enactment? This poses a serious question about the separation of powers principle. Who is then responsible for making the law adapt to the present state of the social evolution if it is to be considered as a normative force in courts? Does the legislator or the judge execute this? The judge may act before a legislator, thereby

[23] Cheryl Saunders, 'Separation of Powers and the Judicial Branch' (2012) 11 Judicial Review Issue 4 337–347, para 34.

seemingly against the expressed will of the legislator. If, on the other hand, the legislator is "just busy doing other things", is the judge doing the legislature a favour? There remain doubts about these questions, but it is nevertheless important, in my opinion, to be aware of this potential dynamic between the functions within the state.[24] This seems to work when the statute in itself is dynamic or changes dramatically, e.g. discrimination of race, in its classic sense with an element of demeanour, allows sanctions directed at an individual by a statute. The application of the statute must mechanically change or disregard the change. In this context I am avoiding constitutional concerns for the sake of sticking to Eskridge's main theoretical focus. I will move the discussion on how reasoning may differ when a jury has the last say and not a judge.

In this context it is worth looking into some aspects of the principle of separation of powers and functionalism. It has been held that there are two main dimensions which are essential for the functioning of the courts in accordance with the principle, as it has been elucidated by Cheryl Saunders,[25] and exemplified by the Australian Federalist court system. The first dimension considers what the courts may do. She mentions, for example, that a court can "adjudge a person guilty of an offence and impose punishment accordingly",[26] and it is assumed to be exclusive in this competence. The second dimension, perhaps more interesting in this context, is what courts may not do. She exemplifies that in Australia a court should not touch "deficiencies of statutes" or "apply unincorporated treaties". More "significantly, perhaps, for present purposes, the doctrine may be used to suggest limits that the courts should impose on themselves".[27]

In Europe a fundamental difference can be formulated when studying the functioning of the European Court of Human Rights. In the case of *Markin v Russia*,[28] the Court found in 2012 that a previous decision on the exact same issue delivered in 1988 was no longer materially just. The Grand Chamber mapped the legal situation in many other High Contracting States and compared to the respondent state Russia. It found that there exists a "European standard" which convinced the court in its delivered opinion in favour of the complainant Markin. What is interesting is that, not only in the judgment from 1988, but not even that article in the convention indicates that the end would be what Markin desired, at least in a strict sense. The judgment relied on the development of society in a larger sense than the national situation. This raises questions

24 Se for example cases *NJA 2014 s. 323* (Swedish Supreme Court Justice Calissendorff dissenting opinion) and *Obergefell v Hodges*, 576 U.S. ___ (2015) (Roberts, C.J., dissenting opinion) for arguments relating to the competences of the legislature or judiciary.

25 Saunders (n 22) para 34.

26 Ibid, para 33.

27 Ibid, para 34.

28 *Markin v Russia* [Grand Chamber] App no 30078/06 (ECtHR, 22 March 2012).

concerning the will of the High Contracting Parties. Did they really intend such application of the articles when they ratified the convention? Similarly, Eskridge would in relation to application of statutory provisions reason in a way that provokes thoughts regarding the actual intent or expressed intent of the legislature. Another aspect is that sometimes the legislature does not change statutes to allow the courts to exercise discretion or apply an evolutive approach.

I can see that there is value in allowing dynamics to work within a spectrum of relatively clear frames, as long as it is the purpose of the system. These frames seem to adjust very little, especially if the constitution and codes with preparatory works are well developed. The question I ask is to what extent it gets appreciation and effect in different countries. It definitely happens in the ECHR as illustrated by the Markin case. A judge may look upon this in many ways, but the mere idea of such a doctrine hardly stands well in line with a classical positivist; what modality of law application is desired must be pondered by the legal practitioner or scholar.

5. Concluding Observations

The article started by describing legal interpretive arguments. They are often used to explain or justify a decision which implies promotion of different values. For example, a textual approach promotes predictability of law application for the individual before adjudication. Different legal theories relate much focus to, however sometimes differently defined, interpretive arguments. The "ranking" of the interpretive arguments give an indication of which values are being promoted by that specific theory in general. This is implicitly relevant to the overall separation of powers doctrine. It is important for the legislature and monitors of state to be aware of this, despite and because of the indefinite implications of any chosen modality law application. In summary, the main concern in the article is to state that it is valuable to allow judges, when deciding cases before them, certain discretion within at least relatively clear frames. The interpretive arguments therefore, if used according to different theories and rankings, may have different implications for the idea of separation of powers.

NO LIS PENDENS UNDER REVISED BRUSSELS I REGULATION AND EXEMPTION CLAUSE FOR ARBITRATION. MORE ROOM FOR TORPEDOS?

Claudio Piombo*

1. Introduction

The revision process of the EU Regulation 44/2001 started in 2007 in accordance with the final provision comprised in Article 73, which prescribed the issue of a report on the application of the Regulation in the five years following its entry into force. The EU Commission issued the Green Book, later followed by a proposal of the Commission on the recast of the EU Regulation that encompassed arbitration in the lis pendens regime, in order to stop the infamous 'torpedo' tactic. However, the inclusion of a lis pendens rule in conflicts between arbitration and court litigation in the draft proposal for recast encountered some resistance from the European Parliament; on the other hand, ECJ case law proved ineffective in addressing the issue. Therefore, the Commission presented a number of amendments to the draft, mostly directed to maintain the total exclusion of the arbitration as in Brussels I Regulation. The final draft of the regulation was eventually voted in December 2012 and the Regulation 1215/2012 shall enter into force in January 2015. This article will deal with the state of the facts and the ways the EU legislations address the recourse to 'torpedos'.

2. Process of Reform of the EU Regulation 44/2001 (Brussels I Regulation)

The revision process of the EU Regulation 44/2001 started in 2007 in accordance with the final provision comprised in Article 73, which prescribed the issue of a report on the application of the Regulation in the five years following its entry into force. The EU Commission issued the Green Book, later followed by a proposal for reform of the Regulation that analysed the main shortcomings of the Brussels I Regulation and set the objectives of the reform of the EU Regulation 44/2001. One of the shortcomings found in the Green Book regarded the arbitration exclusion, present in the Brussels Convention of 1968 and kept in the EU Regulation.

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The urge to rethink arbitration exclusion in EU Regulation 44/2001 (hereinafter Brussels I Regulation) became greater after the ECJ ruling on *West Tankers v Allianz SpA*[1], where the Court held that the Italian court acted within the scope of the Brussels Regulation when ruling on preliminary issue of the validity of the arbitration agreement, therefore the English court could not issue an anti-suit injunction to protect an arbitration agreement in the event that the proceedings were already started in another Member State[2]. The parties to the debate pressured for a solution against the peril of torpedo tactics to escape arbitration in the EU legal space. The 'Torpedo' tactic consists of the commencement of proceedings in one of the competent courts, which may rule on the jurisdiction in accordance with its national civil procedure rules, taking advantage of the different rules in the EU legal systems on the individuality of the competent jurisdiction. The results the prospective losing party obtains are the delay or frustration of a final decision on the claim or the escape from a particular remedy or measure accorded to the claimant under the elected jurisdiction.

The practical difficulties in the light of the *West Tankers* case have been expressed in the consultation paper of the UK government, during the negotiation process of the reform of the Brussels Regulation. It was stated in the consultation that in case a court was seized first for a case where the question on the existence, scope or validity of an arbitration agreement is brought within the judgment as a preliminary or incidental question, the arbitral courts were powerless to protect arbitration or take any action but to stay the proceedings until the court made its own determination. Such a system, in effect, would grant any party wishing to escape arbitration the power to commence proceedings in a court of another Member State, which may rule on the validity of the arbitration agreement according to its national rules, thus undermining the role of the arbitral tribunal to rule on the validity of the arbitration agreement. Moreover, once that court had ruled on the issue, the decision could be enforced in any other Member State under the rules on exequatur of the Brussels I Regulation.

Pressed by such requests, the Commission presented a draft reform of the Brussels Regulation[3], comprising a rule at Article 29(4) regulating lis pendens between courts and arbitral tribunals over the competence to decide on the validity of the arbitration agreement. However, the Parliament,

1 *Case C-185/07 Allianz SpA and Assicurazioni Generali SpA v West Tankers Inc.* [2009] E.C.R- I-663, para 26.

2 Sarah Garvey, 'Brussels Regulation Reform. Where Does this Leave Arbitration?' 30 January 2013, <www.practicallaw.com>; Sarah Garvey, 'Brussels Regulation Reform: Are We Nearly There Yet?' 26 April 2013, < http://www.allenovery.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulation-are-we-nearly-there-yet.aspx>.

3 For further reading, see Luca G Radicati Di Brazolo, 'Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonization?' (2011) Journal of Private International Law.

the Member States and the main stakeholders met this decision with criticism that the Commission then chose to maintain the arbitration exclusion and the *lis pendens* rule between courts and arbitral tribunal was expunged. On 25th September 2011, the EU Parliament's Legal Affairs Committee published further amendments to the Draft Proposal to Regulation 44/2001, including the choice to retain the arbitration exemption as in the wording of Regulation 44/2001. The draft also introduced new provisions in the Recitals to redefine the scope of the arbitration exemption. These are, namely, Recital 11, which preserves the right to Member States' courts to rule on the validity of an arbitration agreement and Recital 12, which clarifies the extension of the exclusion.
Consequently, the revision of the Brussels Regulation has left EU without a uniform rule governing lis pendens regime between arbitration and litigation and there is no criterion to determine the applicable law to the existence or validity of an arbitration agreement[4]. The final draft was eventually voted in December 2012 and the Regulation 1215/2012[5] (hereinafter Brussels I-bis) shall enter into force in January 2015. The reason for this exclusion focused on the circumstance that the EU Member States could rely upon the grounds for recognition set out in the New York Convention of 1958[6], whose implementation in all EU countries has reached a satisfactory level.
It is from these considerations that this paper begins, illustrating the extent of the arbitration exclusion in the Brussels Regulation and this paper will try to evaluate the possibilities to sort out the solutions to the problems caused by the 'torpedos'.

3. Arbitration Exclusion from EU lis pendens Regime

The need to amend the provisions on arbitration became greater after the decision of ECJ in *Allianz SpA v West Tankers Inc.* In the ruling, the Court not only denied the possibility for the English court to issue an anti-suit injunction to protect a London arbitration agreement against proceedings already started in Italy, but it also held that the Brussels I Regulation permits to bring a dispute on the merits before a court of a Member State, which may rule on *"a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity"* as it comes within the scope of the Regulation[7]. By contrast, the English proceedings seeking a declaration upholding

4 Louise Haurberg Wilhelmsen, 'European Perspectives on International Commercial Arbitration' (2014) 10(1) Journal of Private International Law, 114.
5 Regulation No 1215/2012 (EU) of the European Parliament and of the Council on Jurisdiction and the Recognition and the Enforcement of Judgments in Civil and Commercial Matters (recast),(2012) OJ L351/1. Under Article 81 TFEU the Regulation shall apply from January 2015.
6 UK Ministry of Justice Consultation Paper *'Review of the Brussels I Regulation - How should the UK approach the negotiations'* para 43.
7 *Case C-185/07 Allianz SpA and Assicurazioni Generali SpA v West Tankers Inc.* [2009] E.C.R- I-663, para 26.

the arbitration agreement (and enforced by granting an anti-suit injunction) fell outside the Regulation.[8]

In the light of this interpretation of the lis pendens, legal experts feared that such solution would have opened the way for a party wishing to escape arbitration to commence court proceedings, contrary to the arbitration agreement. In addition, the escaping party may demand the court to judge on the validity of an arbitration agreement pursuant to the court's national rules instead of the laws of the arbitration seat[9]. The revised Brussels I Regulation partly addresses the critical points raised in the *West Tankers* ruling.[10]

As mentioned above, one of the most controversial aspects of the reform process of the Brussels I Regulation has been in relation to the scope of the arbitration exclusion at Article 1(2)(d). The decision to retain the exception was the result of a compromise between the Commission and the Parliament. The Commission promoted a round-up discussion on the recast of the Brussels I Regulation with the Parliament, the Member States and the main stakeholders. All the main stakeholders upheld the arbitration exclusion as in the Brussels Convention,[11] relying on the case law of the ECJ in determining the extent of the exclusion[12] and the advanced degree of implementation by the Member States of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.[13]

8 *Case C-185/07 Allianz SpA and Assicurazioni Generali SpA v West Tankers Inc.* [2009] E.C.R- I-663, para 29–32.

9 In its initial draft proposal, the Commission presented a provision to address the problems caused by the arbitration exclusion in the Brussels Regulation, by requiring the court seized of a dispute to stay the proceedings either where the jurisdiction was contested on the basis of arbitration and an arbitral tribunal was seized of the case, or the court proceedings were started in the country of seat of the arbitral tribunal. However, the Parliament decided for an expanded exclusion of the arbitration, relying on the satisfactory results reached by the Member States of the implementation of the New York Convention.

10 *Case C-185/07 Allianz SpA and Assicurazioni Generali SpA v West Tankers Inc.* [2009] E.C.R- I-663. The main points of the case can be found at para 13-18. The question referred to the ECJ (today CJEU) for its preliminary ruling was 'Is it consistent with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?'

11 Inter alia, the Comité Français de l'Arbitrage, the IBA Arbitration Committee, the Association of International Arbitration and the Chamber of National and International Arbitration of Milan. Vice versa, the Law Society of England and Wales and the Law Societies of Europe were favourable to the Commission's proposal to abolish the arbitration exemption. For further reading, see Andrew Pullen 'The Reform of Brussels Regulation a Crossroads for Arbitration in Europe' available at <www.practicallaw.com>.

12 The most important ECJ case law on arbitration exclusion can be found in Marc Rich and West Tankers cases. In Marc Rich case (C-190/89), the ECJ held that court proceedings are excluded from the Brussels Regulation where they concern arbitration and also ancillary proceedings to arbitration (e.g. appointment of arbitrators). In *West Tankers*, the ECJ held that anti-suit injunctions against proceedings in other Member States courts were not permitted, as the validity, operativeness and capacity of performing an arbitration agreement fall within the scope of the Regulation.

13 All EU Member States are parties to the New York Convention. The text of the Convention is available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.

The rules dealing with arbitration in the Brussels I-bis are at Article 1 (2)(d) and 73(2), which read in conjunction provide for the exclusion of the Regulation rules to arbitration, however it saves the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. In addition, Recital 12 of Brussels I-bis sets out the powers of the court vested of a dispute to refer the parties to arbitration. It is useful to notice that Recital 12 is the provision which in effect regulates what the courts should do in case of a matter subject to an arbitration agreement, rather than any other part of the Regulation[14]. Paragraph 1 Recital 12 seems to accord the party the power to request the court an order to dismiss the proceedings and refer the dispute to arbitration. Equally, the party may request the court where the arbitration has its seat to refer the dispute to arbitration. Therefore, when a party objects the existence of a valid arbitration agreement, by virtue of which that particular dispute must be submitted to arbitration, the courts should then refer the dispute to the arbitral tribunal and stay or set aside the proceedings[15]. However, paragraph 2 of Recital 12 excludes that a judgement on the validity of an arbitration agreement is subjected to provisions in the Brussels I-bis.[16]

This means that the court may deem that an arbitration agreement is invalid, inoperative or incapable of being performed by applying its own rules without incurring in violation of the Regulation. The party, in fact, may not oppose the decision by affirming that the dispute is already commenced before an arbitral tribunal, as the rules on lis pendens set out in Article 29 of the Revised Regulation do not apply to conflicts of jurisdiction between a court and an arbitral tribunal.

4. Lis Pendens under the Brussels I-bis: What has (and has not) Changed for Arbitration?

A party wishing to escape a particular jurisdiction and its rules may file a claim before the judge among the fora available by virtue of the Brussels I Regulation rules (the same rules on jurisdiction are applied by the Brussels I-bis), whose legislation is more favourable or the courts are much slower in rendering judgements. The party may then claim lis pendens in the other jurisdiction

14 (Recital 12 para 1) "This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law."

15 Sarah Garvey, 'Brussels Regulation Reform: Are We Nearly There Yet?' 26 April 2013, < http://www.allenovery.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulation-are-we-nearly-there-yet.aspx>.

16 (Recital 12 para 2) "A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question."

where such party was summoned, demanding the court to stay the proceedings until the court first seized (albeit in breach of contract) ruled on its jurisdiction[17]. In addition to cause significant delay in the accomplishment of proceedings, the party may bring a question of law to the court first seized, which is free to apply its own rules and thus the decision on the jurisdiction may be rendered contemporarily to the merits, circumstance which undermines the legal certainty of an issue of law. Moreover, Article 27 of Brussels I Regulation did not impose the latter seized court to stay the proceedings, being the result that the other party was free to promote an action in the allegedly competent court to rule on its jurisdiction before the first seized court. Clearly, such mechanism increased the probability of conflicting judgments as well as causing delay in the resolution of the dispute and swelling the legal costs. For all such reasons, the lis pendens as regulated by Article 27 was object of harsh criticism by most experts of EU Private International Law, who were hoping for a repeal of the legislation in a way to impede the recourse to the so-called "torpedo" tactic.

All such critical points on lis pendens have been partially addressed in the Brussels I-bis Regulation. Indeed, the revised version provides for a different regime of lis pendens at Article 29, attributing the court first seized the competence to rule on its jurisdiction, thus impeding the latter seized court to rule on its jurisdiction independently and requiring the latter seized court to stay proceedings until the first seized court has denied its jurisdiction. Although the reform is expected to bring satisfactory results in avoiding torpedos,[18] the new regime of lis pendens rule does not apply to arbitration, as Article 1(2)(d) mentions arbitration as one of the areas of exclusion of Brussels I-bis. It is useful to mention now that the most critical point of the exclusion regards the case when a court is vested of the merits of a dispute. At the starting point, either party deduces an incidental question to rule an arbitration agreement invalid, inoperative or incapable of being performed or, more in general, the substantial validity of an arbitration agreement or an arbitration clause in a contract. By virtue of the arbitration exclusion as of Article 1(2)(d) read in conjunction with Recital 12 a party is granted a safe-conduct from arbitration by submitting the dispute to the state court when, in fact, the party agreed to give the power to the arbitral tribunal to judge on any dispute arising from the contract. In addition, there is no common principle in the EU legal systems regarding the grounds of validity of an arbitration agreement[19]. The danger of creation of

17 In some EU legal systems it is possible for a court to delay the decision on the jurisdiction after the conclusion of the debate, therefore the decision may be rendered quite longer than expected.

18 For a comprehensive overview on the new rules on lis pendens in the Brussels I-bis, see Garvey (n 16) sections 2 and 3.

19 Wilhelmsen (n 5) 114; Hans Van Houtte proposes the solution to issue a European Protocol to the New York Convention, which may include a rule to Article II of the New York Convention on the law applicable to the validity

conflicting judgements is manifested in the fact that the arbitral tribunal may rule on its competence, even by way of an interim award, which may be directly enforceable in the country where recognition is sought pursuant to the New York Convention.

5. New York Convention on Recognition and Enforcement of Foreign Arbitral Awards: The Only Way to Avoid Torpedos

The European Parliament and most of the stakeholders backed the arbitration exclusion, motivating the decision on the circumstance that the arbitral awards could rely on the safety net assured by the provisions of the New York Convention. It is important to mention that neither the New York Convention establishes an international regime for *lis pendens* between judicial and arbitral proceedings[20], nor does it provide for any criteria on the substantive validity[21] which the arbitral agreement has to comply with to be enforceable, as Article II(3) of New York Convention only sets out the grounds for a court to deny referral to arbitration. On the other hand, the EU *lis pendens* regime applies only to the judgment on the merits, so any claims regarding procedural matters fall outside the Regulation.[22]

What can be seen as the only conflict- of-law rule on the validity of arbitration agreement in the New York Convention is the provision set out at Article V(1)(a), which impedes the recognition of a final award if the arbitration agreement was invalid under the chosen applicable law or, failing the election of law, under the law where the award was made.[23] However, Article V(1)(a) may apply only at the enforcement stage, that is when an award, either final (on the merits) or interim (ruling only on the question of validity of the arbitration agreement) is already issued.[24] Conversely, Article II of the Convention regulates the enforcement on formal validity of the award and equally when

of the arbitration agreement. See Hans Van Houtte, 'Why Not Include Arbitration in the Brussels Jurisdiction Regulation?' (2005) 21 Arbitration International 509, 511 and 516–517.

20 Louise Haurberg Wilhelmsen, 'The Recast of the Brussels I Regulation and Arbitration: Revisited or Revised?' (2014) 30(1) Arbitration International, 185; Advocate General Kokott, in her note on West Tankers at point 73: "It should [...] be pointed out that these cases are exceptions. If an arbitration clause is clearly formulated and not open to any doubt as to its validity, the national courts have no reason not to refer the parties to the arbitral body appointed in accordance with the New York Convention."

21 On the basis of invalidity (fraud, illegality, mistake or unconscionability), inoperativeness (waiver, revocation, repudiation or termination of the agreement) and incapacity of the agreement to be performed (the parties agreed on the impossibility to follow) Gary B Born, *International Commercial Arbitration* (Kluwer Law International 2009), 711–712.

22 Articles 29 and 30 Brussels I-bis.

23 Articles 36 (1)(a)(i) and 34 (2)(a)(i) of the Model Law on International Commercial Arbitration mirror the conflict-of- law provision of Article V(1)(a) of the New York Convention.

24 Wilhelmsen (n 5) 119; Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law 1981), 126–127.

the agreement may be applicable at the early stage of the proceedings.[25] However the question as to which law governs the formal validity of the agreement is still object of debate.[26] This does not mean, however, that a court cannot enforce an award only containing a declaratory judgement on the validity of an arbitration agreement in the same way as a final award, although a court of a Member State has ruled that the arbitration agreement is invalid.[27] This is made possible by construing the paragraphs 2 and 3 of the Recital 12 of the Revised Regulation, which gives precedence to the New York Convention[28]. In general, the enforcement of an arbitral award is sought under the national regime of the enforcing state, and the formal validity is assessed in accordance with the law chosen by the parties or the law of the place of arbitration (i.e. in the same way as for substantial validity). In any case, Article VII(1) New York Convention enshrines the 'most favourable right provision' principle, which lets an award enforceable pursuant to the law of the enforcing state, where its law does not contemplate the same ground for refusal of enforcement as the law of the seat of the arbitration.[29]

The New York Convention provides for substantial grounds for refusal of arbitration awards. However, the actual scope of the substantial violation of the requirements for recognition would mostly depend on the Member States' interpretation of these grounds.[30] In particular, public policy may vary from jurisdiction to jurisdiction, however, Article V(2) of the Convention refers to the international public policy of a state, which is more limited than internal public policy.

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25 The Advocate General's Opinion in West Tankers case acknowledges that Art. II (3) of the New York Convention imposes a positive obligation on the courts of signatory states to enforce agreements to arbitrate by refusing to accept any proceedings in the national court and instead referring the parties to arbitration. The apparent conflicts between the Brussels Regulation and the New York Convention are not irreconcilable insofar as both international instruments were created to foster harmonisation of international trade. For example, both the conventions adopt the 'first seized rule'.

26 Wilhelmsen, 'Recast of Brussels I' (n 21) 176, note 36.

27 Ibid, 185. The same author believes that the problem of parallel proceedings has not been solved by the Brussels I-bis, so the further work of clarification on the practice of parallel proceedings is left to the ECJ.

28 A viable way to construe these paragraphs is provided by the CJEU in the case C-536/13, Gazprom OAO. Paragraphs 40- 43. The Court makes reference to Regulation 1215/2012 as the future applicable law in the field of EU jurisdiction and recognition of foreign decisions. In paragraph 42 the Court declares that 'Thus, in the circumstances of the main proceedings, any potential limitation of the power conferred upon a court of a Member State — before which a parallel action has been brought — to determine whether it has jurisdiction would result solely from the recognition and enforcement of an arbitral award, such as that at issue in the main proceedings, by a court of the same Member State, pursuant to the procedural law of that Member State and, as the case may be, the New York Convention, which govern this matter excluded from the scope of Regulation No 44/2001'. Available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164260&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=346115>.

Further comment on the Recital 12 favour for arbitration is made in 'West Tankers revisited: has the new Brussels I Regulation brought anti-suit injunctions back into the procedural armoury?' By A.E. Ippolito M.Adler-Nilssen Arbitration 2013, 79(2), pages 165-166. Excerpt available at www.gorrissenfederspiel.com/GF_resources/883.pdf .

29 Samantha Johnson (ed), 'International Arbitration Law' (CLP 2013), 153.

30 For example, In England and Wales, Article 68 of the Arbitration Act 1996 may still apply in case of substantial injustice or in case the parties contravened to the agreement to submit the clauses to arbitration. Articles 57 and 68 are mandatory, as well as 37 (seizure), a partial redress to the exemption to arbitration is granted.

The only legal instrument which may, in effect, solve any conflict regarding the law applicable to the validity of an arbitration agreement is the European Convention on Recognition of International Commercial Arbitration of 1961, as it provides for a conflict-of-law rule applicable in the jurisdiction phase. This way, either the court or the arbitral tribunal is obliged to apply the law as determined by the European Convention. Article VI(3) of the European Convention contains a *lis pendens* rule giving priority to the arbitral tribunal, where it was seized earlier than the court, unless the court has good substantial reasons not to stay its proceedings. Such rule may impede the recourse to torpedo tactic. However, only 31 states in Europe are parties to the Convention, of which 17 are EU Member States.

Certainly, if all EU countries were parties to the European Convention it would be much easier to establish a prevalence of the arbitral proceedings over the courts in decisions on the validity of an arbitration agreement. But does this entail that it is more purposeful to seize a court in a Member State not signatory party to the European Convention of 1961 to stop arbitration? The answer may vary from a Member State legislation to another. This does not mean, however, that the national legislations of the EU countries do not provide for effective mechanisms to discourage torpedo tactics. As an example, Netherlands is not party to the European Convention, nonetheless the danger of delaying proceedings is low as the court will decline its jurisdiction in favour of the arbitral tribunal, unless the arbitration agreement is *prima facie* invalid. Besides, the Dutch Arbitration Act recognises the concept of Kompetenz-Kompetenz.[31] Moreover, the recognition of an arbitral award in the Netherlands may be impeded only on grounds of public policy, therefore the arbitral award may impede the court judgment to be effective on the basis of res judicata.[32]

Most of the EU countries adopt the Kompetenz-Kompetenz rule in the civil procedure rules, permitting the arbitral tribunal to rule on its competence, also upon the existence or validity of the arbitration agreement. Countries such as Italy, Germany and France are parties to the Convention and their own codes of civil procedure accord the arbitral tribunal, where it was seized first,

31 Article 1052, DAA.

32 A member State is not required to recognise the judgement of another member State affirming the validity or the invalidity of an arbitration agreement or even an arbitration award (thus, an objection stating the subsistence of res judicata on the point may be rejected by the later seized court). The definition of res judicata differs where the claims are in rem or in personam. A judgement in rem "is an adjudication pronounced upon the status of some particular subject matter[...]and it precludes all persons from saying that the status of the thing or person adjudicated upon was not such as declared by the adjudication" whereas judgements in personam " are those which bind only those who are parties or privies to them". (Jovitt's Dictionary of English Law. 2nd Edition, 1977). Some judgment may be in rem or in personam depending on the turnout of the case. Other distinctions are drawn between final (finally determining all the issues in a claim) and interlocutory judgments, money and non-money judgments (according to the remedy); other authors employ other categories to differentiate the judgments. For further reading, see 'The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process' (The British Institute of International and Comparative Law), 5–7.

precedence to rule on its competence and the validity of an arbitration agreement over a court[33]. Another example of a country not party to the European Convention is the United Kingdom. The Arbitration Act 1996 has a very flexible written requirement concerning the validity of an arbitration agreement as the Act itself favours arbitration. Hence, commencing court proceedings in the UK may not give any advantage to the party wishing to escape arbitration, as an English court is likely to rule on the existence of a valid arbitration agreement[34]. In addition, some jurisdictions apply the conflict-of-law rule of Article V(1)(a) of the New York Convention at the proceedings phase.[35]

6. Abolition of Exequatur for EU-wide Judgments: Res Judicata as a Ground to Block Enforcement

Another factor adding legal uncertainty and increasing the danger of conflicting judgements is the abolition of the procedure of exequatur in the EU-wide disputes. Much criticism was raised against the abolition of exequatur for enforcement of judgements within EU, as the Brussels I-bis misbalances in favour of mutual trust between the EU courts rather than the control over the respect of fundamental rights in the enforcing state. The abolition of exequatur responds to the goal of creating an area of freedom, security and justice, which are expressed in Articles 67(4) and 81 TFEU[36]. The system of mutual recognition of judgements is conceived as the instrument to grant 'judicial cooperation in matters having cross-border implications[37]', although it has significant repercussions in the case of a conflict between an arbitral award and a court judgment.

Nevertheless, the final version of the Brussels I-bis only abolished the formal procedure of the exequatur, whilst the enforcement stage was not varied from the precedent version. Indeed, the Revised Regulation has kept the grounds for refusal of enforcement, the so-called 'title inspection function'. This means that the review of the judgment is limited to its compatibility with the legal

33 The Italian code of civil procedure at Article 819 ter, last paragraph, prohibits the recourse to the court on the basis of invalidity or inoperativeness of the arbitration agreement once the proceedings before an arbitral tribunal have already started. Similar provisions are contained in Article 1448 of the French code of civil procedure, which also attributes priority to the arbitral tribunal to rule on its competence, and Section 1040 of the German ZPO, which, instead, later on in the section grants any party the right to challenge the decision to the court within one month from the reception of the arbitral ruling.

34 Also an attendance note reporting an arbitration agreement between the parties may suffice to prove its existence. In addition, common law provides for the validity of arbitration agreements concluded orally.

35 Inter alia, Sweden is not party to the European Convention of 1961, but included the conflict-of-law rule of Article V (1)(a) New York Convention in the Swedish Arbitration Act of 1999 (SFS 1999:116), s.48.

36 Consolidated Version of the Treaty available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>.

37 See Article 81(1) TFEU.

system of the enforcement state. Review, this, limited to the grounds for approval or refusal specified in the Regulation.[38]

Article 39 of the Brussels I-bis provides for the judgement rendered in a Member State to be recognised in the Member State of enforcement without any formality being required[39]. It is in the automatic recognition that the principle of mutual trust lies. The principle of complete mutual trust is in fact counterbalanced by the grant to the party the right to oppose the enforcement if the judgment is unenforceable pursuant to Articles 45 and 46 of the Brussels I-bis. These articles lay down the grounds for refusal of a judgment,[40] ranging from manifest violation of public policy, default of appearance and irreconcilability of judgements. By contrast, the judgement may not be reviewed in its substance. Of course, the bias on the mutual trust between the courts of different Member States may cause a conflict between a court judgement and an arbitral award. Since the Brussels I-bis has kept the irreconcilability of judgements as a ground for refusal, it is possible to challenge the recognition of the foreign judgement on the basis of an earlier judgement rendered in the enforcing State which conflicts with that foreign judgement. Thus the enforcement of the foreign judgement may be prevented in case the award was already rendered (in case the seat of arbitration is in the same country where the award will produce its effects) or recognised in the Member State where the recognition of the court judgement is tried. This is possible despite the fact that the foreign court ruled that its jurisdiction subsisted, as Recital 12 (3) does not impede a decision on the nullity or invalidity of an arbitration agreement.

However, the decision may not prejudice the recognition of an arbitral award pursuant to the New York Convention of 1958, which is given precedence over the Regulation. This is possible notwithstanding the wording of the new discipline on exequatur in Brussels I-bis restricts the grounds to challenge the decision made by that court, by limiting the possibility to challenge only on non-contractual violations of privacy and defamation and collective redress proceedings.[41] The

[38] Xandra E Kramer, 'Cross-Border Enforcement and Brussels I-bis Regulation: Towards a Balance on Mutual Trust and National Control Over Fundamental Rights' Netherlands International Law Review, (2013) 60(3) Netherlands International Law Review 343–373, 348. In the Green Paper, the Commission refers to the Heidelberg evaluation report, where it was concluded that the exequatur procedure generally functions well. On the basis of (relatively limited) empirical evidence, it was concluded that in over 90% of the cases the application for the exequatur is successful and unproblematic. Only 1-5% of the cases in which exequatur is granted are ultimately appealed; those appeals – usually based on the alleged violation of public policy or defect service – are rarely successful. The latter figure is confirmed in the 'Report on the implementation and review of Council Regulation (EC) No 44/2001 on Jurisdiction And The Recognition And Enforcement Of Judgments In Civil And Commercial Matters'(2009/2140(INI)) Committee on Legal Affairs, 5.

[39] Kramer, 'Cross-Border Enforcement' (n 39) 356. The abolishment of exequatur extends to notarial deeds, as well as to orders and court settlements, by virtue of Articles 58 and 59 of the Revised Brussels I Regulation.

[40] Ibid, 355.

[41] Xandra E Kramer, 'The Abolition of Exequatur under the Brussels I Regulation: Effecting and Protecting Rights in the European Judicial Area' (2011) 4 Nederlands Internationaal Privaatrecht 636–637. Kramer also suggests that

grounds of refusal can be deduced in separate proceedings in the Member State where enforcement is sought under the rules of procedure of that State, being the principles partly governed by Brussels I-bis and mostly by the law of the State.

7. Concluding Remarks

In essence, the Revised Regulation gives further protection to arbitration than the Brussels I did, as it reduces room to delaying tactics. Some experts in the field of cross border litigation express their own satisfaction on the reform, believing that the most critical points of West Tankers ruling have been addressed.[42] Differently, some other authors are still perplexed on the actual capacity of the Brussels I-bis to discourage torpedo tactics.[43] Although a Member State court still may not issue an anti-suit injunction to stop the proceedings commenced before a court of another Member State in violation of the arbitration agreement, as the principle of mutual trust between the courts impedes an order to stop a court from judging on a matter of which another court claims to be competent and although the torpedo tactic is still practicable by way of submitting to the court the question on the validity or inoperativeness of the arbitration agreement or its incapacity of being performed, yet there are various ways to neutralise the conflicting court judgement, either by impeding the enforcement on irreconcilability of judgements pursuant to the New York Convention or the European Convention, or by applying the procedural laws of the relevant Member State or by obtaining a previous judgement in the enforcing state regarding the validity of the contract or by appealing the foreign judgement in that jurisdiction. Maybe it would have been better to maintain the original Article 29, which at section(4), later expunged, addressed the issue on parallel proceedings. However, some authors were critic towards this solution[44] and the analysis and the points raised in this article suggest that the danger of conflicting judgements may in the vast majority of cases be avoided.

the losing party may appeal the judgment where it was rendered in order to further delay the final decision or to reverse the verdict, rather than opposing the enforcement only on specified grounds for refusal. At page 369 in her other article cited at note No. 30, she adds that this may be valid also for the judgment declaring the arbitration agreement invalid.

42 Andreas E Ippolito and Morten Adler-Nilssen, 'West Tankers Revisited: Has the New Brussels I Regulation Brought Anti-suit Injunctions Back into the Procedural Armoury?' (2013) 79(2) Arbitration, 159, available at <www.gorrissenfederspiel.com/GF_resources/883.pdf>.

43 Garvey (n 16) 4; Wilhelmsen, 'Recast of Brussels I' (n 21) 178.

44 Pullen (n 12) 3.

THE INTERACTION BETWEEN NON-EXECUTIVE DIRECTORS AND STAKEHOLDERS IN TAKEOVERS OF PUBLICLY LISTED COMPANIES: A BEHAVIOURAL PERSPECTIVE

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Abstract

Takeovers are a difficult matter to deal with in the current corporate governance environment and the effects of such dramatic changes influence numerous stakeholders of the involved companies. In this context, this paper aims to present and analyse the behavioural theories applicable to the often-argued one-sided relationship between non-executive directors and stakeholders, in particular shareholders and society, represented by politicians. The conclusion is drawn that factors relating to basic human behaviour often influence conduct and decisions of professionals which includes non-executive directors. Under these circumstances, chances are that in the case of a takeover, the actions undertaken by the board and in particular non-executive directors will inadequately represent the best interest of the stakeholders concerned.

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1. Introduction

The majority of corporate law provisions seek to regulate the role that human beings have in companies, on the assumption that they act in a certain way whether it be as directors, shareholders or creditors. It would thus seem that human behaviour is pivotal in the context of the future development of corporate governance. Nevertheless, the understanding of legal rules has often left out a 'comprehensive economic analysis (…) from a perspective informed by insights about actual human behaviour.'[1] The assumption that board members and shareholders, in the case of dispersed ownership,[2] take decisions in a logical, consistent and rational way, based on coherent (utility-oriented) reasoning,[3] has for many years remained unchallenged by both economists and lawyers. Research conducted by psychologists and sociologists however has suggested that this approach is too narrow and that decision-making is in fact heavily influenced by external social factors.[4] This has led to the emergence of a relatively new field of research that is also gaining momentum in the field of corporate governance, namely behavioural economics. This field of research has now seeped into legal scholarship and focuses on how 'actors in and subject to the legal system respond to legal directives.'[5] Roll highlights that psychologists have consistently provided empirical evidence that individuals are often irrational in their decision-making and whilst

1 Christine Jolls, Cass R Sunstein and Richard Thaler, 'A Behavioural Approach to Law and Economics' (1998) 40 Stanford Law Review 1471, 1473.

2 Dispersed ownership is one of the two models of ownership distribution (the second being concentrated management). Dispersed ownership implies that a company has a large number of shareholders and that no individual shareholder has a particularly strong position. With regard to controlling management, all shareholders are faced with a "free-rider" problem in the sense that investors with a small percentage in the share capital of the company are unlikely to actively engage in management discussions, as this would require a significant amount of investment. The shareholders thereby "free ride" on their investments and ultimately shareholder control of management is significantly limited leading to de facto control of the company by the board alone. The owners (the shareholders) therefore do not control the company, which is synonymous with a separation between ownership and control. See Jaap Winter, 'The Evolution of Corporate Governance Systems' (2009) Working Paper, 3.

3 James D Westphal and Edward J Zajac, 'A Behavioural Theory of Corporate Governance: Explicating the Mechanisms of Socially Situated and Socially Constituted Agency' (2013) 7(1) The Academy of Management Annals 607, 608: 'Specifically, economic theories tend to rely on an under-socialized, actor-centric view that emphasizes how individuals voluntarily and rationally pursue their individual goals, guided by self-interest and personal risk preferences, and subject to informational and incentive constraints and opportunities.'

4 Gerwin van der Laan, 'Behavioural Corporate Governance: Four Empirical Studies' (PhD Economics and Business, University of Groningen 2009), 13: 'A behavioural perspective on corporate governance acknowledges that micro-social forces, derived from social psychology, and macro-social forces, derived from sociology, affect board outcomes'; Edward Zajac and James Westphal, 'Towards a behavioural theory of the CEO-board relationship: How research can enhance our understanding of corporate governance practices' in Donald C Hambrick, David A Nadler and Michael L Tushman (eds.), *Navigating Change: How CEOs, Top Teams, and Boards Steer Transformation* (Harvard Business Press 1998), 256–277.

5 Russel B Korobkin and Thomas S Ulen, 'Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 California Law Review 1051, 1055.

lawyers have ignored this in the past, he argues that it should most certainly not be ignored in the case of corporate takeovers given they 'reflect individual decisions'.[6]

Takeovers are often hot topics in the media, not simply because of the large sums of money involved, making for catchy headlines, but also in the broader sense that takeovers can spark significant controversy among the public and national politicians. The more the target company's business is linked to interests of the general public (e.g. telecommunications), the more likely it is to attract public scrutiny. Moreover, a takeover bid from a foreign investor often raises additional concerns of jobs being lost and capital and assets being extracted from the economy. A recent example of the (perceived) profound effects on society of a (potential) takeover was seen in the public debate concerning the bid made by American pharmaceutical company Pfizer, on the English pharmaceutical company AstraZeneca. British Politicians emphatically expressed concerns that Pfizer would move research facilities and jobs out of the U.K. should the takeover bid have succeeded[7] and they even resorted to publicly grilling the bosses of both Pfizer and AstraZeneca in parliamentary hearings.[8] Pfizer eventually decided to withdraw its bid.[9]

This article aims to build on the new line of research that incorporates individual decision-making and behavioural biases into corporate governance and strives to offer insight into how this may help improve corporate governance over time. Current literature appears to focus primarily on the behaviour of executives rather than that of non-executives thus. In an attempt to fill this lacuna and taking the behavioural aspect into consideration, we focus on whether stakeholders can realistically expect non-executive directors on the board to act in their best interest in the case of takeovers. With this in mind, a conscious decision has been made to research the matter from the perspective of stakeholder approach so as to properly illustrate and assess the reciprocal

6 Richard Roll, 'The Hubris Hypothesis of Corporate Takeovers' (1986) 59 Journal of Business 197, 199. For an opposing view, see also Andrei Shleifera and Robert W Vishny, 'Stock Market Driven acquisitions' (2003) 70 Journal of Financial Economics 295, 298–299.

7 Martin Williams, 'Pfizer's promises to protect jobs are meaningless, says Labour; Chuka Umunna says firm's assurances over proposed takeover of AstraZeneca are 'not worth paper they are written on'' *The Guardian* (10 May 2014) <www.theguardian.com/business/2014/may/10/pfizer-chief-astrazeneca-takeover-win-win-society> accessed 11 May 2014.

8 Science and Technology Committee, *Oral Evidence: Proposed Takeover of AstraZeneca* (HC 1272) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/science-and-technology-committee/proposed-takeover-of-astrazeneca/oral/9579.html> accessed 31 May 2014; Hester Plumridge, 'Pfizer CEO Grilled at AstraZeneca Hearing' *The Wall Street Journal* (13 May 2014) <http://online.wsj.com/news/articles/SB10001424052702303627504579559090995876338> accessed 22 May 2014.

9 <http://www.bbc.com/news/business-27572986> accessed 29 May 2014; <http://www.pfizer.com/news/press-release/press-release-detail/announcement_regarding_astrazeneca_plc>, Pfizer statement 26 May 2014, accessed 29 May 2014: 'On 18 May 2014, Pfizer announced that it had made a final proposal to AstraZeneca to make an offer to combine the two companies. Following the AstraZeneca board's rejection of the proposal, Pfizer announces that it does not intend to make an offer for AstraZeneca.'

behavioural relationship between the board and different groups of stakeholders in takeover situations.[10] Moreover, if we aspire to make a meaningful contribution to the improvement of corporate governance with regard to takeovers, it is useful and moreover necessary to look beyond the interests of just shareholders. For this reason, and due to the potential societal impact of takeovers, as the AstraZeneca/Pfizer case illustrated, the interests of two specific groups of stakeholders will be taken into consideration namely, shareholders and society.[11]

Firstly, a general overview of takeovers will be provided including the relevant mechanisms applied and possible motives for engaging in takeovers. Secondly, the position of non-executives on the board and the various stakeholders will be identified. Thirdly, board decisions related to takeovers will be analysed from the perspective of three behavioural theories namely overconfidence/self-serving bias, group bias/social influence and lastly financial incentives. These behavioural aspects are consequently analysed in the context of the interaction between non-executive directors and the two categories of stakeholders. The conclusion is drawn that factors relating to basic human behaviour often influence conduct and decisions of professionals which includes non-executive directors. Under these circumstances, chances are that in the case of a takeover, the actions undertaken by the board and in particular non-executive directors will inadequately represent the best interest of the stakeholders concerned.

2. The Concept and Mechanism of Takeovers

A corporate takeover implies that an independent company (the acquirer) takes control of another independent company (usually referred to as the target company). Following a successful takeover bid, the target company comes under control of the acquiring company and, generally, ceases to exist (unless the takeover is done in the form of an acquisition, in which case the target company remains in existence as a separate legal entity).

10 The stakeholder approach looks beyond the interests of shareholders of a company when analysing a corporate governance problem. The implication of this being that a variety of shareholders (including but not limited to, employees, creditors and consumers) are taken into account in this perspective. See M Blair and L Stout, 'A team production theory of corporate Law' (1999) (85) Virginia Law Review 247, 253: 'Because this view challenges the shareholder primacy norm that has come to dominate the theoretical literature, our analysis appears to parallel many of the arguments raised in recent years by the "communitarian" or "progressive" school of corporate scholars who believe that corporate law ought to require directors to serve not only the shareholders' interests, but also those of employees, consumers, creditors, and other corporate 'stakeholders['].'; John C Coffee, 'Unstable coalitions: corporate governance as a multi-player game' (1990) 78(5) Georgetown Law Journal 1495, 1499: 'Before proceeding further, some terms need to be defined. "Stakeholder" is a deliberately ambiguous term, which includes a variety of subgroups whose interests can often conflict. The two largest constituents in this amorphous category are creditors and employees.'

11 This article examines the position of society from the perspective of politicians representing the interests of society (in a democratically elected system).

Takeovers are often hailed as efficiency-increasing mechanisms that lower production costs and therefore ensure a more profitable environment for the company.[12] In spite of significant evidence showing that takeovers may actually have other (negative) effects,[13] an often-heard argument is that the result efficiency gain is ultimately advantageous to customers.[14] Some arguments in favour of takeovers claim that they help eliminate uncertainty in the market. When asked about the presence of Weapons of Mass Destruction in Iraq, Donald Rumsfeld once referred to the 'unknown unknowns' as situations, which raise most difficulties.[15] Businessmen often grapple with uncertainty in their business, or in the words of Rumsfeld, the 'unknowns'. Although uncertainty in the market is the main ingredient stimulating competition among market participants, which is considered beneficial to society as a whole, there is a natural incentive for companies to try to eliminate that uncertainty.[16] Takeovers eliminate 'unknowns' and decrease uncertainty risks given that both companies will find themselves on the same team. Lastly, tax reasons may further incentivise a company to takeover. The (foreign) tax regime of a target company might offer a more favourable tax base than that of the acquirer, an operation referred to as 'corporate inversion'.[17] Companies often consider tax as one of the key arguments for or against a takeover,

12 Gregor Andrade, Mark Mitchell, and Erik Stafford, 'New Evidence and Perspectives on Mergers' (2001) 15(2) Journal of Economic Perspectives 103, 103: 'But on the issue of why mergers occur, research success has been more limited. Economic theory has provided many possible reasons for why mergers might occur: efficiency-related reasons that often involve economies of scale or other "synergies"; attempts to create market power, perhaps by forming monopolies or oligopolies…'

13 Necmi Kemal Avkiran, 'The evidence on efficiency gains: The role of mergers and the benefits to the public' (1999) 23 Journal of Banking & Finance 991, 1010; 'However, the acquiring bank does not always maintain its pre-merger efficiency. If this is the case, then the role of mergers in efficiency gains is not necessarily positive, a sentiment shared by most other researchers in this field. Decision makers ought to be more cautious in promoting mergers as a means to enjoying efficiency gains.'

14 US Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, par 10 'Efficiencies' <http://www.justice.gov/atr/public/guidelines/hmg-2010.html#10> accessed 31 May 2014: 'Nevertheless, a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.' See also Commission Guidelines of 5 February 2004 on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/03, paras 76–78.

15 Donald Rumsfeld, U.S. Department of Defense News Briefing February 12 2002 <www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636> accessed 10 May 2014: 'Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tends to be the difficult ones.'

16 One such example would be through a merger or acquisition. There is a possibility however that a merger or acquisition may be blocked on grounds of competition law. See for example Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Control Regulation) [2004] OJ L24/22, Article 2.

17 John M Peterson Jr and Bruce A Cohen, 'Corporate Inversions: Yesterday, Today and Tomorrow' (2003) 81(3) The Tax Magazine 161, 162: 'A corporate inversion generally refers to a transaction in which either the stock or assets

illustrated for example by the highly controversial and much discussed tax incentives in the Pfizer/AstraZeneca takeover bid.[18] Regardless of the motivating factors for a takeover, the outcome ultimately depends on the decisions taken in the shareholder meeting of the target company, their vote determines whether the bid is accepted. The power of the board itself should however not be underestimated, particularly in the case of dispersed share ownership. Here, management often holds a strong position and can use its power to block (potentially welfare increasing) takeovers by using so-called takeover defences.[19] The potential acquirer might be put off by the takeover defence, withdraw its bid and the shareholders of the target company lose value.[20] This dynamic between the board and shareholders can be categorised as a typical example of the tension between ownership and control, where different stakeholders have different interests.

3. Framework of Analysis

3.1. Non-Executive Directors on the Board

The argument that takeovers are the result of decisions taken by individuals, as put forward by Roll, suggests that to properly understand and regulate such decisions there is a need for greater awareness on behavioural theories and how these may correspond with questions of corporate governance.[21] Davis and Kay viewed takeovers as individual decisions and suggested that takeovers could have a 'disturbingly contagious effect, with many executives apparently believing that if they

of a U.S. corporation are transferred to a new foreign holding company located in a low-tax or no-tax jurisdiction. The new foreign parent is generally a shell company that was newly formed for purposes of the inversion and the transaction is primarily motivated by a desire to decrease the corporation's worldwide effective tax rate.'

18 'US politicians raise questions over Pfizer bid' *BBC* (9 May 2014) <http://www.bbc.com/news/business-27344465> accessed 22 May 2014: 'In a strategy known as "tax inversion" Pfizer could pay the UK corporate tax rate of 20%, rather than the 35% rate applied in the US, if it bought AstraZeneca'; Julia Kollewe, 'AstraZeneca at risk from Pfizer tax avoidance plans, says company chief' *The Guardian* (15 May 2014) <http://www.theguardian.com/business/2014/may/15/atsrazeneca-chief-steps-up-attack-on-pfizer> accessed 22 May 2014: 'Pfizer, which has proposed a £63bn takeover of the UK business, intends to use the AstraZeneca deal to relocate its tax base to the UK. The move is designed to move away from the US's higher rate of corporation tax (…).'

19 Examples of takeover defences include a 'golden parachute' or a 'fat princess'. The former concerns the situation in which executives provide themselves with substantial financial rewards in case the company is taken over by another company. The latter is the situation in which the company is consciously heavily indebted, in order to deteriorate its financial balance. Both serve purpose of making the target company less attractive for a potential (hostile) takeover.

20 Shareholders of the target company lose value by foregoing a share premium that the acquirer was willing to pay for its shares, or by a drop in share price below pre-takeover levels if the acquisition does not go through because the markets see it as a bad development. (If it's not below pre-takeover levels it is likely they would still be in profit since share prices often go up in takeover situations).

21 Roll (n 7).

are not seen to be joining in, they become more vulnerable to its effects.'[22] It is thus questionable whether a board facing a takeover may not be motivated purely on the basis of the traditional argument such as welfare maximisation, but may actually relate to underlying behavioural and sociological factors. While the arguments advocated by these academics certainly provide food for thought, they nevertheless seem to suggest that takeover decisions are based on the decisions of individuals in a position to influence the final verdict. It is important however to highlight that many decisions taken at a corporate level 'take place within institutions for which groups often make decisions.'[23]

One must also not ignore the internal corporate structure of companies and the legal requirements imposed on them, depending greatly on jurisdiction and on the distinction between a one-tier and two-tier board structure. This is used to determine the interaction between executive directors and non-executive directors.[24] Both the executive and non-executive directors are presumed to act in the interests of the company and to manage the general business, but the actual role that these directors fulfil is somewhat different. Non-executives are typically described as consultants, monitors and decision-makers,[25] and generally fill a position on the board on a part-time basis. The need for non-executives on the board developed significantly in the past decade as a result of corporate governance scandals such as those involving Enron and Tyco in the US, which signalled a need for better management supervision.[26] Numerous measures were taken therefore to avoid future scandals, emphasising the importance of non-executives,[27] whereby they are now perceived to be key contributors to better means of management accountability. Kraakman identifies this as reflecting 'the trusteeship strategy in that it removes one conspicuous high-powered incentive for directors to favour interests of the firm's management at the expense of other constituencies.'[28]

A fair amount of legal literature written on non-executive directors tends to use the term 'outside director', 'non-management director' and 'non-executive director' interchangeably, but Yiching Lai notes that it is important to understand the different implications of these terms.[29] According to

22 Evan Davis and John Kay, 'Corporate governance, takeovers and the role of the non-executive director' (1990) 1 Business Strategy Review 17, 22.

23 Stephen M. Bainbridge, 'Why a Board? Group Decision making in Corporate Governance' (2002) 55 Vanderbilt Law Review 1, 2.

24 This can be challenged of course, more of a formalistic description.

25 Davis and Kay (n 23) 26.

26 William B Stevenson and Robert F Radin, 'Social Capital and Social Influence on the Board of Directors' (2009) 46 Journal of Management Studies 16.

27 Janet Dine and Marios Koutsias, *The Nature of Corporate Governance* (Edward Elgar Publishing Limited 2013), 140–141.

28 Reinier Kraakman and others, *The Anatomy of Corporate Law* (2nd edn, Oxford University Press 2009) para 3.2.

29 Brian Yiching Lai, 'Are Independent Directors Effective Corporate Monitors? – An Analysis of the Empirical Evidence in the USA and Canada' (LL.D. thesis, University of Ottawa 2014), 12.

Yiching Lai, a non-management director and a non-executive director are the same concept and refer to directors that are not on the current senior management team. The terminology gets complicated however when this also refers to 'a director who is (or was) an employee, but not an executive.' In this case, the non-management/executive director is still subject to influence of management.[30] This description of non-executives and the role that they play on the board, particularly in a takeover situation, must be nuanced. It is important to consider that 'individuals exist in a socially situated and socially constituted world'[31] and thus the decisions they take and their interaction with other directors may significantly affect the factors that play a prominent role in takeover situations. This paper therefore aims to focus on the role of non-executives, incorporating a number of behavioural theories, in order to determine whether stakeholders can realistically expect them to act in their best interest in the case of a takeover. The research is centred on the perspective that while non-executives certainly have a stake in the company, their actions and role ultimately represent the company as a legal entity and as such this article studies their role as board members rather than as stakeholders.

3.2 Stakeholders

3.2.1 Shareholders

Business activity is synonymous with risk-taking and whether it is the original founder, an investor or partners of a company, all stakeholders are exposed to a given proportion of loss risk. It is on the basis of this basic principle that shareholders are considered stakeholders in a company and are thereby also justified in their involvement in the development and future life of the company. Some legal scholars oppose the argument that shareholders should be at the centre of directors' concerns and reject the idea that a well-managed company is a company bringing welfare to its shareholders, stressing that directors should focus on other objectives such as ethical conduct and community welfare.[32] Regardless of its merits, this theory disregards the investments made and the risks taken by shareholders, suggesting that 'no good deed goes unpunished' even in the world of corporate governance. Irrespective of any theory, companies are distinct from their founding and investing shareholders, they have their own destiny in society and their own impact on the lives of others. Corporate governance is the means by which shareholders see their interest protected, while executives are encouraged to assume responsibilities that society and the business

30 Ibid.
31 Westphal and Zajac (n 4) 609.
32 Lynn A. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler Publishers 2012), 11.

environment impose on the company. The fact that the risk-taking investor is not necessarily considered part of management as well might (and often does) spark a conflict of interest between the two categories of businessmen.

The conflict between shareholders and executives is seen from a corporate governance perspective as a principal-agent relationship.[33] Shareholders in general, and controlling shareholders in particular, play the role of principal in relation to the company's directors, who act as agents.[34] In the face of an imminent (hostile) takeover,[35] it is likely that this conflict becomes apparent and intensifies, given the potential profitability of such a deal to shareholders, whilst also threatening the well-paid positions of board members.[36] Other scholars have nevertheless pointed to the beneficial effects of takeover risks and saw them as part of an incentivising mechanism, pressing boards to act in the best interest of shareholders.[37]

In contrast, minority shareholders often have a limited power in influencing the fate of a company and may be overwhelmed by larger shareholders. Nevertheless, minority shareholders are investors and partial owners of the company and thereby also bear financial risks. Consequently, many states have implemented protective regulation, favouring minority shareholders.[38] This situation is mirrored in the principal-agent theory, by which minority shareholders play the role of the principal in relation to majority shareholders.[39] The disadvantaged position that minority shareholders hold may encourage defensive behaviour towards majority shareholders, such as selling their stake and giving up shareholder rights or, worse, from the perspective of other stakeholders, decide against further investments in the company.[40] Scholars who oppose the stakeholder approach and sustain that more power should be granted to directors faced opposition from other scholars who claimed that the clash of interests between majority and minority shareholders could eventually harm the latter.[41] Surprisingly, minority shareholders may find support within boards that may be driven to protect their interests, given that minority shareholders' input could affect and perhaps discourage

33 Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305.

34 Kraakman et. al. (n 29) para 2.1.

35 Davis and Kay (n 23) 23.

36 Richard Schoenberg and Daniel Thornton, 'The Impact of Bid Defences in Hostile Acquisitions' (2006) 24 European Management Journal 142, 143.

37 Ibid.

38 Kraakman et. al. (n 29) para 4.1.

39 Ibid.

40 Yi Jiang and Mike W. Peng, 'Principal-principal conflicts during crisis' (2011) 28 Asia Pacific Journal of Management 683, 685.

41 Martin Lipton and William Savitt, 'The Many Myths of Lucian Bebchuk' (2007) 93 Virginia Law Review 733, 744; Nina Walton, 'On the Optimal Allocation of Power between Shareholders and Managers' (2011) USC Center in Law, Economics and Organization Research Paper No. C10-12, USC Legal Studies Research Paper No. 10–13, 9 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654165> accessed 28 May 2014.

a potential takeover, contemplated by controlling shareholders.[42] At EU level, the Takeover Directive[43] implements specific rules[44] aimed at providing minority shareholders with additional protection and ensuring that they are given the option to exit the company at a fair price by, for example, means of a mandatory bid,[45] a squeeze out[46] or a sell-out.[47] The stated purpose of these provisions has nevertheless been challenged, in particular indicating that the mandatory bid rule actually leads to an increase of takeover price, rather than efficiently protecting minority shareholders[48] and at the same time, deprives minority shareholders of benefiting from the increased value of the company following the takeover.[49] This analysis considers shareholders' situation through the lens of behavioural theories and aims to determine whether these interests are actually taken into consideration by a company's management or whether other elements relating to behaviour (e.g. conflicts of interest or irrationality) trigger the decisions taken by management in favour of takeovers.

3.2.2 Society

Businesses are vital for increasing and maintaining welfare in society. What happens to a company is therefore not only relevant for the interests of the shareholders in the company, but also for society in general: with great power comes great responsibility. Companies themselves seem to subscribe to the recently advocated idea that they have a broader set of responsibilities than merely vis-à-vis their shareholders.[50] The widespread existence of so-called 'corporate social responsibility' (CSR) schemes within companies can be seen as a development confirming this evolution in

42 Claudio Loderer and Urs Waelchli, 'Protecting Minority Shareholders: Listed versus Unlisted Firms' [2010] Financial Management 33, 34.

43 Council Directive 2004/25/EC of 21 April 2004 on takeover bids [2004] OJ L142/12.

44 The Takeover Directive leaves Member States room to customise the provisions regarding the mandatory bid and the squeeze-out and sell-out mechanisms. However, these provisions do not fall under the scope of Art. 12 of the Takeover Directive which introduces exceptional cases where Member States can choose to opt-in or opt-out of certain provisions of the Takeover Directive, i.e. the 'no frustration'/'board neutrality' rule (Art. 9(2) and (3)) and the breakthrough rule (Art. 11).

45 Ibid, Art. 5.

46 Ibid, Art. 15.

47 Ibid, Art. 16.

48 Guido Ferrarinit and Geoffrey P Miller, 'A Simple Theory of Takeover Regulation in the United States and Europe' (2009) 42 Cornell International Law Journal 301, 312.

49 Luca Enriques, 'The Mandatory Bid Rule in the Takeover Directive: Harmonization without Foundation?' (2004) 4 European Company and Financial Law Review 440, 448–449.

50 Niall Fitzgerald and Mandy Cormack, 'The Role of Business in Society: An Agenda for Action' [2006] Harvard Kennedy School; John F Kennedy School of Government, Corporate Social Responsibility Initiative Report No. 12, 5: 'Leading an international business in the twenty-first century requires the delivery of goods and services and, through the profitable management of activities, the creation of wealth. But leadership also requires responsibility towards people and the societies in which the company operates and stewardship of the natural resources on which it relies. The role of business in society is a legitimate aspect of business leadership. It is not in conflict with growth or profitability, but an integral part of successful management practice and sustainable business building. (…)'. <http://www.hks.harvard.edu/m-rcbg/CSRI/pub_reports.html> accessed 29 May 2014.

thinking about a company's responsibilities.[51] A company taking a broader set of interests into account does not necessarily correspond with actual benefits to the company,[52] nor does a CSR programme guarantee actual success from the perspective of the people who are supposed to benefit from it.[53] In any case, it is evident that the interests of society are clearly affected by a company's behaviour.

What exactly are the most important issues that are a concern for society when it comes to takeovers? Politicians are figures presumed to speak on behalf of the society and represent the people's interests. It is useful then to see what politicians generally consider are the most pressing concerns for society in a takeover. In this regard, politicians often express unease relating to potential job losses for the national workforce.[54] Public security and plurality of the media were interests found to be so pivotal that they deserved to be explicitly laid down in a legal instrument with EU-wide application, to remove any doubt whether they could be used as legitimate public interest ground. Article 21 of the EU Merger Control Regulation states that Member States 'may take appropriate measures' to protect legitimate interests. Public security and plurality of the media are explicitly mentioned as 'legitimate' interests, any other public interests put forward need to be approved by the Commission before they can be relied upon.[55] Public interest concerns voiced by politicians will often be determined to a large extent by the specific business the company is involved in. The public interest issues surrounding a takeover bid for e.g. a national telecommunications company will quite clearly differ from those related to a takeover bid for a national bank (e.g. infrastructure concerns versus financial stability). With the exception of job losses, it is difficult to determine a fixed set of (public) interests that will be at stake for society in a takeover situation. The relationship between politicians and non-executive directors of a target company is relevant for establishing whether politicians are willing and able to protect the public interest in a takeover situation. The following behavioural theories that are most relevant for the specific dynamic between society and non-executive directors will be used for the analysis.

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51 For a general impression of the development of CSR from the 1950's onwards, see Archie B Carroll, 'A History of Corporate Social Responsibility: Concepts and Practices' in Andrew Crane, Dirk Matten, Abagail McWilliams, Jeremy Moon, and Donald Siegel (eds.), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, 2008).

52 Michael E Porter and Mark R Kramer, 'Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility' (2006) 84(12) Harvard Business Review 78, 80: '(…) that CSR can be much more than a cost, a constraint, or a charitable deed-it can be a source of opportunity, innovation and competitive advantage'.

53 See generally 'Behind the mask: the real face of corporate social responsibility' [2004] Christian Aid Report, 2 <http://www.humanrights.ch/de/Themendossiers/TNC/CSR/Erlaeuterungen/index.html?search=1> accessed 29 May 2014.

54 Williams (n 8).

55 Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Control Regulation) [2004] OJ L24/22, Article 2.

4. Behavioural Theories

4.1 Overconfidence/Self-Serving Bias

"If incompetence is the disease of the novice, overconfidence is the disease of the expert"
- Malcolm Gladwell[56]

Logical decision-making is often taken for granted based on the assumption that fully capable human beings will be able to successfully complete given cognitive tasks. Nevertheless, research in the field of cognitive psychology and behavioural economics has revealed that 'we sometimes fail to abide by rules of logic, [and] (…) we fail to do so in predictable ways.'[57] Amos Tversky and Daniel Kahneman have been at the forefront of this research and initially brought the term 'cognitive bias' into the spotlight in 1974 by claiming that in decision making (under uncertainty) we employ various judgmental heuristics[58] that ultimately lead to 'systematic and predictable errors.'[59] Our cognitive abilities therefore seemingly limit our decision-making abilities.[60] Since then, a number of cognitive biases have been identified and the concept has been further developed and has recently found its way into legal scholarship. One example concerns the excessive optimism and overconfidence bias, which in the light of mergers and acquisitions, has been widely publicised as evidence for why managers 'overestimate potential synergies and underestimate the risk associated with deals.'[61]

Research on the overconfidence bias has in recent years grown exponentially and as a result thereof many sub-biases or biases closely associated with overconfidence have emerged in academic writing.[62] Fellner-Röhling and Krügel for example distinguish between three types of overconfidence namely, judgmental overconfidence, self-enhancement biases and optimism with

56 C-SPAN, Interview with Malcolm Gladwell, Author, Q&A C-SPAN (November 30, 2009) 12:47 <http://www.c-span.org/video/?290341-1/qa-malcolm-gladwell> accessed 5 June 2014.

57 Jon D Hanson and Douglas A Kysar, 'Taking Behavioralism Seriously: The Problem of Market Manipulation' (1999) 74 New York University Law Review 630, 633.

58 Thomas Gilovich, Dale Griffin and Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge University Press 2002) 510: "People often solve inductive problems by use of a variety of intuitive heuristics – rapid and more or less automatic judgmental rules of thumb."

59 Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124, 1131.

60 Charles W L Hill, Gareth R Jones and Melissa A Schilling, *Strategic Management Theory* (Cengage Learning 2014) 27.

61 Rasa Balsyte and Scott Moeller, 'A Study of How Behavioural Finance Theory Applies to the Senior Management Decision-Making Process in M&A' (2012) Cass Business School, City University London Research Paper 5, <http://dl4a.org/uploads/pdf/Balsyte.pdf> accessed 24 May 2014 (highlighting that various authors including Roll, Malmendier & Tate and Goel and Thakor have analysed 'management expectations as a driver of M&A activity in the context of 'hubris' as a concept of one's ego').

62 Hanson and Kysar (n 58) provide a thorough and comprehensive summary of many of the behavioural theories currently permeating the literature.

respect to societal risks.[63] Moore and Healy on the other hand qualify the various forms of overconfidence into the following three categories: overestimation, over-placement and over-precision.[64]

The difference between these two approaches though is minimal and both deal with similar subject matter, summarised as follows: managers are seen to be overconfident in their decisions, believing that their skills rank higher than others and thereby rely more heavily on their own instincts to accelerate acquisition decisions.[65] Those that have benefited from previous successes or significant moves up the career ladder may consequently also overestimate their ability to succeed as a consequence.[66] Moreover, research has shown that we remain unrealistically optimistic with regard to our decisions and beliefs whereby we are 'generally more confident than accurate,'[67] and thus may, for example, overestimate our predicted scores on tests.[68] Many tests and plenty of empirical research has been conducted to explore various angles of overconfidence, where some have questioned the causes of overconfidence and how past experiences may play a role in this phenomena,[69] whereas others have approached the matter from a process-based perspective e.g. when individuals are forced to reason their predictions and decisions it has been shown that their level of overconfidence increases.[70] It is important to take the so-called self-serving bias into consideration, which is intrinsically linked to overconfidence. The self-serving bias has been described and defined in numerous ways, such as: '(…) the tendency for individuals to utilise a variety of cognitive mechanisms to arrive, through a process of apparently unbiased reasoning, at the conclusion they privately desire to arrive at all along'[71]; '(…) the term to describe the observation that actors often interpret information in ways that serve their interests or preconceived notions'[72] or; '(…) a tendency of people to take personal responsibility for desirable

63 Gerlinde Fellner-Röhling and Sebastian Krügel, 'Judgmental Overconfidence and Trading Activity' (2014) Journal of Economic Behavior and Organisation <http://dx.doi.org/10.1016/j.jebo.2014.04.016> accessed 24 May 2014 (forthcoming).

64 Dan A Moore and Paul J Healy, 'The Trouble with Overconfidence' (2008) 115 Psychological Review 502.

65 Wolfgang Breuer and Astrid Juliana Salzmann, 'National Culture and Takeover Activity' (2011) Working Paper, 4 <http://ssrn.com/abstract=1957568> accessed 24 May 2014.

66 Hill et. al. (n 61), 28; Moore and Healy (n 65), referring to 'overplacement'; Fellner-Röhling and Krügel (n 64), referring to 'self-enhancement biases'.

67 Harold Kent Baker and Victor Ricciardi, *Investor Behaviour: The Psychology of Financial Planning and Investing* (John Wiley & Sons, Inc. 2014), 104–105.

68 Moore and Healy (n 65).

69 Matthew T Billett and Yiming Qian, 'Are Overconfident CEOs Born or Made? Evidence of Self-Attribution Bias from Frequent Acquirers' (2008) 54 Management Science 1037.

70 Highlighted in Hanson and Kysar (n 58) 662.

71 Hanson and Kysar (n 58) 653.

72 Korobkin and Ulen (n 6) 1093.

outcomes yet externalise responsibility for undesirable outcomes.'[73] This is particularly interesting in relation to takeovers given that individual concerns are likely to affect the boards' decision-making and the roles that individual actors play here.

4.2 Group Bias/Social Influence

"Of course I talk to myself, sometimes I need expert advice"

While the overconfidence/self-serving bias is primarily concerned with the position of individuals in decision-making, in considering the role of non-executive directors and thereby also the responsibility of the board vis-à-vis stakeholders, cognitive propositions of group settings must also be considered. Non-executives ultimately find their place on the board of a company (or more than one company) and thereby come in direct contact with the management/executive board. It is almost unimaginable to think of a board in this context as not experiencing issues relating to psychological effects of group behaviour.

Somewhat shockingly, Westphal revealed that the increasing need for independence on the board and the growing social nature of the interaction between the various board members has motivated 'CEOs to engage in ingratiatory behaviour toward independent directors, and that such behaviour essentially neutralise[s] the effects of board independence on a variety of corporate policies (…)'[74] Westphal and Zajac define "ingratiatory behaviour" as 'opinion conformity, or verbal statements that validate an opinion held by [an]other person, and "other-enhancement" or flattery.'[75]

While the self-serving bias focuses on championing one's own beliefs, ingratiatory behaviour assumes that individuals conform to the opinion of another through some means of communication. Building on this research, Westphal and Zajac indicated that 'managers and directors who engage in ingratiatory behaviour toward their colleagues are more likely to gain those colleagues' recommendations for board appointments at other firms.'[76] Empirical research supports this conclusion showing that humans are less critical towards the actions of others they feel indebted to in a certain way and that this permissive attitude is likely to give rise to conflicts of interests. As Dan Ariely puts it: 'we humans are deeply social creatures, so when someone lends us a hand in some way or presents us with a gift, we tend to feel indebted. That feeling can in turn colour our view, making us more inclined to try to help that person in the future.'[77] CEOs are

73 Sven Hoeppner and Christian Kirchner, 'Ex-ante vs. Ex-post Governance: a Behavioral Perspective' (2014) Working Paper, 6 <http://ssrn.com/abstract=2405843> accessed 24 May 2014.
74 Westphal and Zajac (n 4) 611.
75 Ibid.
76 Ibid.
77 Dan Ariely, *The (Honest) Truth About Dishonesty* (Harper Collins Publishers 2012), 74.

motivated on a personal level and also in relation to the business activity of the company to engage in such behaviour, but it may also extend to outside groups including journalists who as a result of this behaviour may publish news of a more positive nature regarding the company.[78] This relationship between the executive and non-executives is perhaps not always a result of deliberate manoeuvres but may be the consequence of overlapping ties outside of the boardroom e.g. organisations, sports clubs or other social ties,[79] which could in turn 'reduce cynical or otherwise negative interpretations of each other's behaviour.'[80]

The need to belong to a group and be accepted amongst peers is essential for a person's psychological wellbeing.[81] A particular aspect of human behaviour relating to peer influence and the need for acceptance appears to be highly significant from a corporate governance perspective: the temptation for mimesis. According to sociological studies, it appears that in their endeavour to become accepted amongst their peers, people will engage in imitating behaviour, which appears to be socially acceptable, even though, from a legal or even moral point of view, such behaviour would be unlawful.[82] Continuing this line of thought, Ariely points out that personal moral standards may even be modified or changed according to others seemingly widely accepted behaviour.[83]

The doctrine of 'pluralistic ignorance' relates to sociological theories supporting the basic need for peer acceptance. It assumes that members of a board may refrain from sharing their opinion with the group owing to fear or non-conformity with the presumed norm of the group, with the result that members of the group conform to a norm that in fact does not exist, other than 'in their confused minds.'[84] Furthermore, pluralistic ignorance may be caused by deep-rooted fear of social distancing. Board members may find themselves excluded from group social events or distanced

78 Westphal and Zajac (n 4) 611–612.

79 Ibid, 612–613.

80 Ibid, 612.

81 Rosa Nelly Trevinyo-Rodriguez and Nick Bontis, 'Family ties and emotions: a missing piece in the knowledge transfer puzzle' (2010) 17(3) Journal of Small Business and Enterprise Development 418, 421: 'As Lebowitz (1943) stressed, when knowledge is transmitted in a social dynamic context, it is inseparable from the communication of beliefs (traditions). These shared beliefs and norms of trustworthy behaviour instilled through socialization and tradition among the members of a specific group generate a sense of belonging to the "group" and indirectly build up ties among people.' Martin Lebowitz, 'On Tradition, Belief, And Culture' (1943) 40(4) Journal of Philosophy 100, 101: 'Society is also a humanizing agent which furnishes the individual with the indispensable means for realizing his own essence.'

82 Martin Dandira, 'Executive directors' contracts: poor performance rewarded' (2011) 12 Business Strategy Series 156, 161.

83 Ariely (n 78) 207: 'More generally, these results show how crucial other people are in defining acceptable boundaries for our own behaviour, including cheating. As long as we see other members of our own social groups behaving in ways that are outside the acceptable range, it's likely that we too will recalibrate our internal moral compass and adopt their behaviour as a model of our own.'

84 Kenneth Merchant and Katharina Pick, *Blind Spots, Biases and Other Pathologies in the Board Room* (Business Expert Press 2010), 35.

from the leaders of the group as a result of "violating" 'prevailing norms of director conduct.'[85] Westphal and Zajac presented research results indicating that directors who had fallen subject to social distancing thereafter 'participated in fewer elite-threatening changes in corporate governance (…) on other boards.'[86] It thus appears that, in the world of business, the fear of not belonging to a group transforms to the fear of being expelled from the elite, leading on to the topic of affiliation and its relevance to the decision making process.

As scholars have pointed out, in the context of corporate governance, the most common affiliation for social elites is to the group of the highly educated and wealthy.[87] In this context, boards are nothing but 'large, elite, and episodic decision-making groups that face complex tasks pertaining to strategic-issue processing.'[88] The same authors point to the downside of concentrating highly qualified professionals in one decision making body and show that human behaviour and social interaction can act as disruption and cause deviation.[89] Belonging to the elite often entails rising up to the elite members' expectations. Even though what is expected may be unfeasible or even unlawful, it may be just the ticket to acceptance and respect amongst peers, with the chance that the ultimately ethical standards may be lowered and that unlawful action may eventually be committed.[90]

4.3 Financial Incentives

"When I was young I thought that money was the most important thing in life; now that I am old I know it is."
- Oscar Wilde[91]

Following on from the financial crisis in 2007/08, the topic of director remuneration has become of particular interest to shareholders and society, given that high financial incentives previously granted to executive directors failed to lead to better management or assessment of risk. Non-

85 Westphal and Zajac (n 4), 622; Merchant and Pick (n 85), 36.
86 Westphal and Zajac (n 4), 622.
87 Matthew Bond, Siana Glouharova and Nicholas Harrigan, 'The Political Mobilization of Corporate Directors: Socio-economic Correlates of Affiliation to European Pressure Groups' (2010) 61(2) The British Journal of Sociology 306: 'This paper examines the socio-economic characteristics of directors of Britain's largest corporations who affiliated either to Business for Sterling or Britain in Europe. It reports associations between directors' social backgrounds and their probabilities of affiliation. Elite university education, club membership, wealth and multiple directorships were all associated with higher propensities to affiliate.'
88 Daniel P Forbes and Frances J. Milliken, 'Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups' (1999) 24(3) The Academy of Management Review 489, 492.
89 Ibid.
90 For a detailed discussion on ethics in the corporate governance environment, see Kevin S Groves and Michael A LaRocca, 'An Empirical Study of Leader Ethical Values, Transformational and Transactional Leadership, and Follower Attitudes Toward Corporate Social Responsibility' (2011) 103 Journal of Business Ethics 511.
91 As cited in William Van Winkle, *Strange Horizons Retrospective Volume 1 21 Visions of Recent Technology and Their Implications for Tomorrow* (Smashwords Edition 2011) Chapter III.

executive directors also failed in their supervision or scrutiny of company affairs despite financial incentives.[92] In retrospect, their remuneration seems completely unjustified considering the total ignorance of affairs around them, their often-frivolous attitude towards risk taking[93] and, in certain cases, even fraudulent behaviour.[94]

In contrast to financial incentives granted to executive directors and CEOs, remuneration of non-executive directors received significantly less attention.[95] Whilst their responsibilities on the board are limited to monitoring, ratifying and advising the executives,[96] greater attention should be given to their role in the case of a takeover, given their purported knowledge of the business and their possibility to directly challenge executives. It is thus of utmost importance that non-executives act lawfully and independently despite various financial incentives, to effectively safeguard the interests of stakeholders. Lawyers and sociologists alike have resorted to empirical evidence showing that behaviour is not indefinitely influenced by remuneration.[97] On the contrary, in what concerns unlawful behaviour, sociologists indicate that it is only partly encouraged by financial rewards. A psychological explanation to this would be that receiving greater financial benefits as a result of unlawful behaviour acts as incentive up to the point where the individual considers their own conduct as socially unacceptable.[98]

The tension between directors and shareholders, as exemplified by the principal-agent relationship theory, is mitigated by means of remuneration in the form of bonuses or share schemes.[99] Nevertheless scholars have regularly argued that remuneration is not in fact sufficient in achieving the objective of performance or compliance, as desired by the company's stakeholders. Moreover, the ownership structure (concentrated or dispersed) may further reduce the "performance incentive" to directors since they may have a higher chance of influencing the incentive scheme

92 Chizu Nakajima, '"Greed is good" revisited: another regulatory overhaul!' (2010) 31(10) Company Lawyer 309.

93 Barry Connolly, 'Wrongful Remuneration: Short Term Reward for Long Term Failure' (2012) 2 King's Inns Student Law Review 115: 'As the world economy continues to struggle from the wreckage of the global financial crisis, attention now turns to the causes of the downturn in order to avoid a repeat of these events in the future. One major cause has been identified: excessive' and possibly even reckless risk taking. Corporations throughout global financial centres are guilty of allowing a culture of excessive risk taking to develop.'

94 William Sun, Jim Stewart and David Pollard, 'A Systemic Failure of Corporate Governance: Lessons from the On-going Financial Crisis' [2012] The European Financial Review <http://www.europeanfinancialreview.com/?p=4690> accessed 24 May 2014.

95 Robert N. Clarke, Martin J. Conyon and Simon I. Peck, 'Corporate Governance and Directors' Remuneration: Views from the Top' (1998) 9(4) Business Strategy Review 21, 22.

96 Davis and Kay (n 23) 26–27.

97 Dandira (n 83) 158.

98 Ariely (n 78) 23: 'Essentially, we cheat up to the level that allows us to retain our self-image as reasonably honest individuals.'

99 Connolly (n 94) 120.

itself.[100] Thus, as highlighted in the report prepared by the OECD Steering Group on Corporate Governance in 2009,[101] there is a direct relationship between director's remuneration schemes, the companies' performances and the level (or lack) of shareholder involvement. In its assessment, this was brought forward as one of the key factors in the recent massive failure of the world economy.[102] Remuneration of (non-executive) directors must therefore be permanently kept under the control of shareholders and must be assessed in light of actual performance of the company.

The European Commission has consistently maintained interest in the impact of financial incentives on corporate governance, especially in the aftermath of the financial crisis. The matter of director's remuneration in public companies was brought to the public agenda even prior to the financial crisis, by means of a 2004 Commission Recommendation, which introduced a system by which shareholders could implement a system of controlling directors' pay casting a binding or non-binding vote upon remuneration schemes. [103] The latest initiative of the Commission is the adoption of a draft regulation in 2014 (currently pending approval) regarding technical standards[104] for the identification of material risk-takers subject to the rules on remuneration in the Capital Requirement Directive.[105] This new initiative finds both executive and non-executive directors as impacting 'an institution's risk profile' by including them both under the qualitative criteria,[106] and also under the quantitative criteria of the remuneration paid to both groups of directors.[107] In view of the above, it is obvious that the impact financial incentives have upon directors in general (and non-executive directors in particular) is a genuine concern and provides ample reason for thorough analysis.

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100 Alexandra Laurell, 'Failures in Remuneration Policies: The Rise of Shareholder Responsibility?' (2013) 10 European Company Law 116, 119.

101 The Organisation for Economic Co-operation and Development (OECD), 'Corporate Governance and the Financial Crisis: Key Findings and Main Messages' (June 2009) <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/43056196.pdf> accessed 24 May 2014, 13.

102 Ibid: 'In accordance with the Steering Group's decision in November 2008, this report addresses four areas of corporate governance that the Group considered closely linked to recent failures and that also formed the basis of a global Consultation (see above): remuneration/incentive systems; risk management practices; the performance of boards; and the exercise of shareholder rights.'

103 Commission Recommendation 2004/913/EC of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies [2004] OJ L385/55, recital (8) and para 4.2.

104 Commission Delegated Regulation (EU) No …/. Of 4.3.2014 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile C (2014) 1332 final <http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-1332-EN-F1-1.Pdf> (the Regulatory Technical Standards) accessed 24 May 2014.

105 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176/338.

106 The Regulatory Technical Standards (n 104), Art. 3 (positions of a supervisory and managing nature are both considered to be staff members).

107 Ibid, Art. 4(1): '…staff shall be deemed to have a material impact on an institution's risk profile…'

5. Analysis

5.1 Non-Executive Directors

While it is widely accepted that executive directors play the central role in corporate decision-making, it is also particularly interesting to examine the development of corporate governance and risk management from the perspective of non-executive directors. Non-executives are assigned the task, in simple terms, of monitoring the decision-making of executives and as of recently have more often been held liable in this task.[108] When reviewing the overconfidence theory and the writing on self-serving biases a link to the effects they may have on the performance of non-executives is fairly straightforward. A certain degree of (over) confidence may indeed be beneficial in the task of monitoring executives where such assertive non-executives may find it less daunting to pose provoking questions in board meetings; questions that may lead decision-making in the right direction.

However, various academics have identified that overconfidence has been proven to result in risky investments (e.g. a takeover), thereby 'causing a misalignment between [the board] and their shareholders.'[109] With regard to executive directors, overconfidence in this perspective is particularly worrying as it may lead them to also support the takeover and thereby not question the real advantages of a takeover specifically. The human mind is moreover notorious for justifying things we know not to be correct, which aligns with the self-serving and overconfidence bias. If a non-executive has a high level of overconfidence and thereby believes his view to be correct, there seems to be a high chance he/she will then support the executive directors that share similar opinions on the matter at hand. It is thus questionable, and necessary, to consider that the over-confidence of non-executive directors may amplify the (irrational) decisions of the executive director and vice-versa, thereby making it difficult to find the right balance. Moreover, while some academics argue that a non-executive director is important for the board because of his/her independence from management and thereby has a better ability to represent shareholders' interests, it is simultaneously argued that their past work experiences helps to bring different perspectives to the decision-making.

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108 Emma Grech, 'The Role and Obligations of Non-Executive Directors under Maltese law' [2013] Elsa Malta Law Review 30, 42: For example, in Malta where the Court held that 'it did not matter whether the person was a non-executive director or otherwise. If a person occupied a position on the board of directors, he could and would be held liable given the circumstances, no matter his status.

109 Sudi Sudarsanam and Jian Huang, "Executive compensation and managerial overconfidence: impact on risk taking and shareholder value in corporate acquisitions" in Greg N Gregorio and Luc Renneboog (eds), *Mergers and Acquisitions Activity since 1990: Recent Research and Quantitative Analysis* (Elsevier 2007), 224.

Considering that companies are unlikely to want to hire a non-executive that has experienced a number of failures, and that the hired directors are therefore likely to come with a wealth of (successful) experience, this begs the question of whether overconfidence on the board is as a result amplified, causing further imbalance. While no empirical research has been done in this regard, applying the theories, as discussed above, seems to suggest that such a scenario is certainly imaginable. The issue is further complicated when taking the group bias and social influence theory into consideration. While independence and character of pragmatism are to be taken into consideration in the appointment process, the executives (e.g. the CEO) generally play a part in selecting the non-executives.[110]

When taking this into consideration together with the conclusions drawn by Shivdasani and Yermack that 'a director is a less aggressive monitor if the firm's CEO was active in the process of selecting the director,' it is somewhat worrying, particularly considering the ingratiatory behavioural tendencies as described in the section on behavioural theories. It seems to confirm that the feeling of being indebted to someone that has helped achieve personal career goals or further career achievements, may inadvertently result in less effective fulfilment of the monitoring tasks and thereby less effective protection of stakeholders' interests. Moreover the so called independence of non-executives appears to be threatened in accordance with the norms of reciprocity where executives that have endorsed the appointments of non-executives may result in the non-executives feeling socially obligated to support that executive in their decisions.[111] Kraakman further emphasises this flaw in the appointment procedure by stating that 'if, however, such non-executive directors are directly appointed by managers, shareholders, or other stakeholders as constituency representatives, their independence may be little more than a token.'[112] When taking this into consideration in the perspective of a takeover, if an executive is motivated on the basis of personal goals or as a result of his own overconfidence, non-executives may feel socially obliged to agree with the decisions of the executive rather than to effectively challenge the matter, which reduces the importance of non-executives' input. Hwang and Kim have furthermore identified that while non-executives are considered independent if they have no financial or familial ties to the executive, this criterion ignores certain social ties e.g. similar education or upbringing,[113] which should really be taken into consideration when classifying the independence of a non-executive[114] given that 'these social dimensions (…) have a significant

110 Lisa Fairchild and Joanne Li, 'Director Quality and Firm Performance' (2005) 40 The Financial Review 257, 358.
111 Westphal and Zajac (n 4) 615.
112 Kraakman et. al. (n 29) 64.
113 Byoung-Hyoun Hwang and Seoyoung Kim, 'It pays to have friends' (2009) 93 Journal of Financial Economics 138.
114 Ibid, 155.

impact on directors' monitory and disciplinary effectiveness.'[115] In support of this, Westphal and Zajac found that 'the portion of the board appointed under the current CEO was positively associated with the adoption of golden parachutes for the CEO.'[116]

The danger of appointing biased non-executives to the board is further complicated by the pluralistic ignorance consideration. If non-executives refrain from sharing their opinions on the basis of a fear of non-acceptance, this hampers the effectiveness of a monitoring function significantly. The executives of a company are thereby given a notable amount of power in decision-making, which is not effectively reduced through the appointment of independent non-executive directors. The research conducted by Westphal and Zajac which found that directors who had fallen subject to social distancing thereafter 'participated in fewer elite-threatening changes in corporate governance (…) on other boards,' suggests that assertive and critical behaviour in a previous position that resulted in social distancing may affect the effective functioning of other boards and thereby also gives executives a greater power when appointing these non-executives, since in accordance with the self-serving bias, they may choose to appoint individuals who would support their own views and would be able to easily identify such behaviour.

The issue of financial incentives is particularly tricky when determining the appropriate level for non-executive directors. In contrast with the expectation that non-executives are well-informed as to the company's performance and possible obstacles that it may face, it has been shown that the lack of time and information raise significant challenges for many non-executives.[117] Zattoni and Cuomo highlight the issue that 'if non-executive directors are well paid, they have little incentive to oppose the policies of the CEO and top management, because in some way they are dependent on management', but they also present the other side of the coin in that if non-executives are not well paid they may be less motivated to fulfil their responsibilities on the board.[118] Also, since non-executives rely on the company for their salary indicates that they will, albeit on a personal level,

115 Ibid, 138–139: 'Whether it is conscious or not, actors enjoy an easier mutual understanding and are more comfortable with others who share similar characteristics and experiences.' 139: 'Furthermore, a social relationship "disposes one to interpret favorably another's intensions and actions". Thus, when a CEO enjoys a personal tie with a director, the director's resulting concern for the CEO clouds objective monitoring and disciplining of the CEO.' (Citations omitted); 151: 'The results, presented (…) show a significant difference in the probability of a CEO turnover within the subsample of firms with conventionally independent boards; all else equal, the probability of turnover decreases, on average, by 3.7% for firms with boards that are conventionally independent but not conventionally and socially independent (…)'.

116 Westphal and Zajac (n 4) 615.

117 Alessandro Zattoni and Francesca Cuomo, 'How Independent, Competent and Incentivized Should Non-Executive Directors Be? An Empirical Investigation of Good Governance Codes' (2010) 21 British Journal of Management 63, 65.

118 Ibid.

be incentivised to ensure that decision-making is most profitable. This factor is ultimately a case of balancing interests.

Lastly, with regard to takeovers, non-executive directors face pressure from fellow directors and, presumably shareholders. The desire to maintain the status quo and be accepted as a loyal member of the elite group at the level of company governance may lead non-executives to ignore their better judgment and therefore, willingly or not, behave according to what they believe will be accepted by the executive director (or other members of the board). This then may be to the detriment of shareholders and other stakeholders e.g. for the purpose of this article: society.[119]

5.2 Shareholders

Given that in cases of takeovers, shareholders must take decisions based on information produced by a (often too confident) management,[120] it could be that, in spite of their legal powers and morally justified interest; shareholders are a less powerful group of stakeholders than one would think.[121] Moreover, in certain cases (e.g. institutional investors) their own disinterest in relation to the affairs of the company often puts investors in a disadvantaged position.[122] In contrast with the belief of board members in certain cases,[123] from a behavioural perspective the outcome of takeovers is a decrease in efficiency and prosperity of the merged company.[124] If this is indeed the case, our contention regarding the fact that the board often subtly influences shareholders' decisions, is supported by facts, since it is difficult to imagine that shareholders (of either the purchaser or the target company) would consciously engage in a transaction, likely to develop unfavourably. This argumentation could be applied by analogy to the case of minority shareholders in the context of their relationship with majority shareholders. Legal scholars have gone one step further and showed that in the case of large transactions of shares, block holders are most likely to disregard minority shareholders' interest and act opportunistically, [125] unless a highly dispersed ownership

119 Ibid.

120 Xie Linghong, Liu Shancun and Qiu Wanhua, 'Impact of Managers' Over-confidence on M&A Performances' (3rd International Conference on Information Management, Innovation Management and Industrial Engineering, China 2010); Milton Harris and Artur Raviv, 'Control of Corporate Decisions: Shareholders vs. Management' (2010) 23 The Review of Financial Studies 4115, 4118.

121 Ibid, 744.

122 M Victoria Ruiz-Mallorquí and Domingo J Santana-Martín, 'Ultimate Institutional Owner and Takeover Defences in the Controlling versus Minority Shareholders Context' (2009) 17(2) Corporate Governance: An International Review 238, 241.

123 Andrade et. al. (n 13) 117.

124 Jarrad Harford, 'What Drives Merger Waves?' (2005) 77 Journal of Financial Economics 529, 535.

125 María Gutiérrez and María Isabel Saez, 'A Carrot and Stick Approach to Discipline Self-dealing by Controlling Shareholders' (2010) European Corporate Governance Institute Law Working Paper 138/2010, 7 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1549403> accessed 29 May 2014; M Jensen and W

creates the premise for greater power to be exercised by minority shareholders.[126] According to some legal scholars, such behaviour of block holders is encouraged by the opportunities that takeovers offer for gaining private ("non-profit maximising")[127] benefits that are not shared with minority shareholders.[128]

Remuneration is undoubtedly one of the key elements, which can be used by shareholders as a means of exerting greater influence in the company's business and to indirectly eliminate takeover defences, which might suit mostly (or only) directors. Shareholders' voting rights with regard to remuneration of directors is known in literature as the "say-on-pay" doctrine.[129] The United Kingdom was the first to introduce this right in 2002 in the form of a non-binding vote (consequently also introduced by a few European states i.e. Germany, Spain and Switzerland).[130] Once the possibility was granted to shareholders to control remuneration by a non-binding vote, they did so manifestly and even aggressively, as illustrated by the newspapers at the time.[131] Shareholders' eagerness (also substantiated by public pressure)[132] to cut down board members' remuneration was obvious in the case of GlaxoSmithKline, the well-known pharmaceutical company, whose CEO was left without a golden parachute of $35m and other benefits.[133] Facts prove that, in the absence of a binding system of remuneration control, the board would not feel intimidated in the face of outraged, untrusting shareholders. This was the case of Royal Dutch Shell in 2009; when the company's remuneration committee proceeded with granting financial benefits, even in spite of shareholders' manifest disproval.[134] In European states such as the Netherlands, Sweden and Norway,[135] following the implementation of a binding voting system, shareholders' preference and decisions seem to have come to the fore, given that significant

Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305.

126 Andrei Shleifer and Robert W. Vishny, 'A Survey of Corporate Governance' (1997) 52 The Journal of Finance 737, 755.

127 Ibid, 758.

128 Ibid, 747.

129 Jeremy Ryan Delman, 'Structuring Say-On-Pay: a Comparative Look at Global Variations in Shareholder Voting On Executive Compensation' [2010] Columbia Business Law Review 583; Marisa Anne Pagnattaro and Stephanie Greene, '"Say on Pay": The Movement to Reform Executive Compensation in the United States and European Union' (2011) 31 Northwestern Journal of International Law & Business 593.

130 Ibid, 597.

131 'Have Fat Cats Had Their Day?' *The Economist* (London and New York, 22 May 2003) <http://www.economist.com/node/1796272> accessed 27 May 2014.

132 Delman (n 130) 590.

133 'Revolting Shareholders' *The Economist* (22 May 2003) <http://www.economist.com/node/1796174> accessed 27 May 2014; Jill Treanor 'Glaxo Faces Shareholder Revolt' *The Guardian* (19 May 2003) <http://www.theguardian.com/business/2003/may/19/executivepay> accessed 27 May 2014.

134 Ibid; Julia Werdigier, 'Shareholders Reject Pay Package for Shell Executives' *The New York Times* (19 May 2009) <http://www.nytimes.com/2009/05/20/business/global/20pay.html?_r=0> accessed 27 May 2014.

135 Delman (n 130) 587 and 592-593.

groundless pay destined to directors had been blocked.[136] Building on the lack of trust a parallel can be drawn to the case of takeovers, where the same psychological incentive of money stimulates directors into action or inaction.[137] Thus, legal literature has proposed a "say-on-takeovers" doctrine, which would replace the system by which shareholders are required to vote only on a takeover offer already approved and agreed to by the board (without having the chance to actually become involved in the assessment of the existing alternatives) with a system in which shareholders hold control over the takeover process, avoiding issues such as management entrenchment.[138] This proposal would contribute to the welfare of the company, if we were to follow some opinions of the legal literature that shows that shareholders' involvement increases corporate performance.[139] The chance that directors would act in shareholders' interest in the case of takeovers seems to depend highly on human behaviour. The current trend in regulation will reveal whether granting shareholders more grasp on the decision making process will mitigate agency issues and encourage more generally favourable outcomes in takeover bids.

5.3 Society

The regulation of financial incentives and executive remuneration certainly has been at the forefront of political decision-making in recent years, not least because of the financial crisis. However, in the context of the interaction between non-executive directors and politicians (as representatives of society) in takeover situations, it is difficult to discover a direct link with regard to financial incentives. It appears that any personal financial incentives given by either non-executive director's to politicians, or vice-versa, in order to coordinate any specific corporate or political behaviour in takeover situations, would amount to some kind of corruption (e.g. bribery).[140] Of the identified behavioural theories, overconfidence and social influence seem to be the most relevant for the relationship between politicians and non-executive directors in takeover situations. Simply put, overconfident managers tend to be overly optimistic about the positive

136 Kate Burgess and Richard Milne, 'European investors balk at director pay' *Financial Times* (1 June 2009) <http://www.ft.com/intl/cms/s/0/19d65a2e-4edb-11de-8c10-00144feabdc0.html#axzz32wnbEfpT> accessed 27 May 2014.

137 See Chapter IV of this paper.

138 Joseph Vithayathil and Vidyanand Choudhary, 'Is Board Entrenchment Beneficial and Should Shareholders Decide on Takeovers?' (2012) The Paul Merage School of Business University of California, Irvine, 32 <https://webfiles.uci.edu/jvithaya/www/pdfs/r3.pdf> accessed 28 May 2014.

139 Chris Mallin and Andrea Melis, 'Shareholder Rights, Shareholder Voting, and Corporate Performance' (2012) 16 Journal of Management and Governance 171, 173.

140 See for a definition of corruption: Commission, 'Report From the Commission to the Council and the European Parliament: EU Anti-Corruption Report' [2014] (COM(2014) 38 final), 2: 'In line with international legal instruments, this report defines corruption in a broad sense as any 'abuse of power for private gain'.

side of a merger, while turning a blind eye to or underestimating the potential downside of the same merger.[141]

The problem of overconfidence can apply to the board members of the acquiring company as well as the target company: both may overestimate the benefits of the merger and underestimate the risks associated with it. The perception and communication of benefits and risks of a takeover can be particularly well observed during parliamentary hearings (usually organised when a matter is considered to be highly contentious). The fact that a parliamentary hearing was organised in the UK around the potential Pfizer/AstraZeneca takeover,[142] potentially being the third biggest takeover worldwide ever,[143] therefore should not come as a surprise. An example of overconfidence is the interpretation of certain consequences of the envisaged takeover, given by the CEO of Pfizer, Ian Head, who seemed overly optimistic or positive about certain future events.[144] On several occasions one can also see evidence of a self-serving bias emerging.[145]

The Pfizer/AstraZeneca example shows that representatives of the acquiring company view the takeover as relatively positive in comparison to the view of the committee members. Generally speaking, politicians taking part in parliamentary committees are critical and scrutinise the witnesses heavily, safely guarding public interest. However, in case politicians are insufficiently critical when sitting on a specific committee or orchestrating a particular parliamentary hearing, the risk remains that the takeover, as presented, may not be adequately scrutinised whereby the overconfidence of the acquiring company's board may not be properly addressed or identified.

141 Breuer and Salzmann (n 66) 4: 'Managers with overconfidence traits tend to underestimate the risks and overestimate the synergy gains associated with mergers, and therefore acquire targets quickly and frequently.'

142 Science and Technology Committee, *Oral evidence: Proposed takeover of AstraZeneca* (n 9).

143 Fidelia Liu, 'Global Hostile M&A at Highest YTD Volume Since 2007' Dealogic M&A Statshot, 21 May 2014 <http://www.dealogic.com/media/market-insights/ma-statshot/> accessed 30 May 2014: "Volume was largely driven by Pfizer's $122.6bn hostile bid for AstraZeneca announced on 2nd May 2014 in what is the third largest hostile M&A deal on record."

144 Science and Technology Committee, *Oral evidence: Proposed takeover of AstraZeneca* (n 9) 9, Mr. Ian Read's comment to question 28 of Mr. Heath, which voiced concern over maintaining the UK's science base: 'If I may, can I make a comment that was made yesterday? I want to be very clear here that, while we do this acquisition, our science will continue and I am sure AstraZeneca's will continue.' 13, Mr. Ian Read's answer to question 43 of the Committee Chair: '(…) we have considered what commitments we could make, and they are unprecedented commitments. I haven't seen any company anywhere make those commitments.'

145 Ibid, 9. Mr. Ian Read's answer to question 28 of Mr. Heath, relating to a previous takeover by Pfizer: 'Well, I think the facts were not well expressed. What I said was that when we—I was not on the leadership team when we did Pharmacia, so this is my understanding—bought Pharmacia, (…)'; 4, Mr. Ian Read's answer to question 10 of Stephan Metcalfe, relating to what extent Pfizer will maintain R&D activities in the UK: 'But what we have said is that we will put into the UK 20% of our global R&D headcount. I think that is an unprecedented commitment and what we are saying to you is that this combination would make us the largest pharmaceutical company in the world, and we are saying that we are tying the headcount in the UK to 20% of our global. We would staff our global to be efficient and productive, and 20% of that would be in the UK. That is an incredible commitment from a company of our size.'

On the subject of social influence between politicians and the board of a company involved in a takeover, the concept of ingratiatory behaviour seems particularly relevant. Managers and directors participating in ingratiatory behaviour vis-à-vis their colleagues are more likely to receive recommendations for board appointments at other firms.[146] A significant amount of politicians go through the so-called "revolving door" and secure a job in the private (lobbying) sector after their political tenure has ended.[147] This begs the question whether politicians make the move to the private sector because of personal competences acquired during the political years or whether it is a reward for serving the interests of the private sector whilst the politician was in office.[148] Assuming that at least in some cases the latter scenario applies, the politician concerned will have good reason to maintain warm ties with certain players in the private sector to secure a job after their political career has ended. This may further incentivise the politician to engage in 'opinion conformity'[149] with board members of the company concerned, so as to increase his/her chances of landing a job in the future (e.g. as a non-executive on the board of the company). Moreover, the politician might even feel indebted towards those players as a result of campaign contributions or the guarantee of a job in return for the politician's cooperation. As a consequence, politicians might be considered to be serving the private interest rather than that of the public, which they are presumed to represent, a behaviour which is also known in literature as 'shirking'.[150] The 'shirking' problem is aggravated the closer a politician gets to the end of his political career by what is known as, the 'last period problem',[151] a practice that has been shown, on several occasions.[152]

146 Westphal and Zajac (n 4) 611.

147 Jordi Blanes i Vidal, Mirko Draca, and Christian Fons-Rosen 'Revolving Door Lobbyists' (2012) 102(7) American Economic Review 2012 3731, 3731: 'One important characteristic of the US lobbying industry is the extent to which it is dominated by the "revolving door" phenomenon—i.e. the movement of federal public employees into the lobbying industry. For example, 56 percent of the revenue generated by private lobbying firms between 1998 and 2008 can be attributed to individuals with some type of federal government experience (…)'.

148 Glenn R Parker, Suzanne L Parker and Matthew S Dabros, 'The Labor Market for Politicians: Why Ex-Legislators Gravitate to Lobbying' (2013) 52(3) Business Society 427, 427: "(…) raises a broader question about the labour market for ex-politicians. This question is whether public officials work for those they "regulated" after holding office due to their acquired human capital (e.g., skills, knowledge) or because they favoured those interests while in office."

149 Westphal and Zajac (n 4) 611

150 Bruce Bender and John Lott Jr., 'Legislator voting and shirking: A critical review of the Literature' (1996) Public Choice 67, 68: 'Both political scientists and economists define shirking as the failure by the legislator to act in the interests of his constituents.'

151 Glenn R Parker and Matthew S Dabros, 'Last-period problems in legislatures' (2012) 151 Public Choice 789, 790: 'The widely accepted argument is that last-period problems arise because retiring politicians behave opportunistically prior to leaving office. Rational politicians "shirk" at this point in their careers because they are no longer subject to electoral constraints, and with the electoral incentive removed, they can (and will) indulge their base interests.'

152 Parker and Dabros (n 151) 790 at footnote 3: 'Sensational exposes of legislators negotiating lucrative post-elective positions while in office, or doing legislative favours for future employers, are examples of the types of last-period problems often cited in this regard.'

To put this issue in the context of takeovers, imagine the situation where a politician's close contact, who happens to be the non-executive director of a target company, asks the politician to strongly oppose a potential (hostile) takeover in the media, or in the political body of which he is a member. This may not necessarily be in the best interest of society (e.g. in the case of an already "failing firm" which could be saved by the merger).

6. Conclusion

The outcome of takeovers depends on an extensive number of the most diverse factors, starting with legal issues and ending with the effects of conscious or even unconscious human behaviour. This paper took up the challenge of investigating non-executive directors' involvement and of assessing the result of their behavioural interaction with two major stakeholders in public companies, shareholders and society. This paper sought to answer the question of the extent to which non-executive directors sitting on the boards of publicly listed companies can be expected to act in the best interest of shareholders and society. The analysis commenced with a general overview of the mechanism of the takeovers and on the objective and subjective reasons which ground the boards' and shareholders' decision to engage in takeovers or rather to attempt blocking them by means of takeover defences.[153] The examination went deeper to find out what motivates non-executive directors in such a situation and focused on behavioural particularities of non-executive directors as a general category and on those of shareholders and society.[154]

A substantial piece of our examination concentrated on three major behavioural factors and their effect on the interaction between non-executive directors and the two mentioned stakeholder groups.[155] The argument was made that irrational behaviour and overconfidence often creep in the decision-making process regarding takeovers. From a corporate governance standpoint, the theory of social influences and group biases led to the conclusion that belonging to the elite of the wealthy and influential may lead to distorted perceptions of reality. Remuneration was described both as incentive for directors' rule-abiding conduct and as a mechanism for the control of transparency and performance.

In light of the arguments rendered in this paper, the answer to the research question must be that chances are higher that the decisions taken by board in general, and non-executive directors in particular will be driven by factors which exceed the sphere of interest of shareholders and society and that human nature will have its say undeterred by morals or regulation.

153 See Chapter II - The Concept and Mechanism of Takeovers.
154 See Chapter III – Framework of Analysis.
155 See Chapter IV – Behavioural Theories and Chapter V – Analysis.

ARBITRARY DEPRIVATION OF LIFE IN THE CONTEXT OF ARMED CONFLICTS

Beka Dzamashvili*

Abstract

The article explores the concept of arbitrary deprivation of life in the context of armed conflicts. In other words it aims to analyse how individuals can enjoy the right to life in armed conflicts and to what extent the human rights standards applicable in peacetime can be used during hostilities. To that end, the interplay of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) is analysed based on the findings of the scholars and respective HR bodies. In this context, Article reaches to the conclusion that IHL cannot be considered as *lex specialis* with regard to IHRL. On the contrary, both sets of rules have the same value and their requirements shall be taken into account in similar way. Accordingly, verification of arbitrariness in armed conflict is based on the striking a balance between military and humanitarian considerations. The right to life of combatants and civilians are separately discussed in the article and it is observed that paradoxically in the theory the right to life of combatants is protected in the same degree during hostilities as in peace time, while the ambiguity of the principle of proportionality with regard to incidental loss of civilians leads to the conclusion that such deprivation of life will be always arbitrary.

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1. Introduction

The right to life has long been considered as one of the most fundamental rights from the very beginning of the contemporary human rights movement. Logically, it is the cornerstone of the whole human rights system since life is absolutely necessary to enjoy all other rights.[1] Yet the right has never been deemed to have an absolute character in international law. International, regional or national instruments, protecting this right, include exceptions when deprivation of life will be justified. Those instruments clearly prohibit the 'arbitrary deprivation' rather than the deprivation of life as such.[2]

Accordingly, it can be observed that the central question in relation to the protection of the right to life is - what constitutes the arbitrary deprivation of life? Even though various international human rights authorities attempt to offer an explanation about the meaning and application of this concept, ambiguity still remains about its scope and limits with regard to the right to life.[3] To be more precise, there is no exact formula or elements according to which one can determine arbitrariness. Moreover, the necessity of verifying the precise benchmarks of the protection of the right to life is heightened in the light of contemporary challenges of armed conflicts. As United Nations Human Rights Committee (UN HRC) emphasised, war and other acts of mass violence are utmost hazardous in relation to life,[4] but armed conflicts seem to be unavoidable due to military considerations.

Under human rights law paradigm the lethal force may be used as *ultima ratio* measure only after all other means have been attempted or would be pointless.[5] However, as several scholars argue, such protection of the right to life is weakened or even eliminated during the extreme circumstances of armed conflicts.[6] At a glance, this approach seems to be logical because every serious armed conflict inevitably entails killings and the deprivation of life occurs to be 'necessary devil' in this regard. On the other hand, one might object that inherent human rights must not be

1 Alexandre de M. L. Tolipan, *Right to Life and the Use of Deadly Force Under the European Convention on Human Rights* (Universite de Geneve Institut Universitaire de Hautes Études Internationales, October 2006) 59.

2 See article 6 of International Covenant on Civil and Political Rights, article 4 of American Convention on Human Rights and article 4 of African Charter on Human and People's Rights.

3 See HRC GC N8, Right to liberty and security of persons (30 June1982) para 4; HRC GC N27, Freedom of movement (CCPR/C/21/Rev.1/Add.9, 2 November 1999) para 21; HRC GC N16, The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (8 April 1988) para 4.

4 HRC GC N6, The right to life (30 April 1990), para 2.

5 David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16(2) The European Journal of International Law 171, 180.

6 Robert McCorquodale (ed), *Human Rights* (University of Nottingham, UK, 2003) 437.

dependent on the situation.[7] Moreover, non-derogability of the right to life logically implies that it must be protected in wartime as well.[8]

Accordingly, this article aims to analyse how individuals can enjoy the right to life in armed conflicts and to what extent the human rights standards applicable in peacetime can be used during hostilities. In other words, the main purpose of the research is to examine whether it is possible or not to determine clear and comprehensible elements of the 'arbitrary killing' in the context of armed conflicts and, if not, who should set out benchmarks in each particular occasion and to what degree.

2. Interrelation of International Humanitarian and Human Rights Law in the Context of the Right to Life

In general, interplay of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) has always been a matter of discussions since they came into existence. Scholars attempted to identify the common and distinctive features of two sets of rules and suggested methods of their interrelation.[9] Specifically, some of them stressed on the different roots of IHL and IHRL and suggested that they shall be applied separately in different situations.[10] Others focused on their common objective to protect human beings and asserted that they should work in tandem to provide sufficient protection for victims of conflict.[11] To be more precise, pro-IHL writers argued that the situation of armed conflict was totally different and specific set of rules shall be applied which will be more sophisticated and realistic.[12] Grounded on the principle *inter arma silent leges* (in time of war the laws are silent) they asserted that IHL is a derogation from the normal regime of human rights.[13] On the other hand, human rights view suggests that because IHL and human rights treaties were negotiated and adopted by the same states there is presumption that these treaties are consistent with one another.[14] However, it is more accurate to analyse the problem in line with the views of authoritative bodies to draw the precise picture.

7 Cordula Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40(2) Israel Law Review 310, 324.

8 Elizabeth Wicks, *The Right to life and Conflicting Interests* (Oxford University Press, 2010) 80.

9 Nancie Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40(2) Israel Law Review 355, 356.

10 Patrick Knäble, 'The Relationship Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', (2007) 4 The New Zealand Postgraduate Law e-Journal 1, 1.

11 Daniel Warner (ed), *Human Rights and Humanitarian Law: The Quest for Universality* (Martinus Nijhoff Publishers, The Hague/Boston/London, 1997), 100.

12 Daniel Statman, 'Targeted Killing' (2004) 5 Theoretical Inquiries in Law 179, 182.

13 Roberta Arnold and Noelle Quenivet (eds), International *Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers, 2008) 7.

14 William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' 2005) 16(4) The European Journal of International Law 741, 744.

In fact, regional courts seem to be reluctant to directly apply IHL and therefore they do not provide analysis or detailed opinion clarifying the interplay between IHRL and IHL. On the other hand, International Court of Justice (ICJ) and UN HRC developed authoritative approaches in this regard.[15] Both approaches accept the simultaneous application of both bodies of law in wartime, but address possible incompatibilities and conflicts in different manners. It is often asserted that in the view of ICJ, IHL shall be treated as the *lex specialis* in relation to IHRL.[16]

On the other hand, HRC took the 'belt and suspenders' approach, by which the two systems are essentially cumulative in nature. This method suggests applying the norm that better protects the individual, whether it is drawn from IHRL or IHL.[17] The latter method is part of complementarity theory. Both of the views are authoritative and have their substantiations, though they are not reconcilable to each other. Therefore, it is pertinent to explore each of them in depth and afterwards it will be possible to set out optimal interaction between IHL and IHRL in relation to the right to life.

2.1 IHL as *lex specialis* with Regard to IHRL

One of the most cited cases in relation to interplay of IHL and IHRL is definitely ICJ advisory opinion on Legality of the Threat or Use of Nuclear Weapons. The significance of this case is heightened in the light of this research because the court explicitly expressed its opinion regarding the arbitrary deprivation of the right to life in the context of armed conflict. In particular, the court stated that 'the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then must be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict.'[18]

At a glance, this judgment seems to be useful source for determining interplay of IHL and IHRL, but in fact it is even more confusing in this respect. Among several shortcomings of the judgment, it should be noted that the court did not clarify what legal consequences were related to Latin term *lex specialis*. Reading the whole text gives away impression that in armed conflict the right to life is still protected under IHRL but the peculiarities of hostilities necessitate exploring the concept within IHL as well, rather than directly applying elements of arbitrariness determined in ordinary situations. To be more precise, while interpreting arbitrary killing set forth in Article 6 of the International Covenant on Civil and Political Rights (ICCPR) relevant international law – IHL –

15 Ibid, 370.
16 *Legality of the Threat or Use of Nuclear Weapons,* Advisory opinion (ICJ 8 July 1996), para 25.
17 William A Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of jus ad bellum' (2007) 40(2) Israel Law Review 592, 593.
18 *Legality of the Threat or Use of Nuclear Weapons,* Advisory opinion (ICJ 8 July 1996), para 25.

shall be considered.[19] However, on this background the term *lex specialis* seems to be redundant. Moreover, it is even incompatible with the whole text since traditional understanding of the concept precludes parallel application of general and specific provisions. Originally *lex specialis* was understood as a conflict-resolving tool grounded on the idea that specific law prevails over general law.[20]

However, one might argue that in contemporary times, the purpose and scope of *lex specialis* has been somewhat expanded. As noted by Anja Lindroos, *lex specialis* can be invoked as the more specific norm, which supplements the more general one without contradiction. The *lex specialis* and the *lex generalis* then simply accumulate.[21] In fact, under international law such approach can neither be objected nor supported because Vienna Convention on the Law of Treaties (VCLT), which provides the rules of treaty interpretation, is mute in this respect.[22] Though, such view is counter-logical. If the specific norm is not clashing the general one then it is natural that both of them will be applied. Hence, the notion of *lex specials* is meaningless and having no connotation. Conversely, the only point of deploying the concept is to solve a conflict between clashing norms. This approach was explicitly adopted by International Law Commission in this respect.[23]

To summarise ICJ Advisory Opinion, two possible understanding might be outlined from this judgment:

1. IHL as *lex specialis* does not preclude IHRL, but it is just additive or interpretative source for arbitrary killing. In this case, the concept of *lex specialis* is pointless and it does not have any weight;
2. IHL as special category has supremacy over ICCPR article 6(1) and the latter shall give a way to IHL requirements. The controversy of this version is twofold: a) as already noted, the text explicitly spells out that IHRL does not cease to apply in hostilities and such approach occurs to be counter-textual; b) it is irrational to say abstractly that IHL is specific than article 6(1) of ICCPR because the whole set of rules cannot be properly compared to a single provision.

19 Dale Stephens, 'Human Rights and Armed Conflict - The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case' (2001) 4 Yale human Rights and Development Law Journal 1, 14.

20 Nancie Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40(2) Israel Law Review 355, 367.

21 Ibid, 369.

22 Ibid, 368.

23 *International Legal Protection of Human Rights in Armed Conflict* (United Nations Human Rights Office of the High Commissioner, New York and Geneva, 2011), 60.

Thus, as it turns out, the Advisory Opinion did not end the struggle to analyse parallel application of IHL and IHRL. Rather it has opened wider room for discussions.[24] Later on, in Israeli Wall case ICJ attempted to clarify the way the *lex specialis* rule works in practice and asserted that:

> *As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.*[25]

It should be noted that unlike Nuclear Weapons Case, here the court discussed the interplay not only with regard to the right to life but in general. However, this judgment cannot solve ambiguity over interplay of IHL and IHRL. In fact, ICJ did not explain how to subdivide the rights into these categories.[26] It is also unclear whether the court rejected its view over IHL to be *lex specialis* or it implied that the right to life is that category where IHL should be *lex specialis*.

This judgment should be praised because it paves a way to case-by-case findings, but unfortunately it divides applicability of rules by rights rather than situations.

To summarise the section, it can be concluded that the widespread approach that IHL is *lex specialis* in relation to HRL is not well-founded and human rights law does not give way to IHL during an armed conflict.

2.2 Complementary Application of IHL and IHRL with Regard to the Right to Life in Armed Conflict

From the previous section it can be said that according to ICJ in armed conflict both IHL and IHRL are applicable and none of them has pre-conceived supremacy over each other. Logically, it means that in the context of parallel applicability they are mutual complementary. As a consequence, both advisory opinions implicitly echo the complementarity theory that suggests that they shall be seen as an interpretative device for each other in the context of the right to life.[27] In other words, they should be used to fill the gaps in each other.[28] In fact, this approach is explicitly recognised by several HR bodies. Namely, HRC undertook that while more specific rules of IHL

24 Dale Stephens, 'Human Rights and Armed Conflict - The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case' (2001) 4 Yale human Rights and Development Law Journal 1, 4.

25 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory opinion, (ICJ 9 July 2004), para 106.

26 Roberta Arnold and Noelle Quenivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publisher 2008), 10.

27 Prud'homme (n 21) 374.

28 Arnold and Quenivet (n 27) 9.

may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.[29] Similarly, the UN Secretary General in his report on the protection of Civilians in Armed Conflict has also emphasised cumulative application of all norms that protect civilians in such situations.[30]

As it turns out, all international bodies acknowledge either expressly or implicitly that IHL and IHRL should complement each other to provide sufficient protection of the right to life. In general, both sets of rule aim to protect individuals and there should not be obstacle for harmonisation of two regimes. However, complementarity theory is questioned when the norms of IHL and IHRL are in collision.[31] In this case, some authors suggest that those rules must be applied which offer better protection for the individual.[32] This view seems very attractive from HR standpoint but objectively it is biased, ignoring IHL requirements. The real harmony between two regimes can be achieved only if the requirements of both of them will be equally taken into account and balanced. In other words, the military and humanitarian considerations shall be considered in the same degree so that none of them will be impaired. However, it shall be recognised that such general statements are not sufficient to determine the elements of arbitrary killing in armed conflict. Rather it necessitates detail exploration of IHL standards in relation to the right to life and only after this analysis it will be possible to make some conclusions. Consequently, the following sections will be focused on IHL peculiarities and their effect on the concept of arbitrariness.

3. Legality of the Deprivation of Life in Armed Conflict

Before touching on the right to life the general cornerstones of the IHL shall be outlined. The very idea of IHL is to strike a fair balance between military necessity and humanitarian considerations. Besides, while talking about military necessity it shall be emphasised that traditionally the aim of war has been to overpower not to destroy enemy.[33] These general views are enshrined in more specific principles of necessity and proportionality, which then verify the legitimate means and methods of warfare.[34]

29 HRC GC N31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant (CCPR/C/21/Rev.1/Add.13, 26 May 2004), para 11.

30 Report of the Secretary General to the Security Council on the Protection of Civilians in Armed Conflict (UN Doc. S/1999/957, 8 September 1999), para 36.

31 Droege (n 8) 340.

32 Schabas (n 18) 593.

33 Preamble, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.

34 <http://www.icrc.org/eng/war-and-law/conduct-hostilities/methods-means-warfare/overview-methods-and-means-of-warfare.htm> accessed 29 December 2013.

Under these general principles, ideas or purposes IHL admits several occasions when taking of life is permitted. Among several categories two broad groups shall be outlined:

1. Groups of people, which are considered to be a legitimate target and can be killed intentionally;
2. people who are under protection of IHL and cannot be targeted but their killing might be tolerated in certain circumstances. Therefore, it is necessary to analyse each category separately and make conclusions according to their specificities in the light of general standards.

3.1 The Deprivation of a Combatant's Life in Armed Conflict

Generally, it is widely accepted that combatants are legitimate targets under IHL.[35] Scholars often underline that the mere status of a combatant renders a person targetable.[36] Moreover, some also go further and assert that they are targetable, without the need for imminence of danger.[37] This approach indirectly acknowledges that the lives of combatants cannot be protected in hostilities.[38] In fact, all these views are almost undeniable in a contemporary international law but it is apparently incompatible with HR standards that require equal protection of all individuals in any circumstances. Furthermore, it is also inconsistent with above observed interplay of IHL and IHRL according which the right to life continues to be protected during hostilities as well. Therefore, it begs a logical question – if the right to life is protected during armed conflict why is combatant considered as legitimate target? An accurate answer can be found only through proper analysis of the primary sources of IHL which authorises that combatant might be targeted. Besides that, it shall be explored what does it mean to be a target? Does it equate to authorisation of killing or not?

After this introduction it will be surprising to find out that none of the legally binding documents of IHL expressly states that combatant may be a target. On the contrary, such observation can be only made indirectly or implicitly from several provisions and principles. In particular, the following categories shall be articulated to figure out how IHL treats to the right to life of combatants: 1) principle of distinction; 2) combatant privilege; 3) status of *hors de combat*.

35 <http://www.essex.ac.uk/reportingkillingshandbook/handbook/part_ii_3.htm> accessed 3 June 2012.
36 Arnold and Quenivet (n 27) 542.
37 Louise Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?' (2006) 88(864) International Review of the Red Cross 881, 891.
38 Robert McCorquodale (ed), *Human Rights (International Library of Essays in Law and Legal Theory: Second Series)* (Ashgate Publishing Group 2003), 437.

The principle of distinction is the cornerstone of the whole IHL. It is grounded on the idea that civilians shall be protected against effects of hostilities and to achieve that and it demands that civilians and combatants must be distinguished at all times.[39] Logically, one might argue that this principle indirectly admits that effects of hostilities can be directed to combatants. However, it is pertinent to analyse the text where such principle is enshrined and only after this one can outline implications or side effects of the concept. According to Article 48 of API 'Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.'

As it appears, the text refers to two categories: individuals and objects. In fact, it permits attacks only against military objectives not against military personnel as such. This view is explicitly reaffirmed in article 52 that requires that 'attacks shall be limited strictly to military objectives'. The same provision defines 'military objective' as 'objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'. Accordingly, military objective is object not a person and therefore combatant is out of that category. Consequently, there is no authorisation to direct attacks against combatants.

When it comes to individuals in armed conflicts, pursuant to the principle of distinction Article 51(2) of API and Article 13(2) of APII reiterate that 'the civilian population as such, as well as individual civilians, shall not be the object of attack.' The same expressive protection cannot be found with regard to combatants and some might understand this difference as indirect authorisation of attack against them. But in fact, omission of special guarantees does not mean that a person is out of safeguards. On the contrary, under general principles and IHRL, which continues application in hostilities, every individual's life is protected and without explicit authorisation of killing in certain circumstances their life cannot be deprived. In this regard the omission of special protection leaves a person protected under general regime rather than allows killing of him.

However, article 51(3) of API and Article 13(3) of APII set out very important text that states that the protection of civilians against direct attacks is ceased when they take direct part in hostilities. In fact, no legally bind instrument provides elements of direct participation. Only ICRC adopted definition according which direct participation includes the following cumulative criteria:

[39] <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1> accessed 29 June 2014.

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. There must be a direct causal link between the act and the harm (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm (belligerent nexus).[40]

From this notion it shall be observed that a person can be attacked in hostilities only if these three cumulative elements are satisfied. Therefore, the same standards may be applied with regard to combatants. However, from this stage it can be said that nothing considers combatants as targets merely because of his status. Consequently, the principle of distinction neither allows nor implies that combatants can be attacked in armed conflict. It just reaffirms or reinforces the protection of civilians.

As regards combatant privilege some authors argue that the vulnerability of combatants is the corollary of their privilege to use force during armed conflict.[41] In other words, they assert that because combatants will not be prosecuted for killings during armed conflict, their killing shall be also permitted for adversary. This approach also seems to be logical but it lacks depth of analysis. Firstly, combatant status does not entitle a person to kill someone, but it just empowers him to participate directly in hostilities.[42] Besides that, even Prisoner of War (POW) status does not protect a combatant from being prosecuted if the acts of war were unlawful.[43] Accordingly, combatant status does not authorise blanket killings of adversary. It just allows a combatant to carry out hostile acts in accordance with law of armed conflict. Thus, combatants cannot kill and cannot be killed without restrictions merely because of their status. Only such actions may be tolerated which will be compatible with IHL.

Another attempt to verify combatants as target might be shadowed behind the status of *hors de combat*. According to Article 41(1) a person who is recognised as *hors de combat* shall not be made the object of attack. This category contains persons who have surrendered or due to incapacitation are unable to defend themselves. Still there is nothing in this statement that even implies attack on

40 Nils Melzer (Legal adviser of ICRC), *Interpretative Guidance on the Notion of Direct participation in Hostilities Under International Humanitarian Law* (ICRC, 2009), 46.

41 Oliver Kessler and Wouter Werner, 'Extrajudicial Killing as Risk Management' (2008) 39(2–3) Security Dialogue 289, 298.

42 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, article 43(2).

43 Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98(1) The American Journal of International Law 1, 15.

combatants. This provision aims to protect special category of persons and does not affect on combatant who is object to general safeguards.

From this overview it can be said that combatant is a person and his life is also protected under IHL, which does not authorise killing of an individual simply because of his status. However, some scholars still try to find justification of the deprivation of combatant's life. As Daniel Statman asserts 'judged as individuals, most soldiers would be morally exempt from being killed by the enemy, but judged as agents of a collective, they would lose this immunity and become (morally) legitimate targets'.[44] Similarly, Elizabeth Wicks argues that 'war creates unique circumstances in which a person does not act individually but rather on behalf of a collective. The individual soldier kills in the name of the collective and the victim dies as a representative of the enemy collective.'[45] The central idea behind this approach is that in armed conflict a combatant acts not in the name of him but on behalf of collective. As members of adversary army combatants pose 'institutionalised danger', therefore they might be attacked.[46] To some extent, this approach is logical because all combatants pose potential threat to adversary. However, there are at least two very significant arguments that cannot reconcile with this theory. Firstly, such an approach is contrary to the human dignity, which is the basis of entire HR system. Any human being shall be treated as individual not an abstract creature or part of collective. The protection of human rights is provided for each single individual and such individual right cannot be deprived on the ground of collective guilty. This theory to some degree echoes the collective punishment that is strictly and explicitly prohibited under both IHL and IHRL.[47] Therefore, deprivation of combatant's life cannot be justified as struggle against institutionalised danger.

Besides that, such an approach raises serious questions concerning principle of necessity. This principle under IHRL requires any killing to be *ultima ratio.*[48] When it comes to necessity under IHL it requires any attack to be necessary for military purposes and aimed to gain definite military advantage.[49] Moreover, methods and means shall be employed on the basis of which one accomplishes the necessary objectives with the least possible harm.[50] In the words of conventions,

44 Daniel Statman, 'Targeted Killing' (2004) 5 Theoretical Inquiries in Law 179, 189–190.

45 Elizabeth Wicks, *The Right to Life and Conflicting Interests* (Oxford University Press 2010), 97.

46 Oliver Kessler and Wouter Werner, 'Extrajudicial Killing as Risk Management' (2008) 39(2-3) Security Dialogue 289, 298.

47 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, article 33.

48 *McCann and others v UK*, App no 18984/91 (ECtHR, Grand Chamber, 27 September 1995) para 149.

49 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, article 53(2).

50 Roberta Arnold and Noelle Quenivet (eds), International *Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers 2008), 341.

it is prohibited to cause unnecessary suffering.[51] Based on these requirements and recalling the very idea of any combat to overpower enemy rather than destroy it, one can conclude that killing a combatant who himself does not pose any threat in the given circumstances will never be necessary. Such a policy leaves no room for a consideration of what might amount to a necessary response to a particular threat or use of violence.[52] Moreover, it indirectly violates prohibition on attacks against persons *hors de combat* because a person is not given a chance to surrender.

To sum up, it can be said that life is of no less value in times of war than in times of peace, nor is the life of an enemy of less value than the life of a friend. A combatant can be killed only in case he, by his actions not by his status, poses a threat to adversary and killing is the only feasible measure to gain military advantage. Accordingly, arbitrary deprivation of combatant's life is associated with the same elements as in ordinary circumstances. The only difference is that in the latter case military advantage is decisive criterion but it does not mean that killing is always necessary for that end. In fact IHL never allows killing, but it talks about permitted attack. According to Article 49(1) of API attack is any violence. Consequently, lethal force shall be applied as last sort when it is unrealistic or impossible to achieve the same advantage by incapacitation of enemy or giving chance to surrender. Of course, due to exigencies of armed conflict mostly deadly force might be unavoidable but it does not entail that IHL authorises blanket killings of combatants.

3.2 Killings of Civilians in Hostilities

As already noted, civilian might be attacked if he directly participates in hostilities.[53] However, IHL also admits another condition when the lives of civilians may be deprived as side effect of military necessity. In particular, civilians can be hit when they are located insight the target or reside in the vicinity of target. In other words, the loss of civilians might be incidental. In fact, IHL does not prohibit such loss of civilian life as such, but bars attacks, which may cause incidental loss excessive in relation to the concrete and direct military advantage, anticipated.[54] This occasion is entirely reflection of the principle of proportionality. This principle under IHL is different from IHRL.

[51] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 35(2).

[52] Interights Manual for Lawyers, *The Right to Life Under the European Convention on Human Rights (Article 2)* (2011) 18.

[53] Nils Melzer (Legal adviser of ICRC), *Interpretative Guidance on the Notion of Direct participation in Hostilities Under International Humanitarian Law* (ICRC, 2009), 46.

[54] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 51(5)(b).

Specifically, in peacetime the proportionality is measured in the light of protecting life of others,[55] while in armed conflict military considerations determine benchmarks of proportionality.

Pursuing to balance requirements of IHL and IHRL it shall be noted that proportionality during armed conflict must respect both human life and military considerations. On the one hand, from HR perspective it is difficult to imagine that it may ever be justified to make innocent human beings the victims of calculated military force.[56] On the other hand, if such 'collateral damages' were not legally accepted the lawful conduct of military operations would become nearly impossible.[57] In fact, there is no method or tool that can harmonise these radical requirements. But still IHL standard has to be criticised due to several reasons. Firstly, it is absolutely impossible to assess objectively when incidental loss is excessive. How many innocent civilian should be died to consider attack as disproportionate? What is the 'currency rate' of human life in relation to military advantage? Who has to calculate collateral damage and where is the guarantee of objectivity?

Existence of these unanswered questions means that any killing of civilians on that ground will be arbitrary because the basic element of the concept is not safeguarded. In particular, the central requirement against arbitrariness is that any possible deprivation of life shall be prescribed by law and this law shall be clear and coherent to exclude any unrestricted discretion.[58] On the contrary, the principle of proportionality under IHL is so vague that assessment of permitted loss of civilians is entirely dependent on 'anticipation' by military leadership of adversary. Accordingly, without objective yardstick any loss of civilian is likely to be arbitrary deprivation of life. Besides, the proportionality principle weighs human life quantitatively and therefore it is also incompatible with human dignity, which is essential precondition of freedom, justice and peace in the world[59]. It indirectly states that the killing of few civilians is permitted until it reaches the certain number of lives. Therefore, it contradicts the very essence of human dignity, which demands respect of each individual's right.[60] Moreover, the main significance of the right to life lies in its quality rather than quantity.

55 Alexandre de M. L. Tolipan, *Right to Life and the Use of Deadly Force Under the European Convention on Human Rights* (Universite de Geneve Institut Universitaire de Hautes Études Internationales, October 2006) 35.

56 Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds), *The Right to Life* (Martinus Nijhoff Publishers 2010), 167.

57 Ibid, 169.

58 *Guerrro v Colombia,* Communication no R.11/45 (HRC, 31 March 1982), para 13.1.

59 See Preamble of ICCPR.

60 Ibid.

3.3 Elements of the Arbitrary Deprivation of Life in Armed Conflict

From the previous sections it can be observed that like IHRL deprivation of life under IHL shall satisfy principles of necessity and proportionality. However, the understanding of such principles is different in the context of armed conflict where central determinative factor is military consideration. Therefore, any taking of life shall be necessary for military advantage and proportional to that end.

As regards to necessity, even in hostilities a person can be killed if other softer measures cannot achieve the aim pursued.[61] Consequently, the only difference from peacetime standards in this regard is that in armed conflict military necessity is the central guiding principle[62] and the circumstances where killing is necessary occurs quite often than in peacetime. When it comes to proportionality, the ambiguity of the principle automatically entails arbitrariness since adversary has unlimited discretion to assess 'proportional' collateral damage.

As a consequence, it can be said that paradoxically combatants are better protected in hostilities than civilians to the extent that regulations on their taking of life is clear and foreseeable while the life of civilians as incidental victims is not properly protected under law but rather depends on goodwill of adversary commanders. Accordingly, it has to be observed that direct deprivation of life during hostilities is arbitrary if it is unlawful, unnecessary or disproportionate while side effect killing causing incidental loss of civilians may always be arbitrary.

4. Conclusion

After analysing theoretical approaches and existing cases, articulating doctrinal and practical challenges, exploring actual and potential questions, the following conclusions should be outlined: Unlike widespread and often cited approach IHL cannot be considered as *lex specialis* with regard to IHRL. On the contrary, both sets of rules have the same value and their requirements shall be taken into account in similar way. Accordingly, it has to be acknowledged that verification of arbitrariness in armed conflict necessitates a fair balance between military and humanitarian considerations.

The review demonstrated that almost axiomatic opinion that combatant can be killed during hostilities is inaccurate and IHL does not allow blanket killing of warriors. What is permitted in fact is that combatant can be attacked if he poses threat to the adversary by his actions rather than

61 Expert Meeting on the Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms (Report prepared and edited by Gloria Gaggioli Legal adviser, ICRC), 17.

62 Nobuo Hayashi, 'Contextualizing Military Necessity' (2013) 27 Emory International Law Review 189, 192.

his status of being combatant. In other words, mandatory instruments of IHL do not support the idea that every combatant causes collective or institutional threat. Moreover, even in circumstances when combatants pose a threat IHL allows only attack against them rather than killing. Therefore, general rules of necessity and proportionality continues application in this case and consequently a combatant can be killed when it is the only feasible measure to gain military advantage. Accordingly, in relation to combatant's life the same standards are applicable as it is during normal circumstances of peacetime. The main difference is that due to exigencies of armed conflict deadly force might be unavoidable in a huge range of occasions but it does not entail that IHL authorises blanket killings of combatants.

As regards incidental loss of civilians, the central issue in this respect is the principle of proportionality under IHL. This principle paves a way to twofold problem. Firstly it authorises incidental loss of civilians if the number is proportionate to the anticipated military advantage. In other words, it means that the value of life is quantitative rather than qualitative that clearly disregards the unique character of human dignity. This principle directly recognises absolute primacy of IHL over IHRL by requiring that military advantage can justify killings of innocent civilians. However, one might try to rebut this assertion stating that incidental loss might be seen as unavoidable in many circumstances and the exigencies of armed conflict might substantiate such damage. But the second shortcoming of the principle is irrefutable. IHL does not provide any guidance how one can objectively calculate collateral damage and assess when incidental loss is proportional. On the contrary, such an assessment entirely depends on the will of commanders. Consequently, it can be stated that the contemporary concept of proportionality under IHL in the light of incidental loss is so vague that every incidental death of civilians automatically constitutes arbitrariness. In this case even the most rudimentary requirement against arbitrary killing – prescription by law – is not satisfied.

To sum up, it can be said that direct deprivation of life during hostilities is arbitrary if it is unlawful, unnecessary or disproportionate while side effect killing causing incidental loss of civilians may always be arbitrary. Therefore, it can be concluded that apart from paradoxical exception of incidental loss of civilians, theoretically the right to life is protected in the same degree during hostilities as in peacetime. However, in reality, armed conflict presents unique circumstances in which human life becomes more vulnerable than at other times.[63] Consequently very often the theoretical provisions might become texts without tangible effect for victims due to exigencies of the armed conflict. From this standpoint the protection of the right to life in armed conflict occurs

[63] Elizabeth Wicks, *The Right to life and Conflicting Interests* (Oxford University Press 2010), 79.

to be contextual and random rather than universal and effective for every individual. However, it should be acknowledge that practical obstacles exist to be overtaken rather than ignored and states must do their best to protect life to its maximum extent in every circumstance.

DO ENGLISH LAWS ON ABORTION ADEQUATELY PROTECT THE INTERESTS OF THE FOETUS?

Persefoni Ioannou*

Abstract

This article focuses on a sensitive topic of medical law and ethics across different jurisdictions, namely: the regulation of abortion. I focus on English abortion laws, with the aim of examining whether the foetus' interests are adequately protected by English law, given that there is no legally recognised right to life for the unborn. After providing the general legal framework of abortion in the UK - with specific reference to the Abortion Act 1967 – as amended by the Human, Fertilisation and Embryology Act 1990 – I clarify that English abortion laws are far from liberal – as they are usually erroneously deemed – since they largely rely on medical professionals' discretion. Foetus-protective judicial attitudes will also be examined, in an attempt to illustrate whose interests are in fact prioritised in cases where a maternal-foetal conflict is unavoidable. I conclude by arguing that despite foetus' moral significance, women's rights to autonomy should always prevail in the maternal-foetal conflict. Besides, the judiciary's hesitance – at both a national and a European level- to accord to the foetus a legal status as well as established legal rights, indicates that English Courts should be pro-choice-minded in abortion cases

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1. Introduction

In English law there is neither a foetal right to life, nor a right to an abortion for a pregnant woman. Instead, women must satisfy a specific ground under the Abortion Act 1967 (1967 Act), as amended by the Human, Fertilisation and Embryology Act 1990 (1990 Act), in order to obtain a lawful abortion. The 1967 Act was intended to enhance the protection of women's autonomy rights, but since abortion is a complex area largely based on morals and ethics, there has always been a debate in relation to the maternal-foetal conflict and whose interests should prevail. The English law, in my view, certainly attaches to the foetus a significant status, but I doubt whether it adequately protects it.

2. Evaluation of the Legal Framework

The starting point of the domestic laws on abortion is section 58 of the Offences Against the Person Act 1861 (1861 Act) which provides a criminal offence punishable by a maximum penalty of life imprisonment for any woman or any other person who unlawfully and intentionally procures a miscarriage. Even if the Act did not mention anything about the foetus, 'it was the first time that both foetal and maternal interests, in relation to pregnancy, were acknowledged'[1]. Then, the Infant Life Preservation Act 1929 (1929 Act) created an exception to the 1861 Act, making it a felony to procure a miscarriage of any child capable of being born alive except where the life of the pregnant woman was at risk.[2] It was the first time that Parliament and society accepted that there were situations in which it was necessary to give preference to the maternal, rather than to the foetal, welfare.[3]

The position of the common law in respect of abortion is illustrated in the case of *R v Bourne*,[4] in which it was held that the abortion was necessary to protect the woman's mental health. The doctor was not convicted under section 58 of the 1861 Act, since he was acting in good faith to preserve the mother's physical and mental health.

However, the increasing number of back-street, unsafe abortions and the need to protect medical professionals that were in a vulnerable position, not knowing whether they would face liability under s.58 if they provided a woman with an abortion, led to the 1967 Act which provided

1 Sara Fovargue and José Miola, 'Policing Pregnancy: Implications of Attorney-General's Reference (No 3 of 1994)' (1998) 6 Medical Law Review 265.
2 See s. 1 of the 1929 Act.
3 Fovargue and Miola (n 2).
4 [1939] 1 K.B. 687.

statutory defences to the 1861 Act; it did not provide a defence to the crime of child destruction as set out in the 1929 Act, however.

The Warnock Report[5] led to the 1990 amendments which made the 1967 Act a system whereby abortion is prima facie illegal, unless two medical practitioners acting in good faith agree that it is necessary.[6] The 1990 amendments also reduced the time limit of abortion from twenty-eight weeks' gestation period to twenty-four weeks.

In addition to this time limit, the first ground requires that the continuance of the pregnancy would involve a risk to the mental or physical health of the pregnant woman or any existing children in her family.[7] This ground is called the social ground, as it considers socio-economic reasons that lead women to abortion and as already argued: 'it can be relatively easily satisfied'[8] because abortion only needs to be necessary in order to promote the woman's mental well-being rather than to prevent her from suffering physical or psychiatric harm [9]. Moreover, this section, read in conjunction with s. 1 (2) which provides that 'account may be taken of the pregnant woman's actual or reasonably foreseeable environment', can provide the broadest justification for abortion, because the special weight that is given to a woman's concerns of the high risks involved with carrying a pregnancy to term and with childbirth can render an abortion imperatively necessary for reasons of both mental and physical health. Reality reveals that the law is powerless to police the reasons for which women obtain abortions under section 1 (1)(a).[10]

In direct contrast, section 1 (1)(b)'s conditions are extremely serious, since abortion must be the only solution for the prevention of a grave, permanent injury to the physical or mental health of the pregnant woman. Furthermore, section 1(1)(c) of the 1967 Act permits abortion where the continuance of the pregnancy involves a risk to the life of the woman greater than if the pregnancy were terminated – situations where a woman would become a physical or mental wreck.[11] The fourth ground, known as the disability ground, permits abortion where the child may be born seriously handicapped.[12] This ground's controversy will be discussed later on in this article.

5<http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf> last accessed 18 April 2014.

6 See section 1(1) of the 1967 Act.

7 See section 1 (1)(a) of the 1967 Act.

8 Kristina Swift and Michelle Robson, 'Why Doctors Need not Fear Prosecution for Gender-Related Abortions' (2012) 76(4) Journal of Criminal Law 348.

9 Ibid.

10 Ibid.

11 As per MacNaghten J in *R v Bourne* [1938] 3 All ER 615, 692.

12 S1 (1)(d) of the 1967 Act.

Although the 1967 Act seems quite liberal, given the flexibility of the first ground under which most abortions are justified,[13] and provided that the lawfulness of an abortion depends upon whether the doctors formed their opinion in good faith that the woman's case fits within the statutory grounds and not upon whether those grounds in fact exist,[14] the English laws can be considered medicalised, rather than liberalised.

Academics have criticised this medicalisation, stating that 'the issue of abortion became a medical rather than a legal matter; even if abortions can only be performed within strict legal parameters, the final arbiters of decisions concerning abortion are doctors'.[15] Hence, the operation of the Act is in the hands of the doctors, who must in good faith judge that the defence to a crime is satisfied.

3. The Foetus' Right to Life

As per Sir George Baker, the foetus has no rights in English Law, and thus no standing to assert any claim; it cannot have a right of its own until it is born and has a separate existence from its mother[16] . Indeed, foetuses have no legal status in English law and this is evidenced in *C v S* [17] – where a father could not prevent his partner's termination of pregnancy since medical evidence suggested that the foetus was not viable - and in *Re f (in Utero)*[18] – where the foetus whilst in uterus could not be made a ward of court. Likewise, it is not possible to bring proceedings in the name of the foetus.

Nevertheless, in *Attorney-General's Reference* (*No 3 of 1994*),[19] the House of Lords reasoned that, although the foetus is not a person in the eyes of the law, a conviction would be possible for injuries causing the death of a foetus that is in utero, provided that the injuries crystalise once the child is born alive. Initially, the Court of Appeal reasoned that 'the foetus is part of the mother until it has an existence independent of her, and an intention to cause serious injury to the foetus is an intention to seriously injure the mother'[20]. In contrast, the House of Lords reasoned that a foetus is not simply a part of the mother: 'they are two distinct organisms living symbiotically, not a single organism with two aspects'.[21]

13 Swift and Robson (n 9).
14 Sally Sheldon, 'The Law on Abortion and the Politics of Medicalisation' in Jo Bridgeman and Susan Millns (eds), *Law and Body Politics: Regulating the Female Body* (Aldershot 1995).
15 Ibid.
16 *Paton v British Pregnancy Advisory Service Trustees* [1978] 2 All E.R, 276–279.
17 [1987] 1 All E.R. 1230.
18 [1988] 2 All E.R. 193.
19 [1998] A.C. 245.
20 L Taylor CJ, [1996] 2 All E.R. 10, 18.
21 (n 20), as per L Mustill, 275.

Generally, the ethical debate on the status of the foetus revolves around the idea that if the foetus *is* a person, it has a right to life and cannot be killed, but if it is *not* a person, the foetus can be removed at the wish of the woman. Academics have criticised the former, since it implies that doctors may choose to prioritise the foetus' interests over the mother's, when they clash. This clearly goes against Thomson's argument of a woman's entitlement to self-defence when both the woman and the foetus endanger the life of the other, even if this will cause foetus' death.[22]

Interestingly, the European Court of Human Rights' (ECtHR) jurisprudence also shows that the status of the foetus' right to life under the European Convention on Human Rights (ECHR) is indeterminate. *Vo v France* [23] is a landmark case in ECtHR jurisprudence as 'it was the first time the Court considered directly the possible application of Article 2 of the ECHR – the right to life – to the unborn foetus, in circumstances where the termination was not voluntary'.[24]

The ECtHR ruled that 'the unborn is not regarded as a person directly protected by Article 2; if the unborn does have a right to life, it is limited by the mother's rights and interests'[25]. The Court refrained from ruling directly on whether the foetus has or should have a right to life under Article 2 of the ECHR, because, at a European level, there was absence of social and moral consensus on the moral and legal status of the foetus and on the scientific and legal definition of the beginning of life. Therefore, the issue fell within the margin of appreciation, to be decided on by each Member State. The only point of agreement amongst them was that the foetus is human and that its capacity to become a person meant that it should be protected as a matter of human dignity, but without making it a person with a right to life protectable under Article 2. Nonetheless, it was decided that it would not be contrary to the Convention for a country to enact legislation protecting the foetus, but there was no need to provide criminal law sanctions if the foetus was adequately protected under civil law.

Both *Paton v UK* [26] and *X v UK* [27] concerned the possible application of Article 2 of the ECHR to the foetus under the English Law. In the latter, the Commission held that even if the foetus *was* protected under Article 2, its rights to life would be subject to an implied limitation in respect of an abortion to protect the mother's life or health.

22 Judith Jarvis Thomson, 'A Defence of Abortion', in (1971) 1(1) Philosophy and Public Affairs, 47–66. Reprinted in James Rachels (ed.) *Moral Problems* (Harper & Row 1979), 130–50.

23 (2005) 10 EHRR 12.

24 Aurora Plomer, 'A Foetal Right to Life? The Case of Vo v France' (2005) 5(2) Human Rights Law Review, 311–338.

25 (n 24) para [80].

26 (1980) 3 EHRR 408.

27 (1980) 19 DR 244.

In *Paton v UK*, a father, seeking to prevent his wife's access to abortion, claimed that the 1967 Act contravened Article 2 of the Convention which, he claimed, protected the life of the unborn foetus. He also claimed his Article 8 rights had been violated, in relation to respect for private and family life. The Commission rejected his application and reasoned that the woman's Art. 8 rights prevailed. However, the Court went on to consider that if a right to life *is* assumed in the early stages of the pregnancy, such a right could lawfully be limited. The Court then went on concluding that a right to life could be assumed, since the foetus, lacking legal personality, had, at best, a limited right to life. It was clarified, however, that this conclusion did not amount to any recognition of a foetal right to life.

Thus, *Paton* left open the question of whether Article 2 covers the life of the unborn, but it indicated that 'the interests in the life and health of the pregnant woman trump any putative foetal right to life in the first trimester of the pregnancy and possibly later.[28] As a result, the ECtHR neither explicitly protects nor legally recognises any foetal rights to life.

4. Foetus' Moral Significance

Notwithstanding the arguments suggesting that since the foetus is not recognised in law it cannot have full moral rights,[29] the foetuses *do* have moral significance and it is right that they are protected for the sake of life's sanctity.

In addition, the gradualist approach to the foetal moral status, which suggests that the longer a pregnancy has developed, the greater must be the justification for compromising it,[30] is in accordance with the societal perception.[31] Indeed, foetuses may not enjoy legal status since 'they don't have legal personality, but they enjoy general protections which still stand today'.[32] This is evidenced in *St George's NHS Trust v S*,[33] in which it was decided that the interests of the foetus cannot be disregarded on the basis that in refusing treatment which would benefit the foetus a mother is simply refusing treatment for herself.

Notably, Brazier mentioned: 'the question whether a foetus is a person is essentially a religious one and incapable of scientific assessment';[34] she essentially doubts whether the law should impose that

28 Plomer (n 25).
29 Mary Anne Warren, 'On the Moral and Legal Status of Abortion', (1973) 57 The Monist, 43–61.
30 Rosamund Scott, 'Interpreting the Disability Ground of Abortion Act' (2005) 64(2) Cambridge Law Journal 388.
31 Ibid.
32 Sheelagh McGuiness, 'Law, Reproduction and Disability: Fatally 'Handicapped'' (2013) Medical Law Review 21.
33 [1998] 3 W.L.R. 936.
34 M Brazier, 'Embryo's '"Rights": Abortion and Research' in Freeman M (ed.) *Medicine, Ethics and Law* (Stevens 1988), 9–22.

view on pregnant women. Nonetheless, the societal desire and the 'State's interest in the protection of the unborn,[35] despite its lack of legal personality, cannot be ignored.

5. Protection of the Foetus' Rights by the English Courts

The court-ordered caesarean cases indicate the court's foetal-protection approach. Judges were willing to find women incompetent for refusing a caesarean section and instead authorised the operation at the expense of the women's autonomy rights or even at the expense of their medical interests - in *Re MB (caesarean section)*,[36] only the foetus' life was at risk but the court enforced the operation to save its life, despite this not being in the woman's best medical interests.

Initially, in *Re T (adult: refusal of medical treatment)*,[37] Lord Donaldson qualified the right to refuse medical treatment when that would lead to the death of a viable foetus. Later, in *Re S (Adult: Refusal of Medical Treatment)*,[38] the court considered the foetus' interests and authorised a caesarean to save the life of both the foetus and the woman.

The case of *St George's Healthcare NHS Trust v S (No2); R v Collins, ex parte S (No 2)*[39] clarified the English legal position, as it was held in the case that the pregnant woman's right to refuse 'is not reduced or diminished merely because her decision to exercise it may appear morally repugnant;' the 'autonomy of the woman was placed above any interests of the foetus, including that of being born alive'.[40]

However, the issue of competency continued to act as a catalyst for overriding a pregnant woman's autonomous, irrational even choice. An extreme example of this 'legally unjustifiable'[41] judicial behaviour is the case of *Rochdale Healthcare (NHS) Trust v C*,[42] in which, despite the woman's clear statement that she would rather die than have a caesarean section, and even if her mental capacity was not in question, Johnson J held that the operation was in the best interests of the patient; it has been suggested that 'he referred to the foetus and not the pregnant woman'.[43]

Academics argued that the *Attorney-General's Reference (No 3 of 1994*)[44], which opens the door for criminal liability to ensue when the subject of an unlawful act is a foetus, when combined with the court-ordered caesareans, reveal a trend within the judiciary to accord precedence to foetal

35 C Wells and D Morgan, 'Whose Foetus is it?' (1991) 18 Journal of Law and Society 431.
36 [1997] 8 Medical Law Review 217.
37 [1992] 4 All E.R. 649, 652–653.
38 [1992] 4 All E.R. 671.
39 [1998] 3 All E.R. 673.
40 James Heartfield, 'Abortion – Whose Rights?' <www.prochoiceforum.org.uk/al3.php.> accessed 25 April 2014.
41 Fovargue and Miola (n 2).
42 [1997] 1 F.C.R. 271.
43 Fovargue and Miola (n 2).
44 (n 20).

protection over maternal autonomy[45]. Additionally, Grubb and Pearl criticised these cases by stating that the Parliament in the 1967 Act favoured the interests of the mother over those of the foetus and it would be wrong for the courts to adopt any other policy; only Parliament should do this[46]. Overtly, in the caesarean cases, the courts (paradoxically) acted as if the foetuses have established legal rights in English Law.

Moreover, the court's foetal-protection approach was determinative in *D v Berkshire C.C*,[47] in which the House of Lords applied the Children and Young Person's Act 1969 in order to authorise the removal of the child from its mother. Despite this Act's application to children and not to foetuses, the judges were willing to apply it, arguing that the purpose of the statute was to protect children. Although the outcome of this decision left open the question of maternal liability for children born addicted to illegal drugs,[48] it illustrated that the foetus may not have legally recognised rights or interests, but that the pregnant woman may still be held responsible for her actions relating to the foetus.

6. Civil and Criminal Law Protection

The criminal caw affords a significant protection to the unborn, since abortion is still *prima facie* a criminal offence under s.58 of the 1861 Act, unless it can be justified under the 1967 Act. In *R v Sarah Louise Catt* (17 September 2012), a pregnant woman who bought abortion drugs from the Internet and disposed of the body of the foetus, was convicted under s.58 of the 1861 Act for carrying a miscarriage. Cooke J, taking into account public policy considerations, emphasised that this offence is more serious than any offence except murder and, bearing in mind the need for deterrence, he sentenced her to eight years' imprisonment. Nevertheless, the criminal law does not recognise violence to the foetus as an offence against a person, since it is not a person in being.

In addition, the Civil Law's Congenital Disabilities (Civil Liability) Act 1976 protects the foetus from injuries sustained in utero, while it recognises the pregnant woman's autonomy over her own body. Generally, a woman cannot be liable in negligence for smoking, consuming alcohol or drugs during pregnancy, but she can be held liable if her negligent driving caused the foetus harm. However, this Act is only applicable to the newly born child, with the unborn having no rights of action in respect of injuries occurring prior to birth. Consequently, the civil law does not provide

45 Fovargue and Miola (n 2).
46 A Grubb and D Pearl, 'Protecting the Life of the Unborn Child' (1987) 103 Law Quarterly Review, 340.
47 [1987] 1 All E.R. 20.
48 Fovargue and Miola (n 2).

a direct remedy for harm to the health or life of the foetus itself unless it is born alive, when it acquires legal personality and has a right of action in respect to those injuries.

Comparatively, the civil law achieved an adequate balance between providing a remedy for the injured foetus and the rights of the pregnant woman, whereas the criminal law has left the question of the potential liability of a pregnant woman for her foetus unasked.[49]

7. English Law Prioritising Women's Autonomy

Fortin suggested that the 1967 Act has 'indicated that foetal interests were decreasing in importance' and has 'altered the status quo where the foetal interests were overriding the maternal interests, by permitting abortions in a specific number of situations'.[50] Specifically, the disability ground, which tries to balance the legal interests of the pregnant woman and the foetus, is most broadly accepted by academic lawyers[51] as following a parental interests' and not a foetal interests' interpretation.

Sheldon and Wilkinson argued that 'because very few foetuses aborted under this ground would have lives of little or no quality if born, most abortions under this section cannot be seen as protecting the foetus from such a life. Rather, in the most cases in which this section is invoked the real concern is with the woman's or parents' interests'.[52] Arguably, the purpose of the disability ground is to protect parents by giving them choice, since 'their views over the seriousness of the foetus' impairment have moral legitimacy, within reason'[53] – given the impact that a disabled child will have into their lives – and should be a matter of discussion with the clinicians. As for Morgan's objection to this interpretation – that section 1(1)(d) would essentially repeat section 1(1)(a), making section 1(1)(d) redundant – he noted that there could be more than one justification for this section and that section 1(1)(d) is already differentiated from section 1(1)(a), because of the time limit, therefore, it can never be superfluous.[54]

Concerning the application of the disability ground, when doctors believe that a particular abnormality meets the threshold of seriousness and that the risk of it materialising is substantial, a lawful abortion is justified under section 1(1)(d); it can only be challenged if evidence suggests that the doctors acted in bad faith. Importantly, there are very few prosecutions of doctors, and even

49 Fovargue and Miola (n 2).

50 Jane SE Fortin, 'Legal Protection for the Unborn Child' (1988) 51 Modern Law Review 54.

51 Andrew Grubb and Ian Kennedy, *Principles of Medical Law* (Oxford University Press 1999); Glanville Williams, *Textbook of Criminal Law* (Stevens 1978).

52 Sally Sheldon and Stephen Wilkinson, 'Termination of Pregnancy for Reason of Foetal Disability: Are There Grounds for a Special Exception in Law?' (2001) Medical Law Review 9.

53 McGuiness (n 33).

54 Derek Morgan, 'Abortion: the Unexamined Ground' (1990) Criminal Law Review 687–692.

in situations without specific statutory defences, the courts have been willing to construct a defence to shield a doctor from conviction, provided that he behaved responsibly, in the interests of his patient;[55] the criminal law defence of necessity may be employed in such circumstances to argue that the doctors' actions were justified.[56]

Also, it can be said that the lack of guidance as to the definition of this ground's crucial terms, 'substantial risk' and 'seriously handicapped', 'benefits women by allowing them greater access to abortion in practice than the statute might appear to provide'.[57] The case of *Jepson v Chief Constable of West Mercia*[58] in particular suggests that the definition of 'seriously handicapped' is not very difficult to satisfy. The claimant's argument was that Parliament intended only for extremely serious situations to justify the application of section 1 (1)(d) and not for fairly minor abnormalities. However, it was very difficult to prove that the doctor was not acting in good faith and the court refused to get involved for sensitive policy reasons.

Moreover, Sheldon submitted that 'no woman should be forced to carry to term a disabled, or any other foetus. Termination should be legally justified by the mere fact that a woman does not wish to continue with pregnancy'.[59] Additionally, Glover believes that 'when disability is very severe abortion is not merely permissible but is morally obligatory'.[60] Controversially enough, there is a taboo of allowing parents' interests to be considered in relation to the foetus' impairment, whereas it is easier to accept the legitimacy of parental interests in selective abortion, where 81 per cent of the abortions are justified under s1(1)(d).[61] However, a permissive regulation for abortion of disabled foetuses should be avoided, since that would amount to endorsement of serious discrimination against people with disabilities and would grant disabled foetuses a different, lower level of protection than they would otherwise have but for their diagnosis, which is ethically wrong.

Finally, under section 1 of the 1967 Act, in emergencies, only one doctor needs to certify the abortion if it is required to save the life of the mother. In such instances, there is no room for consideration of the foetus' interests. In addition, considering the legality of the 'morning after pill' and the fact that third parties have no right to obstruct a woman's access to abortion, one can say that the foetus is left unprotected and the law cannot do much to rectify this.

55 Fovargue and Miola (n 2).
56 Swift and Robson (n 9).
57 Ellie Lee, 'Tensions in the Regulation of Abortion in Britain' (2003) 30(4) Journal of Law and Society 533.
58 [2003] EWHC 3318.
59 Sheldon and Wilkinson (n 53).
60 Jonathan Glover, *Causing Death and Saving Lives* (Penguin 1977).
61 Sheldon and Wilkinson (n 53).

8. Conclusion

In summary, the foetus does not have any legally recognised right to life, neither under English Law, nor under the ECHR. Nonetheless, due to its moral significance, the foetus' interests are protected by the courts. However, when they clash with the woman's rights, it is reasonable for women's rights to prevail – since she is already a legal person with an established right to life under Art.2 of the ECHR, deprivation of which shall only occur when it is absolutely necessary (Art. 2 (2) of the ECHR).

Undoubtedly, the inconsistency of the English abortion laws (acknowledging that the foetus is not recognised in law but still prioritising its rights in the caesarean cases) and the socio-legal gap in the current laws [62] (the statutes' wording makes no reference to women's right to terminate, but the medical discretion seems to facilitate it) worked to protect women's right to self-determination and of their fundamental rights which are enshrined in the Human Rights Act 1998. Women's rights should not be infringed in order to protect foetus' hypothetical rights, especially in an era in which legal approaches focus on patients' autonomy.

To sum up, on the one hand, the protection afforded to the foetus under English Law cannot be described as adequate. On the other hand, a potential piece of legislation aiming to enhance foetus' protection at the expense of women's autonomy rights would be anachronistic in a pro-choice era.

[62] Swift and Robson (n 9).

MIXITY AS A METHOD OF TREATY-MAKING FOR EU SHARED COMPETENCE: A STUDY OF SHARED COMPETENCES, MIXED AGREEMENTS, AND THE DUTY OF SINCERE COOPERATION

Viktor Borecky*

Abstract

Some of the most difficult questions that arise within the area of external relations law of the European Union are those concerning of exercising Union competence in international treaty-making, the extent of the already exercised competence, as well as the problems related to the nature of such competence. Shared competences of the EU are possibly the most suspect to these considerations. This has resulted in not only a great number of conflicts between the Commission and the Council, but also a very complex case law developed by the CJEU, which has provoked much academic commentary. The recent codification in the Lisbon Treaty has not satisfactorily solved the complexity of the case law, and it is argued by both the present author and the academia that it has actually created more problems than it had solved.

Mixed agreements, or international agreements in which the EU and its Member States take part jointly, have been presented as a solution to these difficult issues. They are a very unique answer to these problems, which presents an equal number of advantages and disadvantages, especially since there is a strong tendency of the EU Member States to push for these agreements even in cases where they are legally not necessary. Moreover, there is a potential that conduct of some Member States in such mixed setting may fracture the joint EU external representation. One of the ways that the Court of Justice of the European Union has sought to curtail the latter problem has been the development of the duty of sincere cooperation, which can act as to limit the potentially unwanted conduct of EU Member States as far as mixed agreements are concerned. While recent case law has greatly expanded the scope of this doctrine, it is argued that the CJEU will have to address some of the ambiguities criticised by the academia, especially as regards the potentially highly restrictive repercussions it might have on the future exercise of Member State competence in mixed international agreements.

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1. Introduction

As the world's largest trading partner and major donor of humanitarian aid, the European Union has been developing an external dimension to its competences for several decades,[1] seeking to strengthen its presence in the world.[2] To accomplish this, the EU uses a variety of legal competence found in the Treaties, which are either exclusively or partially conferred upon it by its Member States. This raises numerous questions as to how the EU is to proceed in conducting its external relations, especially when concluding international agreements with various third States and international organisations, in areas that might only partially fall under the competence of the EU. Thus, out of both a legal and political necessity, the EU has sometimes been resorting to a practice of mixed agreements, requiring both the EU and its Member States to jointly participate in negotiating, concluding and implementing international agreements. Although maintaining coherence between the positions and actions of the EU institutions and its 28 Member States has proven to be difficult, the Court of Justice of the EU (CJEU) has been able to bring some level of clarity into the conduct of external relations, particularly as regards delimitation of competences and management of mixed agreements.

This paper will first concisely explore the external dimensions of EU shared competences, specifically those listed in Article 4(2) TFEU, by exploring the development of the CJEU's implied external competences and second, the nature of these competence. The complexity of this area of law will be examined, in order to illustrate the uncertainty that has resulted from the codification in the Treaty of Lisbon. Second, this paper will mostly seek to explain what mixed agreements are and analyse the legal reasoning behind using mixed agreements as an external expression of EU's external shared competence, as well as the problems associated with their use. Furthermore, this chapter will delve into the Court's evaluation of the duty of sincere cooperation, especially with regard to the most recent case law, and analyse how the Court has used this duty as an effective way of managing the exercise of shared competence in mixed agreements.

2. Shared Competence: Existence, Nature, and Codification

All EU competences must be exercised according to the principle of conferral, and its subsets of proportionality and subsidiarity, which among others require the Union to '…act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the

1 Paul Craig and Gráinne de Burca*, EU Law: text, cases, and materials* (5th, OUP, Oxford 2011) 302.
2 Craig and de Burca (n 3) 303.

objectives set out therein.'[3] However, a very strict interpretation of this principle could lead to the EU being crippled when exercising external relations, as a strict interpretation implies that the EU does not have the power to extend its competence beyond those narrowly defined by the masters of the Treaty, its Member States.[4] This proves to be a limiting factor, as this means that the Union cannot simply undertake any external action as it wishes.[5]

The Court has sought to formulate a correct balance between external dimension of EU competence and the principle of conferral throughout much of its case law. The CJEU clearly refers to this balancing act in Opinion 2/94,[6] where it has not only held that the principle of conferral had to be '…respected in both the internal action and the international action of the Community',[7] but also that acts of the Community based on specific conferred competence do not have to be '…necessarily the express consequence of specific provisions of the Treaty but may also be *implied* from them.'[8] The Court thus restates the effects of the principle of conferral, and points to the question of *existence* of external powers of the Union.[9] This question, along with the just as relevant question of *nature* of the external competence, is what dominates the case law of the Court with regards to external competence of the EU.[10] The present author believes that in order to fully understand the external dimension of shared competence, it is important to consider them through the prisms of these two separate, yet often hardly distinguishable questions.[11]

2.2 The Existence of an External Dimension of Shared Competence

2.2.1 The Existence of Express External Powers

Since the coming into force of the Lisbon Treaty, the EU has sought to bring greater clarity by separating its competence and defining their various effects.[12] Thus, the TFEU (Treaty on the Functioning of the European Union) characterises competences at EU's disposal as exclusive,[13]

3 Article 5(2) TEU.
4 Alan Dashwood, 'The Attribution of External Relations Competence' in Alan Dashwood and Christophe Hillion (eds), *The General Law of EC External Relations* (Sweet and Maxwell 2000), 116.
5 Bart Vooren and Ramses A Wessel, *EU External Relations Law* (CUP 2014), 74.
6 Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.
7 Opinion 2/94 (n 8) para 24.
8 Opinion 2/94 (n 8) para 24 (emphasis added).
9 Vooren and Wessel (n 7) 75–76.
10 Dashwood (n 6) 115.
11 Vooren and Wessel (n 7) 76.
12 Laaken Declaration on the Future of the European Union, annexed to the Presidency Conclusions, Laaken, 14 and 15 December 2001.
13 Art 3 TFEU.

shared,[14] coordinative[15], and those and that '…support, coordinate or supplement the actions of the Member States'[16].

Shared competences are a more complicated type of competences, as Article 4 TFEU includes a wide variety of competences that require varying conditions to be met for them to be exercised by the Union. Although Article 4(2) features the greatest number of fields of competence, the other two categories of areas of competence, found in Article 4(3) and 4(4) TFEU, require different modes of exercise of competence. This is why many academics seek to classify them differently from the competences listed in Article 4(2). For example, while Cremona classifies the competences of Article 4(3) TFEU and 4(4) TFEU as *parallel*,[17] Vooren and Wessel emphasise their non-pre-emptive nature[18] and thus call them *'shared non-pre-emptive competences'*[19]. Moreover, Klamert classifies them as '*irregular shared competences*', while classifying the competences of Article 4(2) TFEU as '*regular shared competences'*.[20] The author believes that for the purposes of this paper, the term *parallel* should be used to describe the competences under Article 4(3) and 4(4), as not only is this a far simpler classification than those offered by Vooren and Wessel, and Klamert, but it allows the present author to solely focus on the shared competence listed in Article 4(2), as they are the most common competences conferred upon the Union. As Vooren and Wessel succinctly put it, they are '...the default nature of the competences conferred on the Union.'[21]

Article 4(2) TFEU features 11 areas of competence, yet bears no express mention of an external dimension for the said competences, and neither is there any express mention of such a dimension within Article 2(2) TFEU, which defines the nature of shared competence. Thus, one must look for an express external basis for these provisions in specific chapters of the TFEU devoted to the said provisions. However, even this brings mixed results. While some chapters do contain provisions relating to external action (such as Art 191(4) TFEU for environment, Art 79(3) TFEU on international agreements for the immigration policy, as part of the area of freedom, security and justice competence), the vast majority of the competences enumerated in Art 4(2) do not bear express external dimension.[22] However, ever since the CJEU has begun developing the doctrine of implied powers in the 1970s, the EU has the power to act externally even in areas where there

14 Art 4(1) and (2) TFEU.
15 Art 5 TFEU.
16 Art 6 TFEU.
17 Marise Cremona, 'EU External Relations: Unity and Conferral of Powers' in Loic Azoulai (ed), *The Question of Competence in the EU* (Oxford University Press 2014), 69.
18 Pre-emption will be analysed below.
19 Vooren and Wessel (n 7) 102.
20 Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 145.
21 Vooren and Wessel (n 7) 103.
22 Vooren and Wessel (n 7) 78–80.

is no explicit mention of external competence, which will be explored in the next part of this section.[23]

2.2.2 Existence of Implied External Powers

In 1970, the European Commission initiated an application of annulment against the Council, seeking to annul the Council's actions with regards to an agreement envisaging work of crews of vehicles engaged in international road transport.[24] The Court's judgement in this case, known widely as *ERTA*[25] created a doctrine that has been developed in many subsequent judgements. The *ERTA* case is of a '…great constitutional significance', as the CJEU has put forward arguably '…two of the most important principles of EU's external relations law'.[26] The first principle concerns the existence of EU's implied external competences, while the second creates the possibility for the exclusionary nature of such competence with regards to Member States' acts.[27] The second principle will be discussed in the section on the nature of shared external competence.[28]

The most crucial findings of the Court as regards the purposes of the existence of implied external competence are as follows:

> *To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.*
> *Such authority arises not only from an express conferment by the Treaty—as is the case with Articles 113[Article 207 TFEU] and 114[Article 217 TFEU] for tariff and trade agreements and with Article 238 for association agreements—but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.*[29]

As Craig and De Burca point out, the logic of the Court arises from the argument that the Community would not be able to advance a viable external policy if it had to solely rely on its express competences.[30] This author finds this assertion very persuasive, considering the fact that the original EEC Treaty's only express external competences were found only in what is now Article 207 TFEU on the common commercial policy and Article 217 TFEU on association

23 Piet Eeckhout, *External Relations of the EU* (Oxford University Press 2011), 122.
24 Case C-22/70 *Commission v Council* [1971] ECR 263.
25 Vooren and Wessel (n 6) 81; *AETR* in the French versions.
26 Eeckhout (n 25) 70.
27 Vooren and Wessel (n 7) 82.
28 For a more detailed analysis of the existence question, please see Eeckhout (n 27), 71-113; G.de Baere, '*Constitutional Principles of EU External Relation'* (OUP 2008)16-28.; Vooren and Wessel (n 6), 74-99.
29 *Commission v Council* (n 26) paras 15-16 (emphasis and Lisbon Treaty renumbering added).
30 Craig and de Burca (n 3) 309.

agreements.[31] Moreover, it is submitted that the Court correctly understood that in order to prevent external action of Member States from 'affect[ing] [internal] rules',[32] effectiveness of the internal market would have to be insured via the ability of the Union to use international aspects of conferred competences.[33]

In order to get the most accurate picture of the development of the existence of implied external powers case law, it is prudent to point out paragraph 114 of Opinion 1/03, where the Court has summarised the extent of its jurisprudence in this area, just before the Treaty of Lisbon came into force.[34] The Court states:

> *The competence of the Community to conclude international agreements may arise not only from (1) an express conferment by the Treaty but may equally (2) flow implicitly from other provisions of the Treaty and (a) from measures adopted, within the framework of those provisions, by the Community institutions (see ERTA, paragraph 16). The Court has also held that whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake (b) international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (Opinion 1/76, paragraph 3, and Opinion 2/91, paragraph 7).*[35]

Although this authoritative paragraph on the existence of implied competence has been codified in the Lisbon Treaty,[36] it has not been codified in a satisfactory manner.

2.3 The Question of Nature: The Concept of Exclusivity through Pre-Emption

While the ERTA doctrine is of groundbreaking value with regards to the existence of external powers through implication, it is equally important for its first pronouncement of pre-emptive exclusivity.[37] The relevant paragraphs state that:

> *In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.*

31 Eeckhout (n 26) 70.
32 *Commission v Council* (n 26) para 17.
33 Alan Dashwood and Joni Heliskoski , 'The Classic Authorities Revisited, in Alan Dashwood and Christophe Hillion (eds) *The General Law of EC External Relations* (Sweet and Maxwell 2000), 8.
34 Opinion 1/03, *Competence to conclude the Lugano II Convernti*on [2006] ECR I-1145, para 114.
35 Ibid, para 114 (emphasis and numbering added).
36 Art 216(1) TFEU.
37 Craig and de Burca (n 3) 312–313.

> *As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the community legal system.*[38]

Thus, the two 'conditions' required for this type of exclusivity are: the existence of common rules, and that these rules may be affected by Member State's external action.[39] Hence, this is why it is also referred to as 'conditional exclusivity'.[40]

The Court has initially not been very explicit as to the meaning of these *common rules*.[41] Later It has given a wider notion to this term, framing it as going beyond 'common policies' in the Treaties,[42] especially within fields where there have been '…harmonising measures.'[43] This has been taken to mean that common rules may be any legally binding act of the Union.[44] However, the Court has not given a *carte blanche* to the Union to acquire exclusive competences by merely adopting any minor rules; the CJEU has been adamant that in cases of implied competence in particular, a rigorous analysis of the connection between common rules and the international instrument in question has to be conducted.[45]

Unfortunately, although going into the intricacies of the Court's case law is beyond the ambit of this paper, the reader is invited to read the analysis by Vooren and Wessel, as they arguably provide the most easy-to-follow study of the case law on existence and nature of competence.[46] Their analysis organises the CJEU's legal method on the *affect test* into two steps,[47] following the judicial pronouncement in paragraph 133 of Opinion 1/03, which notes that '…account must be taken not only of the area covered by the [Union] and by the provisions of the agreement envisaged, but also of the nature and the content of those rules.'[48] Furthermore, it first focuses on finding the matching rules between the Union internal and the agreement in question to be identified, or as

38 *Commission v Council* (n 26) paras 17–18 (emphasis added).
39 Pieter J Kuijper, Jan Wouters, Frank Hoffmeister, Geert De Baere, and Thomas Ramopoulos, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (Oxford University Press 2013) 8.
40 Vooren and Wessel (n 7) 111.
41 Ibid.
42 Opinion 2/91, *re ILO Convention No 170* [1993] ECR I-1061, para 11.
43 Opinion 1/03 (n 36) para 118.
44 Vooren and Wessel (n 6) 113.
45 Ibid.
46 Vooren and Wessel (n 7) 74–137.
47 Vooren and Wessel (n 7) 114.
48 Opinion 1/03 (n 36) para 133 (emphasis added).

Vooren and Wessel say, an 'overlap' needs to be found.[49] The second step of their analysis focuses on the *nature* and *content* of that 'overlap'.[50]

On the other hand, the readers are also invited to read an analysis by De Baere,[51] while those that are interested in a case-by-case analysis are invited to read Eeckhout's analyses, which also provides a study of significant developments in the Court's case law from ERTA to Opinion 1/03, as well as a discussion of the codification of this case law in the Lisbon, which will be discussed in the following section.[52]

2.4 Codification in Lisbon: Article 216(1) TFEU and Article 3(2) TFEU

After concisely considering both the questions of existence and nature of EU external competences as manifested in the CJEU's case law, it is important to now look at the codification of this case law in the Lisbon Treaty, in order to see whether they bring clarity into EU external relations law. The Lisbon Treaty has sought to codify the case law on existence of implied competences in Article 216 (1) TFEU, which states:

> *The Union may conclude an agreement with one or more third countries or international organisations (1) where the Treaties so provide or (2) where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or (3) is provided for in a legally binding Union act or (4) is likely to affect common rules or alter their scope.*[53]

Unfortunately, this provision has caused quite a bit of concern amongst the academia, as this codification of implied external competence does not satisfactorily reflect the rather 'complex and sometimes obscure' case law on implied external competence.[54] For example, Cremona notes that part 2 of the provision referring to the necessity requirement, seems to imply an expansion of implied powers, due to the fact that it does not refer to an international agreement being necessary to fulfil an objective for which internal competence has been set out, but instead it broadly refers to *any* objectives spelled out in the Treaties.[55] Thus, Cremona argues the provision is word in a

49 Vooren and Wessel (n 7) 114.
50 Ibid, 114.
51 De Baere G., '*Constitutional Principles of EU External Relation'* (Oxford University Press 2008), 33–72.
52 Eeckhout (n 25) 70-119.
53 Numbering has been added by the author.
54 Marise Cremona, 'Defining Competence in EU External Relations: lessons from the Treaty reform' in Alan Dashwood and Marc Marescaeau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press 2008), 56.
55 Ibid.

way that even the very broad general objectives Article 21 TEU could serve as a source of the necessary objectives.[56] Wyatt and Dashwood et al mirror these concerns, noting that while this part of the provision is clearly meant to codify the jurisprudence arising from Opinion 1/76, the drafters of the Treaties have regrettably used paragraph 4 of that judgement as the basis for drafting this part (which uses less precise language and is far more expansive).[57] Unlike paragraph 3 of the said Opinion, which has been consistently cited across much of the case law of the Court,[58] paragraph 4 has not received such positive treatment.[59]

The third part of Article 216(1) provides powers to conclude an international agreement when it is '…likely to affect common rules or alter their scope.' While it is clear that it is meant as a codification of the *ERTA* doctrine, its wording is too similar to Article 3(2) TFEU, which rather deals with the nature of implied exclusive competence, not its existence.[60] Art 3(2) TFEU provides:

> *The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.*[61]

This results in the muddling of what was meant to be a clarification of external competence by the Lisbon Treaty.[62] For example, the distinction in terms of existence of exclusive implied competences and non-exclusive implied competences, which have been distinguished by Opinion 1/03,[63] now becomes problematic, considering that the effects-based case law, which is equally referred to in Article 3(2) and Article 216(1), has been always a part of the Court's jurisprudence on exclusivity, not existence of competence.[64]

Equally importantly, the drafting of Article 3(2) TFEU is problematic with regards to the nature of competence. One of the problems is that the article does not specify what are the limits of the 'affect common rules or alter their scope' phrase.[65] Are these merely supposed to serve as a clumsy means of codifying the *ERTA* case law, or is it meant as an expansion into the field of 'minimum

56 Ibid.
57 A Dashwood, M Dougan, B Rodger, E Spaventa, D Wyatt, *Wyatt and Dashwood's European Union Law* (Hart Publishing 2011), 920.
58 See for example Opinion 2/91 (n 44) para 7; Opinion 1/03 (n 36) para 114.
59 Wyatt and Dashwood (n 57) 920.
60 Cremona (n 54) 58.
61 (Emphasis added).
62 Ibid.
63 Opinion 1/03 (n 50) para 115; also see: M Klamert and N Maydell, 'Lost in Exclusivity: Implied Non-Exclusive Competences in Community Law' (2008) 13 European Foreign Affairs Review 493, 495.
64 Cremona (n 54) 58.
65 Ibid.

standards?'[66] It is submitted that the drafting of the Article suggests it could be an expansion, as both Opinion 2/91[67] and the *Mox Plant*[68] cases confirm that while the EU has competence to enter into international agreements in fields that provide minimum harmonisation, even though they are only of shared nature.[69]

While Eeckhout does find the ambiguities of this drafting troubling, he notes that there are small, yet important differences between these two Articles, which point to the important distinctions with regard to the nature of competence.[70] Thus, when Article 3(2) TFEU and Article 216(1) TFEU are taken together, Eeckhout argues that for there to be an exclusive competence, (a) 'there must be a legislative act providing for the conclusion of the agreement, and not just a legally binding one', while (b) 'the agreement must be necessary to enable the Union to exercise its internal competence, and not just to achieve a Union objective.'[71] He further notes that we should not concentrate on the specific wording of these Articles, for he supposes that the CJEU will maintain 'a certain freedom as regards developing its implied-powers case law.'[72] While this may be true, it is submitted that this still results in the one issue that the Treaty of Lisbon was supposed to prevent - a lack of clarity.[73]

Thus, after analysing the existence and the nature of EU external shared competences, both through the intricacies of CJEU's case law and the recent clumsy codification, it is submitted that the situation has gone from what has been a very complicated, yet nuanced, case-law, to a very ambiguous and unclear codification in the Lisbon Treaty. Thus, it is not difficult to see why the Member States may be even happier to use mixity to avoid clear delimitations of competences in external relations.

3. Mixed Agreements: The Concept and the Duty of Cooperation

3.1 The Concept of Mixed Agreements

As was illustrated in the first chapter, the EU is based on the idea of a limited attribution of power and authority, the EU's principle of conferral,[74] which has led to a practice being developed to

66 Alan Dashwood, 'Mixity in the Era of the Treaty of Lisbon', in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010) 361.
67 Opinion 2/91 (n44) paras 18-21.
68 Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4653.
69 Dashwood (n 68) 361.
70 Eeckhout (n 25) 113.
71 Ibid.
72 Ibid.
73 Cremona (n 19) 74.
74 Art 5 TEU.

counter particular international situations when it is required to go past the scope of EU's competence.[75] This practice of mixed agreements, or mixity, has extensively shaped the whole of EU's external relations, so much as to be referred to as a 'hallmark of the European Union's foreign affairs federalism.'[76]

The concept has made its first appearance in Article 102 of the Euratom Treaty, which points to international agreements with thirds states, international organisations, or foreign nationals for '…which, in addition to the Community, one or more Member States are parties.'[77] Despite not using the exact term *mixed agreements*, this has been taken to mean just that, and served as a basis of legal validity for using mixed agreements as an expression of treaty-making for EU's shared competences.[78] Thus, even though the original EEC Treaty was silent on mixed agreements, it is telling that one of the first bilateral agreements with a third country that was concluded by the EU, the Association Agreement with Greece, was a mixed agreement.[79] The subsequent changes to the Treaty of Rome did not define this concept, even though the modified Article 133(6) EC of the Nice Treaty mentioned a specific category of commercial policy, which was to be "concluded jointly by the Community and the Member States."[80] However, any mention of mixed agreements or joint conclusion of agreements has since disappeared, and thus is not present in the Lisbon Treaty.[81] Yet this does not mean that Lisbon has abandoned the use of mixed agreements, despite the goals of greater unity of the EU and its enhanced external representation,[82] for as we have seen in the preceding chapter, the question of demarcation of competence has not been satisfactorily solved yet. This means that the recourse to mixity in cases of shared competence may increase.[83] Hence, it is argued that considering the widespread usage of mixity in EU external relations, it is safe to assume that mixed agreements have evolved into something of a European 'federal constitutional convention.'[84]

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75 Joni Heliskoski, *Mixed Agreements As a Technique for Organizing the International Relations of the European Community and Its Member States* (Martinus Nijhoff 2001), 6.

76 Robert Schutze, 'Federalism and Foreign Affairs' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010), 80.

77 Art 101, Treaty establishing the European Atomic Energy Community, 1957.

78 I Macleod, I Hendry, and S Hyett, *The External Relations of the European Communities* (Clarendon Press 1996), 143–144.

79 Marc Maresceau, 'A Typology of Mixed Bilateral Agreements', in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010), 11.

80 Ibid, 11–12.

81 Cremona (n 19), 77.

82 Esa Paasivirta, 'The EU's external representation after Lisbon: New rules, new era?' in P.Koutrakos (ed), *The European Union's external relations a year after Lisbon :Coherence at last?*(2011) CLEER Working Paper 2011/3),46 <http://www.asser.nl/upload/documents/ 772011_51358CLEER%20WP%202011-3%20-%20KOUTRAKOS.pdf> accessed 5 April 2014.

83 Dashwood (n 68), 365.

84 Schutze (n 78) 79.

To seek to define and categorise mixed agreements beyond the concise idea that they are 'agreements where the European [Union] and the Member States genuinely share competence'[85] is simply a Sisyphean task, for as Eeckhout has put it; 'the practice of mixity does not lend itself to such attempts.'[86] The only classification that one can reasonably subscribe to is that of mixed agreements being either *obligatory*, meaning legally necessary due to existence, limited exercise, and nature of Union competence, and *facultative* in the sense that the Member States in the European Council can choose to exercise Union competence, or 'insist on mixity for political reasons.'[87] Although the EU technically may pre-empt exclusive powers through the exercise of some of its internal shared competence, it more often than not happens that this internal exercise is incomplete, requiring mixed agreement to 'fill the void' of fields that were not fully occupied by EU's internal shared competence.[88] Even so, Rosas points out that even the conceptual difference between facultative and obligatory mixed agreements is not always maintained in practice.[89] He notes that from his personal experience of working with the Council, it 'is almost always taken for granted that the lack of exclusive [EU] competences…requires mixity' both within the COREPER and Working Parties.[90]

One of the best, if a bit dated, explanations presented on the reasons for the recurring recourse to mixed agreements has been presented by Ehlermann.[91] He argues that mixed agreements are a product of internal decision making of the Union, as 'externally' the EU's Treaty partners do not insist on them.[92] This could even be avoided if the Council would want to limit the subject matter of the agreement or use its powers more broadly, especially if it was willing to use non-exclusive competences.[93] Hence, the main reasons are political ones, especially as 'Member States wish to continue to appear as contracting parties in order to remain visible and identifiable actors on the international scene.'[94] As Ehlermann points out, the Commission has often consented to the use of mixed agreements, so as to prevent intra-institutional tension, especially considering that the

85 Dominic McGoldrick, *International Relations Law of the European Union* (Longman, 1997) 79.
86 Eeckhout (n 25) 213; however, see some valiant attempts at classification: Maresceau (n 79) 9-29. Allan Rosas, ' The European Union and Mixed Agreements' in Alan Dashwood and Christophe Hillion (eds), *The General Law of EC External Relations* (Sweet&Maxwell, 2000) 263-267.
87 Rafael Leal Arcas, 'The European Community and Mixed Agreements' (2001) 6 EFA Rev. 483, 494.
88 Eeckhout (n 25) 214.
89 Allan Rosas, 'Mixed Union-Mixed Agreements' in M Koskenniemi (ed) *International Law Aspects of the European Union* (Kluwer Law International, 1998) p 132.
90 Ibid, note 34.
91 CD Ehlermann, 'Mixed Agreements – A List of Problems' in D O'Keeffe and HG Schermers (eds), *Mixed Agreements* (Kluwers, 1983) 6, in Eeckhout (n 25) 221; Mr Ehlermann was at the time was the Director-General of the Commission's Legal Service.
92 Eeckhout (n 25) 221.
93 Ibid, 221.
94 Ehlermann (n 93) 6.

alternative available to the Commission, a Court action, has been considered a coercive instrument for intra-institutional power struggles.[95] Mixed agreements also allow the Member States to maintain greater power over the decision process of EU external action.[96]

On a similar note, Timmermans submits that the Member States seek to use mixed agreements to maintain their competences in areas of shared competence, so as to '… limit the participation of the EU to what is strictly necessary.'[97] Furthermore, the complexity and lack of clarity in EU competences, as has been noted in the previous chapter, has been shown to be advantageous for Member States, as '…it dispenses Member States from agreeing on the degree of exercise of shared competences.'[98] This view has been confirmed by positions of national ministries of various Member States, which argue for the inclusion of their respective Member States in the negotiations and the conclusion of agreements in the fields of shared competence.[99]

Thus, it is clear that there is a strong bias for using mixed agreements in EU external relations, and this has been compounded by the fact that the Court has significantly helped in the development and the success of these agreements.[100] While it is clear that the Court was ready to forge what is now *a priori* exclusivity[101], in cases like Opinion 1/75[102] (in common commercial policy) and *Kramer*[103](conservation of biological resources regarding fishery stocks), it has equally been accommodating towards the use of mixity.[104] Cremona notes that in this regard, the Court has recognised the danger that the mixed agreements could have on the external relations of the EU,[105] even to the point that it states that '…the repetition of such procedures is in fact likely progressively to undo the work of the Community irreversibly.'[106]

95 Eeckhout (n 25) 221.

96 Allan Rosas, 'Future of Mixity' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010) 370.

97 Christiaan W.A. Timmermans, 'The Court of Justice and Mixed Agreements' in A Rosas, E Levits and Y Bot, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (T.M.C. Asser Press 2013) 662.

98 Ibid, 663.

99 See for example: Foreign Affairs and Commonwealth Office, 'Review of the Balance of Competences Between the United Kingdom and the European Union' (HM Government, 2013) < https://www.gov.uk/government/uploads/system/uploads/ attachment_data/file/ 227437/ 2901086_Foreign_Policy_acc.pdf> accessed 15 April 2014, para 2.39; Jürgo Loo, 'Mixed agreements in the external relations of the European Community and their importance for Estonia as a new member state' (Estonian Ministry of Foreign Affairs) <http://www.vm.ee /?q=en/node/4061> accessed 05 April 2014.

100 Timmermans (n 98), 663.

101 Now codified in Article 3(1) TFEU.

102 Opinion 1/75 *Understanding on a Local Cost Standard* (1975) ECR 1335.

103 Joined Cases 3,4, and 6/76 *Cornelis Kramer and Others* [1976] ECR 1279.

104 Timmermans (n 99), 663.

105 Marise Cremona, 'The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community'(1982) 2 OJLS 393, 414.

106 Opinion 1/76, *Draft Agreement establishing European laying-up find for inland waterway vessels* [1977] ECR 741, para 14.

However, subsequent case law has not capitalised on this pronouncement.[107] While Ruling 1/78 *(Euratom)* was quick to ensure the Union's participation in the Convention on the Physical Protection of Nuclear Materials,[108] by explaining the value of the Union competence,[109] the soon to follow Opinion 1/78 allowed the use of mixity simply because of the paying arrangement of buffer stocks were envisaged with the involvement of the Member States.[110] This case has been criticised for allowing mixity far too easily,[111] and this trend of accepting mixity has been followed since.

As Timmermans points out, ever since Opinion 2/91, there has been a 'full emphasis … on the quest for exclusivity.'[112] While this can be partially put down to the tactic used by the Commission in its pleadings, basing their pleadings mostly on the question of exclusivity,[113] it is submitted that there should be more legal justification in cases of facilitative mixity. Eeckhout has put this even more forcefully, stating that the requirement of unity should act as to prohibit facilitative mixity in case where a proposed agreement falls fully within the 'non–exclusive competences' of the European Union.[114] However, this has not been the case, and it is more correct to argue that the CJEU '…has given its judicial blessing to the uncontrolled use of mixed agreements in areas of shared competence'.[115]

While we have noted that the Member States are predisposed towards using mixity, it is worth exploring some of the positive and negative aspects of using this technique as an expression of the external dimension of EU's shared competence.

As regards the positive aspects, some arguments revolve around the principles of subsidiary and 'federalism' in the European Union. Thus, Heliskoski for example argues that mixed agreements are able to 'reconcile both the Member States' interest in genuine participation on the one hand and that of the Community in autonomy on the other.'[116] Similarly, Weiler praises them as a solution to analogous problems that arise in some other federal systems.[117] Schutze illustrates this by noting that in some aspects the EU is an *open* federation like Germany;[118] while mixity has been a 'dormant national phenomenon' in Germany, the legal capacity of EU's Member States as

107 Eeckhout (n 25) 217; Timmermans (n 98) 664.
108 *Ruling* 1/78, *re Convention on the Physical Protection of Nuclear Materials* [1978] ECR 2151.
109 Timmermans (n 98), 664
110 Eeckhout (n 25) 217.
111 Ibid, 217.
112 Timmermans (n 98) 664.
113 Ibid, 665.
114 Eechout (n 25) 265.
115 Schutze (n 76) 82.
116 Heliskoski (n 75) 27.
117 Joseph HH Weiler, *The Constitution of Europe* (Cambridge University Press 1999), 132.
118 Schutze (n 78) 80.

sovereign subjects of international law has made mixity an important phenomenon in EU external relations.[119]

As was noted above, Member States find mixity advantageous because they do not have to deal with the quagmire of exercising EU's implied shared competence.[120] It is submitted that this can also serve as an intrinsic advantage of mixity in general, because in this way the EU and its Member States can often avoid the lengthy and complex legal battles relating to the existence and nature of competence. On a similar front, it has been submitted by Dauses that third states find mixity also advantageous, in the sense that it allows the EU to conduct external relations even when its competences are shared with its Member States.[121] Dauses notes that this enhances certainty for third states. [122] This author agrees with this assertion, as third states do not have to conclude agreements solely with the EU, an international organisation that in some areas has only limited competence and that has no *plenary* powers to act externally, but can conclude agreements with the EU and its Member States jointly.[123]

Olson however paints a more negative picture, stating that for the EU's treaty partners, 'mixity is experienced […] as a seemingly endless series of practical problems.'[124] He illustrates this argument by noting that mixity openly goes against the well-established treaty practice of only sovereign States being able to be treaty partners.[125] Furthermore, Olson submits that 'declarations of competence', which are often requested in the setting of multilateral agreements,[126] are often very ambiguous, meaning that they have limited value to treaty partners.[127] This means that treaty partners are not fully aware of the scope of competences of the other parties, that being the EU and its Member States, which is compounded even more by the fact that these declarations are seldom updated when the internal delimitation of competences shifts within the EU.[128]

119 Ibid, 74.

120 Timmermans (n 98) 663.

121 M. Dauses, 'Die Beteiligung der Europäischen Gemeinschaften an multilateralen Völkerrecht Übereinkommen' (1979) EuR 138-170, 148, in Nicole Betz, 'Mixed Agreements: EU and EU' (The European Union in International Relations Conference: GARNET 2008) < http://www.ies.be/files/repo/conference2008/EUinIA_V_4_Betz-revised.pdf> accessed 15 April 2014.

122 Ibid.

123 Schutze (n 76) 84.

124 P Olson, 'Mixity from the Outside: the Perspective of a Treaty Partner' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010) 331, 331.

125 Ibid, 333–334.

126 Marise Cremona, 'External Relations of the EU and the Member States: Competence., Mixed Agreements, International Responsibility, and Effects of International Law' (2006) EUI Working Paper LAW No.2006/22, 21-22 < http://cadmus.eui.eu/handle/1814/6249> accessed 5 April 2014.

127 Olson (n 126) 336.

128 Ibid, 336–337.

Last but not least, the issue of delayed national ratifications in cases of mixity has been criticised not only as problematic for the EU and its Member States,[129] but also as for the third States as partners in bilateral and multilateral treaties with the EU.[130] Hence, not only does it slow down the process (as a mixed agreement requires 28+1 ratifications) and at times results in problematic provisional applications,[131] but it also sometimes tempts the Member States to try and gain last-minute concessions from the third States.[132] A rare, but very threatening, example of this issue was the 'Grappa incident', which took place in the final stages of concluding an agreement on trade, development and cooperation with South Africa.[133]As Rosas describes,[134] Italy and Greece were able to threaten their withdrawal from ratification, because they felt that they could extract protection for the terms *Grappa* and *Ouzo*, despite the fact that they were not '…geographical indication[s] in terms of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)'.[135] The fact that this dilemma was solved at the cost of signing a new agreement two years later does not bode well for the practice of mixity,[136] arguably even presents this as a 'systemic risk'[137].

Thus, the practice of mixity reveals not only a varied set of both advantages and problems inherent in using this method in treaty making for the EU's shared competence. Although the Court has been sympathetic to this concept, it will become clear in the next section that it has also created a basis for the effective management of these agreements, that being through the duty of cooperation.[138]

3.2 The Duty of Cooperation

While mixity has proven divisive amongst commentators,[139] the frequency of its usage '…has mooted these discussions.'[140] The present author submits that the duty of cooperation can help solve and prevent some problems inherent with the use of mixed agreements, as this duty has

129 Jeno Czuczai, 'Mixity in Practice: Some Problems and Their (Real or Possible) Solutions' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 231, 243–244.
130 Olson (n 126) 345.
131 Czuczai (n 129) 241–244.
132 Rosas (n 98) 370.
133 Rosas (n 98) 367.
134Rosas was the Director of the Commission Legal Service and Principal Legal Advisory on external relations between 1990-2001.
135 Rosas (n 98) 368.
136 Rosas (n 98) 369.
137 Ibid, 370.
138 Timmermans (n 98) 669.
139 Weiler (n 119) 130-187. But compare Olson (n 208) 331–348.
140 Klamert (n 22) 185.

progressively been evolving from what was only *duty of best effort* to *a duty of result*,[141] as can be seen in the *PFOS* case.[142]

The duty of cooperation finds its basis in Article 4(3) (ex-Article 10 EC), which states:

> *Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*[143]

In essence, the duty of cooperation is an expression of the *duty of loyalty,* which has permeated not only the words of European politicians,[144] but has also been used as an argument of the Court of Justice to '…constrain the exercise of the Member States' competence'[145] in external relations.

It is argued that the CJEU's early development of this principle as regards external relations can be first explicitly found in Opinion 2/91,[146] where the Court transposed the duty of cooperation from the application under the Euratom Treaty,[147] into an application under the EEC as well. However, the Court did not directly relate it to a similar provision of the EC Treaty, Article 10 EC,[148] even though it repeated this pronouncement in Opinion 1/94 and the *FAO* judgement.[149] While the Court was not willing to examine the substantive application of the duty of cooperation under mixed agreements,[150] the significance of the development in these two cases was that the Court stated that the duty cooperation could result in legal obligations for the Member States and the EU institutions.[151] However, the type of duty envisioned by the Court at the time was rather abstract, as illustrated by the *Dior* case, where the Court notes that the '…Member States and the

141 Vooren and Wessel (n 6) 189.
142 Case C-249/06 *Commission v Sweden (PFOS)* [2010] ECR I-3317.
143 Article 4(3) TEU.
144 Anders D Casteileiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 EL Rev 524, 524.
145 Eleftheria Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' (2010) 47 CMLR 323, 359.
146 Opinion 2/91 (n 44) para 15.
147 Christophe Hillion, 'Mixity and Coherence in EU External Relations: the Significance of the "Duty of Cooperation' in *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010), 89.
148 Hillion (n 149) 89.
149 Vooren and Wessel (n 7) 194. Also see Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property* [1994] ECR 1994 I-05267,para 108; Case C-25/94 *Commission v Council (FAO)* [1996] ECR I-1469, para 48.
150 Vooren and Wessel (n 6) 195.
151 Hillion (n 149) 94.

Community institutions have an obligation of close cooperation in fulfilling the commitments…[under] the WTO Agreement'.[152] Although it is clear that the Member States and the EU were mandated by the Court to cooperate, Vooren and Wessel point out that *Dior* and the cases mentioned above '…did not provide substantive guidance' on how the duty of cooperation can be satisfied.[153] Hence, the expression of this duty up to that point has been termed the *obligation of best effort*.[154]

The first major case to move this doctrine to an obligation with some procedural consequences has been the *Mox Plant* case.[155] In short, Ireland initiated an action against the United Kingdom, a partner of Ireland in the mixed agreement under United Nation Convention on the Law of the Sea (UNCLOS) regime.[156] The fact that Ireland proceeded with the action in the Arbitral Tribunal of UNCLOS was a direct breach of EU law, as the matter in dispute fell within the area of exclusive jurisdiction of CJEU.[157] The Court has found that as part of the mixed agreement in question, Ireland was under a 'duty to inform and consult the competent Community institutions prior to instituting dispute-settlement …concerning the MOX plant',[158] and thus Ireland '…had not complied with… [its] duty of prior information and consultation'.[159] This case not only illustrates the duty of cooperation as an expression of *obligation of best efforts*, requiring prior information and consultation between the Members States and the Union,[160] but it also clearly shows that '…the exercise of shared competence [by Member States] is not deprived of any limitation.'[161]

The legal interpretation of the duty of cooperation has become more extensive,[162] following the *Inland Waterways* cases,[163] and most importantly the *PFOS*[164] case. The *Inland Waterways* cases concerned Germany and Luxembourg concluding bilateral agreements on the use of inland waterways with several Central European countries, while the EU was negotiating a mixed multilateral agreement on the same matter with these third States.[165] Although the proceedings in

152 Joined Cases C-300/98 *Christian Dior* and C-392/98 *Assco Gerutze* [2000] ECR I-11307, para 36.
153 Vooren and Wessel (n 7) 194.
154 Ibid, 191.
155 Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-4635.
156 Neframi (n 147) 351.
157 Ibid.
158 Ibid, para 179.
159 Ibid, para 181.
160 Vooren and Wessel (n 7) 197.
161 Neframi (n 147) 351.
162 Vooren and Wessel (n 7) 197.
163 Case C-433/03 *Commission v Germany* [2005] ECR I-6985; Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805.
164 *PFOS* (n 144).
165 Hillion (n 149) 99.

Court did not result from mixity,[166] they were initiated as a result of what the Commission saw as a breach of duty of cooperation in the exercise of shared competence by the above-mentioned Member States.[167]

The CJEU found that Germany and Luxembourg did not abandon their '...respective bilateral treaty-making processes with third countries after the Commission had received the mandate to negotiate [the mixed agreement].'[168] Despite the fact that the infringing bilateral agreements were not yet finalised,[169] the Court found that both Germany and Luxembourg were liable for breaching the duty of cooperation that had begun when the Council gave the Commission the mandate to negotiate the relevant multilateral convention.[170] In this way, the actions of these Member States have negatively impacted the '…the achievement of the Community tasks' and the '…coherence and consistency of the [EU] action and its international representation'.[171] It has been argued that the Court has in essence introduced here an effect similar to that of a 'quasi-pre-emption', which requires nothing less than abstention once a Council Decision on negotiation has been reached.[172] Although the Court explicitly stated that this is not a duty of abstention,[173] the present author agrees with Hillion that for all intents and purposes, the effects of this duty require Member States to abstain when a Union position has been reached.[174]

Even though the positions of Germany and Luxembourg were similar, it is submitted that the two cases differed with regards to how the two Member States executed their duties to inform and consult.[175] While Luxembourg failed to inform and consult completely, Germany did inform and consult with the Commission, yet this happened before the Commission received its mandate from the Council to negotiate the mixed agreement; after which Germany failed to consult again with the Commission.[176] However, this bodes the question of what difference it would make to the proceedings if Germany would have consulted and informed the Commission after this institution had received the mandate in question. The present author agrees with Casteilero and Larik, who state that the duty to inform and consult, as presented by the Court, '…in reality leads to an obligation to refrain from acting.'[177]

166 Vooren and Wessel (n 6) 197.
167 Eeckhout (n 25) 247.
168 Casteilero and Larik (n 146) 530–531.
169 Vooren and Wessel (n 7) 197.
170 Case C-433/03 *Commission v Germany* [2005] ECR I-6985, para 66.
171 Ibid.
172 Vooren and Wessel (n 7) 198–199.
173 *Commission v Germany* (n 172) para 66.
174 Hillion (n 149) 99–100.
175 Eeckhout (n 25) 248.
176 Ibid.
177 Casteilero and Larik (n 146) 533.

3.3 PFOS Case: A Duty to Remain Silent?

The Court's judgement in the *PFOS* case has been the most recent pronouncement on the duty of cooperation, specifically under a mixed agreement in the sphere of environment, which is a shared competence under the current Treaties.[178] In order to understand the logic of the Court, it is important to explain some of the facts in question.

The case concerns the Stockholm Convention on persistent organic pollutants (POPs),[179] a multilateral environmental framework, in which the EU and its Member States participate under a mixed agreement.[180] Sweden wanted to add PFOS, a strong pollutant, to a Council Decision that was supposed to agree on substances to be added to the Convention.[181] The Council's Working Party considered this proposal; the Presidency pointed out that this proposal would require financial compensation to third world countries, and was thus not viable at that time.[182] While this was noted in the minutes of the meeting of July 2005, an agreement on common proposal was not reached.[183] Sweden threatened the Council that if it would not agree on the inclusion of PFOS, Sweden would propose a unilateral inclusion of this chemical to one of the Convention's protocols.[184] Since such an agreement was not found on the floor of the Council, Sweden unilaterally made a submission to the Aarhus Protocol of the Convention to add PFOS on the list.[185] The Commission subsequently brought a case against Sweden for infringing its duty of cooperation.[186]

In the PFOS the Court expands its *Inland Waterways* case law by stating that 'duties of action and abstention' may exist in cases where there is a duty of cooperation '…to facilitate the achievement of the [Union's] tasks and ensure the coherence…of the action and its international representation'.[187] It further opposed Sweden's assertion that there was no decision of the EU on inclusion of PFOS.[188] The Court surprisingly notes that although there was no official position of the Council, there was 'Community strategy'; that being not to add PFOS to the list.[189] The Court

178 Art 4(2)(e).
179 Stockholm Convention on persistent organic pollutants, entered into force on 17 May 2004.
180 Marise Cremona, 'Case C-246/07 *Commission v Sweden* (PFOS), judgment of the Court of Justice (Grand Chamber) of 20 April 2010' (2011) 48 CMLR 1639, 1639–1640.
181 Ibid, 1642.
182 Geert de Baere, ' "O, Where is faith? O, where is loyalty?" Some thoughts on the duty of loyal co-operation and the Union's external environmental competences in the light of the PFOS case' (2011) 36 EL Rev 405, 407.
183 De Baere (n 184) 407–408.
184 De Baere (n 184) 408.
185 Cremona (n 182) 1642.
186 Casteleiro and Larik (n 146) 536.
187 *PFOS* (n 144) paras 74–75.
188 Ibid, para 76.
189 Ibid.

supports this position by stating that it is not necessary for a *common position* to take 'a special form…provided that the content of that position can be established to the requisite legal standard'.[190] Lastly, the Court stresses that Sweden's act '…compromise[d] the principle of unity in the international representation… and weaken[ed] their negotiating power with regard to the other parties' of the Stockholm Convention.[191]

This pronouncement raises two points, which need to be analysed more in depth. The first question that arises is what possible effect will the Court's ambiguous finding of a *common strategy* in the case at hand have on the duty of cooperation with regards to mixed agreements. Vooren and Wessel submit that it is difficult to agree with the position that even a strategy arising from simple discussions in a Council Working Party can have binding legal effect so as to trigger 'the special duties' under the duty of cooperation.[192] Similarly, Larik and Andres argue that basing a common position on what could be a 'non-legal proposal to a technical committee' would undermine the unity of legal representation.[193] What is more, Vooren and Wessel also assert that the lack of legal certainty in this criterion may actually lead to damage of '…the cooperative spirit in mixed settings.'[194] It is submitted that while the arguments presented by Casteleiro and Larik, as well as Vooren and Wessel have merit, the results might actually be opposite, as although these strategies are ambiguous and will require more solid expression by future case law, its earlier trigger of the duty of cooperation can help bring greater coherence,[195] possibly forcing the Member States and the Union cooperate at a sooner moment under mixed arrangements.

The second point concerns what can be described as a possible erosion of the distinction between the effects of pre-emption and duty of cooperation. In this respect, Vooren and Wessel consider the Court's finding that by '…unilaterally proposing the addition of PFOS…Sweden disassociated itself from a concerted common strategy within the Council,'[196] to mean a 'de facto pre-emption'.[197] They argue that following the Court's logic, the only way to exercise shared competence in the mixed setting is to make absolutely sure that there was a clear decision within the Council, so as to not be in a breach of duty of cooperation.[198] However, De Baere sees this differently.[199] He points out that the crucial difference between an *ERTA* style pre-emption and the effects o the

190 *PFOS* (n 144) para 77.
191 Ibid, 104.
192 Vooren and Wessel (n 6) 204.
193 Casteleiro and Larik (n 146) 540.
194 Vooren and Wessel (n 7) 204.
195 De Baere (n 184) 416–418.
196 *PFOS* (n 144) para 91.
197 Vooren and Wessel (n 7) 205.
198 Vooren and Wessel (n 7) 204.
199 De Baere (n 184) 418.

duty of cooperation as outlined by the Court in *PFOS* case, is that an *ERTA* pre-emption excludes any exercise of competence on the part of Member States, while the view of duty of cooperation asserted in the judgement above states that the 'special' duty of abstention arising from duty of cooperation is only triggered when an exercise '…by a Member State can harm the common action of the Union in the relevant international forum.'[200] The present author is more inclined to side with De Baere, as the *PFOS case* clearly explains how Sweden's action managed to hurt the interests of the Union, by weakening the negotiating power of the Union,[201] and complicated the exercise of voting arrangements of the EU's and Member States' joint participation.[202]

Despite some of the uncertainty that the *PFOS* case brings, it is submitted that it is a step in the right direction, in the sense that it creates an 'obligation of result' from the duty of cooperation in the course of mixed agreements.

4. Conclusion

The analysis of the external dimensions of the EU's shared competence, as executed through the method of mixed agreements, has shown an underlying trend of uncertainty that dominates much of this part of EU external relations law. Not only is this true in terms of questions of existence and nature of shared competence, it is even more so for the practice of mixed agreements. It has been noted that the practice of mixed agreements reveals a disproportionate use of *facilitative* mixity, even in case when there is no legal requirement to do so.[203] However, considering the importance of new agreements being currently negotiated, such as the TTIP or the FTA with Philippines, the Court is invited to take a more concrete stance on how it deals with future mixed agreements. The recent *PCA with Philippines* case may provide some framework for using the centre of gravity to limit the excessive use of *facilitative* mixity.[204]

Despite the aims to clarify the law on existence and nature of implied competence, the codification of the *ERTA* doctrine in the Lisbon Treaty has brought more questions than answers.[205] Even though fields of competence have been codified into Title I of the TFEU, Articles 3(2) TFEU and Article 216(1) TFEU are going to be a source of less clarity, which it is submitted will result in an even greater temptation on the part of Member States to resort to mixity.

200 Ibid.
201 *PFOS* (n 144) 104.
202 Ibid, 97–99.
203 Eeckhout (n 25) 221.
204 Case C-377/12 *Commission v Council* (PCA with Philippines) n.y.r.
205 Cremona (n 16) 61–62.

Yet, maybe these ambiguities are the price to pay for the fact that the EU has been able to move beyond being merely an intergovernmental organisation, to being a solid international actor in its own right.[206] Thus, Rosas point out that since

> *'…the European Union [is] a hybrid conglomerate situated somewhere between a State and an intergovernmental organisation, it is only natural that its external relations in general and treaty practice in particular should not be straightforward. The phenomenon of mixed agreements…offers a telling illustration of the complex nature of the [Union]… as an international actor'.*[207]

On the other hand, it is crucial to give credit to the Court of Justice of the European Union, for not only singlehandedly creating the *ERTA* doctrine, but also shaping the law on mixed agreements through the duty of cooperation. Thus, the present author agrees with Rosas that it is important to focus on making the duty of cooperation more functional, as this will 'enhance efficiency, legal security and the credibility of the EU as a partner in international cooperation'.[208] While the *PFOS* case has been a step in the right direction; it is however necessary to continue developing this doctrine in order to avoid ambiguities.[209]

Thus, to conclude, mixity as a vehicle of the EU's shared competence has proven to be a complex, yet unique tool at the disposal of the European Union and its Member States. Moreover, in light of the recent developments and ever-shifting competence of the EU,[210] it is predicted that the future may hold much change for the use of mixed agreements, hence it is important to keep note of how the practice of mixed treaty-making will evolve.

206 Rosas (n 91) 125.
207 Ibid.
208 Rosas (n 91) 372.
209 Vooren and Wessel (n 7) 205–206.
210 In particular, see the recent decision of the Commission to request the Court's Opinion on the FTA with Singapore, in order to ascertain the extent of exclusive competence in the field of common commercial policy, thus determining whether the agreement would be mixed or not: European Commission,' Singapore: The Commission to Request a Court of Justice Opinion on the trade deal' 30 Oct 2014, < http://trade.ec.europa.eu/doclib/press/index.cfm?id=1185>; European Commission, 'European Commission to request a Court of Justice opinion on the trade deal with Singapore' 4 March 2015, < http://trade.ec.europa.eu/doclib/press/index.cfm?id=1269>.

DO UNLAWFULLY RESIDING MIGRANTS HAVE A RIGHT TO HOUSING UNDER THE EUROPEAN SOCIAL CHARTER?

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Winner of the ELSA International Essay Competition on Social Rights 2015[1]

1. Introduction

Nowadays the world is confronted with a long-standing phenomenon of an illegal migration. During the last several years this problem has increased in size and intensity. The reason is a denial of social rights during wars in Africa, Syria and Libya, as well as economic and political prerequisites.[2] Europe has a settled reputation of being a primary destination of flow of more than 4.5 million illegal migrants, [3] i.e. undocumented or irregular.[4] For the purposes of this paper irregular migrants are defined as people that have crossed a border without a proper authorisation.[5] As a result of this process, a housing crisis stroke into a great State's responsibility to provide all people with the dwelling. This lied upon two main European organisations, the Council of Europe (CoE) and the European Union (EU). Should they fail in their duties, tomorrow we would face with people conventionally sleeping on the streets in a way larger numbers than now it is.

This article aims to decide upon a major legal question arising from this situation: do irregular migrants "can come out of the shadows and get right with the law"?[6] This legal problem will be tackled by exploring the irregular migrants' status, which predetermines their social rights

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1 The Panel of Experts that assessed the submissions to the competition consisted of: Annalisa Ciampi (University of Verona), Francesco Costamagna (University oá Turin), Donata Gottardi (University of Verona) Giovanni Guiglia (University of Verona), Lorenza Mola (University of Turin), Claudio Panzera (Mediterranea University of Reggio Calabria), Neliana Rodean (University of Verona), Evelyne Schmid (University of Bern), Gregor T. Chatton (Swiss Federal Supreme Court), Jaume Saura Estapa (University of Barcelona), Mercedes Fernández (Universidad Pontificia Comillas), Joaquín Eguren (Universidad Pontificia Comillas), Cristina Cortázar (Universidad Pontificia Comillas), José Luis Rey (Universidad Pontificia Comillas), Anders Narvestad (University of Oslo), Azin Tadjdini (University of Oslo), Johan Leiss (University of Oslo), Marit Frogner (Labour Court of Norway), Benedita Mac Crorie (University of Minho) and Tiago Fidalgo De Freitas (University of Lisbon).

2 Beatrice Credi, *"How Many People Have Entered the EU via Illegal Border Crossings?"* (2015) Welfare Society Territory; Global Commission on International Migration, *Migration in an interconnected world: new directions for action* (2005),p. 33.

3 Commissioner for Human Rights, *The Human Rights of Irregular Migrants in Europe,* .CommDH/Issue Paper (2007) 1.

4 PICUM, *Strategies to End Double Violence Against Undocumented Women Protecting Rights and Ensuring Justice,* Report (2012), 11.

5 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of 18 December 1990, Art 5.

6 President Barack Obama, Remarks by the President in Address to the Nation on Immigration, the White House, (2014). Available at <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

enshrined in the European Social Charter (Charter), in its original or revised forms, to which every European Union Member State (MS) is a party. The extent of rights granted to undocumented migrants will be analysed in accordance with the Charter and international law. After outlining of the scope inherent to the right to housing, the essay intends to determine the legality of granting this right to irregular migrants. To achieve the result, the analysis relies on the customary interpretative techniques of the Vienna Convention on the Law of Treaties (VCLT). Then, the mechanism of realisation of this right will be addressed, where States are obliged to respect principles of non-discrimination and prevention of homelessness. The supposed outcome of the present analysis is to show that undocumented migrants enjoy the right to housing under the Charter and to articulate a mechanism of this right's realisation.

2. The Right to Housing under Article 31 of the European Social Charter

This section will examine the concept of the right to housing, which is defined in Article 31 of the Revised Charter as follows:

> "With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:
>
> 1. to promote access to housing of an adequate standard;
> 2. to prevent and reduce homelessness with a view to its gradual elimination;
> 3. to make the price of housing accessible to those without adequate resources."[7]

Also, Articles 16, 19 (4) (c), 30 of the Charter are of relevance, emphasising the right to family housing and providing housing as such to avoid poverty and social exclusion respectively.[8]

Being an international treaty between states, the Charter should be interpreted according to the rules contained in the VCLT. Where necessary, they are applied as customary law,[9] since the Original Charter was adopted in 1961, before the entry into force of the VCLT. Consequently, the Charter provisions are to be understood in good faith in the light of ordinary meaning of terms, its object and purpose,[10] which is "to give life to the fundamental social rights"[11] and according to

7 European Social Charter (Revised), Strasbourg, 3.V.1996, ETS No. 163 (Charter (Revised)), Art 31.

8 European Social Charter, Turin, 18.X.1961, ETS No. 35 (Charter), Art.16,19(4)(c), 30.

9 *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] I.C.J. para 94.

10 ECSR, *OMCT v Ireland*, Complaint No. 18/2003, Decision on the Merits [2004], para 60; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 2002), 367.

11 ECSR, *FIDH v France*, Complaint No. 14/2003 Decision on the Merits [2004], Council of Europe, para 29. Available at >http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC14Merits_en.pdf.>.

a current state of the international law.[12] Furthermore, subsequent practice of the MS is necessary for interpretation of each treaty.[13] The goal in the present essay is to determine whether we can conceive of a new notion of the right to housing applicable to irregular migrants that falls within Article 31 of the Revised Charter.

2.1 Ordinary Meaning of the Term "Housing"

According to the ordinary meaning, housing is a habitation with all basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity, etc.[14] This notion of "housing" is primarily defined by national law.[15] The necessary features of this residence are accessibility, social security, cultural adequacy, availability of services, materials, health requirements,[16] legal security of tenure,[17] facilities and infrastructure, affordability, and appropriate location that underlines adequacy of the housing.[18] However, in some cases one could provide with temporary shelter that has a lower threshold of conformity than adequate housing, as it must satisfy only the basic amenities as well as security of the proximate surroundings.[19] Yet, supplying temporary shelter as such is not satisfactory.[20]

2.2 Is a Limited Scope of the European Social Charter Consistent with its Object and Purpose?

2.2.1 The Right to Housing as of Fundamental Importance to Everyone is a Clue to a Puzzle

Advocates of the narrowed reading of Article 31 state that irregular migrants do not *prima facie* enjoy the right to housing.[21] Their assertions are based on the Appendix to the Charter conferring

12 ECSR, *FEANTSA v the Netherlands*, Complaint No. 86/2012, Decision on the Merits [2014], Council of Europe (*FEANTSA v the Netherlands)*, para 45.

13 VCLT, 1155 UNTS 33.1., adopted 23 May 1969, Art. 31 (1),(3).

14 ECSR, Conclusions 2003, France; ECSR, *ERRC v Bulgaria*, Complaint No. 31/2005, Decision on the Merits [2006], Council of Europe (ECSR, *ERRC v Bulgaria*), para 34; UNCESCR, General Comment No. 12: The Right to Adequate Food (Art.11)UN Doc. E/C.12/1999/5, paras 8-13. Available at http://www.refworld.org/docid/4538838c11.html

15 Charter (Revised), Explanatory report, Council of Europe, para 119. Available at <http://conventions.coe.int/Treaty/EN/Reports/HTML/163.htm>.

16 Charter (Revised), Explanatory Report, Council of Europe, para 118.

17 ECSR, *ERRC v Italy*, Complaint No 27/2004, Decision on the Merits [2005], Council of Europe (ECSR, *ERRC v Italy*), para 35; ECSR, Conclusions 2003, France; ECSR, *ERRC v Greece*, Complaint No 15/2003, decision on the Merits [2004], Council of Europe (ECSR, *ERRC v Greece*), para 24.

18 UNCESCR, General Comment No. 4: The Right to Adequate Housing (Art.11(1) of the Covenant) UN. Doc. E/1992/23, annex III (UNCESCR: *The Right to Adequate Housing*), para 8; ECSR, *ERRC v Portugal*, Complaint No 61/2010, Decision on the Merits [2011], Council of Europe, para 41.

19 ECSR, *DCI v the Netherlands*, Complaint No. 47/2008, Decision on the Merits [2009], Council of Europe *(*ECSR, *DCI v the Netherlands),* para 62.

20 ECSR, Conclusions 2003, Italy.

21 ECSR, *ERRC v France*, Complaint No. 51/2008, Decision on the merits [2009], Council of Europe (ECSR, *ERRC v France*), para 111.

this right only upon lawfully residing migrants.[22] However, the direct examination of the context of Article 31 yields more interesting results. The provision does not explicitly mention subjects of the right to housing. However, the Charter incorporated the right of everyone to housing in the Part I that fortified aims of this treaty. In this vein, we could argue *a contrario* that if drafters had intended to limit subjects of this right, they would have included it in the Charter *ad verbatim*.

Even more importantly, the understanding of the Charter provisions as entitling only lawful migrants to a right to adequate housing contradicts the object and purpose of the Charter. This treaty calls upon cooperation between its members to give rise to the realisation of the fundamental principles and ideals to facilitate social progress.[23] The object and purpose of a treaty is "the most important [obligatory] part of the treaty's context"[24] that does not allow anyone to interpret the treaty in order to achieve own aims.[25] Furthermore, by virtue of their jurisprudence the ECtHR and the ECSR broadly interpreted the Charter[26] establishing an indirect right of migrants to a minimum standard of living including health, work, education and adequate housing.[27]

An apparent *erga omnes* character of this right builds a bridge between the right to housing and what the object and purpose of the Charter reflects. Moreover, since these judicial and quasi-judicial bodies assume the huge importance of this right,[28] and the MS should also respect it outside the Charter due to the *erga omnes* character of the right concerned. In its landmark *Barcelona Traction* case, the International Court of Justice (ICJ) explained the concept of *erga omnes* obligations, which means existence of rights where "all States have a legal interest in their protection".[29] The Court stated that basic human rights fall within this concept.[30] For instance, those rights can be found in the Universal Declaration of Human Rights (UDHR), the cornerstone in human rights law.[31] In particular, this document manifests the right of everyone to the adequate standard of living

22 Charter (Revised), Appendix, para 1.
23 Charter, Preamble.
24 Iran-United States Claims Tribunal, *Federal Reserve Bank of New York v Bank Markazi,* Decision No. DEC 130-A28-FT [2000], para 58.
25 Oliver Dörr, Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer H.D. London NY) (2011), 545–547.
26 ECSR, *DCI v Belgium*, Complaint No. 69/2012, Decision on the Merits [2012], Council of Europe (ESCR, *DCI v Belgium*), paras 28 and 35.
27 Yannis Ktistakis, *Protecting Migrants under the European Convention on Human Rights and the European Social Charter a handbook for legal practitioners*, Council of Europe (2013) (Yannis: *Protecting Migrants*), 47.
28 Compilation of Selected Adjudication on Housing Rights, UN Housing Rights Programme, Report No. 4, 3rd ed. (2006), p.117; UNCESCR, General Comment No. 4: The Right to Adequate Housing (Art.11(1) of the Covenant) UN Doc. 13/12/91 (1991), para 1.
29 *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* (Merits, Judgment) [1970] I.C.J. Rep 6 (ICJ, *Barcelona Traction*), para 33.
30 ICJ, *Barcelona Traction* case, para 34.
31 Malcolm N Shaw, *International Law*, Cambridge University Press, 7th ed. (2014), pp.203,204,216; Ilias Bantekas, Lutz Oette, *International Human Rights Law and Practice*, Cambridge University Press (2013), 20.

including housing.[32] Its preamble proclaims the universal respect for these rights that set up "common standard of achievement for all peoples and all nations".[33] The Charter of the United Nations, an organisation promoting human rights and
friendly relations,[34] and the ICESCR confirm the same universal nature for the fundamental freedoms.[35]

Moreover, as stated by the ESCR in *DCI v the Netherlands,* a state may not deprive those not falling within the ambit of the Appendix of their rights linked to life and dignity under the Revised Charter,[36] even in the case of economic crisis.[37] If a link with life and dignity is established for the right concerned, it becomes fundamental.[38] Apart from the mentioned basic rights, the disputed one "cannot be isolated from other fundamental principles" contained in the ICCPR, the ICESCR and other instruments,[39] where the CFREU is of a separate importance. Under this treaty the MS may not apply provisions in an arbitrarily restrictive or negative way in case of human rights' enjoyment,[40] thus undocumented migrants are granted all fundamental freedoms. Correspondingly, the right to housing is the *erga omnes* obligation meaning that the MS should respect this right in any case while we apply the limited scope of the Charter's Appendix.

To this end, the protection under the Charter "should not end up having unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake".[41] Thus, approach to restrict the Charter contradicts its object and purpose, a vital tool in treaty interpretation. Given that the right to housing is a "right to live somewhere in security, peace and dignity"[42] and that the

32 UDHR, adopted by General Assembly resolution 217 A (III) of 10 December 1948, Art. 25(1).

33 UDHR, Preamble; The Committee of Ministers of the Council of Europe, Recommendation No. R (2000) 3 of the Committee of Ministers to member states on the Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship, adopted at the 694th meeting of the Ministers' Deputies, Council of Europe (The Committee of Ministers: Recommendation No. R (2000) 3).

34 PICUM, *Using Legal Strategies to Enforce Undocumented Migrants' Human Rights,* Report (2013), 32.

35 Charter of the United Nations, 1 UNTS XVI, adopted at 24 October 1945, , Preamble; International Covenant on Economic Social and Cultural Rights, 993 UNTS 3., adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 (ICESCR), Preamble; Vienna Declaration, World Conference on Human Rights, UN Doc. A/CONF 157/24 (1993), Preamble, paras 1,5,8; Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 2.

36 ESCR, *DCI v the Netherlands,* paras 32,47; ECSR*, COHRE v Italy,* Complaint No. 58/2009, Decision on the Merits, [2010], Council of Europe, para 33; The Committee of Ministers: Recommendation No. R (2000) 3.

37 ECSR, *FEANTSA v the Netherlands*, para 128; UNCESCR, General Comment 2 (1990) (E/1990/23), annex III, para 9.

38 ECSR, *FIDH v France*, Complaint No. 14/2003, Decision on the merits [2004], para 30.

39 TFEU, 2012/C 326/01 adopted at 26 October 2012, Art. 151 (1); CFREU, O.J. (2010/C 83/02), adopted at 30 March 2010, Art. 1, 34(3).

40 CFREU, Art.53, Preamble.

41 ECSR, *DCI v the Netherlands*, paras 37,38; ECSR, *FIDH v France*, para 30.

42 *DCI v Belgium*, para 35; Raquel Rolnik, UN Special Rapporteur on adequate housing, Right to Adequate Housing, (2010), 21.

Charter is silent on the status of irregular migrants, we could argue for an expansive reading of Article 31, where undocumented migrants are entitled to the dwelling.

3. Enforcement of the Right to Adequate Housing under the European Social Charter

So far, the focus of the present analysis has been on the enjoyment of the right to housing by irregular migrants. The next legal issue to consider is the enforcement of this right by the State parties to the Charter as a good indicator of subsequent practice, being relevant for both interpretation of the Charter and real implementation of state's obligations.

The MS are obliged to undertake the full realisation of the right to adequate housing through international and national co-operation based on free consent.[43] This is a compulsory principle of a "progressive realisation" for the people within the MS' jurisdiction.[44] Although the means of complying with this obligation may vary, the MS must undertake all necessary steps to reach that purpose;[45] particularly adopt a constitutionally entrenched national housing strategy.[46] For example, the constitution of the Federal Republic of Germany upheld the inherent principle of non-discrimination in the granting fundamental rights,[47] thus confirms a foundation for supply of adequate housing. However, in Spain constitutionally guaranteed right to housing[48] in reality just creates lack of affordable one.[49] But in a larger sense, each constitution is a basis for a whole legal framework of the MS, consequently a non-compliance with the obligation to provide dwelling is unacceptable.

43 Charter (Revised), Art.11, 19(3); ICESCR, Art. 2(1); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 (ICCPR), Art.2(2); Message of his Holiness Pope Francis for the 101st World Day of migrants and refugees (2015); The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17 (1986).

44 ICESCR, Art. 2(1) ECSR, *International Movement ATD Fourth World v France*, Complaint No. 33/2006, Decision on the Merits [2007], Council of Europe, para 59.

45 ECSR, *ERRC v France*, para 47; ECSR, *ERRC v Bulgaria*, para 35.

46 Ben Saul, David Kinley, Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials*, OUP Oxford (2014), 932.

47 Basic Law for the Federal Republic of Germany, promulgated by the Parliamentary Council on 23 May 1949, Art. 1(2); 3(3).

48 The Spanish Constitution, passed by the Cortes Generales in Plenary Meetings of the Congress of Deputies and the Senate held on October 31, 1978, Art. 47; The Belgian Constitution, updated following the sixth institutional reform (constitutional revisions of 6 January 2014 – Belgian Official Gazette of 31 January 2014), Belgian House of Representatives, Art. 23.

49 PICUM, *Housing and Homelessness of Undocumented Migrants in Europe: Developing Strategies and good practices to ensure access to housing and shelter,* Report (2014) (PICUM: *Housing and Homelessness of Undocumented Migrants*), 11.

Notwithstanding, a "retrogression in housing rights would constitute a human rights violation".[50] In this respect, in its Additional Protocol, the Charter confers upon the MS and international non-governmental organisations a collective right of petition for adequate reparation to the ECSR[51] overseeing implementation of its provisions.

3.1 Case Law of the European Court of Human Rights

Even if we apply the restrictive wording of the Charter in case of granting the illegal migrants social rights, one would prefer the practice of the ECHtR. This Court aims to implement the provisions of the ECHR, within which the undocumented migrants fall, because the Convention prohibits discrimination on any status, and also ECHtR's judgments are "legally binding for the MS".[52]

The relevant case law of the ECHtR concerns violations of Article 3 of the ECHR that prohibits inhuman or degrading treatment including insufficient access to shelter.[53] The Court found it in the *M.S.S. v Belgium and Greece* case where an asylum seeker lived in extreme poverty whilst waiting for his asylum procedure to be completed.[54] However, the case law of the ECtHR on undocumented migrants sometimes is not of avail. In the case of *Ahmed v Austria* the Court ruled that alleged deportation of the applicant would violate Article 3 of the ECHR.[55] Applicant stayed in Austria without definite status and access to social rights, which led him to a suicide.[56]

It follows that in practice both the Charter and ECHR are not very helpful and despite that these treaties are a huge step towards respect for irregular migrants' dignity, the right to housing is still inaccessible to the fullest extent.

50 Commissioner for Human Rights, Housing Rights: The Duty to Ensure Housing for All, CommDH/IssuePaper (2008) 1; Philip Alston, Gerard Quinn, *The Nature and Scope of States Parties Obligations under ICESCR*, (1987), 156–229.

51 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Strasbourg, 9.XI.1995, ETS No. 158, Preamble, Arts 1 and 2.

52 PICUM, *Using Legal Strategies to Enforce Undocumented Migrants' Human Rights* (2013), 23.

53 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS, ETS 5, Rome, 4. XI. 1950 (ECHR), Art.3; PICUM, *Using Legal Strategies to Enforce Undocumented Migrants' Human Rights* (2013), 23.

54 European Court of Human Rights, *M.S.S. v Belgium and Greece* (Application no. 30696/09) Judgment [2011], paras 235, 254, 360, and 368.

55 European Court of Human Rights, *Case of Ahmed v Austria* (Application no. 25964/94) Judgment [1996], para 47.

56 PICUM, *Using Legal Strategies to Enforce Undocumented Migrants' Human Rights* (2013), p.25.

3.2 Means of Discrimination: Legal Justifications?

The Charter explicitly states the principle of *de facto*[57] non-discrimination in the enjoyment of the rights on "any ground, including other status."[58] The UNCESCR emphasised that a decline in living and housing conditions, attributable to the MS in the absence of compensatory measures, is inconsistent with the mentioned obligation for all categories of people.[59] Correspondingly, there must be no *de jure* or *de facto* restrictions on home-buying, housing aids and loans.[60]

However, the right to adequate housing as it is settled by the treaties differs from that in reality,[61] where irregular migrants are deprived of health and well-being due to the illegality of their presence.[62] Such MS as France, Greece, Italy and some others did not comply with the obligation to provide sufficient supply of social housing[63] and prohibition of discrimination.[64] In Slovenia, one of the conditions for being eligible for social housing is a requirement to permanently reside in the area where the house is located.[65] The additional violations of Article 31 of the Revised Charter are caused by housing outside urban areas or near facilities that create unpleasant conditions, such as "electric transformers or very busy roads",[66] and failure to build housing.[67] Up to date, a problem of Roma migrants has been unresolved.[68] Thousands of families continue to live in inadequate housing conditions[69] both in Italy and Greece because the Governments have failed to supply Roma with adequate housing.[70] In this regard, Roma suffered forced evictions even

57 European Social Charter – European Committee of Social Rights – Conclusions XIX-4/2011, Council of Europe (2013), 167.

58 Charter (Revised), Art. E; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of 18 December 1990, Art.7; International Convention on the Elimination of All Forms of Racial Discrimination, adopted by General Assembly resolution 2106 (XX) of 21 December 1965, Preamble, Art.5; ICCPR, Art.26; Parliamentary Assembly, Human rights of irregular migrants, PACE Doc. 10924 (2006); para 12.18. Available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17456&lang=EN>.

59 UNCESCR: *The Right to Adequate Housing,* para 11.

60 ECSR, Conclusions 2004, Norway; ECSR, Conclusions 2003, Italy.

61 UNCESCR: *The Right to Adequate Housing*, para 4.

62 Ryszard Cholewinski, *Irregular migrants: access to minimum social right,* CoE (2005), p.9.

63 ECSR, *FEANTSA v France*, Complaint No. 39/2006, Decision on the Merits, 5 December [2007], CoE (ECSR, *FEANTSA . France*), paras 78,81; ECSR, *ERRC v Greece*, paras 42,46; ECSR, *ERRC v France*, para 88.

64 PICUM: *Housing and Homelessness of Undocumented Migrants,* 11.

65 Dr. Neža Kogovšek Salamon, Report on Measures to Combat Discrimination Directives 2000/43/EC and 2000/78/EC, Country Report on Slovenia (2013), 53.

66 Thomas Hammarberg, Memorandum following his visit to France from 21 to 23 May 2008, CommDH (2008) 34 (2008), para 132; ECSR, *ERRC v France*, paras 49–50.

67 ECSR, *FEANTSA v France*, para 115.

68 Roma in SEE, PAIRS SEE, South East Europe Transnational Cooperation Programme, EU.

69 Amnesty International, Rome Continues to Deny Adequate Housing to Roma, Press Release 30 October 2013.

70 Amnesty International, Annual Report (Italy) 2014/15. Available at <https://www.amnesty.org/en/countries/europe-and-central-asia/italy/report-italy/>.

without access to alternative accommodation.[71] It flows that the ECSR recognised breaches by Italy of the EU Race Equality Directive and violations of these States obligations under the Charter.[72] However, Ireland established the Irish Human Rights and Equality Commission, an independent statutory body for the real implementation of human rights, particularly in the Roma migrants' case.[73]

Such practice actually has emphasised a failure to avoid discrimination in the light of granting the right to housing. Any inconsideration towards these obstacles would sum up to prevailing harming strategies under the values of a democratic society.

3.3 Are States Obliged to Prevent Homelessness?

Increased costs and poor conditions of housing create homelessness among irregular migrants,[74] which is a great problem in contemporary Europe.[75] The 2020 EU Strategy proclaims a fight against poverty, social exclusion as well as discrimination.[76] In this respect, MS are required to prevent homelessness,[77] thus "to provide shelter as long as the undocumented migrants are under their jurisdiction and unable to provide housing for themselves".[78] This raises the issue of forced evictions, which have been defined as the "deprivation of housing for insolvency or wrongful occupation".[79] One way of achieving this is to find alternative housing or support financially.[80] However, permanent alternative housing is not granted within the meaning of Article 31 (1) to migrants in irregular situation.[81]

Currently, the ECSR observed the following in the 2012 *FEANTSA v the Netherlands* complaint where the respondent state by legislation violated the right to housing of the undocumented migrants by insufficient access to shelter, its poor quality and quantity.[82] The Netherlands refused to grant them housing while illegally staying and referred to the Government's desire to forcibly expel irregular migrants from the State.[83] In Denmark, public shelters are inaccessible, thus

71 Amnesty International, Annual Report (Italy) 2014/15.
72 ECSR, *ERRC v Italy*, paras 12–13; ECSR, *ERRC v Greece*, paras 46–47.
73 Ireland, Strategic Social Report (2015), 10.
74 PICUM: *Housing and Homelessness of Undocumented Migrants*), 4.
75 FEANTSA Press Release 2.9.2005.
76 European Comission, Communication from the Commission Europe 2020 A strategy for smart, sustainable and inclusive growth (2010), 5, 19.
77 Charter (Revised), Art. 31(2).
78 Yannis: *Protecting Migrants*, 51.
79 ECSR, Conclusions 2003, Sweden.
80 Yannis: *Protecting Migrants*, 51.
81 ECSR, *DCI v the Netherlands*, para 63.
82 ECSR, *FEANTSA v the Netherlands*, paras 2, 18, 47, 75, 82, and 83.
83 ECSR, *FEANTSA v the Netherlands*, para 159.

irregular migrants survive on the streets.[84] But instead of providing support the Government assumes that if migrants are not assisted they will leave the country which is ineffective and even creates homelessness additionally.[85]

In this regard, although the States undertake measures to prevent homelessness the threat and existence of abuse are extremely high. Thus, the real implementation of this international obligation should continue to reach sustainable development of MS through national and international cooperation.

4. Conclusion

The outlined background of the migration problem has shown that its solution is extremely vital for the interests of thousands of migrants, for the interests of the MS and the EU as a whole. Yet, the present analysis has indicated that it is not easy to find an answer as to whether undocumented migrants are entitled to the right to housing.

A thorough interpretation of the Charter is a key to the solution of this issue. However, a strict adherence to the general rules of interpretation under the VCLT yields only limited results that do not satisfy the illegal migrants' needs. This gap in their legal status could be filled by virtue of a broad understanding of the Charter's applicability to them. Unsurprisingly, the MS do not follow this idea to the fullest extent, as it might be contrary to the currently pursued policy. Of course, if we grant the undocumented migrants the housing, an influx of people will be inescapable. The consequences are vague. The mere fact that the MS can act unilaterally to perform their absolute sovereignty,[86] could lead to massive abuses, which is not a welcomed outcome of the solution either.

There are still ways for illegal migrants to claim the right to housing under the European Social Charter. As a corollary, of its purported *"erga omnes"* character being pivotal for legal analysis, the right to housing belongs to everyone irrespective of any status implying impossibility to limit subjects of this right. However, it is hard to tell that all MS respect this principle of non-discrimination in the supply of social housing. Once again, it is tough to predict how states will respond to the call for regulation. While a scrutiny shows a possible legality of such claims, only the following steps will assure a likelihood of their enforcement in practice:

— amending of the Charter by explicit fixation of the undocumented migrants' rights;

84 PICUM: *Housing and Homelessness of Undocumented Migrants,* 16.
85 PICUM: *Housing and Homelessness of Undocumented Migrants,* 16.
86 *Asylum case (Colombia/Peru),* Dissenting Opinion of Judge Alvarez, (Judgment) [1950] I.C.J. Rep. 266, 28.

— adoption of protective housing strategies in line with the proposed reading of the Charter at national level by the MS and corresponding guarantees for the persons concerned.

In any event, given the current legal framework the MS are cautious to implement different notion of the right to housing even despite obligations under the Charter.

SPECIFIC PERFORMANCE IN THE UNITED KINGDOM

Iliyana Dimitrova*

It has been suggested that there are three layers of law: the *first layer* of law is comprised of written rules and case law. In the *second layer*, rules are seen as points of fixation typical for a certain period and as such are merely coincidental in a time frame. Creators of rules, such as parliaments and courts, are confronted with similar issues, but often find different solutions and reasoning based on the underlying values, policies and issues determining the rules. The *third layer* exists at the interaction level, whereby the focus in on the underlying process of interaction. This article aims to describe and compare the three layers of law in relation to the rule of specific performance through comparing the particular economic, social, political and judicial circumstances.

In Scotland, the breach of a contract gives the aggrieved party the legal right to sue for special implement and the court has the inherent power to refuse the legal remedy upon equitable grounds. English law, however, takes the opposite approach. Although damages are available as a legal right, specific performance is a purely equitable remedy which is available only where damages are an inadequate remedy. Therefore, this article will examine the underlying judicial, political, economic and social challenges that both legal systems faced, in an attempt to show that the difference between the approaches is not as dramatic as their respective starting points might suggest and similar results are often obtained by different reasoning.[1]

The reason why damages are favoured as a contractual remedy by the English judges is due to the divergence between the common law rules and the rules of equity. The English king's common law courts had largely limited the relief to the payment of damages and to the recovery of the possession of property which was one of the causes of dissatisfaction with the common law courts that led to the development of equity in the separate Court of Chancery.[2] Accordingly, there were two separate systems of law working side by side, each of which had different rules. Due to the fact that equity acts *in personam*, a court exercising equitable jurisdiction had power to order parties to perform their contractual obligations.[3]

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1 Guenter H Treitel, *Remedies for Breach of Contract: A Comparative Analysis* (Clarendon Press 1988), 71.

2 Chancery Amendment Act (1858), but note that it was abolished.

3 Jeannie Paterson, Andrew Robertson, and Arlen Duke, *Principles of Contract Law* (Law Book Co 2005), chapter 30.

However, the exercise of equitable remedies was limited by political pressures from judges and Parliament not to "trespass upon the province" of the separate law courts.[4] As a result, equitable remedies would be granted in "aid of common law rights" only when the remedy available at common law would not be adequate in the circumstances to compensate the plaintiff.[5] Since the Judicature Acts of the 19th century, the two courts have been combined as one. Nevertheless, there remain separate sets of remedies for breach of contract. Moreover, during the 19th century, in the case of *Stewart v Kennedy*[6], Lord Herschell addressed the matter concerning the differences between the departure points from which Scottish and British judges started when dealing with the remedy of specific performance. Lord Watson further indicated that no "*assistance can be derived from English decisions because the laws of the two countries regard the right to specific performance from different standpoints"*.[7]
A century later, this again gave rise to debates in a series of cases concerning the so-called "keep open clauses". A review of the Scottish and English approaches can be illustrated by the Scottish case of *Scotland Retail Parks Investment v Royal Bank of Scotland*[8] and the English case of *Co-operative Insurance Society Ltd v Argyll Stores Ltd*;[9] the facts of both cases were similar. Each case centred on a claim raised by a landlord of a shopping centre against a tenant of the centre. In each case, the lease between the landlord and the tenant contained a clause, known as a "keep open" clause, which required the tenant to remain in the property and conduct business from the property.
In each case, the tenant did not wish to continue to conduct business from the property and breached continuous trading obligations in the leases. Subsequently, the landlords applied to the courts for orders that would require the tenants to keep the premises open and conduct business from them.[10] The rationale behind these claims is the fact that often the tenants in question are "anchor tenants", who play an important role. In particular, they contribute to the commercial viability of the shopping centre and their presence attracts other retailers and customers. A closure of the leased units would have a detrimental impact on the business of the surrounding area. Therefore, it has been argued that is not only important to the landlord to receive rent, but to ensure the shopping centre flourishes.[11]

4 Also note the trend known as 'politicisation of the judiciary'.
5 Encyclopaedia Britannica, <http://www.britannica.com/>.
6 (1890) 17R (HL) I.
7 Ibid, para 10.
8 1996 SLT 669.
9 [1998] AC 1.
10 The term "specific implement" is the Scottish terminology for this positive obligation. The type of decree sought is referred to as "decree *ad factum praestandum*".
11 Gillian Black, *Woolman on Contract (Greens Concise Scots Law)* (Thomson Reuters 2010), paras 10–13.

The Scottish courts approached the matter by granting specific implement,[12] while the English judges were reluctant to grant specific performance. In the English Co-operative case, the Court of Appeal granted a decree of specific performance, but this was subsequently overturned by the House of Lords. Lord Hoffmann expressed doubts about difficulties relating to the precision required for drafting the order,[13] given the fact that it would be oppressive for the store to keep running under the harsh threat of contempt of court that had the possible result of imprisonment.[14] Whilst Lord McCluskey claimed that the requirement of sufficient precision does not prevent specific implement from being used to enforce performance,[15] since an order may be flexible in the sense that it specifies the end to be achieved but leaves open the precise means by which the end is to be achieved.[16] Therefore, the decision of the Inner House in *Retail Parks* marked a movement away from prior Scottish decisions in which the courts had been unwilling to enforce similar duties on the alleged ground of their vagueness and imprecision.[17]

Furthermore, in the Scottish case,[18] it had been suggested that damages would be inadequate, given the fact that it would be too difficult to quantify the exact amounts. The House of Lords, however, held that both parties were large corporations, which were experienced in business dealings. Hence, it would be reasonably expected to have resources available to work out an adequate amount. In addition, there was judicial concern about the need of constant supervision of the business to ensure that performance was being made. Lord Hoffman considered this to be "wasteful for both parties and the legal system". So, it seems that Lord Hoffmann is more interested in the economic effect of requiring a tenant to continue trading at a loss. [19] He also argued that the ongoing relationship between the parties was likely to become hostile, since an "order for specific performance prolongs the battle… An award of damages, on the other hand, brings the litigation to an end. The defendant pays damages…they go their separate ways and the wounds of conflict can heal."[20] Therefore, for Lord Hoffman, damages were an adequate remedy which, in turn, excluded the possibility of a specific performance.[21]

12 *Retail Parks Investment Ltd v Royal Bank of Scotland (No.2)* 63; *Church Commissioners v Abbey National* [1994] SC 651. Also consider the Australian case of *Diagnostic X-Ray v Jewel Food* 4VR623, which was similar to the Scottish decisions.

13 *Middleton v Leslie* [1892] 19 R 801, 802; *Lochgelly Iron v North British Railway Co* [1913] 1 SLT 405, 414.

14 Note that with the advent of the industrial revolution and the pressure applied by new commercial relations, and society in general, judges opted for a theory that would provide a sense of stability and security to the contracting parties; see Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979).

15 *Co-operative Wholesale Society Ltd v Saxone Ltd* [1997] SCLR 835.

16 *Retail Parks Investments Ltd v The Royal Bank of Scotland (No 2)* [1996] SLT 669, para 678F.

17 For example, in *Grosvenor Developments (Scotland) v Argyll Stores* [1987] SLT 738.

18 And in the overruled decision of the court in the case *Co-operative Insurance Society Ltd v Argyll Stores* [1998] AC 1.

19 "From a wider perspective it cannot be in the public interest for the courts to require someone to carry on business at a loss". [1998] AC 1, para 15.

20 This is similar to the so-called "clean break approach" in English family law.

21 Martin Hogg, *Promises and Contract Law* (Cambridge University Press 2011), chapter 6.

To explain why differences between the legal systems in Scotland and England developed, it is necessary to take a look at some historical events. To begin with, Scots law had an early customary law which was influenced by English, Anglo-Norman, Roman Civil and Canon Law. There has been a considerable amount of literature devoted to the foundational influence upon the Scottish law of contract by the medieval canon law.[22] This perhaps explains why the Scottish law emphasised performance as the moral right and duty flowing from promises and agreements.[23] The most significant of the Scottish legal literature are the so-called "Institutional writings" by jurists, such as Stair, Bankton, Erskine and Bell, who themselves borrowed from the European *ius commune*. The influence of English law begins to become apparent in legal writing around the beginning of the nineteenth century. The combined forces of Lord President Inglis and Lord Watson further qualified the right to specific implement by subjecting it to the discretion of the court, while in the twentieth century Gloag added a set of rules stipulating when decree of specific performance would not be granted, these being largely borrowed from English law.[24]

The principles of natural justice and fairness have always formed a source of Scots Law and are applied by the courts without distinction from the law. However, there have been significant constitutional reforms since the Labour government came into power, which had an influence on the legal systems.[25] In particular, the Labour government instituted a process of devolution and the Scottish Parliament was set up, following a referendum, in the Scotland Act 1998.[26] Many key areas are largely governed by the quasi-codifying UK statutes first passed in the late nineteenth or early twentieth centuries.[27] The aim was generally to produce a unified law in the United Kingdom's single market, and that is also the justification for reserving them to the legislative competence of the Parliament.[28] The transfer of legislative power to the Westminster Parliament and the introduction of Scottish judges to the House of Lords brought further influence to the legal

22 For the influence of the Canon Law on the law of contract before the Reformation, see Hector Lewis MacQueen, 'The Foundation of Law Teaching at the University of Aberdeen', in David L Carey Miller and Reinhard Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Duncker and Humblot 1997), 53.

23 *Pacta sunt servanda* or, as translated, 'every paction produceth action'; see Henry Campbell Black, *Black's Law Dictionary* (West Publishing Company 2004).

24 Alastair David Smith, *Some Comparative Aspects of Specific Implement in Scots Law* (University of Edinburgh 1989), 66–69.

25 The doctrine of *laissez-faire* is said to be a political force indicating that the law of contract is no longer seen as a negative instrument the function of which is merely to enforce agreements. See Patrick Atiyah, *An Introduction to the Law of Contract* (Oxford University Press 1971), 11.

26 Hector Lewis MacQueen, 'Scots and English Law: The Case of Contract' (2001) 54 Current Legal Problems 205

27 For example, the Sale of Goods Act 1893.

28 Hector Lewis MacQueen, 'Scots and English Law: The Case of Contract' (2001) 54 Current Legal Problems 205, 213.

climate.[29] So, it might come as no surprise that only two years after the devolution, when the Inner House of the Court of Session was specifically asked to follow the English approach in the important case of *Highland & Universal Properties Ltd v Safeway Properties*, it refused. The court held that Scots law was clear and if the law was required to change, that was a matter for Parliament and not the courts.

On the other hand, Smits has suggested that there was simply a spontaneous process in which some rules are chosen and others are not. He has further claimed that, not only is the content of the rules decisive for their being taken over in a legal system, but also the environment in which these rules have to operate. [30] His theory emphasises the fact that the different solutions are probably based on the factor of economic power.[31] Indeed, the different rules of contract may have different economic effects. Thus, choices made by lawmakers may also have important economic consequences.[32] It has been suggested that that "a renaissance of contract law"[33] has occurred due to the triumph of free market and capitalism in Europe which led to decisions that are better-suited to free market economies and more conductive to economic development. According to Mahoney, common law countries indeed experienced faster economic growth than civil law countries during the period 1960-1999. [34] The difference is founded in the common law's greater orientation toward private economic activity and civil law's greater orientation toward government intervention.

Furthermore, the "economic analysis of law" is said to be an "American product"[35] that was firstly applied in common law. Some economists have tried to legitimise traditional common law restrictions on specific performance, by claiming that the common law approach toward that breach of contract may be more efficient. The economic analysis of contract law is based on the assumption that contracts are an important economic institution, since they allow the exchange of goods and services, which, in turn, allows an efficient allocation of these goods and services.

29 OF Robinson, TD Fergus, and WM Gordon, *European Legal History: Sources and Institutions* (Oxford University Press 2000).

30 Jan Smits, 'Scotland as a Mixed Jurisdiction and the Development of EU Private Law: Is There Something to Learn from Evolutionary Theory?' (2003) 7(5) Electronic Journal of Comparative Law.

31 So it is not a coincidence that most of the influence of English law on Scots law took place in the 19th century, the heyday of the English empire.

32 GPJ de Vries, *Principles of European Contract of Law* (Kluwer 2001), chapter VIII.

33 Stefan Grundmann and Martin Schauer (eds), *The Architecture of European Codes and Contract Law* (Kluwer, 2006), chapter 9.

34 Paul G Mahoney, 'The Common Law and Economic Growth: Hayek Might be Right' (2000) University of Virginia School of Law, Legal Studies Working Paper No. 00-8, 503–525.

35 Kathrina Boele-Woelki and FW Groshiede (eds), *The Future of European Contract Law* (Wolters Kluwer Law & Business 2007), 321–324.

According to legal economists, a transaction is efficient when it makes at least one person better off and nobody worse off.[36]

In certain cases, the availability of the remedy of specific performance may lead to inefficiency so that the breach of contract is more efficient that its performance.[37] According to one of the major figures in comparative law and economics, Posner, this means that "in many cases it is uneconomical to induce completion of performance of a contract after it has been broken."[38] Hence, the law should encourage efficient breaches of contract which is achieved if the contract breaker's profit from the breach is likely to be greater than the innocent party's loss.[39] The contract breaker can then afford to compensate the innocent party's loss and still be better off than s/he would have been if the contact had been performed.[40] However, that view has been criticised in later economic analyses of law[41] that sees the efficient breach of contract as a detriment to the reliance on contractual promises.[42] For example, Schwartz has argued that specific performance should be routinely available because awards of damages undercompensate the plaintiff since they do not include the true cost of entering into a substitute transaction and may underestimate the plaintiff's loss as a result of inherent difficulties of prediction.[43]

In addition, European integration has encouraged the international cooperation of jurists within and outside the EU.[44] The results of such cooperation can be seen in the developed European sets of rules, such as, *inter alia*, the PECL,[45] the Acquis Principles[46] and the DCFR.[47] The so-called europeanisation inspired EU jurisprudence and legislative projects,[48] but has also given inspiration to national jurisprudence and legislative projects. So, against the background of European legislation, one can say that the right to require performance has already been acknowledged in the

36 This reflects the principle of Pareto and Kaldor-Hicks' efficiency and cost-benefit analysis. Richard A. Posner, *Economic Analysis of Law* (Wolters Kluwer Law & Business 2007).

37 Robert Cooter, 'Breaching is More Efficient than Performing when the Costs of Performing Exceed the Benefits to all Parties' (2004) Law and Economics 254.

38 Richard A Posner, 'Law and Economics in Common-Law Civil Law, and Developing Nations' (2004) 17(1) Ratio Juris, 66–67.

39 Peter G Heffey, *Principles of Contract Law* (2005), chapter 30.

40 Ian R Macneil, 'Efficient Breach of Contract: Circles in the Sky' (1982) 68 Virginia Law Review 947, 958.

41 Some reject the economic theory of law because it is based on an economic view (liberal-capitalist).

42 Note that in the mixed legal systems, a higher theoretical value is placed upon the promises. Martin Hogg, *Promises and Contract Law: Comparative Perspectives* (Cambridge University Press 2011), chapter 6.

43 Alan Schwartz, 'The Case for Specific Performance' (1979) 89 Yale Law Journal 271, 276.

44 Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe* (Sellier European Law Publishers 2013), 3–21.

45 Ole Lando and Hugh Beale, *The Principles of EU Contract Law Parts I & II* (Kluwer 1999), 395.

46 Research Group on the Existing EC Private Law (Acquis Group) (eds), *Principles of the Existing EC Contract Law* (Sellier European Law Publishers 2007).

47 The UK has not ratified the Vienna Convention so there have been calls for ratification of the CISG, as the Scottish Law Commission "recommended that the UK should become a party to the Convention". (Report on Scot. Law Com No 144:1993).

48 The Proposal for a Regulation on a Common European Sales Law, COM (2010) 635.

directives.[49] Even in England it has been noted that the new remedies of the Consumer Sales Directive "have a distinct specific performance flavour to them"[50] that led to amendments of the Sale of Goods Act.[51]

Indeed, a new part 5A[52] of remedies was introduced into the Act in 2002 by the Sales and Supply of Goods to Consumers Regulations,[53] which gives the consumer additional rights. The new section, s. 48 E provides that "[o]n the application of the buyer the court may make an order requiring specific performance." Therefore, the court "may" act under that section, i.e. order specific performance of repair or replacement. This wording caused Samuels to argue that "…it seems unfortunate that the House of Lords should wish to develop a law of obligations which allow certain kinds of defendants, simply when the balance sheet dictates it, to walk away from obligations that they have specifically agreed to undertake."[54] Nevertheless, in the recent case of *Liberty Mercian Limited v Cuddy Civil Engineering*,[55] the financial position of the defendant was a major consideration for the court in deciding whether damages would be an adequate remedy.

Furthermore, a compromise in relation to specific performance was reached under PECL. According to Article 9.102, a claim for performance is admitted in general, which mirrors the continental European approach.[56] A general right to performance has several advantages. Firstly, through specific performance the creditor obtains as far as possible what is due to it under the contract. Also, difficulties in assessing damages are avoided and the binding force of contractual obligations is stressed. On the other hand, comparative research of the laws and commercial practices shows that even in the civil law countries the principle of performance must be limited. So, the exceptions then come in several special situations stipulated under the principles, namely, the unlawfulness or impossibility, unreasonable effort or expense, provision of services or work of a personal character and reasonably obtaining performance from another source. [57]

Similar reasoning has been put forward in the case of *Douglas Shelf Seven Ltd v Co-operative Wholesale Society*,[58] in which a Scottish pursuer sought and obtained damages for breach of a keep open

50 Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe* (Sellier European Law Publishers 2013), 17.
50 Christian Twigg-Flesner, 'New Remedies for Consumer Sales Transactions: A Change for the Worse?' (2003) 2 Journal of Obligations and Remedies, 521.
51 Ibid, 530.
52 SS. 48A – 48F.
53 SI 2002/3045 implementing Directive 1999/44/EC.
54 Geoffrey Samuels, *Law of Obligations and Legal Remedies* (Edward Elgar Publishing 2010), 162.
55 [2013] EWHC 2688 (TCC).
56 Under Article 106(1)(a) of the CESL, a buyer's primary remedy is to require performance which is subject to conditions set out in Art. 110–112.
57 The Unidroit Principles contain almost identical provisions. See Art. 7.2.2.
58 *Douglas Shelf Seven Ltd v Co-operative Wholesale Society Ltd* [2007] CSOH 53, the judgment of which ran to over 600 paragraphs; see also Martin Hogg, 'Damages for Breach of a Keep-open Clause' (2007) 11(3) Edinburgh Law Review 416–421.

clause.[59] Three years later, in *Whyte and Mackay Limited v Capstone International Incorporated,*[60] Lady Paton was prepared to claim that "in determining whether to grant or refuse a motion for specific implement...the court should take whichever course appears to carry the lower risk of injustice.[61] Therefore, the "legal fruits of the Europeanization"[62] are said to combine solutions from common law countries and civil law countries that are remarkably compatible with the Scottish approach. Indeed, the Scottish Commission had confirmed that the Scottish rules on specific performance are firmly in line with the approach adopted in modern international instruments on contract law.[63] Therefore, they did not recommend any change, since their consultation "indicated that the law on this remedy [specific performance] was ... regarded as satisfactory".[64] In 1924, Lévy Ullmann predicted that 'Scots law gives us a picture of what will be some day the law of the civilised nations, namely a combination between the Anglo-Saxon and the Continental system'.[65] Indeed, now it seems that it would be easier for Scotland to achieve full compatibility with international norms on remedies for breach of contract.

The current influence of the European instruments is also evident in a very recent case, *Ashworth v Royal National Theatre.*[66] In this case, the Court considered, for the first time in this context, whether the granting of specific performance would interfere with the parties' right to freedom of expression contained in Article 10 of the ECHR. This serves as an example to support the proposition that europeanisation is placing the remedy of specific performance in new contexts, reflecting the present circumstances of our society. This serves as an example supporting the proposition that the europeanisation is placing the remedy of specific performance in new contexts, reflecting the surrounding circumstances of the legal arena today.

In conclusion, the approaches adopted by the Scottish and English judges towards specific performance, despite all their diversities and individual characteristics, to a larger extent lead to similar results. The means used for their achievement are emerging of a long-sustained and

59 Cf. *Scotland Retail Parks Investment v Royal Bank of Scotland* 1996 SLT 669.
60 [2010] CSIH 87.
61 *Films Rover International v Cannon Film Sales* [1987] 1 WLR 670.
62 William M McBryde, 'Remedies for Breach of Contract' (1996) 1 Edinburgh Law Review 43, 55–56.
63 Also, note that the electronic and digital revolution is said to be a new challenge to the traditional principles for the remedies for non-performance of a contract; see Hoeren, Sieber, and Holznagel, *Handbuch Multimedia-Recht* (CH Beck 2012).
64 Scottish Law Commission, Report on Remedies for Breach of Contract (ScotLawCom No. 174 & No. 109) 14.
65 Lévy Ullmann, 'The Law of Scotland' (1925) 37 Juridical Review 390. Confirmed by Konrad Zweigert and H David Kötz, *An Introduction to Comparative Law* (Oxford University Press 1998), 204.
66 [2014] EWHC 1176 (QB).

continuing interaction between the courts, the text-writers, and from the legislators in Brussels, Westminster and Edinburgh.[67]

[67] Hector Lewis MacQueen, 'Scots and English Law: The Case of Contract' (2001) 54 Current Legal Problems 205–229.